NORTH CAROLINA REPORTS

VOLUME 301

SUPREME COURT OF NORTH CAROLINA

SPRING TERM 1980
FALL TERM 1980

RALEIGH
1981

CITE THIS VOLUME
301 N.C.

TABLE OF CONTENTS

THE SUPREME COURT
OF
NORTH CAROLINA

Chief Justice

JOSEPH BRANCH

Associate Justices

J. FRANK HUSKINS
J. WILLIAM COPELAND
JAMES G. EXUM, JR.
DAVID M. BRITT
J. PHIL CARLTON
LOUIS B. MEYER

Retired Chief Justices

WILLIAM H. BOBBITT
SUSIE SHARP

Retired Justices

J. WILL PLESS, JR.
I. BEVERLY LAKE
DAN K. MOORE
WALTER E. BROCK

Clerk

J. GREGORY WALLACE[1]

Librarian

FRANCES H. HALL

ADMINISTRATIVE OFFICE OF THE COURTS

Director

FRANKLIN FREEMAN, JR.[2]

Assistant Directors

DALLAS A. CAMERON, JR.
J. DONALD CHAPPELL

APPELLATE DIVISION REPORTER

RALPH A. WHITE, JR.

ASSISTANT APPELLATE DIVISION REPORTER

SHERRY M. COCHRAN[3]

---

1. Appointed 30 June 1981 to succeed John R. Morgan who resigned 30 June 1981.
2. Appointed 1 July 1981 to succeed Bert M. Montague who resigned 30 June 1981.
3. Resigned 16 July 1981.

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

First Division

DISTRICT	JUDGES	ADDRESS
1	J. HERBERT SMALL	Elizabeth City
2	ELBERT S. PEEL, JR.	Williamston
3	ROBERT D. ROUSE, JR.	Farmville
	DAVID E. REID	Greenville
4	HENRY L. STEVENS III	Kenansville
	JAMES R. SRICKLAND	Jacksonville
5	BRADFORD TILLERY	Wilmington
	N. B. BAREFOOT	Wilmington
6	RICHARD B. ALLSBROOK	Roanoke Rapids
7	GEORGE M. FOUNTAIN	Tarboro
	FRANKLIN R. BROWN	Tarboro
8	R. MICHAEL BRUCE	Mount Olive
	JAMES D. LLEWELLYN	Kinston

Second Division

9	ROBERT H. HOBGOOD	Louisburg
10	JAMES H. POU BAILEY	Raleigh
	A. PILSTON GODWIN, JR.	Raleigh
	EDWIN S. PRESTON, JR.	Raleigh
	ROBERT L. FARMER	Raleigh
11	WILEY F. BOWEN	Dunn
12	E. MAURICE BRASWELL	Fayetteville
	D. B. HERRING, JR.	Fayetteville
	COY E. BREWER, JR.	Fayetteville
13	GILES R. CLARK	Elizabethtown
14	THOMAS H. LEE	Durham
	ANTHONY M. BRANNON	Bahama
	JOHN C. MARTIN	Durham
15A	D. MARSH MCLELLAND	Burlington
15B	F. GORDON BATTLE	Chapel Hill
16	SAMUEL E. BRITT	Lumberton

Third Division

17	JAMES M. LONG	Yanceyville
18	CHARLES T. KIVETT	Greensboro
	W. DOUGLAS ALBRIGHT	Greensboro
	EDWARD K. WASHINGTON	Greensboro
19A	THOMAS W. SEAY, JR.	Spencer
	JAMES C. DAVIS	Concord
19B	HAL HAMMER WALKER	Asheboro
20	F. FETZER MILLS	Wadesboro
	WILLIAM H. HELMS	Wingate
21	WILLIAM Z. WOOD	Winston-Salem
	JUDSON D. DERAMUS, JR.	Winston-Salem

DISTRICT	JUDGES	ADDRESS
22	ROBERT A. COLLIER, JR.	Statesville
	PETER W. HAIRSTON	Advance
23	JULIUS A. ROUSSEAU	North Wilkesboro
	Fourth Division	
24	RONALD W. HOWELL	Burnsville
25	FORREST A. FERRELL	Hickory
	CLAUDE S. SITTON	Morganton
26	WILLIAM T. GRIST	Charlotte
	FRANK W. SNEPP, J.	Charlotte
	KENNETH A. GRIFFIN	Charlotte
	CLIFTON E. JOHNSON	Charlotte
	ROBERT M. BURROUGHS	Charlotte
27A	ROBERT W. KIRBY	Cherryville
	ROBERT E. GAINES	Gastonia
27B	JOHN R. FRIDAY	Lincolnton
28	ROBERT D. LEWIS	Asheville
	C. WALTER ALLEN	Asheville
29	HOLLIS M. OWENS, JR.	Rutherfordton
30	LACY H. THORNBURG	Webster

SPECIAL JUDGES

DONALD L. SMITH	Raleigh
JOHN R. JOLLY, JR.	Rocky Mount
ARTHUR L. LANE	Fayetteville
CHARLES C. LAMM, JR.	Boone
PRESTON CORNELIUS	Mooresville
WILLIAM H. FREEMAN	Winston-Salem
CHARLES WINBERRY	Rocky Mount

EMERGENCY JUDGES

ALBERT W. COWPER	Kinston
HAMILTON H. HOBGOOD	Louisburg
HENRY A. MCKINNON, JR.	Lumberton

DISTRICT COURT DIVISION

DISTRICT	JUDGES	ADDRESS
1	JOHN T. CHAFFIN (Chief)	Elizabeth City
	GRAFTON G. BEAMAN	Elizabeth City
	J. RICHARD PARKER	Manteo
2	HALLETT S. WARD (Chief)	Washington
	JAMES HARDISON	Williamston
3	HERBERT O. PHILLIPS III (Chief)	Morehead City
	ROBERT D. WHEELER	Grifton
	E. BURT AYCOCK, JR.	Greenville
	JAMES E. RAGAN	Oriental
	JAMES E. MARTIN	Bethel
	H. HORTON ROUNTREE	Greenville
4	KENNETH W. TURNER (Chief)	Rose Hill
	WALTER P. HENDERSON	Trenton
	STEPHEN M. WILLIAMSON	Kenansville
	E. ALEX ERWIN III	Jacksonville
	JAMES NELLO MARTIN	Clinton
5	GILBERT H. BURNETT (Chief)	Wilmington
	JOHN M WALKER	Wilmington
	CHARLES E. RICE	Wilmington
	CARTER TATE LAMBETH	Wilmington
6	NICHOLAS LONG (Chief)	Roanoke Rapids
	ROBERT E. WILLIFORD	Lewiston
	HAROLD P. MCCOY, JR.	Scotland Neck
7	GEORGE BRITT (Chief)	Tarboro
	ALLEN W. HARRELL	Wilson
	JAMES EZZELL, JR.	Rocky Mount
	ALBERT S. THOMAS, JR.	Wilson
8	JOHN PATRICK EXUM (Chief)	Kinston
	ARNOLD O. JONES	Goldsboro
	KENNETH R. ELLIS	Fremont
	PAUL MICHAEL WRIGHT	Goldsboro
	RODNEY R. GOODMAN, JR.	Kinston
9	CLAUDE W. ALLEN, JR. (Chief)	Oxford
	BEN U. ALLEN	Henderson
	CHARLES W. WILKINSON	Oxford
	J. LARRY SENTER	Franklinton
10	GEORGE F. BASON (Chief)	Raleigh
	HENRY V. BARNETTE, JR.	Raleigh
	STAFFORD G. BULLOCK	Raleigh

DISTRICT	JUDGES	ADDRESS
	GEORGE R. GREENE	Raleigh
	JOHN HILL PARKER	Raleigh
	RUSSELL G. SHERRILL III	Raleigh
11	ELTON C. PRIDGEN (Chief)	Smithfield
	W. POPE LYON	Smithfield
	WILLIAM A. CHRISTIAN	Sanford
	KELLY EDWARD GREENE	Dunn
12	DERB S. CARTER (Chief)	Fayetteville
	JOSEPH E. DUPREE	Raeford
	CHARLES LEE GUY	Fayetteville
	SOL G. CERRY	Fayetteville
	LACY S. HAIR	Fayetteville
13	WILLIAM E. WOOD (Chief)	Whiteville
	J. WILTON HUNT, SR.	Whiteville
	ROY D. TREST	Shallotte
	WILLIAM C. GORE, JR.	Whiteville
14	J. MILTON READ, JR. (Chief)	Durham
	WILLIAM G. PEARSON II	Durham
	DAVID Q. LABARRE	Durham
	KAREN B. GALLOWAY	Durham
15A	JASPER B. ALLEN, JR. (Chief)	Burlington
	WILLIAM S. HARRIS, JR.	Graham
	JAMES KENT WASHBURN	Burlington
15B	STANLEY PEELE (Chief)	Chapel Hill
	DONALD LEE PASCHAL	Siler City
16	JOHN S. GARDNER (Chief)	Lumberton
	CHARLES G. MCLEAN	Lumberton
	B. CRAIG ELLIS	Laurinburg
	HERBERT LEE RICHARDSON	Lumberton
17	LEONARD H. VAN NOPPEN (Chief)	Danbury
	FOY CLARK	Mount Airy
	PETER M. MCHUGH	Reidsville
	JERRY CASH MARTIN	Mount Airy
18	ROBERT L. CECIL (Chief)	High Point
	JOHN F. YEATTES, JR.	Greensboro
	JOSEPH R. JOHN	Greensboro
	THOMAS G. FOSTER, JR.	Greensboro
	WILLIAM L. DAISY	Greensboro
	EDMUND LOWE	High Point
	ROBERT E. BENCINI	Hight Point
	WILLIAM K. HUNTER[1]	High Point

DISTRICT	JUDGES	ADDRESS
19A	ROBERT L. WARREN (Chief)	Concord
	FRANK M. MONTGOMERY	Salisbury
	ADAM C. GRANT, JR.	Concord
	CLARENCE E. HORTON, JR.[2]	Kannapolis
19B	L. T. HAMMOND, JR. (Chief)	Asheboro
	WILLIAM M. NEELY	Asheboro
20	DONALD R. HUFFMAN (Chief)	Wadesboro
	WALTER M. LAMPLEY	Rockingham
	KENNETH W. HONEYCUTT	Monroe
	RONALD W. BURRIS	Albemarle
21	ABNER ALEXANDER (Chief)	Winston-Salem
	GARY B. TASH	Winston-Salem
	JAMES A. HARRILL, JR.	Winston-Salem
	R. KASON KEIGER	Winston-Salem
	DAVID R. TANIS	Winston-Salem
22	LESTER P. MARTIN, JR. (Chief)	Mocksville
	HUBERT E. OOIVE, JR.	Lexington
	ROBERT W. JOHNSON	Statesville
	SAMUEL ALLEN CATHEY	Statesville
23	SAMUEL L. OSBORNE (Chief)[3]	Wilkesboro
	JOHN T. KILBY	Jefferson
	MAX F. FERREE[4]	Wilkesboro
24	ROBERT HOWARD LACEY (Chief)	Newland
	ROY ALEXANDER LYERLY	Banner Elk
25	LIVINGSTON VERNON (Chief)	Morganton
	ROBERT A. MULLINAX[5]	Newton
	SAMUEL McD. TATE	Morganton
	L. OLIVER NOBLE, JR.	Hickory
	EDWARD J. CROTTY	Hickory
26	CHASE BOONE SAUNDERS (Chief)	Charlotte
	L. STANLEY BROWN	Charlotte
	LARRY THOMAS BLACK	Charlotte
	JAMES E. LANNING	Charlotte
	WILLIAM G. JONES	Charlotte
	WALTER H. BENNETT, JR.	Charlotte
	DAPHENE L. CANTRELL	Charlotte
	T. MICHAEL TODD	Charlotte
	WILLIAM H. SCARBOROUGH	Charlotte
27A	LEWIS BULWINKLE (Chief)	Gastonia
	J. RALPH PHILLIPS	Gastonia

DISTRICT	JUDGES	ADDRESS
	DONALD E. RAMSEUR	Gastonia
	BERLIN H. CARPENTER, JR.	Gastonia
27B	ARNOLD MAX HARRIS (Chief)	Ellenboro
	GEORGE HAMRICK	Shelby
	JAMES THOMAS BOWEN III	Lincolnton
28	JAMES O. ISRAEL, JR. (Chief)	Candler
	WILLIAM MARION STYLES	Black Mountain
	EARL JUSTICE FOWLER, JR.	Arden
	PETER L. RODA	Asheville
29	ROBERT T. GASH (Chief)	Brevard
	ZORO J. GUICE, JR.	Hendersonville
	THOMAS N. HIX	Hendersonville
	LOTO J. GREENLEE	Marion
30	ROBERT J. LEATHERWOOD III (Chief)	Bryson City
	J. CHARLES MCDARRIS	Waynesville
	JOHN J. SNOW, JR.	Murphy

EMERGENCY JUDGE

P. B. BEACHUM, JR.	Charlotte

---

1. Appointed 3 April 1981 to succeed Elreta M. Alexander Ralston who resigned 31 March 1981.
2. Appointed 6 February 1981 to succeed L. Frank Faggart who died 5 January 1981.
3. Appointed Chief Judge 2 March 1981 to succeed Ralph Davis who retired 27 February 1981.
4. Appointed 24 March 1981.
5. Appointed 29 May 1981 to replace Bill J. Martin.

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General

RUFUS L. EDMISTEN

Administrative Deputy Attorney General
CHARLES H. SMITH

Deputy Attorney General For Legal Affairs
JAMES M. WALLACE, JR.

Special Assistant to the Attorney General

JOHN A. ELMORE II

Senior Deputy Attorneys General

JAMES F. BULLOCK
ANDREW A. VANORE, JR.
EUGENE A. SMITH, JR.

Deputy Attorneys General

JEAN A. BENOY
MILLARD R. RICH, JR.
WILLIAM W. MELVIN

Special Deputy Attorneys General

MYRON C. BANKS
T. BUIE COSTEN
JACOB L. SAFRON
JAMES B. RICHMOND
HERBERT LAMSON, JR.
WILLIAM F. O'CONNELL
JOHN R.B. MATTHIS
EDWIN M. SPEAS, JR.
WILLIAM A. RANEY, JR.
LESTER V. CHALMERS, JR.
ANN REED DUNN
CHARLES J. MURRAY
ISAAC T. AVERY III
H. AL COLE, JR.
RICHARD N. LEAGUE
CLAUDE W. HARRIS
I.B. HUDSON, JR.
JO ANNE SANFORD

Assistant Attorneys General

WILLIAM B. RAY
WILLIAM F. BRILEY
THOMAS B. WOOD
CHARLES M. HENSEY
ROBERT G. WEBB
ROY A. GILES, JR.
JAMES E. MAGNER, JR.
GUY A. HAMLIN
ALFRED N. SALLEY
GEORGE W. BOYLAN
RALF F. HASKELL
ROBERT R. REILLY, JR.
RICHARD L. GRIFFIN
ARCHIE W. ANDERS
DAVID S. CRUMP
DANIEL C. OAKLEY
ELIZABETH C. BUNTING
ELISHA H. BUNTING, JR.
ALAN S. HIRSCH
SANDRA M. KING
JOHN C. DANIEL, JR.
JOAN H. BYERS
J. MICHAEL CARPENTER
BEN G. IRONS II
DONALD W. GRIMES
NONNIE F. MIDGETTE
DOUGLAS A. JOHNSTON
JAMES PEELER SMITH
THOMAS G. MOFFITT
FRANK P. GRAHAM
GEORGE W. LENNON
MARILYN Y. RICH
DAVID R. BLACKWELL
NORMA S. HARRELL
THOMAS H. DAVIS, JR.
JANE R. THOMPSON
DENNIS F. MYERS
KAYE R. WEBB
DANIEL F. MCLAWHORN
TIARE B. SMILEY
DONALD W. STEPHENS
HENRY T. ROSSER
HENRY H. BURGWYN
LUCIEN CAPONE III
FRANCIS W. CRAWLEY
MICHAEL D. GORDON
JAMES C. GULICK
HARRY H. HARKINS, JR.
J. CHRISTOPHER PRATHER
GRAYSON G. KELLEY
R. BRYANT WALL
RICHARD L. KUCHARSKI
ROBERT E. CANSLER
LEMUEL M. HINTON
ROBERT L. HILLMAN
SARAH C. YOUNG
STEVEN M. SHABER
W. DALE TALBERT
THOMAS G. MEACHAM, JR.
MAX ALTON GARNER
FRED R. GAMIN
R. DARRELL HANCOCK

DISTRICT ATTORNEYS

DISTRICT	DISTRICT ATTORNEY	ADDRESS
1	THOMAS S. WATTS	Elizabeth City
2	WILLIAM C. GRIFFIN, JR.	Williamston
3	ELI BLOOM	Greenville
4	WILLIAM H. ANDREWS	Jacksonville
5	WILLIAM ALLEN COBB	Wilmington
6	WILLIS E. MURPHREY III	Roanoke Rapids
7	HOWARD S. BONEY, JR.	Tarboro
8	DONALD JACOBS	Goldsboro
9	DAVID WATERS	Oxford
10	RANDOLPH RILEY	Raleigh
11	JOHN W. TWISDALE	Smithfield
12	EDWARD W. GRANNIS, JR.	Fayetteville
13	LEE J. GREER	Whiteville
14	DAN K. EDWARDS, JR.	Durham
15A	HERBERT F. PIERCE	Graham
15B	WADE BARBER, JR.	Pittsboro
16	JOE FREEMAN BRITT	Lumberton
17	TERRY L. COLLINS	Dobson
18	MICHAEL A. SCHLOSSER	Greensboro
19A	JAMES E. ROBERTS	Kannapolis
19B	GARLAND N. YATES	Asheboro
20	CARROLL R. LOWDER	Monroe
21	DONALD K. TISDALE	Clemmons
22	H.W. ZIMMERMAN, JR.	Lexington
23	MICHAEL A. ASHBURN	Wilkesboro
24	CLYDE M. ROBERTS	Marshall
25	DONALD E. GREENE	Hickory
26	PETER S. GILCHRIST	Charlotte
27A	JOSEPH G. BROWN	Gastonia
27B	W. HAMPTON CHILDS, JR.	Lincolnton
28	RONALD C. BROWN	Asheville
29	M. LEONARD LOWE	Caroleen
30	MARCELLUS BUCHANAN III	Sylva

PUBLIC DEFENDERS

DISTRICT	PUBLIC DEFENDER	ADDRESS
3	DONALD C. HICK III	Greenville
12	MARY ANN TALLY	Fayetteville
18	WALLACE C. HARRELSON	Greensboro
26	FRITZ Y. MERCER, JR.	Charlotte
27	CURTIS O. HARRIS	Gastonia
28	J. ROBERT HUFSTADER	Asheville

CASES REPORTED

CASES REPORTED

CASES REPORTED

PETITIONS TO REHEAR

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

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

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

GENERAL STATUTES CITED AND CONSTRUED

G.S.	
1-15(b)	Feibus & Co. v. Construction Co., 294
1-15(c)	Flippin v. Jarrell, 108
1-50	Feibus & Co. v. Construction Co., 294
1-50(5)	Feibus & Co. v. Construction Co., 294
1-52(9)	Feibus & Co. v. Construction Co., 294
	Hice v. Hi-Mil, Inc., 647
1-276	Hassell v. Wilson, 307
1-501	Lowder v. Mills, Inc., 561
1-507.1	Lowder v. Mills, Inc., 561
1A-1	See Rules of Civil Procedure infra
7A-146	Stroupe v. Stroupe, 656
7A-649(6)	In re Brownlee, 532
7A-667	In re Brownlee, 532
8-58.6	State v. Fortney, 31
14-4	Cauble v. City of Asheville, 340
14-5.1	State v. Small, 407
14-6	State v. Small, 407
14-21	State v. Summitt, 591
14-21(1)(a)	State v. Summitt, 591
14-39(b)	State v. Bright, 243
14-183	State v. Lynch, 479
15A-926	State v. Clark, 176
15A-926 to -927	State v. Allen, 489
15A-941	State v. Small, 407
15A-943(b)	State v. Revelle, 153
15A-957	State v. See, 388
15A-1002(b)	State v. See, 388
15A-1022(c)	State v. Sinclair, 193
15A-1215(a)	State v. Price, 437
15A-1221(a)(4)	State v. McDowell, 279
15A-1222	State v. Bright, 243
15A-1235	State v. Ward, 469

GENERAL STATUTES CITED AND CONSTRUED

G.S.	
15A-1242	State v. Thacker, 348
20-16.2(c)	Etheridge v. Peters, Comr. of Motor Vehicles, 76
25-1-201(20)	Hotel Corp. v. Taylor, 200
25-3-104	Trust Co. v. Creasy, 44
25-3-202	Hotel Corp. v. Taylor, 200
30-1(c)	Taylor v. Taylor, 357
50-16.5(a)	Clark v. Clark, 123
51-1	State v. Lynch, 479
55-110(b)	Feibus & Co. v. Construction Co., 294
84-4.1	In re Smith, 621
84.4.1(5)	In re Smith, 621
160A-24	Texfi Industries v. City of Fayetteville, 1
160A-25	Texfi Industries v. City of Fayetteville, 1
160A-45 to -56	Moody v. Town of Carrboro, 318
160A-47(1)	Moody v. Town of Carrboro, 318
160A-47(3)	Moody v. Town of Carrboro, 318
160A-47(3)a	Moody v. Town of Carrboro, 318
160A-49(h)	Moody v. Town of Carrboro, 318
160A-50(a)	Moody v. Town of Carrboro, 318
160A-50(i)	Moody v. Town of Carrboro, 318

RULES OF CIVIL PROCEDURE CITED AND CONSTRUED

Rule No.	
12(b)(6)	Forbis v. Honeycutt, 699
50(a)	Feibus & Co. v. Construction Co., 294
60(b)	Bailey v. Gooding, 205

CONSTITUTION OF NORTH CAROLINA CITED AND CONSTRUED

Art. I, § 19	Moody v. Town of Carrboro, 318
Art. I, § 25	Moody v. Town of Carrboro, 318
Art. IV, § 12(1)	In re Brownlee, 532
Art. IX, § 7	Cauble v. City of Asheville, 340

CONSTITUTION OF UNITED STATES CITED AND CONSTRUED

IV Amendment	State v. McDowell, 279
	State v. Greenwood, 705
V Amendment	State v. McDowell, 279
	Moody v. Town of Carrboro, 318
	Lowder v. Mills, Inc., 561
VI Amendment	State v. McDowell, 279
XIV Amendment	In re Smith, 621

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 individuals were admitted to the practice of law in the State of North Carolina by comity:

On January 30, 1981, the following individuals were admitted:

STEPHEN KITTS BONE, ...Matthews, applied from the State of New York, 1st Dept.
EDWARD LEE FLIPPEN, ... Charlotte, applied from the State of Virginia
SAMANTHA FRANCIS FLYNN, ... Raleigh, applied from the State of Pennsylvania
SETH H. LANGSON, ... Gastonia, applied from the State of Massachusetts
LEX KINGSBURY LARSON, ... Durham, applied from the District of Columbia
NANCY SHERWIN RENDLEMAN, ... Raleigh, applied from the State of Illinois
RICHARD WALTER STIMSON, ... Durham, applied from the State of Michigan

On February 18, 1981, the following individual was admitted to the practice of law in the State of North Carolina by comity:

KENNETH THEODORE LEVENBOOK, .. Raleigh, applied from the State of Oklahoma

Given under my hand and seal this the 23rd day of February, 1981.

FRED P. PARKER III

Executive Secretary
The Board of Law Examiners of
The State of North Carolina

I, FRED P. PARKER III, Executive Secretary of the Board of Law Examiners of the State of North Carolina do certify that the following individuals were admitted to the practice of law in the State of North Carolina by comity:

BARRY ALEXANDER COOK, ... Charlotte, applied from the State of Ohio

On April 14, 1981, the following individuals were admitted:

MORTIMER RYON, ... Asheville,, applied from the State of Pennsylvania
RONALD CHARLES LINK, ... Chapel Hill, applied from the State of Illinois
JOHN JAY MATCHULAT, ... Clemmons, applied from the State of Indiana
JULIAN D. BOBBITT, JR., ... Raleigh, applied from the State of West Virginia
ELIZABETH YVONNE PUGH, ... Raleigh, applied from the State of Pennsylvania

Given over my hand and Seal of the Board of Law Examiners this the 29th day of April, 1981.

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

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 individuals were admitted to the practice of law in the State of North Carolina by comity:

On May 21, 1981, the following individual was admitted:

RICHARD S. ARCHIA, JR., ... Winston-Salem, applied from the State of Wisconsin

On May 26, 1981, the following individuals were admitted:

DAVID BROOKS WESTWATER, JR., ... Greensboro, applied from the State of Ohio

On July 27, 1981, the following individuals were admitted:

EMILY ROBINSON COPELAND, ... Raleigh, applied from the State of Indiana

On July 29, 1981, the following individuals were admitted:

MARY CATHERINE TIMMONS BAVIS, ... Charlotte, applied from the State of Ohio
JAMES ROBERT BAVIS, ... Charlotte, applied from the State of Ohio

Given over my hand and Seal of the Board of Law Examiners this the 13th day of July, 1981.

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

LICENSED ATTORNEYS

I, FRED P. PARKER III, Executive Secretary of the Board of Law Examiners of the State of North Carolina, do certify that the following named persons duly passed the examinations of the Board of Law Examiners as of the 28th day of March, 1981, and said persons have been issued certificates of this Board:

KATHRYN SUE ALDRIDGE ..... Raleigh
JOHN WILLIAM ALEXANDER ..... Morganton
SUE LANDON ALFRIEND ..... Wilkesboro
PAUL BALDASARE, JR. ..... Chapel Hill
CONSTANCE TRIPLETTE BARKER ..... Statesville
JANE SPRINKLE BARKLEY ..... Charlotte
RICHARD EARL BATTS ..... Charlotte
FREDERICK RAYMOND BENSON ..... Charlotte
THOMAS MARSHALL BOSTIAN ..... Knightdale
WALTER JAMES BRANDON ..... Goldsboro
EVANDER MUNN BRITT, III ..... Lumberton
WILLIAM SAMUEL BRITT ..... Lumberton
BLAIN BYERLY BUTNER ..... Winston-Salem
RONALD KENT CAMPBELL ..... Raleigh
MOSES CAREY, JR. ..... Chapel Hill
JOSEPH LEE CARLTON, JR. ..... Greenville
CATHARINE ROYSTER CARRUTHERS ..... Winston-Salem
WILLIAM BENJAMIN CHERRY ..... Washington
WILLIAM CRAWFORD COLEY III ..... Kinston
KAREN CRAFT COMBS ..... Matthews
RICHARD LOWE COX ..... Asheboro
JEAN MARIE CRADDOCK ..... Kernersville
JEANNE DANIELS ..... Durham
ROBERT EUGENE DILLOW, JR. ..... Jacksonville
ELIZABETH SUSAN EDWARDS ..... Raleigh
JOHN ERIC EVENSON II ..... Wilkesboro
DAYLE ANDREW FLAMMIA ..... Raleigh
DANIEL ROY FLEBOTTE ..... Durham
MICHAEL LEE FRAZIER ..... Raleigh
TIMOTHY JAMES FUHRMAN ..... Raleigh
BENJAMIN GILBERT ..... Durham
WILLIAM GARTH GOLDSTON ..... Durham
WILLIAM LAPSLEY GRIFFIN, JR. ..... Chapel Hill
ROBERT S. GRIFFITH II ..... Dunn
JAMES ERNEST GRONQUIST ..... Charlotte
DAVID ALAN GUTH ..... Raleigh
WILLIAM D. HARAZIN ..... Raleigh
JAMES GILBERT HARRIS ..... Roanoke Rapids
JOAN ELIZABETH HEDAHL ..... Bismarck, N. Dakota
KATHRYN GLENN HEMPHILL ..... Winston-Salem
GARY DEVON HENDERSON ..... Winston-Salem
ELIZABETH DOGGETT HICKMON ..... Raleigh
MICHAEL JOHN HUDSON ..... Calico Rock, Arkansas
STEVEN G. JESSUP ..... Raleigh
WILLIAM DAVID JOHNSON ..... Raleigh

ROLAND SUTTON JONES, JR. ..... Raleigh
THOMAS LEE JONES, JR. ..... Conway
FREDERICK JOSEPH KEITEL, III ..... Charlotte
MILFORD KENDRICK KIRBY ..... Raleigh
KATHY A. KLOTZBERGER ..... Raleigh
HOWARD S. KOHN ..... Raleigh
JANE FRANCES KRANZLER ..... Searington, New York
STEVEN ELLSWORTH LACY ..... Raleigh
RIDDICK MADISON LAMM, JR. ..... Asheville
MARY JULIA LINEHAN ..... Hillsborough
JOHN GARRETT LUDLUM ..... Warsaw
NELWYN JOAN MCDUFIE ..... Charlotte
WILLIAM CAMP MATTHEWS, JR. ..... Portsmouth, Virginia
JOHN R. MAYER ..... Chapel Hill
MELINDA WEIKERT MELHORN ..... High Point
HUGH LEONIDAS MERRITT, JR. ..... Mount Airy
RANDY LAMAR MILLER ..... Columbia, South Carolina
MICHAEL MIRANDE ..... Jacksonville, Florida
RONALD LEE MOORE ..... Bath
WAYMON L. MORRIS ..... Hendersonville
GEORGE PORTER PALMER ..... Charlotte
SUSAN PERRY PARROTT ..... Kinston
LARRY WAYNE PEARMAN ..... Greensboro
JOHN JEROME PECK ..... Dunn
SHELLEY MUELLER PEW ..... Winston-Salem
JESSE LAWRENCE PFAFF ..... Chapel Hill
DAVID THOMAS PHILLIPS ..... Kenansville
KENNETH RAYMOND PIERNICK ..... Winston-Salem
THOMAS JAMES PITMAN ..... Winston-Salem
CLARENCE RANDY POOL ..... Marion
CHRISTIE SPEIR PRICE ..... Chapel Hill
DEBRA JEAN RADTKE ..... St. Paul, Minnesota
MELANIE HYATT RODENBOUGH ..... Chapel Hill
JAYRENE FAYE RUSSELL ..... High Falls
ANNE PETTUS SHELBURNE ..... San Francisco, California
JOHN CARLYLE SHERRILL, III ..... Mount Ulla
JOHN OSCAR SHUFORD, III ..... Chapel Hill
DAVID JEROME SMITH ..... Greensboro
MICHAEL DAVID SMITH ..... Charlotte
MITTIE RUTH MOORE SMITH ..... Greensboro
MILTON CALDWELL SPAULDING ..... Fort Braff
DONALD L. STANLEY ..... Greensboro
RICHARD MERRYMAN STEARNS ..... Kinston
SIDNEY JOSEPH STERN III ..... Greensboro
LAURA SUE BURGESS STEVENS ..... Buies Creek
JOHN PHILIP SWART ..... Wilmington
PATRICIA ANN TIMMONS ..... Fayetteville
JAMES BAILEY TRAPP, JR. ..... Newton
H. RUSSELL VICK ..... Chapel Hill

CHARLOTTE ANN WADE ..... Rocky Mount
GEORGE WATERS ..... Greensboro
STUART NEAL WATLINGTON ..... Greensboro
DENISE MAJETTE WELCH ..... Winston-Salem
CHESTER E. WHITTLE, JR. ..... Creston
ROBERT EDMOND WILHOIT ..... Asheboro
MICHAEL WAYNE WILLIS ..... Rougemont
LE VON E. WILSON ..... Greensboro

Given over my hand and Seal of the Board of Law Examiners this the 29th day of April, 1981.

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

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM 1980

TEXFI INDUSTRIES, INC., A CORPORATION v. THE CITY OF FAYETTEVILLE, A MUNICIPAL CORPORATION, BETH FINCH, MAYOR, J.L. DAWKINS, WAYNE WILLIAMS, MILDRED EVANS, BILL HURLEY, GEORGE MARKHAM, MARION GEORGE, MEMBERS OF THE CITY COUNCIL OF THE CITY OF FAYETTEVILLE, AND A.D. JOHNSON, ACTING TAX COLLECTOR FOR THE CITY OF FAYETTEVILLE

No. 126

(Filed 15 August 1980)

1. **Municipal Corporations § 2– annexation hearing – notice by publication in newspaper – due process**

Publication of notice of a public hearing on annexation in a newspaper pursuant to G.S. 160A-24 does not provide inadequate notice to property owners affected by the annexation in violation of their right to due process.

2. **Constitutional Law § 20– equal protection – when strict scrutiny test is used**

When a governmental act classifies persons in terms of their ability to exercise a fundamental right or a governmental classification distinguishes between persons in terms of any right upon a suspect basis, the "strict scrutiny" standard requires the government to demonstrate that the classification is necessary to promote a compelling governmental interest. However, when a statute or action does not involve a suspect class or a fundamental right, equal protection is not violated where the distinctions drawn by the statute or action bear some rational relationship to a conceivable legitimate governmental interest.

3. Municipal Corporations § 2– annexation referendum – no right to vote by corporation – equal protection

A corporation is not denied equal protection of the laws because resident voters but not corporations are given the right to vote in an annexation referendum held pursuant to G.S. 160A-25.

Justices Exum and Carlton dissenting.

ON discretionary review of the decision of the Court of Appeals reported in 44 N.C. App. 268, 261 S.E. 2d 21 (1979), affirming judgment of *McConnell, J.*, entered at the 30 October 1978 Session of CUMBERLAND Superior Court.

Plaintiff is a Delaware corporation which has its headquarters in Greensboro, N.C., with a place of business in Fayetteville, Cumberland County, N.C. Plaintiff owns personal property which is situated in Cumberland County and leases real property under an agreement which obligates it to pay all real property taxes on the leased premises.

On 27 September 1976, the Fayetteville City Council, pursuant to G.S. § 160A-24, *et seq.*, adopted a resolution to consider the annexation of a certain area of land within which property leased by plaintiff and other commercial and industrial enterprises is located. No residences are situated within the area. The resolution scheduled a public hearing for 25 October 1976 at the Fayetteville City Hall. Notice of the council's action was published in *The Fayetteville Observer* on 28 September 1976, 5 October 1976, 12 October 1976, and 19 October 1976. The hearing was held as scheduled and no opposition to the proposed annexation was voiced. Accordingly, the area was annexed to the City of Fayetteville.

On 8 December 1977 plaintiff initiated this action seeking an injunction restraining the enforcement of the previously passed ordinance. Plaintiff alleged that the annexation statutes under which Fayetteville proceeded were unconstitutional on their face and as applied because: (1) the applicable notice provisions of G.S. § 160A-24 were insufficient to give parties affected by the annexation reasonable notice of the pendency of the action; and (2) the statute, which gives resident voters but not corporations in the area proposed for annexation a right to vote in a referendum on the proposal, denies plaintiff the equal protection of the law.

Within the time allowed, defendants filed a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, asserting that the complaint failed to state a claim upon which relief could be granted, lack of subject matter jurisdiction, lack of plaintiff's capacity and standing to sue, laches, and equitable estoppel.

On 1 November 1978, the trial court entered judgment granting defendants' motion to dismiss on the grounds that the complaint failed to state a claim upon which relief could be granted and that plaintiff, as a corporate lessee, lacked standing to sue. Plaintiff appealed from the judgment and defendants cross-appealed for failure of the trial court to grant the motion to dismiss on the other grounds upon which they relied.

The Court of Appeals reversed the trial court's ruling that plaintiff had no standing to sue. It agreed with the trial court's rulings that plaintiff's equal protection and procedural due process claims failed to state claims upon which relief could be granted and affirmed the judgment dismissing the action.

Plaintiff gave notice of appeal to this court and, in the alternative, petitioned us for discretionary review pursuant to G.S. § 7A-31. Defendants moved to dismiss plaintiff's appeal and petitioned for discretionary review of that part of the Court of Appeals decision holding that plaintiff had standing to sue. We allowed plaintiff's petition and disallowed defendants' motion and petition.

McCoy, Weaver, Wiggins, Cleveland and Raper, by L. Stacy Weaver, Jr., and Reginald M. Barton, Jr., for plaintiff-appellant.

Robert C. Cogswell, Jr., for defendant-appellees.

BRITT, Justice.

The question of plaintiff's standing to sue is not before us inasmuch as we denied defendants' petition for discretionary review of the holding of the Court of Appeals that plaintiff had such standing. We now agree with the Court of Appeals with respect to its holding on the questions of due process and equal

protection of the law; therefore, we affirm the decision of the Court of Appeals.

The issue of standing having been resolved in plaintiff's favor we turn now to a brief overview of the substantive law as it relates to the question of annexation.

The 1957 Session of the General Assembly authorized the creation of the Municipal Government Study Commission, directing it to make a comprehensive study of the problems facing municipalities in North Carolina in an age of rapid urbanization. Res. 51, 1957 N.C. Sess. Laws. Among the Commission's many conclusions in its final report to the General Assembly, the body recommended that the question of municipal annexation be made a matter of state-wide policy. Municipal Government Study Commission, Report 21 (1958). The Commission expanded upon its recommendation in a supplemental report several months later. The recommendations propounded in the supplemental report, Municipal Government Study Commission, Supplemental Report 11-13 (1959), formed the basis for a major overhaul of the manner in which North Carolina's municipalities annexed land. Before 1959, much of the annexation which occurred was the result of the petition of all of the affected landowners [1] or by a local act passed by the General Assembly. Municipal Government Study Commission, Supplemental Report 5-6 (1959). The remainder of the annexations proceeded under provisions of the General Statutes which called for referenda on the proposed annexations. G.S. §§ 160-445 to -451 (1952). The Commission observed that two out of every five proposals which were submitted under the latter method were defeated. Municipal Government Study Commission, Supplemental Report 5 (1959). After noting that desirable proposals had often been defeated at the polls under the referendum method and that municipalities were increasingly resorting to the legislative process when they contemplated large-scale annexation plans, the Commission stated its thesis:

[1]Under the provisions of G.S. § 160-452, all of the landowners in an area having fewer than 25 voter-residents could petition a municipality for annexation. G.S. § 160-452 (1952). The substance of this provision is now codified as G.S. § 160A-31 (1976).

> Annexation involves the continuous extension of major utility facilities and other municipal services to parts of the urban area which are now or soon will become parts of the densely populated and congested urban core. Contrary to the impression given by a number of North Carolina cities in recent years, annexation proposals should not be periodic and large-scale in nature. Nor should annexation be considered outside the context of long-range planning in any community. Rather, it should be considered as an integral part of the planning process.

Id. at 6. Against this background, the 1959 Session of the General Assembly undertook a major revision of the annexation laws of the state. *See* 1959 N.C. Sess. Laws c. 1009, 1010. Codified in Chapter 160 of the General Statutes, the new statutes sought to implement a uniform scheme of annexation throughout the state. Both of the new acts, as well as the provisions of former G.S. §§ 160-445 to -453, were subsequently recodified as Article 4A of Chapter 160A of the General Statutes by the 1973 Session of the General Assembly. 1973 N.C. Sess. Laws c. 426. Entitled "Extension of Corporate Boundaries", Article 4A is divided into four parts, three of which merit brief examination[2]

Besides setting out the procedure for annexation by petition, G.S. § 160A-31 (1976), Part One governs annexation by ordinance. Upon publication of public notice in a newspaper in the county with general circulation in the municipality once a week for four successive weeks[3], the municipal governing body is authorized to hold a public hearing. The municipality is thereupon empowered to adopt an ordinance annexing any contiguous tract of land which is not already embraced within the boundaries of another municipality. If, at the public hearing on the proposed annexation, a petition is filed and signed by at least fifteen percent of the qualified voters resident in the area

[2]Part Four of Article 4A concerns the annexation of non-contiguous areas. G.S. §§ 160A-58 to -58.6 (1976). It has no relevance to the case at bar and will not be discussed.

[3]If there is no such newspaper, public notice may be given by posting notice in five or more public places in the municipality. G.S. § 160A-24 (1976).

proposed for annexation, the question must be submitted to a vote of the qualified voters of the area proposed for annexation. *See generally* G.S. §§ 160A-24 to -28 (1976). In the present case, the City of Fayetteville proceeded under the provisions of Part One.

Part Two governs annexation by municipalities with populations less than 5,000 persons. *See generally* G.S. §§ 160A-33 to -44 (1976 and Supp. 1979); *see also* North Carolina League of Municipalities, Mechanics of Annexation for Municipalities of Less than 5,000 (1978). Part Three regulates annexation by municipalities with populations greater than 5,000 persons. *See generally* G.S. §§ 160A-45 to -56 (1976); *see also* North Carolina League of Municipalities, Mechanics of Annexation for Municipalities of 5,000 or more (1978). Both procedures provide for public notice of the municipality's intention to annex a specific area, as well as a public hearing on the question to provide the affected residents with an opportunity to be heard on the issue. Upon compliance with the requirements of notice and hearing, the municipal governing board may, at a regular or special meeting held no earlier than seven days after the public hearing, adopt an ordinance extending the corporate limits to include areas meeting the statutory requirements governing the character of the area to be annexed.

The procedures employed in Part One differ from those embodied in Parts Two and Three in two significant respects. First, Part One imposes no requirements which deal with the character of the area to be annexed provided that it is contiguous to the municipality. Second, municipal action under Part One is subject to veto by the voters resident in the area to be annexed if a petition demanding a referendum on the annexation proposal is signed and filed by at least fifteen percent of the voters resident in the affected area.

While Part One is fully in force in Cumberland County, Parts Two and Three are subject to a distinct modification. Through a local act of the General Assembly, affected voters of Cumberland County are empowered to exercise a veto over any annexation proposal which would otherwise be implemented by resort to the provisions of Part Two or Part Three. Chapter 1058

of the Session Laws of 1969 provides that a municipality located in Cumberland County may not annex land pursuant to either Part Two or Part Three if, within 30 days after the publication of the notice of intent has been completed, a petition signed by a majority of the voters residing in the area to be annexed is filed with the municipality's governing body stating that the signers of the petition are opposed to the annexation. In other words, even though a tract of land is suitably developed for annexation, the resident voters may nonetheless block the annexation upon the timely filing of an appropriate petition. For reasons which do not appear in the record and which are not properly the subject of speculation, the City of Fayetteville did not proceed to attempt to annex the property which is the subject matter of the case at bar under the provisions of Part Three. It instead sought to annex the property under the provisions of Part One. In any event, the facts remain the same: there are no natural persons residing in the area involved in this action. The area contains only commercial and industrial enterprises.

Plaintiff concedes that defendant fully complied with the requirements of G.S. § 160A-24. However, plaintiff argues that the statutory provisions under which the City of Fayetteville acted violated plaintiff's constitutional rights to due process of law and the equal protection of the law.

Our consideration of plaintiff's arguments proceeds from the following premise: Annexation by a municipal corporation is a political question which is within the power of the state legislature to regulate. *Hunter v. City of Pittsburgh*, 207 U.S. 161, 52 L. Ed. 151, 28 S. Ct. 40 (1907); *Berry v. Bourne*, 588 F. 2d 422 (4th Cir. 1978); *In re Annexation Ordinance*, 296 N.C. 1, 249 S.E. 2d 698 (1978); *see also Garren v. City of Winston-Salem*, 463 F. 2d 54 (4th Cir.), *cert. denied*, 409 U.S. 1039 (1972). Speaking for the court in *Hunter v. City of Pittsburgh supra*, Mr. Justice Moody observed:

> Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. * * * The number, nature and duration of the powers conferred upon these corporations and the terri-

> tory over which they shall be exercised rests in the absolute discretion of the State. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the State within the meaning of the Federal Constitution. The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body, conforming its action to the State constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may by such changes suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right by contract or otherwise in the unaltered or continued existence of the corporation or its powers * * * .

207 U.S. at 178-179; 52 L. Ed. at 159; 28 S. Ct. at 46-47. Relying upon the holding and rationale of *Hunter*, a number of courts have rejected attacks on state annexation procedures which have rested on due process or equal protection grounds. *Berry v. Bourne, supra; Deane Hill Country Club, Inc. v. City of Knoxville*, 379 F. 2d 321 (6th Cir.), *cert. denied*, 389 U.S. 975 (1967); *Murphy v. City of Kansas City*, 347 F. Supp. 837 (W.D. Mo. 1972); *Doyle v. Municipal Comm'n of State of Minnesota*, 340 F. Supp. 841 (D. Minn.), *aff'd*, 468 F. 2d 620 (8th Cir. 1972); *Adams v. City of Colorado Springs*, 308 F. Supp. 1397 (D. Colo.), *aff'd*, 399 U.S. 901 (1970); *Detroit Edison Co. v. East China Township School Dist.* No. 3, 247 F. Supp. 296 (E.D. Mich. 1965), *aff'd*, 378 F. 2d 225 (6th Cir.), *cert. denied*, 389 U.S. 932 (1967). The sole exception to this pattern of decision making is confined to challenges which rest upon instances of alleged racial discrimination. *Gomillion v. Lightfoot*, 364 U.S. 339, 5 L. Ed. 2d 110, 81 S. Ct. 125 (1960).

Inasmuch as racial discrimination is not involved in this action, that exception has no application.

[1] Plaintiff argues that the notice requirements of G.S. § 160A-24 deny its right to due process of law under the fourteenth amendment to the United States Constitution. We disagree.

When a municipality wishes to annex contiguous territory pursuant to the provisions of G.S. § 160A-24, it must give public notice by publication once a week for four consecutive weeks in a newspaper in the county with a general circulation in the municipality. If there is no such paper, notice may be given by posting notice in five or more places within the municipality. In either case, the notice must fix the date, hour, and place of the public hearing which must be held with regard to the proposed annexation. The notice must also describe by metes and bounds the property that is to be annexed. The notice which defendant placed in *The Fayetteville Observer* complied in all respects with the mandate of the statute. The notice was also adequate to safeguard plaintiff's right to due process of law. The guarantee of due process is satisfied when notice is given which is reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action. *Cf., Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315, 94 L. Ed. 865, 874, 70 S. Ct. 652, 657 (1950) (" . . . when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing . . . might reasonably adopt to accomplish it.") *see generally* 2 E. McQuillin, The Law of Municipal Corporations § 7.35 (3d ed. 1979). The notice which defendant published in *The Fayetteville Observer* met this standard. The notice described by metes and bounds the area that was proposed for annexation. The date, hour, and place of a public hearing at which affected persons could voice their opinions were stated prominently. On the facts of this case, a newspaper was a reasonable method of disseminating notice.

Plaintiff argues that the City of Fayetteville ought to have been required to mail notice of the pendency of the annexation proposal to each property owner in the affected area. This contention is untenable. If the means of giving notice which has

been mandated by the legislature is constitutionally adequate, it is not within the province of the judiciary to substitute its judgment for that of the General Assembly. Furthermore, even if it were to be required that each property owner be mailed individual notice of the pendency of the proposed annexation, plaintiff would still not be entitled to receive such an advisory because it owns no real property in the area.

[3] Plaintiff further contends that G.S. § 160A-25 operates to deny to it the equal protection of the laws. This contention is without merit.

G.S. §§ 160A-25 provides:

> If, at the meeting held for such purpose, a petition is filed and signed by at least fifteen percent (15%) of the qualified voters resident in the area proposed to be annexed requesting a referendum on the question, the governing body shall, before passing said ordinance, annexing the territory, submit the question as to whether said territory shall be annexed to a vote of the qualified voters of the area proposed to be annexed, and the governing body may or may not cause the question to be submitted to the residents of the municipality voting separately. The governing body may, without receipt of a petition, call for a referendum on the question: Provided, however, the governing body of the municipality shall be required to call for a referendum within the municipality if a petition is filed and signed by at least fifteen percent (15%) of the qualified voters residing in the municipality, who actively participated in the last gubernatorial election.

Traditionally, courts employ a two-tiered scheme of analysis when an equal protection claim is made. *See generally* J. Nowak, R. Rotunda & J. Young, Handbook on Constitutional Law 522-527 (1978); L. Tribe, American Constitutional Law §§ 16-2, 16-6 (1978); *compare Craig v. Boren*, 429 U.S. 190, 210, 50 L. Ed. 2d 397, 415, 97 S. Ct. 451, 463 (1976) (Powell, J., concurring) *but see San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 70, 36 L. Ed. 2d 16, 64, 93 S. Ct. 1278, 1315 (1873) (Marshall, J., dissenting).

[2] When a governmental act classifies persons in terms of their ability to exercise a fundamental right, *e.g., Kramer v. Union Free School District No. 15*, 395 U.S. 621, 23 L. Ed. 2d 583, 89 S. Ct. 1886 (1969); *Shapiro v. Thompson*, 394 U.S. 618, 22 L. Ed. 2d 600, 89 S. Ct. 1322 (1969), or when a governmental classification distinguishes between persons in terms of any right, upon some "suspect" basis, *e.g.; Bolling v. Sharpe*, 347 U.S. 497, 98 L. Ed. 884, 74 S. Ct. 693 (1954), the upper tier of equal protection analysis is employed. Calling for "strict scrutiny", this standard requires the government to demonstrate that the classification is necessary to promote a compelling governmental interest. *E.g., Memorial Hospital v. Maricopa County*, 415 U.S. 250, 39 L. Ed. 2d 306, 94 S. Ct. 1076 (1974).

When an equal protection claim does not involve a "suspect class" or a fundamental right, the lower tier of equal protection analysis is employed. *E.g., Vance v. Bradley*, 440 U.S. 93, 59 L. Ed. 2d 171, 99 S. Ct. 939 (1979). This mode of analysis merely requires that distinctions which are drawn by a challenged statute or action bear some rational relationship to a conceivable legitimate governmental interest. *E.g., New Orleans v. Dukes*, 427 U.S. 297, 49 L. Ed. 2d 511, 96 S. Ct. 2513 (1976); *Hagans v. Lavine*, 415 U.S. 528, 39 L. Ed. 2d 577, 94 S. Ct. 1372 (1974).

For strict scrutiny to be properly applied in evaluating an equal protection claim, it is necessary that there be a preliminary finding that there is a suspect classification or an infringement of a fundamental right. It has been held that a class is deemed "suspect" when it is saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command particular consideration from the judiciary. *E.g., San Antonio Independent School District v. Rodriguez, supra; compare Frontiero v. Richardson*, 411 U.S. 677, 36 L. Ed. 2d 583, 93 S. Ct. 1764 (1973); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 31 L. Ed. 2d 768, 92 S. Ct. 1400 (1972). The underlying rationale of the theory of suspect classification is that where legislation or governmental action affects discrete and insular minorities, the presumption of constitutionality fades because the traditional political processes may have broken down. *Johnson v.*

Robison, 415 U.S. 361, 39 L. Ed. 2d 389, 94 S. Ct. 1160 (1974). In the present case, we are not confronted with a suspect classification. Though the plaintiff is a corporation, we do not find that the challenged statute operates to create or implement a suspect classification. We are unable to conclude that corporations have been saddled with such disabilities, or subjected to such purposeful unequal treatment, or relegated to such a position of political powerlessness as to make it appropriate to make such fictitious entities members of a suspect class. Corporations do not constitute a discrete and insular minority.

Nor do we find that plaintiff has been denied the exercise of a fundamental right. While the right to vote has been identified as a fundamental right, *e.g.*, *Hill v. Stone*, 421 U.S. 289, 44 L. Ed. 2d 172, 95 S. Ct. 1637 (1975); *Dunn v. Blumstein*, 405 U.S. 330, 31 L. Ed. 2d 274, 92 S. Ct. 995 (1972); *Williams v. Rhodes*, 393 U.S. 23, 21 L. Ed. 2d 24, 89 S. Ct. 5 (1968), our inquiry cannot stop with that acknowledgement. The right to vote is not self-executing but requires consideration of the facts and circumstances behind the challenged law, the interest which the state claims to be protecting, and the interest of those who are disadvantaged by the classification. *Storer v. Brown*, 415 U.S. 724, 39 L. Ed. 2d 714, 94 S. Ct. 1274 (1974). That plaintiff is a corporation, an artificial being created for the management and creation of capital, does not, by itself, resolve the issue before this court. It is well established that while corporations are entitled to claim for themselves the protection of a number of constitutional guarantees, *e.g.*, *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 50 L. Ed. 2d 530, 97 S. Ct. 619 (1977); *New York Times Co. v. United States*, 403 U.S. 713, 29 L. Ed. 2d 822, 91 S. Ct. 2140 (1971); *New York Times Co. v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964), corporate identity has been determinative in denying corporations certain constitutional rights. *California Bankers Association v. Shultz*, 416 U.S. 21, 39 L. Ed. 2d 812, 94 S. Ct. 1494 (1974); *United States v. Morton Salt Co.*, 338 U.S. 632, 94 L. Ed. 401, 70 S. Ct. 357 (1950); *Wilson v. United States*, 221 U.S. 361, 55 L. Ed. 771, 31 S. Ct. 538 (1911). A purely personal guarantee, such as the privilege against compulsory self-incrimination, is unavailable to corporations and other organizations because the historic function of the guarantee has been limited to the protection of the individual. *United States v.*

White, 322 U.S. 694, 88 L. Ed. 1542, 64 S. Ct. 1248 (1944). Whether a particular guarantee is purely personal or is unavailable to corporations for some other reason depends upon the nature, history, and purpose of the particular constitutional provision which is being asserted by the organization. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 55 L. Ed. 2d 707, 98 S. Ct. 1407 (1978).

[3] We hold that plaintiff has no fundamental right to vote in an annexation referendum. The history, policy, and purposes of the right to vote all militate against plaintiff's position. The right to vote is the right to participate in the decision-making process of government. *Reynolds v. Sims*, 377 U.S. 533, 12 L. Ed. 2d 506, 84 S. Ct. 1362 (1964); *see State ex rel. Quinn v. Lattimore*, 120 N.C. 426, 26 S.E. 638 (1897); *see also* 1 A. Howard, Commentaries on the Constitution of Virginia 86-90 (1974). The right to vote is at the foundation of a constitutional republic. Corporations are artificial entities which are designed for the purpose of managing economic resources. The very nature of a corporation prevents it from sharing an identity with the broader humane, economic, ideological, and political concerns of the human body politic. Aside from being theoretically inconsistent with the basis of our republican form of government, plaintiff's argument fails to confront the practical difficulties inherent in its argument. With the development of modern corporate law and the parallel expansion of the corporate sector of the economy, it is customary for a single corporation to be diversified, consisting of many affiliates and subsidiaries. The Court of Appeals was correct in observing that corporations could become political hydra, which, unlike natural persons, could multiply their voting power by merely creating additional subsidiaries. A state may not dilute the strength of a person's vote to give weight to other interests. *Evans v. Cornman*, 398 U.S. 419, 26 L. Ed. 2d 370, 90 S. Ct. 1752 (1970).

Since it is inappropriate to apply the test of strict-scrutiny in resolving plaintiff's claim, we must now consider whether, under the test of rationality, plaintiff was denied the equal protection of the laws. We hold that G.S. § 160A-25 bears a rational relationship to a conceivable legitimate governmental purpose. It is the responsibility of government to insure the

integrity of the franchise. The integrity of the right to vote is incompatible with the practical difficulties of plaintiff's argument. Not only do corporations have many autonomous components, the modern corporation represents a variety of interests and positions within its framework. Unlike a natural person, a corporation could not speak with a single voice and resolve without causing competing interests to fall silent. Furthermore, a corporation can be located in a number of jurisdictions. This fact, as well as possibility of a multiplicity of subsidiaries, would tend to show that a corporation could attempt to multiply its power at the ballot box.

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

Affirmed.

Justice EXUM dissenting.

Believing that this complaint states a claim on the theory that the City of Fayetteville has exceeded its statutory authority in this annexation proceeding, I respectfully dissent and vote to reverse. Both their legislative history and our municipal annexation statutes themselves demonstrate to my satisfaction that the legislature never intended to authorize towns to annex property by way of the referendum procedure outlined in Part 1, Art. 4A, Chapter 160A, of our General Statutes, when there are no residents in the area who can participate in a referendum. Fayetteville seeks to so utilize Part 1. Great mischief, I fear, can result from the majority's view that it can. In fairness to the majority, plaintiff, apparently overly enamored with its constitutional claims or perhaps for other more strategic reasons, does not really make this argument. Nevertheless a complaint must be sustained against a motion to dismiss if there is any legal theory to support it notwithstanding plaintiff's failure to identify the theory for the Court. *See Snyder v. Freeman*, 300 N.C. 204, 266 S.E. 2d 593 (1980).

Both their history and the annexation statutes themselves demonstrate that the legislature does not intend for our towns to be able to annex property by municipal fiat. A town's power to annex is not absolute. It cannot constitutionally be so. The

annexation statutes were designed to permit towns to plan for their own development by empowering them to extend their boundaries, and perforce their services, to "parts of the urban area which are now or soon will become parts of the densely populated and congested urban core." Municipal Government Study Commission Supplementary Report 6 (26 February 1959). Part 1 of these statutes authorizes annexation by petition and referendum of the "qualified voters" in the subject area. G.S. 160A-25. Parts 2 (towns under 5000 population) and 3 (towns over 5000 population) authorize annexation provided the area is sufficiently urbanized according to rigorous, specific statutory standards. *See* G.S. 160A-33, *et seq.*, and G.S. 160A-45, *et seq.* Indeed both Parts 2 and 3 expressly provide, G.S. 160A-33(2)(3); G.S. 160A-45(2)(3):

> "(2) That municipalities are created to provide the governmental services essential for sound urban development and for the protection of health, safety and welfare *in areas being intensively used for residential, commercial, industrial, institutional and governmental purposes or in areas undergoing such development;*
>
> (3) That municipal boundaries should be extended, *in accordance with legislative standards applicable throughout the State, to include such areas* and to provide the high quality of governmental services needed therein for the public health, safety and welfare." (Emphasis supplied.)

The power of our towns to annex, therefore, under this statutory scheme is dependent upon and presupposes either (1) the will of the qualified voters in the area or (2) the area itself having become sufficiently urbanized.

I can think of no clearer subversion of our annexation statutes than to permit towns to annex under the referendum procedure when there are no "qualified voters" in the area to be annexed who can express their will. Such a process mocks the referendum procedure, thwarts the legislative will, and constitutes, in effect, annexation by municipal fiat.

There is, of course, some evidence in this record that the area in question is developed industrially. Fayetteville, however, does not purport to demonstrate that the area meets statutory urbanization standards. It claims it need not do so because it is proceeding by way of referendum. It sees no obstacle in the fact that there are no qualified voters with which to conduct a referendum. According to Fayetteville, it could, if it wished, annex large tracts of vacant, unused property under the referendum procedure. It could, in effect, annex at will. I totally reject this position. Our annexation statutes were not intended to permit it. *Lithium Corp. v. Bessemer City*, 261 N.C. 532, 135 S.E. 2d 574 (1964).

Whether Fayetteville could proceed to annex this property under Part 3 by showing that it meets statutory urbanization standards is a question not presented to us. Because of a local act, Chapter 1058, 1969 Session Laws, applicable to Cumberland County, even this attempt might be thwarted by a petition opposing the annexation "signed by a majority of the registered voters residing in the area to be annexed." This fact should not preclude our holding here that Fayetteville cannot proceed by way of referendum.

The referendum procedure requires that if fifteen percent of the qualified voters request it, the question of annexation shall be submitted "to a vote of the qualified voters of the area proposed to be annexed." G.S. 160A-25. A favorable vote is a prerequisite, a condition precedent to annexation. *Rheinhardt v. Yancey*, 241 N.C. 184, 84 S.E. 2d 655 (1954). Under Part 3, however, the only prerequisite, or condition precedent, to annexation is that the area meet statutory urbanization standards. If it does, annexation can proceed only to be stopped, if at all, by a majority of "registered voters" who so petition within a specified period. It would be far easier for me to hold that this latter procedure is available to Fayetteville notwithstanding the absence of "registered voters" who might oppose it. At least Fayetteville would have met all the conditions precedent to annexation.

It might well be argued and with some force that whether approval of voters is a condition precedent, or opposition of voters fatal to an otherwise statutorily authorized annexation,

voters in Cumberland County, under my position, must reside in any area to be annexed. This question is not now before us.

What is before us is whether a town may use the referendum procedure to annex an area in which there are no voters to decide the question. I remain convinced that the answer to this question should be no. I cannot, therefore, join in the majority opinion which, in effect, answers it yes.

Justice CARLTON dissenting.

I join in Justice Exum's dissent. It is inconceivable to me that our annexation statutes were intended to permit the kind of action taken by Fayetteville in this case. It is patently preposterous to allow annexation by referendum where there are no "qualified voters" to vote.

I am in further disagreement with the majority opinion. I find no incompatibility between plaintiffs' desire to vote in an annexation proceeding and the responsibility of government to insure the integrity of the franchise to vote. It is true that modern corporations "[represent] a variety of interests and positions within [their] framework." It does not follow, however, that a corporation cannot speak with a single voice. A corporate board can decide how the corporation will cast its vote in an annexation referendum the same way it makes any major policy decision — by a vote of the board of directors.

The majority also seems concerned that corporations can be residents of a number of jurisdictions and that multiple subsidiaries would present the opportunity for multiple voting. It is enough to say that that possibility does not appear in this case. Denial of the right to vote should not be predicated upon the fear of potential abuse. Such abuse can be prevented by appropriate legislation.

In other words, I just do not agree with the apparent majority concern that practical voting procedure problems should preclude our corporate citizens from a voice in annexation elections. I would hold that the denial of their right to vote in annexation referenda is a violation of equal protection of the laws.

STATE OF NORTH CAROLINA v. HOWARD MATTHEW JOYNER

No. 109

(Filed 15 August 1980)

1. **Searches and Seizures § 8– warrantless arrest upon probable cause – evidence from seizure of person admissible**

There was no merit to defendant's contention that an officer, who arrested defendant without a warrant, had no probable cause to take him into custody and any evidence emanating from that illegal seizure of his person should be suppressed, since the evidence tended to show that the officer observed defendant some 3½ blocks from a rape victim's apartment some seven to ten minutes following the commission of the offenses of burglary, rape and larceny; the officer had earlier been alerted by police radio concerning the commission of the offenses and had been given a description of the offender as a black male with facial hair, wearing a toboggan and a green or blue jogging suit with white stripes down the sides of the trousers; when the officer observed defendant, he reconfirmed by radio this description; and the officer noted that defendant matched the description and placed him under arrest.

2. **Criminal Law §§ 42.2, 50– weapon used during rape – testimony that witness "assumed" it was a knife**

In a prosecution for first degree rape, larceny, and first degree burglary, testimony by the victim that she "assumed" an object which defendant had in his hand during the commission of the crimes was a knife was not an inadmissible opinion or conclusion, since the witness was either giving her then instantaneous conclusion derived from a variety of facts presented to her senses or stating, in effect, that her impression, although indistinct, was that the object was a knife, and under either theory such testimony was admissible; moreover, the victim's statement that the object she had observed "could have been" State's Exhibit No. 1, which she described as a "black handled screwdriver with a bent end on it" and which, other evidence showed, was in defendant's possession at the time of his arrest, was likewise properly admitted into evidence, since any object having a relevant connection with the case is admissible in evidence, it not being necessary that the witness positively identify the object, and the witness could properly testify that what she saw and felt was consistent with its being either a knife or a screwdriver.

3. **Criminal Law § 89.10– rape victim – cross-examination as to prior misconduct – limitation not prejudicial**

In a prosecution for first degree rape, larceny, and first degree burglary, defendant failed to show that he was prejudiced by the trial court's limiting of his cross-examination of the victim concerning prior acts of misconduct, since the victim answered the question before the jury notwithstanding the trial court's ruling; defendant had the benefit of his question from the trial court's ruling; defendant did not show any reasonable possibility that a

different result would have been reached at trial had the questioning been permitted; and the question was designed at most to impeach the victim's credibility as a witness, but her credibility was not a significant issue at this trial.

4. Rape § 5– first degree rape – sufficiency of evidence

In a prosecution for first degree rape evidence was sufficient to be submitted to the jury where it tended to show that the victim had been forced against her will to have sexual intercourse with a black male wearing a toboggan and jogging outfit while he held a long, cold, metallic object against her head which she thought was a knife but which could have been a screwdriver; several items were missing from the victim's apartment following the incident, including a cigarette lighter and some paperback books; within minutes of the alleged incident defendant was discovered 3½ blocks away dressed substantially as the victim had described her assailant; and found in his possession were several objects matching the description of objects missing from the victim's apartment, including two objects which she specifically identified as belonging to her.

5. Rape § 6; Larceny § 8.4; Burglary and Unlawful Breakings § 6.5– possession of recently stolen property – relevancy in determining guilt of rape, larceny, burglary – offenses committed at same time

In a prosecution for first degree rape, larceny, and first degree burglary, the trial court properly instructed the jury that it could consider defendant's possession of recently stolen property as a relevant circumstance in determining whether defendant was guilty of all the crimes charged against him where all of the crimes, including the larceny, occurred as a part of the same criminal enterprise.

6. Burglary and Unlawful Breakings § 6.3– first degree burglary – felony committed – instructions not in conformity with indictment – harmless error

In a prosecution for first degree rape, larceny, and first degree burglary, the trial court erred in instructing the jury that to convict defendant of burglary it must find that, at the time of the breaking and entering, defendant intended to commit rape *or* larceny, since the indictment alleged only that the breaking and entering occurred with the intent to commit larceny. However, defendant failed to meet his burden of showing that, had the error not been committed, a different result would have been reached at trial, since whether defendant intended to commit either larceny or rape or both at the time he entered the dwelling was a fact which must be inferred, if at all, from defendant's actions after he entered the victim's apartment; the evidence tended to show that defendant, once inside, committed both rape and larceny; the evidence that he intended to commit one of those crimes when he entered was therefore no weaker or stronger than the evidence that he intended to commit the other; and the jury found beyond a reasonable doubt that, once inside, defendant committed both.

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

State v. Joyner

BEFORE Judge Seay at the 1 October 1979 Session of GUILFORD Superior Court defendant was convicted by a jury of first degree rape, larceny, and first degree burglary. He was sentenced to life imprisonment for the rape conviction; to not less than twenty-five nor more than fifty years for the first degree burglary conviction; and to not less than nine nor more than ten years for larceny; to begin at the expiration of the life term. He appeals pursuant to G.S. 7A-27(a). We allowed his motion to bypass the Court of Appeals on the convictions of first degree burglary and larceny on 27 February 1980.

Rufus L. Edmisten, Attorney General, by Charles M. Hensey, Assistant Attorney General, for the state.

Frederick G. Lind, Assistant Public Defender, for defendant appellant.

EXUM, Justice.

Defendant assigns as error various rulings on the admission and exclusion of evidence, the denial of his motion to dismiss for insufficiency of evidence, and portions of the court's charge to the jury. For reasons stated in the opinion, we find that defendant's trial was free from prejudicial error.

Evidence for the state tended to show the following: At approximately 4:42 a.m. on 22 April 1979, Helen Young was awakened in her apartment in High Point, North Carolina, by a black male wearing a toboggan and a jogging suit. Ms. Young testified that the man had an object in his hand which she thought was a knife. He threatened her, placed the object against her head, and forced her to have intercourse with him. At approximately 5:00 a.m., just after the intruder left her apartment, Ms. Young called the police. She described the assailant as a bearded black male, wearing a toboggan and a jogging outfit with white stripes down the side. The description was dispatched to patrolling officers. At about 5:10 a.m., High Point police officer Neil Kearns saw defendant standing in a parking lot approximately three and one-half blocks from Ms. Young's apartment. He was wearing a two-piece, lime green jogging suit and a brown toboggan. Kearns stopped defendant

and confirmed by radio the victim's description. Kearns placed defendant in his patrol car. Subsequently Kearns found on or near defendant some paperback books and a cigarette lighter, which Ms. Young later identified as having been missing from her apartment since the incident with her assailant.

Defendant testified in his own behalf and offered evidence tending to show that around midnight on 21 April 1979, he began jogging and walking around High Point. He testified that he found the paperback books, the lighter and some cigarettes on the ground just before Kearns arrested him. Defendant denied committing any of the acts charged.

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

[1] Defendant first assigns as error the denial of his motion to suppress physical evidence seized from him and a pre-trial statement made by him as being the fruits of an illegal arrest. Relying on *Dunaway v. New York*, 442 U.S. 200, 99, S. Ct. 2248, 60 L. Ed. 2d 824 (1979), defendant contends that Kearns had no probable cause to take him into custody and therefore any evidence emanating from that illegal seizure of his person should be suppressed. We disagree.

In *Dunaway, supra,* the United States Supreme Court held that the seizure of one's person for custodial questioning amounts to an arrest and must be supported by probable cause. If not the arrest is illegal, and any incriminating evidence obtained by its exploitation is inadmissible. Our inquiry, then, must focus on whether Kearns had probable cause to arrest defendant at the time he took defendant into custody.

Probable cause exists when there is "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty." *State v. Streeter*, 283 N.C. 203, 195 S.E. 2d 502 (1973); 5 Am. Jur. 2d, *Arrest* § 44 (1962). The existence of probable cause depends upon "whether at that moment the facts and circumstances within [the officer's] knowledge and of which [he] had reasonably trustworthy information were sufficient to

warrant a prudent man in believing that the [suspect] had committed or was committing an offense." *Beck v. Ohio*, 279 U.S. 89, 91 (1964).

Here the trial court conducted a *voir dire* hearing to determine the admissibility of the evidence challenged by defendant's motion to suppress. The court found facts and concluded that probable cause for defendant's arrest existed and that defendant "was lawfully seized and lawfully arrested."

Facts found by the trial court included the following: Kearns observed defendant some three and one-half blocks from Ms. Young apartment "some seven to ten minutes following the commission of the . . . offenses." Kearns had earlier been alerted by police radio of the commission of the offenses against Ms. Young and had been given a description of the offender as a black male with facial hair, wearing a toboggan and a green or blue jogging suit with white stripes down the sides of the trousers. When Kearns observed defendant, he reconfirmed by radio this description. Kearns noted that defendant matched the description and placed him under arrest. These findings are amply supported by evidence adduced at the suppression hearing; therefore, they are conclusive on appeal. *State v. Huskins*, 278 N.C. 52, 178 S.E. 2d 610 (1971). The findings, in turn, fully warrant the trial judge's conclusion that Officer Kearns had probable cause to believe that defendant was the offender in question. The proximity of defendant to the place of the offense and the similarity of his appearance to the description given by Ms. Young of her assailant provided Kearns with the probable cause prerequisite to a lawful arrest. *See State v. Jacobs*, 277 N.C. 151, 176 S.E. 2d 744 (1970) and cases cited therein. This assignment of error is overruled.

[2] Defendant next assigns as error the admission into evidence of the following testimony by Ms. Young:

> "Q. Just describe to them the best you saw him right there.
>
> A. He was standing over me, I saw him standing over me, he had something in his right hand, and I assumed it was a knife.

MR. LIND: Object, and move to strike.

THE COURT: Overruled.

The object he had in his hand was roughly six or eight inches long. He was holding it like this in his hand. (Indicating.)

MR. KIMEL: May I approach the witness, Your Honor?

THE COURT: All right.

TO THE FOLLOWING QUESTION AND ANSWER, THE DEFENDANT IN APT TIME OBJECTED AND NOW OBJECTS AND EXCEPTS AND THIS CONSTITUTES DEFENDANT'S

EXCEPTION NO. 5

Q. Let me show you what's been marked for identification as State's Exhibit 1. I will ask you to examine State's Exhibit Number 1, if you would. Do you recognize State's Exhibit Number 1?

A. It could have been what he was holding in his hand."

Defendant contends the witness should not have been permitted to testify that she "assumed" the object was a knife inasmuch as such testimony constitutes an inadmissible opinion or conclusion. He also argues that her last answer is merely speculative and therefore inadmissible.

Ordinarily a lay witness is not permitted to give opinion or make conclusions. *State v. Watson*, 294 N.C. 159, 240 S.E. 2d 440 (1977). A witness, not an expert, may testify only to that which "he has apprehended by any of his five senses or all of them together." *State v. Fentress*, 230 N.C. 248, 52 S.E. 2d 795 (1949). A witness may, however, testify as to "instantaneous conclusions ... derived from observation of a variety of facts presented to the senses at one and the same time." *State v. Leak*, 156 N.C. 643, 647, 72 S.E. 567, 568 (1911). *See generally* 1 Stansbury's North Carolina Evidence § 125 (Brandis Rev. 1973). Further-

more, "[w]hen terms such as 'I think,' 'my impression is' or 'I believe' connote an indistinctiveness of perception or memory, they are not objectionable although they may carry little weight." *State v. Henderson,* 285 N.C. 1, 15, 203 S.E. 2d 10, 20 (1974), *death sentence vacated,* 428 U.S. 902 (1976); *State v. Carson,* 296 N.C. 31, 249 S.E. 2d 417 (1978) (prosecuting witness' testimony that she "thought" she saw a knife held competent).

Here after the portions of her testimony in question, Ms. Young also testified that her assailant held [indicating] an "object" in his hand which was "roughly six or eight inches long"; that this object was "placed beside my head during the time of the sexual intercourse"; that she then "felt the cold metal of it." Later on cross-examination, Ms. Young testified, "I thought the object in [my assailant's] hand was a knife. He was holding it in his right hand, he was standing over me with it in his right hand."

It is clear enough, therefore, that when Ms. Young testified that she "assumed" the object which she saw and felt was a knife, she was either giving her then instantaneous conclusion derived from "a variety of facts presented" to her senses or stating, in effect, that her impression, although indistinct, was that the object was a knife. Under either theory this portion of her testimony was correctly admitted into evidence.

Her statement that the object she had observed "could have been" State's Exhibit No. 1, which she described as a "black handled screwdriver with a bent end on it" and which, other evidence showed, was in defendant's possession at the time of his arrest, was likewise properly admitted into evidence. "So far as the North Carolina decisions go, any object which has a relevant connection with the case is admissible in evidence, in both civil and criminal trials." 1 Stansbury's North Carolina Evidence § 118 (Brandis Rev. 1973). It is not necessary that the witness positively identify the object. "His lack of positive identification affects the weight of his testimony rather than its admissibility." *State v. Fikes,* 270 N.C. 780, 155 S.E. 2d 277 (1967) ("I cannot absolutely identify it . . . but [pistol] looks exactly like mine."); *State v. Jarrett,* 271 N.C. 576, 157 S.E. 2d 4 (1967) (bank bags looked "similar to" the ones the witness had seen on the night of the alleged crime); *State v. Patterson,* 284 N.C. 190, 200

S.E. 2d 16 (1973) ("[t]his is either the shotgun or very similar to the one I saw. . . ."). *See generally* 1 Stansbury's, *supra*, § 129.

The thrust of Ms. Young's entire testimony on this point is that her senses of sight and touch led her to instantaneously conclude or indistinctly perceive at the time of the incident that the object was a knife; but upon reflection, what she actually saw and felt at the time was not inconsistent with the object's being a screwdriver like State's Exhibit No. 1. She could not at trial be sure that it was a knife or a screwdriver. She was sure that it was six or eight inches long, that it felt cold and metallic against her head, and that what she saw and felt was consistent with its being either a knife or a screwdriver. The jury must have so understood her testimony. It was proper for her to so testify.

[3] By his third assignment of error, defendant contends that the trial court erred in sustaining the state's objection to his questioning the prosecutrix concerning prior acts of misconduct. During defendant's cross-examination of Ms. Young the following exchange occurred:

> Q. Now, isn't it true that you smoked marijuana the weekend before that?
>
> MR. KIMEL: Objection, what's that got to do with this case?
>
> THE WITNESS: If you are talking about —
>
> THE COURT: Sustained.
>
> MR. LIND: I'd like her answer in the record, Judge.
>
> THE COURT: All right, mark the question.
>
> THE WITNESS: If you are talking about Easter weekend, yes, I did."

Later during a break in the trial and in the absence of the jury the following transpired:

"THE COURT: All right. Read the next question.

THE COURT REPORTER: The question asked by Mr. Lind: Isn't it true that you smoked marijuana the weekend before that?

THE COURT: Answer the question.

THE WITNESS: I told him if he was talking about the weekend before that, if it was Easter weekend, it was."

Defendant contends that he was entitled to cross-examine Ms. Young regarding her prior acts of misconduct even if she has not been criminally convicted of them. *See State v. Monk*, 286 N.C. 509, 212 S.E. 2d 125 (1975). Nonetheless defendant's assignment of error on this point must fail. The record shows that Ms. Young answered the question affirmatively before the jury notwithstanding the trial court's ruling. Defendant got the benefit of his question from the trial court's ruling. Even if the impact of the witness' answer was diminished by the ruling of the trial court, defendant has not shown any "reasonable possibility that, had the error ... not been committed, a different result would have been reached at the trial." G.S. 15A-1443(a). The question was designed at most to impeach the victim's credibility as a witness. Yet her credibility was not a significant issue at this trial. Her testimony essentially established only that she was the victim of several criminal offenses. The primary defense was not that the witness was not in fact a victim, but that defendant was not the perpetrator. The witness never purported to identify defendant as her assailant. The state sought to establish this identity by other evidence.

[4] Defendant next assigns as error the denial of his motion to dismiss the charge of rape for insufficiency of the evidence. In support of this assignment, he argues that there was no direct identification evidence and that other circumstantial evidence was insufficient to identify him as the culprit. We disagree.

"A motion to nonsuit in a criminal case requires 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, 117, 215 S.E. 2d 578, 581 (1975). "The test of the sufficiency of the evidence to withstand such a motion is the same whether the evidence is circumstantial, direct, or both." *State v. Cutler*, 271 N.C. 379, 383, 156 S.E. 2d 679, 682 (1967). "The question for the court is whether there is substantial evidence to support a finding both that an offense charged in the bill of indictment has been committed and that defendant committed it." *State v. Roseman*, 279 N.C. 573, 580, 184 S.E. 2d 289, 294 (1971). For purposes of ruling on the motion, the court takes as true all of the state's evidence; whether the testimony is true or false and what it proves or fails to prove are matters for the jury. *State v. Bowman*, 232 N.C. 374, 61 S.E. 2d 107 (1950).

Applying these well-established principles, we hold that there was ample evidence to submit the charge of first degree rape to the jury. Ms. Young testified that she had been forced against her will to have sexual intercourse with a black male wearing a toboggan and jogging outfit while he held a long, cold, metallic object against her head which she thought was a knife but which could have been a screwdriver. She also testified concerning several items which were missing from her apartment following the incident, including a cigarette lighter and some paperback books. Within minutes of the alleged incident defendant was discovered three and one-half blocks away dressed substantially as Ms. Young had described her assailant. Found in his possession were several objects matching the description of objects missing from Ms. Young's apartment, including two objects which she specifically identified as belonging to her. Assuming the state's evidence to be true, we hold it ample to survive defendant's motion to dismiss.

[5] Defendant next contends the trial court erred in charging the jury on the doctrine of recent possession as it related to the rape charge. The trial court's instructions to the jury on circumstantial evidence included the following challenged instruction:

> "Further, members of the jury, the State of North Carolina seeks to establish the defendant Howard Matthew Joyner's guilt, in part, by the doctrine of 'Recent Posses-

sion.' For this doctrine to apply, in this case, the State must prove these three things, and do so beyond a reasonable doubt. First: that the L&M cigarettes, the three books, the cigarette lighter and the eighteen dollars in currency was stolen. Second: that the defendant, Joyner, had possession of these same items of property that I have just designated; and a person possesses books and cigarettes and cigarette lighter and money, when he is aware of its presence and has, either by himself or together with others, both the power and intent to control its disposition or use. And third: that the defendant, Joyner, had possession of these particular items of property so soon after these items were stolen, and understood such circumstances as to make it unlikely that he obtained possession honestly. If you find these things from the evidence, beyond a reasonable doubt, you may consider them, together with all the other facts and circumstances in deciding whether or not the defendant is guilty of rape, burglary and larceny."

Defendant contends it was error to instruct the jurors that they could consider his recent possession of stolen goods as a circumstance tending to prove him guilty of rape. Under the facts of this case we disagree.

It is well established that the "possession of stolen property recently after the theft, and under circumstances excluding the intervening agency of others; affords presumptive evidence that the person in possession is himself the thief, and the evidence is stronger or weaker, as the possession is nearer to or more distant from the time of the commission." *State v. Patterson*, 78 N.C. 470, 472-473 (1878). While the fact of recent possession has been said to raise a "presumption," it is more accurately deemed to raise a permissible inference that the possessor is the thief. *State v. Frazier*, 268 N.C. 249, 150 S.E. 2d 431 (1966). "The presumption, or inference as it is more properly called, is one of fact and not of law. The inference derived from recent possession 'is to be considered by the jury merely as an evidentiary fact along with other evidence in the case, in determining whether the State has carried the burden of satisfying the jury beyond a reasonable doubt of the defendant's guilt.' " *State v. Fair*, 291 N.C. 171, 173, 229 S.E. 2d 189, 190 (1976). The infer-

ence which arises, however, is that the possessor is the thief. *Id.*

While the trial judge here referred to the "doctrine of recent possession," he nowhere charged that the fact of possession raised a presumption or even an inference that defendant was guilty of any of the crimes charged against him. He merely stated that the jury might consider defendant's recent possession "together with all the other facts and circumstances in deciding whether or not the defendant is guilty of rape, burglary and larceny." Here the evidence tends to show that the larceny, burglary and rape all occurred at or about the same time as part of one criminal enterprise committed by the same assailant. Under these circumstances defendant's recent possession of the stolen property is a circumstance tending to show that defendant was present in Ms. Young's apartment at the time the rape occurred. Therefore it is a circumstance which the jury was entitled to consider on the question of defendant's guilt not only of the larceny but also of the rape. "Whenever goods have been taken as a part of the criminal act, the fact of subsequent possession is some indication that the possessor was the taker, *and therefore the doer of the whole crime.*" 1 Wigmore on Evidence § 153 (3d Ed. 1940). (Emphasis added.) In *Williams v. Commonwealth*, 29 Pa. 102, 106 (1857), it was correctly stated that "possession of the fruits of the crime is of great weight in establishing the proof of murder, where that crime has been accompanied with robbery." *See also People v. Jackson*, 182 N.Y. 66, 74 N.E. 565 (1905).

We hold, therefore, that the trial judge properly instructed the jury that it could consider defendant's recent possession of the stolen property as a relevant circumstance in determining whether defendant was guilty of all the crimes charged against him, where, as here, all of the crimes including the larceny occurred as a part of the same criminal enterprise.

[6] By his sixth assignment of error defendant contends the trial court erred in charging on the felonious intent prerequisite to defendant's guilt of burglary. The court instructed the jury that to convict defendant of burglary it must find that at the time of the breaking and entering the defendant in-

tended to commit rape *or* larceny. The indictment alleged only that the breaking and entering occurred with the intent to commit larceny. Defendant argues that the state is bound by that theory of the case; therefore the trial court erred in instructing on rape as an alternative specific felonious intent.

A specific felonious intent is an essential element of burglary which must be alleged and proved. *State v. Thorpe*, 274 N.C. 457, 164 S.E. 2d 171 (1968). The state is held to proof of the intent alleged in the indictment, and it is error for the trial judge "to permit a jury to convict upon some abstract theory not supported . . . by the bill of indictment." *State v. Dammons*, 293 N.C. 263, 237 S.E. 2d 834 (1977); *State v. Thorpe, supra; State v. Jones*, 227 N.C. 94, 40 S.E. 2d 700 (1946). We therefore hold that the trial court erred in submitting for the jury's consideration a specific felonious intent not alleged in the indictment.

Nevertheless, we hold the error here is harmless. Defendant has failed to meet his burden of showing that, "had the error in question not been committed, a different result would have been reached at the trial." G.S. 15A-1443(a). Whether defendant intended to commit either larceny *or* rape or both at the time he entered the dwelling is a fact which in this case must be inferred, if at all, from defendant's actions after he entered. The evidence tended to show that defendant, once inside, committed both rape and larceny. The evidence therefore that he intended to commit one of these crimes when he entered is no weaker or stronger than the evidence that he intended to commit the other. The jury found beyond a reasonable doubt that once inside, defendant committed both. Under these circumstances we are satisfied that the result would have been the same on the burglary charge had the judge limited the jury's consideration on the specific intent element to larceny as charged in the indictment.

Defendant's remaining assignments of error are formal and require no further discussion.

Defendant received a fair trial free from prejudicial error.

No error.

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

STATE OF NORTH CAROLINA v. TERRY LEE FORTNEY

No. 56

(Filed 15 August 1980)

1. **Constitutional Law § 65; Rape § 4.3– rape victim shield statute – constitutionality**

The rape victim shield statute, G.S. 8-58.6, does not violate a rape defendant's constitutional right to confront the witnesses against him because it prevents him from automatically questioning the victim about her prior sexual experience since (1) there is no constitutional right to ask a witness questions that are irrelevant, (2) the statute is primarily procedural in its impact and application and does not alter any of the defendant's substantive rights, and (3) there are valid policy reasons, aside from questions of relevance, which support the statute.

2. **Rape § 4.3– rape victim shield statute – proper application to defendant**

The rape victim shield statute, G.S. 8-58.6, was not unconstitutionally applied to defendant when the trial court excluded evidence that three different semen stains were found on clothing worn by an alleged rape victim since the inference raised by such evidence — that the victim had had sex with two persons other than defendant at some time prior to the sexual acts in question — was not probative of the victim's consent to those acts.

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

ON appeal as a matter of right from judgment of *Martin*, Judge, entered at the 27 July 1979 Session of Superior Court, WAKE County, imposing life sentence for conviction of first degree rape. Defendant's motion to bypass the Court of Appeals for review of convictions of kidnapping and crime against nature arising out of the same event was allowed 18 March 1980.

Our decision today addresses for the first time the question whether North Carolina's rape victim shield statute, G.S. 8-58.6, enacted by the 1977 Legislature, is constitutional. We also determine whether the statute was constitutionally applied to this defendant on the facts before us.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General Thomas F. Moffitt, for the State.

J. Franklin Jackson for defendant-appellant.

CARLTON, Justice.

I.

The evidence tended to show that on 5 May 1979 Georgia Guthrie Shepard, a 23-year-old cocktail waitress, returned to her home in a Raleigh apartment complex after work at approximately 2:00 a.m. While still in the parking lot, she was accosted by a man armed with a gun who grabbed her and forced her to a sitting position between two cars with his arm around her neck. At his order, she stopped screaming, took off her clothes and walked to her car.

Once in the car, her assailant had oral sex with her against her will, then forced her to have intercourse. Finished, he drove her car to the end of the parking lot, stopped to talk to someone in a truck and then forced her into taking him into her apartment to make coffee for him.

Ms. Shepard and her assailant met an apparent mutual friend, a James Atkinson, on their way into the apartment. Atkinson entered the apartment with them and stayed while Ms. Shepard and the assailant played a game of backgammon. When Atkinson left, the assailant, still in control of his gun, again performed oral sex on Ms. Shepard and had intercourse with her against her will.

After the man left, Ms. Shepard waited in her darkened apartment until it was light and then ran to a woman friend's apartment. The friend called police. Ms. Shepard apparently never returned to the apartment to live.

Defendant's defense was consent.

Prior to trial, pursuant to G.S. 8-58.6(c), defendant moved for an *in camera* hearing to determine the admissibility of

certain evidence tending to show that Ms. Shepard had engaged in prior acts of sexual intercourse with third parties. At the *in camera* hearing defendant presented evidence that three different blood groupings of semen were found on clothing Ms. Shepard wore the night of the assault. Type B was found in her vagina, on her jeans and on her body suit, type O was found on her panties and panty hose and type A was found on her bathrobe. Testimony also indicated defendant's blood type was type B, while the victim's was type O.

When questioned closely by defense counsel about this discrepancy, Ms. Shepard testified that she had intercourse with her boyfriend a day and a half before the rape. On that day, Thursday, May 3, she was wearing the same underwear she wore the morning of the rape. She further testified she had not washed her bathrobe for at least a year and that her prior roommate, a sister, had worn it at times. She said she had not had intercourse with any man other than her boyfriend for the four years prior to the assault.

Defense counsel offered no evidence at the *in camera* hearing other than the different blood-typed semen stains.

The judge, at the conclusion of the *in camera* hearing, ruled that evidence of the type O and type A semen stains was inadmissible unless a State's witness "opened the door" while on the witness stand. The judge also ordered, however, that defense counsel could question Ms. Shepard at trial as to her sexual activity with third persons on the night of the crime. This defense consel apparently chose not to do.

During trial, another *in camera* examination was held on the judge's own motion at the time the State tendered the testimony of the expert serologist who had examined semen stains on the victim's clothing. At that time, the expert stated that while he determined positive results for three different blood groups when he tested Ms. Shepard's clothing "[it was] possible on the ones that were group 'O' that the group 'O' came from the victim." The judge thereupon reaffirmed the earlier order that the presence of secretions other than blood type B on the victim's clothes were irrelevant and inadmissible.

Defendant took the stand on his own behalf and denied ever raping Ms. Shepard, asserting that their contact was casual and consensual. He admitted having a gun but denied he ever took it out of the glove compartment of his truck.

The jury returned verdicts of guilty of first degree rape, kidnapping and crime against nature. Defendant appeals.

II.

At issue in this case is the constitutionality of North Carolina's rape victim shield statute, G.S. 8-58.6. Defendant asserts this statute is unconstitutional both on its face and in its application to him. We disagree and find no error in the proceedings against him.

G.S. 8-58.6 provides in pertinent part:

> *Restrictions on evidence in rape or sex offenses cases.* — (a) As used in this section, the term "sexual behavior" means sexual activity of the complainant other than the sexual act which is at issue in the indictment on trial.
>
> (b) The sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior:
>
> (1) Was between the complaint [sic] and the defendant; or
>
> (2) Is evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant; or
>
> (3) Is evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented; or

(4) Is evidence of sexual behavior offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged.

(c) No evidence of sexual behavior shall be introduced at any time during the trial of a charge of rape or any lesser included offense thereof or a sex offense or any lesser included offense thereof, nor shall any reference to any such behavior be made in the presence of the jury, unless and until the court has determined that such behavior is relevant under subsection (b). Before any questions pertaining to such evidence are asked of any witness, the proponent of such evidence shall first apply to the court for a determination of the relevance of the sexual behavior to which it relates. The proponent of such evidence may make application either prior to trial pursuant to G.S. 15A-952, or during the trial at the time when the proponent desired to introduce such evidence. When application is made, the court shall conduct an in-camera hearing, which shall be transcribed, to consider the proponent's offer of proof and the arguments of counsel, including any counsel for the complainant, to determine the extent to which such behavior is relevant. In the hearing, the proponent of the evidence shall establish the basis of admissibility of such evidence. If the court finds that the evidence is relevant, it shall enter an order stating that the evidence may be admitted and the nature of the questions which will be permitted. . . .

[1] Defendant argues that because this statute prevents him from automatically questioning a prosecuting witness about her prior sexual experience, his right to confront the witness against him has been compromised in violation of his constitutional rights.

Defendant is mistaken on several grounds. First, there is no constitutional right to ask a witness questions that are irrelevant. *People v. McKenna*, 196 Colo. 367, 585 P. 2d 275 (1978); *People v. Blackburn*, 56 Cal. App. 3d 685, 128 Cal. Rptr. 864 (1976); *People v. Thompson*, 76 Mich. App. 705, 257 N.W. 2d 268 (1977); *Smith v. Commonwealth*, 566 S.W. 2d 181 (Ky. App. 1978).

Second, in its impact and application, this statute is primarily procedural and does not alter any of defendant's substantive rights. And third, there are valid policy reasons, aside from relevance questions, which support this statute.

III.

The sixth amendment of the Constitution, made applicable to state criminal proceedings by *Pointer v. Texas*, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965), guarantees the right of an accused in a criminal trial to be confronted with the witnesses against him. *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). However, the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process, *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S. Ct. 1038, 1046, 35 L. Ed. 2d 297, 309 (1973), citing *Mancusi v. Stubbs*, 408 U.S. 204, 92 S. Ct. 2308, 33 L. Ed. 2d 293 (1972). *See also Davis v. Alaska, supra* at 321, 94 S. Ct. at 1112-13, 39 L. Ed. 2d at 356 (Stewart, J., concurring).

Thus, while a defendant may generally cross-examine to impugn the credibility of a witness, this right is not inviolate. Indeed the Supreme Court has expressly stated that a court has a duty to protect a witness "from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate him." *Alford v. United States*, 282 U.S. 687, 694, 51 S. Ct. 218, 220, 75 L. Ed. 624, 629 (1931) quoted in *Davis v. Alaska, supra* at 320, 94 S. Ct. at 1112, 39 L. Ed. 2d at 356. Implicit in this statement is the recognition that in such cross-examination, the probative value of any admission is outweighed by its prejudicial effect. The question of the proper scope of cross-examination, therefore, involves resolving the "tension between the right of confrontation and the State's policy of protecting the witness. . . . " *Davis v. Alaska, supra* at 314, 94 S. Ct. at 1109, 39 L. Ed. 2d at 352.

A.

Prior to the enactment of G.S. 8-58.6, it was permissible in this jurisdiction to admit evidence of a prosecuting witness's

general reputation for unchastity in a rape trial both to attack her credibility as a witness and to show the likelihood of her consent. *State v. Banks*, 295 N.C. 399, 245 S.E. 2d 743 (1978); *State v. Goss*, 293 N.C. 147, 235 S.E. 2d 844 (1977); *State v. Grundler*, 251 N.C. 177, 111 S.E. 2d 1 (1959), *cert. denied*, 362 U.S. 917, 80 S. Ct. 670, 4 L. Ed. 2d 738 (1960).

Admissibility of such evidence, however, was bound by the normal test of relevance: evidence was admissible if it had any logical tendency to prove a fact in issue and its reception was neither forbidden by a specific rule of law, *State ex rel. Freeman v. Ponder*, 234 N.C. 294, 67 S.E. 2d 292 (1951), or of such weak probative force that it was outweighed by the likelihood of prejudice, *Pearce v. Barham*, 267 N.C. 707, 149 S.E. 2d 22 (1966); *Modern Electric Company, Inc. v. Dennis*, 259 N.C. 354, 359, 130 S.E. 2d 547, 550 (1963).

This Court's reluctance to apply blindly the *per se* rule that any previous sexual behavior of a rape victim is relevant was recognized in *State v. McLean*, 294 N.C. 623, 242 S.E. 2d 814 (1978). There, the defendant unsuccessfully attempted to show that the prosecuting witness voluntarily lived in an "environment of ... immorality." This Court affirmed the order of the trial judge denying admission. Justice Huskins, speaking for the Court, reasoned that "whether [the victim] lived in an 'environment of sexual immorality' or in a cloistered convent has no relevance to the issues in a case such as this" where consent was not argued. *Id.* at 632, 242 S.E. 2d at 820.

G.S. 8-58.6 is nothing more then than a codification of this jurisdiction's rule of relevance as that rule specifically applies to the past sexual behavior of rape victims. As such, the statute embodies a legislative recognition that decisions such as *State v. McLean, supra*, "[reject] the notion that all sexual behavior, however proved, has some intrinsic relevance in a sexual assault proceeding, and [require] a more specific showing of relevance before such behavior can be proved." Detailed Comments on Draft Law, Legislative Research Commission, *Report to the 1977 General Assembly of North Carolina: Sexual Assaults* 92 (1977).

Such a recognition results in a more logical and just trial both for the State and for the defendant than blind application of the former rule. The idea that *any* previous sexual behavior of a rape victim is *per se* relevant to a rape proceeding was based on two views of human behavior which no longer withstand the scrutiny of rational investigation.

First, evidence of a woman's sexual behavior with a third person is no longer considered by most legal and psychological authorities to be probative of her tendency to willingly consent to the embraces of her accused rapist. *See Annot.*, 94 A.L.R. 3d 257 (1979) and cases cited therein. Unlike the often quoted Judge Cowen in *People v. Abbot* who reasoned, "And will you not more readily infer assent in the practised Messalina, in loose attire, than in the reserved and virtuous Lucretia?" 19 Wend. 192, 195 (New York 1838), or the court in *Lee v. State*, 132 Tenn. 655, 658, 179 S.W. 145, 145 (1915) which stated, "[N]o impartial mind can resist the conclusion that a female who had been in a recent habit of illicit intercourse with others will not be so likely to resist as one who is spotless and pure," common sense and sociological surveys make clear that prior sexual experience by a woman with one man does not render her more likely to consent to intercourse with an often armed and frequently strange attacker. Indeed, one court has stated that belief in the probative value of such evidence on the issue of consent was "more a creature of a one-time male fantasy of the 'girls men date [or] the girls men marry' than one of logical inference." *People v. Blackburn, supra* at 690-91, 128 Cal. Rptr. 864, 867.

Weighed against the weak probative value of such evidence is the much more probable result of prejudice to the State's case when such evidence is admitted. The now classic Chicago Jury Study, originally published in 1966, suggested that jury prejudice operates against the prosecution in rape trials where the jury sees the prosecuting witness having "contributed" to her plight, including having had sexual experience out of marriage. H. Kalven, Jr., & H. Zeisel, *The American Jury*, 24951 (Phoenix ed. 1971). Although this study has been criticized as being out of date, *see* Tanford & Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. Pa. L. Rev. 544 (1980), more recent evidence considered by the drafters of G.S. 8-58.6 suggests that

the tendency toward prejudice still applies to North Carolina juries when the victim has had prior sexual experience.[1]

Furthermore, introduction of such evidence tends to divert jury attention to collateral issues, State ex rel. *Pope v. Superior Court of County of Mohave,* 113 Ariz. 22, 545 P. 2d 946 (1976), and focuses jury deliberation on the private life of the victim, *see, e.g., McLean v. United States,* 377 A. 2d 74 (Dist. Col. 1977), rather than the guilt or innocence of the defendant. An example is *State v. Davis,* 291 N.C. 1, 229 S.E. 2d 285 (1976), where the defendant introduced evidence that the prosecuting witness's reputation for chastity in Charlotte was "bad," and contended that this evidence was probative of the woman's consent on the night of the alleged rape. In view of the fact that the prosecuting witness had moved to Charlotte from Atlanta less than a month prior to the incident to begin her first job and had spent all the intervening weekends at home in Atlanta, and in view of the fact that the defendant was apprehended by police in the very act of raping the victim, whose screams had alerted a neighbor, the fact that the State had to find and present rebuttal character witnesses to this reputation evidence was a totally unnecessary exploration of an issue collateral to the focus of the trial — the defendant's guilt or innocence. We think our Legislature intended G.S. 8-58.6 to prevent such abuses.

Indeed, not only have 46 other jurisdictions rejected the notion that evidence of sexual acts of the victim are *per se* probative of her consent, Tanford & Bocchino, *supra* at 544, these jurisdictions also no longer consider all evidence of sexual behavior as probative of a victim's credibility in general. *See People v. Thompson, supra;* Annot., 94 A.L.R. 3d, *supra* and cases cited therein.

---

[1]Drafters of the law had a report of a local study done by psychologists at N.C. State University indicating victim's prior sexual history had a strong impact on verdicts in a hypothetical fact situation otherwise the same. *Legislative Research Commission Report, supra* at 104. This substantiates a recent national survey of prosecutors which found that 74% believed a victim's previous sexual conduct had considerable impact in a jury trial (as opposed to "none," "slight," and "some"). National Institute of Law Enforcement and Criminal Justice, U.S. Department of Justice, *Forcible Rape: A National Survey of the Response by Prosecutors, Prosecutors Volume 1* 27 (1977).

This prior *per se* rule seems rooted in antiquity. Dean Wigmore questioned the emotional stability and, thus, the credibility of women making rape accusations. *Cf.* 3A J. Wigmore, *Evidence* § 924 at 736 (Chad. rev. 1970) (calling for medical examination of victim's emotions prior to prosecuting the accused). Many courts apparently extended this thinking to include the notion that unchaste women were especially prone to lying, *see, e.g.*, Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 Colum. L. Rev. 1, 16 (1977) and cases cited therein, although some courts expressly held this inference did not extend to men. *Cf., State v. Sibley*, 131 Mo. 519, 532, 33 S.W. 167, 171 (1895) (unchastity which "destroys the standing" of women in "all the walks of life has no effect whatsoever on the standing for truth" of men). Common sense dictates the unreasonableness of this attitude. If sexual experiences outside marriage render one woman less truthful than her virgin sister, then sexual experience outside marriage would be an issue at any trial where a woman was a witness. This is plainly not the case. A woman, just as a man, "may be intemperate, incontinent, profane and addicted to many other vices that ruin the reputation, and yet retain a scrupulous regard for the truth. . . . " *Gilchrist v. McKee*, 4 Watts 380, 386 (Pa. 1835), quoted in *Commonweath v. Crider*, 240 Pa. Super. Ct. 403, 406, 361 A. 2d 352, 354 (1976).

B.

This is not to say, however, that evidence of a victim's prior sexual behavior can never be relevant to an issue presented at trial. As we construe its language and permissible application, the rape victim shield law, G.S. 8-58.6, codifies primarily procedural rules and thus does not unduly impinge upon defendant's substantive right to confront his accusing witness. Unlike the situation in *Davis v. Alaska, supra*, where the defendant was totally prevented by an Alaskan witness protection law from cross-examining a witness against him about a fact that would give rise to a reasonable supposition of bias, and unlike the situation in *Chambers v. Mississippi, supra*, again where state law totally prevented a defendant from presenting evidence that another had confessed to the crime charged, G.S. 8-58.6 contains no such total prohibitions. Thus, although statu-

tory, the rape victim shield law is analogous to judge-made rules of evidence which prevent the admission of opinion evidence, hearsay testimony and convictions of very old standing where the probative value of the evidence is outweighed by the possibility of jury prejudice. No one seriously considers that the policy decision not to admit such analogous evidence is on its face a violation of the fifth or sixth amendments. We see no difference in the impact of G.S. 8-58.6. The statute's exceptions provide ample safeguards to insure that relevant evidence is not excluded. G.S. 8-58.6(b)(2) specifically provides: "(b) The sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior: ... (2) Is evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant. ... " This exception is clearly intended, *inter alia*, to allow evidence showing the source of sperm, injuries or pregnancy to be someone or something other than the defendant. *See generally*, Tanford & Bocchino, *supra* at 553.[2]

Likewise, G.S. 8-58.6(b)(3) preserves an accused defendant's substantive rights when it provides that a victim's sexual history is admissible if it

> (3) Is evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant resonably to believe that the complainant consented ....

This includes evidence which indicates that a victim's pattern of behavior gives rise to the strong inference of consent within the facts of a given situation.

[2]We note that the original draft of the rape victim shield law expressly provided for the admission of evidence that showed "an origin of semen other than the alleged defendant." *Legislative Research Commission Report, supra* at 57. This language was apparently broadened in the law as enacted.

G.S. 8-58.6(b)(1) provides that any evidence of prior sexual behavior between a complainant and a defendant is admissible and G.S. 8-58.6(b)(4) provides that sexual behavior offered as the basis of an expert psychiatric opinion that complainant fantasized or invented the acts is admissible. All of these exceptions define those times when the prior sexual behavior of a complainant *is* relevant to issues raised in a rape trial, and are not a revolutionary move to exclude evidence generally considered relevant in trials of other crimes.

Nor does the statute stop with definitions. If any question arises concerning evidence of a victim's prior sexual history, that question may be presented at an *in camera* hearing where opposing counsel may present evidence, cross-examine witnesses and generally attempt to discern the relevance of proffered testimony in the crucible of an adversarial proceeding away from the jury. In summary, then, G.S. 8-58.6 merely contains and channels long-held tenets of relevance by providing a statutory definition of that relevance and by providing a procedure to test that definition within the context of any particular case. Defendant's substantive right to cross-examine is not impermissibly compromised.

C.

Finally the State has legitimate policy reasons, aside from questions of relevance, which support the permissibility of G.S. 8-58.6. Rape is one of the most underreported of crimes. Estimates are that from 3½, *President's Commission on Law Enforcement and Administration of Justice, The Challenges of Crimes in a Free Society* 21-22 (1967) to 20, Berger, *supra* at 5, times the number of rapes reported actually occur. Only 60% of those arrested are charged and conviction rates for those charged are low compared to other crimes, Berger, *supra* at 6 (35% for rape as compared to 70% for other crimes). *See also* National Institute of Law Enforcement, U.S. Department of Justice, *Forcible Rape: An Analysis of Legal Issues* 3 (1978) (3% of 635 rape complaints in the sample resulted in convictions of rape or some lesser crime). Part of the reluctance of victims to report and prosecute rape stems from their feeling that the legal system harasses and humiliates them. National Institute

of Law Enforcement, U.S. Department of Justice, *Forcible Rape: Final Project Report* 15 (1978). We think the drafters of G.S. 8-58.6 knew this and framed the law accordingly. *Detailed Comments to Draft Law, supra.* In so doing, the Legislature did not unduly infringe on defendant's constitutional rights. As noted above, the U.S. Supreme Court has held that the right to confront the witnesses against one does not extend to unnecessary witness harassment and humiliation. *Alford v. United States, supra.* G.S. 8-58.6 merely codifies this stance.

IV.

[2] Defendant, however, argues that the portion of the statute *as applied to him,* G.S. 8-58.6(b)(3), is unconstitutional. In this, he relies on little more than his original argument that the statute is unconstitutional.

Defendant presented no testimony at either of the *in camera* hearings held on this point that indicated that the victim's sexual *behavior* on past occasions conformed to the defendant's version of the facts in this event. If the defendant had shown that the victim commonly accosted strangers in parking lots seeking sexual partners or that she often met men in apartment parking lots and took them to her car for sexual congress, then clearly the relevance of such evidence is established under the statute and would have been admissible.

Here, however, defendant made no attempt to present evidence of the victim's *behavior* and instead only offered the evidence that three different semen stains were found on clothing the victim had worn. Such evidence is not probative of the victim's consent to the acts complained of. Indeed, the only inference such evidence raises is that the victim had had sex with two individuals other than the defendant at some time prior to the night of the rape.[3] Without a showing of more, this is

[3]Even this inference is weak. The serologist testified that the blood type O he obtained from the victim's panty hose and pants could have been an artifact of victim's own blood type. Blood type A, found only on her bathrobe, could, by the victim's testimony, have come from a friend of her sister who had borrowed the robe. The only semen obtained from the victim's vagina was type B which was defendant's blood type.

precisely the kind of evidence the statute was designed to keep out because it is irrelevant and tends to prejudice the jury, while causing social harm by discouraging rape victims from reporting and prosecuting the crime.

Naked inferences of prior sexual activity by a rape victim with third persons, without more, are irrelevant to the defense of consent in a rape trial. G.S. 8-58.6 merely codifies this rule, and is constitutional both on its face and in its application to the facts *sub judice.*

In the defendant's trial, therefore, we find

No error.

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

BRANCH BANKING AND TRUST COMPANY v. MARGARET W. CREASY

No. 60

(Filed 15 August 1980)

1. **Uniform Commercial Code § 28– guaranty – no specified amount to be paid – instrument not payable to bearer or order – no negotiable instrument**

A "continuing guaranty" signed by defendant was not a negotiable instrument since it provided a ceiling on the amount of defendant's liability but did not specify the amount of liability that was to be paid, and since there was no provision in the agreement that it was payable to order or bearer. G.S. 25-3-104.

2. **Principal and Surety § 1– signing of suretyship contract – wife primarily responsible for husband's debt**

By affixing her signature to a document which provided that "This obligation and liability on the part of the undersigned shall be a primary and not a secondary obligation and liability, payable immediately upon demand without recourse first having been had by [plaintiff] against the Borrower . . . ," defendant manifested her assent to enter into a suretyship contract which imposed primary liability upon her for the payment of her husband's debt to plaintiff.

3. **Principal and Surety § 1– delivery – elements**

Delivery consists of an intention to pass an item beyond one's control and physical transfer of the item to another.

4. Principal and Surety § 1.1– suretyship agreement complete – no notice of conditions given to creditor

When the undertaking of a surety is complete and regular on its face, and the obligee has no notice of conditions which have been imposed by the surety, the creditor is entitled to enforce the promise of the surety.

5. Principal and Surety § 1.1– agreement executed – handing over to attorney – no instructions not to deliver

By signing a "continuing guaranty" and returning it to her attorney, defendant armed him with what appeared to be an absolute suretyship contract, complete in all respects; defendant in no way manifested her intention that the agreement not be delivered to plaintiff; and by so doing, she incurred the risk that the document could be delivered to plaintiff's possession on behalf of her husband contrary to her uncommunicated intentions.

6. Principal and Surety § 1.1– execution of "continuing guaranty" – nondelivery alleged – instrument not stolen

In an action to recover on a "continuing guaranty" executed by defendant, who alleged nondelivery, there was no evidence that the document was stolen from defendant or her attorney where the evidence tended to show that defendant gave her attorney the agreement with no instructions or conditions; the attorney, though representing defendant in trying to work out a marital settlement with her husband, was serving as her husband's agent in obtaining her signature on the document in question; defendant's attorney placed the agreement in a manila folder in his office; and defendant's husband, as a partner in the same law firm as defenant's attorney, had access to the folder in which the document was placed.

7. Principal and Surety § 1.1– valid surety agreement – extension of time to pay debt – surety not discharged

In an action to recover on an agreement executed by defendant which made her primarily liable for her husband's debt to plaintiff, there was no merit to defendant's contention that a consent judgment or restitution entered into between defendant's husband and seven banks served to discharge her from her contract, since the contract executed by defendant provided that she guaranteed payment of her husband's debt " . . . in accordance with the terms of any such notes, drafts, debts, obligations or liabilities or agreements evidencing any such indebtedness, obligation or liability including all renewals, extensions and modifications thereof," and the effect of this language was to waive the benefit of the discharge which would otherwise be provided by an extension of time; and since defendant's breach of her agreement occurred on or about 13 July 1976 when plaintiff made a demand for payment and defendant denied liability, but the extension of time was not entered into until December 1976.

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

Trust Co. v. Creasy

APPEAL by plaintiff from the decision of the Court of Appeals reported in 44 N.C. App. 289, 260 S.E. 2d 782 (1979), reversing judgment of *Hasty, J.*, entered 19 December 1978 in MECKLENBURG Superior Court granting summary judgment in favor of plaintiff.

Defendant married Thomas C. Creasy, Jr., in 1955. On 17 October 1975, the couple separated and they have continued to live separate and apart since that date. At the time of the separation, Mr. Creasy was a licensed attorney, practicing in Charlotte as a partner in the firm of Miller, Creasy, Johnston and Allison. After the separation, one of Mr. Creasy's partners, F. Thomas Miller, Jr., began representing defendant in the negotiation of a marital settlement.

At the time of the separation, Mr. Creasy was in debt to plaintiff in the amount of $35,000 on a promissory note which was payable on 30 October 1975. Around 20 October 1975, Mr. Creasy requested plaintiff to renew the note for an additional ninety days. Plaintiff agreed, on the condition that defendant would execute a new guaranty agreement which would be witnessed by someone other than Mr. Creasy. The bank provided him with a completed form for this purpose. Mr. Creasy gave the form to Miller, who was then acting as defendant's attorney, with a request that Miller obtain defendant's signature.

On 7 November 1975, Miller went to defendant's home and requested that she sign the agreement. At that time, Miller was under the impression that the bank held an unlimited guaranty which had been executed by defendant.[1] When Miller met with defendant, he told her that the bank had requested that she sign the agreement and that on behalf of her husband he was asking her to sign. Defendant reluctantly signed the document and, at the time, she did not impose any conditions or give Miller any instructions.

[1]In his deposition, Miller stated that it was his purpose to substitute the new "guaranty agreement" for the old agreement. While plaintiff's exhibit "B" purports to be an unlimited guaranty dated 8 October 1973, defendant denied signing it, and the signature of the alleged witness is illegible.

The document which defendant signed is set out in pertinent part as follows:

GUARANTY AGREEMENT

BRANCH BANKING & TRUST COMPANY
Charlotte, North Carolina
October 20, 1975

Dear Sirs:

As an inducement to you to extend credit to and to otherwise deal with Thomas C. Creasy, Jr. and/or Margaret W. Creasy (hereinafter called Borrower), and in consideration thereof, the undersigned hereby absolutely and unconditionally guarantees to you and your successors and assigns the due and punctual payment of any and all notes, drafts, debts, obligations and liabilities, primary or secondary (whether by way of endorsement or otherwise), of Borrower, at any time, now or hereafter, incurred with or held by you, together with interest, as and when the same become due and payable, whether by acceleration or otherwise, in accordance with the terms of any such notes, drafts, debts, obligations or liabilities or agreements evidencing any such indebtedness, obligation or liability including all renewals, extensions and modifications thereof.

The undersigned is your debtor for all indebtedness, obligations and liabilities for which this Guaranty is made, and you shall also at all times have a lien on all stocks, bonds and other securities of the undersigned at any time in your possession and the same shall at your option be held, administered and disposed of as collateral to any such indebtedness, obligation or liability of the Borrower, and you shall also at all times have the right of setoff against any deposit account of the undersigned with you in the same manner and to the same extent that the right of setoff may exist against the Borrower.

It is understood that any such notes, drafts, debts, obligations and liabilities may be accepted or created by or with you at any time and from time to time without notice to the undersigned, and the undersigned hereby expressly waives presentment, demand, protest, and notice of dishonor of any such notes, drafts, debts, obligations and liabilities or other evidences of any such indebtedness, obligation or liability.

You may receive and accept from time to time any securities or other property as a collateral to any such notes, drafts, debts, obligations and liabilities, and may surrender, compromise, exchange and release absolutely the same or any part thereof at any time without notice to the undersigned and without in any manner affecting the obligation and liability of the undersigned hereby created.

This obligation and liability on the part of the undersigned shall be a primary and not a secondary obligation and liability, payable immediately upon demand without recourse first having been had by you against the Borrower or any person, firm or corporation; . . . .

The aggregate amount of principal of all indebtedness, obligations and liabilities at any one time outstanding for which the undersigned shall be liable as herein set forth shall not exceed the sum of $35,000.00.

This agreement shall inure to the benefit of you, your successors and assigns, and the owners and holders of any of the indebtedness, obligations and liabilities hereby guaranteed, and shall remain in force until a written notice revoking it has been received by you; but such revocation shall not release the undersigned from liability to you, your successors and assigns, or the owners and holders of any of the indebtedness, obligations and liabilities hereby guaranteed, for any indebtedness, obligation or liability of the Borrower which is hereby guaranteed and then in existence or from any renewals or extensions thereof in whole or in part, whether such renewals or extensions are made before or after such revocation.

* * *

(The document purports to be signed by Margaret W. Creasy and Thomas C. Creasy, Jr., and witnessed by F.T. Miller, Jr.)

At no time did defendant give Miller any instructions relating to whether the document was to be delivered to plaintiff. After defendant had signed the document, Miller took it into his possession. He returned to his office and placed it in a manila folder along with other papers which related to negotiations concerning a marital settlement between Mr. Creasy and defendant. The last time Miller saw the agreement, it was still in a file labeled "Creasy Matters" which he kept in his private office.

While Miller testified that he had never authorized or directed any person to deliver the agreement to plaintiff, on or about 18 November 1975, the executed document came into the hands of Tyler, the bank's cashier. The agreement was placed in Mr. Creasy's permanent folder. At that time, the loan was renewed and on 9 January 1974, it was paid in full. On 10 February 1974, plaintiff made another loan to Mr. Creasy in the sum of $35,000 upon the execution of a new promissory note due and payable on 10 May 1976.

On 18 May 1976, Mr. Creasy obtained a renewal of the loan for an additional sixty days by executing a new promissory note. He failed to pay any portion of the loan at its due date or thereafter, notwithstanding written demands for payment. On 13 July 1976, plaintiff made demand upon defendant for payment of the loan in full. Defendant refused to pay and plaintiff brought suit.

Plaintiff's motion for summary judgment was granted, and defendant appealed. The Court of Appeals, in an opinion written by Judge Martin (Harry C.), concurred in by Judge Erwin, reversed, holding that summary judgment had been erroneously granted. Judge Webb dissented, and plaintiff appealed pursuant to G.S. § 7A-30(2).

Murchison and Guthrie, by Alton G. Murchison III, for plaintiff-appellant.

Stack and Stephens, by Warren C. Stack and Richard D. Stephens, for defendant-appellee.

Edmund D. Aycock for the North Carolina Bankers Association, amicus curiae.

BRITT, Justice.

The sole issue which is presented for review is whether the Court of Appeals erred in holding that summary judgment had been improperly granted in favor of plaintiff. Our consideration of the matter impels the conclusion that the Court of Appeals was in error, and, accordingly, we reverse.

Our resolution of the present case does not require that we review in detail the law of summary judgment. It is now familiar learning that summary judgment is properly entered if it is established that there is no genuine issue of material fact and that any part is entitled to judgment as a matter of law. *E.g., Kessing v. National Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). In deciding the case at bar, we must be sensitive to the standard enunciated in *Kessing* and applied in subsequent cases. *See Odom v. Little Rock & I-85 Corp.*, 299 N.C. 86, 261, S.E. 2d 99 (1980). The party moving for summary judgment has the burden of clearly establishing by the record properly before the court the lack of any triable issue of fact. *Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972). With this framework in mind, we turn now to a consideration of the character of the document which is at the heart of this litigation.

[1] The Court of Appeals held that the materials which were before the trial court were insufficient to establish as a matter of law that plaintiff was a holder in due course of the agreement and was entitled to take it free of the defense of nondelivery. 44 N.C. App. at 294, 260 S.E. 2d at 785. In order to reach this conclusion, it is essential that there first be a determination that the paper writing upon which the bank relies is a negotiable instrument.

The Court of Appeals was in error in treating this document as a negotiable instrument.

To be a negotiable instrument, a writing must be signed by the maker or drawer, must contain an unconditional promise to pay a sum certain in money and no other promise except as authorized by statute, must be payable on demand or at a definite time, and must be payable to order or bearer. G.S. § 25-3-104 (1965); *see Booker v. Everhart*, 294 N.C. 146, 240 S.E. 2d 360 (1978); *see generally* R. Anderson, *Uniform Commercial Code* §§ 3-104:1 to 3-104:25 (2d ed. 1971); F. Hart & W. Willier, *Commercial Paper Under the Uniform Commercial Code* §§ 2.01 to 2.15 (1976). The "continuing guaranty" which was signed by defendant does not meet these requirements.

First, the document which was signed by defendant does not have the attribute of certainty; it provides that: "The aggregate amount of principal of all indebtedness, obligations and liabilities at any one time outstanding for which the undersigned shall be liable shall not exceed the sum of $35,000."

For the requirement of a sum certain to be met, it is necessary that at the time of payment the holder is able to determine the amount which is then payable from the instrument itself, with any necessary computation, without any reference to an outside source. Official Comment, G.S. § 25-3-106 (1965); *Wattles v. Agelastos*, 27 Mich. App. 624, 183 N.W. 2d 906 (1970). It is necessary for a negotiable instrument to bear a definite sum so that subsequent holders may take and transfer the instrument without having to plumb the intricacies of the instrument's background. *Cobb Bank & Trust Co. v. American Mfr's. Mut. Ins. Co.*, 459 F. Supp. 328 (N.D. Ga. 1978).

The document in question calls for a ceiling on the amount of defendant's liability. It does not specify the amount of the liability that is to be paid. That data may be obtained only after resorting to sources of information which are external to the agreement itself. Such an absence is enough by itself to foreclose any finding that the paper at issue is negotiable.

The document upon which plaintiff relies is inadequate as a negotiable instrument in one other respect: At no place in the agreement is there any provision that it is "payable to order or

bearer." For an instrument to be fully negotiable[2] within the scope of Article Three, it must be "payable to order or bearer." *E.g., Mecham v. United Bank of Arizona*, 107 Ariz. 437, 489 P. 2d 247 (1971); *Hall v. Westmoreland*, 123 Ga. App. 809, 182 S.E. 2d 539 (1971); F. Hart & W. Willier, *supra*, § 2.14. Lacking the essential words of negotiability, the paper states that " . . . the undersigned hereby absolutely and unconditionally guarantees to you and your successors and assigns the due and punctual payment of any and all notes, drafts, debts, obligations, and liabilities . . . ."

Having determined that the agreement is not a negotiable instrument, we must now turn to a consideration of its true character.

Although contracts of guaranty and suretyship are, to some extent, analogous, and the labels are used interchangeably, there are, nevertheless, important distinctions between the two undertakings. *See generally* L. Simpson, *Handbook on the Law of Suretyship* 6-8 (1950). A guaranty is a promise to answer for the payment of a debt or the performance of some duty in the event of the failure of another person who is himself primarily liable for such payment or performance. *E.g., O'Grady v. First Union Nat'l Bank*, 296 N.C. 212, 250 S.E. 2d 587 (1978); *Investment Properties of Asheville, Inc. v. Norburn*, 281 N.C. 191, 188 S.E. 2d 342 (1972); *see also* L. Simpson, *supra*, 10-11. A surety is a person who is primarily liable for the payment of the debt or the performance of the obligation of another. *New Amsterdam Cas. Co. v. Waller*, 233 N.C. 536, 64 S.E. 2d 826 (1951); *Dry v. Reynolds*, 205 N.C. 571, 172 S.E. 351 (1934); *see also* L. Simpson, *supra*, 8-9. While both kinds of promises are forms of security, they differ in the nature of the promisor's liability. A guarantor's duty of performance is triggered at the time of the default of another. *Wachovia Bank and Trust Co. v. Clifton*, 203 N.C. 483, 166 S.E. 334 (1932); *see also Arcady Farms Milling Co. v. Wallace*, 242 N.C. 686, 89 S.E. 2d 413 (1955). On the other hand, a surety is

[2]Where an instrument meets all of the requirements of G.S. § 25-3-104 except that it is not payable to order or bearer, Article Three applies and governs the instrument except that no one can become a holder in due course. G.S. § 25-3-805 (1965).

primarily liable for the discharge of the underlying obligation, and is engaged in a direct and original undertaking which is independent of any default. *New Amsterdam Cas. Co. v. Waller, supra; Dry v. Reynolds, supra.*

[2] While the document at issue is entitled "guaranty agreement", its label is not determinative of its character. It is appropriate to regard the substance, not the form, of a transaction as controlling, and we are not bound by the labels which have been appended to the episode by the parties. *E.g., Thompson v. Soles,* 299 N.C. 484, 263 S.E. 2d 599 (1980). The agreement expressly states that

> This obligation and liability on the part of the undersigned shall be a primary and not a secondary obligation and liability, payable immediately upon demand without recourse first having been had by [Branch Banking and Trust] against the Borrower or any person, firm, or corporation; . . . ."

By affixing her signature to the document, defendant manifested her assent to enter into a suretyship contract which imposed primary liability upon her for the payment of her husband's debt to the bank. However, identifying the character of the document does not, by itself, resolve the issue raised by defendant's argument that a genuine issue of material fact exists with respect to the effectiveness of the transfer of the document to plaintiff.

[3] Delivery consists of two elements: First, an intention to pass an item beyond one's control; and, second, physical transfer of the item to another. *E.g., Tarlton v. Griggs,* 131 N.C. 216, 42 S.E. 591 (1902). There is absolutely no evidence in the record which would tend to show that plaintiff had any notice whatsoever that when defendant returned the signed agreement to the custody of her attorney, she did not have the present intention of passing the document beyond her control. While it is true that there is nothing in the record which would tend to show how the agreement came to be in the hands of plaintiff's cashier, Tyler, it is also true that there is nothing in the record which would indicate that plaintiff had notice of any circum-

stances which would prompt inquiry on its part. Plaintiff supplied a form contract to its customer, Mr. Creasy, and gave him instructions as to its execution. That same form was returned to it, having been signed and witnessed. It was only upon making demand for payment that plaintiff learned that defendant did not intend that the document be delivered.

[4] When the undertaking of a surety is complete and regular on its face, and the obligee has no notice of conditions which have been imposed by the surety, the creditor is entitled to enforce the promise of the surety. *Cowan v. Roberts*, 134 N.C. 415, 46 S.E. 979 (1904); *Vass v. Riddick*, 89 N.C. 6 (1883); *Gwyn v. Patterson*, 72 N.C. 189 (1875); *see generally* 10 S. Williston, *A Treatise on the Law of Contracts* § 1244 (3rd ed. 1967).

[5] By signing the agreement and returning it to her attorney, defendant armed him with what appeared to be an absolute suretyship contract, complete in all respects. The deposition of defendant's attorney, Miller, discloses that defendant did not, at the time she signed the agreement, give him any instructions concerning the document. Nor did she subsequently give him any instructions regarding its disposition. In no way did defendant manifest her intention that the agreement not be delivered to plaintiff. By so doing, she incurred the risk that the document could be delivered to plaintiff's possession on behalf of her husband contrary to her uncommunicated intentions. In such a situation, it is well established that where one of two persons must suffer loss by the misconduct of a third person, the loss should fall upon him who first reposed the confidence, or who, by his negligence, made it possible for the loss to occur, rather than an innocent third person. *Cowan v. Roberts, supra; Vass v. Riddick, supra; see also* 10 S. Williston, *supra*, § 1245.

Thus, the proper inquiry is not whether the surety intended that the agreement be delivered to the obligee. Rather, the question becomes whether, assuming *arguendo* that there was no intention to deliver the agreement, the surety manifested that lack of intention in such a way that the obligee would be put on notice of the surety's state of mind. While there is evidence in the record which tends to show that defendant did not intend for the agreement to be returned to plaintiff, there is

absolutely no evidence that her intentions in this matter were communicated to anybody, let alone plaintiff.

[6] There is no evidence that the document was stolen from defendant or Miller. In her deposition, defendant testified that she signed the document after discussing it with Miller. "I did not give him any instructions or any conditions. I merely signed it and handed it to him as my attorney."

In his deposition, Miller testified that after the document was executed on 7 November 1975 by defendant, and he affixed his signature as a witness, he took the document into his possession. He then testified:

> ... The document was retained in my possession and I brought it to my office and inserted it in a manilla folder type file that I was maintaining with respect to the affairs of Mr. and Mrs. Creasy ... .
>
> The manilla file which I kept in my office did not have a label attached to it and it was either a blank manilla folder or had in pencil "Creasy Matters" or some other identification. Generally that file was kept in my office adjacent to my desk or at the desk of Mrs. Harriet Smith, who was Mr. Creasy's secretary, and with whom I discussed matters in connection with the affairs of Mr. and Mrs. Creasy jointly.
>
> * * *
>
> ... I was not told by Mrs. Creasy not to deliver the document to the bank, nor was I told by her not to deliver the document to Mr. Creasy. Mrs. Creasy signed the document at my request and delivered it to me. I brought it to my office and placed it in a manilla folder. I never delivered that document to Branch Banking and Trust. If I delivered Plaintiff's Exhibit A to Harriet Smith it was through transmitting the manilla folder back and forth between her desk and mine with the instrument in the file. I do not recall ever having delivered Plaintiff's Exhibit A to Mr. Creasy, but if I did so, it would have been under the same circumstances that I delivered it to Mrs. Smith in a manilla folder. Every-

one employed in the office had access to my files in my personal office, and that included the partners of the firm together with the associate lawyers, and they would have had access to Mrs. Harriet Smith's files. Mr. Creasy would have had access to the manilla folder.

Although Miller was representing defendant in trying to work out a marital settlement with her husband, with respect to obtaining her signature to the document in question, he was serving as Mr. Creasy's agent. In his deposition, Miller testified:

Mr. Creasy informed me that he was negotiating a loan transaction with Branch Banking and Trust Company, that they had asked that a guaranty agreement be signed by Mrs. Creasy, and in view of the state of affairs and the state of separation, he requested that I submit it for her signature rather submit it himself.

* * *

... I visited with Mrs. Creasy and explained the circumstances of a loan being negotiated by Mr. Creasy with Branch Banking and suggested to her that the bank had requested this guaranty agreement and that I was asking her to sign it on behalf of her husband.

An agent is one who acts for or in the place of another by authority from him. *Julian v. Lawton*, 240 N.C. 436, 82 S.E. 2d 210 (1954). It was in this capacity that Miller procured Mrs. Creasy's signature on the document. Since Miller was acting as Mr. Creasy's agent, and Mr. Creasy had access to the manilla folder in which the document was placed, there could not have been a larceny of the document. When the agreement was returned to plaintiff complete and regular on its face, the bank was under no duty to make inquiry of either Miller or defendant as to the circumstances surrounding its execution.

[7] Defendant makes the further argument that a consent judgment of restitution entered into between Mr. Creasy and seven banks serves to discharge her from her contract. This contention is untenable.

On 1 November 1976, the Grand Jury for the United States District Court for the Western District of North Carolina indicted Mr. Creasy on seven counts of knowingly making false statements for the purpose of influencing banks insured by the Federal Deposit Insurance Corporation. On 21 December 1976, Chief Judge Woodrow W. Jones of the United States District Court for the Western District of North Carolina, entered a consent judgment against Mr. Creasy. The judgment provides that Mr. Creasy's debt to seven different banks, one of which is plaintiff, is nondischargeable under the Bankruptcy Act, that Mr. Creasy will attempt to repay the indebtedness over a period of fifteen years, and that the banks are to share in any income which Mr. Creasy receives over and above the sum of $18,000 per year.

As a general rule, material alteration of the contract between the principal and the creditor will operate to discharge a surety. *Fleming v. Barden*, 127 N.C. 214, 37 S.E. 219 (1900); *See also* L. Simpson, *supra*, 329-351. If the creditor enters into a binding agreement with the principal debtor to extend the time of payment or performance, there has been a material alteration of the contract, and the surety is discharged. *First Nat'l. Bank of Salisbury v. Swink*, 129 N.C. 255, 39 S.E. 962 (1901); *see also* L. Simpson, *supra*, 351-370; 10 S. Williston, *supra*, § 1222. Such an agreement is binding if it is definite as to time, *Revell v. Thrash*, 132 N.C. 803, 44 S.E. 596 (1903), and is supported by consideration. *See* L. Simpson, *supra*, 356-361.

While it is clear that the extension of time provided by the consent judgment is definite as to time and is supported by consideration[3], the validity of the agreement it embodies does not serve to discharge defendant for two reasons. First, the contract of suretyship which defendant executed with plaintiff provided that she guaranteed the payment of her husband's debt " ... in accordance with the terms of any such notes, drafts, debts, obligations or liabilities or agreements evidencing any such indebtedness, obligation or liability including all renewals, extensions and modifications thereof." The effect of this language is to waive the benefit of the dis-

[3]The agreement between Mr. Creasy and the banks provides that the parties agreed to mutually compromise and settle the debts owed to each bank by him.

charge which would otherwise be provided by an extension of time. Second, defendant's breach of her agreement occurred on or about 13 July 1976 when plaintiff made a demand for payment and defendant denied liability. The extension of time was not entered into until several months later in December 1976.

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

Reversed.

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

W. OSMOND SMITH III v. JACK MITCHELL AND WIFE, LAURA MITCHELL, AND THOMAS G. BARBER AND WIFE, SANDRA M. BARBER

No. 127

(Filed 15 August 1980)

1. **Deeds § 21; Vendor and Purchaser § 1– restraint on alienation – preemptive rights**

Certain restrictions on a landowner's right to alienate his property, if defined as preemptive rights and if carefully limited in duration and price, are not void *per se* and will be enforced if reasonable.

2. **Deeds § 21; Vendor and Purchaser § 1– preemptive right defined**

A preemptive right requires that property must first be offered to the conveyor or his heirs or to some specially designated person before it may be sold to another party.

3. **Deeds § 21; Vendor and Purchaser § 1– reasonableness of preemptive right – duration and price**

Two primary considerations dictate the reasonableness of a preemptive right: the duration of the right and the provisions it makes for determining the price of exercising the right.

4. **Deeds § 21; Vendor and Purchaser § 1– preemptive right – rule against perpetuities – determination of price**

A preemptive right is reasonable if the duration does not violate the rule against perpetuities and if it links the price to the fair market value of the land or to the price the seller is willing to accept from third parties.

Smith v. Mitchell

5. Deeds § 21; Vendor and Purchaser § 1– validity of preemptive right

A restrictive covenant which required any grantee of certain land who desired to sell such land to offer the grantors the option to repurchase at a price no higher than the grantee was willing to accept from any other purchaser and which provided that the right should last the lifetime of the male grantor plus twenty years was reasonable as to price and time and created a valid preemptive right.

ON discretionary review of a decision of the Court of Appeals, 44 N.C. App. 474, 261 S.E. 2d (1980), affirming the judgment of *Reid*, Judge, entered at the 12 February 1979 Session of Superior Court, CASWELL County, granting summary judgment for defendants.

We address the questions (1) whether *any* restriction on the right to alienate land, even if such restriction is limited as to time and certain as to price, is void as an impermissible restraint on alienation, and (2) whether, if such a restriction is not void *per se*, the covenant here presented is nevertheless an unreasonable restriction on defendants' right to freely alienate their land.

W. Osmond Smith III, Attorney Pro Se, and Ramsey, Hubbard & Galloway, by Mark Galloway, for plaintiff-appellant.

Latham, Wood & Balog by B.F. Wood and Steve A. Balog for defendant-appellees.

CARLTON, Justice.

I.

The record reveals that in 1967 W.O. Smith, Jr., and his wife, Roberta K. Smith, placed certain restrictive covenants expressly running with the land on a plat of real property they owned in Caswell County. In addition to the usual covenants limiting development on the plat to residential dwellings of a certain size and environmental soundness, the Smiths' duly recorded restrictive covenants included Article XIV. which provided:

> If any future owner of lands herein described shall desire to sell the lands owned by him, he shall offer the

parties of the first part the option to repurchase said property at a price no higher than the lowest price he is willing to accept from any other purchaser. Parties of the first part agree to exercise said option or to reject same in writing within 14 days of said offer. This covenant shall be binding on the parties of the first part and their heirs, successors, administrators, and executors or assigns for as long as W. Osmond Smith, Jr. shall live and for 20 years from the date of his death unless sooner rescinded.

In 1973, plaintiff, W. Osmond Smith III, succeeded W.O. Smith, Jr. and Roberta K. Smith in interest to the land as their heir, successor and assignee. Plaintiff deeded Lot No. 16 in the plat to defendants Mitchell on 26 September 1974. The Mitchells' deed was made subject to all recorded restrictive convenants, including Article XIV., quoted above. In July 1975, defendants Mitchell deeded Lot No. 16 to defendants Barber without first offering the land to plaintiff as they were required to do under the terms of Article XIV. Defendants Mitchell did this despite plaintiff's notification to them that he stood ready, willing, and able to purchase the lot.

Plaintiff thereafter sued for specific performance, or, in the alternative, for damages of some $2,500.00 for breach of the restrictive covenant. Defendant families each counterclaimed for damages in excess of $5,000.00 alleging breach of certain warranties in their deeds and also alleging that plaintiff's lawsuit had clouded their title.

Both sides moved for summary judgment. The trial court granted summary judgment for defendants, stating that Article XIV. was an unlawful restraint on the right to freely alienate property, was against public policy and was therefore void. Plaintiff appealed to the Court of Appeals. That court affirmed the trial court.

We granted plaintiff's petition for discretionary review 4 January 1980.

[1] The Court of Appeals held "squarely" that "*any* restriction on a landowner's right to freely alienate his property, even

though limited as to time and certain as to price, is void as an invalid restraint on alienation." 44 N.C. App. at 476, 261 S.E. 2d at 233 (emphasis in original). We disagree. Certain such restrictions on alienability, if defined as preemptive rights and if carefully limited in duration and price, are not void *per se* and will be enforced if reasonable. Moreover, we find the specific restrictive covenant before us here to be a reasonable preemptive right which is not void. We therefore reverse the Court of Appeals.

II.

[2] A preemptive right "requires that, before the property conveyed may be sold to another party, it must first be offered to the conveyor or his heirs, or to some specially designated person." 6 *American Law of Property* § 26.64 at 506-07 (1952). *See also Restatement of the Law of Property* § 413; L. Simes & A. Smith, *The Law of Future Interests* § 1154 (2d ed. 1956); 6 R. Powell, *The Law of Real Property* § 842 at 12-13 (Rohan ed. 1979); Christopher, *Options to Purchase Real Property in North Carolina*, 44 N.C. L. Rev. 63, 66 (1965). Sometimes termed a "right of first refusal," Christopher, *supra*, preemptive provisions, while analogous to options, are technically distinguishable. An option creates in its holder the power to compel sale of land, 6 *American Law of Property*, *supra* at § 26.64; Simes & Smith, *supra* at § 1154, n. 44. A preemptive provision, on the other hand, creates in its holder only the right to buy land before other parties if the seller decides to convey it. 6 *American Law of Property*, *supra* at § 26.64; Simes & Smith, *supra* at § 1154, n. 44. Preemptive provisions may be contained in leases, *see, e.g., R.J. Reynolds Realty Company v. Logan*, 216 N.C. 26, 3 S.E. 2d 280 (1939), in contracts, *see, e.g., Bennett Veneer Factors, Inc. v. Brewer*, 73 Wash. 2d 849, 853-54, 441 P. 2d 128, 132 (1968), or, as is the case here, in restrictive covenants contained in deeds or recorded in chains of title.

The defendants and the Court of Appeals relied on *Hardy v. Galloway*, 111 N.C. 519, 15 S.E. 890 (1892), as authority for the proposition that *any* preemptive right is an impermissible restraint on alienation in North Carolina. We believe defendants and the Court of Appeals have misapplied *Hardy v. Galloway* for the following reasons.

First, the policy considerations behind the common law prohibition of restraints on alienation have never absolutely forbidden all such restraints. Thus the law has long allowed such indirect restraints as conveying a fee subject to a possibility of reverter or to a condition subsequent. Furthermore, while the rationale underlying the common law prohibition of direct restraints on alienation has been traced to the necessity of maintaining a society controlled primarily by its living members and the desirability of facilitating the utilization of wealth, 4 *Restatement of the Law of Property, Introductory Note to Part II* at p. 2379 (1944), the policy absolutely favoring alienability has always conflicted with another common law tenet that one who has property should be able to convey it subject to whatever condition he or she may desire to impose on the conveyance. *Id.* at p. 2380. *See also* J. Webster, *Real Estate Law in North Carolina* § 344 at 432 (1971).

Faced with this tension, the law has evolved in such a way that some direct restraints on alienation are premissible where the goal justifies the limit on the freedom to alienate, 4 *Restatement of the Law of Property, Introductory Note, supra* at p. 2380, or where the interference with alienation in a particular case is so negligible that the major policies furthered by freedom of alienation are not materially hampered, *id.* Thus the general rule is that a restraint on alienation which provides that the property cannot be alienated, a disabling restraint, Simes & Smith, *supra* at § 1131, *Restatement of the Law of Property* § 404, is *per se* invalid, Simes & Smith, *supra* at § 1137; *Restatement of the Law of Property* § 406, while restraints which provide only that someone's estate may be forfeited or be terminated if he alienates, or that provides damages must be paid if he alienates, may be upheld if reasonable. *Restatement of the Law of Property* § 406.

As applied in other jurisdictions, these principles have frequently led courts to uphold preemptive rights when those rights were reasonable. *See, e.g.*, Annot., 40 A.L.R. 3d 920 (1971 & Supp. 1979), and cases cited therein. Their reasoning appears grounded upon the conviction that any interference of a preemptive right with freedom of alienation is so negligible that the major policies of utilization of wealth and economy of

land control are not hampered. Indeed, some courts have gone so far as to state that the preemptive right does not limit alienability but enhances it, as the seller is provided two buyers instead of one. *Watergate Corporation v. Reagan*, 321 So. 2d 133, 136 (Fla. App. 1975). Other courts have reasoned that the primary purpose of a preemptive right is not to *prevent* an owner from alienating property but to enable a grantor to reacquire it. *See, e.g., Lantis v. Cook*, 342 Mich. 347, 69 N.W. 2d 849 (1955); Simes & Smith, *supra* at § 1154 at 61. It seems clear, then, that the minimal interference with alienability presented by a preemptive right does little violence to the primary reason for prohibiting restraints on alienation in the first place, and should not be *per se* void.

Secondly, the reasons courts uphold the nearest analog to preemptive rights, the option, are equally applicable to preemptive provisions. Options have long been upheld as accepted commercial devices to aid in the disposition of property. *Cf. American Law of Property, supra*, § 26.66 at p. 509 (option is "useful and necessary device" which becomes obnoxious to public policy only when unlimited in time). In *Pure Oil Company v. Baars*, 224 N.C. 612, 31 S.E. 2d 854 (1944), the grantor deeded land to defendants but retained an option to repurchase. Defendants asserted the option was void. The Court upheld the option and refused to void it because it was "an integral part of the transaction and it would be inequitable to allow the defendants to claim the property under deed . . . and at the same time annul the essential terms of its acquisition. If the option is to go out, so must the deed which induced it." *Id.* at 615, 31 S.E. 2d at 856. By analogy here, the preemptive provision in the deed is an integral part of the bargained-for consideration in the sale of the land to defendants. Just as the commercial device of the option is upheld, if it is reasonable, so too the provisions of a preemptive right should be upheld if reasonable, particularly here where the preemptive right appears to be part of a commercial exchange, bargained for at arm's length.

Thirdly, the preemptive right is a useful tool for creating planned and orderly development, again analogous to similar devices upheld by courts of this State. As plaintiff's intestates attempted here, landowners and developers frequently try to

make their land more attractive and desirable to purchasers by establishing a protected residential community free from non-conforming housing and non-residential uses, Webster, *supra* at § 344. Settled law in this jurisdiction upholds such restrictive covenants, insuring privately planned development, when those covenants do not materially impair the beneficial enjoyment of the land or violate the public good. *See* Webster, *supra* at § 344 and cases cited therein. A preemptive covenant in a deed is simply one more way of protecting an area by providing that the original planner has some continuing control over his creation. To hold such a provision void *per se* is an unnecessary limiting of the right of a developer and is in contradiction to a general trend to uphold restrictive covenants running with the land if those covenants are reasonable.[1]

Viewed against this framework, defendants' insistence that *Hardy v. Galloway*, *supra*, prohibits *any* restriction on alienability in this jurisdiction is misguided. *Hardy v. Galloway* involved a preemptive provision which provided that grantors were to have the right of first refusal if their grantees ever decided to reconvey the land. If the grantees failed to allow the grantor this "option," the grantees' deed was "null and void." 111 N.C. at 520, 15 S.E. at 890.

In striking this provision as void, the Court in *Hardy v. Galloway* emphasized that the preemptive right included neither a statement as to the duration of the right nor a method for calculating the price of exercising it. Nowhere did the Court state that *any* restraint on alienation was prohibited. Nowhere did it state that *any* preemptive provision in a deed was void as an impermissible restraint on alienation.

Indeed, decisions of this Court subsequent to *Hardy v. Galloway* indicate that the holding there is authority only when voiding *unreasonable* restraints on alienation. Thus when a

[1]Generally, however, in this jurisdiction restrictive covenants are strictly construed. We do not believe such a construction necessarily indicates judicial disfavor over the concept of restrictive covenants, but is merely an attempt to prevent future litigation over expanding definitions of specific restrictions.

restrictive covenant unreasonably limited a grantee's right to convey only to one small group, this Court cited *Hardy v. Galloway* when striking the restriction. *See, e.g., Norwood v. Crowder*, 177 N.C. 469, 99 S.E. 345 (1919); *Brooks v. Griffin*, 177 N.C. 7, 97 S.E. 730 (1919). When the restrictive covenant totally prevented alienation for a certain period of time, again this Court cited *Hardy v. Galloway* in voiding the restriction, *see, e.g., Welch v. Murdock*, 192 N.C. 709, 135 S.E. 611 (1926); *Stokes v. Dixon*, 182 N.C. 323, 108 S.E. 913 (1921); *Christmas v. Winston*, 152 N.C. 48, 67 S.E. 58 (1910); *Wool v. Fleetwood*, 136 N.C. 460, 48 S.E. 785 (1904); *Latimer v. Waddell*, 119 N.C. 370, 26 S.E. 122 (1896); and *Pritchard v. Bailey*, 113 N.C. 521, 18 S.E. 668 (1893), as it did again when voiding restrictions where the grantor purported to give a fee but imposed restrictive covenants limiting an estate in effect to a trust, *see, e.g., Schwren v. Falls*, 170 N.C. 251, 87 S.E. 49 (1915); *Munroe v. Hall*, 97 N.C. 206, 1 S.E. 651 (1887). In all these cases limitation on the ability to alienate was absolute either in express terms or in practical effect. *See generally Crockett v. First Federal Savings & Loan Association*, 289 N.C. 620, 224 S.E. 2d 580 (1976). The only time, to our knowledge, that this Court reviewed a preemptive right limited as to price and duration, it did not, out of hand, void the provision, but remanded the case to add a necessary third party to the action. *See Story v. Walcott*, 240 N.C. 622, 83 S.E. 2d 498 (1954). The inference is clear and we so hold that certain preemptive rights, if reasonable, may be upheld; *Hardy v. Galloway* stands only for the proposition that preemptive provisions which are unreasonable are void as imposing impermissible restraints on alienation.

III.

The question remains whether the preemptive right before us, while not *per se* void, is nevertheless an unreasonable restraint on alienation.

[3] *Hardy v. Galloway, supra*, makes clear that two primary considerations dictate the reasonableness or unreasonableness of a preemptive right: the duration of the right and the provisions it makes for determining the price of exercising the right.

In *Hardy*, the preemptive provision contained neither a method for determining price of the land nor a time limit on the right to exercise the first refusal. Such vagueness was fatal, the Court held.

The general rule is that as long as the price provision in a preemptive right provides that the price shall be determined either by the marketplace or by the seller's desire to sell, a preemptive right is reasonable if its duration does not violate the rule against perpetuities. *Restatement of the Law of Property* § 413. *But see American Law of Property, supra* at § 26.66, suggesting neither the rule against perpetuities, nor apparently any time limit, should apply despite considerable authority *contra*.

While some courts have not imposed the *Restatement's* rule against perpetuities limit, and have only stated that the duration of a preemptive right must be for a reasonable time, or have said nothing about time, *see American Law of Property, supra* at § 26.66 and cases cited therein, most generally agree there must be some limit on time, and all agree that reasonableness in pricing includes some way of linking the price to the fair market value of the land or to the price the seller is willing to take from third parties. *Restatement of the Law of Property* § 413; 6 Powell, *supra* at § 842, Simes & Smith, *supra* at 1154; *American Law of Property, supra* at 26.65.

[4] We believe the better rule is to limit the duration of the right to a period within the rule against perpetuities and thus avoid lengthy litigation over what is or is not a reasonable time within the facts of any given case. We further agree with the authorities that a reasonable price provision in a preemptive right is one which somehow links the price to the fair market value of the land, or to the price the seller is willing to accept from third parties.

[5] Viewed against these requirements, the terms of the preemptive right *sub judice* are reasonable. The provisions of Article XIV. expressly provide that the preemptive right here shall last the lifetime of the grantor, W.O. Smith, Jr., plus *twenty* years. This is well within the rule against perpetuities

requirement that a property interest shall vest, if at all, within a life-in-being plus *twenty-one* years.

Defendants here argue, however, that Article XVII. of the grant extends the right beyond the permissible time. That Article provides: "covenants ... are to run with the land and shall be binding ... until January 1, 1985, at which time the said restriction shall automatically extend for successive periods of ten years each unless by the written consent of the owners ... agree [sic] to change said restrictions ...."

We disagree with defendants. Although usually applied in statutory construction, the maxim "the specific controls the general," is no less applicable here. *See generally*, 73 Am. Jur. 2d, *Statutes* § 257 (1974). The specific limitation contained in Article XIV., not the general limitations of Article XVII., controls the time that the preemptive right applies. This time is well within the period of the rule against perpetuities, and the plaintiff is seeking to exercise his preemptive right well within the time provided by Article XIV.

In like manner, the provisions of Article XIV. clearly reflect a price tied to the fair market price of the land, or the price that the seller is willing to accept from third parties. Here the grantor provided that the price the grantor or his successor was to pay upon exercise of the right was "a price no higher than the lowest price [grantee] is willing to accept from any other purchaser." This provision is clearly reasonable and imposes no undue restraint upon defendants' ability to alienate their land.

Defendants vigorously argue however that upholding both preemptive rights in general and the reasonableness of this particular preemptive right denies them the right to give their land as a gift or devise. We believe defendants are misstating the case. By its very terms, the preemptive right is exercisable only when and if the seller decides to *sell*, not give or devise his land. Defendants continue to have the unhampered right to give or devise.

The preemptive clause before us, therefore, is not void *per se* nor is it an unreasonable restraint on alienation. Summary judgment for the defendants was improperly granted.

Accordingly, we reverse the decision of the Court of Appeals and remand this case to that court to remand to the trial court for further proceedings in accordance with this opinion.

Because of the analogy between preemptive rights and options to purchase land, on remand we note this case will be controlled by the usual rules in this jurisdiction pertaining to specific performance. These include the ability of the preemptive right holder to enforce that preemptive right against subsequent purchasers for value who are charged with notice of the right in the recorded chain of title, *Chandler v. Cameron*, 229 N.C. 562, 47 S.E. 2d 528 (1948), provided there is no equitable matter precluding this ability.

Reversed and remanded.

BENNY G. VASSEY v. WILLIAM H. BURCH, M.D., ROY L. MORGAN, M.D., AND ST. LUKE'S HOSPITAL, INC.

No. 122

(Filed 15 August 1980)

Hospitals § 3; Appeal and Error § 42– plaintiff suffering from appendicitis – negligence of hospital – hospital's evidentiary material not included in record on appeal

In an action to recover damages for alleged malpractice where the record on appeal contained no evidentiary materials submitted by defendant hospital in support of its motion for summary judgment, it must be assumed that the record is complete and correct, and defendant's motion for summary judgment therefore should have been denied where plaintiff's verified complaint, affidavits and other evidentiary materials tended to show that plaintiff became violently ill and his parents took him to the hospital; plaintiff and his mother informed the nurse in attendance that plaintiff had severe pains in his right lower abdomen and was violently ill; plaintiff's mother twice asked the nurse whether her son might be suffering from appendicitis; the nurse replied in the negative and called plaintiff's regular doctor; in that discussion she told the doctor that plaintiff had no symptoms of appendicitis; as a result the doctor prescribed some medication and directed that defendant be sent home if he appeared to be better in thirty mintutes; accordingly, plaintiff was subsequently dismissed from the hospital without the taking of a blood count and without being otherwise

checked for appendicitis; plaintiff's condition deteriorated overnight; the next morning the doctor instantly recognized plaintiff's symptoms as acute appendicitis and sent him to the hospital for an immediate appendectomy; and during the course of the surgery it was discovered that his appendix had ruptured and severe peritonitis had developed.

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

APPEAL by plaintiff from decision of the Court of Appeals, 45 N.C. App. 222, 262 S.E. 2d 865 (1980), affirming judgment of *Riddle, S.J.*, entered 30 January 1979 in POLK Superior Court.

This is an action for damages for alleged malpractice on the part of defendants and their agents. A motion for summary judgment by St. Luke's Hospital, Inc., was allowed by the trial court and plaintiff appealed. The Court of Appeals upheld summary judgment for the Hospital, with Wells, J., dissenting, and plaintiff appealed to this Court as of right.

The verified complaint alleges that on 21 December 1974 plaintiff became ill and consulted Dr. Burch, who casually examined him. No tests were performed on plaintiff. Dr. Burch told plaintiff he was suffering from intestinal flu, gave him a shot of penicillin, and sent him home with some kind of liquid medicine. Later that day, plaintiff became so ill that his parents took him to the emergency room at St. Luke's Hospital about 3 p.m. There, both plaintiff and his mother conversed with the nurse in charge of the emergency room. They informed her that plaintiff had severe pains in his right abdomen, was violently ill, and asked if he could possibly be suffering from acute appendicitis. The nurse replied in the negative, called Dr. Morgan, who was plaintiff's regular doctor, and discussed the matter on the telephone with him. In that discussion she told Dr. Morgan that plaintiff had no symptoms of appendicitis. Dr. Morgan gave a prescription over the phone and directed that plaintiff be sent home if he appeared to be better in thirty minutes. Neither the doctor nor the nurse suggested a blood count or suggested that plaintiff be checked for appendicitis, and the Hospital dismissed him about thirty minutes after talking with Dr. Morgan.

Plaintiff further alleged that he was ill the entire night, suffered great pain in his right side and had severe vomiting.

The next morning he went to see Dr. Morgan at his office. The doctor immediately recognized his symptoms as acute appendicitis and sent plaintiff to St. Luke's Hospital for an immediate appendectomy. It was then discovered that the appendix had in fact ruptured and severe peritonitis had developed. Plaintiff remained in St. Luke's Hospital for five weeks and underwent four separate surgical procedures in an attempt to bring his condition under control. Plaintiff did not improve and was transferred to Baptist Hospital at Winston-Salem where he remained for several months. He has periodically returned to that hospital for additional surgery and treatment to the time of the filing of his complaint. Plaintiff alleges the cost of his medical attention and surgery to date is more than $60,000; his health has been permanently impaired, and he has no estimate of what the future cost will be.

Plaintiff further alleged that the negligence of the nurses in the emergency room is imputed to St. Luke's Hospital; that the nurses were negligent in that: (a) when plaintiff and his mother went to the hospital the nurses could see the intense pain and discomfort from which plaintiff was suffering and could see that he was vomiting and that they should have immediately recognized the possibility that he was suffering from appendicitis and should have so reported to Dr. Morgan; (b) the nurses not only failed to report his condition correctly to Dr. Morgan but told Dr. Morgan plaintiff had no symptoms of appendicitis; (c) such statements were made without any examination, without blood tests, and without any basis in fact; (d) the negligence and failure of the defendants, as set out in the complaint, to make any attempt to diagnose plaintiff's illness delayed proper medical treatment for his ruptured appendix and proximately caused the peritonitis to develop so that his life was endangered and he was forced to undergo many operations and many months of hospitalization and was forced to suffer severe pain and was not able to work for many months.

St. Luke's Hospital denied all material allegations of the complaint relating to it, denied that the nurse in charge of the emergency room was an employee of the hospital, and denied that the hospital was responsible for any negligence on her part.

The Hospital moved for summary judgment on the ground that there was no genuine issue as to any material fact and the movant was entitled to judgment as a matter of law. In support of this motion, the Hospital "respectfully [showed] unto the court the various pleadings filed in this action, including, but not limited to, verified answers to interrogatories served and filed with the court by the plaintiff, and other pertinent file material presently before the court."

In opposition to the Hospital's motion for summary judgment, plaintiff filed affidavits of himself and his mother which substantially corroborate the allegations of his complaint, an affidavit by Dr. Stewart Todd, one of the doctors who treated plaintiff at Baptist Hospital, stating that in North Carolina "it is accepted medical practice that if a patient comes into your office complaining of severe pains in the lower right lower quadrant of his abdomen, running a fever, and vomiting, he should be checked for appendicitis, a white blood count should be taken, his abdomen should be examined, and particularly the right lower quadrant should be examined to see whether or not it is tender. The failure to do this risks ruptured appendix and complications."

The order allowing summary judgment for the Hospital recites that the court "considered the pleadings in the action, affidavits, interrogatories and answers thereto and other pertinent file material presently before the court." Having heard argument of counsel, the court, being of the opinion that there was no genuine issue as to any material fact and that defendant Hospital was entitled to judgment as a matter of law, allowed the motion for summary judgment and dismissed the action against St. Luke's Hospital, Inc.

We note at this point that there are no "interrogatories and answers thereto and other pertinent file material" in the record now before us.

On plaintiff's appeal, the Court of Appeals affirmed, with Wells, J., dissenting. The only question now before the Court is whether the Hospital's motion for summary judgment was properly allowed.

Hamrick & Hamrick, by J. Nat Hamrick; William H. Miller, attorneys for plaintiff appellant

Hedrick, Parham, Helms, Kellam, Feerick & Eatman, by Richard T. Feerick and Hatcher B. Kincheloe, attorneys for defendant appellee, St. Luke's Hospital, Inc.

HUSKINS, Justice:

Did the Court of Appeals err in upholding summary judgment for St. Luke's Hospital, Inc.? For reasons which follow, we answer in the affirmative and reverse.

Rule 56, Rules of Civil Procedure, authorizes 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 rule does not authorize the court to *decide* an issue of fact. It authorizes the court to determine whether a genuine issue of facts exists. Summary judgment is designed 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 & Procedure § 1660.5 (2d ed. Phillips Supp. 1970).

Accordingly, 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 and his entitlement to judgment as a matter of law. *Pitts v. Pizza, Inc.*, 296 N.C. 81, 249 S.E. 2d 375 (1978). "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. 1980). *Accord, Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979). "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). If the evidentiary materials filed by the parties indicate that a genuine issue of material fact does exist, the motion for summary judgment must be denied, as "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." *Id.*

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. 1980). 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, 92 (1969). Nevertheless, if a motion for summary judgment is supported by evidentiary matter showing a lack of negligence on the part of the movant 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 and summary judgment for the movant should be allowed. *See Moore v. Fieldcrest Mills, Inc., supra;* 6 Pt. 2 Moore's Federal Practice, § 56.17[42] at 948-49 (2d ed. 1980).

We now turn to the propriety of summary judgment for St. Luke's Hospital, Inc., applying the foregoing legal principles to the record properly before us.

At the outset we note that the record on appeal does not indicate what evidentiary materials, if any, were offered by defendant Hospital in support of its motion for summary judg-

ment. The record does indicate that after giving notice of appeal in open court, plaintiff was allowed sixty days in which to make up and serve a proposed record on appeal, and that such record was duly served on defendant Hospital within the allotted time. The Hospital filed no objections, amendments, or a proposed alternative record on appeal. See Rule 11(c), Rules of Appellate Procedure. Accordingly, the proposed record on appeal became the record on appeal. Rule 11(b), Rules of Appellate Procedure. This record was certified by the Clerk of Superior Court on 1 June 1979 as the official record on appeal in this action. See Rule 11(e), Rules of Appellate Procedure.

It is axiomatic that a properly certified record on appeal imports verity. 1 N.C. Index 3d, Appeal and Error § 42, and cases cited therein. The appellate courts in this State are bound by the record as certified and can judicially know only what appears of record. *Griffin v. Barnes*, 242 N.C. 306, 87 S.E. 2d 560 (1955); *Tomlins v. Cranford*, 227 N.C. 323, 42 S.E. 2d 100 (1947). An appellate court will not speculate as to the content of evidentiary matters in support of a summary judgment motion which the record fails to show were offered in evidence in the trial court. *Compare, Equipment Co. v. Hertz Corp.*, 256 N.C. 277, 123 S.E. 2d 802 (1962); *Ingram v. Easley*, 227 N.C. 442, 42 S.E. 2d 624 (1947); *Wallace v. Longest*, 226 N.C. 161, 37 S.E. 2d 112 (1946). In determining whether a movant has met his burden of proof on a summary judgment motion, this Court can rely only upon evidentiary materials appearing of record.

In the instant case, the record contains no evidentiary materials submitted by defendant Hospital in support of its motion for summary judgment. The record contains only the Hospital's *unverified* answer filed in response to plaintiff's *verified* pleading. If the record served on defendant Hospital did not contain all pertinent evidentiary matters offered by the Hospital in support of the motion, it was the duty of the Hospital to file objections, amendments or serve a counter case on the plaintiff appellant. Rule 11, Rules of Appellate Procedure. Here, the defendant Hospital did nothing. Therefore, we assume the record on appeal is complete and correct. In that posture, defendant's motion for summary judgment should have been denied,even if nonmovant had offered no evidence in opposition. *See*

Bank v. Evans, 296 N.C. 374, 250 S.E. 2d 231 (1979); *Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972).

But if defendant Hospital had succeeded in showing *prima facie* its entitlement to summary judgment, we note that the verified complaint, the affidavits and other evidentiary materials submitted by plaintiff in opposition to the motion would negate such a showing and establish the existence of triable issues of material fact. Viewed in its most favorable light, plaintiff's evidence tends to show, in pertinent part, that on 21 December 1974 plaintiff became so violently ill that his parents took him to the emergency room at St. Luke's Hospital. Plaintiff and his mother informed the nurse in attendance that plaintiff had severe pains in his right lower abdomen and was violently ill. Plaintiff's mother twice asked the nurse whether her son might be suffering from appendicitis. The nurse replied in the negative and called Dr. Morgan, plaintiff's regular doctor. In that discussion, she told Dr. Morgan that plaintiff had no symptoms of appendicitis. As a result, Dr. Morgan prescribed some medication and directed that defendant be sent home if he appeared to be better in thirty minutes. Accordingly, plaintiff was subsequently dismissed from the hospital without the taking of a blood count and without being otherwise checked for appendicitis. Plaintiff's condition deteriorated overnight. The next morning Dr. Morgan instantly recognized plaintiff's symptoms as acute appendicitis and sent him to St. Luke's for an immediate appendectomy. During the course of the surgery, it was discovered that his appendix had ruptured and severe peritonitis had developed.

Viewed indulgently, and given every reasonable inference to be drawn therefrom, plaintiff's evidence indicates that a genuine issue of material fact exists on the question of whether defendant Hospital breached its duty to exercise due care for the safety of its patient. *See generally, Rabon v. Hospital*, 269 N.C. 1, 152 S.E. 2d 485 (1967).

In summary, we conclude that the Hospital failed to carry its burden as movant by showing that no triable issues of fact exist and that it is entitled to judgment as a matter of law. We further conclude that plaintiff's evidentiary showing in opposi-

tion to defendant's motion for summary judgment indicates that there are triable issues of material fact. Accordingly, we hold that the trial court erred in granting summary judgment for St. Luke's Hospital.

For the reasons stated the decision of the Court of Appeals upholding summary judgment for St. Luke's Hospital, Inc., is reversed. The case is remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

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

GARY D. ETHERIDGE PETITIONER v. ELBERT L. PETERS, JR., COMMISSIONER, DIVISION OF MOTOR VEHICLES, RESPONDENT

No. 117

(Filed 15 August 1980)

Automobiles §§ 2.4, 126.3– willful refusal to take breathalyzer test – elapse of time while awaiting attorney

A willful refusal to submit to a chemical test within the meaning of G.S. 20-16.2(c) occurs where a motorist: (1) is aware that he has a choice to take or to refuse to take the test; (2) is aware of the time limit within which he must take the test; (3) voluntarily elects not to take the test; and (4) knowingly permits the prescribed thirty minute time limit to expire before he elects to take the test. Therefore, the evidence did not support the trial court's conclusion that petitioner did not willfully refuse to submit to a breathalyzer test where it tended to show that petitioner was advised of his statutory rights relative to the breathalyzer examination at 9:19 p.m.; he indicated his desire to call an attorney or have one present during the test; he was offered the test at the end of a twenty minute period and again at the end of a thirty minute period; approximately thirty-five minutes after he was advised of his rights, petitioner asked to take the test and was refused; and there was nothing in the evidence to indicate that his decision to await the arrival of an attorney before submitting to the test was anything but a conscious choice purposefully made.

APPEAL by petitioner from decision of the Court of Appeals, reported in 45 N.C. App. 358, 263 S.E. 2d 308 (1980), reversing

judgment for petitioner entered 4 April 1979 by Judge *Rouse*. The opinion was by Judge *Hedrick*, Judge *Clark* concurred; Judge *Vaughn* dissented.

Beaman, Kellum, Mills, Kafer & Stallings, P.A., by David P. Voerman for petitioner appellant.

Attorney General Rufus L. Edmisten by Associate Attorney Jane P. Gray and Deputy Attorney General William W. Melvin for respondent appellee.

EXUM, Justice.

The question presented for review is whether the evidence in the instant case supports the trial court's conclusion that petitioner did not willfully refuse to submit to a breathalyzer test. We hold that it does not.

Petitioner was arrested in Craven County, North Carolina and charged with driving while under the influence of intoxicating liquor. The arresting officer, L. T. DuBose, transported petitioner to the breathalyzer room at the Craven County Sheriff's Department and requested him to submit to a breathalyzer test. The breathalyzer operator, Trooper Johnny Brown, informed petitioner that he had a right to call an attorney but that he was only allowed thirty minutes in which to do so. Trooper Brown completed reading petitioner his rights relative to the breathalyzer procedure at 9:19 p.m. Petitioner said that he wanted to call an attorney and tried unsuccessfully several times to contact one. Eventually he was able to locate Mr. Lamar Sledge, an attorney in New Bern, North Carolina. Trooper Brown again offered to administer the breathalyzer test to petitioner, but petitioner responded that he wanted to wait for Mr. Sledge to arrive. Trooper Brown again reminded petitioner of the thrity-minute time limit and informed him that only ten minutes remained.

Mr. Sledge finally arrived and conferred briefly with petitioner. Approximately thirty-five minutes after he was advised of his rights, petitioner indicated that he was willing to take the test. Trooper Brown was at that time dismantling the breatha-

lyzer machine and informed petitioner that thirty minutes had elapsed. He refused to administer the test and recorded the test results as a "refusal" on the part of petitioner.

Later the Division of Motor Vehicles advised petitioner by letter dated 7 April 1978 that pursuant to G.S. 20-16.2(c) his driver's license would be revoked for six months because he refused to submit to the breathalyzer test. Petitioner sought and was granted an order restraining the Division of Motor Vehicles from revoking his license until the matter was determined *de novo* in superior court.

The matter came on to be heard before Judge Rouse, who found in pertinent part:

> "6. Trooper Brown completed reading the rights form to petitioner at 9:19 p.m.
>
> "7. Petitioner did not decline to take the test but indicated to Trooper Brown that he would like to contact an attorney or have an attorney present during the test.
>
> . . . .
>
> "12. Trooper Brown offered the breathalyzer test to petitioner at the conclusion of the required 20-minute waiting period and at the end of the 30-minute waiting period.
>
> "13. At the end of the 30-minute period Officer Brown proceeded to disassemble the breathalyzer machine. Within two to four minutes after the 30-minute period expired Mr. Sledge arrived. The officer had not completed the process of disassembling the breathalyzer machine. He was in the process of taking the ampules out when the attorney arrived.
>
> "14. Mr. Sledge asked to speak with petitioner. Officer DuBose and Brown were there and indicated he could talk with the petitioner. Mr. Sledge was not advised that the 30-minute period had expired or was about to expire. Mr. Sledge conferred quickly with the petitioner out of the hearing of the officers.

"15. Within two or three minutes after he arrived petitioner, upon advice of Mr. Sledge, indicated a willingness to take the test.

. . . .

"18. Petitioner's request to take the test was made within five minutes of the expiration of the 30-minute period, and was made immediately after consultation with his attorney.

"19. Petitioner did not at any time refuse to take the test."

Judge Rouse then concluded as a matter of law that petitioner "did not willfully refuse to submit to a breathalyzer test."

Respondent appealed to the Court of Appeals. That court relying on *Seders v. Powell, Comr. of Motor Vehicles*, 298 N.C. 453, 259 S.E. 2d 544 (1979), reversed the judgment of the trial court. The Court of Appeals held that Judge Rouse's unchallenged findings of fact compelled the conclusion that "petitioner did willfully refuse to take the breathalyzer test within the meaning of the statute." 45 N.C. App. at 363, 263 S.E. 2d at 311. Petitioner appealed to this Court pursuant to G.S. 7A-30(2). We agree with the decision of the Court of Appeals and accordingly affirm.

The relevant statute, G.S. 20-16.2, provides in pertinent part as follows:

"§ 20-16.2. *Mandatory revocation of license in event of refusal to submit to chemical tests; right of driver to request test.* — (a) Any person who drives or operates a motor vehicle upon any highway ... shall be deemed to have given consent, subject to the provisions of G.S. 20-139.1 to a chemical test or tests of his breath or blood for the purpose of determining the alcoholic content of his blood if arrested for any offense arising out of acts alleged to have been committed while the person was driving or operating a motor vehicle while under the influence of intoxicating liquor. The test or tests shall be administered at the request of a law-

enforcement officer having reasonable grounds to believe the person to have been driving or operating a motor vehicle on a highway or public vehicular area while under the influence of intoxicating liquor. The law-enforcement officer shall designate which of the aforesaid tests shall be administered. The person arrested shall forthwith be taken before a person authorized to administer a chemical test and this person shall inform the person arrested both verbally and in writing and shall furnish the person a signed document setting out:

. . . .

(4) That he has the right to call an attorney and select a witness to view for him the testing procedures; but that the test shall not be delayed for this purpose for a period in excess of 30 minutes from the time he is notified of his rights.

. . . .

(c) The arresting officer, in the presence of the person authorized to administer a chemical test, shall request that the person arrested submit to a test described in subsection (a). If the person arrested willfully refuses to submit to the chemical test designated by the arresting officer, none shall be given. However, upon the receipt of a sworn report of the arresting officer and the person authorized to administer a chemical test that the person arrested, after being advised of his rights as set forth in subsection (a), willfully refused to submit to the test upon the request of the officer, the Division shall revoke the driving privilege of the person arrested for a period of six months."

Petitioner contends that a mere showing that a conscious suspect did not take a breathalyzer test within thirty minutes is insufficient to establish a willful refusal to take the test. He argues: Judge Rouse found that at no time did he actually decline or refuse to submit to the test; the evidence supports these findings; and these findings, in turn, support Judge Rouse's conclusion that petitioner "did not willfully refuse to

submit to a breathalyzer test" within the meaning of G.S. 20-16.2(c). The State, on the other hand, argues that the evidence is insufficient to support Judge Rouse's findings 7 and 19; and in light of *Seders, supra,* all the evidence shows that petitioner willfully refused to take the test. We agree with the State's position.

In *Seders,* decided after Judge Rouse's rulings, we upheld the trial court's conclusion that the motorist willfully refused to take the breathalyzer test. The evidence there tended to show the motorist was warned of a thirty-minute time limit, yet remained determined to await contact with his attorney before submitting to the breathalyzer. When finally petitioner agreed to take the test, thirty minutes had elapsed and the operator had already dismantled the apparatus. We held that the motorist's "action constituted a conscious choice purposefully made and his omission to comply with this requirement of our motor vehicle law amounts to a willful refusal." *Id.* at 461, 259 S.E. 2d at 550.

Clearly presaged by *Seders,* our holding here is that a willful refusal to submit to a chemical test within the meaning of G.S. 20-16.2(c) occurs where a motorist: (1) is aware that he has a choice to take or to refuse to take the test; (2) is aware of the time limit within which he must take the test; (3) voluntarily elects not to take the test; and (4) knowingly permits the prescribed thirty-minute time limit to expire before he elects to take the test.

In the instant case, the evidence and Judge Rouse's unchallenged findings are that: petitioner was advised of his statutory rights relative to the breathalyzer examination at 9:19 p.m.; he indicated his desire to call an attorney or have one present during the test; he was offered the test at the end of a twenty-minute period and again at the end of a thirty-minute period; approximately thirty-five minutes after he was advised of his rights, petitioner asked to take the test and was refused. There is nothing whatsoever in the evidence to indicate that his decision to await the arrival of an attorney before submitting to the test was anything but a "conscious choice purposefully made." *Id.*

It is true that some of petitioner's evidence tends to show that he was not aware that the thirty-minute time limit was about to expire and that he did not knowingly permit this time limit to expire before he elected to take the test. Petitioner testified that he had no watch; that there was a discrepancy between Trooper Brown's watch and a clock in the magistrate's office on which petitioner was relying; and that Trooper Brown never advised him of any further lapse of time after his twenty-minute warning. Trooper Brown, however, testified that he warned petitioner of the lapse of both the twenty-minute and the thirty-minute periods. Brown said, "I informed him the thirty minutes were up and if he didn't take the breathalyzer test at that time it would be counted as a refusal." Judge Rouse's unchallenged findings of fact numbers 12 and 18 resolve this factual issue against petitioner. According to these findings petitioner must have knowingly permitted the thirty-minute time limit to expire before he ultimately elected to take the test.

Viewing all the evidence, therefore, in light of *Seders*, our holding here, and Judge Rouse's unchallenged findings 12 and 18, we conclude that it is insufficient to support Judge Rouse's findings 7 and 19, if indeed these may properly be denominated findings of fact rather than conclusions of law. Not only does the evidence so viewed not support these findings, it also provides no support for Judge Rouse's ultimate conclusion that petitioner did not willfully refuse the breathalyzer. All the evidence so viewed shows that he did.

The decision of the Court of Appeals reversing the judgment of the trial court is affirmed, and the case is remanded to that court for further remand to Craven Superior Court for entry of judgment in accordance with this opinion.

Affirmed.

Weber v. Board of Education

PHILIP WEBER		
v		
BUNCOMBE COUNTY BOARD OF EDUCATION, RUSSEL KNIGHT, E.E. CALDWELL, RUEBEN CALDWELL, JOHN W. CARROLL, DR. ROGER JAMES, EDNA ROBERTS, AND W. GRADY ROZZELL, RESPONDENTS	)	ORDER

No. 256 PC

(Filed 26 August 1980)

THIS matter is before us by virtue of notice of appeal from the decision of the Court of Appeals recorded at 46 N.C. App. 714, 226 S.E. 2d 42 (1980). The Respondent Board of Education has moved to dismiss the appeal for lack of a substantial constitutional question. Alternatively, petitioner petitions our discretionary review of the Court of Appeals' decision pursuant to G.S. 7A-31.

Our review of the record reveals that the Buncombe County Board of Education made no findings of fact or conclusions of law upon which to base its decision.

The decision of the Court of Appeals is therefore vacated. That court is directed to remand to the Superior Court, Buncombe County, which said court shall remand to the Buncombe County Board of Education to make findings of fact and conclusions of law as required by law.

This order shall be printed in the official reports of decisions of this Court.

Done by the Court in conference, this 15th day of August 1980.

CARLTON, J.
For the Court

GOODMAN TOYOTA, INC.)
)
v) ORDER
)
CITY OF RALEIGH)

No. 392 PC
(Filed 17 September 1980)

THIS matter is before us upon plaintiff's petition for writ of supersedeas, application for temporary stay and petition for discretionary review under G.S. 7A-31 of the decision of the Court of Appeals reported in 47 N. C. App 628, 267 S.E. 2d 714 (1980).

Plaintiff's petition for writ of supersedeas to reinstate the preliminary injunction by the trial court is allowed.

Plaintiff's petition for discretionary review is allowed for the limited purpose of entering this order in the cause: Our review of the record and the Court of Appeals' opinion reveals that the Court of Appeals improvidently heard the case on its merits. The purported appeal should have been dismissed as premature in accordance with prior decisions of this Court. *See generally, Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 251 S.E. 2d 443 (1979); *State v. School*, 299 N.C. 351, 261 S.E. 2d 908 (1980).

This cause must be returned to the trial court for trial on the merits. Any procedural matters to which the parties take exception may later be considered on appeal of this cause in its entirety should the matter again be brought before the appellate division.

The decision of the Court of Appeals is reversed. That court is directed to enter an order dismissing this appeal.

This order should be printed in the official reports of decisions of this Court.

Done by the Court in conference, this 16th day of September, 1980.

CARLTON, J.
For the Court

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

ALLEN CO. v. QUIP-MATIC, INC.

No. 303 PC

Case below: 47 NC App 40

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 16 September 1980. Motion of defendant to dismiss appeal for lack of jurisdiction allowed 16 September 1980.

BAER v. DAVIS

No. 398 PC

Case below: 47 NC App 581

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 16 September 1980.

BATTEN v. BATTEN

No. 406 PC

Case below: 48 NC App 225

Petition by defendant for discretionary review under G.S. 7A-31 denied 16 September 1980.

BD. OF EDUCATION v. SHAVER PARTNERSHIP

No. 263 PC

No. 106 (Fall Term)

Case below: 46 NC App 573

Petition by defendant for discretionary review under G.S. 7A-31 allowed 15 August 1980.

BROOKS v. INDUSTRIES, INC.

No. 397 PC

Case below: 48 NC App 225

Petition by defendant for discretionary review under G.S. 7A-31 denied 16 September 1980.

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

BROWN v. MOTOR INNS

No. 304 PC

Case below: 47 NC App 115

Petition by defendant for discretionary review under G.S. 7A-31 denied 15 August 1980.

BURCL v. HOSPITAL

No. 305 PC

Case below: 47 NC App 127

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 15 August 1980.

CASUALTY CO. v. GRIFFIN

No. 282 PC

Case below: 46 NC App 826

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 15 August 1980.

CAVINESS v. SMITH

No. 267 PC

Case below: 46 NC App 606

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 15 August 1980.

CONTRACTORS, INC. v. FORBES

No. 319 PC

No. 132 (Fall Term)

Case below: 47 NC App 371

Petition by defendant for discretionary review under G.S. 7A-31 allowed 16 September 1980.

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

COX v. REAL ESTATE LICENSING BOARD

No. 295 PC

Case below: 47 NC App 135

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 16 September 1980.

CRUMPLER v. TURNAGE

No 296 PC

Case below: 47 NC App 374

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 15 August 1980. Appeal dismissed 15 August 1980.

DANIELS v. HATCHER

No. 271 PC

Case below: 46 NC App 481

Petition by defendant for discretionary review under G.S. 7A-31 denied 15 August 1980.

DEPT. OF TRANSPORTATION v. LANCASTER

No. 351 PC

Case below: 47 NC App 374

Petition by defendant for discretionary review under G.S. 7A-31 denied 16 September 1980.

EMANUEL v. FELLOWS

No. 289 PC

Case below: 47 NC App 340

Petition by defendant for discretionary review under G.S. 7A-31 denied 15 August 1980.

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

FIGURE EIGHT v. LAING

No. 249 PC

Case below: 46 NC App 606

Petition by defendants for discretionary review under G.S. 7A-31 and alternative petition for writ of certiorari to North Carolina Court of Appeals denied 15 August 1980.

FOUST v. CITY OF GREENSBORO

No. 310 PC

Case below: 47 NC App 159

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 16 September 1980.

GRAVES v. WALSTON

No. 297 PC

No. 110 (Fall Term)

Case below: 46 NC App 606

Petition by defendants for discretionary review under G.S. 7A-31 allowed 15 August 1980.

HALL v. PUBLISHING CO.

No. 279 PC

Case below: 46 NC App 760

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 15 August 1980. Motion of defendants to dismiss appeal for lack of substantial constitutional question allowed 15 August 1980.

HARRIS v. PAVING CO.

No. 352 PC

Case below: 47 NC App 348

Petition by defendant for discretionary review under G.S. 7A-31 denied 16 September 1980.

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

HART v. WARREN

No. 283 PC

Case below: 46 NC App 672

Petition by defendant for discretionary review under G.S. 7A-31 denied 15 August 1980.

HAZARD v. HAZARD

No. 202 PC

Case below: 46 NC App 280

Petition by defendant for discretionary review under G.S. 7A-31 denied 15 August 1980.

HORNER v. HORNER

No. 321 PC

Case below: 47 NC App 334

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 16 September 1980.

HUDSON v. DOWNS

No. 361 PC

Case below: 47 NC App 207

Petition by defendant for discretionary review under G.S. 7A-31 denied 16 September 1980.

HURDLE v. SAWYER

No. 270 PC

Case below: 46 NC App 814

Petition by defendants Sawyer for discretionary review under G.S. 7A-31 denied 15 August 1980.

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

INDUSTRIES, INC. v. THARPE

No. 399 PC

Case below: 47 NC App 754

Petition by defendant Barker for discretionary review under G.S. 7A-31 denied 16 September 1980.

IN RE CALHOUN

No. 363 PC

Case below: 47 NC App 472

Petition by caveator for discretionary review under G.S. 7A-31 denied 16 September 1980.

IN RE FORECLOSURE OF BURGESS

No. 94

Case below: 47 NC App 599

Motion of petitioner to dismiss appeal of respondents for lack of substantial constitutional question allowed 15 August 1980.

IN RE FORECLOSURE OF SUTTON INVESTMENTS

No. 277 PC

Case below: 46 NC App 654

Petition by Sutton Investments for discretionary review under G.S. 7A-31 denied 15 August 1980. Motion of appellee to dismiss appeal for lack of substantial constitutional question allowed 15 August 1980.

IN RE KAPOOR

No. 389 PC

No. 135 (Fall Term)

Case below: 47 NC App 500

Petition by Trust Company for discretionary review under G.S. 7A-31 allowed 16 September 1980.

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

IN RE KIRKMAN

No. 313 PC

No. 131 (Fall Term)

Case below: 47 NC App 479

Petition by Minnie H. Kirkman for discretionary review under 7A-31 allowed 16 September 1980.

IN RE RIDGE

No. 309 PC

No. 130 (Fall Term)

Case below: 47 NC App 183

Petition by caveators for discretionary review under G.S. 7A-31 allowed 16 September 1980.

INSURANCE CO. v. CONSTRUCTION CO.

No. 261 PC

Case below: 46 NC App 427

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 15 August 1980.

JOHNSON v. JOHNSON

No. 274 PC

Case below: 46 NC App 316

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 15 August 1980.

JOYNER v. INSURANCE

No. 280 PC

Case below: 46 NC App 807

Petition by defendant for discretionary review under G.S. 7A-31 denied 15 August 1980.

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

KEENER v. KORN

No. 219 PC

Case below: 46 NC App 214

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 15 August 1980.

KING v. EXXON CO.

No. 311 PC

Case below: 46 NC App 750

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 15 August 1980.

LATHAN v. BD. OF COMMISSIONERS

No. 323 PC

Case below: 47 NC App 357

Petition be defendants for discretionary review under G.S. 7A-31 denied 16 September 1980.

LEASING CORP. v. MYERS

No. 213 PC

No. 104 (Fall Term)

Case below: 46 NC App 162

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 15 August 1980. Motion of all parties to dismiss appeal allowed 8 September 1980.

LEE v. REGAN

No. 405 PC

Case below: 47 NC App 544

Petition by defendant for discretionary review under G.S. 7A-31 denied 16 September 1980.

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

LEGRANDE v. FURNITURE CO.

No. 251 PC

Case below: 46 NC App 606

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 15 August 1980.

LOGAN v. INSURANCE CO.

No. 260 PC

Case below: 46 NC App 629

Petition by defendant for discretionary review under G.S. 7A-31 denied 15 August 1980.

McFADDIN v. JOHNSON

No. 287 PC

Case below: 46 NC App 837

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 15 August 1980.

MANAGEMENT, INC. v. DEVELOPMENT CO.

No. 292 PC

Case below: 46 NC App 707

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 16 September 1980. Motion of defendant to dismiss appeal for lack of substantial constitutional question allowed 16 September 1980. Motion of plaintiff for correction of findings of fact, conclusions of law and order denied 16 September 1980.

MAYBANK v. KRESGE CO.

No. 286 PC

No. 109 (Fall Term)

Case below: 46 NC App 687

Petition by defendant for discretionary review under G.S. 7A-31 allowed 15 August 1980.

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

MUNCHAK CORP v. CALDWELL

No. 265 PC

No. 107 (Fall Term)

Case below: 46 NC App 414

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed for limited purpose 15 August 1980.

NOVA UNIVERSITY v. UNIVERSITY OF NORTH CAROLINA

No. 381 PC

No. 133 (Fall Term)

Case below: 47 NC App 638

Petition by defendants for discretionary review under G.S. 7A-31 allowed 16 September 1980.

ODOM v. ODOM

No. 358 PC

Case below: 47 NC App 486

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 16 September 1980.

ORANGE COUNTY v. DEPT. OF TRANSPORTATION

No. 264 PC

Case below: 46 NC App 350

Petition by defendants for discretionary review under G.S. 7A-31 denied 15 August 1980.

PIANO CO. v. EXHIBIT WORLD

No. 203 PC

Case below: 46 NC App 122

Petition by defendant for discretionary review under G.S. 7A-31 denied 15 August 1980.

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

POSTON v. MORGAN-SCHULTHEISS, INC.

No. 281 PC

Case below: 46 NC App 321

Petition by plaintiff for writ of certiorari to North Carolina Court of Appeals denied 15 August 1980.

POTTS v. BURNETTE

No. 268

No. 108 (Fall Term)

Case below: 46 NC App 626

Petition by plaintiffs for discretionary review under G.S. 7A-31 allowed 15 August 1980.

QUATTRONE v. ROCHESTER

No. 285 PC

Case below: 46 NC App 799

Petition by defendant for discretionary review under G.S. 7A-31 denied 16 September 1980.

STAM v. STATE

No. 59

Case below: 47 NC App 209

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question denied 15 August 1980.

STANFORD v. OWENS

No. 258 PC

Case below: 46 NC App 388

Petition by defendants Owens, Yarbrough and Gwyn for discretionary review under G.S. 7A-31 denied 15 August 1980.

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

STANSFIELD v. MAHOWSKY

No. 284 PC

Case below: 46 NC App 829

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 15 August 1980.

STATE v. BIDDIX

No. 266 PC

Case below: 46 NC App 606

Petition by defendant for discretionary review under G.S. 7A-31 denied 15 August 1980.

STATE v. CLINDING

No. 315 PC

Case below: 47 NC App 374

Petition by defendant for discretionary review under G.S. 7A-31 denied 15 August 1980.

STATE v. COLE

No. 242 PC

Case below: 46 NC App 592

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 15 August 1980. Motion of defendant to dismiss appeal for lack of substantial constitutional question allowed 15 August 1980.

STATE v. COOLEY

No. 382 PC

Case below: 47 NC App 376

Petition by defendant for discretionary review under G.S. 7A-31 denied 16 September 1980. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 16 September 1980.

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

STATE v. CORBIN

No. 15 PC

Case below: 48 NC App 194

Petition by defendant for discretionary review under G.S. 7A-31 denied 16 September 1980.

STATE v. CRAVEN

No. 388 PC

Case below: 47 NC App 585

Petition by defendant for discretionary review under G.S. 7A-31 denied 16 September 1980.

STATE v. CREECH

No. 348 PC

Case below: 47 NC App 207

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 16 September 1980.

STATE v. CULPEPPER

No. 362 PC

No. 111 (Fall Term)

Case below: 47 NC App 633

Petition by defendants for discretionary review under G.S. 7A-31 allowed 15 August 1980. Petition by defendant Gurganus for writ of supersedeas allowed 15 August 1980.

STATE v. DAVIS

No. 291 PC

Case below: 46 NC App 778

Petition by defendant for discretionary review under G.S. 7A-31 denied 15 August 1980.

STATE v. DENNY

No. 345 PC

Case below: 47 NC App 207

Petition by defendant for discretionary review under G.S. 7A-31 denied 16 September 1980.

STATE v. DIXON

No. 62

Case below: 47 NC App 207

Petition by defendant for discretionary review under G.S. 7A-31 denied 16 September 1980. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 16 September 1980.

STATE v. DIXON

No. 259 PC

Case below: 47 NC App 207

Petition by defendants for discretionary review under G.S. 7A-31 denied 15 August 1980.

STATE v. EDENS

No. 356 PC

Case below: 47 NC App 374

Petition by defendant for discretionary review under G.S. 7A-31 denied 16 September 1980.

STATE v. EFIRD

No. 308 PC

Case below: 37 NC App 66

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 15 August 1980.

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

STATE v. EMANUEL

No. 181 PC

Case below: 44 NC App 380

Application by defendant for further review denied 15 August 1980.

STATE v. FEARING

No. 400 PC

Case below: 48 NC App 329

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 16 September 1980.

STATE v. FELMET

No. 306 PC

No. 129 (Fall Term)

Case below: 47 NC App 201

Petition by defendant for writ of certiorari to North Carolina Court of Appeals allowed 16 September 1980. Motion of Attorney General to dismiss appeal for lack of public interest allowed 16 September 1980.

STATE v. FLOWERS

No. 376 PC

Case below: 47 NC App 457

Petition by defendant for discretionary review under G.S. 7A-31 denied 15 August 1980.

STATE v. FREEMAN

No. 300 PC

Case below: 47 NC App 171

Petition by defendant for discretionary review under G.S. 7A-31 denied 16 September 1980.

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

STATE v. FULLERTON

No. 298 PC

Case below: 46 NC App 837

Petition by defendant for discretionary review under G.S. 7A-31 denied 16 September 1980. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 16 September 1980.

STATE v. GEORGE

No. 317 PC

Case below: 47 NC App 375

Petition by defendant for discretionary review under G.S. 7A-31 denied 15 August 1980. Petition by defendant for temporary stay and writ of supersedeas denied 15 August 1980.

STATE v. GORHAM

No. 255 PC

Case Below: 46 NC App 607

Petition by defendant for discretionary review under G.S. 7A-31 denied 15 August 1980. Motion of Attorney General to dismiss appeal for lack of significant public interest allowed 15 August 1980.

STATE v. HEDGEPETH

No. 262 PC

Case below: 46 NC App 569

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 15 August 1980.

STATE v. HODGEN

No. 357 PC

Case below: 47 NC App 329

Petition by defendant for discretionary review under G.S. 7A-31 denied 16 September 1980.

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

STATE V. JARMAN

No. 257 PC

Case below: 46 NC App 837

Petition by defendant for discretionary review under G.S. 7A-31 denied 15 August 1980.

STATE v. JOHNSON

No. 322 PC

Case below: 47 NC App 297

Petition by defendant for discretionary review under G.S. 7A-31 denied 16 September 1980.

STATE v. LOGUE

No. 349 PC

Case below: 47 NC App 585

Petition by defendant for discretionary review under G.S. 7A-31 denied 15 August 1980.

STATE v. McCASKILL

No. 355 PC

Case below: 47 NC App 289

Petition by defendant for discretionary review under G.S. 7A-31 denied 16 September 1980.

STATE v. McGEE

No. 318 PC

Case below: 47 NC App 280

Petition by defendant for discretionary review under G.S. 7A-31 denied 16 September 1980.

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

STATE v. McNEIL

No. 307 PC

Case below: 47 NC App 30

Petition by defendant for discretionary review under G.S. 7A-31 denied 16 September 1980. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 16 September 1980.

STATE v. MACKINS

No. 350 PC

Case below: 47 NC App 168

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 15 August 1980.

STATE v. MAINES and STATE v. DUNN

No. 118

Case below: 48 NC App 166

Petition by defendant Dunn for discretionary review under G.S. 7A-31 denied 16 September 1980.

STATE v. MARTIN

No. 237 PC

Case below: 46 NC App 514

Petition by defendant for discretionary review under G.S. 7A-31 denied 15 August 1980.

STATE v. MAXWELL

No. 393 PC

Case below: 47 NC App 658

Petition by defendant for discretionary review under G.S. 7A-31 denied 16 September 1980. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 16 September 1980.

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

STATE v. MILBY and STATE v. BOYD

No. 385 PC

No. 134 (Fall Term)

Case below: 47 NC App 669

Petition by Attorney General for discretionary review under G.S. 7A-31 allowed 16 September 1980. Petition by Attorney General for writ of Supersedeas allowed 16 September 1980.

STATE v. MODLIN

No. 353 PC

Case below: 47 NC App 585

Petition by defendant for discretionary review under G.S. 7A-31 denied 16 September 1980.

STATE v. MOORE

No. 272 PC

Case below: 46 NC App 563

Petition by defendant for discretionary review under G.S. 7A-31 denied 15 August 1980.

STATE v. MULLEN

No. 383 PC

Case below: 47 NC App 667

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 16 September 1980.

STATE v. RICH

No. 401 PC

Case below: 47 NC App 767

Petition by defendant for discretionary review under G.S. 7A-31 denied 16 September 1980.

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

STATE V. RUCKER

No. 387 PC

Case below: 47 NC App 585

Petition by defendant for discretionary review under G.S. 7A-31 denied 16 September 1980. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 16 September 1980.

STATE v. SMITH

No. 151 PC

Case below: 45 NC App 501

Petition by defendant for discretionary review under G.S. 7A-31 denied 15 August 1980.

STATE v. STREET

No. 359 PC

Case below: 45 NC App 1

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 15 August 1980.

STATE v. WALTON

No. 312 PC

Case below: 47 NC App 208

Petition by defendant for discretionary review under G.S. 7A-31 denied 15 August 1980.

STATE v. WILLIAMS

No. 299 PC

Case below: 47 NC App 205

Petition by defendant for discretionary review under G.S. 7A-31 denied 16 September 1980.

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

STATE v. WILLIAMS

No. 384 PC

Case below: 47 NC App 586

Petition by defendant for discretionary review under G.S. 7A-31 denied 16 September 1980.

STATE v. WILSON

No. 314 PC

Case below: 47 NC App 586

Petition by defendant for discretionary review under G.S. 7A-31 denied 15 August 1980.

STONE v. CONDER

No. 238 PC

Case below: 46 NC App 190

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 15 August 1980.

STROUPE v. STROUPE

No. 206 PC

No. 103 (Fall Term)

Case below: 46 NC App 123

Petition by defendant for discretionary review under G.S. 7A-31 allowed 15 August 1980.

TAYLOR v. TAYLOR

No. 239 PC

Case below: 46 NC App 349

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 15 August 1980.

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

TERRY v. TERRY

No. 243 PC

No. 105 (Fall Term)

Case below: 46 NC App 583

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 15 August 1980.

VICKERY v. CONSTRUCTION CO.

No. 301 PC

Case below: 47 NC App 98

Petition by defendants for discretionary review under G.S. 7A-31 denied 15 August 1980.

WALKER v. INSURANCE CO.

No. 65

Case below: 47 NC App 375

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 15 August 1980. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 15 August 1980.

WILHITE v. VENEER CO.

No. 390 PC

No. 136 (Fall Term)

Case below: 47 NC App 434

Petition by defendants for discretionary review under G.S. 7A-31 allowed 16 September 1980.

WILLIAMS v. STATE BAR

No. 278 PC

Case below: 46 NC App 824

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 15 August 1980.

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

PETITIONS TO REHEAR

COMR. OF INSURANCE v. RATE BUREAU

No. 85

Reported: 300 NC 381

Petition by plaintiff to rehear denied 16 September 1980.

HAWTHORNE v. REALTY SYNDICATE, INC.

No. 103

Reported: 300 NC 660

Petition by defendants to rehear denied 16 September 1980.

SHIELDS v. BOBBY MURRAY CHEVROLET

No. 106

Reported: 300 NC 366

Petition by plaintiff to rehear denied 15 August 1980.

STATE v. WHITE

No. 90

Reported: 300 NC 494

Petition by defendant to rehear denied 16 September 1980.

BRIAN FLIPPIN, BY HIS GUARDIAN AD LITEM, MELVIN F. WRIGHT, JR., AND SANDRA FLIPPIN v. DR. WILLIAM ERIC JARRELL

No. 102

(Filed 7 October 1980)

1. **Limitation of Actions § 4.1; Physicians, Surgeons, and Allied Professions § 13– professional malpractice statute of limitations – unconstitutional application of new statute to plaintiff's claim**

The professional malpractice statute of limitations set forth in G.S. 1-15(c), which changed the time of accrual of malpractice actions from the date of discovery of injury to the date of defendant's last act which gave rise to the action and shortened the limitation period from ten years to four years for latent non-foreign object claims discovered two or more years after defendant's last negligent act, cannot constitutionally be applied to bar plaintiff's claim for medical expenses and loss of services of her child where the child's injury was discovered on 22 November 1976 and G.S. 1-15(c) became effective on 1 January 1977, plaintiff's claim as it existed before 1 January 1977 did not accrue until 22 November 1976, and the statute thus provided plaintiff only 39 days in which to file her claim after she discovered it, since the statute as applied to plaintiff did not afford her a reasonable time within which to bring her action.

2. **Physicians, Surgeons and Allied Professions § 13– professional malpractice statute of limitations – one-year qualifying clause**

If the four-year period of limitation contained in G.S. 1-15(c) cannot constitutionally be applied to plaintiff's claim for medical malpractice, then the one-year-from-discovery clause of the statute which qualifies the limitation period cannot be applied to the claim, since the one-year qualification clause is not an independent, separable provision but must stand or fall with the time limitation which it qualifies.

3. **Parent and Child § 5.1– injury to minor child – two claims**

Two claims may arise when an unemancipated minor child is injured by the negligence of another: (1) a claim on behalf of the minor child for his losses caused by the injury, and (2) a claim by the parent, ordinarily the father, for parental losses caused by (a) loss of services during the child's minority, and (b) medical expenses reasonably necessary for treating the child's injuries.

4. **Parent and Child § 5.1– injury to minor – loss of services – medical expenses – right of father**

Since the parental right to recover for both loss of services and medical expenses is tied to the support obligation, the father ordinarily has the exclusive right to bring such an action because he is primarily responsible for supporting the child and presumably is fulfilling his responsibility.

5. **Parent and Child § 5.1– injury to minor – loss of services – medical expenses – standing of mother to bring action**

Since parental claims for both loss of services and medical expenses of a

minor child are based upon the parental support obligation, and since the mother has a legal obligation to support her child, even if secondary, a divorced mother who has legal custody of her minor child and provides at least one-half of the support for that child, including all medical expenses not covered by insurance provided by the father, has standing to bring a claim for medical expenses and loss of services resulting from an injury to the child.

On discretionary review [1] of a decision of the Court of Appeals[2] reversing Judge Hal Walker's denial of defendant's motion for summary judgment.[3] This case was argued as No. 129, Spring Term 1980.

White and Crumpler, by Fred G. Crumpler, Jr., Harrell Powell, Jr., Edward L. Powell, and G. Edgar Parker, Attorneys for plaintiff.

Womble, Carlyle, Sandridge & Rice, by H. Grady Barnhill and William C. Raper, Attorneys for defendant.

EXUM, Justice.

This appeal presents two questions. First, whether the professional malpractice statute of limitations found in G.S. 1-15(c)[4] can be constitutionally applied to bar the plaintiff's claim under the facts of this case. We hold, for reasons given, that it cannot. Second, whether plaintiff, the child's divorced mother, has standing to bring this action for medical expenses and loss of the child's services allegedly resulting from injury to the child caused by defendant's negligence.[5] We hold that the mother has standing.

---

[1]Allowed 1 April 1980.

[2]Reported at 44 N.C. App. 518, 261 S.E. 2d 257 (1980).

[3]Order entered in Forsyth Superior Court on 5 January 1979.

[4]Quoted *infra*.

[5]This case involves only the parental claims and not the child's claims for his injury.

I

Plaintiff alleges that Brian Flippin, her minor son, had a condition at birth known as phenylketonuria (PKU), an inborn or inherited metabolism defect which if undetected and untreated usually results in mental retardation. Defendant physician, a pediatrician who attended Brian at birth, allegedly negligently failed to diagnose and treat this condition. Brian was later diagnosed as being mentally retarded due to PKU. Defendant in part answered plaintiff's claim for medical expenses and loss of services by pleading the statute of limitations. After some discovery proceedings, defendant moved for summary judgment upon that ground and also upon the ground that only the father had standing to bring this claim. Judge Walker denied the motion; but the Court of Appeals reversed, holding that the claim was barred under both "the one-year rule and the four-year rule" of G.S. 1-15(c). We reverse the Court of Appeals.

Discovery proceedings and the pleadings show the following chronology of events giving rise to this claim: The child Brian was born 11 March 1972. Defendant last rendered professional services to Brian on 8 July 1972. The child's mother, the plaintiff, became aware on or about 14 October 1975 that "something was wrong" with Brian and took him to the Winston-Salem Child Guidance Clinic for examination. In February, 1976, the clinic concluded that Brian was only "one-half as mentally alert as children of his age." On 22 November 1976 Brian's condition was definitively diagnosed as PKU by physicians at Duke University Medical Center. Plaintiff filed this action for medical expenses and loss of the child's services on 19 December 1977.

Until 1 January 1977 the plaintiff's action was governed by Chapter 1157 of the 1971 Session Laws. This chapter, codified as G.S. 1-15(b) (1977 Cum. Supp.), provided in pertinent part that a cause of action "having as an essential element bodily injury . . . not readily apparent to the claimant at the time of its origin, is deemed to have accrued at the time the injury was discovered by the claimant, or ought reasonably to have been discovered by him, whichever first occurs; provided that in such cases the period shall not exceed 10 years from the last act of the defendant giving rise to the claim for relief." Statutes of limitations

begin to run when the claim against which they are asserted accrues. G.S. 1-15(a). There is a three-year period of limitation for claims arising out of "injury to the person." G.S. 1-52(5). Thus the effect of Chapter 1157 was to provide a three-year period of limitation from the time discovery of the injury was, or should have been, made provided the action was brought within ten years from the last act of the defendant giving rise to the claim.[6]

On a motion for summary judgment, the court is not authorized "to decide an issue of fact, but rather to determine whether a genuine issue of facts exists." Caldwell v. Deese, 288 N.C. 375, 378, 218 S.E. 2d 379, 381 (1975). Further, "all inferences of fact from the proofs proffered at the hearing must be drawn against the movant and in favor of the party opposing the motion." *Id., quoting* 6 Moore's Federal Practice ¶ 56.15(3) at 2337 (2d ed. 1971). When plaintiff discovered, or should have discovered, her child's "injury" may well be a question of fact which we cannot now resolve. For purposes of defendant's summary judgment motion we must assume that this date was 22 November 1976, when the child's condition was first definitively diagnosed. Thus, under G.S. 1-15(b) the plaintiff would have had three years from 22 November 1976 in which to file her action.

On 12 May 1976, however, the General Assembly ratified Chapter 977 of the 1975 Session Laws to become effective 1 January 1977. This act again amended G.S. 1-15 so as to provide for a special statute of limitations in professional malpractice cases. It added subsection (c) to G.S. 1-15 which provides:

> "(c) Except where otherwise provided by statute, *a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action: Provided that whenever there is bodily injury to the person,* economic or

[6]Chapter 1157 was repealed, effective 1 October 1979 by Chapter 654, § 3, 1979 Session Laws.

monetary loss, or a defect in or damage to property *which originates under circumstances making the injury,* loss, defect or damage *not readily apparent to the claimant at the time of its origin, and the injury,* loss, defect or damage *is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of the defendant* giving rise to the cause of action, *suit must be commenced within one year from the date discovery is made:* Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years. *Provided further, that in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action:* Provided further, that where damages are sought by reason of a foreign object, which has no therapeutic or diagnostic purpose or effect, having been left in the body, a person seeking damages for malpractice may commence an action therefor within one year after discovery thereof as hereinabove provided, but in no event may the action be commenced more than 10 years from the last act of the defendant giving rise to the cause of action." (Emphasis supplied.)

This statute significantly altered the law of limitations applicable to professional malpractice actions. It changed the time of accrual of such actions from the date of discovery of injury to the date of defendant's last act which gave rise to the action. *Stanley v. Brown,* 43 N.C. App. 503, 259 S.E. 2d 408 (1979), *disc. rev. denied,* 299 N.C. 332, 265 S.E. 2d 397 (1980). Also, for latent claims discovered two or more years after the defendant's last negligent act, except those involving a non-therapeutic and non-diagnostic "foreign object" left in the body, the statute established a four-year period of limitation measured from its newly defined time of accrual, *i.e.,* from defendant's last act which gave rise to the claim. The period of limitation in such claims which involve a non-therapeutic and non-diagnostic "foreign object" remained ten years.[7]

By its terms Chapter 977 is applicable to this litigation. Section 8 thereof provides, "This act shall not apply to pending

[7]Both periods of limitation are qualified by a requirement that such claims be brought within one year of discovery, discussed in more detail later in the text.

litigation." Section 9 provides, in addition, that the portion of the chapter under discussion "shall become effective on January 1, 1977, and shall apply to actions filed on or after that date." Since this litigation was not pending on and was filed after the effective date of Chapter 977, the statute, by its terms, purportedly applies. *Stanley v. Brown, supra,* 43 N.C. App. 503, 259 S.E. 2d 408. *See, e.g., Spencer v. McDowell Motor Co.,* 236 N.C. 239, 72 S.E. 2d 598 (1952).

When plaintiff discovered the "injury" on 22 November 1976 former G.S. 1-15(b) was in effect. Under it plaintiff would have had three years from the date of discovery in which to bring her action. Thirty-nine days later on 1 January 1977, G.S. 1-15(c), applying specifically to professional malpractice actions, *Stanley v. Brown, supra,* 43 N.C. App. 503, 259 S.E. 2d 408, became effective. If this new statute can within the limits of the Due Process Clause of the Fourteenth Amendment of the United States Constitution be applied to this case, then plaintiff's action for medical expenses and loss of services is barred by it because the action has been brought more than four years from the date it accrued under the new statute and, further, is not a "foreign object" type claim.

II

[1] The first question thus presented is whether the new professional malpractice four-year period of limitations contained in G.S. 1-15(c) can constitutionally be applied so as to bar plaintiff's action for medical expenses and loss of her child's services.

It is well established that the legislature may, without affecting vested interests, shorten or extend a pre-existing period of limitation. *Wilson v. Iseminger,* 185 U.S. 55 (1902); *Turner v. New York,* 168 U.S. 90 (1897); *Graves v. Howard,* 159 N.C. 594, 75 S.E. 998 (1912). If the new statute shortens the period, however, it must, to comport with due process, provide a reasonable time for filing actions which have accrued but which have not been filed when the new statute takes effect. *Atchafalaya Land Co. v. F.B. Williams Cypress Co.,* 258 U.S. 190 (1922); *Wheeler v. Jackson,* 137 U.S. 245 (1890); *Saranac Land Company v. Comptroller,* 177 U.S. 318 (1899); *Turner v. New York, supra,* 168 U.S. 90; *Koshkonong v. Burton,* 104 U.S. 668 (1881); *Terry v. Anderson,* 95 U.S. 628 (1877); *Barnhardt v. Morrison,* 178 N.C.

563, 101 S.E. 218 (1919). In *Barnhardt, supra,* 178 N.C. at 568, 101 S.E. at 221, this Court said:

> "It is essential that statutes barring a right 'allow a reasonable time after they take effect for the commencement of suits upon existing causes of action; though what shall be considered a reasonable time must be settled by the judgment of the Legislature, and the Courts will not inquire into the wisdom of its decision in establishing the period of legal bar, unless the time allowed is manifestly so insufficient that the statute becomes a denial of justice.' Cooley, Const. Lim., 451."

Chapter 977 provided almost eight months between its ratification date (12 May 1976) and its effective date (1 January 1977). At least two North Carolina cases support the proposition that this is a reasonable time. *Matthews v. Peterson,* 150 N.C. 132, 63 S.E. 722 (1909) (five months between ratification and effectuation held reasonable); *Clodfelter v. Bates,* 44 N.C. App. 107, 260 S.E. 2d 672 (1979), *disc. rev. denied,* 299 N.C. 329, 265 S.E. 2d 394 (1980) (plaintiff's action barred by G.S. 1-15(c) when plaintiff discovered injury more than seven months before statute's effective date); *but see Blevins v. Utilities, Inc.,* 209 N.C. 683, 184 S.E. 517 (1936) (six-month grace period deemed unreasonable).

The question before us, however, is not whether the statutory grace period on its face is reasonable. Plaintiff's claim under the law as it existed before 1 January 1977 did not accrue until 22 November 1976. Thus plaintiff was denied the benefit of most of the grace period to which, had she discovered her claim earlier, she would have been entitled. The new statute, G.S. 1-15(c), as we have said, not only shortened the period of limitation from ten to four years; it also changed the time of accrual of actions and, consequently, the time from which the period of limitation begins to run, from the time of discovery to the time of defendant's last act. The new statute, if properly applicable, effectively barred plaintiff's action immediately upon the statute's taking effect. *As applied to plaintiff,* the statute provided her only thirty-nine days in which to file her claim after she discovered it.

The question, then, before us is whether the statute *as applied to plaintiff* afforded to her a reasonable time within

which to bring her action. We conclude that it did not because the thirty-nine day period is constitutionally insufficient and unreasonable.

Courts ordinarily will not inquire into the wisdom of a legislative determination as to the grace period to be afforded unless the time allowed is so insufficient as to constitute a denial of justice. *Wilson v. Iseminger, supra,* 185 U.S. 55; *Barnhardt v. Morrison, supra,* 178 N.C. 563, 101 S.E. 218. In other words, a grace period is unreasonable only if the time afforded for bringing suit on existing causes of action is so short that the right to sue is "practically denied." *Id.* at 568, 101 S.E. 2d at 221, *quoting Adams & Freese Co. v. Kenoyer,* 17 N.D. 302, 116 N.W. 98 (1908). *See generally* 51 Am. Jur. 2d *Limitation of Actions* § 37 (1970). Furthermore, the function of the judiciary is limited to determining whether a particular time is reasonable or unreasonable. "Courts cannot go further and fix a time different from that fixed by the Legislature within which suits may be brought. . . . The fixing of the time within which to bring suit, under such circumstances ... is not within the power of the judiciary." *Barnhardt v. Morrison, supra,* 178 N.C. 563, 568, 101 S.E. 2d 218, 221, *quoting Adams & Freese Co. v. Kenoyer, supra,* 17 N.D. 302, 116 N.W. 98.

We cannot find, nor have we been referred to, any North Carolina case which has approved a grace period shorter than five months. Such a period was approved in *Matthews v. Peterson, supra,* 150 N.C. 132, 63 S.E. 722. Indeed, except for cases refusing to apply statutes which provided no grace period at all, *Trust Co. v. Redwine,* 204 N.C. 125, 167 S.E. 687 (1933); *Barnhardt v. Morrison, supra,* 178 N.C. 563, 101 S.E. 218, our cases do not appear to have considered a period so short as thirty-nine days.

Cases from other jurisdictions, however, strongly support our conclusion that thirty-nine days is an unreasonably short period and, therefore, constitutionally insufficient.[8]

[8]The cases dealing with whether a particular grace period is constitutionally sufficient are voluminous. *See generally* Annot., 120 A.L.R. 758 (1939); Annot., 49 A.L.R. 1263 (1927). Accordingly, we here note only those cases wherein the grace period in question concerned five months or less: *Lamb v. Powder River Live Stock Co.,* 132 F. 2d 434 (8th Cir. 1904) (three month period within which suit

The recent *Cutsinger* decision in Illinois, *supra*, n. 8, involved a medical malpractice action brought under a statute similar to G.S. 1-15(c). In *Cutsinger*, the defendant physician allegedly negligently left a sponge in the plaintiff's abdominal cavity while performing a gall bladder operation in 1969. The Illinois statute provided that such claims had to be brought within two years after the plaintiff knew or should have known of the injury, but that in no event could an action be maintained more than ten years from defendant's last negligent act. Effective 19 September 1976, however, the Illinois statute was amended so that the ten-year period was reduced to four years. There was evidence supporting a discovery date of 4 September 1976, but plaintiff in *Cutsinger* did not file her action until 13 January 1977, some seven years after the operation and approximately five months after the amendment. The plaintiff argued that she was denied a constitutionally reasonable grace period within which to file her action. The Illinois Court of Appeals held that if the injury was discovered on 4 September 1976, fifteen days prior to the amendment's effective date, plaintiff was not afforded a constitutionally reasonable time and the new statute could not, therefore, bar her claim.

We find other cases which seem to approve shorter periods of limitation either distinguishable, in that they do not deal

on certain judgments rendered outside the state had to be commenced within the state found unreasonable); *Cutsinger v. Cullinan*, 72 Ill. App. 2d 527, 391 N.E. 2d 177 (1979) (fifteen days inadequate grace period within which to bring a medical malpractice claim); *Gilbert v. Ackerman*, 159 N.Y. 118, 53 N.E. 753 (1899) (four and one-half month grace period regarding actions against a corporate director found unreasonable); *Parmenter v. State*, 135 N.Y. 154, 31 N.E. 1035 (1892) (eight-week grace period found to be unreasonable); *Malossi v. McElligott*, 166 Misc. 513, 2 N.Y.S. 2d 712 (1938) (four-month grace period within which to file an action seeking review of an officer's determination deemed unreasonable); *Adams & Freese Co. v. Kenoyer, supra*, 17 N.D. 302, 116 N.W. 98 (1908) (three months and twenty-one days unreasonable grace period for institution of proceedings on mortgages): *Relyea v. Tomahawk Paper & Pulp Co.*, 102 Wis. 301, 78 N.W. 412 (1899) (sixty-one day grace period in regard to a personal injury claim found insufficient).

with statutes which shorten pre-existing periods, or simply unpersuasive.[9]

[2] Defendant next argues that even if plaintiff's claim cannot be constitutionally barred by the four-year period of limitation in G.S. 1-15(c), it should be barred by the "one-year provision" therein since plaintiff's claim was brought more than one year from the date of discovery. Defendant and, apparently, the Court of Appeals, seem to treat the "one-year provision" of the statute as if it were a period of limitation separate and apart from the four and ten-year periods, severable therefrom, and independently enforceable. Defendant relies heavily on Section 7 of Chapter 977 which provides,

> "If any *provision* of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable." (Emphasis supplied.)

Defendant also relies on the principle that when only part of a statute is unconstitutional, the constitutional portions will be given effect as long as they are severable from the invalid provisions. *State ex rel Andrews v. Chateau X*, 296 N.C. 251, 250 S.E. 2d 603 (1979); *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).

We do not think the legislature intended the severability provision in Section 7 to refer to the various *clauses* of G.S. 1-15(c), which comprise only one section and indeed constitute only one "provision" of Chapter 977. This Chapter is entitled,

[9]*See, e.g., Shaw v. State*, 8 Ariz. App. 447, 447 P. 2d 262 (1968) (statute providing that actions by a lessor of a motor vehicle weighing over 6,000 pounds against the state must be commenced within thirty days of payment held not to violate any constitutional rights of the lessor); *Oberst v. Mays*, 148 Colo. 285, 365 P. 2d 902 (1961) (thirty-day limitation period in which landowner aggrieved by assessment could test its validity held not unreasonably short); *State, ex rel, v. Board of Education*, 137 Kan. 451, 21 P. 2d 295 (1933) (forty-five day period within which creditors could present claims against the state held reasonable); *Mulvey v. Boston*, 197 Mass. 178, 83 N.E. 402 (1908) (thirty-day period within which to bring existing tort claims against municipalities held reasonable).

"An Act to Revise and Provide for Procedural and Substantive Laws Governing Claims for Professional Malpractice: To Revise the Statute of Limitations for Adults and Minors; To Provide for a Standard of Care, A Doctrine of Informed Consent, an Extension of the Good Samaritan Law, and the Elimination of the Ad Damnum Clause." As implied in its title, the act is far ranging in scope; its various provisions deal with several aspects of professional malpractice. Its most comprehensive provision, Section 4, deals exclusively with medical malpractice actions.

Further, where the various clauses of a statute are so interrelated and mutually dependent that one clause cannot be enforced without reference to another, the statute must stand or fall as a whole. *Surplus Store, Inc. v. Hunter*, 257 N.C. 206, 125 S.E. 2d 764 (1962). "A statute may be valid in part and invalid in part. If the parts are independent, or separable, *but not otherwise*, the invalid part may be rejected and the valid part may stand, provided it is complete in itself and capable of enforcement." *Constantian v. Anson County*, 244 N.C. 221, 228, 93 S.E. 2d 163, 168 (1956), *quoting* 82 C.J.S. *Statutes* § 92 (1953); *Hobbs v. Moore County*, 267 N.C. 665, 149 S.E. 2d 1 (1966). (Emphasis supplied.)

We are satisfied that the various clauses of G.S. 1-15(c) are so interrelated and mutually dependent as to be inseparable for purposes of determining the constitutionality of the statute's application to this case. The statute contains three periods of limitation which can properly be denominated as such — a three-year period, a four-year period, and a ten-year period. These are the periods in the statute which begin running when a malpractice claim accrues, *i.e.*, at the time of defendant's last negligent act. Periods of limitation, by definition, are those periods which begin running upon accrual of the claim. G.S. 1-15(a); *Motor Lines, Inc. v. General Motors Corp.*, 258 N.C. 323, 128 S.E. 2d 413 (1962).

The primary limitation period of G.S. 1-15(c) is three years, *Stanley v. Brown, supra*, 43 N.C. App. 503, 259 S.E. 2d 408, while the four and ten-year periods are exceptions thereto. The latter limitation periods apply only where the injury is not, nor should

have been, discovered within two years of accrual, that is, within two years of the defendant's last act. Thus the four-year limitation period for non-"foreign object" claims, and the ten-year limitation period for "foreign object" claims, are both triggered by discovery of the injury more than two years after accrual. The one-year clause is a qualification of the four and ten-year limitation periods, which are, as noted, exceptions to the normal three-year period. If, therefore, the four-year period of limitation bars the action, as would be the case here if the statute were properly applicable, there is no reason to consider this qualification since it does not come into play. The qualification is to be considered only when the plaintiff has filed an action within the applicable limitation period. It is not an independent, separable provision but is part of a carefully meshed system of time limitations in malpractice actions, the cornerstones of which are the three, four and ten-year periods of limitation. As a qualification it must stand or fall with that which it qualifies.

Hence, if the four-year period of limitation contained in G.S. 1-15(c) cannot constitutionally be applied to plaintiff's claim, neither can the one-year-from-discovery clause which qualifies the limitation period.

III

[5] The second question presented is whether a divorced mother, who has legal custody of her minor child and provides at least one-half of the support for that child, including all medical expenses not covered by insurance provided by the father, has standing to bring a claim for medical expenses and loss of services resulting from an injury to the child. We answer that she has standing.

The obligation to support and provide medical treatment for minor children has traditionally been placed on the father. In turn, the father ordinarily has been entitled to services of his child during the child's minority and, as between the parents, has alone been afforded the right to bring suit for parental losses due to injuries to the child. In contrast, the mother ordinarily had no such parental rights recognized by law, but was

entitled "only to reverence and respect." 59 Am. Jur. 2d *Parent and Child* § 11 (1971). Thus, although the plaintiff has legal custody of Brian and provides at least one-half of his support, including all medical expenses not covered by medical insurance provided by the father[10] defendant maintains that only Brian's father is entitled to bring this action. We do not agree.

[3,4] Two claims may arise when an unemancipated minor child is injured by the negligence of another: (1) a claim on behalf of the minor child to recover for his losses caused by the injury, and (2) a claim by the parent, ordinarily the father, for parental losses caused by (a) loss of services during the child's minority, and (b) medical expenses reasonably necessary for treating the child's injuries. *Shipp v. Stage Lines*, 192 N.C. 475, 135 S.E. 339 (1926). The parental right of action is based upon the support obligation. "The father's right of action . . . is based not only upon the right to services of the child but also upon his duty to care for and maintain the child." *White v. Holding*, 217 N.C. 329, 7 S.E. 2d 825 (1940). Although this Court has stated that the father's primary entitlement to the services of his minor child exists as long as the minor is "in his custody or under his control," *Smith v. Hewett*, 235 N.C. 615, 617, 70 S.E. 2d 825, 827 (1952), we believe that "custody or control" in this context necessarily includes the support obligation. The mere fact of custody does not entitle a parent to claim loss of services if that parent has failed to fulfill his or her support obligations. The parental right to the child's services, being contingent on parental fulfillment of support obligations, may be lost when the parent neglects or refuses to furnish support. *See Gillikin v. Burbage*, 263 N.C. 317, 139 S.E. 2d 753 (1965); *Hunycutt v. Thompson*, 159 N.C. 29, 74 S.E. 628 (1912); *Howton v. Howton*, 51 Cal. App. 2d 323, 124 P. 2d 837 (1942); *Evans v. Kansas City Bridge Co.*, 213 Mo. App. 101, 247 S.W. 213 (1922); *Lessard v. Great Falls Woolen Co.*, 83 N.H. 576, 145 A. 782 (1929); *Brooks v.*

[10]The record reveals by way of plaintiff's answers to some of defendant's interrogatories that by virtue of a separation agreement between plaintiff and the child's father, plaintiff has custody of the child with visitation rights accorded to the father; out of $250 needed monthly to support the child, the father provides only $125 and the balance is provided by the plaintiff; the father provides "medical insurance" for the child, but plaintiff pays all medical expenses not covered by medical insurance.

DeWitt, 178 S.W. 2d (1944), *rev'd on other grds.*, 143 Tex. 122, 182 S.W. 2d 687 (1944), *cert denied*, 325 U.S. 862 (1945). The parental right to recover for both loss of services and medical expenses is, therefore, tied to the support obligation; consequently the father ordinarily has the exclusive right to bring the action since he is primarily responsible for supporting the child and presumably is fulfilling his responsibility.

[5] In contrast, the mother's duty to provide child support is secondary. *Tidwell v. Booker*, 290 N.C. 98, 225 S.E. 2d 816 (1976). The mother does, however, have an obligation to support her child when the father fails in whole or in part to do so. In a recent interpretation of the child support provisions found in G.S. 50-13.4(b) and (c), we said:

> "Taken together, these two statutes clearly contemplate a mutuality of obligation on the part of both parents to provide material support for their minor children where circumstances preclude placing the duty of support upon the father alone. Thus, where the father cannot reasonably be expected to bear all the expenses necessary 'to meet the reasonable needs of the child[ren],' this Court has both the authority and the duty to order that the mother contribute supplementary support to the degree that she is able." *Coble v. Coble*, 300 N.C. 708, 268 S.E. 2d 185 (1980).

Since parental claims for both loss of services and medical expenses are based upon the parental support obligation, and since the mother has a legal obligation to support her child, even if secondary, a mother who has custody of the child and provides at least one-half of the child's support including some of the child's medical expenses should have standing to bring such claims. This much has been recognized by Professor Robert E. Lee, who in 3 *North Carolina Family Law*, § 241, pp. 108-09, (1963) wrote:

> "The mother has such right of action where, by reason of the father's death, abandonment, *or other cause*, the duty of support and the right to the child's earnings have devolved upon her . . . where actual custody, support and care of a minor is in the mother or some person other than the

father, it would seem that this should be a most important factor in holding that such person is the one to bring the action." (Emphasis supplied.)

Although modern statutes make the father and mother joint guardians of their children and equalize their parental obligations and rights, even under the common law the mother "might be entitled to bring an action for loss of services of an infant child where she shows facts entitling her to the services of the infant. . . . The modern tendency even at common law is to treat the mother's right with considerable favor." Schouler Marr. Div. Sep. & Dom. Rel. § 753, pp. 815, 816 (Sixth Ed.), *quoted in Winnick v. Kupperman Construction Co.*, 29 App. Div. 2d 261, 287 N.Y.S. 2d 329 (1968). A number of decisions have permitted the mother to bring parental claims alone or in conjunction with her husband. *E.g., Sims v. Virginia Electric & Power Co.*, 550 F. 2d 929 (4th Cir. 1977); *Southwestern Gas & Electric Co. v. Denney*, 190 Ark. 934, 82 S.W. 2d 17 (1935); *Yordon v. Savage*, 279 So. 2d 844 (Fla. 1973); *Long v. City of Weirton*, 214 S.E. 2d 832 (W. Va. 1975); *Barker v. Saunders*, 116 W. Va. 548, 182 S.E. 289 (1935): *Thoreson v. Milwaukee & Suburban Transport Co.*, 56 Wis. 2d 231, 201 N.W. 2d 745 (1972).

Defendant, maintaining plaintiff has no standing, relies on *Smith v. Hewitt, supra*, 235 N.C. 615, 70 S.E. 2d 825. This reliance is misplaced. In *Smith* two claims were brought to recover damages resulting from an accident in which a minor was injured. The first was brought by the unemancipated minor appearing through his mother as next friend. In the other claim the minor's father, divorced from the mother, sought to recover for loss of services and medical expenses. This Court, noting the father is primarily entitled to the services of the minor child as long as the child is in his custody or control, permitted the father to recover. In *Smith*, however, no custody order had been made, and medical bills were charged to the father. There was no evidence as to who in fact supported the child generally. Although the record indicated that the child lived part of the time with his mother and part of the time with his grandmother, the mother testified, "We were both to have him together." *Id.* at 617, 70 S.E. 2d at 827.

We are not called on here to adjudicate what rights, if any, the father may have in a recovery made by the mother because he furnishes one-half of the child's support plus medical insurance.[11] The case presents no dispute between the parents. There can be, of course, no double recovery and defendant should not have to defend identical claims but once. *See Sims v. Virginia Electric & Power Co., supra,* 550 F. 2d 929. From defendant's perspective, therefore, it should make little difference which parent brings the parental claims.

The decision of the Court of Appeals is reversed, and this case is remanded to that court with instructions to remand to the trial court for further proceedings consistent with this opinion.

Reversed and Remanded.

LORAN S. CLARK v. MARGARET J. CLARK

No. 83

(Filed 7 October 1980)

1. Divorce and Alimony § 16.9– amount of alimony – finding that budgeted expenses not "necessary"

The trial court's finding in an alimony action that all of the items in a budget submitted by defendant wife were not "needed or necessary" items did not show that the court applied an improper standard in determining the amount of alimony for the wife of a wealthy man, since it was clear that the court considered what expenses were necessary to maintain the standard of living of a woman who was married to a man of substantial means rather than what was necessary to maintain bare subsistence.

---

[11]Neither are we faced with a situation where the mother has mere custody and the father provides *all* support including medical expenses, or simply all the medical expenses. If, in such cases, it can be shown that neither party has defaulted on any parental obligation, interesting questions would arise as to which parent properly had standing to bring a claim for loss of services, or medical expenses, or both. Having, we believe, properly resolved the case before us, we leave these questions, as interesting as they are, for a later day.

2. **Divorce and Alimony § 16.9– amount of alimony – income tax consequences**

Periodic payments received by a wife, which constitute a discharge of a legal obligation which the husband has to provide in the way of alimony by virtue of a court decree entered after 1 March 1954, are taxable to the wife and deductible by the husband, and though G.S. 50-16.5(a) does not include the income tax consequences of an award of alimony as a factor to be weighed in the balance in determining the proper amount of the award, such would be a proper consideration in making that determination.

3. **Divorce and Alimony § 16.9– amount of alimony – income tax consequences**

An award of alimony to defendant wife was not erroneous on the ground that the trial judge failed to consider the income tax consequences of the award where defendant offered evidence of her potential income tax liability at trial, and the record did not indicate that this liability was not one of the factors taken into consideration in the determination of the amount of alimony to which defendant was entitled.

4. **Divorce and Alimony § 16.9– alimony order – failure to provide for possession of homeplace**

The trial court did not abuse its discretion in failing to make some provision in its alimony order for possession of the parties' homeplace.

5. **Divorce and Alimony § 16.5– alimony action – estimate of future value of stock – incompetency**

The trial court in an alimony action properly excluded a handwritten statement by plaintiff which forecast the value of his interest in a corporation, since the statement, which estimated that the value of plaintiff's stock would increase annually by the sum of $100,000 after May 1976, extended indefinitely into the future and was therefore incompetent, and since no basis for the valuation was established.

6. **Divorce and Alimony § 18.16– alimony action – showing required for award of counsel fees**

For an award of counsel fees to be made in an alimony case, it must be determined that the spouse is entitled to the relief demanded, that the spouse is a dependent spouse, and that the dependent spouse is without sufficient means whereon to subsist during the prosecution of the suit and to defray the necessary expenses thereof.

7. **Divorce and Alimony § 18.16– alimony action – amount of counsel fees – determining factors**

In making its determination of the proper amount of counsel fees which are to be awarded a dependent spouse in an alimony action, the trial court must consider the separate estates of the parties, the nature and worth of the legal services rendered, the magnitude of the task imposed upon counsel, and the parties' respective conditions and financial circumstances.

8. **Divorce and Alimony § 18.16– alimony action – amount of counsel fees – abuse of discretion**

The trial court's award of only $500 in legal fees to defendant wife in an

alimony action constituted an abuse of discretion, though defendant had a separate estate of approximately $87,000, since plaintiff's net worth was approximately $650,000, including a savings account of $75,000; defendant was not under an obligation to meet the expenses of the litigation through the unreasonable depletion of her separate estate, since it was considerably smaller than that of the supporting spouse; and there was no indication in the record that the trial court considered the nature and worth of the services rendered by defense counsel or the magnitude of the task imposed upon them.

Justice BROCK took no part in the consideration or determination of this case.

APPEAL by defendant from the decision of the Court of Appeals reported in 44 N.C. App. 649, 262 S.E. 2d 659 (1980), affirming in part and vacating in part the judgment of *Pearson, J.*, entered 10 November 1978 in DURHAM County District Court.

Plaintiff and defendant were married on 16 January 1954. Following the death of his first wife, plaintiff moved from Rochester, New York, to Durham, North Carolina, where he built a motel, utilizing approximately $100,000 of his own funds which he had acquired in other business ventures. The motel opened for business in 1952. After defendant married plaintiff, she began working at the motel as a salaried employee. She remained in that capacity for approximately one year.

In 1962, plaintiff sold the motel in Durham, and the couple moved to Puerto Rico where plaintiff engaged in manufacturing golf gloves. While defendant assisted her husband by entertaining and engaging in other business-related activities, she was not again employed outside of the home during the course of her marriage to plaintiff.

Plaintiff remained in the manufacturing business for six years, selling his interest in the concern in 1968. Thereupon, he and defendant returned to Durham. After his return to North Carolina, plaintiff was approached for advice concerning the operation of the Hilton Inn located in Durham.

By May of 1969, the Hilton Inn was in a precarious financial condition. Over the course of the preceding thirty-eight months of operation, the business had accumulated losses amounting to $524,000.00. After reviewing the situation, plaintiff recom-

mended that the business seek protection from its creditors under Chapter Ten of the Bankruptcy Act so that it could reorganize its operations. On 10 September 1969, the United States District Court for the Middle District of North Carolina granted the motel's parent company, Landmark Inns of Durham, such protection. The court also entered an order appointing Richard M. Hutson II to serve as trustee in bankruptcy. The trustee, in turn, employed plaintiff as the manager of the motel. In the ensuing forty-two months, the company was able to show a profit of $421,000.00. On 16 May 1973, the company's protection under the Bankruptcy Act terminated. At that time, plaintiff purchased 101,000 shares of stock, controlling interest, in the corporation for one dollar per share. Plaintiff serves as chairman of the board of directors of the corporation, now known as Landmark Inns of Durham, Inc., as well as its secretary and treasurer. In addition, he serves as chief operating officer. His salary from the corporation has increased from $52,000 in 1974 to $79,500 in 1978. Plaintiff has also engaged in a partnership with two other persons in the operation of a motel located in Myrtle Beach, South Carolina, known as the Four Seasons Motor Inn.

Throughout the course of their marriage, plaintiff and defendant enjoyed a high standard of living. They lived in a house in Durham whose purchase price in 1974 was $75,000.00. The couple accumulated numerous items of personal property, including silverware, porcelain and antique furniture. They travelled extensively, counting among their journeys a seven-month tour around the world and several Carribean cruises.

On 6 December 1976, plaintiff moved out of the couple's home on Wilshire Drive in Durham. On 29 March 1977, he filed suit against defendant, seeking a divorce from bed and board, alleging that "the mental abuse associated with the defendant's attitude toward the plaintiff has rendered the plaintiff's continued life with the defendant both intolerable and burdensome." Defendant answered, denying the allegations of the complaint, and counterclaimed for alimony *pendente lite*, permanent alimony without divorce and counsel fees, alleging that plaintiff had abandoned her without justification and had willfully failed to provide her with necessary subsistence.

In an order entered 19 May 1977, the District Court, Moore, J., found that the parties had been lawfully married on 16 January 1954; that no children had been born of the marriage; that plaintiff was the supporting spouse; and that defendant was the dependent spouse. Defendant was awarded alimony *pendente lite* in the amount of $1,400 per month, continued possession of the parties' house, and $600 in counsel fees. Defendant was ordered to make the mortgage payments on the dwelling, as well as to pay all insurance premiums and *ad valorem* taxes thereon. Defendant had the further obligation to pay the costs of ordinary repairs to the house.

Before the hearing on the merits, the parties stipulated that plaintiff would withdraw his complaint for divorce from bed and board. They further stipulated that plaintiff was the supporting spouse; that defendant was the dependent spouse; and that the only issue would be the amount and type of permanent alimony. Any award of counsel fees to defendant was to be in the discretion of the trial judge.

The matter came on for hearing before Judge Pearson on 18 October 1978. Based upon the testimony of the parties as well as exhibits offered by each, the trial judge entered an order on 10 November 1978 in which he made findings of fact and conclusions of law. The court concluded as a matter of law that defendant was entitled "to live in a lifestyle to which she had become accustomed during the marriage and up to and including the date of the separation. . . ." Defendant was awarded permanent alimony in the amount of $1,500 per month as well as counsel fees in the amount of $500.00. The court further directed the parties to divide the personal property located in their homeplace in a manner which was mutually agreed upon by the couple.

The Court of Appeals, in an opinion written by Judge Parker, concurred in by Judge Martin (Robert M.), affirmed that portion of the district court's judgment which awarded defendant permanent alimony and counsel fees. The Court of Appeals vacated that portion of the judgment which directed the couple to divide their personal property. Judge Erwin dissented, concluding that the trial court had abused its discretion

in making the award of permanent alimony in the amount of $1,500, and by not making any provision for the continued payment of the mortgage insurance, *ad valorem* taxes, and ordinary or major repairs of the couple's house.

Defendant appealed pursuant to G.S. § 7A-30(2).

Maxwell, Freeman, Beason and Lambe, P.A., by James B. Maxwell, for plaintiff-appellee.

Haywood, Denny and Miller, by Egbert L. Haywood, David L. Lomas and George W. Miller, for defendant-appellant.

BRITT, Justice.

Defendant first contends that the trial court abused its discretion in the award of permanent alimony in the amount of $1,500 per month on the grounds that it failed to consider the income tax consequences of the award; that it applied an incorrect standard in evaluating her expenses in light of her accustomed standard of living; and that it failed to make provision for the disposition of the parties' homeplace. We agree with the Court of Appeals that there was no abuse of discretion on these points.

While defendant has presented three arguments with respect to this contention, the starting point of our discussion as to each must be that which is provided by G.S. § 50-16.5(a) which dictates: "Alimony shall be in such amount as the circumstances render necessary, having due regard to the estates, earnings, earning capacity, condition, accustomed standard of living of the parties, and other facts of the particular case." In applying the statute to particular factual situations, our cases have consistently embodied the rule that while the factors which are delineated in the statute must be considered by the judge in determining the amount of alimony to be awarded in a given case, his determination of the proper amount may not be disturbed on appeal absent a clear showing of abuse of discretion. *E.g., Eudy v. Eudy*, 288 N.C. 71, 215 S.E. 2d 782 (1975); *Schloss v. Schloss*, 273 N.C. 266, 160 S.E. 2d 5 (1968); *Sayland v. Sayland*, 267 N.C. 378, 148 S.E. 2d 218 (1966). By the exercise of

his discretion, a judge ought not to arrogate unto himself arbitrary power to be used in such a manner so as to gratify his personal passions or partialities. *Hensley v. McDowell Furniture Co.*, 164 N.C. 148, 80 S.E. 154 (1913). Discretion is properly applied in those instances where, upon deliberation and with firmness, a judge deems its use necessary to the proper execution of justice. *See Jarrett v. High Point Trunk & Bag Co.*, 142 N.C. 466, 55 S.E. 338 (1906). A judge is subject to reversal for abuse of discretion only upon a showing by a litigant that the challenged actions are manifestly unsupported by reason. *See Martin v. Martin*, 263 N.C. 86, 138 S.E. 2d 801 (1964). It is with these principles in mind that we now turn our attention to a consideration of defendant's challenge to the award of permanent alimony which was made by Judge Pearson.

[1] Defendant initially argues that the trial court erred by applying an incorrect standard in formulating its award of permanent alimony. We disagree.

Prior to their separation on 6 December 1976, plaintiff and defendant had established and maintained a high standard of living. The couple lived in a house in an exclusive section of Durham whose cost at the time of its purchase in 1974 was $75,000.00. Throughout their marriage, the parties had traveled extensively, including trips to Canada, the Carribean Sea and Europe, as well as a trip around the world. The couple ate and dressed well. Except for the time they lived in Puerto Rico while plaintiff manufactured golf gloves, the parties maintained a membership in the Hope Valley Country Club in Durham. Throughout their marriage, the couple worked to accumulate numerous items of personal property, including antiques, porcelain and silverware. The couple consistently enjoyed this lifestyle throughout the course of their marriage.

Defendant worked outside of the home only for a short while early in the marriage and thereafter supported her husband in his business endeavors in other ways. Upon defendant's withdrawal from the work force, the parties looked to the income of plaintiff to maintain them in the style to which they had become accustomed. The record does not reflect plaintiff's income throughout the course of the marriage. However, it does

indicate rather substantial growth in his income in the latter years of the parties' marital relationship. Plaintiff's taxable income in the years 1969 through 1973 fluctuated between a high of $33,986.69 in 1972 and a low of $10,594.42 in 1970. It was during this period that plaintiff worked with the trustee in bankruptcy to put the Hilton Inn on a sound financial footing. Plaintiff's association with Landmark Inns of Durham, Inc., commenced in 1974. His income thereupon grew from $52,000 in 1974 to $72,000 in 1976, the last year that the parties lived together as husband and wife. Other sources of income brought plaintiff's income for 1976 to a total of $95,756.17.

At the hearing held for the purpose of determining the amount of permanent alimony which was to be awarded, the trial court heard evidence not only of the income and lifestyle of the parties but also of their respective separate estates. Based upon this evidence, the trial court found as a fact that plaintiff's net worth in 1975 was approximately $650,000.00. His separate estate included several parcels of real estate, as well as two-third's ownership of Landmark Inns of Durham, Inc. By March 1978, plaintiff had built a savings account up to a balance of $75,000.00. Defendant's net worth consisted of stock, bonds, savings accounts, and a one-half interest in the Wilshire Drive property. Taken together, these items gave defendant assets amounting to $87,000.00.

The trial judge was presented with an annual budget which projected expenses for defendant in the amount of $23,200.57. In his order, Judge Pearson concluded that "... the Court does not feel that all of the items on the budget submitted by the wife, Margaret J. Clark, on her Exhibit 1, are needed or necessary items."[1] While we do not consider it proper for us to speculate as to the items which Judge Pearson had in mind in making this observation, an examination of the proposed budget in

[1]In seeking an award of alimony *pendente lite*, defendant submitted annual estimated expenses to the court amounting to $23,500.00. In his order granting defendant alimony *pendente lite* in the amount of $1,400 monthly, Judge Moore observed that "[T]he Court considers the $23,500.00 as a somewhat liberal expense account and that some of the expenses may not be economically calculated in determining pure subsistence."

light of other evidence which was adduced at the hearing refutes defendant's contention that the order manifests an abuse of discretion.

While the amount of permanent alimony that is to be awarded is basically a question of fairness and justice to all concerned parties, *Beall v. Beall*, 290 N.C. 669, 228 S.E. 2d 407 (1976); *Sayland v. Sayland, supra*, the precise amount of the award in a given case is subject to the principle that the wife of a wealthy man should be awarded an amount commensurate with the normal standard of living of a man of like financial resources. *Schloss v. Schloss, supra.* Before this court, defendant characterized the use of the term "needed or necessary" as an abuse of discretion manifesting an application of an improper standard. We disagree.

Viewed within the context of the findings of fact concerning the parties' accustomed standard of living, the court's use of the phrase is not inconsistent with the standard enunciated by *Schloss v. Schloss, supra.* It is manifest that the court considered what expenses were necessary to maintain the standard of living of a woman who was married to a man of substantial means, rather than in terms of what was necessary to maintain bare subsistence. There is no rule of law which would serve to require a trial judge to accept without question a party's assertion of what would constitute an award of alimony which was adequate to maintain a particular standard of living. *See Williams v. Williams*, 299 N.C. 174, 261 S.E. 2d 849 (1980).[2] To so require would be to make a mockery of the standard which defendant properly asserts as controlling in the present case. Indeed, it is incumbent upon the court, in making a determina-

[2]Speaking for the court in *Williams v. Williams*, Justice Carlton observed that

> ... the trial court must then determine whether the spouse seeking alimony has a demonstrated need for financial contribution from the other spouse in order to maintain the standard of living of the spouse seeking alimony in the manner to which the spouse became accustomed during the last several years prior to separation. This would entail considering what reasonable expenses the party seeking alimony has, bearing in mind the family unit's accustomed standard of living.

299 N.C. at 183, 261 S.E. 2d at 856.

tion of the award of alimony, to weigh the evidence so as to make an independent determination of the proper amount.

Furthermore, we note that with the entry of judgment in the present case awarding defendant permanent alimony, she was no longer saddled with certain obligations imposed on her by the order granting her alimony *pendente lite*. That order imposed upon her the obligation of bearing the burdens normally incident to home ownership in regard to the Wilshire Drive property. The budget which defendant submitted to Judge Pearson called for the expenditure of approximately $8,000 in discharge of the mortgage payments and the maintenance of the house in an adequate state of repair, as well as the payment of property taxes and insurance premiums.

As a general rule, the award of permanent alimony terminates an order of alimony *pendente lite*. *Rickert v. Rickert*, 282 N.C. 373, 193 S.E. 2d 79 (1972). The order of temporary alimony had granted defendant the sum of $1,400 per month, $100 per month less than the amount awarded as permanent alimony by Judge Pearson. Yet, with the smaller sum which was available to her, defendant met the obligations of home ownership as well as increased the balance in her savings account by approximately $9,000.00. Therefore, upon the record which is before us, we are unable to agree with defendant that the trial court applied the wrong standard in determining the amount of her alimony award.

Similarly, we do not find that the trial judge committed error in failing to consider the income tax consequences of the award of permanent alimony.

[2] Periodic payments received by a wife, which constitute a discharge of a legal obligation which the husband has to provide in the way of alimony by virtue of a court decree entered after March 1, 1954, are taxable to the wife and deductible by the husband. I.R.C. § 71 (1954). While it is true that the express language of G.S. § 50-16.5(a) does not include the income tax consequences of an award of alimony as a factor to be weighed in the balance in determining the proper amount of the award, we are of the opinion that such would be a proper consideration

in making that determination. While the award to defendant amounts to $18,000 annually, the sum of money which is available to her for the maintenance of her standard of living will be considerably less than that because the payments which she receives under the decree entered by Judge Pearson are taxable to her.

The statute is clearly broad enough to authorize the courts to consider the tax aspects of an award of permanent alimony by providing that "[A]limony shall be in such amount as the circumstances render necessary, having due regard to the estates, ... and other facts of the particular case." G.S. § 50-16.5(a) (1976). To ignore the income tax consequences of an award of permanent alimony would be an unreasonable application of the mandate of the statute, as well as a violation of the principle laid down by *Beall v. Beall, supra,* and *Sayland v. Sayland, supra,* that the amount of alimony that is to be awarded is basically a question of fairness and justice to all parties. We do not mean to suggest that tax consequences are in any way preeminent in the determination of the amount of the award. Nor do we mean to suggest that a trial court must compute the amount of the award in such a manner as to result in the least amount of tax liability for either the supporting spouse or the dependent spouse. We simply hold that the tax consequence of an award of alimony is but one consideration among several that are properly weighed by a trial court in determining the amount of the award. It is clear that to disregard the effect of taxation on such an award would be to flirt with an unrealistic, and potentially unjust, result. The great weight of authority in other jurisdictions supports our position. *E.g., Wetzel v. Wetzel,* 35 Wis. 2d 103, 150 N.W. 2d 482 (1967); *see generally* Annot., 51 A.L.R. 3d 461 (1973).

[3] While it is true that the trial court made no specific finding of fact concerning the income tax implications of the award, we conclude that our holding as to this argument does not require reversal. Defendant offered evidence of her potential income tax liability at trial. The record does not indicate, nor has defendant demonstrated on appeal, that this liability was not one of the factors taken into consideration in the determination of the amount of alimony to which defendant was entitled. The facts

which Judge Pearson did find support his conclusions of law and the judgment entered insofar as the award of alimony is concerned. That there was no specific finding concerning the tax consequences of the award does not amount to reversible error under these circumstances.

[4] Nor do we agree with the defendant's contention that the trial court erred in failing to make adequate provisions in its judgment with respect to the status of the parties' homeplace in Durham. In his order, Judge Pearson expressly stated

> That no division or writ of possession as to the homeplace of the parties located at 1918 Wilshire Drive in Durham, North Carolina should be made by this court.

The order granting defendant alimony *pendente lite* also granted her possession of the property located at 1918 Wilshire Drive in Durham. That order also imposed upon her the obligations of home ownership in regard to that property. As we have noted earlier, the order granting defendant permanent alimony superseded the prior order. *See Rickert v. Rickert, supra.* Defendant was no longer obligated by court order to make payments on and maintain the homeplace. Any such obligation which remains is now grounded in considerations of contract and ownership which are peripheral to this litigation. While a trial court has the authority to order payment of alimony by possession of real property, G.S. § 50-16.7(a) (1976), as well as the power to issue a writ of possession when necessary, G.S. § 50-17 (1976), the pertinent statutory provisions do not require it to do so.[3] We agree with the decision of the Court of Appeals in this respect.[4]

[3]While Judge Pearson *could* have awarded the homeplace to defendant as part of the award, defendant cannot assert that she had an automatic right to possession of the house or that such possession was an inherent aspect of her standard of living.

[4]We specifically reject plaintiff's contention that defendant's argument ought to be rejected out of hand because she did not specifically ask for the award of possession in her counterclaim. Clearly, her prayer "[F]or such other and further relief as the defendant may be entitled and which the court deems just and proper" is broad enough to include such an award. *See State Highway Com'n v. Thornton,* 271 N.C. 227, 156 S.E. 2d 248 (1967).

[5] By her second assignment of error, defendant contends that the trial court erred by excluding from evidence defendant's Exhibit 14. The exhibit is a handwritten statement by plaintiff in which he estimated the value of his controlling interest in Landmark Inns of Durham, Inc., to be $202,000 as of 1976. The document went on to forecast the value of the stock to increase annually by the sum of $100,000 after May 1976. We agree with the Court of Appeals that there was no error.

The value of property within a reasonable time before or after the commencement of an action seeking an award of permanent alimony is a proper subject of inquiry for a trial court which is hearing such a case. Otherwise, an accurate assessment of the value of the parties' separate estates and, therefore, a fair determination of ability to provide and need to receive such an award would be difficult, if not completely impossible. In the present case, defendant sought to introduce a valuation of stock in a corporation which had been prepared by plaintiff. Such a valuation of personal property may be admitted as an admission. *See Daniels v. Fowler*, 123 N.C. 35, 31 S.E. 598 (1898); *compare Everett v. Gainer*, 269 N.C. 528, 153 S.E. 2d 90 (1967) (lack or amount of internal revenue stamps on a deed is evidence of consideration paid). However, a valuation that extends into the remote future is incompetent. *Tennessee Carolina Transportation Inc. v. Strick Corp.*, 283 N.C. 423, 196 S.E. 2d 711 (1973). The exhibit in question was prepared some time prior to May 1976 and extends indefinitely into the future. Furthermore, no basis for that valuation is established in the record which is before us. *See Harrelson v. Gooden*, 229 N.C. 654, 50 S.E. 2d 901 (1948); *Nantahala Power & Light Co. v. Rogers*, 207 N.C. 751, 178 S.E. 575 (1935).

By her third assignment of error, defendant contends that the trial court abused its discretion in awarding defendant only $500 in counsel fees. This assignment has merit and we hold that the Court of Appeals erred in overruling it.

[6] In order to receive an award of counsel fees in an alimony case, it must be determined that the spouse is entitled to the relief demanded; that the spouse is a dependent spouse; and that the dependent spouse is without sufficient means whereon

to subsist during the prosecution of the suit, and defray the necessary expenses thereof. *Rickert v. Rickert, supra; see generally, Hudson v. Hudson,* 299 N.C. 465, 263 S.E. 2d 719 (1980). Whether these requirements have been met is a question of law that is reviewable on appeal, and if counsel fees are properly awarded, the amount of the award rests within the sound discretion of the trial judge and is reviewable on appeal only for an abuse of discretion. *Hudson v. Hudson, supra; Rickert v. Rickert, supra.* The guiding principle behind the allowance of counsel fees is to enable the dependent spouse, as litigant, to meet the supporting spouse, as litigant, on substantially even terms by making it possible for the dependent spouse to employ adequate and suitable legal representation. *Hudson v. Hudson, supra; Williams v. Williams, supra; Rickert v. Rickert, supra; Schloss v. Schloss, supra.*

[7] In making its determination of the proper amount of counsel fees which are to be awarded a dependent spouse as litigant, the trial court ought not to cease its inquiry with a determination of the separate estates of the parties which are available to defray the costs of litigation. *See Stanback v. Stanback,* 270 N.C. 497, 155 S.E. 2d 221 (1967). The trial court is under an obligation to conduct a broad inquiry in this regard, considering as relevant factors the nature and worth of the services rendered, the magnitude of the task imposed upon counsel, and reasonable consideration for the parties' respective conditions and financial circumstances. *Stanback v. Stanback, supra; Stadiem v. Stadiem,* 230 N.C. 318, 52 S.E. 2d 899 (1949). On appeal, the question posed is not whether the award was larger or smaller than expected, or whether it was of the customary amount. Instead, the issue becomes whether, upon consideration of all the circumstances under which it was made, it was so unreasonable as to constitute an abuse of discretion. *Stanback v. Stanback, supra; Stadiem v. Stadiem, supra.*

[8] In the present case, the disparity of financial resources which are available to the parties to defray the expenses of litigation is apparent. The record reflects that plaintiff's net worth in 1975 was approximately $650,000.00. By 1978, plaintiff had built a savings account whose balance of $75,000 approached the value of defendant's entire separate estate of

$87,000.00. To award only $500 in counsel fees to defendant in light of this substantial difference in worth manifests an abuse of discretion. While defendant is an individual of some means by contemporary standards, the law does not impose upon her the obligation to deplete her separate estate to meet the financial burdens imposed by this litigation. *Cf., Williams v. Williams*, 299 N.C. at 183-84, 261 S.E. 2d at 856. (A spouse who has a substantial separate estate is not prevented from being found to be actually, substantially dependent upon the supporting spouse where the depletion of the separate estate could maintain the accustomed standard of living.)

We think that the rationale behind our decision in *Williams v. Williams, supra*, on the question of alimony is appropriately applied to the question of counsel fees. It is true that in *Williams* we disallowed counsel fees, but in that case the separate estate of the dependent spouse was almost equal to that of the supporting spouse. It would be contrary to what we perceive to be the intent of the legislature to require a dependent spouse to meet the expenses of litigation through the unreasonable depletion of her separate estate where her separate estate is considerably smaller than that of the supporting spouse as is the case here. Furthermore, it flies in the face of common sense and fair play to so require. While in the abstract, it would seem that defendant has ample resources with which to do battle in the courts, close analysis suggests that such is the case only through unreasonable depletion of her relatively small resources.

We observe that this litigation has been underway since 1977. While the record suggests that there was extensive discovery and other activity conducted in the course of the litigation, there is no suggestion that the trial court considered the nature and worth of the services rendered by defense counsel or the magnitude of the task imposed upon them. Accordingly, on the question of counsel fees, we reverse the decision of the Court of Appeals, we vacate the award of counsel fees and remand the case to the Court of Appeals for remand to the district court for further proceedings not inconsistent with this opinion.

Affirmed in part.

Reversed in part and remanded.

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

AMERICAN MANUFACTURERS MUTUAL INSURANCE COMPANY, AMERICAN PROTECTION INSURANCE COMPANY, FEDERAL KEMPER INSURANCE COMPANY, KEMPER SECURITY INSURANCE COMPANY, LUMBERMENS MUTUAL CASUALTY COMPANY, AMERICAN MOTORISTS INSURANCE COMPANY v. JOHN RANDOLPH INGRAM, COMMISSIONER OF INSURANCE OF THE STATE OF NORTH CAROLINA, THE HEALTH CARE LIABILITY REINSURANCE EXCHANGE: THOMAS GRIFFITH AND CO., INC., and THOMAS C. HAYS, JR., INDIVIDUALLY AND AS REPRESENTATIVES OF THE NORTH CAROLINA AGENCIES AND AGENTS OF THE PLAINTIFFS IN THIS ACTION; DRS. JULIAN T. SUTTON AND G. VANCE BYRUM, P.A., JULIAN T. SUTTON, M.D., G. VANCE BYRUM, M.D., ANDERSON PAGE HARRIS, M.D., WILLIAM RUSSELL GRIFFIN, JR. AND DONALD GEORGE JOYCE, INC., DONALD GEORGE JOYCE, M.D., WILLIAM RUSSELL GRIFFIN, JR., M.D., FORSYTH SURGICAL ASSOCIATES, P.A., ROBERT L. MEANS, M.D., RILEY M. JORDAN, M.D., WILLIAM W. SUTTON, M.D., DAVID ALLYN SCUDDER, M.D., TERESITA J. FERRER ESTOYE, M.D., WAKE ANESTHESIOLOGY ASSOCIATES, INC., J. LEROY KING, M.D., LAWRENCE B. HAYNES, M.D., JAFAR M. SCHICK, M.D., ET AL.

No. 15

(Filed 7 October 1980)

1. **Insurance § 3.1; Physicians, Surgeons and Allied Professions § 11; Statutes § 8.1– medical malpractice insurance binder – effect of unconstitutional statute**

A binder for medical malpractice insurance issued by plaintiff insurer to defendant physicians while general liability insurers were required by the Health Care Liability Reinsurance Exchange Act to write such insurance was not void because the Reinsurance Exchange Act was thereafter declared unconstitutional where the record shows that plaintiff did not enter into the insurance binder contract involuntarily under coercion of the unconstitutional statute but that plaintiff deliberately and voluntarily decided to assume the liability and entered into a contract to insure defendants for thirty days regardless of the constitutionality of the Reinsurance Exchange Act.

2. **Insurance § 4.1– medical insurance binder – constitutionality of statute as condition – alteration by letter**

Any attempt by plaintiff insurer to make a binder for medical malpractice insurance conditional upon the constitutionality of the Health Care

Liability Reinsurance Exchange Act through a "Statement of Intent, Notice of Protest and Reservation of Rights" sent to defendant physicians was altered by a letter from plaintiff's agent to an agent for both plaintiff and defendants stating that defendants were fully covered.

3. **Insurance § 4.1– medical malpractice binder – contention of voidness – effect of failure to cancel**

The trial court erred in concluding that plaintiff insurer remained bound by a medical malpractice insurance binder which it contended was void because of its failure to cancel the binder, since the very fact of an attempt to cancel an insurance policy is an admission that there is a policy, and plaintiff may have waived the ground upon which it sought to avoid the policy in question and others by any attempt to cancel what it contended was a nullity.

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

APPEAL by defendants Wake Anesthesiology Associates, Inc., and its employees, Drs. Haynes, King and Schick, from decision of the Court of Appeals, 43 N.C. App. 621, 260 S.E. 2d 120 (1979), reversing judgment of *Smith (Donald), J.*, entered 24 July 1978 in WAKE Superior Court. A petition by these appellants for discretionary review was at first denied but later granted on rehearing.

Based upon stipulations of the parties at trial and the findings of the trial court to which no exceptions have been taken, the facts and circumstances which give rise to this appeal may be briefly stated as follows.

In 1975, a medical malpractice insurance crisis developed in North Carolina when the companies which traditionally provided such coverage announced their withdrawal from the malpractice insurance market. The General Assembly responded to the crisis on 28 May 1975 by enacting Chapter 427 of the 1975 North Carolina Session Laws entitled "An Act to Establish a Health Care Liability Reinsurance Exchange" (the Act) which was subsequently codified as G.S. 58-173.34 *et seq.* The Act required certain classes of general liability insurers, licensed to write liability insurance in North Carolina, to insure applicants for medical malpractice insurance, to participate in a nonprofit, unincorporated legal entity created by the Act known as the North Carolina Health Care Liability Reinsurance Ex-

change (the Reinsurance Exchange) and to participate in losses suffered by the Reinsurance Exchange on a pro rata basis based on the amount of general liability insurance written by the insurer in North Carolina. A general liability insurer could not engage in the writing of any liability insurance in North Carolina unless it complied with the provisions of the Act by providing medical malpractice insurance and participating in the Reinsurance Exchange.

Plaintiffs on this appeal are an affiliated group of Illinois insurance corporations collectively known as the Kemper Group, authorized to write general liability coverage in North Carolina. Prior to 1975, they were not writing health care liability insurance in North Carolina and had no personnel in the State with expertise in this field of insurance. The plan of operation for the Reinsurance Exchange was promulgated by the Commissioner of Insurance on 6 August 1975. Shortly thereafter, general liability insurers writing insurance in North Carolina began filing numerous individual suits challenging the constitutionality of the Reinsurance Exchange legislation and obtaining preliminary injunctions staying the application of the Act. Plaintiffs subscribed to the plan of operation subject, however, "to the reservation of its rights through legal proceedings to question the legality of said plan and the statute authorizing its adoption."

On 24 September 1975, plaintiffs mailed to each of their agents a document entitled "Statement of Intent, Notice of Protest and Reservation of Rights" which contained the following:

> "Any policy or binder of physicians and surgeons professional liability insurance issued by the Kemper Insurance Company identified below, hereinafter referred to as the Company, is issued under the mandate of North Carolina House Bill 74, Chapter 427, Session Laws of 1975, (G.S. 58-173.23 et seq.) [sic] and is issued under protest and not as a voluntary act of the Company.
>
> The validity of this statute is being tested in court. The Company intends to reinsure all eligible physicians and

surgeons professional liability insurance policies and binders in the North Carolina Health Care Liability Reinsurance Exchange, an entity created by the statute. The Company does not intend to assume any risk on its own account.

Any coverage under this policy or binder may be contingent upon the statute being valid and the ability of the Reinsurance Exchange to adequately reinsure this policy or binder.

In the event that any court declares, or enters a judgment the effect of which is to render the provisions of House Bill 74, Chapter 427, Session Laws of 1975 (G.S. 58-173.23 et seq.) [sic] invalid or unenforceable in whole or in part, or in the event the Reinsurance Exchange is inadequately funded, the Company may have the option to consider this policy as null and void as of the inception date. The Company intends to exercise that option if it is available."

Moore and Johnson Insurance Agency (Moore and Johnson), which had represented the Kemper Group in Raleigh for approximately ten years, acknowledged receipt of the "Statement of Intent, Notice of Protest and Reservation of Rights" in a letter dated 29 September 1975 written by Earl Johnson.

Since 1969, Moore and Johnson had been employed by Wake Anesthesiology Associates, Inc., and the doctors practicing therewith, Haynes, King and Schick, to provide medical malpractice insurance coverage. This coverage had been provided since 1969 by St. Paul Fire and Marine Insurance Company, which gave notice that it would terminate coverage at 12:01 a.m., 1 October 1975. Harry W. Moore of Moore and Johnson undertook to obtain other malpractice insurance coverage for defendant appellants who had decided to limit their professional practice to emergency cases only due to the unavailablility of medical malpractice insurance. On 30 September, Moore and Johnson verbally bound coverage to defendant appellants on behalf of Lumbermens Mutual Casualty Company (Lumbermens), a plaintiff in this action, for a period beginning 1 October 1975 and ending 1 November 1975. Based upon the verbal binder, defendant appellants continued the next day and thereaf-

ter to perform without restriction or limitation their usual professional services. Lumbermens issued a written binder which was forwarded to defendant appellants by Moore and Johnson on 17 October 1975. The "Statement of Intent, Notice of Protest and Reservation of Rights" was attached to the binder. In a letter sent to defendant appellants with the binder, Harry Moore wrote in part the following:

> "Enclosed is the Malpractice Insurance Binder issued in the Lumbermen's Mutual Casualty Company to cover your operations for a period from 10/1/75 to 11/1/75. The reason for the binder instead of a policy is that the Lumbermen's Mutual Casualty Company does not have the necessary forms on hand to issue policies at this time. They expect to have them in within the next week or so at which time they will issue the policy, and we will forward to you . . . .
>
> I discussed the attached Statement of Intent with Dr. Haynes this afternoon and explained to him that I had a conversation with the insurance company this morning in which they stated that the Statement of Intent did not accurately express their position. They assured me that regardless of the wording of the Statement of Intent, your coverage is and will be in force and that you have nothing to worry about on this score. To be on the safe side, I wrote Mr. Russ Cossart, Manager of the commercial lines underwriting department of the insurance company, reviewing our conversation and asking for written confirmation. As soon as we receive his reply, I will send you a copy.
>
> At this moment, based on assurances from the insurance company, I can assure you that you are fully and adequately covered up to $1,000,000. If there are any new developments, I will, of course, get in touch with you at once. If you have any questions, in the meantime, please do not hesitate to call me."

Harry Moore, that day, wrote Russell Cossart, the Commercial Lines Underwriting Manager for Kemper Insurance, requesting written confirmation of the effect of the "Statement of

Intent, Notice of Protest and Reservation of Rights" on the insurance binder. In his letter to Cossart, Moore stated:

> "Today we received binders in the Lumbermen's Mutual Casualty Company for the physicians in caption with your Statement of Intent attached. After receiving these binders, I called you to discuss coverage that would be afforded these physicians in the event the North Carolina Health Care Liability Reinsurance Exchange was found to be unconstitutional by the North Carolina Courts.
>
> In our conversation you assured me that regardless of the wording in the Statement of Intent, if the Reinsurance Exchange was found to be unconstitutional, the physicians covered by these binders and subsequent policies to be issued when the proper forms are available would have malpractice coverage for the period of their binders or policies. Depending on the Court ruling, it is our understanding that their coverage could be either with the Lumbermen's Mutual or some company to be designated as the carrying company for the Exchange."

Cossart in reply to this letter on 30 October 1975 stated:

> "As we all agree, the malpractice mess has us all in a lot of trouble and therefore the companies that are involved are trying to protect themselves against being forced into something that they are either not capable of handling or choose to not handle because of the guaranteed loss involved.
>
> We still do not know where we stand with regard to the constitutionality of the Malpractice Act nor do we know where we stand as far as the St. Paul is concerned, but at this point I think we have to agree that the company is offering binders for malpractice coverage which means that we are the carrier at this point. Hopefully all of this will be resolved the week of Nov. 3 and the persons seeking insurance will find a market that is technically competent to handle this insurance."

The binder expired the next day. The binder contained a termination clause which provided:

> "This binder shall expire at the end of the binder period shown in Item 3 or it shall terminate (1) immediately on notice of cancelation by the named insured or the company or (2) on its effective date if replaced by a policy as stated herein."

Defendant appellants were never given notice of cancellation of the binder. No premiums were ever billed to defendant appellants for the binder.

On 6 October 1976, defendant appellants were sued for damages in a civil action alleging professional malpractice arising out of acts committed on 5 October 1975. Lumbermens denied coverage, contending its binder was void *ab initio* because the unconstitutional Reinsurance Exchange Act had coerced Lumbermens into issuing it.

On 30 September 1975, the day the verbal binder was issued to defendant appellants, plaintiffs filed a complaint in Wake Superior Court seeking declaratory and injunctive relief from the Reinsurance Exchange and its enabling legislation. Plaintiffs requested the trial court to "enter a declaratory judgment determining that the Act is unlawful, invalid and void and that all applications received and binders issued thereunder are null, void and unenforceable . . . ." A temporary restraining order was issued at 5:30 p.m. the same day staying the Commissioner of Insurance from applying the provisions of the Act to plaintiffs. Some forty-eight physicians and professional associations, including defendant appellants, had been given verbal binders by agents for plaintiffs before the temporary restraining order was granted on 30 September, but they were not made parties to the 30 September action until the trial court so ordered on 29 October 1975. Defendant appellants were served with a summons and copy of the complaint on the day the binder expired.

On 9 October 1975, this action was consolidated with all other actions seeking similar relief and a preliminary injunc-

tion was subsequently issued. On 29 October 1975, the day defendant appellants were made parties to the action, the trial court severed from the action to have the Reinsurance Exchange legislation declared unconstitutional the claim for relief which requested that binders issued by plaintiffs be declared null and void. The Reinsurance Exchange Act was declared unconstitutional in Wake Superior Court on 7 November 1975, a judgment this Court affirmed in 290 N.C. 457, 226 S.E. 2d 498 (1976). The Reinsurance Exchange ceased to operate from the date of the judgment in Superior Court.

The severed claim for relief from binders issued by plaintiffs to the forty-eight physicians and professional associations was tried without a jury at the 24 April 1978 Session of Wake Superior Court. Only Wake Anesthesiology Associates, Inc., and Drs. Haynes, King and Schick were represented by counsel. Based upon its findings of fact, the trial court made the following conclusions of law:

> "1. Harry W. Moore, in his capacity as an independent insurance agent in Raleigh, North Carolina, was an agent both for the plaintiffs herein and for defendants, Wake Anesthesiology Associates, Inc., and Drs. Haynes, King and Schick.
>
> 2. Russ Cossart was an agent for the plaintiffs herein.
>
> 3. Harry W. Moore had apparent authority to alter the terms of the Statement of Intent, Notice of Protest and Reservation of Rights but neither Harry W. Moore nor any other employee of Moore & Johnson Insurance Agency effectively altered the terms of such Statement of Intent.
>
> 4. Russ Cossart had apparent authority to alter the terms of the Statement of Intent, Notice of Protest and Reservation of Rights, but he did not effectively alter such terms.
>
> 5. There is an actual presently existing controversy between the plaintiffs and defendants, Wake Anesthesiology Associates, Inc., and Drs. Haynes, King and Schick, and

declaratory relief is therefore an appropriate remedy as to those defendants and as to them only. There is no actual presently existing controversy between plaintiffs and the remaining named defendants, and declaratory relief is therefore not an appropriate remedy as to them.

6. Plaintiffs have not effectively cancelled their binder pursuant to the terms of the Statement of Intent, Notice of Protest and Reservation of Rights set forth in paragraph 8. Accordingly, the binder issued by plaintiffs to defendants Wake Anesthesiology Associates, Inc., and Drs. Haynes, King and Schick for the period October 1, 1975 to November 1, 1975 is still valid and in full force and effect. The joining of these defendants on October 29, 1975 to these legal proceedings does not constitute notice of cancellation of defendants' coverage or adequate notice that the plaintiffs intend to exercise rights reserved in Statement of Intent, Notice of Protest and Reservation of Rights.

7. The binder and Statement of Intent, Notice of Protest and Reservation of Rights, should be construed strictly against plaintiffs and in favor of the insureds and any ambiguities therein should be resolved in favor of the insured defendants."

Plaintiffs appealed the judgment entered thereon adjudging that the binder issued to defendants Wake Anesthesiology Associates, Inc., and Drs. Haynes, King and Schick was valid and in full force and effect. Plaintiffs also appealed the dismissal of their claim for declaratory relief against all other defendants. The Court of Appeals reversed, holding that the binder issued to Wake Anesthesiology Associates, Inc., and Drs. Haynes, King and Schick was void *ab initio* as an involuntary action and that whether plaintiffs took steps to cancel it was of no consequence. As to the other defendants, the Court of Appeals reversed the judgment denying declaratory relief regarding the validity of the binder issued to the other defendants and, as to them, remanded the case for further proceedings. Only defendants Wake Anesthesiology Associates, Inc., and Drs. Haynes, King and Schick appealed to this Court. All matters concerning all other defendants are now before the

trial court on remand from which no appeal was taken.

John R. Jordan, Jr.; Robert R. Price; Henry W. Jones, Jr., attorneys for plaintiff appellees

Tharrington, Smith & Hargrove by Wade M. Smith and Steven Evans, attorneys for defendant appellants.

HUSKINS, Justice:

[1] This appeal poses the question whether Lumbermens Mutual can avoid its insurance contract with defendant appellants because the Health Care Liability Reinsurance Exchange Act was declared unconstitutional. We hold that the facts of this case require a negative answer.

It is a rule of statutory construction that a statute declared unconstitutional is void *ab initio* and has no effect. *Board of Managers v. Wilmington*, 237 N.C. 179, 74 S.E. 2d 749 (1953); *Idol v. Street*, 233 N.C. 730, 65 S.E. 2d 313 (1951); *Sessions v. Columbus County*, 214 N.C. 634, 200 S.E. 418 (1939); *State v. Williams*, 146 N.C. 618, 61 S.E. 61 (1908). This rule was best stated in *Norton v. Shelby County*, 118 U.S. 425, 442, 30 L.Ed. 178, 186, 6 S.Ct. 1121, 1125 (1886), where Justice Field, speaking for the Court, said: "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." Depending on the circumstances, courts have employed other rules which avoid the hard and fast consequences of the rule enunciated in *Norton*. A court may employ the rule that a statute is presumed valid until declared invalid; or, in a case-by-case analysis, an unconstitutional statute may be given some effect, for example, by way of estoppel or due to a mistake of law. O. Field, The Effect of an Unconstitutional Statute 2-8 (1935).

The United States Supreme Court itself has retreated from the broad statement set out in *Norton*.

> "It is quite clear, however, that such broad statements

as to the effect of a determination of unconstitutionality must be taken with qualifications. The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects, — with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of courts, state and federal, and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified."

Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 374, 84 L.Ed. 329, 332-33, 60 S. Ct. 317, 318-19 (1940); *see also, Linkletter v. Walker*, 381 U.S. 618, 14 L.Ed. 2d 601, 85 S.Ct. 1731 (1965). In a later decision quoting in part from *Linkletter* and *Chicot County*, the United States Supreme Court stated:

"The process of reconciling the constitutional interests reflected in a new rule of law with reliance interests founded upon the old is 'among the most difficult of those which have engaged the attention of courts, state and federal . . . .' Consequently, our holdings in recent years have emphasized that the effect of a given constitutional ruling on prior conduct 'is subject to no set "principle of absolute retroactive invalidity" but depends upon a consideration of "particular relations . . . and particular conduct . . . of rights claimed to have become vested, of status, of prior determinations deemed to have finality"; and "of public policy in the light of the nature both of the statute and of its previous application." ' . . . However appealing the logic of Norton may have been in the abstract, its abandonment reflected our recognition that statutory or even judge-made rules of law are hard facts on which people must rely

> in making decisions and in shaping their conduct. This fact of legal life underpins our modern decisions recognizing a doctrine of nonretroactivity."

Lemon v. Kurtzman, 411 U.S. 192, 198-99, 36 L.Ed. 2d 151, 160, 93 S.Ct. 1463, 1468 (1973) (Citations omitted). This does not mean that every unconstitutional statute, "like every dog, gets one bite, if anyone has relied on the statute to his detriment." *New York v. Cathedral Academy*, 434 U.S. 125, 130, 54 L.Ed. 2d 346, 352, 98 S.Ct. 340, 344 (1977). It does mean that a test of reasonableness and good faith is to be applied in determining the effect which a judicial decision that a statute is unconstitutional will have on the rights and obligations of parties who have taken action pursuant to the invalid statute.

Other courts have adopted such a test in deciding whether to give retroactive or prospective effect to their declaration that a statute is unconstitutional. *See, e.g., Cardinal Glennon Memorial Hospital v. Gaertner*, 583 S.W. 2d 107 (Mo. 1979); *Wagshal v. Selig*, 403 A. 2d 338 (D.C. 1979); *Plumley v. Hale*, 594 P. 2d 497 (Alaska 1979); *Cumberland Capital Corp v. Patty*, 556 S.W. 2d 516 (Tenn. 1977); *Stanton v. Lloyd Hammond Farms*, 400 Mich. 135, 253 N.W. 2d 114 (1977); *Perkins v. Eskridge*, 278 Md. 619, 366 A. 2d 21 (1976).

This Court has also retreated from the absolute rule that an unconstitutional statute is a nullity. In *Roberson v. Penland*, 260 N.C. 502, 133 S.E. 2d 206 (1963), the plaintiffs entered into a consent judgment and executed a deed on the understanding that the defendant widower had a right to dissent from the will of his deceased wife. Following the execution of these documents, this Court held that the statute giving the husband the right to dissent was unconstitutional. The plaintiffs then sought, without success, to have the consent judgment and deed set aside. The Court said:

> "In this case the rights of the parties are fixed by solemn warranty deed and consent judgment. These may not be set aside merely because eminent lawyers were unable to anticipate that this Court would strike down the Act of the General Assembly which permitted the dissent. The

> rights of the parties are fixed by the judgment and the deed. These documents provide road blocks which the Court may not remove merely because the parties were mistaken as to one or more of the factual considerations which induced them."

260 N.C. at 506, 133 S.E. 2d at 208. The Court rejected application of the hard and fast rule in *Norton* and adopted the reasoning of the *Chicot County* case. It must therefore be recognized in this case that the unconstitutionality of the Reinsurance Exchange Act alone will not void *ab initio* Lumbermens' contract with defendant appellants.

For Lumbermens to escape the contract, the record must demonstrate that it entered into the contract involuntarily under coercion of the unconstitutional statute. As stated in *McLean Coal Co. v. Pittsburg Terminal Coal Corp.*, 328 Pa. 250, 253, 195 A. 4, 6 (1937), and quoted with approval in *Roberson v. Penland:*

> "The unconstitutionality of a statute is a defense to an action only when the liability is created by the statute in question; the invalidity of the act is of no avail when the liability arises from acts indicating the assumption of liability by parties who may, it is true, be acting only because the statute was passed, but who are, nevertheless voluntarily assuming a relationship which creates a liability."

This record demonstrates that as to defendant appellants, Lumbermens made a studied decision after weighing the alternatives available to it and voluntarily assumed the contractual relationship of insurer.

The insurance binder at issue in this case is not clear in its terms. The "Statement of Intent, Notice of Protest and Reservation of Rights" conflicts with the letter by Cossart. The general rule that a contract is interpreted against the party who drafts it in cases of doubt or ambiguity has been given effect in cases involving problems with insurance. *Woods v. Insurance Co.*, 295 N.C. 500, 246 S.E. 2d 773 (1978); *Grabbs v.*

Insurance Co., 125 N.C. 389, 34 S.E. 503 (1899). "Why these two apparently conflicting provisions should have been inserted in the same contract is not easy to perceive, but in keeping with the general rule of construction, with respect to ambiguously worded policies of insurance, where they are reasonably susceptible of two interpretations, we think the one more favorable to the assured should be adopted." *Bennett v. Insurance Co.*, 198 N.C. 174, 176, 151 S.E. 98, 99 (1930). It is difficult to imagine a more ambiguous and equivocal insurance contract than that created by issuing a binder with a reservation of rights as to coverage and following that with a clarifying letter stating defendant appellants were fully covered. Mr. Moore, the agent for both Lumbermens and defendant appellants, wrote Lumbermens' agent, Cossart, requesting confirmation of the coverage. In his 17 October letter, Moore wrote:

> "In our conversation you assured me that regardless of the wording in the Statement of Intent, if the Reinsurance Exchange was found to be unconstitutional, the physicians covered by these binders and subsequent policies to be issued when the proper forms are available would have malpractice coverage for the period of their binders or policies. Depending on the Court ruling, it is our understanding that their coverage could be either with the Lumbermens Mutual or some company to be designated as the 'carrying company' for the Exchange."

Cossart in reply to this letter on 30 October stated:

> "We still do not know where we stand with regard to the constitutionality of the Malpractice Act nor do we know where we stand as far as the St. Paul is concerned, but *at this point I think we have to agree that the company is offering binders for malpractice coverage which means that we are the carrier at this point.* Hopefully all of this will be resolved the week of Nov. 3 and the persons seeking insurance will find a market that is technically competent to handle this insurance." (Emphasis added)

Construing the ambiguities in favor of the insured, it is clear that Lumbermens deliberately and voluntarily decided to

assume the liability and entered into a contract to insure defendant appellants for thirty days regardless of the constitutionality of the Reinsurance Exchange Act. It was a voluntary, arm's length transaction. The Court of Appeals erred in its conclusion to the contrary.

The trial court concluded that the conditions of the reservation of rights were not altered by anyone. It further concluded that Lumbermens, because it had not effectively canceled the binder, remained bound. In these two conclusions, the trial court erred.

[2] An insurance company has a right to fix conditions upon which it will become liable and it is for the party seeking insurance to accept or refuse such conditions. *Saunders v. Insurance Co.*, 272 N.C. 110, 157 S.E. 2d 614 (1967); 1 Couch on Insurance 2d § 14:39. The constitutionality of the Reinsurance Exchange Act was not a factor upon which the effectiveness of the binder to defendant appellants was made conditional. The contract entered into by Lumbermens and defendant appellants survived the determination that the Reinsurance Exchange Act was unconstitutional. Any attempt by Lumbermens to make the binder conditional upon the constitutionality of the Reinsurance Exchange through its "Statement of Intent, Notice of Protest and Reservation of Rights" was altered by the letter of Cossart to Moore. Contrary to the conclusion of the trial court, this was an alteration of the insurance contract which Cossart, as plaintiffs' agent, had apparent authority to make.

[3] The argument of plaintiffs throughout has been that there was no valid insurance coverage. Our conclusion as to defendant appellants is to the contrary. Even so, failure to cancel the binder is not a proper reason for holding Lumbermens to its contract. As the Court of Appeals correctly noted, plaintiffs may very well have waived the very ground upon which they sought to avoid this policy and others by any attempt to cancel what they argued was a nullity. The very fact of an attempt to cancel a policy is an admission that there is a policy. 17 Couch on Insurance 2d § 67:50; 12 Appleman, Insurance Law and Practice § 7124.

In view of the posture of this case wherein only one group of defendants appealed to this Court and that group established a special set of facts, we do not reach the question of retroactivity of this Court's decision declaring the Reinsurance Exchange Act unconstitutional. Regardless of whether that decision is retroactive, defendant appellants had a valid, enforceable insurance contract with Lumbermens for the month of October 1975.

As the case now stands with respect to the other defendants, it has been remanded to the trial court for further proceedings to determine the validity of their contracts. On the record before us, we neither reach nor decide the question whether those contracts are enforceable.

For the reasons stated, the decision of the Court of Appeals is reversed. The case is remanded to the Court of Appeals for further remand to Wake Superior Court for entry of judgment in favor of Wake Anesthesiology Associates, Inc., and its employees, Drs. Haynes, King and Schick in accord with this opinion.

Reversed and Remanded.

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

STATE OF NORTH CAROLINA v. MICHAEL EARL REVELLE

No. 30

(Filed 7 October 1980)

1. **Criminal Law §22– indictment and trial on same day – no violation of statute**

G.S. 15A-943(b) was not violated where defendant was indicted for burglary on the same day the case was called to trial, since the protection of subsection (b), that a defendant may not be tried without his consent in the week in which he is arraigned, applies only to those counties in which there are regularly scheduled twenty or more weeks of trial in which criminal cases are heard, and Hertford County, in which defendant was brought to trial, did not meet that requirement.

2. Criminal Law §22– indictment, arraignment, trial on same day – no violation of due process

Defendant's indictment, arraignment, and trial on the same day on a burglary charge was not such a flagrant violation of his due process rights that the court was required to dismiss the burglary indictment, since defendant, by not contesting indictments for armed robbery, larceny, and rape conceded that he had been given sufficient time in which to prepare a defense on these charges; the burglary indictment arose out of the same series of events which led to the three other indictments; the offenses took place at such a close proximity in time that any defense which counsel might have prepared to the charge of burglary could not have significantly differed from the defenses he did prepare to the charges of larceny, armed robbery, and rape; and any proof of the nonexistence of the essential elements of burglary would necessarily be included in defendant's defense on the other charges in this case, because for each charge defendant would seek to disprove the State's evidence of the sequence of events leading up to the charge, which facts also supported the burglary indictment.

3. Larceny §6.1– value of property stolen – testimony of car owner admissible

In a prosecution of defendant for larceny and other crimes, a witness, as owner of a 1972 Plymouth which defendant allegedly stole, had the familiarity, knowledge, and experience necessary to enable him to place a value on the automobile, and his testimony that the car had a fair market value of $1000 was competent and was properly admitted.

4. Larceny §7; Robbery §4.3; Burglary and Unlawful Breakings §5; Rape §5– sufficiency of evidence of larceny, armed robbery, burglary, rape

In a prosecution for larceny, armed robbery, burglary, and rape, evidence was sufficient to support defendant's conviction where it tended to show that defendant, carrying a shotgun, entered the victims' mobile home at 9:30 p.m. without permission; defendant took a .22 caliber pistol from one victim at gun point; he threatened all of the victims with the pistol and took money from them; he ordered two of the victims into the bathroom and threatened to kill them if they emerged; defendant then raped the third victim at gun point and then drove away in one victim's car; defendant was apprehended driving the victim's car; he had the .22 caliber pistol in his possession as well as the exact denominations of currency which the victims described as being taken from them; and defendant admitted having had sexual relations with one of the victims.

5. Criminal Law §97.1– introduction of additional stipulated evidence – no error

The trial court did not err in granting the State's motion to reopen its case in order to enter stipulated evidence concerning the results of a medical examination of the rape victim, since defendant could not have been surprised by the admission of the evidence, and there was therefore no prejudice to him.

6. Constitutional Law §34; Criminal Law §26– four offenses arising from same series of events – no double jeopardy

Defendant's conviction of felonious larceny, armed robbery, burglary,

and rape, all of which arose out of the same series of events, did not place defendant in double jeopardy, since the four offenses were legally separate and distinct crimes, no one of which was a lesser included offense of the other; each clearly required the proof of at least *one* essential element not embodied in any of the other three offenses at issue; and the four felonies were factually distinct and independent crimes in this case.

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

APPEAL by defendant from judgment of *Tillery, J.*, entered at the 7 January 1980 Criminal Session of HERTFORD County Superior Court.

Defendant was tried upon indictments proper in form which charged him with larceny, armed robbery, burglary and rape. Defendant pled not guilty as to each. The jury returned a verdict of guilty on all four charges. The trial court entered judgment sentencing defendant to ten years imprisonment for felonious larceny, life imprisonment for first degree rape, life imprisonment for armed robbery, and life imprisonment for first degree burglary. Defendant appeals to this Court as a matter of right pursuant to G.S. 7A-27(a).

The State's evidence tended to show that at about 9:30 p.m. on 17 November 1979, Stanley Whitley, his wife Fannie Whitley, and an eighteen year old neighbor, Treava Earley, were seated in the living room of the Whitleys' mobile home when defendant entered through the outside door, carrying a shotgun. Night had fallen when defendant entered. The door was not locked, but it was closed and defendant did not knock or seek permission to enter. An altercation between defendant and Mr. Whitley ensued, during which defendant held the shotgun pointed at the Whitleys and threatened to kill them in retribution for a previous prison sentence of two years which he served for stealing Mr. Whitley's pistol.

Mr. and Mrs. Whitley and Ms. Earley testified that Mr. Whitley was forced at gun point to give his .22 caliber pistol to defendant. Defendant then threatened all three occupants of the trailer with the pistol, and took $35.00 from Mr. Whitley's wallet, $42.00 from Mrs. Whitley's pocketbook, and an additional $1.00 from Mrs. Whitley's sewing box. He then ordered the Whit-

leys into the bathroom, threatening to kill them if they emerged. Ms. Earley testified that at this time she was forced into the bedroom and raped at gun point.

The State's evidence further tended to show that after raping Ms. Earley, defendant took the Whitleys into the living room and demanded the keys to Whitley's 1972 model Plymouth automobile. After ascertaining that the keys were in the car, defendant dismantled the telephone and drove away in Whitley's Plymouth. The county sheriff's office was notified and defendant was apprehended at approximately 1:00 a.m. on 18 November 1979, driving the car in Ahoskie, North Carolina. When defendant was stopped, the officers observed and seized a .22 caliber pistol lying on the seat between defendant's legs. He was arrested and a search of his person uncovered $78.00, in the exact currency denominations that the Whitleys described as having been taken from them.

Defendant testified in his own behalf that he went to the Whitleys' mobile home on the night in question, carrying a shotgun as protection from an animal. He stated that the Whitleys invited him into their trailer, whereupon he attempted to buy the .22 caliber pistol from Mr. Whitley for $78.00, which money he had found in a lost wallet earlier that evening. Mr. Whitley refused to sell the pistol, and the two argued. Defendant testified that Ms. Earley had consented to sexual intercourse with him, and that he took the Whitley car with Mr. Whitley's permission. He claimed that he found the pistol underneath the seat of the car.

Defendant appeals from the trial court's judgment sentencing him to three life imprisonment terms and imprisonment for ten years, following his conviction of felonious larceny, armed robbery, first degree burglary, and first degree rape.

Joseph J. Flythe, for defendant-appellant.

Attorney General Rufus L. Edmisten, by Associate Attorneys Barry S. McNeill and Thomas J. Ziko for the State.

COPELAND, Justice.

Defendant argues six assignments of error on appeal. We have carefully considered each assignment and conclude that the trial court committed no error which would entitle defendant to a new trial.

[1] By his first assignment of error, defendant contends the trial court erred when it allowed the State, over defendant's objection, to obtain a bill of indictment on the charge of burglary on the same day defendant was called to trial on the burglary and other three charges. On 18 November 1979 defendant was served with arrest warrants for larceny, rape, and armed robbery. On 7 January 1980, the date of defendant's trial, the grand jury returned bills of indictment charging defendant with burglary as well as larceny, rape, and armed robbery. Defendant objected to being tried at that time on the burglary charge and moved to dismiss the burglary indictment. He alleged that the indictment caused him to be arraigned and tried on the burglary charge on the same day, in violation of G.S. 15A-943(b). In addition, defendant claimed that the burglary indictment deprived him of his due process rights.

Defendant's argument that G.S. 15A-943(b) was violated is without merit. G.S. 15A-943 provides:

> (a) In counties in which there are regularly scheduled 20 or more weeks of trial sessions of superior court at which criminal cases are heard, and in other counties the Chief Justice designates, the prosecutor must calendar arraignments in the superior court on at least the first day of every other week in which criminal cases are heard. No cases in which the presence of a jury is required may be calendared for the day or portion of a day during which arraignments are calendared.
>
> (b) When a defendant pleads not guilty at an arraignment required by subsection (a), he may not be tried without his consent in the week in which he is arraigned."

This statute was interpreted in *State v. Shook*, 293 N.C. 315, 237 S.E. 2d 843 (1977), where Justice Exum, speaking for the Court, stated that the protective provisions of subsection (b) apply only to those counties which meet the requirements of subsection (a). We take judicial notice of the dates on which superior court is held and find that Hertford County is not a county in which 20 or more weeks of trial sessions of superior court are regularly scheduled at which criminal cases are heard. *State v. Shook, supra; State v. Wright*, 290 N.C. 45, 224 S.E. 2d 624 (1976), *cert. denied*, 429 U.S. 1049, 97 S. Ct. 760, 50 L. Ed. 2d 765 (1977); 1 Stansbury, N.C. Evidence §13 (Brandis Rev. 1973). Nor has the Chief Justice designated Hertford County as one to which G.S. 15A-943 will apply. Therefore, defendant's case does not fall within the protection of the statute and there is no merit in defendant's contention that G.S. 15A-943(b) was violated by his indictment and trial on the burglary charge.

[2] Defendant also claimed that the denial of his motion to dismiss the burglary indictment deprived him of his due process right to be apprised of the charges against him and afforded a reasonable time in which to prepare his defense. The warrants for arrest on the charges of larceny, armed robbery, and rape, served on 18 November 1979, gave defendant prior notice of these charges. Since no arrest warrant was issued on the charge of burglary, defendant argued that he had no knowledge that the state would seek to convict him on that charge, therefore he was surprised by the burglary indictment and unprepared to present a defense.

The due process provisions of Article I, Sections 18 and 19 of the North Carolina Constitution and the Fourteenth Amendment to the U.S. Constitution provide that no person shall be deprived of liberty without due process of law. A defendant is denied due process if he is not notified of the charges against him within a sufficient time to allow him to prepare a defense. *State v. Hill*, 287 N.C. 207, 214 S.E. 2d 67 (1975); *State v. Moses*, 272 N.C. 509, 158 S.E. 2d 617 (1968); *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972); 21 Am. Jur. 2d Criminal Law §§222, 237 (1965). G.S. 15A-954(a) states that, on defendant's motion, the court must dismiss a criminal charge against him if it determines that:

"(4) The defendant's constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution."

Dismissal of a criminal charge is a drastic remedy, therefore a motion to dismiss under the terms of the statute should be granted sparingly. *State v. Joyner*, 295 N.C. 55, 243 S.E. 2d 367 (1978). *Accord, State v. Curmon*, 295 N.C. 453, 245 S.E. 2d 503 (1978). Defendant alleges that his indictment, arraignment, and trial on the same day for the burglary charge was such a flagrant violation of his due process rights that the court must dismiss the burglary indictment.

In some instances, defendant's contention that indictment and trial on the same day violates due process would be valid. *State v. Moses, supra.* However, due process is not denied simply because the court acts expeditiously, and whether there is a violation of due process depends upon the particular facts of the case. *State v. Gibson*, 229 N.C. 497, 50 S.E. 2d 520 (1948). We hold that in this case the trial court did not deny defendant due process of law.

By not contesting the indictments on armed robbery, larceny and rape, defendant conceded that he had been given sufficient time in which to prepare a defense on these charges. The burglary indictment arose out of the same series of events which led to the other three indictments. The offenses took place at such a close proximity in time that any defense counsel might have prepared to the charge of burglary could not have significantly differed from the defenses he did prepare to the charges of larceny, armed robbery, and rape. This is true even though the constituent elements of burglary in the first degree differ from the elements of armed robbery and larceny, in that in burglary the state must prove a breaking and entering into a dwelling, that it was night time, and that the dwelling was occupied, none of which are elements of the other offenses. *State v. Wells*, 290 N.C. 485, 226 S.E. 2d 325 (1976). Any proof of the nonexistence of the essential elements of burglary would necessarily be included in defendant's defense on the other charges in this case, because for each charge defendant must

seek to disprove the State's evidence of the sequence of events leading up to the charge, which facts also support the burglary indictment. Consequently, defendant has shown no evidence that he was prejudiced by indictment, arraignment, and trial on the same day for burglary, and he has not suffered any violation of his right to due process.

[3] By his second assignment of error, defendant contends that the trial court erred in allowing state's witness Stanley Whitley to testify as to the value of his automobile. During the State's case-in-chief, Whitley testified that he owned the 1972 Plymouth which defendant was driving at the time of his arrest. On recall he testified, over defendant's objection, that the Plymouth had a fair market value of approximately $1,000.00. This testimony supported defendant's conviction of larceny of goods with a value of more than $400.00, which constitutes felonious larceny. G.S. 14-72.

A witness may give his opinion as to the value of specific personal property if he has obtained his knowledge of value from experience, information, and observation. The witness need not be an expert; it is sufficient that he is familiar with the thing upon which he places a value and has the knowledge and experience necessary to enable him to intelligently value it. 1 Stansbury, North Carolina Evidence §128 (Brandis Rev. 1973). We hold that Stanley Whitley, as the owner of the 1972 Plymouth, had the familiarity, knowledge, and experience necessary to enable him to place a value on the automobile. *State v. Muse*, 280 N.C. 31, 185 S.E. 2d 214 (1971), *cert. denied*, 406 U.S. 974, 92 S. Ct. 2409, 32 L.E. 2d 674 (1972). *See also Highway Comm. v. Helderman*, 285 N.C. 645, 207 S.E. 2d 720 (1974). His testimony was therefore competent and it was not error to admit it.

[4] Defendant next contends that it was error for the trial court to deny his motion to dismiss on the grounds that the State's evidence was insufficient to support his conviction. The evidence presented by the State must be sufficient to convince a rational trier of fact to find each element of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). The evidence in this case was clearly sufficient to overcome defendant's motion to dismiss on

each charge. The testimony of Stanley Whitley, Fannie Whitley, and Treava Earley was consistent on all material points and, if believed, would support a verdict of guilty on each offense charged. In addition, defendant was apprehended driving Whitley's car, in possession of a .22 caliber pistol, identified by Mr. Whitley as his own, and carrying the exact denominations of currency which the Whitleys described as being taken from them. Defendant admitted that he had sexual relations with Ms. Earley and there was stipulated evidence that upon examination by a doctor at the hospital on 17 November 1979, semen was found in Ms. Earley's vagina. Defendant's motion to dismiss was properly denied.

[5] By defendant's next assignment of error he argues that the trial judge erred in granting the State's motion to reopen its case in order to enter stipulated evidence concerning the results of a medical examination of the rape victim. After the State had rested its case and defendant moved to dismiss on the grounds of insufficient evidence, the trial court allowed the prosecutor's motion to reopen the State's case in order to introduce the following stipulated evidence:

> "That Treava Earley went to the hospital on November 17, 1979, and she was examined in the Ahoskie Hospital by Dr. David Ascarella and if he had been here, he would have testified that he found semen in her and physically she was not damaged."

G.S. 15A-1226(b) specifically provides that the trial judge may exercise his discretion to permit any party to introduce additional evidence at any time prior to the verdict. This is so even after arguments to the jury have begun and even if the additional evidence is testimony from a surprise witness. *State v. Carson*, 296 N.C. 31, 249 S.E. 2d 417 (1978); *State v. Jackson*, 265 N.C. 558, 144 S.E. 2d 584 (1965).

In this case, the evidence was admitted after the State rested its case and before defendant presented evidence. Since the evidence was a stipulation, defendant could not have been surprised by its admission. Therefore there was no prejudice to defendant in allowing the stipulation into evidence and we find no abuse of discretion.

Defendant's fifth contention is that the trial court erred in its charge to the jury. He argues that the jury should not have been charged on felonious larceny because Stanley Whitley should not have been allowed to testify that the value of his car was $1,000.00, and without his testimony there was no evidence to establish the felonious nature of the larceny. We have found that Stanley Whitley's testimony was competent, therefore we hold that Judge Tillery's charge to the jury on felonious larceny was proper.

Defendant also claims that the charge to the jury was in error in that the trial judge's summary of the evidence tended to emphasize the State's presentation of the case more than defendant's. We have carefully reviewed the charge and find that in view of the relative number of witnesses testifying for each side, the judge's charge does not unduly emphasize the State's case and is a fair, impartial compilation of all the evidence presented.

[6] By his sixth assignment of error, defendant argues that the trial court violated his right to be free from double jeopardy when it convicted him of felonious larceny, armed robbery, burglary and rape, all arising out of the same series of events. Article I, Section 19 of the North Carolina Constitution and the Fifth Amendment to the United States Constitution bestow on every person the right not to be placed in double jeopardy. A person's right to be free from double jeopardy is violated not only when one is tried for and convicted of offenses which are in law and fact identical, but also when one is charged and convicted of two offenses, one of which is a lesser included offense of the other, where both offenses arose out of the same series of events. *State v. Shook, supra; State v. Hill, supra; State v. Birkhead,* 256 N.C. 494, 124 S.E. 2d 838, 6 A.L.R. 2d 888 (1962). *See also Brown v. Ohio,* 432 U.S. 161, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977). One offense is a lesser included offense of a more serious offense if all the essential elements of the lesser offense are also essential elements of the greater offense; and therefore proof sufficient to support a conviction on the more serious offense would also support conviction on the lesser offense. *State v. Shook, supra; State v. Hill, supra; State v. Richardson,* 279 N.C. 621, 185 S.E. 2d 102 (1971); *State v. Barefoot,* 241 N.C. 650, 86 S.E. 2d 424 (1955).

We hold that defendant's conviction of felonious larceny, armed robbery, burglary, and rape out of the same series of events does not place defendant in double jeopardy. The four offenses are legally separate, distinct crimes and no one of the offenses is a lesser included offense of the other. First degree rape, defined in G.S. 14-27.2, plainly requires proof of elements not included in the other offenses. The constituent elements of first degree burglary are: "(1) the breaking (2) and entering (3) in the nighttime (4) into a dwelling house or room used as a sleeping apartment (5) which is actually occupied at the time of the offense (6) with the intent to commit a felony therein." *State v. Wells*, 290 N.C. at 496, 226 S.E. 2d at 332; *State v. Davis*, 282 N.C. 107, 191 S.E. 2d 664 (1972); G.S. 14-51. Larceny is defined at common law as "the felonious taking by trespass and carrying away by any person of the goods or personal property of another, without the latter's consent and with the felonious intent permanently to deprive the owner of his property and to convert it to the taker's own use." *State v. McCrary*, 263 N.C. 490, 492, 139 S.E. 2d 739, 740 (1965). G.S. 14-72 provides that the larceny of property having a value of more than $400.00 is deemed a felony. Armed robbery is defined in G.S. 14-87(a), as the taking of personal property from another, from his person or in his presence, without his consent and by endangering or threatening his life with a firearm or other dangerous weapon. Each of these offenses clearly requires the proof of at least one essential element not embodied in any of the other three offenses at issue.

The four felonies are also factually distinct and independent crimes in this case. Each offense represents a separate action by defendant, although all the charges were based on the same series of events. The burglary charge arose when defendant entered the mobile home. The State's evidence that subsequently defendant took property from the Whitleys at gun point supported the charge of armed robbery. The alleged rape occurred after the armed robbery, and the larceny charge arose when defendant took Mr. Whitley's automobile. Thus, the State did not use exactly the same evidence to establish more than one offense. Double jeopardy does not occur when the evidence to support two or more offenses overlaps, but only when the evidence presented on more than one charge is identical. *State v. Hill, supra, State v. Richardson, supra. See also* Comment, *Crim-*

inal Law-Multiple Punishment and the Same Evidence Rule, 8 Wake Forest L. Rev. 243 (1972). We therefore hold that defendant's claim of double jeopardy is without merit.

Defendant received a fair trial without prejudicial error and we find

No Error.

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

STATE OF NORTH CAROLINA v. NORRIS CARLTON TAYLOR

No. 1

(Filed 7 October 1980)

1. **Kidnapping § 1.3– instruction on theories of conviction not supported by indictment**

In a prosecution for kidnapping upon an indictment charging defendant with "unlawfully removing" the victim from one place to another "for the purpose of facilitating the commission of the felony of rape and for the purpose of facilitating the flight of defendant . . . following the commission of a felony," the trial judge improperly instructed the jury on possible theories of conviction not charged in the indictment when he instructed that defendant would be guilty of kidnapping if the jury found that defendant's confinement or constraint of the victim was "for the purpose of facilitating his flight from apprehension for another crime, or to obtain the use of her vehicle."

2. **Criminal Law §§ 34.4, 34.8– evidence of other offenses – admissions to victim – overcoming rape victim's will – common scheme or plan**

A kidnapping and rape victim was properly permitted to testify as to defendant's admissions to her of prior murders and rapes since the admissions, made prior to the rape of the victim, were relevant to show how the victim's will was overcome and her submission procured, and since defendant's statements were part of a common scheme or plan embracing the kidnapping and rape.

3. **Criminal Law § 34.8– other acts of misconduct – same transaction – corrobation**

The trial court in a kidnapping and rape case properly permitted witnes-

ses for the State to testify concerning prior and subsequent acts of misconduct by defendant where the subsequent acts of misconduct were a part of the same transaction as the kidnapping and rape, and where the testimony of each of these witnesses was admissible to corroborate the victim's testimony.

4. **Criminal Law § 75.2– in-custody statements – voluntariness – threats from civilians – officers' use of guns at arrest scene – protracted questioning**

There is no merit to defendant's contention that his in-custody statements were not voluntary because threats were made against his life by civilians at the scene of his arrest, because two police officers had their guns drawn at the arrest scene, or because the questioning of defendant was protracted and he was not immediately taken before a magistrate, since the arresting officers had no control over threats made against defendant by civilians at the arrest scene and the threats were made prior to and separate from defendant's in-custody statements; defendant was armed and dangerous and use of weapons by the police at the arrest scene was not unwarranted; defendant was not threatened by the officers; the record shows that the questioning of defendant was not unduly protracted in that defendant voluntarily mentioned separate offenses not subject to the initial interrogation and other law enforcement agencies were called in; and the record shows that defendant was advised of his rights and knowingly and intelligently waived his rights to counsel and to remain silent prior to each interview.

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

APPEAL by defendant from *Bailey, James H. Pou, J.*, at the 12 November 1979 Criminal Session of Superior Court, GUILFORD County. The bill of indictment, proper in form, charged defendant with kidnapping, armed robbery and rape. The armed robbery charge was dismissed at the close of the State's evidence. Defendant was convicted of kidnapping and first degree rape. For each of these crimes he was sentenced to life imprisonment, the kidnapping sentence to run concurrently "with sentence heretofore imposed in Superior Court in New Hanover County" and the sentence for rape to run consecutively with "all other sentences he is now serving." He appeals the life sentences to this Court as a matter of right.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General Ann Reed and Associate Attorney William R. Shenton, for the State.

Mary Ann Talley, Public Defender, for the defendant.

CARLTON, Justice.

We find prejudicial error in the trial court's instructions on kidnapping under G.S. 14-39 (Cum. Supp. 1979) and hold that he is entitled to a new trial in the kidnapping case. We find no error in the trial for first degree rape.

I.

Briefly, evidence for the State tended to show that on the evening of 28 August 1978 Jewel Taylor, an accountant, was returning to work and parked her car in the parking lot of the Wachovia Bank Building in downtown Fayetteville, North Carolina. As she walked from her car toward the building, she noticed a black male, later identified as the defendant, approaching her. Defendant grabbed her by the arm, pointed a gun at her and told her to get back in the car and take him wherever he wanted to go or he would kill her. Ms. Taylor complied with the demand, returned to the car and proceeded to drive in accordance with defendant's directions. Defendant directed her to Pope Park in Fayetteville and, after driving through the park, made her stop the car. At that time defendant related to Ms. Taylor the history of his recent criminal activities and told her that he wanted to have sex with her. Ms. Taylor was forced to get out of the car and to remove her clothes. She was then forced, at gunpoint, to have sexual intercourse with defendant against her will. After the rape, defendant instructed her to return to the car and to drive north on U.S. I-95. Ms. Taylor drove north until they reached Petersburg, Virginia, at which time defendant made Ms. Taylor park the car. Defendant and Ms. Taylor waited in the car until daylight so that he could find another car to steal. When he left her car in pursuit of another, Ms. Taylor drove away.

Defendant was apprehended on 1 September 1978 in Woodland, North Carolina, and transported to the Sheriff's Department in Northampton County. After being advised of his rights, defendant was interrogated and confessed to the charges that

are the subject of this appeal. He was later taken to Fayetteville. The case was removed to Guilford County for trial.

II.

[1] We first consider whether the trial court erred in its instructions to the jury on the kidnapping charge. Because the instructions allowed the jury to convict on grounds other than those charged in the indictment, we hold that it did.

Defendant was tried under G.S. 14-39 which provides:

> Kidnapping. — (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.
>
> (b) Any person convicted of kidnapping shall be guilty of a felony and shall be punished by imprisonment for not less than 25 years nor more than life. If the person kidnapped, as defined in subsection (a), was released by the defendant in a safe place and had not been sexually assaulted or seriously injured, the person so convicted shall be punished by imprisonment for not more than 25 years, or by a fine of not more than ten thousand dollars ($10,000), or both, in the discretion of the court.

G.S. 14-39(a)-(b).[1]

Defendant contends that the trial court's instructions to the jury on the kidnapping charge did not comport with the grounds charged in the indictment. In order to examine this contention, we set out relevant portions of the indictment and the jury instructions.

That portion of the indictment under which defendant was convicted of kidnapping charged as follows:

> THE JURORS FOR THE STATE UPON THEIR OATH DO PRESENT, that Norris Carlton Taylor, on or about the 28th day of August, 1978, in Cumberland County, North Carolina, did unlawfully, wilfully and feloniously kidnap Jewel Faye Taylor, a person who had attained the age of sixteen (16) years, by *unlawfully removing* her from the parking lot of the Wachovia Building on Green Street, Fayetteville, North Carolina to Pope Park, located adjacent to Interstate Highway Number 95 in Cumberland County, Fayetteville, North Carolina *for the purpose of facilitating the commission of the felony of rape and for the purpose of facilitating the flight of the defendant, Norris Carlton Taylor following the commission of a felony.* The said Jewel Faye Taylor was sexually assaulted in the course of this kidnapping, in violation of North Carolina General Statutes Section 14-39.

(Emphases added.)

[1]We first note that the record refers to the charge against defendant pursuant to this statute as "aggravated kidnapping." This expression likewise appears in the briefs of both parties. While not important to this decision, we remind the profession that the term "aggravated kidnapping" is a misnomer. We so stated in *State v. Banks*, 295 N.C. 399, 406-407, 245 S.E. 2d 743, 749 (1978), and expressly rejected the term in *State v. Williams*, 295 N.C. 655, 663-65, 249 S.E. 2d 709, 715-17 (1978). In *Williams*, Justice Exum clearly explained that G.S. 14-39 does not create two kidnapping offenses, one of simple kidnapping and another of aggravated kidnapping, but merely sets forth factors that will result in reduced punishment if the person kidnapped is released by defendant in a safe place and has neither been sexually assaulted nor seriously injured. We reiterate that the statute does not divide the crime of kidnapping into two separate offenses.

With respect to the kidnapping charge, the trial court instructed the jury as follows:

> The defendant is also charged with the crime of kidnapping. In order for you to find the defendant guilty of kidnapping, there are four things that the State must prove, each beyond a reasonable doubt. First, that the defendant *unlawfully confined* Jewel Taylor, either in her automobile or at Pope Park or *removed her by force* from the Wachovia Building to Pope Park, or from Pope Park to a place in Virginia.
>
> Second, that Jewel Taylor did not consent to that act. Again, I advise you that consent obtained or induced by fear is not consent in the eyes of the law. Third. That you find the defendant *confined or restrained* Jewel Taylor *for the purpose of facilitating his flight from apprehension for another crime, or to obtain the use of her vehicle.* Finally, *that the removal was a separate and complete act, independent and apart from his obtaining the vehicle or any other criminal act on his part;* that it was a separate act. If you find these things from the evidence and beyond a reasonable doubt, then you will have found sufficient facts upon which to find the defendant guilty of the crime of kidnapping. Therefore, I instruct you that if you find from the evidence, and beyond a reasonable doubt, that on or about the 28th day of August 1978, Norris Carlton Taylor *unlawfully restrained* Jewel Taylor or *unlawfully removed* her from the area of the Wachovia Building to the area of Pope Park in the City of Fayetteville, or to some other place, and that Jewel Taylor did not consent to this removal or restraint, and that it was done *for the purpose of facilitating Norris Taylor's flight after committing a crime, or obtaining possession, unlawfully, of Jewel Taylor's car* — I might say that one does not have to complete his intent; the mere fact that he intended would be sufficient — and you further find that this act was a separate and complete act, independent and apart from either the felony he committed or the felony he is charged with having committed thereafter, it would be your duty to return a verdict of guilty of kidnapping.

(Emphases added.)

It is a well-established rule in this jurisdiction that it is error, generally prejudicial, for the trial judge to permit a jury to convict upon some abstract theory not supported by the bill of indictment. *State v. Dammons*, 293 N.C. 263, 237 S.E. 2d 834 (1977); *State v. Thorpe*, 274 N.C. 457, 164 S.E. 2d 171 (1968); *see State v. Duncan*, 264 N.C. 123, 141 S.E. 2d 23 (1965). When the jury instructions are examined under this rule, it is apparent that the charge is erroneous in several respects.

Here, the instructions presented to the jury several possible theories of conviction which were not charged in the bill of indictment. First, the bill of indictment charged defendant with unlawfully "removing" Jewel Taylor from the parking lot of the bank. However, in his charge to the jury, the trial court instructed with respect to the defendant having unlawfully "confined" and "restrained" Ms. Taylor. While these theories of the case might be supported by the evidence, they are not charged in the indictment.

Secondly, the bill of indictment charged that defendant unlawfully removed Ms. Taylor from the parking lot "for the purpose of facilitating the commission of the felony of rape and for the purpose of facilitating the flight of the defendant ... following the commission of a felony." In its charge to the jury, however, the trial court instructed that defendant would be guilty of kidnapping if, *inter alia*, the jury found that "the defendant confined or restrained Jewel Taylor *for the purpose of facilitating his flight from apprehension for another crime, or to obtain the use of her vehicle.*" (Emphasis added.) In *State v. Thorpe, supra*, the indictment for first degree burglary alleged that defendant intended to "feloniously ravage and carnally know" the person who occupied the dwelling. This Court held it was error to instruct the jury that defendant would be guilty if he entered with "the intent to commit a felony." The Court cited the rule that "[t]he indictment having identified the intent necessary, the State was held to the proof of that intent." *Id.* at 464, 164 S.E. 2d at 176. Here, the indictment charged that defendant's purposes in removing his victim were to facilitate the commission of the felony of rape and to facilitate the flight of

the defendant following the commission of a felony. It was prejudicial error, therefore, for the trial court to instruct with respect to "another crime" and to refer to "[obtaining] the use of her vehicle," the latter not being charged in the bill of indictment.

Thirdly, the trial court erred in stating "that the removal was a separate and complete act, independent and apart *from his obtaining the vehicle* or any other criminal act on his part . . . ." (Emphasis added.) Clearly, such reference to "obtaining the vehicle" was misleading to the jury; the armed robbery charge had been dismissed and was not a part of the case being presented to the jury for consideration.

The State's theory, under the bill of indictment, was that defendant had unlawfully removed Ms. Taylor from one place to another for the express purpose of facilitating the commission of the felony of rape and for the purpose of facilitating his flight from the commission of the felony of rape. At no point, however, did the trial court instruct with respect to kidnapping for the express purposes stated in the bill of indictment. Its failure to instruct on the theory charged in the bill of indictment, in addition to its instructions on theories not charged, constitutes prejudicial error entitling defendant to a new trial on the charge of kidnapping. *State v. Dammons, supra; State v. Thorpe, supra.*

III.

We turn next to defendant's contentions that the trial court improperly ruled on his motions *in limine* to suppress evidence as to other crimes defendant admitted to the prosecuting witness and to restrict evidence of prior or subsequent convictions or acts of misconduct on the part of the defendant. In connection with these motions the trial court ruled, in part, as follows:

> The Court is informed that the State's evidence will tend to show that at the initiation of this series of alleged events, the defendant, Norris Carlton Taylor, advised the victim, Jewel Taylor, of his previous murder of a number of people and of his previous rapes. That this was part of the placing in fear and the subjugation of the will of Jewel Taylor.

The State will be allowed to elicit from Jewel Taylor evidence relating to the threats and brags of the defendant in connection with this series of crimes.

The State may also elicit testimony from Jewel Taylor of rapes subsequent to the original Cumberland County rapes involving Jewel Taylor and the defendant, Norris Taylor, as being a part and parcel of the single course of conduct.

The State will not be permitted to elicit evidence from any witness of prior acts for which the defendant has not been convicted, other than the crimes that may have been committed against Jewel Taylor as a part of this series of events.

Evidence relating to an alleged armed robbery of a service station on Interstate 95 by the defendant will not be admitted, and the State is directed not to elicit such testimony.

The State is in no way restricted in its cross-examination of the defendant, from cross-examining the defendant on any and all prior convictions, but is restricted as to acts of misconduct for which he has not been convicted.

[2] Defendant first contends that the trial court erred in allowing Ms. Taylor to testify as to other crimes admitted by defendant to her. He argues that Ms. Taylor's will was overcome and her submission procured by the use of a deadly weapon, not by any statements he made to her, and that the only relevance of his statements is to show the character of the defendant or his disposition to commit a crime. If this were the case, the admission of these statements would be in violation of the North Carolina rule that in a prosecution for a particular crime, the State cannot introduce evidence tending to show that the accused has committed another distinct, independent or separate offense. *E.g., State v. Duncan*, 290 N.C. 741, 228 S.E. 2d 237 (1976); *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954).

Defendant's reliance on this rule is misplaced for two reasons. Firstly, this exclusionary rule applies only when the sole relevancy of the evidence of other crimes is its tendency to

show the defendant's disposition to commit a crime of a nature similar to the one for which he is being tried. *State v. Cherry*, 298 N.C. 86, 109, 257 S.E. 2d 551, 565 (1979), *cert. denied*, 64 L. Ed. 2d 796 (1980); *State v. Shrader*, 290 N.C. 253, 264, 225 S.E. 2d 522, 530 (1976); *State v. Carey*, 288 N.C. 254, 269, 218 S.E. 2d 387, 397 (1975), *death sentence vacated*, 428 U.S. 904 (1976); *State v. McClain, supra.* Here defendant's admissions to Ms. Taylor made prior to the rape are also relevant to show the subjugation of her will. Secondly, assuming *arguendo* that the rule is applicable here, the evidence is admissible under a well-recognized exception to the rule because defendant's statements are part of a common scheme or plan embracing the kidnapping and the rape. *See State v. McClain*, 240 N.C. at 176, 81 S.E. 2d at 367. These statements are an integral part of the proof of the crimes for which defendant was tried and are so interwoven as to constitute one transaction or series of events. In *State v. McClain, supra*, Justice Ervin quoted with approval the test articulated by the Supreme Court of South Carolina for determining whether the rule requires the exclusion of evidence of an offense other than the one charged:

> "The acid test is its logical relevancy to the particular excepted purpose or purposes for which it is sought to be introduced. If it is logically pertinent in that it reasonably tends to prove a material fact in issue, it is not to be rejected merely because it incidentally proves the defendant guilty of another crime."

Id. at 177, 81 S.E. 2d at 368, quoting *State v. Gregory*, 191 S.C. 212, 221, 4 S.E. 2d 1, 4 (1939). An essential element of the crime of rape is that it is committed against the will of the victim. Thus, subjugation of Ms. Taylor's will is a "material fact in issue," defendant's statements tend to show that the victim's will was overcome, and, hence, they were properly admitted.

[3] In this same connection, defendant additionally contends that the trial court's denial of its motion *in limine* improperly allowed other prosecuting witnesses to testify concerning prior and subsequent acts of misconduct by the defendant. We note that the "subsequent acts" of misconduct testified to by other witnesses are, in reality, a part of the same transaction as the

kidnapping and rape. The testimony of each of these witnesses simply corroborated the testimony of Ms. Taylor and is therefore clearly admissible. *See State v. Rose*, 270 N.C. 406, 154 S.E. 2d 492 (1967); 1 Stansbury's North Carolina Evidence § 50 (Brandis Rev. 1973).

For these reasons, we hold that the trial court properly denied defendant's motions *in limine* and the assignments of error with respect thereto are overruled.

IV.

[4] Defendant also contends that his statements to authorities were not voluntary because threats were being made against his life by civilians at the scene of his arrest, because two police officers had their guns drawn, because the questioning of defendant was protracted and because he was not immediately taken before a magistrate upon his arrest. Defendant's contention is without merit. We glean from the record that the threats made against defendant were made only at the scene of the arrest and by civilians, a circumstance over which the arresting officers had no control. Moreover, they were made prior to and separate from any statements made by defendant about the offenses which are the subject of this appeal. Use of the police weapons at the scene of the crime was not unwarranted; defendant was armed and dangerous. Moreover, defendant was not threatened by the officers in any way. The record also reveals that questioning of defendant was not unduly protracted in that defendant voluntarily mentioned separate offenses not the subject of the initial interrogation and other law enforcement agencies were called in. Finally, the record discloses that defendant was advised of his rights and knowingly and intelligently waived his rights to counsel and to remain silent prior to each interview. He at no time requested that an attorney be present or that he wished to remain silent. Indeed, when informed during interrogation that his court-appointed counsel was present and wished to talk with him, defendant stated that he wanted to finish talking with the police before seeing his attorney. Under these circumstances, we hold that defendant's statements were voluntary.

Defendant assigns numerous other errors which we deem unnecessary for discussion in this opinion. He contends, for example, that the district attorney should have been removed from the trial of this case because it was necessary for an assistant district attorney to testify as to the time of defendant's first appearance in the trial court. He also contends that the trial court made prejudicial comments to the jury throughout the trial, that the trial court erred in allowing the district attorney to ask prejudicial and leading questions of the State's witnesses, that the trial court erred in allowing the State's motions to introduce into evidence certain items of physical evidence, and that the trial court erred in allowing redirect testimony outside the scope of cross-examination. With respect to these and other assignments not enumerated herein, it is sufficient to say that we have reviewed them carefully and find them completely without merit.

Finally, we note defense counsel's statement in defendant's brief that she has reviewed the entire record of this case and can find no error in the submission of the charges of rape and kidnapping to the jury. She requests, however, that "in light of the seriousness of the offenses involved in this trial, defense counsel respectfully requests this Court to review the record to determine the sufficiency of the evidence for the consideration of the jury." We have done as defense counsel requested and find that the State's evidence was not only sufficient, but overwhelming, to show every essential element of the crime of first degree rape and that defendant was the rapist. G.S. 14-27.2 (Cum. Supp. 1979). In light of our disposition of the kidnapping conviction, we do not consider the sufficiency of the evidence to support that verdict.

For the reasons stated above, we hold that defendant is entitled to a new trial in the kidnapping case. We also hold that defendant had a fair trial, free from prejudicial error, in the rape case.

On the first degree rape conviction — No Error.

On the kidnapping conviction — New Trial.

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

STATE OF NORTH CAROLINA v. ROGER WARREN CLARK

No. 77

(Filed 7 October 1980)

1. **Criminal Law § 92.4– several charges against one defendant – consolidation proper**

The trial court properly allowed the State to join for trial offenses of kidnapping one person and kidnapping and murdering another person where the State submitted a written motion to join prior to trial stating that it was made pursuant to G.S. 15A-926, which provides for joinder when offenses are based on a series of acts or transactions connected together or constituting parts of a single scheme or plan, and in this case all of the matters out of which the joined cases grew occurred on the same afternoon of the same day and each was perpetrated according to a common *modus operandi*.

2. **Criminal Law § 66.6– lineup procedure not suggestive – in-court identification proper**

In-court identifications of defendant by two witnesses were not tainted by a pretrial lineup procedure which defendant contended was suggestive and conducive to irreparable mistaken identity where the evidence tended to show that both witnesses had ample opportunity to observe defendant in the daytime at close range and during an encounter which involved only two people; each witness gave police a substantially correct description of her assailant prior to the lineup; the lineup consisted of six men who had reasonably similar physical characteristics; the identification by each witness was certain and was made at a lineup conducted within two days of the crime; no one suggested to the witnesses which person they should pick; and the lateness of the hour when the lineup was held and the summoning of witnesses at that late hour did not create a defectively suggestive pretrial identification by indicating someone in the lineup was a prime suspect.

3. **Criminal Law § 82.2– testimony by psychiatrist – no bona fide doctor-patient relationship – waiver of right to privileged communication**

Cross-examination of defendant's psychiatrist concerning incriminating statements made by defendant did not violate defendant's statutory right to privileged communication with his doctor on the basis that no bona fide doctor-patient relationship existed between defendant and his expert witness, or on the basis that, even assuming a valid relationship, defendant waived his right to the privilege by putting the doctor on the stand.

4. Criminal Law § 112.6– insanity – burden of proof on defendant

The trial court did not err in placing upon defendant the burden of proving his defense of insanity to the satisfaction of the jury.

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

APPEAL by defendant from *Barbee, J.*, 6 April 1979 Criminal Session of CABARRUS Superior Court.

Defendant was charged in separate bills of indictment with the kidnapping of Gay Porter and the kidnapping and murder of Phoebe Alisa Barbee. Upon motion of the State and over defendant's objection, the trial judge joined the charges for trial. Defendant properly notified the State of his intention to rely on the defense of insanity. At arraignment, defendant entered a plea of not guilty to each charge.

On the charge of kidnapping Gay Porter, the State offered evidence tending to show that on 11 September 1978 at about 1:15 in the afternoon Gay Porter was driving on Interstate 85 in Rowan County when a truck pulled alongside, and the driver motioned toward the rear of her car. Ms. Porter pulled off to the side of the road and asked the driver of the truck "what the trouble was." At this point in her testimony, the witness was asked to identify the driver of the pickup truck. Defendant objected, and, after conducting a voir dire hearing, the trial judge permitted the witness to identify defendant as the person she saw on this occasion. Ms. Porter then testified before the jury that defendant told her that he owned a wrecker, and he would be willing to drive her to Charlotte and arrange for her automobile to be towed. She agreed, and, after entering the truck, defendant began to crisscross through the countryside on secondary roads despite her directions that he proceed directly to Charlotte. Upon arriving in Charlotte, the driver propositioned Ms. Porter and, against her will, placed his hands between her legs and on her breasts. At this point, Ms. Porter grabbed the steering wheel and caused the truck to strike a road sign and stop. After a struggle, she managed to obtain her pocketbook and escape from the truck. She obtained a ride with a young girl who had stopped nearby.

On the charges of kidnapping and murder of Phoebe Alisa Barbee, the State's evidence tended to show that on the same afternoon Lisa Bingaman was traveling toward Matthews, North Carolina, when a man in a pickup truck motioned to her to pull over. He told her that black smoke was coming from her automobile and offered to take her where she was going and arrange to have her car towed. She rejected his offer, and at that time he pinched her breasts; she slapped him and after a scuffle the driver of the truck left. When the witness Ms. Bingaman was asked to identify the driver of the truck, defendant again objected, and a voir dire hearing was held. After hearing evidence, the trial judge denied defendant's motion to suppress. We will consider the evidence presented at the voir dire hearings in connection with our consideration of the pertinent assignment of error. The State also offered evidence tending to show that Phoebe Alisa Barbee left for work on the morning of 11 September 1978. She was driving a 1978 Toyota automobile and was wearing a white uniform with a blue and white apron smock. She left her place of employment at about 3:00 p.m. driving the same automobile and dressed in the same manner. About 3:15 p.m. on that afternoon, a witness observed a Toyota sitting on the side of the road with a blue truck parked behind it. He noticed that the driver of the car was a young girl and that a white male was the driver of the truck. Another witness who lived on Highway 27 saw a Toyota and a truck stop across the road from her home and observed a young girl get into the truck with a man and depart.

Jerry McLaurin testified that he also saw a small gray Toyota with a pickup truck parked behind it on Highway 27. He saw a young girl and a man whom he recognized as defendant. McLaurin drove past and turned around, but when he arrived at the place where he had seen the truck and automobile, the young girl, the man and the truck were gone. The Toyota automobile was still parked on the side of the road.

Claude Allen, Jr., testified that when he was getting off a school bus at about 3:50 p.m. the same date he saw a man whom he identified as defendant drive by in a pickup truck with another person in it. Another witness saw the truck turn around near Teeter Bridge and come back past the school bus.

The truck then turned off Miami Church Road and proceeded down a dirt road. There was evidence that a body was discovered on 12 September at about 1:00 p.m. near an old corncrib on a dirt road off of Miami Church Road. The body was later identified as that of Phoebe Alisa Barbee. Medical testimony indicated that her death was caused by one of multiple blows from a blunt object which caused a fracture to the skull and injury to the brain. An autopsy of the body revealed other wounds including shallow tears around the anus. There was sperm in the anal cavity.

Pursuant to a written authorization from defendant and an express oral authorization by defendant's father-in-law, who owned and resided in the home where defendant lived, the premises were searched. Officers found a blue work uniform with blood smears on it which were later found to be of the same blood-type as that of the victim. Blood of the same type as that of the victim and human hair which matched the victim's hair were found in a pickup truck which belonged to defendant's father-in-law and which defendant was using on 11 September 1978.

Defendant offered evidence tending to show that his mother and father were afraid of him and that he was moody at times and on occasion was violent and dangerous.

Defendant also offered the testimony of Dr. Charles E. Smith, an expert in the field of forensic psychiatry. Dr. Smith testified that he had examined defendant on two occasions in January, 1979, and that it was his opinion that defendant suffered from schizophrenia. It was his opinion that on 11 September 1978, defendant was unable to know right from wrong or to appreciate the nature and quality of his acts. On cross-examination and over the objection of defendant, Dr. Smith was permitted to testify about inculpatory statements defendant made during consultation.

Defendant did not testify in his own behalf.

In rebuttal, the State offered the testimony of Dr. James Groce, an expert in the field of forensic psychiatry. Dr. Groce

testified that he interviewed and observed the defendant on several occasions and that in his opinion on 11 September 1978 defendant knew the nature and quality of his acts and was able to distinguish right from wrong.

The trial judge submitted the possible verdicts of guilty, not guilty and not guilty by reason of insanity on each of the kidnapping counts. He submitted the same three possible verdicts on the charge of first-degree murder and the lesser included offense of second-degree murder. The jury returned verdicts finding defendant guilty on both kidnapping charges and guilty of first-degree murder. The trial judge entered judgments imposing a sentence of life imprisonment on the charge of first-degree murder and consecutive sentences of life imprisonment on the verdicts of kidnapping. The judgment of guilty of kidnapping Phoebe Alisa Barbee was arrested. Defendant appealed.

Rufus L. Edmisten, Attorney General, by George W. Boylan, Assistant Attorney General, for the State.

James C. Johnson, Jr., for defendant.

BRANCH, Chief Justice.

[1] Defendant assigns as error the trial judge's ruling permitting the State to join the offenses for trial.

Defendant first argues that there was procedural error in that the motion for joinder did not set forth the grounds except by reference to a statute. The provisions of G.S. 15A-951 require that all motions made prior to trial must be in writing and must state the grounds upon which the motion is based. Here the State submitted a written motion to join the cases prior to trial stating that it was made pursuant to G.S. 15A-926. Defendant answered the State's motion with specific objections to joinder, and, after a hearing, the trial judge joined the cases. Assuming, without deciding, that the State improperly submitted its written motion without stating factual grounds therefor, defendant fails to show that this omission was prejudicial to him.

G.S. 15A-926 provides that when an accused is charged with two or more offenses, such offenses may be joined for trial when they are "based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan."

In ruling upon a motion for joinder, the trial judge should consider whether the accused can be fairly tried upon more than one charge at the same trial. If such consolidation hinders or deprives the accused of his ability to present his defense, the cases should not be consolidated. *State v. Davis*, 289 N.C. 500, 223 S.E. 2d 296 (1976). In determining whether defendant has been prejudiced, the question posed is whether the offenses are so separate in time and place and so distinct in circumstances as to render a consolidation unjust and prejudicial to an accused. *State v. Greene*, 294 N.C. 418, 241 S.E. 2d 662 (1978). However, it is well established that the motion to join is addressed to the sound discretion of the trial judge and his ruling will not be disturbed absent a showing of abuse of discretion. *State v. Davis, supra; Dunaway v. United States*, 205 F. 2d 23 (D.C. Cir., 1953). In the instant case, all of the matters out of which the joined cases grew occurred on the same afternoon of the same day and each was perpetrated according to a common *modus operandi*. Thus, the facts of this case meet the statutory requirements for joinder, and the record shows that the respective charges are not so distinct in time and circumstances as to prejudicially hinder or deprive defendant of his ability to defend any one of the charges.

We hold that the trial judge, acting in the exercise of his discretion, properly joined the cases for trial.

[2] Defendant next contends that the trial judge erred by overruling his motion to suppress the in-court identifications of defendant by the witnesses Gay Porter and Lisa Bingaman. It is his position that the pretrial lineup was so suggestive and conducive to irreparable mistaken identity that it tainted the in-court identification.

On each occasion, defendant objected to the respective in-court identification, and the trial judge properly excused the

jury and conducted a voir dire hearing to determine the admissibility of that evidence. *State v. Accor*, 277 N.C. 65, 175 S.E. 2d 583 (1970).

The witnesses Porter and Bingaman viewed the same lineup at different times during the early morning hours of 13 September 1978. The pertinent evidence at each voir dire hearing tended to show that defendant voluntarily waived his right to counsel before the lineup procedure was held. The lineup consisted of six men recruited by sheriff's deputies from a nearby work place. Defendant who was five feet seven inches tall was the shortest man in the lineup, but the lineup included another man five feet eight inches tall and two men at five feet ten inches tall. Each man in the lineup had reasonably similar physical characteristics. Defendant had a mustache and beard, and each of the other men in the lineup also had facial hair. No one suggested to either of the witnesses whom they should identify, and no one furnished them the names of any of the persons who made up the lineup. Neither of the witnesses had previously been shown any photographs of any of the persons. The witness Bingaman was the first to view the lineup, and she picked out number five, defendant, as being the person who assaulted her on 11 September 1978. When the witness Porter viewed the lineup, she also identified number five, defendant, as the person driving the pickup truck on 11 September 1978.

At the conclusion of each of the voir dire hearings, the trial judge after finding facts concluded that the in-court identification of defendant by each of the witnesses was of independent origin based solely on what the witness saw at the time defendant was in her presence on 11 September 1978. He also found that the identification did not result from any pretrial identification procedures.

An improper out-of-court identification procedure requires suppression of an in-court identification unless the trial judge determines that the in-court identification is of independent origin. *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974). The test to determine the validity of pretrial identification procedures under the due process clause is whether the totality of the circumstances reveals pretrial procedures so suggestive

and conducive to irreparable mistaken identity as to offend fundamental standards of decency, fairness, and justice. *State v. Henderson, supra.* Even if the pretrial procedure is invalid, the in-court identification will be allowed if the trial judge finds it is of independent origin. *State v. Headen,* 295 N.C. 437, 245 S.E. 2d 706 (1978). After hearing the voir dire evidence, the trial judge must make findings of fact to determine whether the in-court identification meets the tests of admissibility. *State v. Tuggle,* 284 N.C. 515, 201 S.E. 2d 884 (1974). The standards to be used to determine reliability of the identification are those set out in *Neil v. Biggers,* 409 U.S. 188, 34 L.Ed. 2d 401, 93 S.Ct. 375 (1972) — (1) opportunity to view, (2) degree of attention, (3) accuracy of description, (4) level of certainty, (5) time between crime and confrontation. *See State v. Headen, supra.* If the findings of the trial judge are supported by competent evidence, they are conclusive on the appellate courts. *State v. Tuggle, supra.*

Here both witnesses had ample opportunity to observe defendant in the daytime, at close range and during an encounter which involved only two people. Each witness gave police a substantially correct description of her assailant prior to the pretrial lineup. The identification by each witness was certain and was made at a lineup conducted within two days of the crime. Even so, defendant further argues that the lateness of the hour when the lineup was held and the summoning of witnesses at that late hour created a defectively suggestive pretrial identification by indicating someone in the lineup was a prime suspect. We do not agree. Any such suggestiveness is implicit in simply holding a pretrial lineup. Expeditious determination of eyewitness identification benefits the potential defendant in that a failure of identification may speed his release, and it benefits the identification process by allowing the eyewitness to view the suspect while the details of the crime are still fresh in his or her mind.

In instant case, the findings of the trial judge are supported by ample competent evidence and are conclusive on this Court. We therefore hold that the trial judge correctly denied defendant's motion to suppress the identification testimony of the witnesses Gay Porter and Lisa Bingaman.

[3] Defendant next contends that the trial judge erred in overruling his objections to the admission of certain statements made by defendant to his psychiatrist. Defendant argues that the self-incriminating statements testified to by the psychiatrist on cross-examination by the State violated defendant's statutory right to privileged communication with his doctor. The State answers, first, that no bona fide doctor-patient relationship existed between defendant and his expert witness and, second, that, even assuming a valid relationship, defendant waived his right to the privilege by putting the doctor on the stand.

G.S. 8-53 provides:

> No person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon. Confidential information obtained in medical records shall be furnished only on the authorization of the patient, or if deceased, the executor, administrator, or, in the case of unadministered estates, the next of kin; provided, that the court either at the trial or prior thereto, or the Industrial Commission pursuant to law may compel such disclosure, if in his opinion the same is necessary to a proper administration of justice.

This Court has dealt with the assertion of the protection afforded by the provisions of G.S. 8-53 in this precise situation in *State v. Litteral*, 227 N.C. 527, 43 S.E. 2d 84 (1947). The Court held that the statements made to the "alienist" in *Litteral* were not incompetent by reason of the statute, although the Court was not clear about whether the basis of the holding was the absence of a bona fide doctor-patient relationship or waiver of the privilege by placing the doctor on the stand.[1] *See State v. Litteral, supra* at 533-34, 43 S.E. 2d at 88-89. Under the facts of the

[1]See Annot., 44 A.L.R. 3d 24, §§24(a), 31 (1972). This annotation on the psychotherapist-patient privilege cites *Litteral* for both propositions.

case before us, a choice between the two bases is still not required. Under either basis the cross-examination did not violate defendant's right to privileged communication.

That defendant's statements testified to by his psychiatrist amount to a confession creates no difficulty. The Court stated in *Litteral*, "The doctor gave his opinion as to the mental capacity of the defendant. The solicitor had a right to inquire into the basis of that opinion." *State v. Litteral, supra* at 534, 43 S.E. 2d at 89. In instant case, the trial court judge specifically asked the psychiatrist whether his determination of defendant's sanity was based on defendant's statements to the psychiatrist about the incidents surrounding the crimes, and the psychiatrist answered that it was. After the psychiatrist testified to the statements by defendant, the trial judge correctly instructed the jury that the psychiatrist's testimony about the statements be considered only for the light it shed on the psychiatrist's opinion that defendant was insane at the time of the crimes.

The admission of the challenged statements is consistent with North Carolina case law and cases from other jurisdictions. *In re Spencer*, 46 Cal. Reptr. 753, 406 P. 2d 33 (1965); *State v. Whitlow*, 45 N.J. 3, 210 A. 2d 763 (1965); and *State v. Newsome*, 195 N.C. 552, 143 S.E. 187 (1928). In *Newsome*, this Court permitted a psychiatrist appointed by the trial court at defense counsel's request to testify during the State's case-in-chief about a *confession* made to the psychiatrist by the defendant during consultation.

[4] Finally, defendant assigns as error the trial judge's instruction placing upon defendant the burden of proving his defense of insanity to the satisfaction of the jury. Defendant recognizes that this assignment runs counter to a long line of decisions by this Court including the recent case of *State v. Leonard*, 300 N.C. 223, 266 S.E. 2d 631 (1980). We therefore find no error in this portion of the trial judge's instructions.

No error.

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

State v. King

STATE OF NORTH CAROLINA v. RICHARD WAYNE KING

No. 24

(Filed 7 October 1980)

1. **Criminal Law § 33.3– observation of movement of defendant's mouth – absence of prejudice**

The trial court in a homicide case did not commit prejudicial error in admitting a witness's testimony that he didn't hear defendant say anything "but I could sort of see his mouth moving like in a low mumble but you could not understand what he was saying" since the testimony was in no way prejudicial to defendant's interests and since evidence of the same import was thereafter admitted without objection.

2. **Criminal Law § 33.4– testimony does not intimate bribery attempt**

Testimony by a State's witness that his wife suggested to him after a court hearing that he should go and see defendant and talk to him about the shooting in question did not intimate an attempt by defendant to bribe the witness.

3. **Criminal Law § 57– testimony concerning bullet fragment – absence of prejudice**

In this first degree murder prosecution, defendant was not prejudiced by the testimony of an S.B.I. agent who examined two bullets and a bullet fragment taken from deceased's body that the fragment was similar to the two whole bullets "in that they too are brass coated lead," particularly since the evidence showed that a whole bullet which struck deceased's heart caused his death.

4. **Criminal Law § 34.7– evidence of other crimes – competency to show intent to kill**

In this prosecution for first degree murder, a witness's testimony that defendant scuffled with another person at a bar and grill, that defendant then went to the witness's body shop and got into an altercation with a second person, that defendant fired shots into the witness's house and his daughter's car, and that defendant then returned to the bar and grill and began the encounter with deceased which led to the fatal shooting was competent to show defendant's intent to kill, although it also tended to show defendant's commission of offenses unrelated to the one for which he was being tried.

5. **Criminal Law § 85.2– character evidence – reputation when drinking**

The trial court erred in permitting the prosecutor to ask an officer to state defendant's "character and reputation when he is drinking" and the officer to testify that defendant's reputation is that "when he gets drunk he fights"; however, such error was harmless where the evidence of the State, aside from the officer's testimony, clearly indicated that defendant was prone to be argumentative and combative when he had been drinking alcohol.

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

APPEAL by defendant from judgment entered by *Long, J.*, 22 October 1979 Criminal Session, SURRY Superior Court.

Upon a plea of not guilty, defendant was tried on a bill of indictment, proper in form, charging him with the first-degree murder of Charles Eugene Martin on 2 December 1978. Evidence presented by the state tended to show:

Late in the afternoon of said date, decedent, his uncle, Charles Alvis Martin, and Ralph Hurt, went to the 601 Grill (also known as the Orange Blossom) in Crutchfield, North Carolina. Among other things the establishment had a bar at which beer was sold and several pool tables. Some 45 minutes later defendant entered the grill and began talking with Hurt. An argument developed between defendant and Hurt as to which one could whip the other. After arguing awhile, they went outside and began wrestling. Hurt wrestled defendant to the ground and sat on top of him after which defendant insisted that they stop their argument and their playing. Defendant then left the premises and was gone approximately one and one-half hours.

When defendant returned he had a cut lip. He ordered a beer after which deceased confronted him and said, "Don't be talking about the Martins, I am a Martin." As of that time defendant had consumed six or eight beers and deceased had consumed several beers. They were both "high". The bartender suggested that deceased quieten down and go outside and get some cool air. Although he had not been asked to go outside, defendant did so. After deceased had left the building, the bartender went to the door and saw defendant coming from the direction of his car with a rifle. Defendant raised the rifle and fired, after which deceased grabbed his right side and "humped" over. No weapon was found on deceased.

Before the first shot was fired, Alvis Martin went outside to check on his nephew. He saw deceased some distance away. As Alvis yelled at deceased, defendant fired a gun four times. One of the bullets struck Alvis on his ear, causing him to retreat quickly into the building.

After the shooting stopped, defendant entered his automobile, drove up to the door of the grill holding his rifle, ordered another beer and drove away without paying for it. Thereafter, deceased was found lying on the ground with one gunshot wound in his chest area and another in his back. He died within a few minutes after being shot. Eight spent .22 caliber casings were found near the body. An autopsy revealed three wounds, one in the chest area, one in his back and another in his jaw. Two bullets and the fragments of a third bullet were recovered from deceased's head and body. The bullet which entered his chest passed through his lung and struck his heart; this bullet caused his death.

Defendant presented evidence, including his own testimony, which is summarized as follows: Following the words with deceased in the bar, he went outside to his car with the intention of going home. As he reached his car, deceased came up from behind him and knocked him down. Defendant then got up and deceased knocked him down again. Thereafter, defendant managed to get into his car but deceased pulled him from the car and knocked him down a third time. As defendant got back into his car, deceased started on him again and pulled something shiny out of his pocket which looked like a knife. As deceased tried to pull him out of the car again, defendant reached into the back of the car, obtained an automatic rifle and shot deceased. Deceased staggered backward and then advanced on defendant again at which time he shot him a second time. Deceased then walked away a few steps and fell. Defendant fired several shots into the ground and drove off.

Defendant presented numerous character witnesses. Other evidence pertinent to the assignments of error will be discussed in the opinion.

The jury returned a verdict finding defendant guilty of first-degree murder. The court then conducted a sentencing hearing as provided by G.S. § 15A-2000, *et seq.* The jury recommended that defendant be sentenced to life imprisonment and from judgment entered in accordance with the recommendation, defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Norma S. Harrell, for the state.

Morrow, Fraser and Reavis, by Larry G. Reavis and Alvin A. Thomas, for defendant-appellant.

BRITT, Justice.

Defendant contends by his Exceptions 1, 2, 3, 5 and 6 that the trial court committed prejudicial error by admitting, over objection, evidence "of a highly, speculative and inflammatory nature" that was not relevant to the case. There is no merit in this contention.

[1] Defendant's first exception relates to the testimony of state's witness Clifford Speer. After the witness stated that he heard deceased tell defendant "don't be talking about the Martins, I am a Martin", the witness was asked: "What, if anything, did you see in the way of or hear in the way of coming from him?" Over objection the witness answered: "I didn't hear Mr. King say anything but I could sort of see his mouth moving like in a low mumble but you could not understand what he was saying."

Initially, we are compelled to observe that the answer was in no way prejudicial to defendant's interests. It is incumbent upon the defendant not only to show error but also to demonstrate that the error so identified was prejudicial. *E.g., State v. Paige*, 272 N.C. 417, 158 S.E. 2d 522 (1968). Furthermore, evidence of the same import was introduced at a later point in the direct examination of the witness when Mr. Speer was allowed to testify "Mr. King then said something else in a low tone of voice. I could not understand him . . . ." By failing to object to that later testimony, defendant waived his objection to the challenged testimony. *E.g., State v. Hampton*, 294 N.C. 242, 239 S.E. 2d 835 (1978).

[2] Defendant's second exception relates to the testimony of James D. Barker, a witness for the state. He testified on cross-examination that he had not told his wife on numerous occa-

sions that he did not know what happened outside of the building. He further testified that his wife asked him one time what happened on the occasion in question and "she thought that I ought to go and see Wayne (defendant) and talk to him about it." On redirect examination the witness testified that he did not know why his wife suggested that he go and talk with defendant. He further stated that "when they had the hearing over here, my wife was in the court sitting with Mr. King and his wife." The district attorney then asked, "And then after that she asked that you go and see Wayne." The witness answered, "Yes, after the hearing." Defendant then objected to the question and moved that the answer and the question be stricken. The court overruled the objection.

Defendant argues that the evidence to which his Exception No. 2 relates suggests an attempt by defendant, or his wife on his behalf, to bribe a state's witness. We think this is a strained interpretation of the testimony. The challenged question simply clarified the time sequence by establishing that it was after the hearing that the witness Barker's wife suggested that Barker talk to defendant about the occasion of the shooting. Furthermore, the evidence tends to show that the witness had no motive to offer anything except truthful testimony against defendant because it establishes the friendship between defendant and his wife, on the one hand, and the witness and his wife, on the other hand. Lastly, we note that defendant's objection was not made until after the question had been asked and the witness had answered. That being the case, the motion to strike was addressed to the discretion of the trial judge. *State v. Perry*, 275 N.C. 565, 169 S.E. 2d 839 (1969).

[3] Defendant's Exception No. 3 relates to the testimony of state's witness Montgomery who was an S.B.I. agent in December of 1978 and who examined the two bullets and the fragment of a bullet removed from deceased's body. The witness described the two whole bullets as having brass coating and stated that the lead fragment was also brass coated. He further stated that the fragment was not sufficient for him to determine its caliber, its manufacturer, or if it had been fired from a particular weapon. He then stated, over objection, that the fragment was similar to the two whole bullets "in that they too are brass coated lead."

We can perceive no prejudice that defendant suffered by the admission of this testimony, particularly in view of the fact that the evidence showed that the whole bullet which struck deceased's heart was the one that caused his death. Again, we apply the principle that it is incumbent upon a defendant not only to show error but to show that the error was prejudicial to him. *State v. Paige, supra.* Furthermore, defendant made no objection when the lead fragment was offered and admitted into evidence.

[4] Exceptions 5 and 6 pertain to the testimony of Bill Cochran who testified as a witness for the state on rebuttal. He testified that he saw defendant at the Orange Blossom on the day in question at around 5:00 p.m.; that the witness then went to his body shop in or near Boonville where he and three friends, including Gary Sizemore, took "a few drinks"; that defendant and J.T. Williams came into the shop and had a drink; that defendant and Sizemore got into an argument and the witness ordered them to leave; that when the two men went outside, defendant hit Sizemore; that the witness then got his gun and ordered defendant and Sizemore to leave; that when defendant got into his car, the witness got mad and hit him; that defendant fired several shots as he drove away and that one shot hit the witness' daughter's car, and two shots hit his house.

Defendant argues that the challenged testimony was inadmissible because it tended to show the commission of offenses which were unrelated to the one for which he was being tried; and that its only purpose was to inflame the jury. This argument is not persuasive.

While the general rule is that in a prosecution for a particular crime, the state cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense, the rule is subject to certain exceptions. One of those exceptions is that where a specific mental intent or state is an essential element of the crime charged, evidence may be offered of such acts or declarations of the accused as tend to establish the requisite mental intent or state, even though the evidence discloses the commission of another offense by the accused. *State v. McClain,* 240 N.C. 171, 81 S.E. 2d

364 (1954); *accord, State v. Tate*, 294 N.C. 189, 239 S.E. 2d 821 (1978); *State v. Williams*, 292 N.C. 391, 233 S.E. 2d 507 (1977).

We think this testimony clearly comes within this exception. The challenged evidence tended to show that defendant scuffled with Ralph Hurt at the Orange Blossom; that he thereafter went to Cochran's place of business and got into an argument with Sizemore; that after firing shots into Cochran's house and his daughter's car, defendant returned to the Orange Blossom and began the encounter with Martin which led to the fatal shooting. All of this evidence was competent to show defendant's intent to kill, an essential element of first-degree murder. *State v. Wilson*, 280 N.C. 674, 187 S.E. 2d 22 (1972).

[5] By his Exceptions 7 and 8, defendant contends the trial court committed prejudicial error in admitting evidence of a specific character trait of defendant. These exceptions relate to the testimony of Trooper D.B. Peeler, a witness for the state, who was questioned with respect to defendant's general character and reputation in the community where he lived. Without objection, the witness answered that "it is not good". He was then asked, "What is his character and reputation when he is drinking?" Defendant objected and the court overruled the objection. The witness then answered, "His reputation when he gets drunk he fights."

The rule in North Carolina regarding evidence of character traits is well established. While a party who offers a character witness can only prove the general character of the person asked about, the witness, on his own volition, may say in what respect it is good or bad. *See generally* 1 Stansbury's North Carolina Evidence § 114 (Brandis Rev. 1973). While the trial court was in error by overruling defendant's objection, we hold that defendant has failed to establish prejudice. An error in the trial court will serve as a basis for the award of a new trial only upon a showing that the error was so substantial that a different result would likely have ensued in its absence. *State v. Johnson*, 294 N.C. 288, 239 S.E. 2d 829 (1978). As it applies to evidentiary matters, this rule holds that unless there is the reasonable possibility that the item of evidence alleged to have been erroneously admitted might have contributed to the con-

viction, its admission constitutes harmless error. *State v. Foster*, 284 N.C. 259, 200 S.E. 2d 782 (1973).

The evidence of the state, aside from the testimony of the trooper, clearly indicated that defendant was prone to be argumentative and combative when he had been drinking alcohol. The state was able to establish that on the day in question prior to the fatal shooting defendant clashed with at least three other men. During all of this time, defendant had been drinking. In view of the quantum of this type of evidence, we are unable to conclude that the testimony of the trooper was the difference between conviction and acquittal in the present case.

For the reasons stated, we conclude that defendant received a fair trial free from prejudicial error.

No error.[1]

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

STATE OF NORTH CAROLINA v. LAVERNE McNEIL SINCLAIR

No. 6

(Filed 7 October 1980)

1. **Criminal Law § 25; Forgery § 2.2– insufficient evidence of forgery – acceptance of no contest plea – no factual basis shown for plea**

Where defendant was charged in fourteen bills of indictment with fourteen counts of forgery of savings account withdrawal slips and fourteen counts of uttering the forged slips, six of the indictments were consolidated for trial, the jury returned guilty verdicts in all cases, and defendant then pleaded no contest to all counts in the remaining eight indictments, the trial court erred in accepting defendant's plea of no contest, since the record did

[1]We note in passing that defendant's counsel in preparing the record on appeal violated Rule 9(b)(3) of the Rules of Appellate Procedure in that they included the court's charge to the jury when no error was assigned to the charge. Counsel's attention is called to the penalty that is authorized by Rule 9 (b)(5).

not reveal a sufficient factual basis to support defendant's pleas in that evidence in the six cases was insufficient to be considered by the jury and dismissal should have been granted; evidence that defendant had the authority to sign the withdrawal slips in the name of her grandmother, the owner of the savings accounts, tended positively to show defendant's innocence; and defendant's plea of no contest itself did not provide the "factual basis" contemplated by G.S. 15A-1022(c).

2. **Criminal Law §§ 23.1, 25– plea of guilty or no contest – factual basis required**

G.S. 15A-1022(c) which provides that a judge may not accept a plea of guilty or no contest without first determining that there is a factual basis for the plea contemplates that some substantive material independent of the plea itself must appear of record which tends to show that defendant is, in fact, guilty.

Justice BROCK did not participate in the consideration and decision of this case.

ON appeal pursuant to G.S. 7A-30(2) from a decision of the Court of Appeals, reported at 45 N.C. App. 586, 263 S.E. 2d 811, opinion by *Judge Hedrick* with *Judge Vaughn* concurring and *Judge Clark* dissenting, reversing one judgment but affirming another judgment entered by Judge Brown on 10 April 1979 in EDGECOMBE Superior Court.

Rufus L. Edmisten, Attorney General, by Archie W. Anders and James E. Magner, Jr., Assistant Attorneys General, for the state.

C. Ray Joyner, Attorney for defendant appellant.

EXUM, Justice.

Defendant was charged in fourteen indictments each containing one count of forgery and one count of uttering a forged instrument. On 4 December 1978 she entered pleas of not guilty to all charges. At the 19 February 1979 Criminal Session of Edgecombe Superior Court, Judge Frank R. Brown presiding, the state called only six indictments to be consolidated for trial. The jury returned guilty verdicts in all cases. Defendant then pleaded no contest to all counts in the remaining eight indictments. In the six jury cases the Court of Appeals unanimously held that the state's evidence was insufficient to be submitted to the jury and reversed judgment imposing a one-year prison

sentence. A majority of the Court of Appeals, however, affirmed judgment imposing a ten-year prison sentence in the eight cases in which defendant entered pleas of no contest. Judge Clark dissented from this portion of the decision on the ground that no factual basis appeared of record to support the no contest pleas as required by G.S. 15A-1022. We agree with Judge Clark and reverse the Court of Appeals.

The state presented its evidence at trial through the testimony of Janet Pittman, a teller at Peoples Bank and Trust Company in Rocky Mount, and Alice Alston, the grandmother of defendant. Ms. Pittman described six occasions between 8 September and 6 October 1978 on which defendant came to the bank and executed savings withdrawal slips on two accounts listed in the names of R.L. Alston or Alice Alston. Defendant, who was in possession of the passbook on three of the six occasions, signed all withdrawal slips as Alice Alston. Mrs. Alston testified that she had opened the two savings accounts for the defendant's benefit, that the money was "to be used as she [defendant] needed it," and that defendant had permission to make withdrawals "whenever she [defendant] needed money." Although Mrs. Alston did not know about the specific withdrawals in question, she insisted that the money belonged to defendant and that defendant was authorized to take her passbook and withdraw the money at any time. The state also introduced into evidence six affidavits which were signed by Mrs. Alston shortly after being notified that "someone" was withdrawing money from her account. These provided, in pertinent part:

> "[T]hat after an examination of said check she never signed or authorized any other person to sign her name or said check and that name appearing thereon was made without her knowledge or consent; that she has no knowledge as to the person or persons so doing and further says that she never received the whole or part of the proceeds thereof."

Mrs. Alston testified that she did not learn that her granddaughter was the person withdrawing the money until after her arrest, and that had she known that her granddaughter was the person who made the withdrawals, she would not have

signed the affidavits. Defendant offered no evidence. The jury returned guilty verdicts in all six cases. Defendant then pleaded no contest to the remaining eight indictments. Prayer for judgment in all fourteen cases was continued until the 9 April 1979 Session.

On 10 April 1979 defendant, before judgment was pronounced, moved to withdraw her earlier pleas of no contest on the ground they were not "freely and voluntarily made." Defendant stated to the court through counsel: Her pleas were made immediately after the jury verdicts were returned against her in February when the birth of her child was imminent. In fact labor ensued that very night and the child was born the next day. She felt that by entering her pleas of no contest to the remaining charges Judge Brown might permit her to "go home" to have her baby and not have the child in prison. After consulting with her counsel for approximately one hour, she decided, because of pressures engendered by the physical and mental stress of the imminent birth and the jury's unexpected guilty verdicts, to enter pleas of no contest to all remaining charges.

Judge Brown, without a hearing, summarily denied the motion. He then sentenced defendant to ten years imprisonment in the cases in which she pleaded no contest and to one year imprisonment in the jury cases, to begin at the expiration of the ten-year sentence.

The Court of Appeals unanimously reversed the judgment entered on the jury convictions on the ground that evidence presented by the state was insufficient to be considered by the jury. Accordingly, it held defendant's motion for dismissal should have been allowed. It noted that Mrs. Alston's affidavits represented at most prior inconsistent statements offered only to impeach her trial testimony; they were not offered nor could they be considered as substantive evidence. 1 Stansbury's North Carolina Evidence, *Witnesses* § 46 at 131 (Brandis Rev. 1973). Reversal, therefore, was required since the state was without any substantive evidence that the defendant's execution and use of the withdrawal slips was unauthorized.

Finding no error in Judge Brown's denial of defendant's motion to withdraw her pleas of no contest, a majority of the

Court of Appeals affirmed judgment in the cases in which defendant had entered these pleas. Judge Clark dissented on the ground that there was no factual basis in the record to support defendant's pleas of no contest. Indeed the record demonstrated that defendant was, in fact, not guilty of these charges. We agree with Judge Clark.

[1] We note first that the Court of Appeals majority construed defendant's appeal from Judge Brown's denial of her motion to withdraw her pleas as based solely on Judge Brown's failure to conduct an evidentiary hearing on the question of *voluntariness* of the pleas. The majority reasoned that under the rationale of *State v. Dickens*, 299 N.C. 76, 261 S.E. 2d 183 (1980), no such hearing was required inasmuch as, unlike *Dickens*, the transcript taken at the time of defendant's pleas was conclusive on this question. We, like Judge Clark, do not construe defendant's argument in the Court of Appeals so narrowly. She did argue in her brief in that court:

> "Since the trial judge did not conduct a hearing to determine the appropriate findings concerning the basis for the Defendant's motion to withdraw her pleas of no contest made prior to sentencing . . . the sentence imposed in those cases should be vacated and the cases remanded for an evidentiary hearing to determine whether the Defendant's motion to withdraw her pleas of no contest should be allowed. The Court of Appeals should strongly consider vacating the judgment in those cases and dismissing those cases since all of the cases arise out of the same series of events and are part of a common plan and should have been consolidated for trial. If the evidence considered in the light most favorable to the State is insufficient as a matter of law to sustain the convictions, the other cases should be dismissed also."

We agree with this argument.

A plea of guilty or no contest involves the waiver of various fundamental rights such as the privilege against self-incrimination, the right of confrontation and the right to trial by jury. Our legislature has sought to insure that such pleas are entered into voluntarily and as a product of informed choice. G.S. 15A-1022(a)(b). In addition, G.S. 15A-1022(c) provides that:

"(c) *The judge may not accept a plea of guilty or no contest without first determining that there is a factual basis for the plea.* This determination may be based upon information including but not limited to:

(1) A statement of the facts by the prosecutor.
(2) A written statement of the defendant.
(3) An examination of the presentence report.
(4) Sworn testimony, which may include reliable hearsay.
(5) A statement of facts by the defense counsel."

(Emphasis supplied.)

The statute "does not require the trial judge to elicit evidence from each, any or all of the enumerated sources . . . . The trial judge may consider any information properly brought to his attention in determining whether there is a factual basis for a plea of guilty or no contest." *State v. Dickens, supra,* 299 N.C. at 79, 261 S.E. 2d at 185-86. That which he does consider, however, must appear in the record, so that an appellate court can determine whether the plea has been properly accepted. Discussing Fed. R. Crim. P. 11, which then provided that a federal court "shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea," the United States Supreme Court has noted that the factual basis must appear "on the record." *Santobello v. New York,* 404 U.S. 257, 261 (1971). *Accord, Gilbert v. United States,* 466 F. 2d 533 (5th Cir. 1972); *United States v. Delsanter,* 433 F. 2d 972 (2nd Cir. 1970); *Manley v. United States,* 432 F. 2d 1241 (2nd Cir. 1970).

Judge Brown, at the time he accepted defendant's plea of no contest, undoubtedly thought the record revealed a sufficient factual basis to support defendant's pleas. He earlier had submitted cases apparently arising from identical facts to the jury, and the jury had returned verdicts of guilty in all cases. The Court of Appeals, however, determined that the evidence in these earlier cases was insufficient to be considered by the jury and dismissal should have been granted.

We thoroughly agree with this ruling. The substantive evidence presented at trial by the state positively shows that

defendant had authority to sign the withdrawal slips in her grandmother's name. Not only, then, is this evidence insufficient to establish defendant's guilt; it, as Judge Clark noted, tends positively to show her innocence.

[2] Neither does the Transcript of Plea itself provide a factual basis for the plea. A defendant's bare admission of guilt, or plea of no contest, always contained in such transcripts, does not provide the "factual basis" contemplated by G.S. 15A-1022(c). If the plea itself constituted its own factual basis, the statute requiring a factual basis to support the plea would be meaningless. The statute, if it is to be given any meaning at all, must contemplate that some substantive material independent of the plea itself appear of record which tends to show that defendant is, in fact, guilty.

In *State v. Dickens, supra,* 299 N.C. at 82, 261 S.E. 2d at 187, we relied on the fact, appearing of record, that defendant had been duly convicted in the district court on the very charges to which he entered pleas of guilty in superior court in addition to his statement in his transcript that he was "in fact" guilty to support our conclusion that a factual basis for the plea existed in the record.

For the reasons stated the decision of the Court of Appeals affirming the judgment against defendant based on her pleas of no contest is reversed. These pleas of no contest and the judgment based thereon in cases numbered 78-CRS-7705, 78-CRS-7711, 78-CRS-7713, 78-CRS-7715, 78-CRS-7717, 78-CRS-7719, 78-CRS-7727, and 78-CRS-9767, are hereby vacated. These cases are remanded to the Court of Appeals for remand to Edgecombe Superior Court for such proceedings as the state may elect to pursue.

Reversed and Remanded.

Justice BROCK did not participate in the consideration and decision of this case.

ECONO-TRAVEL MOTOR HOTEL CORPORATION, PLAINTIFF v. JOHN M. TAYLOR, EDGAR M. HOLT AND CHARLES P. FLETCHER, T/A TAYLOR-HOLT-FLETCHER, A PARTNERSHIP AND JOHN M. TAYLOR, BARBARA B. TAYLOR, EDGAR M. HOLT, GUSTANA HOLT, CHARLES P. FLETCHER AND JUANITA U. FLETCHER, INDIVIDUALLY, DEFENDANTS AND CHARLES P. FLETCHER AND WIFE, JUANITA U. FLETCHER, THIRD PARTY PLAINTIFFS v. FOREMANS, INC. T/A ALL-STATE BUILDING SUPPLY AND CLAY B. FOREMAN, JR., THIRD PARTY DEFENDANTS

No. 20

(Filed 7 October 1980)

1. **Uniform Commercial Code § 30– negotiable instrument – holder**

Where a negotiable instrument is made payable to order, one becomes a holder of the instrument when it is properly indorsed and delivered to him, and mere possession of a note payable to order does not suffice to prove ownership or holder status. G.S. 25-1-201(20); G.S. 25-3-202.

2. **Uniform Commercial Code § 30– action on note – showing that plaintiff not holder – summary judgment**

Summary judgment was properly entered for defendant movants in an action to recover a deficiency judgment on a negotiable promissory note where defendants offered evidence that plaintiff corporation was not the holder of the note by showing that the note was not made payable to plaintiff or to bearer and was not indorsed to plaintiff and that the last indorsee and plaintiff were two separate and distinct corporate entities, and where plaintiff merely rested on its pleadings that it became the owner and holder of the note by corporate merger with the last indorsee but failed to introduce evidence to support its allegation of the existence of a merger.

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

APPEAL by defendants from the decision of the Court of Appeals *(Judge Clark, Judges Parker and Martin [Robert M.]* concurring), 45 N.C. App. 229, 262 S.E. 2d 869 (1980), reversing summary judgment for defendants entered by *Judge Hal H. Walker,* at the 25 September 1978 Civil Session of PASQUOTANK Superior Court.

Plaintiff, Econo-Travel Motor Hotel Corporation, instituted this action to obtain a deficiency judgment for an amount owing on a promissory note dated May 15, 1973, in the principal amount of $375,000.00. The note was executed by the general partnership of Taylor-Holt-Fletcher, consisting of defendants

John M. Taylor, Edgar M. Holt, and defendant-appellant Charles P. Fletcher. The note was made payable to Southern Loan & Insurance Company and indorsed by the wife of each general partner, defendants Barbara B. Taylor, Gustana H. Holt, and defendant-appellant Juanita U. Fletcher. On 1 October 1973 the note was indorsed and transferred to Southern Mortgage Company, and on 14 June 1974 it was assigned to Econo-Travel Corporation. Plaintiff Econo-Travel Motor Hotel Corporation alleged in its complaint that it was the owner and holder of the note as successor to Econo-Travel Corporation by merger.

Defendant-appellants Charles P. Fletcher and Juanita U. Fletcher were the only defendants to file answer and appear in this action. In their answer they denied plaintiff's allegation that it was the owner and holder of the note sued upon. Defendant-appellants moved for summary judgment, which was granted by the trial court on 26 September 1978.

Plaintiff offered no evidence in response to defendants' summary judgment motion, choosing to rely on its pleadings and the exhibits, stipulations, and deposition testimony placed into evidence by defendants.

The evidence presented by defendant-appellants at the summary judgment hearing established the following additional facts: The partnership of Taylor-Holt-Fletcher was formed for the purpose of dealing in real estate. The promissory note sued upon represented a loan for the construction of an Econo-Travel Motor Hotel in Elizabeth City, North Carolina, which the partnership was undertaking to build pursuant to licensing agreements with Econo-Travel Corporation. The loan agreement provided the Southern Mortgage Company would make advances to defendants as needed during construction, not to exceed the $375,000.00 principal amount of the note. The loan was secured by the note and a deed of trust on the motel property.

Defendant-appellant Charles P. Fletcher withdrew from the partnership on 10 September 1973. As of that date, Southern Mortgage Company had advanced $110,000.00 to defend-

ants. On 19 September 1973, plaintiff, Charles P. Fletcher, and the remaining partners, Holt and Taylor, entered into a release agreement whereby Fletcher assigned all of his rights in the licensing agreements with plaintiff to Holt and Taylor, and Fletcher was released from all obligations under those agreements.

Upon default on the promissory note, foreclosure proceedings were instituted on 16 May 1974, and after sale, upset bid, and resale, the property represented by the deed of trust was sold for $315,050.00, of which $310,584.95 was applied to the outstanding indebtedness on the note. In its action for a deficiency judgment, plaintiff demanded $76,534.35 plus interest, representing the balance owing on the note.

The Court of Appeals reversed Judge Walker's order granting summary judgment for defendants on the ground that defendants, as the party moving for summary judgment, had failed to meet their burden of establishing that no genuine issue existed as to any material fact in the case. Defendants' petition to this Court for discretionary review pursuant to G.S. 7A-31 was allowed 6 May 1980.

Wilson & Ellis by J. Kenyon Wilson, Jr. and M.H. Hood Ellis for defendant-appellants.

Walker & Romm by Wilton F. Walker; and Robert E. Brown, for plaintiff-appellee.

COPELAND, Justice.

The sole question presented by this appeal is whether the trial court erred in granting defendant's motion for summary judgment. Summary judgment is properly granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." G.S. 1A-1, Rule 56(c); *Caldwell v. Deese*, 288 N.C. 375, 218 S.E. 2d 379 (1975). The party moving for summary judgment has the burden of establishing the absence of any triable issue of fact. The

movant may satisfy this burden 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." *Middleton v. Myers*, 299 N.C. 42, 261 S.E. 2d 108 (1980); *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979); *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E. 2d 795 (1974); 6 Moore's Federal Practice, §56.15[8] at 642 (2d ed. 1976). The purpose of Rule 56 is not to allow the court to decide an issue of fact, but to determine whether a genuine issue of fact exists and thereby eliminate the necessity of a formal trial where only questions of law are involved and a fatal weakness in the claim or defense of a party is exposed, *Moore v. Fieldcrest Mills, Inc., supra; Caldwell v. Deese, supra; Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971).

We hold that defendant-appellants Charles P. Fletcher and Juanita U. Fletcher satisfied their burden as movants for summary judgment when they offered into evidence a copy of the promissory note at issue, showing that the note had not been indorsed and transferred to plaintiff.

[1] G.S. 25-3-301 provides that the holder of a negotiable instrument may enforce payment in his own name. To bring suit on the instrument in his own name, the plaintiff must first establish that he is in fact a holder. The holder of an instrument is defined in G.S. 25-1-201(20) to be one who is in possession of an instrument "drawn, issued, or indorsed to him or to his order or to bearer or in blank." Where, as in this case, a negotiable instrument is made payable to order, one becomes a holder of the instrument when it is properly indorsed and delivered to him. *First Citizens Bank & Trust Co. v. Raynor*, 243 N.C. 417, 90 S.E. 2d 894 (1956). Mere possession of a note payable to order does not suffice to prove ownership or holder status. G.S. 25-3-202; *Metcalf v. Ratcliff*, 216 N.C. 216, 4 S.E. 2d 515 (1939).

[2] Defendant-appellants' evidence at the summary judgment hearing established that the $375,000.00 note had never been made payable to plaintiff or to bearer, nor had it ever been indorsed to plaintiff. The last indorsement was by Southern Mortgage Company to Econo-Travel Corporation. The record

shows that Econo-Travel Corporation and plaintiff Econo-Travel Motor Hotel Corporation are two separate and distinct corporate entities, therefore indorsement to Econo-Travel Corporation did not constitute indorsement to plaintiff. By proving the absence of indorsement to plaintiff, defendants established that plaintiff was not the owner or holder of the note, and thereby negated an essential element of plaintiff's cause of action, meeting their burden as movants for summary judgment and showing their entitlement to judgment as a matter of law.

Once a party satisfies his burden in moving for summary judgment, the party who opposes the motion must either assume the burden of showing that a genuine issue of material fact does exist or provide an excuse for not doing so. *Zimmerman v. Hogg & Allen, supra.* The opposing party must come forward with facts, not mere allegations, which controvert the facts set forth in the moving party's case. The opposing party may not rest solely upon the allegations or denials in his pleadings. G.S. 1A-1, Rule 56(e); *Moore v. Fieldcrest Mills, Inc., supra, Conner Co. v. Spanish Inns,* 294 N.C. 661, 242 S.E. 2d 785 (1978). *See also* Louis, Federal Summary Judgment Doctrine: A Critical Analysis, 83 Yale L.J. 745 (1974).

Plaintiff in this case alleged in its complaint that it became the owner and holder of the note sued upon by merger with indorsee Econo-Travel Corporation. G.S. 55-110(b) provides that in the event of a merger between corporations, the surviving corporation succeeds by operation of law to all of the rights, privileges, immunities, franchises and other property of the constituent corporations, without the necessity of a deed, bill of sale, or other form of assignment. *Good Will Distributors (Northern), Inc. v. Shaw,* 247 N.C. 157, 100 S.E. 2d 334 (1957). Therefore, if the alleged merger had occurred, then plaintiff, as the surviving corporation, would have succeeded by operation of law to Econo-Travel Corporation's status as owner and holder of the promissory note, and would have had standing to enforce the note in its own name.

However, plaintiff introduced no evidence to support its allegation of the existence of a merger, choosing instead to rest

on its pleadings, which merely contended that a merger had taken place. Since defendant-appellants had met their burden under Rule 56 as movants for summary judgment, it was incumbent upon plaintiff to come forth with evidence to controvert defendant's case, or otherwise suffer entry of summary judgment against it. It would have been a simple matter for plaintiff to present evidence of a merger in a form permitted under Rule 56(c), if a merger had in fact occurred. By resting on its pleadings, plaintiff failed to establish a genuine issue as to whether it was the owner and holder of the note, therefore defendant-appellants were entitled to entry of summary judgment in their favor as a matter of law, and the trial court was correct in so ordering.

Accordingly, the decision of the Court of Appeals is reversed and the judgment of Judge Walker granting summary judgment for defendant-appellants is reinstated.

Reversed.

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

PATRICIA T. BAILEY and ELBERT L. BAILEY, JR. v. MARVIN C. GOODING, SEASHORE TRANSPORTATION COMPANY AND CAROLINA COACH COMPANY

No. 88

(Filed 7 October 1980)

Appeal and Error § 6.2– order setting aside default judgment – order interlocutory – no substantial right affected – order not appealable

An order of the trial court allowing a motion pursuant to G.S. 1A-1, Rule 60(b) to set aside a default judgment was interlocutory and not appealable, and the Court of Appeals should have dismissed the appeal, even though the question of appealability was not raised by the parties. Furthermore, the order setting aside default judgment did not affect a substantial right of plaintiffs, the avoidance of a full trial on the merits not being a substantial right in this case.

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

ON appeal as a matter of right pursuant to G.S. 7A-30(2) from the decision of the Court of Appeals, 45 N.C. App. 335, 263 S.E. 2d 634 (1980), one judge dissenting.

We consider whether an interlocutory order allowing a motion pursuant to Rule 60(b), N.C. Rules of Civil Procedure, to set aside a default judgment is appealable.

Freeman, Edwards & Vinson, by George K. Freeman, Jr., and Narron, Holdford, Babb, Harrison & Rhodes, P.A., by William H. Holdford, for plaintiff-appellants.

Young, Moore, Henderson & Alvis, by B.T. Henderson, II, and Walter E. Brock, Jr., for defendant-appellees.

CARLTON, Justice.

I.

The procedural quagmire that confronts us here is best unraveled by a chronological account of the proceedings in the trial court.

This controversy arose from a collision between a bus and an automobile on 6 February 1977. The plaintiffs filed complaint on 16 June 1977 and all defendants were duly served. On 7 July 1977, W.S. Pearce, Jr., a representative of defendants' insurance carrier, called on plaintiffs' attorney, George K. Freeman, Jr. The following day Freeman wrote Pearce confirming their understanding that no default judgment would be taken "until our negotiations break down." Pearce was to get back in touch with Freeman around the first of August. Freeman also wrote, "At that time if the negotiations break down we will give you additional time within which to secure counsel and file answer." For reasons not important to this decision, Pearce and Freeman did not get back together and on 6 October 1977 plaintiffs filed a calendar request for a hearing on a motion in the case and mailed a copy to each defendant. The request did not specify the nature of the motion.

On 17 October 1977 plaintiffs' attorney filed motion for entry of default pursuant to Rule 55, N.C. Rules of Civil Proce-

dure. The motion was allowed by the clerk on that date. On 18 October 1977 Freeman received a letter from B.T. Henderson stating that his firm had been retained in the case to represent defendants. Enclosed with the letter was a stipulation extending the time for answer for thirty days which Henderson requested Freeman to sign. Instead, Freeman called Henderson and advised "that default had been entered the previous day."

On 20 October 1977 plaintiffs filed motion for default judgment. On 28 October defendants filed a motion pursuant to Rule 55, N.C. Rules of Civil Procedure, for an order setting aside the entry of default and a "Response to Motion For Default Judgment." These motions were brought before Judge Friday on 9 November 1977 who deferred ruling until receipt of medical evidence. Defendants filed answer on 22 November 1977.

A hearing was held on 6 February 1978 before Judge David I. Smith who entered (1) an order denying defendants' motion to set aside the clerk's entry of default because defendants' failure to plead or appear "was not due to any of the reasons justifying relief set out in Rule 60(b)" and because good cause had not been shown, and (2) a judgment that plaintiffs have and recover such damages as a jury might determine. It was also ordered that the matter be placed on the trial calendar for determination of damages by the jury. Defendants excepted to both. No jury trial for damages has been held.

On 2 June 1978, defendants filed a motion pursuant to Rule 60(b), N.C. Rules of Civil Procedure, to set aside the default judgment. On 5 March 1979, prior to the hearing on the motion, defendants filed an Offer of Judgment in the amount of $4,500.00, pursuant to Rule 68 of the N.C. Rules of Civil Procedure. The motion was heard by Judge Stevens. He entered an order filed 9 May 1979 that entry of default on 17 October 1977 and default judgment entered on 6 February 1978 both be stricken on grounds of mistake, inadvertence, surprise and excusable neglect.

Plaintiffs excepted and appealed to the Court of Appeals. That court vacated Judge Stevens' order granting the Rule 60(b) motion, noting that a Rule 60(b) motion is proper only when a *final* default judgment has been entered (as opposed to

a judgment that requires that damages be determined by a jury trial) and that one superior court judge cannot overrule another. The Court of Appeals also remanded the cause to the trial court to determine whether good cause was shown to set aside the entry of default, noting that Judge Smith erred in applying the stricter standards of Rule 60(b) in lieu of the "good cause" standard of Rule 55(d).

Judge Clark concurred in the result only "because it more closely approximates the result that would be reached if the appeal should be dismissed." He would have dismissed the appeal because the judgment appealed from was interlocutory and not appealable. Judge Hedrick dissented, voting to vacate Judge Stevens' order and to remand the proceeding to the superior court for trial on the issue of damages.

We think the Court of Appeals improperly considered the case on its merits and reverse.

II.

The threshold question which should have been considered by the Court of Appeals, although not argued by either party before that court,[1] was whether an appeal lies from Judge Stevens' order. It is well established in this jurisdiction that if an appealing party has no right of appeal, an appellate court on its own motion should dismiss the appeal even though the question of appealability has not been raised by the parties themselves. *Dickey v. Herbin*, 250 N.C. 321, 108 S.E. 2d 632 (1959); *Rogers v. Brantley*, 244 N.C. 744, 94 S.E. 2d 896 (1956). We therefore do not address the various matters considered by the Court of Appeals. This appeal was premature and the action should first run its course in the trial court.

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) (1969). Judge Ervin noted the difference between the two in *Veazey v. Durham:*

[1]Defendants' motion to dismiss the appeal as interlocutory was denied by a different panel of judges on 28 June 1979.

> 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.

231 N.C. 354, 361-62, 57 S.E. 2d 377, 381 (1950) (citations omitted). While final judgments are always appealable, interlocutory decrees are immediately appealable only when they affect some substantial right of the appellant and will work an injury to him if not corrected before an appeal from final judgment. *Id.* at 362, 257 S.E. 2d at 381; G.S. § 1-277 (Cum. Supp. 1979). "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." *Veazey v. Durham*, 231, N.C. at 362, 57 S.E. 2d at 381.

These rules are designed to prevent fragmentary and premature appeals that unnecessarily delay the administration of justice and to ensure that the trial divisions fully and finally dispose of the case before an appeal can be heard. *Waters v. Personnel, Inc.*, 294 N.C. 200, 240 S.E. 2d 338 (1978); *Raleigh v. Edwards*, 234 N.C. 528, 67 S.E. 2d 669 (1951). "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*, 231 N.C. at 363, 57 S.E. 2d at 382; *see also Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 251 S.E. 2d 443 (1979).

Unquestionably, the order of Judge Stevens setting aside the default judgment is interlocutory; it does not finally dispose of the case and requires further action by the trial court. Because the order is interlocutory we will not review it unless it "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." *Veazey v. Durham*, 231 N.C. at 362, 57 S.E. 2d at 381, *see* G.S. § 1-277.

The "substantial right" test for appealability is more easily stated than applied. The question before the Court in *Waters v. Personnel, Inc.*, 294 N.C. 200, 240 S.E. 2d 338 (1978), was the appealability of an order setting aside a summary judgment. In concluding that such an order does not affect a substantial right, the Court considered the determinative factor to be that the appellant's rights would be fully and adequately protected by an exception to the order that could then be assigned as error on appeal after final judgment. The Court also noted that the only burden suffered by the appellant because of its inability to take an immediate appeal was the necessity of rehearing its summary judgment motion. *Id.* at 208, 240 S.E. 2d at 344.

Because the factors considered in *Waters* fully effectuate the policy behind the appealability rule, we will follow the approach used by the *Waters* Court. Plaintiff-appellants' objection to Judge Stevens' order setting aside default judgment and entry of default have been preserved by an exception to that order. If the ultimate result of a trial on the merits goes against plaintiffs, they will then be able to appeal and assign as error the order setting aside their default judgment. No right of plaintiffs will be lost by delaying their appeal until after final judgment; their exception fully and adequately preserves their challenges to Judge Stevens' order. The absence of a right of immediate appeal will force plaintiffs to undergo a full trial on the merits instead of a trial solely on the issue of damages. Although this is a much greater burden than the necessity of a rehearing of a motion, we do not think it so difficult a burden, on the facts of this case, to elevate the order to the status of affecting a "substantial right." Avoidance of a trial, in this context, is not a "substantial right." *See Waters v. Personnel, Inc.*, 294 N.C. 200, 240 S.E. 2d 338 (1978); *cf. Acoustical Co. v. Cisne and Associates, Inc.*, 25 N.C. App. 114, 212 S.E. 2d 402 (1975) (order setting aside entry of default not appealable).

For a collection of representative cases holding interlocutory orders not appealable, see *Waters v. Personnel, Inc.*, 294 N.C. at 208-09, 240 S.E. 2d at 344.

We recognize the discretionary authority of the Court of Appeals to treat a purported appeal as a petition for writ of

certiorari and to issue its writ in order to consider the appeal. G.S. § 7A-32(c) (1969); Rule 21, North Carolina Rules of Appellate Procedure. There is no record of any such action having been taken. It is noted that another panel of the Court of Appeals denied a motion to dismiss the appeal. The majority opinion of the Court of Appeals recites only that the court was reviewing the order of Judge Smith in its discretion. There is no such recital of the grounds upon which that court reviewed the order of Judge Stevens, the order from which this appeal was taken. We also recognize that we could, in the exercise of our supervisory powers, elect to consider the appeal on its merits. N.C. Const., art. IV, § 12(1); G.S. § 7A-32(b) (1969). We decline to do so for the reasons stated above and because we strongly feel that fragmented appeals such as that here presented seriously encroach upon judicial time and effort and threaten the orderly administration of justice.

The Court of Appeals, therefore, erred by not dismissing the appeal *ex proprio motu*. The cause must be returned to the trial court for trial on the merits. Any procedural matters to which the parties take exception may later be considered on appeal of this cause in its entirety should the matter again be brought before the appellate division.

The decision of the Court of Appeals is vacated and this cause is remanded to it with instructions that it enter an order dismissing the appeal.

Vacated and remanded.

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

State v. Crawford

STATE OF NORTH CAROLINA v. EDWARD LEE CRAWFORD

No. 25

(Filed 7 October 1980)

Criminal Law § 75.7– defendant's statements to officer – absence of Miranda warnings – harmless error

Assuming, without deciding, that defendant's statements to an officer that "I'll kill him if he lives" and "I'll kill the m—— f——" which were made after the officer asked him "Why?" were erroneously admitted into evidence because defendant had not been given the *Miranda* warnings before the officer's question, the admission of such statements was harmless beyond a reasonable doubt where statements by defendant which were identical in all material respects were admitted from three other sources without objection.

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

APPEAL by defendant from *Howell, J.*, 13 December 1979 Criminal Session of MECKLENBURG County Superior Court.

Defendant was charged in an indictment proper in form with the murder of Alfred Woodrow Smith. Defendant entered a plea of not guilty.

At trial the State presented evidence tending to show that on the morning of 8 August 1979 defendant was talking with Thomas Jackson. Jackson said that defendant told him that before the day was out he would kill somebody. Defendant also told Jackson that somebody had testified in court against his son. Jackson said that defendant showed him a sawed-off shotgun he was carrying in a paper bag.

Shortly after this conversation, Jackson and another witness saw Alfred Woodrow Smith approach defendant. Each witness testified that Smith held his hand out to defendant and asked, "How are you doing?" Neither witness saw Smith holding a gun or going for his pocket. Jackson testified that defendant answered Smith, "I'll show you how I'm doing," pulled the shotgun from the bag, and shot Smith. After the shooting, the witnesses said defendant went down the street with the shotgun. Another witness said that after the shooting defendant

asked him to hide the shotgun in his house, but he refused. Police later found the gun in a local poolroom.

Officer Judy Ward was the first police officer on the scene. She testified that a crowd had formed around Smith who lay sprawled, but still alive, in the street. She asked the crowd who shot the victim, and she testified that defendant stepped from the crowd and said, "I shot the s-- of a b----." Officer Ward and other witnesses testified that defendant then went over to the victim and kicked him in the head. Jackson testified that he heard defendant say, "I thought you were dead."

Officer Ward testified that after defendant kicked the victim in the head she pushed him toward her patrol car. Defendant objected to the admission of any other statements made by defendant to Officer Ward, contending that the admission of the statements would violate defendant's Miranda rights because he was in the custody of Officer Ward, was questioned and had not been read his rights. During the voir dire hearing, Officer Ward testified that, as she directed defendant to the patrol car and before reading him his rights, she asked him "Why?" She said he answered, "It's none of your damn business." She said that she asked no further questions, but that defendant continued to make statements, including, "I'll kill him if he lives. I'll kill the m----- f-----." The trial judge, after making findings of fact, concluded that, although in his opinion the confrontation was not governed by *Miranda*, he would suppress defendant's immediate response to Officer Ward's question, but he would not suppress defendant's additional statements.

William Massey, who lives in the vicinity of the shooting, testified that he joined the crowd around the victim. He testified, without objection by defendant, that he heard defendant say that if the victim did not die, he would kill him when he got out.

Gentry Caudill, an Assistant District Attorney for Mecklenburg County, testified that the victim had been a witness in a case against defendant's son. The State offered medical evidence tending to show that Smith died as a result of a gunshot wound to the abdomen.

Defendant took the stand in his own defense. Defendant testified that when he met Smith that day he asked him why he had two boys rob defendant's home. Defendant said that Smith then reached into his pockets twice, and the second time pulled out a gun. Defendant testified he then shot Smith in self-defense. Defendant denied kicking the victim in the head, but said, "I had on some soft-bottomed shoes. My foot slid beside his head." He denied seeing the State's witness Jackson on the day of the shooting or knowing that the victim had testified against his son. He also denied stating to Officer R.B. Crenshaw that he had intended to kill Smith and would go to the hospital to finish the job.

On rebuttal the State presented Officer Crenshaw and another officer who testified that defendant, after being advised of his Miranda rights, told them he hoped Smith would die and that if the victim did not he would go to the hospital to finish the job.

The trial judge submitted the possible verdicts of guilty of first-degree murder, guilty of second-degree murder, guilty of manslaughter, or not guilty. The jury returned a verdict finding defendant guilty of first-degree murder. After a hearing on the recommendation for punishment, the jury recommended a life sentence. The trial judge entered judgment imposing a sentence of life imprisonment. Defendant appealed.

Rufus L. Edmisten, Attorney General, by Grayson G. Kelley, Associate Attorney, for the State.

Lyle J. Yurko, Assistant Public Defender, 26th Judicial District, for defendant.

BRANCH, Chief Justice.

Defendant's only assignment of error was the trial court's admission of defendant's statements to Officer Ward after her question, "Why?" Defendant answered the question, "None of your damn business," and then defendant went on, and Officer Ward was allowed to testify in court, "[Defendant] said, 'I'll kill him if he lives' and 'I'll kill the m----- f-----.' "

Statements of a defendant made while he is being interrogated and while he is held in custody should be excluded from evidence if the defendant is not warned of and does not understandingly waive his rights to remain silent and have an attorney present at questioning. *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602. However, admission of such statements into evidence is not fatal and will not require reversal when the admission of the statements is harmless beyond a reasonable doubt. *State v. Siler*, 292 N.C. 543, 234 S.E. 2d 733 (1977), *citing*, *Chapman v. California*, 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824 (1967). In *Siler* this Court stated, "[B]ecause in this case defendant's inadmissible first statement was in all material respects identical to his admissible second statement, we conclude the error was harmless beyond a reasonable doubt." *State v. Siler, supra* at 552, 234 S.E. 2d at 739.

Assuming, without deciding, that defendant's statements to Officer Ward rise to the protection of *Miranda*, we consider whether the statements were harmless beyond a reasonable doubt. Statements identical in all material respects were admitted without objection from three other sources. A bystander testified to the same matter that defendant seeks to have suppressed. Further, police officers Crenshaw and Overturf testified, on rebuttal, to almost identical statements made by defendant. Thus we hold that, even if the statements to Officer Ward were erroneously introduced into evidence, their effect was harmless beyond a reasonable doubt.

No Error.

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

STATE OF NORTH CAROLINA v. REUBEN ISAAC COATS

No. 32

(Filed 7 October 1980)

1. **Robbery § 5.4– armed robbery charged – instruction on common law robbery not required**

In a prosecution for armed robbery where the evidence tended to show that a gun was pointed at the victim and its persuasive influence was still present when defendant removed the victim's watch and wallet, defendant's denial of his participation in the robbery and his denial that he saw a gun during the robbery did not constitute evidence sufficient to require the trial court to submit an issue of common law robbery to the jury.

2. **Criminal Law § 126– polling of jury – comment by juror – unanimous verdict**

The verdict of the jury was unanimous and the trial court properly accepted it, though a juror, when asked if the guilty verdict was her verdict, responded, "We understood it acting in concert," since the juror's comment referred to the instructions which had been given by the trial judge, and the juror responded affirmatively when the question was put to her again.

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

DEFENDANT appeals from decision of the Court of Appeals, 46 N.C. App. 615, 265 S.E. 2d 486 (1980), upholding judgment of *Brown, J.*, entered at the 30 July 1979 Criminal Session, CUMBERLAND Superior Court.

Defendant was tried upon a bill of indictment charging him with the armed robbery of James Russell Smith on 20 December 1978 in Cumberland County.

Evidence for the State tends to show that James Russell Smith was casually acquainted with defendant, having been in prison with him. On 20 December 1978, Smith entered a car occupied by defendant and three other black men. Smith sat on the rear seat of the car with defendant on his left and another man on his right. A man called "Hoot" sat on the passenger side of the front seat and the fourth man did the driving. As the car was driven out of town, Hoot asked James Russell Smith, "Have you ever been robbed white boy? Well, you're robbed now." At that time, Smith saw that Hoot had a silver gun. Hoot then struck Smith in the mouth and the man sitting on Smith's right also struck him across the nose. The blows knocked out two of

Smith's teeth. The defendant then took Smith's wallet, containing eight dollars in currency, his watch, four to five dollars in change and $68 located in Smith's right front pocket. Smith's shoes and shirt were then taken from him, and he was thrown out of the vehicle.

Defendant testified in his own behalf and swore that on 20 December 1978 he, together with Smith and three other males, entered a vehicle; that as the car proceeded toward Highway 87, the occupant of the front passenger seat known as "Hoot" turned and asked James Smith if he had ever been robbed; that Hoot then said, "you are robbed now, white boy," and struck Smith in the face; that the person sitting to Smith's right also struck him; that Hoot and the other man robbed Smith and threw him out of the car. Defendant swore he did not participate in the robbery and further stated that it was dark and he never saw a gun.

The jury convicted defendant of armed robbery as charged, and he was sentenced to forty years in prison. On defendant's appeal, the Court of Appeals found no error with Webb, J., dissenting. Defendant thereupon appealed to this Court pursuant to G.S. 7A-30(2), assigning errors discussed in the opinion.

Rufus L. Edmisten, Attorney General; Dennis P. Myers, Assistant Attorney General, for the State

Daniel T. Perry, III, attorney for defendant appellant

HUSKINS, Justice:

[1] The trial judge submitted two, and only two, permissible verdicts, viz: guilty of armed robbery as charged or not guilty. Defendant's first assignment of error is based on the contention that the court erred in failing to submit common law robbery as a permissible verdict. The Court of Appeals found no merit in this assignment and neither do we.

"The essential difference between armed robbery and common law robbery is that the former is accomplished by the use

or threatened use of a firearm or other dangerous weapon whereby the life of a person is endangered or threatened. In a prosecution for armed robbery, the court is not required to submit the lesser included offense of common law robbery unless there is evidence of defendant's guilt of that crime. If the State's evidence shows an armed robbery as charged in the indictment that there is no conflicting evidence *relating to the elements* of the crime charged an instruction on common law robbery is not required." *State v. Lee*, 282 N.C. 566, 569-70, 193 S.E. 2d 705, 707 (1973) (citations omitted); *accord, State v. Carnes*, 279 N.C. 549, 184 S.E. 2d 235 (1971).

In the instant case, Smith testified that he saw the barrel, handles and cylinder of a silver-colored heavy gun. The gun was pointed at Smith by Hoot when the robbery commenced, and its persuasive influence was still present when defendant removed Smith's watch and wallet. Thus, the State's evidence shows an armed robbery as charged in the bill of indictment. The mere fact that defendant swore he did not see a weapon is of insufficient probative value to warrant or require the submission to the jury of the lesser included offense of common law robbery. *Compare State v. Thompson*, 297 N.C. 285, 254 S.E. 2d 526 (1979). His statement to that effect is not in conflict with the State's evidence. He explained why he could not see the gun, saying, "It was dark in the car and it was dark and it was dark in the area. I was in the back seat and I never saw no gun." Obviously, an instruction on common law robbery was not required. Defendant's testimony that he did not participate in the robbery and did not see a gun constitutes no evidence of his guilt of common law robbery. Defendant's first assignment of error is overruled.

[2] Defendant contends the verdict of the jury was not unanimous and the court erred in accepting it. This constitutes his second assignment of error.

When the verdict was returned in open court, defendant requested that the jurors be polled and this was done. During that inquiry, the following colloquy occurred:

"COURT: Mrs. Bailey, your foreman has returned a verdict of guilty as charged, was this your verdict?

MRS. BAILEY: We understood it acting in concert.

COURT: Was this your verdict?

MRS. BAILEY: Yes.

COURT: And do you still agree and assent thereto?

MRS. BAILEY: Yes."

Defendant argues that the quoted colloquy does not establish affirmatively that each juror assented to the verdict announced earlier by the foreman. Defendant therefore contends the verdict was not unanimous as required by Article I, section 24 of the Constitution of North Carolina.

We find no merit in this contention. The record reveals that the trial judge had charged the jury, in pertinent part, as follows:

> "Now, for a person to be guilty of a crime it is not necessary that he himself do all the acts necessary to constitute the crime. If two or more persons act together with a common purpose to commit robbery with a firearm each of them is held responsible for the acts of the others done in the commission of robbery with a firearm.
>
> So, I charge that if you find from the evidence and beyond a reasonable doubt that on or about December 20, 1978 Reuben Isaac Coats acting either by himself or acting together with others had in his possession a firearm and took and carried away money and watch and wallet and shoes from the person or presence of James Smith without his voluntary consent by endangering or threatening his life with the use or threatened use of a pistol, the defendant, Reuben Isaac Coats, knowing that he was not entitled to take the money, watch, wallet and shoes and intending at that time to deprive James Smith of its use permanently it would be your duty to return a verdict of guilty of robbery with a firearm. However, if you do not so find or have a reasonable doubt as to one or more of these things it would be your duty to return a verdict of not guilty."

It is quite obvious that the comment of the juror refers to the quoted instruction that it was not necessary for defendant himself to do all the acts necessary to constitute the crime and that if several persons acted together with a common purpose to commit robbery with a firearm, then each of them was in law responsible for the acts of the others. That is what Mrs. Bailey was talking about when she said, "We understood it acting in concert." It is therefore equally obvious that the verdict of the jury was unanimous and the court properly accepted it. Defendant's second and final assignment of error is overruled.

Defendant has shown no prejudicial error in his trial and conviction. The verdict and judgment must therefore be upheld.

No Error.

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

STATE OF NORTH CAROLINA v. WILLIAM BERNARD COHEN

No. 2

(Filed 7 October 1980)

Homicide § 21.5– first degree murder – sufficiency of evidence

A charge of first degree murder was properly presented to the jury for decision since there was substantial evidence of every essential element of the crime and that defendant was the perpetrator thereof.

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

APPEAL by defendant from judgment entered by *Howell, J.*, at the 13 November 1979 Session of MECKLENBURG Superior Court.

Defendant was charged in a bill of indictment with the murder of Ralph Harding Dixon. Prior to trial the State filed a notice of its intention to prosecute defendant for first degree murder on a non-capital basis. He entered a plea of not guilty.

The State presented evidence that tended to show that on the morning of 27 July 1979 Ralph Dixon, an insurance agent, left his home driving a Volkswagen automobile. He did not return home that evening by his usual hour of ten o'clock. His body was discovered at about five o'clock the next morning by a security guard in the parking lot of a county business. The cause of death was a stab wound that penetrated the heart and lung.

Defendant, a black male, was arrested at about two o'clock on the morning of 28 July 1979 for stealing a motor bicycle. At that time, the police were unaware of Mr. Dixon's death. The arresting officers advised defendant of his *Miranda* rights and searched him. They found two wallets, one of which contained a driver's license and credit cards issued to the deceased. When questioned about the wallet, defendant replied that it belonged to his brother-in-law. Because the picture on the driver's license was that of a white male, the police questioned defendant further. He again asserted that Dixon was his brother-in-law and claimed that his sister had married a white man.

One of the arresting officers called the Dixon home to check defendant's story. He learned from Mrs. Dixon that her husband was an insurance agent, was supposed to have collected insurance premiums that evening and had not returned home. Using this information the officer again questioned defendant on the identity of Ralph Dixon. Defendant's responses were excluded from evidence.

Other evidence for the State showed that a black male used the deceased's gasoline credit card to purchase gasoline on the evening of 27 July 1979. This same credit card was in the wallet found on defendant. The signature on the receipt was not that of the deceased. Dixon's car was found on 28 July in a wrecker service parking lot. It had been towed in at the telephoned request of a man who claimed to be the owner. A key found on defendant fit the ignition and his fingerprints were found on the car.

Defendant presented no evidence but, through cross-examination, showed that the exact time of death could not be

determined. Blood found on clothing worn by defendant when he was arrested was shown to be that of the defendant and not of the deceased. Defendant's handwriting was not compared to the handwriting on the credit card receipt. The wrecker service driver testified on direct examination that the caller who requested that the car be towed sounded to him like a drunken white man.

Defendant was found guilty of first degree murder and was sentenced to life imprisonment.

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

Keith M. Stroud for defendant-appellant.

CARLTON, Justice.

Counsel for defendant excepted to the judgment entered and perfected his appeal. Although the record on appeal contains two assignments of error, defendant's counsel candidly concedes in his brief that there is no error in either assignment. He requests that we review the entire record on appeal to determine whether there exists any prejudicial error in the proceedings below.

Rule 28 of the Rules of Appellate Procedure limits our review to questions that are supported by the arguments made and authorities cited in the brief. *State v. Adams*, 298 N.C. 802, 260 S.E. 2d 431 (1979). Here defendant made no arguments in his brief and cited no authority. Thus, nothing is presented to us for review. However, Rule 2 of the Rules of Appellate Procedure allows the appellate courts to suspend or vary the Rules in order to prevent manifest injustice or to expedite decision in the public interest. Because this case involves a sentence of life imprisonment we elected pursuant to our inherent authority and Rule 2 to examine the entire record. After careful review, we conclude that the murder charge was properly presented to the jury for decision since there was substantial evidence of every essential element of the crime and that defendant was the perpetrator of the crime. *See State v. Davis*, 289 N.C. 500, 223

S.E. 2d 296, *death sentence vacated,* 429 U.S. 809, 97 S. Ct. 47, 50 L. Ed. 2d 69 (1976); *State v. Hairston,* 280 N.C. 220, 185 S.E. 2d 633, *cert. denied,* 409 U.S. 888, 93 S. Ct. 194, 34 L. Ed. 2d 145 (1972); G.S. § 14-17 (Cum. Supp. 1979). We find no prejudicial error in the trial judge's evidentiary rulings. The court in its instructions to the jury adequately explained and applied the law to the evidence presented.

We, therefore, hold that there was no error warranting that the verdict or judgment be disturbed.

No error.

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

STATE OF NORTH CAROLINA
v
JOHN EDDIE BURNEY

ORDER

No. 119

(Filed 23 September 1980)

IT is ordered that this cause be remanded to the Superior Court, RICHMOND County for an evidentiary hearing on defendant's motion for appropriate relief on the ground that evidence has become available which was unknown to defendant at the time of the trial. The Clerk of Superior Court, Richmond County, is directed to forthwith bring this matter before any superior court judge presently holding court in the district for the purpose of setting a time for the evidentiary hearing here ordered.

It is further ordered that all time periods for perfecting or proceeding with this appeal (including but not limited to the filing of briefs) are tolled pending the final disposition of defendant's motion for appropriate relief.

It is further ordered that the order of the Superior Court, Richmond County entered following the hearing ordered herein shall be transmitted to the clerk of this Court in accordance with G.S. 15A-1418.

Done by the Court in conference, this 22nd day of September 1980.

CARLTON, J.
For the Court

IN THE MATTER OF)
JUDGE JOSEPH A.)
WILLIAMS,)
DISTRICT COURT JUDGE,) ORDER
EIGHTEENTH JUDICIAL)
DISTRICT)

No. 216PC

(Filed 30 September 1980)

THIS cause is before the Supreme Court of North Carolina upon petition and allegations of the District Attorney, Eighteenth Prosecutorial District, said petition being labeled "Petition for Writ of Prohibition." Judge Williams has responded to the petition and does not deny the allegations of fact. Therefore, the allegations of fact in the petition are taken as true.

From an analysis of approximately fifty to sixty cases brought to our attention by the District Attorney, it appears that Judge Williams has exceeded his authority and has failed to follow recognized practice and procedure in the disposition of criminal cases. His particular digressions in handling the various cases brought to our attention will not be detailed here. We find no evidence of moral misconduct on the part of Judge Williams. We must conclude on the record before us that Judge Williams, in disposing of most of the fifty to sixty cases detailed in the record, failed to follow applicable statutes, rules, customs or practices, and the actions taken by him were not within the Judge's inherent or discretionary powers.

However, this Court has been variously assured that the digressions complained of by the District Attorney in his petition to us have been discontinued by all District Judges in the Eighteenth Judicial District and in particular that Judge Williams, who will leave office in December 1980, will not follow such procedures again. We have concluded, therefore, that the questions raised in the petition before us are moot.

IT IS ORDERED by this Court in Conference that the petition by the district attorney of the Eighteenth Prosecutorial District be and the same is hereby DISMISSED.

By Order of the Court in Conference this 30th day of September, 1980.

CARLTON, J.
For the Court

The foregoing order is issued over my hand and the seal of the Supreme Court this 1st day of October, 1980.

John R. Morgan
Clerk of the Supreme Court
of North Carolina

Morrison v. Burlington Industries

ELSIE T. MORRISON, EMPLOYEE, PLAINTIFF	)	
v	)	ORDER
BURLINGTON INDUSTRIES, EMPLOYER, AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS	)	

No. 60

(Filed 23 October 1980)

THIS matter is before us on appeal from a decision of the North Carolina Court of Appeals reported in 47 N.C. App. 50, 266 S.E. 2d 741 (1980).

On 26 August 1976, plaintiff filed notice of accident and claim with the Industrial Commission, alleging that her exposure to cotton dust while working at Burlington Industries prior to 25 April 1974 had caused her to contract an *occupational disease*, byssinosis, resulting in permanent and total disability.

On 18 December 1978, Commissioner Brown entered an Opinion and Award finding that plaintiff was *totally disabled* for work *due to her exposure to cotton dust* while in defendant's employ. He entered an award accordingly. Defendants appealed to the Full Commission which modified Commissioner Brown's award. The Full Commission found that plaintiff does suffer from an occupational disease and is entitled to compensation but "that plaintiff *is not totally disabled by reason of such occupational disease.*" (Emphasis added.) It found that, "In addition to her chronic obstructive lung disease, plaintiff suffers and has suffered for some time from phlebitis, varicose veins and diabetes. Such conditions constitute an added factor in causing her disability."

The Full Commission also entered the following finding of fact:

> Due to the occupational disease suffered by plaintiff and due to her other physical infirmities, including bronchitis, phlebitis, varicose veins and diabetes, plaintiff has no earning capacity in any employment for which she can qualify in the labor market. Fifty-five percent of such disability is due to her occupational disease and 45 percent of such disability is due to her physical infirmities not related to her employment with defendant-employer.

The Commission thereupon awarded plaintiff 55% *partial disability* compensation for three hundred weeks pursuant to G.S. 97-30.

Plaintiff appealed to the Court of Appeals which reversed the Full Commission. The Court of Appeals held that the employee was totally incapacitated for work due to a compensable occupational disease and was entitled to an award for total incapacity under G.S. 97-29. Chief Judge Morris dissented on the ground that an employee should be compensated only for incapacity "resulting from the injury," and not for "factors totally unrelated to her employment."

On 7 July 1980, defendants appealed to this Court pursuant to G.S. 7A-30. We heard oral arguments on 13 October 1980. We do not express any opinion on the merits in this order. For reasons stated below, we remand to the Industrial Commission for further hearing on the medical evidence, direct that a record of the proceedings on remand be forwarded to this Court forthwith and retain jurisdiction for our final determination on the merits.

We note herewith a summary of the medical testimony.

Dr. Mabe testified, *inter alia*, as follows:

> On September 3, 1975, she had a persistent bronchitis, chronic fibrosis of the lungs and concomitant phlebitis of the left leg . . . .
>
> . . . .

. . . Based on my physical examination and taking a history on her admission, she was admitted to the hospital with a working diagnosis of a recent upper respiratory infection superimposed on chronic bronchitis, diabetes mellitus, controlled by diet; and suspected byssinosis, occupational oriented. The final impression was chronic bronchitis, severe, diabetes mellitus, controlled by diet; possible byssinosis with history of exposure to lint, aggravated by upper respiratory infections and productive cough.

. . . .

. . . [T]he medical bases for her disability were chronic bronchitis, phlebitis of the left leg with some brown edema, maxillary sinusitis, and, of course, chronic pulmonary obstructive disease were the primary things as far as working was concerned. She did have a leg problem with old residual which would not have totally disabled her but it was an added factor to her disability. . . .

. . . . .

I have treated her multiple times for respiratory infections, with sinusitis involved in it. In 1965, she did have a lot of respiratory infections, but this was a different season of the life and different age. She was treated on multiple occasions for bronchitis, cough. I did not treat her originally for the phlebitis. That was a residual and more current thing, but before she retired, she was treated for a chronic, persistent cough, which we labelled as a bronchitis.

. . . .

. . . She had a leg problem too, which kept her from doing anything with any walking any length of time, or standing. This was another problem, and was an additive factor as far as her maintaining a job of some other character.

Dr. Sieker testified, *inter alia,* as follows:

Pulmonary function studies showed lung capacity 85% of normal but with severe obstruction of the bronchial tubes so that arterial oxygen is 62. Her arterial oxygen normally is 80 and with exercise, it is only 71, so she has severe respiratory disability.

. . . .

. . . She had mild diabetes and phlebitis in her leg.

. . . .

. . . She smoked about a half a pack of cigarettes a day for 20 years and less in recent years. . . .

. . . .

. . . Based upon all the foregoing, my opinion satisfactory to myself to a reasonable degree of medical certainty, with the history of long exposure, is that the plaintiff's cotton dust exposure is most likely a causative factor in her chronic lung disease.

Again, based upon the same report and facts, my opinion, satisfactory to myself to a reasonable degree of medical certainty, is that the plaintiff's disability is due to her chronic lung disease. . . .

. . . .

I did get a history of smoking. At the maximum, she smoked a half pack a day and by her history, and she decreased this amount, although she was still smoking at the time I saw her. I noted that she had a "small nodular density in the periphery of the right lung." It is hard to say from the x-ray exactly what caused it, but usually this represents previous inflammatory disease, most likely fungus or TB.

. . . .

. . . Based on the other conditions that Mrs. Morrison has had, I would have to say that weighing the cotton dust exposure, somewhere between 50 and 60% of her disability would be related to her cotton dust exposure. Therefore, 50-40% was due to factors other than the cotton dust exposure.

Dr. Battigelli testified, *inter alia*, as follows:

If the Commission should find that Mrs. Morrison is either totally or partially disabled, my opinion, satisfactory to myself to a reasonable degree of medical certainty, as to what percentage of her disability which can be traced or is due to her exposure to cotton dust is that it could be quite miniscule, if not negligible. With luck, between 0 and 20%, in percentage terms.

. . . .

In my report I indicate a diagnosis of chronic obstructive lung disorder, bronchitis in type, in cigarette smoker with aggravation of complaints, on dust exposure. . . . As to the question of what effect aggravation on dust exposure would have over a period of twenty-eight years in terms of a clinical picture which she presented in 1975, I don't have any rational evidence to reply to that. I would state that does not necessarily mean that this temporary aggravation may result in a chronic one.

. . . I am unable to quantitate the effect of aggravation on cotton dust exposure over twenty-eight years; I can quantitate the effect of cigarette smoking. The statistical evidence shows that the damage of cigarette smoking is proportional to dose. There is similar data with respect to dose response in terms of cotton dust exposure. In a much less persuasive fashion, there is some analogy.

. . . .

Assuming that the Commission would find as fact that Mrs. Morrison, some ten or twelve years before her retire-

ment after working a substantial number of years in textile employment, exposure to cotton dust, began to notice symptoms of cough and chest tightness at work as opposed to weekend, that would occur soon after her return to work on Sunday evening, assuming they were the facts in this particular case, assuming that the evidence that I had not been able to gather was presented to me, talking about hypothetical — then the diagnosis would be different. A label of byssinosis could be legitimately used; otherwise, it is a fraud. But if that evidence is collected, then you could use it. The question that remains to define is what that label may imply in terms of disability.

. . . And I would be happy to support her in her claim [for Social Security] on the grounds of — number one, severe venous insufficiency; number two, chronic obstructive lung disorder; number three, depression; and number four, status post surgery.

I believe I also indicated that she presented valid symptoms of dyspenea on exertion in relation to those problems, which is evidence of chronic obstructive lung disorder and is one of the most common factors in dyspenea.

From the record, we conclude that the medical evidence before the Commission is not sufficiently definite on the cause of plaintiff's disability to permit effective appellate review. As we read the medical testimony, the physicians never addressed the crucial medical question of the interrelations, if any, between the cotton dust exposure and claimant's other infirmities such as her bronchitis, upper respiratory infection, sinusitis, phlebitis, and diabetes. In order for this Court to determine if the Commission's findings and conclusions are supported by the evidence, the record, through medical testimony, must clearly show: (1) what percentage, if any, of plaintiff's disablement, *i.e.*, incapacity to earn wages, results from an occupational disease; (2) what percentage, if any, of plaintiff's disablement results from diseases or infirmities unrelated to plaintiff's occupation which were accelerated or aggravated by plaintiff's occupational disease; and (3) what percentage, if any, of plaintiff's disablement is due to diseases or infirmities unrelated to

plaintiff's occupation which were *not* accelerated or aggravated by plaintiff's occupational disease.

For example, it is obvious that the Commission relied on Dr. Sieker's percentages in its finding of fact quoted above. However, Dr. Sieker never testified what he meant by "factors other than cotton dust exposure." Did he mean simply the phlebitis, or did he mean also to refer to claimant's bronchitis, upper respiratory infection, sinusitis, phlebitis, and diabetes? Could her cotton dust exposure have aggravated, contributed to or accelerated any of these other conditions; if so, which ones? If claimant is partly disabled by conditions which are caused, aggravated or accelerated by breathing cotton dust, then what percent of her disability is caused by these conditions? If claimant is partly disabled by conditions which are neither caused, aggravated nor accelerated by breathing cotton dust, then what percentage of her disability is caused by these conditions?

This Court does not abandon the well-established rules in this jurisdiction that the Industrial Commission has the exclusive duty and authority to find the facts relative to disputed claims and such findings are conclusive on appeal when supported by any competent evidence. Moreover, where the evidence before the Commission is such as to permit either one of two contrary findings, the determination of the Commission is conclusive on appeal and the mere fact that an appellate court disagrees with the findings of the Commission is not grounds for reversal. Here, however, the medical evidence before the Commission which appears in the record before us is not sufficiently definite to permit appropriate appellate review.

We cannot evaluate the testimony quoted above and correctly determine whether the findings made by the Commission are supported by the evidence. For that reason, we direct the Commission to re-examine the three medical witnesses to elicit definite answers to the questions noted above.

The Commission will then make findings of fact based thereon. If those findings require legal conclusions and an award at variance with those heretofore made by the Commis-

sion, it will then make appropriate legal conclusions and order the issuance of an award based thereon. If the additional findings require no change, the Commission will leave its conclusions and award intact. The additional findings of fact together with amended conclusions and award, if any, and a transcript of the additional medical evidence, will be certified to this Court forthwith and treated as an addendum to the record. Copies shall be forwarded to all parties for such further proceedings in this Court as may then be ordered.

It is so ordered.

Remanded to the Industrial Commission for further proceedings consistent with this order.

Jurisdiction retained by this Court for final determination.

This order shall be printed in the official reports of decisions of this Court.

Done by the Court in conference this 23rd day of October, 1980.

CARLTON, J.
For the Court.

The foregoing order is issued over my hand and the seal of the Supreme Court this 24th day of October, 1980.

John R. Morgan
Clerk of the Supreme Court
of North Carolina

Disposition of Petitions For Discretionary Review Under G.S. 7A-31

ASBURY v. CITY OF RALEIGH

No. 402PC

Case below: 48 N.C. App. 56

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 7 October 1980.

BURCL v. HOSPITAL

No. 305PC

No. 146 (Fall Term)

Case below: 47 N.C. App. 127

Petition by plaintiff for reconsideration of the denial of discretionary review under G.S. 7A-31 (See 301 N.C. 86) allowed 7 October 1980.

CITY OF WINSTON-SALEM v. CONCRETE CO.

No. 386PC

Case below: 47 N.C. App. 405

Petition by plaintiff and intervenors for discretionary review under G.S. 7A-31 denied 7 October 1980.

CURRITUCK COUNTY v. WILLEY

No. 269PC

Case below: 46 N.C. App. 835

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 October 1980.

DAVIS v. SILOO INC.

No. 354PC

Case below: 47 N.C. App. 237

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 7 October 1980.

Disposition of Petitions For Discretionary Review Under G.S. 7A-31

DODD v. WILSON

No. 247PC

Case below: 46 N.C. App. 601

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 7 October 1980.

FULLER v. FULLER

No. 375PC

No. 147 (Fall Term)

Case below: 47 N.C. App. 766

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 7 October 1980.

HOLT v. HOLT

No. 404PC

No. 149 (Fall Term)

Case below: 47 N.C. App. 618

Petition by defendants for discretionary review under G.S. 7A-31 allowed 7 October 1980.

IN RE LAMB

No. 409PC

No. 150 (Fall Term)

Case below: 48 N.C. App. 122

Petition by propounders for discretionary review under G.S. 7A-31 allowed 7 October 1980.

INVESTMENT CO. v. GREENE

No. 24PC

Case below: 48 N.C. App. 29

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 7 October 1980.

Disposition of Petitions For Discretionary Review Under G.S. 7A-31

MAXWELL v. WOODS

No. 380PC

Case below: 47 N.C. App. 495

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 7 October 1980.

PARKER v. SHELDON

No. 411PC

Case below: 47 N.C. App. 493

Petition by plaintiffs for writ of certiorari to the North Carolina Court of Appeals denied 7 October 1980.

SPINKS v. TAYLOR and RICHARDSON v. TAYLOR CO.

No. 377PC

No. 148 (Fall Term)

Case below: 47 N.C. App. 68

Petition by plaintiffs for discretionary review under G.S. 7A-31 allowed 7 October 1980.

STATE v. BIZZELL

No. 9PC

Case below: 47 N.C. App. 374

Application by defendant for further review denied 7 October 1980.

STATE v. BROWN

No. 424PC

Case below: 48 N.C. App. 225 (No. 795SC854)

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 October 1980.

Disposition of Petitions For Discretionary Review Under G.S. 7A-31

STATE v. CROUCH

No. 13PC

Case below: 48 N.C. App. 72

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 7 October 1980.

STATE v. CURRIE

No. 422PC

Case below: 47 N.C. App. 446

Petition by Attorney General for writ of certiorari to the North Carolina Court of Appeals denied 7 October 1980.

STATE v. DAVIS

No. 41PC

Case below: 48 N.C. App. 526

Petition by defendant for discretionary review under G.S. 7A-31 denied and appeal dismissed 7 October 1980.

STATE v. EVANS

No. 365PC

Case below: 46 N.C. App. 607

Motion of Attorney General to dismiss defendant's appeal for lack of a substantial constitutional question allowed 7 October 1980.

STATE v. GREENWOOD

No. 22PC

No. 152 (Fall Term)

Case below: 47 N.C. App. 731

Petition by Attorney General for discretionary review under G.S. 7A-31 allowed 7 October 1980. Motion of defendant to dismiss appeal for lack of substantial constitutional question denied 7 October 1980.

Disposition of Petitions For Discretionary Review Under G.S. 7A-31

STATE v. MARTIN

No. 346PC

Case below: 47 N.C. App. 223

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 October 1980. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 7 October 1980.

STATE v. PILKINGTON

No. 25PC

No. 153 (Fall Term)

Case below: 48 N.C. App. 431

Petition by defendant for discretionary review under G.S. 7A-31 allowed 7 October 1980.

STATE v. RICE

No. 290PC

Case below: 47 N.C. App. 208

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 October 1980.

STATE v. THACKER

No. 342PC

Case below: 45 N.C. App. 102

Application by defendant for further review denied 7 October 1980.

SYNCO, INC. v. HEADEN

No. 288PC

Case below: 47 N.C. App. 109

Petitions by plaintiffs and defendants for discretionary review under G.S. 7A-31 denied 7 October 1980.

Disposition of Petitions For Discretionary Review Under G.S. 7A-31

THOMPSON v. KYLES

No. 5PC

Case below: 48 N.C. App. 422

Petition by defendants for discretionary review under G.S. 7A-31 denied 7 October 1980.

WATSON v. DEPT. OF CORRECTION

No. 423PC

Case below: 47 N.C. App. 718

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 7 October 1980.

WESLEY v. GREYHOUND LINES, INC.

No. 14PC

Case below: 47 N.C. App. 680

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 October 1980.

WILLIFORD v. WILLIFORD

No. 410PC

No. 151 (Fall Term)

Case below: 48 N.C. App. 226

Petition by defendant for discretionary review under G.S. 7A-31 allowed 7 October 1980.

WOJSKO v. STATE

No. 396PC

Case below: 47 N.C. App. 605

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 7 October 1980. Motion of the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 7 October 1980.

Disposition of Petitions For Discretionary Review Under G.S. 7A-3

WRIGHT v. WRIGHT

No. 294PC

No. 145 (Fall Term)

Case below: 47 N.C. App. 367

Petition by defendant for discretionary review under G.S. 7A-31 allowed 7 October 1980.

STATE OF NORTH CAROLINA v. RICKY ALLEN BRIGHT

No. 14

(Filed 4 November 1980)

1. **Criminal Law § 84; Searches and Seizures § 25– insufficient affidavit for search warrant – admission of seized evidence – harmless error**

The affidavit upon which a search warrant for defendant's motel room was issued was fatally defective where the affidavit contained facts from which the magistrate could form a reasonable belief that the crimes of kidnapping and rape had been committed by a slender white man about six feet tall who had red curly hair and that the victim was assaulted in an automobile registered in defendant's name and parked in front of the motel, but the affidavit contained only a conclusory statement that defendant was registered in the motel, contained no information or circumstances indicating that defendant was the person described in the affidavit, and was therefore insufficient to support an inference that defendant was the person who committed the crimes and that the articles sought would be in his motel room or would aid in the apprehension or conviction of the offender. However, evidence admitted as the result of the search of defendant's motel room was not sufficiently prejudicial to require a new trial where the only article taken pursuant to the search under the warrant which revealed any probative evidentiary matter was a blanket containing two stains of type A blood, the same type as that of the victim, but such evidence was cumulative and of little probative value since type A stains were found in the automobile in which the assault occurred, and an expert testified that he could not determine the age of the stains on the blanket or even whether the stains were placed on the blanket at the same time.

2. **Searches and Seizures § 23– warrant to search automobile – sufficiency of affidavit**

An affidavit upon which a warrant to search defendant's automobile was issued contained sufficient facts and circumstances to support a finding by the magistrate that there was reasonable cause to believe that the search would reveal the presence of the articles sought and that such objects would aid in the apprehension or conviction of the offender.

3. **Criminal Law § 99.9– voir dire – court's leading questions to child witness**

In this prosecution for rape and kidnapping, the trial court did not err in asking leading questions of the seven year old victim during the *voir dire* hearing on defendant's motion to suppress identification testimony since G.S. 15A-1222 does not apply when the jury is not present during questioning, a child may be asked leading questions concerning delicate matters of a sexual nature, and the trial court may question a witness to clarify his testimony.

4. **Criminal Law § 66.9– photographic identification – no impermissible suggestiveness**

The trial court properly determined that a pretrial photographic identification procedure was not impermissibly suggestive where the court found

upon supporting *voir dire* evidence that a kidnapping victim was in the presence of her abductor for approximately two hours, that shortly after being released she gave the police a description of her abductor which was consistent with her trial testimony, and that the photographic display consisted of eight black and white photographs of the same quality showing persons with glasses, curly hair and basically the same facial features.

5. **Criminal Law § 53– expert medical testimony – cause of bruises**

A medical expert was properly permitted to state his opinion that bruises on a kidnapping and rape victim's face "looked as though that pattern could have been made by fingers."

6. **Arrest and Bail § 3.7– probable cause for arrest**

Officers had probable cause to arrest defendant for kidnapping and rape, and evidence seized pursuant to the arrest was thus not tainted by an illegal arrest, where the seven year old victim had been abducted from a bowling alley; the victim described her assailant as a white, slim male with reddish brown hair, described the automobile which had transported her as big, blue, old, "with two humps on the back," and stated that there were beer bottles in the back; an officer learned that defendant met the description given by the victim and that he had been seen at the bowling alley prior to her disappearance; the officer learned that defendant lived at a motel and drove a 1967 Chevrolet which matched generally the description the victim had given; officers saw the Chevrolet at the motel and determined that it was registered to defendant; before making the arrest, officers observed defendant and noted that he matched the description given by the victim of her assailant; and officers noted that the Chevrolet was humped and looked inside and saw that it contained beer bottles.

7. **Kidnapping § 1.2; Rape § 18.2– kidnapping – facilitating commission of rape – assault with intent to rape – sufficiency of evidence**

The State's evidence was sufficient to support defendant's conviction for assault with intent to commit rape and kidnapping by removing and restraining the victim "for the purpose of facilitating the commission of the felony of rape" where it tended to show that a white male removed the seven year old victim from a bowling alley, took her by car to a dirt road and "hurt" her; defendant had been to the bowling alley a short time before the victim disappeared; both defendant and his car matched descriptions given by the victim to the police; defendant had type O blood and the victim had type A blood; type A blood was found on the seat of defendant's automobile, and tests on trousers taken from defendant at the time of his arrest revealed the presence of semen and a group A substance; expert medical witnesses testified that there was a laceration between the victim's rectum and vagina; and a medical expert stated his opinion that "something had been inserted into the vagina beyond the hymenal ring."

8. **Criminal Law § 128.2– improper question – motion for mistrial – objection sustained – jury instructed**

It was not error for the court to deny defendant's motion for mistrial on the ground of improper questioning by the prosecutor where the court sustained defendant's objection and instructed the jury to disregard the prosecutor's question and its implication.

9. **Kidnapping § 2– sentence of life imprisonment – absence of findings on mitigating circumstances – jury verdict finding defendant guilty of assault with intent to rape**

The trial court properly sentenced defendant to life imprisonment for kidnapping without making findings of fact concerning the mitigating circumstances as to whether the victim "was released by the defendant in a safe place *and* had not been sexually assaulted or seriously injured," G.S. 14-39(b), where charges of kidnapping and assault with intent to commit rape were submitted to the jury, the jury found defendant guilty of both charges, and the nonexistence of the mitigating factors of G.S. 14-39(b) was thus already established beyond a reasonable doubt.

10. **Criminal Law § 138.7– severity of sentences – no showing defendant punished for pleading not guilty**

Presentence remarks made by the trial judge concerning defendant's plea of not guilty, while not approved, were made in the context of evaluating the worth of our jury system and did not show that defendant was more severely punished for kidnapping and assault with intent to commit rape because he exercised his constitutional right to a trial by jury.

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

APPEAL by defendant from the judgment of *Kirby, J.*, entered at the 17 September 1979 Criminal Session of GASTON Superior Court.

Defendant was charged in indictments proper in form with the kidnapping and first-degree rape of Melissa Smith. He entered a plea of not guilty to each charge.

Evidence for the State tended to show the following:

On the evening of 7 April 1979, Mr. and Mrs. Walter Smith and their seven-year-old daughter, Melissa, went to the Major League Bowling Lanes in Gastonia. After eating at the snack bar, Mr. and Mrs. Smith began to bowl. They gave Melissa money with which to play one of the game machines located in the building. At about 8:15 p.m., Mr. Smith went to look for Melissa but could not find her. A search of the building and grounds was unsuccessful, and the police were called. Around 11:00 p.m., Melissa was found in the parking lot of a Volkswagen dealer, located next door to the bowling alley. Several witnesses testified that she had a bruised face at that time.

Melissa was taken to Gastonia Memorial Hospital for an examination. Dr. Clifford Galloway, the physician who treated Melissa, testified that the victim had a laceration about three

or four centimeters long between her vagina and rectum, and that she was bleeding in that area. Dr. Robert H. Ogden, a gynecologist who also examined Melissa at the hospital, testified that in his opinion, something had been inserted into the vagina.

Melissa testified that a man with blondish-red hair took her to a gas station. The man drove a "bluish" car with torn black seats. She stated that the man took her to a dirt road and hurt her. Melissa identified defendant as the man who had abducted her.

Based on information which Melissa gave to him that night, Officer Rodney Parham questioned several employees of the bowling alley and determined that another employee, the defendant, matched the description given by Melissa of her abductor. Officer Parham learned defendant's name, that he had been seen at the bowling alley shortly before Melissa's disappearance, and that he drove a Chevrolet automobile matching the description Melissa had given. Officer Parham also discovered that defendant resided at the Cardinal Motel. Officer Parham and Officer James Carter went to the motel and observed a 1967 Chevrolet Impala in the parking lot. A Police Information Network (P.I.N.) report indicated that the car was registered in defendant's name. Several officers then set up a surveillance of the car. At approximately 6:00 a.m. on 8 April 1979, defendant walked from his motel room to the Chevrolet and then returned to his room.

Shortly thereafter, defendant was taken to the police station and arrested. The automobile and motel room were searched pursuant to search warrants, and several items secured in the searches were introduced into evidence.

Defendant testified in his own behalf and introduced evidence tending to show that he had gone to the bowling alley around 7:00 p.m. on 7 April 1979. He had been drinking earlier. He testified that he talked briefly with some of the other employees and left around 8:00. He returned to his motel residence and went to bed. He did not see the Smiths or Melissa at the bowling alley and denied ever having committed a sexual assault of any type.

The jury returned a verdict of guilty of assault with intent to commit rape and of kidnapping. Defendant was sentenced to fifteen years imprisonment for the conviction of assault with intent to commit rape and to life imprisonment for the kidnapping charge. The sentences were made to run concurrently. Defendant appealed pursuant to G.S. 7A-27 on the kidnapping charge, and on 7 May 1980 we allowed his motion to bypass the Court of Appeals on the charge of assault with intent to commit rape.

Other facts pertinent to this appeal will be set out in the opinion.

Rufus L. Edmisten, Attorney General, by Evelyn M. Coman, Associate Attorney, for the State.

R.C. Cloninger, Jr., Assistant Public Defender, for defendant.

BRANCH, Chief Justice.

Defendant assigns as error the trial judge's denial of his motions to suppress evidence obtained from defendant's motel room and automobile pursuant to separate search warrants. Defendant argues that the affidavits upon which the search warrants were issued did not contain sufficient facts or circumstances to support a finding of probable cause by the magistrate.

The affidavit upon which the warrant to search defendant's motel room was issued reads as follows:

> That on 4/7/79 Melissa T. Smith was kidnapped from the Major League Bowling Lanes. This incident was reported to the Gastonia City Police at approximately 8:48 p.m. Around 11 p.m. on this same night, 4/7/79, Melissa T. Smith was seen walking in the vicinity of the Major League Lanes by her parents.
>
> Melissa was taken to the Gaston Memorial Hospital and examined. The examination revealed that Melissa T. Smith had been sexually assaulted. While at the hospital, Melissa Smith described the person that took her from the Major League Lanes as having red curly hair, white, about 6 ft. tall and slender. She described the car in which she was

riding as blue with two humps on the back. She also states the car had two doors, big, and a black interior. The interior, she states was torn up. Victim also states she saw brown beer bottles in the car.

A 1967 Chevy blue/green in color was observed at 2:30 a.m. on 4/8/79 at the Cardinal Motel, Lowell, N.C. by Sgt. Carter and Officer Parham. The car is a 2 door 1967 blue/green Chevy with a long trunk which rises up on each side. On closer observation the interior of the car was observed. The car has a black interior and the front seat is torn up. The car is registered to Ricky Allen Bright according to the PIN network. Ricky Allen Bright is registered in room 42 of the Cardinal Motel in Lowell, N.C. / / / / / / / / / /

4/8/79

/ / / / / s/ SERGEANT J.R. CARTER / / / / /

/ / / / / s/ Gastonia Police Dept. / / / / /

s/ J.O. ELLINGTON (Magistrate)

The 1973 General Assembly enacted G.S. 15A-245 which declared the basis for issuance of a search warrant and set forth the duties of the issuing official. That statute provides:

Basis for issuance of a search warrant; duty of the issuing official. — (a) Before acting on the application, the issuing official may examine on oath the applicant or any other person who may possess pertinent information, but information other than that contained in the affidavit may not be considered by the issuing official in determining whether probable cause exists for the issuance of the warrant unless the information is either recorded or contemporaneously summarized in the record or on the face of the warrant by the issuing official.

(b) If the issuing official finds that the application meets the requirements of this Article and finds there is probable cause to believe that the search will discover items specified in the application which are subject to seizure under G.S. 15A-242, he must issue a search warrant in accordance with the requirements of this Article. The issuing official must retain a copy of the warrant and war-

rant application and must promptly file them with the clerk. If he does not so find, the official must deny the application.

A search warrant cannot be issued upon affidavits which are purely conclusory and which do not state underlying circumstances upon which the affiant's belief of probable cause is founded. Further, there must be facts or circumstances in the affidavit which implicate the premises to be searched. In other words, the affidavit must furnish reasonable cause to believe that the search will reveal the presence of the articles sought on the premises described in the application for the warrant and that such objects will aid in the apprehension or conviction of the offender. *State v. Edwards*, 286 N.C. 162, 209 S.E. 2d 758 (1974); *State v. Campbell*, 282 N.C. 125, 191 S.E. 2d 752 (1972); *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971), *cert. denied*, 414 U.S. 874 (1973).

[1] The affidavit upon which the warrant to search defendant's motel room was issued contains facts from which the magistrate could form a reasonable belief that the charged crime had been committed by a slender white man about six feet tall who had red curly hair. The affidavit would also support a reasonable belief that the 1967 Chevrolet registered in defendant's name and parked in front of the Cardinal Motel in Lowell, North Carolina, was the vehicle in which the victim was assaulted. However, there was only a conclusory statement that defendant was registered in the motel. There was no information or circumstances set forth in the affidavit or which was recorded or contemporaneously summarized in the record or on the face of the warrant by the issuing official in any way indicating that the defendant was the person described in the affidavit. Therefore, it cannot be inferred from the affidavit that defendant was the person who committed the charged crime. It follows that there was nothing to support a belief that the articles sought would be in his motel room or would aid in the apprehension or conviction of the offender. We, therefore, hold that the affidavit upon which the search warrant for defendant's motel room was issued was fatally defective. However, under the facts of this case, we do not believe that the evidence admitted as the result of the search of defendant's motel room was sufficiently prejudicial to warrant a new trial.

There was plenary evidence before the jury that the charged crime had been committed. On the same night that the crime was committed, the seven-year-old victim gave police officers a description of her assailant. The officers questioned employees of the bowling alley from which the child was abducted and determined that defendant matched this description. The officers' investigation also disclosed that defendant had been seen at the bowling alley shortly before Melissa disappeared. The victim on the same night gave the police officers a detailed description of the automobile in which she was transported. After ascertaining that defendant lived at the Cardinal Motel in Lowell, North Carolina, the officers proceeded to that place where they observed a 1967 Chevrolet automobile which matched the exterior and interior descriptions furnished by the victim. They then determined through the Police Information Network that this automobile was registered in defendant's name. A surveillance of the motel and automobile was arranged and in the early morning hours of 8 April 1979 the officers observed defendant as he went to his car and returned to the motel. Shortly thereafter, he was arrested. The victim made a positive in-court identification of defendant as her assailant. There was expert testimony tending to show that defendant's blood-type was O and that the victim's blood-type was A. A piece of cloth taken from the seat of the Chevrolet automobile was tested, and the test disclosed the presence of blood-type A. The expert examination of trousers taken from defendant at the time of his arrest revealed semen and the presence of a group A substance. None of the articles taken pursuant to the challenged search warrant revealed any probative evidentiary matter except the blanket. The blanket revealed the presence of human blood of the same type as that of the victim. On cross-examination the expert witness testified that type A blood is a common blood-type, occurring among about forty percent of the world's population. He testified that he found two blood stains on the blanket, but he could not determine the age of the stains or even whether the two stains were placed on the blanket at the same time.

In *State v. Heard and Jones*, 285 N.C. 167, 203 S.E. 2d 826 (1974), we were faced with the question of whether the admission of certain constitutionally barred evidence was prejudicial. There we stated the following rule:

> We recognize that all Federal Constitutional errors are not prejudicial, and under the facts of a particular case, they may be determined to be harmless, so as not to require an automatic reversal upon conviction. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. Nevertheless, before a court can find a constitutional error to be harmless it must be able to declare a belief that such error was harmless beyond a reasonable doubt. *Schneble v. Florida*, 405 U.S. 427, 31 L.Ed. 2d 340, 92 S.Ct. 1056; *Harrington v. California*, 395 U.S. 250, 23 L.Ed. 2d 284, 89 S.Ct. 1726; *Chapman v. California*, 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824; *Fahy v. Connecticut*, 375 U.S. 85, 11 L.Ed. 2d 171, 84 S.Ct. 229; *State v. Cox* and *State v. Ward* and *State v. Gary*, 281 N.C. 275, 188 S.E. 2d 356; *State v. Jones*, 280 N.C. 322, 185 S.E. 2d 858; *State v. Swaney*, 277 N.C. 602, 178 S.E. 2d 399; *State v. Brinson*, 277 N.C. 286, 177 S.E. 2d 398.

Id. at 172, 203 S.E. 2d at 829.

The 1977 General Assembly codified this rule by the enactment of G.S. 15A-1443(b) which provides:

> (b) A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless.

We conclude that the evidence obtained from the motel room was of little probative value and was at most cumulative since type A blood stains were found in the automobile, the place where, according to all the evidence, the assault occurred. We, therefore, hold that the erroneous admission of the evidence obtained by a search of defendant's motel room was harmless error beyond a reasonable doubt.

[2] The affidavit submitted in support of the issuance of a warrant to search defendant's automobile provides:

> On April 7, 1979 Melissa T. Smith was reported missing from the Major League Bowling Lanes on Wilkinson Blvd. in Gastonia, N.C. about 8:48 p.m. by her parents.
>
> At 11:00 p.m. 4-7-79 the victim, Melissa Smith wandered back to Major League Bowling Lanes by herself.

Officer Parham of the Gastonia City Police was contacted and met the victim and her parents at City Hall. Two other people accompanied them. At City Hall Officer Parham questioned victim and got name from her.

Victim described her assailant as a white male with red hair, slender, and wearing green pants. She stated the car in which she rode was blue, two doors, black interior, and big. She also indicated the interior was torn up. The victim stated there was a brown beer bottle in the car and that her assailant had been drinking. Sgt. Carter and Officer Parham questioned the managers of Major League Bowling Lanes about the incident on 4-8-79 after the victim had been found. Sgt. Carter talked to Max Bumgardner about 2:05 a.m. at Major League Bowling Lanes. Max stated he talked to Lee Gardner who stated Ricky was in the Bowling Alley on 4-7-79.

Officer Parham talked to William Joseph Costner at Major League Lanes at approximately 2:05 a.m. On the basis of information received from Max Bumgardner who was questioned at the same time William Costner was asked to call Mike Gayette, manager of Major League Lanes. Mike gave Officer Parham the name of a Ricky Bright. He stated that Ricky Bright lived at Cardinal Motel but he didn't know the room number. He also stated Ricky drove a blue 1967 Chevrolet.

Officer Parham and Sgt. Carter went to the Cardinal Motel at 2:30 a.m. and saw a blue-green 1967 Chevy, 2 door, N.C. Lic #RFS813 in front of unit 42 of Cardinal Motel. License checked through PIN and came back to Ricky Allen Bright. Capt. D.M. Roystor was then called and a surveillance of car was set up at about 3 a.m. After surveillance set up it was at this point the victim was questioned at Hospital. It was at this point that the victim described the car being blue, black interior, with two humps on the rear, on each one, said it was old and big with the interior torn up. Stated male was 6 ft., red curly hair, and slender with green pants on.

At approximately 6 a.m., 4-8-79, Sgt. Carter and Officer Parham returned to the Cardinal Motel and observed car. Officer observed that gas tank was leaking gas. Also saw

limb stuck under car in area of gas tank. Officer Parham looked in driver's side of car and saw front seat was torn and a blanket folded in the back seat. Sgt. Carter observed the seat torn and the blanket. There was nothing hanging from the rear view mirror which Officer Parham asked victim about earlier. Victim had stated there was nothing hanging from the rear view mirror.

4-8-79

/ / / / s/ RODNEY PARHAM / / / / /

s/ J.O. ELLINGTON (Magistrate) 4/8/79

Applying the legal principles above set forth, we conclude that the affidavit upon which the warrant to search defendant's automobile was issued contained sufficient facts and circumstances to support a finding by the magistrate that there was reasonable cause to believe that the search would reveal the presence of the articles sought and that such objects would aid in the apprehension or conviction of the offender. We therefore hold that the trial judge correctly denied defendant's motion to suppress the items seized from defendant's automobile.

[3] Defendant argues that the trial court erred by asking a series of leading questions of the victim during the *voir dire* hearing on defendant's motion to suppress identification testimony. Defendant maintains that the judge's questions were highly suggestive and, in fact, indicated bias on the part of the court. He concedes that the challenged questioning took place out of the hearing of the jury and recognizes the long line of cases holding that G.S. 15A-1222 is not intended to apply when the jury is not present during the questioning. Nevertheless, defendant submits that the judge's questioning impaired defendant's opportunity for a full and fair cross-examination of the witness.

It is well settled that a child may be asked leading questions, particularly when the inquiry concerns "delicate matters of a sexual nature." *State v. Cobb*, 295 N.C. 1, 243 S.E. 2d 759 (1978). In addition, the trial court may question a witness for the purpose of clarifying his testimony. *State v. Greene*, 285 N.C. 482, 206 S.E. 2d 209 (1974). Here the trial judge's inquiries were well within the above-stated rules. Furthermore, there is no

indication in this record that defendant was restricted in his cross-examination of the victim.

[4] By his seventh assignment of error, defendant contends that the court erred in admitting into evidence the victim's in-court identification of defendant on the grounds that the photographic lineup identification procedures were impermissibly suggestive. Upon defendant's request, the trial court conducted a *voir dire* hearing to determine the admissibility of the in-court identification.

In determining whether a pretrial lineup is impermissibly suggestive, giving rise to a substantial likelihood of irreparable misidentification, the court considers the following factors in making its findings: (1) opportunity of the witness to view at the time of the alleged act; (2) degree of attention; (3) accuracy of the witness's description; (4) level of certainty displayed in the act of identifying; (5) time between the crime and the confrontation. *Neil v. Biggers*, 409 U.S. 188, 34 L.Ed. 2d 401, 93 S.Ct. 375 (1972). If the findings of the trial court are supported by competent evidence, they are binding on the appellate courts. *State v. Tuggle*, 284 N.C. 515, 201 S.E. 2d 884 (1974).

The trial court here found, among other things,

> That the witness was in the presence of her abductor for approximately two hours and shortly after being released gave the police a description of her abductor which was consistent with her testimony;
>
> * * *
>
> That there was a photographic display consisting of eight photographs with substantially similar physical characteristics wearing glasses, curly hair, and basically the same facial features, all of the same general photographic quality, black and white, made by the police mug-shot camera and identified only by a number in the upper left-hand corner, each photograph representing a frontal view; and that Melissa Smith selected the photograph of the defendant as her abductor.

The trial court then concluded "that the pretrial identification procedure was not unnecessarily suggestive and conducive to irreparable mistaken identification as to violate defendant's

rights to due process." The judge made no determination as to whether the witness's in-court identification was of independent origin. However, assuming arguendo that it was *not* independent of the pretrial procedures, the trial court found the pretrial lineup to be constitutionally sound. *A fortiori,* then, the in-court identification could not be tainted by the lineup. The findings of the court here are supported by ample evidence and are conclusive on this Court. We therefore hold that the trial court correctly denied defendant's motion to suppress the witness's in-court identification of defendant.

[5] Defendant next challenges the court's ruling which permitted the examining physician to give an opinion regarding the cause of several bruises on Melissa's face. Dr. Clifford Calloway, a physician who treated Melissa at the emergency room at Gaston Memorial Hospital, was asked if he had an opinion "as to what caused that particular bruise." Dr. Calloway replied that he had an opinion and that "it looked as though that pattern could have been made by fingers." Defendant contends that this was mere surmise on the part of Dr. Calloway.

It is well settled that an expert may give an opinion regarding what caused a particular condition, including the nature of the instrument producing a particular injury, when he bases his opinion on facts that are within his knowledge. *State v. Monk,* 291 N.C. 37, 229 S.E. 2d 163 (1976); *see generally* 1 Stansbury's North Carolina Evidence, §§ 135, 136 (Brandis Rev. 1973). This assignment is overruled.

[6] Defendant assigns as error the denial of his motion to suppress evidence obtained as a result of his arrest. Defendant maintains that there was no probable cause for the arrest and thus any evidence obtained as a result of the illegal arrest must be suppressed.

An arrest is constitutionally valid if made upon probable cause. *State v. Streeter,* 283 N.C. 203, 195 S.E. 2d 502 (1973). The existence of probable cause depends upon "whether at that moment the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense." *Beck v. Ohio,* 379 U.S. 89, 13 L.Ed. 2d 142, 85 S.Ct. 223 (1964); *State v. Streeter, supra.*

Upon defendant's motion to suppress evidence seized as a result of defendant's arrest, the court conducted a *voir dire* hearing. Officer Parham testified that Melissa described her assailant as a white, slim male with reddish brown hair. She described the automobile which had transported her as big, blue, old, "with two humps on the back." There were beer bottles in the back. Upon inquiry at the bowling alley, the officer learned that defendant matched the description given by Melissa and that he had been seen at the bowling alley prior to her disappearance. Officer Parham also learned that defendant lived at the Cardinal Motel and drove a 1967 Chevrolet, matching generally the description which Melissa had given. At the motel, the officers saw a blue 1967 Chevrolet which, according to the Police Information Network report, was registered to defendant. The motel manager confirmed the fact that defendant lived at the motel and was registered in Room 42. Before making the arrest, the officers had an opportunity to observe defendant and to note that he matched the description given by Melissa of her assailant. The officers looked inside the automobile and saw that it contained beer bottles. They also noted that the car was humped. Shortly afterwards, the officers arrested defendant.

We hold that the facts and circumstances known to the arresting officers at the time they arrested defendant were more than ample to support a finding that there was probable cause to arrest defendant. That being so, the arrest was not illegal; and evidence seized pursuant to the valid arrest was not tainted by an unlawful arrest.

Even so, defendant contends that the court erred in failing to make findings of fact at the conclusion of the *voir dire*. We have held, however, that such a failure to find facts is not fatal where, as here, the defendant offered no evidence on *voir dire*, the court's ruling is supported by competent evidence, and the defendant can show no prejudice from the failure to make the findings. *State v. Bell*, 270 N.C. 25, 153 S.E. 2d 741 (1967). This assignment is overruled.

[7] Defendant next assigns as error the failure of the court to dismiss for insufficiency of the evidence. He contends that the victim of the alleged offenses never testified regarding the manner in which defendant assaulted her. She merely stated,

"He hurt me. He smacked me in the face." Defendant thus maintains that there was insufficient evidence to show that he assaulted Melissa with the intent to force her to have sexual relations, an essential element of the offense of assault with intent to commit rape. He also contends, for much the same reason, that the evidence was not sufficient to show that he had "removed and restrained" Melissa "for the purpose of facilitating the commission of the felony of rape."

Upon defendant's motion to dismiss, the evidence is considered 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, 117, 215 S.E. 2d 578, 581 (1975). If the evidence "is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion for [dismissal] should be allowed." *State v. Cutler*, 271 N.C. 379, 383, 156 S.E. 2d 679, 682 (1967). The test of whether the evidence is sufficient to withstand a motion to dismiss is whether a reasonable inference of defendant's guilt may be drawn from the evidence. *Id.* The test is the same whether the evidence is circumstantial or direct. *Id.*

In the instant case, Melissa testified that she had been "hurt." Several witnesses testified regarding the circumstances surrounding her disappearance and the apprehension of defendant pursuant to her description of him and his automobile. Dr. Robert H. Ogden, the gynecologist who examined Melissa in the emergency room, testified that there was a "laceration between her rectum and vagina," and, in his opinion, "something had been inserted into the vagina beyond the hymenal ring." Dr. Clifford K. Calloway, the emergency room physician who treated Melissa, also testified that "Melissa's bottom was torn between the rectum and the vagina."

Theodore Yeshion, an expert in the field of forensic serology, testified that lab tests performed on blood samples taken from defendant indicated that his blood type was O, while samples taken from Melissa indicated she was type A. Mr. Yeshion testified that he performed tests on a cloth cutting from the seat of the automobile and discovered the presence of type A blood. He further stated that he examined a stain on the pants

taken from defendant at the time of his arrest and found a secretion that "had to come from a group A individual."

We do not deem it necessary to relate once again the circumstances surrounding Melissa's disappearance, her description of her assailant and his automobile, defendant's subsequent arrest, and the evidence adduced at trial regarding the presence of blood and semen stains found on certain items belonging to defendant. Suffice it to say that, taken in the light most favorable to the State, evidence of these facts together with the expert medical testimony of the treating physicians, is sufficient to permit a jury to find that the offenses charged had been committed and that defendant committed them. We so hold.

[8] By his next assignment, defendant contends that the court erred in failing to grant his motion for mistrial on grounds of improper questioning by the prosecutor. On cross-examination, the district attorney asked defendant whether, at the time of his arrest, he had denied having been with Melissa the night before. Defense counsel objected and moved for a mistrial. The trial court sustained the objection and instructed the jury to disregard the question and its implications.

"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. Love*, 296 N.C. 194, 204, 250 S.E. 2d 220, 227 (1978). Furthermore, we have held that it is not error for the trial court to deny a defendant's motion for mistrial for improper questioning by the district attorney where the court sustained the defendant's objection and instructed the jury not to consider the question. *Id.*; *State v. Self*, 280 N.C. 665, 187 S.E. 2d 93 (1972). We therefore hold that the court's action sustaining the objection and instructing the jury to disregard the question cured any impropriety in the district attorney's question. There was no abuse of discretion in the denial of defendant's motion for mistrial.

[9] Defendant contends that the court erred in sentencing him to life imprisonment for kidnapping without making findings of fact concerning the absence or presence of mitigating circumstances.

G.S. 14-39(b) provides:

> (b) Any person convicted of kidnapping shall be guilty of a felony and shall be punished by imprisonment for not less than 25 years nor more than life. If the person kidnapped, as defined in subsection (a), was released by the defendant in a safe place *and* had not been sexually assaulted or seriously injured, the person so convicted shall be punished by imprisonment for not more than 25 years, or by a fine of not more than ten thousand dollars ($10,000), or both, in the discretion of the court. [Emphasis added.]

In *State v. Williams*, 295 N.C. 655, 249 S.E. 2d 709 (1978), Justice Exum speaking for the Court stated the principles of law which control this assignment of error. We quote from that opinion:

> Normally a jury need only determine whether a defendant has committed the substantive offense of kidnapping as defined in G.S. 14-39(a). The factors set forth in subsection (b) relate only to sentencing; therefore, their existence or non-existence should properly be determined by the trial judge.
>
> The judge may make such a determination from evidence adduced at the trial of the kidnapping case itself or at the sentencing hearing provided for in G.S. 15A-1334 following the trial, or at both proceedings. If at either or both proceedings evidence of the existence of the mitigating factors has been presented, the judge must consider this and all other evidence bearing on the question. If the judge is satisfied by a preponderance of the evidence, the burden being upon the defendant to so satisfy him, that the kidnapping victim was released in a safe place and was neither sexually assaulted nor seriously injured, he shall so find and may not then impose a sentence on the kidnapping conviction of more than 25 years or a fine of up to $10,000, or both. If the judge is not so satisfied, he must so state on the record in which case he may impose a sentence of not less than 25 years nor more than life imprisonment. If no evidence either at trial or at the sentencing hearing is adduced tending to show the existence of the mitigating factors then the judge, without making findings, may pro-

ceed to impose a sentence of not less than 25 years nor more than life imprisonment.

* * *

We note one exception to the procedures we have set out above, and it applies to this case. When, as here, the question of the existence of mitigating factors has, in effect, been submitted to the jury in the form of separate criminal charges tried jointly with the kidnapping case, and the jury finds defendant guilty, there is no need for the judge to make separate findings. The nonexistence of mitigating factors will already have been determined beyond a reasonable doubt. Since the jury made such a determination in this case, the life sentences imposed upon defendant's conviction of the kidnapping charges were proper.

Id. at 669-670, 679, 249 S.E. 2d at 719, 725.

The circumstances which mitigate the punishment for kidnapping are that the kidnapped person must be released by the defendant "in a safe place *and* had not been sexually assaulted or seriously injured." G.S. 14-39(b). [Emphasis added.]

In instant case, the trial judge submitted kidnapping and the separate crime of assault with intent to commit rape. The jury found defendant guilty on both counts thereby declaring beyond a reasonable doubt that one of the threefold requirements set forth in G.S. 14-39(b) had not been met. We, therefore, hold that the trial judge properly imposed the life sentence upon verdict of guilty of kidnapping.

[10] Defendant finally contends that the trial judge erred by considering irrelevant and improper matter in determining the severity of the sentence imposed.

After the verdicts were returned by the jury and before imposing sentences, the trial judge in essence observed that there was rather overwhelming evidence against defendant. He then commented on the dilemma facing jurors and defense counsel under such circumstances and concluded that there was no better system of determining one's guilt or innocence than our jury system. The trial judge further stated that he was going to accept the jury verdict and pronounce a sentence

based upon that verdict. He then proceeded to relate to defendant the adverse effects of defendant's actions upon his family and to again review the evidence upon which the jury verdicts were based.

Defendant relies heavily on *State v. Swinney*, 271 N.C. 130, 155 S.E. 2d 545 (1967), and *State v. Boone*, 293 N.C. 702, 239 S.E. 2d 459 (1977). In *Swinney* defendant entered a plea of nolo contendre to voluntary manslaughter which was accepted by the court. The evidence heard by the court tended to show that after a party in the home of defendant and her husband where there was drinking and dancing, the defendant's husband attacked her and she shot and killed him. The trial judge by his cross-examination of the defendant and statements made by him in open court clearly indicated that he was punishing defendant, not for the killing, but for her part in the party. This court vacated the judgment sentencing defendant to imprisonment for a period of five to seven years and remanded the cause for proper judgment.

Instant case is easily distinguishable from *Swinney* in that here it clearly appears that defendant was sentenced upon the jury verdicts and the evidence upon which the verdicts were based.

In *Boone* the Court vacated the judgment entered and remanded for proper sentencing because the trial judge in open court stated that the sentence was based, in part, on defendant's action in exercising his constitutional right to plead not guilty and demand a jury trial.

The reasoning in *Boone* is not applicable to the facts before us. Statements made concerning defendant's plea of not guilty were made in the context of evaluating the worth of our jury system. We cannot say that the statements made by the trial judge in instant case showed that the severity of the sentence imposed related to the defendant's plea of not guilty.

The general rule is that a judgment is presumed to be valid and will not be disturbed absent a showing that the trial judge abused his discretion. When the validity of a judgment is challenged, the burden is on the defendant to show error amounting to a denial of some substantial right. *State v. Pope*, 257 N.C. 326, 126 S.E. 2d 126 (1962).

Although we do not approve of the judge's extended presentence remarks, we cannot, under the facts of this case, say that defendant was prejudiced or that defendant was more severely punished because he exercised his constitutional right to trial by jury. By its verdict, the jury found that defendant kidnapped a seven-year-old child, attempted to rape her thereby inflicting serious injury upon her person. In our opinion, the evidence in this case justified the sentence imposed.

Our careful consideration of all defendant's assignments of error and this entire record discloses no error warranting that the verdicts returned and the judgment entered be disturbed.

No Error.

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

STATE OF NORTH CAROLINA v. DHARLENE FRANCES MOORE

No. 4

(Filed 4 November 1980)

1. **Constitutional Law § 30– witness's viewing of defendant's photograph – failure of district attorney to disclose information – defendant not prejudiced**

Defendant was not prejudiced by the district attorney's failure to disclose that a witness had seen a photograph of defendant, and defendant's contention that she was too surprised adequately to cross-examine the witness was without merit, since defendant's attorney was aware that the State possessed a photograph of defendant; when the district attorney was asked during discovery if he had shown the photograph to anyone, he truthfully replied that he had not; subsequently, the witness was in the district attorney's office for the first time and asked to see a picture of defendant; the district attorney handed her the picture in question and she looked at it for a short period; he did not ask the witness if the person photographed resembled the individual she had seen and the witness never indicated that she recognized the person in the picture; the district attorney first became aware that the witness recognized and could identify defendant during her testimony at trial; and the only fact he failed to disclose to defendant prior to the witness's testimony was that he had shown the witness the picture for a short time.

2. **Criminal Law §§ 66.9, 66.16– identification of defendant – pretrial photographic procedure not suggestive**

The trial court in a homicide prosecution did not err in allowing an

eyewitness to the shooting to make an in-court identification of defendant, since the identification was based solely on the witness's personal observation of defendant immediately after the shooting, and the observation of one photograph by the witness was not a pretrial identification procedure sufficiently suggestive to deny defendant due process of law.

3. **Constitutional Law § 30– list of State's witnesses and statements — no discovery — no error**

Defendant was not entitled to pretrial discovery of the names of the State's witnesses, any statement of defendant to a third party, or any statement of a codefendant.

4. **Criminal Law § 98.2– sequestration of witnesses – denial of motion no abuse of discretion**

In a prosecution for the first degree murder of a supermarket manager, the trial court did not err in denying defendant's motion, made after two supermarket employees had testified, to sequester the remaining witnesses who were supermarket customers, since nearly all the witnesses testified to different facts and circumstances surrounding the incident, and the testimony of each witness was sufficiently different from the others so as to indicate an absence of collusion or the parroting of another's testimony.

5. **Criminal Law § 71– assailant having feminine run – shorthand statement of fact admissible**

The trial court in a homicide prosecution did not err in allowing witnesses to the shooting to give testimony characterizing the assailant as female or having feminine characteristics and particularly describing the manner in which the assailant fled from the store as "like a feminine run," since such testimony was admissible as a shorthand statement of fact.

6. **Homicide § 20– admissibility of pistol – chain of custody**

There was no merit to defendant's contention in a homicide prosecution that the trial court erred in admitting into evidence a .38 caliber revolver because the State failed to establish a continuous chain of custody to the date of trial and failed to show that the fatal bullet was fired from the weapon, since the evidence tended to show that the victim, a supermarket manager, died of a gunshot wound; a .38 caliber pistol was found on the steps of the manager's office immediately after the shooting; no gun was normally kept in the office; members of the sheriff's department testified that the State's exhibit was the weapon or a weapon identical to the gun taken from the scene of the shooting; the gun found by the officers contained four unfired cartridges and one fired cartridge; and an SBI agent testified that the bullet found in the victim's body could have been fired from a .38 pistol.

7. **Criminal Law § 76.2– defendant's confession to persons other than law officers – voir dire not required**

The trial court did not err in denying defendant's motion for a voir dire examination of two witnesses to determine the voluntariness of admissions made to them by defendant and an accomplice, since defendant and her accomplice went to the witnesses' home of their own free will and admitted their participation in the shooting without coercion from the witnesses.

8. **Criminal Law § 48– silence of defendant – implied admission**

The trial court in a homicide prosecution properly instructed the jury on implied admissions where the evidence tended to show that defendant's accomplice talked to a witness about the crime, mentioning defendant's participation in the shooting on several occasions; defendant was sitting on a couch approximately twelve feet away and could hear what they were saying; and defendant never made a statement of denial.

9. **Criminal Law § 89.3– hearsay testimony – admissibility for corroboration**

The trial court did not err in admitting the hearsay testimony of a State's witness which was offered for the purpose of corroborating another witness.

10. **Criminal Law § 117.2– interested witnesses – general instruction sufficient**

Evidence was insufficient to show that two witnesses were interested witnesses so as to require the trial court to give the jury special instructions with respect to them, and the court's general instruction concerning interested witnesses was an adequate statement of the existing law.

11. **Criminal Law § 113.1– failure to summarize evidence favorable to defendant – evidence unnecessary to explanation of applicable law**

There was no merit to defendant's contention that the trial court erred in its summary of the evidence to the jury by failing to relate any of the evidence favorable to defendant, since defendant presented no evidence in her behalf, and none of the State's evidence favorable to defendant or evidence elicited by defendant on cross-examination was necessary to an explanation of the applicable law.

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

APPEAL by defendant from *Rousseau, J.*, 15 October 1979 Criminal Session of FORSYTH Superior Court.

Defendant was charged in separate indictments, proper in form, with the first degree murder of Paul Steven Miller and conspiracy to commit armed robbery. The charges were consolidated for trial and defendant entered a plea of not guilty to each charge.

At trial the State's evidence tended to show that at approximately 8:30 p.m. on 30 June 1978, several persons standing at the check-out counters of the Food World in Stanleyville, North Carolina, heard Paul Steven Miller, the night manager, call for help. They observed Mr. Miller in the manager's office, an area raised above the floor level of the store, and saw an individual fire two shots at Mr. Miller, drop the gun, and flee from the store. The assailant was described as being stocky in build,

weighing from 150 to 160 pounds, about five feet six inches tall, between eighteen and twenty-two years old, and dressed in blue jeans, a striped T-shirt, tennis shoes, sunglasses and a small-brimmed hat. Several witnesses testified that the assailant ran from the store in an awkward fashion, similar to a "feminine run." After a *voir dire* examination, the trial court allowed Betty Ballard, a Food World employee, to identify defendant as the assailant.

Dennis Turbyfill, a customer at Food World, testified for the State that he followed defendant out of the store and jumped into a blue automobile with her. He struggled with defendant and grabbed the car keys from the ignition. After the two had gotten out of the car, a white Chevrolet van drove up and defendant climbed into it. The driver of the van, later identified as Jackie Richard Weimer, told Mr. Turbyfill to "leave that guy [defendant] alone." A white van with a license tag number matching the one given by Mr. Turbyfill was found in a parking lot shortly thereafter. The van was registered in the name of Jackie Weimer's wife and was positively identified by her at trial.

State's witness Wallace Alverin Turner testified that he had known Mr. Weimer since 1966 and had known defendant, whom he knew as "Sam," for about two years. He stated that defendant and Mr. Weimer arrived at his home shortly after he and his wife had returned from work on the morning of 1 July 1978, at approximately 9:00 a.m. He recalled that defendant was wearing tennis shoes, blue jeans, a T-shirt, and a hat with her hair piled up into it. Mr. Turner related that Mr. Weimer said something to the effect of: "They are going to fix me this time. More than likely they'll give me the chair." He further stated that he had "really messed up" at the Food World, and that "Sam" had gone into the Food World and "messed up." Mr. Weimer then proceeded to relate the Food World incident to Mr. Turner, including his participation in driving the white van and ordering Mr. Turbyfill to leave defendant alone. Defendant was present during the entire conversation between Mr. Turner and Mr. Weimer, sitting on a couch about twelve feet away from the two men. Defendant sat silently and did not deny any of Mr. Weimer's statements. Mrs. Turner testified that later the same day during the same visit defendant admitted to her that she had shot a man at Food World.

Dr. Modesto Scharyj testified that, in his opinion, Mr. Miller died of a gunshot wound in the abdomen.

Defendant and Mr. Weimer were apprehended on 1 June 1979 in Anderson County, South Carolina.

The jury found defendant guilty of first degree murder and conspiracy to commit armed robbery. Defendant appeals from the trial court's judgment sentencing her to life imprisonment for first degree murder and ten years imprisonment for conspiracy to commit armed robbery. Defendant's motion to bypass the North Carolina Court of Appeals on the conspiracy judgment was allowed 25 April 1980.

Other facts relevant to the decision will be related in the opinion.

W. Joseph Burns for the defendant-appellant.

Attorney General Rufus L. Edmisten, by Assistant Attorney General J. Michael Carpenter, for the State.

COPELAND, Justice.

Jackie Richard Weimer was convicted after a separate trial of first degree murder and conspiracy to commit armed robbery. The judgment of the trial court was affirmed by this Court in *State v. Weimer*, 300 N.C. 642, 268 S.E. 2d 216 (1980). The opinion by Chief Justice Branch in *Weimer* is cited below where dispositive of identical assignments of error raised by defendant. We have carefully considered each of defendant's assignments of error and, for the reasons stated below, we find no error justifying a new trial.

[1] Defendant first contends that the State violated G.S. 15A-907 by not disclosing to defendant prior to trial the fact that Betty Ballard had seen a photograph of defendant in the district attorney's office. Defendant claims she was prejudiced by this non-disclosure in that she was unprepared to fully cross-examine Ms. Ballard. Defendant further alleges that the trial court erred in not imposing sanctions pursuant to G.S. 15A-910 for the State's failure to disclose.

Defendant made a timely motion for discovery in accordance with G.S. 15A-902(a), requesting the State to supply, among other information, any photographs in its possession.

This motion gave rise to the State's duty under G.S. 15A-907 to disclose any additional, relevant evidence discovered prior to or during the trial. *State v. Jones*, 296 N.C. 75, 248 S.E. 2d 858 (1978). The record clearly shows that during discovery, which took place prior to 16 October 1979, defendant's attorney was aware that the State possessed a photograph of defendant. When the district attorney was asked during discovery if he had shown the photograph to anyone, he replied that he had not. This was a truthful statement at the time. In ruling on defendant's motion to suppress Ms. Ballard's in-court identification of defendant, the trial court found as facts that on 16 October 1979 Ms. Ballard was in the district attorney's office and for the first time asked to see a picture of defendant. The district attorney handed her the picture in question and she looked at it for a short period. He did not ask Ms. Ballard if the person photographed resembled the individual she had seen and Ms. Ballard never indicated that she recognized the person in the picture. Ms. Ballard never told anyone that she was able to identify defendant. These findings of fact are supported by competent evidence and are therefore binding on this Court. *State v. Saults*, 299 N.C. 319, 261 S.E. 2d 839 (1980); *State v. Small*, 293 N.C. 646, 239 S.E. 2d 429 (1977). It appears, then, that the district attorney first became aware that Ms. Ballard recognized and could identify defendant during her testimony at trial. Thus, the only fact he failed to disclose to defendant prior to Ms. Ballard's testimony was that he had shown the witness the picture for a short time. He may well have considered this an irrelevant matter outside his statutory duty to disclose. Even if there was a duty to disclose pursuant to G.S. 15A-907, there is no evidence of bad faith on the part of the district attorney nor is there any indication that he misrepresented the facts to defendant. Defense attorney had the opportunity to conduct a complete and searching cross-examination of Ms. Ballard. We therefore hold that defendant was not prejudiced by the district attorney's failure to disclose that Ms. Ballard had seen the photograph, and defendant's contention that she was too surprised to adequately cross-examine the witness is without merit. *State v. Jones, supra; State v. Hill*, 294 N.C. 320, 240 S.E. 2d 794 (1978). We also find no merit in defendant's argument that the trial court erred in not imposing sanctions under G.S. 15A-910. The decision to employ one of the remedies available under G.S. 15A-910 is a matter within the discretion of the trial

judge and, absent abuse, is not reviewable on appeal. *State v. Hill, supra; State v. Thomas*, 291 N.C. 687, 231 S.E. 2d 585 (1977). Defendant did not request the imposition of sanctions at the time the facts were revealed. Furthermore, defendant showed no evidence of bad faith by the State and defendant was not prejudiced by the State's nondisclosure. For these reasons the trial judge did not abuse his discretion in refusing to impose sanctions.

[2] By her fourth assignment of error, defendant contends that the trial court erred in allowing Betty Ballard to give an in-court identification of defendant. Defendant claims that showing Ms. Ballard a picture of defendant in the district attorney's office constituted an impermissibly suggestive pretrial identification procedure which tainted Ms. Ballard's in-court identification and rendered it inadmissible. We addressed and overruled the identical assignment of error in *State v. Weimer, supra*. Our decision in that case is dispositive of defendant's argument in this case and we likewise find no error. Ms. Ballard's in-court identification was properly allowed both because it was based solely on her personal observation of defendant immediately after the shooting and because the observation of one photograph was not a pretrial identification procedure sufficiently suggestive to deny defendant due process of law. *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed. 2d 1247 (1968); *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed 2d 1149 (1967); *State v. Thomas*, 292 N.C. 527, 234 S.E. 2d 615 (1977); *State v. Yancey*, 291 N.C. 656, 231 S.E. 2d 637 (1977).

[3] In her second assignment of error defendant contends that the trial court erred in denying her motion for pretrial discovery of the names of the State's witnesses, any statement made by defendant to a third party, and any statement of a codefendant.

It is well settled that a defendant in a criminal case is not entitled to a list of the State's witnesses who are to testify against him. G.S. 15A-903, which lists the information the State must disclose upon defendant's proper discovery motion, does not alter this rule. *State v. Sledge*, 297 N.C. 227, 254 S.E. 2d 579 (1979); *State v. Smith*, 291 N.C. 505, 231 S.E. 2d 663 (1977).

Nor is the State required to disclose the substance of defendant's statements to third parties which the State intends to

use as evidence against him. G.S. 15A-903(a)(2) provides that the State, upon defendant's motion, must "... 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." This provision has been interpreted to require the State to disclose defendant's statements to third parties only when the third party is an agent of the State. *State v. Crews*, 296 N.C. 607, 252 S.E. 2d 745 (1979). Defendant gave no indication that the statements she sought to discover were statements she had made to an agent of the State, therefore her motion to discover was properly denied.

Likewise, the State was not obliged to divulge any statement of a codefendant. G.S. 15A-903(b) entitles defendant to discover any written, recorded, or oral statement by a codefendant "... which the State intends to offer in evidence at their joint trial." Defendant's motion to sever her case from codefendant Weimer's for separate trial was granted on 19 October 1979, prior to the commencement of this trial. Since there was no joint trial, defendant had no right under G.S. 15A-903(b) to discover statements made by a codefendant. We find defendant's assignment of error without merit.

[4] By her fifth and thirteenth assignments of error defendant alleges that the trial court erred in denying her motion to sequester several of the State's witnesses. After two Food World employees had testified for the State, defendant moved to sequester the remaining witnesses who were Food World employees or customers in the store at the time of the shooting. The one employee witness remaining was sequestered by the court, but defendant's motion as to the customers was denied. Defendant claims that allowing the customer witnesses to testify in the presence of each other created a risk of collusion among the witnesses which prevented her obtaining a fair trial. The sequestration of witnesses is a matter within the trial judge's discretion, and his ruling thereon is not reviewable absent a showing of abuse of that discretion. *Geders v. United States*, 425 U.S. 80, 96 S.Ct. 1330, 47 L. Ed. 2d 592 (1976); *State v. McQueen*, 295 N.C. 96, 244 S.E. 2d 414 (1978); *State v. Cross*, 293 N.C. 296, 237 S.E. 2d 734 (1977). In this case, defendant had filed a pretrial motion for sequestration of witnesses which she later abandoned. She offered no reason to the court for her renewal of the motion. We have carefully reviewed the testimony of each

witness defendant sought to sequester and found that nearly all the witnesses testified to different facts and circumstances surrounding the incident. The testimony of each witness is sufficiently different from the others so as to indicate an absence of collusion or the parroting of another's testimony. Under these circumstances, the failure of the trial court to sequester witnesses did not prejudice defendant and we find no abuse of discretion. *See State v. Mason*, 295 N.C. 584, 248 S.E. 2d 241 (1978).

Defendant also contends that the trial court abused its discretion in denying her motion to sequester the witnesses Wallace Alverin Turner and his wife, Viola Mae Turner during the testimony of the other. Defendant claims that she could not effectively cross-examine either of the Turners in the presence of the other, in that there were certain lines of questioning defendant wished to pursue which would be harmful to the marriage and which either spouse would be reluctant to discuss in the presence of the other. The trial record reveals that defendant conducted an extensive cross-examination of both witnesses, during which Mrs. Turner admitted that she had had sexual relations with Mr. Weimer and that she had seen her husband "in bed with" defendant. Mr. Turner testified on cross-examination that he had "been with" defendant and eight or nine hundred other women. These responses indicate that neither spouse was a restraining influence on the other. The trial court did not abuse its discretion in refusing to sequester the witnesses and defendant's assignments of error are overruled.

[5] Defendant next argues that it was error to permit the witnesses Charles Stoltz and Dennis Turbyfill, Food World customers at the time of the shooting, to give testimony characterizing the assailant as female or having feminine characteristics. Defendant claims that whether the assailant was male or female was a question for the jury and the State's witnesses should not have been allowed to give an opinion on the assailant's sex. The specific testimony objected to was the witnesses' description of the manner in which the assailant fled from the store as "like a feminine run." As a general rule, a witness may not give opinion evidence when the facts underlying the opinion are such that the witness can state them in a manner which will permit an adequate understanding of them

by the jury and the witness is no better qualified than the jury to draw inferences and conclusions from facts. *State v. Sanders*, 295 N.C. 631, 245 S.E. 2d 674 (1978); *State v. Watson*, 294 N.C. 159, 240 S.E. 2d 440 (1978). However, this Court has long held that a witness may state the "instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time." *State v. Spaulding*, 288 N.C. 397, 411, 219 S.E. 2d 178, 187 (1975). Such testimony is referred to as a shorthand statement of facts, and is admissible when, as here, the facts on which the witness bases his opinion are difficult to describe in a manner which will allow the jury to understand them sufficiently to be able to draw their own inferences. *State v. Myers*, 299 N.C. 671, 263 S.E. 2d 768 (1980); *State v. Jones*, 291 N.C. 681, 231 S.E. 2d 252 (1977); 1 Stansbury, N.C. Evidence §125 (Brandis Rev. 1973). In this case, it was extremely difficult for the witnesses to convey their impressions of the person fleeing without referring to the feminine nature of the run. We therefore find the testimony admissible as a shorthand statement of facts. Any prejudicial effect of the statement was remedied by the trial judge's instruction during Mr. Turbyfill's testimony that the jury should disregard that the witness said the person ran more like a female than a male. Defendant's assignment of error is without merit.

By her eleventh assignment of error, defendant contends that the trial court erred in permitting Avis Weimer, wife of Jackie Weimer, to testify that she saw defendant and Mr. Weimer "in bed together." She argues that this testimony, was irrelevant, inflammatory, and highly prejudicial. It is well settled that a party loses his objection to the admission of testimony when the same or similar evidence is theretofore or thereafter admitted without objection. *State v. Smith*, 294 N.C. 365, 241 S.E. 2d 674 (1978). In this case, both Mr. and Mrs. Turner testified without objection that defendant had "been to bed with" Mr. Turner. We therefore find that defendant waived her right to object to Mrs. Weimer's testimony. In any event, the statement was not unduly prejudicial to defendant, and her assignment of error is overruled.

[6] In defendant's twelfth assignment she alleges that it was error to admit into evidence State's Exhibit 13, a .38 caliber

revolver, where the State failed to establish a continuous chain of custody to the date of trial and failed to show that the fatal bullet was fired from the weapon. This argument is without merit. This court has often held that "any object which has a relevant connection with the case is admissible in evidence, in both civil and criminal trials. Thus, weapons may be admitted where there is evidence tending to show that they were used in the commission of a crime . . . ." *State v. Crowder*, 285 N.C. 42, 46, 203 S.E. 2d 38, 41-42 (1974), *death sentence vacated*, 428 U.S. 903, 96 S.Ct. 3205, 49 L. Ed. 2d 1207 (1976). *See also State v. Lovette*, 299 N.C. 642, 263 S.E. 2d 751 (1980); *State v. Thomas*, 294 N.C. 105, 240 S.E. 2d 426 (1978); *State v. Bishop*, 293 N.C. 84, 235 S.E. 2d 214 (1977); 1 Stansbury, N.C. Evidence § 118 (Brandis Rev. 1973). In the instant case, there was evidence tending to show that Mr. Miller died of a gunshot wound; that a .38 caliber pistol was found on the steps of the manager's office immediately after the shooting, and that no gun was normally kept in the office. Members of the Forsyth County Sheriff's Department testified that State's Exhibit 13 was the weapon or a weapon identical to the gun taken from the scene of the shooting, and that the gun they found contained four unfired cartridges and one fired cartridge. SBI agent Carpenter stated that the bullet found in the victim's body could have been fired from a .38 pistol. This evidence tended to show that State's Exhibit 13 was the weapon used in the commission of the murder, and thus the weapon was properly admitted into evidence. Any evidence to the contrary only affects the probative force of the exhibit, not its admissibility. *State v. Thomas, supra.*

[7] By her assignments numbered 14 through 20, 22, and 27, defendant contests two of the trial court's rulings concerning the testimony of State's witnesses Mr. and Mrs. Turner. She first alleges that the trial court erred in denying her motion for a *voir dire* examination of the Turners to determine the voluntariness of admissions made to them by defendant and Jackie Weimer, as required by the United States Supreme Court in *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L. Ed. 2d 908 (1964). Defendant has misinterpreted the necessity for a *voir dire* examination to determine the voluntariness of confessions. Our rule was established in *State v. Perry*, 276 N.C. 339, 345-46, 172 S.E. 2d 541, 546 (1970) as follows:

> "As a general rule, voluntary admissions of guilt are admissible in evidence in a trial. To render them inadmissible, incriminating statements must be made under some sort of pressure. Here we quote from the Supreme Court of the United States in *Hoffa v. United States*, 385 U.S. 293, 17 L. Ed. 2d 374: 'Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it .... "The risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak." [A]ll have agreed that a necessary element of compulsory self-incrimination is some kind of compulsion.' "

This rule was recently reaffirmed in *State v. Boykin*, 298 N.C. 687, 259 S.E. 2d 883 (1979), where Justice Carlton, speaking for the Court, found defendant Boykin's admissions to a police officer admissible without a *voir dire* to determine voluntariness. The evidence presented in the instant case indicates that defendant and Mr. Weimer went to the Turner's home of their own free will and admitted their participation in the shooting without coercion from the Turners. We therefore find no error in the trial court's refusal to grant a *voir dire*.

[8] Defendant also contends that it was error for the trial court to instruct the jury on the law concerning admission by silence, in that the State's evidence was insufficient to support a finding that defendant implied an admission by not denying statements made by Mr. Weimer to Mr. Turner. The rule in this jurisdiction on implied admissions was aptly stated in *State v. Spaulding*, 288 N.C. 397, 406, 219 S.E. 2d 178, 184 (1975):

> "Implied admissions are received with great caution. However, if the statement is made in a person's presence by a person having firsthand knowledge under such circumstances that a denial would be naturally expected if the statement were untrue and it is shown that he was in position to hear and understand what was said and had the opportunity to speak, then his silence or failure to deny renders the statement admissible against him as an implied admission.

2 Stansbury's N.C. Evidence, § 179, p. 50 (Brandis Rev. 1973)."

See also State v. Phifer, 290 N.C. 203, 225 S.E. 2d 786 (1976), *cert. denied*, 429 U.S. 1123, 97 S. Ct. 1160, 51 L. Ed. 2d 573 (1977). In the present case, the evidence tends to show that during Jackie Weimer's discussion with Mr. Turner, defendant was present and silently seated on a couch approximately twelve feet away. Mr. Turner testified that defendant was close enough to the two men to hear what they were saying. Mr. Weimer referred to defendant's participation in the shooting on several occasions, but she never made a statement of denial. We find this testimony sufficient to show that defendant was in a position to hear Mr. Weimer's statements, that the statements were such that a denial would naturally be expected if the statements were untrue, and that no denial was made by defendant. The instruction to the jury on implied admissions was proper and defendant's assignments of error are overruled.

[9] In assignment number 21 defendant argues it was error to admit the hearsay testimony of State's witness Kay Pettit. Ms. Pettit was allowed, over defendant's objection, to relate a conversation between herself and Mrs. Turner as follows: "... she [Mrs. Turner] said, 'you heard about the guy that got killed at Food World last night?' " And I said "Yes." She said, "Well, it wasn't a man that shot him." Ms. Pettit further testified that "... she [Mrs. Turner] said the girl did make the statement that she had shot the man but she didn't mean to." This evidence was offered for the purpose of corroborating Mrs. Turner's testimony that defendant had said she shot the man at Food Town but didn't mean to. This Court has long held that prior consistent statements of a witness which strengthen his credibility may be admitted into evidence as an exception to the hearsay rule. *See* 1 Stansbury, N.C. Evidence § 51 (Brandis Rev. 1973), and cases cited therein. To be admissible as corroborative evidence, the prior consistent statement need not be identical to the testimony it is offered to corroborate. Slight variations will affect only the credibility of the evidence, not its admissibility. *State v. Madden*, 292 N.C. 114, 232 S.E. 2d 656 (1977); *State v. Warren*, 289 N.C. 551, 223 S.E. 2d 317 (1976). However, if the testimony offered as a prior consistent statement contains additional or contradictory evidence, it should not be allowed. *State v. Madden, supra; State v. Brooks*, 260 N.C. 186, 132 S.E. 2d

354 (1963). Defendant claims that since Ms. Pettit's testimony referred to the person who shot Mr. Miller as a female, it contained evidence in addition to Mrs. Turner's testimony and should not have been admitted. We disagree. Inherent in Mrs. Turner's statement that defendant said she killed a man at Food World is the statement that the assailant was female. Ms. Pettit's testimony was properly admitted as corroborative evidence and assignment number 21 is overruled.

[10] By her twenty-sixth assignment of error, defendant alleges that the trial court erred in denying her request for a special instruction to the jury that the Turners were interested witnesses in this case. Instead, the trial judge gave a general instruction concerning interested witnesses, to the effect that the jury might find that a witness was interested in the outcome of the trial and, if so, the jury might properly take this interest into account in deciding the credibility to be attributed to the witness' testimony. We hold that defendant was not entitled to an instruction which required the jury to consider the Turners as interested witnesses. In the present case where there is no evidence to show that the Turners were accomplices in the shooting, testifying under a grant of immunity from the State, or otherwise clearly interested witnesses, whether the Turners should be considered interested parties is a question for jury. *State v. Abernathy*, 295 N.C. 147, 244 S.E. 2d 373 (1978); *State v. Hardy*, 293 N.C. 105, 235 S.E. 2d 828 (1977); *State v. Harris*, 290 N.C. 681, 228 S.E. 2d 437 (1976); *State v. Bailey*, 254 N.C. 380, 119 S.E. 2d 165 (1961); G.S. 15A-1052(c). The only evidence of the Turners' interest or bias in this case is their admitted aid to defendant and Mr. Weimer in not reporting their whereabouts subsequent to the shooting, Mrs. Turner's statement that she "had her reasons" not to report the fugitives' whereabouts, and Mr. Turner's testimony that he had hired an attorney to advise him during this case. This evidence is insufficient to establish that the Turners are interested witnesses to the degree necessary to warrant the instruction requested by defendant.

The instruction requested thus embodies an erroneous statement of the law, and the trial judge properly refused to give it. *State v. Bock*, 288 N.C. 145, 217 S.E. 2d 513 (1975); *State v. Beach*, 283 N.C. 261, 196 S.E. 2d 214 (1973). The court's general instruction concerning interested witnesses was an adequate

statement of the existing law and was sufficient to inform the jury that if they found the Turners to be interested witnesses, they should weigh the credibility of the Turners' testimony accordingly. *State v. Holmes*, 296 N.C. 47, 249 S.E. 2d 380 (1978); *State v. Watson*, 294 N.C. 159, 240 S.E. 2d 440 (1978); *State v. Eakins*, 292 N.C. 445, 233 S.E. 2d 387 (1977). This assignment of error is without merit and overruled.

[11] By her twenty-ninth assignment of error, defendant claims the trial court erred in its summary of the evidence to the jury by failing to relate any of the evidence favorable to defendant. Although defendant presented no evidence in her behalf, she claims that evidence was brought out during her cross-examination of the State's witnesses which tended to raise inferences favorable to her, and therefore the trial judge was required to summarize this evidence in accordance with this Court's holding in *State v. Sanders*, 298 N.C. 512, 259 S.E. 2d 258 (1979). In *Sanders* we interpreted the following language of G.S. 15A-1232: "In instructing the jury, the judge must declare and explain the law arising on the evidence. He is not required to state the evidence except to the extent necessary to explain the application of the law to the evidence." We found that although the wording of G.S. 15A-1232 is not identical to former G.S. 1-180, the law essentially remains unchanged, and thus the provision of G.S. 1-180 which required the trial judge to give equal stress to the State and defendant in its charge is implicit in the new statute. *See also State v. Hewett*, 295 N.C. 640, 247 S.E. 2d 886 (1978). We further held that:

> "... when the court recapitulates fully the evidence of the State but fails to summarize, at all, evidence favorable to the defendant, he violates the clear mandate of the statute which requires the trial judge to state the evidence to the extent necessary to explain the application of the law thereto. In addition, he violates the requirement that equal stress be given to the State and to the defendant."

State v. Sanders, *supra* at 519, 259 S.E. 2d at 262. The State in *Sanders* argued that the defendant waived his right to challenge the trial judge's error on appeal, relying on the general rule that objections to the charge in reviewing the evidence and stating the contentions of the parties must be made before the jury retires so as to afford the trial judge an opportunity for

correction, otherwise they are deemed to have been waived and will not be considered on appeal. *State v. Hewett, supra, State v. Potter,* 295 N.C. 126, 244 S.E. 2d 397 (1978); *State v. Abernathy, supra; State v. Virgil,* 276 N.C. 217, 172 S.E. 2d 28 (1970). The Court rejected the State's contention, expanding the rationale of *State v. Hewett, supra.* In *Hewett* the Court held that where the trial judge in his charge states the *contentions* of the State but fails to relate any *contentions* of defendant, the defendant is not required to object before the jury retires in order to preserve his challenge on appeal. Chief Justice Branch, speaking for the Court in *Sanders,* reasoned that the rationale of *Hewett* "... should apply with equal force when in his instructions the trial judge states the evidence favorable to the State and applies the law to that evidence but fails to state any of the evidence favorable to defendant to the extent necessary to explain the application of the law thereto." *State v. Sanders, supra* at 520, 259 S.E. 2d at 262.

The facts in the case *sub judice* are similar to those in *Sanders* in that the defendant in both cases presented no evidence, claimed that the State's evidence created inferences favorable to the defense, and challenged the trial judge's failure to summarize any of the evidence favorable to the defendant. In both cases defendant failed to object to the charge before the jury retired. The State's argument in the present case that defendant waived her right to challenge the charge on appeal by not making a timely objection is squarely rejected by the Court's opinion in *Sanders.*

However, the case at issue is factually distinguishable from *Sanders,* and we find that G.S. 15A-1232 does not require the trial judge to summarize the evidence favorable to defendant under the circumstances present in this case. The language of the statute and our prior decisions interpreting it require the court to summarize the evidence of both parties only *to the extent necessary to explain the application of the law thereto.* In *Sanders,* the evidence elicited on cross-examination and presented in the State's case which was favorable to defendant was substantive evidence which tended to exculpate defendant, including a statement made by defendant to police officers which was directly in conflict to the evidence presented by the State. The trial judge could not have adequately explained the application of the law in the case without mentioning this evi-

dence. In the present case, the evidence which defendant claims is favorable to her includes testimony by several of the State's witnesses that the assailant had male characteristics, the inability of several witnesses to make a positive in-court identification of defendant, inconsistencies in the witnesses' descriptions of the assailant's clothing, and prior inconsistent statements by some of the witnesses. This evidence is all testimony which tends to impeach or show bias in the State's witnesses. It is not substantive in nature and would not clearly exculpate defendant if believed. The capable trial judge was thus able to adequately relate the application of the law to the evidence without mentioning this testimony. We hold that G.S. 15A-1232 and our opinion in *Sanders* do not require the trial judge to summarize evidence favorable to defendant under the circumstances present in this case where the evidence is not necessary to an explanation of the applicable law. Since there was no evidence favorable to defendant which met this test, the court was not required to summarize it. We find no merit in defendant's assignment number 29.

We have carefully reviewed defendant's assignments of error numbered 17, 23, 24, and 28 and find no error which would entitle defendant to a new trial. Assignments numbered 3, 6, 8, 9, and 25 were not brought forward and argued in defendant's brief and are therefore deemed abandoned. *State v. Franks*, 300 N.C. 1, 265 S.E. 2d 177 (1980); *State v. Detter*, 298 N.C. 604, 260 S.E. 2d 567 (1979), Rule 28 (a)(b)(3), Rules of Appellate Procedure.

Defendant received a fair trial free from prejudicial error. The convictions and sentences are affirmed because in the trial we find

No Error.

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

STATE OF NORTH CAROLINA v. ROBERT HENRY McDOWELL

No. 80

(Filed 4 November 1980)

1. **Constitutional Law § 48– case transferred to another county – indigent defendant – no right to counsel from new county**

An indigent defendant whose case was transferred from Lee County to Johnston County because of extensive news coverage of an attempted jailbreak in Sanford was not entitled to the appointment of additional counsel from Johnston County, since defendant was already adequately represented by two court-appointed attorneys.

2. **Constitutional Law § 43– photographing of defendant – no right to counsel**

There was no merit to defendant's contention that a photographic identification ought to be suppressed because the procedure violated his Sixth Amendment right to counsel since, at the time defendant was photographed, he had not formally been charged with any offense, and his right to counsel therefore had not attached.

3. **Constitutional Law § 76– photographing of defendant – no violation of right against self-incrimination**

Defendant's Fifth Amendment privilege against self-incrimination was not violated when he was photographed in a parole office, since the privilege protects an accused only from being compelled to testify against himself or otherwise to provide the State with evidence of a testimonial or communicative nature.

4. **Criminal Law § 43.1; Searches and Seizures § 1– photographing of defendant – no unreasonable search and seizure**

Defendant's Fourth Amendment right to be free from unreasonable searches and seizures was not violated by the taking of his photograph, since the Fourth Amendment offers no shield for that which an individual knowingly exposes to public view, and one does not have a reasonable expectation of privacy in those features which are exposed to the view of others as a matter of course.

5. **Criminal Law § 66.18– identification of defendant – voir dire not required**

The trial court did not err in failing to order a voir dire before permitting an assault victim to make an in-court identification of defendant, since defendant made a pretrial motion to suppress any identification of him by the victim; a voir dire was held and the trial judge made findings of fact and conclusions of law in an order which denied defendant's motion; though the victim did not testify at the voir dire, the evidence adduced in no way suggested that defendant's photograph was singled out from those viewed by the victim in her hospital room; and defendant was not prevented from calling the victim as a witness at the voir dire and so was not denied his right of confrontation.

6. **Criminal Law § 93– opening statement – statutory right waived by defendant**

By his failure to request the opportunity to make an opening statement, defendant engaged in conduct inconsistent with a purpose to insist upon the exercise of a statutory right, and defendant's conduct at trial amounted to a waiver of this procedural right. G.S. 15A-1221(a)(4).

7. **Criminal Law § 35– homicide case – killing of another person – insurance proceeds on victim's life – evidence properly excluded**

In a prosecution of defendant for first degree murder and assault with a deadly weapon with intent to kill inflicting serious injury, the trial court did not err in excluding evidence of the killing the day after the crime of the victim's mother's friend, nor did the court err in refusing to permit defendant to cross-examine the victim's step-grandfather with respect to whether he was the beneficiary of any insurance on the victim's life.

8. **Criminal Law § 113.1– evidence favorable to defendant on cross-examination – when evidence must be summarized**

While a trial judge must summarize evidence favorable to defendant which is brought out on cross-examination, there is no requirement that this be done when the evidence does not go to the establishment of a substantive defense but is instead of an impeaching quality and effect.

9. **Criminal Law § 116– defendant's failure to testify – instruction not erroneous**

While it is the better practice for a trial judge not to instruct on a defendant's election not to testify or otherwise offer evidence absent a request, the trial court's instruction that, while defendant had elected not to present any evidence, they were not to allow that decision to influence their deliberations did not constitute reversible error.

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

APPEAL by defendant from judgments of *Smith, J.*, entered at the 3 December 1979 Criminal Session of JOHNSTON Superior Court.

Having entered pleas of not guilty, defendant was tried upon bills of indictment proper in form which charged him with the crimes of (1) first-degree murder and (2) assault with a deadly weapon with intent to kill inflicting serious injury. The trial was conducted in the bifurcated manner mandated by G.S. § 15A-2000 *et seq.* Phase one of the trial determined the guilt or innocence of defendant. Phase two of the trial was held to determine his sentence for first-degree murder following his conviction of that charge.

During the guilt determination phase of trial, the state introduced evidence which tended to show:

On 14 July 1979, Carol Ann Hinson, age four, and Patsy Ann Mason, age fourteen, were living in the home of Patsy's parents, John and Sarah Mason, in Sanford, North Carolina. The Masons were Carol's step-grandparents. Sometime after 11:00 p.m., on said date, the girls went to bed.

The two girls shared the same bedroom. At some point between the time they went to bed and 1:00 a.m., they were awakened by a knock on the door at the end of an entryway which led from their bedroom to the outside. Both girls got out of bed and went to the door.

Without asking the identity of the early-morning caller, Patsy opened the door slightly and saw a man. The visitor was a black man with large eyes and a big nose; he was wearing a dark pullover shirt and blue jeans and his hair was plaited. Patsy identified defendant as being the man she had seen standing outside of the door that morning. At the time he was first seen by the two girls, defendant was carrying a machete which Patsy described as being approximately two feet long. As Patsy tried to close the door, defendant entered the house.

Upon entering the house, defendant greeted both girls by their names, even though Patsy had never seen him before that night. Defendant went into the girls' bedroom and sat upon the bed. As the girls sat down on the bed, defendant began talking with them, specifically asking Patsy if she would like to go bicycle riding with him. Patsy insisted that she could not go bicycling with him.

After declining defendant's invitation to go bicycling, Patsy observed that defendant still held a machete in his hand. Upon telling Patsy that he had purchased the knife at a discount store in Sanford, defendant asked her if her parents were asleep. After Patsy replied affirmatively, defendant warned her to be quiet and not make any noise otherwise he would cut her with the knife.

Throughout this time, defendant had been tickling Carol. After warning Patsy to remain still, defendant made two attempts to get Carol to leave the room by suggesting that she go to the bathroom. In both instances, the child refused to follow the suggestion. After each attempt to get the four-year-old out of the room, defendant turned to Patsy and told her that

he was going to rape her. On both occasions, Patsy rebuffed his statement. In the first instance, defendant did nothing except resume tickling the younger child, Carol. After the second instance, however, as Carol was making her way out of the bedroom, defendant grabbed her and threw her on the bed whereupon Patsy picked her up and held her in her lap.

As Patsy held Carol in her arms, defendant began to strike at the children with the machete. Despite the protests and other resistance of the two girls, defendant continued his attack upon them. After Patsy was struck on her head by defendant's knife, she lost consciousness which she did not regain until she awoke as a patient at Duke Medical Center in Durham. While she was at the Medical Center, she was treated for injuries which included lacerations about her head, as well as to a wrist and several fingers. After inflicting numerous wounds to the two children, defendant left the house.

At approximately 1:00 a.m., Mr. Mason awoke. He had fallen asleep at about 11:00 p.m. while he was watching television. It was his custom to look in on the children before he went to bed each night. As he walked through the kitchen towards the girls' bedroom, Mr. Mason observed that the outside door at the end of the entryway was open. After shutting the door, he turned around and saw Patsy sitting in a nearby bathroom. Patsy's face was covered with blood and the bathroom had been bloodied from her wounds. After wiping Patsy's face with a washcloth so that she could see, Mr. Mason went to the bedroom which he shared with his wife and awakened her. Upon telling his wife to summon the rescue squad because "something had happened to the children", Mr. Mason went into the girls' bedroom and found Carol lying at the foot of a bed. Carol was pronounced dead on arrival at Lee County Hospital in Sanford. A subsequent autopsy revealed that she had been wounded nine times. Six of the wounds were to her head; her left arm had been cut at least three times; and on her right hand, her thumb, as well as her index finger, had been amputated at the middle joint.

Defendant did not offer any evidence.

Defendant was found guilty as charged and the court convened a sentencing hearing before the same jury in order to determine the sentence to be imposed on the murder conviction.

During this phase of the trial, the state introduced evidence which tended to show that defendant had pled guilty to a charge of second-degree murder in Cumberland County in 1970. On 31 October 1977, he was paroled and until the time of his arrest on 21 July 1979, he was under the supervision of the Department of Correction.

During the sentencing hearing, defendant presented evidence which tended to show that after his release from prison, he had been employed in the Sanford area as a welder. Those with whom defendant worked testified that he had a good work record and got along well with others.

Issues with respect to punishment were submitted to and answered by the jury as follows:

Issue One:

Do you unanimously find from the evidence, beyond a reasonable doubt, that one or more of the following aggravating circumstances existed at the time of the commission of this murder?

ANSWER: Yes.

(1) Had Robert Henry McDowell been previously convicted of a felony involving the use of violence to the person?

ANSWER: Yes.

(2) Was this murder especially heinous, atrocious or cruel?

ANSWER: Yes.

(3) Was this murder for which defendant stands convicted part of a course of conduct in which defendant engaged and which included the commission by defendant of other crimes of violence against another person?

ANSWER: Yes.

Issue Two:

Do you unanimously find from the evidence beyond a reasonable doubt that the aggravating circumstance or

circumstances found by you are sufficiently substantial to call for the imposition of the death penalty?

ANSWER: Yes.

Issue Three:

Do you find one or more mitigating circumstances?

ANSWER: Yes.

(1) Robert Henry McDowell has no significant history of prior criminal activity.

ANSWER: No.

(2) Are there any *other* circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value?

ANSWER: Yes.

Issue Four:

Do you unanimously find that the mitigating circumstances are insufficient to outweigh the aggravating circumstances?

ANSWER: Yes.

The jury recommended that a sentence of death be imposed upon the defendant. Pursuant thereto the court imposed the death sentence. On the felonious assault charge, defendant was sentenced to twenty years imprisonment.[1]

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General Lester V. Chalmers, Jr., for the state.

F. Jefferson Ward, Jr., for defendant-appellant.[2]

BRITT, Justice.

---

[1]Defendant's motion to bypass the North Carolina Court of Appeals on the assault conviction was allowed by this court 5 March 1980.

[2]In addition to Mr. Ward, defendant was also represented at trial and on appeal by the Honorable J.W. Hoyle of Sanford. However, Mr. Hoyle died between the time defendant's brief was filed and the time the appeal was argued.

We find no prejudicial error in either phase of defendant's trial and conclude that the verdicts and judgments should not be disturbed.

PHASE I — GUILT DETERMINATION

[1] By his first assignment of error, defendant contends that the trial court erred in denying his motion for the appointment of additional counsel from Johnston County. There is no merit in this assignment.

It is manifest that the state has the responsibility to provide an indigent defendant with the effective assistance of counsel and the other necessary resources which are incident to presenting a defense in a criminal prosecution. G.S. § 7A-450 (1969); *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979). However, the right of a criminal defendant to court appointed counsel does not include the right to require the court to appoint more than one attorney unless there is a clear showing that the interests of the defendant are not being adequately represented by the counsel already appointed. *State v. Barfield, supra.* While this precept embodies a consistent standard of proof to guide its implementation, it is apparent that its application will produce conclusions which will vary depending upon the nature of individual cases. It is with this consideration in mind that we turn to a brief examination of the facts of the present case as they relate to this assignment of error.

Although defendant was indicted by the Lee County Grand Jury, he was convicted at a trial which was held in Johnston County. Defendant was initially brought to trial in Lee County in November 1979. However, after the jury had been impaneled, there was an attempted jailbreak in Sanford which received extensive attention from the news media. Upon motion of defense counsel, the presiding judge declared a mistrial and ordered a change of venue to Johnston County where the case was brought on for trial on 3 December 1979.

The essence of defendant's argument is that his right to due process of law could be effectively safeguarded only by the appointment of an attorney from Johnston County. Defendant contends that such an attorney would be in a superior position to assist defense counsel, who were members of the Lee County bar, in the selection of a jury. In support of his argument,

defendant suggests that the district attorney was in an unfair strategic position to try this case in that he was a native of Johnston County, and, as such, he was better equipped to select a jury which would be sympathetic to the state's case. We are not impressed with this argument.

Upon a finding of indigency, defendant had been provided with the services of court-appointed counsel. In fact, by the time defendant's case was called for trial, the initial appointment of counsel had evolved to the point where defendant was represented by two court-appointed attorneys. Together with Harnett County, Lee and Johnston Counties constitute the Eleventh Judicial District. It is commonplace in North Carolina for attorneys who live in one county to try cases in other counties in their judicial district, as well as in other districts of the state. Several of our judicial districts are composed of rural counties whose populations are of a low to medium density. Though the geographical dimensions of these districts may be rather substantial, the demographics of the population within a particular district will be generally consistent throughout the unit. With the development of modern communications, as well as the construction of an extensive transportation system, many attorneys no longer confine their practices to the areas immediately surrounding their homes.

It is apparent from the record before us that the crimes which resulted in judgments against defendant are of such a nature as to provoke interest among residents in the area in the subsequent proceedings against defendant. The possibility of an irreparably prejudiced venire was vitiated by the change of venue which removed the prosecution to Johnston County. While the change of venue did nothing to lessen the severity of the crimes or the seriousness of the accusations against defendant, the change of venue did serve to place the prosecution in an area less likely to be tainted with preconceived notions about defendant's guilt or innocence, particularly in light of the attempted jailbreak in Sanford. Nor would a venire which was drawn from the population of Johnston County be as likely to have individuals who were interested in the disposition of this case because of affinity or consanguinity.[3] It would seem, there-

[3]According to the 1970 census, Johnston County has a land area of 797 square miles and a population of 61,737 which is 77 percent rural. North Carolina Manual 136 (1979).

fore, that Johnston County was a more favorable venue from the standpoint of the defendant's right to a fair trial notwithstanding the fact that the district attorney was a resident of that county.

In summary, while it remains the law of this state that there may be situations in which the right to the effective assistance of counsel can be safeguarded only by the appointment of additional counsel, *State v. Barfield, supra*, such a situation is not present in this case. There has been no showing that the burdens which were shouldered by defense counsel in the representation of their client were so disproportionate to that borne in the usual course of criminal defense work required the court to appoint another attorney to provide assistance.

By his second assignment of error, defendant contends that the trial court erred in denying his motion to suppress a photographic identification of him which was made by Patsy Ann Mason. In support of this contention, defendant offers three distinct grounds for his objection, suggesting that the procedure in question violated his rights under the fourth, fifth, and sixth amendments to the United States Constitution. We find no merit in this assignment.

In 1970, defendant pleaded guilty to a charge of second-degree murder in Cumberland County. In 1977, he was placed on parole, subject to continued supervision by the Department of Correction. A condition of his parole required defendant to report promptly to his parole officer when instructed to do so, as well as in the manner prescribed by his parole officer.

On 20 July 1979, Charles Mann was a parole officer with the Department of Correction and was supervisor of parole officers in Lee and Harnett Counties. In that capacity, he served as immediate supervisor of defendant's parole officer. It is the policy of the Department of Correction to maintain up-to-date photographs of parolees in its files. On 20 July 1979, the only photograph of defendant in the files of the department had been taken on 26 May 1976.

Before 20 July 1979, the files of the Sanford probation office had been routinely available to law enforcement officers in general, and agents of the State Bureau of Investigation in

particular. On 20 July 1979, agents of the S.B.I. informed Mr. Mann that defendant was a suspect in the investigation of the murder of Carol Ann Hinson and the assault of Patsy Ann Mason. Accordingly, they requested that Mr. Mann allow them to review defendant's parole file. The request was granted. Upon making the ensuing review of the file, agents of the S.B.I., as well as officers of the Sanford Police Department, requested that Mr. Mann secure a more recent photograph of defendant for their use.

On the afternoon of 20 July 1979 between the hours of 3:00 and 3:30, Mr. Mann went to defendant's place of employment, Brackett Steel Company. Mr. Mann asked defendant to report to the parole office to have his picture taken. The officer told defendant that the files were being updated and that the picture which the files already contained was not current. Later that same day, defendant reported to the office as he has been instructed to do.

After the photograph was made and a print was developed, law enforcement officers prepared two manilla folders containing various photographs. The photographs portrayed black men whose hair was braided or plaited. The second folder contained a series of photographs of black men whose complexions varied and whose clothing differed. The photograph of defendant that had been obtained at the probation office was placed in the second folder.

Both folders were taken to Duke Medical Center where they were displayed before Patsy Ann Mason. There is no evidence in the record which would tend to suggest that the photograph of defendant was in any way singled out by the officers for the special attention of Patsy. The girl picked out defendant's photograph within moments of opening the second folder.

Defendant made a pretrial motion to suppress the photographic identification. After conducting a voir dire, the court overruled defendant's motion. There was no error.

[2] Defendant initially contends that the photographic identification ought to be suppressed because the procedure violated his sixth amendment right to counsel. We disagree. The sixth amendment right to consel attaches only upon the initiation of adversary judicial criminal proceedings, whether by way of

formal charge, preliminary hearing, indictment, information, or arraignment. *Kirby v. Illinois*, 406 U.S. 682, 32 L. Ed. 2d 411, 92 S. Ct. 1877 (1972); *State v. Matthews*, 295 N.C. 265, 245 S.E. 2d 727 (1978), *cert. denied*, 439 U.S. 1128 (1979); *State v. Finch*, 293 N.C. 132, 235 S.E. 2d 819 (1977). At the time defendant was photographed, he had not been formally charged with any offense. While it is true that the investigation had narrowed its focus upon him, it had not so progressed that the state had committed itself to prosecute. It is only when the defendant finds himself confronted with the prosecutorial resources of the state arrayed against him and immersed in the complexities of a formal criminal prosecution that the sixth amendment right to counsel is triggered as a guarantee.

[3] Nor was defendant's fifth amendment privilege against self-incrimination violated when he was photographed in the parole office. It is well established that routine police procedures such as the taking of handwriting samples, blood samples, fingerprints, and hair samples from a defendant, as well as the taking of his photograph are outside the scope of the fifth amendment guaranty because the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the state with evidence of a testimonial or communicative nature. *Schmerber v. California*, 384 U.S. 757, 16 L. Ed. 2d 908, 86 S. Ct. 1826 (1966); *State v. Wilson*, 296 N.C. 298, 250 S.E. 2d 621 (1979); *State v. Wright*, 274 N.C. 84, 161 S.E. 2d 581 (1968), *cert. denied*, 396 U.S. 934 (1969).

[4] Similarly, we are not persuaded that defendant's fourth amendment rights were violated by the taking of his photograph. The fourth amendment offers no shield for that which an individual knowingly exposes to public view. *Katz v. United States*, 389 U.S. 347, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967); *State v. Leggette*, 292 N.C. 44, 231 S.E. 2d 896 (1977). It follows, therefore, that an individual's personal traits, such as his facial appearance or the tone and manner of his voice, are not within the purview of the fourth amendment's protection against unreasonable searches and seizures. One does not have a reasonable expectation of privacy in those features which serve to distinguish one individual from another and which are exposed to the view of others as a matter of course. *United States v. Dionisio*, 410 U.S. 1, 35 L. Ed. 2d 67, 93 S. Ct. 764 (1973); *Davis v.*

Mississippi, 394 U.S. 721, 22 L. Ed. 2d 676, 89 S. Ct. 1394 (1969); *State v. Sharpe*, 284 N.C. 157, 200 S.E. 2d 44 (1973).

[5] In a related assignment of error, defendant contends that the trial court erred by failing to suppress his in-court identification by Patsy Ann Mason. This assignment is without merit.

During her direct examination, Patsy was asked if she saw the man who had come into her bedroom on the evening of 14 July 1979 seated in the courtroom. Over objection, she was permitted to identify defendant. Defendant now argues that the trial court should have ordered a voir dire at that point so that he could have inquired as to her opportunity to view her assailant, as well as the manner in which she identified defendant's photograph among those which she viewed in her hospital room at Duke Medical Center.

The record reveals that defendant made a pretrial motion to suppress any identification of him by Patsy. After a voir dire was held, the trial judge made findings of fact and conclusions of law in an order which denied defendant's motion. While it is true that Patsy did not testify at the hearing, no right of defendant was denied by the proceeding. The gist of defendant's complaint is that he was denied the opportunity to question the prosecuting witness as to the circumstances surrounding her photographic identification of him, as well as her opportunity for observation of her assailant. In no way can it be said that defendant was denied his right of confrontation. There is no requirement that the state call any particular witness at a voir dire which is held on a motion to suppress. The evidence which was adduced at the voir dire does not in any way suggest that defendant's photograph was singled out for the special attention of Patsy. Furthermore, the record does not suggest that defendant was prevented from calling Patsy as a witness at voir dire. Defendant's lack of an opportunity to question the prosecuting witness in this regard stemmed not from the action of the court but from a tactical decision made on his behalf prior to trial.

[6] By his third assignment of error, defendant contends that the trial court erred in denying him the opportunity to make an opening statement. There is no merit in this assignment.

G.S. § 15A-1221(a)(4) provides that the defendant in a criminal case, as well as the state, must be given the opportunity

to make a brief opening statement. The record before us in the present case is completely silent with respect to any mention by either the trial court or defense counsel concerning an opening statement. It is well established that a defendant may waive the benefit of statutory or constitutional provisions by express consent, failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it. *State v. Gaiten,* 277 N.C. 236, 176 S.E. 2d 778 (1970). It follows that in order for an appellant to assert a constitutional or statutory right on appeal, the right must have been asserted and the issue raised before the trial court. *State v. Parks,* 290 N.C. 748, 228 S.E. 2d 248 (1976). In addition, it must affirmatively appear on the record that the issue was passed upon by the trial court. *City of Durham v. Manson,* 285 N.C. 741, 208 S.E. 2d 662 (1974); *State v. Braswell,* 283 N.C. 332, 196 S.E. 2d 185 (1973). By his failure to request the opportunity to make an opening statement, defendant engaged in conduct inconsistent with a purpose to insist upon the exercise of a statutory right. Therefore, his conduct at trial amounts to a waiver of this procedural right.

[7] Defendant's fourth assignment of error relates to the testimony of John Earl Mason. Mr. Mason testified that after Carol's body had been removed from his house and Patsy had been taken to a hospital for treatment, he and his wife were taken to the Sanford Police Department so that they could make several phone calls. While they were at the police station, the Masons talked by telephone with Cliff Ferguson, a friend of Terry Hinson, the mother of Carol. The Mason couple had adopted Carol and her brother, Jerome. Ms. Hinson was the daughter of Mrs. Mason. Ms. Hinson had instructed the couple to call Mr. Ferguson's home in the event that she was needed. On cross-examination of Mr. Mason, defendant sought to establish that Mr. Ferguson was killed the next day. The objection of the district attorney was sustained, and Mr. Mason was not permitted to answer the question.

There was no error. Defendant argues that the evidence was relevant to establish the violent atmosphere which surrounded the Mason household in that it tended to establish a connection between two deaths, that of Carol Ann Hinson and that of Cliff Ferguson. The only connection between the two deaths that has been demonstrated to this court is the relationship of the decedents to Terry Hinson. Ms. Hinson not only

was Carol's mother, she was also a friend of Mr. Ferguson. No other connection is apparent or has been demonstrated. While it remains the general rule that evidence is relevant if it has any logical tendency, however slight, to prove a fact in issue, *e.g.*, *State v. Banks*, 295 N.C. 399, 245 S.E. 2d 743 (1978), no such tendency exists in regard to a purported connection between the two deaths. Indeed, such evidence, nothing else appearing, would have done nothing in the present case except confuse the issues before the jury.

Similarly, it was not error for the trial court to refuse to permit defendant to cross-examine Mr. Mason with respect to whether he was the beneficiary of any insurance on Carol's life. In the absence of the jury, Mr. Mason testified that an insurance company had paid him the sum of $5,000 upon the child's death. We are unable to agree with defendant's contention that the evidence was relevant on the question of a motive Mr. Mason would have had in regard to the death of Carol. Such an argument is purely speculative in that it finds no support whatsoever in the record. Evidence that a crime was committed by another must point unerringly to the guilt of another. *State v. Jenkins*, 292 N.C. 179, 232 S.E. 2d 648 (1977); *State v. Smith*, 211 N.C. 93, 189 S.E. 175 (1937). Evidence which does no more than cast suspicion upon another or to raise a mere conjectural inference that the crime may have been committed by another is inadmissible. *State v. Shinn*, 238 N.C. 535, 78 S.E. 2d 388 (1953).

[8] Defendant also contends that the trial court erred in its charge to the jury in two respects. He first submits that evidence favorable to him which had been elicited on cross-examination was not summarized for the jury as was the case with evidence favorable to the state. This contention is controlled by *State v. Moore*, 301 N.C. 262, 271 S.E. 2d 242 (1980), in which we held that while a trial judge must summarize evidence favorable to defendant which is brought out on cross-examination, there is no requirement that this be done when the evidence goes not to the establishment of a substantive defense but rather is of an impeaching quality and effect.

In the present case, the trial judge failed to instruct the jury, among other things, that no bloodstains had been found

on defendant's bicycle, his underclothing, or on the nunchukas which had been seized by police. Nor did the trial judge undertake to direct the jury's attention to the fact that Patsy had worn glasses since the first grade or that she was unable to say that the state's exhibit 8, a set of nunchukas, was the weapon which she had seen in the back pocket of her assailant. All of this evidence, while competent, goes to affect the weight to be accorded these matters rather than the establishing of a substantive defense, as was the case in *State v. Sanders*, 298 N.C. 512, 259 S.E. 2d 258 (1979).

[9] Similarly, it was not error for the trial judge to instruct the jury that while defendant had elected not to present any evidence, they were not to allow that decision to influence their deliberations. We have repeatedly held that while it is the better practice for a trial judge not to instruct on a defendant's election not to testify or otherwise offer evidence absent a request, such an instruction does not constitute reversible error. *E.g., State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976).

PHASE II — SENTENCE DETERMINATION

Although defendant has not brought forward and argued to this court any assignment of error which relates to the submission of a particular aggravating circumstance to the jury, in view of the penalty that has been imposed, we have carefully considered those which were submitted. We conclude that the trial court did not err in this respect. *See State v. Barfield, supra; State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979).

As a check against the capricious or random imposition of the death penalty, G.S. § 15A-2000(d)(2) authorizes this court to review the record in a capital case to determine whether the record supports the jury's finding of any aggravating circumstance, whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor, and whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

We have carefully reviewed the record of defendant's trial. We have given serious consideration to the briefs and arguments which have been presented to us. It is our conclusion

that there is sufficient evidence in the record to support the jury's findings as to the aggravating circumstances which were submitted to it. Nothing in the record suggests that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor.

Considering the brutal manner in which Carol Ann Hinson was murdered and Patsy Ann Mason was seriously injured, and considering defendant's prior history of violent criminal behavior, we conclude that the sentence of death in this case is not excessive and that we should not exercise the discretion given us by statute to set aside the sentence imposed.

No error.

Justice BROCK took no part in the consideration or determination of this case.

FEIBUS & COMPANY, INC. (N.C.) (FORMERLY F.G. REALTY CORPORATION) v. GODLEY CONSTRUCTION COMPANY, INC.; M.R. GODLEY AND F.O. GODLEY

No. 82

(Filed 4 November 1980)

1. **Appeal and Error § 4; Rules of Civil Procedure § 50.5– directed verdict – affirmance on appeal – different ground from that asserted in trial**

The Court of Appeals erred in upholding a directed verdict for defendants on a ground different from that upon which the trial court reached its decision when the ground relied upon by the Court of Appeals was not stated in defendant's motion or argument on the motion in the trial court. G.S. 1A-1, Rule 50(a).

2. **Limitation of Actions § 8.3– collapse of floor – fraud – tenant in possession – statute of limitations**

The six year statute of limitations of G.S. 1-50 did not apply to an action for fraud arising out of the collapse of the floor of a building where the corporate tenant of the building merged into the corporate plaintiff after the building collapsed and plaintiff succeeded to the rights of the corporate tenant and thus was in possession of the building as tenant at the time of the injury. G.S. 1-50(5); G.S. 55-110(b).

3. **Limitation of Actions § 8.1– actions for fraud – applicable statute of limitations**

Actions for fraud are not subject to the ten year limitation of G.S. 1-15(b) since G.S. 1-52(9) is a statute that "otherwise provide[s]" as to time of accrual of an action for fraud. Under G.S. 1-52(9) the three year limitation for an

action for fraud accrues at the time of discovery regardless of the length of time between the fraudulent act or mistake and discovery of it.

4. **Limitation of Actions § 8.1– action for fraud – reasonable time of discovery – jury question**

In this action for fraud arising out of the collapse of the floor of a building, plaintiff made a *prima facie* showing of reasonable discovery within three years prior to the suit and that the action was thus not barred by G.S. 1-52(9) where plaintiff offered proof that the subject of the alleged fraud, a drainage pipe which ran under the building, was buried deep in the ground and had never been inspected because of defendant's assurances that it was well constructed of concrete and that plaintiff "had nothing to worry about," and proof that the damage caused by the drainage system was not apparent until a cave-in caused the floor of the building to collapse.

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

ON plaintiff's petition for discretionary review of a decision of the Court of Appeals, reported at 44 N.C. App. 133, 260 S.E. 2d 665 (1979), affirming a directed verdict for defendants entered by *Griffin, J.*, on 26 October 1978 in the Superior Court, MECKLENBURG County.

The primary issues involved in this appeal are (1) whether the provision in Rule 50(a), N.C. Rules of Civil Procedure, that "[a] motion for a directed verdict shall state the specific grounds therefor," is mandatory, and (2) whether the trial court applied the proper statute of limitations in an action for fraud.

Hasty, Waggoner, Hasty, Kratt & McDonnell, by William J. Waggoner and John H. Hasty, for plaintiff-appellant.

Ervin, Kornfeld & MacNeill, by Winfred R. Ervin and Winfred R. Ervin, Jr., and Jones, Hewson & Woolard, by William L. Woolard, for defendants-appellee.

CARLTON, Justice.

I.

Plaintiff is engaged in the textile waste business with a warehouse located in Charlotte, North Carolina. It buys waste and rag clippings from mills and resells them to the paper and plastic industry. The corporate defendant is a construction company located in Charlotte. F.O. Godley was at all relevant times an officer, director and stockholder of Godley Construction Co., Inc. The defendants are land developers and building contractors.

In the early 1960s plaintiff's corporate predecessor (hereinafter called plaintiff) required a larger warehouse within which to operate its business and to store the heavy bales of waste and rag clippings. After searching for a new location on which to build a new warehouse, plaintiff entered into negotiations with defendants. The negotiations culminated in the signing of two separate contracts in February of 1965, one with the individual defendants for the purchase of the land, the second with the corporate defendant for the design and construction of a warehouse that would meet plaintiff's specialized needs. Defendants were informed that the floors would be subjected to substantial loading and would have to be built accordingly. The purchase price for the land and building was $193,000 plus plaintiff's old warehouse and site.

In August 1965 the new warehouse was substantially completed and plaintiff moved in. The warehouse was not finally completed until 1967 or 1969. On 18 June 1975 a portion of the warehouse floor collapsed, causing substantial damage to the building.

Plaintiff repaired the building and filled in the land. On 1 July 1976 it filed suit against defendants as joint venturers. Its complaint prayed for damages of $250,000 and alleged three causes of action: (1) fraud, (2) negligent construction, and (3) breach of implied warranties.

Defendants answered, denying plaintiff's material allegations, pleading the statute of limitations, among other defenses, as a bar to plaintiff's claims. Defendants then moved for summary judgment under Rule 56, N.C. Rules of Civil Procedure. The motion was denied by Judge Kirby in an order dated 5 February 1978.

At trial, plaintiff presented evidence that the collapse of its warehouse was caused by the subterranean erosion of soil around and above an improperly installed drainage pipe which was on the land at the time of plaintiff's purchase. The pipe had no bedding underneath it, and the fill dirt on top of the pipe consisted of silt, sand, organic material, and some clay. The exact method of joining the sections of the pipe could not be determined, but the preferred and stronger method of joining by collars was not used. As a result of the weight of the soil above the pipe and the improper manner in which it was in-

stalled and the sections joined, the pipe flattened, creating cracks in the joints and causing erosion of the soil around the pipe by the water flowing through it. The erosion, or ravelling, created a cavity above the pipe and under the building. Over the years the cavity grew larger until it finally eroded enough of the building's support to cause it to collapse. The drainage pipe had been installed at least four years prior to the sale to plaintiff by an independent contractor hired by defendants.

Plaintiff also presented evidence of several misrepresentations made to it by defendants. Defendant F.O. Godley represented the pipe to be concrete and sixty inches in diameter when, in reality, it was of thin gauge metal. He also told plaintiff that there was no reason to be concerned about the pipe because of the construction and its depth. The building site had been filled some years prior to the sale to plaintiff. Defendants represented that the fill was well-compacted, would not settle and was "as good as virgin soil." Plaintiff was told that the property never flooded and that very little water flowed through the pipe. After the building collapsed plaintiff discovered that the fill consisted of sand, silt and organic material, that the pipe was metal and had been improperly installed, and that a large amount of water had flowed through the pipe over the years.

At the close of plaintiff's evidence defendants moved for a directed verdict on all three claims. Defendants' motion was granted and plaintiff appealed. The Court of Appeals affirmed, 44 N.C. App. 133, 260 S.E. 2d 665 (1979). Plaintiff petitioned for our discretionary review *with regard to the fraud claim only*. We granted the petition on 5 March 1980.

II.

[1] We first consider whether the Court of Appeals erred in affirming the trial court's allowance of defendants' motion for directed verdict pursuant to Rule 50(a), N.C. Rules of Civil Procedure. For the reasons set out below, we hold that it did. We reverse.

We glean from the record that the trial court premised its allowance of defendants' motion for a directed verdict on the expiration of a statutory limitation period for plaintiff's fraud claim. However, the Court of Appeals affirmed defendants'

directed verdict on the fraud claim on a different ground. It evaluated the evidence presented and held it insufficient to establish a *prima facie* case of fraud. The Court of Appeals concluded that plaintiff had shown several misrepresentations — that the pipe was concrete instead of metal, that the pipe had been installed as few as three years or as many as twelve years earlier, and that the fill was compacted and as good as virgin soil — but that the evidence showed these misrepresentations to be immaterial. Plaintiff's expert testified that the cause of the cave-in was the improper installation of the drainage pipe and that none of the above representations, even had they been true, would have made any difference.

We must first consider the propriety of the Court of Appeals upholding the directed verdict on a ground different from that upon which the trial court based its decision, when the ground relied upon by the Court of Appeals was not stated in defendants' motion to the trial court.

Rule 50(a) of the North Carolina Rules of Civil Procedure requires that "[a] motion for a directed verdict shall state the specific grounds therefor." G.S. 1A-1, Rule 50(a) (1969). This Court held in *Anderson v. Butler*, 284 N.C. 723, 729, 202 S.E. 2d 585, 588 (1974), that this provision is mandatory.[1] In this case, defendant did not state the grounds for its motion in writing; instead, the grounds were stated on oral argument on the motion and a written transcript of that argument was included in the record on appeal as required by *Hensley v. Ramsey*, 283 N.C. 714, 726, 199 S.E. 2d 1, 8 (1973). Plaintiff contends that defendants did not include insufficient evidence as a ground for the directed verdict in their argument on the motion and, therefore, the Court of Appeals erred in upholding the directed verdict on that basis. We evaluate this contention in light of the purpose behind the requirement of Rule 50(a) that specific grounds for the motion be stated.

[1]Justice Branch (now Chief Justice), speaking for the Court, added "However, the courts need not inflexibly enforce the rule when the grounds for the motion are apparent to the court and the parties." *Anderson v. Butler*, 284 N.C. at 729, 202 S.E. 2d at 588.

"The purpose of the rule is to apprise the Court and the adverse parties of movant's grounds for the motion." *Anderson v. Butler*, 284 N.C. at 728, 202 S.E. 2d at 588. Professor Sizemore has provided an excellent insight into the function of this rule:

> If movant states the specific grounds of the motion, plaintiff may be able to meet the defect with proof, and his case would be complete. If movant was not required to state the specific ground, the defect might be the cause of a later judgment notwithstanding the verdict when it is too late for plaintiff to supply the proof. Failure to state specific grounds for the motion is sufficient reason to deny the motion.

Sizemore, *General Philosophy and Scope of the New Rules*, 5 W.F.L. Rev. 1, 37 (1969). We must, then, decide whether defendants' argument gave the trial court and plaintiff adequate notice that it challenged the sufficiency of the evidence. We conclude that it did not.

In his argument on the fraud cause of action, defendants' counsel stated:

> Now, on this Cause of Action, of course, the arguments are very much different [from the arguments as to the other causes of action]. *We cannot argue, I cannot in good faith argue to the court that there has been no evidence on that because there has been seven days of it.* We have had seven days of evidence from the plaintiff, all of it directed toward fraud, all of it trying to establish fraud, and the court is aware, and we are all aware, of what the elements of fraud are, what the various six elements are which the complainer is required to prove to establish fraud. We know what they are, and the plaintiff has undertaken to bring out evidence seeking to establish those six elements of fraud. That has been the thrust of the lawsuit almost in its entirety. *So I cannot argue to the court that the First Cause of Action should be dismissed on its merits*, but I can and I will and I do strenuously argue to the court that even the First Cause of Action is also barred by the Statute of Limitations.
>
> .... [devoted entirely to argument on the statute of limitations.]

So even as to fraud, the First Cause of Action, about which there is an abundance of evidence, we respectfully contend and argue to the court that that Cause of Action was also barred by G.S. 1-15, which is the broadest Statute of Limitations that we have. . . . [continuation of statute of limitations argument.]

But again, in final summation, we would reiterate that first off it ought to be dismissed as to M.R. Godley for the reason that there is no evidence sufficient to hold him in the lawsuit. It also should be dismissed as to F.O. Godley and Godley Construction Company for the same reasons. I do not care to argue that point, but I do strenuously argue to the court that the Third Cause of Action [implied warranty] is clearly barred by the Statute of Limitations, and the Second Cause of Action [negligent construction] is clearly barred by the Statute of Limitations for the reasons I have just recited. They are both covered by three year statutes.

. . .

. . . His real allegations of fraud, those dealing with the six elements of fraud, are the First Cause of Action. We contend that the Third [Cause of Action for implied warranty] should be dismissed by the statute; the Second [for negligent construction] should be dismissed by the statute; and then you come down to the First, which is the fraud, and that's what all this lawsuit has been about. Everything that has been done has been directed toward it, and we respectfully submit that that one also by a different statute, by G.S. 1-15, should also be dismissed for the reason that it too was not brought within ten years after the time that the defect occurred or that it should have been discovered by the plaintiff; and for that reason we would respectfully move that the entire lawsuit be dismissed. Thank you.

[Emphases added.]

We think that defendants' argument, taken as a whole, indicates that the sole ground stated for the directed verdict motion as to fraud was the statute of limitations. Defendant contends that certain statements do suggest that insufficient

evidence was stated as a ground for the motion but was not argued:

> ... [F]irst off it [the entire action] ought to be dismissed as to M.R. Godley for the reason that there is no evidence sufficient to hold him in the lawsuit. It should also be dismissed as to F.O. Godley and Godley Construction Company for the same reasons. I do not care to argue that point. ...

These statements, taken out of context, may support defendants' contentions, but they are insufficient to give notice because other portions of the argument indicate, conclusively, that the sufficiency of the evidence on the fraud claim was not being questioned. Defendants' argument was therefore inadequate to apprise plaintiff of any challenge to the evidence, and that insufficiency of the evidence is clearly a "specific ground" for the directed verdict motion within the meaning of Rule 50(a). We must assume that the trial court granted defendants' directed verdict for the ground stated in defendants' argument. Because insufficiency of the evidence was not stated as a ground, the granting of the directed verdict was premised solely on the statute of limitations ground. No other ground was presented to the trial court.

Therefore, the only question properly before the Court of Appeals with respect to the motion for a directed verdict was whether the grant of the motion could be upheld on the basis of the statute of limitations. The Court of Appeals' opinion does not address this issue. We hold that the Court of Appeals erred in affirming the directed verdict on a ground not stated in defendants' motion. A contrary result would completely frustrate the notice purpose of Rule 50(a) because it would allow an appellant to question the sufficiency of an opponent's evidence for the first time on appeal. *Cf., Hensley v. Ramsey*, 283 N.C. 714, 199 S.E. 2d 1. Rule 50(a), by requiring specific grounds to be stated before the trial court in order to give notice, is clearly designed to prevent such a result.

Because we hold that the Court of Appeals erred in reaching the issue, we must decline to review the record to inquire into the sufficiency of the evidence to withstand a Rule 50(a) motion in the fraud action. The effect of our decision is to leave that issue unresolved on this appeal. If defendants desire

to test the evidence by a motion for directed verdict on re-trial, they are, of course, free to do so.

III.

In light of the foregoing, we must now turn to the principal issue presented by this appeal, not reached by the Court of Appeals: Whether the directed verdict in defendants' favor should be affirmed because the action for fraud is barred by the statute of limitations.

[2] Defendants first contend that the limitation of this action is governed by G.S. 1-50 which, in part, provides:

> No action to recover damages for any injury to property, real or personal, . . . , arising out of the defective and unsafe condition of an improvement to real property, . . . , shall be brought against any person performing or furnishing the design, planning, supervision of construction or construction of such improvement to real property, more than six (6) years after the performance of furnishing of such services and construction.

G.S. § 1-50(5) (1969). If this statute provides the applicable limitation, plaintiff's cause of action would have accrued upon the completion of the construction, either in August 1965 or sometime in 1967, and would have been barred by the running of the limitation period long before the collapse of the building and the filing of this suit.

In order for this statute to apply, three circumstances must exist: (1) the action must be for recovery of damages to real or personal property, (2) the damages must arise out of the defective and unsafe condition of an improvement to real property, and (3) the party sued must have been involved in the designing, planning, or construction of the defective or unsafe improvement. Although the damages sought in this action are of the type required by this statute, damages to real or personal property, it is unclear whether the two remaining circumstances, that the damages arise from an improvement and the status of the defendant in relation to the improvement, arise on the facts of this case. Even assuming, arguendo, that these circumstances do exist, we must still consider whether the statute applied to *this plaintiff*. G.S. 1-50(5) also provides that "[t]his limitation shall not apply to any person in actual posses-

sion and control as owner, tenant or otherwise, of the improvement at the time the defective and unsafe condition of such improvement constitutes the proximate cause of the injury for which it is proposed to bring an action." *Id.* The injury contemplated by this statute is obviously not the defective and unsafe condition itself; the statutory language indicates that the injury is something subsequent to and caused by the defective condition and must mean the temporal damage caused by the condition. *See* Lauerman, *The Accrual and Limitation of Causes of Actions for Nonapparent Bodily Harm and Physical Defects in Property in North Carolina*, 8 W.F.L. Rev. 327, 345 (1972). Here the time of injury was the collapse of the building. We must decide whether this plaintiff was excluded from the coverage of the statute as of the date of the collapse.

Defendants contend that plaintiff was not "in actual possession and control" at the time of injury because it had leased the property, relinquishing possession and control, and, thus, was not within the excluded class. We need not decide that question, however, because the record discloses that the owner at the time of the injury, F.G. Realty Corp., merged into the corporate tenant, Feibus-Gordon of Charlotte, Inc., which was in actual possession and control, after the collapse of the building. Feibus-Gordon of Charlotte, the surviving corporation, later changed its name to Feibus & Company, Inc., the named plaintiff. It is well-established in this State that the surviving corporation succeeds to the rights of the corporation that merged into it and also retains its own rights and obligations as they existed prior to the merger. G.S. 55-110(b) (1975). Thus, the plaintiff, as tenant, was in actual possession and control on the date of the injury and the period of limitation prescribed by G.S. 1-50 is inapplicable.

[3] Defendant next contends that the action is barred by former G.S. 1-15(b) which provided:

> Except where otherwise provided by statute, a cause of action, other than one for wrongful death or one for malpractice arising out of the performance of or failure to perform professional services, having as an essential element bodily injury to the person or a defect in or damage to property which originated under circumstances making the injury, defect or damage not readily apparent to the

> claimant at the time of its origin, is deemed to have accrued at the time the injury was discovered by the claimant, or ought reasonably to have been discovered by him, whichever event first occurs; provided that in such cases the period shall not exceed 10 years from the last act of the defendant giving rise to the claim for relief.

Law of July 21, 1971, 1971 N.C. Sess. Laws 1706, Ch. 1157, s. 1 (repealed 1979).

Prior to the 1971 enactment of this statute, the limitation for causes of action for fraud was governed by G.S. 1-52(9) (Cum. Supp. 1979), which provides that the action accrues upon discovery and creates a three-year limitation period. Defendant argues that because former G.S. 1-15(b) created for other cases of concealed injury the same criterion as to time of accrual of the action, its proviso placing a ten year outside limit on accrual should be construed to apply to all types of concealed injury, even those expressly covered by other statutes. Defendant cites as grounds for this contention the well-established rule of statutory construction that the Legislature is presumed to intend to correlate the statutory scheme by construing new statutes in harmony with existing statutes, stated in *Hardbarger v. Deal*, 258 N.C. 31, 127 S.E. 2d 771 (1962). The stated principle is inapplicable here because G.S. 1-15(b) expressly limits itself to those actions not covered by other statutes. G.S. 1-52 provides for the period of limitation and also for time of accrual for fraud actions. "Within three years an action — . . . (9) For relief on the ground of fraud or mistake; the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." G.S. § 1-52 (Cum. Supp. 1979). This is clearly the statute applicable to the instant case. We construe this provision to set accrual at the time of discovery *regardless* of the length of time between the fraudulent act or mistake and plaintiff's discovery of it. *See Lauerman, supra* at 348. Thus, G.S. 1-52(9) is a statute that "otherwise provide[s]" as to time of accrual, and fraud actions are not subject to the ten year limitation of G.S. 1-15(b).

[4] Defendant finally contends that the action is barred even if G.S. 1-52(9) is the applicable limitation because more than three years have elapsed since the time the plaintiff should reasonably have discovered the fraud. When plaintiff should, in the

exercise of reasonable care and due diligence, have discovered the fraud is a question of fact to be resolved by the jury. Because this case is before us for review of a directed verdict, we consider only whether plaintiff made a *prima facie* showing of reasonable discovery within the three years prior to the suit. *E.g., Kelly v. International Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971). We hold that it did. Plaintiff offered proof that the subject of the alleged fraud, the drainage pipe, was buried deep in the ground and had never been inspected by plaintiff because of defendants' assurances that it was well constructed and "nothing to worry about," and that the damage caused by the drainage system was not apparent until the cave-in. While we express no opinion as to whether this evidence, by itself, would be sufficient to require an ultimate finding in plaintiff's favor, we do consider it sufficient to create an issue of fact for the jury and to overcome a motion for directed verdict.

We hold, therefore, that the trial court erred in allowing the motion for directed verdict pursuant to Rule 50(a), N.C. Rules of Civil Procedure, on the stated ground of the statute of limitations.

IV.

Finally, several procedural contentions are presented. This cause was first heard before Judge Kirby on defendants' motion for summary judgment. Judge Kirby denied defendants' motion at the close of the hearing but did not sign a written order at that time. The term of court was adjourned on that day. Judge Kirby signed the written order at his home, which was outside the district, after the term of court expired. Defendants contend that the order is invalid because it was signed out of term and district without their consent. Their contention is without merit. Rule 6(c) of the Rules of Civil Procedure provides that the expiration of a session of court has no effect on the court's power "to do any act or take any proceeding." G.S. § 1A-1, Rule 56(c) (1969). This rule clearly allows a written order to be signed out of term, especially when such an act merely documents a decision made and announced before the expiration of the term. This assignment of error is overruled.

Defendants also assign as error Judge Kirby's denial of their summary judgment motion. This contention is without merit. Summary judgment can be entered only when there

exists no genuine issue as to any material fact and when the movant shows he is entitled to judgment as a matter of law. G.S. § 1A-1, Rule 56(c) (1969); *accord, Bell v. Martin,* 299 N.C. 715, 718, 264 S.E. 2d 101, 103 (1980); *Pitts v. Pizza, Inc.,* 296 N.C. 81, 85, 249 S.E. 2d 375, 378 (1978); *Page v. Sloan,* 281 N.C. 697, 704, 190 S.E. 2d 189, 193 (1972). Generally, summary judgment is inappropriate when intent or other subjective feelings are material. *Smith v. Currie,* 40 N.C. App. 739, 253 S.E. 2d 645 (1979); 6 Moore's Federal Practice ¶56.17, at 930 (2d ed. 1948). This case is no exception. The evidence before Judge Kirby showed that intent was a contested issue. Other evidence before the judge indicated other disputed material facts. Denial of the summary judgment motion was proper. This assignment of error is overruled.

In light of our holding above, we find it unnecessary to consider the parties' remaining procedural assignments of error.

In conclusion, we hold that defendants' failure to include insufficiency of the evidence as a ground for its directed verdict motion precludes our consideration of that ground on appeal and that plaintiff's claim is not barred, as a matter of law, by the applicable statute of limitations, G.S. 1-52(9). Defendants' motion for directed verdict as to the fraud claim should have been denied on the specific grounds stated in its motion. The trial court erred in granting that motion. The Court of Appeals erred in affirming the motion on a ground not stated when the motion was made.

The decision of the Court of Appeals with regard to plaintiff's cause of action for fraud is reversed. This cause is remanded to that court with instructions to remand to the Superior Court, Mecklenburg County, for further proceedings consistent with this opinion.

Reversed and remanded.

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

Hassell v. Wilson

TEX R. HASSELL AND WIFE, PHRONIA LOY HASSELL v. J. KENYON WILSON, JR., TRUSTEE; ALBEMARLE SAVINGS & LOAN ASSOCIATION; JAMES AUBREY HUDSON AND WIFE, HELEN B. HUDSON

No. 16

(FILED 4 NOVEMBER 1980)

1. **Judgments § 30; Rules of Civil Procedure §§ 4, 60– attack on foreclosure – independent suit or motion in cause proper – return of service insufficient on face**

Plaintiffs could properly attack a foreclosure proceeding either by motion in the cause or by independent action, since the stipulation of the parties at pre-trial conference that a companion action raising the identical issues had been instituted by plaintiffs by filing a motion in the cause in the foreclosure proceedings and that a final judgment in the present action would determine the companion litigation was sufficient to transfer the motion in the cause pending before the clerk to the superior court for its determination, and original jurisdiction of the superior court over the motion was established by G.S. 1-276; furthermore, plaintiffs were entitled to attack the foreclosure proceeding either by a motion in the cause or by an independent action because the officer's return was insufficient on its face to show service upon plaintiff husband in that the return did not show the place where the papers were left.

2. **Process § 5– return of service insufficient on face – remand to determine propriety of amendment**

Although an officer's return was insufficient to show service upon plaintiff husband in mortgage foreclosure proceedings because it did not show the place where the papers were left, such defect was not necessarily fatal to the foreclosure proceedings, and the matter is remanded for the trial judge to determine within his discretion whether the sheriff's return ought to be amended so as to comport with facts regarding the place and manner of service.

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

ON discretionary review of a decision of the Court of Appeals, 44 N.C. App. 434, 261 S.E. 2d 227 (1980) vacating the involuntary dismissal of plaintiffs' claim and judgment in favor of defendants on their counterclaim entered by *Judge Ralph Walker* at the 12 December 1978 Session of PASQUOTANK Superior Court.

Cherry, Cherry and Flythe by Joseph J. Flythe, Attorneys for plaintiff appellees.

White, Hall, Mullen, Brumsey and Small by Gerald F. White, Attorneys for defendant appellants.

EXUM, Justice.

This case raises questions regarding the insufficiency of a sheriff's return of substituted service of process and the procedurally proper method of attacking it.

Plaintiffs, husband and wife, filing both a motion in the cause before the Pasquotank Clerk and a separate action in Pasquotank Superior Court, seek to have a clerk's order in foreclosure of plaintiffs' home and trustee's deed to defendants set aside for failure to serve notice of the foreclosure hearing on plaintiff husband, Tex Hassell. Defendants counterclaim in the superior court action for possession of the property and for rent due. After hearing evidence without a jury, Judge Walker, without finding facts, entered an order of involuntary dismissal of plaintiffs' action pursuant to Rule 41(b). He also entered judgment, based on that dismissal, in favor of defendants on their counterclaim.

The Court of Appeals concluded that plaintiffs were required to proceed, if at all, by motion in the cause; that the parties could not by stipulation give the superior court jurisdiction of the motion pending before the clerk; and that plaintiffs' independent action ought to be dismissed for failure to state a claim. The Court of Appeals also vacated the judgment for defendants on their counterclaim because the trial court erroneously based this judgment on its involuntary dismissal of plaintiffs' action. The Court of Appeals then remanded the matter for further proceedings on defendants' counterclaim. We allowed defendants' petition for further review.

We conclude that plaintiffs were entitled to attack the foreclosure proceeding either by motion in the cause or by independent action; the superior court properly had before it both proceedings; and it erroneously dismissed plaintiffs' claim. Since its judgment for defendants on their counterclaim was predicated on its dismissal of plaintiffs' claim, that judgment must be vacated. The result is that we reverse the Court of Appeals' decision that plaintiffs' independent action ought to be dismissed; for the reasons given herein we affirm the Court of Appeals' vacation of both judgments entered by the superior

court; we remand for further proceedings not inconsistent with this opinion.

Plaintiffs owned their home, a house and lot, which was the real property conveyed to defendants Hudson at the foreclosure sale. From 1 September 1977 plaintiffs owed the sum of $5,035.62 with interest to Albemarle Savings & Loan Association; the debt was secured by a deed of trust on the property. Plaintiff husband was employed away from home beginning 1 September 1977 and entrusted his wife with the duty and necessary funds to make the required payments on the loan. This she failed to do. She also failed to tell her husband she was not making the payments. Foreclosure proceedings were begun against the home. When on 16 September 1977 a Pasquotank deputy sheriff served notice of the foreclosure hearing on Mrs. Hassell, she hid the papers under a mattress, never delivered them to her husband, and never told him about them. Mrs. Hassell did attend the hearing before the clerk on 14 October 1977 but said nothing about it to her husband. Pursuant to the foreclosure order issued after the hearing on 14 October 1977 and after due advertisement the foreclosure sale was held on 14 November 1977. No upset bids were received. The trustee executed and delivered a deed dated 1 December 1977 conveying the property to defendants James Aubrey Hudson and wife, Helen B. Hudson, for the price of $6,300. Mr. Hassell first learned of these developments on 1 January 1978 when his sister and brother found the papers and brought them to him. Plaintiffs purchased their home in 1971 for $7,900 and made extensive additions and renovations. Apparently they are willing to reimburse defendants for the $6,300 defendants paid at foreclosure. They have deposited this amount with the clerk.

I.

[1] Challenging the foreclosure proceeding, plaintiffs complain that service of the notice of foreclosure hearing was not properly had on Mr. Hassell.[1] Plaintiffs maintain that the return of

[1]G.S. 45-21.16 requires: "(a) The mortgagee or trustee granted a power of sale under a mortgage or deed of trust who seeks to exercise such power of sale shall serve upon each party entitled to notice under this section a notice of hearing. ... The notice shall be served in any manner provided by the Rules of Civil Procedure for the service of summons ...." *See also* section (b) listing those entitled to receive the notice. The list would include in this case Mr. Hassell.

service does not show that the papers which were left with Mrs. Hassell were left at Mr. Hassell's "dwelling house or usual place of abode" as Rule 4(j)(1)(a) requires.[2] Defendants contend that the return, certified by a deputy sheriff, shows substantial compliance with the rule. The return of service reads as follows:

> "I certify that this Order of Service was received on the 15th day of September, 1977 and together with the copy of the Notice of Hearing was served as follows: on Tex R. Hassell.
>
> On the 16 day of Sept., 1977 at the following place:
>
> _____
> (Address where copy delivered or left)
>
> By: X leaving copies with Phronia Loy Hassell who is a person of suitable age and discretion and who resides in the designated recipient's dwelling house or usual place of abode."

When plaintiffs' action was brought in superior court the parties, at pre-trial conference, stipulated:

> "[A] companion action raising the identical issues presented in the present action and seeking the same relief as that sought in the present action has been instituted by plaintiffs herein upon filing motion in the cause in the foreclosure proceedings herein and therein disputed, said companion action being contained in File No. 77-Sp-72 of the Pasquotank County Clerk of Superior Court's office. By consent of the parties hereto, the final result and judgment reached in the present action shall likewise finally determine said companion litigation as contained in said File No. 77-Sp-72."

Although both parties agree before us as they did in the Court of Appeals that this stipulation was sufficient to put before the superior court the motion in the cause pending be-

[2]This subsection of Rule 4(j) provides for service upon a natural person "[b]y delivering a copy of the summons and of the complaint to him or by leaving copies thereof at the *defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. . . .*" (Emphasis supplied.)

fore the clerk so that the superior court could assume original jurisdiction of the motion, the Court of Appeals concluded to the contrary "since, under the statute, the Superior Court would have only appellate jurisdiction over the original foreclosure proceeding, and over the clerk's ruling on a motion in the cause." 44 N.C. App. at 439, 261 S.E. 2d at 230. The Court of Appeals erred in this conclusion.

The stipulation of the parties at pre-trial conference was sufficient in substance, if not in form, to transfer the motion in the cause pending before the clerk to the superior court for its determination. Original jurisdiction of the superior court over the motion is established by G.S. 1-276:

> "*Judge determines entire controversy; may recommit.* — Whenever a civil action or special proceeding begun before a clerk of a superior court is for any ground whatever sent to the superior court before the judge, the judge has jurisdiction; and it is his duty, upon the request of either party, to proceed to hear and determine all matters in controversy in such action, unless it appears to him that justice would be more cheaply and speedily administered by sending the action back to be proceeded in before the clerk, in which case he may do so."

This Court has consistently construed this statute to mean that the clerk is really an arm of the superior court. When a proceeding before the clerk is brought before the superior court, the court's jurisdiction is not appellate or derivative; it is original. *Hudson v. Fox*, 257 N.C. 789, 127 S.E. 2d 556 (1962); *Langley v. Langley*, 236 N.C. 184, 72 S.E. 2d 235 (1952); *Perry v. Bassenger*, 219 N.C. 838, 15 S.E. 2d 365 (1941).

Furthermore because of the nature of the defect in the officer's return, we believe plaintiffs were entitled to attack the foreclosure proceeding either by a motion in the cause or by an independent action. Rule 60 provides for an attack on a judgment void because of lack of personal jurisdiction by way of motion in the cause or independent action. But which method must be used depends upon whether the jurisdictional defect appears on the face of the record. If the officer's return of process shows that service was duly made upon the party over which personal jurisdiction was required, then that party may

attack the proceeding only by a motion in the cause; but if a defect in the service of process appears on the face of the return itself, the prior proceeding may be attacked either by motion in the cause or by an independent action. "If the defect [pertaining to personal jurisdiction] appear on the face of the papers, or is discernible from an inspection of the record, the judgment may be treated as a nullity, vacated on motion, or attacked collaterally." *Dunn v. Wilson*, 210 N.C. 493, 187 S.E. 802, 803 (1936).

As already noted G.S. 45-21.16 required as a prerequisite to the validity of the foreclosure proceedings here being attacked that Mr. Hassell be served with notice of the foreclosure hearing in accordance with the Rules of Civil Procedure. The deputy sheriff's return of service as to Mr. Hassell indicates that he attempted to use the substituted service provisions of Rule 4(j)(1)(a). These provisions require that the papers to be served be left: (1) at the dwelling house or usual place of abode of the person to be served (2) with a person of suitable age and discretion (3) who resides with the person to be served. The papers, in other words, must be left at a place which constitutes the dwelling of both the person to be served and the person with whom the papers are left. *Guthrie v. Ray*, 293 N.C. 67, 235 S.E. 2d 146 (1977). There is no valid service if the papers are not left at this place. *Id.*

Furthermore, G.S. 1-75.10 prescribes how proof of service of process shall be made when service is challenged.[3] Under the statute the officer's certificate, or return, must show the "*place*, time and manner of service. . . ." (Emphasis supplied.) Under G.S. 1-75.11 when "a defendant fails to appear in the action within apt time, the court shall, before entering a judgment against such a defendant, require proof of service of the summons in the manner required by § 1-75.10. . . ."

[3]The statute provides:

"Where the defendant appears in the action and challenges the service of the summons upon him, proof of the service of process shall be as follows:

(1) Personal Service or Substituted Personal Service. —

a. If served by the sheriff of the county or the lawful process officer in this State where the defendant was found, by the officer's certificate thereof, showing *place*, time and manner of service. . . ." (Emphasis supplied.)

The officer's return here does not show the place where the papers were left. There is a blank space for the insertion of this information in the return but the information has not been inserted. Thus, on its face, this return does not show compliance with Rule 4(j)(1)(a) nor does it comply with G.S. 1-75.10.

In concluding that the officer's return of service is insufficient on its face to show service upon Mr. Hassell, we are advertent to our decision in *Guthrie v. Ray, supra*, 293 N.C. 67, 235 S.E. 2d 146, in which we concluded that a similar return of service substantially complied with Rule 4(j)(1)(a). In *Guthrie*, a personal injury action arising out of a motor vehicle collision, the summons gave defendant's address as "Route 3, Box 187, Weaverville, North Carolina." In his return of service the deputy sheriff certified that defendant was served "at the following place: Route 3, Box 187 By: leaving copies with Mrs. C. Ray (mother) who is a person of suitable age and discretion and who resides in the defendant's dwelling house or usual place of abode." Despite defendant's claims contained in an affidavit that he was a resident of Tennessee, the trial court concluded that defendant was duly served. The Court of Appeals reversed, in part on the grounds that "[t]he return clearly fails to disclose that service was had on the defendant by leaving a copy of the summons and complaint *at* defendant's dwelling house or usual place of abode as required by G.S. 1A-1, Rule 4(j)(1)(a)." 31 N.C. App. 142, 144, 228 S.E. 2d 471, 473 (1976). This Court reversed the Court of Appeals. In *Guthrie*, however, the return properly recited the place where the summons was delivered. The place was the same address given for defendant in the body of the summons. Nevertheless this Court cautioned in *Guthrie*, 293 N.C. at 70, 235 S.E. 2d at 148:

> "The better practice, then, would be for the sheriff to state explicitly in his return of service that the place where the summons was left was the dwelling house or usual place of abode of both the named defendant and 'the person of suitable age and discretion' to whom he delivered the summons."

We are also advertent to some of our older cases which conclude that if the return merely recites that it was "served" without detailing the manner of service it is sufficient to show proper service. *State v. Moore*, 230 N.C. 648, 55 S.E. 2d 177 (1949);

Isley v. Boone, 113 N.C. 249, 18 S.E. 174 (1893); *McDonald v. Carson*, 94 N.C. 497 (1886); *Strayhorn v. Blalock*, 92 N.C. 292 (1885). These cases, however, dealt with personal rather than, as here, substituted service. Rule 4(j)(1)(a), setting out in detail the prerequisites to substituted service, and G.S. 1-75.10, prescribing how service must be proved, have both been enacted since these earlier cases were decided.[4]

Our decision here is supported by *Propst v. Hughes Trucking Co.*, 223 N.C. 490, 27 S.E. 2d 152 (1943). In *Propst*, a wrongful death action arising out of a motor vehicle collision, service was attempted on a non-resident motorist pursuant to statutory provisions which made the North Carolina Commissioner of Motor Vehicles a process agent for such non-residents. The statute in question provided that "service of such process shall be made by leaving a copy thereof in the hands of said Commissioner of Motor Vehicles, or in his office ...." The sheriff's return in the case read as follows: "Served ... by delivering copy of the within summons ... to ... W.H. Rogers, Jr., Assistant Commissioner, Motor Vehicle Bureau of the State of North Carolina, Statutory Process Agent of the Hughes Trucking Co., a foreign corporation." This Court held that the return was insufficient to show that summons was delivered *in the office* of the Commissioner of Motor Vehicles even though the record showed that the Commissioner had duly mailed notice of service and copy of the process to the non-resident defendant.

Statutes authorizing substituted service of process, service by publication, or other particular methods of service are in derogation of the common law, are strictly construed, and must be followed with particularity. *Sink v. Easter*, 284 N.C. 555, 202 S.E. 2d 138 (1974). "Where, by the local law, substituted or constructive service is in certain situations authorized in the place of personal service when the latter is inconvenient or impossible, a strict and literal compliance with the provisions of the law must be shown in order to support the judgment based on such substituted or constructive service." 62 Am. Jur. 2d, *Process* § 68 (1972).

[4]Indeed G.S. 1-592, in effect when these cases were decided, provided that "when a notice issues to the sheriff, his return thereon that the same has been executed is sufficient evidence of its service." This statute was repealed by Chapter 954, 1967 Session Laws, effective 1 January 1970 — the same chapter which, in turn, enacted G.S. 1-75.10, presently in effect.

Here the place of service is not mentioned in the return; place is a prerequisite to valid substituted service under Rule 4(j)(1)(a); and place must be stated in the return under G.S. 1-75.10. Therefore the return was insufficient on its face to show valid service.

It is true that the return does not show that notice of the foreclosure hearing was *not* left at Mr. Hassell's dwelling. The return is silent as to this aspect of the purported service. Nevertheless we believe this defect is of the kind which permits plaintiffs to attack the proceedings for lack of service in an independent action. Where all the papers in a former proceeding had been lost except the judgment against defendant and there was nothing to show that defendant had or had not been served with process, it was held in *Downing v. White*, 211 N.C. 40, 188 S.E. 815 (1936), that defendant could attack the judgment in an independent action on the grounds that no summons was ever served on her. The Court said, *id.* at 41-42, 188 S.E. at 816:

> "[W]here it affirmatively appears from the record in a case that one was duly served or made a party thereto, the remedy for establishing the fact of nonservice . . . is by motion in the cause and not by an independent action. . . . So [the papers having been lost] it not appearing that [plaintiff] was ever a party to said proceeding, we apprehend her right presently to attack the judgment rendered therein as a cloud on her title ought not to be denied."

Here the return does not affirmatively show that Mr. Hassell was ever duly served. It does not appear that he was ever duly made a party. Consequently plaintiffs are entitled to attack the foreclosure proceeding in an independent action.

II.

[2] Although the defect appearing on the face of the return is sufficient to permit the foreclosure proceedings to be attacked in an independent action, it is not such a defect which is necessarily fatal to the foreclosure proceedings. "It is the service of summons and not the return of the officer that confers jurisdiction. . . . The Court in its discretion may permit an officer to amend his return by adding further specifications as to the manner of service or the acts done in compliance with the

statute . . . ." *State v. Moore, supra,* 230 N.C. at 649, 55 S.E. 2d at 178. In *Propst v. Hughes Trucking Co., supra,* 223 N.C. 490, 27 S.E. 2d 152, the Court held that the sheriff's return was insufficient to show that he had left the papers to be served in the appropriate office; nevertheless the matter was remanded so that opportunity could be given the sheriff "to make a true and accurate return, if in fact his service was in accordance with the statute." 223 N.C. at 492, 27 S.E. 2d at 153.

"The officer is bound by the return, and so are the parties until the contrary is shown; but where it does not show correctly what was done, the court may permit amendment in accordance with the facts . . . . [T]he amendment relates back, having the same effect as if included in the original return." McIntosh, North Carolina Practice and Procedure, § 890 (1956). "An officer does not have the right to amend his return to a summons after the return is filed, but the court, under its discretionary power, in meritorious cases may grant him leave to do so." *Lee v. Hoff,* 221 N.C. 233, 236, 19 S.E. 2d 858, 859 (1942). The Court said further, quoting from 21 R.C.L. 1329, *Process,* § 77: "The Court is bound in every case to exercise a sound discretion, and to allow or disallow an amendment as may best tend to the furtherance of justice." *Id.*

The return as it stands is thus insufficient to show that Mr. Hassell was ever duly served. Unless and until it is amended, it is an insufficient basis upon which to predicate the validity of the foreclosure proceedings. The trial judge, therefore, erred in dismissing plaintiffs' action and entering judgment for defendants on their counterclaim predicated upon that dismissal.

On remand, the first inquiry will be whether the sheriff's return ought to be amended so as to comport with facts regarding the place and manner of service. The decision rests within the sound discretion of the trial judge. If, warranted by the facts, circumstances and the ends of justice, he permits the return to be amended so as to show valid service of the notice upon Mr. Hassell, then plaintiffs' attack against the foreclosure proceedings must fail. If he does not permit amendment of the return then plaintiffs are entitled to have the foreclosure proceedings set aside.

The matter must, therefore, be remanded for a new hearing and a new determination on the questions whether the sheriff

in fact duly served Mr. Hassell with notice of the foreclosure hearing pursuant to Rule 4(j)(1)(a) and whether the trial court will in its discretion permit an amendment to the return to perfect service of the notice of hearing.

III.

On defendants' counterclaim for possession and rent due the trial court entered judgment, supported by findings of fact and conclusions of law, favorable to defendants. We express no opinion regarding the ultimate correctness of any aspect of this judgment nor upon the correctness of the Court of Appeals' remarks about it. This judgment was expressly predicated upon the dismissal of plaintiffs' claim that Mr. Hassell was not served and upon findings that the foreclosure proceedings were otherwise proper. Since we are reversing this dismissal of plaintiffs' claim of lack of service, we, like the Court of Appeals, must vacate the judgment predicated upon it on defendants' counterclaim and remand the counterclaim for a new hearing.

The decision of the Court of Appeals insofar as it concluded that the trial court lacked jurisdiction of plaintiffs' action and that their claim should be dismissed under Rule 12(b)(6) is reversed. The decision of the Court of Appeals vacating all judgments of the trial court is, for the reasons we have given, affirmed. Plaintiffs' action and defendants' counterclaim are remanded for further proceedings not inconsistent with this opinion.

Reversed in Part.

Affirmed in Part.

Remanded.

Justice BROCK did not participate in the consideration and decision of this case.

H.E. MOODY v. TOWN OF CARRBORO

No. 28

(Filed 4 November 1980)

1. **Municipal Corporations § 2.4– attack on annexation – denial of motion to amend pleading**

The trial court did not err in the denial of plaintiff's motion to amend his pleading in an action attacking an annexation ordinance to include a further section alleging failure on the part of defendant town to meet the prerequisites to annexation set forth in G.S. 160A-47(3) by not indicating in the annexation report the plans of the town to extend bus service into the annexed area where the motion to amend was not made until the day of hearing, since the allowance of such amendment on the day of the hearing would constitute unnecessary delay in an expedited hearing procedure.

2. **Jury § 1; Municipal Corporations § 2– annexation procedure – absence of jury trial – constitutionality**

The procedure for annexation by cities of 5,000 or more, G.S. 160A-45 to -56, does not violate Art. I, § 25 of the N.C. Constitution because it does not provide for trial by jury on issues of fact.

3. **Municipal Corporations § 2– annexation procedure – payment of ad valorem taxes – municipal services – due process**

The procedure for annexation by cities of 5,000 or more does not authorize a taking of private property without just compensation in violation of the due process clause of the Fifth Amendment of the U.S. Constitution or the law of the land provision of Art. I, § 19 of the N.C. Constitution on the alleged ground that petitioner will pay a substantial sum in ad valorem taxes to the annexing town without receiving any substantial benefits or major services he does not already receive, since petitioner may petition for a writ of mandamus pursuant to G.S. 160A-49(h) if he discovers he is not receiving services other residents are receiving within 12 to 15 months from the effective date of the annexation, and the annexation procedure thus provides adequate due process safeguards to assure that citizens in the annexed area get municipal services on a nondiscriminatory basis.

4. **Municipal Corporations § 2.3– annexation report – policy statement**

A statement in an annexation plan report that the annexation is designed to promote sound urban development and assure adequate provision of government services is a sufficient statement of the policy objectives to be met by the annexation to comply with G.S. 160A-45.

5. **Municipal Corporations § 2.3– annexation report – sufficiency of maps**

Maps prepared by a town as part of its revised annexation plan report substantially complied with G.S. 160A-47(1), although the eastern boundary and approximately one-fifth of the town area were omitted and the map showing the general land use pattern contained several blank areas representing vacant lots which do not appear as a category on the legend of the

maps, where the entire area contiguous to the area to be annexed and that area itself were included on the map.

6. **Municipal Corporations § 2.6– annexation report – extension of services to annexed area**

A revised annexation plan report was sufficiently specific with respect to providing police and garbage collection services, was sufficient with respect to extension of street maintenance services where it detailed what services were provided in the annexing town and stated that all such services would be provided in the annexed area, and was not deficient in failing to provide for the extension of water and sewer lines where this was not a service provided by the town to anyone but was a duty vested with an independent water authority. G.S. 160A-47(3)a.

7. **Municipal Corporations § 2.5– effective date of annexation**

Where petitioner appealed an annexation ordinance to the superior court within the time limits of G.S. 160A-50(a) but not before the ordinance's effective date of 31 December 1979, the superior court on 18 February 1980 remanded the annexation plan report to the town board for a more specific statement of the services to be provided and the sources of revenues to finance such services, and the infirmities in the report were cured by a revised plan adopted on 26 February 1980, this date became the effective date of the annexation ordinance subject to further appeal to the superior court. Where such appeal was taken and the superior court entered an order on 4 March 1980 approving the 26 February 1980 revised annexation plan report and affirming the annexation, the effective date of the annexation thus became 4 March 1980 subject to further appeal to the N.C. Supreme Court. When petitioner appealed from that judgment to the Supreme Court, the effective date of the ordinance was again postponed by the language of G.S. 160A-50(i) until the date the final judgment of the Supreme Court was certified to the clerk of superior court.

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

APPEAL by plaintiff petitioner pursuant to G.S. 160A-50(h) from judgment of *Brewer, J.*, entered 4 March 1980 in ORANGE Superior Court.

Petitioner seeks a declaratory judgment and review of an annexation ordinance of the Town of Carrboro.

At its 23 October 1979 meeting, the Carrboro Board of Aldermen passed resolutions expressing intent to annex certain property to the north and west of existing town limits and to hold a public hearing on the question on 3 December 1979; notice of said public hearing was published in the Chapel Hill newspaper on 11, 18 and 25 November and 2 December 1979. The Town also prepared an Annexation Plan Report dated 23 October 1979.

Petitioner owns property adjoining a state-maintained secondary road within the proposed area to be annexed. At the time of the 3 December hearing, petitioner was receiving adequate fire protection from the Town of Carrboro under contract with Orange County; the Orange County Sheriff's Department had law enforcement jurisdiction over petitioner's property; the property was not hooked up to the water and sewer system operated by the Orange Water and Sewer Authority (OWASA); and petitioner's property was served by a private garbage collection service.

At the 3 December hearing, several people testified, including the Carrboro planning director, the chairman of the Planning Board, a spokesman for the Economic Development Commission and residents of the proposed annexation area. Residents of the proposed annexation area spoke unanimously against annexation.

Sonna Loewenthal, the Town's planning director, testified that upon annexation, area residents would immediately have all the privileges and responsibilities of Town citizens. She then read from and commented upon the Annexation Plan Report, copies of which she said were available to the public. The planning director stated the Town intended to provide services to the annexed area in "substantially the same manner as provided to the rest of the town." She further stated that the annexation area already had fire protection through the South Orange Fire District and that all streets except those in the Barrington Hills subdivision were part of the state highway system maintained by the Department of Transportation. Loewenthal anticipated no capital expenditures as a result of the annexation.

Robert McDuffey, chairman of the Planning Board, testified against the proposed annexation. He stated the Planning Board had passed a unanimous resolution saying that the development of an initial annexation proposal should not have been the responsibility of the Town staff alone and that there should have been more communication before the public hearing between the Town government and the Planning Board. He stated that the Planning Board felt only the Barrington Hills subdivision and an apartment complex were suitable for

annexation since the remaining area was rural and already within the Town's planning district.

Miles Crenshaw, spokesman for the Economic Development Commission, stated that it would be advantageous to Carrboro not to annex rural areas likely to be industrialized in the near future until they were developed.

On 19 December, the Carrboro Board of Aldermen adopted an annexation ordinance effective 31 December 1979 incorporating certain portions, but not all, of the area proposed for annexation.

Petitioner filed this action on 18 January 1980 alleging unconstitutionality of the annexation statutes and the Town of Carrboro's failure to meet requirements of annexation set out in those statutes. At the 18 February 1980 hearing on the matter, petitioner moved to amend his pleading to include an allegation regarding the failure of the Town to include in its Annexation Plan Report a statement on its intent to provide bus service in the annexed area. The court denied this motion. The constitutional claims were dismissed. The annexation ordinance was remanded to the Town Board of Aldermen for purposes of bringing the Annexation Plan Report and the annexation ordinance within the statutory requirements. The trial court stated:

> [T]here is insufficient specificity to enable the Court or a reviewing body to make a reasonable and intelligent appraisal of the Town of Carrboro's capacity and intent to provide services to the newly annexed area and based on such finding the Court concludes that there is a fatal lack of specificity in the Section III entitled, *Provision of Services.*

On 26 February, the Carrboro Board of Aldermen adopted a resolution which amended the annexation report. The amended report was served on petitioner on 4 March, the same day a hearing was held in superior court on the annexation.

The superior court found the Revised Annexation Plan Report demonstrated prima facie compliance with G.S. 160A, Art. 4A, Part 3. The ordinance adopted 19 December 1979 was declared valid and enforceable. The superior court affirmed the

action of the Board of Aldermen in adopting the ordinance. Petitioner appealed to this Court.

Coleman, Bernholz, Dickerson, Bernholz, Gledhill & Hargrave, by Alonzo Brown Coleman, attorneys for plaintiff appellant

Michael B. Brough, attorney for defendant appellee

HUSKINS, Justice:

[1] Petitioner assigns error in the denial of the motion to amend his pleading to include a further section alleging failure on the part of the Town to meet the prerequisites to annexation set forth in G.S. 160A-47(3) by not indicating in the annexation report the plans of the Town to extend bus service into the annexed area which petitioner contends is a major service provided by the Town. This argument is without merit.

The motion to amend was addressed to the sound discretion of the court. The denial of such motion is reviewable only for manifest abuse of discretion. *Vending Co. v. Turner,* 267 N.C. 576, 148 S.E. 2d 531 (1966); *Crump v. Eckerd's Inc.*, 241 N.C. 489, 85 S.E. 2d 607 (1955); *see also* G.S. 1A-1, Rule 15. The record indicates petitioner first moved to amend orally in open court at the 18 February 1980 hearing. A written version of the amendment was filed on 6 March 1980. The trial court denied the motion at the 18 February hearing. This denial was not an abuse of discretion. The judicial review afforded in annexation proceedings is limited in scope. The review is afforded pursuant to G.S. 160A-50 and serves as a safeguard against unreasonable and arbitrary action by the annexing municipality. *See* G.S. 160A-50(f). The clear intent of the legislature is that this review be expedited. The petition for review must be filed within thirty days following passage of the annexation ordinance. G.S. 160A-50(a). "Such petition *shall explicitly state* what exceptions are taken to the action of the governing board and what relief the petitioner seeks." G.S. 160A-50(b) (emphasis added). The petition must be served on the town within five days of its filing and the town then has fifteen days or such additional time as the court may allow to provide the court with a transcript of the minutes relating to the annexation and a copy of the annexation report. G.S. 160A-50(b)(c). The court must then set a hearing date, preferably within thirty days following the last day for

receiving petitions "to the end that review shall be expeditious and without unnecessary delays." G.S. 160A-50(f). The statute requires that petitioner "explicitly state what exceptions are taken," and he did not do this with respect to bus service. Nor did he attempt to explain his failure to raise the question of bus service in the petition he initially filed. To allow the amendment on the day of the hearing would ordinarily cause needless delay. The record indicates that bus service within the Town of Carrboro is provided by the Town of Chapel Hill according to contractual arrangement between the two towns. The routing of the bus service was the responsibility of the Town of Chapel Hill, and the Carrboro town manager termed routing "a political question." If bus service is a proper issue for the reviewing court to consider as one of the prerequisites to annexation, some evidence from the Town of Chapel Hill seemingly would be required. To allow this attack through amendment on the day of the hearing would constitute unnecessary delay in an expedited hearing procedure. The superior court did not abuse its discretion in denying the motion to amend.

We do not reach the question whether bus service is indeed a "major municipal service performed in the municipality at the time of annexation" within the contemplation of G.S. 160A-47(3) which would require that the plan of annexation state how such service would be extended into the annexed area. Nor do we reach the question whether a "major municipal service" which is not specifically listed in G.S. 160A-47(3) a, b, c, such as bus service, should be discussed in the annexation report.

[2] Review of an annexation ordinance is provided in the superior court of the county in which the municipality is located and "shall be conducted by the court without a jury." G.S. 160A-50(f). Petitioner argues that the entire procedure for annexation by cities of 5,000 or more, G.S. 160A-45 to -56, is unconstitutional in that it does not provide for trial by jury on issues of fact as required by N.C. Const. art. I, § 25 for "controversies at law respecting property." This argument has been raised before and squarely rejected. *In re Annexation Ordinance*, 284 N.C. 442, 202 S.E. 2d 143 (1974); *In re Annexation Ordinance*, 253 N.C. 637, 117 S.E. 2d 795 (1961). In the 1961 case, this Court said:

> The procedure and requirements contained in the [annexation legislation] being solely a legislative matter, the right of trial by jury is not guaranteed, and the fact that the General Assembly did not see fit to provide for trial by jury in cases arising under the Act, does not render the Act unconstitutional.
>
> The right to a trial by jury, guaranteed under our Constitution, applies only to cases in which the prerogative existed at common law, or was procured by statute at the time the Constitution was adopted. The right to trial by jury is not guaranteed in those cases where the right and remedy have been created by statute since the adoption of the Constitution.

253 N.C. at 649, 117 S.E. 2d at 804. Our earlier holdings on this issue are sound and will not be disturbed.

[3] Petitioner further attacks the constitutionality of the annexation procedure on the ground that it authorizes a taking of private property without just compensation in violation of the due process clause of the Fifth Amendment of the United States Constitution and the law of the land provision found in the North Carolina Constitution, art. I, § 19. Petitioner's basic argument is that he will pay a substantial sum in ad valorem taxes to the Town without receiving any substantial benefits or major services he does not already receive. A similar constitutional claim was rejected in *In re Annexation Ordinance*, 253 N.C. 637, 117 S.E. 2d 795 (1965), where the Court stated:

> Certainly it would seem that [petitioners] do not desire to have their respective properties subject to the levy of city taxes. Even so, where additional territory is annexed in accordance with the law, the fact that the property of the residents in such area will thereby become subject to city taxes levied in the future, does not constitute a violation of the due process clause of the State and Federal Constitutions.

253 N.C. at 651-52, 117 S.E. 2d at 805. Petitioner has adequate due process safeguards within the existing annexation law to assure that he gets Town services on a nondiscriminatory basis. However, "there 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, 689 (1961); *see also In re Annexation Ordinance*, 296 N.C. 1, 249 S.E. 2d 698 (1978). Thus the Town need not lay a sewer or water line where it does not do so for anyone else and where service is provided by an independent authority. The Town has submitted a plan pursuant to G.S. 160A-47 demonstrating it will provide its services equally. But, if petitioner discovers he is not receiving services other residents are receiving, whatever those services may be, within twelve to fifteen months from the effective date of the annexation, he may petition for a writ of mandamus pursuant to G.S. 160A-49(h). The annexation procedure adequately provides protection to the annexed area to assure that its citizens get adequate nondiscriminatory municipal services.

Petitioner next argues that the superior court erred in finding as fact that the Revised Annexation Plan Report of the Town complied with the annexation statutes in that it failed to comply with the declarations of State policy found in G.S. 160A-45 and failed to comply with several of the prerequisites to a valid annexation found in G.S. 160A-47. There is no merit in any of these contentions.

[4] Petitioner contends the Revised Annexation Plan Report does not state any policy objectives to be met by the annexation of his property. The report states: "The North Carolina General Assembly recognizes the extension of municipal boundaries through annexation as a desirable mechanism to promote sound urban development and assure adequate provision of government services" and then quotes the body of G.S. 160A-45 which provides:

> (1) That sound urban development is essential to the continued economic development of North Carolina;
>
> (2) That municipalities are created to provide the governmental services essential for sound urban development and for the protection of health, safety and welfare in areas being intensively used for residential, commercial, industrial, institutional and governmental purposes or in areas undergoing such development;

(3) That municipal boundaries should be extended in accordance with legislative standards applicable throughout the State, to include such areas and to provide the high quality of governmental services needed therein for the public health, safety and welfare;

(4) That new urban development in and around municipalities having a population of 5,000 or more persons is more scattered than in and around smaller municipalities, and that such larger municipalities have greater difficulty in expanding municipal utility systems and other service facilities to serve such scattered development, so that the legislative standards governing annexation by larger municipalities must take these facts into account if the objectives set forth in this section are to be attained;

(5) That areas annexed to municipalities in accordance with such uniform legislative standards should receive the services provided by the annexing municipality as soon as possible following annexation.

G.S. 160A-45. Petitioner argues this is insufficient compliance with State policy outlined in G.S. 160A-45 in view of his position that (1) the Town has neither the ability nor the intention to provide the promised services, (2) petitioner neither needs nor wants the services and (3) petitioner's land is not ripe for annexation in the opinion of a majority of the Carrboro Planning Board.

The grounds asserted for invalidity of the annexation are not properly raised under G.S. 160A-45. Rather, they are merely arguments addressed to the mechanics of annexation dealt with in G.S. 160A-46 to -49. For example, the question whether the area is ripe for annexation should be addressed under the statutory criteria set up in G.S. 160A-48. *See, e.g., Food Town Stores v. Salisbury*, 300 N.C. 21, 265 S.E. 2d 123 (1980). Petitioner has made no such argument. The Town states that the annexation is designed to promote sound urban development and assure adequate provision of government services. That is a

sufficient compliance with the general statement of legislative intent found in G.S. 160A-45. If petitioner seeks to invalidate the annexation, he must show noncompliance with the requirements for annexation found in G.S. 160A-46 to -49. Petitioner has made some arguments to that effect which we discuss next.

The annexation plan submitted by a municipality must show prima facie complete and substantial compliance with the annexation statutes as a condition precedent to the right to annex. *In re Annexation Ordinance*, 296 N.C. 1, 249 S.E. 2d 698 (1978); *Huntley v. Potter, supra.* "[S]light irregularities will not invalidate annexation proceedings if there has been substantial compliance with all essential provisions of the law." *In re Annexation Ordinance*, 278 N.C. 641, 648, 180 S.E. 2d 851, 856 (1971).

Petitioner has attacked the adequacy of the annexation report under standards provided in G.S. 160A-47. The superior court at the 18 February hearing properly remanded the original Annexation Plan Report to the Town Board for amendment of the plans for providing services to the end that the provisions of G.S. 160A-47 be satisfied. *See* G.S. 160A-50(g)(3). The amended report was approved by the superior court at the 4 March hearing. It is that amended report which petitioner contends is flawed.

[5] Petitioner contends maps prepared by the Town as part of the Revised Annexation Plan Report do not comply with the requirements of G.S. 160A-47(1), which provides that the report shall include:

> A map or maps of the municipality and adjacent territory to show the following information:
>
> a. The present and proposed boundaries of the municipality.
>
> b. The present major trunk water mains and sewer interceptors and outfalls, and the proposed extensions of such mains and outfalls as required in subdivision (3) of this section.
>
> c. The general land use pattern in the area to be annexed.

He contends the maps were inadequate because they failed to include the entire boundary of the Town and contained blank areas.

The eastern boundary and approximately one-fifth of the Town area was omitted. The entire area to the north and west of the Town contiguous to the area to be annexed and that area itself was included on the maps. The map showing the general land use pattern contains several blank areas. The blank areas apparently represent vacant lots which do not appear as a category on the legend of the maps. The maps are in substantial compliance with G.S. 160A-47(1).

[6] Petitioner complains that the Revised Annexation Plan Report is not sufficiently specific with respect to providing police and garbage collection services as required by G.S. 160A-47(3)a. The plan statements on these services are quite adequate. Similar statements have been approved. *See In re Annexation Ordinance*, 255 N.C. 633, 122 S.E. 2d 690 (1961).

Petitioner also contends the plan is insufficient with respect to extension of street maintenance service as required by G.S. 160A-47(3)a. The plan details what services are provided in the Town and states that all such services will be provided in the annexed area. Providing a nondiscriminating level of services within the statutory time is all that is required.

Petitioner's final attack on the Revised Annexation Plan Report deals with the failure of the Town to provide for extension of water and sewer lines. As heretofore pointed out, this is not a service provided by the Town to anyone. It is a duty vested with OWASA, an independent water authority. *See* G.S. 162A-1, *et seq.*

In summation, the Revised Annexation Plan Report is in substantial compliance with statutory requirements. The annexation ordinance cannot be voided on any ground raised in these arguments concerning the report on the plan to extend services to the annexed area.

[7] The final question we must address on this appeal is the effective date of the annexation ordinance. The ordinance was adopted on 19 December 1979 to become effective 31 December 1979. This proceeding for review of the annexation was instituted on 18 January 1980 within thirty days from the passage of

the ordinance as required by G.S. 160A-50(a). At the 18 February hearing, the superior court remanded the Annexation Plan Report to the Town Board of Aldermen for a more specific statement of the services to be provided and the sources of revenues to finance such services. A revised plan was adopted by the Board of Aldermen on 26 February 1980, and this report was approved by the superior court at the 4 March 1980 hearing. The judgment and order provided that the annexation ordinance adopted 19 December 1980 was effective and enforceable. The judgment and order did not specify the effective date of the ordinance. The facts of this case present a conflict between G.S. 160A-50(a) and (i). The provisions in question read as follows:

> Within 30 days following the *passage* of an annexation ordinance under authority of this Part, any person owning property in the annexed territory who shall believe that he will suffer material injury by reason of the failure of the municipal governing board to comply with the procedure set forth in this Part or to meet the requirements set forth in G.S. 160A-48 as they apply to his property may file a petition in the superior court of the county in which the municipality is located seeking review of the action of the governing board.

G.S. 160A-50(a) (emphasis added).

> If part or all of the area annexed under the terms of an annexation ordinance is the subject of an appeal to the superior or Supreme Court *on the effective date* of the ordinance, then the ordinance shall be deemed amended to make the effective date with respect to such area the date of the final judgment of the superior or Supreme Court, whichever is appropriate, or the date the municipal governing board completes action to make the ordinance conform to the court's instructions in the event of remand.

G.S. 160A-50(i) (emphasis added). Petitioner appealed to the superior court within the time limits of G.S. 160A-50(a) but not before the effective date of the ordinance.

Substantial compliance with the annexation statute is a condition precedent to effective annexation. *In re Annexation*

Ordinance, 296 N.C. 1, 249 S.E. 2d 698 (1978); *In re Annexation Ordinance*, 255 N.C. 633, 122 S.E. 2d 690 (1961). At the 18 February hearing, the superior court found the procedure not to be in substantial compliance due to failure to be specific in the Annexation Plan Report with respect to the services provided and their financing as required in G.S. 160A-47(3) and remanded the Annexation Plan Report for amendment by the Town Board pursuant to G.S. 160A-50(g)(3). Thus the ordinance could not be effective 31 December 1979 due to the infirmities. Since the infirmities were cured by the revised plan adopted on 26 February 1980, this date became the effective date of the annexation ordinance subject to further appeal to the superior court. Such appeal was taken. The superior court entered an order on 4 March 1980 approving the 26 February 1980 Revised Annexation Plan Report and affirming the annexation. The effective date of the annexation thus became 4 March 1980 subject to further appeal to the Supreme Court. Since plaintiff petitioner appealed from that judgment to the Supreme Court, the effective date of the ordinance was again postponed by the language of G.S. 160A-50(i) until the date of the final judgment of the Supreme Court.

The foregoing interpretation of the statutes correctly resolves the conflict between G.S. 160A-50(a) and (i). It was not the legislative intent to authorize the municipality to shorten the thirty-day period allowed aggrieved property owners within which to file a petition in the superior court for review of the annexation proceeding. To hold otherwise would produce an absurd and unjust result. For example, in this case, plaintiff petitioner would have had only eleven days during the Christmas holidays in which to seek review of the proceeding.

We hold that the effective date of the annexation order here in question will be the date on which the final judgment of this Court is certified to the Clerk of the Superior Court of Orange County.

For the reasons stated, the judgment of the superior court upholding the annexation is

Affirmed.

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

TOWN OF SCOTLAND NECK v. WESTERN SURETY COMPANY

No. 11

(Filed 4 November 1980)

Principal and Surety § 5– bond of town clerk – annual premiums paid – one continuous contract

Renewals of a surety bond on plaintiff's town clerk through the payment of annual premiums should be construed with the original bond as one contract only, with the maximum liability fixed by the principal amount of the bond, since the bond in question contained no termination date; the outside cover of the bond contained the word "Expires" followed by a blank line on which the word "Indefinite" was written; in the body of the bond the beginning date was given and the words "being continuous" were inserted in lieu of an ending date; though the bond was entered into on 31 August 1971, it reached back to 10 September 1966, thus indicating a continuous contract which ignored successive terms of office; on its face the bond was not tied to any period for which the employee as principal might hold the office of town clerk; nothing tending to show the intention of the parties — except that annual premiums were paid — was introduced into evidence; the lack of evidence to the contrary in the subsequent treatment of the bond indicated that it was regarded by the parties as a single, continuous contract and not multiple contracts for each year a premium was paid or for each term of office to which the clerk was appointed; and though the statutes require town clerks to be bonded if they handle town money, the statutes do not require a new bond for each term of a town clerk.

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

DEFENDANT appeals from decision of the Court of Appeals, 46 N.C. App. 124, 264 S.E. 2d 917 (1980), vacating a directed verdict in favor of defendant entered by *Peel, J.*, on 1 February 1979 in HALIFAX Superior Court.

This is a civil action by the Town of Scotland Neck to recover on the official bond of its employee James Elisha Boyd, Jr. (hereinafter Boyd) by reason of certain embezzlements committed by Boyd while serving as Town Clerk.

Boyd was appointed Town Clerk beginning 10 September 1964 and thereafter served in that capacity until 2 September 1977. On 31 August 1971, Boyd and Western Surety Company entered into an official bond as principal and surety, respectively, in favor of the Town of Scotland Neck as promisee or obligee. The face amount of the bond is $20,000. Other pertinent provisions of the bond read:

"THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That whereas, the said Principal has been ☒ appointed ☐ elected to the office of Town Clerk, for the term beginning the 10th day of September, 1966, and ~~ending~~ the being continuous day of _____, 19____.

NOW, THEREFORE, if the said Principal shall in all things faithfully perform the duties of his office and shall honestly account for all moneys and effects that may come into his hands in his official capacity during the said term, then this obligation to be void, otherwise to remain in full force and effect.

This bond is executed by the Surety upon the following express conditions, which shall be conditions precedent to the right of recovery hereunder:

* * * *

SECOND: This bond may be canceled by the Surety as to future liability by giving written notice, by Certified Mail, addressed to each, the Principal and the Obligee at Scotland Neck, N.C., and thirty (30) days after the mailing of said notices by Certified Mail, this bond shall be canceled and null and void as to any liability thereafter arising, the Surety remaining liable, however, subject to all the terms and conditions of this bond for any and all acts covered by this bond up to the date of such cancelation."

Annual premiums were paid on the bond by the Town of Scotland Neck.

On 2 September 1977, Boyd resigned as Town Clerk and confessed to the Mayor that he had misappropriated Town funds on many occasions while in office. Boyd testified to embezzlements as set out in the following table:

March 16, 1972	$ 459.06
June 27, 1973	713.46
June 29, 1973	122.58
November 27, 1973	9,384.30
December 4, 1973	3,927.74
February 26, 1974	357.44
July 24, 1975	15,000.00

May 21, 1976	10,000.00
July 14, 1976	1,641.99
March 31, 1977	5,877.32
July 15, 1977	7,000.00
July 15, 1977	611.30
July 15, 1977	2,763.80
July 29, 1977	2,366.27
August 7, 1977	50.24
August 12, 1977	2,141.51
August 16, 1977	2,320.23

The record reveals that Boyd had occupied the office of Town Clerk continuously from 10 September 1964 until he resigned on 2 September 1977. The trial court excluded evidence of the terms of office, duties added to the office and dates of reappointment found in the minutes of Town Board meetings.

At the close of plaintiff's evidence, defendant moved for a directed verdict on the ground that, taking plaintiff's evidence as true, it was not entitled to recover anything in excess of $20,000, which sum was tendered to plaintiff in open court. After hearing the parties, the court allowed defendant's motion for a directed verdict. The court signed a judgment which, in pertinent part, reads as follows:

> "1. That the plaintiff have and recover of the defendant the sum of $20,000.00, plus interest in the amount of $100.00.
>
> 2. That the motion of the defendant for a directed verdict that plaintiff should not recover any sums over and above the $20,000.00 payment tendered be and the same is hereby allowed.
>
> 3. That the cost of this action be taxed against the plaintiff."

Plaintiff appealed to the Court of Appeals, and that court vacated the judgment of the trial court and awarded plaintiff a new trial, with Parker, J., dissenting. Defendant thereupon appealed to this Court as of right pursuant to G.S. 7A-30(2) assigning errors noted in the opinion.

Josey, Josey and Hanudel by C. Kitchin Josey, attorneys for plaintiff appellee

Battle, Winslow, Scott & Wiley, P.A., by Marshall A. Gallop, Jr. and Robert L. Spencer, attorneys for defendant appellant

HUSKINS, Justice.

The issue presented by this appeal is whether renewals of the surety bond through the payment of annual premiums result in separate and distinct cumulative contracts or whether the renewals are to be construed with the original as one contract only with the maximum liability fixed by the principal amount of the bond.

The plaintiff Town contends the bond and the annual premiums constitute separate contracts for the maximum amount stated in the bond for each year or, in the alternative, for each term Boyd was appointed to the office of clerk by the Town Board. The defendant Surety Company contends that the bond itself sets defendant's contractual obligations and that plaintiff's evidence shows the bond was issued on 31 August 1971, delivered to plaintiff at that time, has been in continuous possession of plaintiff since its issuance and shows upon its face that it was for a continuous or an indefinite term.

Based upon the language used in this particular bond and the facts and circumstances surrounding and occurring subsequent to its execution, we hold the surety bond is a single, continuous contract for a maximum liability of $20,000 over the entire life of the contract.

The extent of liability on a fidelity bond which is renewed from year to year is the subject of a distinct conflict of opinion. A large body of case law construes a fidelity bond accompanied by periodic premium payments as a single, continuous contract where the liability of the surety is limited to a specified amount stated in the bond which cannot be exceeded, although defaults by the principal occur at various times and exceed the stated liability figure in the bond. *See, e.g., American Bonding Co., v. Morrow*, 80 Ark. 49, 96 S.W. 613 (1906); *First National Bank v. United States Fidelity & Guaranty Co.*, 110 Tenn. 10, 75 S.W. 1076 (1903); *see also* Couch on Insurance 2d § 68:46; Appleman, Insurance Law and Practice §§ 6766, 7648. A large body of case law also construes a fidelity bond accompanied by periodic premium payments as separate and distinct contracts upon each of which the surety is liable for defaults by the principal occurring

during the term each is in force to the maximum amount stated in the bond for each individual period. *See, e.g., Middlesboro v. American Surety Co.*, 306 Ky. 367, 211 S.W. 2d 670 (1948); *Massachusetts Bonding & Insurance Co. v. Adams County Commissioners*, 100 Colo. 398, 68 P. 2d 555 (1937); *see also* Couch on Insurance 2d § 68:47; Appleman, Insurance Law and Practice § 7648. Case law in this State applies both rules. *Compare Indemnity Co. v. Hood*, 226 N.C. 706, 40 S.E. 2d 198 (1946), *with Hood v. Simpson*, 206 N.C. 748, 175 S.E. 193 (1934). The reasoning most often applied is that a fidelity bond is continuous and not cumulative, although this is a rule which has been criticized. *See* Annot., 7 A.L.R. 2d 946 (1949); Note, *Fidelity Bonds — Does it Pay to Renew Them?* 27 Mich. L. Rev. 442 (1929).

In our view neither rule need be rejected and the other applied exclusively for all cases. Both are sound positions and can be appropriately applied depending on the facts and circumstances of each case and the bond in question. In fact, the two rules represent the final holdings of courts based on the facts and circumstances of the particular case. Thus, the question in this case is whether the facts and circumstances surrounding this bond and the words of the bond itself demonstrate an intent of the parties to contract for a continuous or a cumulative bond. As a corollary question, the significance of certain statutes and the minutes of the Town Board which reflect the terms the Town Clerk served in his official capacity must be addressed.

The liability of a surety on a fidelity bond is determined by the language of the bond and cannot be enlarged beyond the scope of its definite terms. *Henry v. Wall*, 217 N.C. 365, 8 S.E. 2d 223 (1940). Ambiguities in the wording of a bond are resolved against the party which drafts it, in this case the surety. *Hood v. Davidson*, 207 N.C. 329, 177 S.E. 5 (1934).

The surety bond itself is the only written evidence of the contractual relationship in question here. No subsequent renewal instrument or contractual writing of any sort was introduced into evidence. Only annual premiums were paid on the original bond. This fact alone distinguishes many of the cases which construe a fidelity bond *and* renewal instruments and hold the writings create separate, cumulative contracts. *See, e.g., Miami Springs v. Travelers Indemnity Co.*, 365 So. 2d 1030

(Fla. App. 1978); *Krey Packing Co. v. Employers' Liability Assurance Corp.*, 127 S.W. 2d 780 (Mo. App. 1939); Annot., 7 A.L.R. 2d 946, 971-77 (1949). This is not the sole determining factor. The bond must be examined and construed to determine what the employer purchased with each premium.

Termination and time limitation provisions within the bond are particularly important to the question involved in this case. The bond here contains no termination date. The outside cover of the bond contains the word "Expires" followed by a blank line on which the word "Indefinite" is written. The printed form reads "for the term beginning the _____ day of _____, 19_____, and ending the _____ day of _____, 19_____." The "10th day of September, 1966" was inserted by the parties as the beginning date. The word "ending" was stricken from the quoted clause on the printed form and the words "being continuous" inserted in lieu thereof. No ending date was supplied by the parties. The obligation of the bond was that "if the said Principal shall in all things faithfully perform the duties of his office and shall honestly account for all moneys and effects that may come into his hands in his official capacity during the *said term*, then this obligation to be void, otherwise to remain in full force and effect." (Emphasis added.) The "said term" refers to the term beginning 10 September 1966 and "being continuous." The bond could be terminated only by giving written notice by certified mail to the obligee, and the bond could be terminated only thirty days after notice was mailed and only as to future liability. The termination by notice and not by a specified date implies a continuous contract. *Leonard v. Aetna Casualty & Surety Co.*, 80 F. 2d 205 (4th Cir. 1935).

It is important to note that the bond was entered into on 31 August 1971, yet reached back almost five years to 10 September 1966. This is another factor from the face of the bond indicating a continuous contract which ignores successive terms of office. On its face, the bond was not tied to any period for which Boyd as principal might hold the office of Town Clerk. From 10 September 1966 on, as long as the premiums were paid, the surety was obligated to the face amount of the bond. It should be noted at this point that within the excluded evidence of Boyd's terms of office was evidence that he was first

appointed Town Treasurer on 17 August 1966 and thus impliedly first began to handle money which would require a bond.

Courts will generally adopt the construction given a contract by the parties. *Hood v. Simpson, supra.* The only shred of relevant evidence relating to the treatment of the bond by the parties prior to the controversy is that annual premiums were paid upon the bond. Nothing from the Town minutes relevant to the bond or its renewal was offered. No renewal instrument, rider or amendment to the bond and no communication, contact or correspondence of any kind between the parties before the controversy arose was offered. Nothing tending to show the intention of the parties — except that annual premiums were paid — was introduced into evidence. The lack of evidence to the contrary in the subsequent treatment of the bond indicates that it was regarded by the parties as a single, continuous contract and not multiple contracts for each year a premium was paid or for each term of office to which Boyd was appointed. *Compare Lee v. Martin,* 186 N.C. 127, 118 S.E. 914 (1923), *rehearing, State v. Martin,* 188 N.C. 119, 123 S.E. 631 (1924); *see generally* Annot., 7 A.L.R. 2d 946, 952-57 (1949).

Where a bond is for an indefinite period running from a given date, annual premiums do not create a series of yearly contracts. *Scranton Volunteer Fire Co. v. United States Fidelity & Guaranty Co.,* 450 F. 2d 775 (2d Cir. 1971); *Columbia Hospital v. United States Fidelity & Guaranty Co.,* 188 F. 2d 654 (D.C. Cir. 1951); *Brulatour v. Aetna Casualty and Surety Co.,* 80 F. 2d 834 (2d Cir. 1936). Paying annual premiums has no greater effect than to continue the existing contract. "By the general rule, a contract of fidelity guaranty insurance, although it may run indefinitely, runs for but a year at a time, and will not continue unless the premiums are paid. There is authority, however, that under a contract of fidelity guaranty insurance, by which, in consideration of an initial premium and subsequent annual ones, the insurer undertakes to indemnify the insured against loss, and which contains no provision for forfeiture or termination upon nonpayment, the payment of the annual premium is to be enforced as part of the consideration and not as a condition, and the obligation of the contract is therefore continuous and single, and a new assent or affirmative action is not necessary to keep it in force, even on a failure to pay an annual

premium; rather, the contract runs until affirmative action is taken to avoid it." Couch on Insurance 2d § 30:9 (footnotes omitted).

The various terms of office to which Boyd was appointed, as reflected in the minute book of the Town Board, were properly excluded. The excluded evidence was to the effect that Boyd was appointed Town Clerk effective 11 September 1964; that he was appointed Town Treasurer on 17 August 1966; that he was appointed Tax Collector for one year from 1 July 1972 to 30 June 1973; that he was retained as Town Clerk and Finance Officer or Tax Collector in 1973-74, 1974-75, 1975-76, 1976-77 and 1977-78, and nothing appears in the Town minutes for the year 1965 and the years 1967 through 1971. The actual terms of office as manifested in a unilateral document of the Town of which the surety had neither notice nor knowledge is not a relevant fact or circumstance in light of the wording of the bond. An indication in the minutes that, upon each reappointment, Boyd was to obtain a new successive bond for the term would have been relevant. *See* 1 Wigmore on Evidence § 28.

Certain statutes in effect during the life of the bond specify the term and duties of a town clerk. The office of Town Clerk is authorized in G.S. 160A-171; *see also* G.S. 160-273 (repealed 1971). Since 1917, our statutes have required town clerks to be bonded if they handle town money. G.S. 159-29; *see also* G.S. 160-277 (repealed 1971). When the bond in question was entered into, the term of office was "for the term of two years and until his successor is elected and qualified." G.S. 160-273 (repealed 1971). After 1 January 1972, the term was for whatever period the Town in its discretion might set. G.S. 160A-146, -171. No Town ordinance setting the term of office for the Town Clerk was introduced, and we cannot take judicial notice of one if it exists. *Surplus Co. v. Pleasants*, 263 N.C. 587, 139 S.E. 2d 892 (1965). The law in force at the time of execution of a contract will be given full force and effect. *Hood v. Simpson, supra.* The statutes do not require a new bond for each term of a town clerk. *Compare* G.S. 109-3 *with* G.S. 159-29; *see also Lee v. Martin, supra.* A statutory bond must be written in accordance with the provisions of the applicable bonding statute. *Washington v. Trust Co.*, 205 N.C. 382, 171 S.E. 438 (1933); *see generally Howell v. Indemnity Co.*, 237 N.C. 227, 74 S.E. 2d 610 (1953). In *Washington*, the term of office was for six years, while the surety con-

tract recited it was for the first year only. The Court held the bond covered a period of one year only and the obligee accepted the bond with knowledge of the fact:

> "We are aware of the doctrine that official bonds should be liberally construed and that any variance in the condition of such an instrument from the provisions prescribed by law will usually be treated as an irregularity. C.S., 324 [G.S. 109-1]. But this principle does not abrogate the freedom of contract. A bond is a contract between the parties and obligations of the parties are generally not extended by construction beyond their specific engagements. The theory of a surety's liability to the end of the term may be modified by a contractual limitation of time, and the solution of the question is often found in the language of the bond."

205 N.C. at 385, 171 S.E. at 439. By the same token, parties may contract beyond one term of office. The surety bond in the present case is an example of such a contract. Where the one bond is clear and unambiguous in its language, the terms of the bond cannot be extended. *Indemnity Co. v. Hood, supra; Jacksonville v. Bryan*, 196 N.C. 721, 147 S.E. 12 (1929). No factual or statutory basis exists for construing the bond to provide $20,000 coverage each year or for each term of office.

This case is distinguishable from those cases where successive or multiple bonds are given, often by different sureties, for one official during a particular term or terms of office. When coverage has been issued under separate bonds or bonds with different sureties, the coverage is held to be cumulative and not continuous. The first bond is liable to the extent of its penalty amount and the subsequent bond or bonds provide security to the extent of its penalty sum for defaults by the principal above the penalty amount of the first bond. *See, e.g., Pender County v. King*, 197 N.C. 50, 147 S.E. 695 (1929); *Fidelity Co. v. Fleming*, 132 N.C. 332, 43 S.E. 899 (1903); *Pickens v. Miller*, 83 N.C. 543 (1880). By contrast, the case at hand involves but one bond.

The facts and circumstances surrounding the bond in question and the express provisions of the bond itself show that the parties entered into a single, continuous contract. Consequently, the trial court's directed verdict for defendant was proper.

The decision of the Court of Appeals to the contrary is therefore

Reversed.

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

JULIUS R. CAUBLE v. CITY OF ASHEVILLE

No. 21

(Filed 4 November 1980)

Penalties § 1; Schools § 1– penalty for violating overtime parking ordinance – fine for breach of State penal law – use for county schools

Monies voluntarily paid by motorists to a city upon citations for violations of a city overtime parking ordinance constitute a penalty or fine collected for breach of a State penal law and should be used exclusively for maintaining free public schools in the county pursuant to Art. IX § 7 of the N.C. Constitution, since violation of a city ordinance is also a violation of G.S. 14-4 which makes the violation of a local ordinance a misdemeanor.

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

Justice EXUM dissenting.

Justice BRITT joins in the dissenting opinion.

ON discretionary review to review the decision of the Court of Appeals reported in 45 N.C. App. 152, 263 S.E. 2d 8 (1980), affirming the granting of partial summary judgment by *Bruce, J.*, at the 23 October 1978 Civil Session of BUNCOMBE Superior Court.

This is a class action pursuant to Rule 23 of the North Carolina Rules of Civil Procedure instituted to compel defendant City of Asheville to pay into the Buncombe County School Fund all fines assessed for violations of the ordinance proscribing overtime parking. The essential facts are not in dispute and may be summarized as follows:

Pursuant to statutory authority to regulate parking, G.S. 160A-301, defendant enacted Ordinance 376 which provides:

> It shall be unlawful for any person or operator to cause, allow, permit or suffer any vehicle registered in his name,

or under his control, to be parked overtime or beyond the lawful periods of time as above set forth.

Under this ordinance, defendant issued notices or citations for overtime parking and collected penalties for violations of the overtime parking regulations. The parties stipulated as follows:

> Under ordinance #376, the City would place a notice on a motor vehicle indicating overtime parking. The individual who received this notice and who complied with the ordinance would deliver the penalty of $1.00 to an administrative clerk at the City's Police Department or would deposit the $1.00 in a receptacle maintained by the City for such purpose.
>
> Under ordinance #914, the City would place a parking citation on a motor vehicle indicating overtime parking. The individual who received this citation and who complied with the ordinance would deliver the appropriate penalty to an administrative clerk in the City Hall Building or would mail same to the City.
>
> Criminal warrants were taken out on occasions against persons who failed to pay the civil penalty.

Plaintiff alleged that he and the citizens, residents and taxpayers of the City of Asheville had paid fines for overtime parking which constituted penalties or fines collected for a "breach of the penal laws of the State" and therefore, pursuant to article IX, section 7 of the North Carolina Constitution, belonged to the county to be "used exclusively for maintaining free public schools." The trial court agreed and granted partial summary judgment on the issue of liability, reserving for trial the determination of what constituted the "clear proceeds" of such fines.

The Court of Appeals, in a well-reasoned opinion by Chief Judge Morris, Judges Parker and Martin (Robert M.) concurring, affirmed, holding that the money "collected by reason of overtime parking ... is properly payable to the county school fund as penalties collected for breach of the penal laws of the State." 45 N.C. App. at 162, 263 S.E. 2d at 13. We allowed defendant's petition for discretionary review on 6 May 1980.

Swain & Stevenson, by Joel B. Stevenson and Robert S. Swain, for plaintiff appellee.

Patla, Straus, Robinson & Moore, by Victor M. Buchanan, for defendant appellant.

Ernest H. Ball and Fred P. Baggett, for North Carolina League of Municipalities, Amicus Curiae.

Tharrington, Smith & Hargrove, by George T. Rogister and Richard A. Schwartz, for North Carolina School Boards Association, Inc., Amicus Curiae.

BRANCH, Chief Justice.

The sole issue presented for decision is whether article IX, section 7, of our Constitution requires that the clear proceeds of the monies paid to defendant for violations of its overtime parking ordinance be appropriated to Buncombe County for the maintenance of its public schools. The pertinent provision of the North Carolina Constitution provides as follows:

> All moneys, stocks, bonds, and other property belonging to a county school fund, *and the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State,* shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools. [Emphasis supplied.]

Defendant contends that the ordinances involved here are not "penal laws of the State" and that any proceeds derived from violations of the ordinances are civil in nature and belong to the City.

Plaintiff concedes the general rule that penalties collected for violations of city ordinances are civil in nature. *See School Directors v. City of Asheville,* 137 N.C. 503, 50 S.E. 279 (1905); D. Lawrence, Local Government Finance in North Carolina 57 (1977). Plaintiff argues, however, that violations of town ordinances have been made criminal by virtue of G.S. 14-4 which provides:

> *Violation of local ordinances misdemeanor.* — If any person shall violate an ordinance of a county, city, or town, he shall be guilty of a misdemeanor and shall be fined not

more than fifty dollars ($50.00), or imprisoned for not more than thirty days.

Plaintiff's contention is further buttressed by G.S. 160A-175(b) which provides that "[u]nless the council shall otherwise provide, violation of a city ordinance shall be a misdemeanor as provided by G.S. 14-4."

Our cases admit of little doubt that the legislature in enacting G.S. 14-4 made criminal what would otherwise be civil penalties for violations of ordinances. *State v. Barrett*, 243 N.C. 686, 91 S.E. 2d 917 (1956); *School Directors v. City of Asheville, supra; Board of Education v. Henderson*, 126 N.C. 689, 36 S.E. 158 (1900). As we stated in *Board of Education v. Henderson, supra.*

> [a municipal corporation] has no right to create criminal offenses. And this being so, it was found to be almost impossible to administer and enforce a proper police government in towns and cities by means of penalties alone. It therefore became necessary to make the violation of town ordinances a misdemeanor — a criminal offense — which was done by section 3820 (now G.S. 14-4) of The Code.

126 N.C. at 691, 36 S.E. at 159.

We therefore do not hestitate to reiterate and to reaffirm our holding in *Henderson, supra*, that,

> all the fines . . . collected upon prosecutions for violations of the *criminal laws* of the State, whether for violations of . . . *ordinances* made criminal by [G.S. 14-4], or by other criminal statutes . . . belong to the common school fund of the county. It is thus appropriated by the Constitution, and it can not be diverted or withheld from this fund without violating the Constitution. [Emphasis in original.]

126 N.C. at 692, 36 S.E. at 159.

Even so, defendant contends that the instant case is distinguishable from the case where the violation of a city ordinance has been prosecuted to judgment and a fine imposed. Here the disputed proceeds result from payments *voluntarily* made by violators upon citations for overtime parking. Depending upon the ordinance in effect, the offenders would pay the appropriate penalty to the Police Department or the Clerk at City Hall, or would deposit the money in a designated receptacle

or mail the money to the City. Defendant thus argues that the sums received were not "fines" since they were not paid as a result of a criminal conviction. Defendant relies upon the following language from *Henderson* in support of its contention that the monies received here are civil penalties:

> A "fine" is the sentence pronounced by the court of a violation of the criminal law of the State . . . a "penalty" is the amount recovered — the penalty prescribed for a violation of the statute law of the State or the ordinance of a town. This penalty is recovered in a civil action of debt.

126 N.C. at 691, 36 S.E. at 159. Defendant therefore concludes that since the proceeds here were civil "penalties" and not "fines," they properly belong to the municipality.

We agree that the case at bar differs from previous cases construing the constitutional mandate of article IX, section 7, since the sums here were voluntarily paid upon citations for violations. However, defendant's reading of the language used by the *Henderson* Court to differentiate "fines" from "penalties" is unduly restrictive. The heart of that court's distinction lies not in whether the monies are *denominated* "fines" or "penalties." Indeed, we have often stated that the label attached to the money does not control. *State v. Rumfelt,* 241 N.C. 375, 85 S.E. 2d 398 (1955); *School Directors v. City of Asheville,* 128 N.C. 249, 38 S.E. 874 (1901). Neither does the heart of the distinction rest in whether there has been an actual criminal prosecution resulting in a "sentence pronounced by the court." *Board of Education v. Henderson,* 126 N.C. at 691, 36 S.E. at 159. The crux of the distinction lies in the *nature* of the *offense* committed, and not in the *method* employed by the municipality to collect fines for commission of the offense. A "fine" is a "sum of money exacted of a person guilty of a misdemeanor, or a crime." *State v. Addington,* 143 N.C. 683, 686, 57 S.E. 398, 399 (1907); *State v. Rumfelt, supra.* The constitution mandates that "all fines collected in the several counties for any *breach of the penal laws* of the State" be appropriated to the school fund. The inquiry addressed by the *Henderson* Court, then, was whether the monies in dispute were collected for violations of the criminal laws of the State or for violations of city ordinances. The Court determined that, since G.S. 14-4

makes violations of city ordinances misdemeanors, the sums in question were collected for breach of the State's penal laws.

We hold that the same result must ensue here. The Asheville Code makes it unlawful to park overtime. G.S. 14-4 specifically makes criminal the violation of a city ordinance, unless "the council shall provide otherwise" pursuant to G.S. 160A-175(b). Thus, where, as here, the ordinances do not provide otherwise, a person who violates the overtime parking ordinance also breaches the penal law of the State. *See State v. Barrett, supra.* Consequently, fines collected for overtime parking constitute fines collected for a breach of the penal laws of the State. We, therefore, hold that the clear proceeds of all penalties, forfeitures and fines collected for breaches of the ordinances in question remain in Buncombe County and be used exclusively for the maintenance of free public schools.

We note that the trial judge here ordered "that the *Board of Education of the County of Buncombe* have and recover of the Defendant City of Asheville an amount equal to the clear proceeds of all penalties, forfeitures, or fines collected for the violation of the parking ordinances." [Emphasis added.] This was error. The correct procedure requires that the clear proceeds of the monies collected by the City shall be paid to the Buncombe County finance officer who shall disburse those funds in the same manner as is provided for the disbursement of penalties, fines and forfeitures collected for other breaches of the penal laws of the State. Upon receipt of these monies, the finance officer of Buncombe County must "forthwith determine what portion of the total is due to *each* administrative unit in the county and remit the appropriate portion of the amount to the finance officer of each administrative unit." G.S. 115-100.35. [Emphasis added.]

The portion of the Court of Appeals decision affirming that part of Judge Bruce's judgment which adjudged that only the Board of Education of the County of Buncombe should have the right to recover "the clear proceeds of all penalties, forfeitures or fines collected for the violation of the parking ordinances" is reversed; in all other respects, the decision is affirmed. This cause is remanded to the Court of Appeals for further remand to the Superior Court of Buncombe County for entry of judgment consistent with this opinion.

Reversed in part; Affirmed in part and Remanded.

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

Justice EXUM dissenting.

Perceiving what I believe to be a fundamental flaw in the reasoning of the majority, I must respectfully dissent.

Under Article IX, § 7 of the North Carolina Constitution, "the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties *for any breach of the penal laws of the State*, shall belong to ... the several counties, and shall be ... used exclusively for maintaining free public schools." (Emphasis supplied.) The City of Asheville has an ordinance no. 376, which prohibits overtime parking. Under this ordinance a motorist who parks overtime in violation of it must pay a penalty of $1.00.

The question in this case is whether the $1.00 penalty collected by the City of Asheville from motorists who violate parking ordinance no. 376 constitutes a penalty, or fine,[1] collected for the breach of a *state penal law*. I submit that it does not.

The majority reasons: Violation of any city ordinance also constitutes a violation of a state penal law, to wit, G.S. 14-4, which by its terms makes the violation of a local ordinance a misdemeanor punishable by a fine of not more than $50.00 or imprisonment for not more than 30 days. A motorist who violates Asheville's parking ordinance no. 376 *ipso facto* violates the statute. Therefore the $1.00 collected by Asheville from a motorist who violates its parking ordinance is a fine collected for the breach of G.S. 14-4, a state penal law.

I agree with the majority's major and minor premises, but I cannot agree that the conclusion drawn by the majority flows

[1]The majority correctly concludes that the label attached to the monies paid, *i.e.*, "fine" or "penalty," makes no substantive difference. Indeed, *State v. Addington*, 143 N.C. 683, 685, 57 S.E. 398 (1907), relied on by the majority for a definition of "fine," points out that the word does not "always mean a pecuniary punishment ... inflicted by a court in the exercise of criminal jurisdiction. It has other meanings, and may include a forfeiture, or a penalty recoverable by civil action." What *does* make a difference is whether the monies are collected pursuant to the city ordinance itself, a state penal law, or both. The majority concludes both. In this I believe it has erred.

logically from them. A person who may have in fact violated G.S. 14-4 pays no fine pursuant to that statute until he has been duly prosecuted and adjudged guilty of its violation both in fact and in law. I would hold that the $1.00, denominated in the ordinance itself as *the* penalty for its violation, constitutes a penalty collected for violation of the ordinance only. Although the motorist may have also violated G.S. 14-4 in fact, he has not violated it in law because he has neither been prosecuted for, pled guilty to, nor found guilty of its violation.

I disagree with the majority's statement, which seems to be the nub of its argument, that the method by which the $1.00 is collected is irrelevant. Money collected pursuant to a city ordinance is not necessarily money collected pursuant to a state statute even though both the ordinance and the statute may have been violated by the same act of the motorist. I agree with the majority's statement that a "fine" is a "sum of money exacted of a person guilty of a misdemeanor or a crime." The cases cited by the majority in support of this statement, *State v. Addington*, 143 N.C. 683, 686, 57 S.E. 398, 399 (1907); *State v. Rumfelt*, 241 N.C. 375, 85 S.E. 2d 398 (1955), were referring, of course, to a person who had been duly adjudged guilty in fact and in law.[2] The statement is not authority for the proposition that a person can be required to pay, or in fact pays, a fine for violating a state penal statute in the absence of due prosecution and judicial determination that the person is in fact and in law guilty of the violation.

There has been no such determination in this case. Asheville has not yet *invoked* G.S. 14-4. So far the city has invoked only its ordinance. The $1.00 penalty thus far paid by motorists is a penalty for violating that ordinance. By paying it the motorist admits having violated the ordinance in fact and in law[3] *in order to avoid* being prosecuted under, and perhaps being found

[2]*Addington* held that a proceeding by which defendant was determined to be the father of an illegitimate child was civil, not criminal; therefore defendant could not be fined or imprisoned, but could be required to pay an "allowance" to the child's mother. *Rumfelt* dealt with a defendant who had been found guilty by a jury of violating G.S. 20-162 which prohibits, among other things, parking within twenty-five feet from an intersection.

[3]He makes no such admission with regard to G.S. 14-4.

guilty of violating, G.S. 14-4, in which event he would be subject not only to imprisonment but also to a fine *assessed pursuant to that statute* considerably larger than the $1.00 penalty provided for in the ordinance. Such a fine, if paid, would belong to the county's school fund. The $1.00 penalty, I submit, does not.

Justice BRITT joins in this dissent.

STATE OF NORTH CAROLINA v. ROBERT LEE THACKER

No. 8

(Filed 4 November 1980)

1. **Constitutional Law § 46– court appointed counsel – conflict with defendant over trial tactics - no right to substitute counsel**

Defendant did not have the constitutional right to have substitute counsel appointed to represent him after his motion to dismiss original counsel was granted because of a disagreement over trial tactics, since the record disclosed no reason for the trial court to have doubted defendant's counsel's competency as an advocate or to have suspected that the relationship between the two had deteriorated to such an extent that the presentation of defendant's defense would be prejudiced so as to require the appointment of new counsel.

2. **Constitutional Law § 46– conflict between defendant and counsel – request for substitute counsel – extent of inquiry required**

When faced with a claim of conflict between defendant and his court appointed counsel and a request for appointment of substitute counsel, the trial court must satisfy itself only that present counsel is able to render competent assistance and that the nature or degree of the conflict is not such as to render that assistance ineffective, and the trial court in this case was not required to make an in-depth inquiry or detailed findings of fact.

3. **Constitutional Law § 49– waiver of counsel – defendant questioned in accordance with statute – waiver knowing and voluntary**

Where the trial court specifically questions a defendant, who wishes to represent himself, in accordance with G.S. 15A-1242 and determines that defendant has been advised of his right to counsel, is aware of the consequences of his decision to represent himself, and understands the nature of the charges and the permissible punishments, the constitutional requirement that waiver of counsel must be knowing and voluntary has been fully satisfied.

4. **Rape § 6– jury instructions – sexual intercourse not defined – no error**

The trial court in a rape prosecution did not err in its jury charge by substituting the words "sexual intercourse" for the words "carnal knowl-

edge" as required by the statute under which defendant was charged, nor was it error for the court to fail to define sexual intercourse.

5. **Crime Against Nature § 4– unnatural sexual intercourse defined – instructions proper**

In a prosecution of defendant for crime against nature, cunnilingus, the trial court's definition of "unnatural sexual intercourse" in the jury charge was proper and could not have caused the jury to confuse cunnilingus with sexual intercourse.

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

DEFENDANT appeals from judgment entered by *Seay, Judge*, at the 17 December 1979 Session of Superior Court, GUILFORD County.

Defendant was charged in three indictments, each proper in form, with rape, robbery with a dangerous weapon, and crime against nature. He pled not guilty to each. The jury found defendant guilty of all charges and he was sentenced to life imprisonment for the rape conviction, twenty to thirty years for the armed robbery conviction, and ten years for the crime against nature conviction. Defendant appeals to this Court from the life sentence imposed for the rape conviction. We allowed his motion to bypass the Court of Appeals on the armed robbery and crime against nature convictions on 18 June 1980.

This case presents the issues of (1) when the constitutional right to counsel in a criminal case requires that substitute counsel be appointed to replace original counsel because a conflict exists between defendant and original counsel and (2) whether compliance with G.S. 15A-1242 satisfies the constitutional requirement that waiver of counsel be "knowing and voluntary."

Attorney General Rufus L. Edmisten, by Associate Attorney Grayson G. Kelley, for the State.

Joel G. Bowden for defendant.

CARLTON, Justice.

I.

At trial, the State presented evidence tending to show that on 28 September 1979 at approximately 1:45 p.m. Marilyn Ozan was working alone at The Mailing Service in Greensboro, North

Carolina. At approximately 1:45 p.m., a black male whom Ms. Ozan identified as defendant, entered the building and asked if it were The Mailing Service. Ms. Ozan replied that it was, and the man attacked her. He grabbed her around the neck with his arm and held a hunting knife to her throat. Defendant told her that he wanted all her money and that he would kill her if she screamed. Ms. Ozan was walked back into a room where the mail bags were kept and was forced to lie face-down on the floor. Defendant cut the ropes off a mail bag, tied her feet and hands, and put a mail bag over her head. He then opened Ms. Ozan's purse and emptied it out on the floor of the mail bag room. After defendant took the money from Ms. Ozan's purse, he sexually assaulted her by performing cunnilingus and raping her. After he finished, he left without further incident.

Ms. Ozan worked herself free from the ropes, called the police, and gave a description of her assailant. Defendant was picked up a few minutes later about seven blocks from The Mailing Service. His appearance matched the description given by Ms. Ozan.

A police detective showed Ms. Ozan seven pictures of black males. She was not told that her attacker was in the group. The pictures were placed in front of her one at a time. When defendant's picture was placed before her, she immediately identified him.

The doctor who examined Ms. Ozan at the hospital emergency room testified that she had rope burns on her wrists and that tests revealed recent intercourse.

Defendant's evidence tended to show that he had been at the Guilford County Department of Social Services sometime on the day in question.

II.

[1] The principal issue raised by this appeal is whether defendant had the constitutional right to have substitute counsel appointed to represent him after his motion to dismiss original counsel was granted.

Defendant was originally represented in this case by an attorney from the Public Defender's Office, Mr. Deno Econo-

mou. Mr. Economou was appointed about one month prior to trial. He filed motions to suppress statements made by and evidence seized from defendant at the time of his arrest. On 6 December 1979 defendant appeared in court and informed the trial judge that he was dissatisfied with his court-appointed counsel:

> MR. THACKER: The defendant moves that he be appointed new counsel or either the defendant makes a motion that he defend his own self.
>
> COURT: All right. You want me to first deny or appoint new counsel?
>
> MR. THACKER: Yes, sir.
>
> COURT: Do you mean somebody in addition to Mr. Deno Economou, or do you want me to get rid of him for you and appoint somebody new?
>
> MR. THACKER: Get rid of Mr. Deno.

The court inquired into the reason for defendant's dissatisfaction with his counsel. Defendant replied, "The reason is communication between me and the Court-appointed counsel. We can't see no headway with this, you know." When pressed further defendant stated that his counsel didn't understand the questions that defendant wanted presented to the court. The trial court granted defendant's motion to dismiss his counsel and denied his motion to appoint substitute counsel. However, he directed the assistant public defender to remain in the courtroom during trial to assist defendant if requested by defendant.

Defendant claims that the trial judge did not make sufficient inquiry into the conflict between himself and counsel to determine whether there was valid reason for appointment of substitute counsel. Failure to do so, he argues, operated to deprive him of his constitutional right to counsel.

While it is a fundamental principle that an indigent defendant in a serious criminal prosecution must have counsel appointed to represent him, *Gideon v. Wainright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), an indigent defendant does not have the right to have counsel *of his choice* appointed to

represent him.[1] *State v. McNeil*, 263 N.C. 260, 270, 139 S.E. 2d 667, 674 (1965); *accord, State v. Robinson*, 290 N.C. 56, 65-66, 224 S.E. 2d 174, 179 (1976). This does not mean, however, that a defendant is never entitled to have new or substitute counsel appointed. A trial court is constitutionally required to appoint substitute counsel whenever representation by counsel originally appointed would amount to denial of defendant's right to effective assistance of counsel, that is, when the initial appointment has not afforded defendant his constitutional right to counsel. *United States v. Young*, 482 F. 2d 993 (5th Cir. 1973); *United States v. Calabro*, 467 F. 2d 973, 986 (2d. Cir. 1972), *cert. denied*, 410 U.S. 926, 93 S. Ct. 1358, 35 L. Ed. 2d 587, *reh. denied*, 411 U.S. 941, 93 S. Ct. 1891, 36 L. Ed. 2d 404 (1973); *see also United States v. Morrissey*, 461 F. 2d 666 (2d. Cir. 1972); *Brown v. Craven*, 424 F. 2d 1166 (9th Cir. 1970); *Bowman v. United States*, 409 F. 2d 225 (5th Cir. 1969), *cert. denied*, 398 U.S. 967, 90 S. Ct. 2183, 26 L. Ed. 2d 552, *reh. denied*, 400 U.S. 912, 91 S. Ct. 128, 27 L. Ed. 2d 152 (1970); *United States v. Grow*, 394 F. 2d 182, 209 (4th Cir.), *cert. denied*, 393 U.S. 840, 89 S. Ct. 118, 21 L. Ed. 2d 111 (1968); *United States v. Gutterman*, 147 F. 2d 540 (2d Cir. 1945); *United States v. Mitchell*, 138 F. 2d 831 (2d. Cir. 1943), *cert. denied*, 321 U.S. 794, 64 S. Ct. 785, 88 L. Ed. 1083 (1944); Annot., 157 A.L.R. 1225 (1945). Thus, when it appears to the trial court that the original counsel is reasonably competent to present defendant's case and the nature of the conflict between defendant and counsel is not such as would render counsel incompetent or ineffective to represent *that* defendant, denial of defendant's request to appoint substitute counsel is entirely proper. This Court has held that a disagreement over trial tactics generally does not render the assistance of the original counsel ineffective. *State v. Robinson*, 290 N.C. at 66, 224 S.E. 2d at 179; *see State v. McNeil*, 263 N.C. at 270, 139 S.E. 2d at 674; *cf. United States v. Young*, 482 F. 2d 993. While defendant may have disagreed with his counsel over trial tactics and there may have been some communication problem between them, the record before us discloses no reason for the trial court to have doubted

[1]Defendant does not disagree with the principle that an indigent is not entitled to choose his counsel. The State argues that this principle disposes of defendant's claim, but that is not the issue presented by this appeal. The issue here is whether defendant was denied his right to counsel by the trial judge's refusal to appoint substitute counsel.

the assistant public defender's competency as an advocate or suspected that the relationship between the two had deteriorated to such an extent that the presentation of his defense would be prejudiced so as to require the appointment of new counsel, *cf. State v. Gray*, 292 N.C. 270, 282, 233 S.E. 2d 905, 913 (1977). Thus, we hold that a mere disagreement over trial tactics such as this record discloses does not entitle defendant to have new counsel appointed for him. *State v. Robinson*, 290 N.C. at 66, 224 S.E. 2d at 179. The trial court properly denied defendant's motion for substitute counsel.

[2] Defendant next argues that regardless of the apparent nature of the conflict, the trial court should inquire into its basis and that failure to make a detailed inquiry amounts to a *per se* violation of defendant's right to counsel. To this end, defendant requests that we formulate a set of criteria by which a trial court must determine whether a valid conflict exists and that we require the trial courts to make findings of fact to permit appellate review of such decisions. We decline to adopt such an unnecessary and stringent requirement. The right to counsel guaranteed to all defendants in state prosecutions by the fourteenth amendment requires only that defendant receive competent assistance of counsel. Thus, when faced with a claim of conflict and a request for appointment of substitute counsel, the trial court must satisfy itself only that present counsel is able to render competent assistance and that the nature or degree of the conflict is not such as to render that assistance ineffective. The United States Constitution requires no more. While some situations may indeed require an in-depth inquiry and detailed findings of fact, the conflict in the case *sub judice* is clearly not one of them. The trial court made sufficient inquiry to learn that the conflict here was not such as to render the public defender's assistance ineffective. Having so learned, his failure to inquire further was entirely proper. This assignment of error is overruled.

III.

We next consider defendant's claim that he was denied his right to counsel to encompass a challenge to the propriety of allowing defendant to take charge of his case.

The right to counsel guaranteed to all criminal defendants by the Constitution also implicitly gives a defendant the right

to refuse counsel and conduct his or her own defense. *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). Services of counsel cannot be forced upon an unwilling defendant. *Id.; State v. Mems*, 281 N.C. 658, 190 S.E. 2d 164 (1972); *State v. Morgan*, 272 N.C. 97, 157 S.E. 2d 606 (1967) (per curiam); *State v. McNeil*, 263 N.C. at 267-68, 139 S.E. 2d at 672; *State v. Bines*, 263 N.C. 48, 138 S.E. 2d 797 (1964). However, the waiver of counsel, like the waiver of all constitutional rights, must be knowing and voluntary, and the record must show that the defendant was literate and competent, that he understood the consequences of his waiver, and that, in waiving his right, he was voluntarily exercising his own free will. *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562.

In questioning defendant about his desire to represent himself, the trial court followed the dictates of G.S. 15A-1242 which provides:

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:
>
> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

G.S. § 15A-1242 (1978). The trial court questioned defendant specifically in accordance with this statue and his responses indicated that he had been advised of his right to counsel, that he was aware of the consequences of his decision to represent himself, and that he understood the nature of the charges, the range of permissible punishment for each and the trial proceedings.

We believe that following the criteria set out in G.S. 15A-1242 for allowing a defendant to represent himself adequately ensures that "[a defendant] knows what he is doing and [that]

his choice is made with his eyes open," *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279, 63 S. Ct. 236, 242, 87 L. Ed. 268, 275 (1942). Therefore, we hold that compliance with the dictates of G.S. 15A-1242 fully satisfies the constitutional requirement that waiver of counsel must be knowing and voluntary. The trial court acted properly in allowing defendant to represent himself.

IV.

Defendant next alleges error in the trial court's charge to the jury on the offenses of rape and crime against nature. In its charge on rape the court instructed:

> I charge that for you to find the defendant guilty of first degree rape, the State of North Carolina must prove five things and do so beyond a reasonable doubt:
>
> First, that on the occasion herein, that is September 28, 1979 that the defendant, Robert Lee Thacker, had *sexual intercourse* with Marilyn Ozan.

(Emphasis added.) The charge on crime against nature contained the following:

> I charge for you to find the defendant Thacker guilty of crime against nature, the State of North Carolina must prove beyond a reasonable doubt that the defendant Thacker took part in *an act of unnatural sexual intercourse* with Marilyn Ozan. *Unnatural sexual intercourse includes cunnilingus, and cunninlingus in any penetration, however slight, by the mouth or tongue of one person into the female sex organ of another.*

(Emphasis added.)

Defendant contends that the court's failure to define "sexual intercourse" in the charge on rape was prejudicial error for two reasons: (1) "sexual intercourse" is a "term of art" and, as such, it must be defined, and (2) the court, in contrast, defined "unnatural sexual intercourse" in the charge on crime against nature and, thus, may have caused the jurors to confuse the two terms. We find these contentions to be without merit.

[4] This Court was last confronted with the failure of a trial court to define sexual intercourse in a charge on rape in *State v.*

Vinson, 287 N.C. 326, 215 S.E. 2d 60 (1975), *death sentence vacated*, 428 U.S. 902, 96 S. Ct. 3204, 49 L. Ed. 2d 1206 (1976). Justice Huskins, writing for the Court, concluded that failure to define "sexual intercourse" was not error because that term and "carnal knowledge," the statutory definition of rape,[2] were synonymous and that the law did not require that any particular words be used when stating the elements of the offense. *State v. Vinson*, 287 N.C. at 341-42, 215 S.E. 2d at 71-72; *accord, 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); *State v. Hodges*, 61 N.C. (Phil. Law) 231 (1867). We agree. The statute requires carnal knowledge of a female. The substitution of "sexual intercourse" for carnal knowledge in the charge on rape in no way altered the requirements for conviction of rape. The rape instruction was proper.

[5] We also conclude that the trial judge's defining of "unnatural sexual intercourse" was proper. A "crime against nature," G.S. 14-177 (1969), includes several different sexual acts; defendant was indicted and charged with only one, cunnilingus. The specificity of the indictment bound the State to a single theory for the charge, and the trial court could instruct only on that specific ground. *See, e.g., State v. Taylor*, 301 N.C. 164, 270 S.E. 2d 409 (1980). The jury could find defendant guilty of a crime against nature only if it found beyond a reasonable doubt that defendant had performed the act charged in the indictment. The definition given "unnatural sexual intercourse" in the charge was proper and could not have caused the jury to confuse cunnilingus with sexual intercourse. This assignment of error is overruled.

V.

On oral argument, defense counsel conceded that the right to counsel was the only real issue on this appeal. We have, however, carefully reviewed the remaining assignments of error and the entire record.

---

[2]The statute under which *Vinson* and this case are brought is former G.S. 14-21 which defined rape as "ravishing and carnally knowing any female of the age of twelve years or more." Law of April 8, 1974, Ch. 1204, s. 2, 1973 N.C. Sess. Law 33 (1974) (repealed 1980). Article 7A of Chapter 14 now covers rape and other sexual offenses. It defines rape as "vaginal intercourse." G.S. § 14-27.2(a) and § 27.3(a) (Cum. Supp. 1979).

Defendant, in his brief, brings forward several evidentiary and procedural challenges. For example, he contends that the district attorney's opening statement contained prejudicial and suggestive remarks which made a fair trial impossible and that several of the State's exhibits were improperly admitted. We have carefully reviewed the record on these points and find his contentions to be without merit. We overrule all remaining assignments of error.

We hold that defendant's right to counsel was not denied him and that he received a fair trial, free from prejudicial error.

No error.

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

MARY R. TAYLOR v. D. WAYNE TAYLOR, INDIVIDUALLY, ROLAND TAYLOR AND WIFE, EDNA H. TAYLOR; T.C. TAYLOR AND WIFE, MARJORIE A. TAYLOR; DORIS TAYLOR ROBINSON AND HUSBAND, DAVID ROBINSON; EDWARD TAYLOR; TRUSTEES OF CEDAR GROVE METHODIST CHURCH; ERVIN TAYLOR; FRANCES T. BLAKELY; EDNA MAY MAYNOR; RUBY LEE DAY; SAMUEL TAYLOR

No. 13

(Filed 4 November 1980)

1. **Wills § 61– dissent to will – agreement as to valuation of estate and testate and intestate shares**

Where plaintiff filed a dissent to her late husband's will, and the administrator with the will annexed and the other devisees under the will have implicitly assented to the wife's valuation of the estate and her testate and intestate shares thereof by conceding her right to dissent from the will, the parties have complied with the provisions of G.S. 30-1(c) with respect to an agreement as to valuation except for procuring the approval of the clerk of their valuation.

2. **Wills § 61.5– dissent to will – waiver of right to seek construction of will**

Plaintiff's dissent to her husband's will, which is subject only to an essentially ministerial act by the clerk of court in approving a valuation agreement, precluded her from maintaining an action for construction of the will or claiming property passing under the residuary clause of the will.

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

Taylor v. Taylor

APPEAL by defendants pursuant to G.S. § 7A-30(2) from decision of the Court of Appeals, 45 N.C. App. 449, 263 S.E. 2d 351 (1980), one judge dissenting.

In this declaratory judgment action, plaintiff asks the court to determine the rights of the parties under the will of her late husband, J.B. Taylor. Defendants are the other devisees and legatees named in the will.

J.B. Taylor, the owner of certain farmlands in Orange County, died on 31 January 1973 leaving a will dated 30 August 1958 which was duly admitted to probate. The will provides in pertinent part as follows:

> After the payment of my just debts and funeral expenses, I give, devise and bequeath my property as follows:
>
> FIRST: To my beloved wife, Mary R. Taylor, I give, devise and bequeath my home and 30 Acres of land surrounding the same to be hers for and during the term of her natural life, and at her death, I give, bevise (sic) and bequeath the same to my two nephews, Wayne Taylor and Roland Taylor, share and share alike.
>
> SECOND: To my brother, Edward Taylor, I give, devise and bequeath 12 Acres of my Plantation located in the Northwest corner of same, to be his absolutely and in fee simple.
>
> THIRD: To my brother, T.C. Taylor, I give, devise and bequeath 12 Acres on the East side of my Plantation to be his absolutely and in fee simple.
>
> FOURTH: The remainder of my real estate, I give, devise and bequeath to my two nephews, Wayne Taylor and Roland Taylor in fee simple, share and share alike.
>
> FIFTH: I give, devise and bequeath to the Trustees of Cedar Grove Methodist Church the sum of $400.00 to be used in the upkeep of the Church and Cemetery as they deem advisable.
>
> SIXTH: To my sister, Mary T. Graham, and to my nieces and nephews, Ervin Taylor, Frances T. Blakely, Edna May Maynor, Ruby Lee Day, Doris T. Hawkins

and Samuel Taylor I give, devise and bequeath the sum of $25.00 each.

SEVENTH: The remainder of my property, real, personal and mixed, I give, devise and bequeath to my beloved wife, Mary R. Taylor, to be hers absolutely and in fee simple.

Plaintiff was named executrix of the will but declined to qualify. On 23 May 1973, she filed a dissent from the will. In her dissent, plaintiff alleged that the value of the assets of the estate was as follows:

Chattels	$ 500.00
Savings Account	2,527.50
Real Estate	36,500.00
	$39,527.50

She further alleged that the aggregate value of the provisions under the will for her benefit, when added to the value of the property or interests in property passing in any manner outside the will to her as a result of the death of the testator, was $16,716.20; that the net estate of the decedent, exclusive of family allowances, cost of administration, and all lawful claims against the estate, is at least $37,527.50; that her intestate share would be about $18,763.75, and that the property passing outside of the will and the provisions under the will for her benefit give to her property whose aggregate value is less than her intestate share. She expressly stated that she dissented from the will and claimed properties to which she would be entitled under Chapter 30 of the General Statutes of North Carolina.

On 16 August 1973, plaintiff filed a caveat to the will. The cause came on for trial at the 12 November 1974 Civil Session of Orange Superior Court at which time a jury found that the paper writing in question was executed by J.B. Taylor "according to the formalities of the laws required to make a valid Last Will and Testament"; that at the time of executing said writing J.B. Taylor was mentally capable of making a valid will; that the execution of said writing was not procured by undue influence; and that said writing and each and every part thereof was the last will and testament of J.B. Taylor.

On 2 July 1976 plaintiff instituted this action, alleging that questions had arisen as to whether the devises made by the first three items of the will were void because of vagueness and as to whether the remainder of the testator's estate passed to his nephews, Wayne and Roland Taylor, under item four or to his wife under item seven of the will.

Defendants moved pursuant to G.S. 1A-1, Rule 12(b), to dismiss the complaint on the ground that plaintiff, having previously filed a dissent to the will, no longer had any interest in its interpretation. This motion was denied by Judge Lee on 17 September 1976.

On 28 December 1977 plaintiff moved for summary judgment. The cause came on for hearing on the motion and for trial on 9 January 1978. At that time the parties agreed to a postponement of the hearing and trial until 20 April 1978 in order that the case might be submitted to the court without a jury on affidavits and other documentary evidence. Plaintiff reserved the right to object to the evidence on the ground of relevancy.

When the case came on for trial on 20 April 1978, defendants attempted to introduce evidence by affidavits tending to show that the various parcels of land referred to in the will could be identified and located on the ground. The court sustained plaintiff's objections to the evidence on the ground of relevancy and then entered judgment as follows:

> The Court concludes that the attempted devises contained in the First, Second and Third items of the Will of J.B. Taylor are void for vagueness; that the testator intended by Item Fourth of said Will to devise to Wayne Taylor and Roland Taylor the remainder of said farm not included in the devises attempted by the first three items of said Will; that since the attempted devises contained in the first three items are incapable of location because of the vagueness of said descriptions, the remainder of said property cannot be determined and is void for vagueness; that said void devises fail to take effect and pass under Item Seventh to the widow of the testator, Mary R. Taylor, absolutely and in fee simple.

Defendants appealed to the Court of Appeals. In an opinion by Judge Parker, concurred in by Judge Harry C. Martin, the

Court of Appeals affirmed the judgment of the superior court, holding that the first three sections of the will, which purported to devise real property, were void for vagueness under the rule enunciated by this court in *Hodges v. Stewart*, 218 N.C. 290, 10 S.E. 2d 723 (1940). Judge Robert M. Martin dissented, suggesting that the rule embodied in the *Hodges* decision is in need of reconsideration.

Graham & Cheshire, by Lucius M. Cheshire, for plaintiff-appellee.

Latham, Wood & Balog, by Steve A. Balog, for defendant-appellants.

BRITT, Justice.

Defendants raised the issue in the Court of Appeals, as they have before this court, that the trial court erred in denying their motion to dismiss. The crux of defendants' argument is that plaintiff no longer has standing upon which to seek an interpretation of testator's will because she has dissented from the will. The Court of Appeals rejected this contention, holding that the record reveals that "all that has happened is that plaintiff has *filed* her dissent within apt time as she was required to do by G.S. 30-2"; that whether plaintiff has a *right* to dissent is governed by G.S. § 30-1; and that her right to dissent is yet to be determined. Our consideration of the facts in this case, in light of the pertinent statutory provisions, impels us to reverse the decision of the Court of Appeals, and order that the judgment entered by Judge Bailey be vacated and that the cause be remanded for further proceedings.

Though plaintiff was named executrix of her husband's will by the document, she renounced the appointment on 10 May 1973. In the notice of dissent which she filed with the clerk, plaintiff alleged that the value of property passing to her under the will, as well as the value of any property passing to her outside of the will in any manner, was $16,716.20; that her husband's net estate had a value of $37,527.50; and that her intestate share of the estate was $18,763.75. Thereupon, she asserted a right to dissent from her husband's will and take an appropriate intestate share. Since the date of the filing of her notice of dissent, no further proceedings have been conducted before the clerk insofar as plaintiff's right to dissent is con-

cerned. Even so, defendants have never denied or questioned plaintiff's right to dissent and so confirmed their position before this court at oral argument. As in any case, the facts upon which the controversy is founded are crucial to an appropriate resolution of the issues presented. In this case, the events leading up to the presentation of the dispute before us take meaning upon themselves only in the context of the statutory framework provided by Article 30 of the General Statutes.

For the purposes of the case at bar, plaintiff is entitled to dissent from the will of her late husband upon demonstrating that the aggregate value of the provisions for her benefit under the will, when added to the value of property or interests passing to her in any manner outside the will, is less than her intestate share of his estate. G.S. § 30-1(a)(1)(1976)[1]; *see Vinson v. Chappell*, 275 N.C. 234, 166 S.E. 2d 686 (1969); *North Carolina Nat'l Bank v. Stone*, 263 N.C. 384, 139 S.E. 2d 573 (1965); *see generally* 1 N. Wiggins, *Wills and Administration of Estates in North Carolina* § 160 (1964).

The statutory scheme contemplates that the surviving spouse's right of dissent is established by a mathematical computation. *See Phillips v. Phillips*, 296 N.C. 590, 252 S.E. 2d 761 (1979). G.S. § 30-1(c) provides as follows:

> (c) For the purpose of establishing the right of dissent, the estate of the deceased spouse and the property passing outside of the will to the surviving spouse as a result of the death of the testator shall be determined and valued as of the date of his death, *which determination and value the executor or administrator with the will annexed and the surviving spouse are hereby authorized to establish by agreement subject to approval by the clerk of the superior court.* If such personal representative and the surviving spouse do not so agree upon the determination and value, or if the surviving spouse is the personal representative, or if the clerk shall be of the opinion that the personal representative may not be able to represent the estate adversely

[1]The formulation which is necessary to establish the right of dissent varies, of course, in situations not relevant to the present case. G.S. § 30-1 (1976).

> to the surviving spouse, the clerk shall appoint one or more disinterested persons to make such determination and establish such value. Such determination and establishment of value made as herein authorized shall be final for determining the right of dissent and shall be used exclusively for this purpose. (Emphasis added.)

[1] As set forth above, plaintiff has stated her valuation of her late husband's estate, her share of the estate which she stands to take under the terms of his will, and the share which she would be entitled to take by intestate succession in the event it is determined that she has the right to dissent. By so stating, fairness and logic dictate that plaintiff ought to be held to her computation, absent some showing of excusable neglect. In conceding before this court that plaintiff does indeed have the right to dissent from her husband's will, defendants have implicitly assented to her valuation of the estate and her testate and intestate shares thereof.

Because the statute does not prescribe a particular method by which an agreement between the surviving spouse and the personal representative may be memorialized, the parties' course of conduct in the present case is sufficient to establish a meeting of the minds in this regard. In short, the parties to this litigation have complied with the provisions of G.S. § 30-1(c) except for procuring the approval of the clerk of their valuation. Upon obtaining that approval, plaintiff's right to dissent will be established as a matter of law. Absent a showing that the parties have failed to act in an arm's length manner, or that the rights of creditors of the estate would be adversely affected thereby, the clerk ought to abide by this agreement. *See Phillips v. Phillips, supra.* Accordingly, the cause must be remanded, ultimately, to the clerk for further appropriate proceedings which would result either in his approval or his disapproval of the valuation before us in the present record. Without this approval, the record in the instant case is inadequate to establish plaintiff's right to dissent.

However, assuming, *arguendo,* that plaintiff has the right to dissent from her husband's will, the application of the provisions of G.S. § 30-1(c) will not completely resolve the issue of standing posed to us by the present litigation. Indeed, that

question compels us to examine other related statutory provisions in order to arrive at a resolution of the case.

Any person who is otherwise entitled to dissent from the will of his or her deceased spouse may do so by filing such dissent with the clerk of the superior court of the county in which the will is probated at any time within six months after the issuance of letters testamentary or of administration. G.S. § 30-2 (1976). Though plaintiff filed her notice of dissent in the office of the clerk of court where her late husband's will had been filed for probate, she did so slightly more than six weeks before D. Wayne Taylor qualified as administrator C.T.A. Plaintiff's superficially premature filing was not fatally inopportune. The six month period which is delineated by G.S. § 30-2 is not a condition precedent to the exercise of the right of dissent but merely a statute of limitations which serves to cut off the time in which a spouse may resort to the courts to enforce it. *First-Citizens Bank & Trust Co. v. Willis*, 257 N.C. 59, 125 S.E. 2d 359 (1962); *Whitted v. Wade*, 247 N.C. 81, 100 S.E. 2d 263 (1957).

[2] Any interested party may obtain a declaration of rights, status, or any other legal relation under a will by bringing an action for declaratory judgment. G.S. § 1-254 (1969); *First-Citizens Bank & Trust Co. v. Carr*, 279 N.C. 539, 184 S.E. 2d 268 (1971); *see generally* 1 N. Wiggins, *Wills and Administration of Estates in North Carolina* § 130 (1964). By filing her notice of dissent, to which defendants have implicitly assented, plaintiff has staked herself to a theory which is inconsistent with the status of a party who is interested, in the legal sense of that term, in the legal effect of a will. While it is true that her right to dissent has not been fully adjudicated before the clerk, such a conclusion must necessarily follow upon his approval of her computations. By electing to take her intestate share of her husband's estate and seeking a court order directing the personal representative to deliver that share to her, plaintiff has abandoned her right to bring an action for construction of the will. It is well established that upon dissenting from the will of a deceased spouse, the surviving spouse terminates all of her interests under that will. *Gomer v. Askew*, 242 N.C. 547, 89 S.E. 2d 117 (1955); *Wachovia Bank & Trust Co. v. Green*, 236 N.C. 654, 73 S.E. 2d 879 (1953).

Under the terms of Judge Bailey's judgment, the challenged devises were declared void for vagueness. Accordingly, by virtue of the residuary clause of her husband's will, plaintiff stood to take outright the real property that would otherwise have passed through the attempted devises. G.S. § 31-42(c) (Supp. 1979). We do not reach the question whether Judge Bailey erred in his holding. Since plaintiff has functionally dissented from her husband's will, subject only to an essentially ministerial act on the part of the clerk of Orange Superior Court, she has abandoned her right to claim property under the residuary clause of the will she now seeks to challenge.

We are aware that North Carolina has a qualified dissent statute. It is only upon demonstrating that he or she qualifies under a mathematical computation that a surviving spouse is entitled to dissent from the will of his or her late spouse. G.S. § 30-1 (1976). We recognize that it is not always apparent from the face of the will and the accounting of the assets of the subject estate that a surviving spouse will be entitled to dissent. This is particularly true in situations where clauses of the will are open to question by way of construction or where the will itself is subject to challenge. In those situations, the General Assembly has provided a method by which the surviving spouse may preserve his or her potential right to dissent.

It will be recalled that a surviving spouse must file his or her dissent no later than six months after the issuance of letters testamentary or administration. G.S. § 30-2(a) (1976). However, that same statute goes on to provide that if litigation that affects the share of the surviving spouse is pending at the expiration of that time period, then the surviving spouse is entitled to file a dissent within such reasonable time as may be ordered by the clerk of the superior court. *Id.; see generally* 1 N. Wiggins, *Wills and Administration of Estates in North Carolina* § 160 (1964). Implicit in the extension of time so provided is the requirement that any action for construction of a will be filed *before* the filing of the notice of dissent. Plaintiff has failed to so conduct the present litigation. It follows, therefore, that the trial court erred in failing to grant defendants' motion to dismiss.

The decision of the Court of Appeals is reversed and this cause is remanded to that court with directions to vacate the

judgment entered by Judge Bailey and remand the case to Orange Superior Court for further proceedings before the clerk not inconsistent with this opinion.

Reversed and remanded.

Justice BROCK took no part in the consideration and decision of this case.

BOYCE L. BRANDON v. NATIONWIDE MUTUAL FIRE INSURANCE COMPANY

No. 34

(Filed 4 November 1980)

1. **Insurance § 130– fire insurance – filing of proof of loss as required by contract – issue properly submitted to jury**

In an action to recover under an insurance policy for loss to certain insured property resulting from fire, the trial court properly submitted to the jury an issue as to whether plaintiff filed with defendant insurance company a proof of loss as required by the insurance contract, since there was ample evidence tending to show that, while plaintiff eventually submitted forms entitled "Proofs of Loss," he failed to file proof of loss as required by the contract; the contract required that the proof of loss be sworn to by the insured; plaintiff testified that he could not remember whether he submitted sworn proofs of loss; and several letters to plaintiff from defendant, admitted into evidence at trial, indicated that the proofs of loss submitted were not sworn statements and thus did not comply with the terms of the policy.

2. **Insurance § 136– fire insurance – timeliness of filing of proof of loss – instruction favorable to plaintiff**

In an action to recover under a fire insurance policy, the trial court's charge amounted to a peremptory instruction on the issue of timeliness of filing of proofs of loss where the court instructed the jury that, if it found that proper proofs of loss were filed, plaintiff's claim was not barred due to lack of timely filing, and such an instruction was favorable to plaintiff and was not grounds for a new trial.

3. **Insurance § 130.1– fire insurance – proof of loss – no waiver by assertion of alternative defense**

In an action to recover on a fire insurance policy, defendant insurer did not waive the defense of failure to file required proofs of loss by asserting, as an alternative defense, that plaintiff was guilty of arson, since the denial of liability on grounds of arson occurred after the period prescribed by the policy for the filing of the proofs.

4. Insurance § 130.1– fire insurance – proof of loss – waiver – sufficiency of evidence

In an action to recover on a fire insurance policy, evidence was sufficient to permit, but not compel, the jury to find that defendant, by words or conduct, waived the requirement of proofs of loss, and the issue of waiver should have been submitted to the jury where plaintiff's evidence tended to show that he notified defendant of the fires and defendant sent several agents to talk with plaintiff and his wife; one representative gave plaintiff a number of pink slips to fill out and promised to supply additional slips but never did; defendant's representative instructed plaintiff to appraise the damaged property and if necessary appraise it by going through the Sears Roebuck catalog; at the agent's direction, plaintiff moved temporarily into a motel; the agent offered plaintiff money; and plaintiff received several letters from defendant rejecting his proofs of loss but never telling him what was wrong; defendant's evidence on the other hand tended only to show that it continued to reject the proofs of loss and to request proper ones; the remainder of plaintiff's evidence was uncontradicted; and one of defendant's witnesses testified that he prepared estimates of the fire damage shortly after each fire at the request of defendant.

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

ON appeal from the decision of the Court of Appeals, reported in 46 N.C. App. 472, 265 S.E. 2d 497, granting a new trial upon plaintiff's appeal from the judgment of *Kirby, J.*, entered at the 4 December 1978 Session of GASTON Superior Court.

Plaintiff instituted this action to recover under an insurance contract for loss to certain insured property resulting from fire. The evidence tended to show that a fire occurred at plaintiff's residence on 11 June 1975 and that a second fire occurred on 18 June 1975. The relevant portion of the insurance policy provided as follows:

> The insured shall give immediate written notice to this company of any loss, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, furnish a complete inventory of the destroyed, damaged, and undamaged property showing in detail quantities, costs, actual cash value and amount of loss claimed, and within sixty days after the loss unless such time is extended in writing by this company, the insured shall render to this company a proof of loss signed and sworn to by the insured
>
> ....

Plaintiff submitted a proof of loss for the first fire shortly thereafter. Defendant sent an agent to interview plaintiff and his wife but refused to accept the proof of loss because it was incomplete with regard to certain details. Defendant notified plaintiff of its refusal of the proof of loss and requested him to submit proper forms.

In September, 1975, plaintiff submitted another proof of loss on the 11 June fire and again, defendant rejected it because it failed to set forth certain particulars. No proof of loss was submitted on the second fire until March of 1976, and it, too, was rejected as incomplete.

At trial, the following issues were submitted to and answered by the jury:

1. Did the plaintiff sustain damage to his property as the result of fires which occurred on June 11, 1975 and June 18, 1975?

Answer: Yes.

2. Did the plaintiff file with the defendant insurance company a proof of loss as required by the insurance contract?

Answer: No.

3. What amount, if any, is the plaintiff entitled to recover for damage to:

(a) Real property
AMOUNT: $_____

(b) Personal property
AMOUNT: $_____

(c) Additional living expense
AMOUNT: $_____

Judgment was entered for defendant. The Court of Appeals, in an opinion by Judge Hill, Judge Parker concurring, awarded a new trial on the grounds that issue number two was erroneously submitted to the jury. Judge Martin (Harry C.) dissented, and defendant appealed pursuant to G.S. 7A-30.

Hollowell, Stott & Hollowell, by Grady B. Stott, for defendant appellant.

Jim R. Funderburk for plaintiff appellee.

BRANCH, Chief Justice.

[1] The Court of Appeals, in awarding plaintiff a new trial, held that "[t]he second issue, as it is phrased, should not have been tendered to the jury." 46 N.C. App. at 479, 265 S.E. 2d at 501. The court stated that "it is uncontroverted that proofs of loss were filed. The defendant only contends they were incomplete." *Id.* Defendant contends that the second issue was properly submitted since there was ample evidence tending to show that, while plaintiff eventually submitted forms entitled "Proofs of Loss," he failed to "file with the defendant insurance company a proof of loss *as required by the insurance contract.*" [Emphasis added.] We agree. The issue submitted to the jury was not whether a form denominated "Proof of Loss" was filed by plaintiff; rather, the issue was whether the plaintiff filed "a proof of loss *as required by the insurance contract.*" [Emphasis added.] The insurance contract required that the proof of loss be sworn to by the insured. Compliance with the requirements for filing proofs of loss is a prerequisite to recovery under the policy. *Boyd v. Insurance Co.*, 245 N.C. 503, 96 S.E. 2d 703 (1957). Plaintiff testified that he could not remember whether he submitted sworn proofs of loss. Several letters to plaintiff from defendant, admitted into evidence at trial, indicated that the proofs of loss submitted were not sworn statements and thus did not comply with the terms of the policy. Since the evidence conflicted on the issue of whether the proofs of loss filed were in accordance with the terms of the policy, the issue was one for the jury.

[2] The Court of Appeals also held that there were "sufficient facts to require the court to charge the jury under the provisions of G.S. 58-180.2." 46 N.C. App. at 479, 265 S.E. 2d at 501. The statute in question provides:

> § 58-180.2. *Bar to defense of failure to render timely proof of loss.* — In any action brought to enforce an insurance policy subject to the provisions of this Article, any party claiming benefit under the policy may reply to the pleading of any other party against whom liability is sought which asserts as a defense, the failure to render timely proof of loss as required by the terms of the policy that such failure was for good cause and that the failure to render timely proof of loss has not substantially harmed

> the party against whom liability is sought in his ability to defend. The issues raised by such reply shall be determined by the jury if jury trial has been demanded.

The trial court charged the jury:

> In connection with the timely filing within sixty days of the proof of loss, members of the jury, I instruct you that if you find by the greater weight of the evidence that the proof of loss was filed, then I further instruct you that the law of this state further provides that failure to timely file shall not preclude the plaintiff from asserting his claim unless there is a substantial prejudice done the defendant by such untimely filing. *I instruct you that under the law and evidence in this case there is no substantial injury or prejudice to the defendant by the late filing if such were done by the plaintiff.* [Emphasis added.]

Defendant contends that this instruction substantially complies with the wording of the statute. Defendant further maintains that, in any event, the instruction as given is favorable to plaintiff. We agree. The court's charge technically is erroneous, since the statute requires a showing that failure to file timely was for good cause *as well as* a showing that the failure to so file did not substantially harm the party against whom liability is sought. However, the judge in essence relieved plaintiff of the burden of showing good cause and removed the issue of timeliness from the jury's consideration by stating as a matter of law that defendant was not substantially harmed. The court's charge amounted to a peremptory instruction on the issue of timeliness, instructing the jury that, if it found that proper proofs of loss were filed, plaintiff's claim was not barred due to lack of timely filing. Such an instruction was favorable to plaintiff and is not grounds for a new trial. *Hardee v. York*, 262 N.C. 237, 136 S.E. 2d 582 (1964).

[3] Finally, the Court of Appeals held that there were "sufficient allegations in the complaint, admitted by the defendant, and evidence in the record to carry the case to the jury on the question of waiver and estoppel." 46 N.C. App. at 479, 265 S.E. 2d at 501. It is well settled that an insurer may be found to have waived a provision or condition in an insurance policy which is for its own benefit. 43 Am. Jur. 2d, "Insurance" § 1055 (1969). The filing of proofs of loss is such a provision and "is waived by

any conduct on the part of the insurer or its authorized agent inconsistent with an intention to enforce a strict compliance with the insurance contract in such regard." 44 Am. Jur. 2d, "Insurance" § 1509 (1969); *Hicks v. Insurance Co.*, 226 N.C. 614, 39 S.E. 2d 914 (1946). Various patterns of conduct and combinations of acts on the part of insurers have been found to justify a finding of waiver in a particular case.

A well-recognized situation giving rise to a justifiable claim of waiver, and one which plaintiff urges exists on the facts of this case, occurs when the insurer denies liability, on grounds not relating to the proofs, during the period prescribed by the policy for the presentation of proofs of loss. *Commercial Carving Co. v. Manhattan Fire & M. Ins. Co.*, 191 F. Supp. 753 (M.D.N.C. 1961) (applying North Carolina law); 44 Am. Jur., *supra* § 1514. In the instant case, defendant asserted, as an alternative defense to failure to submit proper proofs of loss, that plaintiff was guilty of arson. Plaintiff argues that, under the general rule above, defendant should be deemed to have waived the defense of failure to file the required proofs of loss. Defendant contends that no waiver occurred because the denial of liability on grounds of arson occurred *after* the period prescribed by the policy for the filing of the proofs. We agree.

The rationale for the general rule that denial of liability on grounds other than failure to file proper proofs of loss waives the latter defense is that the "denial of liability is equivalent to a declaration that the insurer will not pay even though proofs are furnished in accordance with the policy, and the law will not require the doing of a vain or useless thing." 44 Am. Jur., *supra*, § 1514; *Gerringer v. Insurance Co.*, 133 N.C. 407, 45 S.E. 773 (1903). Where, as here, the insurer does not deny liability during the applicable sixty-day period, it has not mislead the insured in any way, and there is no basis upon which to predicate a waiver. *Commercial Carving Co. v. Manhattan Fire & M. Ins. Co., supra.*

[4] Even so, plaintiff contends that there is evidence of other conduct on the part of defendant, which, if believed by the jury, would justify a finding of waiver. Plaintiff thus maintains that there was sufficient evidence to require the judge to submit to the jury the issue of estoppel and waiver. Defendant contends, on the other hand, that plaintiff failed to establish a waiver of the requirement of proofs of loss, since plaintiff's own evidence

indicates that defendant continually requested proofs of loss and at no time lulled plaintiff into believing the proffered proofs of loss were adequate.

The resolution of this question requires a twofold inquiry: (1) What types of conduct on the part of the insurer suffice to justify a finding of waiver; and (2) What quantum of proof is necessary to require submission of an issue to the jury?

In answer to the first inquiry, the courts have not hesitated to scrutinize the facts and circumstances of each individual case in determining whether the insurer waived the requirement of proof of loss. Generally, the waiver is not effectuated by a single act, but rather by a series of acts or a course of conduct inconsistent with an intention to enforce the requirement. *See* 44 Am. Jur. 2d, *supra*, § 1509. Included among the factors considered are whether the insurer had actual knowledge of the loss, *Union Indemnity Co. v. Gaines*, 36 Ohio App. 165, 173 N.E. 29 (1930); whether the insurer customarily sent blank forms or promised to send forms, and did not, *Standard Life & Accident Insurance Co. v. Schmaltz*, 66 Ark. 588, 53 S.W. 49 (1899); whether an agent or adjuster made representations to insured indicating that no proofs need be filed; *McCollough v. Home Ins. Co.*, 155 Cal. 659, 102 P. 814 (1909); whether the insurer continued to demand a detailed inventory, *Meekins v. Insurance Co.*, 231 N.C. 452, 57 S.E. 2d 777 (1950); whether the insurer made partial payment or otherwise indicated a recognition of liability by assurances that an adjustment would be made, *Howrey v. Star Ins. Co. of America*, 46 Wyo. 409, 28 P. 2d 477 (1934); and whether the insurer rejected proofs of loss without explicitly stating the deficiencies and the means by which they could be corrected. 44 Am. Jur. 2d, *supra* § 1519.

In response to the second inquiry, evidence is sufficient to go to the jury on an issue when the evidence is sufficient to permit, but not compel, a favorable verdict. 2 Stansbury's North Carolina Evidence § 203 (Brandis Rev. 1972). "[T]he jury may disbelieve the evidence presented, or believe the evidence but decline to draw the inferences necessary to a finding of the ultimate fact, or believe the evidence and draw the necessary inferences." 2 Stansbury's, *supra*, § 218. If the evidence is more than a scintilla, and if it reasonably tends to prove the fact in

issue, the issue must be submitted to the jury. *Howell v. Lawless*, 260 N.C. 670, 133 S.E. 2d 508 (1963).

In the instant case, plaintiff's evidence tended to show the following: He notified defendant of the fires, and defendant sent several agents to talk with plaintiff and his wife. At least one agent took a statement from plaintiff regarding the fire. One representative gave him a number of pink slips to fill out and promised to supply additional slips but never did. Plaintiff testified that,

> [An agent] gave me some pink slips but there wasn't enough and he was supposed to bring me some more. He never did bring any more to me . . . and I called Raleigh. . . . I called Mr. Russell in Raleigh and he said he would mail them, and this gentleman here said he had to be right back at my house on a certain date, and he would bring them by, and he ain't done it until this date, but I did fill them out the best I knew how. At his instructions, I filled out the pink slips.

The defendant's representative also instructed plaintiff to appraise the damaged property and, if necessary, "go to Sears Roebuck and get you a Sears Roebuck catalog and go through it — and I know it's time consuming — and appraise it according to the price in the catalog." At the agent's direction, plaintiff moved temporarily to "the Howard Johnson Motel on Highway 321." Plaintiff also testified that,

> He offered me some money and said he would give me a couple of weeks in advance and I said, "Well, I think I can make out," and he said, "Well, he didn't think it would take more than ten or twenty days."

Finally, plaintiff testified that he received several letters from defendant rejecting his proofs of loss, but "[t]hey never did tell me what was wrong."

Evidence for defendant tended only to show that it continued to reject the proofs of loss and to request proper ones. The remainder of plaintiff's evidence is uncontradicted, and, in fact, one of defendant's witnesses testified that he prepared estimates of the fire damage shortly after each fire at the request of defendant. In our view, the evidence in this case is

sufficient to permit, but not compel, a jury to find that defendant, by words or conduct, waived the requirement of proofs of loss. The defendant's evidence does not, as a matter of law, compel a contrary conclusion. *See* 2 Stansbury's *supra*, § 203. We, therefore, hold that the issue of waiver should have been submitted to the jury.

Although we are ordering a new trial in this action on other grounds, we are constrained to point out that upon retrial another issue must be submitted to the jury. In addition to the issues submitted by the trial court here, and the issue of waiver upon which our reversal is predicated, the jury should be directed, upon proper instructions, to answer the issue of whether, if they find that plaintiff's proofs of loss were deficient because not timely filed, the failure to file timely was for good cause, and whether the failure to file timely proofs resulted in substantial harm to the insurer in its ability to defend the case.

The decision of the Court of Appeals awarding plaintiff a new trial is

Modified and Affirmed.

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

STATE OF NORTH CAROLINA v. JOHN W. CUMMINGS AND WILLIE MAE RAY CUMMINGS

No. 54

(Filed 4 November 1980)

1. Homicide § 30.3– involuntary manslaughter – assault as one proximate cause of death

The State's evidence was sufficient to show that assault by defendants was one of the proximate causes of the victim's death and to support defendants' conviction of involuntary manslaughter where it tended to show that the immediate cause of the victim's death was obstruction of the airway system of the lungs by vomitus which he had inhaled into the lungs; the victim was highly intoxicated at the time defendants assaulted him and his intoxication affected his ability to expel vomitus from his mouth; his gag reflexes were greatly inhibited, if not inoperative, by reason of his intoxication, and he was more likely to become strangled by the inhalation of his

vomitus when lying on his back in a supine position; prior to the assault by defendants, the victim was in an upright position, able to run and move about freely, and was not vomiting before being struck in the stomach and on the head by defendants; when defendants struck him with a board and broken bottle about the head and body, knocking him to the sidewalk, the victim then lay flat on his back in an unconscious position; defendants made no effort to aid him but left the scene; and when an officer arrived shortly thereafter, the victim was still on his back and was taking his last dying breaths.

2. **Homicide § 27.2– instructions – involuntary manslaughter – unlawful act – criminal negligence – no expression of opinion**

The trial court's definitions of "an unlawful act" and "criminal negligence" and its application of those definitions to the offense of involuntary manslaughter did not amount to an expression of opinion on the evidence or invade the province of the jury.

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

DEFENDANTS appeal from decision of the Court of Appeals, 46 N.C. App. 680, 265 S.E. 2d 923 (1980), upholding judgment of *Braswell, J.*, at the 9 July 1979 Criminal Session, CUMBERLAND Superior Court.

Defendants were charged in separate bills of indictment, proper in form, with voluntary manslaughter in violation of G.S. 14-18.

The State's evidence tends to show that on 17 September 1978, defendants were chasing one Oscar M. Melvin. Melvin was running backwards with his hands up in the air, and defendant John Cummings had a thick board in his hand and was striking at Melvin with it. At the same time, Willie Mae Ray Cummings was carrying a broken bottle and striking at Melvin with it. John Cummings swung the board and struck Melvin in the stomach; Willie Mae tried to stab him. As Melvin fell forward after being struck in the stomach, John Cummings hit him with the board again and Melvin spun around, falling to the sidewalk. Other people came by the scene carrying sticks but did not strike Melvin. In a few seconds, they all ran away, leaving Melvin flat on his back on the sidewalk. He was found in that position when the officers arrived. A small puddle of blood was around his head. Melvin took a few gasping breaths and died.

Dr. Leach, an expert pathologist, performed an autopsy on 18 September 1978 on Melvin whom he found to be a middle-

aged man, five feet eight inches tall and weighing 180 pounds. A number of wounds were found on his body including a cross-shaped laceration of the skull four inches above the left eyebrow, a deep cut to the bone on his left chin, a cut in the lower neck above the breastbone, a shallow cut below his left collarbone and numerous scratches. Internally, Melvin's lungs were congested and the air passage and bronchial system were filled with material identical to that later found in Melvin's stomach. This indicated to Dr. Leach that the victim had sucked this material into his lungs. In the doctor's opinion, the immediate cause of death was obstruction of Melvin's airway by vomit which he had sucked into the airway system of his lungs. He drowned because of this obstruction.

Dr. Leach found that Melvin had a blood alcohol content of .35 percent, which would cause a person to be unconscious. The high blood alcohol content would affect his gag reflexes and would have caused him to suck vomit into his throat. This is more common when a person is lying in a prone position on his back.

No knife or other weapon was found on Melvin or near his body. The officers found at that spot only a broken one by four piece of lumber.

Defendants testified in their own behalf and offered other evidence which tends to show the following. Defendants and others were at "Rick's house" and all were drinking wine. Willie Mae Cummings was at the piano with a glass of wine when Oscar Melvin made some sexual comments to her. Melvin went to the bathroom, returned and again made sexual remarks to Willie Mae. Willie Mae then went to the front porch and told Rick what had happened. Defendant John Cummings took up the argument with Melvin. Melvin had a knife in his hand and was threatening to cut John so John got a board to defend himself. He and Melvin chased each other around the yard, John with the board and Melvin with a knife. Meanwhile, Willie Mae picked up a piece of broken bottle. The running and chasing eventually led them to Horne's Grocery where defendant John Cummings hit Melvin with the board, Willie Mae swung at him with the bottle and Melvin went down. Both defendants then left and returned to "Rick's house."

The jury convicted each defendant of involuntary manslaughter and each was sentenced to five years in prison. Both defendants appealed, and the Court of Appeals found no error, with Judge Clark dissenting. Defendants thereupon appealed to the Supreme Court as of right pursuant to G.S. 7A-30(2), assigning errors discussed in the opinion.

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

James R. Parish, Assistant Public Defender, for defendant appellants.

HUSKINS, Justice.

Failure of the court to nonsuit constitutes each defendant's first assignment of error.

A motion to nonsuit requires the trial court to consider the evidence in its light most favorable to the State, take it as true and give the State the benefit of every reasonable inference to be drawn therefrom. *State v. Goines*, 273 N.C. 509, 160 S.E. 2d 469 (1968). Whether the evidence is direct, circumstantial, or both, if there is evidence from which a jury could find that the offense charged has been committed and that defendant committed it, the motion to nonsuit should be overruled. *State v. Haywood*, 295 N.C. 709, 249 S.E. 2d 429 (1978); *State v. McKinney*, 288 N.C. 113, 215 S.E. 2d 578 (1975).

Defendants' motions for nonsuit are grounded upon the contention that the evidence is insufficient to establish a causal relation between the victim's death and the assaults allegedly made upon him by defendants. It is argued, therefore, that the motions for nonsuit should have been allowed. For reasons which follow, we hold defendants' position is unsound.

To warrant a conviction in this case, the State must establish that the acts of the defendants were a proximate cause of the death. "[T]he act of the accused need not be the immediate cause of death. He is legally accountable if the direct cause is the natural result of the criminal act." *State v. Minton*, 234 N.C. 716, 722, 68 S.E. 2d 844, 848 (1952); *State v. Everett*, 194 N.C. 442, 140 S.E. 22 (1927). There may be more than one proximate cause and criminal responsibility arises when the act complained of caused or directly contributed to the death. *State v. Luther*, 285

N.C. 570, 206 S.E. 2d 238 (1974); *State v. Horner*, 248 N.C. 342, 103 S.E. 2d 694 (1958).

[1] When the State's evidence in this case is tested by the foregoing rules, it suffices to show beyond a reasonable doubt that one of the proximate causes of the death of Oscar Melvin is attributable to the assaults made upon him by defendants. The State's evidence is sufficient to support the following findings: The victim Oscar Melvin was highly intoxicated at the time defendants assaulted him and his intoxication affected his ability to expel vomitus from his mouth; his gag reflexes were greatly inhibited, if not inoperative, by reason of his intoxication; and he was more likely to become strangled by the inhalation of his vomit when lying on his back in a prone position. The jury could further find from the State's evidence that prior to the assault by defendants, the victim was in an upright position, able to run and move about freely, and was not vomiting prior to being struck in the stomach and on the head by defendants. When defendants struck him with a board and a broken bottle about the head and body, knocking him to the sidewalk, the victim then lay flat on his back in an unconscious condition. Defendants made no effort to aid him but left the scene and returned to "Rick's house." Shortly thereafter, when Officer Burgess arrived, Melvin was still on his back, his eyes glassed over, taking his last dying breaths. These permissible findings are supported by the evidence. It necessarily follows, therefore, that the evidence was sufficient to carry to the jury the question whether the wounds inflicted upon the deceased by the defendants were a proximate cause of the victim's death. This is true because the acts of the defendants need not be the immediate cause of the death. They are legally accountable if the immediate cause of death is the natural result of their criminal acts. *State v. Knight*, 247 N.C. 754, 102 S.E. 2d 259 (1958); *State v. Minton, supra. Compare State v. Hargett*, 255 N.C. 412, 121 S.E. 2d 589 (1961); in which the evidence is markedly analogous to the evidence before us in this case.

We hold the evidence is sufficient under the laws of North Carolina for a rational jury to find defendants guilty of involuntary manslaughter beyond a reasonable doubt. *Compare State v. Jones*, 290 N.C. 292, 225 S.E. 2d 549 (1976), in which it was held that a victim's death immediately resulting from improper or unskilled treatment by attending physicians was no defense to

a charge of homicide against one who had inflicted a dangerous wound which necessitated the medical treatment, since neither negligent treatment nor neglect of an injury excuses a wrongdoer unless the treatment or neglect is the *sole cause* of death. Defendants' first assignment of error is overruled.

[2] Defendants also assign as error the trial court's definition of "an unlawful act" and of "criminal negligence" and the application of those definitions to the lesser included offense of involuntary manslaughter. This constitutes their final assignment of error.

The record reveals that the trial judge defined "involuntary manslaughter" to be "the unintentional killing of a human being by an unlawful act and not amounting to a felony or by an act done in a criminally negligent way." This definition of involuntary manslaughter is taken from Pattern Jury Instructions for Criminal Cases in North Carolina, Criminal 206.50 (Replacement April 1973), and is a correct definition of that crime. *State v. Wrenn,* 279 N.C. 676, 185 S.E. 2d 129 (1971). Defendants do not challenge this definition.

The court then charged:

> For you to find the defendant guilty of involuntary manslaughter, the State must prove two things beyond a reasonable doubt: first that the defendant whose case you then have under consideration acted unlawfully or in a criminally negligent way. (It is an unlawful act for one person to strike another person in the chin and jaw and head with a board when not in his own self-defense or in the defense of another.) I instruct you that criminal negligence is more than mere carelessness. (A defendant's act was criminally negligent if, judging by reasonable foresight, it was done with such gross recklessness or carelessness as to amount to a heedless indifference to the safety and rights of others. I instruct you that it is an act of criminal negligence to be in a position to see and observe the condition of intoxication of a person and having reasonable grounds to believe that a person is intoxicated to strike him with a board and to cause him to fall prone upon the ground; that such an act is an act of criminal negligence.)

Defendants challenge that part of the foregoing charge enclosed in parentheses on the ground that it amounts to an expression of opinion by the judge and invades the province of the jury.

The court then charged in its final mandate to the jury that if it found from the evidence and beyond a reasonable doubt that on 17 September 1978 each defendant, acting either alone or in concert with the other, did unlawfully strike Oscar M. Melvin over the head with a piece of board approximately one by four inches in width and thickness and about five to six feet in length, or found that the board was used in a criminally negligent way to strike the victim under circumstances such that defendants should have realized the victim was intoxicated and not able to help himself if he were knocked to the ground in a prone position, and should further find that the acts and conduct of defendants proximately caused the victim's death, it would be the duty of the jury to return a verdict of guilty of involuntary manslaughter. Should the jury not so find or if it had a reasonable doubt as to any one or more of those things, then the jury was told to return a verdict of not guilty. Defendants contend this portion of the charge was erroneous.

The judge then charged the jury that regardless of how it found as to the male defendant it should separately consider the same charge as it related to the female defendant. The jury was then instructed that if it found from the evidence and beyond a reasonable doubt that on the date in question either defendant, acting alone or in concert with the other, struck the victim over the head with a piece of board one to four inches thick and five to six feet in length; or that either defendant, acting alone or in concert with the other, did in a criminally negligent way strike the victim in the chin and head with the board as described in the evidence and that the blows caused the victim to fall in a prone position on the sidewalk and that defendants should have reasonably foreseen that the victim was intoxicated and would be unable to take care of himself, and further found that such act thereby proximately caused the victim's death, it would be the duty of the jury to return a verdict of involuntary manslaughter. Should the jury fail to so find or if it had reasonable doubt as to any of the enumerated prerequisites, the jury was told that it should return a verdict

of not guilty. Defendants challenge the foregoing instructions and assign same as error.

In our opinion, reversible error does not appear from the challenged portions of the charge. The challenged portions do not contain an improper expression of opinion by the trial judge. The assignment of error based thereon is overruled.

Although the challenged portions are poorly organized and not recommended as a model to be followed, when those portions are considered in context with the charge as a whole, prejudicial error does not appear. A charge will be construed contextually, and isolated portions will not be held prejudicial when the charge as a whole is correct. *State v. Cook*, 263 N.C. 730, 140 S.E. 2d 305 (1965); *State v. Goldberg*, 261 N.C. 181, 134 S.E. 2d 334 (1964). The charge of the court must be read as a whole, and if it presents the law fairly and clearly to the jury, the fact that some expressions, standing alone, might be considered erroneous will afford no ground for reversal. *State v. Hall*, 267 N.C. 90, 147 S.E. 2d 548 (1966). Insubstantial technical errors which could not have affected the result will not be held prejudicial. "It is not sufficient to show that a critical examination of the judge's words, detached from the context and the incidents of the trial, are capable of an interpretation from which an expression of opinion may be inferred." *State v. Gatling*, 275 N.C. 625, 633, 170 S.E. 2d 593, 598 (1969); *see also State v. Alexander*, 279 N.C. 527, 184 S.E. 2d 274 (1971). Furthermore, we are satisfied that had the challenged portions of the charge been omitted and a perfect charge given in lieu thereof, the result of the trial would have been the same. There is no reason to believe that another trial would produce a different result.

We conclude that defendants had a fair trial free from prejudicial error. The decision of the Court of Appeals upholding the verdicts and judgments is

Affirmed.

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

State v. Lane

STATE OF NORTH CAROLINA v. ADOLPHUS LANE

No. 43

(Filed 4 November 1980)

Constitutional Law § 76; Criminal Law § 48.1– in-custody silence about alibi – cross-examination at trial – prejudicial error

In a prosecution of defendant for possession and sale of heroin where defendant was arrested and taken to a police station, indictments were read to him, and defendant interrupted the reading to state that he had not sold heroin to the person named in the indictments, defendant's failure to disclose his alibi defense to the police officers then or to some other person prior to trial did not amount to an inconsistent statement in light of his in-court testimony relative to an alibi, and the district attorney's cross-examination of defendant concerning failure to disclose his alibi was sufficiently prejudicial to warrant a new trial, since the cross-examination attacked defendant's exercise of his right against self-incrimination in such a manner as to leave a strong inference with the jury that defendant's alibi defense was an after-the-fact creation, and the cross-examination concerning defendant's failure to relate his defense of alibi prior to trial probably substantially contributed to his conviction.

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

APPEAL by the State pursuant to G.S. 7A-30(2) from decision of the Court of Appeals, 46 N.C. App. 501, 265 S.E. 2d 493, granting a new trial upon defendant's appeal from *Hairston, J.*, at the 16 July 1979 Session of FORSYTH Superior Court.

Defendant was charged in bills of indictment issued on 23 April 1979 with (1) possession with intent to sell heroin and (2) the sale of heroin.

At trial the State offered evidence tending to show that Lee Walker, a Greensboro police officer, acting as an undercover agent went to a lounge in Winston-Salem at about 11:00 p.m. on the night of 4 April 1979 where he purchased $50.00 worth of heroin from defendant. Defendant was arrested on 25 April 1979 and transported to the Winston-Salem Police Station where Detective Gary A. Lloyd began reading the indictments to defendant. Defendant interrupted the reading of the indictments and stated, "Hell, I sold heroin before, but I didn't sell heroin to this person." At that point, defendant was not being interrogated and had not been given his *Miranda* warnings. He made no other statements to the officers at that time.

Defendant testified that on 3 April 1979 at about 5:00 in the afternoon he accompanied his employer to Charlotte in order to attend an automobile auction. They returned to High Point at about 11:30 p.m. and shortly thereafter left for Darlington, South Carolina. They left Darlington on 5 April 1979 and arrived in High Point at about 11:00 a.m. on that day. His employer gave testimony which corroborated defendant's alibi.

On cross-examination the Assistant District Attorney was permitted over defendant's objections to ask defendant whether he had previously told the police officers, any of the district attorneys or anyone else about the alibi to which he testified at trial.

The jury returned verdicts of guilty on both charges. Defendant appealed from a judgment imposing consecutive prison sentences of nine to ten years in each case. The Court of Appeals ordered a new trial in a decision written by Judge Hill and concurred in by Judge Robert M. Martin. Judge Webb dissented. The cause is now before us as a matter of right pursuant to G.S. 7A-30(2).

Rufus L. Edmisten, Attorney General, by William F. O'Connell, Special Deputy Attorney General, Robert R. Reilly, Assistant Attorney General, and Reginald L. Watkins, Associate Attorney, for the State.

Alexander, Hinshaw & Schiro, by Charles J. Alexander, II, for defendant appellant.

BRANCH, Chief Justice.

The single question presented by this appeal is whether defendant was prejudicially deprived of his constitutional rights when the court permitted the district attorney to cross-examine him concerning his failure to disclose his alibi at the time he made a statement to the police officers or at any time before the trial.

Defendant relies heavily upon the case of *Doyle v. Ohio*, 426 U.S. 610, 49 L. Ed. 2d 91, 96 S. Ct. 2240 (1976). In *Doyle* the two defendants were arrested and charged with selling marijuana. They were duly given their *Miranda* warnings. At trial the defendants for the first time related that they were "framed" by narcotics agents and over objections were cross-

examined as to their post-arrest silence concerning the "frame." The defendants were convicted and appealed, assigning as error, *inter alia*, the prosecutor's cross-examination concerning their post-arrest silence. The United States Supreme Court held that the use for impeachment purposes of defendants' silence at the time of arrest and after they had received the *Miranda* warnings violated their rights under the Due Process Clause. The Court held that it was fundamentally unfair to impeach defendants concerning their post-arrest silence after they had been impliedly assured through the *Miranda* warnings that their silence would not result in any penalty.

We note that the warnings mandated by *Miranda* are directed to whether statements made by an accused while in custody and while being subjected to custodial interrogation by police officers are voluntarily made so as to be admissible into evidence. *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602, 10 A.L.R. 3d 974 (1966); *State v. Sykes*, 285 N.C. 202, 203 S.E. 2d 849 (1974); *State v. Fletcher*, 279 N.C. 85, 181 S.E. 2d 405 (1971). Here the only statement made by defendant was volunteered, and its admissibility is not before us. In the context of this case, we attach little significance to the fact that *Miranda* warnings were not given. With or without such warnings defendant's exercise of his right to remain silent was guaranteed by Article 1, Section 23, of the North Carolina Constitution and the fifth as incorporated by the fourteenth amendment to the United States Constitution. The due process reasoning upon which decision in *Doyle* mainly rests does not arise in this case since defendant had not been given the *Miranda* warnings at the time the indictments were being read to him. Thus, any comment upon the exercise of this right, nothing else appearing, was impermissible. *State v. Castor*, 285 N.C. 286, 204 S.E. 2d 848 (1974).

We are cognizant of the recent case of *Jenkins v. Anderson*, _____U.S._____, 65 L.Ed. 2d 86, 100 S.Ct. 2124 (1980), where the defendant in a first-degree murder case testified at trial that he acted in self-defense. On cross-examination the prosecutor questioned the defendant about the fact that he never told anyone about that defense over a period of about thirty days prior to his arrest. The defendant was convicted and upon his appeal before the Supreme Court of the United States that Court held that the defendant's fifth amendment rights were

not violated by the use of his *prearrest* silence to impeach his credibility. *Jenkins v. Anderson, supra,* is distinguishable from the case *sub judice* in that here defendant was under arrest at the crucial time and thus within the ambit of fifth amendment protections. Even so, there remains the question of whether the challenged cross-examination was permissible for the purpose of impeachment by showing a prior inconsistent statement.

In *Harris v. New York,* 401 U.S. 222, 28 L.Ed. 2d 1, 91 S.Ct. 643 (1971), the United States Supreme Court held that the trial judge did not commit error by allowing the prosecutor to introduce into evidence prior inconsistent statements which were made by the accused without benefit of the *Miranda* warnings for the purpose of impeaching the defendant's credibility. The Court, in so holding, reasoned that the *Miranda* safeguards could not be perverted into a license to use perjury as a defense without being confronted with his prior inconsistent utterances.

Thus, in the case before us, we are squarely faced with the question of whether defendant's failure to disclose his alibi defense to the police officers or to some other person amounts to an inconsistent statement in light of his in-court testimony relative to an alibi. In support of its position that defendant's failure to relate his alibi testimony to someone prior to trial amounted to a prior inconsistent statement, the State points to a quote in *Wigmore on Evidence,* Section 1040 (Chadbourn Rev. 1970) from *Foster v. Worthing,* 146 Mass. 607, 16 N.E. 572 (1888) which states:

> It is not necessary, in order to make the letter competent, that there should be a contradiction in plain terms. It is enough if the letter, taken as a whole, either by what it says or *by what it omits to say,* affords some presumption that the fact was different from his testimony; and in determining this question, much must be left to the discretion of the presiding judge. [Emphasis added.]

The State also relies upon *State v. Mack,* 282 N.C. 334, 193 S.E. 2d 71 (1975). There the witness testified that she had heard deceased threaten the defendant but failed to state that she had told a police officer that she had also heard defendant threaten deceased. The trial judge allowed the police officer to testify to this omission as a prior inconsistent statement. In

holding this to be proper, this Court speaking through Justice Huskins stated:

> Prior statements of a witness which are inconsistent with his present testimony are not admissible as substantive evidence because of their hearsay nature. *Hubbard v. R.R.*, 203 N.C. 675, 166 S.E. 802 (1932); *State v. Neville*, 51 N.C. 423 (1859). Even so, such prior inconsistent statements are admissible for the purpose of impeachment. . . .
>
> ". . . [I]f the former statement fails to mention a material circumstance presently testified to, *which it would have been natural to mention in the prior statement*, the prior statement is sufficiently inconsistent," . . . . [Citations omitted.] [Emphasis added.]

Id. at 339-40, 193 S.E. 2d at 75.

The crux of this case is whether it would have been natural for defendant to have mentioned his alibi defense at the time he voluntarily stated that he "did not sell heroin to this person [Lee Walker]." We answer the question in the negative. In our opinion, the alibi defense was not inconsistent with defendant's statement that he did not sell heroin to Officer Lee Walker. At the time the indictment was being read to defendant on 25 April 1979, he was under arrest and was in custody in the Winston-Salem Police Department. At that point, with or without the *Miranda* warnings, his constitutional rights guaranteed by the fifth amendment were viable. The indictment charged that on 4 April 1979, some twenty-one days prior to the date of the reading of the indictment, defendant sold heroin to police officer Walker. It was natural for defendant to know whether he had sold drugs to a named person and spontaneously to deny having done so. In our opinion it would not be natural for a person, particularly under the circumstances present in this case, to know where he was on a given date some twenty-one days prior thereto. It is a matter of common knowledge that the average person cannot, *eo instanti*, remember where he was on a given date one, two or three weeks in the past without some investigation and substantiation from sources other than his ability of instant recall.

Under the particular circumstances of this case, it is our opinion that the failure of defendant to state his alibi defense at

the time the indictment was being read to him or at any time prior to trial did not amount to a prior inconsistent statement.

Finally, we must decide whether the challenged cross-examination of defendant was sufficiently prejudicial to warrant a new trial. We considered this question in *State v. Taylor*, 280 N.C. 273, 185 S.E. 2d 677 (1972), and there stated the pertinent rule as follows:

> Every violation of a constitutional right is not prejudicial. Some constitutional errors are deemed harmless in the setting of a particular case, not requiring the automatic reversal of a conviction, where the appellate court can declare a belief that it was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824, 24 A.L.R. 3d 1065 (1967); *Harrington v. California*, 395 U.S. 250, 23 L.Ed. 2d 284, 89 S.Ct. 1726 (1969). Unless there is a reasonable possibility that the evidence complained of might have contributed to the conviction, its admission is harmless. *Fahy v. Connecticut*, 375 U.S. 85, 11 L.Ed. 2d 171, 84 S.Ct. 229 (1963).

The test is not whether there was sufficient evidence to support the verdict. The correct test is whether in the setting of a particular case the court can declare a belief that the error was harmless beyond a reasonable doubt, that is, that there is no reasonable possibility that the violation might have contributed to the conviction. *Fahy v. Connecticut, supra; State v. Castor, supra; State v. Taylor, supra.*

Here it is clear that there was a violation of defendant's constitutional rights. The cross-examination attacked defendant's exercise of his right against self-incrimination in such a manner as to leave a strong inference with the jury that defendant's defense of alibi was an after-the-fact creation. The defense of alibi was crucial to defendant's case, and it seems probable that the cross-examination concerning his failure to relate his defense of alibi prior to trial substantially contributed to his conviction. Since we cannot declare beyond a reasonable doubt that there was no reasonable possibility that this evidence might have contributed to defendant's conviction, we hold that it was sufficiently prejudicial to warrant a new trial.

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. EDWARD ALLEN SEE A/K/A DAVID PENNY

No. 56

(Filed 4 November 1980)

1. **Criminal Law § 42.4– display of pistol before jury – identification – use for illustrative purposes**

The trial court did not err in permitting the district attorney to display a .22 caliber pistol before the jury where two of the State's witnesses testified that the pistol was similar to the pistol used by defendant in committing the crimes charged, and the court instructed the jury that the pistol was not substantive evidence but could be considered only for the purpose of illustrating the testimony of the two State's witnesses.

2. **Criminal Law § 71; Rape § 4– testimony that defendant "raped me" – shorthand statement of fact**

Testimony by the prosecutrix that defendant "raped me" did not invade the province of the jury since (1) the court sustained an objection to the testimony and (2) the testimony was competent as a shorthand statement of fact.

3. **Criminal Law § 57; Robbery § 3.2– hobby of reloading firearms – target shooting – foundation for testimony concerning robber's pistol**

A robbery victim's testimony that he had the hobby of reloading firearms and that he did target shooting on occasion was competent to lay a foundation for his subsequent testimony describing the characteristics of the pistol used by the robber and his testimony that a State's exhibit was similar to the pistol used by the robber.

4. **Criminal Law § 34.4; Rape § 4.1– previous kidnapping by defendant – statements to victim – overcoming victim's will**

Testimony by a kidnapping and rape victim that defendant told her that he had previously kidnapped another girl was competent to show that the victim's will was overcome by her fears for her safety.

5. **Criminal Law § 96– allowance of objection and motion to strike – no instruction to jury to disregard – absence of request**

The trial court's failure to instruct the jury to disregard certain testi-

mony after sustaining defendant's objection thereto and allowing his motion to strike was not error where defendant made no request for such an instruction.

6. **Criminal Law § 87.2– rape victim – leading questions**

The trial court did not err in permitting the district attorney to ask a rape victim a leading question as to why she consented to engage in particular acts with defendant since it is within the sound discretion of the trial judge to allow the use of leading questions on direct examination, and the exercise of this discretion should not be disturbed when the testimony relates to matters of a delicate nature such as sexual conduct.

7. **Criminal Law § 15.1– denial of change of venue**

The trial court did not err in the denial of defendant's *pro se* motion for a change of venue where defendant failed to show that he could not obtain a fair and impartial trial in the county of venue. G.S. 15A-957.

8. **Criminal Law § 29.1– denial of motion for psychiatric examination**

The trial court did not abuse its discretion in the denial of defendant's *pro se* motion for a psychiatric examination. G.S. 15A-1002(b).

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

APPEAL by defendant from *Britt, J.*, 28 January 1980 Special Session, ROBESON Superior Court.

Upon pleas of not guilty, defendant was tried on bills of indictment charging him with (1) rape, (2) kidnapping, (3) armed robbery, and (4) felonious larceny. Evidence presented by the state tended to show:

At approximately 11:00 p.m. on 16 October 1979 defendant, wearing a toboggan which covered his head and face and carrying a small caliber pistol in his hand, entered the McDonald's Restaurant on Roberts Avenue (Highway 211) in the City of Lumberton, North Carolina. After ordering all eight employees of the establishment into a mop closet, he took a set of car keys from Bobby Hammonds, an employee of the restaurant. Thereupon, he orderd Carol Jane Douglas to leave the premises with him. With defendant driving, he and Miss Douglas left in a Mercury automobile which belonged to Hammonds' wife which had been parked at the restaurant. A short while later, a McDonald's employee called police.

After driving the Mercury two or three miles north of Lumberton on Highway 211, defendant turned off to the right onto a dirt road which led into a wooded area. He stopped the car and forced Miss Douglas to have sexual intercourse with him twice.

Thereafter, defendant drove the Mercury to another section of Lumberton where he was seen by police. After an ensuing chase, defendant abandoned the stolen car and Miss Douglas on a dead-end road. Defendant eluded arrest and Miss Douglas was taken to a hospital. After being arrested in Texas, defendant voluntarily returned to North Carolina.

Defendant offered no evidence.

The jury found him guilty of armed robbery, kidnapping, second-degree rape and felonious larceny. The court entered judgments imposing life sentences in the kidnapping and rape cases, and prison sentences of ten years and five years in the armed robbery and larceny cases, respectively. Defendant appealed and we allowed his motions to bypass the Court of Appeals in the armed robbery and larceny cases.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General Isham B. Hudson, Jr., for the state.

Robert D. Jacobson for defendant-appellant.

BRITT, Justice.

[1] Defendant first contends that the trial court prejudicially erred by allowing the assistant district attorney to display a .22 caliber pistol before the jury. Two of the state's witnesses testified that the gun which was displayed was similar to the gun which allegedly had been used by defendant on the night the crimes in question were committed. There is no merit in this contention.

Mr. Bayne Prevatte, assistant manager of the McDonald's Restaurant, and Mr. Hammonds were both present when defendant purportedly entered the restaurant and brandished a small revolver. During the direct examination of Mr. Prevatte, the assistant district attorney presented him with a .22 caliber pistol which had been marked as state's Exhibit 1. The gun was also shown to Mr. Hammonds. Both witnesses testified that the gun which was exhibited to them was similar to the gun which their assailant had employed on the evening of 16 October 1979. At no time did the state make a formal tender of the exhibit. During his charge, the trial judge instructed the jury that the exhibit was not substantive evidence but that it

could be considered by them as illustrative of the testimony of Mr. Prevatte and Mr. Hammonds.

In their testimony, both witnesses fully described the kind of weapon that had been employed in their presence at the restaurant by the robber. Both men testified that state's Exhibit 1 was similar to the gun they had seen on the evening of 16 October 1979. It is an established principle of the law of evidence that a model of a place or a person or an object may be employed to illustrate the testimony of a witness so as to make it more intelligible to the court and to the jury. *Britt v. Carolina N.R.R.*, 148 N.C. 37, 61 S.E. 601 (1908); *see* 1 Stansbury's North Carolina Evidence § 34 (Brandis Rev. 1973); *compare* McCormick's Handbook on the Law of Evidence § 213 (2d ed. 1972). Furthermore, we are unable to perceive there to have been prejudice to defendant in the exhibition of the gun during the testimony of Mr. Prevatte because Mr. Hammonds was allowed to testify that the exhibit in question was about the same size as the gun he had seen in the possession of defendant at the restaurant. Defendant made no objection to that testimony. Such an absence waives the benefit of his prior objection during the testimony of Mr. Prevatte. *E.g.*, *State v. Hunter*, 290 N.C. 556, 227 S.E. 2d 535 (1976), *cert. denied*, 429 U.S. 1093 (1977).

[2] Nor was it error for the trial court to allow Miss Douglas to testify that defendant "raped me" and in permitting Detective Franklin Lovette of the Lumberton Police Department to testify that Miss Douglas had told him that defendant had "raped her." Defendant argues that allowing this testimony to be received into evidence invaded the province of the jury. We disagree.

The record reveals that when Miss Douglas testified that defendant raped her, defendant objected and moved to strike her testimony in that regard. The trial judge sustained the objection but did not instruct the jury not to consider the answer of the witness in their deliberations. The failure of the court to so instruct was not error in that defendant failed to request the appropriate instruction. *State v. Willard*, 293 N.C. 394, 238 S.E. 2d 509 (1977). Even so, had there been a proper request for instructions, defendant cannot complain about the testimony of Miss Douglas as it was competent as a shorthand

statement of fact. *State v. Sneeden*, 274 N.C. 498, 164 S.E. 2d 190 (1968).

As to the testimony of Detective Lovette, he was merely relating what Miss Douglas had told him in an interview he conducted with her on the afternoon of 22 October 1979. The court instructed the jury at the time the testimony was given that it was to be received by them only for the purpose of corroborating the earlier testimony of Miss Douglas. It was competent for this purpose in that it embodied a prior consistent statement of the prosecutrix. *E.g.*, *State v. Medley*, 295 N.C. 75, 243 S.E. 2d 374 (1978).

Defendant next contends that the trial court erred in admitting what he alleges was irrelevant, immaterial and incompetent evidence. This contention is without merit.

[3] Defendant initially directs the attention of this court to the testimony of Mr. Prevatte to the effect that he had the hobby of reloading firearms and that he did some target shooting on occasion. During his testimony, the state elicited evidence from the witness which served to describe the gun which had been employed during the incident at the restaurant. The testimony of Mr. Prevatte concerning his hobby was competent to enable the state to lay an adequate foundation for his subsequent testimony concerning the characteristics of state's Exhibit 1 and the similarity which it bore to the weapon defendant is alleged to have used during the robbery at the McDonald's restaurant.

[4] Nor was it error for the trial court to allow Miss Douglas to testify that defendant told her that he had previously kidnapped another girl. An essential element of the crime of rape is that it is committed against the will of the victim. *State v. Taylor*, 301 N.C. 164, 270 S.E. 2d 409 (1980). Since subjugation of Miss Douglas' will is a material fact in issue, defendant's statement tends to show that her will had been overcome by her fears for her safety. *State v. Taylor, supra.*

[5] Defendant further contends that the trial court erred in allowing Detective Lovette to testify that at approximately 2:15 a.m. on 17 October 1979 (some two hours after the alleged offenses had been committed) he saw Miss Douglas lying on an examination table at Southeastern General Hospital and that

she "appeared to be very emotional, upset." The record clearly indicates that defendant's objection was sustained and that his motion to strike was allowed. There is no indication in the record that defendant requested an instruction to the jury that it disregard the testimony. Therefore, there is no basis for his complaint against this evidence. *State v. Willard, supra.*

[6] Similarly there is no merit in defendant's contention that the trial court erred in permitting the district attorney to ask Miss Douglas a leading question as to why she had submitted to engage in particular acts with defendant. Over defendant's objection, the court permitted her to testify that she had relented because she felt that she had no choice in the matter. It is the general rule in this jurisdiction that it is within the sound discretion of the trial judge to allow the use of leading questions on direct examination. *See generally* 1 Stansbury's North Carolina Evidence § 31 (Brandis Rev. 1973). The exercise of this discretion ought not to be disturbed when the testimony relates to matters of a delicate nature such as sexual conduct. *See State v. Greene,* 285 N.C. 482, 206 S.E. 2d 229 (1974). We perceive no abuse of discretion.

[7] Defendant contends next that the trial court committed prejudicial error in denying his *pro se* motions for a change of venue and for a psychiatric examination. This contention is without merit.

G.S. § 15A-957 provides that "if, upon motion of the defendant, the court determines that there exists in the county in which the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial, the court must either: (1) [t]ransfer the proceeding to another county in the judicial district or to another county in an adjoining judicial district, or (2) [o]rder a special venire under the terms of G.S. 15A-958." We have held that the burden of showing "so great a prejudice against the defendant that he cannot obtain a fair and impartial trial" falls on the defendant. *State v. Boykin,* 291 N.C. 264, 229 S.E. 2d 914 (1976). A motion for change of venue is addressed to the sound discretion of the trial judge, and abuse of discretion must be shown before there is any error. *State v. Boykin, supra.* Defendant did not show that he could not obtain a fair and impartial trial in Robeson County, and we perceive no abuse of discretion on the part of the trial judge in denying his motion.

[8] With respect to defendant's motion for a psychiatric examination, this court has held 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 (1974); *see generally* G.S. § 15A-1002(b). Defendant failed to show in this case that he was entitled to a psychiatric examination and the trial court did not abuse its discretion in denying the motion.

There is no merit in defendant's contention that the trial court erred in denying his motion for a mistrial. This motion was based on the assertion that the court erred in permitting Exhibit 1, a pistol, to be displayed in the presence of the jury. Having held above that the court did not err in permitting the pistol to be displayed in the presence of the jury, it follows that the court did not err in denying the motion for mistrial.

Defendant's contention that the trial court erred in denying his motions for directed verdict has no merit. The evidence against defendant on all charges was substantial and unequivocal.

We have considered defendant's other contentions and conclude that they too are without merit. We hold that defendant received a fair trial, free from prejudicial error.

No error.

Justice BROCK took no part in the consideration or determination of this case.

STATE OF NORTH CAROLINA v. JAMES BENJAMIN DAVIS, JR.

No. 26

(Filed 4 November 1980)

1. Robbery § 4.5– armed robbery – guilt as aider and abettor

The State's evidence was sufficient for the jury on the issue of defendant's guilt of armed robbery where it tended to show that the clerk of a convenience store was robbed by a black male who pointed a .38 caliber blue steel pistol at him and demanded money; the clerk gave the robber approximately $200, some of which was in change, including loose pennies in a bag;

about the time of the robbery, a witness saw a white 1975 Lincoln Continental parked near the convenience store, saw a black male get out of the car and walk toward the store, and saw a second person sitting under the car's steering wheel; some two hours after the robbery, officers observed a white 1975 Lincoln Continental parked in a secluded area approximately a mile from the store; defendant and the person who robbed the store were asleep in the car, defendant being in the driver's seat and the other person being in the passenger seat; a loaded .38 caliber blue steel pistol was on the floor of the car at defendant's feet and a .22 caliber pistol was on the floor under the other person's legs; a paper bag containing $2.53 in pennies and $74 in currency was found on the front seat, $80 in currency was found on defendant's person, and $37 in one-dollar bills was found strewn over the front seat; and defendant was the registered owner of the Continental.

2. **Criminal Law § 9– principals in the first or second degree**

A person who actually commits an offense or who is present when another commits the offense and does some act in furtherance of the crime is a principal in the first degree, while a person who is actually or constructively present when the crime is committed and who aids or abets another in its commission is a principal in the second degree, and both are equally guilty.

3. **Criminal Law § 113.7– instructions on acting in concert and aiding and abetting**

The evidence in an armed robbery case warranted the court's instructions on acting in concert and aiding and abetting where it tended to show that defendant accompanied the actual perpetrator to the vicinity of the robbery of a convenience store; defendant sat under the steering wheel of the getaway car while the robbery was committed; defendant was acting in concert with the actual perpetrator pursuant to a common plan or purpose to rob the convenience store; and defendant provided the means by which the actual perpetrator got away from the scene upon completion of the robbery.

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

APPEAL by defendant from *Bruce, J.*, 3 December 1979 Session of NEW HANOVER Superior Court.

By an indictment proper in form, defendant was charged in case no. 79CRS19808 with the armed robbery of Mark Carter Mattox. He was also charged with armed robbery in another case, No. 79CRS20586. He pled guilty in the latter case and not guilty in the Mattox case.

The jury found defendant guilty as charged. The court consolidated the two cases for purpose of judgment and imposed a life sentence.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General T. Buie Costen, for the state.

Jay D. Hockenbury for defendant-appellant.

BRITT, Justice.

[1] Defendant first assigns as error the failure of the trial court to grant his motion for dismissal on the ground of insufficient evidence. We find no merit in this assignment.

The evidence presented by the state tended to show:

At approximately 11:00 p.m. on 13 September 1979, a black man, subsequently identified as Howard Cheers, entered a convenience store called the Country Store located on Highway 421 south of Wilmington, North Carolina. Cheers ponited a .38 caliber blue steel pistol at the clerk, Mark C. Mattox, and demanded money. The clerk gave Cheers approximately $200, some of which was in change, including "a whole bunch of loose pennies" in a bag. The robber then left the store and Mattox called the sheriff's department.

Around 10:58 p.m. on 13 September 1979, Debbie Rose was driving her car north on Highway 421. As she approached the Country Store, she slowed down; her first thought was to buy some gasoline at the store but she then decided to drive on to another place. As she passed the Country Store, she observed a white 1975 Lincoln Continental parked on the right-hand side of the road. She saw a black man get out of the car and walk toward the store. She also saw a second person sitting under the car's steering wheel. Ms. Rose then proceeded north on Highway 421 to another business establishment. Thereafter, she encountered a roadblock which had been set up by police and she told police what she had seen at the Country Store.

Around 11:00 p.m. on the night in question, Captain McQueen of the New Hanover County Sheriff's Department had occasion to be in the southern part of the county. As a result of a radio communication which he had received, he arranged for three roadblocks to be set up in the area, and he then went to the Country Store. There he talked with Mattox who told him about the robbery and gave him a description of the robber.

Thereafter, Captain McQueen began checking the area. At about 1:15 a.m., in the Seabreeze community approximately one mile from the Country Store, he observed a white 1975 Lincoln Continental bearing North Carolina license number PWN-881 parked in a secluded area. He and other officers approached the car and observed therein two black men

slumped over, apparently asleep. The police observed a .22 caliber pistol in the car and money strewn over its front seat.

The two men in the car were identified as defendant, who was seated in the driver's seat, and Howard Cheers, who was occupying the passenger seat. The two men were awakened and ordered out of the car. The .22 caliber pistol was located on the floor of the car under Cheers' legs and a .38 caliber blue steel loaded revolver was located on the floor of the car at defendant's feet. A paper bag containing $2.53 in pennies and $74 in currency was found on the seat between defendant and Cheers. Eighty dollars in currency was found on defendant's person and $37 in one-dollar bills was found on the seat.

The state introduced a certified record from the Commissioner of Motor Vehicles showing that defendant was the registered owner of the automobile in question.

Defendant offered no evidence.

[2] An armed robbery is defined as the taking of the personal property of another in his presence or from his person without his consent by endangering or threatening his life with a firearm, with the taker knowing that he is not entitled to the property and the taker intending to permanently deprive the owner of the property. G.S. § 14-87; *State v. May*, 292 N.C. 644, 235 S.E. 2d 178, *cert. denied*, 434 U.S. 928 (1977). A person who actually commits the offense, or who is present when another commits the offense and does some act in furtherance of the crime, is a principal in the first degree. A person who is actually or constructively present when the crime is committed and who aids or abets another in its commission is a principal in the second degree. Both are equally guilty. *State v. Allison*, 200 N.C. 190, 156 S.E. 547 (1931).

When the evidence presented in the case at hand is considered in the light most favorable to the state, and the state is given every reasonable intendment thereon and every reasonable inference therefrom, as we are bound to do, *State v. Primes*, 275 N.C. 61, 165 S.E. 2d 225 (1969); 4 Strong's N.C. Index 3d, Criminal Law § 176, we hold that it was sufficient to withstand defendant's motion for directed verdict.

[3] By his second and third assignments of error, defendant contends the trial court committed prejudicial error in charg-

ing the jury on "acting in concert" and "aiding and abetting". These assignments have no merit.

Defendant does not challenge the legal principles of acting in concert and aiding and abetting as charged by the trial judge; he merely argues that the evidence did not warrant instructions on either principle and that he was prejudiced thereby.

In the recent case of *State v. Joyner*, 297 N.C. 349, 356, 255 S.E. 2d 390 (1979), Justice Exum, speaking for this court, defined "acting in concert" as follows: "To act in concert means to act together, in harmony or in conjunction one with another pursuant to a common plan or purpose."

In *State v. Price*, 280 N.C. 154, 158, 184 S.E. 2d 866 (1971), this court, speaking through Justice Lake, described an aider and abettor in an armed robbery case as follows:

> ... One who procures or commands another to commit a felony, accompanies the actual perpetrator to the vicinity of the offense and, with the knowledge of the actual perpetrator, remains in that vicinity for the purpose of aiding and abetting in the offense and sufficiently close to the scene of the offense to render aid in its commission, if needed, or to provide a means by which the actual perpetrator may get away from the scene upon the completion of the offense, is a principal in the second degree and equally liable with the actual perpetrator. *State v. Bell*, 270 N.C. 25, 153 S.E. 2d 741; *State v. Sellers*, 266 N.C. 734, 147 S.E. 2d 225. ...

Quoted with approval in *State v. Beach*, 283 N.C. 261, 267, 196 S.E. 2d 214 (1973).

In the very recent case of *State v. Williams*, 299 N.C. 652, 656, 263 S.E. 2d 774 (1980), Justice Carlton, speaking for this court, said: "The distinction between aiding and abetting and acting in concert, however, is of little significance. Both are equally guilty, *see, e.g., State v. Allison*, 200 N.C. at 195, 156 S.E. 2d at 550; *State v. Powell*, 168 N.C. 134, 83 S.E. 310 (1914), and are equally punishable."

While the difference between acting in concert and aiding and abetting is of little significance, we hold that the evidence in this case warranted jury instructions on both principles,

particularly on the principle of aiding and abetting. The evidence was sufficient to support a jury finding that defendant was the person under the steering wheel of the car at the time the robbery was committed; that he was acting in harmony with Cheers pursuant to a common plan or purpose to rob the Country Store; and that he accompanied Cheers, the actual perpetrator, to the vicinity of the offense and provided a means by which Cheers got away from the scene upon the completion of the offense.

In defendant's trial and the judgment entered, we find

No error.

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

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

ADVERTISING CO. v. BRADSHAW, SEC. OF TRANSPORTATION

No. 12 PC

Case below: 48 N.C. App. 10

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 4 November 1980. Motion of defendant to dismiss appeal for lack of substantial constitutional question allowed 4 November 1980.

AUTO SUPPLY v. VICK

No. 19 PC

No. 11 (Spring Term)

Case below: 47 N.C. App. 701

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 4 November 1980.

BREWER v. MAJORS

No. 18 PC

Case below: 48 N.C. App. 202

Petition by defendants for discretionary review under G.S. 7A-31 denied 4 November 1980.

CENTRAL SYSTEMS v. HEATING & AIR CONDITIONING CO.

No. 6 PC

Case below 48 N.C. App. 198

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 November 1980.

DARSIE v. DUKE UNIVERSITY

No. 23 PC

Case below: 48 N.C. App. 20

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 4 November 1980.

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

GATES-MILLS v. KIMBROUGH INVESTMENTS

No. 56 PC

Case below: 48 N.C. App. 742

Petition by defendants for discretionary review under G.S. 7A-31 denied 4 November 1980.

INSURANCE CO. v. CONSTRUCTION CO.

No. 261 PC

No. 9 (Spring Term)

Case below: 46 N.C. App. 427

Petition by plaintiff for reconsideration of denial of discretionary review under G.S. 7A-31 (see 301 N.C. 91) allowed 4 November 1980.

MARSHALL v. MILLER

No. 3 PC

Case below: 47 N.C. App. 530

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 4 November 1980.

MIMS v. MIMS

No. 16 PC

No. 10 (Spring Term)

Case below: 48 N.C. App. 216

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 4 November 1980.

MOORE v. STEVENS & CO.

No. 47 PC

Case below: 47 N.C. App. 744

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 4 November 1980.

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

OSBORNE v. WALKER

No. 36 PC

Case below: 48 N.C. App. 627

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 4 November 1980.

PEEBLES v. MOORE

No. 31 PC

No. 13 (Spring Term)

Case below: 48 N.C. App. 497

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 4 November 1980.

RODIN v. MERRITT

No. 2 PC

Case below: 48 N.C. App. 64

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 November 1980.

SALTER v. PETERS

No. 27 PC

Case below: 48 N.C. App. 431

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 4 November 1980. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 4 November 1980.

STATE v. COX

No. 49 PC

No. 14 (Spring Term)

Case below: 48 N.C. App. 470

Petition by defendants for discretionary review under G.S. 7A-31 allowed 4 November 1980.

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

STATE v. DAWSON

No. 20 PC

No. 12 (Spring Term)

Case below: 48 N.C. App. 99

Petition by Attorney General for discretionary review under G.S. 7A-31 allowed 4 November 1980.

STATE v. FEARING

No. 400 PC

Case below: 48 N.C. App. 329

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 November 1980.

STATE v. FERGUSON

No. 34 PC

Case below: 48 N.C. App. 431

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 November 1980.

STATE v. FULLER

No. 37 PC

Case below: 48 N.C. App. 418

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 November 1980.

STATE v. HAITH

No. 35 PC

Case below: 48 N.C. App. 319

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 November 1980. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 4 November 1980.

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

STATE v. HUNT

No. 421 PC

Case below: 48 N.C. App. 431

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 November 1980.

STATE v. MILLER

No. 21 PC

Case below: 48 N.C. App. 226

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 November 1980.

STATE v. PARTIN

No. 11 PC

Case below: 48 N.C. App. 274

Petition by defendants for discretionary review under G.S. 7A-31 denied 4 November 1980. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 4 November 1980.

STATE v. PHILLIPS

No. 94 PC

Case below: 49 N.C. App.

Petition by defendant for discretionary review under G.S. 7A-31 denied 30 October 1980.

STATE v. PIERCE

No. 40 PC

Case below: 48 N.C. App. 742

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 4 November 1980.

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

STATE v. TRAPPER

No. 143

No. 48 N.C. App. 481

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 4 November 1980.

THOMPSON v. TRANSFER CO.

No. 17 PC

Case below: 48 N.C. App. 47

Petition by defendants for discretionary review under G.S. 7A-31 denied 4 November 1980.

TIERNEY v. TIERNEY

No. 26 PC

Case below: 48 N.C. App. 631

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 November 1980.

WHITFIELD v. WINSLOW

No. 4 PC

Case below: 48 N.C. App. 206

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 November 1980.

WILKINSON v. INVESTMENT CO.

No. 30 PC

Case below: 48 N.C. App. 213

Petition by plaintiff for writ of certiorari to North Carolina Court of Appeals denied 4 November 1980.

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

WILLIAMS v. CHRYSLER-PLYMOUTH, INC.

No. 28 PC

Case below: 48 N.C. App. 308

Petition by defendant Chrysler Corp. for discretionary review under G.S. 7A-31 denied 4 November 1980.

WISE v. LAUGHRIDGE

No. 33 PC

Case below: 48 N.C. App. 432

Petition by defendants for discretionary review under G.S. 7A-31 denied 4 November 1980.

STATE OF NORTH CAROLINA v. JAMES LENARD SMALL

No. 101

(Filed 2 December 1980)

1. Criminal Law § 9— principal defined

A principal is one who is present at and participates in the commission of the crime charged.

2. Criminal Law § 9— principal in first or second degree

He who actually perpetrates the crime either by his own hand or through an innocent agent, or who acts in concert with the principal perpetrator, is a principal in the first degree, and any other person who is actually or constructively present at the place and time of the crime and who aids, abets, assists, or advises in its commission is a principal in the second degree.

3. Criminal Law § 9— principals in first or second degree — equal guilt

Principals in the first degree and those in the second degree are equally guilty of the offense committed and may be punished with equal vigor.

4. Criminal Law § 10— accessory before the fact

An accessory before the fact is one who is absent from the scene when the crime was committed but who participated in the planning or contemplation of the crime in such a way as to "counsel, procure, or command" the principal(s) to commit it.

5. Criminal Law § 10— principal in second degree — accessory before fact — distinction

The primary distinction between a principal in the second degree and an accessory before the fact is that the latter was not actually or constructively present when the crime was in fact committed.

6. Criminal Law §§ 9.1, 10— accessory before fact not present at crime scene — no conviction as principal on conspiracy theory

A defendant who was not actually or constructively present at the commission of a crime may not be convicted as a principal to that crime solely upon the basis that he participated in a conspiracy by counseling, procuring or commanding some other person to bring it about.

7. Criminal Law §§ 9, 10, 77; Conspiracy § 5.1— acts and declarations of co-conspirators — relevancy to show aider and abettor or accessory before the fact

When one who conspires is shown to have been present at the commission of the crime contemplated by or a natural consequence of the original conspiracy, evidence of the conspiracy, including the conspiratorial acts and declarations of all the conspirators, may then be relevant to show his intent and participatory presence, *i.e.*, that he aided and abetted in the commission of the crime, or acted in concert with those who did, in which event he is substantively liable as a principal. Likewise, when a defendant-conspirator is shown to have been absent from the

scene of the crime, evidence of the conspiracy may nevertheless be relevant to support the State's theory that the defendant participated as an accessory before the fact.

8. Homicide § 31— verdict of first degree murder — defendant not at crime scene —conspiracy theory — guilt as accessory before the fact

Where defendant was indicted for the first degree murder of his wife, the jury found defendant guilty of first degree murder, a sentence of death was imposed, the State's evidence tended to show that defendant hired another to murder his wife, that she was murdered by the one so hired, and that defendant was not present at the murder scene, and the case was submitted to the jury on the theory that defendant could be convicted as a principal perpetrator because he participated in a conspiracy to commit the murder, the jury verdict, in effect, found defendant guilty of being an accessory before the fact to murder, and defendant's conviction of first degree murder must be set aside and the case remanded for entry of a sentence of life imprisonment, the sentence prescribed by G.S. 14-6 for one who is an accessory before the fact to murder.

9. Criminal Law § 10; Indictment and Warrant § 18— indictment for principal crime — conviction as accessory before the fact

The statute which changes the prior rule that one indicted for the principal felony may be convicted upon that indictment as an accessory before the fact, G.S. 14-5.1, is to be applied prospectively only to those cases in which the indictment was returned on or after its effective date of 1 October 1979; therefore, a defendant indicted on 4 December 1978 upon the charge of the principal felony of first degree murder could be convicted as an accessory before the fact to the crime of murder.

10. Criminal Law § 22— arraignment — failure of record to show charges read to defendant

Where the record shows that an arraignment took place and defendant, duly represented by counsel, entered a plea of not guilty, defendant was not prejudiced by failure of the record to show that the charges were read or summarized to defendant as required by G.S. 15A-941, since it was the duty of defendant to object and to have appropriate entries made in the record to show the basis for the objection if he was not properly informed of the charges.

11. Criminal Law § 34.2; Homicide § 17.1— murder of defendant's wife — details of defendant's sexual relations with other women

While evidence tending to show that defendant had, generally, had sexual relations with other women might have been competent to show defendant's motive for hiring someone to kill his wife, the trial court erred in the admission of testimony detailing the manner in which defendant engaged in sexual relations with other women; however, such error was not prejudicial since the testimony did not make defendant out to be a "moral degenerate" and it could not have affected the result of the trial.

12. Criminal Law § 86.5; Homicide § 17.1— murder of defendant's wife — cross-examination of defendant — sexual relations with other women

In this prosecution of defendant as an accessory before the fact to the murder

of his wife, defendant could properly be asked on cross-examination for impeachment purposes about his sexual relations with other women and other forms of misconduct.

13. Criminal Law § 62— polygraph results — cross-examination invited by direct testimony

The trial court did not err in permitting the State to cross-examine defendant concerning the results of a polygraph test administered to defendant where (1) defendant failed to object to one question and to move to strike his answer thereto; (2) defendant's objection to a subsequent question was not on the ground that the question asked for polygraph results but was on the ground that the witness was being asked to repeat former testimony, and it was within the trial court's discretion to permit the testimony to clear up any confusion as to which of two polygraph tests the witness was referring; and (3) defendant's direct examination, which left the false impression that the State had refused his offer to submit to a polygraph test, rendered admissible the State's cross-examination of defendant as to whether he had been given a polygraph test and the results thereof.

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

Justice HUSKINS dissents.

BEFORE *Judge Donald L. Smith,* at the 2 April 1979 Special Criminal Session of ROBESON Superior Court, defendant was convicted of conspiracy to commit murder and first degree murder. From a judgment imposing the death sentence on the murder count (judgment arrested as to the conspiracy), defendant appeals pursuant to G.S. 7A-27(a). This case was argued as No. 4. Spring Term 1980.

Rufus L. Edmisten, Attorney General, by Henry T. Rosser, Assistant Attorney General, for the state.

Bobby W. Rogers and Linwood T. Peoples for defendant appellant.

EXUM, Justice.

The state's evidence tends to show that defendant hired another to murder defendant's estranged wife and that she was murdered by the one so hired. Defendant has been convicted of the murder and sentenced to death. The most important question, therefore, raised by defendant's appeal is whether one who is an accessory before the fact to a felony within the meaning of G.S. 14-5[1]

[1]The statute defines such an accessory as one who shall "counsel, procure, or command any other person to commit any felony . . . ."

may be convicted and punished as a principal perpetrator, once the crime is committed, on the theory that he participated in a conspiracy to commit the offense charged. We hold that he may not.

Defendant's conviction for first degree murder must therefore be set aside. The jury, in effect, has found him guilty of being an accessory before the fact to the murder. We find no other prejudicial error in the trial. We remand the case for entry of a sentence of life imprisonment, the sentence prescribed in G.S. 14-6 for one who is an accessory before the fact to murder.

Defendant and codefendant Paul Lowery were convicted of the first degree murder of defendant's wife Evelyn Small. The state's evidence tended to show that defendant had experienced marital difficulties which led to separation from his wife in September, 1977. A deed of separation was drawn which provided that defendant was to convey to his wife his interest in the couple's residence and his automobile free of all encumbrances and debts, to make all payments on the mortgage on the residence, and to provide child support payments amounting to $200.00 per month.

Earl Locklear, a friend of defendant, testified for the state that defendant had talked with him on several occasions about killing Mrs. Small. According to Locklear's testimony, defendant "needed to get his wife killed because the divorce papers was laying uptown ready to be signed by him. He said if he didn't get his wife killed before he signed the divorce papers, that his wife's mother or father, one would get the house and he said nobody wasn't getting the house." Locklear testified that defendant had asked him to help Paul Lowery murder the deceased in exchange for $4,000.00. Locklear refused and told defendant he wanted no part of the scheme.

The state's chief witness Vincent Johnson testified that defendant had initially approached him in September 1978 with a similar offer. Johnson first refused to cooperate but eventually agreed to perform the deed with Paul Lowery. Several attempts were made by Johnson and Lowery thereafter to kill the deceased but in each case the attempts were abandoned. Finally, on the evening of 14 November 1978, the pair gained entrance to Mrs. Small's house with a key that defendant had supplied them. They went through the house until they found Mrs. Small's bedroom. According to Johnson, Lowery then tried to smother Mrs. Small and finally succeeded in strangling her. Johnson and Lowery then left the

scene and went to see defendant.

Defendant took the stand in his own behalf and denied any involvement whatsoever in the killing of his wife.

In his charge to the jury relating to the indictment against defendant of first degree murder, Judge Smith submitted as possible verdicts: Guilty of first degree murder, guilty of second degree murder, guilty of accessory before the fact to murder, guilty of voluntary manslaughter, and not guilty. In his final mandate, he instructed the jury in pertinent part:

> "So, I charge that if you should find from the evidence, beyond a reasonable doubt, that on the 14th day of November, 1978, either Paul Lowery or Vincent Johnson intentionally strangled or smothered Evelyn Small, thereby proximately causing Evelyn Small's death, to kill her, and that the act was done with malice, with premeditation and deliberation, *and that the person who strangled or smothered Evelyn Small had previously agreed with James Small to murder Evelyn Small, and at the time of the agreement, James Small and the person with whom he made the agreement intended that it be carried out, and that the agreement had not been terminated, and that the strangling or smothering was done in the furtherance of the agreement, then it would be your duty to return a verdict of first degree murder, as alleged in the Bill of Indictment, as to James L. Small."* (Emphasis supplied.)

After Judge Smith instructed on the other possible verdicts, the jury retired and later returned with verdicts of guilty of first degree murder as to both defendant and codefendant Paul Lowery. Based upon the jury's recommendations subsequent to the sentencing hearing required by G.S. 15A-2000, the court sentenced defendant to death. From this judgment he appeals.

I

Defendant argues that since there was no evidence adduced at trial that he was actually or constructively present during the killing of his wife, he was criminally liable at most as an accessory before the fact to her murder. Since G.S. 14-6 provides for the punishment of life imprisonment for an accessory before the fact to

murder;[2] defendant contends that the sentence of death imposed upon him cannot stand. We agree.

This case was prosecuted on the theory that defendant, having conspired with Lowery and Johnson to commit murder, thereby became liable as a principal to the crime of murder once the object of the illegal agreement was attained. That portion of the judge's final mandate quoted above clearly directed the jury to find defendant guilty of first degree murder if they were convinced beyond a reasonable doubt that the deceased was intentionally killed with malice and premeditation in furtherance of the conspiracy in which defendant participated. The jury's verdict and the judgment subsequently imposed by the trial court clearly indicate that defendant, as a conspirator, is now held liable as a principal to the substantive offense which was the object of the conspiracy but which was committed in his absence by his co-conspirators. The question presented, then, is whether a conspirator may be held substantively liable for the acts of his co-conspirators without reference to our traditional common law principles governing parties to a crime. We answer in the negative.

[1—3] Our law governing felonies continues to maintain common law distinctions between principals and accessories. *State v. Furr*, 292 N.C. 711, 235 S.E. 2d 193, *cert. denied*, 434 U.S. 924 (1977). A principal is one who is present at and participates in the commission of the crime charged. He who actually perpetrates the crime either by his own hand or through an innocent agent, or who acts in concert with the principal perpetrator, is a principal in the first degree. Any other person who is actually or constructively present at the place and time of the crime and who aids, abets, assists, or advises in its commission, is a principal in the second degree.[3]

[2]G.S. 14-6 provides in pertinent part that "[a]ny person who shall be convicted as an accessory before the fact in either of the crimes of murder, arson, burglary or rape shall be imprisoned for life. . . ."

[3]Originally, only the actual perpetrator of a felony was called a principal, and the law deemed one who was present but who did not actually commit the crime an accessory "at the fact." At a relatively early stage in the development of our modern common law, however, the accessory at the fact began to be recognized as a principal in the second degree: "But at this day, and long since, the law hath been taken otherwise, and namely, that all that are present, aiding, and assisting, are equally principals with him that gave the stroke . . . and tho they are called principals in the second degree, yet they are principals . . . ." 1 M. Hale, Pleas of the Crown *437. *See also* E. Coke, 3d Institutes *138.

Principals in the first degree and those in the second degree are equally guilty of the offense committed and may be punished with equal vigor. *State v. Benton*, 276 N.C. 641, 174 S.E. 2d 793 (1970); *State v. Powell*, 168 N.C. 134, 83 S.E. 310 (1914); *State v. Wiggins*, 16 N.C. App. 527, 192 S.E. 2d 680 (1972); 22 C.J.S. *Criminal Law* §§ 83, 85 (1961).

[4,5] An accessory before the fact is one who is absent from the scene when the crime was committed but who participated in the planning or contemplation of the crime in such a way as to "counsel, procure, or command" the principal(s) to commit it. G.S. 14-5; *State v. Benton, supra.* Thus, the primary distinction between a principal in the second degree and an accessory before the fact is that the latter was not actually or constructively present when the crime was in fact committed. *Id; State v. Powell, supra; see also* LaFave and Scott, Criminal Law § 63 at p. 498 (1972); 1 Wharton, Criminal Law § 263 at pp. 350-351 (12th ed. 1932); 4 W. Blackstone, Commentaries *36.

At common law principals in the first degree, principals in the second degree, and accessories before the fact were all guilty of the same felony; they were all parties to the same crime. J. Stephen, A Digest of the Criminal Law 21 (9th ed. 1950); 1 M. Hale, Pleas of the Crown *626. "This merely gave recognition to the legal theory that one is considered to have done what he has caused to be done." R. Perkins, *The Act of One Conspirator*, 26 Hastings L.J. 337, 349 (1974). There were nevertheless important procedural differences in the prosecution of principals and accessories before the fact, one of which was that accessories before the fact must have been indicted as such in order for a conviction to stand. *See, e.g., State v. Green*, 119 N.C. 899, 26 S.E. 112 (1896); *State v. Dewer*, 65 N.C. 572 (1871). Virtually all states have by now avoided such procedural limitations by legislative reform. *See* Model Penal Code § 2.04, Appendix (Tent. Draft No. 1, 1953) and the statutes cited therein. In this state, the procedural problems stemming from a variance between the indictment and proof were, until recently, sufficiently answered both by case law and statutory authority to the effect that the charge of accessory before the fact was to be deemed included in the charge of the principal crime. *See State v. Holmes*, 296 N.C. 47, 249 S.E. 2d 380 (1978); *State v. Jones*, 254 N.C. 450, 119 S.E. 2d 213 (1961); 41 N.C. L. Rev. 118 (1982). Effective 1 October 1979, however, newly enacted G.S. 14-15.1 reverts to the prior common law principle that the crime of accessory before the fact is not "a lesser

included offense of the principal felony." Under this statute one indicted for the principal felony may not be convicted on that indictment as an accessory before the fact. 1979 N.C. Sess. Laws, c. 811. Although our law continues to follow the rule that an accessory before the fact is liable as a party, *i.e.*, as an accessory, to the commission of the substantive offense, the *punishment* of an accessory before the fact has long been provided for in separate statutory provisions. *See* G.S. 14-5; G.S. 14-6.[4]

Against this background, our inquiry is whether and to what degree certain rules pertaining to the law of conspiracy may operate to vary or abrogate these classifications so well preserved in our case law and statutes. We focus not upon the crime of conspiracy *per se*[5] but rather upon the scope of a conspirator's substantive liability for a criminal offense committed by his fellow co-conspirators in his absence within the scope of, or in furtherance of, the original agreement.

One need not go far to find such familiar statements as the following:

> "A conspirator is criminally responsible for the acts of his co-conspirators which are committed in furtherance of the common design and follow incidentally as the natural and probable consequences of such design, even though he was not present when the acts were committed . . . ." 15A C.J.S. *Conspiracy* § 74 (1967).
>
> "[I]f two or more persons enter into a conspiracy, any act done by any of them pursuant to the agreement is, in contemplation of law, the act of each of them and they are jointly responsible therefor . . . . It makes no difference as to the liability of a conspirator that he was not physically

[4]Although G.S. 14-5 formerly allowed an accessory before the fact to be convicted upon an indictment charging the principal felony (now changed by the enactment of G.S. 14-5.1, referred to in the text), it provided that the accessory would be punished "in the same manner as any accessory before the fact to the same felony." The statutory provision pertinent to punishment of an accessory before the fact is G.S. 14-6, the relevant text of which is set out in Note 2, *supra*.

[5]For statements of the general principles pertinent to the law of conspiracy, *see State v. Branch*, 288 N.C. 514, 220 S.E. 2d 495, *cert. denied*, 433 U.S. 907 (1977); *State v. Goldberg*, 261 N.C. 181, 134 S.E. 2d 334 (1964). *See generally* Developments in the Law, *Criminal Conspiracy*, 72 Harv. L. Rev. 920 (1959).

present when the acts were committed by his fellow conspirators . . . . And this joint responsibility extends not only to what is done by any of the conspirators pursuant to the original agreement but also to collateral acts incident to and growing out of the original purpose." 16 Am. Jur. 2d *Conspiracy* § 19 (1979).

"It is a familiar rule that when several parties conspire or combine together to commit any unlawful act, each is criminally responsible for the acts of his associates or confederates committed in furtherance or in prosecution of the common design for which they combine . . . . When one of the conspirators commits a homicide in the furtherance of the original design, it is, in the eyes of the law, the act of all . . . . The actual perpetrator is considered to be the agent of his associates. His act is their act, and all are equally criminal." 40 Am. Jur. 2d *Homicide* § 34 (1968).

When interpreted as rules of substantive liability, statements such as these would seem to render immaterial any inquiry into whether a criminal defendant who has conspired with others to commit a completed offense should be viewed as a principal or accessory. Instead, the quoted "black letter" appears to stand for the proposition that any defendant, having once agreed with others to further an unlawful enterprise, *ipso facto* becomes liable as a principal to any crimes committed thereafter by his partners so long as the criminal acts are "in the furtherance" of or reasonably "incidental" to the original illegal design. Such a broad reading leads to the rather startling result that a conspirator's criminal liability for the act of another may be based less upon the circumstances of his personal participation than upon his presumed status as "partner" in all actions which proximately result from the venture originally agreed upon. Fictions and presumptions derived from the civil law of agency and partnership thus comingle with tort law notions of foreseeability and proximate cause to provide a stew of expanded criminal liability. We recognize that the rule adopted for federal prosecutions in *Pinkerton v. United States*, 328 U.S. 640 (1946), appears to sanction such a result. Defendant there was convicted both of conspiring with his brother to evade federal taxes and for the subsequent acts of evasion committed by his brother while defendant was in jail. The trial court had instructed the jury that they could convict defendant of the offenses committed by his brother upon a finding that the offenses were committed in the furtherance

of the original conspiracy. The Supreme Court affirmed. Writing for the majority, Mr. Justice Douglas first noted that it was well settled in federal case law of conspiracy that the overt act of one conspirator may be deemed the act of all. 328 U.S. at 646-47. By analogy, then, it seemed reasonable to hold all conspirators liable for the substantive offenses committed by one of them:

> "The rule which holds responsible one who counsels, procures, or commands another to commit a crime is founded on the same principle. That principle is recognized in the law of conspiracy when the overt act of one partner is attributable to all. An overt act is an essential ingredient of the crime of conspiracy under [the Federal Criminal Code]. If that can be supplied by the act of one conspirator, we fail to see why the same or other acts in furtherance of the conspiracy are likewise not attributable to the others for the purpose of holding them responsible for the substantive offense." *Id.* at 647.

By holding in effect that membership in a conspiracy is sufficient for criminal liability as a principal for all offenses committed in furtherance of the conspiracy, the *Pinkerton* decision obviates application of common law or statutory distinctions among the various parties to a criminal offense.[6]

[6] We are not so free to do the same with the law of this state. As earlier noted, the distinction between an accessory before the fact and a principal to a criminal offense is well maintained both in our

[6]This point was noted in Mr. Justice Rutledge's dissent, joined by Mr. Justice Frankfurter, 328 U.S. at 649: "[The majority's] ruling violates both the letter and spirit of what Congress did when it separately defined the three classes of crime, namely: (1) completed substantive offenses; (2) aiding, abetting or counselling another to commit them; and (3) conspiracy to commit them." It should be noted, however, that federal law defines one who aids, abets, counsels, or procures the commission of a federal offense as a "principal." 18 U.S.C. § 2(b) (formerly 18 U.S.C. § 550). Stripped to its essentials, then, the *Pinkerton* decision could be read as holding that a jury finding that defendant conspired to commit the substantive offense is legally equivalent to a finding that defendant counseled, procured, aided, or abetted the commission of the substantive offense. Thus the remark by Mr. Justice Jackson, who did not participate in *Pinkerton*, that the *Pinkerton* holding "sustained a conviction of a substantive crime where there was no proof of participation in or knowledge of it, upon the novel and dubious theory that conspiracy is equivalent in law to aiding and abetting." *Krulewitch v. United States*, 336 U.S. 440, 451 (1949) (Jackson, J., concurring).

cases and in our legislation. The distinction is of more than academic importance. Our General Assembly has mandated that an accessory before the fact to a felony be indicted and convicted as such, G.S. 14-5.1, and, upon conviction, be punished as such. G.S. 14-6. There is not the slightest indication in any of our statutes that a defendant's role as a conspirator may be used to deny the operation of these provisions where they obviously apply. It is well established that in order for a defendant to be punished for criminal conduct, his actions must fall plainly within the prohibition of the statute which defines his crime. *State v. Cole*, 294 N.C. 304, 240 S.E. 2d 355 (1978). As a corollary to this principle, it is equally clear that where a defendant's conduct is plainly defined as criminal by an applicable statute, neither the courts nor the prosecution may manipulate inapposite analogies drawn from other areas of the law to avoid the statute's intended effect. It is for the legislature to define a crime and prescribe its punishment, not the courts or the district attorney. *See* N.C. Const. Art. I, § 6; *In re Greene*, 297 N.C. 305, 255 S.E. 2d 142 (1979). Accordingly, we join the ranks of those who reject the rule in *Pinkerton*.[7] We hold that a defendant who was not actually or constructively present at the commission of a crime may not be convicted as a principal to that crime solely upon the basis that he participated in a conspiracy by counseling, procuring, or commanding some other person to bring it about. To hold otherwise would be to expand the scope of accessorial liability beyond the legislative design.

We are advertent to certain decisions of this Court which have apparently found evidence of participation in a conspiracy suffi-

[7]Despite its force in the federal courts, the *Pinkerton* rule has never gained broad acceptance. It has been heavily criticized by legal commentators. *See, e.g.*, 56 Yale L.J. 371 (1947); 16 Fordham L. Rev. 275 (1947); Developments in the Law, *Criminal Conspiracy*, 72 Harv. L. Rev. 920, 994-1000 (1959). It was rejected by the draftsmen of the Model Penal Code and of the proposed new Federal Criminal Code. *See* LaFave and Scott, Criminal Law § 65 at p. 515, notes 15 and 16. Finally, it has been flatly rejected by the highest courts of both Massachusetts, *Commonwealth v. Stasiun*, 349 Mass. 38, 206 N.E. 2d 672 (1965), and New York, *People v. McGee*, 49 N.Y. 2d 48, 424 N.Y.S. 2d 157, 399 N.E. 2d 1177 (1979). It is true that under the Model Penal Code, § 2.06 (Proposed Official Draft, 1962), § 2.04 (Tent. Draft No. 1, 1953) persons who solicit, command, request, or provoke another to commit a crime may be found guilty of the crime itself. Our statues, however, G.S. 14-5 and G.S. 14-6, make such persons guilty and punishable only as accessories before the fact to the crime.

cient to hold a defendant who was absent from the scene of the crime guilty as a principal. *See, e.g., State v. Bindyke*, 288 N.C. 608, 220 S.E. 2d 521 (1975); *State v. Albert L. Carey*, 288 N.C. 254, 218 S.E. 2d 387, *death sentence vacated*, 428 U.S. 904 (1976); *State v. Anthony D. Carey*, 285 N.C. 497, 206 S.E. 2d 213 (1974); *State v. Maynard*, 247 N.C. 462, 101 S.E. 2d 340 (1958). In each of these cases, however, this Court relied on language contained in prior decisions which concerned defendants who had in fact been present, actually or constructively, during the commission of the crimes with which they were charged. In those prior decisions, then, the distinction between an accessory before the fact and a principal simply did not arise.[8]

[7] Yet the distinction is crucial. The co-conspirator rule — the well established proposition that the acts and declarations of one conspirator, made or done in the furtherance of or within the scope of the original conspiracy, may be imputed to other conspirators who were not present at the time — is a valid and useful *evidentiary* rule when it is used to establish the existence and extent of the conspiracy itself or the nature and extent of the accomplishment of the

[8]In *Bindyke*, the apparent basis for this Court's treatment of defendant as a principal on the charge of attempt to damage personal property by the use of an incendiary device (*See* G.S. 14-49 (b), (c)) was that defendant, although absent from the scene of the criminal attempt, nevertheless took part in a conspiracy to intimidate the owner of the property. 288 N.C. at 618-19, 220 S.E. 2d at 528. *Bindyke* relied upon *State v. Brooks*, 228 N.C. 68, 44 S.E. 2d 482 (1947) and *State v. Smith*, 221 N.C. 400, 20 S.E. 2d 360 (1942). In *Brooks*, however, all the defendants were active participants in an attempt to escape prison which resulted in the homicide of a prison guard. The conviction of those who did not actually fire the fatal shot was sustained upon grounds that they acted in concert with the one who did. 228 N.C. at 70-71, 44 S.E. 2d at 483. Similarly, in *Smith*, defendants were all present and participated in the acts which resulted in the burning of a truck. Their conviction for *conspiracy* to burn the truck was upheld against their contention that the common intent had been only to stop the truck on the ground (among others) that "each conspirator becomes liable for the means used by any of the conspirators in the accomplishment of the purpose *in which they are all engaged at the time.*" 221 N.C. at 405, 20 S.E. 2d at 363. (Emphasis supplied.)

The *Carey* cases concerned defendant-brothers who waited in an automobile while their confederates robbed a service station and shot and killed a station attendant. Although it appears from the reported facts of the cases that defendants could have been convicted of felony murder on the theory that they were constructively present at the robbery, aiding and abetting in its commission, *see, e.g., State v. Sellers*, 266 N.C. 734, 147 S.E. 2d 225 (1966), this Court upheld their conviction on the ground that "[w]hen a conspiracy is formed to commit a robbery or burglary, and a murder is committed by anyone of the conspirators in the attempted perpetration of the crime, each and all of the conspirators are guilty of murder in the first degree."

conspiracy's object. It means, in essence, that such acts and declarations of one co-conspirator are *admissible* against all. Thus applied *as a rule of evidence*, it does no more than permit the jury the logical inference that one who conspires to bring about a result intends the accomplishment of that result, or of anything which naturally flows from its attempted accomplishment. When one who so conspires is shown to have been present at the commission of the crime, contemplated by or a natural consequence of the original conspiracy, evidence of the conspiracy, including the conspiratorial acts and declarations of all the conspirators, may then be relevant to show his intent and participatory presence, *i.e.*, that he aided and abetted in the commission of the crime, or acted in concert with those who did, in which event he is substantively liable as a principal. Likewise, when the defendant-conspirator is shown to have been absent from the scene of the crime, evidence of the conspiracy may nevertheless be relevant to support the state's theory that the defendant participated as an accessory before the fact. In either case the co-conspirator rule is a rule of evidence, the fruits of which may be accepted or rejected by the jury in determining whether a defendant's partici-

---

State v. Albert L. Carey, 288 N.C. at 273, 218 S.E.2d at 399; *State v. Anthony D. Carey*, 285 N.C. at 504, 206 S.E. 2d at 218-19, *quoting from State v. Fox*, 277 N.C. 1, 17, 175 S.E. 2d 561, 571 (1970). In *Fox*, however, the Court noted that defendant, who waited outside in a truck while his associates robbed a couple in their home and committed a homicide, "was constructively present aiding and abetting . . . and, therefore, a principal" *Id.* Reliance in *State v. Anthony D. Carey, supra*, was also had upon *State v. Bell*, 205 N.C. 225, 171 S.E. 50 (1933), another case in which defendant waited in the getaway car while his confederates committed murder in the course of an attempted robbery.

In *Maynard*, defendant was not present at the scene of the murder and attempted robbery, but his life sentence for felony murder was upheld on the ground that he had conspired to rob the deceased and advised others to commit the robbery. As a conspirator he was held guilty of the substantive offense, apparently as a principal. 247 N.C. at 470-71, 101 S.E. 2d at 346. However, the cases cited in *Maynard* in support of this theory all involved defendants who had aided and abetted or acted in concert with the actual perpetrators of the crimes charged. *See State v. Kelly*, 243 N.C. 177, 90 S.E. 2d 241 (1955); *State v. Chavis*, 231 N.C. 307, 56 S.E. 2d 678 (1949); *State v. Bennett*, 226 N.C. 82, 36 S.E. 2d 708 (1946); *State v. Green*, 207 N.C. 369, 177 S.E. 120 (1934); *State v. Stefanoff*, 206 N.C. 443, 174 S.E. 411 (1934); *State v. Bell, supra*. It should also be noted that even if defendant in *Maynard* had been properly convicted of the homicide as an accessory before the fact, his sentence would have been the same, since G.S. 14-6 provides that an accessory before the fact to murder "shall be imprisoned for life."

Notice should also be had of *State v. Grier*, 30 N.C. App. 281, 227 S.E. 2d 126, *cert. denied*, 291 N.C. 177, 229 S.E. 2d 691 (1976), wherein the Court of Appeals felt bound by the decisions in *State v. Bindyke, supra*, and *State v. Albert L. Carey, supra*, and upheld the conviction as a principal of a defendant-conspirator who was not present at the scene of the crime charged.

pation in the criminal acts of another rises to the level of establishing his guilt as a principal *or* an accessory before the fact.[9]

In sum, a defendant's conspiratorial involvement may often be strong evidence of his liability *as a party* to a crime which arose out of the conspiracy. His status as a party — whether he is to be deemed a principal or an accessory before the fact — will nevertheless turn upon his presence at or absence from the place of the crime's commission.[10] His involvement in the conspiracy itself will not *alone* make him a principal, or, for that matter, an accessory either. *People v. McGee*, 49 N.Y. 2d 48, 424 N.Y.S. 2d 157, 399 N.E.

[9]This is the approach sanctioned by the drafters of the Model Penal Code:

"Conspiracy may prove command, encouragement, assistance or agreement to assist, etc.; it is evidentially important and may be sufficient for that purpose. But whether it suffices ought to be decided by the jury; they should not be told that it establishes complicity as a matter of law.

"This disposition is . . . faithful to the present American statutes, none of which declares the doctrine that conspirators are liable as such; the statutes on their face require 'inference that the offender has counseled or induced or encouraged the crime' (Cardozo, J., in *People v. Swersky*, 216 N.Y. at 476). However proper it may be to draw that inference from proof of a conspiracy, the jury ought to face in concrete cases whether or not, on the evidence, the inference is one that should be drawn." American Law Institute, *Model Penal Code* § 2.04 (3), Comment, pp. 23-24 (Tent. Draft No. 1, 1953).

Early cases applied the co-conspirator rule only as a rule of evidence but sometimes stated it so broadly that it sounded like a rule imposing substantive liability. *See United States v. Gooding*, 25 U.S. (12 Wheat.) 460 (1827); *State v. Poll*, 8 N.C. (1 Hawks) 442, 446 (1821) ("when a common design is proven, the act of one [but not the declarations] in furtherance of that design is evidence against his associate; it is in some measure the act of all . . . ."); *State v. George*, 29 N.C. (7 Ired.) 321 (1847) (acts *and* declarations of one criminal conspirator are considered the acts and declarations of all in the sense that they may be *received in evidence* against all if they were done or uttered in furtherance or in execution of the conspiracy); *State v. Dean*, 35 N.C. (13 Ired.) 63 (1851); *State v. Earwood*, 75 N.C. 210 (1876); *State v. Jackson*, 82 N.C. 565 (1880); 1 Greenleaf, Evidence, *compare* §§ 111, 113, and 233 (1844); Developments in the Law, *Criminal Conspiracy*, 72 Harv. L. Rev. 920, 988 (1959).

[10]"The law of conspiracy determines who is guilty, and of what, where a conspiracy is involved, but whether one found guilty under this law is a principal or accessory depends, at common law, on the law of parties . . . . The notion that, even where unchanged by statute, all parties to a felony are principals if they are conspirators, is clearly refuted by the cases. Thus although the felony is committed in pursuance of a concerted plan, those who are not present, or so near as to be able to render assistance at the time of perpetration, are not principals, but accessories before the fact." R. Perkins, "The Act of One Conspirator," 26 Hastings L.J. 337, 346, 347 (1974). (Citations omitted.)

2d 1177 (1979).[11] For reasons stated earlier and for those which follow, we conclude that the co-conspirator rule in this state is not and has never been intended to be taken as a separte rule of substantive liability which erases the common law distinctions among criminal parties. Any indications in our case law to the contrary are expressly disapproved.

In the companion cases of *State v. Haney*, 19 N.C. (2 Dev. & Bat.) 390 (1837), and *State v. Hardin*, 19 N.C. (2 Dev. & Bat.) 407 (1837), it appeared from the testimony of an accomplice and from other evidence that Haney, Hardin and the witness conspired to steal a slave; Haney then acted alone in convincing the slave to leave with him, and he and the slave subsequently joined up with the witness and Hardin. In Haney's trial, Haney objected to the admission of the accomplice's testimony concerning acts the accomplice had committed in Haney's absence. This Court ruled the testimony competent:

> "That one man should not be criminally affected by the acts or declarations of a stranger, is a rule founded in common sense, and resting on the principles of natural justice; and, therefore, a mere gratuitious assertion by any one, inculpating himself and others as fellow conspirators, should never be received as evidence against any person but himself. But where a privity or community of design has been established, the act of any one of those who have combined together for the same illegal purpose, done in furtherance of the unlawful design, is, in the consideration of law, the act of all." 19 N.C. (2 Dev. & Bat.) at 395.

Although this language, taken literally and out of context, might support the proposition that a conspirator could be regarded as a principal to a substantive offense committed in his absence by a co-conspirator in furtherance of the illegal design, such a notion was quickly dispelled by Chief Justice Ruffin's opinion in *State v. Hardin*,

[11]Conspiracy or preconcert, plus presence, does not automatically establish guilt as a principal in the second degree. It is possible, for example, that A and B agree (conspire) to commit a crime. A and B later visit the scene of the intended crime, but without the shared intent to commit it at the time. B nevertheless then commits the crime without A's approval or support, but in A's presence. A would not be a party to the crime. Similarly, conspiracy alone does not automatically trigger guilt as an accessory before the fact to a later substantive offense. The circumstances of the illegal agreement must also reveal that defendant procured, counseled, or commanded the subsequent offense. In most cases they will, but the matter is for the jury to decide.

supra. The defendant Hardin, absent during the actual taking of the slave by Haney, was nevertheless found guilty of larceny on the theory that he had conspired with Haney to commit the act. This Court reversed:

> "The evidence, we are satisfied, establishes a conspiracy between the accused persons and the witness, to steal or seduce negroes; and that those persons, or any of them, should carry them to a distance from their owners, and sell them for the common benefit. *But the concerting of such a plan does not make all the parties to it guilty as principals, upon a subsequent stealing of a slave by any one of them.* There must also be a concurrence and participation in the acts of taking and carrying away. This is ordinarily evinced by those acts being done by the prisoner himself, or by some other, when he is present, or so near that he can assist in the fact, or in the escape of him who actually perpetrates it. *Presence, therefore, in its legal sense, generally distinguishes the guilt of a principal from that of an accessory.*
>
> . . . .
>
> "The common unlawful design to steal, does not make each of the parties a principal, unless, as Judge Foster says, p. 350, at the commission of the crime 'each man operates in his station *at one and the same instant*, towards the same common design; as where one is to commit the fact, and others to watch at proper distances, to prevent surprise, or to favour escape, or the like." 19 N.C. (2 Dev. & Bat.) at 412, 416. (Former emphases supplied; latter emphasis original.)[12]

[12]Chief Justice Ruffin's quote is from M. Foster, Crown Law *350 *1762). On the same page cited by Ruffin, we find the statement: "In order to render a person an accomplice and a principal in a felony, he must be aiding and abetting at the fact, or ready to afford assistance if necessary." This section of Foster's work deals generally with situations in which those present at the scene of a crime, but who do not actually commit the criminal deed, may nevertheless be held guilty as principals (in the second degree) because of their unlawful preconcert and shared intent with the actual perpetrator.

See further *State v. Bryson*, 173 N.C. 803, 92 S.E. 698 (1917), where defendant was convicted of second degree murder when all the evidence showed him to be an accessory before the fact to first degree murder. A majority of the Court found no *prejudicial* error and refused to remand for resentencing because, it reasoned,

Chief Justice Ruffin's opinion for the Court in *Hardin* establishes beyond question that even though one conspires to commit a crime, he may not be held liable as a principal to its subsequent commission if he was not actually or constructively present at the criminal act. "Presence . . . in its legal sense" is an essential ingredient of the status of principal. *Id.* at 412. When such presence is lacking, a party to a felony may only be punished as an accessory before the fact. This important rule of the common law, affirmed in the *Hardin* decision and long codified in G.S. §§ 14-5, 14-6 and their predecessors, has never been directly questioned in our case law. Moreover, *Hardin* itself has never been overruled and it remains the law of this state.

As noted above, *see* note 8, *supra*, and accompanying text, each of the decisions which have apparently predicated liability as a principal upon no more than a showing of defendant's involvement in a conspiracy to effect the substantive crime (or one related to it) drew precedential support from language in prior cases involving defendants who were in fact present at the criminal act. An analysis of these earlier cases, and of *their* cited precedents, reveals two conceptually distinct statements of rules which were ultimately taken out of context of the cases which generated them and read literally to support the notion that conspiratorial involvement itself opens a route to liability as a principal.

The first, an agency rationale of the coconspirator rule of evidence, was itself derived from notions of civil accountability.[12.1]

---

defendant's sentence (twenty years) was less severe than if he had been convicted as an accessory before the fact (mandatory life sentence) and no more severe than the sentence given the principal perpetrator (twenty years) who had pled guilty to second degree murder. Later cases make it clear that one who is not present at the actual commission of the crime but who counsels or procures its commission is guilty, if at all, only as an accessory. *State v. Furr*, 292 N.C. 711, 235 S.E. 2d 193 (1977), *cert. denied*, 434 U.S. 924 (1977) (defendant's murder conviction reversed when evidence showed that he was, at most, an accessory before the fact to his wife's murder); *see also State v. Benton*, 276 N.C. 641, 174 S.E. 2d 793 (1970).

[12.1] In civil law although conspiracy itself is not actionable, a civil claim may be maintained against *all* conspirators for damages resulting from overt acts committed pursuant to the conspiracy by one or more conspirators. *Burton v. Dixon*, 259 N.C. 473, 131 S.E. 2d 27 (1963); *Burns v. Oil Corporation*, 246 N.C. 266, 98 S.E. 2d 339 (1957). The basis for civil liability of a conspirator who committed no overt act resulting in damage "bears close resemblance to the basis of liability of a principal

Although the rule was consistently *applied* to sustain the admissibility of the acts and declarations of one conspirator against other co-conspirators as *evidence* of the guilt of all, it was often *stated* in extraordinarily broad terms. It is not surprising, then, that its use in the criminal context could be misleading. "Everyone who does enter into a common purpose or design is equally deemed in law a party to every act which has been before done by the others, and a party to every act which may afterwards be done by any of the others, in furtherance of such common design." 1 Greenleaf on Evidence § 111 (1844). This principle was quoted verbatim in *State v. Jackson, supra*, 82 N.C. 565, 568 (1876), a conspiracy case in which the co-conspirator rule was invoked to sustain the admission against defendant of evidence of the acts and declarations of his confederate. It was quoted again in *State v. Ritter*, 197 N.C. 113, 147 S.E. 733 (1929), a conspiracy case in which we find this additional paraphrase of the principle by Chief Justice Stacy: "One who enters into a criminal conspiracy . . . forfeits his independence and jeopardizes his liberty, for, by agreeing with another or others to do an unlawful thing, he thereby places his safety and security in the hands of every member of the conspiracy." *Id.* at 115, 147 S.E. at 734. This statement, along with the original Greenleaf quote, then found a home in *State v. Williams*, 216 N.C. 446, 5 S.E. 2d 314 (1939), a homicide case wherein defendants conspired to rob the deceased and then all acted together in the perpetration of the fatal robbery. The opinion in *Williams*, however, did note that the substantive principle applicable to the facts of that case was that "where two or more persons aid and abet each other in the commission of a crime, *all being present*, all are principals and equally guilty." *Id.* at 448, 5 S.E. 2d at 315. (Emphasis supplied.) The *Williams* decision was subsequently cited in *State v. Smith*, 221 N.C. 400, 20 S.E. 2d 360 (1942), as support for general proposition that "if a number of persons combine or conspire to commit a crime . . . each is *responsible* for all acts committed by the others in the execution of the common purpose which are a natural or probable consequence of the

under the doctrine of *respondeat superior* for the torts of his agent." *Reid v. Holden*, 242 N.C. 408, 415, 88 S.E. 2d 125, 130 (1955). The doctrine of *respondeat superior* is, of course, not generally available in the criminal law to hold principals liable for the crimes of their agents. As we demonstrate in the text, criminal liability is generally personal to the defendant; he may be liable, if at all, as a conspirator (even if the object of the conspiracy is not accomplished), an accessory, or a principal perpetrator.

unlawful combination . . ." *Id.* at 405, 20 S.E. 2d at 364. (Emphasis supplied.) The proposition was applied in *Smith* to defendants who were all present and acted together at the scene of the crime, but it was then taken out of this context and quoted in *State v. Bindyke, supra*, 288 N.C. at 618-19, 220 S.E. 2d at 528, for the proposition that a defendant who was absent from a criminal attempt could nevertheless be liable as a principal to the attempt on the ground that the substantive crime naturally resulted from a conspiracy which defendant had promoted. We thus see in *Bindyke* the fruition of a rule of substantive liability derived from previous statements concerning a rule of evidence.

The second line of statements which eventually caused confusion conceptually had nothing to do with the agency basis of the co-conspirator rule, but rested upon established common law principles of accomplice liability. To illustrate, we examine those cases in which evidence of preconcert or conspiracy was used to show that defendant's presence at the scene of the crime was with criminal intent and that he therefore was liable as a principal (in the second degree) to the criminal act committed by his associates. In *State v. Simmons*, 51 N.C. (6 Jones) 21 (1958), it appeared that defendants acted in concert in committing the fatal assault. The trial court had instructed the jury that if they found the defendants had pursued the deceased with the common understanding "that they were to aid and assist each other, both being present at the commission of the act, each would be responsible for the acts of another." *Id.* at 23. This Court approved the instruction, noting: "It is a well established principle, that where two agree to do an unlawful act, each is responsible for the act of the other, provided it be done in pursuance of the original understanding, or in furtherance of the common purpose." *Id.* at 24-25. *Simmons* was subsequently relied upon in *State v. Gooch*, 94 N.C. 987 (1886), another case involving evidence of defendants acting together with a common purpose. Headnote 14 to the original report of *Gooch* reveals, however, a somewhat broader proposition than that stated in *Simmons*: "Where two or more conspire to do an unlawful act, although the act be done by one, yet they are all equally principals." Nevertheless, it is apparent from the factual circumstances of both *Simmons* and *Gooch* that the statements contained therein were intended to apply only in cases where defendants were present at the crime's commission. This point is clarified somewhat in *State v. Holder*, 153 N.C. 606, 607, 69 S.E. 66, 67 (1910): "The proof of conspiracy is necessary only to fix

liability upon members of a crowd or mob *who are present* but not shown to have committed the illegal act. In such case, if the common design or conspiracy is shown, all parties are liable." (Emphasis supplied.)

In *State v. Donnell*, 202 N.C. 782, 164 S.E. 352 (1932), this Court was faced with a trial court instruction which apparently incorporated the principle stated in *Holder*. In *Donnell*, the evidence showed that defendant had actively participated with another in the robbery which resulted in homicide. The trial court instructed the jury to find both defendants guilty of felony murder if they found that one of the defendants had killed the deceased "while in the attempt to carry out the unlawful purpose" of the conspiracy to rob. Citing *State v. Holder, supra*, this Court held the instruction free from "reversible error," noting that "*[w]ithout regard to the existence or absence of a conspiracy* . . . where two persons aid and abet each other in the commission of a crime, both being present, both are principals and equally guilty." *Id.* at 784, 164 S.E. at 353.

After the decision in *Donnell* there ensued a series of felony murder cases in which the prosecution relied upon the theory that if defendants had conspired to commit a felony, and a murder were committed by any one of the conspirators in the perpetration or attempted perpetration of the felony, each and all of the defendants would be guilty of homicide. In each of these cases, the state's theory was approved by this Court as a "correct proposition of law." *See State v. Bell*, 205 N.C. 225, 171 S.E. 50 (1933); *State v. Stefanoff*, 206 N.C. 443, 174 S.E. 411 (1934); *State v. Bennett*, 226 N.C. 82, 36 S.E. 2d 708 (1946). In each of these cases, however, all the defendants were in fact present at the scene of the murder. The *additional* evidence of their conspiracy and concerted design to commit the underlying felony was clearly sufficient to establish their liability as principals.

The same cannot be said of *State v. Maynard, supra*, 247 N.C. 462, 101 S.E. 2d 340, another case in which the conspiracy theory arguably approved in *Donnell* was applied. There the evidence disclosed that defendant was not even constructively present at the commission of the homicide, although he had conspired and participated in the preparations for the commission of the underlying felony. This Court nevertheless sustained his conviction as a principal to first degree murder upon the authority of the "correct principle of law" represented by the decisions in *Bennett, Stefanoff, Bell,* and *Donnell, supra*. 247 N.C. at 469-70, 101 S.E. 2d at 345-46. This

"correct principle" — *i.e.*, that when a homicide occurs in the course of the commission of a felony, all those who conspired to commit the felony are liable in effect as principals to first degree murder — was then reiterated in *State v. Fox*, 277 N.C. 1, 175 S.E. 2d 561 (1970). *Fox* was in turn relied upon in *State v. Albert L. Carey, supra*, 288 N.C. 254, 218 S.E. 2d 387, and in *State v. Anthony D. Carey, supra*, 285 N.C. 497, 206 S.E. 2d 213, both cases which applied the principle without regard to defendant's absence or presence at the occurrence of the felony murder.

From the foregoing, it can be seen that the erroneous idea that a conspirator automatically becomes liable as a *principal* to all crimes committed as a result of or in furtherance of the illegal agreement has largely resulted from too broad a reading of case law statements which either (1) discussed the application of the co-conspirator rule as a rule of evidence, or (2) applied established principles of accomplice liability to evidence of conspiracy and preconcert. It is likely, moreover, that the more general notion expressed in *Pinkerton v. United States, supra*, 328 U.S. 640, that a defendant's involvement in a conspiracy *ipso facto* makes him *liable as a party* to all substantive offenses committed by others in furtherance of the conspiracy, likewise derives from a misreading of similar sources.[13] "But it is repugnant to our system of jurisprudence, where guilt is generally personal to the defendant . . . to impose punishment, not for the socially harmful agreement to which the defendant is a party, but for substantive offenses in which he did not participate." *People v. McGee, supra*, 49 N.Y. 2d 48, 58, 424N.Y.S. 2d 157, 162, 399 N.E. 2d 1177, 1182 (rejecting the *Pinkerton* approach); *see also Commonwealth v. Stasiun, supra*, n. 7, 349 Mass. 38, 206 N.E.

[13]It has been noted that, prior to *Pinkerton*, the federal courts applied the dogma that the act of one conspirator is the act of all when committed within the scope of the conspiracy *only* (1) to establish as the act of all the "overt act" of one; (2) to show the extent and duration of the conspiracy; or (3) to connect all the defendants with the crime charged. Prior to *Pinkerton*, "the doctrine had not, by its own force, supported an imposition of vicarious liability for substantive offenses committed by co-conspirators." 56 Yale L.J. 371, 375-76 (1947). For a similar conclusion, *see* Developments in the Law, *Criminal Conspiracy*, 72 Harv. L. Rev. 920, 993-94 (1959). Another commentator has found that the vast majority of the decisions cited in support of the majority's ruling in *Pinkerton* "are cases which, upon examination, prove to contain evidence of definite participation in the substantive offenses by all parties convicted . . . . The conspirators convicted in these decisions are burdened with the accoutrements of accomplices." 16 Fordham L. Rev. 275, 278 (1947). In *People v. McGee, supra*, note 7, the same point was noted by the New York Court of Appeals as to previous New York decisions.

2d 672 (also rejecting the *Pinkerton* analysis).

We have seen that, as a matter of evidence, the acts and declarations of one conspirator, made in furtherance of the conspiracy, are regarded as the acts and declarations of all. But that rule, derived from the civil law of agency, should not be extended beyond the limits of its logic to impose substantive liability solely on the basis of participation in a prior criminal agreement. Otherwise, the distinction between conspiracy and the substantive offense which results from it would disappear.[14] Evidence of a defendant's involvement in a conspiracy may well be sufficient, in a proper case, to enable the jury to infer the elements of defendant's guilt as a party to the later substantive offense. But participation in an illegal agreement does not itself establish, as a matter of law, criminal liability for crimes which result from furtherance of the agreement.

To summarize our holding today:

(1) Evidence sufficient to show defendant's involvement in a criminal conspiracy does not itself establish defendant's liability as a party to the substantive felony committed as a result of the conspiracy; it is reversible error for the court to so instruct the jury.

(2) Such evidence will nevertheless always be *relevant* to submit to the jury as proof of defendant's complicity in the substantive felony charged, in that it tends to show either (a) defendant, though absent at the felony's commission, nevertheless counseled, procured,

[14]We have consistently held that the crime of conspiracy is a separate offense from the accomplishment or attempt to accomplish the intended result. Thus, the offense of conspiracy does not merge into the substantive offense which results from the conspiracy's furtherance. A defendant may be properly sentenced for both offenses. *See, e.g., State v. Goldberg*, 261 N.C. 181, 134 S.E. 2d 334 (1964); *State v. Brewer*, 258 N.C. 533, 129 S.E. 2d 262 (1963). It would be otherwise, however, were a defendant convicted of the substantive offense solely on the basis of his participation in the conspiracy. In such a case, proof of guilt of the substantive offense would necessarily include (indeed, would be equivalent to) proof of involvement in the conspiracy, and the defendant could not be properly punished both for conspiracy and the separate offense. *See, e.g., State v. Thompson*, 280 N.C. 202, 185 S.E. 2d 666 (1972), discussing the rationale of merger of the underlying felony into the homicide charge in cases of felony murder. *See also State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979), and *State v. Tatum*, 291 N.C. 73, 229 S.E. 2d 562 (1976), pointing out that the merger requirement may depend upon the theory of the case submitted by the judge to the jury. It should be noted that in the instant case, Judge Smith instructed the jury to find defendant guilty of murder upon proof that defendant had conspired to commit the murder. Given this theory of the case (a theory we reject today), the offense of conspiracy merged into the offense of murder. Accordingly, Judge Smith arrested judgment on the conspiracy conviction.

or commanded its commission, or (b) that defendant, present at the scene of the felony, shared in the criminal intent of the actual perpetrators and thus aided and abetted in the felony's occurrence or acted in concert with those who committed it. What the evidence does in fact show, however, is for the jury to decide.

(3) Unless and until the legislature acts to abolish the distinction between principal and accessory, a party to a crime who was not actually or constructively present at its commission may at most be prosecuted, convicted and punished as an accessory before the fact.

In the case before us, there is plenary evidence that the brutal murder of the deceased was committed at defendant's direction. From all the evidence, however, defendant was not present, actually or constructively, during the homicide's commission. Defendant's status as a party to the crime is at most, therefore, that of an accessory before the fact. He may not be punished as a principal.

The question remains as to the scope of relief to which he is entitled upon this appeal.

[8] By returning a verdict of guilty of first degree murder, the jury necessarily found that the evidence showed beyond a reasonable doubt all those elements instructed upon by the trial judge in his final mandate, *i.e.*, (1) that the deceased was intentionally killed with malice, premeditation, and deliberation; (2) that the person(s) who killed the deceased had previously agreed with defendant that the murder be committed; (3) that at the time of this agreement, both the defendant and the murderer(s) intended that the agreement's fatal objective be effected; and (4) that the murder itself was done in the furtherance of the agreement. In substantive effect, then, the jury found from the evidence that the murder of Evelyn Small was the intended product of the agreement between defendant and her killer(s). The *only* such agreement shown by the evidence, however, was that series of transactions whereby defendant approached Johnson and Lowery and successfully solicited their services to commit the fatal deed in his absence. Thus, the circumstances of the agreement itself reveal beyond contradiction that defendant "procured" and "counseled" the commission of the offense with which he is charged. Viewed in this light, the verdict *as found by the jury* clearly establishes as a matter of law defendant's guilt as an accessory before the fact to first degree murder.

[9] The record further reveals that defendant was indicted, not as an accessory before the fact, but upon the charge of the principal felony of first degree murder. At the time of the return of the indictment by the grand jury on 4 December 1978, it was the law in this state that one indicted for the principal felony could nevertheless be convicted upon that indictment as an accessory before the fact. *See* G.S. 14-5; *State v. Holmes*, 296 N.C. 47, 249 S.E. 2d 380 (1978), and cases cited therein. Effective 1 October 1979, however, G.S. 14-5.1 provides that any person "who *shall be charged* with the principal felony in an indictment . . . may not be convicted as accessory before the fact to the principal felony on the same indictment...." (Emphasis supplied.) We discern in the statute's use of the words "shall be charged" a clear legislative intent that the change in procedure mandated by G.S. 14-5.1 apply prospectively only, *i.e.*, to those cases in which the indictment itself is returned on or after 1 October 1979. Defendant therefore is not entitled to the procedural benefits embodied in the new statute. *State v. Cameron*, 284 N.C. 165, 200 S.E. 2d 186 (1973), *cert. denied*, 418 U.S. 905 (1974); *State v. Pardon*, 272 N.C. 72, 157 S.E. 2d 698 (1967). His conviction as an accessory before the fact to the crime of murder, manifest in the jury's verdict, may thus be upheld. His punishment as an accessory before the fact must, however, proceed according to the limitations of G.S. 14-6, which provides for a mandatory sentence of life imprisonment upon conviction as an accessory before the fact to murder.

II

[10] Defendant assigns as error the failure to arraign him before trial in accordance with G.S. 15A-941.[15] The record reveals that there was an arraignment before Judge McKinnon on 15 December 1978. The clerk's minutes, which are included without objection or challenge as to their accuracy, and which as part of the record on appeal, reflect that on that day "[t]he defendant was brought to Court for the purpose of arraignment and the plea was not guilty." Defendant argues that the record must reflect that at arraignment the charges were read or summarized to defendant by the prosecutor as required by the statute. We disagree. Defendant, as appellant, has

[15] § 15A-941. *Arraignment before judge* — Arraignment consists of bringing a defendant in open court before a judge having jurisdiction to try the offense, advising him of the charges pending against him, and directing him to plead. The prosecutor must read the charges or fairly summarize them to the defendant. If the defendant fails to plead, the court must record that fact, and the defendant must be tried as if he had pleaded not guilty.

the burden on appeal to show that error was made. We will not presume that G.S. 15A-941 was not complied with when the record shows that an arraignment took place and defendant, duly represented by counsel, entered a plea of not guilty. If defendant was not properly informed of the charges against him at arraignment, it was his duty to object at that time and to have appropriate entries made in the record to show the basis for the objection. Defendant here did neither. The record reveals simply that on 2 April 1979, just before the jury was selected, the following entry was made:

"ARRAIGNMENT

No record of the defendant being arraigned and entering a plea. No record of his waiving arraignment and entering a plea. Defendant tried without pleading to the charge, the defendant contends.
EXCEPTION No. 1"

The entry does not appear to be factually correct. It certainly does not suffice to preserve defendant's complaint about what might have occurred when the arraignment actually took place on 15 December 1978. Furthermore, in *State v. McCotter*, 288 N.C. 227, 234, 217 S.E. 2d 525, 530 (1975), we found no prejudicial error when the record was silent as to whether an arraignment had taken place but the trial was conducted throughout as if defendant had been arraigned and had pleaded not guilty. So it is here. This assignment of error is overruled.

Defendant assigns as error the introduction of evidence regarding his past acts of misconduct.

[11] The first such evidence was offered during the testimony of the state's first witness, Earl Locklear. Locklear was describing a meeting between him, Paul Lowery, and defendant in the early morning hours in defendant's store. The central topic of conversation at the meeting was the defendant's request of Small and Lowery to kill defendant's wife. The meeting lasted an hour. Locklear described the conversation between the men in great detail. He testified that when he entered the store defendant was lying on a mattress in a small storage room "bragging about the women he had made love to on the mattress." The following testimony then occurred:

"Q. What did he say about that?

MR E. BRITT: Object. Move to strike.

THE COURT: Overruled.

Q. (BY MR. J. BRITT) Go ahead.

A. Well, he said he had made love to them "dog fashion," legs straight up in the air.

Q. What else?

A. Blow jobs.

Q. All right.

MR. E. BRITT: Object. Move to strike.

THE COURT: All right. Let's be quiet.
Overruled.
EXCEPTION No. 4"

Later, on cross-examination, Locklear testified:

> "We went into the back room and James was bragging about having sex with women, that is what he told me. I told you that then James Small and Paul Lowery talked about the killing of his wife and that as such I told him I wouldn't have any part of it."

There was no objection to the evidence tending to show that defendant had, generally, had sex with other women. Defendant concedes in his brief that such testimony might be competent to show motive. *See State v. Burney*, 215 N.C. 598, 3 S.E. 2d 24 (1939). Defendant, however, strenuously urges that it was error to permit evidence which described in some detail the nature of defendant's sexual encounters with the other women. He relies on *State v. Rinaldi*, 264 N.C. 701, 142 S.E. 2d 604 (1965), in which defendant, having been convicted of murdering his wife, was awarded a new trial because the state offered evidence that defendant had made homosexual advances to a state's witness whom defendant had sought to hire to do the murder. The Court said, "The jury should not be prejudiced to defendant's detriment by evidence tending to prove that he is a moral degenerate, prepared to commit the abominable and detestable crime against nature, a felony." *Id.* at 705, 142 S.E. 2d at 67.

It is, of course, error for the state "in a prosecution for a particular crime [to] offer evidence tending to show that the accused has committed another distinct, independent, or separate offense" when the *sole* purpose of the evidence is, generally, to show that the defendant is a bad person and, therefore, predisposed to commit criminal acts generally. *State v. McClain*, 240 N.C. 171, 173, 81 S.E. 2d 364, 365 (1954). In the testimony here complained of, only the reference to "blow jobs" could conceivably amount to evidence tending to show that defendant had committed a prior criminal act. *See State v. Adams*, 299 N.C. 699, 264 S.E. 2d 46 (1980). Nonetheless we believe that it was error to permit this testimony detailing the manner in which defendant engaged in sexual relations with other women. We are satisfied, however, that given the admissibility of the fact that defendant had sexual relations with other women, the outcome of the trial would not have been different had this bit of embellishment not been admitted. There is no "reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial..." G.S. 15A-1443. The embellishment does not necessarily, in today's society at least, make defendant out to be a "moral degenerate" as the court described the effect of the testimony in *Rinaldi* dealing with homosexual advances. This assignment of error is, therefore, overruled.

[12] Defendant next assigns as error the admissibility of similar evidence regarding defendant's sexual relations with other women and other forms of misconduct brought out on cross-examination of defendant himself. In each instance the defendant denied committing any of the acts. We see no error in this procedure. A defendant who takes the stand in his own behalf may be cross-examined for purposes of impeachment concerning prior criminal acts or specific acts of misconduct so long as the questions by the prosecutor are asked in good faith. *State v. Mayhand*, 298 N.C. 418, 259 S.E. 2d 231 (1979). In the one instance in which the prosecutor appeared not to be acting in good faith because he repeated an inquiry concerning an act of misconduct which defendant had already denied, the trial judge sustained defendant's objection and instructed the jury to disregard the question. We find no error, consequently, in this aspect of the trial.

[13] Defendant next assigns as error the admission of testimony given by defendant on cross-examination regarding the results of a

polygraph examination administered to defendant before trial.[16] Before trial defendant and the state stipulated that defendant would submit to a polygraph examination. The stipulation further provided that the polygraph operator's written report could be introduced into evidence at the time of the operator's testimony and that if the operator was unavailable to testify then the written report itself could be introduced. If, however, according to the stipulation, the results of the polygraph were indefinite, then the operator would not be called to testify nor would the polygraph examination itself be mentioned either directly or indirectly or alluded to in any way during the trial. The polygraph result, itself, does not appear in the record. On direct examination, however, defendant testified that he had gone to the police department for the purpose of taking a polygraph test but was told to go back home. He then said that he would have voluntarily taken a polygraph test if it had been offered to him.

On cross-examination defendant testified, without objection, that the state had given him two polygraph tests. He also gave testimony, to which no assignment of error on appeal has been directed, as follows: During one of the tests he took a penicillin tablet, but he had not been instructed by the operator not to take any pills during the test. Nevertheless he was taken, pursuant to his pre-trial stipulation, to a hospital to have his stomach evacuated after having taken the pill; thereafter the operator immediately scheduled another polygraph examination. On cross-examination with regard to the second examination defendant was asked whether he "flunked it." An objection to this question was sustained and the jury instructed not to consider it. The following then transpired:

> "Q. (By Mr. J. Britt) You know that your test showed deception all the way through; don't you, Small?
>
> MR. KIRKMAN: Objection.
>
> THE WITNESS: No, I do not.
>
> THE COURT: Overruled.
>
> Q. (By Mr. J. Britt) You have not seen a copy of the report given to your lawyers?

[16]The general rules for admissibility of such evidence are set out in *State v. Milano*, 297 N.C. 485, 256 S.E. 2d 154 (1979). Generally the results of polygraph examinations are inadmissible absent a stipulation to the contrary by the parties.

A. I was told I didn't do too well on it.

EXCEPTION NO. 33"

Later during defendant's cross-examination concerning the second polygraph examination the following occurred:

"Q. And that is the one that you say you showed deception on the test in; is that correct?

MR. E. BRITT: Objection to *what he said.*

THE COURT: Overruled.

Q. (By Mr. J. Britt) Isn't it?

A. Yes, sir.

EXCEPTION NO. 45" (Emphasis supplied.)

First, we note that defendant neither objected to the question, "You have not seen a copy of the report given to your lawyers?" nor did he move to strike his answer, "I was told I didn't do too well on it." Consequently defendant has not properly preserved his Exception No. 33. "In case of a specific question, objection should be made as soon as the question is asked and before the witness has time to answer. Sometimes, however, inadmissibility is not indicated by the question, but becomes apparent by some feature of the answer. In such cases the objection should be made as soon as their inadmissibility becomes known, and should be in the form of a motion to strike out the answer or the objectionable part of it." *State v. Patterson*, 284 N.C. 190, 196, 200 S.E. 2d 16, 21 (1973), *quoting* 1 Stansbury's North Carolina Evidence § 27 (Brandis Rev. 1973) (hereinafter North Carolina Evidence); *see* App. R. 10 (b) (1).

Second, defendant's later objection to the question, "And that is the one that you say you showed deception on the test in; is that correct?", was not on the ground that the question asked for polygraph results, but on the ground that the witness was being asked to repeat former testimony. If the objection was properly overruled on this ground, another ground cannot be assigned to it on appeal. *State v. Jones*, 293 N.C. 413, 238 S.E. 2d 482 (1977); 1 North Carolina Evidence 72. Mere repetition should not generally be permitted, *State v. Gray*, 268 N.C. 69, 150 S.E. 2d 1 (1966); but there are circumstances (*e.g.*, former testimony was confusing or inaudible) where repetition is appropriate. Such circumstances often exist on

cross-examination where the examiner may wish to test the witness' consistency, perception, memory, etc., or to bring out further details of the witness' direct testimony. The extent to which such cross-examination may be permitted is a matter which, to some extent, rests in the trial judge's discretion so long as the discretion is not exercised to violate a defendant's right of confrontation. *See generally* 1 North Carolina Evidence § 35, and particularly p. 108, n. 51. Here the question was obviously asked to clear up any confusion that might have existed as to which polygraph test the witness was referring. It was well within the trial court's discretion to permit the answer for this purpose. Defendant's objection on the ground assigned, therefore, was properly overruled.

There is a more fundamental reason why defendant may not now complain of the state's cross-examination regarding the polygraph. Defendant's direct testimony on the subject rendered admissible the state's cross-examination. Evidence which might not otherwise be admissible against a defendant may become admissible to explain or rebut other evidence put in by the defendant himself. *State v. Black*, 230 N.C. 448, 53 S.E. 2d 443 (1949); *see also State v. Patterson, supra*, 284 N.C. 190, 200 S.E. 2d 16. Here on direct examination defendant testified in such a way as to leave the false impression that the state had refused to accept his offer to submit to a polygraph examination. It was proper for the state, therefore, on cross-examination to show that, in fact, defendant had been given a polygraph. The state was not, however, required to stop there. Had it done so, the jury might have been left with the impression that the state, bearing the burden of proof, did not offer the results of the polygraph because they were unfavorable to it. Both the state and defendant are entitled to a fair trial. Defendant by first injecting the subject of the polygraph into the trial in a manner designed to mislead the jury invited the very cross-examination of which he now complains. His assignments of error directed to this cross-examination are for this additional reason overruled.

In defendant's trial we find no error except the submission to the jury of the question of defendant's guilt of murder in the first degree and the sentence of death imposed as a result of defendant's conviction of that crime. The matter is remanded, therefore, to the Superior Court of Robeson County for the entry of a verdict of guilty of accessory before the fact to murder, *State v. Goss*, 293 N.C. 147, 235 S.E. 2d 844 (1977), and the imposition of a sentence of life

imprisonment. *State v. Matthews*, 295 N.C. 265, 245 S.E. 2d 727 (1978). Defendant's presence for these entries shall not be required. *Id.*

Error and remanded.

Justice BROCK did not participate in the consideration and decision of this case.

Justice HUSKINS dissents.

STATE OF NORTH CAROLINA v. LARRY WADE PRICE

NO. 44

(Filed 2 December 1980)

1. Constitutional Law § 61; Jury § 7.1— exclusion of group from jury — showing required

In order to establish a *prima facie* case that there has been a violation of the requirement that a jury be composed of persons who represent a fair cross-section of the community, defendant must document that the group alleged to have been excluded is a distinctive group, that the representation of the group in question within the venire is not fair and reasonable with respect to the number of such persons in the community, and that this underrepresentation is due to systematic exclusion of the group in the jury selection process.

2. Constitutional Law § 61; Jury § 7.1— exclusion of group from jury — requirements of group

In determining whether a group is distinctive or cognizable for the purpose of a challenge to a jury selection plan, three factors which must be considered are whether there is some quality or attribute in existence which defines or limits the membership of the alleged group, whether there is a cohesiveness of attitudes, ideas, or experiences which serves to distinguish the purported group from the general social milieu, and whether a community of interest is present within the alleged group which may not be represented by other segments of the populace.

3. Constitutional Law § 61; Jury § 7.1— jury representing cross-section of community — young people not a distinct group

The N.C. Supreme Court does not recognize "young people" as a distinct group for the purpose of determining whether a jury panel represents a fair cross-section of the community, since the parameters of such a group are difficult to ascertain, as evidenced by the widely varying ages which have been used to define it; defendant failed to demonstrate that the values and attitudes of this purported group are substantially different from those of other segments of the community or that the values and attitudes of the members of the purported

group are cohesive and consistent; and the membership of the purported group is constantly in flux with persons aging out of it as well as growing into it.

4. Constitutional Law § 61; Jury §§ 7.1, 7.4— blacks and young people — representation in jury pool fair and reasonable

Defendant failed to show that the representation of young people between the ages of 18 and 29 and blacks within the venire was not fair and reasonable with respect to the group's presence within the relevant community, and he failed to show that such misrepresentation was the result of a systematic exclusion of the group by the jury selection process, since during the time in question blacks made up 17.1% of the jury pool but 31.1% of the county's population; young people between the ages of 18 and 29 made up 22.5% of the jury pool but 33.3% of the county's population; such disparity did not establish that the components of the population of the county were not reflected fairly and reasonably in the jury pool; the jury pool was chosen through use of property tax listings and voter registration records; and such method created a broad and extensive data base which was appropriately employed to give the competing perspectives in the community a reasonable opportunity to participate in the judicial process through service on a jury.

5. Criminal Law § 77.2— defendant's statement that shooting was self-defense — exclusion as hearsay

Defendant's statement to officers at the time of his arrest that the shooting had been in self-defense was properly excluded from the jury's consideration because of the statement's hearsay character.

6. Homicide § 19.1— shooting deaths — self-defense alleged — evidence of violent nature of victims

There was no merit to defendant's contention in a homicide prosecution that the trial court erred in excluding evidence concerning the predisposition to violent behavior of the victims, since the court excluded testimony in two instances, but in neither case was the answer which the witness would have given placed in the record; on several occasions defendant offered evidence to which the State objected, and the objection was granted, but no motion to strike was made so that the evidence was before the jury notwithstanding the State's objection; and other evidence which defendant sought to place before the jury but which was excluded was merely repetitive.

7. Homicide § 15— evidence of gun held by victims' son — attempt of investigator to test fire — evidence not prejudicial

In a homicide prosecution where the evidence tended to show that defendant shot his victims, the trial court did not err in admitting testimony by an investigator from the sheriff's department that he had received a shotgun from an uncle of the victims' son three months after the shootings and that he had attempted to test-fire the weapon, since the investigator's testimony served to flesh out the account the victims' son offered concerning his conduct during the incident, and even if the evidence was too remote to have been properly placed before the jury, defendant failed to demonstrate how the evidence was prejudicial to his interests.

8. Jury § 9— juror's calling of defense counsel — juror properly removed —alternate juror properly substituted

The trial judge did not abuse his discretion in removing a juror and substituting the alternate juror where the original juror contacted defense counsel at his home during the week-end recess and persisted in discussing matters of a personal nature, including counsel's marital status, and though there was no evidence that any matter which related to the trial of defendant was discussed during the conversation, the exercise of discretion by the trial judge served to safeguard the trial of defendant from even the appearance of impropriety. G.S. 15A-1215 (a).

9. Criminal Law § 114.3— jury instructions — no expression of opinion

There was no merit to defendant's contention in a homicide prosecution that the trial judge impermissibly expressed an opinion (1) on the credibility of defendant and those of his relatives who testified on his behalf, since the court's instruction on interested witnesses was proper; (2) by failing to reinstruct the jury on the elements of self-defense when the jury on two occasions returned to the courtroom and requested additional instructions on the crimes charged, since a trial judge who has complied with a request by the jury for additional instructions is not required also to repeat his instructions as to other features of the case which have already been correctly given; and (3) in instructing the jury on the procedure which was to be followed upon their return of a verdict which found defendant guilty of first degree murder, since the judge's comments did not precipitate a rush to judgment by the jury.

Justice BROCK did not participate in the consideration or decision of this opinion.

APPEAL by defendant from judgments of *Rouse, J.*, entered at the 31 October 1979 Criminal Session of WAYNE Superior Court.

Defendant was tried upon bills of indictment proper in form which charged him with two counts of first-degree murder and one count of discharging a firearm into an occupied building.

The state introduced evidence which tended to show:

On the afternoon of 22 May 1979, defendant and his wife visited in the home of Glenn Cashwell and his wife on Highway 55 near Mt. Olive, North Carolina. Defendant and his wife lived approximately 1,000 feet from the Cashwell family on the opposite side of the highway. Both defendant and Mr. Cashwell were unemployed. The couples had gathered to discuss the possibility of the two men obtaining employment in Virginia.

Between 3:30 p.m. and 4:00 p.m., defendant and his wife left the Cashwell trailer and returned to their own home to pack their belongings for the impending trip to Virginia. At the time the couples parted company, their relationship was amicable.

At about 4:10 p.m., Mrs. Price returned to the Cashwell residence visibly upset. In the presence of her husband, Mrs. Cashwell tried to calm her neighbor. Some fifteen minutes later, Mr. Cashwell left his home in an automobile and drove to the Price trailer to make an inquiry as to what had happened. He was accompanied by his fifteen-year-old son, Billy, who was later to be the state's principal witness.

Upon their arrival at defendant's home, Mr. Cashwell went to the front door and Billy went to the back door. Responding to Billy's knocking, defendant went to the back door and let the teenager enter the dwelling. Defendant had appeared at the entrance in an unkempt manner. Billy and defendant walked through the trailer to the front door where Mr. Cashwell was standing. Defendant opened the door and invited his neighbor to enter the home. Mr. Cashwell talked with defendant for approximately ten minutes seeking to calm him. After a short while, defendant agreed to return to the Cashwell home.

Upon defendant's arrival at the Cashwell home, the couples resumed their discussion. After approximately a half hour, defendant took off his wedding ring and threw it on the kitchen table, whereupon Mr. Cashwell asked him to leave the trailer. Defendant complied with the request, leaving the residence immediately in an agitated state. Defendant's wife remained in the kitchen with the Cashwell couple.

Approximately forty-five minutes after he had left the Cashwell home, defendant returned, driving a gray Pontiac automobile. During the time of defendant's absence, the Cashwells sat at their kitchen table with Mrs. Price and talked with her. When defendant drove into the driveway, Billy Cashwell, who was standing at the front door, called out to his father, "Daddy, Larry Price is back." Defendant remained seated in his car until Mr. Cashwell went out the front door. At that time, defendant's automobile was approximately forty feet from the front door of the Cashwell trailer.

As Mr. Cashwell walked out the front door of his home, defendant got out of the car and produced a shotgun. Aiming his weapon at Mr. Cashwell, defendant demanded that his wife be sent out of the house to him. Mr. Cashwell indicated that he would not do as defendant had demanded. Defendant thereupon replied that if Mr. Cashwell did not send Mrs. Price out of the house he would "blow his (Cashwell's) brains out." Ten minutes passed as the two men confronted each other in silence across the yard.

Meanwhile, Mrs. Cashwell had called the Mt. Olive Police Department seeking assistance. Throughout the encounter, Mrs. Cashwell remained in the trailer. As his mother talked frantically on the telephone, Billy took down a shotgun from the gun rack and went to the front door with it. When Billy brought the gun to the front door, defendant saw the weapon and ordered the boy to put it down. The teenager complied with the demand, laying the shotgun down on the floor beside a front window.

The confrontation between the two men ended with Mr. Cashwell telling defendant, "Go ahead and shoot me in the back. I am going in the house." Mr. Cashwell turned away from defendant and raised his hands into the air as he walked toward the front door of his home. As he reached the entrance after having taken about three steps, Mr. Cashwell was shot in his back by a blast from defendant's weapon. Mrs. Cashwell was shot as she stood by the front door talking on the telephone. Both of the Cashwells were fatally wounded. At the time he fired, defendant was standing against an oak tree in the front yard of the Cashwell home.

Defendant fled the scene in his car. Around midnight, some six hours after the killings, defendant was arrested in Wilson County by police officers who had received information concerning the killings. Defendant told the officers that he had been charged with a double homicide in Wayne County.

Defendant introduced evidence, including his own testimony, which tended to show:

On Friday, 22 May 1979, he was unemployed and he, his wife and infant daughter were preparing to move to Virginia. Previously he was employed by Georgia-Pacific Corporation where Glenn Cashwell was a co-worker. While defendant had heard of Mr. Cashwell for much of his life, the two men did not actually meet one another until Mr. Cashwell went to work at Georgia-Pacific. They had been friends for approximately five to six weeks prior to 22 May 1979.

On the morning of 22 May 1979, defendant called Mr. Cashwell on the telephone and asked him to drive him to the plant to pick up his paychecks and his car. Mr. Cashwell was willing to meet the request but suggested that defendant call the factory to make sure that the paychecks would be ready. Upon calling the plant and learning that his paychecks would be ready, defendant again called

the Cashwell trailer and talked with Mrs. Cashwell who agreed to drive defendant to the factory. As defendant and Mrs. Cashwell were driving off, they saw Mr. Cashwell at a distance. They stopped and defendant went on to the plant with Mr. Cashwell.

After defendant picked up his paychecks and turned in his tools, defendant and Mr. Cashwell ran errands in the area. Around 11:00 a.m., they returned to the Cashwell residence where they began drinking liquor with their wives. After a short while, defendant and his wife left the Cashwells to attend to some personal matters, only to return in early afternoon. Not long after the Price couple returned to the Cashwell home, a dispute erupted when Mr. Cashwell apparently suggested that the wives remain together in North Carolina while he and defendant went to Virginia seeking work. Defendant insisted that Mr. Cashwell's plan was not what he had in mind. At around 3:00 p.m., defendant and his wife returned to their own trailer but only after Mrs. Price expressed an intention to remain with Mrs. Cashwell.

Upon returning to their own home, the Price couple continued arguing with one another over the arrangements for the trip to Virginia. After being pushed against the wall in their home by her husband, Mrs. Price fled to the Cashwell trailer. Between fifteen and twenty minutes later, Mr. Cashwell drove up to the Price residence and asked defendant what was wrong. Defendant told him that he did not approve of the Cashwells trying to influence Mrs. Price concerning the planned trip to Virginia. After Mr. Cashwell left, having been told that defendant no longer wished to be his friend, defendant packed a few clothes and drove back to the Cashwell trailer.

Upon his arrival, defendant insisted upon having his wife accompany him to Virginia, but she refused. At about the same time, defendant's sister, Deborah Williams, entered the trailer. As she walked in, Mr. Cashwell pushed her into a chair and ordered her not to move. The argument between the couples continued until defendant took off his wedding ring and threw it on the kitchen table after having been told by his wife that her parents were on their way to pick her up and take her back home. Thereupon, defendant returned to his trailer alone.

A few minutes later, Glenn Cashwell and his son, Billy, arrived at defendant's residence. Billy entered the trailer through the back door and talked briefly with defendant as they walked together

through the house to the front door where Mr. Cashwell was waiting. Upon entering the trailer, the elder Cashwell began slapping defendant and pushing him about the residence. Defendant retreated into the kitchen where he procured a butcher knife which he used to force Mr. Cashwell to leave the premises.

Five or six minutes later, defendant telephoned his wife, who was still at the Cashwell home, telling her that if she did not return home, he would go there and get her himself. Defendant then drove to the nearby trailer. As he drove up in the yard, defendant saw Mr. Cashwell coming out of the front door carrying a knife whose blade was approximately 2½ inches long. As Mr. Cashwell approached, defendant reached into the back seat of his car to retrieve a hard hat but before he could do so, Mr. Cashwell was upon him and pressed the knife to his side, telling defendant to leave the premises. Defendant immediately left and went to the home of his sister where he borrowed a shotgun, saying that he intended to go back to the Cashwell trailer and pick up his wife and child. Before returning to the home of the Cashwells, defendant went to the home of a neighbor and procured ammunition for the weapon.

As defendant drove into the driveway, he saw Mr. Cashwell coming out of the house. Mr. Cashwell walked across the yard and stopped at the rear of another automobile. As Mr. Cashwell came around the rear of the car, he reached into his pocket, and defendant pulled out his gun. After defendant demanded that his wife and child be sent out to him, Mr. Cashwell told him to put down his weapon. Mrs. Cashwell, meanwhile, had appeared at the front door. She withdrew momentarily into the house and reappeared at the door bearing a shotgun. When Mrs. Cashwell pointed the weapon at defendant, he fired his gun and fled the scene.

The jury returned verdicts finding defendant guilty of the second-degree murder of Mr. Cashwell, guilty of the second-degree murder of Mrs. Cashwell, and guilty of discharging a firearm into an occupied dwelling. The court entered judgments imposing life prison sentences in the murder cases and a prison sentence of 8-10 years in the other case, all sentences to run concurrently. We allowed defendant's motion to bypass the Court of Appeals in the discharging a firearm case.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Jane Rankin Thompson, for the state.

John W. Dees for defendant-appellant.

BRITT, Justice.

By his first assignment of error, defendant contends that the trial court erred in denying his pretrial motion challenging the jury pool on the ground that blacks as well as young people between the ages of 18 and 29 were underrepresented in the pool. He argues that he was denied due process of law. There was no error in the denial of the motion.

At the hearing on the motion, defendant presented the testimony of Mr. James O'Reilly, a doctoral candidate in the field of sociology with an emphasis in demography at Duke University. Mr. O'Reilly conducted studies on the demographics of the Wayne County jury pool for the periods of 1976-1977 and 1978-1979. The purpose of these studies was to determine the correlation between the racial makeup of the jury pool for these periods and the population of the county as a whole. The studies also sought to determine whether the composition of the jury pool for the periods in question reflected the composition of the county's population by age group. The study was based upon data which had been obtained from the 1970 United States Census.

After the data was adjusted for an undercount of 2 percent for whites and 8 percent for blacks, the population of Wayne County over the age of eighteen was 68.9 percent white and 31.1 percent black. The census data further indicated that those persons between the ages of 18 and 29 made up 33.3 percent of the population which was subject to service as jurors.

The surveys indicate that the 1976-1977 jury pool was 79 percent white and 21 percent black and that the racial composition of the 1978-1979 jury pool was 82.9 percent white and 17.1 percent black. In other words, the two surveys reflected an underrepresentation of blacks by 10.1 percent and 14 percent, respectively. The studies further revealed that members of the 18 to 29-year-old group composed 20 percent of the 1976-1977 jury pool and 22.5 percent of the 1978-1979 jury pool. Again, the surveys demonstrated an under-representation of a segment of the community's population in the amount of 13 percent and 10.5 percent respectively.

At the hearing, the state introduced evidence which established that the Wayne County Jury Commission for 1978-1979 drew

a jury list by selecting every second name from the Wayne County tax roll, excluding non-personal listings of corporations and associations, and every third name from the Wayne County voter registration list. Both sources of data were stored in the facilities of the Wayne Computer Center. At the direction of the jury commission, the computer center provided the commission with data cards which indicated the names and addresses of the persons who had been selected by the computer in accordance with the procedure set out above. The cards contained no information concerning the age or the race of the person so selected. The cards were then locked in the vault of the Wayne County Register of Deeds where they were blindly selected whenever it became necessary to draw a venire.

In all respects, the procedure followed by the Wayne County Jury Commission comported with the statutory requirements for constituting a jury pool *See generally G.S.* §§ 9-1 to -7 (1969 and Cum. Supp. 1979). However, that observation does not serve to resolve the issue in the case *sub judice.* Defendant does not contend that the statutory procedures were not followed but instead argues that his sixth amendment right to trial by jury was infringed upon by the procedure so employed in that it served to deny to him the right to be tried before a jury which was composed of a fair cross-section of the community. Our analysis of the facts of the present case in light of the pertinent case law compels us to disagree.

[1] In order to establish a *prima facie* case that there has been a violation of the requirement that a jury be composed of persons who represent a fair cross-section of the community, defendant must document that the group alleged to have been excluded is a distinctive group; that the representation of the group in question within the venire is not fair and reasonable with respect to the number of such persons in the community; and that this underrepresentation is due to systematic exclusion of the group in the jury selection process. *Duren v. Missouri,* 439 U.S. 357, 58 L. Ed. 2d 579, 99 S. Ct. 664 (1979); *State v. Hough,* 299 N.C. 245, 262 S.E. 2d 268 (1980); *State v. Avery,* 299 N.C. 126, 261 S.E. 2d 803 (1980).

[2] In determining whether a group is distinctive or cognizable for the purposes of a challenge to a jury selection plan, three factors must be weighed as being pertinent to the decision. First, there must be some quality or attribute in existence which defines or limits the membership of the alleged group; second, there must be a cohesiveness of attitudes, ideas, or experiences which serves to

distinguish the purported group from the general social milieu; and third, a community of interest must be present within the alleged group which may not be represented by other segments of the populace. *United States v. Smith*, 463 F. Supp. 680 (E.D. Wis. 1979); *United States v. Guzman*, 337 F. Supp. 140 (S.D.N.Y.), *aff'd*, 468 F. 2d 1245 (2d Cir. 1972), *cert. denied*, 410 U.S. 937 (1973). When defendant's claim is evaluated in light of the relevant considerations, blacks are cognizable as a distinctive group for the purpose of fair cross-section analysis. *Strauder v. West Virginia*, 100 U.S. 303, 25 L. Ed. 664 (1879); *State v. Hough, supra; State v. Avery, supra.* We are unable to conclude, however, that young people between the ages of 18 and 29 constitute such a group.

[3] On numerous occasions, courts have been requested to recognize "young people" as a distinct group for the purpose of determining whether a jury panel represents a fair cross-section of the community. With one exception, *United States v. Butera*, 420 F. 2d 564 (1st Cir. 1970), they have refused to do so. *United States v. Ross*, 468 F. 2d 1213 (9th Cir. 1972), *cert. denied*, 410 U.S. 989 (1973); *United States v. Kuhn*, 441 F. 2d 179 (5th Cir. 1971); *United States v. DiTommaso*, 405 F. 2d 385 (4th Cir.), *cert. denied*, 394 U.S. 934 (1968). If the jury system is to fulfill its historic mission to bring the common sense of the community to the application and enforcement of the substantive law, it is of manifest necessity that the attitudes and perspectives of the pertinent community be fairly represented in the process. *See Ballew v. Georgia*, 435 U.S. 223, 55 L.Ed. 2d 234, 98 S. Ct. 1029 (1978); *Peters v. Kiff*, 407 U.S. 493, 33 L. Ed. 2d 83, 92 S. Ct. 2163 (1972). However, we are unable to agree with defendant's argument that young people between the ages of 18 and 29 bring to the judicial process potentially unique and varied perspectives. We base our decision in this regard on three distinct grounds. First, the parameters of such a group are difficult to ascertain, as evidenced by the widely varying ages which have been used to define it. *See United States v. Ross*, 468 F. 2d at 1217. Second, defendant has failed to demonstrate that the values and attitudes of this purported group are substantially different from those of other segments of the community, nor has he demonstrated that the values and attitudes of the members of the purported group are cohesive and consistent. Third, the membership of the purported group is constantly in flux, with persons aging out of it, as well as growing into it. In other words, an individual is not a member of this group once and for all.

[4] Though it is settled that blacks constitute a cognizable group for purposes of fair cross-section analysis, and even if we were to accept defendant's argument that young people between the ages of 18 and 29 ought to be deemed such a group, two more elements of the *Duren* test must be established for defendant to successfully challenge the Wayne County jury pool. Not only must the group in question be cognizable, it must also be affirmatively documented that the representation of that group within the venire is not fair and reasonable with respect to the group's presence within the relevant community. That misrepresentation, in turn, must be the result of a systematic exclusion of that group by the jury selection process. It is our conclusion that defendant has utterly failed to meet his burden with respect to either of the latter two prongs of the *Duren* test. *See State v. Hough, supra; State v. Avery, supra; State v. Hardy*, 293 N.C. 105, 235 S.E. 2d 828 (1977).

While it is undisputed that the Wayne County jury pool for the 1978-1979 biennium does underrepresent the percentage of blacks and young people living in the county[1], we are unable to conclude as a matter of law that the applicable percentages are sufficient to establish that the representation of these groups is not fair and reasonable in light of their presence in the community. During this time period, blacks made up 17.1 percent of the jury pool. This representation compares with the fact that the population of Wayne County was 31.1 percent black. In other words, there is an absolute disparity of 14 percent[2]. Turning to the representation of young adults between the ages of 18 and 29, the data indicates that members of this age group comprised 22.5 percent of the jury pool. According to the 1970 United States Census, young people between the ages of 18 and 29 made up 33.3 percent of the population which was subject to service as jurors. Again, there is an absolute disparity of 10.8 percent.

---

[1]Defendant has offered data concerning the 1976-1977 biennium also. While that data is entitled to consideration, particularly regarding a showing of systematic exclusion, it is not determinative of the question posed by this case.

[2]In dealing with allegations that fair representation has been denied, it is appropriate to consider absolute disparity rather than comparative disparity. *See State v. Hough, supra; State v. Brower*, 289 N.C. 644, 224 S.E. 2d 551 (1976).

It is apparent that the data adduced by defendant in support of his challenge indicates a disparity between the presence in the population of Wayne County of blacks and young people and the representation of these groups in the pertinent jury pool. However, a criminal defendant is not entitled to a jury of any particular composition, nor is he entitled to be tried before a jury which mirrors the presence of various and distinctive groups within the community. *Apodaca v. Oregon*, 406 U.S. 404, 32 L. Ed. 2d 184, 92 S. Ct. 1628 (1972); *Fay v. New York*, 332 U.S. 261, 91 L. Ed. 2043, 67 S. Ct. 1613 (1947). In other words, the right to trial by jury carries with it the right to be tried before a body which is selected in such a manner that competing and divergent interests and perspectives in the community are reflected rather than reproduced absolutely. *Taylor v. Louisiana*, 419 U.S. 522, 42 L. Ed. 2d 690, 95 S. Ct. 692 (1975). In the present case, the disparity which is demonstrated by the data does not establish that the components of the population of Wayne County are not reflected fairly and reasonably in the jury pool. We are compelled to observe that the disparity about which defendant now complains is not significantly greater than that which we approved in *State v. Avery, supra*, where there was an underrepresentation of blacks of 9 percent, or *State v. Cornell*, 281 N.C. 20, 187 S.E. 2d 768 (1972), where the disparity which was challenged amounted to 10 percent.

Nor do we conclude that the underrepresentation is the product of systematic discrimination. When a defendant makes a sixth amendment challenge alleging that the jury pool does not represent a fair cross-section of the community, there is no requirement that a discriminatory purpose or intention be proven. *Duren v. Missouri*, 439 U.S. at 366, 58 L. Ed. 2d at 588, 99 S. Ct. at 669; *State v. Avery*, 299 N.C. at 141, 261 S.E. 2d at 812 (Exum, J., dissenting). Instead, it must be demonstrated that the absence of a fair cross-section of the community in the process is the inherent product of the particular method of selection utilized. *Duren v. Missouri, supra.*

Defendant has failed to demonstrate that the data base employed in Wayne County inevitably dictates an unfair and unreasonable underrepresentation of blacks and young adults. Similarly, defendant has not established that the data base was employed in such a manner as to forecast underrepresentation of the groups in question. No single data base can assure complete representation of the community. To so demand is unreasonable because that is not the pertinent objective. Rather, the data base

must be such that the competing perspectives in the community are given a reasonable opportunity to participate in the judicial process through service on a jury. The usage of property tax listings and voter registration records serves to create a broad, as well as an extensive, data base which may be appropriately employed so that this objective may be fulfilled.

In that he has failed to establish the *prima facie* case set forth by *Duren v. Missouri, supra,* we conclude that defendant's challenge to the Wayne County jury pool is without merit.

By his second assignment of error, defendant contends that the trial court erred by excluding evidence which purportedly bolstered his claim of self-defense. There are two prongs to this argument. Initially, defendant maintains that the trial court erred in excluding the testimony of three law enforcement officers concerning statements defendant made to them at the time of his arrest and shortly thereafter concerning the double homicide in Wayne County. Second, defendant asserts that the trial court erred in excluding evidence concerning decedent Glenn Cashwell's predisposition to violent behavior. Neither argument is meritorious.

[5] Defendant's initial challenge is directed at the testimony of three law enforcement officers: Officer Johnston Livingston of the Stantonsburg Police Department, Sergeant Ronnie Batts of the Wilson County Sheriff's Department, and Special Investigator Stan Flowers of the Wayne County Sheriff's Department. Officer Livingston arrested defendant after he and Officer Roger Reason of the Stantonsburg Police Department had stopped his car. Sergeant Batts arrived shortly thereafter and assisted in handcuffing defendant, after which he transported defendant to the sheriff's office in Wilson. Officer Livingston was asked on cross-examination whether defendant had told him at the time of the arrest that the killings had been in self-defense. The objection of the state was sustained, and the officer answered for the record, in the absence of the jury, that defendant had told him that he had acted in self-defense. Sergeant Batts was asked the identical question, and he answered the question affirmatively before the state could interpose an objection. The subsequent objection by the district attorney was sustained and the jury was given a limiting instruction. Special Investigator Flowers was asked on cross-examination whether defendant had told him that Mrs. Cashwell had a shotgun in her possession at the time of the shooting.

The statement to the officers at the time of defendant's arrest that the shooting had been in self-defense was properly excluded from the consideration of the jury. The statement was inadmissible as substantive evidence because of its hearsay character. *See generally* 1 Stansbury's North Carolina Evidence §§ 138, 140 (Brandis Rev. 1973). The characterization by the state of the statement in question as "self-serving" is an insufficient response to the argument. The statement was incompetent as substantive evidence in that it failed to come within any of the generally recognized exceptions to the hearsay rule. Nor was the statement admissible as corroborative evidence in that defendant had not yet taken the stand and testified in that manner.

Regarding the objection to the inquiry which had been directed at Special Investigator Flowers, we are compelled to observe that defendant has failed to make his record by making the answer that the witness would have given part of the record of the proceedings at trial. When an objection to a specific question asked on cross-examination is sustained, the answer the witness would have given must be made part of the record or the propriety of the objection will not be considered on appeal. *E.g., State v. Martin*, 294 N.C. 253, 240 S.E. 2d 415 (1978). Otherwise, this court is capable only of speculating as to what the answer of the witness would have been and whether the challenged evidentiary ruling was prejudicial.

[6] By the second prong of his argument, defendant contends that the trial court erred by excluding evidence concerning the predisposition to violent behavior of decedents Glenn and Barbara Cashwell. It is the general rule that where the defendant in a homicide prosecution pleads self-defense and there is evidence which tends to show that the killing was in self-defense, evidence of the character of the deceased as a violent and dangerous fighting person is admissible if such character was known to the defendant or the evidence is wholly circumstantial or the nature of the transaction is in doubt. *E.g., State v. Barbour*, 295 N.C. 66, 243 S.E. 2d 380 (1978); *see generally* 1 Stansbury's North Carolina Evidence § 106 (Brandis Rev. 1973). We do not question the continued viability of this principle. However, our examination of the record leads us to conclude that the record will not support defendant's assertions of error.

On cross-examination, Billy Cashwell was asked whether it was true that his father had been fired from Georgia-Pacific for striking another foreman. On direct examination, defendant himself

was asked if he knew why Glenn Cashwell was unemployed on the day of the incident. In both instances, the objections of the state were sustained. In neither instance was the answer which the witness would have given placed in the record for our consideration. Accordingly, these particular exceptions will not be considered on appeal. *E.g., State v. Martin, supra.*

On direct examination, defendant testified that after he had let Billy Cashwell enter his trailer through the back door, the telephone rang. Billy answered the call and told defendant that it was his sister, Mrs. Williams. Thereupon defendant testified that his sister told him during the conversation that Mrs. Cashwell had gone to her home and had tried to fight her. At that point, the district attorney objected, and the presiding judge sustained the objection. However, there was no motion to strike made, and the judge did not instruct the jury that it was to disregard the testimony in question. Accordingly, the evidence was before the jury notwithstanding the objection, and defendant cannot reasonably complain of prejudicial error.

During the direct examination of defendant, he testified that he had occasion to hear the workers at Georgia-Pacific discuss Glenn Cashwell and that decedent had a reputation for violence among the workers at the plant. Thereupon, the following exchange took place:

> Q. What was that reputation?
> MR. JACOBS: OBJECT
> A. The same thing.
> THE COURT: OBJECTION SUSTAINED
> EXCEPTION NO. 22.

Defendant asserts that for the court to have sustained the objection of the state was error in that it denied him the opportunity to present evidence of decedent's violent disposition. First, we again note that there was no motion to strike. Therefore, the evidence was before the jury for its consideration because of the absence of an instruction directing them to disregard the testimony, and there was no prejudice in the sustaining of the objection. Second, the question was subject to challenge in that it was repetitive because it immediately followed another question of the same import. *See State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1 (1966), *cert. denied,* 386 U.S. 911 (1967).

Lastly, on redirect examination, defendant was asked whether he had heard from his sister, Mrs. Williams, on the afternoon of 22 May 1979 concerning Mrs. Cashwell. The objection of the state was sustained, and the jury was excused. Over the renewed objection of the state, defendant testified for the record that his sister had told him that Mrs. Cashwell had been "pushing her around, wanting to fight her." While this testimony is arguably relevant as to the predisposition toward violence of Mrs. Cashwell, we perceive no prejudice in its exclusion. The same evidence had already been placed before the jury during defendant's direct examination. Furthermore, the incident was not the subject of any inquiry on cross-examination of defendant by the district attorney. While the objective of redirect examination is to clarify the subject matter of the direct examination and any new matter elicited on cross-examination, *see, e.g., State v. Cates*, 293 N.C. 462, 238 S.E. 2d 465 (1977), it ought not be used by counsel as a vehicle for merely repetition of evidence which is already before the trier of fact and which has not been challenged in any way during the presence of the particular witness on the stand.

[7] Defendant further contends that the trial court erred in receiving certain testimony offered by Special Investigator Flowers. The officer testified that he had received a shotgun from an uncle of Billy Cashwell's three months after the shootings. Billy had previously testified himself that he had taken a shotgun down from the family's gun rack and had gone to the front door with it, but he had put the weapon aside when ordered to do so by defendant. During an interrogation, Billy told the investigator about the weapon, and he had been told that the officers who were investigating the incident needed the weapon. A short time later, Royce Roberts, an uncle of Billy's who actually owned the weapon, delivered the gun to the authorities. Over objection, Officer Flowers testified that he had unsuccessfully attempted to test-fire the weapon. More specifically, he attempted to fire the weapon with five different shotgun shells at least three times each. Defendant asserts that this testimony was prejudicial error in that the "weapon obviously could have been used, tampered with, worked on or otherwise mistreated during the three-month period it was missing." Defendant concludes that the results of any such test-firing were irrelevant and immaterial to the inquiry made by the jury. We disagree.

It is an established principle that in a criminal case, every circumstance which is reasonably calculated to throw light upon the alleged crime is admissible. *E.g., State v. Bundridge*, 294 N.C. 45, 239

S.E. 2d 811 (1978). During his direct examination, Billy Cashwell testified that the spring on the gun was weak and that as a result the firing mechanism would not discharge a shell. The testimony of Officer Flowers served to flesh out the account Billy offered concerning his conduct during the incident. Also, assuming, *arguendo*, that the relevance of this evidence is too attenuated for it to have been properly placed before the jury, defendant has failed to demonstrate how this evidence was prejudicial to his interests.

[8] By his fourth assignment of error, defendant contends that the trial court erred in removing a juror, arguing that this action amounted to an abuse of discretion in that no grounds existed upon which to justify the action. It is our conclusion that the conduct of Judge Rouse in this regard was proper and served to prevent the trial proceedings from being subjected to even the slightest taint of suspicion.

On 5 November 1979, defense counsel was at his home asleep on the couch when he was called to the telephone by his thirteen-year-old son who told him that a woman had asked to speak with him. The attorney went to the phone and discovered that the caller was a female juror in the present case. The woman had called the attorney about thirty minutes earlier but had told the son, who had answered that call as well, not to disturb the lawyer when she had been informed that he was asleep. When the second call was received the son had awakened his father thinking that the matter was fairly important to have the same individual call again so quickly. During the second phone call, the woman persisted in discussing matters of a personal nature with defendant's counsel, including his marital status. The attorney was able, after a short while, to end the conversation.

The next day, the attorney informed the presiding judge about the incident. Thereupon, Judge Rouse convened a hearing in chambers on Monday morning, 7 November 1979, before defendant's trial resumed after the weekend recess. After hearing the lawyer's account of the incident, the judge made findings of fact and concluded that the juror in question ought to be removed from the panel so as to assure a fair trial for defendant. When court reconvened, the alternate juror was substituted for her.

G.S. § 15A-1215(a) provides that the trial judge may substitute an alternate juror for another juror if the latter dies, becomes

incapacitated or disqualified, or is discharged for any reason before final submission of the case to the jury. The exercise of this power rests in the sound discretion of the trial judge and is not subject to review absent a showing of an abuse of discretion. *State v. Nelson*, 298 N.C. 573, 260 S.E. 2d 629 (1979); *State v. Waddell*, 289 N.C. 19, 220 S.E. 2d 293 (1975), *death sentence vacated*, 428 U.S. 904 (1976). This discretion ought to be used to the end that both the state and defendant receive a fair trial. *State v. Nelson, supra; State v. McKenna*, 289 N.C. 668, 224 S.E. 2d 537, *death sentence vacated*, 429 U.S. 912 (1976).

One of the basic precepts of professional responsibility is that during the trial of a case, an attorney who is involved in the matter shall not communicate with any member of the jury. DR 7-108(B)(1). Otherwise, the impartiality of the tribunal which is at the foundation of the judicial process would be threatened, and the public's confidence in that process would be undermined. EC 7-29. A concurrent ethical obligation is imposed upon an attorney to report to the court any improper conduct by a juror of which the attorney has knowledge. DR 7-108(G). The conduct of trial counsel in this regard was above reproach. While there is no evidence that any matter which related to the trial of defendant was discussed during the conversation, the exercise of discretion by Judge Rouse served to safeguard the trial of defendant from even the appearance of impropriety. *See* EC 9-6.

[9] By his fifth assignment of error, defendant contends that the trial judge impermissibly expressed an opinion of the case before the jury on three separate occasions. We have carefully reviewed the record and conclude that there was nothing improper about the conduct of Judge Rouse.

First, defendant alleges that the trial judge expressed an opinion on the credibility of defendant and those of his relatives who testified on his behalf. During his charge, Judge Rouse instructed the jury in the following manner:

> When you come to consider the evidence and the weight you will give to the testimony of the different witnesses, I instruct you that it is your duty to carefully consider and scrutinize the testimony of the defendant when he testifies in his own behalf; and also the testimony of those who are closely related to him. In passing upon the testimony of such witnesses, the jury ought to take into consideration the interest the witness has in the

result of the action, but I instruct you that the law requires you to do so does not require you to object or impeach such evidence; and if you believe that such witness or witnesses have sworn to the truth, you will give to his or their testimony the same weight you would do that of any disinterested or unbiased witness. (R.p. 161).

The identical instruction was expressly approved by this court in *State v. Eakins*, 292 N.C. 445, 233 S.E. 2d 387 (1977), and we are not disposed to reexamine the propriety of that decision.

Second, defendant contends that the trial judge expressed an opinion by failing to reinstruct the jury on the elements of self-defense when the jury on two occasions returned to the courtroom and requested additional instructions on first-degree murder, second-degree murder, felony murder, and discharging a firearm into an occupied building. Defendant contends that the judge's failure to repeat the pertinent instructions as to self-defense amounts to an expression of his opinion on the viability of that plea. This argument is without merit in that once a trial judge has complied with a request by the jury for additional instructions on a particular point of law, it is not necessary that he also repeat his instructions as to other features of the case which have already been correctly given. *State v. Dawson*, 278 N.C. 351, 180 S.E. 2d 140 (1971).

Third, defendant argues that Judge Rouse expressed an opinion by instructing the jury that in the event defendant was convicted of first-degree murder, a separate sentencing proceeding would be conducted to determine whether defendant would be sentenced to life imprisonment or to death. The judge went on to instruct the jury that their only concern at that point in the proceeding was to determine the issue of defendant's guilt or innocence. We do not agree with defendant's contention that for Judge Rouse to have so instructed was an expression of disbelief in defendant's claim of self-defense. G.S. § 15A-2000 *et seq.* contemplates a bifurcated proceeding in capital cases. It is only upon a guilty verdict that the second stage of the proceeding is convened. The instruction about which defendant now complains did nothing more than serve to acquaint the jury with the procedure which was to be followed upon their return of a verdict which found defendant guilty of first-degree murder. We cannot perceive that the judge's comments precipitated a rush to judgment by the jury.

By his sixth and seventh assignments of error, defendant has preserved twenty-nine exceptions which are directed at portions of Judge Rouse's charge not previously discussed in this opinion. We have carefully examined these instructions contextually and find them to be without prejudicial error.

There was no error in the denial of defendant's motion to set aside the verdicts as being against the evidence. There was plenary evidence brought forward at trial by the state to establish its *prima facie* cases. Defendant was effectively and zealously represented by competent counsel.

In defendant's trial and in the judgements appealed from, we find

No error.

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

MARTHA ANDREWS JOHNSON WING AND JANE VIRGINIA ANDREWS POWER PHILBRICK v. WACHOVIA BANK & TRUST COMPANY, N.A., SUCCESSOR TRUSTEE, AND AUGUSTA ANDREWS YOUNG, JULIA MARKS DOZIER, ALEXANDER A. MARKS, LAURENCE H. MARKS, ALEX B. ANDREWS III, JULIA ANDREWS PARK, MARY S. ANDREWS WORTH, GRAHAM H. ANDREWS, JR., F. M. SIMMONS ANDREWS, AUGUSTA YOUNG MURCHALL, ELEANOR YOUNG BOOKER, SANDRA JOHNSON WALKER, RICHARD T. DOZIER, JR., JANE DOZIER HARRIS, WILLIAM M. MARKS III, RALPH STANLEY MARKS, FRANCES MARKS BRUTON, JULIA MARKS YOUNG, ELIZABETH MARKS GREEN, JANE MARKS CLINE, HAL V. WORTH III, JULIA WORTH RAY, SIMMONS HOLLADAY WORTH, JOHN W. ANDREWS, SARA SIMMONS ANDREWS JOHNSTON AND MARY GRAHAM ANDREWS; ADDITIONAL PARTIES: JESSICA ANNE MURCHALL EDGMON, MELINDA SUSAN MURCHALL, JOHN ALEXANDER MURCHALL, ROBERT ANDREWS BOOKER, PAUL CURTIS BOOKER, PAUL CURTIS BOOKER, MINOR, WILLIAM CONRAD WALKER, JR., JAMES ALEXANDER WALKER, MINOR, TIMOTHY TODD WALKER, MINOR, SHARON VIRGINIA WALKER, MINOR, ANNE GILCHRIST DOZIER, MINOR, PATRICIA JANE DOZIER, MINOR, LAURA CROMWELL DOZIER, MINOR, JULIA

MARKS HARRIS, CHARLES ANDREW HARRIS III, WILLIAM MARK HARRIS, MINOR, WILLIAM M. MARKS IV, MINOR, ANN ELVA MARKS, MINOR, RALPH STANLEY MARKS, JR., MINOR, RICHARD HUGHES MARKS, MINOR, ALEXANDER ANDREWS GRANT BRUTON, MINOR, EDWARD MACCAULEY BRUTON, MINOR, FRANCES BRINKLEY BRUTON, MINOR, HAL VENABLE WORTH IV, MINOR, KELLY ANDREWS WORTH, MINOR, FRED C. RAY III, MINOR, GRAHAM ANDREWS RAY, MINOR, MABLE Y. ANDREWS, SHERMAN YEARGAN, TRUSTEE, HOWARD E. MANNING, TRUSTEE, WILLIAM HENRY CLARKSON, JR., OUR LADY OF LOURDES CATHOLIC CHURCH, JOHN A. MCALLISTER, GUARDIAN AD LITEM, S. LEIGH PARK, BRUCE R. PARK, MABEL Y. ANDREWS, A.B. ANDREWS IV, GEORGE HAMILTON ANDREWS, JAMES ROSE ANDREWS

No. 37

(Filed 2 December 1980)

Trusts §§ 8, 10.2— testamentary trust — silence of will on distribution of corpus — gift by implication — right to income upon death of beneficiary

Where testator's will provided that a small portion of the income of a testamentary trust should be paid to testator's brothers and sister for life, another small portion of the income should be paid to testator's nieces and nephews for life, 80% of the income should be paid to testator's great nieces and great nephews alive at his death or born within 21 years after his death, and the 20% of net income enjoyed for life by testator's brothers, sister, nieces and nephews would eventually be added to the income received by the great nieces and nephews, the will provided that the trust would terminate at the death of the last survivor of testator's brothers, sister, nieces, nephews, great nieces and great nephews alive at his death, but the will made no provision as to the ultimate distribution of the trust corpus following termination of the trust, the corpus should not pass by intestacy but should pass, under the terms of the will, to the ultimate income beneficiaries, the natural born great nieces and great nephews of testator, since testator's statement in his will that he gave all of the remainder of his estate to his brothers as executors and trustees was some evidence of his intent to dispose of the entire estate and supported the finding of a gift by implication; the duration of the income interests bequeathed to each of testator's siblings, nieces and nephews was expressly limited to their lifetimes while the interests granted to the great nieces and great nephews was not so limited, and in the absence of a disposition of the principal, a testamentary gift of the income of a trust without limitation as to its duration amounts to a gift of the principal; testator's termination of the trust did not indicate an intention to limit the interests of his great nieces and great nephews, but more strongly supported the conclusion that testator intended only to ensure the validity of the trust by limiting its duration so as not to violate the perpetuities rule as recognized in this State at the time of execution of the will; and testator indicated throughout his will an intent to divide his property on a *per capita* rather than a *per stirpes* basis, as distribution under the laws of intestacy would have required. Furthermore, upon the death of a great niece or great nephew, the income share of such beneficiary should be paid to the beneficiary's

estate until the trust terminates.

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

ON discretionary review of the decision of the Court of Appeals reported in 44 N.C. App. 402, 261 S.E. 2d 279 (1980), reversing judgment of *Braswell, Judge*, entered at the 2 January 1979 Session of Superior Court, WAKE County.[1]

This is an action for declaratory judgment to construe the will of Alexander B. Andrews II. The principal issue presented by this appeal is whether failure to expressly bequeath the corpus of a testamentary trust causes the corpus to pass by intestacy or results in a bequest by implication in favor of the ultimate income beneficiaries. For the reasons set out below, we hold that the corpus of the trust will pass, under the terms of the will, to the ultimate income beneficiaries, the natural born great nieces and great nephews of testator born prior to 21 October 1967.

Maupin, Taylor & Ellis, P.A., by W. W. Taylor, Jr., and Jane Fox Brown, for defendant-petitioners Augusta Andrews Young, Alexander A. Marks, Laurence H. Marks, Graham H. Andrews, Jr., F. M. Simmons Andrews, William M. Marks III, Ralph Stanley Marks, Frances Marks Bruton, Julia Marks Young, Elizabeth Marks Green, Jane A. Marks (formerly designated as Jane Marks Cline), Hal V. Worth III, Julia A. Worth Ray, Simmons Holladay Worth, John W. Andrews, Sara Simmons Andrews Johnston and Mary Graham Andrews.

John A. McAllister, for defendant-petitioners minor and unborn parties as Guardian ad Litem.

Vaughan S. Winborne for original plaintiff-appellees.

---

[1]Petitioners were defendants Augusta Andrews Young, Alexander A. Marks, Laurence H. Marks, Graham H. Andrews, Jr., F. M. Simmons Andrews, William M. Marks III, Ralph Stanley Marks, Frances Marks Bruton, Julia Marks Young, Elizabeth Marks Green, Jane A. Marks (formerly designated as Jane Marks Cline), Hal V. Worth III, Julia A. Worth Ray, Simmons Holladay Worth, John W. Andrews, Sara Simmons Andrews Johnston, Mary Graham Andrews, and the Guardian ad Litem for the minor parties, John A. McAllister. These petitioners are certain of testator's nieces, nephews, great nieces and great nephews who themselves or whose children would receive greater benefit if a gift by implication were found.

Emanuel and Thompson, by W. Hugh Thompson, for defendant-appellee Alex B. Andrews III.

Manning, Fulton & Skinner, by Howard E. Manning, Jr., for defendant-appelles Howard E. Manning, Trustee, and William H. Clarkson, Jr.

Smith, Debnam, Hibbert & Pahl, by J. Larkin Pahl, for defendant-appellee James Rose Andrews, minor, as Guardian ad Litem.

Hunton & Williams, by Henry S. Manning, Jr., for defendant-appellee Wachovia Bank & Trust Company, N.A., Successor Trustee.

CARLTON, Justice.

I

Alexander B. Andrews II, a Wake County lawyer, died on 21 October 1946 leaving a will dated 21 November 1945. The will was duly probated and recorded in the office of Clerk of Superior Court of Wake County. He was survived by a sister, two brothers, eleven nieces and nephews, and twelve great nieces and great nephews. One brother and a nephew predeceased testator; both were survived by children.

The will provided for payment of testator's debts and burial expenses and directed the executors to turn over to the University of North Carolina and Church Historical Society the sets of books testator had already committed to each. The will directed that the remainder of the estate be placed in trust for the benefit of his family. Testator's brothers, John and Graham, were designated as trustees. Wachovia Bank & Trust Company, N.A., is the successor trustee. After payment of the expenses of handling the trust, the income was to be divided into *twenty equal shares* and distributed to various members of testator's family. Each of his siblings, one sister and two brothers, was to receive one share of the annual income "for and during [his or her] natural life." One share of the annual income was to be divided equally and paid to testator's eleven nieces and nephews for and during their lifetime. The remaining sixteen shares of the annual income were to be divided equally among testator's great nieces and great nephews alive at his death or born within twenty-one years thereafter. The income interest of this class of beneficiaries was not limited to their lifetime.

Upon the death of testator's sister or brothers, his or her share was to be added to the share of income allotted testator's nieces and nephews. Thus, the ultimate number of shares of income going to the nieces and nephews was four. Upon the death of a niece or nephew, his or her interest in the income ceased, and the portion formerly going to that niece or nephew was to be divided among the surviving members of the class, until the number of survivors reached four. After that time the share of any niece or nephew who died was to be added to the sixteen shares going to the great nieces and great nephews. Under the testator's plan of distribution, his great nieces and great nephews would ultimately receive 100 percent of the trust income.

The duration of the income interest of the great nieces and great nephews was not expressly limited to life as were the income interests of testator's sister, brothers, nieces and nephews. However, a later portion of the will provided that the trust should extend:

> for and during the joint and several lives of any other nieces or nephews or great nieces or great nephews born prior to, and alive at the time of my death, and until the death of the last survivor of my nieces and nephews and the last survivor of my great nieces and nephews [sic] (alive at my death), . . . , and no longer.

Thus, the trust terminates at the death of the last survivor of testator's brothers, sister, nieces, nephews, great nieces and great nephews alive at his death. The paragraph of the will which provides for termination of the trust is silent on the question of entitlement to or distribution of the corpus.

The courts of this state have examined this will on two prior occasions. In *Trust Co. v. Andrews*, 264 N.C. 531, 142 S.E. 2d 182 (1965), this Court construed the portion in the will providing for distribution of income to "those . . . [great nieces and great nephews] hereafter . . . born within twenty-one (21) years after [testator's] death" to limit the class to natural born members and to exclude adopted great nieces and great nephews. Some thirteen years later, the validity of the entire trust was challenged in *Wing v. Trust Co.*, 35 N.C. App. 346, 241 S.E. 2d 397, *cert. denied*, 295 N.C. 95, 244 S.E. 2d 263 (1978), as violating the rule against perpetuities. The Court of Appeals examined the will and held that all interests created under the trust vest within the perpetuities period and, thus, that the trust did not violate the rule. At the time the latter suit was brought, all

necessary parties were joined. The successor trustee, Wachovia Bank & Trust Company, asserted a claim for affirmative declaratory relief in the form of instructions on how to distribute the income after the death of a great niece or great nephew and on how to distribute the corpus at the termination of the trust. A hearing on this claim was delayed pending final determination of the plaintiffs' claim that the trust violated the rule against perpetuities. *The successor trustee's claim for declaratory judgment in the form of instructions is the subject of the present appeal.*

As of 20 October 1978 the corpus of the trust was valued in excess of two million dollars. In 1977 the income distribution to nieces and nephews was $2,174.57 to North Carolina residents and $2,251.72 to nonresidents. Great nieces and great nephews who reside in North Carolina received $4,604.97, while those who are nonresidents received $4,768.73. A great nephew testified that knowing what vested interest he had in the trust corpus would greatly influence his estate planning and his decision on life insurance. A vice-president of the successor trustee testified that the trustee would be forced to seek instructions from the courts on how to distribute the income upon the death of the first great niece or great nephew who received income from the testamentary trust. The members of that class range in age from the mid-twenties to about fifty years of age.

Judge Braswell made findings of fact and concluded as a matter of law that the claim was a proper one for declaratory relief under our Uniform Declaratory Judgment Act, G.S. 1-253 to 267 (1969). He also concluded that the adopted children of testator's nieces and nephews have no interest in either the income or the corpus of the trust and that the seventeen natural great nieces and great nephews alive at testator's death or born within twenty-one years thereafter own the entire equitable interest in the trust subject to the life interests of the nieces and nephews in four of the shares of the trust income. Judge Braswell further concluded that the interest of a great niece or great nephew in the income or corpus does not terminate at his or her death. Accordingly, he ordered that the portion of income which the natural great niece or great nephew, if alive, would have received be paid to the estate, testamentary beneficiaries or intestate heirs of that person until termination of the trust. With respect to the corpus of the trust, Judge Braswell ordered that upon the termination of the trust at the death of the last survivor of testator's nieces, nephews, great nieces and great nephews alive at testator's death, the trust corpus be divided into

seventeen equal shares and distributed equally among the estates, intestate heirs, or testamentary beneficiaries of each deceased great niece or great nephew and those great nieces and great nephews alive at the termination of the trust.

Several of defendants appealed from Judge Braswell's findings, conclusions of law and orders. The Court of Appeals affirmed the conclusion and order concerning the payment of income to the estate of a deceased great niece or great nephew, reasoning that a condition of survivorship will not be inferred, but reversed the trial court's determination that the testator intended that his natural born great nieces and great nephews have the entire interest in the corpus of the trust. Instead, the Court of Appeals held that the testator did not intend to dispose of the trust corpus in the will because of the will's silence on that matter and because testator was a lawyer.

Certain of the appellees in the Court of Appeals petitioned this Court's discretionary review of that portion of the Court of Appeals' decision dealing with the disposition of the trust corpus. We allowed their petition on 3 June 1980. The propriety of this cause for declaratory judgment is not before us.

II

The trust provision of the will before us lends itself to two possible constructions. The silence of the will on the distribution of the corpus might be construed to mean that testator did not intend to dispose of the corpus by his will; the result of such construction would be to cause the corpus to pass by intestate succession to his heirs at law at the time of testator's death. Alternatively, the will as a whole might be construed to support a gift by implication of the trust corpus in favor of testator's natural born great nieces and great nephews in proportion to their income interests at the time of the termination of the trust. Under this interpretation, the corpus would be divided into seventeen shares and distributed equally among the ultimate income beneficiaries, the natural born great nieces and great nephews, or their respective estates. For the reasons set out below, we hold that testator's intent, gleaned from the four corners of the will, was to leave the corpus of the trust to his natural born great nieces and great nephews and, accordingly, reverse the Court of Appeals.

"The basic rule of construction, and the refrain of every opinion which seeks to comprehend a testamentary plan, is that '[t]he intent

of the testator is the polar star that must guide the courts in the interpretaion of a will.'" *Trust Co. v. Bryant*, 258 N.C. 482, 484, 128 S.E. 2d 758, 760 (1963) (Sharp, J., later C.J.), quoting *Coppedge v. Coppedge*, 234 N.C. 173, 174, 66 S.E. 2d 777, 778 (1951). The intent of the testator must be gathered from the four corners of the will and the circumstances attending its execution. *Wilson v. Church*, 284 N.C. 284, 200 S.E. 2d 769 (1973). In searching a will to determine that intent, courts are guided by the presumption that "one who makes a will is of disposing mind and memory and does not intend to die intestate as to any part of his property," *Ferguson v. Ferguson*, 225 N.C. 375, 377, 35 S.E. 2d 231, 232 (1945); *accord*, *Jones v. Jones*, 227 N.C. 424, 42 S.E. 2d 620 (1947). Thus, when a will is capable of two interpretations, one resulting in complete testacy and the other in partial testacy, this presumption operates to favor the former over the latter. In re *Will of Wilson*, 260 N.C. 482, 133 S.E. 2d 189 (1963); *Poindexter v. Trust Co.*, 258 N.C. 371, 128 S.E. 2d 867 (1963); *Little v. Trust Co.*, 252 N.C. 229, 113 S.E. 2d 689 (1960); *Finch v. Honeycutt*, 246 N.C. 91, 97 S.E. 2d 478 (1957); *Ferguson v. Ferguson*, 225 N.C. 375, 35 S.E. 2d 231. "Having undertaken to make a will at all, it is not consistent with sound reasoning that the testator would have left his estate dangling." *Coddington v. Stone*, 217 N.C. 714, 720-21, 9 S.E. 2d 420, 424 (1940).

Here, testator's will does not expressly dispose of the corpus of the trust into which he placed the great bulk of his estate. If partial intestacy is to be avoided and the corpus is to pass under the will, then it must be through the vehicle of a bequest or gift clearly implied by the terms of the will.

This State has long recognized and given effect to bequests or gifts by implication. *Finch v. Honeycutt*, 246 N.C. 91, 97 S.E. 2d 478; *Efird v. Efird*, 234 N.C. 607, 68 S.E. 2d 279 (1951); *Burney v. Holloway*, 225 N.C. 633, 36 S.E. 2d 5 (1945); *Burcham v. Burcham*, 219 N.C. 357, 13 S.E. 2d 615 (1941); *Ferrand v. Jones*, 37 N.C. (2 Ired. Eq.) 633 (1843); *see generally* 4 Bowe-Parker: Page on Wills, § 30.18 (4th ed. 1961); 1 Underhill on Wills, §§ 463 to 478 (1900). The doctrine of bequest or gift by implication is simply stated:

> 'If a reading of the whole will produces a conviction that the testator must necessarily have intended an interest to be given which is not bequeathed by express and formal words, the court may supply the defect by implication, and so mould the language of the testator as to carry into

> effect, so far as possible, the intention which it is of opinion that he has on the whole will sufficiently declared.'

Burcham v. Burcham, 219 N.C. at 359, 13 S.E. 2d at 616 (citations omitted). A gift implied by the terms of the will will be given effect unless the implication violates an established rule of law or offends public policy. *Efird v. Efird*, 234 N.C. 607, 68 S.E. 2d 279; 80 Am. Jur. 2d, Wills, § 1385 (1975).

Despite long-standing acceptance of this doctrine, a gift by implication is not favored in the law and cannot rest upon mere conjecture. *E.g., Burney v. Holloway*, 225 N.C. 633, 36 S.E. 2d 5; 80 Am. Jur. 2d, Wills, § 1385. It will not be inferred execpt upon cogent reasoning. The probability that the testator intended that which is imputed to him "must be so strong that a contrary intention 'cannot reasonably be supposed to exist in testator's mind,' and cannot be indulged merely to avoid intestacy." *Burney v. Holloway*, 225 N.C. at 637, 36 S.E. 2d at 8, quoting 69 C. J., Wills, § 1123 (1934). However, the inference need not be irresistible; it is sufficient if all factors, taken as a whole, leave no doubt as to testator's intent. *Efird v. Efird*, 234 N.C. 607, 68 S.E. 2d 279; 80 Am. Jur. 2d Wills, § 1385.

With these rules in mind, we turn to the will before us. Item 2 of testator's will purports to dispose of the bulk of his estate:

> After the payment of my just debts, and the payment of the specific legacies, hereinafter named, *I give, devise, and bequeath the remainder of my estate, of whatsoever kind, character or description, whether real or personal* into the hands of my brothers [as executors and trustees] . . . to have and to hold and to invest and sell and re-invest....

(Emphasis added.) This language indicates that testator intended, by use of the trust, to dispose of his entire estate. When the language following an introductory phrase which purports to dispose of all of testator's property can be interpreted to result in complete disposition or partial intestacy, "the introductory statement, *pointing to a complete disposition*, ought to be considered, and that sense adopted which will result in a disposition of the whole estate." 1 Underhill, *supra*, § 464 (emphasis in original). Thus, the presence of this introductory statement is some evidence of testator's intent to dispose of the entire estate and supports the finding of a gift by implication. *Id.* This factor alone, however, is not determinative.

The duration of the income interests bequeathed to each of testator's siblings, nieces and nephews was *expressly* limited by the provision granting them, to his or her lifetime:

> (b) One share of the net income shall be annually paid to my sister . . . , for and during her natural life.
>
> (c) One share of the net income shall be annually paid to my brother John . . . , for and during his natural life.
>
> (d) One share of the net income shall be paid to my brother Graham . . . , for and during his natural life
>
> (e) [sic] One share of the net income shall be divided in equal parts, or divisions, and paid to my eleven (11) nieces and nephews; . . . for and during their lefetime [sic].

In contrast, the interests granted testator's great nieces and great nephews were not so limited:

> (i) The income from the sixteen shares shall be equally divided among my great nieces and nephews, now twelve (12) in number, and those who hereafter may be born within twenty-one (21) years after my death, they to share equally with the others.

In the absence of a disposition of the principal, a testamentary gift of the income or interest of a fund, such as a trust, without limitation as to its duration amounts to a gift of the principal. *Poindexter v. Trust Co.*, 258 N.C. 371, 128 S.E. 2d 867; *Burcham v. Burcham*, 219 N.C. 357, 13 S.E. 2d 615; 80 Am. Jur. 2d, Wills, § 1389; *Annot.*, 174 A.L.R. 319, 333-36 (1948). The Court of Appeals found this principle inapplicable because Item 6 of the will provides a time for termination of the trust and, thus, for the interests of the great nieces and great nephews thereunder. This provision is not controlling.

Testator, a lawyer, executed the will *sub judice* on 21 November 1945. At that time, this jurisdiction adhered to the minority view that the rule against perpetuitites required that a trust for private purpose terminate within a life or lives in being plus twenty-one years in order to be valid. *E.g., Mercer v. Mercer*, 230 N.C. 101, 52 S.E. 2d 229 (1949); *Trust Co. v. Williamson*, 228 N.C. 458, 46 S.E. 2d 104 (1948); *Springs v. Hopkins*, 171 N.C. 486, 88

S.E. 774 (1916). [2]While testator's termination of the trust might indicate an intention to limit the interests of his great nieces and great nephews, we think it more strongly supports the conclusion that testator intended only to ensure the validity of the trust by limiting its duration so as not to violate the perpetuities rule and thereby intended to protect, rather than limit those interests. In support of the latter construction we note that other provisions of the will indicate the drafter's concern with the rule against perpetuities: the nieces and nephews who were to share in the trust income were specifically named and the class of great nieces and great nephews who were to share in the trust was limited to those alive at testator's death or born within twenty-one years thereafter.

The Court of Appeals considered testator's status as "a man lettered in the law and familiar with the technical sense the law gives to words" to be determinative on the issue of his silence as to the corpus. While the profession and knowledge of the testator may properly be considered in determining intent, it can never be such as to negate the intent clearly expressed in the will. To hold otherwise would be to find a *per se* intent for every mistake or omission in the will of one who holds a law degree. Absent some additional evidence that the testator wrote his or her own will and possessed adequate knowledge to justify imputing to him or her the positive intent to make what appears to be a mistake or omission, the presumption employed by the Court of Appeals cannot stand. We find no such additional evidence in the record before us.

Other factors also support the conclusion that testator intended to dispose of the corpus of his estate and not have it ultimately pass under the laws of intestacy. Testator indicated throughout his will an intent to divide his property on a *per capita* rather than a *per stirpes* basis. A review of the record discloses that the number of nieces, nephews, great nieces and great nephews descending from his sister and brothers was not at all equal. In spite of this difference, the whole thrust of testator's will is to treat each generation equally or on a *per capita* basis. To allow this estate to

[2]This line of cases was overruled in *McQueen v. Trust Co.*, 234 N.C. 737, 68 S.E. 2d 831 (1952), and North Carolina thereby adopted the majority rule that the rule against perpetuities "does not relate to and is not concerned with the postponement of the full enjoyment of a vested estate. The time of vesting of title is its sole subject matter.... The question is not the length of the trust but whether title vested within the required time." *Id.* at 741, 743, 68 S.E. 2d at 835, 836 (citations omitted).

ultimately pass under the intestate laws applicable at the time of testator's death would produce a directly contrary result; the estate would pass pursuant to a *per stirpes* scheme. Such a result would violate testator's clearly expressed intent.

This interpretation is otherwise strengthened by a reading of the will. Testator expressly limited his living brothers and sister to a small fractional part of the trust income. He bequeathed to none of them any estate which could pass under their wills or deeds or by descent from them. Moreover, the issue of his deceased brother were pointedly left nothing on a *per stirpes* basis, but only as members of a class. In every instance, testator expressed the intent for his estate to pass on a *per capita*, not *per stirpes*, basis.

The scheme employed by testator in disposing of his large estate unequivocally indicates his intention that the primary benefit of his wealth be ultimately bestowed upon his great nieces and great nephews and that each should share equally. In furtherance of this clear purpose, he allotted only 20 percent of the income from the trust to his sister, brothers, nieces and nephews and provided for a gradual accretion of this amount to the income shares initially allotted his great nieces and great nephews. Testator sought to benefit all members of the class of his great nieces and great nephews insofar as possible without violating the rule against perpetuities and to benefit each equally. Testator clearly intended to favor this class over his siblings, nieces and nephews, those who would take by intestate succession. The intent behind this testamentary plan is clear: by giving to his great nieces and great nephews a major portion of the income of the trust, testator intended that class to be the ultimate beneficiaries of his largesse, the principal as well as the income.

The scheme employed by testator clearly contemplated the great nieces and great nephews as the ultimate beneficiaries of his estate. The implication of testator's intent that the members of that class ultimately receive the corpus of the residuary trust is "so strong that a contrary intention 'cannot reasonably be supposed to exist in testator's mind,'" *Burney v. Holloway*, 225 N.C. at 637, 13 S.E. 2d at 8.

III

Appellants correctly note in their brief that the issue of continuation of trust income in the event of the death of a great niece or great nephew was not properly before the Court of Appeals since no

error with respect thereto had been assigned to that court. The Court of Appeals proceeded, however, to address the issue. Counsel for substitute trustee requested on oral argument that we not leave this issue in doubt.

The Court of Appeals affirmed the trial court's legal conclusion that the death of a great niece or great nephew does not terminate his or her right to income and that the income should be paid to his or her estate, intestate heirs or testamentary beneficiaries until the termination of the trust. We affirm. The income interests of the ultimate beneficiaries were not limited to their respective lifetimes; their interests were limited solely by the duration of the trust. In contrast, the interests of all the other income beneficiaries were expressly limited to their lifetimes. Testator obviously was aware of and knew how to create life estates. Had he desired to so limit the interests of his great nieces and great nephews, we think he would have done so. We believe his failure to limit these interests to the lifetimes of the respective beneficiaries was intentional.

IV

In summary, the Court of Appeals erred in reversing the judgment of the trial court and in concluding that the corpus of the trust passed according to the laws of intestate succession in effect at testator's death. The Court of Appeals correctly held that testator intended that income should be paid to the estate of a deceased great niece or great nephew until termination of the trust.

The substitute trustee is directed as follows:

(1) Trust income otherwise payable to a deceased great niece or great nephew shall be paid to his or her estate, intestate heirs, or testamentary beneficiaries until termination of the trust.

(2) Upon termination of the trust, the corpus shall be divided into seventeen equal shares and distributed equally among the natural born great nieces and great nephews, or their respective estates.

The decision of the Court of Appeals is affirmed in part, reversed in part and remanded to that court with instructions to remand to the Superior Court, Wake County, for proceedings consistent with this opinion.

Affirmed in part.

Reversed in part and remanded.

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

STATE OF NORTH CAROLINA v. GEORGE THOMAS WARD

No. 22

(Filed 2 December 1980)

1. **Criminal Law § 112.6— insanity — burden of proof — "reasonable satisfaction" — error favorable to defendant**

The trial court's instruction that defendant had the burden of proving his defense of insanity to the "reasonable satisfaction" rather than to the "satisfaction" of the jury was favorable to defendant, since "reasonable satisfaction" imposes a lesser burden than "satisfaction."

2. **Criminal Law § 112.6— instructions — reasonable doubt — insanity defense — reasonable satisfaction**

The jury could not have been confused by the court's instruction on the standard of proof beyond a reasonable doubt, requiring full or entire satisfaction, and defendant's standard on the insanity issue, requiring reasonable satisfaction.

3. **Criminal Law § 5.1— guilt — insanity — denial of bifurcated trial**

The trial court did not abuse its discretion in the denial of defendant's motion for a bifurcated trial on issues of his guilt or innocence and his insanity made on the ground that he intended to raise inconsistent defenses of self-defense and insanity since nothing in the record indicates that defendant made more than a bare assertion of an intention to claim self-defense; there was nothing inherently inconsistent between the two defenses; and evidence of self-defense was meager if it existed at all.

4. **Indictment and Warrant § 8.4— election between offenses — denial of pretrial motion**

The trial court did not err in denying defendant's pretrial motion to require the State to elect between the charges of felonious assault with a deadly weapon upon a law enforcement officer in the performance of his duties and felonious assault with a deadly weapon with intent to kill inflicting serious injury since a defendant may be charged with more than one offense based on a given course of conduct, and even when an election ultimately will be necessary, the State is not required to elect prior to the introduction of evidence.

5. **Criminal Law § 63— exclusion of defendant's statements to psychiatrist — failure to show use in diagnosis — absence of answer of witness in record**

In a prosecution for felonious assaults in which a psychiatrist stated his opinion that defendant was suffering from paranoid schizophrenia on the date of

the crimes, the exclusion of the psychiatrist's answer to a question as to what defendant told him regarding the events in question cannot be held prejudicial error where defendant made no showing that statements made by defendant to the witness did in fact bear upon his ultimate diagnosis of defendant's mental condition, and where defendant failed to request that the record reflect what the answer of the witness would have been.

6. Criminal Law § 162.6— general objection — failure to show evidence not admissible for any purpose

The trial court properly overruled defendant's general objection to the district attorney's question to a psychiatrist concerning whether defendant was able, at the time of trial, to "function" in society where defendant failed to demonstrate that such evidence would not be admissible for any purpose.

7. Criminal Law § 162.6— objection to form of question — relevance of testimony not presented

Defendant's objection to the form of a question was insufficient to present on appeal an issue as to the relevancy of evidence elicited by the question.

8. Criminal Law § 112.6— instructions — not guilty by reason of insanity

The trial court did not err in failing to instruct that the jury could find defendant not guilty by reason of insanity when the court instructed that if the jury had a reasonable doubt as to one of the elements of the offense charged, it should return a "verdict of not guilty," or when the court instructed that "all twelve minds must agree on a verdict of guilty or not guilty" where the court included the possible verdict of not guilty by reason of insanity at the beginning of the instructions, after the instructions on the elements of the offense charged, and in the final mandate.

9. Criminal Law § 126— instructions — unanimity of verdict

The trial court's instruction on unanimity of the verdict complied with G.S. 15A-1235, and the court's failure to instruct that the individual jurors were not to surrender their own convictions solely in order to reach a verdict was not error, particularly where defendant made no request for such an instruction.

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

ON writ of certiorari to the Court of Appeals to review the decision of that court, reported in 44 N.C. App. 513, 261 S.E. 2d 274, reversing judgment of *Friday, J.*, 19 February 1979 Session of MECKLENBURG Superior Court.

Defendant was charged in indictments, proper in form, with felonious assault with a deadly weapon upon a law enforcement officer in the performance of his duties, and felonious assault with a deadly weapon with intent to kill inflicting serious injury. He entered pleas of not guilty to both charges.

Evidence for the State tended to show that on 18 March 1978, defendant was stopped by Highway Patrolman Dale Mills for reckless driving. Trooper Mills asked defendant to get out of the car and

to produce his driver's license. Defendant got out of his car and handed his license toward the officer. Defendant then jerked the license back and started to return to his car. When Trooper Mills asked him to stop, defendant suddenly grabbed the officer and yelled, "I'll kill you. I'll kill you." A struggle ensued. Defendant managed to get Mills' flashlight and began to hit the trooper about the head with it. While defendant continued to hit him, Mills reached for his gun and shot twice. As a result, defendant received a wound in the neck and one in the chest.

Defendant did not take the witness stand but offered evidence tending to show that he had been an outpatient at Cleveland County Mental Health Center from April, 1977, until January, 1978. Dr. William Van Fleet, an expert in the field of psychiatry who treated defendant at the Mental Health Center, testified that he had diagnosed defendant's mental condition as paranoid schizophrenia. Several witnesses testified regarding unusual or bizarre conduct on the part of the defendant. Following the incident giving rise to the charges in this case, defendant was admitted to Dorothea Dix Hospital. Dr. James Groce treated him and diagnosed defendant's condition as chronic undifferentiated schizophrenia. Dr. Groce testified at trial that, in his opinion, defendant "did not have the ability to make the distinction between right and wrong."

The jury returned verdicts of guilty on both charges. Defendant was sentenced to not less than eight nor more than ten years on the charge of assault with a deadly weapon with intent to kill inflicting serious injury. On the charge of assault with a deadly weapon upon a law enforcement officer while in the performance of his duties, prayer for judgment was continued from term to term for five years from 23 February 1979. On appeal, the Court of Appeals in an opinion by Judge Martin (Harry C.), Judges Vaughn and Webb concurring, reversed. After the applicable time period had elapsed for petitioning this Court for review pursuant to G.S. 7A-31(a), the State petitioned for a writ of certiorari. We granted the writ on 6 May 1980.

Rufus L. Edmisten, Attorney General, by W. A. Raney, Jr., Special Deputy Attorney General, for the State.

Marnite Shuford for defendant.

BRANCH, Chief Justice.

[1] We first consider the Court of Appeals' reversal of defendant's

conviction because of the trial court judge's instruction on defendant's burden of proof on the issue of insanity. On that issue the trial court judge gave the following instruction: "He [defendant] must prove defendant's insanity to you to your *reasonable satisfaction.*" [Emphasis added.]

Defendant contends and the Court of Appeals agreed that the standard of "reasonable satisfaction" imposes a heavier burden on defendant than the proper "satisfaction" standard. Defendant argues that to uphold this conviction would require the court to overturn the long line of cases which support the "satisfaction" standard. The State, on the other hand, contends that this Court can uphold the conviction without overturning these precedents. The State argues that the "reasonable satisfaction" standard is less burdensome than the "satisfaction" standard, and, thus, the error in the instruction was favorable to defendant.

This Court has not considered this particular permutation of the proper instruction on defendant's burden of proof on the issue of insanity. We have determined that the proper standard of "proof to the satisfaction of the jury" is less burdensome than the standard of "beyond a reasonable doubt"; yet, it may be heavier than the "preponderance of the evidence" standard. *State v. Harris*, 223 N.C. 697, 28 S.E. 2d 232 (1943). We have also decided that the "satisfaction" standard is less burdensome than the "clearly established" test. *State v. Swink*, 229 N.C. 123, 47 S.E. 2d 852 (1948). We have not, however, ever considered where reasonable satisfaction fits into this graduated scale.

Other jurisdictions have wrestled with problems where the trial court judges have strayed from the proper instructions on the burden of proof of insanity. *Modern Statutes or Rules as to Burden and Sufficiency of Mental Responsibility in a Criminal Case*, 17 A.L.R. 3d 146 (1968). Only the courts in Alabama, however, appear to have dealt with the issue in a context similar to that which we face. *Id.* §11.

An Alabama statute requires that defendant prove insanity to the "reasonable satisfaction" of the jury. The Alabama courts have consistently held that an instruction that the defendant must prove insanity to the "satisfaction" of the jury imposes a heavier burden than the proper "reasonable satisfaction" standard. *James v. State*, 167 Ala. 14, 52 So. 840 (1910); *Dean v. State*, 54 Ala. App. 270, 307 So. 2d 77 (1975). The Alabama court in its criminal cases has never

really explained its holding. In *Torrey v. Braney*, 113 Ala. 496, 21 So. 348 (1897), however, it noted that "satisfaction" implies proof beyond any doubt, while "reasonable satisfaction" permits less certainty while still finding in favor of the person with the burden. *Id.* at 504, 21 So. at 350-51.

While Alabama's interpretation in the "satisfaction" definition seems to impose a heavier burden than this Court's construction of the same term, we find that, nonetheless, the Alabama court properly ranks the terms, finding "reasonable satisfaction" imposes a lesser burden than "satisfaction."

The distinction between the terms, however, is not one which can only be made by legal scholars and not by the average juror. The difference in the terms can be illustrated from common experience. For example, a question to a coach after a game about how his team played could evoke two responses, either, "I was satisfied with the team's play" or "I was reasonably satisfied with the team's play." The first response, unlimited by a modifier, indicates a higher degree of satisfaction than the second.

On the basis of common experience and the persuasive Alabama decisions, we conclude that in this case the trial court judge's erroneous instruction on the burden of proof on the issue of insanity was favorable to defendant, and, thus, unobjectionable. *Hardee v. York*, 262 N.C. 237, 136 S.E. 2d 582 (1964). We wish to make it clear that we do not suggest that hereafter the trial judge should use the term "reasonable satisfaction" in lieu of the long-approved "satisfaction of the jury."

[2] Next, defendant contends and the Court of Appeals agreed that the juxtaposition of the terms "beyond a reasonable doubt" and "reasonable satisfaction" could have been confusing to the jury and could have led them to infer that defendant carried the same heavy burden as the State.

This argument is simply not supported by a fair reading of the record. The trial court judge properly instructed on the standard of "beyond a reasonable doubt." He said, "Proof beyond a reasonable doubt is proof that *fully* satisfied or *entirely* convinces you of the defendant's guilt." [Emphasis added.] Later the trial court judge instructed the jury on defendant's insanity plea: "He needed not prove beyond a reasonable doubt that he was insane, but only to your reasonable satisfaction." The jury had before them the stand-

ard of beyond a reasonable doubt, requiring full or entire satisfaction, and defendant's standard on the insanity issue, requiring reasonable satisfaction. Again, a common understanding of the language compels the conclusion that the jury could tell the difference between being reasonably satisfied and being fully or entirely satisfied. We find that the instruction was not so confusing as to require a new trial.

Since the Court of Appeals reversed the judgment, it did not reach defendant's remaining assignments of error. We turn now to those assignments.

[3] By his first assignment of error, defendant contends that the trial court erred in denying his motion for a bifurcated trial. Defendant moved, prior to trial, that he be tried first on the question of guilt or innocence and then tried on the issue of insanity. He alleged that he intended to raise a defense of self-defense and a defense of insanity, two inconsistent defenses which he contends require a bifurcated trial. Defendant concedes that the granting of a motion to bifurcate rests in the sound discretion of the trial judge and is not reviewable absent abuse. *State v. Helms*, 284 N.C. 508, 201 S.E. 2d 850, *cert. denied*, 419 U.S. 977 (1974); however, he relies on the following language in *Helms, supra*, to support this contention:

> Other jurisdictions hold that the sound exercise of the trial court's discretion should result in a bifurcated trial only when "a defendant shows that he has a substantial insanity defense and a substantial defense on the merits to any element of the charge, either of which would be prejudiced by simultaneous presentation with the other." *Contee v. United States*, 410 F. 2d 249 (D. C. Cir. 1969).

Id. at 513, 201 S.E. 2d at 853.

The State contends, and we agree, that defendant's motion for a bifurcated trial was properly denied. Nothing in the record indicates that he made more than a bare assertion of an intention to assert self-defense. He produced no evidence tending to support that defense when he made the motion. Neither has defendant demonstrated the manner in which he alleges the defenses would be inconsistent. In *Contee v. United States, supra*, the sole case cited by this Court in support of the proposition in *Helms, supra*, the court stated:

> At the same time, however . . . the court must depend

> largely on defense counsel for the relevant information . . . Defense counsel made only a minimal showing of possible prejudice . . . On the basis of what it knew or could reasonably be expected to discover, we do not think the court abused its discretion in denying the motion to bifurcate.

410 F. 2d at 251.

Moreover, on the facts of this case, we can see nothing inherently inconsistent between the defenses of self-defense and insanity. Neither defense denies that defendant was at the scene of the crime or that he committed the act in question. Finally, evidence of self-defense in the instant case is meager if it exists at all, and we agree with the following observation by the court in *Contee*:

> In the instant case, the record shows that in "abandoning" his self-defense defense, appellant was not sacrificing anything of value . . . It is doubtful that [the] evidence would have required an instruction on self-defense had one been requested. In any event, we think it is too insubstantial to warrant reversal for lack of bifurcation in the circumstances of this case.

Id.

This assignment of error is overruled.

[4] Defendant next contends that the trial court erred in denying his pretrial motion to require the State to elect between the offenses charged. Defendant argues that the two offenses arise out of the same transaction, and actually only one assault occurred. In making his assertion, defendant relies on *State v. Dilldine*, 22 N.C. App. 229, 206 S.E. 2d 364 (1974). In that case, defendant was charged with shooting his victim three times in the front and twice in the back. On the basis of this one occurrence, defendant was charged on one count of felonious assault with intent to kill for the bullets in the front and another count of felonious assault with intent to kill for the bullets in the victim's back. The Court of Appeals held that "[i]t was improper to have two bills of indictment and two offenses growing out of this one episode." 22 N.C. App. at 231, 206 S.E. 2d at 366.

Defendant's reliance on *Dilldine* is misplaced. There, the defendant was charged on two counts of the *same* offense, felonious assault with intent to kill, on the basis of what can only be characterized as one assault, or one continuous transaction. In the case at

bar, defendant has been charged with two separate and distinct offenses which happen to grow out of the particular facts of this case. It is elementary that a defendant may be charged with more than one offense based on a given course of conduct. *See State v. Summrell*, 282 N.C. 157, 192 S.E. 2d 569 (1972). In any event, even when an election ultimately will be necessary, the State is not required to elect prior to the introduction of evidence. *State v. Boyd*, 287 N.C. 131, 214 S.E. 2d 14 (1975); *State v. Summrell, supra*. This assignment of error is overruled.

[5] Defendant contends that the trial court erred in not permitting Dr. Van Fleet to testify regarding whether defendant had discussed with him the events which transpired 18 March 1978. Defendant elicited from Dr. Van Fleet an opinion that, on 18 March 1978, defendant was suffering from paranoid schizophrenia. Dr. Van Fleet was then asked what defendant told him regarding the events of 18 March 1978. The trial court sustained the State's objection.

Defendant argues that, under *State v. Wade*, 296 N.C. 454, 251 S.E. 2d 407 (1979), a psychiatrist may relate statements made by a defendant which are reliable and which form the basis for diagnosis. In *Wade*, we formulated the following general propositions regarding expert testimony:

> (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.

Id. at 462, 251 S.E. 2d at 412.

We note first that defendant made no showing that the statements to which Dr. Van Fleet referred did in fact bear upon his ultimate diagnosis of defendant's mental condition. In this regard,

defendant further failed to request that the record reflect what the answer of the witness would have been. *Perfecting Serv. Co. v. Product Development & Sales Co.*, 259 N.C. 400, 131 S.E. 2d 9 (1963); 1 *Stansbury's North Carolina Evidence* § 26 (Brandis Rev. 1973). Thus, we are unable to ascertain whether the statements were admissible under *Wade, supra*, in the first instance, nor whether their exclusion, if admissible, was prejudicial. *Id.*

[6] Defendant also assigns as error the trial court's overruling his objections to questions asked by the district attorney which he now contends were irrelevant. The first of these exceptions is to the district attorney's question to Dr. Van Fleet regarding whether defendant was able, at the time of trial, to "function" in society. Over defendant's objection, the psychiatrist responded that he did not know what was meant by "function." Defendant here interposed only a general objection to the question, and a "general objection, if overruled, is no good, unless, on the face of the evidence, there is no purpose whatever for which it could have been admissible." 1 *Stansbury's, supra*, §27, and cases cited therein. Defendant has failed to demonstrate that this evidence would not be admissible for any purpose whatever. Moreover, the record discloses that Dr. Van Fleet did not, in fact, respond to the substance of the question but stated only that he was not sure what was meant by "function in society."

[7] Defendant's second exception to what he terms irrelevant evidence involves the following exchange:

> Q. Eight hour a day shifts on a week prior to the date of an occurrence when you've testified he didn't on a specific date, the eighteenth would have no bearing as to whether or not he knew the difference between right and wrong on that day. Is that what you're telling this jury?
>
> MS. SHUFORD: OBJECTION to the question.
>
> COURT: OVERRULED. Cross examination.

Obviously, the objection was directed to the form of the question. There was no objection to the evidence which was elicited by the question. Furthermore, there was no motion to strike any portion of the witness's answer to the challenged question. *See* 1 *Stansbury's, supra*, §27. "A specific objection, if overruled, will be effective only to the extent of the grounds specified." *Id.*

We are not inadvertent to the fact that these evidentiary rules may seem at times technical. However, they are bottomed on strong policy foundations and on the principle that the trial judge is present at the trial, and to him is entrusted the conduct of the trial. A party seeking to admit evidence, or objecting to the admission of evidence, should provide the trial court with a "timely and specifically defined opportunity to rule correctly." 1 *Stansbury's, supra,* §27. Only by enforcing these rules can we ensure that the judicial process proceed as efficaciously as possible and that appeals do not become merely an opportunity for counsel to "retry" the case.

[8] Defendant next argues that the trial court erred in charging the jury regarding the possible verdicts in this case. In instructing specifically on one of the offenses involved, the judge charged that if the jury had a reasonable doubt as to one of the elements, it should return a "verdict of not guilty." Later in the charge, the court instructed that "all twelve minds must agree on a verdict of guilty or not guilty." Defendant maintains there was error since the judge failed to charge that the jury could find the defendant "not guilty by reason of insanity." For this proposition, defendant relies on *State v. Dooley*, 285 N.C. 158, 203 S.E. 2d 815 (1974). As the State points out, however, *Dooley* does not control in the instant case. The defendant there relied on self-defense, and the trial judge failed to include in his final mandate that the jury could find defendant not guilty by reason of self-defense. In the case at bar, the court not only included in the final mandate the possible verdict of not guilty by reason of insanity, but that verdict was included at the very beginning of the instructions, and again after the instructions on the elements of the offenses. This assignment is overruled.

[9] Defendant's next argument relates to the following charge to the jurors:

> Now, the court instructs you that a verdict is not a verdict unless and until all twelve jurors agree unanimously as to what your decision shall be; that is, all twelve minds agree on a verdict of guilty or not guilty.

Defendant argues that the court should have also instructed that individual jurors were not to surrender their own convictions solely in order to reach a verdict. We note, however, that defendant requested no instructions to this effect, and we are therefore not readily disposed to hear his complaint now. *See State v. Poole*, 25

N.C. App. 715, 214 S.E. 2d 774 (1975). Furthermore, the instruction as given is in accordance with the law of this State as set out in G.S. 15A-1235 as follows: "Before the jury retires for deliberation, the judge *must* give an instruction which informs the jury that in order to return a verdict, all 12 jurors must agree to a verdict of guilty or not guilty." [Emphasis added.] We find no error.

We have examined defendant's remaining assignments and find no prejudicial error warranting a new trial.

We find no error in the trial before Judge Friday, and thus the decision of the Court of Appeals is

Reversed.

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

STATE OF NORTH CAROLINA v. JAMES ROBERT LYNCH

No. 31

(Filed 2 December 1980)

Bigamy § 2; Marriage § 2— ceremony not performed before proper minister — no valid marriage — no bigamy

A ceremony solemnized by a Roman Catholic layman in the mail order business who bought for $10 a mail order certificate giving him "credentials of minister" in the Universal Life Church, Inc. was not a ceremony of marriage to be recognized for purposes of a bigamy prosecution in the State of N.C. G.S. 51-1, G.S. 14-183.

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

DEFENDANT appeals pursuant to G.S. 7A-30(2) from decision of the Court of Appeals, 46 N.C. App. 608, 265 S.E. 2d 491 (1980), finding no error in his bigamy conviction before *Walker (Hal H.), J.*, at the 23 February 1979 Session of FORSYTH Superior Court.

Defendant was tried upon a bill of indictment charging him with the crime of bigamy.

The State offered the testimony of three witnesses and three exhibits as evidence of the crime. The witnesses were the alleged first wife of defendant and the two men who performed marriage

ceremonies in which defendant was the groom. The three exhibits were a certificate of ordination as minister in the Universal Life Church, Inc., held by the man who officiated over the first ceremony of marriage, a certificate of marriage for the first marriage certified by a deputy register of deeds of Davidson County to have occurred 28 October 1973 and a copy of an application, license and certificate of marriage for the second marriage certified by an assistant register of deeds of Forsyth County to have occurred 8 July 1978. The State's evidence can be summarized as follows:

On 28 October 1973, after living together for a year, defendant and Sandra Lynch participated in a marriage ceremony over which Sandra's father, Chester A. Wilson, officiated in his home in the presence of Sandra's mother, daughter, sister and three friends, two of whom signed the marriage license as witnesses. Vows of marriage and rings were exchanged by defendant and Sandra. The rings were borrowed from Sandra's sister and brother-in-law and later returned to them. After the ceremony, defendant and Sandra went on a weekend trip to the mountains, which defendant referred to as a honeymoon. They returned to Clemmons, North Carolina, where they resided and held themselves out as husband and wife until November 1977 when Sandra returned to the home of her father. As of the time of trial, Sandra knew of no legal proceeding whereby defendant had obtained a divorce from her. Sandra is a member of the Roman Catholic Church.

Chester A. Wilson, the father of Sandra Lynch, performed the 28 October 1973 marriage ceremony between defendant and his daughter at the request of defendant. At the time he performed the ceremony, Wilson was--and still is--a lay member of the Roman Catholic Church and ran a mail order business. He also held the "credentials of minister" of the Universal Life Church, Inc. of Modesto, California. Wilson produced an eight by eleven inch certificate to that effect on which appeared the following printed matter:

UNIVERSAL LIFE CHURCH, INC.

Headquarters: 1766 Poland, Modesto, Calif. 95351
537-0553

CREDENTIALS
of Minister

This is to certify that the bearer hereof CHESTER A. WILSON of WINSTON SALEM State or Province of NORTH CAROLINA *has been ordained by Universal Life Church, Inc. this day 7 January* 1973,

Board Members
Auddie A. Gardner
Rev. Susetta Lykins
Al DeBettencourt
Lida G. Hensley, Secretary

(SEAL) s / KIRBY J. HENSLEY
President--Kirby J. Hensley, D.D.

To obtain these credentials of minister, Wilson mailed his name, address and ten dollars to the California headquarters. He has never been through any further proceedings or training with the Universal Life Church, Inc. Wilson applied for membership after becoming a born-again Christian and does not use his Universal Life Church, Inc., affiliation for tax purposes. He officiates over no church. According to Wilson, the Universal Life Church, Inc., has seven million ministers and permits memberships in any other religious organization, a consequence of which is his continued participation in the activities of his local parish of the Roman Catholic Church. Wilson stated, "the Universal Life Church will ordain anyone without question of his or her faith for life." Wilson has not performed any ceremony of marriage other than the one between defendant and his daughter.

On 8 July 1978, Clayton H. Persons, an ordained minister of the Moravian Church, performed a ceremony of marriage between Mary Alice Bovender and defendant at the home of the bride. The ceremony was that customary in the Moravian Church. Persons performed the ceremony with the knowledge that a lay Catholic person performed some ceremony between defendant and another. According to Persons, such a ceremony would be very clearly invalid under Moravian Church doctrine and under Roman Catholic doctrine as verified to Persons by two local priests of the Roman Catholic Church. Persons could not recall when defendant told him the lay Roman Catholic was also a member of the Universal Life Church, Inc., and he could not remember being told the man was an "ordained minister" of the Universal Life Church, Inc. Persons stated: "If Mr. Lynch had told me that the person who performed the first marriage and who claimed to be an ordained

minister was a lay member of the Roman Catholic Church, I would have performed the ceremony; and in fact, I did so so."

Defendant's evidence consisted of his own testimony and literature concerning the Universal Life Church, Inc. Defendant's testimony and significant information from the document can be summarized as follows:

Defendant lived with Sandra Lynch for five years--one before the 23 October 1973 ceremony and four years afterwards. Defendant intended the 1973 ceremony to be a marriage and he considered Sandra his wife until their November 1977 breakup. He had not seen Wilson's credentials of minister. Wilson did tell defendant he had such a certificate which he got through the mail from California. He did not know that Wilson, with whom he cursed, drank and gambled on cards and dogs, considered himself a born-again Christian. Both the 1973 and 1978 ceremonies were done freely and voluntarily on defendant's part. Based on conversations with Persons and his attorney, he considered the first marriage null and void. Defendant claimed the first knowledge he had that Sandra Lynch felt she was still married to him was when he was arrested for bigamy. The State, on cross-examination, introduced a letter dated 19 April 1978 to Sandra Lynch from defendant's attorney which read in part:

> Please be advised that I have been retained by your husband, James Roberts Lynch, to obtain a final decree of divorce for him. I have enclosed a special power of attorney for your signature which would allow Mr. Lynch to obtain a divorce in the Dominican Republic without the necessity of court costs and an action here in North Carolina. If you are in agreement, please sign the enclosed in the presence of a notary public and return the form to me in the enclosed envelope.
>
> In the event you do not sign this form and return it to me, it will be necessary for me to file an action here in North Carolina and obtain a final decree of divorce through the courts here in Forsyth County. I am sure that you can see that signing the form and obtaining the divorce in the Dominican Republic would save everyone involved time and expense.

Defendant presented a front and back printed circular entitled

"The Universal Life Church," under which appeared a California address. The circular contained a clip-out coupon to send for ordination. Among the large print type statements are the following: "FREEDOM! The Universal Life Church believes only in what is right . . . and every person has the right to decide what is right for him; We have 7 Million Ministers and over 30,000 Churches; We are one Church! Advocates of the Good Life; Our Goal--A fuller life for everyone; Our Objective--Eternal progression; Our Slogan--To live and help live." Within the finer print appears the following:

> The Universal Life Church, Inc., has no traditional doctrine. We, as an organization, only believe in that which is RIGHT. Each individual has the privilege and responsibility to determine what is RIGHT for him/her as long as it does not infringe on the RIGHTS of others. We do not stand between you and your God. We are active advocates of the First Amendment of the United States of America....
>
> The ULC will ordain anyone, without question of his/her faith, for life. We ordain them according to St. John 15:16. ULC ministers have the authority to officiate at marriages, baptismals, funerals, conduct church meetings, administer "last rites." Every right and privilege accorded other ministers is accorded the ULC minister. We do not require you to give up your membership with any other church to be a minister of the ULC, Inc.
>
> REMEMBER--a church is PEOPLE, not a building. Church meetings may be held in your home, apartment, on top of a mountain, in a park or wherever the Board of Directors decide. The meeting place may or may not be owned by the church. A church function can take place "wherever two or more people are gathered together." There is no obligation to have a special building to perform marriages, funerals, baptisms, etc. We urge that you strive to have a building at sometime for your services, a building of your own.

According to the circular offered in evidence at trial of this case, the twenty-seven titles offered by the Universal Life Church, Inc., include that of Archpriest, Bishop, Dervish, Guru, Rev. Mother, Preceptor, Brahman and Universal Religious Philosopher. Among the courses offered by Universal Life Church, Inc., are a course

resulting in an Honorary Doctor of Divinity degree (DD) for $20.00, a course resulting in a Doctor of Universal life degree (DUL) for $15.00, a course entitled the "the SOUL Clinic" (Science of Understanding Life) for $100.00, a course resulting in a Doctor of Religious Science degree (DRS) for $35.00, a course on American Church Law and Parliamentary Procedure which teaches the legal rules and principles concerning separation of church and state which results in a Doctor of Religious Humanities degree (DRH) for $40.00 and a course which results in a Doctor of Metaphysics degree (MSD) for $10.00. A Doctor of Philosophy in Religion is given for $100.00. The circular contains a "suggested ULC marriage service" and information regarding church charters and religious exemptions from tax and social security. All titles are bestowed without question upon any person who remits the indicated amount.

Upon this evidence, the jury convicted defendant of bigamy. The Court of Appeals found no error with Wells, J., dissenting. Defendant appealed to the Supreme Court as of right pursuant to G.S. 7A-30 (2).

Rufus L. Edmisten, Attorney General, by Norma S. Harrell, Assistant Attorney General, for the State.

Eubanks, Walden & Mackintosh by Bruce A. Mackintosh, attorney for defendant appellant.

HUSKINS, Justice.

The question we address upon this appeal is whether the evidence of the crime of bigamy is sufficient to withstand defendant's motion for nonsuit. We hold the evidence insufficient to go to the jury, and defendant's motion for nonsuit should have been granted.

Upon a motion for nonsuit in a criminal action, all of the evidence favorable to the State, whether competent or incompetent, must be considered. Such evidence must be taken as true and considered in the light most favorable to the State. Discrepancies and contradictions are disregarded, and the State is entitled to every inference of fact which may reasonably be deduced therefrom. *State v. Witherspoon*, 293 N.C. 321, 237 S.E. 2d 822 (1977).The test is the same whether the evidence is circumstantial, direct or both. *State v. McKnight*, 279 N.C. 148, 181 S.E. 2d 415 (1971). If the evidence is sufficient only to raise a suspicion or conjecture, the motion for nonsuit should be allowed. "This is true even though the

suspicion so aroused by the evidence is strong." *State v. Cutler*, 271 N.C. 379, 383, 156 S.E. 2d 679, 682 (1967).

Bigamy is a statutory crime in all fifty states. *See* Slovenko, *The De Facto Decriminalization of Bigamy*, 17 J. of Fam. L. 297, 307-08 (1979) (Appendix contains a list of bigamy statutes). Bigamy was not an offense at common law. It was an offense against society punishable under ecclesiastical law. *State v. Burns*, 90 N.C. 707 (1884); 4 W. Blackstone, Commentaries * 163; *but see, State v. Williams*, 220 N.C. 445, 17 S.E. 2d 769 (1941), *rev'd on other grounds, Williams v. North Carolina*, 317 U.S. 287, 87 L.Ed. 279, 63 S.Ct. 208 (1942). It was made a statutory offense in the reign of James I. 2 James I, c.11 (1604). This English statute was the prototype for the first North Carolina bigamy statute of 1790. 1790 N.C. Sess. Laws c.11.

Our bigamy statute is presently codified at G.S. 14-183 and reads as follows:

> If any person, being married, shall marry any other person during the life of the former husband or wife, every such offender, and every person counseling, aiding or abetting such offender, shall be guilty of a felony, and shall be imprisoned in the State's prison or county jail for any term not less than four months nor more than ten years. Any such offense may be dealt with, tried, determined and punished in the county where the offender shall be apprehended, or be in custody, as if the offense had been actually committed in that county. If any person, being married, shall contract a marriage with any other person outside of this State, which marriage would be punishable as bigamous if contracted within this State, he shall be guilty of a felony and shall be punished as in cases of bigamy. Nothing contained in this section shall extend to any person marrying a second time, whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to have been living within that time; nor to any person who at the time of such second marriage shall have been lawfully divorced from the bond of the first marriage; nor to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction.

A person commits bigamy when being lawfully married he purports to marry another person.

The issue raised in the nonsuit question is whether defendant contracted a marriage to Mary Alice Bovender while lawfully married to Sandra Lynch. This case turns upon whether the marriage to Sandra Lynch was a valid marriage under the laws of this State.

The existence of a valid prior marriage must be proved beyond a reasonable doubt by the State. The question of its validity must be determined by the law of the state in which the ceremony was performed. If the prior marriage was void, the second marriage was not bigamous. 2 Wharton's Criminal Law § 236 (14 ed. 1979).

Marriage is an institution controlled by the individual states *Jones v. Bradley*, 590 F.2d 294, 296 (9th Cir. 1979); *see also Boddie v. Connecticut*, 401 U.S. 371, 28 L.Ed.2d 113, 91 S.Ct. 780 (1971). "There are three parties to a marriage contract—the husband, the wife and the State." *Ritchie v. White*, 225 N.C. 450, 453, 35 S.E.2d 414, 415 (1945).

> Marriage, or the relation of husband and wife, is in law complete when parties, able to contract and willing to contract, actually have contracted to be man and wife in the forms and with the solemnities required by law. It is marriage—it is this contract, which gives to each right or power over the body of the other, and renders a consequent cohabitation lawful. And it is the abuse of this formal and solemn contract, by entering into it a second time when a former husband or wife is yet living, which the law forbids because of its outrage upon public decency, its violation of the public economy, as well as its tendency to cheat one into a surrender of the person under the appearance of right. A man takes a wife lawfully when the contract is lawfully made. He takes a wife unlawfully when the contract is unlawfully made; and this unlawful contract the law punishes.

State v. Patterson, 24 N.C. 346, 355-56 (1842). To constitute a valid marriage in this State, the requirements of G.S. 51-1 must be met. That statute provides:

> The consent of a male and female person who may lawfully marry, presently to take each other as husband and

> wife, freely, seriously and plainly expressed by each in the presence of the other, and in the presence of an ordained minister of any religious denomination, minister authorized by his church, or of a magistrate, and the consequent declaration by such minister or officer that such persons are husband and wife, shall be a valid and sufficient marriage: Provided, that the rite of marriage among the Society of Friends, according to a form and custom peculiar to themselves, shall not be interfered with by the provisions of this Chapter: Provided further, that marriages solemnized and witnessed by a local spiritual assembly of the Baha'is, according to the usage of their religious community, shall be valid; provided further, marriages solemnized before March 9, 1909, by ministers of the gospel licensed, but not ordained, are validated from their consummation.

A common law marriage or marriage by consent is not recognized in this State. *State v. Alford*, 298 N.C. 465, 259 S.E.2d 242 (1979); *State v. Samuel*, 19 N.C. 177 (1836). Consent is just one of the essential elements of a marriage. The marriage must be acknowledged in the manner and before some person prescribed in G.S. 51-1. *State v. Wilson*, 121 N.C. 650, 28 S.E. 416 (1897). In order to have a valid marriage in this State, the parties must express their solemn intent to marry in the presence of (1) "an ordained minister of any religious denomination," or (2) a "minister authorized by his church" or (3) a "magistrate."

In this case, the State is required to establish beyond a reasonable doubt that Chester A. Wilson was an ordained minister of a religious denomination or a minister authorized by his church. Though the marriage license is competent evidence tending to prove a marriage, *State v. Melton*, 120 N.C. 591, 26 S.E. 933 (1897), the absence or presence of a marriage license is of minimal consequence in establishing a valid marriage to support a bigamy prosecution. *State v. Robbins*, 28 N.C. 23 (1845); *see also* G.S. 51-6 to -21. The subjective intent of defendant to indeed marry the person alleged to be his first wife is also of minimal consequence. Bigamy is an offense even though unwittingly committed. *State v. Goulden*, 134 N.C. 743, 47 S.E. 450 (1904). The admission of defendant that he was previously married is competent evidence tending to establish the marriage. *State v. Goulden, supra; State v. Melton, supra; State v. Wylde*, 110 N.C. 500, 15 S.E. 5 (1892). The marriage defendant

admitted he entered into or intended and the marriage which is at least licensed by the State or which is apparent by reputation in the community must, however, comply with G.S. 51-1. We conclude the State has failed to meet this burden and the motion for nonsuit consequently should have been allowed.

It is not within the power of the State to declare what is or is not a religious body or who is or is not a religious leader within the body. *State v. Bray*, 35 N.C. 289 (1852). In *Bray*, a bigamy case which brought into question the validity of the first marriage, Chief Justice Ruffin addressed the wording of the North Carolina marriage statute:

> The statute, without assuming to pronounce dogmatically who were true ministers of the gospel, meant to give a catholic rule, by admitting everyone to be so, to this purpose, who, in the view of his own church, hath the cure of souls by the ministry of the Word, and any of the sacraments of God, according to its ecclesiastical polity, implying spiritual authority to receive or deny and desiring to be partakers thereof, and to administer admonition or discipline, as he may deem the same to be the soul's health of the person and the promotion of godliness among the people. When to such a ministry is annexed, according to the canons, or statutes of the particular church, the faculty of performing the office of solemnizing matrimony, the qualification of the minister is sufficient, within the statute.

35 N.C. at 295-96. Whether defendant is married in the eyes of God, of himself or of any ecclesiastical body is not our concern. Our concern is whether the marriage is one the State recognizes. "[A] marriage pretendedly celebrated before a person not authorized would be a nullity." *State v. Wilson*, 121 N.C. 650, 656-57, 28 S.E. 416, 418 (1897). A ceremony solemnized by a Roman Catholic layman in the mail order business who bought for $10.00 a mail order certificate giving him "credentials of minister" in the Universal Life Church, Inc.—whatever that is—is not a ceremony of marriage to be recognized for purposes of a bigamy prosecution in the State of North Carolina. The evidence does not establish—rather, it negates the fact—that Chester A. Wilson was authorized under the laws of this State to perform a marriage ceremony.

The State has failed to prove a prior marriage within the

meaning of G.S. 51-1. The second marriage was therefore not bigamous. Defendant's motion for nonsuit should have been granted. The decision of the Court of Appeals is

Reversed.

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

STATE OF NORTH CAROLINA v. TYRONE EUGENE ALLEN

No. 49

(Filed 2 December 1980)

1. Criminal Law § 66.8; Constitutional Law § 29— photographs of defendant while in jail — legal arrest — no constitutional violation

A photograph of defendant taken while he was in jail in Virginia was not obtained in violation of his constitutional rights where the officer who arrested defendant in Virginia had probable cause to stop the car in which defendant was riding and arrest him without a warrant for the robbery of a grocery store, and the trial court properly admitted in evidence the photograph and testimony concerning the photograph.

2. Criminal Law §§ 66, 117.3— instructions — difficulty in identifying person of different race

The trial court did not err in refusing to give instructions requested by defendant to the effect that the identifying witnesses were of a different race than defendant, that in the experience of many it is more difficult to identify members of a different race than members of one's own, that the jury could consider such experience in evaluating the testimony of the identification witnesses, and that the jury must also consider whether there were other factors present which overcame any difficulty of identification, particularly where there was no indication that race in any way affected the identification of defendant by the witnesses in this case.

3. Constitutional Law § 30— quashal of subpoena

The trial court in an armed robbery case did not err in allowing the State's motion to quash his subpoena for "all the sawed-off shotguns confiscated by the Greensboro Police Department" since the date of the robbery.

4. Criminal Law § 92.1— consolidation of charges against two defendants

The trial court did not err in allowing the State's motion to consolidate for trial charges against defendant and a codefendant for the same armed robbery. G.S. 15A-926 to -927.

5. Criminal Law § 42.4— identification of shotgun

The trial court properly admitted a sawed-off shotgun in an armed robbery case where one witness positively identified the gun as the one used in the robbery and another witness testified that it looked like the weapon used.

6. Criminal Law § 66.16— in-court identifications — no taint from photographic identification

The trial court properly determined that in-court identifications of defendant were not tainted by a pretrial photographic procedure where the court found upon supporting *voir dire* evidence that the witnesses had ample opportunity to observe defendant during the course of the robbery in question; the in-court identifications of defendant were of independent origin based solely on what the witnesses saw at the time of the robbery and did not result from any out-of-court confrontation, photograph, or pretrial identification procedure; and the pretrial photographic procedures were not so unnecessarily suggestive as to lead to irreparable mistaken identification.

7. Criminal Law § 114.2— instructions — corroborating evidence "tending to show" — no expression of opinion

The trial court did not express an opinion on the evidence in instructing the jury that evidence had been received as corroboration "tending to show" that certain State's witnesses had made statements to officers which were consistent with their testimony at trial.

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

APPEAL by defendant from *Wood, J.*, 14 January 1980 Session, GUILFORD Superior Court.

Upon a plea of not guilty, defendant was tried on a bill of indictment, proper in form, charging him with the armed robbery of two named employees of a Western Sizzlin Restaurant in the City of Greensboro. He and a codefendant were tried together. Evidence presented by the state is summarized in pertinent part as follows:

At approximately 3:30—4:00 p.m. on 20 May 1979, four employees—Lacy Goodwin, Elizabeth Flynt, Kelley Sealey and Linlia Williams—and one visitor—Leslie Britt—were talking while seated in the dining area of the Western Sizzlin Restaurant on West Market Street in Greensboro. There were no customers in the restaurant at that time.

A white car drove into the parking lot and two black men got out and entered the restaurant. One of the men was quite large; the other one was short in stature and appeared to be older. The men asked if there was a Western Sizzlin on Battleground Avenue. When told that there was, they left but returned in less than a minute later and asked for job applications. Some of the employees referred the men to Mr. Goodwin, the assistant manager, who had left the table and was in the kitchen area. Mr. Goodwin came back out and the two men talked with him about jobs. He gave them application forms. Thereupon, the short man pulled out a sawed-off

shotgun and said, "Back-up". The two men stepped over a railing and the large man pulled out a pistol.

All five persons who were in the restaurant when the two men entered were ordered to get down on the floor. Ms. Williams was then ordered to open the cash register. As she went to the register, the smaller man said, "We're not going to hurt you, but if he moves, you're dead." She opened the register and was pushed against the wall. The shorter man took the cash drawer out himself and then told Mr. Goodwin to open the safe. When Mr. Goodwin did not move, the shorter man stuck the shotgun in Ms. Williams' left side. Goodwin got up and went to the safe. While opening the safe, the shorter man held the shotgun in Goodwin's side and the larger man was standing behind him with a pistol to Goodwin's head. The two men took a little more than $1,000.00.

The robbers then discussed whether to put the five victims in the freezer or the storeroom. Eventually they ordered them into the storeroom and made additional threats. The victims were told to remain in the storeroom for "half an hour or we'll blow your head off". They waited in the storeroom for approximately thirty minutes until Manager Gordan Durham opened the door. Police were called and the victims described the two robbers in considerable detail.

Defendant and his codefendant, James Carroll, also known as James Holland, were arrested in Petersburg, Virginia, on 28 June 1979 for an alleged armed robbery of an IGA store there. Upon their arrest a sawed-off shotgun was taken. (Defendant Allen was found not guilty of that robbery while his codefendant pleaded guilty.) Witness Flynt testified that the shotgun was similar to the one used in the robbery in question while witness Goodwin testified positively that it was the one used in the robbery. The gun was admitted into evidence.

All of the witnesses identified codefendant Carroll as the older robber. However, defendant Allen was identified in court only by witnesses Flynt and Britt. Both witnesses based identification on events at the time of the robbery. Petersburg Police Officer Carmichael testified that since the time he saw defendant in Petersburg on 28 June 1979, defendant had lost 70-80 pounds. Witnesses Williams and Britt agreed that defendant had lost considerable weight.

Other evidence presented by the state and necessary for an understanding of the questions presented on appeal will be referred to in the opinion.

Neither of defendants presented evidence.

The jury returned a verdict finding defendant Allen guilty of armed robbery and from judgment imposing a life sentence, he appealed.[1]

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

Assistant Public Defender A. Wayland Cooke for defendant-appellant.

BRITT, Justice.

[1] By his first assignment of error argued in his brief, defendant contends the trial court erred in admitting into evidence a photograph of him taken while he was in jail. He argues that the photograph was obtained in violation of his constitutional rights. This assignment has no merit.

While the record is unclear as to just what defendant is complaining about in this assignment, it appears to relate to state's Exhibit 2, a photograph of defendant taken while he was in jail in Petersburg, Virginia, on 2 July 1979. Witness Lacy Goodwin, one of the victims of the robbery, was shown Exhibit 2 and then testified:

> I've picked out the picture that fairly and accurately represents the man that was in there on May the 20th. State's Exhibit No. 2 fairly and accurately represents this individual. There is no doubt in my mind that the individual that robbed me fairly and accurately is represented in this picture.

The state then introduced the photograph for purpose of illustrating the testimony of the witness and the court instructed the jury that they could consider the photograph for that purpose alone.

Witness Goodwin was followed on the witness stand by Sergeant Robert Carmichael of the Petersburg, Virginia Police Department. He testified that on 28 June 1979, following a reported armed robbery, he stopped a 1973 Cadillac being driven in the City of Petersburg by defendant; that codefendant Carroll and a woman

[1]Codefendant Carroll was also found guilty of armed robbery and he was sentenced to life imprisonment.

were also in the front seat; and that he found a sawed-off shotgun on the floor of the car under Carroll's legs some two or three feet from defendant. Sergeant Carmichael then identified Exhibit 2 as a picture of defendant "as he looked when I saw him". The witness then stated that in his opinion defendant had lost approximately 70 to 80 pounds between the time he first saw defendant in Petersburg and the date of the trial.

Greensboro Police Officer W. E. McNair followed Sergeant Carmichael on the witness stand. After giving other testimony, he stated, over objection, that Mr. Goodwin selected the photograph identified as Exhibit 2 from a group of pictures and said "that's the man"; also, "that's the man—the big man in the robbery".

Defendant argues that Exhibit 2 was obtained in violation of his constitutional rights and that the trial court erred in allowing it to be admitted into evidence. In support of his argument, defendant cites us to our decision in *State v. Accor and Moore*, 277 N.C. 65, 175 S.E. 2d 583 (1970), in which we held that photographs which were taken of defendants in jail after they have been picked up without probable cause are inadmissible.

State v. Accor and Moore, supra, is distinguishable from the present case. In the case *sub judice*, the trial judge conducted a voir dire on defendant's motion to suppress identification testimony. At that hearing, Sergeant Carmichael gave testimony which tended to show that he had probable cause to stop the car in which defendant was riding and arrest defendant in connection with the robbery of a grocery store. At the time the officer had been dispatched to the scene of the armed robbery, he had been given a description of a suspect: a black male who was wearing a light colored suit with a blue shirt. Upon his arrival at the scene, Sergeant Carmichael was told that the suspect had jumped into a nearby automobile. Witnesses at the store pointed out a passing silver colored 1973 Cadillac on an adjacent street. The officer and a police lieutenant left the store and stopped the Cadillac a short distance away. At the time the car was stopped, defendant was driving the vehicle and was wearing a suit and a blue shirt.

These facts were sufficient to establish probable cause to justify the arrest of defendant pursuant to Section 19.2-81 of the Code of Virginia which authorizes a law enforcement officer to "arrest, without a warrant, . . . any person whom he has reasonable grounds or probable cause to suspect of having committed a felony not in his

presence; . . . ."

We hold the trial court did not commit error in admitting testimony relating to the photograph because the rule of *State v. Accor and Moore, supra*, simply does not apply to the situation of the present case where there was probable cause. Furthermore, any error was rendered harmless by the admission of the following testimony by Mr. McNair without objection:

> In the set of photographs in reference to the larger man, Mr. Goodwin picked out the picture of Mr. Allen and he stated that he was the larger suspect in the robbery. He did not make any misidentification as to the larger suspect. He did not pick anybody else out.

"When evidence is admitted over objection but the same evidence has theretofore or thereafter been admitted without objection, the benefit of the objection is ordinarily lost." 4 Strong's N.C. Index 3d, Criminal Law § 162, pp. 825-26.

[2] Defendant assigns as error the failure of the trial court to grant his request that the following special instruction be given to the jury:

> In this case the identifying witnesses are of a different race than the defendant. In the experience of many, it is more difficult to identify members of a different race than members of one's own. If this is also your experience, you may consider it in evaluating the witness' testimony. You must also consider, of course, whether there are other factors present in this case which overcome any such difficulty of identification. For example, you may conclude that the witness has had sufficient contacts with members of the defendant's race that he would not have greater difficulty in making a reliable identification.

The only authority defendant cites for this novel assignment is *United States v. Telfaire*, 469 F. 2d 552 (D.C. Cir. 1972). We do not find that case authoritative or persuasive. In *Telfaire*, the defendant was convicted of robbery on the identification of a single witness. The United States Court of Appeals for the District of Columbia Circuit (Bazelon, C.J., and Leventhal and Adams, J.J.) affirmed the conviction. Following the opinion, the court, in an appendix, set forth "Model Special Instructions on Identification". Thereafter, in

a concurring opinion, Bazelon, C.J., discussed the question of inter-racial identifications and concluded that when the issue is raised, an instruction similar to that quoted above should be given. Leventhal, J., in a concurring opinion, discussed the same subject but disagreed with Bazelon, C.J.; he closed his discussion with the following conclusion:

> The more I ponder the problems, the better I understand the kernel of wisdom in the decisions that shy away from instructions on inter-racial identifications as divisive. [Citing *People v. Burris*, 19 A.D. 2d 557-558, 241 N.Y.S. 2d 75, 76 (Second Dept. 1963); *People v. Hearns*, 18 A.D. 2d 922, 923, 238 N.Y.S. 2d 173, 174-175 (Second Dept. 1963)]. 469 F. 2d at 562.

We do not choose to follow the Bazelon opinion. In the case at hand, there is no indication that race in any way affected the identification of defendant by the witnesses. The robbery took place in the daytime, in a well-lighted restaurant, and the witnesses were able to view the robbers at close range for several minutes. The only difficulty in identifying defendant was due to the fact that he had lost considerable weight—70 to 80 pounds—between the time of the robbery and the time of the trial. The assignment of error is overruled.

[3] We find no merit in defendant's assignment of error in which he contends that the trial court erred in allowing the state's motion to quash his subpoena for "all the sawed-off shotguns confiscated by the Greensboro Police Department since May, 20, 1979".

Defendant makes the broad assertion that his rights guaranteed by Article 1, Section 23, of the North Carolina Constitution, and the sixth and fourteenth amendments to the United States Constitution were violated by this action of the trial court, but at no place does he state why compliance with the subpoena was necessary to his defense. It is true that as soon as the district attorney made the motion to quash, the trial judge allowed it. However, the court then asked defense counsel if he wanted to be heard "on that" and there was no response. "The burden is on defendant not only to show error but also to show that the error complained of affected the result adversely to him...." 4 Strong's N.C. Index 3d, Criminal Law § 167.

[4] There is no merit in defendant's assignment of error that the trial court erred in allowing the state's motion that defendant's case

and defendant Carroll's case be consolidated for trial. This was a matter within the discretion of the trial judge and we perceive no abuse of discretion. G.S. §§ 15A-926 to -927 (1978); *State v. Slade*, 291 N.C. 275, 229 S.E. 2d 921 (1976).

[5] There is no merit in defendant's assignment of error in which he contends that the admission of a sawed-off shotgun into evidence was error. The gun was relevant evidence, and, upon proper identification, was admissible. *State v. King*, 287 N.C. 645, 215 S.E. 2d 540 (1975), *death sentence vacated*, 428 U.S. 903 (1976). One of the witnesses positively identified the gun as the one used in the robbery and another witness testified that it looked like the weapon used. The testimony was admissible. *State v. Simmons*, 286 N.C. 681, 213 S.E. 2d 280 (1975), *death sentence vacated*, 428 U.S. 903 (1976).

[6] By his assignment of error No. 1, defendant contends that the trial court erred in finding that the in-court identifications of defendant were untainted. This assignment has no merit.

Begining on 3 December 1979, prior to the trial of this case at the 14 January 1980 session of the court, the trial judge conducted lengthy voir dire hearings relating to the identification of defendants Allen and Carroll, not only with respect to this case but other robberies as well. At these hearings, the five witnesses to the robbery, together with Greensboro and Petersburg police officers, testified regarding the identification of the defendants. Following the hearings, the court made extensive findings of fact and conclusions of law to the effect that the witnesses had ample opportunity to observe the defendants during the course of the robbery in question; that the in-court identifications of the defendants were of independent origin based solely on what the witnesses saw at the time of the robbery; that the identifications did not result from any out-of-court confrontation, photograph or pretrial identification procedure; and that the pretrial photographic identification procedures were not so unnecessarily suggestive or conducive as to lead to irreparable mistaken identification.

It is well settled in this jurisdiction that when the admissibility of in-court identification testimony is challenged on the ground that it is tainted by an out-of-court identification made under constitutionally impermissible circumstances, the trial judge must make findings as to the background facts to determine whether the proffered testimony meets the tests of admissibility; and when the facts

so found are supported by competent evidence, they are conclusive on the appellate courts. *State v. Woods*, 286 N.C. 612, 213 S.E. 2d 214 (1975), *death sentence vacated*, 428 U.S. 903 (1976); *State v. Tuggle*, 284 N.C. 515, 201 S.E. 2d 884 (1974); 4 Strong's N.C. Index 3d, Criminal Law § 66.20. We hold that the evidence presented at the voir dire hearings was more than sufficient to support the findings of fact made by the trial court, and those findings were sufficient to support the conclusions of law made by the court.

[7] Finally, defendant assigns as error the following instruction given by the trial court to the jury:

> Evidence has been received as corroboration tending to show that at an earlier time the witness Elizabeth Carol Flynt made statements to Detective McNair and also a statement to Officer Brooks; that the witness Linlia Williams made the statement to Detective McNair and also to Officer Lloyd, that the witness Lacy Goodwin made a statement to Detective McNair and also to Officer Lloyd, that the witness Leslie Britt made a statement to Officer Brooks consistent with their testimony at this trial.

Defendant argues that the quoted instruction is erroneous because the court expressed an opinion on the evidence to the jury. We do not find this argument persuasive. It will be noted that in the early part of the instruciton, the court stated that there was evidence "*tending* to show . . . ." (Emphasis added.) This court has held many times that the use of these words does not constitute the expression of an opinion. *State v. Huggins*, 269 N.C. 752, 153 S.E. 2d 475 (1967); *State v. Jackson*, 228 N.C. 656, 46 S.E. 2d 858 (1948).

A careful review of the record leads us to conlude that defendant received a fair trial, free from prejudicial error.

No error.

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

GERALDINE BEVERIDGE, LEVI BEVERIDGE AND WIFE, EUNICE L. BEVERIDGE, AND SUSAN BEVERIDGE CARROLL v. WILLIAM F. HOWLAND III AND WIFE, VERDYE HOWLAND, LELAND HOWLAND AND WIFE, MAYSEL HOWLAND, RALPH L. HOWLAND AND WIFE, MARGARET HOWLAND, ELIZABETH BETTY WARREN DAWSON AND HUSBAND, R. G. DAWSON, C. G. HOLLAND, JR., TRUSTEE, C. G. HOLLAND, JR., AND WIFE, JEANETTE R. HOLLAND, WACHOVIA BANK & TRUST COMPANY, MABEL C. UZZELL, AND LANGLEY P. LAND

No. 70

(Filed 2 December 1980)

Deeds § 11— deed conveying half of tract — entire interest of plaintiffs' predecessors conveyed

In a declaratory judgment action where plaintiffs asked the court to adjudge that they owned interests in a particular tract of land, the trial court properly entered summary judgment for defendants where the tract of land was owned by three members of the Howland family; half of the tract was conveyed by a deed which provided that "this deed conveys . . . the entire estate of L. C. Howland and wife . . . and Emma J. Howland in the above described land and one-half of the whole tract"; and the "four corners" rule applied so that the deed conveyed all of the interest of L. C. and Emma, under whom plaintiffs claimed, and a sufficient portion of the interest of W. F. Howland, under whom defendants claimed, to make up the one-half of the tract.

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

APPEAL by plaintiffs from *Strickland, J.*, 1 February 1980 Civil Session, CARTERET Superior Court.

Plaintiffs instituted this action on 7 August 1979 pursuant to the Declaratory Judgment Act, G.S. § 1-253, *et seq.*, asking the court to adjudge that they own interests in a tract of land on Shackleford Banks in Carteret County known as the Mullet Pond Tract.

Defendants Howland and Dawson filed answer denying that plaintiffs have any interests in the land and pleading certain further defenses. Defendant Mabel C. Uzzell filed a separate answer in which she alleged ownership of a 7/32 interest in the land and denied that plaintiffs own any interest inconsistent thereto. The other defendants filed answer denying that plaintiffs own any interest in the land.

This action grew out of an eminent domain proceeding instituted by the United States of America in the U. S. District Court for the Eastern District of North Carolina in January of 1978 which

sought to condemn 2,368.64 acres, more or less, of land on the Outer Banks for inclusion in the Cape Lookout National Seashore. That court appointed a special master to determine titles to, and ownership of various parties in, the several tracts of land involved in the project. The special master filed his report on 5 February 1979. In his report he addressed the claim of plaintiffs herein in the Mullet Pond Tract but rejected their contentions. Plaintiffs filed exceptions to the report.

When the report of the special master and exceptions came on for hearing before Federal District Judge John D. Larkins, Jr., he ruled that the claim of plaintiffs "would best be litigated in the courts of the State of North Carolina." Thereupon, he provided that he would take plaintiffs' claim "under advisement pending the outcome of said state court litigation."

Following discovery proceedings in the case *sub judice*, defendants Howland and Dawson moved for summary judgment pursuant to G.S. § 1A-1, Rule 56, on the ground that there is no genuine issue as to any material fact and they are entitled to judgment as a matter of law. Other defendants also moved for summary judgment.

After a hearing on the motion by defendants Howland and Dawson for summary judgment, Judge Strickland allowed the motion and dismissed plaintiffs' action. Plaintiffs appealed and defendants Howland and Dawson petitioned this court to bypass the Court of Appeals on the ground that the subject matter of the appeal has significant public interest. They argued that until the question presented by this appeal is determined, the process of the acquisition of lands on Shackleford Banks for the Cape Lookout National Seashore project cannot proceed. We allowed the petition on 15 July 1980.

Hiram J. Mayo, Jr., for plaintiff-appellants.

Nelson W. Taylor III, for defendant-appellees.

BRITT, Justice.

The sole issue for our determination is whether the trial court erred in granting defendants' motion for summary judgment and dismissing plaintiffs' action. We hold that it did not err.

Any decision in this action necessarily rests upon the construction of a deed dated 12 March 1895 from W. F. Howland *et al.*, to W. S.

Chadwick. The following facts are not in dispute:

(1) The common source of title to the Mullet Pond tract of land is Elizah Howland.

(2) Following the death of Elizah Howland around 1885, title to the land passed to her five children—Z.J., Ralph, Emma, L. C., and W. F. Howland—as tenants in common.

(3) By deed dated 24 December 1888 Z. J. Howland conveyed all of his interest in the land in question to W. F. Howland.

(4) By deed dated 3 April 1890 Ralph Howland and wife conveyed their one-fifth undivided interest in the land to W. F. Howland.

(5) On 12 March 1895 L. C. Howland and wife, Ralph Howland and wife, Z. J. Howland, Emma J. Howland, and W. F. Howland executed the deed in question to W. S. Chadwick.[1] The granting clause of the deed provides that it conveys to the grantee "one-half of a certain tract or parcel of land" and thereafter is set forth a general description of the Mullet Pond tract containing 450 acres, more or less. Immediately following the description is the following proviso:

> This deed conveys to said party of the second part & his heirs, the entire estate of L. C. Howland and wife Susan P. Ralph Howland and wife Alice G. Z. J. Howland and Emma J. Howland in the above described land and one-half of the whole tract.

The habendum of the deed provides as follows:

> To Have and to Hold the aforesaid half of said tract or parcel of land, and all privileges and appurtenances thereto belonging, to the said W. S. Chadwick and his heirs and assigns . . . .

Plaintiffs claim through L. C. Howland and Emma J. Howland.[2] They argue that at the time the deed to Chadwick was

[1]It is not known why Z. J. Howland and Ralph Howland and wife joined in the execution of this deed as they had theretofore conveyed their interest to W. F. Howland.

[2]Plaintiffs and defendants all take the position that the deed to Chadwick conveyed a one-half undivided interest in the entire Mullet Pond tract rather than a geographical half of the tract.

executed, L. C. and Emma each owned a one-fifth interest and that W. F. Howland owned a three-fifths interest; that a one-half undivided interest was conveyed to Chadwick; and that the interest received by Chadwick consisted of one-half of L. C.'s and Emma's two-fifths interest and one-half of W. F.'s three-fifths interest. Defendants Howland and Dawson claim under W. F. Howland and contend that the deed to Chadwick conveyed all of the interest of L. C. and Emma and a sufficient portion of W. F.'s interest to make up the one-half.

Plaintiffs contend that this case is controlled by the principle of law stated in *Artis v. Artis*, 228 N.C. 754, 761, 47 S.E. 2d 228 (1948), as follows:

> Hence it may be stated as a rule of law that where the entire estate in fee simple, in unmistakable terms, is given the grantee in a deed, both in the granting clause and habendum, the warranty being in harmony therewith, other clauses in the deed, repugnant to the estate and interest conveyed, will be rejected.

See also McCotter v. Barnes, 247 N.C. 480, 101 S.E. 2d 330 (1958), and *Pilley v. Smith*, 230 N.C. 62, 51 S.E. 2d 923 (1949).[3]

Defendants Howland and Dawson contend that this case is controlled by the principle of law restated in *Lackey v. Hamlet City Board of Education*, 258 N.C. 460, 462, 128 S.E. 2d 806 (1963), as follows:

> In the interpretation of a deed, the intention of the grantor or grantors must be gathered from the whole instrument and every part thereof given effect, unless it contains conflicting provisions which are irreconcilable or a provision which is contrary to public policy or runs counter to some rule of law. *Cannon v. Baker*, 252 N.C. 111, 113 S.E. 2d 44; *Griffin v. Springer*, 244 N.C. 95, 92 S.E. 2d 682; *Dull v. Dull*, 232 N.C. 482, 61 S.E. 2d 255; *Ellis v. Barnes*, 231 N.C. 543, 57 S.E. 2d 772; *Willis v. Trust Co.*, 183 N.C. 267, 111 S.E. 163; *Spring v. Hopkins*, 171 N.C. 486, 88 S.E. 774; 16 Am. Jur., Deeds, Sections 171, 172 and 173, page 534, *et seq.*

[3]We are aware of the enactment of Chapter 1182 of the 1967 Session Laws, now codified as G.S. § 39-1.1, but that statute expressly relates to conveyances executed after 1 January 1968.

We reject plaintiffs' contention and agree with defendants. While it is true that the granting clause and the habendum in the deed in question conveyed a fee simple interest to Chadwick, there is nothing in the proviso following the description that is repugnant thereto—that attempts to limit or alter the fee simple interest. Manifestly, the purpose of the proviso was to indicate precisely whose interest in the property constituted the one-half interest conveyed to Chadwick. The rule stated in *Artis* is for the benefit of the grantee in a deed; the proviso in question here does not affect the grantee in any way.

We hold that the rule quoted from *Lackey*, often referred to as the "four corners" rule, applies to the case at hand. Since L. C. and Emma together owned a two-fifths interest, and W. F. owned a three-fifths interest, and Chadwick was being conveyed only a one-half interest, it was appropriate for the deed to set forth the intention of the parties — at least the intention of the grantors — as to whose interests were being conveyed. Although the challenged proviso might have been more artfully drawn, it clearly states that the deed conveys "the entire estate of L. C. . . . and Emma . . . in the above described land . . . ."

For the reasons stated, the judgment of the trial court is

Affirmed.

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

ELOISE TARKINGTON v. ZEBULON VANCE TARKINGTON

No. 40

(Filed 2 December 1980)

Trusts § 13.4— down payment for realty furnished by wife — title in husband and wife — presumption of resulting trust for wife

Where the evidence showed that plaintiff wife provided all of the $19,800 down payment for realty conveyed to plaintiff and her husband as tenants by the entirety, the presumption arose that she did not intend to make a gift to her husband of an entirety interest but that she intended that the husband would hold such an interest in trust for her, and this presumption of a resulting trust was not rebutted by evidence that both parties signed a note and deed of trust for the balance of the purchase price remaining after plaintiff's contribution and that defendant husband made some of the payments on the note between that time and the separation of the parties.

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

Justice CARLTON concurs in result.

ON plaintiff's petition for discretionary review pursuant to G.S. 7A-31 of a decision of the Court of Appeals (Vaughn, J., concurred in by Hedrick and Clark, J.J.), reported at 45 N.C. App. 476, 263 S.E. 2d 294 (1980), affirming the judgment of *Martin, John C., Judge*, entered at the 26 February Session of Superior Court, ALAMANCE County.

Plaintiff brought this action against her husband seeking conveyance to her of fee simple title to a certain piece of realty held by her and her husband as tenants by the entirety. The parties waived a trial by jury.

At trial, plaintiff argued she was entitled to fee simple ownership of the realty on the theory of a purchase money resulting trust.

After hearing the evidence the trial judge made the following relevant findings of fact:

> "5. That plaintiff and defendant were married on November 25, 1973, and lived together as husband and wife until May 5, 1977;
>
> 6. That the plaintiff, Eloise Tarkington, was married to Boyd Holt Wright in 1949, and was widowed in 1967, and that plaintiff married the defendant, Zebulon Vance Tarkington, on November 25, 1973;
>
> 7. That from the Social Security payments received by the plaintiff by reason of the death of her first husband and from her earnings prior to her marriage to the defendant, the plaintiff accumulated a substantial savings account, having funds in excess of $20,000.00 on or about April 18, 1974;
>
> 8. That on April 18, 1974, the plaintiff and defendant purchased a house and lot located at 519 Williamsdale Drive, Graham, North Carolina, receiving title therefor as tenants by the entireties from Equitable Life Assurance Society and that as down payment for the purchase of said property, the plaintiff withdrew the sum of $19,800.00 from her savings account, which was her sole and separate property, and paid that amount directly to

or for the benefit of Equitable Life Assurance Society;

9. That the balance of the purchase price was around $16,500.00, the purchase price being $36,000.00 and was secured from a loan from Graham Savings and Loan Association the loan secured by a note signed by the plaintiff and the defendant and by a deed of trust on said property signed by the plaintiff and the defendant;

10. That the deed from Equitable Life Assurance Society to the plaintiff and defendant as husband and wife was not made at the specific request of the plaintiff or the defendant, but from the evidence offered in court both the plaintiff and the defendant testified that the deed was made to them as husband and wife with the knowledge of both and for the reason that each assumed that the property should be placed in the joint names as tenants by the entireties due to marriage;

11. From the evidence the Court finds that at the time of the transaction plaintiff was under the impression that each of the parties would own an equal interest in the home, and with that impression she voluntarily furnished the money for the down payment of the house, and that the plaintiff testified that she does not contend that the deed to herself and the defendant as tenants by the entireties was as a result of any coercion or dishonesty on the part of the defendant;

12. The Court finds as a fact that there is no clear, strong and convincing evidence that at the time the property was titled in the name of the plaintiff and defendant as tenants by the entireties that there was any intention or agreement on the part of either of the parties that the plaintiff be the equitable owner of said property;

13. That from all the facts and circumstances surrounding the purchase of the property there does not appear to the Court to be sufficient facts based solely upon the marriage relationship to imply in law any intention on the part of the plaintiff or the defendant that the equitable ownership should be other than legal title or that the defendant was not entitled to beneficial interest as well as legal title;

14. That since the date of the purchase of the property, both plaintiff and defendant have made certain payments on account of the note and deed of trust securing the balance of the purchase price on said house. That the plaintiff has made payment for all real estate taxes for the years 1974 through 1978, and had further made payments for all insurance for those years;

15. That on or about May 9, 1977, the plaintiff and defendant were separated, and that plaintiff is now in possession of the premises and further more since that date, she has made all payments on account of the indebtedness existing, taxes and insurance."

Based on the above findings, the trial judge concluded that there was no purchase money resulting trust in favor of the plaintiff; rather, the parties held the property as tenants by the entirety. The Court of Appeals recognized that there was a presumption of a resulting trust in favor of the wife, but further held that defendant had effectively rebutted the presumption. In reaching that result, the Court of Appeals held that the trial court's finding that the defendant made some of the monthly payments due on the note and deed of trust, and that the plaintiff testified that she understood the property would be deeded to both parties precluded a finding of a resulting trust.

R. Chase Raiford for plaintiff-appellant.

William L. Durham for defendant-appellee.

COPELAND, Justice.

Before this Court, plaintiff argues that the trial court failed to apply properly the presumption, well-established in this State, that when a wife furnishes the consideration for the purchase of property she did not intend to make a gift to her husband of an entirety interest. Instead, the law presumes that she had title conveyed in this form with the intent that the husband hold such an interest in trust for her. *Overby v. Overby*, 272 N.C. 636, 158 S.E. 2d 799 (1968); *Wise v. Raynor*, 200 N.C. 567, 157 S.E. 853 (1931); *Deese v. Deese*, 176 N.C. 527, 97 S.E. 475 (1918).

This presumption is a judicial creation designed in part to ameliorate the harsh effects of the traditional rule that a wife was

subservient to her husband. It is furthermore an extension of the general rule of equity that "[t]he payment of the purchase money raises a resulting trust in favor of him who 'furnishes' or 'pays' or 'owns' the purchase money, unless a contrary intention, or a contrary presumption of law, prevents" such a result. *Tire Co. v. Lester*, 190 N.C. 411, 416, 130 S.E. 45, 48 (1925).

Contrary to this general rule that the payment of purchase money raises a resulting trust in favor of the party who furnishes the money, such a resulting trust does not arise in favor of the husband where the husband provides the consideration. Instead there is the presumption of a gift to the wife of an entirety interest in the property. *Honeycutt v. Bank*, 242 N.C. 734, 89 S.E. 2d 598 (1955). In light of this, and in the context of the present day, some courts have done away with the presumption of a resulting trust for the benefit of the wife. *Peterson v. Massey*, 155 Neb. 829, 53 N.W. 2d 912 (1952); *Emery v. Emery*, 122 Mont. 201, 200 P.2d 251 (1948); *Hogan v. Hogan*, 286 Mass. 524, 190 N.E. 715 (1934); Tiffany, *Law of Real Property* § 272 (1939).

The facts of the case before us offer no compelling reason to change this long-standing presumptive rule, favorable to the wife in this case.

A resulting trust is presumed once the wife proves she provided the consideration for the property held as tenants by the entirety. Furthermore, if a resulting trust is created, it is created at the time of the execution of the deed. *Cline v. Cline*, 297 N.C. 336, 255 S.E. 2d 399 (1979). The record in the instant case shows that the plaintiff did provide all of the monetary consideration given for the interest received in the deed dated 18 April 1974. "The general rule is that the trust is created, if at all, in the same transaction in which the legal title passes, and by virtue of the consideration advanced before or at the time the legal title passes." *Id.*, at 344, 255 S.E. 2d at 405. Therefore, although the evidence also shows that both parties signed a note and deed of trust for the balance of the purchase price remaining after plaintiff's contribution, and that the husband made some of the payments between that time and the separation of the parties in May 1977, those facts do not overcome the presumption of a resulting trust. *Hanley v. Hanley*, 152 N.E. 2d 879 (Ill. 1958).

Applying the applicable law to the case *sub judice*, it is clear that Judge Martin failed to consider the legal presumption, which

our law provides the plaintiff wife, in making his findings of fact numbers 12 and 13:

> "12. The Court finds as a fact that there is no clear, strong and convincing evidence that at the time the property was titled in the name of the plaintiff and defendant as tenants by the entireties that there was any intention or agreement on the part of either of the parties that the plaintiff be the equitable owner of said property;
>
> 13. That from all the facts and circumstances surrounding the purchase of the property there does not appear to the Court to be sufficient facts based solely upon the marriage relationship to imply in law any intention on the part of the plaintiff or the defendant that the equitable ownership should be other than legal title or that the defendant was not entitled to beneficial interest as well as legal title."

Thus, because the trial court apparently misapprehended the law on the question before it, the case must be returned to Superior Court, Alamance County, for a new trial.

It is possible for the husband, defendant here, to rebut the presumption of a resulting trust in favor of the wife by evidence that a trust was not intended. The burden is on the plaintiff to prove by clear, strong and convincing evidence that she provided the consideration for the purchase. *Vinson v. Smith* 259 N.C. 95, 130 S.E. 2d 45 (1963). A mere preponderance of the evidence is not sufficient. *Hodges v. Hodges*, 256 N.C. 536, 124 S.E.2d 524 (1962); *McWhirter v. McWhirter*, 155 N.C. 145, 71 S.E. 59 (1911). Likewise, the burden on the defendant husband will be to rebut by evidence which is clear, strong and convincing the presumption, which the facts of this case establish, in favor of the plaintiff wife. Accordingly, the case must be remanded for a new trial so that the correct legal rules can be properly applied to the evidence before the trial court.

Thus, there must be a

New trial.

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

Justice CARLTON concurs in the result.

STATE OF NORTH CAROLINA v. LEBURN HOYT LANG

No. 69

(Filed 2 December 1980)

Criminal Law § 101.4— jury's request for evidence — denial because of assumed lack of authority — prejudicial error

The trial judge's refusal of the jury's request to have the transcript of the testimony of one of defendant's witnesses read to it on the grounds that the judge did not have the authority to grant the jury's request in his discretion was prejudicial error entitling defendant to a new trial.

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

ON defendant's petition for discretionary review from a decision of the Court of Appeals, 46 N.C. App. 138, 264 S.E. 2d 821 (1980) (opinion by Morris, C.J., with Martin (Harry C.), J. and Hill, J. concurring), affirming the judgments of *Grist, J.*, entered 11 January 1979 in Superior Court, BUNCOMBE County.

Defendant was charged in indictments, proper in form, with assault with the intent to commit rape and kidnapping with the intent to commit rape. He was convicted by a jury on both counts and sentenced to fifteen years imprisonment for the assault and twenty-five years imprisonment for the kidnapping. The trial court suspended the twenty-five year sentence and placed the defendant on probation for a five year period, to commence at the expiration of the fifteen year term.

The State's evidence tended to show that at approximately 9:20 to 9:30 p.m. on 4 October 1978 a man ordered prosecutrix Teresa Fender, at gunpoint, to get into his automobile in the parking lot of the Asheville Mall on Tunnel Road in Asheville, North Carolina. After forcing Ms. Fender to put her head down, he drove for about thirty minutes before parking the car. He then instructed her to face the right front door of the automobile and remove her clothing. At that point a bicyclist passed by the car and the man ordered Ms. Fender to put her head down again, whereupon he drove for another fifteen minutes and again stopped the car. He ordered Ms. Fender to face the car door again and remove all her clothing, and she complied. He then fondled her breasts and vagina.

Ms. Fender explained that a scar on her breast was from the open heart surgery she had undergone several years before. The man told her to put her clothing back on, except for her shirt. He drove for a short while, fondling Ms. Fender's breasts as he drove, then stopped, allowed Ms. Fender to put on her shirt, and let her out at a bowling alley on Tunnel Road in Asheville, near the place where he had picked her up. Ms. Fender ran into the bowling alley and law enforcement officers were summoned. Ms. Fender testified that the man had a gun in his possession during the entire incident and that she could see the weapon when she looked in his direction. Although she kept her head lowered during most of the time she was in the car, as the man had ordered, she stated that she managed to glance at him several times. During an interview with police officers at the bowling alley, Ms. Fender described her abductor's car as a gray, four-door Ford Granada, with a Citizens Band radio antenna mounted on the back and a red velvet interior, containing a box filled with papers in the back seat, a tray with several items in it on the front floorboard, a Citizens Band radio hung low under the dashboard, and several papers strewn about the floor of the car. She described her abductor as a white male with grayish hair, approximately fifty to fifty-five years old, and from 5 feet 8 inches to 5 feet 9 inches tall. Later that evening police officers located a gray Chevrolet Impala, which matched the prosecutrix' description in all respects except for the make and style of the vehicle. Ms. Fender identified the car as the one in which she had been abducted. Police officers then arrested defendant, the registered owner of the vehicle, and Ms. Fender identified him in a three-person line-up as the man who had kidnapped her.

Defendant presented evidence tending to show that from 9:00 to 10:00 p.m. on 4 October 1978 he was at a restaurant and therefore could not have committed the offenses for which he was charged. Ms. Rena James, a waitress at the restaurant, testified at trial that defendant entered the restaurant just before the closing time of 9:00 p.m., and that he was the last customer to leave at approximately 10:00 p.m.

We allowed defendant's petition for discretionary review pursuant to G.S. 7A-31 on 15 July 1980.

Joseph Beeler; Tharrington, Smith & Hargrove by Roger W. Smith; and Elmore & Powell, P.A., by Bruce Elmore, Sr. for defendant.

Attorney General Rufus L. Edmisten by Special Deputy Attorney General T. Buie Costen and Assistant Attorney General Nonnie F. Midgette for the State.

COPELAND, Justice.

By his nineteenth assignment of error, defendant contends that the trial court erred in refusing the jury's request, after beginning its deliberations, to have the transcript of the testimony of defendant's witness Ms. Rena James read to it. We hold that the trial judge's refusal on the grounds that he did not have the authority, in his discretion, to grant the jury's request was prejudicial error entitling defendant to a new trial.

It is well settled in this jurisdiction that the decision whether to grant or refuse a request by the jury, after beginning its deliberations, for a restatement of the evidence lies within the discretion of the trial court. *State v. Hough*, 299 N.C. 245, 262 S.E. 2d 268 (1980); *State v. Ford*, 297 N.C. 28, 252 S.E. 2d 717 (1979); *State v. Fulcher*, 294 N.C. 503, 243 S.E. 2d 338 (1978). When a motion addressed to the discretion of the court is denied upon the ground that the court has no power to grant the motion in its discretion, the ruling is reviewable. *Calloway v. Ford Motor Co.*, 281 N.C. 496, 189 S.E. 2d 484 (1972). In addition, there is error when the trial court refuses to exercise its discretion in the erroneous belief that it has no discretion as to the question presented. Where the error is prejudicial, the defendant is entitled to have his motion reconsidered and passed upon as a discretionary matter. *State v. Ford, supra; Calloway v. Ford Motor Co., supra; Tickle v. Hobgood*, 212 N.C. 762, 194 S.E. 461 (1938). *See also People v. Autman*, 58 Ill. 2d 171, 317 N.E. 2d 570 (1974); *People v. Queen*, 56 Ill. 2d 560, 310 N.E. 2d 166 (1974).

We find that the trial court's response to the jury's request in this case must be interpreted as a statement that the court believed it did not have discretion to consider the request. In answer to the jury's question whether the transcript of Ms. Rena James was available to be read to them, the trial judge replied:

> "No sir, the transcript is not available to the jury. The lady who takes it down, of course, is just another individual like you 12 people. And what she hears may or may not be what you hear, and 12 of you people are expected, through your ability to hear and understand and to recall

> evidence, to establish what the testimony was. No, I hope you understand. She takes it down and the record, after she submits it to the various individuals, if it needs to be submitted is gone over and then they themselves can object to what she had in the record as not being what the witness says, and so on and so forth. For that reason I do not allow records to even be read back to the jury, because she may not have heard it exactly as the witness said it, and you people might have heard it differently; so for that reason you are required to recall the witness' testimony as you've heard it."

We hold that Judge Grist's comment to the jury that the transcript was *not available* to them was an indication that he did not exercise his discretion to decide whether the transcript should have been available under the facts of this case. The denial of the jury's request as a matter of law was error.

We further find the trial court's error prejudicial to defendant in this action. In a case involving an identical assignment of error, *State v. Ford, supra*, we held that the trial judge's failure to exercise his discretion was not prejudicial where the evidence requested by the jury concerned the exact date and time that each perpetrator of the crime involved was arrested. The Court reasoned that the requested evidence was conflicting, inconclusive, or not in the record, and that any attempt to review it would likely have raised more questions than it would have answered. In the present case, however, the requested evidence was testimony which, if believed, would have established an alibi for defendant. Ms. James' statements were in direct conflict with the evidence presented by the State. Thus, whether the jury fully understood the alibi witness' testimony was material to the determination of defendant's guilt or innocence. Defendant was at least entitled to have the jury's request resolved as a discretionary matter, and it was prejudicial error for the trial judge to refuse to do so.

Since we have held that the trial court committed prejudicial error entitling defendant to a new trial, we deem it unnecessary to discuss defendant's remaining assignments of error, as they are unlikely to recur. However, defendant's assignment involving the failure of the trial court to allow defendant's motion to reopen the case in order to introduce into evidence Ms. Rena James' time card from the restaurant at which she worked gives us particular con-

cern, since the time card corroborated Ms. James' crucial testimony as defendant's alibi witness. Because defendant can subpoena the time card and present this evidence at retrial, we do not consider this assignment at this time.

For the reason that the trial court erred in failing to exercise its discretion in determining whether to grant the jury's request for a restatement of Ms. James' testimony, defendant is given a

New trial.

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

STATE OF NORTH CAROLINA v. RAYFORD ASHFORD, JR.

No. 75

(Filed 2 December 1980)

1. Rape § 5— proof of penetration — "sex" and "intercourse" with prosecutrix

Testimony by the prosecutrix in a rape case that defendant had "sex" and "intercourse" with her was sufficient to support a finding by the jury that there was penetration.

2. Criminal Law §§ 113.1, 113.9— no statement of fact not in evidence — no misstatement of material fact

The trial court in a kidnapping and rape case did not state a fact not in evidence when he stated during recapitulation of the evidence that, after four men had engaged in intercourse with the victim, "she was thereafter taken by [defendant] to a place to pick up her child" where the evidence showed that the victim was taken by all four men, including defendant, to a friend's house to pick up her daughter, and that one of the men, not defendant, escorted her into the house; furthermore, even if such fact were not in evidence, the court's statement did not amount to a misstatement of a *material* fact, and defendant cannot complain thereof where he failed to call the misstatement to the court's attention at trial.

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

APPEAL by defendant from judgments of *Collier, J.*, entered at the 28 April 1980 Session of UNION Superior Court.

Defendant was charged in separate indictments proper in form with the first-degree rape and kidnapping of Louise Williams Isom. He entered pleas of not guilty to both charges.

At trial, evidence for the State tended to show that while the prosecutrix walked to work on 10 March 1980, a blue car pulled up beside her. One of the four occupants of the car got out and forced her into the car at gunpoint. The prosecutrix testified that she was instructed to keep her eyes closed and that subsequently she was blindfolded. She was taken to a local motel and was there forced to have intercourse with each of the four men. At some later point, Ms. Isom was taken by one of the men into the bathroom. The man removed her blindfold. He then forced her to have sex with him. At trial, she identified the man as defendant. Defendant had sex with the prosecuting witness twice more.

The four men subsequently took Ms. Isom to a friend's house to pick up her daughter. They drove Ms. Isom and her daughter to Ms. Isom's apartment. Defendant walked with the two to the apartment and while there forced Ms. Isom to have sex once again.

While Ms. Isom and defendant were at the apartment, her boyfriend arrived. Shortly after her boyfriend left, the police came and arrested defendant.

Defendant testified that he had been picked up by the other males and that one of them accosted the prosecutrix as she walked to work and forced her into the car. Defendant stated that he protested the actions of the others. His defense was that the prosecutrix consented to his having sex with her.

The jury returned verdicts of guilty of both offenses charged. Defendant was sentenced to life imprisonment on each conviction and appealed to this Court pursuant to G.S. 7A-27.

Rufus L. Edmisten, Attorney General, by Myron C. Banks, Special Deputy Attorney General, for the State.

Bobby H. Griffin for defendant appellant.

BRANCH, Chief Justice.

[1] Defendant first assigns as error the failure of the trial court to dismiss the charge of rape on the ground that the State never presented evidence of penetration. Defendant contends that the prosecuting witness never testified that he penetrated her, and that there was no other evidence of penetration, such as the presence of semen.

The State points out that Ms. Isom testified that defendant had

"intercourse" and "sex" with her and that these terms are sufficient as shorthand statements of fact on the issue of penetration. We agree. As this Court stated in *State v. Bowman*, 232 N.C. 374, 376, 61 S.E. 2d 107, 108 (1950),

> The law did not require the complaining witness to use any particular form of words in stating that the defendant had carnal knowledge of her. *S. v. Hodges*, 61 N.C. 231. Her testimony that the defendant had "intercourse" with her and "raped" her under the circumstances delineated by her was sufficient to warrant the jury in finding that there was penetration of her private parts by the phallus of the defendant.

The prosecutrix's testimony here that defendant had "sex" and "intercourse" with her likewise was sufficient to support a finding by the jury that there was penetration. This assignment is overruled.

[2] Defendant's second and final assignment of error relates to the trial court's recapitulation of the evidence. He contends that the judge stated material facts which were not in evidence, in violation of the rule of G.S. 15A-1232 that the judge "must not express an opinion whether a fact has been proved." The challenged portion of the charge reads as follows:

> . . . that all 4 of the individuals engaged in intercourse with her after one had undressed her and a gun was held to her neck; *that she was thereafter taken by Rayford Ashford, Jr., to a place to pick up her child* who was at a baby sitter's after they located her child. [Emphasis added.]

Defendant argues that the italicized portion was a misstatement of the evidence since Ms. Isom testified as follows:

> [W]e went on to my girlfriend's house and got my little girl, and one of them came in the house with me to make sure I came out . . . . It was not Ashford.

Defendant concedes the general rule that misstatements in summarizing the evidence must be brought to the court's immediate attention, *State v. Barbour*, 295 N.C. 66, 243 S.E. 2d 380 (1978), and that he made no objection to the court's charge here. However, the statement of a material fact not in evidence constitutes reversible

error, whether or not called to the court's attention. *Id.*

It is clear from the evidence that the prosecutrix was taken by all four men, including defendant, to a friend's house to pick up her daughter. One of the men, not defendant, escorted Ms. Isom into the house. The trial judge stated only that "she was thereafter taken by Rayford Ashford, Jr., to a place to pick up her child. . . ." We do not think the trial judge stated a fact not in evidence.

Furthermore, even if the fact were not in evidence, we fail to see how it amounted to a misstatement of *material* fact. Whether or not defendant escorted Ms. Isom into the house to pick up her child adds little, if anything, inferentially to the question of defendant's guilt. This assignment is without merit.

A review of the record reveals no prejudicial error warranting a new trial.

No error.

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

STATE OF NORTH CAROLINA v. MARK DUANE FLETCHER

No. 95

(Filed 2 December 1980)

Homicide § 21.7— second degree murder — sufficiency of evidence

Evidence was sufficient for the jury in a second degree murder prosecution where it tended to show that defendant and the victim were passengers in an automobile; the two were having a discussion; defendant shot the victim in the back of the head; the driver proceeded down a dirt road for 70 to 75 yards whereupon defendant dragged the victim's body into the woods and shot it six or seven more times; defendant took a wallet and approximately $50 off the victim and returned to the car; and defendant returned to the site of the crime approximately six weeks later and moved the body elsewhere.

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

DEFENDANT appeals from judgment of *Fountain, J.*, 24 March 1980 Criminal Session, ONSLOW Superior Court.

In a bill of indictment, proper in form, defendant was charged with the murder of Jimmy Leroy Dulaney on 23 May 1979 in

Onslow County. For reasons not disclosed by the record, he was placed on trial for murder in the second degree only.

Benjamin Duval testified that on and prior to 23 May 1979 he and defendant were both members of the United States Marine Corps and were stationed at Camp LeJeune in Onslow County. At defendant's request, he drove defendant and a man named Jimmy Leroy Dulaney away from the base during the lunch hour on 23 May 1979. Defendant said they wanted to go to "another guy's house," and Duvall followed the directions given by defendant. Defendant rode in the back seat and Dulaney in the front seat beside the driver. They drove along Highway 24 toward Swansboro. Defendant and Dulaney were discussing something about hash. Shortly before reaching Swansboro, they turned down the road to Belgrade and proceeded two or more miles. At that point, defendant shot Dulaney in the back of the head and told Duval to keep driving. Defendant put a pair of old blue jeans over Dulaney's head and told Duval to drive down a dirt road, which he did for about seventy to seventy-five yards and stopped. Defendant dragged Dulaney's body into the woods, a distance of fifty to sixty feet, and then shot the body six or seven more times. Defendant took a wallet and approximately fifty dollars off the victim, returned to the car and told Duval to remain silent because he was an accomplice now. They returned to the base at Camp LeJeune.

On 4 July 1979, Duval and defendant returned to the site of the crime and moved the body elsewhere. Parts of the body were found on 1 August 1979 at both locations. Duval's testimony was corroborated in many respects by other witnesses. Incriminating letters written by defendant were also introduced in evidence.

Duval further testified he had entered a plea of guilty in this case and faced a sentence of twenty years in prison.

Defendant offered no evidence.

The jury convicted defendant of murder in the second degree, and he was sentenced to life imprisonment. He appealed to this Court urging errors noted in the opinion.

Rufus L. Edmisten, Attorney General, by Elisha H. Bunting, Jr., Assistant Attorney General, for the State.

Richard S. James, attorney for defendant appellant.

HUSKINS, Justice.

Defendant contends the State's evidence was insufficient to repel his motion for judgment of nonsuit made at the close of the State's evidence. Denial of that motion constitutes his first assignment of error.

It is elementary that a motion to nonsuit requires the trial court to consider the evidence in its light most favorable to the State, take it as true, and give the State the benefit of every reasonable inference to be drawn therefrom. *State v. Cook*, 273 N.C. 377, 160 S.E. 2d 49 (1968). Whether the evidence is direct, circumstantial, or both, if there is evidence from which a jury could find that the offense charged had been committed and that defendant committed it, the motion to nonsuit should be overruled. *State v. Goines*, 273 N.C. 509, 160 S.E.2d 469 (1968). When so considered, the evidence in this case is sufficient to support a conviction for murder in the first degree. There is substantial evidence of every material element of first degree murder, including premeditation and deliberation as well as felony murder, *i.e.*, a murder committed in the perpetration of a felony. Defendant's guilt or innocence of second degree murder was therefore a question for the jury. The record contains abundant evidence of an unlawful killing done with malice. Defendant cannot complain that a benevolent State saw fit to spare his life. The motion for compulsory nonsuit was properly denied.

Defendant's motion to set aside the verdict is merely formal and requires no discussion. Such motion is addressed to the discretion of the trial court, and refusal to grant it is not reviewable absent abuse of discretion. *State v. Downey*, 253 N.C. 348, 117 S.E. 2d 39 (1960); *State v. Reddick*, 222 N.C. 520, 23 S.E. 2d 909 (1943). No abuse of discretion is shown, and the motion was properly denied. *State v. McNeil*, 280 N.C. 159, 185 S.E.2d 156 (1971).

Notwithstandig the overwhelming evidence of defendant's guilt, we have examined the entire record and find no prejudicial error. The judgment must therefore be sustained.

No error.

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

THE WAYFARING HOME, INC. AND HAROLD L. SPRINKLE, INDIVIDUALLY AND AS PRESIDENT OF THE WAYFARING HOME, INC. v. CHARLES WARD AND WIFE, REBECCA WARD

No. 66

(Filed 2 December 1980)

Appeal and Error § 64— evenly divided court — decision 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 decision of the Court of Appeals is affirmed without becoming a precedent.

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

ON discretionary review of the unpublished decision of the Court of Appeals, 45 N.C. App. 555, 263 S.E. 2d 376 (1980), which reversed the judgment of *Ferrell, J.*, entered at the February 1979 Civil Session of MCDOWELL Superior Court.

In their complaint plaintiffs allege that on 23 May 1977 the corporate plaintiff entered into a written option contract with defendant to purchase certain real property; that the purchase price of $55,000 was to be paid by 1 September 1977; that on 15 August 1977 plaintiffs notified defendants of their intent to exercise the option and made a payment of $10,000; that the parties agreed to extend the time for payment of the remaining amount to 1 October 1977; that prior to 1 October 1977 plaintiffs were notified by defendants that they would not convey the property and would not refund the $10,000.00. Plaintiffs prayed for specific performance plus interest on the $10,000 or payment of the $10,000 plus interest.

In their answer defendants admitted executing the option contract and admitted that a check for $10,000 had been given to them by plaintiffs; they denied that plaintiffs had given notice of an intention to exercise the option. They further alleged that plaintiff Sprinkle had told them that he would not be able to raise the purchase price by the option deadline and that the $10,000 was consideration for extending the option as well as partial payment on the purchase price; and that they had remained willing and able to convey the property upon the tender of the remainder of the purchase price.

The parties presented evidence which substantially supported

their respective pleadings. However, plaintiffs' and defendants' evidence tended to show that plaintiffs at no time tendered the balance of the purchase price and demanded conveyance of the property. Defendants' evidence further showed that when plaintiffs paid the $10,000, they were assured that the balance of the purchase price would be forthcoming; and that they (defendants) made a deposit of $3,800 or $4,000 on a home in Florida, which deposit they lost when plaintiffs failed to purchase the property in question.

The issues submitted to the jury by the trial court included the following:

> (2) Did the parties enter into an agreement by the terms of which the defendants granted to the plaintiff an extension of the terms of the original written option?
>
> (3) If so, did the parties intend that all or any portion of the $10,000 payment by plaintiff to defendants would constitute a partial payment toward the purchase price of the property and that failure to exercise such option would result in defendants refunding or returning to the plaintiff any or all of such sum?

The jury answered these two issues in the affirmative and awarded plaintiffs $8,000.00. The trial court entered judgment predicated on the verdict.

The Court of Appeals reversed the trial court's judgment, holding that defendants' motion for directed verdict should have been allowed. This court allowed plaintiffs' petition for discretionary review pursuant to G.S. 7A-31.

Dameron & Burgin, by E. Penn Dameron, Jr., for plaintiff-appellants.

Carnes and Little, P. A., by Everette C. Carnes, for defendant-appellees.

PER CURIAM.

Justice Brock, being absent because of an extended illness, did not participate in the consideration and decision of this case. The justices are equally divided as to whether the decision of the Court of Appeals should be affirmed or reversed. Chief Justice Branch and Justices Britt and Carlton vote to affirm; Justices Huskins, Copeland and Exum vote to reverse. Therefore, in accordance with our

practice, the decision of the Court of Appeals is left undisturbed without precedential value. *Starr v. Clapp*, 298 N.C. 275, 258 S.E. 2d 348 (1979); *Mortgage Company v. Real Estate, Inc.*, 297 N.C. 696, 256 S.E. 2d 688 (1979); *Townsend v. Railway Company*, 296 N.C. 246, 249 S.E. 2d 801 (1978); and *State v. Johnson*, 286 N.C. 331, 210 S.E. 2d 260 (1974).

Affirmed.

Justice BROCK did not participate in the consideration and decision of this case.

NANNIE RUTH GREENHILL, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF WILLIAM NORWOOD CRABTREE v. LANIE N. CRABTREE, EXECUTRIX OF THE ESTATE OF RAYMOND E. CRABTREE, LANIE N. CRABTREE AND RICHARD S. CRABTREE

No. 18

(Filed 2 December 1980)

Appeal and Error § 64— equally divided court — opinion of Court of Appeals 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 is affirmed without precedential value.

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

WE allowed plaintiff's petition for discretionary review from the decision of the Court of Appeals, 45 N.C. App. 49, 262 S.E. 2d 315 (1980) (Martin (Harry C.), J., concurred in by Vaughn and Webb, JJ.). The Court of Appeals affirmed an order by *McKinnon, J.*, entered 15 March 1979, denying plaintiff's motion to set aside the notice of dismissal entered by Judge Snepp on 22 September 1977 in Superior Court, ORANGE County.

On 17 November 1975 plaintiff filed a complaint against defendants and members of her family, alleging that they had improperly influenced her father to grant them a deed to certain property before he died and that one defendant had improperly influenced her father in other regards. Plaintiff sought to have the deed declared void and to have certain money returned to her father's estate. Three days before this action was filed, plaintiff had taken a voluntary dismissal pursuant to G.S. 1A-1, Rule 41(a)(1) on

an identical cause of action, originally filed 24 October 1974. The present action was calendared for trial on 14 September 1977. In an order dated 12 September 1977, Judge McKinnon, having considered both defendants' motion for early trial and plaintiff's motion for continuance, denied the motion for continuance and ordered that the case be calendared for trial on 19 September 1977.

When the case was called on that date, plaintiff's counsel again moved for a continuance. The motion was denied by Judge Snepp. On 22 September 1977 plaintiff's counsel filed a notice of voluntary dismissal pursuant to Rule 41(a)(1), which provides in pertinent part as follows:

> "Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is withou prejudice, except that a notice of dismissal operates as an *adjudication upon the merits* when filed by a plaintiff who has once dismissed in any court of this or any other state or of the United States, an action based on or including the same claim." [Emphasis added.]

Since the voluntary dismissal filed 22 September 1977 was the second dismissal taken by plaintiff pursuant to Rule 41(a)(1) in an identical cause of action, the second dismissal was with prejudice. On 2 November 1978 plaintiff, employing different counsel, filed a motion pursuant to G.S. 1A-1, Rule 60(b)(4) and (6), to set aside the notice of dismissal filed 22 September 1977 by Attorney William Blue "for the reason that said dismissal was filed without any authority express, or implied, from the plaintiff or anyone representing the plaintiff." The motion was accompanied by affidavits of plaintiff and her husband. A hearing was held on the motion 20 February 1979. Plaintiff's former attorneys testified at this hearing. The court then made findings of fact, concluded that plaintiff's evidence did not justify relief under Rule 60(b)(4) or (6), and ordered that plaintiff's motion be denied.

Plaintiff contends that by filing notice of a second voluntary dismissal, her attorney surrendered a substantive right to a claim without her express authority, and thus entitled her to relief under the rule above stated. However, Judge McKinnon found as facts that:

> "16. At no time during the course of plaintiff's representation in the matter by attorneys J. William Blue and Barry T. Winston, was any limitation placed by the plaintiff on the aforesaid attorneys' authority to repre-

> sent the plaintiff and the aforesaid attorneys or members of their law firm represented the plaintiff in all matters pertaining to this litigation from the inception . . . until a record on appeal was prepared in the present action."

The Court of Appeals reasoned that since it is presumed that an attorney has the authority to act for the client he professes to represent, which presumption plaintiff failed to rebut in this case, plaintiff's Rule 60(b) motions were properly denied. We allowed plaintiff's petition for discretionary review pursuant to G.S. 7A-31 on 6 May 1980.

McCain and Moore by Grover C. McCain, Jr., Archbell and Cotter by James B. Archbell for the plaintiff.

Frank B. Jackson for the defendant.

PER CURIAM.

Justice Brock did not participate in the consideration or decision of this case. The remaining six justices are equally divided as to whether Judge McKinnon erred in denying plaintiff's motion to set aside the notice of dismissal filed 22 September 1977 by William Blue "for the reason that said dismissal was filed without any authority, express or implied, from the plaintiff, or anyone representing the plaintiff." In accordance with the usual practice and long established rule, this equal division requires that the opinion of the Court of Appeals be affirmed without precedential value. *State v. Greene*, 298 N.C. 268, 258 S.E. 2d 71 (1979); *Townsend v. Railway Co.*, 296 N.C. 246, 249 S.E. 2d 801 (1978); *State v. Johnson*, 286 N.C. 331, 210 S.E. 2d 260 (1974).

It is so ordered.

Affirmed.

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

CHARLES R. KINNARD, D/B/A CLOSET ENTERPRISES, INC. v. MECKLENBURG FAIR, LTD., HORACE WELLS, MACK HUNTER, ED MATTICK, SANDRA HUMPHRIES

No. 52

(Filed 2 December 1980)

ON appeal by defendant from the decision of the North Carolina Court of Appeals, reported in 46 N.C. App. 725, 266 S.E. 2d 14 (1980), which reversed the judgment of *Snepp, Judge*, entered at the 11 May 1979 Session of Superior Court, MECKLENBURG County, granting defendant's motion for directed verdict at the close of plaintiff's evidence.

Plaintiff instituted this action to recover damages for breach of a lease agreement between Closet Enterprises, Inc., a corporation wholly owned by plaintiff, and Mecklenburg Fair, Ltd. Plaintiff is a promoter and used the leased premises on the Mecklenburg fairgrounds primarily to operate a flea market. Other events, such as gospel sings and wrestling events, were also held there, but the flea market appears to have been plaintiff's main business.

The lease agreement, signed on 26 June 1972 but effective 1 January 1972, set the base rental at $2000 per month. Additionally, defendant was entitled to receive certain percentages of the receipts for old business, new business and concessions. The agreement also required plaintiff to pay the utility bills for the leased premises. Plaintiff was behind in his rent at the time the lease agreement was signed, both in base and percentage receipts rent but the amount was disputed. During the 26 June 1972 meeting of the corporate defendant's board of directors, at which the lease was signed, plaintiff agreed to make a $1200 payment to defendant at the end of the July Fourth weekend.

At the flea market held on that weekend defendant's caretaker-employee distributed a circular advertising a flea market with a name similar to that of plaintiff's flea market which was to operate at the fairgrounds at the same time and place as plaintiff's market and was to be under new management. When plaintiff saw the circulars he announced over the loudspeakers that his flea market was moving to a new location. Plaintiff testified that he had begun making arrangements to move his flea market in May 1972. On 3 July 1972 Horace Wells, president of the corporate defendant, demanded payment of the $1200 from plaintiff. Plaintiff refused to pay and was told to leave the grounds and not to return. When plaintiff attempted to leave later that evening, he found that the gates were locked and the locks had been changed. He saw the corporate defendant's caretaker outside the gate with what

appeared to be a gun. Plaintiff then called the police. After the police arrived, he was let out. When plaintiff returned to the fairgrounds the next day to prepare for the next event, he was arrested for trespassing.

Plaintiff filed suit against Mecklenburg Fair, Ltd., and several individuals for breach of the lease agreement by interference with his business and termination of the lease and taking possession of the premises without giving the ten days written notice required by the lease. The corporate defendant counterclaimed for damages and an accounting. The trial court granted summary judgment in favor of the individual defendants and, at the close of plaintiff's evidence, directed a verdict in favor of defendant Mecklenburg Fair, Ltd. The corporate defendant's counterclaim was dismissed with prejudice. Plaintiff appealed to the Court of Appeals from the directed verdict. That court (Martin (Robert M.), J., with Hill, J., concurring) reversed the directed verdict, holding that whether plaintiff waived his right to notice of termination was an issue for the jury. Judge Webb dissented, reasoning that because plaintiff had breached the lease by falling behind in rent, he was not entitled to written notice of termination.

Defendant appeals to this Court of right pursuant to G.S. § 7A-30 (2) (1969).

Louise E. Fowler for plaintiff-appellee.

Walker, Palmer & Miller, P.A., by James E. Walker and Raymond E. Owens, Jr., for defendant-appellant.

PER CURIAM.

We have carefully examined the Court of Appeals' opinion 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 and adopt that opinion as our own. Its decision is, therefore,

Affirmed.

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

JEANE JUNKER MORRIS v. KENT B. MORRIS

No. 51

(Filed 2 December 1980)

APPEAL from a decision of the Court of Appeals finding no error in a trial in MECKLENBURG District Court, *Judge Clifton E. Johnson* presiding, in which the jury found for defendant. The Court of Appeals' opinion, 46 N.C. App. 701, 266 S.E. 2d 381 (1980), is by Judge Parker with Judge Arnold concurring. Judge Webb dissented. The appeal, therefore, comes by way of G.S. 7A-30 (2).

Walker, Palmer & Miller, P.A., by James E. Walker and Robert P. Johnston, Attorneys for Plaintiff appellant.

Craighill, Rendleman, Clarkson, Ingle & Blythe, P.A., by John R. Ingle, Attorneys for Defendant appellee.

PER CURIAM.

In this action for alimony without divorce on grounds of abandonment and non-support, the defense was constructive abandonment of defendant by plaintiff. Aside from routine evidentiary and jury instruction questions, the principal contention of plaintiff appellant is that the trial judge erroneously placed upon her the burden of proving that defendant's abandonment was without justification, or at least placed upon her a heavier burden in this regard than the law allows, or ought to allow. We have carefully examined each of appellant's assignments of error in light of the record and her brief. The Court of Appeals' majority opinion has dealt fully and properly with each of them. For the reasons given in that opinion, therefore, the decision of the Court of Appeals is

Affirmed.

Justice BROCK did not participate in the consideration and decision of this case.

STATE OF NORTH CAROLINA)

v.) ORDER

JAMES ROBERT HOLLAND)

No. 48 PC

(Filed 12 December 1980)

Defendant James Robert Holland's petition for discretionary review of the decision of the Court of Appeals (No. 7916SC1182, 48 N.C. App. 226, 275 S.E. 2d 572 (1980)) is allowed. On the authority of *State v. Small*, 301 N.C. 407, 272 S.E. 2d 128 (1980), defendant's conviction and sentence for felonious possession of cocaine in Robeson County Case No. 78-CR-15550 is vacated and set aside; and the decision of the Court of Appeals insofar as it found no error in this case is reversed. The decision of the Court of Appeals finding no error in Robeson County Case No. 78-CR-15549, the conspiracy conviction, is affirmed.

By order of the Court in Conference this 2nd day of December, 1980.

BRITT, J.
For the Court

The foregoing order is issued over my hand and the seal of the Supreme Court this 12 day of December, 1980.

JOHN R. MORGAN
Clerk of the Supreme Court
of North Carolina

Disposition of Petitions For Discretionary Review Under G.S. 7A-31

BOARD OF TRANSPORTATION v. PIERCE
No. 55 PC
Case below: 48 NC App 618
Petition by defendants Pierce for discretionary review under G.S. 7A-31 denied 2 December 1980.

CAMBY v. RAILWAY CO.
No. 66 PC
Case below: 48 NC App 668
Petition by defendants for discretionary review under G.S. 7A-31 denied 2 December 1980.

CONDOMINIUM ASSOC. v. SCHOLZ CO.
No. 29 PC
Case below: 47 NC App 518
Petition by third party plaintiff Cooler for discretionary review under G.S. 7A-31 denied 2 December 1980.

CUMBERLAND COUNTY v. EASTERN FEDERAL CORP.
No. 32 PC
Case below: 48 NC App 518
Petition by defendants for discretionary review under G.S. 7A-31 denied 2 December 1980.

ELLER v. PORTER-HAYDEN CO.
No. 64 PC
Case below: 48 NC App 508
Petition by plaintiff for discretionary review under G.S. 7A-31 denied 2 December 1980.

GUARANTY ASSOC. v. ASSURANCE CO.
No. 60 PC
Case below: 48 NC App 508
Petition by defendant for discretionary review under G.S. 7A-31 denied 2 December 1980. Motion of plaintiff to dismiss appeal for lack of substantial constitutional question allowed 2 December 1980.

HUNT v. REINSURANCE FACILITY
No. 5
Case below: 49 NC App
Petition by defendants for discretionary review under G.S. 7A-

31 allowed 2 December 1980.

STATE v. BELL
No. 89 PC
Case below: 48 NC App 356
Petition by defendant for further review denied 2 December 1980. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 2 December 1980.

STATE v. BIRKHEAD
No. 102 PC
Case below: 48 NC App 575
Petition by defendants for writ of certiorari to North Carolina Court of Appeals denied 2 December 1980.

STATE v. BOLT
No. 67 PC
Case below: 47 NC App 584
Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 2 December 1980.

STATE v. BRACEY
No. 65 PC
No. 24 (Spring Term)
Case below: 48 NC App 603
Petition by Attorney General for discretionary review under G.S. 7A-31 allowed 2 December 1980.

STATE v. COOK
No. 68 PC
Case below: 48 NC App 685
Petition by defendant for discretionary review under G.S. 7A-31 denied 2 December 1980.

STATE v. CORBETT
No. 140 PC
Case below: 48 NC App 742
Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 3 December 1980

Disposition of Petitions For Discretionary Review Under G.S. 7A-31

STATE v. EFIRD
No. 106 PC
Case below: 49 NC App
Petition by defendant for discretionary review under G.S. 7A-31 denied 2 December 1980.

STATE v. GARDNER
No. 78 PC
Case below: 49 NC App
Application by defendant for further review denied 2 December 1980.

STATE v. HARRIS
No. 141 PC
Case below: 49 NC App
Petition by defendant for discretionary review under G.S. 7A-31 denied 2 December 1980.

STATE v. McGUIRE
No. 72 PC
Case below: 49 NC App
Petition by defendant for discretionary review under G.S. 7A-31 denied 2 December 1980. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 2 December 1980.

STATE v. MURPHY
No. 81 PC
Case below: 47 NC App 375
Application by defendant for further review denied 2 December 1980.

STATE v. PORTER
No. 63 PC
Case below: 48 NC App 565
Petition by defendant for discretionary review under G.S. 7A- denied 2 December 1980. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 2 December 1980.

Disposition of Petitions For Discretionary Review Under G.S. 7A-31

STATE v. ROGERS
No. 149 PC
Case below: 49 NC App
Petition by defendant for discretionary review under G.S. 7A-31 denied 16 December 1980.

STATE v. RUDISILL
No. 62 PC
Case below: 48 NC App 631
Petition by defendant for discretionary review under G.S. 7A-31 denied 2 December 1980.

STATE v. YOUNG
No. 71 PC
Case below: 48 NC App 743
Petition by defendant for discretionary review under G.S. 7A-31 denied 2 December 1980.

TAYLOR v. HAYES
No. 70 PC
No. 25 (Spring Term)
Case below: 48 NC App 738
Petition by defendant for discretionary review under G.S. 7A-31 allowed 2 December 1980.

TEXTILES v. HILLVIEW MILLS and
TEXLAND INDUSTRIES v. HILLVIEW MILLS
No. 7 PC
Case below: 47 NC App 593
Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 2 December 1980.

THORPE v. INSURANCE CO.
No. 96 PC
Case below: 49 NC App
Petition by plaintiff for discretionary review under G.S. 7A-31 denied 2 December 1980.

Disposition of Petitions For Discretionary Review Under G.S. 7A-31

TREXLER v. TREXLER
No. 51 PC
Case below: 48 NC App 743
Petition by plaintiff for discretionary review under G.S. 7A-31 denied 2 December 1980.

TRULL v. McINTYRE
No. 53 PC
Case below: 48 NC App 599
Petition by plaintiff for discretionary review under G.S. 7A-31 denied 2 December 1980.

UTILITIES COMM. v. BOREN CLAY PRODUCTS CO.
No. 38 PC
Case below: 48 NC App 263
Petition by defendant for discretionary review under G.S. 7A-31 denied 2 December 1980.

UTILITIES COMM v. POWER CO.
No. 54 PC
Case below: 48 NC App 453
Petition by plaintiff for discretionary review under G.S. 7A-31 denied 2 December 1980.

WARD v. CITY OF CHARLOTTE
No. 50 PC
Case below: 48 NC App 463
Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 2 December 1980.

IN THE MATTER OF: SCOTT WEBSTER BROWNLEE

No. 159

(Filed 6 January 1981)

1. Appeal and Error § 7—who may appeal

One who is not a party to an action or who is not privy to the record is not entitled to appeal from the judgment of a lower court.

2. Appeal and Error § 7; Infants § 21—juvenile court order—requirement that county pay for treatment—no right by county to appeal—exercise of supervisory jurisdiction by appellate court

Wake County did not have the right to appeal from orders entered by the district court in a juvenile delinquency proceeding directing the county to pay for the juvenile's treatment at the Brown Schools in Austin, Texas since (1) the county was not a party to the juvenile proceeding, and (2) G.S. 7A-667 did not empower a county to take an appeal in a juvenile proceeding. However, the Supreme Court will review the ordered entered by the district court pursuant to its supervisory powers under Art. IV, § 12(1) of the N.C. Constitution.

3. Infants § 20—delinquent juvenile—order that county pay for out-of-state treatment—no authority by trial court

The district court did not have the authority under G.S. 7A-649(6) to require Wake County to pay for the treatment of a delinquent juvenile at a facility in another state.

Justice CARLTON dissenting.

Justice EXUM joins in the dissenting opinion.

PURPORTED appeal by WAKE County from orders of *Bason, J.*, entered 22 August 1980 and 16 September 1980 in WAKE County District Court.

This proceeding was instituted and heard pursuant to the provisions of the North Carolina Juvenile Code, Articles 41-54 of Chapter 7A of the General Statutes. The proceeding was begun in October 1978 when the juvenile (Scott) was 14 years old. He was adjudged to be delinquent, and, subsequently, numerous alternatives were pursued in an effort to provide appropriate treatment for Scott.

All of these alternatives having proved unsuccessful, the court conducted a further hearing on 6 August 1980. Following that hearing and the entry of an order, the court conducted an additional hearing on 12 September 1980. A complete history of the case is best presented by quoting from the orders which were entered by the court following each hearing.

Pertinent portions of the 22 August 1980 order are as follows:

This cause came on for hearing on August 6, 1980, upon Motion for Review by Steven J. Williams, Chief Court Counselor, Tenth Judicial District. The following persons were present for said hearing: Scott Brownlee; Copper Rain, mother of Scott Brownlee; Steven J. Williams, Chief Court Counselor; and Martha Kay Mayberry, Wake County Department of Social Services. The respondent child was represented by Sandra L. Johnson, Attorney at Law. John C. Cooke, Assistant County Attorney, appeared on behalf of Wake County.

At the hearing on August 6, 1980, Mr. Cooke voiced the county's interest in said hearing in that the Motion for Review requested that the court consider the appropriate entity to provide financial resources to pay for needed treatment and educational services of the respondent child at the Brown School in Austin, Texas. Mr. Cooke further objected to testimony by the Chief Court Counselor regarding the opinions of others as to Scott's treatment and educational needs and as to information received from others regarding possible placements for Scott. The hearing was continued until August 18, 1980, upon the court's own motion so that those persons whose opinions were to be testified to by Mr. Williams could be present at the hearing and available for examination by the county attorney, and so that the county would have the opportunity to prepare and present evidence.

Wake County's Motion requesting that the court rule that said county is not a party to this juvenile proceeding was filed on August 11, 1980. Said motion came on for hearing on August 18, 1980. Mr. Cooke appeared on behalf of the county. The respondent was represented by Sandra L. Johnson. The court deferred its ruling on said motion and proceeded with the hearing over the county's objection.

. . . on August 18, 1980, having been continued from August 6, 1980.

* * *

After considering the factual evidence, including the testimony of witnesses, documents and written reports

concerning the child's condition and needs, the court finds the facts set forth below and enters its conclusions of law and judgment thereon as follows:

FINDINGS OF FACT

1. The court takes judicial notice of and finds as fact all matters set forth in official court records related to the respondent child.

2. Scott was adjudicated delinquent on October 25, 1978. Disposition was continued for two weeks to allow time for development of treatment plan, with temporary placement at Wake House.

3. . . . Said order incorporated by reference the report resulting from a psychological evaluation of Scott performed by Marguerite Robinson, M.A. on October 18, 1978, and called for implementation of the recommendations contained therein. Said psychological evaluation found Scott to be a child of above average intelligence with deep-seated emotional problems which keep him from using his intelligence to its potential and result in poor inner controls. Evaluation at Dorothea Dix Hospital was recommended, with temporary placement at Wake House to continue. The evaluation report pointed to Scott's probable need for long-term therapeutic intervention.

4. Scot was evaluated at Dorothea Dix Hospital during November of 1978 upon referral from Trentman Mental Health Center. Scott was denied admission to Dorothea Dix Hospital based upon a diagnosis of 'Impulse Ridden Personality.' Scott was found to be dependent upon his environment for control of his impulses, and treatment in a program offering external structure and controls with behavior management, probably throughout his adolescence, was recommended.

5. Scott was admitted to Duncraig Manor on March 14, 1979, from which he was discharged in May of 1979, as a result of behavioral problems.

6. Scott was adjudicated delinquent on June 25, 1979, and placed on twelve months probation.

7. Scott was adjudicated delinquent on November 19, 1979, and was committed to the custody of the North Carolina Department of Human Resources, Division of Youth Services, on said date. The court recommended that considerations be given to placement of Scott in several special programs operated by the Department of Human Resources and further requested that the Division of Youth Services advise the court, immediately following screening of what program was available for Scott. No treatment plan or information regarding available programs has been received by this court from the Division of Youth Services.

8. Scott was placed at Samarcand Manor by the Division of Youth Services, where he was considered for admission to the Title XX program but was not admitted to said program. Shortly after Scott arrived at Samarcand, Dr. Thomas Cornwall, a child psychiatrist consulting at Samarcand [examined him and found him to be anxious, depressed, and feeling that his situation was hopeless].

9. Scott was admitted to [Dorothea Dix State Hospital] for evaluation on January 21, 1980, and was discharged on February 27, 1980, upon findings that he is a child with 'long standing personality problems' in need of a safe environment where he can begin to learn to trust people and to tolerate limits being placed on him. Scott was diagnosed as suffering from an 'Impulse Ridden Personality with questionable Borderline Personality Organization' and was seen by the hospital as an inappropriate candidate for long term treatment at Dorothea Dix because he would not benefit from the intensive psychotherapeutic and pharmacological treatment available through the hospital's programs for adolescents.

10. Efforts by the office of the Chief Court Counselor to locate a placement for Scott in state-supported residential treatment facilities have been unsuccessful.

11. Scott remains in need of treatment for his serious emotional problems and of specialized educational services appropriate to his needs. He has not received and is not receiving appropriate educational services there.

Treatment and education appropriate to his needs are not available to him at Samarcand Manor.

12. It is the opinion of Dr. Cornwall who was directly involved in Scott's evaluation at Dorothea Dix Hospital, and of Dr. Lenore Behar of the Division of Mental Health Services that no residential treatment facility appropriate to Scott's needs currently exists in the State of North Carolina, and no such program is known to the court.

13. The educational and psychiatric needs of Scott Brownlee while committed to the custody of the Division of Youth Services have not been met.

14. The Director of the Division of Youth Services did not exercise his [option] under G.S. 7A-665 to seek an alternative disposition for a juvenile committed to the care of the Division and found not to be suitable for its program.

* * *

16. The court now finds that its order committing Scott to the custody of the Division of Youth Services is not in his best interest and further finds that said commitment is inappropriate in that the court's increased awareness of the severity of Scott's emotional disturbance and the extent of his behavioral problems, together with the court's findings that his treatment and educational needs have been and continue to be unmet; constitute a change in circumstances which requires that the court vacate and revoke its prior order of commitment.

17. Scott has nowhere to go as of the date of this order, and it is not in his best interest to vacate his commitment to training school effective today.

18. Upon recommendation of Dr. Cornwall and as a result of efforts by his court counselor, Scott had been accepted for admission to the Brown School in Austin, Texas. The Brown School is a residential treatment facility which offers both appropriate treatment for his severe emotional and behavioral problems and appropriate specialized educational services. The costs associated with placement at the Brown School are in excess of $40,000 per year.

19. No appropriate treatment alternatives other than the Brown School are known to the court at this time.

20. Scott's mother, Copper Rain, is employed as a bartender. Her net weekly salary is $105.00 per week. She has two other children who reside with her for approximately 105 days per year. She has no health insurance or other assets from which she can pay for the cost of care at the Brown School or any other residential facility. Ms. Rain's effort to secure support from Scott's father through Interstate Child Support Enforcement proceedings have been unsuccessful to date.

21. The Department of Human Resources is not now able to purchase care for Scott in a private residential treatment facility for the reason that no funds have been appropriated for the purpose of purchasing private residential care for emotionally disturbed children.

* * *

23. The court is hopeful that the North Carolina Department of Human Resources, Wake County Area Mental Health Program and the Wake County Board of Education will develop an appropriate treatment and educational plan for Scott which can be implemented immediately and/or will identify and make available funds necessary to provide or purchase such appropriate treatment and education at the Brown School or in some other appropriate program.

24. If such plans and/or funds are not forthcoming, this court will have no resource other than Wake County to which it can look for funds necessary to purchase the treatment Scott needs.

CONCLUSIONS OF LAW

A. Upon review, the court concludes that its order committing the respondent child to the custody of the Division of Youth Services is not in said child's best interest. The current needs of the juvenile and the change in circumstances since said order was entered require that the court vacate and revoke its prior order of commitment pursuant to N.C. G.S. § 7A-664 (a).

B. Scott Brownlee is in need of treatment and care for his severe emotional problems and of specialized educational services. He is not receiving said services at this time.

C. Scott's mother is unable to pay the cost of the care and treatment Scott needs.

D. This court, in this proceeding, does not have the authority to order the Department of Human Resources, Wake County Area Mental Health Program or the Wake County Board of Education to provide particular treatment or funding of treatment while the juvenile is committed to the custody of the Division of Youth Services.

E. If an appropriate treatment and educational plan for Scott is not developed and funded by the Department of Human Resources, and/or Wake County Area Mental Health and/or the Wake County Board of Education, the court's only alternative for securing the funds necessary to provide the treatment Scott needs will be to charge the cost of said treatment to the county pursuant to G.S. § 7A-647 (3).

* * *

A. This court's commitment of Scott Brownlee to the custody of the Division of Youth Services is hereby vacated and revoked effective September 12, 1980, pursuant to N.C. G.S. § 7A-664.

B. Disposition in this matter shall be continued until September 12, 1980.

C. The North Carolina Department of Human Resources, Wake County Area Mental Health Program and the Wake County Board of Education are hereby requested to attempt to make available funds necessary to secure placement for Scott Brownlee in the Brown School or some other appropriate treatment facility or to develop and arrange for immediate implementation of an appropriate treatment and educational program by September 12, 1980, and to inform the court of the results of said efforts on or before that date.

D. Wake County is hereby notified that if an appropriate treatment and educational plan or funds to secure placement in any appropriate program are not forthcoming from other sources on or before September 12, 1980, this court will on that date turn to the county for any information and assistance it may wish and/or be able to offer regarding placement of Scott in an appropriate treatment facility which is less expensive than the Brown School.

E. The court requests that the county participate in the dispositional hearing on September 12, 1980.

On 11 August 1980 Wake County filed a motion in the cause asking the court to rule that Wake County is not a party to the proceeding. Thereafter, the court ruled that the County was not a *necessary* party but, as stated in the above order, requested the County to participate in the dispositional hearing scheduled for 12 September 1980. The record indicates that the County did not participate in that hearing.

Pertinent portions of the 16 September 1980 order are as follows:

This cause came on for hearing on September 12, 1980, with disposition having been continued until said date by Order entered August 22, 1980.

After considering the factual evidence, including the testimony of witnesses, documents and written reports concerning the respondent child's condition and needs and the programs and resources available to meet those needs, the court finds from the facts set forth below that the following disposition would best provide for the protection, treatment, rehabilitation and correction of the child.

FINDINGS OF FACT

1. The court takes judicial notice of and finds as fact all matters set forth in official court records relating to the respondent child.

2. The court takes judicial notice of and hereby incorporates by reference all matters set forth in its order of August 22, 1980, in this matter.

3. Copies of this court's order of August 22, 1980, were served on the following persons:

* * *

Mr. John C. Cooke, Assistant Wake County Attorney:

* * *

Mr. Carl Johnson, Wake County Manager; and

Mr. M. Edmund Aycock, Chairman, Wake County Commissioners.

4. The court regrets that Wake County did not participate in the hearing on September 12, 1980, as requested by Order entered on August 22, 1980.

5. A proposal requesting funding to implement an appropriate treatment plan for Scott in Wake County was submitted to the North Carolina Department of Human Resources following entry of this court's order of August 22, 1980. Wake County Schools agreed to provide the funding necessary for the educational component of the plan. Funding for said proposal was denied by the Department of Human Resources on September 11, 1980. The court appreciates the efforts of Mr. Kirkpatrick, Ms. Lambe and others involved in these efforts and regrets the decision of the Department of Human Resources.

6. A proposed placement and treatment plan was presented by Lenore Behar, Ph.D., on behalf of the Department of Human Resources. The Department proposed placement in a new residential program for children between the ages of 10 and 17 to be developed on the campus of John Umstead Hospital. Dr. Behar testified that she did not know who in the Department of Human Resources decided that placement in the proposed program at John Umstead Hospital would be appropriate for Scott, that she was not involved in that decision and that she was instructed by her superiors on September 11, 1980, to develop a plan for Scott's placement in that program.

7. The proposed program at John Umstead Hospital is not yet in existence. Renovations to buildings have not

been completed and not all of the staff has been hired. Dr. Behar testified that she did not know when the rest of the staff will be hired. The screening procedures for admission to the program are not yet in place and it is not possible for the court to determine the ages or conditions of other children with whom Scott would be living and interacting.

8. The Department of Human Resources' proposed written plan for Scott's treatment includes an accurate description of Scott's needs and strengths and specifies appropriate long and short term treatment goals. However, the court is not able to find from the evidence before it that the plan, whenever it could be implemented, would be an appropriate placement or would constitute an appropriate treatment plan. There is no evidence before the court from a psychiatrist familiar with Scott's condition and needs relating to details of the program to be offered to Scott by the proposed program at John Umstead Hospital and there is no opinion from such a psychiatric expert that placement in the program would be appropriate and in Scott's best interest.

9. Scott was discharged from Samarcand Manor on September 3, 1980. Scott has been in the custody of the Department of Human Resources since November 19, 1980. He was evaluated at Dorothea Dix Hospital in January and February of 1980.

10. The court appreciates Dr. Behar's appearance at the hearing and her efforts to develop the plan suggested by the Department of Human Resources.

11. The court finds again that Scott Brownlee is in need of treatment for his serious emotional problems. The court further finds again that no treatment facility appropriate to Scott's needs currently exists in the State of North Carolina.

12. The 'Brown Schools' is in reality a system of residential psychiatric treatment programs in Texas. Said program includes a variety [of] residential treatment facilities and specialized programs, each of which offers specialized services according to the needs of the patient.

All programs of the Brown Schools are accredited by the Joint Commission on Accreditation of Hospitals.

13. The court finds that the Brown Schools offer appropriate treatment for Scott, which treatment is immediately available to him in that he has been accepted for admission and that the court was informed at the hearing on September 12, 1980, that he can be admitted to the program's Short-Term Adolescent Center as soon as necessary paper work is completed.

14. The court finds that no appropriate placement and treatment plan other than that available at the Brown Schools is known to the court.

15. The court finds that costs associated with treatment at the Brown Schools are consistent with costs at other treatment facilities and are less than those associated with treatment in some residential psychiatric treatment programs. Specifically, the cost of treatment in the Adolescent Admission Service, Ward 601, Dorothea Dix Hospital is approximately $65,000 per patient per year.

16. The court specifically incorporates herein its finding in the Order of August 22, 1980, that Scott's mother is unable to pay for the cost of the treatment he needs. Her net income is approximately $105. per week. She has two other children who reside with her approximately 105 days per year. She has no health insurance or other income or assets with which to pay for the treatment Scott needs. Her efforts to secure support for Scott from his father through Interstate Enforcement Proceedings have been unsuccessful.

17. Scott is in need of care and supervision which his parent cannot provide and is in need of placement. Placement of Scott in the Brown Schools will be facilitated by placing him in the custody of the Wake County Department of Social Services in that his mother is not able to make the financial arrangements necessary for admission.

18. Admission to the Brown Schools does not require a commitment that the child will remain a patient there for any particular period of time. Charges are made for

services actually rendered and are charged on a daily basis between admission and discharge.

19. In addition to daily charges, other costs associated with treatment at the Brown Schools include costs of transportation, medical and dental care and clothing.

20. The court remains hopeful that an appropriate placement and treatment program for Scott will be developed and funded in Wake County or elsewhere in North Carolina and remains ready to consider modification of this Order if it can be shown that such a program does exist and that transfer to that program will be in Scott's best interest.

21. The court finds that it is in Scott's best interest that he be admitted to the Brown Schools immediately in that he has been waiting for appropriate placement and treatment for many months and that no other alternative is available. Further delay in appropriate placement and commencement of appropriate treatment will be damaging to him. The court further finds that there is no assurance that this placement and the treatment it offers this seriously disturbed child will remain available if he is not admitted at once.

CONCLUSIONS OF LAW

A. Scott is in need of care and supervision which his mother cannot provide and is in need of placement.

B. Scott is in need of psychiatric, psychological and other treatment of his serious emotional problems. Placement in the Brown Schools is in Scott's best interest.

C. Scott's mother is unable to pay the cost of the care and treatment he needs.

D. Scott's great need of immediate treatment, the immediate availability of such treatment at the Brown Schools and the long delay in receiving appropriate treatment to which Scott has already been subjected compel immediate placement at the Brown Schools.

E. This court has the authority to order the treatment Scott needs and to charge the cost to Wake County pursuant to G.S. 7A-647 (3).

IT IS THEREFORE ORDERED:

1. Scott Brownlee is hereby placed in the custody of the Wake County Department of Social Services pursuant to G.S. 7A-647 (2) in order to facilitate placement at the Brown Schools.

2. Scott Brownlee is hereby ordered to the Brown Schools for residential treatment pursuant to G.S. 7A-649 (6).

3. All arrangements necessary for Scott's *immediate* admission to the Brown Schools shall be made by the Chief Court Counselor and the Wake County Department of Social Services.

4. The cost of Scott's care at the Brown Schools shall be paid by Wake County pursuant to G.S. 7A-647 (3). The county is hereby ordered to cooperate with the Chief Court Counselor and the Department of Social Services in making the arrangements necessary for Scott's *immediate* admission to the Brown Schools.

5. The Wake County Department of Social Services is hereby relieved of responsibility for identifying alternative placements for Scott until such time this court's order for placement at the Brown Schools is vacated or modified.

6. This order and Scott's placement at the Brown Schools shall be implemented immediately pursuant to G.S. 7A-668 notwithstanding appeal by any interested party.

7. The court will consider modification of this Order upon motion of any interested party at such time as it can be alleged that appropriate treatment and placement for Scott Brownlee at a program other than those offered by the Brown Schools is actually available and that transfer to such program would be in his best interest.

On 28 August 1980 Wake County gave and served notice of

appeal to the 22 August 1980 order. The County also petitioned the Court of Appeals for writs of prohibition and mandamus; the petition was denied without prejudice.

On 17 September 1980 Wake County gave and served notice of appeal to the 12 September 1980 order. On the same day, the County again petitioned the Court of Appeals for a writ of mandamus or, in the alternative, a writ of supersedeas; it also asked for an order temporarily staying the orders of the district court. On 23 September 1980 the Court of Appeals granted a temporary stay but on 25 September 1980 it dissolved the stay and denied the petition for mandamus and supersedeas.

On 29 September 1980 Wake County applied to this court for a temporary stay of the orders entered by Judge Bason pending preparation and filing of a petition for a writ of certiorari. On 30 September 1980 this court, feeling that an expedited decision of this case is in the public interest, elected to invoke Rule 2 of the Rules of Appellate Procedure and ordered: (1) that the application for a stay order be denied; (2) that the petition be treated as a motion to bypass the Court of Appeals and that the motion be granted; (3) that the times for filing the record on appeal and the briefs be accelerated; and (4) that this matter be specially set for hearing at the December 1980 session of this court. [1]

John C. Cooke, Assistant County Attorney, for petitioner-appellant, Wake County.

Johnson & Johnson, by Sandra L. Johnson, for respondent-appellee, Scott Webster Brownlee.

BRITT, Justice.

The present case brings before this court two principal questions for our consideration: (1) whether Wake County is entitled to appeal from the orders entered by Judge Bason; and (2) whether the district court was empowered to direct the county to provide care

[1]This court took note of the fact that arrangements for Scott's admission to the Brown Schools had been made; that he was to be admitted at 9:00 a.m. on Wednesday, 1 October 1980; that transportation arrangements to Austin, Texas had been made for the afternoon of 30 September 1980; and that the Wake County Board of Commissioners on 23 September 1980 had passed a resolution appropriating the sum of $16,000 to the Wake County Department of Social Services to cover the estimated cost of three months initial care, travel to and incidental expenses at the Brown Schools.

for respondent at the Brown Schools in Austin, Texas. These issues are separate and distinct. Accordingly, it is appropriate for us to examine each one independently of the other.

WAKE COUNTY'S RIGHT TO APPEAL

[1] G.S. § 1-271 codifies the common law rule that "[a]ny *party* aggrieved may appeal in the cases prescribed in this chapter." (Emphasis added.) *See Duke Power Co. v. Salisbury Zoning Board of Adjustment*, 20 N.C. App. 730, 202 S.E.2d 607, *cert. denied*, 285 N.C. 235, 204 S.E.2d 22 (1974). One who is not a party to an action or who is not privy to the record is not entitled to appeal from the judgment of a lower court. *Siler v. Blake*, 20 N.C. 90 (1838).

[2] It is clear that Wake County was not a party to the present action when it came on for hearing before the district court. In his order of 22 August 1980, Judge Bason gave notice to Wake County that the court would turn to the county to bear the cost of providing care for Scott in the event that the North Carolina Department of Human Resources, the Wake County Area Mental Health Program, or the Wake County Board of Education were unable to develop and fund an appropriate program of treatment for the child. In that order, Judge Bason specifically requested the participation of the county in the dispositional hearing which he scheduled for 12 September 1980. In particular, the county was directed to provide the court with "any information and assistance it may wish . . . or be able to offer regarding placement of Scott in an appropriate treatment facility which is less expensive than the Brown School." Notwithstanding this notice of the intention of the district court, the county elected not to participate in the dispositional hearing. There is no dispute, upon the present record, that the county had notice of the pendency of the action and was given the opportunity to be heard, both at the dispositional hearing as well as at the earlier hearing.

At the hearing of 18 August 1980, the county argued that it ought not to be a party to the proceeding because "it has never filed a motion or petition and because there is no legal relationship between it and the child." While the factual basis of the county's argument is correct, to so argue, however, is to miss the point. The county had no responsibility to file a motion in the cause. Nor was the county privy to a legal relationship between itself and the child. The pertinent legal relationship was that between respondent and the Division of Youth Services to whom Scott's custody had been

committed for the unauthorized use of a motor vehicle. The extent of the county's actual interest in the present case arises from its potential liability for the expenditure of its tax revenues. As such, it had no legitimate interest in the commencement of the action. Instead, its interest is confined to the effect a final disposition of the cause will have upon its financial resources.

Even if the county had been a party, it would not have had the *right* to appeal from the orders in question. G.S. 7A-667 provides as follows:

> An appeal may be taken by the juvenile; the juvenile's parent, guardian, or custodian; the State or county agency. The State's appeal is limited to the following:
>
> (1) Any final order in cases other than delinquency or undisciplined cases;
>
> (2) The following orders in delinquency or undisciplined cases:
>
> a. An order finding a State statute to be unconstitutional;
>
> b. Any order which terminates the prosecution of a petition by upholding the defense of double jeopardy, by holding that a cause of action is not stated under a statute, or by granting a motion to suppress.

It is manifest that the statute which is set out above does not empower a county to take an appeal in a juvenile proceeding. While it is true that the Wake County Department of Social Services was given custody of Scott and directed to make all of the necessary arrangements for his transfer to the Brown Schools, that portion of Judge Bason's order cannot be employed as a basis upon which to found a right of appeal under the applicable statute. It is clear that the terminology "county agency" could not have been intended to include the very entity which would create the agency in the first place.

We hold that Wake County did not have the right to appeal from the challenged orders. Nevertheless, this court is authorized to issue "any remedial writs necessary to give it general supervision

and control over the proceedings of the other courts" of the state. N.C. Constitution, Article IV, Section 12 (1). Under exceptional circumstances this court will exercise power under this section of the constitution in order to consider questions which are not presented according to our rules of procedure; *State v. Stanley*, 288 N.C. 19, 215 S.E.2d 589 (1975); and this court will not hesitate to exercise its general supervisory authority when necessary to promote the expeditious administration of justice. *Brice v. Robertson House Moving, Wrecking and Salvage Co.*, 249 N.C. 74, 105 S.E.2d 439 (1958); *Park Terrace, Inc., v. Phoenix Indemnity Co.*, 243 N.C. 595, 91 S.E.2d 584 (1956).

We consider the present case to be of such importance that the expeditious administration of justice requires us to invoke our supervisory authority. The novelty of the issues presented, coupled with the potential liability of the counties of North Carolina, serves to emphasize the proper role of the judiciary in securing a prompt resolution of this matter. While it is true that Wake County was not a *formal* party to the proceeding before Judge Bason, it does have a significant interest in the outcome of the matter in that its funds have already been expended pursuant to a court order and that its funds are potentially subject to further expenditures pursuant to the directive of the district court. In other words, the county has a cognizable interest in the determination of whether the action of the lower court was authorized by law. Therefore, we elect to treat the papers which have ben filed in this court as a motion calling upon the court to exercise its supervisory powers to enable it to review the orders entered by Judge Bason. The motion is allowed, and we will now proceed to examine the cause on its merits.

THE VALIDITY OF THE ORDERS

[3] A careful study of the pertinent statutes leads us to conclude that Judge Bason did not have the authority to require Wake County to pay for Scott's treatment at the Brown Schools in Austin, Texas.

Judge Bason's order of 16 September 1980 states that he was sending Scott to "the Brown Schools for residential treatment pursuant to G.S. 7A-649(6)." G.S. 7A-649 lists ten "dispositional alternatives" that a district court judge has available to him in dealing with delinquent juveniles. G.S. 7A-649(6) provides that a judge may "[o]rder the juvenile to a community-based program of academic or vocational education or to a professional residential or non-residential treatment program. Participation in the programs shall not exceed 12 months". Obviously Judge Bason concluded that the

Brown Schools provide "a professional residential . . . treatment program".

G.S. 7A-647 provides district court judges with certain dispositional alternatives in dealing with delinquent, undisciplined, abused, neglected, or dependent juveniles. G.S. 7A-647(3) provides as follows:

> In any case, the judge may order that the juvenile be examined by a physician, psychiatrist, psychologist or other qualified expert as may be needed for the judge to determine the needs of the juvenile. If the judge finds the juvenile to be in need of medical, surgical, psychiatric, psychological or *other treatment*, he shall allow the parent or other responsible persons to arrange for care. If the parent declines or is unable to make necessary arrangements, the judge may order the needed treatment, surgery or care, and the judge may order the parent to pay the cost of such care pursuant to G.S. 7A-650. If the judge finds the parent is unable to pay the cost of care, *the judge may charge the cost to the county* . . . . (Emphasis added.)

Since our present Juvenile Code, G.S. 7A, Articles 41-54, was enacted by the 1979 General Assembly and became effective on 1 January 1980 (1979 N.C. Sess. Laws c. 815) the courts have had little opportunity to construe its provisions. It is fundamental that legislative intent controls the interpretation of statutes. *Housing Authority of the City of Greensboro v. Farabee*, 284 N.C. 242, 200 S.E.2d 12 (1973); *Person v. Garrett*, 280 N.C. 163, 184 S.E.2d 873 (1971). In seeking to ascertain and give effect to the legislative intent, an act must be considered as a whole. *State v. Harvey*, 281 N.C. 1, 187 S.E.2d 706 (1972). Statutes which deal with the same subject matter must be construed in *pari materia*, *e.g.*, *Shaw v. Baxley*, 270 N.C. 740, 155 S.E.2d 256 (1967), and harmonized, if possible, to give effect to each. *E.g.*, *Jackson v. Guilford County Board of Adjustment*, 275 N.C. 155, 166 S.E.2d 78 (1969).

The first section of our Juvenile Code, G.S. 7A-516, provides:

> This Article shall be interpreted and construed so as to implement the following purposes and policies:
>
> (1) To divert juvenile offenders from the juvenile system through the intake services authorized herein *so that juveniles may remain in their own homes and may be treated through community-based services when this ap-*

proach is consistent with the protection of the public safety;

(2) To provide procedures for the hearing of juvenile cases that assure fairness and equity and that protect the constitutional rights of juveniles and parents; and

(3) To develop a disposition in each juvenile case that reflects consideration of the facts, the needs and limitations of the child, the strengths and weaknesses of the family, and the protection of the public safety. (Emphasis added.)

While it is manifest that the express words of the statute which is set out above speak in terms of "this article", it would be inappropriate for us to be oblivious to the public policy objectives which prompted the adoption of the new Juvenile Code by the 1979 General Assembly and which the legislature attempted to articulate in the introductory provisions of the legislation. Prior to the adoption of the Juvenile Code, judges of the district courts who were sitting in juvenile matters had little flexibility in making suitable provision for youthful offenders. Other than committing a juvenile to a county or regional detention home when such was needed for the protection of the community or in the best interest of the child, *see* G.S. § 110-24 (1978), the judges of the state were empowered only to place juveniles on probation, the conditions and duration of which were to be set out in the appropriate order entered in the cause. *See* G.S. § 110-22 (1978).

In seeking to introduce greater flexibility in the juvenile justice system of the state, the General Assembly, we think, was echoing the sentiments of the Penal System Study Commission of the North Carolina Bar Association. In its report, *As the Twig Is Bent,* the Commission observed

> Certainly there are young people within our society for whom confinement and rigid discipline may be necessary for both their protection and society's protection. The State must provide a system of dealing with youngsters who become delinquent for whatever reason. It must afford young people maximum opportunities to overcome their problems and to become adults well equipped to take their places in society. Our present system does not achieve this goal.
>
> * * *

> We must establish a continuity of care that begins when the child is arrested and continues through and beyond his incarceration until all reasonable steps have been taken to assure his rehabilitation.

North Carolina Bar Association Penal System Study Commission, *As the Twig Is Bent* 23 (1972); *compare* National Advisory Committee on Criminal Justice Standards and Goals, *Juvenile Justice and Delinquency Prevention* 611-12 (1976).

While the term "community-based program" is a term of art, *see* G.S. § 7A-517(8) (Cum. Supp. 1979), we feel that its usage by the General Asembly reflects its concern that responses to the problems of the juveniles coming before the courts be fashioned in a flexible manner so as to address the best interests of the child in ways other than probation and commitment to training schools. The same subsidiary concept at work in the introductory provisions of the Juvenile Code permeates all of its subsequent provisions: The relationship of family and friends is an important component in the rehabilitative program for a youthful offender, and institutionalization of a child ought not to be ordered except in an extraordinary situation. Otherwise, the stabilizing and motivational attributes of familiar surroundings is lost to the process.

Indeed, the General Assembly has provided in concrete terms an expression of its concern in this regard by stating in G.S. § 7A-646 that

> The purpose of dispositions in juvenile actions is to design an appropriate plan to meet the needs of the juvenile and to achieve the objectives of the State in exercising jurisdiction. If possible, the initial approach should involve working with the juvenile and his family in their own home so that the appropriate community resources may be involved in care, supervision, and treatment according to the needs of the juvenile. Thus, the judge should arrange for appropriate community-level services to be provided to the juvenile and his family in order to strengthen the home situation.
>
> In choosing among statutorily permissible dispositions for a delinquent juvenile, the judge shall select the least restrictive disposition both in terms of kind and duration, that is appropriate to the seriousness of the offense, the

> degree of culpability indicated by the circumstances of the particular case and the age and prior record of the juvenile. *A juvenile should not be committed to training school or to any other institution if he can be helped through community-level resources.* (Emphasis added.)

As we observed earlier, G.S. § 7A-649 provides ten specific alternatives from which the court is empowered to select what it feels to be the most appropriate disposition for a delinquent child. The wide variety and scope of the alternatives which are embodied in the statute's formulation of dispositional alternatives leads us to conclude that it was the legislature's intention that the district courts exercise sound discretion in fashioning an appropriate response to each particular instance of delinquency. The tenth alternative which is provided by the statute is clearly the most severe: commitment of the juvenile to the Division of Youth Services in accordance with the provisions of G.S. § 7A-652. This alternative is the most severe in that it makes no change in the former practice of committing juveniles to state training schools when it was concluded that conditional probation was inappropriate on the facts of the case. Clearly, that alternative ought to be employed only when there is no reasonable alternative open to the court in its disposition of the matter.

A close examination of the other nine alternatives provided by G.S. § 7A-649 indicates that all of them are subsumed within the concept of *community-level* services. It will be recalled that we earlier observed that *community-based* program is a term of art defined in the statute itself as being a residential or non-residential treatment program which serves a juvenile in the community in which he lives. Only G.S. § 7A-649(6) is in any way defined in terms of this term of art. Even then, its scope is limited to a program of academic or vocational education. Every other alternative provided by the statute, including the provision of G.S. § 7A-649(6) which authorizes commitment of a child to a professional residential or non-residential treatment program, can be employed in such a manner upon an appropriate court order that the concern of the Juvenile Code that the needs of an individual child be addressed in terms of programs which provide meaningful, *community-level* efforts which would serve to keep the child in familiar surroundings. It is apparent that such programs would be aided by the fact that a child's rehabilitation in such a program would be aided to a considerable degree by keeping the child among his family and

friends, or at the very least, having them within reasonably close proximity to the location where the care is being provided to the child in question.

G.S. § 7A-646 sets forth in clear terms the mandate of the General Assembly in providing for various dispositional alternatives for delinquent juveniles. The statute provides that

> . . . the initial approach should involve working with the juvenile and his family in their own home so that the appropriate community resources may be involved in the care, supervision and treatment according to the needs of the juvenile. Thus, the judge should arrange for appropriate community-level resources to be provided to the juvenile and his family in order to strengthen the home situation.
>
> * * *
>
> A juvenile should not be committed to training school or any other institution if he can be helped through community-level resources.

While it is true that one of the clear objectives of the juvenile justice system is to fashion a response to the problems of a child within its purview which addresses the particular needs of the child and is in the child's best interests as determined by the court, *see In re Vinson*, 298 N.C. 640, 260 S.E.2d 591 (1979); *compare State v. Burnett*, 179 N.C. 735, 102 S.E. 711 (1920), that determination cannot be in a vacuum. Indeed, in making its decision concerning the disposition of a juvenile, a court exercising its juvenile jurisdiction must also weigh the best interests of the state. *See In re Burrus*, 275 N.C. 517, 169 S.E.2d 879 (1969), *aff'd. sub. nom., McKeiver v. Pennsylvania*, 403 U.S. 528 (1971). What is or is not in the best interest of the child must be determined in tandem with the perception of the legislature as to what is in the best interest of the state as enunciated by the terms of the Juvenile Code and by its general theme as deduced from the impetus behind its enactment.

While G.S. § 7A-649 provides numerous alternatives to be employed in fashioning a suitable disposition for a juvenile delinquent, some of its provisions are not self-executing. It is conceivable that an appropriate disposition of a juvenile's case would require that resources other than those provided by governmental units be employed by the court. No doubt exists in our minds that the

General Assembly envisioned such a situation emerging. This conclusion is made clear upon examination of the provisions of G.S. § 7A-647. In that statute, the legislature directed that

> In any case, the judge may order that the juvenile be examined by a physician, psychiatrist, psychologist or other qualified expert as may be needed for the judge to determine the needs of the juvenile. If the judge finds the juvenile to be in need of medical, surgical, psychiatric, psychological, or other treatment, he shall allow the parent or other responsible persons to arrange for care. If the parent declines or is unable to make necessary arrangements, the judge may order the needed treatment, surgery, or care, and the judge may order the parent to pay the cost of such care .... If the judge finds that the parent is unable to pay the cost of care, the judge may charge the cost to the county.

It would seem, therefore, that the dispositional alternatives enumerated by G.S. § 7A-649 are to be read in tandem with this provision. If it were not for this grant of authority, it is possible that the alternatives provided to the courts would, in some instances, be empty and unworkable. However, in invoking the authority to charge the cost of care to the county, the courts must be sensitive not only to the proper placement of the child. The courts must also consider what is in the best interest of the state in the utilization of its resources and those of its inferior components.

Throughout the Juvenile Code, there is a consistent emphasis upon treating a child at the community level. We do not understand this emphasis to be taken in a literal fashion. To do so would be to foster an absurd result. It is manifest that not all areas in our state are privy to the same wealth and the resources which that wealth would make available within the confines of the *geographic* community. While we hasten to add that the best interests of the child will often be served by keeping the individual in his own home, subject to guidance and outpatient services of one kind or another, it need not necessarily be so.

Our decision today ought not to be taken to mean that judges may not remove a child from his neighborhood and hometown or county. That would not be a reasonable interpretation of the statute and the legislative intent. Instead, we feel that the term community

ought to be interpreted in a broad manner, connoting an interrelationship among persons who live in the same general area, but who also share the same laws, rights, and interests. *See Sacred Heart Academy of Galveston v. Karsch.* 173 Tenn. 618, 122 S.W.2d 416 (1938). In this regard, we find Judge Bason's order to be fatally defective. By making the detailed provisions of the Juvenile Code, with their repeated emphasis upon community-level services, we find it inconceivable that the General Assembly intended to vest the court with the authority to order a child committed to an out-of-state facility and charge the cost of the care so provided to the county.

We commend Judge Bason for his longstanding concern for the welfare of juveniles who come before him. The record in the present case reveals the patience that His Honor exercised in dealing with Scott over a period of many months and his tireless efforts to secure effective help for a delinquent and disturbed youth. Such patience and expenditure of effort is a salutary example to the judiciary of this state. However, we are unable to conclude that the General Assembly intended to vest him with the authority which he sought to exercise in this case. Hopefully, this case and others like it, will prompt our state to develop an effective means of dealing with children of Scott's nature and disposition.

For the reasons stated, the judgment of the District Court is

Reversed.

Justice CARLTON dissenting.

I respectfully dissent from the majority opinion. In interpreting the statutes enacted by our Legislature, it places form above substance, erroneously construes the dispositional provisions of our juvenile code, and produces a result which seriously curtails the ability of court officials to deal with emotionally disturbed children.

I disagree with the majority's repeated emphasis on and interpretation of the provisions of G.S. 7A-649 for two reasons.

First, it is obvious from the record that Judge Bason intended to commit the child under the authority of G.S. 7A-647(3), not G.S. 7A-649(6) as assumed by the majority. As developed more fully below, the former clearly authorizes Judge Bason's action. While the final order did recite that Scott was being sent to the Brown School pursuant to G.S. 7A-649(6), it also expressly stated that Wake Coun-

ty's responsibility to provide for the care was pursuant to G.S. 7A-647(3). Moreover, various findings and conclusions by the trial judge compel the conclusion that he was proceeding under the authority of G.S. 7A-647(3). For example, conclusion of law E. in the final order provided, "This court has the authority *to order the treatment Scott needs* and to charge that cost to Wake County *pursuant to G.S. 7A-647(3)*" (emphases added). For the majority to ignore all of this and simply conclude that the judge was proceeding solely under G.S. 7A-649(6) is, in my opinion, placing form above substance.

Secondly, assuming *arguendo* that Judge Bason was proceeding under the authority of G.S. 7A-646(6), I strongly disagree that this statute is presently limited to programs within the State of North Carolina. The statute provides that a judge may "[o]rder the juvenile to a community-based program of academic or vocational education *or to* a professional residential or non-residential treatment program." G.S. 7A-649(6) (Cum. Supp. 1979) (emphasis added). The "community-based" limitation is clearly intended to apply only to the academic or vocational education programs — programs normally available in many communities. The remainder of the sentence referring to professional programs is pointedly separated by the words "or to" and there is not even a hint that such programs must be located within the child's home community or the state. Indeed, such programs are available in relatively few communities in North Carolina and no community in the state has available the program prescribed for Scott. This was the finding of the trial court and is binding on this Court on appeal.

G.S. 7A-647(3), quoted in the majority opinion, clearly allows the trial judge to order psychiatric, psychological or other appropriate care for a child when he finds the child needs such care and to charge the costs to the county. This is what the statute provides, plainly and simply. There is absolutely nothing in the statute limiting the trial court to in-state placement for treatment of a disturbed child.

The majority has strained mightily to find some language in our juvenile code to support its result. In my opinion, it has failed to do so. After quoting, disjointedly, various sections of the code emphasizing the laudable goal of serving troubled children in surroundings most similar to their own communities when appropriate programs are available, the majority then concludes that,

"we find it inconceivable that the General Assembly intended to vest the court with the authority to order a child committed to an out-of-state facility and charge the cost . . . to the county." The majority cites no authority for such a conclusion, for there is none.

I find the reasoning of the majority both strained and inconsistent. For example:

(1) It speaks of the lack of flexibility provided by the former juvenile code in dispositional alternatives and interprets the present code to provide a more "flexible manner" for courts to fashion responses to the problems of juveniles, yet it denies that very flexibility in the matter before us.

(2) It acknowledges the clear intent of the code that juveniles be committed to training school only when no other "reasonable alternative" is available, yet it denies Scott Brownlee the only "reasonable alternative" the trial court could find for him after weeks of pleading with local and state agencies for help they were unable to provide.

(3) In holding that one of the clear purposes of the juvenile justice system is to serve the child's best interests, the majority holds that a dispositional "determination cannot be made in a vacuum." The majority states, "a court exercising its juvenile jurisdiction must also weigh the best interests of the state," yet the majority fails to point to any step in these proceedings at which the trial court was acting in a "vacuum" or at which the judge failed to consider the "best interests of the state." Indeed, the majority could make such statements only in the abstract because the record before us discloses that the trial court gave Wake County every conceivable opportunity to present an alternative solution and invited the county to fully participate in the proceedings. The assistant county attorney, at one stage of the proceedings, walked out of the courtroom. If any "vacuum" resulted, it was the fault of Wake County, not that of the trial court or of the child.

(4) The majority states that "[i]t is conceivable that an appropriate disposition . . . would require that resources other than those provided by governmental units be employed by the court. No doubt exists in our minds that the General Assembly envisioned such a situation emerging." The majority here denies such a resource to Scott Brownlee.

(5) The majority holds that G.S. 7A-649 must be read "in tandem" with G.S. 7A-647, yet it fails to apply the clear language of G.S. 7A-647(3) to the matter before us.

(6) The majority holds that when a juvenile judge invokes the authority to charge the cost of care to a county, the judge must be sensitive both to the proper placement for the child and consider the best interests of the state "in the utilization of its resources and those of its inferior components," yet it fails to note any failure of the trial court to consider the utilization of Wake County's resources. If the implication is that the approximate annual cost in excess of $40,000 for treatment at the Brown School is excessive, how does the majority rationalize such a conclusion with the finding quoted in the opinion that the average annual cost of treatment for an adolescent at Dorothea Dix Hospital in Raleigh is $65,000?

(7) The majority states that, "Our decision today ought not to be taken to mean that judges may not remove a child from his neighborhood and hometown or county. That would not be a reasonable interpretation of the statute and the legislative intent," yet it denies such removal of this child. Its only explanation for such a result is that the majority finds "inconceivable" a legislative intent to vest the trial court with authority for out-of-state placement at county expense.

The majority, in effect, has held that the juvenile code permits treatment of a child only in "community-based" facilities and that "community" is intended by the Legislature to encompass the entire state. That this could not have been the legislative intent is clear from the code itself. Throughout the code are references to treatment of the child within his own community, and full utilization of "community-level resources" is required before a juvenile can be committed to a *state* training school. Additionally, a *"community*-based program" is defined as "[a] program providing nonresidential or residential treatment to a juvenile in the community *where his family lives.*" G.S. § 7A-517(8) (Cum. Supp. 1979) (emphasis added). "Community" was obviously intended by our Legislature to mean a much smaller geographic area than the entire state. And it is also obvious that the Legislature, although it intended that resources within the child's community *be utilized first,* did not intend district court judges to be limited to resources available within the child's community when fashioning the appropriate disposition for each child. Likewise, there is nowhere manifested in the juvenile code an intent that the available dispositional alterna-

tives be limited to facilities within the state.

This Court announces today that juvenile judges must exercise "sound discretion" in determining appropriate dispositions for juvenile delinquents, yet it cites no instance in which Judge Bason abused his discretion. Is it because the costs of this program are too excessive or the distance to Texas too far? Is it because the majority feels the program of treatment inappropriate for this child? Trial courts are given no guidelines for exercising their discretion. One can only conclude from the opinion that the majority feels that Judge Bason abused his discretion by placing Scott in a program beyond the borders of North Carolina. However, would the majority result have been any different had the same program at the same cost been available *within* our state but several hundred miles from Scott's home county? I realize, of course, that an appellate court cannot always answer questions which are not asked and must deal with the record before it. However, I fear that the majority opinion today will be confusing to our trial judges as they attempt to decide whether their dispositions for juveniles are based on "sound discretion."

I wish to make it clear that I do not advocate that juvenile judges be given the authority to send children all over the country for treatment wherever and whenever they wish. Obviously, there is a limit to the amount of public funds which can be expended for such purposes. Equally obvious, as the majority acknowledges, is that North Carolina must develop effective programs for such children. The Legislature must address this serious problem. In the meantime, however, Scott Brownlee should not be denied a program which is in his best interests and which the present juvenile code plainly allows, G.S. § 7A-647(3) (Cum. Supp. 1979). I do not think this Court should engage in judicial legislating.

The result of the decision of this Court today is to take Scott Brownlee from a program found to be in his best interest and to bring him back to Wake County to face an uncertain future. Perhaps that will not matter. Like the majority, I have no idea whether Scott has made any progress whatsoever. It may be that this young man's mind is so disturbed that no program anywhere in the world could prevent his graduation from juvenile delinquent to hardened criminal. It seems to me, however, that we ought not to give up on him in the middle of treatment and return him to a situation which offers little hope. The odds that he will soon be an adult criminal

will surely be greater if he is returned. Such a result, I might add, will be far more expensive to the public than the costs of his present program. With so much at stake, I simply cannot understand why a majority of this Court chooses to read words into our juvenile code which are not there.

During oral argument, one member of this Court stated that he could not conceive that our Legislature intended to give juvenile judges the authority to send children, at county expense, to such faraway places as Texas, Hawaii or England. I agree that not even the first member of our Legislature consciously considered that our emotionally disturbed children would be sent so far away. Such a conclusion on our part, however, should not result in the decision reached by the majority today. Rigid adherence to such a view has led a majority of this Court to usurp the legislative process. Moreover, our juvenile judges will find it far more difficult in the future to utilize novel and innovative programs for delinquent children.

Assuming the Legislature never contemplated the situation presented by the record before us, what should this Court do about it? The answer is, of course, that we should construe the statute according to its plain meaning and not attempt to divine what the Legislature would have intended had it considered this situation. We should affirm the action of the trial court because it was proper under the present code. The Legislature convenes in this city in less than three weeks and can, if it wishes, amend the statutes to more clearly reflect the legislative intent, whatever that may be. The public money spent during the interim would surely not be an unwise investment when compared to the harm this decision may cause to Scott Brownlee and to thousands of other young people in the future.

I vote to affirm.

Justice EXUM joins in this dissent.

MALCOLM M. LOWDER, MARK T. LOWDER, AND DEAN A. LOWDER v. ALL STAR MILLS, INC., LOWDER FARMS, INC., CAROLINA FEED MILLS, INC., ALL STAR FOODS, INC., ALL STAR HATCHERIES, INC., ALL STAR INDUSTRIES, INC., TANGLEWOOD FARMS, INC., CONSOLIDATED INDUSTRIES, INC., AIRGLIDE, INC., AND W. HORACE LOWDER

Nos. 67 and 112

(Filed 6 January 1981)

1. Corporations § 29— mismanagement of corporation — corporation in danger of insolvency — sufficiency of evidence

Where defendant was accused of mismanaging, diverting, converting and wasting corporate assets, the trial court's order appointing operating receivers was proper and evidence was sufficient to support the court's finding that the corporate defendants were in imminent danger of becoming insolvent where the evidence tended to show that individual defendant borrowed substantial sums from all of the corporate defendants for his own personal benefit, the gross income income and the net worth of the corporate defendants had drastically decreased under defendant's management, the physical assets of the corporate defendants had been grossly neglected by defendant who had failed and refused to repair or replace the assets, and the corporate defendant's federal income tax affairs were so improperly managed by individual defendant that the companies were subject to several million dollars in tax liabilities as well as the risk of loss of millions of dollars in interest and penalties. Moreover, even if the corporate defendants were not in imminent danger of insolvency within the purview of G.S. 1-507.1, the findings of fact supported numerous other grounds for the appointment of receivers by the trial court in the exercise of its inherent equitable powers.

2. Corporations § 29— appointment of receivers — notice to defendants

There was no merit to defendants' contention that the initial order of the trial court appointing operating receivers was void because certain shareholders were not given notice of the proceedings and were thereby denied their due process rights to notice prior to a court proceeding, the outcome of which would affect their property interests, since there is no requirement in the statutes that notice be given to persons who are not parties to the action and since defendants, the allegedly aggrieved shareholders, moved prior to the initial hearing on plaintiffs' application for appointment of receivers to dismiss the application and noted specifically that they had received and read a copy of plaintiff's complaint, thereby admitting actual prior notice of the proceedings and therefore waiving any error in the failure of plaintiffs to give notice.

3. Corporations § 29; Receivers 1— receivers appointed by judge rotating out of district — jurisdiction retained by judge

G.S. 1-501, which provides that a superior court judge assigned to a district who appoints receivers while holding court in that district may retain jurisdiction of the original action and of the receivers appointed therefor following his rotation out of the district, became effective on May 8, 1979, the date it was

ratified, so that it applied to this action which was pending, and the trial judge could properly enter an order retaining jurisdiction in himself of all matters in this action notwithstanding his rotation out of the district.

4. Appeal and Error § 16— authority of trial court after notice of appeal given

Since the corporate defendants' subsequent perfection of their appeal related back to the time of the giving of notice of appeal, all orders entered by the trial judge after defendants' notice of appeal were void for want of jurisdiction, and orders approving the payment of fees and expenses for attorneys, accountants and receivers must therefore be vacated.

5. Appeal and Error § 16; Contempt of Court § 8— appeal from contempt order — jurisdiction of trial court ousted

Defendant's oral notice of appeal of the trial court's 21 February contempt order ousted jurisdiction from the trial court as to any further contempt proceedings in the same matter and the trial court's order entered at a 28 February hearing imposing sanctions for contempt was null and void.

6. Contempt of Court § 1.1— defendant ordered to produce records — failure to do so as civil or criminal contempt

Where defendant was accused of mismanaging, diverting and wasting corporate assets and the trial court ordered him to cooperate with receivers of the corporation and to provide them and plaintiffs with copies of his tax returns and a list of his assets, defendant's contempt, if any, in failing to provide the required materials could be criminal or civil, and contemnor waived procedural requirements when he came into court to answer charges of the trial court's show cause order.

7. Contempt of Court § 6; Constitutional Law § 24.2— contempt proceeding based on affidavit — right to confront witness abridged

The N. C. and U. S. Constitutions preserve the right of confrontation of the witnesses against an accused and this right is applicable to contempt proceedings so that an adjudication of contempt against defendant based on the affidavit of the receiver of a corporation was invalid.

8. Contempt of Court § 6; Constitutional Law § 74— order to produce tax returns — Fifth Amendment protection not applicable

Where defendant was accused of mismanaging, diverting, converting and wasting corporate asets, defendant's refusal to comply with the trial court's order to produce tax returns was not protected by the Fifth Amendment proscription against compulsory self-incrimination since there was no evidence tending to show defendant was under any physical or mental coercion at the time he prepared his tax returns, and he therefore could not rely upon the contents of the tax returns to support his claim of Fifth Amendment protection.

9. Contempt of Court § 6; Constitutional Law § 74— order to produce tax returns — no authentication supporting claim of Fifth Amendment privilege

Where defendant was accused of mismanaging, diverting, converting and wasting corporate assets and he was ordered by the trial court to produce his tax returns, the production of the returns did not amount to such authentication as to be compelled testimonial self-incrimination which would support a claim of Fifth Amendment privilege.

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

Case No. 112 is on discretionary review to review, prior to determination by the Court of Appeals, interlocutory orders entered by *Seay, J.*, on 9 February 1979 and 20 May 1980, STANLY Superior Court, appointing receivers for defendant corporations and approving fees for accountants, attorneys and receivers.

Case No. 67 is on discretionary review to review the decision of the Court of Appeals, reported in 45 N.C. App. 348, 263 S.E.2d 624, reversing judgments of *Seay, J.*, finding defendant in contempt, entered 21 February 1979 at UNION Superior Court and 2 March 1979 at STANLY Superior Court.

Case No. 112 is a shareholder's derivative action instituted by Malcolm M. Lowder and his two sons, Mark T. and Dean A. Lowder, shareholders of All Star Mills, Inc. (hereinafter referred to as "Mills"), Lowder Farms, Inc. (hereinafter referred to as "Farms"), Consolidated Industries, Inc. (hereinafter referred to as "Consolidated"), and alleged beneficial shareholders of All Star Foods, Inc. (hereinafter referred to as "Foods"). All Star Hatcheries, Inc. (hereinafter referred to as "Hatcheries"), All Star Industries, Inc. (hereinafter referred to as "Industries"), and Airglide, Inc. (hereinafter referred to as "Airglide") are actual defendants in the case. Defendant Horace Lowder, either solely or together with his wife, owns all of the stock in the latter three corporations. None of the plaintiffs is a shareholder of record of the latter three corporations.

Plaintiffs sought damages and other relief on the grounds that "the defendant W. Horace Lowder has engaged in an unlawful course of conduct in willful and gross abuse of his authority and discretion as the chief executive officer and as director of said companies, and in violation of his fiduciary and prudent manage-

ment obligations to the companies and their shareholders." Plaintiffs specifically requested that a receiver be appointed to preserve and manage the corporate assets of defendants pending a trial on the merits, and that an injunction issue against defendant Horace Lowder.

Defendants were ordered to appear and show cause why plaintiffs' application for appointment of a receiver pending trial on the merits should not be granted. The case was heard beginning 22 January 1979 before Judge Seay who, by order dated 2 February 1979, enjoined all of the defendants from conveying any assets of the defendants, except Carolina Feed Mills, Inc., pending further order of the court. On 9 February 1979, after receiving affidavits, hearing testimony and arguments of counsel, and reviewing the record, Judge Seay filed findings of fact which included the following:

> 5. Malcolm M. Lowder is and at all times material to this suit has been the record holder of more than 5% of the issued and outstanding shares of Mills, Farms, and Consolidated, and of 2.6% of the issued and outstanding shares of Carolina. Through his ownership of Mills stock, Malcolm M. Lowder is and at all times material to this suit has been the owner of beneficial interest in the shares of Foods.
>
> 6. Mark T. Lowder and Dean A. Lowder are and have been at all times material to this suit the record holders of 13 and 14 shares, respectively, in Mills. Through their ownership of Mills stock, Mark T. Lowder and Dean A. Lowder are and have been at all times material to this suit the owners of beneficial interest in the shares of Farms and Foods.
>
> 7. All of the corporate defendants collectively constitute one integrated business enterprise, which has been run solely and exclusively at the direction of W. Horace Lowder, since about 1960.
>
> 8. The principal business activities of the various corporate defendants at the present time are as follows:
>
> *Mills* - Formerly Southern Flour Mills, Inc., the origi-

nal Lowder family company. The company was engaged in the business of milling and selling flour, cornmeal and cattle, hog, poultry and dog feed, and selling poultry supplies. It used to supply Foods, Farms and Hatcheries with cattle and poultry feed and other requirements. Now, it only leases assets to other parts of the family enterprise.

Foods - The company produces and sells eggs commercially. It operates all of the feed business formerly conducted by Mills. It leases poultry houses from Farms, and chickens from hatcheries. It also operates the cattle business formerly conducted by Farms.

Hatcheries - This company hatches and grows out chicks until twenty to twenty-two weeks old after which it leases them to Foods. The company obtains feed and poultry supplies from Foods and leases poultry houses from Consolidated.

Farms - Farms used to raise beef cattle for commercial sales. Now it merely leases land and poultry houses to other parts of the family enterprise.

Carolina - The company produces and sells livestock, hog and poultry feed in South Carolina and raises beef cattle in South Carolina for commercial sales.

Consolidated - Consolidated owns a cattle farm and poultry houses, all of which are leased to other parts of the family enterprise.

Industries - Industries finances real estate purchases by Foods, and other family companies, with money borrowed from family companies.

Airglide - The company owns the Lowder family enterprise's airplane.

* * *

10. Defendant W. Horace Lowder has at all times material to this suit exercised sole managment responsibility for the business affairs of all the corporate defendants and has excluded plaintiff and other shareholders of said

companies from participation in their management.

The trial court found that defendant Horace Lowder had "engaged in an unlawful course of conduct" and had violated his fiduciary obligations to the corporate defendants and their shareholders. The findings of fact specifically outlined the specific acts of unlawful conduct and breach of fiduciary duty, including, *inter alia*, convictions for violation of federal tax laws, involvement in pending tax litigation, conversion of corporate assets to his own use, issuance of corporate stock to his own benefit in violation of shareholders' preemptive rights, failure to convene meetings of shareholders or directors, and failure to keep corporate records as required by law. The court further found that there was "an imminent danger of insolvency to the corporate defendants," and that "[t]he appointment of a Receiver for defendant corporations is necessary to preserve and prevent further depletion of their assets, and to prevent further unlawful acts of W. Horace Lowder." Based upon his findings, the court concluded that:

> 4. The requirements for the appointment of a Receiver set out in NCGS Sec. 1-502, and 1-507.1, have been met.
>
> 5. Plaintiffs have shown entitlement to the appointment of a Receiver, and to preliminary injunctive relief against W. Horace Lowder.
>
> * * *
>
> 7. It is necessary, in the aid of the court's jurisdiction, and in order to accomplish the purpose of the statutes set out above, to appoint a Receiver to manage the assets of the corporate defendants, and to enjoin defendant W. Horace Lowder from continuing to manage the corporate defendants, or to take any action on their behalf.

The court entered an order, dated 5 February 1979 and filed on 9 February 1979, appointing receivers and ordering defendant Horace Lowder, *inter alia*, to cooperate with the receivers, to provide copies of his personal federal income tax returns, and to provide to plaintiffs a schedule of all of his assets. Defendant Horace Lowder was enjoined from managing in any way the business of any of the corporate defendants, from exercising any control over them,

and from interfering in any way with the authority of the receivers.

Upon reports by the receivers that defendant Horace Lowder was not obeying the preliminary injunction, the trial judge entered an order, dated 12 February 1979, modifying the injunction in certain particulars and further ordering defendant Horace Lowder to appear and show cause why he should not be held in contempt.

On 14 February 1979, Judge Seay entered a supplemental receivership order further defining the duties of the receivers and authorizing the receivers to employ the accounting firm of Coopers & Lybrand, and the law firm of Moore and Van Allen. The court also appointed Richard Lane Brown, III, and Arent, Fox, Kintner, Plotkin, and Kahn as special tax counsel to the receivers.

On 19 February 1979, defendants moved to alter and amend the findings of fact and conclusions of law and preliminary injunction and order appointing a receiver under Rule 59 of the Rules of Civil Procedure. In an affidavit dated 20 February 1979, John M. Bahner, Jr., one of the court-appointed receivers, attested to acts of defendant Horace Lowder in violation of the previous orders and injunction. On 21 February 1979, a hearing was held before Judge Seay on the order to Horace Lowder to show cause why he should not be held in contempt. An order was entered adjudging Horace Lowder to be in civil contempt and opportunity was afforded for Horace Lowder to purge himself by compliance with the previous orders. Defendants excepted and gave notice of appeal in open court. This constitutes appeal number 67.

Defendant Horace Lowder failed to comply with the portions of the earlier orders in that he refused, on fifth amendment grounds, to produce his federal income tax returns and a listing of all of his assets. In a hearing on 28 February 1979, Judge Seay ruled that the fifth amendment privilege against self-incrimination did not apply and found Horace Lowder to be in willful disobedience of a court order. Defendant was ordered imprisoned for a five-day period and ordered to pay a fine of $500.00. Judge Seay subsequently amended the order to delete the imprisonment and impose a continuing fine of $250.00 per day until defendant purged himself.

On 5 March 1979, defendants gave notice of appeal from the 9 February 1979 order appointing a receiver and granting an injunc-

tion. This appeal eventually became a part of case number 112.

In April, 1979, the corporate defendants filed for protection under Chapter XI of the United States Bankruptcy Act. The State court proceedings were automatically stayed and jurisdiction was not returned until February, 1980. In the interim, on 26 June 1979, Judge Seay entered an order on his own motion purporting to retain jurisdiction of all matters pending in the litigation notwithstanding his rotation from the Twentieth District. Defendants excepted and subsequently moved to vacate the order. Defendants ultimately petitioned the Court of Appeals for a writ of mandamus directing the superior court judges assigned to the Twentieth District to hear motions and other matters in the case. The petition was denied.

On 4 March 1980, the Court of Appeals, in an opinion by Judge Erwin, Judges Clark and Arnold concurring, reversed the order adjudging defendant Horace Lowder to be in contempt. We allowed plaintiffs' petition for discretionary review on 16 July 1980.

On 19 April 1979, and again on 10 March 1980, the receivers petitioned the trial court for an order authorizing the payment of fees to the attorneys and accountants appointed by the court to assist in the case. By order dated 30 April 1980, Judge Seay, sitting in the Nineteenth Judicial District, scheduled a hearing on the petition for fees. The matter of fees was heard before Judge Seay at Rowan County Courthouse in Salisbury, North Carolina, on 9 May 1980. Defendants objected and excepted on the grounds that Judge Seay lacked jurisdiction to order payment of the fees. Upon his overruling the objection, defendants gave notice of appeal. On 15 May 1980, Judge Seay ordered the payment of fees to the attorneys, accountants, and receivers, and further ordered that the receivers do "whatever is necessary, and take whatever steps they deem appropriate, without further order of the Court, to sell assets of the corporate defendants, whether real or personal, in order to make payment in accordance with this Order."

Defendants did not give notice of appeal on the issue of the propriety of the initial order appointing a receiver until 5 March 1979 in violation of Rule 12 of the Rules of Appellate Procedure. In their brief to the Court of Appeals, defendants petitioned for a writ of certiorari on that issue. We allowed defendants' petition for discretionary review prior to decision of the Court of Appeals on 15

August 1980.

Moore & Van Allen, by John T. Allred and Jeffrey J. Davis, for plaintiffs.

Delaney, Millette, Dearmon and McKnight, P.A., by Ernest S. Delaney, for defendants.

BRANCH, Chief Justice.

[1] Defendants first contend that the initial order appointing operating receivers was void. They maintain that the statutory authorization for appointing an operating receiver for a corporation requires a finding that the corporation is either insolvent or "is in imminent danger of insolvency." G.S. 1-507.1. They concede that Finding of Fact Number 28 states specifically that "the corporate defendants are in imminent danger of becoming insolvent." However, they argue that there are no findings to support "this naked assertion." We disagree.

Statutory authority for the appointment of receivers of corporations is found in G.S. 1-507.1 which provides:

> When a corporation becomes insolvent or suspends its ordinary business for want of funds or it is in imminent danger of insolvency . . . a receiver may be appointed by the court under the same regulations that are provided by law for the appointment of receivers in other cases.

The trial court found, *inter alia*, as follows:

> (a) Defendant W. Horace Lowder has converted assets of Lowder Farms, Inc., to his own beneficial use.
>
> (b) Defendant W. Horace Lowder has converted assets of All Star Foods to his own beneficial use.
>
> (c) The companies' Federal income tax affairs were so improperly managed by Defendant Lowder that in 1973

he was convicted by a jury in the United States District Court for the Middle District of North Carolina on one count of conspiracy to defraud the United States by obstructing the Internal Revenue Service in its task of computing and collecting revenue, by concealing the nature, extent and treatment of inter-corporate sales, purchases and transfers among the family corporations and secreting, destroying or refusing to produce supporting documents and records relating to such inter-corporate transactions (all in violation of 18 U.S.C. Sec. 371), and on two counts of knowingly filing false corporate income tax returns (all in violation of 26 U.S.C. Sec. 7206 (1)). Six of the Lowder family companies - Mills, Farms, Foods, Hatcheries, Industries and Consolidated - were indicted under the conspiracy count but the criminal charges against them were subsequently dismissed voluntarily by the government, prior to trial. On appeal defendant Lowder's convictions were upheld (*United States v. Lowder* 492 F 2d 953 (4th Cir. 1974)) and *certiorari* was denied (419 U.S. 1092 (1974)). Defendant Lowder was fined $20,000 and sentenced to two years of imprisonment on each of the three counts (concurrent) and he actually served over one year until his parole in 1976. Said defendant continued his exclusive operational control and management of the companies while he was in prison. Defendant Lowder appeared *pro se* in the District Court criminal trial, and handled his appeal to the 4th Circuit Court of Appeals *pro se* as well.

(d) In addition to the criminal charges described above, civil tax deficiencies and assessments were made by the IRS against defendant Lowder, his father's estate, and against Mills, Farms, Hatcheries, Foods and Carolina for various tax years from 1950 through 1972. The aggregate amount of these claims against the five companies is $4,712,651.00 exclusive of penalties and interest (which could bring the total liability to almost $10 million) and also exclusive of such state income tax liabilities as may become due and payable after federal tax liabilities have been fully determined. Attached hereto as Exhibit B and incorporated by reference is a list of the pending United States Tax Court cases indicating the amounts claimed

from the defendants in those cases and the tax years in question. These civil cases were continued from the time that defendant was indicted, until he completed serving his term in prison. In April, 1978, the cases were consolidated for trial and the trial was commenced. Defendant Lowder, *pro se*, is representing himself, his father's estate and the five defendant companies. The trial is in recess until February 20, 1979. Defendant Lowder has failed and refused to retain legal counsel and accounting assistance in the defense of such cases notwithstanding that the original petitions were filed by competent counsel, Fleming, Robinson and Bradshaw, of Charlotte, and notwithstanding (i) the repeated urgings of the Tax Court judge and government counsel that he do so, and (ii) repeated warnings by such judge and counsel that his failure to do so is likely to substantially increase the tax liability which said companies will suffer. Defendant Lowder is not an attorney or otherwise experienced in tax or general litigation and has had no formal training which would equip him for the defense of the pending litigation against five of the Lowder family companies. The IRS investigation of the All Star group companies is continuing at the present time and further tax deficiencies and assessments may be asserted.

(e) Beginning in 1971 with his Federal grand jury indictment and continuing through the present, defendant W. Horace Lowder has grossly neglected his duties as manager of the Lowder family companies and has devoted his energies to his personal tax problems and to the tax problems of the Lowder family companies resulting from his management, all to the financial detriment of the Lowder family companies.

(f) Defendant Lowder has converted funds and other assets of Mills, Farms and their subsidiary and affiliated companies to his own beneficial use, has unlawfully transferred assets of such companies to other corporations, all the shares of which are issued to him, has diverted business opportunities from such companies to himself or to the corporations owned by him and has caused and permitted such companies to make unlawful loans to himself

or to other corporations owned by him, all without the knowledge or consent of the other stockholders.

(g) Defendant Lowder has caused and permitted corporate stock of Mills and Farms to be unlawfully issued to himself, for his use and benefit, in disregard and violation of the preemptive rights of the plaintiffs and other stockholders; two such instances having occurred on October 23, 1978, when said defendant caused 1435 shares of Mills and 460 shares of Farms to be issued to himself.

(h) Defendant Lowder has unlawfully managed and operated Mills, Farms and their subsidiary and affiliated companies by failing and refusing to convene meetings of shareholders or directors of said companies. He admitted in this case that there have been no shareholder meetings for any of the corporate defendants since 1958.

(i) Defendant Lowder has unlawfully failed and refused to keep the corporate and business records and minutes required by law and has failed and refused to advise the shareholders of the condition of the several businesses.

(j) (i) On October 20, 1978, in accordance with NC GS Sec 55-38, plaintiff Malcolm M. Lowder made written demand upon defendant W. Horace Lowder for the production of the following documents of Mills, Farms and Consolidated for examination by said plaintiff at the principal office of said corporation:

(a) The books and records of account,

(b) The minutes of the stockholders' and directors meetings,

(c) The stock certificate books, and

(d) The corporate income tax returns for all fiscal years subsequent to 1952.

(ii) In response to this lawful demand defendant W.

Horace Lowder (a) advised plaintiff Malcolm M. Lowder that he could resign from his position with Foods if he did not like the way said defendant was operating the family enterprise, and (b) furnished said plaintiff with the first and last pages of what appear to be the Federal income tax returns of the three corporations for the ten years since 1968 and with a typed list of the shareholders of the three corporations.

(iii) On November 9, 1978, plaintiff Malcolm M. Lowder made a second written demand upon defendant W. Horace Lowder advising him of the insufficiency of the documents produced, enclosing a copy of NC GS Sec 55-38 and reiterating his demand for the documents.

(iv) In response to this second demand the defendant W. Horace Lowder advised plaintiff Malcolm M. Lowder that said defendant believes he "had satisfied the purpose of your request of October 20th."

(k) W. Horace Lowder unlawfully discharged Malcolm Lowder from his duties with All Star Foods, Inc., in retaliation for the institution of this lawsuit.

(l) W. Horace Lowder has admitted borrowing large sums of money from several of the corporations, and these transactions were never approved by the shareholders or the directors, as required by NC GS Sec 55-22 and 55-30.

(m) Horace Lowder has admitted transferring the egg production of Lowder Farms, of which he owns 12%, to All Star Foods, of which he owns 51%, *without consideration.* This transfer resulted in a decline of Lowder Farms gross income from $1,800,000 to about $50,000 in the course of one year.

(n) During the period of time when this transfer was occurring, the net worth of Lowder Farms decreased by $69,000 and the net worth of All Star Foods increased by $465,000.

(o) Horace Lowder admitted having borrowed, on numerous occasions, from *all* of the corporate defendants, at one time or another, and admitted that All Star Hatcheries, which is owned wholly by him and his wife, had also borrowed from the other defendants.

(p) Horace Lowder also purchased 3,800 acres of land in Beaufort County, North Carolina, and various tracts in Stanly County, North Carolina, personally rather than on behalf of the corporations. Most, if not all, of these purchases were financed with corporate funds.

(q) He admitted that All Star Foods purchased 15,000 acres of land in Hyde County, North Carolina with money borrowed from All Star Industries, which he owns wholly. All Star Industries had borrowed the money from Horace Lowder personally, who in turn had borrowed it from All Star Mills, All Star Hatcheries, All Star Foods, and Lowder Farms. (Thus, the Hyde County property was purchased with these companies' money.)

(r) He admitted that this transaction resulted in a *net* interest income to him personally of ¼ of 1% of the principal outstanding, and that All Star Industries also received a net interest income of ¼ of 1%. Since he owns 100% of the shares of All Star Industries, the net result of the transaction, is that Horace Lowder makes ½ of 1% in interest on money loaned by All Star Foods, through him, to itself.

(s) None of the defendant companies has ever paid a dividend to any shareholder since Horace Lowder took over control of the companies, except that the I.R.S. contends that one of Horace Lowder's transactions with the companies has resulted in a constructive dividend to him personally of approximately $500,000.

* * *

16. In addition to the unlawful conduct described above, W. Horace Lowder has breached his fiduciary duties, and duties to prudently manage the business of the companies, in the following ways:

(a) Prior to 1960, Malcolm Lowder had received several

dividends on his stock in All Star Mills. In 1960 he received one dividend on his stock in Lowder Farms. Since 1960 he has not received any dividends from any of the companies in which he holds stock.

(b) The physical assets of Mills, Farms and their subsidiary and affiliated companies have been grossly neglected by the defendant Lowder for the past several years and continuing to the present time. Said defendant has failed and refused to repair or replace said assets so that at the present time most of the companies' business operations are being conducted with worn out, obsolete and otherwise inadequate equipment.

(c) In the Tax Court cases, the assets of the companies have been, and are continuing to be recklessly subjected to the risk of loss of millions of dollars over and above the amounts of federal tax liabilities which the company should reasonably expect to pay if defended by competent, legal and accounting professionals, rather than *pro se* by W. Horace Lowder.

* * *

20. If competent legal and accounting counsel is not retained for the companies for the tax court cases currently pending, there is a substantial and immediate risk that the companies will be irreparably harmed, by imposition of liabilities of millions of dollars in federal taxes.

21. This risk of loss creates an imminent danger of insolvency to the corporate defendants.

22. If W. Horace Lowder is allowed to retain control of the corporate defendants, and a receiver is not appointed, the corporate defendants may suffer irreparable harm, in that:

(a) Assets of the companies may continue to be converted to W. Horace Lowder's own beneficial use.

(b) Assets of the companies will be exposed to loss as a result of the Tax Court proceedings.

(c) Corporate financial, business, and other records required by law may not be kept.

(d) There will be a continual loss of revenues.

(e) The reputation and good will of the companies will be further injured.

(f) Plaintiffs will continue to be deprived of their preemptive rights to buy corporate stocks.

(g) The stockholdings of plaintiffs' will be unlawfully diluted.

(h) Plaintiffs will continue to be denied access to information about defendant companies to which they are entitled.

(i) Plaintiffs will continue to be deprived of any opportunity to elect directors and otherwise exercise and enjoy their rights as stockholders.

23. Defendant W. Horace Lowder's course of conduct is continuing and will continue so long as defendant has managerial control of the Lowder family companies.

24. Plaintiffs have no adequate remedy at law to prevent such continuing mismanagement, waste of assets and loss of revenues.

* * *

27. The appointment of a Receiver for defendant corporations is necessary to preserve and prevent further depletion of their assets, and to prevent further unlawful acts of W. Horace Lowder, as described above.

28. Because of the facts described above, the corporate defendants are in imminent danger of becoming insolvent.

The extensive findings by the trial court amply support the findings and conclusion that these corporations are in imminent danger of insolvency.

Furthermore, even if the findings did not support a determination that insolvency was imminent within the purview of the statute, it is elementary that a Court of Equity has the inherent power to appoint a receiver, notwithstanding specific statutory authorization. *Skinner v. Maxwell*, 66 N.C. 45 (1872).

The appointment of receivers is one of the oldest remedies

known to chancery, *Blum Bros. v. Girard Nat. Bank*, 248 Pa. 148, 93 A. 940 (1915), and one of the most common instances in which a receiver may be appointed is where it is necessary "to preserve, *pendente lite*, specific property which is the subject of litigation." *Sinclair v. Moore Central Railroad Co.*, 228 N.C. 389, 395, 45 S.E. 2d 555, 560 (1947). The remedy is considered a harsh one and should be utilized only with attendant "caution and circumspection." 65 Am. Jur. 2d "Receivers" §27 (1972). There should be fraud or "imminent danger of the property being lost, injured, diminished in value, destroyed, squandered, wasted, or removed from the jurisdiction." *Id.*

Appointing a receiver for a going, solvent corporation is an especially rare and drastic remedy. *Id.* §§ 59, 60. However, it has been found to constitute a proper remedy in cases where there is fraud or gross misconduct in the management of the corporation., *Id.* §§ 64, 66; where there is incapacity or neglect on the part of those operating it, *Id.* § 60; where there is evidence of diversion of corporate funds, *Hall v. Nieukirk*, 12 Idaho 33, 85 P. 485 (1906); and even where there is a refusal to permit inspection of corporate books, at least when such a refusal occurs in combination with the existence of other grounds. *Baille v. Columbia Gold Mining Co.*, 86 Or 1, 166 P. 965 (1917) (subsequent history deleted).

We hold that even if the corporate defendants were not in imminent danger of insolvency within the purview of G.S. 1-507.1, the findings of fact support numerous other grounds for the appointment of receivers by the trial court in the exercise of its inherent equitable powers, and that the appointment of the receivers in the instant case was without error.

[2] Even so, defendants contend that the initial order was void because certain shareholders were not given notice of the proceedings to secure the appointment of the receivers. Defendants argue that these shareholders were denied their due process rights to notice prior to a court proceeding, the outcome of which would affect their property interests. Assuming, *arguendo*, that the corporate defendants have standing to assert the constitutional rights of third persons, we nevertheless find no error. There is no requirement in the statutes, either in the provisions governing the appointment of receivers, G.S. 1-502, 1-507 *et. seq.*, or in the provisions governing derivative shareholder suits, G.S. 55-55, that notice be given to persons who are not parties to the action. Furthermore, the

allegedly aggrieved shareholders moved, prior to the initial hearing on plaintiffs' application for appointment of a receiver, to dismiss the application, and noted specifically that they had received and read a copy of plaintiffs' complaint. Such action on the part of the shareholders admits of actual prior notice of the proceedings and amounts to a waiver of error, if one exists, in the failure of the plaintiffs to give notice. *Grieve v. Huber*, 38 Wyo. 223, 266 P. 128 (1928). We, therefore, hold that the trial court's order appointing receivers is not void for failure to notify third persons of the proceedings.

[3] Defendants next maintain that the trial judge erred in reserving jurisdiction of the cause in himself, and that all orders entered by him after his rotation out of the Twentieth Judicial District are void for lack of jurisdiction. The record in this case indicates that while federal bankruptcy proceedings were pending, Judge Seay entered an order retaining jurisdiction in himself of all matters in this action, notwithstanding his rotation out of the Twentieth District. Subsequently, after jurisdiction of the case was returned to state court, Judge Seay, sitting in District Nineteen-A, entered orders approving payment of certain fees to attorneys and accountants. Defendants now contend that Judge Seay lacked authority to reserve jurisdiction in himself.

The resolution of this issue turns on the effective date of the following amendment to G.S. 1-501:

> Any resident judge of the Superior Court Division or any nonresident judge of the Superior Court Division assigned to a district who appoints receivers pursuant to the authority granted [in this section] while holding court in that district may, in his discretion, retain jurisdiction and supervision of the original action, of the receivers appointed therefor and of any other civil actions pending in the same district involving the receivers, following his rotation out of the district.

The amendment is found in the 1979 Session Laws, Chapter 525, section 13. The act was ratified on 8 May 1979, almost four months following the institution of this action. An examination of the relevant portions of Chapter 525 reveals the following:

> Sec. 12. Section 1 of this act shall become effective January 1, 1980, and shall not apply to causes of action

arising prior to January 1, 1980. The remaining sections of this act are effective upon ratification, except they shall not affect pending litigation and Section 4 shall apply only to the administration of the estates of decedents dying on or after the effective date.

Sec. 13. G.S. 1-501 as the same appears in the 1977 Cumulative Supplement to Volume 1A (1975 Replacement) of the General Statutes is hereby amended on line 5 to add a new sentence to read as follows:

"Any resident judge of the Superior Court Division or any nonresident judge of the Superior Court Division assigned to a district who appoints receivers pursuant to the authority granted hereby while holding court in that district may, in his discretion, retain jurisdiction and supervision of the original action, of the receivers appointed therefor and of any other civil actions pending in the same district involving the receivers, following his rotation out of the district."

Sec. 14. Section 13 of this act shall become effective upon ratification.

In the General Assembly read three times and ratified, this the 8th day of May, 1979.

The question thus presented is whether section 12 governs the determination of the effective date of section 13, or whether section 14 is the applicable section for that determination. In our view, it is the latter section which controls. Where two statutory provisions appear, a special or particular provision will control over a general one. *Phillips v. Shaw*, 238 N.C. 518, 78 S.E. 2d 314 (1953). It is apparent to us that section 14 applies specifically to the preceding section, while section 12 refers to all other portions of the chapter. To hold otherwise renders section 14 applicable to *no* section and therefore mere surplusage. It cannot be presumed that the legislature intended to enact meaningless provisions. *Jackson v. Guilford County Board of Adjustment*, 275 N.C. 155, 166 S.E. 2d 78 (1969). Since the legislative grant of authority took effect, pursuant to section 14, upon ratification on 8 May 1979 and was applicable to pending actions, Judge Seay was not divested of jurisdiction for lack of statutory authority.

[4] Defendants contend that the trial court had no jurisdiction to

proceed in this matter after the corporate defendants gave notice of appeal from the court's overruling their objection to the court's jurisdiction. They argue that all orders entered subsequent to the notice of appeal are void. Plaintiffs maintain that the jurisdiction of the trial court continued unhindered until the appeal was perfected. In support of this contention, they rely upon the following language in G.S. 1-294:

> When an appeal is perfected as provided by this article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein . . . .

Plaintiffs further bolster their argument with citations to two cases, both of which support the notion that "perfection" of an appeal is something more than the mere giving of notice of appeal. *Coates v. Wilkes*, 94 N.C. 174 (1885); *Wilson v. Seagle*, 84 N.C. 110 (1880). As the Court stated in *Coates v. Wilkes, supra*, "It is settled that the order appealed from did not pass out of the jurisdiction and beyond the control of the Court, until the appeal was perfected." *Id.* at 178.

The well-established rule of law is that "an appeal from a judgment rendered in the Superior Court suspends all further proceedings in the cause in that court, pending the appeal." *Harris v. Fairly*, 232 N.C. 555, 556, 61 S.E. 2d 619, 620 (1950). It is also well settled that an appeal, even of an interlocutory order, "operates as a stay of all proceedings in the Superior Court relating to issues included therein until the matters are determined in the Supreme Court." *Veazey v. City of Durham*, 231 N.C. 357, 363, 57 S.E. 2d 377, 382 (1950); *Combes v. Adams*, 150 N.C. 64, 63 S.E. 186 (1908). While we agree with plaintiffs that "perfecting" an appeal means more than merely giving notice of appeal, we have held that the perfection, or docketing, of an appeal "relates back to the time of trial; [and] operates as a stay of proceedings within the meaning of the statute, and brings the . . . cause within the principle of the cases which hold that the court below is without power to hear and determine questions involved in an appeal pending in the Supreme Court." *Pruett v. Power Co.*, 167 N.C. 598, 600, 83 S.E. 830, 831 (1914).

Plaintiff's reliance, therefore, on *Coates v. Wilkes, supra*, and *Wilson v. Seagle, supra*, is misplaced. In both of these cases, the appealing party gave notice of appeal and then allowed the time for perfecting the appeal to elapse. Upon the trial court's proceeding further to determine matters, the appealing party objected on the

grounds that the taking of the appeal removed the case from the jurisdiction of the trial court, and hence any subsequent proceedings would be void. This Court in essence held in both cases that the appealing party "did not *take* an appeal within the meaning of the statute, and that by his laches and subsequent conduct, he has lost the right, now, to do so." *Wilson v. Seagle, supra,* at 114. Similarly, the Court in *Pruett v. Power Co., supra,* observed,

> In various cases where the construction of [G.S. 1-294] was directly or indirectly involved, the Court has held that an appeal is not to be considered as perfected until it is duly docketed in the Supreme Court; but in all of them, so far as examined, the questions presented were either on the right of this Court to take cognizance of some matter embraced in the appeal before docketing the record or the time within which the appellant had the right to docket had expired, and the parties were allowed to proceed in the court below on the idea that the appeal had been either temporarily or finally abandoned or there was some omission or laches on the part of the appellant which were considered as a waiver of his rights in the premises.

Id. at 599, 83 S.E. at 831.

In the instant case, defendants excepted and gave oral notice of appeal on 9 May 1980 from Judge Seay's overruling their objections to the court's jurisdiction to hear matters outside the Twentieth Judicial District. The ruling of the trial court affected a substantial right of defendants and was therefore appealable. G.S. 1-277; *Steele v. Moore-Flesher Hauling Co.,* 260 N.C. 486, 133 S.E. 2d 197 (1963); *Veazey v. City of Durham, supra; Martin v. Flippin,* 101 N.C. 452, 8 S.E. 345 (1888). Since defendants' subsequent perfection of the appeal related back to the time of the giving of notice of appeal, all orders entered by Judge Seay after defendants' notice of appeal on 9 May 1980 are void for want of jurisdiction. Thus the orders entered 15 May 1980 approving the payment of fees and expenses in this case must be vacated.

We turn then to the assignments of error having to do with the contempt phase of the hearing.

Our consideration of the trial court's handling of the contempt matter requires three inquiries. First, we must determine whether the contempt proceedings are properly before us for review. Second,

we must consider whether we are dealing with criminal or civil contempt to determine whether the proper procedure was applied. Third, we must determine whether there is sufficient evidence to support a finding of contempt.

[5] On the first point, defendant contends that his oral notice of appeal of the 21 February contempt order ousted jurisdiction from the trial court as to any further contempt proceedings in the same matter. Plaintiff argues that jurisdiction was not lost until the appeal was properly perfected, and that the order entered at the 28 February hearing imposing sanctions is valid.

In *Willis v. Duke Power Company*, 291 N.C. 19, 229 S.E. 2d 191 (1976), we held that a contempt order to compel the production of documents under the discovery provision of the Rules of Civil Procedure could be appealed upon entry even though sanctions were not imposed. Here the requirement to produce documents, though not under the Rules of Civil Procedure, is so factually similar that we find *Willis* to be controlling. As we noted above, perfection of an appeal relates back to the taking of the appeal, and the jurisdiction of the trial court is divested from the date that notice of appeal was given. *Veazy v. City of Durham, supra.* We, therefore, hold that when oral notice of the appeal was given in open court on 21 February, the court lost jurisdiction to take further action on the contempt matter. The trial court's order imposing a sanction which is based on the second contempt hearing is null and void.

With only the 21 February hearing before us, we turn to the question of the characterization of the contempt.

[6] In the context of compelled production of documents, a contempt order has been characterized as an amalgam of civil and criminal contempt. *Willis v. Duke Power Company, supra.* Although this characterization occurred before passage of the new contempt statutes, those statutes continue to recognize that the same act can constitute both civil and criminal contempt. G.S. 5A-21(c). G.S. 5A-21 provides that "[f]ailure to comply with an order of a court is a continuing civil contempt." Similarly, G.S. 5A-11(3) provides that "[w]ilful disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution" constitutes criminal contempt. Since the contempt proceeding in this case can rest on either the criminal or civil foundations, we conclude that compliance with either the procedural requirements

of civil contempt or criminal contempt will validate the proceedings.

We first consider the procedural requirements of civil contempt. The Court of Appeals decided that the court can only issue a civil contempt show cause order on the basis of a sworn statement or affidavit. G.S. 5A-23. It then decided that, since it could find no evidence in the record of sworn statement or affidavit prior to the 12 February issuance of the show cause order, it could not uphold the proceeding as one for civil contempt.

The Court of Appeals' analysis of the new statute is correct. However, when the contemnor came into court to answer the charges of the show cause order, he waived procedural requirements. *Safie Manufacturing Company v. Arnold*, 228 N.C. 375, 45 S.E. 2d 577 (1947); *In re Odum*, 133 N.C. 250, 45 S.E. 569 (1903).

Finally, we come to the question of the sufficiency of the evidence to support the contempt order. As the Court of Appeals noted, the contempt order can only be upheld on either of two evidentiary bases: (1) the Bahner affidavit or (2) the admission of defendant's counsel in open court that defendant would defy the order of the court to turn over his personal income tax returns[1] by asserting his fifth amendment privilege against self-incrimination.

[7] The Court of Appeals correctly dealt with the first of these bases. It recognized that the North Carolina Constitution as well as the Federal Constitution preserve the right of confrontation of the witnesses against an accused and that this right is applicable to contempt proceedings. *Cotton Mills v. Local 578*, 251 N.C. 218, 111 S.E. 2d 457 (1959), *cert. denied*, 362 U.S. 941, 80 S.Ct. 806, 4 L.Ed. 2d 770 (1960). The Court of Appeals found that defendant in this case had made a timely assertion of the right. Thus, reliance on the affidavit cannot support a finding of contempt.

[8] There remains the question of whether defendant's refusal to comply with the court's order to produce tax returns was protected

[1]Defendant only asserted his right against self-incrimination as to the tax returns at the 2 February hearing. He later asserted the privilege as to other material in the second hearing. Only the assertion of the privilege covering the tax returns is properly before this Court.

by the fifth amendment proscription against compulsory self-incrimination.

The fifth amendment to the Unites States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." Although the fifth amendment privilege against compulsory testimonial self-incrimination is ordinarily asserted in criminal proceedings, its protection also extends to civil proceedings where a party may be subjected to imprisonment. *McCarthy v. Arndstein*, 266 U.S. 34, 45 S.Ct. 16, 69 L.Ed. 158 (1924); *Allred v. Graves*, 261 N. C. 31, 134 S.E. 2d 186 (1964).

Both the state and federal courts have long recognized and applied the important constitutional prohibition against compulsory testimonial self-incrimination. *Couch v. United States*, 409 U.S. 322, 34 L.Ed. 2d 548, 93 S.Ct. 611 (1973); *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966); *Malloy v. Hogan*, 378 U.S. 1, 12 L.Ed. 2d 653, 84 S.Ct. 1489 (1964); *Counselman v. Hitchcock*, 142 U.S. 547 35 L.Ed. 1110, 12 S.Ct. 195 (1892). This consitutional provision grew out of our abhorrence of and desire that there be no "recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality." *Ullmann v. United States*, 350 U.S. 422, 428, 100 L.Ed. 511, 519, 76 S.Ct. 497, 501 (1956).

Many of the earlier cases which considered the fifth amendment prohibition against compelled testimonial incrimination contained language to the effect that the purpose of the amendment was to protect personal privacy. *Couch v. United States, supra; Murphy v. Waterfront Commission*, 378 U.S. 52, 12 L.Ed. 2d 678, 84 S.C. 1594 (1964); *Davis v. United States*, 328 U.S. 582, 90 L.Ed. 1453, 66 S.Ct. 1256 (1946); *Wilson v. United States*, 221 U.S. 361, 55 L.Ed. 771, 31 S.Ct. 538 (1911); *Boyd v. United States*, 116 U.S. 616, 29 L.Ed. 746, 6 S.Ct. 524 (1886). This rational was first set out in *Boyd v. United States, supra*. As the Court said in that case, "The principles laid down in this opinion affect the very essence of constitutional liberty and security . . . . [T]hey apply to all invasions, on the part of the government and its employees, of the sanctity of a man's home and the privacies of life." *Id.* at 630, 29 L.Ed. at 749, 6 S.Ct. at 532.

We find similar language in *Couch*, but there the Court more narrowly focused on the requirements that there must be compelled testimonial self-incrimination before the fifth amendment

protections are triggered.

In *Couch* the Internal Revenue Service issued a subpoena duces tecum to Couch's independent acountant to produce records which had been delivered over a number of years to the accountant for his preparation of Couch's income tax returns. Couch unsuccessfully invoked his fifth amendment right against self-incrimination in the United States District Court of Virginia, and the Fourth Circuit Court of Appeals affirmed. The United States Supreme Court allowed petition for certiorari. In affirming the lower courts, the Supreme Court, emphasizing the fact that the subpoena was directed to petitioner's independent accountant rather than to petitioner, in part, stated:

> It is important to reiterate that the Fifth Amendment privilege is a *personal* privilege: it adheres basically to the person, not to information that may incriminate him. As Mr. Justice Holmes put it: "A party is privileged from producing the evidence but not from its production." *Johnson v. United States*, 228 U.S. 457, 458, 57 L.Ed. 919, 33 S.Ct. 572 (1913). The Constitution explicitly prohibits compelling an accused to bear witness "against himself": it necessarily does not proscribe incriminating statements elicited from another. Compulsion upon the person asserting it is an important element of the privilege, and "prohibition of compelling a man . . . to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from *him*," *Holt v. United States*, 218 U.S. 245, 252-253, 31 S.Ct. 2, 6, 54 L.Ed. 1021 (1910) (emphasis added). It is extortion of information from the accused himself that offends our sense of justice.
>
> * * *
>
> The divulgence of potentially incriminating evidence against petitioner is naturally unwelcome. But petitioner's distress would be no less if the divulgence came not from her accountant but from some other third party with whom she was connected and who possessed substantially equivalent knowledge of her business affairs. The basis complaint of petitioner stems from the fact of divulgence of the possibly incriminating information, not from the manner in which or the person from whom it

> was extracted. Yet such divulgence, where it did not coerce the accused herself, is a necessary part of the process of law enforcement and tax investigation.

Id. at 328-29, 34 L.Ed. 2d at 554-55, 93 S.Ct. at 616.

Couch was followed by *Garner v. United States*, 424 U.S. 648, 47 L.Ed. 2d 370, 96 S.Ct. 1178 (1976). There defendant was charged with conspiracy to violate federal gambling statutes. At trial the government, over defendant's fifth amendment objection, was permitted to introduce his income tax returns in which defendant had reported his occupation as "professional gambler." Defendant was convicted, and the Ninth Circuit Court of Apeals affirmed on the ground that defendant failed to timely assert his fifth amendment privilege. The Supreme Court affirmed, reasoning that the disclosures were made at the time the documents were prepared and were not at that time *compelled* by the government. Since defendant did not timely claim his fifth amendment privilege, it was in effect waived. This was so even though defendant might have been subjected to prosecution for willful failure to file a return or was subject to be summoned to testify or produce records pursuant to 26 U.S.C. Section 7602(2). In reaching its decision, the Court noted that the scope of the fifth amendment is narrowly restricted to matters in which the government seeks testimony which will subject the giver to imprisonment.

Fisher v. United States, 425 U.S. 391, 48 L.Ed. 2d 39, 96 S.Ct. 1569 (1976), involved two cases consolidated on appeal in which the government had subpoenaed tax returns and tax records in the hands of the defendants' attorneys. Case No. 74-611 involved the defendant's tax returns and involved work papers and correspondence relative to the defendant's returns. The subpoena in Case No. 74-18 was directed to documents containing analyses by the accountant of the taxpayer's income and expenses as derived from checks and deposit slips. The Fifth Circuit Court of Appeals reversed the enforcement of the order in Case No. 74-611, and the Third Circuit affirmed the enforcement order in Case No. 74-18. The Supreme Court granted certiorari and affirmed in Case No. 74-18 and reversed in Case No. 74-611. In so holding, the Court clearly limited the individual privacy claim under the fifth amendment to those cases which involved *compelled testimonial incrimination.*

After deciding in Case No. 74-18 that the documents in the hands of the defendant's lawyers were not protected by the attorney-

client privilege unless the defendant himself could have asserted the fifth amendment privilege, the Court turned to a consideration of the elements necessary to raise fifth amendment protection. Although the Court found that the materials sought were testimonial, it concluded that the *contents* could not activate the fifth amendment protection because the element of *compulsion* was lacking. In so finding, the Court used this language: ". . . The preparation of all of the papers sought in these cases was wholly voluntary, and they cannot be said to contain compelled testimonial evidence either of the taxpayers or of anyone else." *Id.* at 409, 48 L.Ed. 2d at 55, 96 S.Ct. at 1580. In other words, the Court concluded that at the time the contents of all of the documents sought were prepared, there was no physical or moral compulsion exerted upon the accused or any other person who prepared the tax returns or other documents. However, the Court recognized that the *production* of the documents was compelled by subpoena and that compliance with the subpoena had the communicative effect of conceding the *existence* of the subpoenaed documents and their possession by the taxpayer. The production would also amount to testimonial authentication of the documents by expressing the taxpayer's belief that the papers produced were the same as those described in the subpoena.

The Court then concluded that the collateral testimony as to the *existence* of the papers was so inconsequential that it did not rise to the level of the fifth amendment prohibition. Turning to the question of whether the production of the documents constituted compelled testimony by authenticating the tax returns, the Court reasoned that since the records were not prepared by defendant his production of the records could not be an authentication because he could not authenticate the work of another person. The Court therefore held that the required testimonial element was not met by the production of the records and tax returns and thus the fifth amendment privilege did not arise. The Court expressly reserved the question of whether the same result would have been reached had the taxpayer prepared his own returns.

In summary, the recent cases represented by *Fisher* and *Garner* effectively destroyed the rationale of *Boyd v. United States, supra,* to the effect that the fifth amendment's proscription against self-incrimination was based on the individual's right to privacy. These later cases hold that the fifth amendment's protection is against "compelled testimonial self-incrimination, not [the disclo-

sure of] private information." *U.S. v. Nobles*, 422 U.S. 225, 233 n. 7, 45 L.Ed. 2d 141, 151 n. 7, 95 S.Ct. 2160, 2167 n. 7 (1975). Both *Garner* and *Fisher* stand for the proposition that the *contents* of subpoenaed documents cannot support the required element of compulsion unless the physical or moral force was exerted at the time the documents were prepared thereby making their preparation involuntary. The Court in *Fisher* nevertheless recognized that the forced production of documents could involve two testimonial aspects in that (1) production is implicit testimony of the existence of the documents and (2) production can be construed as some evidence of the authenticity of the documents produced, *i.e.*, that the documents produced are the ones described in the subpoena. *Fisher v. United States, supra.*

In the case before us we find no evidence tending to show that defendant was under any physical or mental coercion at the time he prepared his tax returns. We therefore hold that defendant cannot rely upon the *contents* of the tax returns to support his claim of fifth amendment protection. *Fisher v. United States, supra; Garner v. United States, supra.*

[9] Finally, it is unquestioned that the production of the tax returns was compelled by the subpoena. Therefore, we turn to the question of whether the testimonial aspects of compulsory production of the tax returns support a claim of fifth amendment privilege.

Here defendant does not take the position that the returns do not exist. To the contrary, he implicitly admits the existence of the tax returns by arguing that information in the tax returns might be incriminating as a "link in the chain." However, the question of whether the production of the tax returns amounts to such authentication as to be compelled testimonial self-incrimination presents a more difficult question.

The authentication rationale "appears to be the prevailing justification for the fifth amendment's application to documentary subpoenas." *Fisher v. United States, supra* at 412, n. 12, 48 L.Ed. 2d at 57, n. 12, 96 S.Ct. at 1582, n. 12. Defendant's position relying on this rationale is supported by a rather loosely reasoned statement at § 2264 of 8 Wingmore on Evidence (McNaughton rev. 1961):

> (1) It follows that the production of *documents* or *chattels* by a person (whether ordinary witness or party witness) in response to a subpoena, or to a motion to order

> production, or to other form of *process relying on his moral responsibility for truthtelling,* may be refused under the protection of the privilege. This is universally conceded. For though the documents or chattels thus sought be not oral in form, and though they be already in existence and not desired to be first written and created by a testimonial act or utterance of the person in response to the process, still there is a testimonial disclosure implicit in their production. It is the witness' assurance, compelled as an incident of the process, that the articles produced are the ones demanded. No meaningful distinction can be drawn between a communication necessarily implied by legally compelled conduct and one authenticating the articles expressly made under compulsion in court. Testimonial acts of this sort - authenticating or vouching for pre-existing chattels - are not typical of the sort of disclosures which are caught in the main current of history and sentiments giving vitality to the privilege. Yet they are within the borders of its protection.

We are more inclined to accept Judge Friendly's criticism of this rationale which appears in 37 U. Cin. L. Rev. 671, 701-02 (1968) as follows:

> The argument that compulsory production involves an implicit testimonial disclosure, to wit, "the witness' assurance...that the articles produced are the ones demanded," which led Wigmore to grudging acceptance of the fifth amendment holding in *Boyd,* reeks of the oil lamp. Yet it is only this assumed authentication that brings the case within the words of the amendment "to be a witness against himself." The prosecution wants the chattels, typically documents; it will find its own ways for authenticating them. The dilemma thus is not of self-accusation and perjury but of self-accusation and refusal to respect a court's process. It takes a heart much more hemophilic than mine to find cruelty in this. Although the Court's recent qualified rejection of the rule banning searches for "mere evidence" greatly reduces the practical importance of *Boyd* with respect to ordinary chattels, the Court declined to decide how far writings could be the subject of a search and seizure. Whatever limits the fourth

> amendment may be held to to impose on the seizure of writings, there is no justification for a similar restriction with respect to the fifth. The writings typically sought to be produced are not the outpourings of an individual's soul, for which first amendment protection against subpoena may be in order, but rather the books and records of an enterprise that is criminal or has been unlawfully conducted.
>
> . . . While the *Boyd* decision was doubtless supported by precedent at common law, I agree with Professor Mayers' statement that: "However one looks at it, no practical reason connected with fairness of procedure can be found for this extraordinary privilege of withholding needed documentary evidence from a court." Any proper considerations can be dealt with under fourth amendment protection against dragnet subpoenas and first amendment guarantees against inquiry into improper subjects.

Tax returns are not completely private documents because they must be filed with the government. 26 U.S.C. §§ 6001, 6011, 6012. N.C.G.S. 105-154. On the other hand, the information in these returns is not completely public. We are not at this point concerned with the contents of the tax returns since we have held that under the facts of this case the contents do not activate the fifth amendment protection; however, we consider instead how the hybrid nature of the documents affects the question of implicit authentication. The federal statute, 26 U.S.C. 6103, which provides for the confidentiality of the returns is riddled with exceptions which permit an individual's tax return to be examined, *inter alia*, by the Chief of Staff of the Joint Committee on Taxation, specially authorized committees of the House of Representatives, agents of committees of the House of Representatives, the President of the United States, the Department of the Treasury, and by the Department of Justice. The statute also permits disclosures of information concerning an individual's tax returns in judicial and administrative tax proceedings.

The documents sought here are not strictly private documents such as an individual's diary or personal letters. To the contrary they are, at most, semi-private documents which the law requires to be filed. The authentication resulting from defendant's compelled production of the documents adds little, if anything, to the quantum of knowledge possessed by the court. *See Fisher v. United States,*

supra. We therefore hold that the testimonial aspect involved in producing defendant's tax returns would not be sufficient to rise to the level of fifth amendment protection.

We do not reach the question of whether the privilege might be asserted had the documents sought been purely private papers.

The decision of the Court of Appeals in No. 67 is reversed and the cause is remanded to that court for further remand to the Superior Court Division, Seay, J., having properly retained jurisdiction pursuant to G.S. 1-501 (1979 Cum. Supp.), for proceedings in accordance with this opinion.

No. 112 is remanded to the Superior Court Division, Seay, J., having properly retained jurisdiction pursuant to G.S. 1-501 (1979 Cum. Supp.), for further proceedings consistent with this opinion.

No. 67 - Reversed.

No. 112 - Affirmed in part; vacated in part.

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

STATE OF NORTH CAROLINA v. MARK SUMMITT

No. 41

(Filed 6 January 1981)

1. Criminal Law § 115— instructions on lesser included offense

The trial judge must submit and instruct the jury on a lesser included offense when, and only when, there is evidence from which the jury can find that a defendant committed the lesser included offense; conversely, when all the evidence tends to show that defendant committed the crime charged in the bill of indictment and there is no evidence of the lesser included offense, the court should refuse to charge on the lesser included offense.

2. Rape § 5— first degree rape case — submission of second degree rape

Evidence would be sufficient to carry a case to the jury on a charge of second degree rape of a twelve-year-old child pursuant to former G.S. 14-21 when the evidence fails to support any one of the elements of first degree rape enumerated in G.S. 14-21(1)(a), to wit, (1) the prosecuting witness is less than twelve years of age, (2) the defendant is more than sixteen years of age, (3) the virtuous character of the prosecuting witness.

3. Criminal Law § 106— sufficiency of evidence to overrule nonsuit

The standard to determine whether a charge should be submitted to the jury is the "more than a scintilla of evidence" test.

4. Rape § 6.1— first degree rape case — submission of second degree rape —insufficient evidence — harmless error

In a prosecution for first degree rape of an eleven-year-old girl, medical testimony which indicated that the victim had engaged in sexual intercourse prior to an examination a year after the incident in question and testimony by the prosecutrix that the rape did not cause any bleeding was insufficient to permit the jury to find that the victim was not virtuous at the time of the alleged rape so as to support the court's submission of the lesser offense of second degree rape. However, the court's erroneous submission of second degree rape was not prejudicial to defendant since the jury's verdict finding defendant guilty of second degree rape implicitly rejected defendant's sole defense that he did not commit the act upon which the charge was based, all the other evidence pointed to a crime of first degree rape, and the submission of the lesser included offense was thus favorable to defendant.

5. Rape § 5— first degree rape — eleven year old victim — sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution for first degree rape where the prosecuting witness testified that defendant had intercourse with her on or about the Friday before Easter in 1978, that she was born on 18 November 1966 and therefore was under the age of twelve at that time, and that she had never had sexual intercourse with anyone prior to the incident in question, and where the fact that defendant was over sixteen years of age was not contested.

6. Indictment and Warrant § 17.2; Rape § 6— instructions — failure to limit jury to date in indictment — no denial of fair trial

In a prosecution for rape upon an indictment which alleged that the crime occurred on 24 March 1978, defendant was not denied a fair trial because of the court's failure to limit the jury's consideration to the specific date charged in the indictment where a contextual reading of the record makes it clear that the jury's consideration of the crime was restricted to defendant's actions on or about 24 March 1978, the record reveals nothing indicating that defendant was surprised or hampered by any attempt of the State to alter the date charged in the bill of indictment, and defendant squarely met the State's evidence concerning his actions on or about 24 March 1979.

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

Justice EXUM dissenting.

Justice COPELAND joins in the dissenting opinion.

ON petition for discretionary review of decision of the Court of Appeals, 45 N.C. App. 481, 263 S.E. 2d 612, finding no error in the

trial before *Burroughs, J.*, at the 21 May 1979 Session of GASTON Superior Court.

Defendant was charged in bill of indictment number 79CRS 5134 with the first-degree rape of his eleven-year-old niece, Sherry Lynn Knight, He was also charged with the second-degree rape of the same person in bill of indictment number 79CRS5133. The charges were consolidated for trial, and defendant entered a plea of not guilty to each charge. The indictment for second-degree rape in indictment number 79CRS5133 is not before us on this appeal since the jury returned a verdict of not guilty on that charge.

The prosecuting witness testified that on or about 24 March 1978, defendant came to her home and carried her to his home. Defendant told her at that time that he and his wife were going to take her to buy an Easter dress. Upon arriving at defendant's home, she discovered that his wife was not at home, and shortly thereafter defendant proceeded to have intercourse with her. Sherry testified that she had never had intercourse before that date and that she did not tell her mother about this incident until sometime in March, 1979. After she told her mother of this assault, her mother called the police, and Sherry related substantially the same facts to the police. The witness's mother and police officers corroborated the prosecuting witness's testimony by relating statements that she made to them on that day.

A medical examination performed in March, 1979, indicated that the prosecuting witness had engaged in intercourse at some prior time.

Defendant testified that he had never transported the prosecuting witness anywhere unless someone else was in the car and that his wife was with him when they picked Sherry up on the date in question. Defendant offered corroborative testimony and also offered evidence of his good character.

In rebuttal, the State offered a witness who testified concerning a conversation with the prosecuting witness in which she told the witness of an attack upon her by defendant.

On the charge of first-degree rape on or about 24 March 1978, the trial judge submitted the possible verdicts of guilty or not guilty of first-degree rape, guilty or not guilty of second-degree rape, guilty or not guilty of assault with intent to commit rape and guilty

or not guilty of assault on a female. Before the trial judge instructed the jury, defendant objected to the submission of the lesser-included offenses. His objection was overruled. The jury returned a verdict of guilty of second-degree rape, and the trial judge entered judgment imposing a prison sentense of not less than ten nor more than fifteen years. Defendant appealed. The Court of Appeals in a unanimous opinion found no error, and defendant gave notice of appeal. In the alternative, defendant petitioned this Court for discretionary review pursuant to G.S. 7A-31. The Attorney General moved to dismiss defendant's appeal on 24 April 1980. We allowed defendant's petition for discretionary review on 3 June 1980 and denied the Attorney General's motion to dismiss on the same date.

Rufus L. Edmisten, Attorney General, by John R. B. Matthis, Special Deputy Attorney General, Alan S. Hirsch, Assistant Attorney General, and John F. Maddrey, Associate Attorney, for the State.

Frank Patton Cooke, by Kenneth B. Oettinger, for defendant appellant.

BRANCH, Chief Justice.

Defendant assigns as error the action of the trial judge in submitting to the jury, over his objection, the lesser-included offense of second-degree rape. Defendant argues that it was error to submit the lesser-included offense of second-degree rape because there was no evidence from which the jury could find that he committed that offense. Defendant was charged under the provisions of former G.S. 14-21, repealed effective 1 January 1980 which provided:

> 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 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 child under the age of 12 years, the punishment shall be death; or
>
> b. If the person guilty of rape is more than 16 years of age, and the rape victim had her re-

sistance 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.

(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.

The trial judge gave the following instructions to the jury on second-degree rape:

If you do not find the defendant guilty of first-degree rape, you must decide whether he is guilty of second-degree rape. Second-degree rape differs from first-degree rape in that it is not necessary for the State to prove that the defendant was more than sixteen years of age or that Sherry Lynn Knight was virtuous.

So, I charge that if you find from the evidence beyond a reasonable doubt that on or about March 24, 1978, Mark Summitt had sexual intercourse with Sherry Lynn Knight who at that time had not reached her twelfth birthday, it would be your duty to return a verdict of guilty of second-degree rape. However, if you do not so find or have a reasonable doubt as to one or both of these things, you will not return a verdict of guilty of second-degree rape.

* * *

Now, Members of the Jury, I want to instruct you as to second-degree rape because in my earlier charge to you I left out a portion of it.

If you do not find the defendant guilty of first-degree rape, you must decide whether he is guilty of second-degree rape. Second-degree rape differs from first-degree rape in that it is not necessary for the State to prove the defendant was more than sixteen years of age or that Sherry Lynn Knight was virtuous.

So, I charge that if you find from the evidence beyond a reasonable doubt that on or about March 24, 1978, Mark

Summitt had sexual intercourse with Sherry Lynn Knight who at that time had not reached her twelfth birthday, it would be your duty to return a verdict of guilty of second-degree rape.

[1] The trial judge must submit and instruct the jury on a lesser-included offense when, and only when, there is evidence from which the jury can find that a defendant committed the lesser-included offense. Conversely, when all the evidence tends to show that defendant committed the crime charged in the bill of indictment and there is no evidence of the lesser-included offense, the court should refuse to charge on the lesser-included offense. *State v. Redfern*, 291 N.C. 319, 230 S.E. 2d 152 (1976). The presence of evidence to support conviction of the lesser-included offense is the determinative fact. *State v. Harris*, 290 N.C. 681, 228 S.E. 2d 437 (1976).

[2] Evidence would be sufficient to carry a case to the jury on a charge of second-degree rape of a twelve-year-old child pursuant to G.S. 14-21 when the evidence fails to support any one of the elements of first-degree rape enumerated in G.S. 14-21(1)(a), to wit, (1) the age of the prosecuting witness is less than twelve years old, (2) the age of defendant is more than sixteen years old, (3) the virtuous character of the prosecuting witness. Neither defendant nor the State contends that the age of the prosecuting witness or the age of defendant is in doubt. The State contends however that evidence exists in the record to support the submission and an instruction on the lesser offense since there was sufficient evidence to permit the jury to find that the prosecuting witness was not virtuous.

The State emphasizes two aspects of the evidence to support the instruction on the lesser offense. First, the State points to the medical evidence which indicated that the victim had previously engaged in sexual intercourse. Second, the State notes that during the prosecuting witness's testimony she twice stated that the rape did not cause any bleeding. The State contends that this evidence is sufficient to support a reasonable inference that the prosecuting witness was not virtuous.

[3] The standard to determine whether a charge should be submitted to a jury is the "more than a scintilla of evidence" test. The classic statement of the test comes from Stacy, C.J., in *State v. Johnson*, 199 N.C. 429, 431, 154 S.E. 730, 731 (1930), where he states:

It is sometimes difficult to distinguish between evidence

> sufficient to carry a case to the jury, and a mere scintilla, which only raises a suspicion or possibility of the fact in issue. [Citations omitted.] The general rule is that, if there be any evidence tending to prove the fact in issue, or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury.

[4] The medical evidence relied upon by the State cannot be considered in support of its position. The examination of the prosecuting witness took place about a year after the incident and, while relevant to the issue of prior sexual activity as some evidence of defendant's guilt, the evidence is irrelevant as to the question of the victim's condition at the time of the alleged rape. Nothing in the doctor's testimony gives the jury a time frame from which it could reasonably conclude that the prosecuting witness was not virtuous on or before March, 1978.

The prosecuting witness's testimony that she did not bleed when she had her encounter with defendant does have some tendency to support the inference that she was not virtuous at the time of the incident. However, without more we cannot say that this meets the standard which would permit the case to go to the jury. It is common knowledge that a female person's hymen may be ruptured by many means other than sexual intercourse. Thus, in our opinion, the evidence relied upon by the State to support an inference that the prosecuting witness was not virtuous does not rise above a scintilla. The evidence may raise "a suspicion or conjecture," but it does not support "a fairly logical and legitimate deduction." Therefore, it was error for the trial judge to submit to the jury and instruct on the lesser-included offense of second-degree rape.

We turn to the question of whether the erroneous submission of the lesser-included offenses was so prejudicial to defendant as to warrant a new trial.

For many years, it has been the rule in this jurisdiction that the erroneous submission of a lesser-included offense not supported by the evidence is error, but not prejudicial error. *State v. Vestal*, 283 N.C. 249, 195 S.E. 2d 297 (1973); *State v. Stephens*, 244 N.C. 380, 93 S.E. 2d 431 (1956); *State v. Quick*, 150 N.C. 820, 64 S.E. 168 (1909); *State v. Alston*, 113 N.C. 666, 18 S.E. 692 (1893). However, in

State v. Ray, 299 N.C. 151, 261 S.E. 2d 789 (1980), a new dimension was added to this rule by applying the harmless error test to the facts and circumstances peculiar to each case.

The harmless error test, other than in constitutional matters, requires a finding of prejudice to a defendant when there is a reasonable possibility that had the error not been committed a different result would have been reached at the trial. *State v. Ray, supra*; G.S. 15A-1443.

In *Ray* the defendant was charged with first-degree murder and at the close of the evidence, the court submitted to the jury alternative verdicts of second-degree murder, manslaughter, involuntary manslaughter, not guilty and not guilty by reason of self-defense and defense of another. All the evidence disclosed that the defendant intentionally shot the victim and the only defense was self-defense and defense of another. Defendant was convicted of involuntary manslaughter, and his appeal presented the sole question of whether the court committed prejudicial error in submitting the alternative possible verdict of involuntary manslaughter.

In writing the majority opinion, Justice Exum (Justice Copeland dissenting, and Chief Justice Branch joining in the dissent) reasoned that the trial judge erred in distinguishing involuntary manslaughter from manslaughter and second-degree murder by focusing on intent to kill rather than the presence of an intentional act, thereby "short-circuiting" the jury's consideration of defendant's claims of self-defense and defense of another. The majority further reasoned that, if the jury had been required to squarely face the real issue of self-defense or the right to defend another, there was a reasonable possibility that a verdict of not guilty might have resulted. In reversing the Court of Appeals' finding of no prejudicial error, Justice Exum, *inter alia*, wrote:

> We emphasize that the result reached here should not be read as casting any doubt on the validity of earlier decisions of this Court or of the Court of Appeals. Our decision today does no more than recognize that a verdict based upon the erroneous submission of a lesser included offense not supported by the evidence does not invariably constitute error favorable to a defendant as a matter of law. Whether such an error is harmless depends instead upon the facts and circumstances peculiar to each case.

> We hold simply that the facts and circumstances peculiar to the instant case warrant a conclusion that, absent the erroneous sumission on involuntary manslaughter, there is a reasonable possibility that the jury would have returned a verdict of acquittal. The error complained of was therefore prejudicial to the defendant. G.S. 15A-1442 . . . .
>
> * * *
>
> The principle applied in our cases so far, then, is nothing more than an application of the well recognized doctrine of harmless error, now codified in G.S. 15A-1442 and G.S. 15A-1443. Stated simply, that doctrine provides that only those errors which prejudice a defendant will entitle him to relief on appeal. G.S. 15A-1442. And a defendant is "prejudiced" by errors other than constitutional ones only when "there is a reasonable possibility that, had the error in question not been committed, a different result [favorable to defendant] would have been reached at the trial . . . ." G.S. 15A-1443. Thus, where there is no reasonable possibility that a verdict more favorable to defendant would have occurred absent an erroneous instruction on a lesser offense not supported by the evidence, the error occasioned by such instruction is harmless. Conversely, where there does exist a reasonable possibility that defendant would have been acquitted had not the lesser offense been erroneously submitted, the error is prejudicial and defendant is entitled to appellate relief.

Id. at 167 and 163-64, 261 S.E. 2d at 799 and 797.

The instant case is not governed by *Ray*. The case *sub judice* is controlled by the rule set out in the original line of cases represented by *State v. Vestal, supra*. We are of the opinion that the language in *State v. Quick, supra*, accurately sets forth the rule and its rationale.

In *Quick* the defendant was charged with second-degree murder and convicted of voluntary manslaughter. On appeal he contended that there was no evidence to support the charge of the lesser-included offense. Although the Court found there was evidence to support the lesser charge, the Court in a dictum statement wrote:

> Suppose the court erroneously submitted to the jury a

> view of the case not supported by evidence, whereby the jury were permitted, if they saw fit, to convict of manslaughter instead of murder, what right has the defendant to complain? It is an error prejudicial to the State, and not to him. His plea of self-defense had been fully and fairly presented to the jury and rejected by them as untrue. What, then, was the duty of the jury, if there was no evidence of manslaughter? Clearly, under the law, they should have convicted the defendant of murder in the second degree.

Id. at 823-24, 64 S.E. at 170.

In instant case, defendant's sole defense was that he did not commit the act upon which the greater and lesser offenses were based. There is no contention that there was anything in the charge to the jury which clouded that defense. Thus, the jury's verdict finding him guilty of second-degree rape implicitly, but clearly, rejected his defense that he did not commit the act upon which the charges were based. When the jury discarded defendant's sole defense, all the evidence pointed to the greater crime of first-degree rape. Therefore, the submission of the lesser-included offense was not prejudicial to defendant but to the contrary was in his favor.

[5] Defendant next assigns as error the failure of the trial judge to grant his motion for judgment as of nonsuit. He contends that the State's evidence was so inconsistent that it could not support a verdict of guilty.

In support of his position, defendant relies upon the case of *State v. Williams*, 185 N.C. 685, 116 S.E. 736 (1923), which stands for the proposition that a case of this nature should be subjected to close examination and scrutiny by the jury.

A motion for judgment of nonsuit is correctly denied if there is competent evidence to support the allegations contained in the bill of indictment. Evidence tending to support these allegations must be considered in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn from such evidence. *State v. Bell*, 285 N.C. 746, 208 S.E. 506 (1974). Further, this Court has consistently applied the rule that contradictions and discrepancies are for the jury to resolve and the presence of such contradictions and discrepancies does not warrant nonsuit. *State v. McKinney*, 288 N.C. 113, 215 S.E. 2d 578 (1975). Here the prosecuting

witness testified that defendant had intercourse with her on or about Friday before Easter. She testified that she was born on 18 November 1966 and therefore was under the age of twelve years old at that time. She also testified that she had never had sexual intercourse with anyone prior to the incident on or about the Friday before Easter in the year 1978. The fact that defendant was over sixteen years of age was not contested.

Applying the above-stated rules of law, we hold that there was plenary evidence to carry the case to the jury.

Defendant contends that the trial judge erred by permitting the witness, Linda Harris, to testify concerning a conversation she had with the prosecuting witness in the fall of 1978. Defendant takes the position that the witness's testimony had the effect of altering the date fixed in the bill of indictment. Our careful examination of this record discloses that the witness, Linda Harris, made no statement as to the date of the alleged incident.

[6] Finally, defendant contends that he was denied a fair trial because of the court's instructions as to the date of the offense. He contends that, because the judge expressly instructed the jury as to the date of the July charge and did not so instruct on the 24 March charge, that the jury was left with the impression that the date of that crime was of no concern. The record reveals an exchange between defense counsel and the prosecutor concerning the July charge which necessitated the instruction there given. A contextual reading of the record makes it clear that the jury's consideration of the crime of which defendant stands convicted was restricted to his actions on or about 24 March 1978. The record reveals nothing indicating that defendant was surprised or hampered by any attempt of the State to alter the date charged in the bill of indictment. Defendant clearly had full opportunity to meet the State's evidence and did squarely meet the State's evidence concerning his actions on or about 24 March 1978. The jury chose to believe the evidence offered by the State.

We are constrained to note that because of the discrepancies and contradictions in the evidence and the long delay before the prosecuting witness made an accusation, a very close question was presented to the jury as to defendant's guilt or innocence. Nevertheless, our careful review of this record discloses no error warranting a new trial. Any relief for defendant must, therefore, come from the Executive Branch.

The decision of the Court of Appeals is

Affirmed.

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

Justice EXUM dissenting.

The majority, disturbed about the result in this case, suggests that defendant might get relief from the Executive Branch. Because of a serious legal error in the trial, prejudicial to defendant, but not really dealt with in the majority opinion, I see no need to defer the matter to the Governor. This Court should recognize the error and order a new trial on the basis of it.

Defendant was charged in two indictments with two different rapes of his niece, Sherry Knight. The first indictment alleged that a rape occurred on 24 March 1978. The second indictment alleged that a second rape occurred on 28 July 1978.

Easter in 1978 fell on March 26. The prosecuting witness, Sherry Knight, testified unequivocally that the March incident took place "the Friday before Easter last year." Thus she testified in accord with the indictment that the date of the March incident was March 24. She also tied the incident to the time that defendant, to whom she referred as "Uncle Mark," picked her up to go get her Easter dress. She said that on this occasion he took her back to his home where, being alone, they engaged in sexual intercourse. About "five or ten minutes later" defendant's wife, to whom Sherry referred as "Aunt Linda," came in and the three of them "went and got my Easter dress." Sherry was less clear as to the date of the July incident. She testified, in essence, that it happened sometime during the summer of 1978. During cross-examination when defendant was trying to elicit from Sherry the date of the July incident the district attorney stated before the jury that, in fact, he had picked out the date of 28 July and inserted it in the indictment. The witness, herself, according to the district attorney, did not arrive at that date. Sherry did not report these incidents until March 1979. She admitted that she "used to have a problem about lying, but it was before anything like this ever happened. I don't know who I lied to, or what I lied about. I remember I used to lie . . . ."

Defendant testified in his own behalf and offered corroborating witnesses. He denied being with the prosecuting witness on the

dates alleged in the indictments. With regard to the dates of July 26, 27 and 28 defendant's testimony tended to show that he, a gospel singer, was out of the state engaged in recording sessions in South Carolina. With regard to the March incident defendant's evidence tended to show as follows: On Tuesday, March 14, defendant and his wife picked up Sherry at her home and took her to Sears where they bought her an Easter dress as they had done the year before. After the purchase they returned Sherry to her home. On Friday, March 17, defendant and his wife again picked up Sherry at her home and took her back to defendant's home where she spent the weekend. Sherry slept in another bedroom with a friend of the Summitts on Friday and Saturday nights. Defendant was never alone with Sherry in his home during this weekend.

On this state of the evidence the trial judge instructed the jury regarding the July incident that the state "must be held to July 27, July 28, or July 29, 1978...." He gave no such limiting instructions with regard to the March incident, saying only that the jury would have to find that the March rape occurred "on or about March 24." Defendant was acquitted in the July case but convicted in the March case.

The Court of Appeals found no error in this instruction on the ground that defendant had offered an alibi defense for July 28 but not for March 24. The trial judge, reasoned the Court of Appeals, was not required to limit the jury's consideration to the date of March 24.

It is true that defendant did not attempt to establish where he was on March 24. He testified, in effect, that he was not with the prosecuting witness on that date and had never been with her at any time alone. Nevertheless because defendant admitted being with the prosecuting witness on several dates in March close to March 24, this date to me looms as crucial in the case based upon the March incident as does the date of July 28 in the case based upon that incident.

The prosecuting witness testified unequivocally that the rape occurred on March 24. She also tied the incident to the time defendant picked her up for the purpose of going to get her Easter dress. Defendant admitted being with the prosecuting witness when he bought her Easter dress but said that this was on Tuesday, March 14. He also admitted being with the prosecuting witness on March 17 through 21, the weekend she spent in defendant's home. At all

these times, according to defendant's testimony, someone other than the prosecuting witness and defendant was always present. Defendant and the prosecuting witness were never alone. Under the judge's instructions, however, the jury was permitted to consider whether the rape was committed on dates other than March 24. Left to roam in the month of March for possible dates upon which the rape might have occurred, the jury might well have seized upon the dates on which defendant admitted being with the prosecuting witness. This is particularly likely since the prosecuting witness tied the rape incident to the date when defendant bought her her new dress. By permitting the jury to consider these dates after defendant's evidence was in, the trial judge undermined defendant's legitimate reliance on the date alleged in the bill of indictment and testified to by the prosecuting witness, and thus ensnared defendant in his own defense. In other words, had the state's evidence indicated uncertainty as to the exact date, defendant would have been on notice that the state was not relying on March 24 but that it was relying on some date at or about that time. Defendant might well have chosen not to testify at all, because to do so truthfully he would have to admit that he was with the victim although he did not rape her at or about the time the state contended the rape occurred. When the indictment alleged and the state's evidence proved the date of the offense to have been March 24, defendant, in reliance thereon, chose to testify as he did: that he never raped her and was with her only on days other than the one alleged by the state and testified to by the alleged victim. By then permitting the jury to consider these other days, the trial court permitted, in effect, the jury to convict the defendant upon a theory which was not alleged in the bill of indictment and not supported by the state's evidence, but which was supported in part at least by defendant's own testimony.

Thus, in this case defendant, in considering what defense, if any, he could offer, was entitled to rely on the March 24 date. His testimony as to several March meetings with the prosecuting witness would not have been damaging to his defense but for the later instruction of the trial judge. Given that the defendant based his defense not only upon the fact that he did not rape the prosecuting witness, but also upon the fact that he was not even with her on the date alleged, the trial judge should have required the jury to find that defendant committed the act alleged, if at all, on March 24. Had he done so the jury would have been free to utilize all the

defendant's testimony against him; but the jury would then have had to decide whether defendant committed the act *on the date alleged.* By in effect allowing the jury to select other dates as the date of the crime, the trial court allowed defendant's evidence, evidence which would have been helpful given a proper instruction, to be utilized to convict him.

It may be argued that the state offered some evidence that the rape occurred earlier than March 24 in the form of Sherry Knight's testimony that it happened on the day defendant took her to buy her Easter dress. All the state's evidence, however, is that this day was March 24, the Friday before Easter. It is only the *defendant's testimony combined with that of Sherry Knight* which could support a date for the rape other than March 24. The argument only serves to heighten the fact that the court's instructions regarding the March incident served to entrap defendant with his own defense.

I do not mean to suggest that a defendant is denied a fair trial whenever his own testimony so implicates him in the offense that it likely leads to his conviction. Every defendant takes that risk when he chooses to testify in his own behalf. My point is that a defendant should be able to decide whether to testify at all and what defense, if any, he should offer *in reliance* on what the state has alleged and tried to prove with regard to the date, time and nature of the offense. When a defendant does so rely and offers his defense accordingly, the trial judge ought not then instruct the jury so as to permit a conviction which is both at variance with the state's case and supported only by defendant's own defense. To do so, in my view, denies defendant the rudiments of due process.

I think this principle is supported by *State v. Whittemore*, 255 N.C. 583, 122 S.E. 2d 396 (1961), a case also involving the sexual abuse of minors. Defendants there, just as defendant here, relied on the time fixed in the bill of indictment in preparing for trial. At trial they relied on the state's evidence in putting up their own defense. It is true that in *Whittemore*, the defense was alibi. Here, strictly speaking, the defense was not alibi with regard to the March incident. Nevertheless defendant's reliance on the date of March 24 as being the date of the alleged crime was equally as strong as the defendants' similar reliance in *Whittemore*. Defendants in *Whittemore* were given a new trial because the state in rebuttal offered evidence of offenses committed on other dates and the trial court instructed the jury that they could consider dates other than that charged in the bill of indictment. The Court said,

255 N.C. at 592, 122 S.E. 2d at 403:

> "True the time named in a bill of indictment is not usually an essential ingredient of the crime charged, and the State may prove that it was in fact committed on some other date. G.S. 15-155; *S. v. Bryant*, 228 N.C. 641, 46 S.E. 2d 847; *S. v. Baxley*, 223 N.C. 210, 25 S.E. 2d 621; *S. v. Trippe*, 222 N.C. 600, 24 S.E. 2d 340. *But this salutary rule*, preventing a defendant who does not rely on time as a defense from using a discrepancy between the time named in the bill and the time shown by the evidence for the State, *cannot be used to ensnare a defendant and thereby deprive him of an opportunity to adequately present his defense. The State did not contend that there was confusion as to the time named in the bill of indictment.* It insisted the date named was in fact the true date; but when defendants' evidence, if believed, would establish their innocence, it then contended the jury could, nevertheless, convict for the subsequent asserted wrongful acts." (Emphasis supplied.)

Just as in *Whittemore* the state here does not contend that there was confusion as to the time named in the bill; indeed its evidence unequivocally supports the date alleged and no other. Also as in *Whittemore*, the state, through the trial judge's jury instructions, is permitted to rely on other dates after defendant's evidence has come in.

Had the trial judge not expressly limited the jury's consideration to three particular dates with regard to the July incident his charge regarding the March incident, standing alone, may have been free from error. His words, "on or about March 24" may then have been taken by the jury as meaning that date or the dates immediately preceding or following. Since in the July case he did limit the jury's consideration to the date charged in the indictment and the dates immediately preceding and following but did not so limit it with regard to the March incident, the jury undoubtedly felt that they could consider other dates in March.

This error in the instructions denied defendant a fair trial in keeping with the dictates of due process. *State v. Whittemore, supra.* I, therefore, vote for a new trial.

Justice COPELAND joins in this dissent.

STATE OF NORTH CAROLINA v. WAYMARE BILLUPS

No. 63

(Filed 6 January 1981)

1. Criminal Law § 91.4— continuance to obtain new counsel — denial proper

The trial court did not err in denying defendant's request, made just prior to jury selection, that he be granted a continuance in order to have time to discuss with his family the hiring of private counsel because he lacked confidence in his court appointed attorney.

2. Criminal Law § 98.3— shackled defendant — no abuse of discretion

The trial court did not err in ordering that defendant be restrained in the courtroom by the use of shackles, and there was no merit to defendant's argument that the shackling was improper absent a showing that he had previously tried to escape or evidence of a planned escape, since the evidence tended to show that defendant was charged with crimes of violence; he was 29 years old and apparently in good health; other serious charges were pending against him, including an appeal from a conviction the previous week for which he received a 40 to 50 year prison sentence; only one deputy was available to serve as bailiff and provide security in the courtroom; and there was a warrant outstanding charging him with escape from another jurisdiction.

3. Criminal Law § 98.3— shackling of defendant-curative instructions sufficient

There was no merit to defendant's argument that the trial court's curative instruction on shackling was insufficient since the trial judge told the jury that defendant was being restrained only because the sheriff's department was shorthanded; no mention was made of the nature of the charges nor was any reference made to defendant's record or character; the judge asked all who would be unable to overlook the shackling of defendant to raise their hand and none did; and the trial judge specifically instructed the jury to put the fact of defendant's shackles out of their mind in determining his guilt.

4. Criminal Law § 66.16— photographic identification procedure — independent origin of in-court identification

In a prosecution for robbery and assault with a dangerous weapon, trial court did not err in allowing an in-court identification of defendant by the prosecuting witnesses where the witnesses identified defendant by choosing his picture from among six photographs shown them by police; one witness had the opportunity to see defendant when she admitted him to her home; both witnesses were with defendant for at least five minutes in a well-lighted room and approximately twenty minutes elsewhere in their house at the time of the crime; one witness stated clearly that her in-court identification of defendant was of independent origin and based entirely on her observations on the night of the crime; and the other witness's statement that the intruder looked like defendant was properly allowed as identification testimony.

5. Criminal Law § 71— shorthand statement of fact

The trial court did not err in failing to strike a robbery victim's statement, "that's when he robbed me," since such testimony was admissible as a shorthand statement of fact.

6. Criminal Law § 101— prosecuting witness in jury room — no mistrial required

The trial court did not err in denying defendant's motion for a mistrial made on the ground that one of the prosecuting witnesses entered the jury room during a recess at the conclusion of the trial but prior to the charge of the court, since the trial judge determined that the prosecuting witness knocked at the door of the jury room, came through the room and used the restroom, but did not communicate with any of the jurors.

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

Justice EXUM dissenting.

Justice COPELAND joins in the dissenting opinion.

ON appeal by defendant from judgments entered by *Bruce, Judge*, at the 11 February 1980 Criminal Session of Superior Court, PERQUIMANS County.

Defendant was charged in separate indictments, proper in form, with the crimes of robbery with a dangerous weapon, a violation of G.S. 14-87, and assault with a deadly weapon with intent to kill inflicting serious injury, a violation of G.S. 14-32. Defendant pleaded not guilty to both charges.

Prior to trial, defendant made a motion to suppress the victims' identification of him. After a voir dire hearing at trial, at which the State presented four witnesses, the judge made findings of fact and conclusions of law and denied the motion.

At trial, the State's evidence tended to show that on the night of 19 February 1979 Mr. and Mrs. Isaac Lowe were in their home in Hertford, North Carolina. A little after 9:00 p.m., a man knocked at the Lowes' door and asked about renting a room from the Lowes. Mrs. Lowe admitted him to the living room where he began to talk with her husband while she resumed watching television. After several minutes of conversation, the man drew a gun on the Lowes and demanded money. He removed approximately $86.00 from a wallet he took from Mr. Lowe, and also picked up $100.00 in cash which was lying on a table. He then ordered the Lowes to go upstairs.

Mr. Lowe reached the top of the stairs first, and retrieved a

pistol which he had hidden under the pillow on his bed. As the intruder reached the top of the steps, Mr. Lowe testified he fired once at his feet hoping to scare him away. The intruder fired three times at Mr. Lowe, wounding him in the head and neck. As Mrs. Lowe began to scream for help, the intruder fled.

Both the Lowes identified the defendant in court as the man who robbed them and shot Mr. Lowe.

By way of rebuttal, defendant offered the testimony of his mother. She stated that to the best of her knowledge her son was not in Hertford at the time of the crimes. Defendant's sister offered similar testimony.

The jury returned a verdict of guilty on both charges. The defendant was sentenced to life imprisonment for the armed robbery and to a term of ten years for assault with a deadly weapon inflicting serious injury. Defendant appeals the life sentence as a matter of right; his motion to bypass the Court of Appeals on the latter conviction was allowed on 16 July 1980.

Where necessary, other relevant facts will be discussed in the body of this opinion.

Attorney General Rufus L. Edmisten by Assistant Attorney General Marilyn R. Rich for State-appellee.

Walter G. Edwards, Jr. for defendant-appellant.

CARLTON, Justice.

From numerous exceptions at trial, defendant brings forward nine assignments of error. We find no prejudicial error and affirm.

I.

[1] Defendant charges error in the refusal of the trial court to grant defendant's request, made just prior to jury selection in February 1980, that he be granted a continuance. Defendant complained to Judge Bruce that he lacked confidence in his court-appointed attorney, and asked that he be allowed time to discuss with his family the hiring of private counsel. Citing the fact that the defendant had been indicted since October, and thus had had adequate time to secure other counsel, Judge Bruce denied the request.

Before this Court, defendant recognizes that a motion to continue is normally addressed to the sound discretion of the trial

judge, and hence is customarily reviewable only for abuse of that discretion. 4 Strong's N.C. Index 3d, Criminal Law § 91.1; *State v. Rigsbee*, 285 N.C. 708, 208 S.E.2d 656 (1974).

Where a constitutional right is involved though, as defendant claims here by virtue of the sixth amendment's guarantee of effective assistance of counsel, a motion to continue is deemed on appeal to present a question of law, and is therefore reviewable. *State v. Brower*, 289 N.C. 644, 224 S.E.2d 551 (1976). If a constitutional violation is shown, the burden shifts to the State to prove that such error was harmless beyond a reasonable doubt. G.S. § 15A-1443 (b) (1978). If the State does not do so, the court cannot find it to be harmless error, and the conviction must be reversed. *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). Here however, we do not reach the question of harmless error because defendant has not presented a cogent argument that he was denied his constitutional right to counsel when the trial court denied his motion for a continuance. Our own examination of the record leads us to conclude that the defendant was adequately represented. This assignment is overruled.

II.

Defendant next assigns as error the failure of the trial court to sustain three objections made by defendant during the testimony of Mrs. Lowe. In the challenged testimony, Mrs. Lowe stated that she was not sure how good her husband's hearing was on the side where he had been shot; that she can still see the defendant's face when she closes her eyes; and that she let the defendant take the money because he had a gun. While defendant may be correct in his assertion that these answers were in places speculative or unresponsive, neither the defendant nor the record shows that the errors were material or prejudicial. Absent such a showing defendant is not entitled to a new trial. *State v. Jones*, 278 N.C. 259, 179 S.E.2d 433 (1971).

III.

[2] By his next two assignments of error, defendant contends that the court erred in ordering that the defendant be restrained in the courtroom by the use of shackles, and that the curative instruction given the jury by the court was insufficient. On its own motion the trial court made the following findings of fact before ordering that the defendant be so restrained: (1) that the defendant was charged

with armed robbery and assault with intent to kill inflicting serious injury; (2) that defendant had other serious charges pending against him and had the previous week received a sentence of not less than forty nor more than fifty years on a different charge; (3) that there was an outstanding warrant for escape against the defendant issued by the State of Maryland; and (4) that because many of the sheriff's employees were involved in a special venire which had been summoned from Perquimans County to Dare County there was only one deputy sheriff to serve as bailiff and security officer for the court. Based on those findings the defendant was ordered shackled until such time as more deputies might become available.

Defendant's primary contention before this Court was that Judge Bruce's decision was based only on circumstances within the courtroom. The defendant argues that absent a showing that he had previously tried to escape or evidence of a planned escape, Judge Bruce abused his discretion in ordering that defendant be shackled. We disagree.

The seminal decision on this question, recognized as controlling by both sides, is *State v. Tolley*, 290 N.C. 349, 226 S.E.2d 353 (1976). Justice Huskins, writing for the Court, presented an exhaustive analysis of the issue here considered. As stated there, the general rule is that a defendant in a criminal case is entitled to appear at trial free from all bonds or shackles except in extraordinary instances. However, as stated in *Tolley*, the general rule does not lead to the conclusion that every trial in shackles is fundamentally unfair. *Id.* at 367, 226 S.E.2d at 367. Rather, "the rule against shackling is subject to the exception that the trial judge, in the exercise of his sound discretion, may require the accused to be shackled when such action is necessary to prevent escape, to protect others in the courtroom or to maintain order during trial." *Id.* at 367, 226 S.E.2d at 367. The trial judge "is best equipped to decide the extent to which security measures should be adopted to prevent disruption of the trial, harm to those in the courtroom, escape of the accused, and the prevention of other crimes." *United States v. Samuel*, 431 F.2d 610, 615 (4th Cir. 1970), *cert. denied*, 401 U.S. 946, 91 S. Ct. 964, 28 L. Ed.2d 229 (1971).

In reaching a decision as to whether a defendant should be shackled, *Tolley* lists a broad range of factors including "the seriousness of the present charge against the defendant; . . . his age and physical attributes; . . . past escapes or attempted escapes; . . . the

nature and physical security of the courtroom; and the adequacy and availability of alternative remedies." 290 N.C. at 368, 226 S.E.2d at 368. Furthermore, "[t]he information upon which the judge acts need not come from evidence formally offered and admitted at the trial." *Id.*

Applying those criteria to the case *sub judice*, it is clear that Judge Bruce properly framed his order as required by *Tolley*. The record shows that the defendant was charged with crimes of violence; that he was 29 years old and apparently in good health; that other serious charges were pending against him including an appeal from a conviction the previous week for which he received a forty to fifty year prison sentence; that only one deputy was available to serve as bailiff and provide security in the courtroom; and that there was a warrant outstanding charging him with escape from another jurisdiction.

Defendant argues that because a warrant is not a conviction, the existence of an outstanding warrant was irrelevant and should not have been considered by the trial court. While evidence of a warrant prior to conviction is improper for certain purposes in a criminal proceeding, that rule clearly does not control this situation. The existence of such a warrant for escape from another jurisdiction is probable cause to believe the defendant had escaped from custody on a previous occasion. Defendant's propensity to escape must be one of the overriding considerations in determining whether a defendant should be shackled. Any reasonable evidence of such propensity may properly be considered by the trial court on this question. Thus, Judge Bruce properly considered the existence of the warrant for escape in reaching his decision.[1]

Defendant's further argument that restraint is proper only if there is evidence of a past or planned escape attempt is also not persuasive. "[A] trial court need not wait until an escape or other violence has occurred in its presence before exercising its discretion." *State v. Johnson*, 594 P.2d 514, 526-27 (Ariz. 1979). Where there appears some reasonable basis upon which the judge concluded, in the exercise of his sound discretion, that it was necessary

[1]In *Patterson v. Estelle*, 494 F.2d 37 (5th Cir. 1974) the court cited the fact that there was an outstanding charge of escaping from custody against the defendant as one factor justifying the handcuffing and chaining of the prisoner during trial. *Id.* at 38.

for the defendant to be shackled during trial, we cannot say, as a matter of law, that the trial judge abused his discretion. *State v. Tolley*, 290 N.C. at 371, 266 S.E.2d at 369.

Even if we were to find that shackling of the defendant was improper, that alone would not mandate reversal. The United States Supreme Court has recognized that "the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant...." *Illinois v. Allen*, 397 U.S. 337, 344, 90 S. Ct. 1057, 1061, 25 L. Ed. 2d 353, 359 (1970). But, in considering the analogous issue of jail clothing, that Court has also indicated the fact that a defendant appears at trial in prison clothing may not always be prejudicial. *Estelle v. Williams*, 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976). For that reason the harmless error rule has often been applied to cases where a defendant has appeared for trial so garbed. *Thomas v. Beto*, 474 F.2d 981 (5th Cir.), *cert. denied*, 414 U.S. 871, 94 S. Ct. 95, 38 L. Ed. 2d 89 (1973); *Watt v. Page*, 452 F.2d 1174 (10th Cir. 1971), *cert. denied*, 405 U.S. 1070, 92 S. Ct. 1520, 31 L. Ed. 2d 803 (1972). Apparently "it is not an uncommon defense tactic to produce the defendant in jail clothes in the hope of eliciting sympathy from the jury." *Estelle v. Williams*, 425 U.S at 508, 96 S. Ct. at 1695, 48 L. Ed. 2d at 133. It is, of course, impossible for us to know whether the shackling of the defendant in this case had the adverse effect complained of by defense counsel, or whether perhaps it evoked sympathy for the defendant from the jury. *See State v. Reid*, 559 P. 2d 136 (Ariz. 1976), *cert. denied*, 431 U.S. 921, 97 S. Ct. 2191, 53 L. Ed. 2d 234 (1977). Suffice it to say that no showing of prejudice has been presented to us, nor do we perceive any.

Nor does the fact that the trial court did not employ less restrictive security measures afford defendant a sufficient basis for relief.[2] There is nothing in the record to indicate that other means were available, and no such other means were proposed by the defendant. Defendant's failure to suggest althernatives to the shackling precludes his arguing on appeal that less restrictive but equally effective means were available. *See State v. Tolley*, 290 N.C. at 370, 226 S.E.2d at 369. Moreover, the trial court limited its order to such time as other deputies might be available, an indication of

[2]Among the cases holding that the mere fact of handcuffing does not alone warrant reversal *see United States v. Kress*, 451 F.2d 576 (9th Cir. 1971) and *McDonald v. United States*, 89 F.2d 128 (8th Cir. 1937).

the court's recognition of the gravity of its decision to shackle the defendant. We hold that under the authority of *State v. Tolley, supra,* the trial court did not abuse its discretion by ordering, after making sufficient findings of fact as also required by *Tolley,*[3] that the defendant be restrained.

[3] Defendant's argument that the curative instruction given by the court was insufficient is equally without merit for two reasons. First, an examination of Judge Bruce's instruction to the jury,[4] given just prior to the beginning of trial, shows that he told the jury that the defendant was being restrained only because the sheriff's department was shorthanded.[5] No mention was made of the nature of the charges nor was any reference made to defendant's record or character. The judge asked all who would be unable to overlook the shackling of the defendant to raise their hand. None did. The trial judge also specifically instructed the jury to put the fact of defendant's shackles out of their minds in determining his guilt. This instruction fully complied with the applicable tenets of *State v. Tolley,* 290 N.C. at 369, 226 S.E.2d at 368-69. Second, we note that although defendant complains that the instruction was not repeated to the jury at the time other jury instructions were given, defendant did not request an additional instruction. The burden was on him to do so. *State v. Tolley,* 290 N.C. at 371, 226 S.E.2d at 370; *accord, State v. Stewart,* 276 N.W.2d 51 (Minn. 1979); *State v. Cassel,* 180 N.W.2d 607 (Wisc. 1970). In the absence of such a request, the trial court did not err in not repeating the instruction. *Cf. Patterson v. Estelle,* 494 F.2d 37 (5th Cir.), *cert. denied,* 419 U.S. 871, 95 S. Ct. 130, 42 L. Ed. 2d 110 (1974) (where no request for instruction concerning shackling requested, state court did not err in failing to give one). The trial in this case lasted less than two days. Defend-

[3]We note in passing that *State v. Tolley* does not require, as defendant urges, that the trial court conduct a full evidentiary hearing before ordering the defendant restrained. All that is required is that the record reflect the reasons for the judge's action. 290 N.C. at 368, 226 S.E.2d at 368.

[4]In relevant part, Judge Bruce explained the shackling by saying, "The reason for this is that the Sheriff's Department has all of its men over in Dare County and there in (sic) only one Sheriff who can serve as Bailiff and also act as security officer for the courtroom."

[5]A similar instruction which explained defendant's appearance in handcuffs and leg irons as necessary because trial was being held in a makeshift courtroom was upheld in *People v. Burnett,* 59 Cal. Rptr. 652 (Court of Appeal 1967).

ant's mere speculation that the curative instruction was not sufficiently fresh in the jury's mind is without merit. These assignments of error are overruled.

IV.

[4] By his next assignment of error, defendant complains of the trial court's allowing an in-court identification of the defendant by the prosecuting witnesses. Just prior to in-court identification by both witnesses of defendant as the perpetrator of the crimes, a voir dire hearing of each witness was held. In light of their testimony on voir dire, defendant claims that the subsequent in-court identifications were inherently unreliable.

The voir dire testimony of the witnesses reveals that they first identified the defendant by choosing his picture from among six photographs shown them by police on 21 March 1979. Defendant challenges this procedure as constitutionally remiss. We do not agree. The use of a photographic line-up has been approved by this Court on several occasions. *State v. Davis*, 290 N.C 511, 227 S.E.2d 97 (1976). *State v. Waddell*, 289 N.C. 19, 220 S.E.2d 293 (1975), *death sentence vacated*, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976); *State v. McPherson*, 276 N.C. 482, 172 S.E.2d 50 (1970). Defendant's assignment of error as to the manner in which the photographic identification was conducted is without merit. *State v. Davis*, 294 N.C. 397, 241 S.E.2d 656 (1978).

Conviction based on eyewitness identification at trial following a pre-trial photographic identification will be set aside only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. *Simmons v. United States*, 390 U.S. 377, 19 L. Ed. 2d 1247, 88 S. Ct. 967 (1968). Applying that standard to the case before us, we find that the in-court identification of the defendant was clearly proper.

A close examination of the voir dire testimony reveals that Mrs. Lowe had the opportunity to see the defendant when she admitted him to the house; and that she and Mr. Lowe were with him for at least five minutes in a well-lighted room and for approximately 20 minutes elsewhere in the house. Mrs. Lowe stated clearly that her in-court identification of the defendant was of independent origin and based entirely on her observations that night. Thus its admission was proper. *State v. Bass*, 280 N.C. 435,

186 S.E.2d 384 (1972). Mr. Lowe's statement that the intruder "looked like" the defendant was properly allowed as identification testimony. *State v. Brown*, 280 N.C. 588, 187 S.E.2d 85 (1972). Any lack of certainty in his identification goes to the weight and not the admissibility of the testimony. *State v. Bridges*, 266 N.C. 354, 146 S.E.2d 107 (1966). We find the trial court acted properly in allowing the identification testimony.

V.

[5] By his next assignment of error, defendant contends the court erred in failing to allow defendant's motion to strike Isaac Lowe's statement, "That's when he robbed me . . . ." Such shorthand statements of fact have been upheld by this Court before. *See, e.g., State v. Goss*, 293 N.C. 147, 235 S.E.2d 844 (1977); *State v. Sneeden*, 274 N.C. 498, 164 S.E.2d 190 (1968). Defendant's argument is without merit.

VI.

The defendant next alleges that the trial court committed error by allowing the State to introduce a purse and its contents found in the upstairs of the Lowe's home. While we agree with defendant that the items apparently had no relevance to the case, that alone does not warrant reversal. Rather, "the appellant must show error positive and tangible, that has affected his rights substantially and not merely theoretically, and that a different result would have likely ensued." *State v. Cross*, 284 N.C. 174, 200 S.E.2d 27 (1973), quoting *State v. Cogdale*, 227 N.C. 59, 40 S.E.2d 467 (1946). Defendant has made no such showing.

VII.

[6] Defendant next urges that the denial of his motion for a mistrial by the trial court was improper. The record shows that Mrs. Lowe, one of the prosecuting witnesses, entered the jury room during a recess at the conclusion of trial but prior to the charge of the court. Apparently she did so in order to use the bathroom. Defendant promptly moved for a mistrial. Judge Bruce examined first Mrs. Lowe and then one of the jurors, chosen at random from the jury room. Their testimony established that Mrs. Lowe kocked at the door, came through the room, and used the restroom. She did not communicate with any of the jurors. On these facts the trial court, exercising its sound discretion, properly denied the motion

for a mistrial. *See State v. Gaines*, 283 N.C. 33, 194 S.E.2d 839 (1973); *State v. Shedd*, 274 N.C. 95, 161 S.E.2d 477 (1968).

We have carefully considered all other errors brought forward by the defendant and find no reason to disturb the result achieved in the trial division. A close examination of the record shows that defendant had a fair trial, free from prejudicial error.

No error.

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

Justice EXUM dissenting.

I respectfully dissent from the majority opinion because I believe there were insufficient grounds upon which to order, over defendant's objection, his shackling at trial. The shackling thus denied defendant due process of law under both the Fourteenth Amendment to the Federal Constitution and Article I, Section 19, of the State Constitution.

Due process requires that persons accused of a crime receive the "fundamental liberty" of a fair and impartial trial, and that such persons be afforded the presumption of innocence. *Drope v. Missouri*, 420 U.S. 162 (1975). To implement this presumption courts must guard against factors which may "undermine the fairness of the fact-finding process" and thereby dilute "the principle that guilt is to be established by probative evidence and beyond a reasonable doubt...." *Estelle v. Williams*, 425 U.S. 501, 503 (1976), *quoted in State v. Tolley*, 290 N.C. 349, 365, 226 S.E. 2d 353, 366 (1976). It follows, then, that the presumption of innocence requires the garb of innocence, for "regardless of the ultimate outcome, or of the evidence awaiting presentation, every defendant is entitled to be brought before the court with the appearance, dignity, and self-respect of a free and innocent man." *Eaddy v. People*, 115 Colo. 488, 492, 174 P. 2d 717, 718 (1946), *quoted in State v. Tolley, supra.* As recognized by the United States Supreme Court in *Illinois v. Allen*, 397 U.S. 337, 344 (1970):

> "But even to contemplate [binding and gagging a defendant], much less see it, arouses a feeling that no person should be tried while shackled and gagged except as a *last resort.* Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's

> feelings about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold." (Emphasis supplied.)

Accordingly, this Court in *Tolley* held that a criminal defendant is entitled to appear at trial free from shackles except in *extraordinary circumstances* where such action is *necessary* to prevent escape, to protect persons in the courtroom, or to maintain order during trial. The trial court in determining whether such extraordinary circumstances do in fact exist may consider various "material circumstances." *State v. Tolley, supra.*[1]

The majority, in upholding the shackling here, notes that defendant was charged with crimes of violence, was 29 years old and in good health, and had recently been convicted on other charges and sentenced to a lengthy prison term; that only one deputy was available to provide for courtroom security; and that there was an outstanding warrant from Maryland charging defendant with escape from a penal institution. I respectfully submit the simple existence of all the factors listed does not justify shackling defendant without some other indication that shackling was in fact necessary to prevent his escape, to protect persons in the courtroom, or to maintain order during trial. In so doing I recognize that the propriety of shackling is originally entrusted to the discretion of the trial court. Although the abuse of discretion standard is inherently flexible, it is not without limits. As noted by this Court in *Tolley*, "sound judicial discretion means 'a discretion that is not exercised arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result.'" *State v. Tolley, supra*, 290 N.C. 349, 367, 226 S.E. 2d 353, 367-68, *quoting Langnes v. Green*, 282 U.S. 531, 541 (1931). It is my opinion that the trial court here exceeded the limits of sound judicial discretion.

---

[1]As noted in *Tolley*: "The 'material circumstances' which the trial judge may consider in exercising his sound discretion include, *inter alia*, the seriousness of the present charge against the defendant; defendant's temperament and character; his age and physical attributes; his past records; past escapes or attempted escapes, and evidence of a present plan to escape; threats to harm others or cause a disturbance; self-destructive tendencies; the risk of mob violence or of attempted revenge by others; the possibility of rescue by other offenders still at large; the size and mood of the audience; the nature and physical security of the courtroom; and the adequacy and availability of alternative remedies." 290 N.C. at 368, 226 S.E. 2d at 368.

There is no indication in the record that defendant at the time of his trial posed a threat to any person in the courtroom, was likely to be unruly or disruptive, or was likely to try to escape. All indications are that he would do none of these things. That defendant is charged with serious crimes, is young and healthy, and has recently been convicted of other serious crimes does not justify the shackles. Although these are among the "material circumstances" which in a proper case may be considered, our courts regularly try young, healthy defendants who have criminal records and who are on trial for serious offenses; yet we do not shackle them. These trials include, of course, even those defendants who have escaped from penal institutions. That only one deputy was available cannot be seized upon as a justification. The absence of adequate courtroom staff was an administrative problem which the trial court should not have solved at the expense of defendant's right to a fair trial.[2] The most telling circumstance of all is that defendant sat quietly through his uneventful trial on other charges held the previous week and at his prelimary hearing.

It thus appears that the trial court, seeking to solve a shortage of deputies problem, simply decided *sua sponte* to shackle defendant unnecessarily.[3] Neither the state nor any representative of the county, so far as the record reveals, advised the court of feelings of insecurity or any felt need for restraining defendant.

The facts in *State v. Tolley, supra,* 290 N.C. 349, 226 S.E. 2d 353, the only decision rendered by this Court as to the propriety of shackling and in which we unanimously approved the shackling, are significantly different from those here. In *Tolley* the sheriff, charged with custody of defendant during trial, expressed the opinion that shackles were necessary. In *Tolley* defendant tried to escape during the preliminary hearing. Importantly, also in *Tolley,* defendant's counsel did not object to the shackling when explicitly

[2]The proper solution to this problem would have been for the trial court to have secured other personnel such as state highway patrolmen, if possible; if not, the trial should have been delayed until sufficient personnel could be secured.

[3]The court instructed the jury, in pertinent part, as follows: "One more thing, ladies and gentlemen, I want you people who are on the venire to also listen to this. Some of you may have noticed that the defendant is partially restrained in that he has on what are commonly referred to as shackles or leg irons. The reason for this is that the Sheriff's Department has all of its men over in Dare County and there is only one sheriff who can serve as Bailiff and also act as security officer for the courtroom."

asked if he wished to do so. Thus, while we noted in *Tolley* that defendant was charged with serious offenses, and was young and in good physical condition, these "material circumstances" were clearly secondary to the prior escape attempt during the preliminary hearing, the sheriff's request, and the lack of objection by defendant himself, through counsel.

The thrust of *Tolley* is that while shackling does not always violate a defendant's right to due process under the law, it is a remedy to be used only in extraordinary situations. The simple existence of several of the "material circumstnces" there mentioned does not automatically justify shackling. Only in the extraordinary event that these circumstances *together with* other actions by defendant himself or concern expressed by those in charge of his prosecution or custody indicate that shackling is necessary to prevent his escape, to protect persons in the courtroom, or to maintain order during trial, should a remedy so damaging to the trial's impartiality be used.

Finally, the majority notes that "no showing of prejudice has been presented to us, nor do we perceive any." This Court, however, has stated that "in the absence of a showing of necessity therefor, compelling the defendant to stand trial while shackled is *inherently prejudicial* in that it so infringes upon the presumption of innocence that it 'interferes with a fair and just decision of the question of . . . guilt or innocence.'" (Emphasis supplied.) *State v. Tolley, supra*, 290 N.C. at 366, 226 S.E. 2d at 367, *quoting Blair v. Commonwealth*, 171 Ky. 319, 328, 188 S.W. 390, 393 (1916). The state contends that even if the shackling was improper the error was cured by the trial judge's instruction. My view is that if the shackling was not justified in the first place the error cannot be cured by instructions to the jury. We do a great disservice to the dignity and integrity of our courts when we permit the needless shackling of criminal defendants. I vote for a new trial for defendant at which he will not be shackled unless the circumstances then are such that shackling is required.

Justice COPELAND joins in this dissent.

IN RE: CONTEMPT PROCEEDING OF TALBOT MICHAEL SMITH

No. 38

(Filed 6 January 1981)

1. **Attorneys at Law § 2— foreign attorney — admission to practice for limited purpose — discretionary privilege**

It is not a right but a discretionary privilege which allows out of state attorneys to appear *pro hac vice* in a state's courts without meeting the state's bar admission requirements.

2. **Attorneys at Law § 2— foreign attorney — admission to practice for limited purpose — no due process right**

The right to appear *pro hac vice* in the courts of another state is not a right protected by the Due Process Clause of the Fourteenth Amendment.

3. **Attorneys at Law § 2— foreign attorney — admission to practice for limited purpose - requirement of local counsel - waiver not permitted**

A trial judge cannot waive the requirement of G.S. 84-4.1(5) that local counsel be associated before an out of state attorney is admitted to limited practice in the courts of this State.

4. **Attorneys at Law §2; Contempt of Court § 2.2— failure of foreign attorney to appear for trial — contempt of court — absence of valid admission for limited purpose**

An out of state attorney could not be held in and punished for willful contempt of court for failure to comply with an order of the trial court that he appear as an attorney in a criminal case where there had been no general appearance by local counsel as required by G.S. 84-4.1 and the out of state attorney thus never acquired eligibility to appear in the case and was never an attorney in the case admitted to limited practice in N. C.

Justices COPELAND and BROCK took no part in the consideration or decision of this case.

ON discretionary review of decision of the Court of Appeals, 45 N.C. App. 123, 263 S.E.2d 23 (1980), affirming judgment of *Ferrell, J.*, entered at the 20 March 1979 Session of WAYNE Superior Court.

This criminal contempt adjudication against Talbot Smith, an attorney licensed to practice law in the State of Michigan, arises out of the prosecution of Leslie "Ike" Atkinson and others for violation of the controlled substances laws of North Carolina. The chronology of the case follows.

On 27 March 1978, Atkinson, then serving a forty-four year

sentence in a United States penitentiary, was indicted by the Grand Jury of Wayne County for various drug offenses. Atkinson wanted Talbot Smith to represent him. On 26 June 1978, Talbot Smith and Stephen A. Kermish, a Georgia attorney, appeared before Judge Ferrell in chambers to discuss pretrial discovery.

Atkinson was arrested, served with a copy of the bill of indictment, given his first appearance before a district court judge and placed in custody in Central Prison on 6 September 1978. At Atkinson's arraignment on 11 September 1978, Kermish appeared for the limited purpose of contesting the jurisdiction of North Carolina over Atkinson. Talbot Smith was not present. Counsel for a codefendant told the court Talbot Smith had planned to appear on behalf of Atkinson but his airplane had been delayed. Atkinson stated in open court that Talbot Smith was his lawyer. After an evidentiary hearing, the court concluded it had jurisdiction over Atkinson and continued the arraignment until 13 September 1978. At the 13 September 1978 arraignment, Talbot Smith announced he was Atkinson's attorney and requested a continuance of ten working days in which to obtain local counsel to move his admission to the bar. He further moved the court to set a new evidentiary hearing on the question of jurisdiction on the grounds that Kermish had no authority to litigate the question of North Carolina's jurisdiction over Atkinson. This latter motion was denied. The arraignment was continued until 2 October 1978 to allow Talbot Smith to obtain local counsel to move his admission to the bar.

On 2 October 1978, Stephen Smith of the Wake County, North Carolina Bar appeared with Talbot Smith in the case. Stephen Smith filed a notice of limited representation for the purpose of moving the court to continue the case for thirty days to allow Talbot Smith to associate local counsel. Stephen Smith told Judge Ferrell he was not retained as local counsel. Talbot Smith told the court he was ready to proceed with the filing of motions but was as yet unable to obtain the statutorily required local counsel. The court granted a continuance of two days for the requested purpose. The court advised Atkinson and his counsel that standby counsel would be appointed in the event counsel of his choice was not available. On 4 October 1978 when Atkinson was again called for arraignment, he had no counsel present. Atkinson stated he was not indigent and did not want court appointed counsel. He signed a waiver to that effect. The court entered a plea of not guilty for defendant and directed the district attorney to serve discovery materials upon defendant, which he did.

At the next session of court on 30 October 1978, Stephen Smith, who again filed a notice of limited representation, appeared on behalf of Atkinson. Talbot Smith and Richard Barry Mazer of the California Bar were also present. When Stephen Smith attempted to defer to Talbot Smith on a question, the court refused to hear Talbot Smith until he was properly qualified to appear in the case. Stephen Smith then orally moved the court to admit Talbot Smith and Mazer to practice in the courts of this State for the sole purpose of representing Atkinson. A written motion was tendered on behalf of Talbot Smith. Judge Ferrell ruled the motions did not comply with the requirements of G.S. 84-4.1 and denied them. The next day Stephen Smith filed various written motions on behalf of Atkinson including a written motion pursuant to G.S. 84-4.1 seeking to permit Mazer and Talbot Smith to practice in North Carolina for the limited purpose of representing Atkinson. both out-of-state attorneys filed signed statements in accordance with G.S. 84-4.1(3) which recited in pertinent part:

> I hereby state that unless permitted to withdraw sooner by order of the Court, I will continue to represent my client in this proceeding until the final determination thereof, and that with reference to all matters incident to this proceeding, I agree that I will be subject to the orders and amenable to the disciplinary action and the civil jurisdiction of the General Court of Justice and the North Carolina State Bar in all respects as if I were a regularly admitted and licensed member of the Bar of North Carolina in good standing.

Stephen Smith moved the admission of Talbot Smith and Mazer to the Bar of this State. The court neither granted nor denied the motion; it reserved ruling and set a hearing on various motions for 27 November 1978 and a trial date of 3 January 1979.

On 15 November 1978, Stephen Smith filed on behalf of Atkinson a "Renewed Motion for Limited Practice and Motion for Continuance of Trial" and a "Request for Immediate Hearing of Renewed Motion for Limited Practice and Motion for Continuance of Trial." These papers recited (1) Talbot Smith and Mazer are willing to enter an appearance on behalf of Atkinson; (2) Stephen Smith will not enter a general appearance until paid his trial retainer; (3) Talbot Smith and Mazer will not begin to prepare for

trial until their motions to represent Atkinson are formally allowed; (4) these motions "are conditional upon the court continuing the trial of the case for a minimum of eight weeks so that said attorneys [Talbot Smith and Mazer] may have opportunity to properly prepare for trial after their admission to this case"; and (5) said motions should be deemed withdrawn by Talbot Smith and Mazer if the court will not continue the trial for a minimum of eight weeks from the date it rules on the motions to be admitted to practice.

Stephen Smith appeared before the court to argue various pretrial motions on 27 November 1978. The question of the admission of Talbot Smith and Mazer arose. Judge Ferrell stated he would not admit them until local counsel had made a general appearance. He stated admission without local counsel being retained was not possible under G.S. 84-4.1, "although it's my intention likely to do so as I have indicated to you in a telephone conversation or conversations about this matter." On 29 November 1978, Stephen Smith advised Judge Ferrell by letter that "[b]ecause of insurmountable differences between Talbot Smith and myself, my representation of Leslie Atkinson has been terminated effective today."

On 6 December 1978, Judge Ferrell wrote Atkinson a letter with carbon copies to Talbot Smith, Stephen Smith and Mazer. Judge Ferrell expressed his concern that Atkinson have counsel at trial. In part, he stated:

> I am concerned that your Sixth Amendment Constitutional rights and Due Process guarantees are protected to the fullest extent. Since you told me in open court that you desire Mr. Talbot Smith and Mr. Richard Mazer to represent you, and due to the nature and seriousness of the charges against you, and, since Mr. Talbot Smith obviously has expended considerable efforts over a long period of time in preparing your cases for trial, I am, in my discretion, now waiving the requirements of North Carolina counsel, and do now hereby allow the Motion of Mr. Talbot Smith and Mr. Richard Mazer to appear for you and represent you in the trial of your cases.
>
> As you are aware, the cases are scheduled for trial in Wayne County, North Carolina beginning January 3, 1979. You are hereby advised, therefore, that the cases will stand for trial at that time with counsel of your

> choice, Mr. Talbot Smith and Mr. Richard Mazer now being formally admitted to the North Carolina Court for the general purpose of representing you at the trial of your cases, and any subsequent proceedings.
>
> I am by copy of this letter addressed to your counsel at the addresses listed in their petitions advising them of the ruling of the court, and instructing them that the cases will be called for trial at the appointed session of court beginning January 3, 1979.

In a letter dated 12 December 1978, Mazer advised Judge Ferrell the case must be continued for at least eight weeks, otherwise he and Talbot Smith would be unable to represent Atkinson due to insufficient time to prepare for trial. Judge Ferrell wrote in reply on 19 December 1978:

> Any motion to continue the case of Mr. Atkinson will be determined in open court on January 3, 1979. As you know, the cases were scheduled for trial at that time. Should the cases not be continued, you and Mr. Smith, pursuant to your affidavit to remain in the case, will be expected to represent Mr. Atkinson on the trial of his cases commencing January 3, 1979.

Mazer wrote Judge Ferrell on 26 December 1978 that he and Talbot Smith would undertake to represent Atkinson only if given eight weeks to prepare for trial. He further advised they would not appear for the 3 January 1979 trial unless the trial was continued for eight weeks.

When Atkinson's case was called on 3 January 1979, Talbot Smith and Mazer were not present. Judge Ferrell appointed John Duke of Wayne County, North Carolina Bar as standby counsel for Atkinson pursuant to G.S. 15A-1243. The case was concluded on 19 January 1979. Talbot Smith and Mazer did not appear. At the trial's conclusion, Judge Ferrell announced he believed Talbot Smith and Mazer to be in direct, willful and criminal contempt of court. He sent to them, by certified mail, a proposed contempt order which gave summary notice of the punishment to be imposed and informed them that he would conduct an inquiry into the matter at the end of March. In the proposed contempt order, Judge Ferrell concluded as a matter of law:

(1) Talbot Michael Smith knew of the pendency of this matter and appeared on behalf of the defendant at Sessions of Court devoted to hearing pretrial motions on June 26, 1978; September 13, 1978; October 2, 1978; and October 30, 1978.

(2) Richard Barry Mazer knew of the pendency of this matter and appeared on behalf of the defendant at a session of the Court devoted to hearing pretrial motions on October 30, 1978.

(3) Both Richard Barry Mazer and Talbot Michael Smith represented to the Court by their signed statements attached to their motion to be admitted to limited practice before the bar of the Court that:

a. They would continue to represent their client in the proceeding until the final determination thereof or until allowed to withdraw by order of the Court.

b. They would be subject to the orders of the Court and subject to its discipline in same manner as a regularly licensed member of the North Carolina Bar.

(4) That the Court deferred ruling on the original application for limited practice for the sole reason that local counsel had not been retained for the entire trial as required by GS 84-4.1.

(5) Leave of Court was never obtained to withdraw or modify the original motion for limited practice or the statement of counsel attached thereto and the Court never allowed said motion to be withdrawn or modified.

(6) The Renewed Motion for Limited Practice and Motion for Continuance were not signed by either Talbot Michael Smith or Richard Barry Mazer nor did said motions contain a statement signed by said parties in a form required by GS 84-4.1 although said motions were filed.

(7) GS 84-4.1(6) specifically does not deprive the court of the discretionary power to allow or reject the application of the particular out-of-state attorney, and the Court had discretionary authority to waive the requirement of local

North Carolina licensed counsel.

(8) The waiver of the requirement of associating local North Carolina licensed counsel did not in any manner abrogate or modify any of the other terms and conditions agreed to by Richard Barry Mazer and Talbot Michael Smith in their written statement.

(9) That no order of the Court was entered allowing Richard Barry Mazer or Talbot Michael Smith to withdraw as counsel of record for the defendant in this proceeding.

(10) That Richard Barry Mazer and Talbot Michael Smith were directed by the Court to be present in Court in Goldsboro, North Carolina, on January 3, 1979, when any motions for continuance would be determined.

(11) That Richard Barry Mazer and Talbot Michael Smith were advised that the Court expected them to represent defendant at the trial of his case and that this constituted a clear warning by the Court that any non-appearance by them would be improper conduct.

(12) That Richard Barry Mazer and Talbot Smith acknowledged receipt of the Court's warning and stated, in response thereto, "we shall not appear in Goldsboro on January 3, 1979."

(13) That such a response, in view of their written statement and the clear direction and warning of the Court constituted, beyond a reasonable doubt, willful, direct, criminal contempt of court as defined by GS 5A-11(a)(3), (6) & (7) and GS 5A-13(a)(3), by Richard Barry Mazer and Talbot Michael Smith which interrupted and interfered with matters before the Court in that standby counsel for defendant was required to be appointed to assist defendant on the trial.

(14) That because neither Richard Barry Mazer nor Talbot Michael Smith appeared in Goldsboro at any time after January 3, 1979, until the termination of the proceeding on January 19, 1979, and because both individuals reside outside the boundaries of North Carolina, no summary notice has been given to said individuals in

person. The Court, however, before entering this order, has caused copies thereof to be mailed to Richard Barry Mazer and Talbot Michael Smith by certified mail and they were given until sixty days from January 19, 1979, to respond thereto.

On 20 March 1979, a hearing was held on the contempt matter at which neither Talbot Smith nor Mazer was present. Thomas Loflin of the Durham County, North Carolina Bar appeared and announced he was counsel of record for the two lawyers. He made various motions on behalf of Mazer and Talbot Smith. He moved that the proceedings be dismissed for lack of jurisdiction, that Judge Ferrell recuse himself from the case, that the case be dismissed as to Talbot Smith because the record failed to show any direct, criminal contempt and that the case be dismissed as to Talbot Smith because he was not accorded procedural due process. These motions were denied.

Mazer avoided final judgment of contempt by apologizing to the court and making restitution for standby counsel fees. Judge Ferrell entered the order which he had mailed earlier finding Talbot Smith in willful and direct criminal contempt. Judge Ferrell sentenced Talbot Smith to thirty days in jail, fined him $500.00 and directed that a copy of the order be certified to the disciplinary officials of the Michigan Bar. Talbot Smith appealed to the Court of Appeals which affirmed the trial court.

The Court of Appeals reasoned that (1) G.S. 84-4.1 does not permit an out-of-state attorney to move for admission to practice in a particular case conditioned upon the court taking specific action in the case, *i.e.*, continuing it for eight weeks; (2) Judge Ferrell's 6 December 1978 letter was a sufficient order allowing Talbot Smith's first, unconditional motion of 31 October 1978 to be admitted to practice for the limited purpose of representing Atkinson; (3) the letter of 6 December 1978 directing Talbot Smith to appear on 3 January 1979 was a lawful order inasmuch as a trial judge has the power to waive the requirement of G.S. 84-4.1(5) relating to the necessity of local counsel; (4) the trial court was correct in disregarding the conditional motion of 17 November 1978 and considering only the 31 October motion; (5) Talbot Smith's failure to appear for trial on 3 January 1979 constituted criminal contempt under G.S. 5A-11(a) (1)(3)(6)(7); (6) the trial court had personal jurisdiction over Talbot Smith and properly served him with the contempt

order pursuant to G.S. 1A-1, Rule 4(j)(1)c and G.S. 5A-15(a) by sending it by certified mail to the address given the court in his motion to be allowed to appear in the case and (7) Judge Ferrell did not err in refusing to recuse himself from the 20 March 1979 contempt proceedings.

This Court granted discretionary review.

Loflin, Loflin & Acker by Thomas F. Loflin III and James R. Acker, attorneys for respondent appellant

Rufus L. Edmisten, Attorney General, by Charles M. Hensey, Assistant Attorney General, for the State

HUSKINS, Justice.

In disposing of this case, we reach only one of the issues raised in the Court of Appeals, viz: May a judge in his discretion waive the requirement of local counsel found in G.S. 84-4.1(5) when an out-of-state attorney is admitted to limited practice in this State? Our answer to this question makes it unnecessary to consider other holdings and dicta of the Court of Appeals. We hold a trial judge cannot waive the requirement that local counsel be associated before an out-of-state attorney is admitted to limited practice in the courts of this State.

[1,2] As a general rule, a regularly licensed attorney admitted to practice in one state is permitted to practice in the courts of another state in the disposition of a particular case without formal admission and license to practice in the other state. *Smith v. Brock*, 532 P.2d 843 (Okla. 1975); *Johnson v. Di Giovanni*, 347 Mich. 118, 78 N.W.2d 560 (1956); *Freeling v. Tucker*, 49 Idaho 475, 289 P. 85 (1930); *In re Pierce*, 189 Wis. 441, 207 N.W. 966 (1926). It is a custom at least as old as 1735 when Andrew Hamilton, a Philadelphia lawyer, gained special permission to appear in the New York courts to defend the right of freedom of speech and press of one John Peter Zenger. *See J. Alexander, A Brief Narrative of the Case and Trial of John Peter Zenger*, 17-26, 61 (S. Katz ed. 1963); Loyd, *Andrew Hamilton* in 1 Great American Lawyers 1, 4, 27-48 (1907). It is, however, not a right but a discretionary privilege which allows out-of-state attorneys to appear *pro hac vice* in a state's courts without meeting the state's bar admission requirements. "It is permissive and subject to the sound discretion of the Court." *State v. Hunter*, 290 N.C. 556, 568, 227 S.E.2d 535, 542 (1976), *cert. den.*, 429

U.S. 1093, 51 L.Ed.2d 539, 97 S.Ct. 1106 (1977). The right to appear *pro hac vice* in the courts of another state is not a right protected by the Due Process Clause of the Fourteenth Amendment. The Federal Constitution does not obligate state courts to grant out-of-state attorneys procedural due process in the grant or denial of their petition for admission to practice *pro hac vice* in the courts of the state. *Leis v. Flynt*, 439 U.S. 438, 58 L.Ed.2d 717, 99 S.Ct. 698, *reh. den.*, 441 U.S. 956, 60 L.Ed.2d 1060, 99 S.Ct. 2185 (1979); *Thomas v. Cassidy*, 249 F.2d 91 (4th Cir. 1957), *cert. den.*, 355 U.S. 958, 2 L.Ed.2d 533, 78 S.Ct. 544 (1958).

"It is well established that the constitutional power to establish the qualifications for admission to the Bar of this State rests in the legislature." In *re Willis*, 288 N.C. 1, 14, 215 S.E.2d 771, 779, *appeal dismissed*, 423 U.S. 976, 46 L.Ed.2d 300, 96 S.Ct. 389 (1975); *Seawell, Attorney-General v. Motor Club*, 209 N.C. 624, 184 S.E. 540 (1936); *In re Applicants for License*, 143 N.C. 1, 55 S.E. 635 (1906); *see also Baker v. Varser*, 240 N.C. 260, 82 S.E.2d 90 (1954); *State v. Ballance*, 229 N.C. 764, 51 S.E.2d 731 (1949); *State v. Harris*, 216 N.C. 746, 6 S.E.2d 854 (1940); *State v. Lockey*, 198 N.C. 551, 152 S.E. 693 (1930). The legislature fixed the conditions under which an out-of-state attorney may be admitted to practice *pro hac vice* in this State in G.S. 84-4.1 which reads as follows:

> Any attorney regularly admitted to practice in the courts of record of another state and in good standing therein, having been retained as attorney for any party to a legal proceeding, civil or criminal, pending in the General Court of Justice of North Carolina, or the North Carolina Utilities Commission or the North Carolina Industrial Commission, may, on motion, be admitted to practice in the General Court of Justice or North Carolina Utilities Commission or the North Carolina Industrial Commission for the sole purpose of appearing for his client in said litigation, *but only upon compliance with the following conditions precedent:*
>
> (1) He shall set forth in his motion his full name, post-office address and status as a practicing attorney in such other state.
>
> (2) He shall attach to his motion a statement, signed by his client, in which the client sets forth his post-office address and declares that he has re-

tained the attorney to represent him in such proceeding.

(3) He shall attach to his motion a statement that unless permitted to withdraw sooner by order of the court, he will continue to represent his client in such proceeding until the final determination thereof, and that with reference to all matters incident to such proceeding, he agrees that he shall be subject to the orders and amenable to the disciplinary action and the civil jurisdiction of the General Court of Justice and the North Carolina State Bar in all respects as if he were a regularly admitted and licensed member of the Bar of North Carolina in good standing.

(4) He shall attach to his motion a statement to the effect that the state in which he is regularly admitted to practice grants like privileges to members of the Bar of North Carolina in good standing.

(5) *He shall attach to his motion a statement to the effect that he has associated and has personally appearing with him in such proceeding an attorney who is a resident of this State and is duly and legally admitted to practice in the General Court of Justice of North Carolina, upon whom service may be had in all matters connected with such legal proceedings, or any discplinary maters, with the same effect as if personally made on such foreign attorney within this State.*

(6) Compliance with the foregoing requirements shall not deprive the court of the discretionary power to allow or reject the application.

(Emphasis added.) The discretionary power of the court expressed in G.S. 84-4.1(6) arises "*only* upon compliance with the . . . conditions precedent" contained in G.S. 84-4.1(1-5). Those conditions must first be met. Then and only then does the court have "discretionary power to allow or reject the application." *See also* G.S. 84-4.2.

This case centers on G.S. 84-4.1(5) which requires an out-of-state attorney to attach to his motion for admission to limited prac-

tice a statement that he has associated resident local counsel to appear with him at all times during the proceeding he seeks to enter *pro hac vice*. By implication, the statute obviously requires the out-of-state attorney to do what he has stated he will do -- that is, in fact, to associate local counsel to appear with him. This is a valid and reasonable state requirement. *Martin v. Walton*, 368 U.S. 25, 7 L.Ed.2d 5, 82 S.Ct. 1, *reh. den.*, 368 U.S. 945, 7 L.Ed.2d 341, 82 S.Ct. 376 (1961); *Bradley v. Sudler*, 172 Kan. 367, 239 P.2d 921 (1952), *later appeal*, 174 Kan. 293, 255 P.2d 650 (1953); *Arthaud v. Griffin*, 202 Iowa 462, 210 N.W. 540 (1926); *Annot.*, 45 A.L.R.2d 1065, § 2 (1956). It is a requirement our Court of Appeals has enforced with vigor in the past. *Development, Inc. v. Phillips*, 9 N.C. App. 158, 175 S.E.2d 782 (1970), *aff'd in part, rev. in part on other grounds*, 278 N.C. 69, 178 S.E.2d 813 (1971); *State v. Daughtry*, 8 N.C. App. 318, 174 S.E.2d 76 (1970). It is a rule of wide application in the various states. *See, e.g., Keogh v. Pearson*, 35 F.R.D. 20 (D.D.C. 1964); *Dorador v. State*, 573 P.2d 839 (Wyo. 1978); *Frost v. Hardin*, 218 Kan. 260, 543 P.2d 941 (1975); *Application of American Smelting and Refining Co.*, 164 Mont. 139, 520 P.2d 103 (1973); *Re New Jersey Refrigerating Co.*, 96 N.J. Eq. 431, 126 A. 174 (1924); *Anderson v. Coolin*, 27 Idaho 334, 149 P. 286 (1915).

The rule is one way for the courts to control out-of-state counsel and assure compliance with the duties and responsibilities of an attorney practicing in the courts of this State. The association of out-of-state counsel with a local attorney satisfies a reasonable interest of our courts in having a member of the Bar of our State responsible for the litigation. *See Sanders v. Russell*, 401 F.2d 241 (5th Cir. 1968); *Willis v. Semmes, Bowen and Semmes*, 441 F.Supp. 1235 (E.D. Va. 1977). Our statute is specifically designed to insure that the court has ready jurisdiction over those appearing only occasionally before it by insuring that counsel who appear regularly before it participate in the case. *See Slayman v. Steinhoff*, 185 Kan. 88, 340 P. 2d 98 (1959).

[3] The very wording of the statute itself impels the conclusion that the association of local counsel is a mandatory condition precedent to the admission of an out-of-state attorney to a limited appearance in the courts of this State. Even after the provisions of G.S. 84-4.1(1-5) have been complied with, the court has absolute discretion to "allow or reject the application." Unless and until subsections (1) through (5) are complied with, the court has no discretion whatever. The legislative requirement of local counsel is therefore

mandatory and the court cannot waive it. It has no discretion in that respect. The conclusion of the Court of Appeals to the contrary in this case is erroneous.

[4] In this case, a valid motion for limited practice and attached statement was before Judge Ferrell on 31 October 1978. On its face, it complied with all the prerequisites of G.S. 84-4.1. It included an express statement to the effect that local counsel had been associated as required by G.S. 84-4.1(5) which read as follows:

> I am associating and will have personally appearing with me in this proceeding Stephen T. Smith of Kimzey, Smith & McMillan, Raleigh, North Carolina, who is a resident of the State of North Carolina and is duly and legally admitted to practice in the General Court of Justice of North Carolina and upon whom service may be had in all matters connected with this legal proceeding, or any disciplinary matter, with the same effect as if personally made on me within this State.

The record discloses that this motion was not allowed, apparently because Stephen Smith of the Wake County, North Carolina Bar had not been retained generally. A general appearance by local counsel is required by G.S. 84-4.1. Absent such appearance by local counsel, Talbot Smith never acquired eligibility to appear in the case and therefore was never an attorney in the case admitted to limited practice in North Carolina. Under those circumstances, Talbot Smith could not be held in and punished for direct and willful contempt of the court. Judge Ferrell was without power to order him to appear as attorney in the Atkinson case. The "order" to that effect was a nullity. Disobedience of an order made without, or in excess of, jurisdiction is not punishable as contempt. *State v. Black*, 232 N.C. 154, 59 S.E.2d 621 (1950); *see also* 17 Am. Jur., 2d, Contempt, § 42, and cases cited in footnote 9; 17 C.J.S., Contempt § 14.

For the reasons stated the contempt order against Talbot Smith, who was never properly admitted to practice *pro hac vice* before the courts of this State, is dismissed. The decision of the Court of Appeals is

Reversed.

Justices COPELAND and BROCK took no part in the consideration or decision of this case.

IN THE MATTER OF: JERRY BANKS MOORE, APPLICANT TO THE 1978 BAR EXAMINATION

No. 12

(Filed 6 January 1981)

1. Attorneys at Law § 2— admission to practice — insufficiency of finding of Board of Law Examiners

Finding of fact by the Board of Law Examiners that applicant "made false statements under oath on matters material to his fitness of character" inadequately resolved the factual issue which it addressed and was too vague to permit appropriate judicial review, where the evidence tended to show that applicant had committed a murder and an assault 14 years ago but argued that he had been duly punished for the acts, fully rehabilitated since they occurred, and that their evidentiary force had been long spent; to counter this argument the Board offered evidence that several years after these events applicant had made belligerent statements to a person to the effect that under some circumstances he was prepared to kill again, but applicant denied making these statements; the Board, in finding that applicant made "material false statements under oath," did not indicate which statements it considered to be untruthful; consequently, neither a reviewing court nor the applicant could be certain as to the content or materiality of the false statements referred to, and the Board could not meet its burden of proving specific acts of misconduct without setting out with specificity what they were and that they had been proved by the greater weight of the evidence.

2. Attorneys at Law § 2— admission to practice — finding that applicant lied under oath

In determining an applicant's fitness to practice law, the Board of Law Examiners should not conduct a hearing to consider applicant's alleged commission of specific acts of misconduct and, without a finding that he committed the prior acts, use his denial that he committed them as substantive evidence of his lack of moral character; rather, the Board should first determine whether in fact the applicant committed the prior acts of misconduct and, if it determines that he did, it must then say whether these acts so reflect on the applicant's character that they are sufficient to rebut his prima facie showing of good character.

3. Attorneys at Law § 2— admission to practice — findings by Board of Law Examiners

An applicant for admission to practice law was not prejudiced where the Board of Law Examiners found that applicant was paroled after serving a portion of his prison term but the Board failed to find that applicant was completely discharged from parole, since the reviewing court would take into account under a whole record review undisputed facts which favored applicant's position, and this would include, in this case, the fact of discharge from parole which applicant argued was unfairly omitted from the Board's findings.

4. Attorneys at Law § 2— application for admission to practice — failure to list assault - insufficiency of Board's findings

Where an applicant for admission to the practice of law had been convicted of assault and murder, finding by the Board of Law Examiners that applicant did

not disclose that he had been convicted of assault and battery on a female failed adequately to resolve the factual issue to which it was addressed where the factual issue before the Board was whether the omission was a mere inadvertence caused by applicant's initial failure to recall the conviction as an incident separate from the murder or was instead a purposeful omission designed to mislead the Board, the later correction of which was prompted only by notice of the hearing.

5. Attorneys at Law § 2— character of applicant in question — sealing of examination results proper

The Board of Law Examiners properly advised an applicant for admission to the practice of law that he would be permitted to take the Bar examination but that the result would be sealed until the Board had concluded its character evaluation, and the Board was not required subsequently to divulge applicant's examination result, since the result was irrelevant to the matter of applicant's character evaluation, and even if applicant failed the examination, this appeal would not be moot since it concerned applicant's character, a separate and distinct matter.

6. Attorneys at Law § 2— applicant's showing of good moral character — sufficiency of evidence to rebut showing

The Court on appeal could not conclude that as a matter of law the Board of Law Examiners' evidence was insufficient to support findings of fact which could rebut a prima facie showing of good moral character by an applicant for admission to the Bar where it was undisputed that applicant had committed and been convicted of murder and assault; the question before the Board was whether these acts occurring 14 years ago continued to constitute evidence that applicant was presently morally unfit to practice law; and only the Board through proper findings of fact and conclusions of law based thereon could answer the question as to whether events subsequent to the murder and assault demonstrated to the Board that applicant had been fully rehabilitated so that the evidentiary force of the 14 year old offenses was spent or whether they led to a contrary conclusion.

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

ON appeal pursuant to Section .1405 of the Rules Governing Admission to the Practice of Law (herein "Rules")[1] from a judgment, entered by *Judge Herring* on 5 February 1980 in WAKE Superior Court, affirming an order to the North Carolina Board of Law Examiners denying appellant permission to stand for the 1978 Bar Examination.

Vaughan S. Winborne, Attorney for applicant appellant.

Rufus L. Edmisten, Attorney General, by Harry H. Harkins, Jr., Associate Attorney, for the state, and Fred P. Parker, III, Attorney

[1]All references to the Rules are to those published by the Board in pamphlet form dated 23 August 1977.

for the Board of Law Examiners.

EXUM, Justice.

Appellant Jerry Banks Moore is an applicant for admission to the North Carolina Bar. He was denied permission to stand for the 1978 Bar Examination by the Board of Law Examiners (herein "Board") because of its decision that he had failed to demonstrate his good moral character. The principal question presented is whether certain findings of fact made by the Board adequately resolve the factual issues to which they are addressed. We conclude that two of them do not. We therefore reverse the judgment of the superior court which affirmed the Board's order, and remand for further proceedings.

Applicant Moore filed his application for admission to the bar in January, 1978. His application was complete. It was accompanied by four certificates of moral character signed by persons acquainted with him. Subsequently the Board twice summoned Moore to appear before it for inquiry into his moral character. The first hearing was held on 5 July and 7 July, 1978. Five days later the Board notified Moore that he would be permitted to take the 1978 Bar Examination but that the results would be withheld pending further investigation. Moore took the examination. A second hearing was held on 18 October 1978. On 27 December 1978 the Board issued an order which in effect denied Moore permission to be admitted to the bar because he failed to satisfy the Board "that he is of such good moral character as to be entitled to the high regard and confidence of the public." On applicant's appeal to Wake Superior Court Judge Herring affirmed this order.

Undisputed facts, adduced at the hearings, are essentially as follows: In 1963 Moore secured employment as a pharmaceutical representative and moved to Cary, North Carolina. He became a citizen of good standing in the community and was involved in a number of civic and church activities. In 1966, however, Moore and his wife began experiencing marital difficulties. On 20 July 1966 Moore discovered his wife with another man; and, after his wife brandished a handgun, struck her in the face. This incident led to Moore's subsequent trial and conviction for assault upon a female, whereupon he paid eleven dollars in court costs and a fifty dollar fine. Several weeks later, in mid-August, 1966, Moore and his wife separated. On 29 August 1966 Moore shot and killed a Mr. Barney Adler, Moore's estranged wife's paramour. Moore was tried for

first degree murder in Wake Superior Court and, despite his contention of self-defense, was convicted of second degree murder. Moore was incarcerated for over six years during which time he participated in work-release and college study-release programs. He graduated from the University of North Carolina at Charlotte (UNC-C) with honors in religion, and subsequently attended and graduated from South Texas Law School. Moore's parole was terminated unconditionally in 1975 and his rights of citizenship were restored at that time.

In response to a question asking for a listing of all arrests and convictions other than parking violations Moore failed to list his conviction for assault on a female either on his application or registration forms filed, respectively, on 5 January 1978 and 10 February 1978. He did ultimately disclose this incident by an amendment to his application filed 1 July 1978.

The central factual dispute in the record arises out of a conflict between Moore's testimony and that given by Mr. Sam Adler, father of Barney Adler, and Ms. Ira Myers, secretary to Dean William S. Mathis at UNC-C. Both Mr. Adler and Ms. Myers testified at the 18 October 1978 hearing. Mr. Adler testified that on or about 13 August 1966 Moore came to the Adler residence and warned Barney that "I don't want you to see my wife, if you do I'll kill you." Ms. Myers testified that Moore, in a conversation with her during the summer of 1970, made a statement to the effect that "My government took me into service, they taught me how to kill, and the more people I killed, the more medals and pay I received, but when I came home and did what my government taught me, they punished me." She further testified that during either the summer of 1973 or the summer of 1974 Moore made a statement to the effect that "I don't like to see anyone hurt the woman I love. I have already killed one man and I have paid for it; it did me no harm and I would not hesitate to kill another man who hurt the woman I love." Ms. Myers intimated that Moore's remark was in reference to Dean Mathis who was then involved in a tenure dispute with Moore's second wife. Applicant Moore repeatedly denied that he threatened to kill Barney Adler or that he made any such statements to Ms. Myers. The issue thus becomes whether Moore did in fact make these belligerent statements or any of those attributed to him.

Another factual issue arose when Moore explained that he had not originally listed the assault on a female conviction because "it

was a part of a chain of events which led up to the second degree murder of Mr. Barney Adler . . . . There's no desire on my part to hide anything from the bar. I'm quite aware that the bar has the power to check FBI records." This issue thus became whether Moore inadvertently omitted this incident because he had ceased to recall it as an incident separate and apart from the murder itself or whether the omission was willful and intended to mislead the Board.

The Board, in concluding that Moore had failed to demonstrate his moral character, made the following findings of fact and conclusion:

> "1. The applicant was charged with first-degree murder and convicted of second-degree murder in the Superior Court for Wake County, North Carolina, in 1966, and was duly sentenced to confinement in the prison system of the State.
>
> 2. The applicant, after serving a portion of the term for which he was sentenced, was duly paroled by lawful authority.
>
> 3. On several occasions in his testimony before the Board, the applicant made false statements under oath on matters material to his fitness of character.
>
> 4. In response to a question on the registration and a similar question on the application requiring that all of his arrests and convictions other than parking violations be listed, the applicant failed to disclose that in 1966 he had been arrested, tried and convicted in Durham County, North Carolina, for assault and battery on a female. Although the applicant filed his registration and his application with the Board on February 10, 1978 and January 5, 1978, respectively, he first disclosed this arrest and conviction to the Board by an amendment to his application filed on July 1, 1978 shortly before a hearing by the Board on July 6, 1978 as to his fitness of character, the Board having given notice to the application of that hearing on June 22, 1978.
>
> Based upon the foregoing Findings of Fact, the Board concludes that the applicant has failed to satisfy the Board that he is of such good moral character as to be

entitled to the high regard and confidence of the public and therefore to take the 1978 North Carolina Bar Examination."

Accordingly, the Board ordered that Moore's application to take the 1978 Bar Examination be denied and that the results of his examination be permanently sealed.

I

[1] Moore first contends that finding number three, that Moore "made false statements under oath on matters material to his fitness of character," inadequately resolves the factual issue which it addresses and is too vague to permit appropriate judicial review. We agree.

The Board of Law Examiners was created for the purpose of "examining applicants and providing rules and regulations for admission to the bar." G.S. 84-24; *In re Willis*, 288 N.C. 1, 215 S.E. 2d 771, *appeal dismissed*, 423 U.S. 976 (1975); *Baker v. Varser*, 240 N.C. 260, 82 S.E. 2d 90 (1954). General Statute 84-24 authorizes the Board "to make or cause to be made such examinations and investigations as may be deemed by it necessary to satisfy it that the applicants for admission to the Bar possess the qualifications of character and general fitness requisite for an attorney and counselor-at-law." Each applicant for admission has, pursuant to Rule .0601, the burden of proving his good moral character, and must initially come forward with sufficient evidence to make out a prima facie case. *In re Rogers*, 297 N.C. 48, 253 S.E. 2d 912 (1979).[2]

When an applicant makes a prima facie showing of good moral character and the Board, to rebut the showing, relies on specific acts of misconduct the commission of which are denied by the applicant, the Board must prove the specific acts by the greater weight of the evidence. *Id.* "When a decision of the Board of Law Examiners rests on a specific fact or facts the existence of which is contested, the Board's duty to resolve the factual dispute by specific findings is no less than that of other administrative agencies." *In re Rogers, supra* at 56-57, 253 S.E. 2d at 918. Orders rendered by an administrative agency on the basis of findings which do not adequately resolve crucial factual conflicts before the agency preclude any kind of meaningful judicial review of the orders and require

[2]*Rogers* was decided *after* the Board's hearing and order in this case.

that the orders be set aside and the matter remanded for further proceedings. *Commissioner of Insurance v. Automobile Rate Office*, 293 N.C. 365, 239 S.E. 2d 48 (1977). As noted by the United States Supreme Court in *Wyoming Gas Co. v. Federal Power Commission*, 324 U.S. 626, 634 (1945):

> "[W]e must first know what the 'finding' is before we can give it . . . conclusive weight. We have repeatedly emphasized the need for clarity and completeness in the basic or esential findings on which administrative orders rest. *Florida v. United States*, 282 U.S. 194, 215; *United States v. Baltimore & Ohio R. Co.*, 293 U.S. 454, 464; *United States v. Chicago, M., St. P. & P.R. Co.*, 294 U.S. 499, 504-505, 510-511; *United States v. Carolina Carriers Corp.*, 315 U.S. 475, 488-489. Their absence can only clog the administrative function . . . ."

Similarly, "[c]ourts ought not to have to speculate as to the basis for an administrative agency's conclusion." *Northeast Airlines Inc. v. CAB*, 331 F. 2d 579, 586 (1st Cir. 1964). *Accord, Austin v. Jackson*, 353 F. 2d 910, 911 (4th Cir. 1965).

In the present case we find that Moore through his application and evidence in support thereof made out a prima facie showing of his present good moral character. The question then becomes whether certain specific acts of misconduct committed or allegedly committed by Moore are sufficient to rebut this showing. Two of these acts, a murder and an assault, were admittedly committed by Moore some fourteen years ago. He argues, however, that he has been duly punished for the acts, fully rehabilitated since they occurred, and that their evidentiary force has been long spent. To counter this argument the Board offered evidence that several years after these events Moore had made belligerent statements to Ms. Ira Myers to the effect that under some circumstances he was prepared to kill again. Moore denied making these statements. Thus the most crucial factual issue in these proceedings was joined.

We hold that finding number three fails adequately to resolve this issue and lacks the requisite specificity to permit adequate judicial review of the Board's order. The Board, in finding that Moore made "material false statements under oath," did not indicate which statements it considered to be untruthful. Consequently neither a reviewing court nor the applicant can be certain as to the content or materiality of the false statements referred to. The Board

cannot meet its burden of proving specific acts of misconduct without setting out with specificity what they are and that they have been proved by the greater weight of the evidence. The Board in its brief attempts to specify the false statements referred to in the disputed finding. Suffice it to say that the specifications must be contained in the Board's order. Its brief should be directed to whether the specific findings are supported by the evidence and if so whether they along with other findings of misconduct are sufficient to rebut the applicant's prima facie case.

[2] In addition, we question whether the Board should rely on a finding that an applicant lied under oath when the finding is based on nothing more than the applicant's denial of accusations against him. The purpose of the hearing before the Board is to probe matters set forth in the notice of hearing required by Rule .1202. Such an inquiry must of necessity concern acts which occurred *prior* to the hearing. The Board should not conduct a hearing to consider applicant's alleged commission of specific acts of misconduct and *without a finding that he committed the prior acts* use his denial that he committed them as substantive evidence of his lack of moral character. The Board should first determine whether in fact the applicant committed the prior acts of misconduct. If it determines that he did, it must then say whether these acts so reflect on the applicant's character that they are sufficient to rebut his prima facie showing of good character. *In re Rogers, supra*, 297 N.C. 48, 253 S.E. 2d 913.[3]

II

[3] Moore next maintains that findings two and four are not "complete and fair with the full truth from the evidence." He argues that finding two, which states that Moore was paroled after serving a portion of his prison term, fails to find that he was completely discharged from parole effective 25 October 1975.[4] Finding four, which states that Moore initally failed to disclose his conviction for

[3]In many instances finding the applicant to have committed the prior acts will be sufficient to support a conclusion of lack of the requisite moral character. There may, however, be instances where the prior acts are not dispositive of the character determination; applicant's false statements about the acts then take on added significance. In either event the Board must prove the commission of the prior act and should first make a finding in regard thereto. It may then find, if it is so convinced, that the applicant testified falsely under oath.

assault and battery upon a female, fails, he argues, to identify the female assaulted as his wife, to disclose the time of the assault in relation to the subsequent murder of Barney Adler, and to include Moore's explanation for omitting this conviction from his initial application.

While the Board's findings on each material factual issue should specifically, fully, and fairly resolve the issue, applicant here has not been prejudiced by whatever incompleteness exists in finding two. The matter omitted from this finding is not the subject of a material factual dispute. The findings and conclusions of the Board are judicially reviewed by giving consideration to the whole record before the Board. *In re Rogers, supra*, 297 N.C. 48, 253 S.E. 2d 912. This requires the reviewing court "in determining the substantiality of evidence supporting the Board's decision, to take into account whatever in the record fairly detracts from the weight of the Board's evidence." *Thompson v. Board of Education*, 292 N.C. 406, 410, 233 S.E. 2d 538, 541 (1977). Thus a reviewing court must take into account under a "whole record" review at least undisputed facts which favor the applicant's position. This would include, here, the fact which applicant argues was unfairly omitted from finding two. There is, therefore, no error prejudicial to applicant arising from this omission.

[4] Not so, however, with regard to finding four. This finding, like finding three, fails adequately to resolve the factual issue to which it is addressed. In view of the applicant's explanation of his failure

---

[4]Moore also contends before us that he was granted a "Pardon or Pardon of Forgiveness" by Governor Hunt on 19 October 1979. The alleged pardon is not a part of the record on appeal. It was not before the Board or the Superior Court. We cannot consider it.

Since we are remanding this case, applicant Moore will have the opportunity to request the Board to take cognizance of such a pardon, if one exists, and to give it such weight, if any, as it deems it to deserve. Rule .1207 provides: "After a final decision has been reached by the board . . . a party may petition the board to reopen or reconsider a case. Petitions will not be granted except when petitioner can show that the reasons for reopening or reconsidering the case are to introduce newly discovered evidence which was not presented at the initial hearing because of some justifiable, excusable, or unavoidable circumstances and that fairness and justice require reopening or reconsidering the case." *See also*, Annot. "Criminal Record as Affecting Applicant's Moral Character for Purposes of Admission to the Bar," 188 A.L.R. 3d 192 (1978); Annot., "Pardon as Restoring Public Office or License or Eligibility Therefor," 58 A.L.R. 3d 1191 (1974).

initially to list the assault conviction, the factual issue before the Board was whether the omission was a mere inadvertence caused by applicant's initial failure to recall the conviction as an incident separate from the murder or was instead a purposeful omission designed to mislead the Board the later correction of which was prompted only by notice of the hearing. For the reasons discussed in Part I of this opinion in connection with finding three, the matter must be remanded in order that the Board can appropriately resolve the factual issue addressed by finding four.

III

[5] Applicant Moore also objects to the sealing of his examination result. The Board advised Moore that he would be permitted to take the 1978 Bar Examination but that the result would be sealed until the Board concluded its character evaluation. Moore took the examination on that basis. After filing his appeal in Wake Superior Court, however, Moore submitted the following interrogatory to the Board: "Did the applicant, Jerry Banks Moore, pass the written 1978 North Carolina Bar Examination?" Moore maintains that a non-passing grade on the written examination moots this appeal; therefore the Board should be required to divulge his examination result. The Board objected on the ground that the examination result was irrelevant to the matter under consideration. Judge Bailey, on 4 October 1979, entered an order sustaining the Board's objection.

We affirm this ruling. Moore's examination score is not relevant to the investigation regarding his character. The present case is concerned only with Moore's character, and does not concern his learning in the law. If Moore failed the examination he could simply take it again. In contrast, however, Rule .0605 provides that an applicant whose application is denied on character grounds may not reapply for the examination until three years after the date of the denial. Even if Moore failed the examination this appeal would not be moot since it concerns his character, a separate and distinct matter.

IV

After Moore gave notice of appeal to Wake Superior Court pursuant to Rule .1402 the Board, as it was required to do under Rule .1403, filed with the court the record of the case. Defendant then moved that the record be corrected in certain specific respects

in apparent reliance on that provision of Rule .1403 which provides, "[t]he court may require or permit subsequent corrections or additions to the record when deemed desirable." Rule .1404 provides further that the mattter shall be heard in Wake Superior Court on the record "but no evidence not offered at the hearing [before the Board] shall be taken except that in cases of alleged omissions or errors in the record. Testimony thereon may be taken by the court."

The motion came on for hearing before Judge Bailey at the 1 October 1979 Non-Jury Civil Session of Wake Superior Court. On 4 October 1979 Judge Bailey entered an order allowing a number of Moore's requests for additions and corrections to the record. Judge Bailey denied, however, Moore's motion to include in the record a copy of Moore's transcript at UNC-C. He also denied Moore's motion to include in the record certain letters certifying to Moore's good character. Moore contends that both of these rulings were prejudicially erroneous.

Moore's UNC-C transcript was attached to his application for admission to the bar. It was not included in the record on appeal apparently because the Board considered it to be irrelevant to any of the issues raised on appeal. Moore argues that the transcript tends "to impeach the credibility of the testimony of Miss Ira Myers." The transcript is in the record on appeal to this Court.[5] Insofar as the UNC-C transcript does impeach Mrs. Myers' testimony, it was before the Board. Applicant, therefore, was permitted to take whatever advantage he could from the transcript before the Board, and the Board was able to consider the transcript in making its findings. Since, however, appellate review of the Board's decision is made on the whole record, the appellate court needs to have

[5]The transcript shows that Moore attended UNC-C during the summers of 1970, 1973 and 1974. It further shows that he did not attend UNC-C from 11 November 1970 until summer 1973. Ms. Myers testified at the 18 October 1978 hearing that Moore made the statements in question during the summer of 1970, and during the summer of either 1973 or 1974. In her affidavit, however, Ms. Myers states: "That during the summer of 1972, she assisted Jerry Banks Moore, at his request, in order for him to receive extra hours credit from the study that he had completed while he was in the military; that following this period of time, she did see Jerry Moore, but he did not visit her as frequently as he had in the past; that on one occasion he visited her ofice in the Rowe Building and during this converstion made, in substance, the following statement: 'I don't like to see anyone hurt the woman I love. I have already killed one man and I have paid for it and it did me no harm and I would not hesitate to kill another man who hurt the woman I love.'"

before it any evidence which might fairly detract from the decision of the Board. We believe Moore's UNC-C transcript should have been included as a part of the record on appeal. It may be so included if after further proceedings on remand, applicant again appeals.

Judge Bailey ruled correctly in exluding the four character letters from the record because they were not duly offered in evidence at the hearings before the Board. No testimony on this controversy was taken before Judge Bailey. According to both the Board's and the applicant's brief, however, two of the letters were offered at the hearings in July but rejected because they were not signed. These letters and two others were then purportedly signed and mailed to the Board between the July and October hearings but they were never formally offered into evidence at the October hearing. Mailing the letters to the Board did not get them into evidence. It was, therefore, not error for Judge Bailey to deny applicant's motion to have them included in the record. Again, however, when the matter is remanded applicant may petition the Board to reopen the case in order to give applicant an opportunity to offer the letters. Rule .1207.

Judge Bailey, responding to applicant's questioning of the accuracy of the transcript of the testimony before the Board, denied applicant's motion to insert additional material in the transcript "without prejudice to the applicant's right to renew same upon providing evidence that comments or testimony offered at the hearing were omitted from the transcript." Moore provided no such evidence. The Board, however, furnished the court reporter's affidavit certifying to the accuracy of the transcript. Applicant did not except to any of Judge Bailey's rulings in this regard. He does except to and assigns as error Judge Herring's later denial of this motion to strike the court reporter's affidavit from the record. There is obviously no merit to this assignment of error. The Board was entitled to meet applicant's questioning of the accuracy of the transcript with whatever relevant evidence it could muster. Its reliance on the court reporter's affidavit was proper. Judge Herring did not err in denying applicant's motion to strike the affidavit.

V

[6] Finally, Moore contends the Board erred in concluding that he has failed to demonstrate his good moral character. He urges this Court to conclude that, as a matter of law, the Board's evidence is

insufficient to support findings of fact which could rebut his prima facie showing of good moral character. We so concluded in *In re Rogers, supra*, 297 N.C. 48, 253 S.E. 2d 912. We do not so conclude here. In *Rogers* there was an absence both of requisite findings and of sufficient evidence. Here all that is lacking are the requisite findings.

We are not unmindful that apart from applicant's murder conviction, his omission of the assault conviction from his initial application and registration forms, and the belligerent statements he is accused of having made, applicant has made a relatively strong showing that he possesses the requisite good moral character for admission to the bar. Prior to the murder his character and reputation in the community where he lived was good. The murder itself and the assault are, of course, severe blemishes. But applicant argues: (1) Both arose out of his domestic difficulties and constitute one unfortunate episode in his life that occurred some fourteen years ago. (2) He has paid his debt to society for both offenses. (3) He has been fully rehabilitated as evidenced by his exemplary record and conduct both in prison and after his parole.[6]

Nonetheless this case differs from *Rogers*. In *Rogers* we concluded in light of the whole record that the evidence was simply insufficient to support findings that Rogers had committed specific acts of misconduct. Therefore Rogers' strong prima facie showing of good moral character was, as a matter of law, unrebutted. Here it is undisputed that Moore has committed and been convicted of two specific acts of misconduct: murder and assault. The real question for the Board is whether these acts, occurring some fourteen years ago, continue to constitute evidence that Moore is *presently* morally unfit to practice law. Stated another way, the question is whether events subsequent to these acts demonstrate to the Board that Moore has been fully rehabilitated so that the evidentiary force of the fourteen-year-old offenses is spent or whether they lead to a contrary conclusion. Only the Board, through proper findings of fact and conclusions based thereon, can answer these questions in the first instance. This is why the factual issues addressed by findings three and four loom so crucial and why the matter must be remanded to the Board for a proper resolution of these issues. For if Moore did in fact utter in 1970 and 1973 or 1974 the belligerent

[6]*See* Annot., "Criminal Record as Affecting Applicant's Moral Character for Purposes of Admission to the Bar," *supra* at n.4.

statements attributed to him, this would be more recent evidence of his attitude about the propriety of violence as a dispute settling device. It would provide the Board a better key with which to unlock the question of Moore's rehabilitation from his earlier offenses. Of almost equal importance is the question of Moore's omission of the assault conviction from his original application and registration forms. Was this an intentional omission designed to mislead the Board or was it a mere inadvertence, a matter initially forgotten by Moore because of the long lapse of time?

These crucial factual issues need to be resolved before the Board can properly answer in the first instance the questions of whether Moore has indeed been rehabilitated and whether he *presently* possesses the good moral character prerequisite for admission to the bar. It is not the function of this Court to determine factual issues. On this record we cannot properly address the correctness of the Board's ultimate conclusions.

The decision, therefore, of the superior court affirming the Board's order is reversed and the matter remanded to Wake Superior Court for further remand to the North Carolina Board of Law Examiners for further proceedings not inconsistent with this opinion.

Reversed and Remanded.

Justice BROCK did not participate in the consideration and decision of this case.

JOHNSIE A. HICE v. HI-MIL, INC.

No. 89

(Filed 6 January 1981)

1. Reformation of Instruments § 5— burden of proof for reformation

In an action for reformation of a written instrument, the plaintiff has the burden of showing that the terms of the instrument do not represent the original understanding of the parties and must do so by clear, cogent and convincing evidence.

2. Reformation of Instruments § 5— presumption of correctness

There is a strong presumption in favor of correctness of the instrument as written and executed, for it must be assumed that the parties knew what they agreed and have chosen fit and proper words to express that agreement in its

agreed and have chosen fit and proper words to express that agreement in its entirety.

3. Reformation of Instruments § 7— reformation of deed —mutual mistake — sufficiency of evidence

Plaintiff's evidence was sufficient to show a mutual mistake as to what land was being conveyed by a 1971 deed from plaintiff to defendant's predecessors in title by clear, cogent and convincing evidence so as to justify a reformation of the deed where it tended to show that the deed conveyed numerous tracts of mountain land which were contiguous and located at some distance from plaintiff's homeplace; included in the tracts conveyed by the deed was a 13 acre tract which was a part of plaintiff's 25 acre homeplace; the attorney who prepared the deed for plaintiff obtained the descriptions of the land to be conveyed from deeds brought to him by plaintiff and did not discover until 1977 that the 13 acre tract was not contiguous to the other tracts conveyed; plaintiff did not realize at the time of the 1971 transaction that her homeplace consisted of two separate tracts of land; and plaintiff intended to convey and the purchasers intended to receive by the deed only the mountain land and not any portion of plaintiff's homeplace.

4. Reformation of Instruments § 1— effect on rights of bona fide purchaser

As a general rule, reformation will not be granted if the rights of an innocent bona fide purchaser would be prejudiced thereby.

5. Corporations § 7— knowledge of officer or director — imputation to corporation

Although a corporation is generally not chargeable with knowledge of its officer or director concerning a transaction in which the officer or director is acting in his own behalf, the corporation is properly charged with the knowledge of an individual officer or director when the interests of such individual are clearly aligned with those of the corporation.

6. Corporations § 7; Reformation of Instruments § 9— mistake in deed — imputation of knowledge to corporation — corporation not innocent bona fide purchaser

In an action to reform a deed on the ground that a portion of plaintiff's homeplace was mistakenly included in the description of the tracts conveyed, knowledge of one original grantee as to what land was intended to be conveyed at the time the property was conveyed by such grantee to the corporate defendant was imputed to the corporation, and the corporation was thus not an innocent bona fide purchaser for value against whom reformation of the deed may not be granted, where such grantee was an officer, director and 50% shareholder of defendant corporation at the time he conveyed the property to the corporation; the grantee remained personally, although secondarily, liable on a note given to plaintiff as part of the purchase price after the note was assumed by defendant corporation; successful development of the property would be to the mutual benefit of the grantee and defendant corporation; and the interests of the grantee were thus clearly aligned with those of the corporation.

7. Reformation of instruments 1.1; Limitation of Actions § 8.1—reformation of deed — mutual mistake — date of discovery —action not barred by statute of limitations

The evidence did not show that plaintiff discovered or should have discovered that a 1971 deed mistakenly included 13 acres of her homeplace at the time she executed the deed, and plaintiff's action instituted in 1978 to reform the deed was not barred by the three year statute of limitations of G.S. 1-52(9), where the evidence showed that, although the deed stated the property had been purchased from named persons and plaintiff knew that part of the homeplace had been purchased from such persons, and although plaintiff stopped paying taxes on the 13 acre tract in 1973, plaintiff did not know that the description in the deed included a part of her homeplace; plaintiff knew she had paid taxes on only 12 acres of land after 1973 but thought that the 12 acres included all of her homeplace, which actually contained 25 acres; and plaintiff did not learn of the mistake until 1977 when a title search was made in preparation for sale of her 25 acre homeplace.

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

ON appeal as a matter of right pursuant to G.S. § 7A-30(2) (1969) from the decision of the Court of Appeals, 47 N.C. App. 427, 267 S.E. 2d 507 (1980), affirming judgment entered for plaintiff by *Riddle, Judge*, at the 28 September 1979 Civil Session of Superior Court, CALDWELL County.

This appeal involves the propriety of the trial court's ruling to reform a deed on the ground of mutual mistake of fact. We also consider whether the last purchaser was an innocent bona fide purchaser for value and whether the action for reformation was barred by the statute of limitations. We agree with the Court of Appeals that reformation was proper and affirm.

West, Groome and Correll, by Ted G. West and Edward H. Blair, Jr., for plaintiff-appellee.

Billings, Burns and Wells, by Donald R. Billings and R. Michael Wells, for defendant-appellant.

CARLTON, Justice.

I.

Plaintiff instituted this action seeking to reform a deed on the ground of mutual mistake. In a deed dated 27 October 1971 plaintiff conveyed to Everett Welch (spelled "Walsh" in the deed) and Ray Hice, first cousin to plaintiff's deceased husband, twenty tracts of

land known as the "mountain land," containing approximately 900 to 1200 acres. Included in the tracts conveyed by the deed was a thirteen acre tract which was part of plaintiff's twenty-five acre homeplace. Plaintiff alleged that the description of the thirteen acre tract was mistakenly included in the deed to Welch and Ray Hice and that she did not intend to convey nor did the purchasers intend to purchase that tract. The purchase price was $100,000 plus a reconveyance of eight acres to plaintiff and her children. A down payment of $20,000 to $25,000 was made and a note was given to secure the balance.

Welch conveyed his half interest in the "mountain land" to Ray Hice by deed dated 27 July 1973. Later in 1973 Ray Hice and Jack Miller organized the defendant, Hi-Mil, Inc., for the purpose of developing the mountain land. Each owned 50 percent of the stock and each became an officer and director of the corporation. On 14 September 1973 Ray Hice transferred to the corporation all the land acquired from plaintiff, including the thirteen acre tract which is the subject of this suit. The corporation assumed the balance of the debt owed to plaintiff. Thereafter, Ray Hice sold most of his stock interest in the corporation to Jack Miller for $17,000. By the time of the trial, defendant had paid in full the balance of the note on the land.

In late 1977 plaintiff discovered that the thirteen acre tract constituting a part of her homeplace had been conveyed by the 1971 deed to Ray Hice and Welch. In 1978 she brought this action to reform the deed on the ground of mutual mistake. Defendant answered, denying plaintiff's allegations, alleging that plaintiff had failed to state a claim upon which relief could be granted, and pleading the statute of limitations as a bar to the action. Defendant then moved for summary judgment, which was denied. The case was heard before Judge Riddle sitting without a jury.

In addition to the above facts, the evidence tended to show that plaintiff negotiated with Ray Hice and Welch for the sale of the "mountain land," which consisted of numerous tracts of land purchased over the years by her husband. All parties to the original sale intended the subject property to be contiguous tracts of land located in the "Brushy Mountains" approximately three miles from plaintiff's homeplace. The deed to Ray Hice and Welch was prepared by plaintiff's attorney who took the descriptions of the property to be conveyed from deeds brought to him by plaintiff. The

thirteen acre tract was included as the fifth tract. Plaintiff read the deed before she signed it but did not realize from the description of the fifth tract that it was part of her homeplace. Ray Hice testified that he understood the sale to be of the "mountain land," that the fifth tract was not part of the "mountain land," that all of the consideration paid was for the mountain land only, and that no consideration was given for the fifth tract, which was not part of the "mountain land."

Defendant's motions for a directed verdict at the close of plaintiff's evidence and at the close of all the evidence were denied. At the close of the evidence and arguments of counsel, Judge Riddle made findings of fact and conclusions of law and entered judgment for plaintiff. The Court of Appeals (Hill, J., with Martin (Robert M.), J., concurring) affirmed. Judge Arnold dissented without opinion.

II.

Defendant first contends that the trial court's finding that a "mutuality of mistake existed" is not adequately supported by the evidence.

[1,2] In an action for reformation of a written instrument, the plaintif has the burden of showing that the terms of the instrument do not represent the original understanding of the parties and must do so by clear, cogent and convincing evidence. *Isley v. Brown*, 253 N.C. 791, 117 S.E. 2d 821 (1961); *Insurance Co. v. Lambeth*, 250 N.C. 1, 108 S.E. 2d 36 (1959); *Perkins v. Perkins*, 249 N.C. 152, 105 S.E. 2d 663 (1958); *Hege v. Sellers*, 241 N.C. 240, 247, 84 S.E. 2d 892, 897 (1954); *Coppersmith v. Insurance Co.*, 222 N.C. 14, 21 S.E. 2d 838 (1942). Additionally, there is "a *strong presumption* in favor of the correctness of the instrument as written and executed, for it must be assumed that the parties knew what they agreed and have chosen fit and proper words to express that agreement in its entirety." *Clements v. Insurance Co.*, 155 N.C. 57, 61, 70 S.E. 1076, 1077 (1911) (emphasis added). This presumption is strictly applied when the terms of a deed are involved in order "to maintain the stability of titles and the security of investments." *Williamson v. Rabon*, 177 N.C. 302, 306, 98 S.E. 830, 832 (1919); *accord, Isley v. Brown*, 253 N.C. at 793, 117 S.E. 2d at 823. With these principles in mind, we must examine the record to determine whether plaintiff proved that there was a mutual mistake of fact as to what land was conveyed in the October 1971 sale by "clear, cogent and convincing evidence."

[3] Plaintiff's evidence showed that she was a fifty-four-year-old widow, engaged in settling her husband's estate at the time of the sale; that she had only a seventh grade education and worked as a seamstress; that prior to the October 1971 sale she had never engaged in any real estate transactions nor had she employed an attorney; that she intended to sell only the mountain tract and not any part of her homeplace; that her entire homeplace had been fenced in to pasture horses and cattle; that the tracts intended to be conveyed were contiguous and were located at some distance from her homeplace; and that at the time of the October 1971 transaction plaintiff did not realize that her homeplace consisted of two separate tracts of land.

The attorney who prepared the deed for plaintiff, Dickson Whisnant, testified that all the land to be sold was contiguous mountain land, that he prepared the descriptions of the land to be conveyed from deeds brought to him by plaintiff, and that he did not discover until 1977 that the thirteen acre trace conveyed as the fifth tract was not contiguous to the other tracts conveyed. The attorney also testified that he told plaintiff that including this tract in the deed had been his mistake. Mr. Whisnant notified Mr. Miller, the sole owner of defendant-appellant, of the mistake. According to Mr. Whisnant, Miller agreed that the tract was not supposed to have been in the October 1971 deed. Mr. Whisnant prepared a deed of reconveyance from Hi-Mil, Inc., to plaintiff, but it was never executed. Miller denied that he agreed that the thirteen acre tract had been mistakenly included in the deed to Welch and Ray Hice.

Ray Hice testified that the sale consisted only of the mountain land, consisting of numerous contiguous tracts, and did not include any part of plaintiff's homeplace. Hice, who had lived in the area all his life and was familiar with the land, testified that the land he and Welch intended to purchase was mountain land located approximately three miles from plaintiff's homeplace and consisted of numerous contiguous tracts totaling about 900 acres. There was no survey conducted at the time of the sale to Hice and Welch.

These facts are clearly sufficient to rebut the presumption that the deed is correct as written and executed and constitute clear, cogent and convincing evidence of mutual mistake as to what land was being conveyed.

Defendant argues in its brief that both parties to the original transaction who testified at trial are interested in the outcome and

their testimony is inherently unreliable. While the interest of a witness may properly be considered in determining his credibility, that determination is for the trier of fact and cannot be disturbed on appeal absent conclusive evidence to the contrary. 1 Stansbury, North Carolina Evidence § 8 (Brandis Rev. 1973); 13 Strong, N.C. Index 3d, Witnesses § 3 (1978). Defendant also argues that the absence of testimony from Welch, a grantee in the October 1971 deed, prevents plaintiff's evidence of mutual mistake from being clear, cogent and convincing. This argument is without merit. Its clear implication is that Welch, had he testified, would have told a different story from that told by appellant and Ray Hice. From the record before us, we are unable to determine whether Welch was available to testify. Assuming, *arguendo*, that Welch was available to plaintiff, he was equally available to defendant, and defendant's failure to secure his testimony is its own fault. An appellate court cannot speculate on what a potential witness's testimony would have been had he been called to the stand.

The uncontroverted facts show that plaintiff intended to convey and the purchasers intended to receive by the 27 October 1971 deed only mountain land, which was located some distance from plaintiff's homeplace. Plaintiff has shown a mutual mistake as to what land was being conveyed. The trial court's conclusions of law and findings of fact are amply supported by the evidence.

III.

Defendant next challenges the finding and conclusion of the trial court that it is not a bona fide purchaser for value.

[4] As a general rule, reformation will not be granted if the rights of an innocent bona fide purchaser would be prejudiced thereby. *Lowery v. Wilson*, 214 N.C. 800, 200 S.E. 861 (1939); *Dameron v. Lumber Co.*, 161 N.C. 495, 77 S.E. 694 (1913). Because defendant is not a party to the original deed, plaintiff is required to prove that knowledge of the mistake can be imputed to defendant in order to succeed on her reformation claim. The trial court found that defendant is not a bona fide purchaser for value without notice of the irregularities because the knowledge of Ray Hice, an officer, director and 50 percent shareholder, constituted notice to defendant.

Defendant contends that, at the time it purchased the property from Ray Hice, Hice had no knowledge of the mistake which could be imputed to the corporation. Defendant erroneously assumes that

the mistake in the case *sub judice* is a drafting error, of which Ray Hice had no knowledge until long after the sale to defendant. The mistake, however, was in what land was being conveyed: the deed to Welch and Hice conveyed more than plaintiff intended to sell and the grantees intended to buy. Likewise, the deed from Ray Hice to Hi-Mil, Inc., was meant to convey only the mountain land and not the thirteen acre tract that is part of plaintiff's homeplace. The relevant knowledge of Hice is his knowledge as to what land was being conveyed at the time of the conveyance to defendant.

[5,6] We must now consider whether defendant is properly charged with this knowledge. Ray Hice was an officer, director, and 50 percent shareholder of defendant at the time of the sale. Additionally, Hice's interest in the sale of the property was not in conflict with defendant's interest; rather, as the Court of Appeals notes, their interests were "clearly aligned." This is so because Hice remained personally, although secondarily, liable on the note, because Hice was a 50 percent owner of defendant, and because successful development of the property would be to their mutual benefit. Although appellant correctly notes that a corporation is generally not chargeable with the knowledge of its officer or director concerning a transaction in which the officer or director is acting in his own behalf, *e.g.*, *Lumber Corp. v. Equipment Co.*, 257 N.C. 435, 439, 126 S.E. 2d 97, 100 (1962), the facts of this case demonstrate that this general rule is inapplicable. Because of Hice's position vis-a-vis the defendant and his continued liability on the note, Hice could not have been acting for his sole benefit. Any action that would benefit him would also benefit the corporation. We hold that when the interests of the individual officer or director are so clearly aligned with those of the corporation, the corporation is properly charged with the knowledge of the individual.

The trial court correctly imputed the knowledge of Ray Hice concerning what land was being conveyed to the corporation. Because the corporation is charged with notice of the mistake, it is not an innocent bona fide purchaser for value against whom reformation may not be granted.

IV.

Both the trial court and the Court of Appeals held that plaintiff's claim is not barred by the three-year statute of limitations, G.S. § 1-52(9) (Cum. Supp. 1979), for actions based on fraud or

mistake. Defendant challenges the sufficiency of the evidence to support the findings of fact which led to this conclusion of law.

[7] Specifically, defendant contends that plaintiff did discover, or should have discovered, the mistake at the time she conveyed the property to Hice and Welch or shortly thereafter. The description of the fifth tract in the deed stated that the property had been purchased from the Kellers; plaintiff testified that she knew part of the homeplace had been purchased from the Kellers. Also, plaintiff stopped paying taxes on the thirteen acre tract in 1973. Defendant argues that plaintiff had to have known that she stopped paying the taxes and must have known why she was no longer obligated to pay them. Defendant's arguments assume that plaintiff knew that the land described as the fifth tract in the deed was part of her homeplace. There was no evidence that plaintiff knew that the description in the deed was that of a part of her homeplace. To the contrary, plaintiff testified that although she read the deed she did not know that it conveyed away part of her homeplace. Plaintiff testified that she knew that she paid taxes on only twelve acres of land after 1973 but thought that the twelve acres included all of her homeplace, which actually contains twenty-five acres. All the evidence shows that plaintiff did not learn of the mistake until late 1977 when a title search was made in preparation for the sale of her twenty-five acre homeplace.

Defendant also challenges the trial court's findings that the other tracts of mountain land were generally contiguous and that defendant had not exercised any control or dominion over the thirteen acre tract prior to the discovery of the mistake. These findings were made in support of the conclusion that the action was not barred by the statute of limitations. While there may be some evidence in the record that would allow contrary findings, there is also evidence to support the trial court's findings. The findings of a trial court cannot be disturbed on appeal when, as here, they are supported by adequate and competent evidence. *E.g., Transit, Inc. v. Casualty Co.*, 285 N.C. 541, 206 S.E. 2d 155 (1974); *Cogdill v. Highway Comm.*, 279 N.C. 313, 182 S.E. 2d 373 (1971). This assignment of error is without merit.

V.

In conclusion, we hold that plaintiff has proven a mutual mistake by clear, cogent and convincing evidence, that defendant is

not an innocent bona fide purchaser, and that plaintiff's claim is not barred by the statute of limitations. The opinion of the Court of Appeals is, therefore,

Affirmed.

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

SUE HIGGINS STROUPE v. STEPHEN HILLARD STROUPE

No. 103

(Filed 6 January 1981)

Courts § 14— district court judge — no authority to enter interlocutory order

The judgment entered by a district court judge in favor of plaintiff which directed, among other things, that defendant immediately pay to plaintiff's attorney a certain sum for legal services rendered was interlocutory and was void since the district court judge who entered the order had not been assigned by the chief district judge to preside over a session of court in the county where the judgment was entered, nor was he authorized by order or rule entered by the chief judge to hear motions and enter interlocutory orders on that date. Moreover, though defendant did not perfect his appeal from such judgment, defendant did not lose his right to attack the judgment since the record indicated that the appeal was not taken because of an agreement between the parties' counsel to vacate the order in question. G.S. 7A-146.

ON discretionary review of the unpublished decision of the Court of Appeals, 46 N.C. App. 123, 265 S.E.2d 252 (1980), affirming judgment of *Crotty, J.*

The facts pertinent to the disposition of this appeal appear to be as follows:

1. Plaintiff instituted this action against defendant on 31 December 1976 seeking alimony without divorce, temporary alimony, child custody and child support. Defendant filed answer denying plaintiff's allegations and counterclaiming for an absolute divorce.

2. A hearing was held by Judge Bill J. Martin, and on 8 February 1977 a judgment was entered in favor of plaintiff. The judgment directed, *inter alia*, that defendant immediately pay to Douglas F. Powell, plaintiff's attorney, the sum of $1,000 for

legal services rendered. Defendant filed notice of appeal from the judgment but the appeal was not perfected.

3. Mr. Powell was discharged as plaintiff's attorney on 21 July 1977 although he continued to appear as her attorney of record.

4. On 22 July 1977 plaintiff and defendant entered into an agreement stipulating that all matters in controversy had been compromised and settled. The agreement further indicated that each party thereby took a voluntary dismissal with prejudice of his or her claims against the other, and that all orders of the court entered during the pendency of the cause "are hereby declared null and void, *ab initio*, and shall be hereby vacated."

5. On 7 September 1977 Mr. Powell filed a motion in the cause seeking to recover attorney fees from defendant for services rendered to plaintiff. A hearing was held, and, on 10 October 1977, the trial court entered a judgment ordering defendant to pay Mr. Powell $1,000. Defendant appealed.

6. The Court of Appeals, in an unpublished decision, *Stroupe v. Stroupe*, 39 N.C. App. 735, 251 S.E.2d 732 (1979), filed on 6 February 1979, vacated the 10 October 1977 judgment. The court held that on the limited record before it, there was nothing to show that the 8 February 1977 judgment was invalid; that while the "Stipulations of Dismissal" entered into between the parties on 22 July 1977 may have amounted to a contract between the parties to forego their rights under the judgment, their agreement did not void the judgment or "alter the rights of others under the judgment"; and that the hearing held on 10 October 1977 relitigated issues that were determined by the 8 February 1977 judgment.

7. On 27 March 1979 attorney Powell filed a motion in the cause asking that defendant be adjudged in contempt of court for failing to pay counsel fees as ordered by the 8 February 1977 judgment. In a response to this motion, defendant alleged that the 8 February 1977 judgment was entered by Judge Martin; that it was entered pursuant to a hearing of which defendant did not have proper notice; that Judge Martin did not have authority to conduct said hearing because it was held out of term by a judge not scheduled to hold court in Burke County; that defendant gave notice of appeal from said judgment; that he did not perfect the appeal because counsel for plaintiff, Mr. Powell, assured defendant's counsel that he would agree to have the judgment vacated; and that Mr.

Powell failed to comply with that agreement.

8. At the 14 May 1979 Session of District Court for Burke County, Judge Crotty conducted a hearing on Mr. Powell's motion that defendant be adjudged in contempt of court for failure to comply with the 8 February 1977 judgment. Following the hearing, Judge Crotty entered a judgment finding facts and making conclusions of law summarized in pertinent part as follows:

> (a) That due to the 'complicated legal posture' of this case, defendant was not found in willful contempt of court; however, to show good faith, defendant would be required to deposit with the Clerk of Superior Court $1,153 to be held by said Clerk pending a final determination of the cause by the Appellate Division.
>
> (b) That while the court found that the judgment dated 8 February 1977, was valid on its face, the court took judicial notice of the opinion of the Supreme Court in In re Martin, 295 N.C. 291, 296, 245 S.E.2d 766, 769 (1978), wherein this Court observed that the Judicial Standards Commission had found as a fact: 'That on 8 February 1977 in the case *SUE HIGGINS STROUP V. STEPHEN HILLARD STROUP* [*sic*], 76CVD834, Burke County, the Respondent knowingly presided at a hearing out of term when Respondent was not scheduled to hold court in Burke County and entered a judgment for the plaintiff in the case in the absence of the defendant or defendant's counsel and with knowledge that proper notice as required by law had not been given the defendant or Stephen T. Daniel, Jr., attorney for the defendant.'
>
> (c) That the court was bound by the decision of the Court of Appeals upholding the validity of the 8 February 1977 judgment.
>
> (d) That with respect to the question of notice of the hearing held on 8 February 1977, the court noted the finding of this court in *In re Martin* that '[T]he only showing of actual notice to the defendant's counsel as to the time of the hearing at which judgment was entered was one hour before the Trial Judge began to receive evidence. This conduct did not afford the Defendant Stroup [*sic*] or his counsel the right to be heard according

to the law and was, in effect, a willful *ex parte* consideration of the proceeding without proper legal notice to the defendant or his counsel.' In re Martin, 295 N.C. at 305, 245 S.E.2d at 774.

(e) That Judge Martin was not scheduled to hold court in Burke County on 8 February 1977, nor was the case scheduled to be heard on said date; that there are weeks when the judges of the 25th Judicial District are not assigned to hold court and are not scheduled to hold judicial hospitalization hearings at Broughton Hospital; that upon such occasions, the judges had been making themselves available to hold hearings to eliminate the backlog of domestic cases; that such hearings were only held out of term with the consent of both parties and their counsel; that neither the defendant nor his attorney consented to the hearing held out of term on 8 February 1977; that defendant's counsel, upon being summoned to the hearing by telephone on the morning of 8 February 1977, appeared at the hearing and objected thereto and moved that the hearing be continued until such time as defendant had received proper legal notice.

9. The Court of Appeals affirmed the judgment of Judge Crotty in an unpublished opinion, holding that "mere informalities" in procedure could be waived and that a party could be estopped to attack a judgment by failing to object in apt time and by acquiescing in the judgment so rendered. Speaking for the court, Judge Hill concluded that since the defendant had not perfected his appeal, nor had he consumated the agreement to vacate the judgment, it remained in full force and effect.

10. Defendant's petition for discretionary review of the decision of the Court of Appeals was allowed on 15 August 1980 by this court.

Hatcher, Sitton, Powell & Settlemyer, P.A., by Douglas F. Powell, for plaintiff.

Stephen T. Daniel, Jr. for defendant.

BRITT, Justice.

While numerous questions are suggested by this appeal, we think there are two questions which are dispositive: (1) Was the 8

February 1977 judgment void? (2) If so, has defendant lost his right to attack the judgment? We answer the first question yes and the second question no.

G.S. § 7A-192 provides in pertinent part:

> Any district judge may hear motions and enter interlocutory orders in causes regularly calendared for trial or for the disposition of motions, at any session to which the district judge has been assigned to preside. The chief district judge and any district judge designated by written order or rule of the chief district judge, may in chambers hear motions and enter interlocutory orders in all causes pending in the district courts of the district, including causes transferred from the superior court to the district court under the provisions of this chapter....

The quoted statute makes it clear that the authority of a district judge, other than the chief district judge, to hear motions and enter interlocutory orders in cases pending in the district court is a special authority which is limited by statute. *See Austin v. Austin*, 12 N.C. App. 286, 183 S.E.2d 420 (1971). Under the provisions of the first portion of the quoted statute, before a district court judge, other than the chief district judge, may hear motions and enter interlocutory orders at any session of district court in cases calendared for trial or hearing at such session, he must be first assigned by the chief district judge under the provisions of G.S. § 7A-146 to preside at such session. *Austin v. Austin, supra.* Chambers matters may be heard by the chief district judge at any time and place within the district, but other district judges have no authority to hear chambers matters out of session except upon written order or rule of the chief district judge. *Bowen v. Hodge Motor Co.*, 29 N.C. App. 463, 224 S.E.2d 699 (1976), *rev'd. on other grounds*, 292 N.C. 633, 234 S.E.2d 748 (1977). *See also Jim Walter Homes, Inc. v. Peartree*, 28 N.C. App. 709, 222 S.E.2d 706 (1976).

This court takes judicial notice of the fact that Judge Martin was not the chief judge of the 25th Judicial District on 7 February 1977. The record before us establishes that he had not been assigned by the chief district judge to preside over a session of the court in Burke County on said date and he was not authorized by order or rule entered by the chief judge to hear motions and enter interlocutory orders on said date. The judgment in question was interlocutory.

Since the district courts are comparatively new in our state, there have been very few rulings by the appellate division relating to jurisdiction and whether the order or judgment entered when the court has no jurisdiction is a nullity or is merely irregular. However, we think that decisions of this court relating to powers of special and emergency judges of the superior court under the former practice are instructive.

In *Lewis v. Harris*, 238 N.C. 642, 78 S.E.2d 715 (1953), an emergency judge entered an order in a case when he was not sitting in the county in which the action was pending but he was holding court in the district. This court held that the order was a nullity and that an objection to such lack of jurisdiction may be made at anytime during the progress of the action, citing numerous decisions of this court. In the opinion, Justice Winborne quoted from *Burroughs v. McNeill*, 22 N.C. 297, 301 (1839), as follows:

> The instant that the court perceives that it is exercising, or is about to exercise, a forbidden or ungranted power, it ought to stay its action, and, if it does not, such action is, in law, a nullity. 238 N.C. at 646, 78 S.E.2d at 717.

Justice Winborne further quoted from *Branch v. Houston*, 44 N.C. 85, 88 (1852), in which Justice Pearson observed:

> If there be a defect, *e.g.*, a total want of jurisdiction apparent upon the face of the proceedings, the court will of its own motion, 'stay, quash, or dismiss' the suit. This is necessary to prevent the court from being forced into an act of usurpation, and compelled to give a void judgment . . . so, (out of necessity) the court may, on plea, suggestion, motion, or *ex mero motu*, where the defect of jurisdiction is apparent, stop the proceedings. 238 N.C. at 646, 78 S.E.2d at 717-18.

The judgment from which defendant now appeals was void, and remains void, for the simple reason that Judge Martin was utterly without jurisdiction to proceed in the matter. *See generally* 2 McIntosh North Carolina Practice and Procedure § 1713 (2d ed. 1956). A void judgment is not a judgment at all, and it may always be treated as a nullity because it lacks an essential element of its formulation. *See Clark v. Carolina Homes, Inc.*, 189 N.C. 703, 128 S.E. 20 (1925).

In *Carter v. Rountree*, 109 N.C. 29, 32, 13 S.E. 716, 717 (1891), Chief Justice Merrimon aptly observed that

> A void judgment is one that has merely semblance, without some essential element or elements, *as when the court purporting to render it has not jurisdiction.*
>
> * * *
>
> A void judgment is without life or force, and the court will quash it on motion, or *ex mero motu.* Indeed, when it appears to be void, it may and will be ignored everywhere, and treated as a mere nullity. (Emphasis added.)

It follows, therefore, that in such instances, collateral attack is a permissible manner of seeking relief.

We conclude that the Court of Appeals misapprehended the matter before it in the present case. An absence of jurisdiction does not comport with the concept of a "mere informalit[y]." Indeed, it strikes at the very foundation of the court's authority and ability to take action in matters which come before it.

Furthermore, we are unable to agree that defendant has acted in such a manner as to raise an estoppel. While it is true that defendant did not perfect his appeal, the record indicates that the action was not taken because of an agreement to vacate the order in question. It appears to us that from the very beginning of this matter, defendant's counsel acted in a reasonable manner to safeguard the interests of his client. We find no basis upon which to conclude that the principles of estoppel ought to apply.

The decision of the Court of Appeals is

Reversed.

WADE H. POTTS; DON WAYNE POTTS, ARTHUR B. POTTS AND MAVIS L. POTTS, TRUSTEES OF JOHN H. POTTS MEMORIAL CEMETERY; BOBBY E. McDANIEL; DONALD R. McDANIEL AND WIFE, NANCY M. McDANIEL; AND FRED B. McDANIEL AND WIFE, JOANN S. McDANIEL v. J. W. BURNETTE AND WIFE, ESTELLE BURNETTE; JUDY LEE BURNETTE ROGERS AND HUSBAND, ALEXANDER ROGERS; JAMES HENRY BURNETTE; C. T. BURNETTE AND WIFE, JUANITA BURNETTE; AND DENNIS HALL BURNETTE

No. 108

(Filed 6 January 1981)

1. **Easements § 6.1— elements of adverse possession**

In order to prevail in an action to establish an easement by prescription, a plaintiff must prove the following elements by the greater weight of the evidence: (1) that the use is adverse, hostile or under a claim of right; (2) that the use has been open and notorious such that the true owner had notice of the claim; (3) that the use has been continuous and uninterrupted for a period of at least 20 years; and (4) that there is substantial identity of the easement claimed throughout the 20 year period.

2. **Easements § 6.1; Adverse Possession § 2— prescriptive easements — presumption of permissive use**

The Supreme Court will adhere to the presumption of permissive use in prescriptive easement cases and will not adopt the presumption of hostile use.

3. **Easements § 6.1; Adverse Possession § 25.1— prescriptive easement — rebuttal of presumption of permissive use - sufficiency of evidence**

In an action to establish a prescriptive easement in a roadway across defendants' land, plaintiffs' evidence was sufficient to rebut the presumption of permissive use and to allow a jury to conclude that the roadway was used under such circumstances as to give defendants notice that the use was adverse, hostile and under a claim of right and that the use was open and notorious and with defendants' full knowledge and acquiescence, where it tended to show that the disputed roadway is the only means of access to plaintiffs' land and the cemetery located thereon and has been open and continuously used by plaintiffs, their predecessors in title, and the public for a period of at least 50 years; no permission for use has ever been asked or given; plaintiffs, on at least one occasion, smoothed, graded and gravelled the road, and have, on other occasions attempted to work on it; and plaintiffs considered their use of the road to be a right and not a privilege.

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

Chief Justice BRANCH dissenting.

ON plaintiffs' petition for discretionary review of the decision of the Court of Appeals, 46 N.C. App. 626, 265 S.E. 2d 504 (1980), reversing the judgment entered following jury verdict on 16 April 1979 by *Leatherwood, Judge*, in the District Court, JACKSON County.

The primary issues brought forward by this appeal are (1) whether this State should adhere to the presumption of permissive use in prescriptive easement cases or adopt the presumption of hostile use, and (2) if we adhere to the presumption of permissiveness, whether plaintiffs' evidence adequately rebuts that presumption. Although we decline to adopt the presumption of hostility urged upon us by plaintiff-appellants, we hold that appellants' evidence was sufficient to rebut the presumption of permissiveness and reverse the Court of Appeals.

Rodgers, Cabler & Henson, by J. Edwin Henson, for plaintiff-appellants.

Orr, Payne & Kelley, by Robert F. Orr, for defendant-appellees.

CARLTON, Justice.

I.

This case arose out of the long-continued use by plaintiffs of a roadway over defendants' property to get to and from plaintiffs' land. Plaintiffs brought this action to establish their right to use defendants' roadway by virtue of an easement by prescription and to enjoin defendants from interfering with plaintiffs' use of the road.

In their complaint plaintiffs alleged that they and their predecessors in title had openly and continuously used a road leading from the lands of plaintiffs across the lands of defendants to State Road No. 1149 and that the use of the road by plaintiffs and their predecessors in title had been open, notorious, hostile, adverse and continuous for a period of more than fifty years. The complaint requested, *inter alia*, that the court enjoin defendants from interfering with their use of the roadway and decree a permanent and existing easement in the roadway in favor of plaintiffs' land. Defendants denied the material allegations of the complaint.

At trial, plaintiffs' evidence tended to show that the road in question had been in existence for substantially more than fifty years and had remained essentially in the same location. The road is the only means of access for vehicular traffic to plaintiffs' property. Plaintiffs, members of their families and the public have used the road for at least fifty years to reach plaintiffs' land for social and agricultural purposes and also to visit and attend funerals at the John H. Potts Memorial Cemetery, which is located in the upper corner of plaintiffs' land. Neither plaintiffs nor members of the

public have ever requested permission of defendants or their predecessors in title to use the road and none has been given. Plaintiffs have maintained the road by smoothing, upgrading and gravelling it on at least one occasion. Defendants presented no evidence, but moved for a directed verdict, which was denied. At the close of the evidence, the following issue was submitted to the jury: "(1) Have the Plaintiffs and their predecessors in interest used the roadway over Defendant's [sic] land openly, notoriously, and adversely for a continuous period of twenty (20) years or more?" The jury answered, "Yes," and Judge Leatherwood entered judgment granting plaintiffs a permanent easement for a road right-of-way over defendants' lands and permanently restraining and enjoining defendants from "blocking, obstructing, fencing, chaining, or in any manner interfering with Plaintiffs' easement over the lands of the Defendants." Defendants' motion under Rule 50 (b) for judgment notwithstanding the verdict was denied.

Defendants appealed and the Court of Appeals reversed. Judge Arnold, in an opinion in which Chief Judge Morris and Judge Vaughn concurred, found plaintiffs' evidence insufficient to go to the jury on the issue of hostility and held that defendants were entitled to a directed verdict or a judgment notwithstanding the verdict. Plaintiffs thereupon petitioned for our discretionary review of the Court of Appeals' decision, which we granted on 15 August 1980.

Other facts pertinent to our decision will be set out below.

II.

Defendants are entitled to a directed verdict and, thus, a judgment notwithstanding the verdict only if the evidence, when considered in the light most favorable to plaintiffs, fails to show the existence of each and every element required to establish an easement by prescription. *Dickinson v. Pake*, 284 N.C. 576, 583, 586, 201 S.E. 2d 897, 902, 903 (1974); Sizemore, General Scope and Philosophy of the New Rules, 5 Wake Forest L. Rev. 1, 41 (1969); *see Snider v. Dickens*, 293 N.C. 356, 237 S.E. 2d 832 (1977); *Summey v. Cauthen*, 283 N.C. 640, 197 S.E. 2d 549 (1973); *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971). Plaintiffs are also entitled to the benefit of every reasonable inference which may be legitimately drawn from the evidence, and all evidentiary conflicts must be resolved in their favor. *Daughtry v. Turnage*, 295 N.C. 543, 246 S.E. 2d 788 (1978); *Husketh v. Convenient Systems*, 295 N.C. 459, 245

S.E. 2d 507 (1978); *Clark v. Bodycombe*, 289 N.C. 246, 221 S.E. 2d 506 (1976).

[1] In order to prevail in an action to establish an easement by prescription, a plaintiff must prove the following elements by the greater weight of the evidence: (1) that the use is adverse, hostile or under claim of right; (2) that the use has been open and notorious such that the true owner had notice of the claim; (3) that the use has been continuous and uninterrupted for a period of at least twenty years; and (4) that there is substantial identity of the easement claimed throughout the twenty-year period. *E.g.*, *Dickinson v. Pake*, 284 N.C. at 580-81, 201 S.E. 2d at 900-01. The Court of Appeals determined that plaintiffs' evidence failed to establish the first element, that their use of the road over defendants' land was "adverse, hostile, or under a claim of right." This Court has, on several occasions, considered the meaning of this requirement. In the most recent of these cases, *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897, we reiterated the principle established in a long line of cases that:

> "To establish that a use is 'hostile' rather than permissive, 'it is not necessary to show that there was a heated controversy, or a manifestation of ill will, or that the claimant was in any sense an enemy of the owner of the servient estate.' [Citations omitted.] A 'hostile' use is simply a use of such nature and exercised under such circumstances as to manifest and give notice that the use is being made under a claim of right." *Dulin v. Faires*, [266 N.C. 257, 260-61, 145 S.E. 2d 873, 875 (1966)]. There must be some evidence accompanying the user which tends to repel the inference that it is permissive and with the owner's consent. [Citations omitted.] A mere permissive use of a way over another's land, however long it may be continued, can never ripen into an easement by prescription. [Citations omitted.]

Dickinson v. Pake, 284 N.C. at 580-81, 201 S.E. 2d at 900.

[2] Much confusion and controversy have arisen over the requirement that the use be hostile.[1] Plaintiffs have vigorously urged us to reject our present position that a user is presumed to be permissive

[1]For an excellent discussion of the development of the law of prescriptive easements in North Carolina see Justice Huskins' learned opinion in *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1974).

and adopt the rule, obtaining in the majority of jurisdictions, that the user is presumed to be adverse.[2] This we decline to do. An easement by prescription, like adverse possession, is not favored in the law, 2 G. Thompson, Real Property §§ 335, 337 (1980), and we deem it the better-reasoned view to place the burden of proving every essential element, including hostility, on the party who is claiming against the interests of the true owner. Additionally we note that "[t]he modern tendency is to restrict the right of one to acquire a prescriptive right-of-way whereby another, through a mere neighborly act, may be deprived of his property by its becoming vested in one whom he favored." 2 G. Thompson, Real Property § 335, at 145. Thus, in order for plaintiffs to succeed in their claim, they must have shown sufficient evidence of the hostile character of their use to create an issue of fact for the jury.

The facts and legal posture in *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897, are strikingly similar to the case before us. In *Dickinson*, plaintiffs brought action to establish a prescriptive easement in a roadway over defendants' land which had been used by themselves and the public to reach plaintiffs' property for over twenty year. The disputed roadway provided the sole means of ingress and egress to plaintiffs' land. Plaintiffs had themselves performed the slight maintenance necessary to keep the road passable. Permission to use the road had neither been sought nor given, and plaintiffs testified that, prior to the blocking of the road by defendants, they considered the road to be their own. Defendants presented no evidence, and the jury returned a verdict in favor of plaintiffs. Defendants moved, as here, for judgment notwithstanding the verdict; however, in *Dickinson*, the motion was granted and judgment was entered for defendants.

On appeal to this Court from a decision of the Court of Appeals affirming the judgment, we reversed. Justice Huskins, writing for the Court, found the evidence, viewed in the light most favorable to plaintiffs, sufficient to establish the following:

> (1) the Lupton family continuously and uninterruptedly used Lupton Drive substantially as now located, for any and all purposes incident to the use and enjoyment of their property, from 1938 until 1968 as their only means of access from their property to the Lennoxville Road; (2)

[2] 3 R. Powell, The Law of Real Property ¶413, at 34-113 (1979) and cases cited therein at n. 18; 2 G. Thompson, Real Property § 335, at 144 (1980) and cases cited therein at n. 28.

> the use of said road commenced before defendants acquired the servient estate and was continued under such circumstances as to give defendants notice that the use was adverse, hostile, and under claim of right; (3) the use was open and notorious and with defendants' full knowledge and acquiescence. *Dulin v. Faires*, 266 N.C. 257, 145 S.E. 2d 873 (1966).

Dickinson v. Pake, 284 N.C. at 583-84, 201 S.E. 2d at 902.

[3] We think *Dickinson* controls the disposition of this case. Plaintiffs' evidence, viewed in the most favorable light, shows that the disputed roadway is the only means of access to plaintiffs' land and the cemetery located thereon and has been openly and continuously used by plaintiffs, their predecessors in title and the public for a period of at least fifty years. No permission has ever been asked or given. Plaintiffs, on at least one occasion, smoothed, graded and gravelled the road, and have, on other occasions, attempted to work on it. Although there was no evidence that plaintiffs thought they owned the road, there was abundant evidence that plaintiffs considered their use of the road to be a *right* and not a privilege. This evidence is sufficient to rebut the presumption of permissive use and to allow, but not compel, a jury to conclude that the road was used under such circumstances as to give defendants notice that the use was adverse, hostile, and under claim of right and that the use was open and notorious and with defendants' full knowledge and acquiescence.

We conclude that plaintiffs' evidence tends to establish the existence of every essential element of their claim for a prescriptive easement, and the jury verdict must stand. We, therefore, reverse the Court of Appeals and remand to that court with directions to remand to the District Court, Jackson County, for entry of judgment in accordance with the jury verdict in favor of plaintiffs.

Reversed and remanded.

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

Chief Justice BRANCH dissenting.

I agree with the rules of law upon which the majority relies. However, taking the evidence in the light most favorable to the plaintiffs, I am unable to glean from this record evidence which is sufficient to overcome the presumption that plaintiffs' use of the

road was permissive. It is true that there is evidence that on one occasion plaintiffs scraped the roadway, but on that occasion defendants did not permit them to scrape a certain portion of the land. On another occasion, the evidence discloses that plaintiffs asked permission of defendants to bring in a bulldozer in order to widen a portion of the road lying on plaintiffs' land. In my opinion, these acts are not consistent with a hostile, adverse use or a use under claim of right. To the contrary, such acts seem to be consistent with a permissive use. I vote to affirm the decision of the Court of Appeals.

STATE OF NORTH CAROLINA v. JERRY MAINES

No. 118

(Filed 6 January 1981)

1. **Larceny § 7.4— possession of recently stolen property**

The presumption spawned by possession of recently stolen property arises when, and only when, the State shows beyond a reasonable doubt that the property described in the indictment was stolen; the stolen goods were found in defendant's custody and subject to his control and disposition to the exclusion of others, though not necessarily found in defendant's hands or on his person so long as he had the power and intent to control the goods; and the possession was recently after the larceny, mere possession of stolen property being insufficient to raise the presumption of guilt.

2. **Burglary and Unlawful Breakings § 5.9; Larceny 7.4— breaking and entering and larceny — possession of recently stolen property**

Evidence was insufficient to support the conviction of defendant of felonious breaking and entering and larceny under the doctrine of possession of recently stolen property where it tended to show that defendant was one of four persons in a car which contained stolen goods; the State did not demonstrate a criminal conspiracy among the four; only one of the four claimed a possessory interest in the stolen goods; that person also owned the car; in order to convict defendant, the jury must infer that he possessed the goods from the mere fact of driving with the owner of the car seated beside him, and then infer he was the thief that stole them based on the possession of recently stolen goods, and such a conviction based on stacked inferences could not stand.

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

APPEAL by defendant from decision of the Court of Appeals, 48 N.C. App. 166, 268 S.E.2d 268 (1980), upholding judgment of *McConnell, J.*, entered 18 October 1979, ASHE Superior Court.

Defendant Maines and a man named Steve Dunn were charged in separate bills of indictment with felonious breaking and entering and felonious larceny. Each bill alleged that the defendant therein named broke and entered a building occupied by Pauline Milam and used as a retail grocery in Ashe County with the intent to commit a felony therein, to wit, larceny; and further charged that on 6 July 1979 each defendant, after feloniously breaking and entering the building, unlawfully, willfully and feloniously breaking and entering the building, unlawfully, willfully and feloniously stole, took and carried away thirty-five cartons of assorted cigarettes, frozen pizzas, hamburgers and hotdogs, eight men's caps, one necklace, one carton JOBS rolling papers for cigarettes, five cases of Mountain Dew, one coat, one checkbook, and Avon toothbrushes, the personal property of Pauline Milam, having a value of Five Hundred Dollars in violation of G.S. 14-72.

The State's evidence tends to show that between 9 p.m. on 5 July 1979 and 9 a.m. on 6 July 1979, Pauline Milam's Grocery was broken and entered. A number of items including an old blue coat, cigarettes, a necklace, cigarette rolling papers, Avon products and toothbrushes were stolen.

The old blue coat (State's Exhibit 3) was definitely identified by Pauline Milam as her coat. She recognized certain distinctive features involving ripped pockets on it. The necklace (State's Exhibit 4), the toothbrushes (State's Exhibit 5), the cigarette papers (State's Exhibit 6), the cap or caps (State's Exhibit 7), the cartons of cigarettes (State's Exhibit 8) and a number of loose packs of cigarettes (State's Exhibit 9), were not definitely identified since these items are all mass produced. However, the testimony is that they were of the same type as those stolen from the Milam store.

The State's evidence further tends to show that on 7 July 1979 at 10:25 p.m., defendant Maines and Steve Dunn were observed in a Pontiac car in a Boone parking lot. The car was owned by Steve Dunn but operated at the time by Maines. Dunn was in the front passenger seat and two other men were riding in the rear seat of the car. Detecting a strong odor of alcohol on defendant Maines, the officers took all parties to the police station in Boone. While there, a message was received about the Milam break-in and Dunn, as owner of the vehicle, was requested to sign a consent to search form, which he did after being informed of his constitutional rights. The police searched the vehicle and found paper bags containing cigarettes and cigarette papers in the trunk of the car. A blue nylon

windbreaker coat was found in the back seat of the car and two new toothbrushes were found in the closed glove compartment. The officers seized a necklace worn by Dunn around his neck. A cap with the word "Ford" on the front of it was taken from one of the rear seat passengers who was wearing it on his head. In a statement to the sheriff, Steve Dunn claimed ownership of the necklace, toothbrushes and the coat.

Both Jerry Maines and Steve Dunn testified for the defense, and each offered the testimony of other witnesses as well.

Jerry Maines testified that on 5 July 1979 he spent the night with his uncle James Maines who lived in Zionsville. He said that one Paul Price was at his uncle's home playing cards and that he played cards with them from 6 p.m. until 3 or 4 a.m. the following morning. He further testified that on 7 July 1979, he saw Steve Dunn, who was a friend of his, about 11:30 a.m. Later in the day, they went to West Jefferson in a 1972 Pontiac owned by Steve Dunn. Sometime before dark, he left Steve Dunn in West Jefferson and started hitchhiking to his uncle's home in Zionsville. Later that evening, Steve Dunn and the other two passengers in Dunn's car came along and picked him up between West Jefferson and Deep Gap. Dunn was driving at the time. They stopped at a service station and he, Maines, commenced driving because all of them were drunk, including Maines, but Maines thought he was "the soberest one in the crowd." He had no knowledge of the items found in the trunk and the glove compartment of the car. He saw the cap being worn by one of the passengers in the back seat but did not see the coat or the cigarette papers. He saw the necklace around Dunn's neck, had never seen it before, and in fact had never seen any of the items before and had no knowledge that any of them had been stolen.

Maines admitted he had been convicted of issuing worthless checks, driving under the influence, driving with no operator's license and public drunkenness. He said he had been placed on probation for some of those offenses but went to Florida and failed to come back in violation of the terms of his probation. He is twenty-six years of age and unemployed.

Paul Price testified that he had known Jerry Maines for twenty years; that he saw Maines on Thursday, 5 July 1979, at his uncle's home; that they started playing cards around 6:30 or 7 p.m. and played six or seven hours, maybe longer; that when the card game was over they went to Price's apartment and had breakfast.

Steve Dunn testified that he did not know Mrs. Milam, never broke into her store and never stole any of her property on the night of July 5 and 6, 1979, or at any other time. He said the necklace taken from around his neck was purchased by him in Albuquerque, New Mexico from a man named Kevin Kilpatrick. The toothbrushes taken from the glove compartment of his car were bought by him in Fairmont, Georgia from a woman who runs the motel there where he stays. He got some of the cigarettes from his mother and the remainder of them at a store in Lenoir, the name of which he did not know. He was in the company of Mr. Ivan Lewis when he bought them Thursday evening, 6 July 1979 at about 9 to 10 o'clock. He said cigarettes cost five dollars a carton in Georgia and the people where he worked had asked him to bring some cigarettes back and for that reason he had purchased several cartons. He said he was too drunk to drive when, after picking Maines up, he turned the car over to him. He admitted he told Sheriff Waddell: "The blue coat in the car is mine." He explained that he had a coat just like it with the words "Appalachian State University" on it, and he thought it was his coat because both were blue and he didn't pick the coat up to look at it when he told the sheriff it belonged to him. "When I made the statement I just thought it was mine."

Dunn admitted he had been convicted of driving under the influence, two possessions of marijuana, attempted aggravated burglary, possession of burglary tools, disorderly conduct and resisting arrest. He swore that Jerry Maines was not with him on the night of 5 July 1979 and that he did not see him at any time on 6 July of that year.

Denise Hart testified that she had known Steve Dunn for six years and was with him on 5 July 1979 in Lansing; that she went to Lenoir with him on that date; that they went to the home of Ivan and Terry Lewis and stayed overnight at the Lewis home; that they went back to Ashe County on Friday, July 6th, leaving Lenoir about 8 a.m. and arriving in Ashe County around 10 a.m.; that after attending to some insurance matter, they returned to the Lewis home and spent the night of July 6th there; that she is a criminal justice student at UNC-Charlotte and has no criminal record.

Mr. and Mrs. Ivan Lewis both testified in corroboration of Steve Dunn's testimony with respect to purchasing cigarettes and other items in Boone and spending the night in the Lewis home.

Geneva Calhoun testified she lived in Lansing, knew Steve

Dunn, saw him on 6 July 1979 at the wagon train that comes up from Wilkesboro and camps out "and everybody goes to see"; that she stayed in Dunn's company at the wagon train gathering and, while there, saw State's Exhibit 3, the blue coat, on the ground under a tree; that it was just "lying there on the ground" and, when it started raining, she picked it up, put it around her shoulders and wore it to the car; that she and Steve Dunn left the wagon train together traveling in Steve's 1972 Pontiac; that she took the coat off and laid it in the back seat; that Dunn took her home later that night. She testified that she has no criminal record; that she is twenty-one years of age and works at Sprague Electric; and that she does not know whose jacket she picked up.

The jury found each defendant guilty as charged. Dunn was sentenced to a prison term of eight to ten years and Maines to a term of four to five years. Both appealed to the Court of Appeals, and that court found no error with Hedrick, J., dissenting as to defendant Maines. Jerry Maines thereupon appealed to the Supreme Court as of right pursuant to G.S. 7A-30(2).

Rufus L. Edmisten, Attorney General, by T. Buie Costen, Special Deputy Attorney General, for the State.

Wade E. Vannoy, Jr., attorney for defendant appellant.

HUSKINS, Justice.

Denial of his motion for judgment of nonsuit at the close of all the evidence constitutes defendant's sole assignment of error. The assignment turns on whether defendant's possession of stolen goods soon after the breaking and entering and larceny is a circumstance tending to show defendant is guilty of the breaking and entering and larceny. We hold the possession shown in defendant Jerry Maines in this case is insufficient to support a verdict of guilty of the breaking and entering and larceny charged in the bill of indictment. Accordingly, this defendant's nonsuit motion should have been granted.

The State relies, as indeed it must in this case, on the doctrine of recent possesson. That doctrine is simply a rule of law that, upon an indictment for larceny, possession of recently stolen property raises a presumption of the possessor's guilt of the larceny of such property. *State v. Bell*, 270 N.C. 25, 153 S.E.2d 741 (1967); *State v. Allison*, 265 N.C. 512, 144 S.E.2d 578 (1965). The presumption is strong or weak depending upon the circumstances of the case and

the length of time intervening between the larceny of the goods and the discovery of them in defendant's possession. *State v. Williams*, 219 N.C. 365, 13 S.E.2d 617 (1941). Furthermore, when there is sufficient evidence that a building has been broken into and entered and thereby the property in question has been stolen, the possession of such stolen property recently after the larceny raises presumptions that the possessor is guilty of the larceny and also of the breaking and entering. *State v. Lewis*, 281 N.C. 564, 189 S.E.2d 216, *cert. denied* 409 U.S. 1046, 34 L.Ed.2d 498, 93 S.Ct. 547 (1972). The presumption or inference arising from recent possession of stolen property "is to be considered by the jury merely as an evidential fact, along with the other evidence in the case, in determining whether the State has carried the burden of satisfying the jury beyond a reasonable doubt of the defendant's guilt." *State v. Baker*, 213 N.C. 524, 526, 196 S.E. 829, 830 (1938); *accord, State v. Greene*, 289 N.C. 578, 223 S.E.2d 365 (1976).

Proof of a defendant's recent possession of stolen property, standing alone, does not shift the burden of proof to the defendant. That burden remains on the State to demonstrate defendant's guilt beyond a reasonable doubt. *State v. Baker, supra.* In order to invoke the presumption that the possessor is the thief, the State must prove beyond a reasonable doubt each fact necessary to give rise to the inference or presumption. When the doctrine of recent possession applies in a particular case, it suffices to repel a motion for nonsuit and defendant's guilt or innocence becomes a jury question.

[1] In summary then, the presumption spawned by possession of recently stolen property arises when, and only when, the State shows beyond a reasonable doubt: (1) the property described in the indictment was stolen; (2) the stolen goods were found in defendant's custody and subject to his control and disposition to the exclusion of others though not necessarily found in defendant's hands or on his person so long as he had the power and intent to control the goods; *State v. Eppley*, 282 N.C. 249, 192 S.E.2d 441 (1972); *State v. Foster*, 268 N.C. 480, 151 S.E.2d 62 (1966); *State v. Turner*, 238 N.C. 411, 77 S.E.2d 782 (1953); *State v. Epps*, 223 N.C. 741, 28 S.E.2d 219 (1943); and (3) the possession was recently after the larceny, mere possession of stolen property being insufficient to raise a presumption of guilt. *State v. Jackson*, 274 N.C. 594, 164 S.E.2d 369 (1968).

> The possession sufficient to give rise to such inference does not require that the defendant have the article in his

> hand, on his person or under his touch. It is sufficient that he be in such physical proximity to it that he has the power to control it to the exclusion of others and that he has the intent to control it. One who has the requisite power to control and intent to control access to and use of a vehicle or a house has also the possession of the known contents thereof.

State v. Eppley, supra, 282 N.C. at 254, 192 S.E.2d at 445 (citations omitted).

[2] This case turns upon the second element as outlined above: whether the stolen goods were found in defendant's custody and subject to his control and disposition to the exclusion of others. What amounts to exclusive possession of stolen goods to support an inference of a felonious taking most often turns on the circumstances of the possession. The crucial circumstances of possession in this case are: the goods were found in a car and persons other than defendant were present in the car, including the owner of the vehicle. Both fact situations have been addressed by various courts with varied results. *See Annot.*, 51 A.L.R.3d 727 (1973). The variances in the cases can perhaps be explained by the presence of additional circumstances. When the stolen goods are found in a car in which more than one person is present, the question may narrow to whether the defendant was the owner, driver or mere passenger in the car. In this case Steve Dunn was the owner and passenger in the car and defendant was the driver.

The "exclusive" possession required to support an inference or presumption of guilt need not be a sole possession but may be joint. *State v. Holloway*, 265 N.C. 581, 144 S.E.2d 634 (1965). If the situation is one where persons other than defendant have equal access to the stolen goods, the inference may not arise. For the inference to arise where more than one person has access to the property in question, the evidence must show the person accused of the theft had complete dominion, which might be shared with others, over the property or other evidence which sufficiently connects the accused person to the crime or a joint possession of coconspirators or persons acting in concert in which case the possession of one criminal accomplice would be the possession of all. Stated differently, for the inference to arise, the possession in defendant must be to the exclusion of all persons not party to the crime. The State has not shown such a possession in this case. The

evidence shows four persons in a car which contains stolen goods. The State has not demonstrated a criminal conspiracy among the four. Only one of them, Steve Dunn, claimed a possessory interest in the stolen goods. Dunn also owned the car.

Defendant did not have actual or personal possession of the stolen property. None of the goods were on his person and he did not make any conscious assertion of ownership as did Dunn. Defendant's possession was at most constructive, based on the fact he was driving the car and presumably in control of it and its contents. Thus, to convict defendant, the jury must infer that defendant possessed the goods from the mere fact of driving with the owner of the car seated beside him and then infer he was the thief who stole them based on the possession of recently stolen goods. We hold this criminal conviction cannot stand because it is based on stacked inferences. "Inference may not be based on inference. Every inference must stand upon some clear or direct evidence, and not upon some other inference or presumption." *State v. Parker*, 268 N.C. 258, 262, 150 S.E.2d 428, 431 (1966), *quoting Lane v. Bryan*, 246 N.C. 108, 112, 97 S.E.2d 411, 413 (1957); *accord, State v. Greene, supra.*

In order to take the case against defendant Maines to the jury, the State must show something more than was shown here. For example, the State could make a case sufficient to repel nonsuit by evidence of an attempt by defendant as driver to avoid the officer when he approached the car, or evidence that the property is obviously contraband, or some evidence at the crime scene indicating defendant had been there, or evidence of constant association with or customary use of the car by defendant. No legal presumption that defendant was a thief could arise from merely driving the car with the owner present. *Contrast State v. Lewis*, 281 N.C. 564, 189 S.E.2d 216, *cert. den.*, 409 U.S. 1046, 34 L.Ed.2d 498, 93 S.Ct. 547 (1972).

Under the particular circumstances here, we hold defendant did not have that exclusive possession of the property necessary to justify an inference of guilt. Nonsuit was appropriate. The decision of the Court of Appeals upholding the denial of his motion for nonsuit is

Reversed.

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

SEBASTIAN LEE COLSON, BY HIS GUARDIAN AD LITEM, CLARENCE V. MATTOCKS, AND PATRICIA ANN COLSON v. MAMIE MACON SHAW AND DAN R. DOUGLASS

No. 36

(Filed 6 January 1981)

1. Automobiles § 92.1— duty of driver to passenger

The operator of an automobile has the duty to exercise that degree of care which a person of ordinary prudence would exercise under similar circumstances to prevent injury to the invited occupants of his vehicle.

2. Automobiles § 92.1— duty of driver to alighting passenger

The operator of a vehicle must at least allow his passengers to unload in a safe place and may not stop his car in a manner likely to create a hazard to those alighting.

3. Automobiles § 41— duty of driver to children

Where the actions of children are at issue, the duty to exercise due care should be proportioned to the child's incapacity adequately to protect himself.

4. Automobiles § 92.3— unloading of passenger at unsafe place — sufficient evidence of negligence

In an action to recover for injuries sustained by a five year old child who alighted from defendant's car and was struck by another car while crossing the street, plaintiff's evidence was sufficient to enable the jury to find that defendant breached his duty to unload his passengers in a safe place where it tended to show that defendant driver stopped his car on the south side of a busy residential street after dark to allow his passengers to alight therefrom and to go to a home on the north side of the street; defendant allowed the five year old plaintiff to exit from his car unattended with knowledge that it was necessary for the child to cross the street to reach his destination; defendant knew that the adult who had been responsible for the minor plaintiff before getting into the car was seated in the back of defendant's two-door vehicle and thus could not control the child as he alighted from the car; and there were no cars parked on the north side of the street so as to have prevented defendant from parking next to the northern curb directly in front of the home to which the passengers were going, thus avoiding the necessity for the children to cross the street.

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

Justice CARLTON concurring in result.

PLAINTIFF appeals from a decision of the Court of Appeals, 46 N.C. App. 402, 265 S.E. 2d 407 (1980), (opinion by *Parker, J.* with *Erwin, J.* concurring and *Martin (Harry C.), J.* concurring in part and dissenting in part), affirming directed verdicts entered for de-

fendants by *Crissman, J.*, at the 3 April 1978 Session of GUILFORD Superior Court.

The minor plaintiff, Sebastian Lee Colson, was severely injured on 18 June 1976 when he alighted from an automobile driven by defendant Dan R. Douglass, attempted to cross the street, and was struck by an automobile driven by defendant Mamie Macon Shaw. This action was brought by the minor plaintiff and his mother, Patricia Ann Colson, to recover damages for the child's injuries and to recover the medical expenses incurred by Ms. Colson for Sebastian's treatment. Plaintiffs alleged that defendant's joint and concurrent negligence caused the child's injuries.

At trial before a jury, plaintiffs' evidence tended to show the following: On 18 June 1976 plaintiff Patricia Colson and three of her children, including plaintiff Sebastian who was then five years old, were visiting at the home of Ms. Colson's mother, Ola Mae Campbell. Ms. Campbell's home was located on the north side of East Commerce Avenue in High Point, North Carolina. East Commerce Avenue runs east and west and is intersected at right angles by Meredith Street, which runs north and south. The intersection is approximately 78 feet east of the Campbell residence. East Commerce Avenue is a frequently traveled city street, 32 feet wide and paved with a coarse blacktop surface.

Between seven and eight o'clock that evening Fanny Douglass, defendant Dan Douglass' mother, came to the Campbell residence with two of defendant Douglass' children. With the consent of Ms. Colson, Ms. Douglass took charge of the three Colson children, including Sebastian, and proceeded to walk with all five children to a friend's house. At approximately 9:00 p.m. defendant Dan Douglass, while driving his two-door Chevrolet automobile eastward on East Commerce Avenue, noticed his mother, the five children, and another adult walking eastward along the south side of East Commerce toward Meredith Street. Defendant Douglass stopped and offered the group a ride, indicating that he was willing to take them wherever they were going. They accepted and plaintiff Sebastian Colson climbed into the front seat with one of the Douglass children, while the remaining children and the two adults seated themselves in the back. Sebastian occupied the right front seat with Kevin Douglass seated in the middle next to the driver. After all were in the car, defendant Douglass was told that the Colson children were to be taken to the Campbell home, about a block away. He then drove

eastwardly toward the Meredith Street intersection and stopped his car on the right hand, or south, side of East Commerce, directly across the street from the Campbell residence. At that time there were no cars parked directly in front of the Campbell house along the north side of East Commerce.

Sebastian Colson opened the right front door, got out of the car first, walked around to the back of the car, and started to run across East Commerce Avenue towards his grandmother Campbell's house. As he was crossing the street he was hit by defendant Shaw's vehicle, which had just turned right from Meredith Street onto East Commerce and was proceeding in a westwardly direction. As a result of the collision, Sebastian sustained a cerebral concussion and residual brain damage. His medical bills at the time of trial amounted to $10,044.79.

Plaintiff Patricia Colson testified at trial that at the moment of the collision, only Sebastian and the other two Colson children had alighted from the vehicle. The other Colson children were standing at the front of the Douglass vehicle, waiting to cross the street. Ms. Douglass and the other adult who had been walking with the children were still seated in the back of the two-door car. Defendant Douglass testified that he saw Sebastian open the door and get out of the car and that he knew Sebastian had to cross the street to get to the Campbell house, but that he never made any attempt to determine for Sebastian whether there were other vehicles driving on the street. Mr. Douglass further stated that he did not warn Sebastian in any manner or make any effort to aid him in crossing the street.

At the conclusion of plaintiff's evidence, both defendants moved for directed verdicts on the grounds that plaintiffs' evidence failed to establish any negligence on the part of either defendant. The trial court granted defendants' motions and the Court of Appeals affirmed. Judge Harry C. Martin dissented from that part of the Court of Appeals' opinion which affirmed the directed verdict for defendant Douglass. Plaintiff appeals to this Court as a matter of right pursuant to G.S. 7A-30(2).

Schoch, Schoch and Schoch by Arch Schoch, Jr. for plaintiff-appellants.

Smith, Moore, Smith, Schell & Hunter by J. Donald Cowan, Jr. and Suzanne Reynolds for defendant-appellee.

COPELAND, Justice.

The sole issue before us on this appeal is whether the evidence presented by plaintiffs at trial was sufficient to withstand defendant Douglass' motion for directed verdict. Since Judge Harry C. Martin's dissent was confined to that portion of the Court of Appeals' opinion which affirmed the entry of directed verdict in favor of defendant Douglass, we are not called upon to decide the propriety of the directed verdict entered for defendant Shaw. For the reasons stated below, we hold that the trial court erred in granting defendant Douglass' motion for directed verdict.

Plaintiffs alleged that defendant Douglass was negligent in failing to supervise the minor plaintiff in alighting from his vehicle, and in failing to instruct the child in crossing the street, in violation of his duty as the owner and operator of an automobile to exercise reasonable care to insure the safety of his invited passengers. Defendants denied plaintiffs' allegation of negligence and defendant Douglass contended that he had no duty to aid the minor plaintiff in crossing the street. The Court of Appeals agreed, holding that neither defendant was negligent as a matter of law.

[1,2] It is well settled in North Carolina that the operator of an automobile has a duty to exercise that degree of care which a person of ordinary prudence would exercise under similar circumstances to prevent injury to the invited occupants of his vehicle. *Wright v. Wright*, 229 N.C. 503, 50 S.E. 2d 540 (1948); *Boykin v. Bissette*, 260 N.C. 295, 132 S.E. 2d 616 (1963). *See also Basnight v. Wilson*, 245 N.C. 548, 96 S.E. 2d 699 (1957); 7A Am. Jur. 2d *Automobiles and Highway Traffic* § 535 (1980). Our research has revealed no North Carolina cases which involve the particular duty that an operator owes to passengers alighting from his vehicle. It is generally established that the operator must at least allow his passengers to unload in a safe place and may not stop his car in a manner likely to create a hazard to those alighting. *Nelson v. Williams*, 300 Minn. 143, 218 N.W. 2d 471 (1974); *Employers Liability Assurance Corp., Ltd. v. Smith*, 322 S.W. 2d 126 (Ky. 1959); 7A Am. Jur. 2d *Automobiles and Highway Traffic* § 572 (1980). *See also Chatteron v. Pocatello Post*, 70 Idaho 480, 223 P. 2d 389 (1950); *Haskell v. Perkins*, 16 Ill. App. 2d 428, 148 N.E. 2d 625 (1958). In defining defendant Douglass' duty to the minor plaintiff in this case, we may be guided by the decisions reached by other jurisdictions when presented with a similar fac-

tual situation, as compiled in Annot., 20 A.L.R. 2d 789 (1951). Although we may be guided by these decisions, we also acknowledge the general principle that each case turning upon such an allegation of negligence must be decided on its facts, and no one decision is dispositive of another.

[3] Our determination in this case is also influenced by the rule that where the actions of children are at issue, the duty to exercise due care should be proportioned to the child's incapacity to adequately protect himself. *Yokely v. Kearns*, 223 N.C. 196, 25 S.E. 2d 602 (1943). As stated by Justice Parker, (later Chief Justice) speaking for our Court in *Pavone v. Merion*, 242 N.C. 594, 594, 89 S.E. 2d 108, 108 (1955):

> "A motorist must recognize that children, and particularly very young children, have less judgment and capacity to avoid danger than adults, that their excursions into a street may reasonably be anticipated, that very young children are innocent and helpless, and that children are entitled to a care in proportion to their incapacity to foresee and avoid peril."

[4] Upon defendant's motion for directed verdict at the completion of plaintiffs' evidence, the trial court's task was to consider the evidence in the light most favorable to plaintiffs, resolving any discrepancies in the evidence on favor of plaintiffs, to determine whether there was sufficient evidence to submit the case to the jury. *Williams v. Wachovia Bank & Trust Co.*, 292 N.C. 416, 233 S.E. 2d 589 (1977). After viewing plaintiffs' evidence in this case in the light most favorable to them, we hold that plaintiff presented enough evidence to enable a jury to find that defendant breached his duty to unload his passengers in a safe place. Plaintiff's evidence indicates that defendant allowed the five-year-old plaintiff to exit from his car unattended, on a busy residential street after dark, knowing that it was necessary for the child to cross the street to reach his destination. Since Ms. Douglass, who had been responsible for the minor plaintiff before getting into the car, was seated in the back seat of defendant's two-door vehicle, defendant knew that she could not control the child as he alighted from the car. There were no cars parked on the north side of East Commerce Avenue directly in front of the Campbell home, therefore there was nothing to prevent defendant Douglass from turning around and parking next to the

northern curb, thus avoiding the necessity for the children to cross the street. Considering these facts, we find that it was error for the trial court to grant defendant Douglass' motion for directed verdict and for the Court of Appeals to hold as a matter of law that Mr. Douglass had not breached any duty he might have owed to plaintiff.

Our conclusion is supported by the decision of the Minnesota Supreme Court in *Nelson v. Williams, supra.* In *Nelson* the defendant motorist was towing a boat on a four-lane highway when an object flew out of the boat and landed in the median separating the north and south bound lanes. He pulled his vehicle onto the right-hand shoulder of the road and allowed his eight-year-old son to cross two lanes of traffic to retrieve the object. The child was struck by a passing vehicle as he attempted to recross the highway. The Court held that the jury could reasonably find that the father failed to exercise the degree of care expected of a reasonably prudent person in the operation of his automobile, stating that:

> "The decisive question is whether the evidence justifies the jury's inference that defendant . . . in the use of his automobile failed to exercise that degree of care for the protection of his minor son that should be expected of a reasonably prudent person. In other words, could he have stopped and parked his car in such a way as to better protect his son as he left and was returning to the vehicle?" 300 Minn. at 148, 218 N.W. 2d at 474.

Since defendant could have easily driven a short distance farther and stopped his vehicle in a place from which plaintiff could have reached the median without crossing the highway, the court held that the issue of defendant's negligence was properly submitted to the jury. Likewise, the jury in the case *sub judice* could have reasonably found that defendant Douglass breached his duty to unload his passengers in a safe place.

For the foregoing reasons, we find that the trial court erred in entering a directed verdict in favor of defendant Douglass. Accordingly, the Court of Appeals' decision affirming the directed verdict is reversed, and the case is remanded to the Superior Court, GUILFORD County, for a

New trial.

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

Justice CARLTON concurring in result.

I concur in the result reached by the majority. I read the majority opinion to hold that a driver has a duty to discharge his passengers in a safe place and does not have a duty to supervise. My concern with the majority opinion is that its recitation of the evidence which establishes a *prima facie* case of negligence creates, I fear, an inference that a driver has the duty to stop in the *safest* place in relation to his passengers' destination. I concur in the result only insofar as it grants plaintiffs the opportunity to take their case to the jury on the *theory* enunciated by the majority. I would remand for a new trial with directions that the jury be allowed to consider only whether defendant breached his duty to unload his passengers in a safe place.

STATE OF NORTH CAROLINA v. JAMES LUTHER PRUITT

No. 87

(Filed 6 January 1981)

1. Criminal Law § 34.8— defendant's involvement in other crimes — admissibility of evidence

In a prosecution of defendant for conspiracy to commit forgery and conspiracy to utter forged instruments, the trial court did not err in admitting testimony by a State's witness that defendant had been involved in the commission of an offense other than the ones for which he was being tried, since the other offense was a break-in during which a check writer and checks were taken from a cabinet shop; the challenged evidence was competent to show that the check writer and checks which defendant and his companions had used in perpetrating the forgeries in question had been stolen from the cabinet shop; this was a part of the overall scheme which embraced the related offenses for which defendant was being tried and tended to connect him with those offenses; and defendant himself opened the door to such testimony by inquiring further into charges pending against the State's witness.

2. Criminal Law § 96— objectionable evidence withdrawn — defendant not prejudiced

The trial court did not err in permitting the State to question a witness with respect to another offense unrelated to the case being tried and in denying defendant's motion for a mistrial because of the admission of the evidence and comments

of the district attorney which followed, since the court instructed the jury that the objectionable evidence had nothing entirely to do with the case, that the jury should strike the evidence from their minds, and that any juror who could not do so should raise his hand, which no juror did.

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

ON *certiorari* to review judgment of *Smith (David I.), J.*, entered at the 23 April 1979 Special Criminal Session of GUILFORD Superior Court, Greensboro Division.

Upon pleas of not guilty defendant was tried on bills of indictment, proper in form, charging him with four counts of conspiracy to commit forgery and four counts of conspiracy to utter forged instruments. Evidence presented by the state is briefly summarized as follows:

Defendant and several companions had obtained the check-writing machine and a checkbook belonging to the Safrit Cabinet Shop in Thomasville, North Carolina. On the evening of 22 December 1978, defendant and his companions were riding around together and were overheard to say that they were going to obtain a lot of money. Later that evening, defendant and the others went to the trailer where defendant lived with two other people. At that time they had in their possession the check-writing machine and the aforesaid checkbook. Defendant placed the checks in the machine and he and Anthony Nealy signed them. The checks were then given to Elbert Nealy. They were payable to Valerie Bradley, the name which appeared on a false indentification card carried by Kim Huffman with whom defendant lived. Elbert Nealy, Kim Huffman and Gail Hicks then took the checks to several grocery and convenience stores where they were exchanged for groceries and cash.

Defendant offered evidence, including the testimony of Anthony Nealy, which tended to show that defendant had nothing to do with the scheme and that all of it was carried out by Anthony Nealy.

The jury returned a verdict finding defendant guilty of conspiracy to commit forgery in four cases. The court consolidated the cases for the purpose of judgment and imposed a prison sentence of 10 years, said sentence to begin at expiration of a sentence already being served by defendant.

Defendant gave notice of appeal to the Court of Appeals. He failed to perfect his appeal within the time allowed by the rules and petitioned that court for a writ of certiorari. The petition was denied. Defendant then petitioned this court for a writ of certiorari to review the decision of the Court of Appeals denying his petition. This court allowed that petition on 1 April 1980. We also treat defendant's petition to this court as a motion to bypass the Court of Appeals in reviewing the case on the merits and allow that motion.

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

Neill A. Jennings, Jr. for defendant.

BRITT, Justice

[1] Defendant contends first that the trial court erred in admitting testimony by a state's witness that defendant had been involved in the commission of an offense other than the ones for which he was being tried. This contention has no merit.

Kim Huffman was called and testified as a witness for the state. On cross-examination defendant attempted to show that she had made a "deal" with the state and that she had a long criminal record. She testified that she had sixteen charges pending against her "in these cases"; that she had been indicted in Forsyth, Davidson and Guilford Counties; and that in Davidson County she was charged with being an accessory after the fact to a break-in.

On re-direct examination, with respect to the Davidson County break-in case, the prosecuting attorney asked the witness who was charged in that case. Over defendant's objection, she testified that defendant, Elbert Nealy and Anthony Nealy were charged and that the check-writer in question, as well as "a checkbook with checks", had been taken from Safrit's Cabinet Shop.[1]

Defendant argues that the admission of the testimony violated the rule enunciated in *State v. McClain*, 240 N.C. 171, 81 S.E.2d 364 (1954), that in a prosecution for a particular crime, the state cannot offer evidence tending to show that the accused has committed another distinct, independent or separate offense. Defendant also challenges the admission of the testimony on the additional ground that a defendant in a criminal action may not be cross-examined

[1]It will be noted that Thomasville is in Davidson County.

with respect to whether he had been indicted for the commission of an unrelated criminal offense for purposes of impeachment, relying upon our opinion in *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971). Defendant's argument in both respects is unpersuasive.

Although the rule of *State v. McClain, supra*, states the general rule upon which defendant relies, it further provides that there are eight basic exceptions to that fundamental principle. One of the exceptions is: "Evidence of other crimes is admissible when it tends to establish a common plan or scheme embracing the commission of a series of crimes so related to each other that proof of one or more tends to prove the crime charged and to connect the accused with its commission." *State v. McClain*, 240 N.C. at 176, 81 S.E.2d at 367; *see generally* 1 Stansbury's North Carolina Evidence § 92 (Brandis Rev. 1973).

The challenged evidence was competent to show that the check-writer and checks which defendant and the others had used in perpetrating the forgeries in question had been stolen from Safrit's Cabinet Shop. This was a part of the overall scheme which embraced the related offenses for which defendant was being tried and tended to connect him with those offenses.

Furthermore, defendant's reliance upon *State v. Williams, supra*, is misplaced. The *Williams* decision relates to the situation where a criminal defendant is cross-examined *himself* with respect to an indictment for criminal conduct for the purpose of impeaching his credibility before the jury. While in the present case the inquiry was not made of defendant, we do not rest our decision upon that distinction. To do so would be to elevate form over substance to the end that our holding would not adhere to the underlying rationale of *State v. Williams*: An indictment is purely hearsay in that it is a conclusion drawn upon an *ex parte* presentation of evidence. *See State v. Williams*, 279 N.C. at 673, 185 S.E.2d at 180.

Our rejection of defendant's contention is not based upon a fine technical distinction between cases. Instead, a close examination of the record discloses that defendant opened the door to further inquiry by the prosecution by cross-examining Kim Huffman concerning the charges then pending against her. In conducting the inquiry, defense counsel sought to impeach the state's witness by connecting her with other criminal activity. Apparently, counsel sought to convince the jury that Ms. Huffman was testifying in a

particular manner so as to obtain leniency towards her from the state. While the state would not have been entitled to initiate such an inquiry itself, it was entitled to explore the matter fully in its attempt to rehabilitate its witness. Ms. Huffman testified on cross-examination that she was charged as an accessory after the fact of a break-in which had occurred in Davidson County. Accordingly, the state was entitled to have its witness elaborate upon the nature of that accusation, even to the extent to naming those who had been charged with the commission of the underlying substantive offense. In the process of securing that elaboration, the state was able to secure the connection it had earlier demonstrated between defendant and the forgery scheme.

[2] Defendant contends that the trial court erred in permitting the state to question Kim Huffman with respect to another offense unrelated to the cases being tried; and in denying his motion for a mistrial because of the admission of said evidence and comments of the district attorney which followed. We find no merit in these contentions.

Defendant also called Kim Huffman as a witness. On re-cross-examination the prosecuting attorney asked the witness "[w]ho got killed . . .?" She answered, "Jerry Kenan." Defendant objected and the court overruled the objection. The witness was then asked who Jerry Kenan was and she answered: "he is a friend of ours." The witness further states that she was unable to state what connection Kenan had to the case. After this testimony had been received, defendant moved for a mistrial. Following a conference between the attorneys and the court in the absence of the jury, the motion was denied.

Defendant argues that this testimony was a follow-up of testimony elicited on the re-direct examination of Gail Hicks, another witness for the state. Ms. Hicks had testified that James Nealy had shot and killed Kenan after he had helped her inject some drugs into her arm. Defendant contends that the testimony was prejudicial error in that it placed before the jury other acts of unlawfulness which were completely unrelated to the offenses which were then being tried.

We reject defendant's argument. When the jury returned to the courtroom after the conference had been concluded between the attorneys and judge, the court immediately proceeded to give the

following instruction:

> Members of the jury, during the course of the trial there has been some testimony in reference to an individual by the name of Jerry Kenan and that Jerry Kenan was recently murdered. The Court instructs you that the circumstances and the death of Jerry Kenan have nothing entirely to do with this particular case and that there is no evidence that this defendant was whatsoever in any way involved in that, or had anything to do with it, and you're not to hold anything concerning Jerry Kenan and his demise against this particular defendant. He's not to be prejudiced by that. We're trying a forgery and a conspiracy to forge case. Is there anyone on this jury who thinks they cannot strike this reference from their mind and who will not, or who cannot refrain from holding against this particular defendant in these cases? If there is anyone, please raise your hand.

The record does not disclose that any juror raised his or her hand.

Ordinarily, when incompetent or objectionable evidence is withdrawn from the jury's consideration by appropriate instructions from the trial judge, any error in the admission of the evidence is cured. *E.g., State v. Covington*, 290 N.C. 313, 226 S.E.2d 629 (1976). In like manner, improper argument or remarks by counsel are usually cured by appropriate instructions by the court to the jury. *State v. Sparrow*, 276 N.C. 499, 173 S.E.2d 897 (1970). Assuming, *arguendo*, that the testimony about which defendant complains was erroneously admitted, there was no prejudice because of the curative instructions which the jury received.

In defendant's trial and the judgment entered, we find

No error.

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

THE MUNCHAK CORPORATION (DELAWARE) AND RDG CORPORATION, A JOINT VENTURE, D/B/A THE CAROLINA COUGARS AND THE MUNCHAK CORPORATION (GEORGIA) v. JOE L. CALDWELL

No. 107

(Filed 6 January 1981)

1. **Evidence § 22— transcript of prior trial**

A transcript of testimony given at a prior trial or proceeding, if offered to prove the truth of the matters stated therein, is hearsay. However, the transcript becomes admissible as an exception to the hearsay rule upon a proper showing that (1) the witness whose testimony is sought is unavailable; (2) the testimony sought was given at an earlier trial or proceeding of the same cause; and (3) the party against whom the evidence is offered was present at the earlier trial and able to cross-examine the witness.

2. **Evidence § 22— transcript of trial on complaint — admission in trial on counterclaim without proper foundation — harmless error**

A transcript of a trial on plaintiffs' complaint in which the jury determined that the parties intended a contract to be enforceable as written, if offered to prove the truth of the matters contained therein, was hearsay and not admissible in a trial on defendant's counterclaim for specific performance of the contract absent the laying of a proper foundation for its admission. However, the trial court's admission of the transcript when offered by defendant without the laying of a proper foundation was harmless error where the counterclaim was heard by a judge without a jury; the transcript of the prior proceeding was not necessary to a determination of the propriety of specific performance of the contract; and, nothing else appearing, it is presumed that the trial court disregarded it.

ON discretionary review pursuant to G.S. 7A-31 (a) to review the decision of the Court of Appeals, reported in 46 N.C. App. 414, 265 S.E. 2d 654, affirming the judgment entered by *Mills, J.*, at the 22 March 1977 Session of GUILFORD County.

This is an action arising out of a contract entered into on 30 October 1970 between defendant Caldwell and Southern Sports Corporation. Under the contract, defendant was to render personal services as a professional basketball player and to receive certain payments and other benefits, including pension benefits. On 1 April 1971, The Munchak Corporation (Delaware), the original plaintiff in this action, acquired all of the assets of Southern Sports Corporation, including the contract for defendant's services as a professional basketball player.

Subsequently a dispute arose regarding the following provision of the contract:

5. At the time of the rendering of services to Club by

> Player. Player shall be eligible for and shall receive entitlement to pension benefits from an insurance carrier acceptable to Player at least equal to the following:
>
> (a) The sum of Six Hundred Dollars ($600.00) per month for each year of services as a professional basketball player, which sum shall be paid at age 55.

Plaintiffs Munchak Corporation (Delaware) and RDG Corporation, a joint venture d/b/a The Carolina Cougars, filed suit for reformation of the quoted portion, contending that the six-hundred-dollar provision was inserted as a result of mutual mistake of the parties. They maintained that the parties intended the amount to be only sixty dollars. Defendant filed answer denying that the parties intended any figure other than the one included in the contract as written. Defendant also counterclaimed for specific performance of the contract as written.

In July 1974, The Munchak Corporation (Georgia) was incorporated under the laws of Georgia and was a corporation entirely separate and distinct from The Munchak Corporation (Delaware). The latter corporation later assigned to the Georgia corporation the contract with defendant which is the subject of this action. On 12 November 1974, The Munchak Corporation (Georgia) was made a party to this action.

Following a pretrial conference on 10 January 1977, the trial court ordered that the issues of reformation and specific performance be tried separately. The issue of reformation was tried before a jury at the 3 January 1977 Session of Guilford Superior Court presided over by Judge Kivett. The following issues were submitted to and answered by the jury:

> 1. Was the following underlined language in paragraph 5 (a) of the contract included by mutual mistake of the parties?
>
> "(a) The sum of *Six Hundred Dollars ($600.00)* per month for each year of services as a professional basketball player, which sum shall be paid at age fifty-five (55)"?
>
> ANSWER: No.
>
> 2. Was the above paragraph as written in the contract executed by the parties on October 30, 1970, in accord

with the intention of Joe L. Caldwell at the time he signed the contract?

ANSWER: Yes.

3. Was the above paragraph as written in the contract executed by the parties on October 30, 1970, in accord with the intention of Southern Sports Corporation d/b/a The Carolina Cougars at the time its representative, Carl Scheer, signed the contract?

ANSWER: Yes.

Plaintiffs appealed from a judgment dismissing their action and the Court of Appeals affirmed. *Munchak Corporation v. Caldwell*, 37 N.C. App. 240, 246 S.E. 2d 13 (1978). We denied plaintiffs' petition for discretionary review. *Munchak Corporation v. Caldwell*, 295 N.C. 647, 248 S.E. 2d 252 (1978).

On 2 April 1979, defendant's counterclaim for specific performance came on for trial before Judge Fetzer Mills sitting without a jury. Defendant offered evidence for the most part consisting of the entire transcript of the earlier trial on the complaint. Plaintiffs objected on grounds that the evidence was hearsay and that defendant had failed to lay the proper foundation for its admission. The trial court nevertheless admitted the transcript. The Court of Appeals, in an opinion by Judge Hill concurred in by Judges Parker and Martin (Harry C.), affirmed. We allowed plaintiffs' petition for discretionary review for the limited purpose of reviewing the admissibility of the prior transcript.

Brooks, Pierce, McLendon, Humphrey & Leonard, by Hubert Humphrey and Edward C. Winslow, III; and Powell, Goldstein, Frazier & Murphy, by Frank Love, for plaintiff appellant Munchak Corporation (Delaware).

Younce, Wall & Chastain, for plaintiff appellant Munchak Corporation (Georgia).

Smith, Moore, Smith, Schell & Hunter, by Bynum M. Hunter, James L. Gale, and Alan W. Duncan, for defendant appellee.

BRANCH, Chief Justice.

The sole question presented for review is whether the trial court erred in permitting defendant to offer into evidence the transcript of the prior proceeding without first laying the proper foundation.

[1] A transcript of testimony given at a prior trial or proceeding, if offered to prove the truth of the matters stated therein, is hearsay. *State v. Smith*, 291 N.C. 505, 231 S.E. 2d 663 (1977); *Smith v. Moore*, 149 N.C. 185, 62 S.E. 892 (1908). *See generally* 1 Stansbury's North Carolina Evidence § 145 (Brandis Rev. 1973). Nevertheless, the necessity and reliability of such evidence often override the principles underlying the hearsay rule, and the transcript becomes admissible upon a proper showing of three requisites: (1) The witness whose testimony is sought is unavailable; (2) the testimony sought was given at an earlier trial or proceeding of the same cause; (3) the party against whom the evidence is offered was present at the earlier trial and able to cross-examine the witness. *Id.*

At the proceeding on defendant's counterclaim for specific performance, the following exchange took place:

> MR. HUNTER: In view of the position of the plaintiffs, I would propose to introduce the entire transcript and they can read whatever part of it they want to subject to the same objections that were made by the parties in the trial of the case. This is all part of the same case. I don't understand Mr. Humphrey's position. He seems to be thinking this is something else.
>
> MR. HUMPHREY: This is a different case. This is the reformation case, and this is an entirely different case. This is a different trial, and as I say, I don't know — I don't want to introduce the whole record because if the thing goes up on appeal, I think it is sufficient to introduce such portions as you deem relevant.
>
> MR. HUNTER: I will let Mr. Humphrey do it like he wants to. I thought we wouldn't have to introduce any evidence. I thought it was pretty clear-cut but in view of what took place in the conference room and the position taken by the plaintiffs, which I have difficulty understanding, and if that is the position they are taking. I am not sure what their position is, based on what it was back there in chambers.
>
> I suppose, to be on the safe side, I will have to introduce the same thing. They are contending that there was something inequitable about this matter. *All of that was gone through in the case before. I think we should let the record*

show that we have already gone through all of this and that their position is totally unfounded because it has already been litigated.

At the outset, we note that it is not at all clear that the transcript was offered to prove the truth of the matters stated therein. To the contrary, it appears that the transcript was offered to prove the existence of the prior judgment and the fact that certain issues had already been litigated. If this is the case, the transcript was not hearsay.

[2] Nevertheless, for purposes of this decision, we will assume that the transcript constituted hearsay. Plaintiffs contend that it was error to admit the transcript without requiring defendant to lay a foundation as required in *Smith v. Moore, supra.* Defendant argues on the other hand, and the Court of Appeals agreed, that the two proceedings here were but two parts of the same case, and therefore the *Smith* rule should be inapplicable. In holding the transcript admissible, the Court of Appeals reasoned that, "[i]f the claim had been heard on the same day, the parties and the judge would have been cognizant of and able to rely on evidence presented on the claim for reformation . . . . To hold otherwise would be to destroy the ability of trial judges to exercise discretion by severing complicated cases into more understandable issues." 46 N.C. App. at 417, 265 S.E. 2d at 657. We disagree.

We recognize that there may well be a situation where a strict adherence to the *Smith* rule would impede or even thwart the ends of justice, or present an unnecessary obstacle to the expedient disposition of cases. However, the facts of the instant case do not compel a divergence from the well-entrenched *Smith* rule. We are not presented here with a situation in which a case is separated into issues to be heard at different times by the same judge or jury. In this case, the evidence was heard by a jury in the action on the complaint. That prior proceeding was presided over by Judge Kivett. Some two years later, the matter of defendant's counterclaim came on for trial before Judge Mills. The transcript constituted out-of-court statements, and, assuming that it was offered to prove the truth of the matters contained therein and was therefore hearsay, we hold that under the rule of *Smith v. Moore, supra,* it was inadmissible absent the laying of a proper foundation. Since defendant failed to lay the requisite foundation, the admission of the transcript was error.

Nevertheless, we find that the error was harmless. The proceeding at which the transcript was admitted was before a judge sitting without a jury. In such a case, "the ordinary rules as to the competency of evidence applied in a trial before a jury are to some extent relaxed, for the reason that the judge with knowledge of the law is able to eliminate from the testimony he hears that which is immaterial and incompetent, and consider only that which tends properly to prove the facts to be found." *Cameron v. Cameron*, 232 N.C. 686, 690, 61 S.E. 2d 913, 915 (1950). It is therefore presumed that the court disregards the incompetent evidence, and if the court's findings are supported by competent evidence, they will be sustained. *Wood-Hopkins Contracting Co. v. Ports Authority*, 284 N.C. 732, 202 S.E. 2d 473 (1974); *Cotton v. Cotton*, 269 N.C. 759, 153 S.E. 2d 489 (1967).

The remedy of specific performance is available to "compel a party to do precisely what he ought to have done without being coerced by the court." *McLean v. Keith*, 236 N.C. 59, 71, 72 S.E. 2d 44, 53 (1952). The party claiming the right to specific performance must show the existence of a valid contract, its terms, and either full performance on his part or that he is ready, willing and able to perform. 71 Am. Jur. 2d "Specific Performance," §207 (1973). Disregarding the incompetent evidence in the case at bar, there was sufficient evidence of the three requisites to support the court's findings necessary in turn to support his award of specific performance. The existence of the contract was not in dispute, and neither was the fact of defendant's performance under its terms. The dispute over the terms of the contract had been laid to rest by the prior judgment incorporating the jury determination that the parties intended the contract to be enforceable as written. The transcript of the prior proceeding was not necessary to reach a determination of the propriety of specific performance and, nothing else appearing, we presume the trial court disregarded it. *See Wood-Hopkins Contracting Co. v. Ports Authority, supra.* We therefore hold that while it was error to admit the prior transcript, under the facts of this case, the error was harmless.

The decision of the Court of Appeals affirming the judgment of the trial court is

Modified and Affirmed.

STATE OF NORTH CAROLINA v. JOSEPH PHILLIP SMITH AND JOHNNY BENJAMIN SMITH

No. 85

(Filed 6 January 1981)

1. Criminal Law § 128.1— testimony stricken — mistrial not required

In a prosecution of defendant for armed robbery and murder, trial court did not commit prejudicial error in denying defendant's motion for a mistrial after striking the testimony of several witnesses concerning the absence of fingerprints of defendant at the murder scene and the absence of gunpowder on the hands of bystanders after the robbery-murder, since the trial court, after the motions to strike were allowed, instructed the jury not to consider the stricken evidence and specifically referred to the evidence and the witness who provided it, there was no way in which defendant would have been prejudiced by the evidence had it not been withdrawn from the jury's consideration, and defendant's motion for mistrial was a matter addressed to the sound discretion of the trial judge, and no abuse of that discretion appeared.

2. Criminal Law § 92.1— two defendants charged with same crime — consolidation proper

The trial court did not err in consolidating defendant's case for trial with that of a codefendant since defendants were charged in separate indictments for the same crimes; they were tried upon the theory that the murder with which they were charged was committed in connection with a robbery committed by them jointly; their defenses were not antagonistic; and neither attempted to incriminate the other in the presentation of an alibi.

3. Criminal Law § 60— fingerprint evidence — admissibility

In a prosection of two defendants for armed robbery and murder, there was no merit to one defendant's contention that the trial court erred in admitting evidence of fingerprints of a codefendant found on the murder weapon as well as the cards containing his fingerprints because the fingerprints found on the weapon were never linked to him, since the evidence of fingerprints was relevant because the State proceeded upon the theory of acting in concert and the fingerprint cards were not allowed to remain in evidence.

APPEAL by defendants from judgments of *Preston, J.*, entered at the 19 November 1979 Criminal Session of CUMBERLAND Superior Court.

Upon pleas of not guilty, defendants were tried on separate bills of indictment charging them with the armed robbery and murder of Robert Eugene Boyer. Evidence presented by the state tended to show:

At approximately 7:15 p.m. on 24 February 1979 the body of Robert Boyer was found at the Adult Book Store located on Murchi-

son Road in the city of Fayetteville, North Carolina. Boyer's death was caused by a single bullet wound to his head. The murder weapon was subsequently identified as a .44 magnum revolver which was found by a 10 year-old girl on 7 April 1979 in a playground area in Smithfield, North Carolina. Defendant Joseph Smith's latent fingerprints were found on the weapon, and he was seen by a police officer in Smithfield on the same day the gun was found.

Co-defendants Randy Allen and Roscoe Washington testified for the state as part of certain plea bargaining arrangements. They testified that they left Goldsboro on the day of the alleged offenses with defendants Smith; that defendant Johnny Smith was driving the automobile in which they traveled; that all four of them entered the book store and proceeded to look around; that while they all four were in a projection room viewing a film, defendant Joseph Smith pulled out a pistol; that they then went to the front counter where the operator of the store, Boyer, was ordered from behind the counter; that Allen then went behind the counter, filled a paper bag with money and pulled the telephone out of the wall; that Allen also found a briefcase containing money; that he placed the paper bag in the briefcase, after which Allen, Washington and defendant Johnny Smith left the store; that as the trio approached the car, they heard a gunshot from inside the store; that defendant Joseph Smith came out of the store shortly thereafter saying that he had shot the operator; that after they left the store, the four men drove to Wilson and then to Goldsboro; and that they divided the money taken from the store between them.

Defendants Smith offered evidence tending to establish an alibi.

Defendants were found guilty as charged. A sentencing hearing was conducted pursuant to G.S. 15A-2000 *et seq.* and the jury returned recommendations that defendants be sentenced to life imprisonment. The court ordered that the armed robbery charge against each defendant be merged with the murder charges and entered judgments that each defendant be sentenced to prison for life.

Attorney General Rufus L. Edmisten by Assistant Attorney General Daniel F. McLawhorn for the State.

D. Lynn Johnson for defendant Joseph Phillip Smith.

Richard M. Wiggins for defendant Johnny Benjamin Smith.

BRITT, Justice.

DEFENDANT JOSEPH SMITH'S APPEAL

[1] This defendant's sole assignment of error is that the trial court committed prejudicial error in denying his motion for a mistrial after striking the testimony of several witnesses. We find no merit in the assignment.

The evidence which the court ordered stricken did not directly involve either defendant. It tended to show that no fingerprints were found at the murder scene which matched those of any of the four participants and that those persons who entered the crime scene after the robbery-murder, but before the police arrived, had no traces of gunpowder on their hands. The motion to strike was allowed by the trial judge because the state failed to establish a sufficient foundation for the introduction of the evidence relating to either the handwipings of the bystanders or their fingerprints.

We perceive at least three reasons why this assignment is without merit.

First, after the motions to strike were allowed, the trial court instructed the jury not to consider the stricken evidence and specifically referred to the evidence and the witness who provided it. It is well-settled in this jurisdiction that when the court withdraws incompetent evidence and instructs the jury not to consider it, any prejudice is ordinarily cured. *E.g., State v. Perry*, 276 N.C. 339, 172 S.E.2d 541 (1970); *State v. Moore*, 276 N.C. 142, 171 S.E.2d 453 (1970).

Second, we are unable to deduce any way in which defendant would have been prejudiced by the evidence had it not been withdrawn from the jury's consideration. While it is true that the evidence did tend to show that certain persons who had arrived at the scene of the crimes in the interval between their commission and the time that police arrived had no part in the commission of the offenses, it also tended to show that no fingerprints matching those of defendant or any of the co-defendants were found at the scene. It is incumbent upon an appellant not only to show error but also to show that the error was prejudicial to him. *E.g., State v. Partlow*, 272 N.C. 60, 157 S.E.2d 688 (1967). Furthermore, in light of the other overwhelming evidence which was adduced at trial, this evidence could not have been the difference between a guilty verdict and an acquittal. *See* G.S. § 15A-1443(a) (1978).

Third, as to the motion for mistrial itself, this was a matter

addressed to the sound discretion of the trial judge and his ruling thereon will not be disturbed absent a showing of abuse of discretion. G.S. § 15A-1061 (1978); *e.g., State v. McLean*, 294 N.C. 623, 242 S.E. 2d 814 (1978). We find no abuse of discretion in the present case.

DEFENDANT JOHNNY SMITH'S APPEAL

[2] This defendant contends first that the trial court erred in consolidating his case for trial with that of defendant Joseph Smith. There is no merit in this contention.

G.S. § 15A-926(a) provides that "[t]wo or more offenses may be joined . . . for trial when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan . . . ." In the case at hand, defendants Smith were charged in separate indictments with the same crimes. They were tried upon the theory that the murder, with which they were charged, was committed in connection with a robbery committed by them jointly. Their defenses were not antagonistic and neither attempted to incriminate the other in the presentation of an alibi. We hold that the court properly consolidated the cases for trial. *State v. Madden*, 292 N.C. 114, 232 S.E.2d 656 (1977); *State v. Mitchell*, 288 N.C. 360, 218 S.E.2d 332 (1975), *death sentence vacated*, 428 U.S. 904 (1976).

Defendant Johnny Smith contends next that the trial court erred in denying his motion *in limine* concerning evidence of an alleged armed robbery in Smithfield. We find no merit in this contention.

The record fails to disclose that any evidence relating to an armed robbery in Smithfield was introduced. When the state began questioning one of its witnesses with respect to the murder weapon being found in Smithfield on 7 April 1979, and defendant Joseph Smith being seen in that city on that date, the court in the absence of the jury cautioned the prosecuting attorney that any reference to an unrelated offense could result in a mistrial of the case *sub judice*. Thereupon, the state carefully limited the evidence to the finding of the murder weapon and the presence of defendant Joseph Smith in Smithfield on that date, evidence which was relevant to the case being tried. We perceive no error.

[3] Finally, defendant Johnny Smith contends that the court erred

in admitting evidence of fingerprints found on the murder weapon, as well as the cards containing his fingerprints. This contention has no merit. Defendant Johnny Smith argues that this evidence "was extraneous to the issues in the trial" and that the fingerprints found on the weapon were never linked to him. We reject this argument. While the fingerprints were those of defendant Joseph Smith, rather than defendant Johnny Smith, the evidence of the fingerprints was relevant because the state proceeded upon a theory of acting in concert. ". . . [I]n criminal cases, every circumstance that is calculated to throw any light upon the supposed crime is admissible." *State v. Hamilton*, 264 N.C. 277, 286, 141 S.E.2d 506, 513 (1965), *cert. denied*, 384 U.S. 1020 (1966).

As to the cards containing this defendant's fingerprints, the record indicates that they were not allowed to remain in evidence. Even so, since defendant Johnny Smith's prints were not found on the murder weapon or at any place at the scene of the offenses, we perceive no prejudice to him.

* * *

We conclude that both defendants received fair trials, free from prejudicial error.

No error.

CLINTON S. FORBIS, JR. AND WIFE, NANCY M. FORBIS v. GERALD DOUGLAS HONEYCUTT AND WIFE, PATRICIA ARROWOOD HONEYCUTT

No. 122

(Filed 6 January 1981)

1. Rules of Civil Procedure § 12— motion to dismiss — failure to state claim for relief

A complaint may be dismissed on motion filed under Rule 12(b)(6) if it is clearly without merit, and such lack of merit may consist of an absence of law to support a claim of the sort made, absence of fact sufficient to make a good claim, or the disclosure of some fact which will necessarily defeat the claim.

2. Rules of Civil Procedure § 12— sufficiency of complaint to withstand motion to dismiss

A complaint is sufficient to withstand a motion to dismiss where no insurmountable bar to recovery on the claim alleged appears on the face of the complaint and where allegations contained therein are sufficient to give a defend-

ant notice of the nature and basis of plaintiff's claim so as to enable him to answer and prepare for trial.

3. Brokers and Factors § 3— exclusive listing agreement for real estate — no authority by agent to enter binding contract of sale

An exclusive listing agreement for real estate which sets out the sales price, fixes a commission and provides an expiration date for the exclusive listing does not confer upon the real estate agent authority to enter into a contract of sale which is binding on the seller.

APPEAL of right by plaintiffs from a decision of the Court of Appeals reported in 48 N.C. App. 145, 268 S.E. 2d 247 (1980) (*Wells, Martin, Harry C., J.J.*, concurring, *Webb, J.*, dissenting), affirming the granting of defendants' motion to dismiss pursuant to Rule 12 (b)(6), N.C. Rules of Civil Procedure, entered by *Mills, Judge* at the 19 November 1979 Session of Superior Court, CABARRUS County.

In this appeal we consider whether an exclusive listing agreement for real estate, which sets out the sale price and other terms of sale, confers upon the agent authority to enter into a contract of sale on behalf of the seller. We hold that it does not and affirm the Court of Appeals.

Forbis & Grossman, by Steven A. Grossman, for the plaintiff-appellants.

Carroll & Scarbrough, by James F. Scarbrough, for defendant-appellees.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Harry H. Harkins, Jr., for the North Carolina Real Estate Licensing Board, amicus curiae.

CARLTON, Justice.

Plaintiffs bring this action seeking specific performance of an exclusive listing contract for certain real property. In their complaint, plaintiffs allege that defendants are the owners of the property, and that on or about 13 July 1979 the defendants signed an exclusive listing agreement whereby the land was listed for sale with Kiser Beaver Real Estate, Inc.

Plaintiffs further allege that they executed a written offer to purchase the property for the price quoted in the listing agreement, and delivered that offer to Kiser Beaver Real Estate, Inc., together with earnest money of $600.00. Plaintiffs sold their home in anticipation of buying the subject real property from the defendants.

Plaintiffs also stand ready, willing and able to fulfill the terms of their offer, but defendants refuse to convey the property. Plaintiffs pray that defendants be required to execute a general warranty deed to them conveying the subject property.

Defendants answered, alleging as a first defense that plaintiffs' complaint failed to state a claim upon which relief could be granted. Subsequently, defendants filed a separate motion to dismiss under G.S. 1A-1, Rule 12 (b) (6) which, following a hearing, was granted by the trial court. Plaintiffs appealed to the Court of Appeals and that court affirmed the trial court.

[1,2] The procedural issue presented is whether the trial court properly allowed the motion to dismiss pursuant to Rule 12 (b) (6), N.C. Rules of Civil Procedure. The test on a motion to dismiss for failure to state a claim upon which relief can be granted is whether the pleading is legally sufficient. 11 Strong, N.C. Index 3d, Rules of Civil Procedure § 12 (1978). A complaint may be dismissed on motion filed under Rule 12 (b) (6) if it is clearly without merit; such lack of merit may consist of an absence of law to support a claim of the sort made, absence of fact sufficient to make a good claim, or the disclosure of some fact which will necessarily defeat the claim. *Hodges v. Wellons*, 9 N.C. App. 152, 175 S.E. 2d 690 (1970). For the purpose of a motion to dismiss, the allegations of the complaint are treated as true. *Smith v. Ford Motor Co.*, 289 N.C. 71, 221 S.E. 2d 282 (1976). A complaint is sufficient to withstand a motion to dismiss where no insurmountable bar to recovery on the claim alleged appears on the face of the complaint and where allegations contained therein are sufficient to give a defendant notice of the nature and basis of plaintiffs' claim so as to enable him to answer and prepare for trial. *Industries, Inc. v. Construction Co.*, 42 N.C. App. 259, 257 S.E. 2d 50 (1979).

Turning to the question whether plaintiffs' complaint states a claim upon which relief can be granted against defendants, we agree with the Court of Appeals that the dispositive substantive question is whether the listing agreement vested in the real estate agent the authority to enter into a contract binding on defendants to convey the subject property. If it did, plaintiffs' pleadings are "legally sufficient" to proceed to trial. If it did not, there appears "an absence of law to support a claim of the sort made" and "an insurmountable bar to recovery" appears on the face of the complaint.

[3] We join the majority of jurisdictions and hold that a real estate

listing agreement such as the one in question here does not confer on the real estate agent authority to enter into a contract binding the owners to convey.

The key provisions of the listing agreement here are as follows:

> The Owner hereby gives to the Agent the exclusive right to sell the property hereinafter listed at the price and upon the terms set forth below or at such other price as the parties hereto may agree upon. This listing contract shall continue until midnight, the last hour of 13 October 1979.
>
> Property to be sold: 1616 Longbow Drive, Kannapolis, North Carolina 28081.
>
> Sale Price: Sixty two thousand five hundred Dollars ($62,500.00).
>
> . . . .
>
> If the property is sold, leased, transferred or exchanged by the Owner or by any other party before the expiration of this listing, at any terms accepted by the Owner or within three months thereafter to any purchaser with whom the Agent or Owner negotiated during the listing, or if a ready, willing and able purchaser is procured, the Owner agrees to pay the Agent's commission. The Agent's commission for his services shall be SIX per cent (6%) of the gross sale price.
>
> . . . .
>
> It is understood and agreed that if the property is sold during the period set forth herein, Owner will execute and deliver a fee simple deed with the usual covenants of warranty, subject only to current ad valorem taxes (which are to be prorated on the calendar year basis to the date of closing the transaction), existing easements, rights-of-way, and restrictive covenants, if any, and the following encumbrances, (if none, so state).
>
> 1st Mortgage - Citizens S & L, Kannapolis Bal. 24,500.00 Payment 266.00 PIT 9% loan
>
> Owner agrees to give a purchaser possession of the

property by at the time of final settlement.

> The Owner agrees to enter into contract of sale with and to convey said property by good and sufficient deed with usual warranties to such ready, willing and able purchaser for the price and on the terms and conditions herein stated: or if the stated price cannot be obtained, in the alternative, for such other price or on such other terms and conditions as the Owner may approve. This property which is the subject matter of this agreement is offered without respect to race, creed, color or national origin.

As the Court of Appeals recognized, the question here presented is one of first impression in this State. Case law from other jurisdictions, though, establishes the majority rule that a real estate broker listing agreement such as the one in this case does not confer on a real estate broker authority to enter into a binding contract to convey the disputed property. *See* Annot., Power of Real-Estate Broker to Execute Contract of Sale in Behalf of Principal, 43 A.L.R. 2d 1014 (1955).

It is well settled that in the absence of special authority, the agent who is authorized by his principal to negotiate the sale of real estate has no power to bind his principal to a contract to convey. *McCall v. Institute*, 189 N.C. 775, 128 S.E. 349 (1925). An agent's authority from his principal to sell real estate is not to be readily inferred, but exists only where the intention of the principal to give such authority is plainly manifest. *O'Donnell v. Carr*, 189 N.C. 77, 126 S.E. 112 (1925).

Of course, a real estate agent *may* be vested with authority to enter into a contract of sale binding on the owner. *Combes v. Adams*, 150 N.C. 64, 63 S.E. 186 (1908). But such authority must be expressly conferred upon the agent or necessarily implied from the terms of the particular contract. *Gallant v. Todd*, 235 S.C. 428, 111 S.E. 2d 779 (1960).

> However, language relied upon to confer such authority must be specific, adequate, and appropriate to express an intention to create such power, in addition to the limited power inherent in the conventional relationship of owner and broker, merely to find a purchaser with whom the

> owner may negotiate with the object of entering into a contract of sale.

12 Am. Jur. 2d, Brokers, § 71.

Applying the foregoing to the case *sub judice*, we first note that plaintiffs pled only the agreement between the defendants and the broker as a basis for finding the requisite contractual power in the agent. Our inquiry, then, is limited to the question whether as a matter of law this agreement gave the defendants' agent authority to contractually bind the defendants. We hold that it did not.

While the listing agreement states that the agent shall have an exclusive "right to sell" the property, such a provision does not imply authority to enter into a contract binding on the owners for the sale of the property. When used in contracts between real estate agents and owners of land, the term "to sell" is generally given the restricted meaning of power to find a purchaser, and alone is not sufficient to empower a real estate agent to enter into a contract of sale. Restatement 2d, Agency, § 53 interprets the terms "to buy" and "to sell" as meaning that the agent shall (a) find a seller or purchaser from whom or to whom the principal may buy or sell; (b) make a contract for purchase or sale; or (c) accept or make a conveyance for the principal. Comment (b) under this section says:

> *Land.* Unless the price and other terms have been completeley stated by the principal, it is the normal inference that an agent employed "to buy" or "to sell" land and not given a formal power of attorney is authorized merely to find a seller or a purchaser with whom the principal is to conduct the final negotiations. *This inference is strengthened if the agent is a broker who ordinarily merely solicits; even where the complete terms have been set out, it is ordinarily inferred that such a person is employed merely to find a customer.* Authority to accept or to make a conveyance of land for the principal is found only if clearly expressed in the authorization or clearly indicated by the circumstances. (Emphasis added.)

Under the quoted language of the Restatement, plaintiffs' claim is not persuasive merely because the listing agreement here sets a sales price, fixes a commission and provides an expiration date for the exclusive listing. The agent was not given a power of

attorney, nor any authority to contract on behalf of defendants. We see nothing in this agreement to defeat the normal inference that the agent was employed solely to find a buyer.

Our decision that the authority of the agent did not include the power to contract under the facts of this case is also supported by practical reasons and the inherent relationship of the parties. The decision whether to sell the land, on what terms, and to whom, involves complex questions which should not be deemed readily entrusted to an agent. Where several offers are received by an agent, they may vary not only as to price but also as to terms, financing, date of possession or numerous other factors. A decision on such matters would normally be for the owners of real estate, not their agents. Under the terms of the agreement set out above, we do not believe defendants intended to vest this agent with authority beyond that of finding willing purchasers. The decision of the Court of Appeals is

Affirmed.

STATE OF NORTH CAROLINA v. MICHAEL BARXLEY GREENWOOD

No. 152

(Filed 6 January 1981)

Searches and Seizures § 37— pocketbook on rear seat of car — warrantless search incident to arrest for marijuana possession

Search of a pocketbook found on the rear seat of defendant's automobile subsequent to his warrantless arrest for possession of marijuana was proper since defendant offered no evidence to show any legitimate property or possessory interest in the pocketbook; the State's evidence tended to show that it belonged to a third person and it had been stolen from her automobile which was parked near defendant's automobile; and defendant failed to show that the seizure and search of the pocketbook infringed upon his own personal rights under the Fourth Amendment.

APPEAL by the State from decision of the Court of Appeals, 47 N.C. App. 731, 268 S.E.2d 835 (1980), reversing the trial court's order which denied defendant's motion to suppress a pocketbook and its contents.

Defendant was charged under G.S. 90-95(a)(3) with the misdemeanor possession of marijuana and under G.S. 14-56 and

G.S. 14-72 with the felonious breaking and entering of a motor vehicle and the larceny therefrom of a pocketbook. Defendant moved to suppress both the marijuana and the pocketbook and its contents.

At a pretrial suppression hearing, the State offered evidence tending to show that on 27 November 1977 at approximately 8 p.m., Officer Simpson of the High Point Police Department was called to the Church of God at 209 West Ward Street in High Point to investigate a report that a suspicious person was on the premises. Upon arrival, Officer Simpson was directed to a 1966 blue Ford Mustang parked in the corner of the church parking lot and occupied by defendant who was sitting in the driver's seat.

At the request of Officer Simpson, defendant rolled the window down and the officer asked to see his driver's license. At that time Officer Simpson detected the odor of marijuana in and around the vehicle and asked defendant to get out, which he did. The officer advised defendant of his constitutional rights. Officer Simpson then informed defendant that he intended to search the vehicle for marijuana. The search revealed several fragments of cigarette butts which were later determined to contain marijuana. He also discovered a "roach clip" with marijuana residue on it. Defendant was then arrested for possession of marijuana. Defendant was advised by Officer Simpson that, according to departmental rules and regulations, it was his duty to store and inventory defendant's car. Officer Simpson then proceeded to inventory the vehicle. In doing so, he found a light brown pocketbook under some jackets on the rear seat of the car. The pocketbook was searched and the contents inventoried. The contents revealed that the pocketbook did not belong to defendant but was the property of Rosabelle Duncan. Defendant was then charged with breaking and entering a motor vehicle belonging to Rosabelle Duncan and with the larceny of the pocketbook therefrom. Defendant's vehicle was subsequently towed away and stored.

At the conclusion of the suppression hearing, the court denied defendant's motion to suppress, concluding that Officer Simpson had the right, under the circumstances, to make a warrantless search of defendant's vehicle for marijuana and to impound the car "to keep it from getting away."

Thereafter at trial, defendant pleaded no contest to the charge of misdemeanor possession of marijuana and misdemeanor breaking

and entering. Pursuant to a plea arrangement, defendant was given a suspended sentence of not less than eighteen nor more than twenty-four months, placed on unsupervised probation for a period of two years, and ordered to pay fines and costs in each case. Execution of the sentence was stayed pending appeal by defendant of the denial of his motion to suppress. G.S. 15A-979(b).

The Court of Appeals upheld the trial court's order denying defendant's motion to suppress the marijuana but held the motion to suppress should have been allowed insofar as it related to the contents of the pocketbook. The State appealed to this Court alleging error with respect to suppression of the contents of the pocketbook.

Rufus L. Edmisten, Attorney General, by William R. Shenton, Associate Attorney, for the State, appellant.

Robert L. McClellan, Assistant Public Defender, for defendant appellee.

HUSKINS, Justice.

The only question before the Court on this appeal is whether the Court of Appeals erred in holding that the pocketbook and its contents should have been suppressed. We answer in the affirmative and reverse.

It is apparent from the face of the record that the pocketbook in question was not the property of the defendant. In fact, defendant's possession of the pocketbook was the basis of the breaking, entering and larceny charge against him under G.S. 14-56. Defendant offered no evidence to show any legitimate property or possessory interest in the pocketbook, and we conclude that he had none. The State's evidence tends to show that it belonged to a lady named Duncan and had been stolen from her 1976 Toyota automobile parked on the church parking lot nearby.

It is a general rule of law in this jurisdiction that one may not object to a search or seizure of the premises or property of another. *State v. Eppley*, 282 N.C. 249, 192 S.E.2d 441 (1972); *State v. Ray*, 274 N.C. 556, 164 S.E.2d 457 (1968); *State v. Craddock*, 272 N.C. 160, 158 S.E.2d 25 (1967). We said in *Craddock* that "immunity to unreasonable searches and seizures is a privilege personal to those whose rights thereunder have been infringed." *Id.* at 169, 158 S.E. 2d at 32. Absent ownership or possessory interest in the premises or

property, a person has no standing to contest the validity of a search. *State v. Eppley, supra.* Our decisions on this point are in accord with Fourth Amendment interpretations by the Supreme Court of the United States. *See Rakas v. Illinois*, 439 U.S. 128, 58 L.Ed.2d 387, 99 S.Ct. 421 (1978). In that case the passengers in a motor vehicle challenged its search. In dismissing their challenge, the Court said:

> A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed. And since the exclusionary rule is an attempt to effectuate the guarantees of the Fourth Amendment, it is proper to permit only defendants whose Fourth Amendment rights have been violated to benefit from the rule's protections.

Id. at 134, 58 L.Ed.2d at 395, 99 S.Ct. at 425 (citations omitted). Decisions of this Court in accord with *Rakas* include *State v. Jones*, 299 N.C. 298, 261 S.E.2d 860 (1980); *State v. Alford*, 298 N.C. 465, 259 S.E.2d 242 (1979); *State v. Taylor*, 298 N.C. 405, 259 S.E.2d 502 (1979); *State v. Crews*, 296 N.C. 607, 252 S.E.2d 745 (1979). In *Crews*, we held that defendants had no standing to object to the search of the truck which they had stolen. In *Taylor*, we held that defendant had the burden of demonstrating an infringement of his personal rights by a search. *Compare Ybarra v. Illinois*, 444 U.S. 85, 62 L.Ed.2d 238, 100 S.Ct. 338 (1979), and *Rawlings v. Kentucky*, — U.S. —, 65 L.Ed.2d 633, 100 S.Ct. 2556 (1980).

Applying the foregoing principles of law to the facts before us, we hold that defendant failed to show that the seizure and search of the pocketbook infringed upon his own personal rights under the Fourth Amendment. Therefore, defendant's motion to suppress the pocketbook and its contents was properly denied by the trial court. Decision of the Court of Appeals to the contrary is erroneous and must be reversed.

The Court of Appeals properly rejected defendant's argument that the search of his automobile was pursuant to an unlawful seizure of his person. It further correctly concluded that the smell of marijuana gave the officer probable cause to search the automobile for the contraband drug. It erred, however, in relying on its recent decision in *State v. Cole*, 46 N.C. App. 592, 265 S.E.2d 507, *cert. den.*, 301 N.C. 96, — S.E.2d — (1980), to sustain its conclusion that the

warrantless seizure and search of the stolen pocketbook was improper. In *Cole*, the Court of Appeals held the warrantless search of Cole's jacket found in the trunk of Cole's automobile violated his Fourth Amendment rights. Cole's reasonable expectations of privacy had been violated because the pockets of his jacket had been invaded. *Compare Arkansas v. Sanders*, 442 U.S. 753, 61 L.Ed.2d 235, 99 S.Ct. 2586 (1979). For obvious reasons, the stolen pocketbook in this case cannot be equated with the jacket in *Cole* because Cole owned the jacket and could reasonably be expected to use it as a repository for personal items. This placed the jacket beyond the search power of the investigating officer. Here, however, defendant had stolen the pocketbook and may not treat it as his personal luggage to create a constitutional sanctuary. No thief has any reasonable expectations of privacy in his use of the property he has stolen. *Cole* is factually distinguishable and is not controlling here.

For the reasons stated, the decision of the Court of Appeals, insofar as it reversed the trial court's order denying defendant's motion to suppress the pocketbook and its contents, is

Reversed.

STATE OF NORTH CAROLINA v. MARK DUANE FLETCHER

No. 138

(Filed 6 January 1981)

Homicide § 21.7— second degree murder — sufficiency of evidence

The State's evidence was sufficient to support defendant's conviction of second degree murder where it tended to show that the victim entered a car occupied by defendant and defendant's companion in order to sell defendant a stolen M-16 rifle; the victim was seated in the front seat and defendant was seated in the back seat; defendant told the victim he had to pick up the money for the rifle at a friend's house; as the car was being driven by defendant's companion, defendant shot the victim in the head with a pistol which belonged to the girlfriend of defendant's companion; defendant threatened to shoot his companion unless he followed defendant's orders, whereupon the companion assisted defendant in burying the body; and a search of the residence of defendant and his companion uncovered the M-16 rifle.

DEFENDANT appeals from judgment of *Stevens, J.*, entered at the 21 May 1980 Criminal Session of Superior Court, ONSLOW County.

Defendant was charged in a bill of indictment, proper in form,

with the murder of Ronald Ray Jenkins on 25 May 1979. For reasons undisclosed in the record, the district attorney announced prior to trial that defendant would be tried for second degree murder only. The jury returned a verdict of guilty, and from the trial court's judgment sentencing him to life imprisonment, defendant appeals.

State's witness Benjamin M. Duvall testified at trial as follows: On and prior to 25 May 1979, both he and defendant were members of the United States Marine Corps and were stationed at Camp LeJeune in Onslow County. At the time of the murder, Duvall was living in Newport, North Carolina with his girlfriend, B.J. Rohweller, and defendant. Before 9:00 p.m. on 25 May 1979, defendant telephoned Duvall at their home in Newport and requested that Duvall meet him at Camp LeJeune. When Duvall arrived at the base, defendant instructed him to drive to another barracks area. Defendant met Duvall at the designated area, threw a green awol bag into the back seat of the green Chevrolet Vega Duvall was driving, and rode with Duvall to the end of the street. A man walked to the driver's side of the car and asked defendant if he "had the money." Defendant replied that he had to pick the money up at a friend's house off the base, whereupon the man walked away, returned with a green vinyl bag, and got into the front passenger seat of the Vega. Defendant was seated on the right side of the back seat. The man was introduced to Duvall as Ronald Ray Jenkins. As the three men drove off, Jenkins produced an M-16 rifle, disassembled into three parts, which defendant inspected and Jenkins then replaced in the green vinyl bag. Defendant instructed Duvall to drive up Rocky Run Road in Onslow County. After driving upon this road for a short distance, Duvall heard a gunshot close to his right ear. He looked over and saw Jenkins slumped against the front passenger door of the vehicle and observed defendant in the back seat, grinning and holding a pistol. Duvall recognized the pistol as the one belonging to his girlfriend, and identified it at trial as such. Defendant then threatened to shoot Duvall unless he followed defendant's orders, whereupon Duvall assisted defendant in burying the body beside a small road leading off Rocky Run Road. Duvall testified that because of defendant's repeated threats, neither he nor his girlfriend reported the incident to law enforcement officers.

Mark Taylor testified for the State that at approximately 9:30 p.m. on 25 May 1979 he accompanied his roommate Ronald Ray Jenkins to a spot in the woods near their barracks, where the two

recovered a buried M-16 rifle which Jenkins had previously stolen. Jenkins told Taylor that he had arranged to meet defendant Fletcher at 10:00 p.m. that night to transact a sale of the weapon. Taylor stated that he went with Jenkins to the designated meeting place and saw a green Vega automobile drive up and park. Jenkins approached the vehicle, talked for a moment with the vehicle's occupants, and returned to Taylor, relating to him that defendant was in the vehicle and that they were going to proceed with the sale. Jenkins then returned to the Vega and rode away. Taylor never saw him again.

Further evidence presented by the State tended to show that on 3 June 1979 State's witness Johnny Midgett was jogging on a dirt road near Rocky Run Road when he saw a man's arm protruding from the ground beside the road. Law enforcement officers were summoned and the body was identified as that of Ronald Ray Jenkins. The cause of death was a gunshot wound to the head.

B. J. Rohweller, witness Duvall's girlfriend, testified for the State that she was unaware of the incident until the discovery of Jenkins' body was aired over the television and Duvall became sick after watching the broadcast. Duvall then confessed the murder to her. After defendant's repeated threats to kill or assault her, Ms. Rohweller reported the information she had pertaining to the murder to law enforcement authorities on 31 July 1979. Defendant and Duvall were arrested on 1 August 1979, and a search of their residence in Onslow County on the same day uncovered an M-16 rifle, among other items.

Defendant testified in his own behalf, denying that he committed the murder and stating that he did not know Ronald Ray Jenkins. He claimed that the M-16 rifle belonged to Duvall. Defendant further presented evidence tending to establish his good character and reputation as a nonviolent person, and tending to show that Duvall was an interested witness, since he was testifying under an agreement with the State for a reduction of the charges against him in exchange for his testimony.

Richard S. James for defendant

Attorney General Rufus L. Edmisten by Assistant Attorney General Alfred N. Salley for the State.

COPELAND, Justice.

By his sole assignment of error, defendant contends that the trial court erred in refusing to grant defendant's motion to dismiss on the grounds that the evidence was insufficient to sustain the conviction and in failing to set aside the verdict as being against the greater weight of the evidence. We have carefully reviewed defendant's assignment of error and find it without merit.

In ruling upon defendant's motion to dismiss, the trial court is required to interpret the evidence in the light most favorable to the State, and all reasonable inferences favorable to the State must be drawn therefrom. *State v. King*, 299 N.C. 707, 264 S.E. 2d 40 (1980); *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). As stated by Justice Ervin in *State v. Bowman*, 232 N.C. 374, 376, 61 S.E. 2d 107, 109 (1950),

> "[i]n ruling on such motion, the Court does not pass upon the credibility of the witnesses for the prosecution, or take into account any evidence contradicting them offered by the defense. The court merely considers the testimony favorable to the State, assumes it to be true, and determines its legal sufficiency to sustain the allegations of the indictment. Whether the testimony is true or false, and what it proves if it be true are matters for the jury."

Upon defendant's motion to dismiss for insufficiency of the evidence, the trial court must determine as a question of law whether the State has offered substantial evidence against defendant of every essential element of the crime charged. "Substantial evidence" is that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *State v. Smith*, 300 N.C. 71, 265 S.E. 2d 164 (1980); *State v. Powell, supra.* After considering the evidence in this case in the light most favorable to the State, we find that there was substantial evidence presented of defendant's guilt on each material element of second degree murder; i.e., the unlawful killing of a human being with malice. *State v. Rogers*, 299 N.C. 103, 261 S.E. 2d 1 (1979); *State v. Cates*, 293 N.C. 462, 238 S.E. 2d 465 (1977). The determination of defendant's guilt or innocence was therefore a question to be answered by the jury, and trial court did not err in denying defendant's motion to dismiss for insufficiency of the evidence.

A motion to set aside the verdict as being against the greater weight of the evidence is addressed to the discretion of the trial court, and is not reviewable on appeal absent an abuse of that

discretion. *State v. Hamm*, 299 N.C. 519, 263 S.E. 2d 556 (1980); *State v. Pearce*, 296 N.C. 281, 250 S.E. 2d 640 (1979). We find no abuse of discretion by the trial judge in this case, therefore defendant's motion was properly denied.

After careful examination of the entire record before us on appeal, we hold that defendant received a fair trial free from prejudicial error.

No error.

STATE OF NORTH CAROLINA v. KENNETH DARRELL HAMMONDS

No. 123

(Filed 6 January 1981)

1. Criminal Law § 68— identification of assailant by body odor and voice

There was no merit to defendant's contention in a rape case that the trial court erroneously allowed the prosecutrix to identify the defendant by body odor and voice since prosecutrix never identified defendant but simply testified that she knew four men were involved because her assailants had four different body odors and she heard four different voices; defendant admitted he was present with three other men; and no *voir dire* was required before the prosecutrix's testimony was admitted because it was not identification evidence.

2. Criminal Law § 34— testimony not reference to another crime by defendant

There was no merit to defendant's contention that an officer involved in the investigation of the crime charged should not have been allowed to testify that he left the room where defendant was being interrogated "in reference to the rape of [an accomplice]," since the officer's comment was not evidence tending to show that defendant had committed another offense but was simply a passing reference to one of the four men who allegedly raped the victim, and the statement was clearly not prejudicial.

3. Rape § 5— penetration of victim — sufficiency of evidence

The trial court in a rape case did not err in failing to dismiss on the grounds that the State had not proved that there was penetration of the prosecuting witness by defendant since the testimony of the prosecutrix that she was forced to have intercourse against her will was clearly sufficient to withstand motion for nonsuit, and there was also sufficient evidence that defendant was the perpetrator of the offense charged where he admitted he was one of the four men in a car who abducted the prosecutrix; she testified that she was taken by the four men to a motel and raped by each of them and eventually driven home by the same four men; and defendant admitted being present the entire time but claimed he fell asleep and denied having sexual relations with the prosecutrix or seeing anyone else do so.

4. Rape § 6— defendant's presence at crime scene — instructions proper

In a prosecution for first degree rape where the trial court instructed that defendant's admission that he was in the car with the rape victim could be considered by the jury as an admission of a fact relating to the crime charged, there was no merit to defendant's contention that such instruction could have led the jury to believe that his mere presence was sufficient for conviction and that he had therefore committed the crime, since the trial court's instructions made clear what the jury must find in order to convict defendant.

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

ON appeal as a matter of right from judgments of *Collier, J.*, entered at the 16 June 1980 Criminal Session, UNION Superior Court, imposing a life sentence for conviction of first degree rape. Defendant was also sentenced to 25-35 years for kidnapping for the purpose of facilitating the first degree rape. Motion to bypass the Court of Appeals for review of that conviction was allowed on 9 September 1980.

At trial, evidence offered by the State tends to show that Louise Williams Isom was walking to work at about 5:55 a.m. on 10 March 1980 when she was accosted by four males. One male put a gun to her neck, told her to get in the back seat of the car and not to look at anyone. The prosecutrix was then blindfolded.

After driving for a period of time, the car stopped at a motel where the four men secured a room. The prosecuting witness was taken to the room and forced to have sexual intercourse with each of the four men against her will. She was left alone in the room, without a blindfold, for thirty or forty minutes but was afraid to call for help.

The four men subsequently took Isom to a friend's house to pick up her daughter and then drove her and her small daughter to Isom's home where one of the four men, not the defendant, forced her to have sex again. Isom's boyfriend came by to see her, left and called the police. The police arrived and arrested Rayford Ashford, Jr., whom the prosecutrix identified as one of the four men involved.

The State introduced, over objection, a statement by defendant to police officers at the time of his arrest wherein defendant admitted being in the car with three other men, one of whom was Ashford, and admitted that they stopped and picked up Louise Isom. Defendant denied knowing anything about the alleged kidnapping and rapes, claiming he fell asleep in the car and also at the motel and that he did not have sex with the prosecutrix nor see

anyone else have sex with her.

Testimony of expert witnesses offered by the State tends to show that lipstick stains on the blindfold allegedly used on the prosecutrix matched the lipstick worn by the prosecutrix.

Where relevant, other facts will be discussed in the body of the opinion.

Rufus L. Edmisten, Attorney General, by Joan H. Byers, Assistant Attorney General, for the State.

Robert L. Huffman for defendant appellant.

HUSKINS, Justice.

[1] By his first assignment of error defendant contends the trial court erroneously allowed the prosecutrix to identify the defendant by body odor and voice. We find no error here. The truth is that the prosecutrix never identified defendant. She simply testified that she knew four men were involved because her assailants had four different body odors and she heard four different voices. Defendant admitted he was present with three other men. No *voir dire* was required before Isom's testimony was admitted because it was not identification evidence. *See* 1 Stansbury's North Carolina Evidence § 57 (Brandis rev. 1973). The evidence was clearly competent and admissible.

[2] Defendant next assigns error to the refusal of the trial court to strike an answer of a police officer involved in the investigation. Defendant claims that under *State v. Aycoth*, 270 N.C. 270, 154 S.E.2d 59 (1967), the officer should not have been allowed to testify that he left the room where the defendant was being interrogated "in reference to the rape of Ashford." Defendant's reliance on *Aycoth* is misplaced because *Aycoth* merely reaffirmed the established rule that "in a prosecution for a particular crime, the State cannot offer evidence tending to show that the accused has committed another distinct, independent or separate offense." *Id.* at 272, 154 S.E.2d at 60, *citing State v. McClain*, 240 N.C. 171, 81 S.E.2d 364 (1954).

In the instant case, the officer's comment was a passing reference to one of the four men who allegedly raped Louise Isom. Even if irrelevant, the statement was clearly not prejudicial. This assignment is therefore without merit.

[3] By his third assignment of error defendant challenges the failure of the trial court to dismiss on the grounds that the State had not proved there was penetration of the prosecuting witness by defendant.

Upon a motion for nonsuit the trial court is concerned only with the sufficiency of the evidence to carry the case to the jury and not with its weight. *State v. Powell*, 299 N.C. 95, 261 S.E.2d 114 (1980). The evidence is to be viewed in the light most favorable to the State. *State v. Thomas*, 296 N.C. 236, 250 S.E.2d 204 (1978).

Applying those principles to this case, we find no merit in defendant's contention. The argument that there was insufficient evidence of penetration because the prosecutrix did not specifically say she was penetrated has previously been answered by this Court in *State v. Bowman*, 232 N.C. 374, 61 S.E.2d 107 (1950):

> The law [does] not require the complaining witness to use any particular form of words in stating defendant had carnal knowledge of her . . . . Her testimony that the defendant had "intercourse" with her or "raped" her under the circumstances delineated by her was sufficient to warrant the jury in finding that there was penetration of her private parts by the phallus of the defendant.

Id. at 376, 61 S.E.2d at 108. The testimony of the prosecutrix that she was forced to have sexual intercourse against her will was clearly sufficient to withstand motion for nonsuit.

There was also sufficient evidence that defendant was the perpetrator of the offense charged. He admitted he was one of the four men in a car who picked up the prosecutrix. She testified she was taken by the four men to a motel and raped by each of them and eventually driven home, again by the same four men. Defendant admitted being present the entire time but claimed he fell asleep and denied having sexual relations with Isom or seeing anyone else do so. This evidence raises more than a mere suspicion of guilt. It strongly supports the verdict and clearly repels the motion for nonsuit. The motion to dismiss was properly denied.

[4] In his final three assignments, defendant asserts error by the trial court in its instructions to the jury. Discussing defendant's complaints *seriatim*, we first find no merit in his argument that the trial court erred in instructing that defendant's admission that he

was in the car could be considered by the jury as an admission of a fact relating to the crime charged. That instruction, argues the defendant, could have led the jury to believe mere presence of the defendant was sufficient for conviction and that defendant had therefore admitted the crime.

We find the argument unpersuasive because, in his instruction to the jury, the judge made clear what the jury must find in reaching its verdict. In relevant part, the judge instructed:

> A defendant would be aided and abetted by another person if that person or persons was present at the time the rape was committed and knowingly advised, encouraged, instigated or aided him to commit that crime.

A clear reading of that charge disposes of defendant's further argument that the trial judge failed to explicitly instruct that presence alone was not sufficient to convict.

Finally, although defendant assigns error to the trial court's summary of the evidence, defendant in his own brief "concedes that one may read . . . the charge . . . and conclude that the court fairly summarized the evidence." Our own examination convinces us that the trial court did properly recapitulate the evidence in the charge to the jury. Moreover, if the court did not do so, the burden was on the defendant to make a proper objection. Failure of the defendant to do so waives objections to the summary of the evidence and statement of contentions. *State v. Gaines*, 283 N.C. 33, 194 S.E.2d 839 (1973). This assignment is overruled.

A close examination of the record in this case reveals that the defendant received a fair trial, free of prejudicial error. The judgments appealed from must therefore be upheld.

No error.

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

ELSIE T. MORRISON, EMPLOYEE, PLAINTIFF	)	
V	)	ORDER
BURLINGTON INDUSTRIES, EMPLOYER, AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER DEFENDANTS	)	

No. 60

(Filed 28 January 1981)

IT is ordered that this cause be calendared for additional oral argument at the March 1981 Session in light of the amended opinion and award of the Commission filed with this Court on 19 January 1981. No additional briefs shall be required.

Done by the Court in conference this 27th day of January 1981.

MEYER, J.
For the Court

The foregoing order is issued over my hand and the seal of the Supreme Court this 28th day of January, 1981.

John R. Morgan
Clerk of the Supreme Court
of North Carolina

Disposition of Petitions For Discretionary Review Under G.S. 7A-31

AUSTIN v. AUSTIN

No. 111 PC

Case below: 49 NC App 203

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 January 1981.

BANK v. INSURANCE CO.

No. 152
No. 70 (Spring Term)

Case below: 49 NC App 365

Petition by defendants for discretionary review under G.S. 7A-31 allowed 6 January 1981.

CLARK v. BURLINGTON INDUSTRIES

No. 144 PC

Case below: 49 NC App 269

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 27 January 1981.

DEVELOPMENT ASSOCIATES v. BOARD OF ADJUSTMENT

No. 61 PC

Case below: 48 NC App 541

Petition by defendant McDonald for discretionary review under G.S. 7A-31 denied 6 January 1981.

DEVELOPMENT CO v. ARBITRATION ASSOC.

No. 59 PC

Case below: 48 NC App 548

Petition by intervenor Hopkins for discretionary review under G.S. 7A-31 denied 6 January 1981.

Disposition of Petitions For Discretionary Review Under G.S. 7A-31

EDWARDS v. SMITH & SONS

No. 103 PC

Case below: 49 NC App 191

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 January 1981.

EMPLOYERS INSURANCE v. HALL

No. 139 PC

Case below: 49 NC App 179

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 27 January 1981.

GILCHRIST, DISTRICT ATTORNEY v. HURLEY

No. 58 PC

Case below: 48 NC App 433

Petition by defendants for discretionary review under G.S. 7A-31 denied 6 January 1981.

HOHN v. SLATE

No. 57 PC

Case below: 48 NC App 624

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 January 1981.

IN RE RICH

No. 114 PC

Case below: 49 NC App 165

Petition for discretionary review under G.S. 7A-31 denied 27 January 1981.

Disposition of Petitions For Discretionary Review Under G.S. 7A-31

LIGHT AND WATER COMRS. v. SANITARY DISTRICT

No. 151 PC

Case below: 49 NC App 421

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 27 January 1981.

MARSHALL v. MILLER

No. 3 PC
No. 72 (Spring Term)

Case below: 47 NC App 530

Petition by Attorney General for reconsideration of denial of discretionary review under G.S. 7A-31 (301 NC 401) allowed for limited purpose of consideration of question whether Court of Appeals erred in holding that proof of bad faith is required to establish a violation of G.S. 75-1.1, 6 January 1981.

MASSEY-FERGUSON CORP. v. WOOLARD

No. 148 PC

Case below: 49 NC App 374

Petition by defendant for discretionary review under G.S. 7A-31 denied 27 January 1981.

OXENDINE v. DEPT. OF SOCIAL SERVICES

No. 169 PC
No. 71 (Spring Term)

Case below: 49 NC App 570

Petition by plaintiffs for discretionary review under G.S. 7A-31 allowed 6 January 1981.

Disposition of Petitions For Discretionary Review Under G.S. 7A-31

PALLET CO. v. TRUCK RENTAL, INC.

No. 143 PC

Case below: 49 NC App 286

Petition by defendant for discretionary review under G.S. 7A-31 denied 27 January 1981.

PIGFORD v. BD. OF ADJUSTMENT

No. 99 PC

Case below: 49 NC App 181

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 January 1981. Appeal dismissed 6 January 1981.

PMB, Inc. v. ROSENFELD

No. 95 PC

Case below: 48 NC App 736

Petition by defendants for discretionary review under G.S. 7A-31 denied 6 January 1981.

RUSSELL v. SAM SOLOMAN CO.

No. 104 PC

Case below: 49 NC App 126

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 January 1981.

SCALLON v. HOOPER

No. 117 PC

Case below: 49 NC App 113

Petition by defendant Caldwell for discretionary review under G.S. 7A-31 denied 27 January 1981.

Disposition of Petitions For Discretionary Review Under G.S. 7A-31

SPICER v. SPECTOR FREIGHT

No. 110 PC

Case below: 49 NC App 203

Petition by defendants for discretionary review under G.S. 7A-31 denied 6 January 1981.

STATE v. ALEXANDER

No. 118 PC

Case below: 49 NC App 203

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 January 1981.

STATE v. BAGBY

No. 101 PC

Case below: 48 NC App 222

Petition by defendant for further review denied 27 January 1981.

STATE v. BAILEY

No. 158 PC

Case below: 49 NC App 377

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 February 1981.

STATE v. BROOKS

No. 116 PC

Case below: 49 NC App 14

Petition by defendant for discretionary review under G.S. 7A-31 denied 27 January 1981. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 27 January 1981.

Disposition of Petitions For Discretionary Review Under G.S. 7A-31

STATE v. CONNER

No. 112 PC

Case below: 49 NC App 203

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 February 1981. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 2 February 1981.

STATE v. EDWARDS

No. 121 PC

Case below: 49 NC App 547

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 2 February 1981. Motion of defendant to dismiss appeal for lack of substantial constitutional question allowed 2 February 1981.

STATE v. HOYLE

No. 109 PC

Case below: 49 NC App 98

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 6 January 1981.

STATE v. JEFFERS

No. 98 PC

Case below: 48 NC App 663

Petition by defendant for discretionary review under G.S. 7A-31 denied 27 January 1981. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 27 January 1981.

Disposition of Petitions For Discretionary Review Under G.S. 7A-31

STATE v. LEISY

No. 155 PC

Case below: 49 NC App 546

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 January 1981. Motion of Attorney General to dismiss appeal for lack of significant public interest allowed 6 January 1981.

STATE v. MANEY

No. 93 PC

Case below: 48 NC App 742

Petition by defendant for discretionary review under G.S. 7A-31 denied 27 January 1981. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 27 January 1981.

STATE v. MESSER

No. 165 PC

Case below: 49 NC App 691

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 January 1981.

STATE v. PARRISH

No. 122 PC

Case below: 49 NC App 546

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 2 February 1981.

Disposition of Petitions For Discretionary Review Under G.S. 7A-31

STATE v. ROBERTS

No. 115 PC

Case below: 49 NC App 52

Petition by defendant for discretionary review under G.S. 7A-31 denied 27 January 1981. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 27 January 1981.

STATE v. SEUFERT

No. 172 PC

Case below: 49 NC App 524

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 2 February 1981.

STATE v. WILLIAMS

No. 97 PC

Case below: 49 NC App 184

Petition by defendant for discretionary review under G.S. 7A-31 denied 27 January 1981. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 27 January 1981.

TAYLOR v. BAILEY

No. 6

Case below: 49 NC App 216

Motions of plaintiff and defendant to dismiss appeal allowed 13 January 1981.

Disposition of Petitions For Discretionary Review Under G.S. 7A-31

TAYLOR v. CP&L CO.

No. 113 PC

Case below: 49 NC App 205

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 January 1981.

WALTERS v. BRASWELL

No. 185 PC

Case below: 49 NC App 587

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 2 February 1981.

W. R. COMPANY v. PROPERTY TAX COMM.

No. 39 PC

Case below: 48 NC App 245

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 27 January 1981.

PETITIONS TO REHEAR

FEIBUS & CO. v. CONSTRUCTION CO.

No. 82

Reported: 301 NC 294

Petition by defendants to rehear denied 6 January 1981

FLIPPIN v. JARRELL

No. 102

Reported: 301 NC 108

Petition by defendant to rehear denied 6 January 1981

Disposition of Petitions For Discretionary Review Under G.S. 7A-31

INSURANCE CO. v. INGRAM, COMR. OF INSURANCE

No. 15

Reported: 301 NC 138

Petition by plaintiff to rehear denied 6 January 1981

MOODY v. TOWN OF CARRBORO

No. 28

Reported: 301 NC 318

Petition by defendant to rehear denied 6 January 1981

APPENDIXES

AMENDMENTS TO RULES OF APPELLATE PROCEDURE

AMENDMENTS TO CODE OF PROFESSIONAL RESPONSIBILITY

AMENDMENT TO RULES GOVERNING ADMISSION TO PRACTICE OF LAW

AMENDMENTS TO
NORTH CAROLINA RULES
OF APPELLATE PROCEDURE

The first sentence of Rule 13(a) of the Rules of Appellate Procedure, 287 N.C. 671, 710, shall be amended to read as follows (new material appears in italics):

FILING AND SERVICE OF BRIEFS.

Within 20 days after the *clerk of the appellate court has mailed the printed record to the parties*, the appellant shall file his brief in the office of the clerk, and serve copies thereof upon all other parties separately represented.

This amendment to Rule 13(a) was adopted by the Supreme Court in Conference on 7 October 1980, to become effective January 1, 1981. It shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals.

CARLTON, J.

For the Court

The last sentence of the first paragraph of Rule 14(d)(1) of the Rules of Appellate Procedure, 287 N.C. 671, 712, as amended 31 January 1977, 291 N.C. 721, shall be amended to read as follows (new material appears in italics):

Filing and Service; Copies.

* * *

Within *20* days after service of the appellant's brief upon him, the appellee shall similarly file and serve copies of a new brief.

The last sentence of Rule 15(g)(2) of the Rules of Appellate Procedure, 287 N.C. 671, 717, shall be amended to read as follows (new material appears in italics):

**Cases Certified for Review of
Court of Appeals Determinations.**

* * *

The appellee shall file a new brief in the Supreme Court and

serve copies upon all other parties within *20* days after a copy of appellant's brief is served upon him.

This amendment to Rules 14(d)(1) and 15(g)(2) was adopted by the Supreme Court in Conference on 7 October 1980, to become effective January 1, 1981. It shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals.

CARLTON, J.

For the Court

The third and final paragraph of Rule 18(d)(3) of the Rules of Appellate Procedure, 287 N.C. 671, 724, as amended 21 June 1977, 292 N.C. 739, shall be amended to read as follows (new material appears in italics):

Settling the Record on Appeal.

* * *

Upon receipt of a request for settlement of the record on appeal the Chairman of the Industrial Commission or the Chairman of the Hearing Committee of the Disciplinary Hearing Commission of the North Carolina State Bar shall by written notice to counsel for all parties set a place and time not later than 20 days after receipt of the request for a hearing to settle the record on appeal. At the hearing the Chairman shall settle the record on appeal by order; *provided, however, that when the Chairman of the Hearing Committee of the Disciplinary Hearing Commission of the North Carolina State Bar is a party to the appeal as permitted by Rule 19(d), settlement of the record on appeal, absent an agreement of the parties, shall be by a referee appointed pursuant to the procedures contained in the preceding paragraph.*

This amendment to Rule 18(d)(3) was adopted by the Supreme Court in Conference on 7 October 1980, to become effective January 1, 1981. It shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals.

CARLTON, J.

For the Court

The first sentence of Rule 23(b) of the Rules of Appellate Procedure, 287 N.C. 671, 733 shall be amended to read as follows (new material appears in italics):

Pending Review by Supreme Court of Court of Appeals Decisions

Application may be made in the first instance to the Supreme Court for a writ of supersedeas to stay the execution or enforcement of a judgment, order or other determination mandated by the Court of Appeals when a *notice of appeal of right or a petition for discretionary review has been or will be timely filed,* or *a petition* for review by certiorari, mandamus, or prohibition has been filed to obtain review of the decision of the Court of Appeals. No prior motion for a stay order need be made to the Court of Appeals.

Approved by the Court in Conference this 2 day of December, 1980, to become effective 1 January 1981. It shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals.

CARLTON, J.
For the Court

Rule 28 of the North Carolina Rules of Appellate Procedure 287 N.C. at 742 is hereby amended by repealing subsection (d), "Incorporation of Court of Appeals Argument into Supreme Court Brief by Reference."

Rather than re-letter the remaining subsections of Rule 28, the Court has elected to reserve subsection (d) for future use. The following note will be added to the end of the existing material under the Commentary to Rule 28, Subdivision (d):

> "Note: The North Carolina Supreme Court, in repealing subsection (d), has eliminated the right to incorporate by reference any argument contained in a brief filed in the Court of Appeals. Not only must a party include in his new brief any question which he wants to preserve as required by Rule 28(b), but now he must also present any argument for that question upon which he intends to rely. Questions not brought forward *and* argued in the new brief will be considered abandoned."

Approved by the Court in Conference this 27th day of January 1981, to become effective 1 July 1981. It shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals.

Meyer, J.
For the Court

AMENDMENTS TO CODE OF PROFESSIONAL RESPONSIBILITY

The following amendments to the Rules, Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 16, 1980.

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 205 NC 865 and as amended in 212 NC 840; 221 NC 592; 283 NC 783 and 294 NC 757 is hereby amended by adding an additional sub-paragraph under DR2-101 (B) to be designated as (15) and DR2-101 (C) is renumbered DR2-101 (C)(2) and an additional paragraph added as DR2-101 (C)(1) as follows:

DR2-101 (B)

(15) a brief, accurate, informative statement of the law applicable to the specific service advertised.

DR2-101 (C)

(1) Any attorney seeking advance approval for the proposed text of material which he or she desires to publish under criteria established by DR2-101, *supra*, should follow the rules relating to Ethics Advisories (as established in "Procedures of the N. C. State Bar for Ruling on Questions of Ethics").

(2) Any person desiring to expand the information authorized for disclosure in DR2-101 (B), or to provide for its dissemination through other forums may apply to the North Carolina State Bar. Any such application shall be served upon the North Carolina State Bar, which shall be heard, together with the applicant, on the issue of whether the proposal is necessary in light of the existing provisions of the Code, accords with standards of accuracy, reliability and truthfulness, and would facilitate the process of informed selection of lawyers by potential consumers of legal services. The relief granted in response to any such application shall be promulgated as amendments to DR2-101 (B) and other affected ethical considerations and disciplinary rules, universally applicable to all lawyers.

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of the North Carolina Sate Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar have 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 amendments 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 12th day of November, 1980.

B.E. JAMES, Secretary-Treasurer
North Carolina State Bar

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 27th day of January, 1981.

JOSEPH BRANCH
CHIEF JUSTICE

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the Minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 27th day of January, 1981.

MEYER, J.
For the Court

AMENDMENT TO RULES GOVERNING ADMISSION TO PRACTICE OF LAW

The amendment below to the Rule 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 April 17, 1981.

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 .0402(2) as appears in 289 NC 741, 293 NC 761 and 299 NC 818 as follows:

Rule .0402 APPLICATION FORM

(2) An applicant who has aptly filed a complete application with the Board within the past twelve (12) month period immediately preceding the filing deadline specified in Rule .0403 of this Chapter may file a Supplemental Application on forms supplied by the Board, along with the applicable fees. *An applicant who has filed a Supplemental Application as provided by this rule within the past seven (7) month period immediately preceding the filing deadline specified in Rule .0403 of this Chapter may file a subsequent Supplemental Application on forms supplied by the Board, along with the applicable fees.* The Supplemental Application will update the information previously submitted to the Board by the applicant. Said Supplemental Application must be filed by the deadline set out in Rule .0403 of this Chapter.

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 27th day of April, 1981.

B. E. JAMES, Secretary
North Carolina State Bar

After examining the foregoing amendment to the Rules Governing Admission to the Practice of Law of the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 5th day of May, 1981.

JOSEPH BRANCH
CHIEF JUSTICE

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules Governing Admission to the Practice of Law of the Rules and Regulations of the North Carolina State Bar be spread upon the Minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 5th day of May, 1981.

MEYER, J.
For the Court

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N.C. Index 3d.

TOPICS COVERED IN THIS INDEX

ADVERSE POSSESSION

§ 2. Hostile and Permissive Use

The Supreme Court will adhere to the presumption of permissive use in prescriptive easement cases and will not adopt the presumption of hostile use. *Potts V. Burnette*, 663.

§ 25.1. Sufficiency of Evidence

Plaintiffs' evidence was sufficient to rebut the presumption of permissive use of a roadway across defendants' land and to allow a jury to conclude that the roadway was used under such circumstances as to give defendants notice that the use was adverse, hostile and under a claim of right. *Potts v. Burnett*, 663

APPEAL AND ERROR

§ 4. Theory of Trial in Lower Court

The Court of Appeals erred in upholding a directed verdict for defendants on a ground different from that upon which the trial court reached its decision when the ground relied upon by the Court of Appeals was not stated in defendant's motion in the trial court. *Feibus & Co. v. Construction Co.*, 294.

§ 6.2. Finality as Bearing on Appealability

An order of the trial court allowing a motion pursuant to G.S. 1A-1, Rule 60(b) to set aside a default judgment was interlocutory and not appealable. *Bailey v. Gooding*, 205.

§ 7. Parties Who May Appeal

Wake County did not have the right to appeal from orders entered by the district court in a juvenile delinquency proceeding directing the county to pay for the juvenile's treatment at the Brown Schools in Austin, Texas. *In re Brownlee*, 532.

§ 16. Powers of Trial Court After Appeal

Since the corporate defendants' subsequent perfection of their appeal related back to the time of giving notice of appeal, all orders entered by the trial judge after defendants' notice of appeal were void for want of jurisdiction. *Lowder v. Mills, Inc.*, 561.

Defendant's oral notice of appeal of the trial court's 21 February contempt order ousted jurisdiction from the trial court as to any further contempt proceedings in the same matter, and the trial court's order entered at a 28 February hearing imposing sanctions for contempt was null and void. *Ibid.*

§ 64. Affirmance

Where one member of the Supreme Court did not participate and the remaining six justices are equally divided, the decision of the Court of Appeals is affirmed without becoming a precedent. *Wayfaring Home, Inc. v. Ward*, 518; *Greenhill v. Crabtree*, 520.

ARREST AND BAIL

§ 3.7. Legality of Arrest for Rape

Officers had probable cause to arrest defendant for kidnapping and rape of a seven year old girl, and evidence seized pursuant to the arrest was thus not tainted by an illegal arrest. *S. v. Bright*, 243.

ATTORNEYS AT LAW

AUTOMOBILES

BIGAMY

BROKERS AND FACTORS

§ 3. Authority of Broker

An exclusive listing agreement for real estate which sets out the sales price, fixes a commission and provides an expiration date for the exclusive listing does not confer upon the real estate agent authority to enter into a contract of sale which is binding on the seller. *Forbis v. Honeycutt*, 699.

BURGLARY AND UNLAWFUL BREAKINGS

§ 5. Sufficiency of Evidence of Burglary

Evidence that defendant entered the victims' mobile home without permission and there robbed them at gunpoint was sufficient for the jury in a burglary prosecution. *S. v. Revelle*, 153

§ 5.9. Breaking and Entering and Larceny of Business Premises; Sufficiency of Evidence

Evidence was insufficient to support the conviction of defendant of felonious breaking and entering and larceny under the doctrine of possession of recently stolen property. *S. v. Maines*, 669.

§ 6.3. Instructions on Felony Attempted or Committed During Burglary

Trial court erred in instructing the jury that in order to convict defendant of burglary it must find that defendant at the time of the breaking and entering intended to commit rape or larceny since the indictment alleged only that the breaking and entering occurred with intent to commit larceny, but defendant was not prejudiced by such an instruction. *S. v. Joyner*, 18.

§ 6.5. Instructions on Doctrine of Possession of Recently Stolen Property

In a prosecution for rape, larceny and burglary, trial court properly instructed the jury that it could consider defendant's possession of recently stolen property as a relevant circumstance in determining whether defendant was guilty of all the crimes charged where all of the crimes occurred as part of the same criminal enterprise. *S. v. Joyner*, 18.

CONSPIRACY

§ 5.1. Admissibility of Acts and Statements of Coconspirators

Evidence of a conspiracy, including the conspiratorial acts and declarations of all the conspirators, may be relevant to show that defendant aided and abetted in the commission of the crime or to support the State's theory that defendant participated as an accessory before the fact. *S. v. Small*, 407.

CONSTUTUTIONAL LAW

§ 24.2. Due Process; Right to Notice and Hearing in Court Proceedings

An adjudication of contempt against defendant based on the affidavit of the receiver of a corporation was invalid because it abridged defendant's right to confront the witnesses against him. *Lowder v. Mills, Inc.* 561.

§ 29. Fairness of Pretrial Identification Procedures

A photograph of defendant taken while he was in jail in Virginia was not obtained in violation of his constitutional rights where the officer who arrested defendant had probable cause to do so. *S. v. Allen*, 489.

CONSTITUTIONAL LAW—Continued

§ 30. Discovery, Access to Evidence and Other Fruits of Investigation

Defendant was not entitled to pretrial descovery of the names of the State's witnesses, any statement by defendant to a third party, or any statement of a codefendant. *S. v. Moore*, 262.

Defendant was not prejudiced by the district attorney's failure to disclose that a witness had seen a photograph of defendant prior to trial. *Ibid.*

Trial court properly allowed the State's motion to quash defendant's subpoena for "all the sawed-off shotguns confiscated by the Greensboro Police Department" since the date of a robbery. *S. v. Allen*, 489.

§ 34. Double Jeopardy

Defendant's conviction of felonious larceny, armed robbery, burglary, and rape, all of which arose out of the same series of events, did not place defendant in double jeopardy. *S. v. Revelle*, 153.

§ 43. Right to Counsel; What Is Critical Stage of Proceedings

Defendant's right to counsel had not attached at the time he was photographed for identification purposes. *S. v. McDowell*, 279.

§ 46. Removal or Withdrawal of Appointed Counsel

Defendant did not have the constitutional right to have substitute counsel appointed to represent him after his motion to dismiss original counsel was granted because of a disagreement over trial tactics, and trial court was not required to make an in-depth inquiry or detailed findings of fact concerning the disagreement. *S. v. Thacker*, 348.

§ 48. Effective Assistance of Counsel

An indigent defendant whose case was transferred from Lee County to Johnston County was not entitled to the appointment of additional counsel from Johnston County. *S. v. McDowell*, 279.

§ 49. Waiver of Right to Counsel

Where the trial court specifically questions a defendant who wishes to represent himself in accordance with G.S. 15A-1242, the constitutional requirement that waiver of counsel must be knowing and voluntary has been fully satisfied. *S. v. Thacker*, 348.

§ 61. Discrimination in Jury Selection Process on Basis Other Than Race

The N.C. Supreme Court does not recognize young people as a distinct group for the purpose of determining whether a jury panel represents a fair cross-section of the community. *S. v. Price*, 437.

Defendant failed to show that the representation of young people between the ages of 18 and 29 and blacks within the venire was not fair and reasonable with respect to the group's presence within the relevant community. *Ibid.*

§ 65. Right of Confrontation Generally

The rape victim shield statute, G.S. 8-58.6, does not violate a rape defendant's constitutional right to confront the witnesses against him. *S. v. Fortney*, 31.

§ 74. Self-Incrimination Generally

Where defendant was accused of mismanaging, diverting, converting and wasting corporate assets, defendant's refusal to comply with the trial court's order to produce tax returns was not protected by the Fifth Amendment proscription against compulsory self-incrimination, and the production of the returns did not amount to

CONSTITUTIONAL LAW—Continued

such authentication as to be compelled testimonial self-incrimination which would support a claim of Fifth Amendment privilege. *Lowder v. Mills, Inc.*, 561.

§ 76. Self-Incrimination; Nontestimonial Disclosures by Defendant

Defendant's Fifth Amendment privilege against self-incrimination was not violated when he was photographed in a parole office. *S. v. McDowell*, 279.

Defendant's failure to disclose his alibi defense to police officers at the time of his arrest or to some other person prior to trial did not amount to an inconsistent statement in light of his in-court testimony relative to an alibi, and the district attorney's cross-examination of defendant concerning failure to disclose his alibi was sufficiently prejudicial to warrant a new trial. *S. v. Lane*, 382.

CONTEMPT OF COURT

§ 2.2. Direct Contempt; Acts Committed Outside Courtroom

An out of state attorney could not be held in contempt for failure to comply with an order of the court that he appear as an attorney in a criminal case where there had been no general appearance by local counsel, and the out of state attorney thus never acquired eligibility to appear in the case. *In re Smith*, 621.

§ 6. Hearings on Orders to Show Cause

Where defendant was accused of mismanaging, diverting, converting and wasting corporate assets, defendant's refusal to comply with the trial court's order to produce tax returns was not protected by the Fifth Amendment proscription against compulsory self-incrimination, and the production of the returns did not amount to such authentication as to be compelled testimonial self-incrimination which would support a claim of Fifth Amendment privilege. *Lowder v. Mills, Inc.*,

An adjudication of contempt against defendant based on the affidavit of the receiver of a corporation was invalid because it abridged defendant's right to confront the witnesses against him. *Ibid.*

§ 8. Appeal and Review

Defendant's oral notice of appeal of the trial court's 21 February contempt order ousted jurisdiction from the trial court as to any further contempt proceedings in the same matter, and the trial court's order entered at a 28 February hearing imposing sanctions for contempt was null and void. *Lowder v. Mills, Inc.*, 561.

CORPORATIONS

§ 7. Powers and Authority of Officers and Agents in General

In an action to reform a deed which mistakenly included a portion of plaintiff's homeplace in the description of the tracts conveyed, knowledge of one original grantee as to what land was intended to be conveyed at the time the property was reconveyed to the corporate defendant was imputed to the corporation, and the corporation was thus not an innocent bona fide purchaser for value against whom reformation of the deed could not be granted. *Hice v. Hi-Mil, Inc.*, 647.

§ 29. Appointment and Authority of Receivers.

The trial court's order appointing operating receivers for the corporate defendants was proper and was not void because certain shareholders allegedly were not given notice of the proceedings, and evidence was sufficient to support the court's findings that the corporate defendants were in imminent danger of becoming insol-

CORPORATIONS—Continued

COURTS

CRIME AGAINST NATURE

CRIMINAL LAW

CRIMINAL LAW—Continued

§ 25. Plea of Nolo Contendere

G.S. 15A-1022(c) which provides that a judge may not accept a plea of no contest without first determining that there is a factual basis for the plea contemplates that some substantive material independent of the plea itself must appear of record which tends to show that defendant is, in fact, guilty. *S. v. Sinclair*, 193.

Trial court erred in accepting defendant's plea of no contest to eight forgery indictments, since the record did not reveal a sufficient factual basis to support defendant's pleas. *Ibid.*

§ 26. Plea of Former Jeopardy

Defendant's conviction of felonious larceny, armed robbery, burglary, and rape, all of which arose out of the same series of events, did not place defendant in double jeopardy. *S. v. Revelle*, 153.

§ 29.1 Procedure for Raising and Determining Issue of Mental Capacity

Trial court did not abuse its discretion in the denial of defendant's pro se motion for a psychiatric examination. *S. v. See*, 388.

§ 33.4 Evidence Tending to Excite Prejudice

Testimony by a State's witness that his wife suggested to him after a court hearing that he should go and talk to defendant about the shooting in question did not intimate an attempt by defendant to bribe the witness. *S. v. King*, 186.

§ 34.2 Defendant's Guilt of Other Offenses; Admission of Inadmissible Evidence Harmless Error

While evidence tending to show that defendant had had sexual relations with other women might have been competent to show defendant's motive for hiring someone to kill his wife, trial court erred in admission of testimony detailing the manner in which defendant engaged in sexual relations with other women. *S. v. Small*, 407.

§ 34.4 Admissibility of Evidence of Other Offenses

A kidnapping and rape victim was properly permitted to testify as to defendant's admissions to her of prior murders and rapes. *S. v. Taylor*, 164.

Testimony by a kidnapping and rape victim that defendant told her he had previously kidnapped another girl was competent to show that the victim's will was overcome by her fears for her safety. *S. v. See*, 388.

§ 34.7 Admissibility of Evidence of Other Offenses to Show Intent

In a first degree murder case, evidence of defendant's altercations with two other persons and his firing a gun into a house and car was competent to show defendant's intent to kill decedent. *S. v. King*. 186.

§ 34.8 Admissibility of Evidence of Other Offenses to Show Common Plan, Scheme or Design

Witnesses for the State in a kidnapping and rape trial were properly permitted to testify as to prior and subsequent acts of misconduct by defendant which were a part of the same transaction as the kidnapping and rape. *S. v. Taylor*, 164.

In a prosecution of defendant for conspiracy to commit forgery and conspiracy to utter forged instruments, trial court did not err in admitting testimony that defendant had been involved in the commission of another separate offense. *State v. Pruitt*, 683.

CRIMINAL LAW—Continued

§ 42.4 Admissibility of Weapons; Identification and Connection with Crime

Trial court did not err in permitting the district attorney to display a pistol before the jury where two State's witnesses testified that the pistol was similar to the pistol used by defendant. *S. v. See*, 388.

A shotgun was sufficiently identified for admission into evidence. *S. v. Allen*, 489.

§ 43.1 Photographs of Defendant

Defendant's Fourth Amendment right to be free from unreasonable searches and seizures was not violated by the taking of his photograph. *S. v. McDowell*, 279.

§ 48. Silence of Defendant as Implied Admission

Evidence was sufficient to support trial court's instruction in a homicide case on implied admissions. *S. v. Moore*, 262.

§ 48.1. Silence of Defendant Incompetent

Defendant's failure to disclose his alibi defense to police officers at the time of his arrest or to some other person prior to trial did not amount to an inconsistent statement in light of his in-court testimony relative to an alibi, and the district attorney's cross-examination of defendant concerning failure to disclose his alibi was sufficiently prejudicial to warrant a new trial. *S. v. Lane*, 382.

§ 50. What Constitutes Opinion Testimony

Testimony by a victim of rape, larceny and burglary that she "assumed" an object which defendant held in his hand during commission of the crimes was a knife was not an inadmissible opinion or conclusion. *S. v. Joyner*, 18.

§ 53. Medical Expert Testimony in General

A medical expert was properly permitted to state his opinion that bruises on a kidnapping and rape victim's face "looked as though that pattern could have been made by fingers." *S. v. Bright*, 243.

§ 15.1 Fingerprint Evidence

In a prosecution of two defendants for armed robbery and murder, there was no merit to one defendant's contention that the trial court erred in admitting evidence of fingerprints of a codefendant found on the murder weapon. *S. v. Smith*, 695.

§ 62. Lie Detector Tests

Defendant's direct examination, which left the false impression that the State had refused his offer to submit to a polygraph test, rendered admissible the State's cross-examination of defendant as to whether he had been given a polygraph test and the results thereof. *S. v. Small*, 407.

§ 63. Evidence as to Sanity of Defendant

The exclusion of a psychiatrist's answer to a question as to what defendant told him regarding the events in question cannot be held prejudicial error where defendant made no showing that statements made by defendant to the witness did in fact bear upon his ultimate diagnosis of defendant's mental condition. *S. v. Ward*, 469.

§ 66. Evidence of Identity by Sight

Trial court did not err in refusing to give requested instructions on the difficulty of identifying persons of a different race. *S. v. Allen*, 489.

CRIMINAL LAW—Continued

§ 66.6 Evidence of Identity by Sight; Suggestiveness of Lineup Identification

In-court identifications of defendant by two witnesses were not tainted by a pretrial lineup procedure which defendant contended was suggestive and conducive to irreparable mistaken identity. *S. v. Clark*, 176.

§ 66.8 Identification from Photographs; Taking of Photographs

A photograph of defendant taken while he was in jail in Virginia was not obtained in violation of his constitutional rights where the officer who arrested defendant had probable cause to do so. *S. v. Allen*, 489.

§ 66.9 Identification from Photographs; Suggestiveness of Procedure

A pretrial photographic identification procedure was not impermissibly suggestive. *S. v. Bright*, 243.

Trial court did not err in allowing an eyewitness to the shooting to make an in-court identification of defendant based solely on the witness's personal observation of defendant immediately after the shooting. *S. v. Moore*, 262.

§ 66.16 Independent Origin of In-Court Identification in Cases Involving Photographic Identifications

The trial court in a homicide prosecution did not err in allowing an eyewitness to the shooting to make an in-court identification of defendant, since the identification was based solely on the witness's personal observation of defendant immediately after the shooting, and the observation of one photograph by the witness was not a pretrial identification procedure sufficiently suggestive to deny defendant due process of law. *S. v. Moore*, 262.

Trial court properly determined that in-court identifications of defendant were not tainted by a pretrial photographic procedure. *S. v. Allen*, 489.

Trial court did not err in allowing in-court identifications of defendant by assault and robbery victims where the identifications were of independent origin and not based on a pretrial photographic identification. *S. v. Billups*, 607.

§ 66.18 Voir Dire to Determine Admissibility of In-Court Identification; When Required

Trial court did not err in failing to order a voir dire before permitting an assault victim to make an in-court identification of defendant. *S. v. McDowell*, 279.

§ 71. Shorthand Statements of Fact

Trial court in a homicide case did not err in allowing witnesses to the shooting to describe the manner in which the assailant fled from the crime scene as "like a feminine run" since such testimony was admissible as a shorthand statement of fact. *S. v. Moore*, 262.

Testimony by the prosecutrix that defendant "raped me" was competent as a shorthand statement of fact. *S. v. See*, 388.

§ 75.2 Admissibility of Confession; Effect of Threats or Other Statements of Officers

There was no merit to defendant's contention that his in-custody statements were not voluntary because threats were made against his life by civilians at the scene of his arrest, because two police officers had their guns drawn at the arrest scene, or because the questioning of defendant was protracted and he was not immediately taken before a magistrate. *S. v. Taylor*, 164.

CRIMINAL LAW—Continued

§ 75.7 Admissibility of Confession Made to Persons Other than Officers; When Voir Dire Hearing Required

Assuming that defendant's statements to an officer that he would kill the victim if he lived which were made after the officer asked him "Why?" were erroneously admitted into evidence because defendant had not been given the Miranda warnings before the officer's question, the admission of the statements was harmless error. *S. v. Crawford*, 212.

§ 76.2 Admissibility of Confession Made to Persons Other than Officers; When Voir Dire Hearing Required

Trial court did not err in denying defendant's motion for a voir dire examination of two witnesses to determine the voluntariness of admissions made to them by defendant. *S. v. Moore*, 262.

§ 77. Admissions and Declarations of Persons Other than Defendant

Evidence of a conspiracy, including the conspiratorial acts and declarations of all the conspirators, may be relevant to show that defendant aided and abetted in the commission of the crime or to support the State's theory that defendant participated as an accessory before the fact. *S. v. Small*, 407.

§ 77.2 Self-Serving Declarations

Defendant's statement to officers at the time of his arrest that the shooting had been in self-defense was properly excluded from the jury's consideration because of the statement's hearsay character. *S. v. Price*, 438.

§ 82.2 Physician-Patient Privilege

Cross-examination of defendant's psychiatrist concerning incriminating statements made by defendant did not violate defendant's statutory right to privileged communication with his doctor, since no bona fide doctor-patient relationship existed.

§ 84. Evidence Obtained by Unlawful Means

Although the affidavit upon which a search warrant for defendant's motel room was issued was fatally defective, evidence admitted as a result of the search of defendant's motel room was not sufficiently prejudicial to require a new trial. *S. v. Bright*, 243.

§ 85.2 Character Evidence Relating to Defendant; State's Evidence Generally

The trial court erred in permitting an officer to state that defendant's character and reputation when he is drinking is that "when he gets drunk he fights." *S. v. King*, 186.

§ 86.5 Impeachment of Defendant; Particular Questions and Evidence as to Specific Acts

Defendant in a prosecution as an accessory before the fact to the murder of his wife could properly be asked on cross-examination for impeachment purposes about his sexual relations with other women. *S. v. Small*, 407.

§ 87.2 Leading Questions; Illustrative Cases

Trial court did not err in permitting the district attorney to ask a rape victim a leading question as to why she consented to engage in particular acts with defendant. *S. v. See*, 388.

CRIMINAL LAW—Continued

§ 89.10 Impeachment of Witnesses; Witnesses' Prior Degrading and Criminal Conduct

In a prosecution for rape, larceny and burglary, defendant failed to show that he was prejudiced by the trial court's limiting of his cross-examination of the victim concerning prior acts of misconduct. *S. v. Joyner*, 18.

§ 91.4 Continuance to Obtain New Counsel

Trial court did not err in denying defendant's request, made just prior to jury selection, that he be granted a continuance in order to obtain new counsel. *S. v. Billups*, 607.

§ 92.1. Consolidation of Charges Against Multiple Defendants; Same Offense

Trial court properly allowed the State's motion to consolidate for trial charges against two defendants for the same crime. *S. v. Allen*, 489; *S. v. Smith*, 695.

§ 92.4 Consolidation of Multiple Charges Against Same Defendant

Trial court properly allowed the State to join for trial offenses of kidnapping one person and kidnapping and murdering another person where the matters out of which the joined cases grew occurred on the same afternoon and each was perpetrated accourding to a common modus operandi. *S. v. Clark*, 176.

§ 93. Order Proof

By his failure to request the opportunity to make an opening statement, defendant waived his procedural right. *S. v. McDowell*, 279.

§ 98.2 Sequestration of Witnesses

In a prosecution for the first degree murder of a supermarket manager, the trial court did not err in denying defendant's motion, made after two supermarket employees had testified, to sequester the remaining witnesses who were supermarket customers. *S. v. Moore*, 262.

§ 98.3 Custody of Defendant During Trial

Trial court did not err in ordering that defendant be restrained in the courtroom by the use of shackles, and the trial court's curative instruction on shackling was sufficient. *S. v. Billups*, 607.

§ 99.9 Examination of Witnesses by the Court

Trial court did not err in asking leading questions of the seven year old rape and kidnapping victim during the voir dire on defendant's motion to suppress identification testimony. *S. v. Bright*, 243.

§ 101. Conduct Affecting Jurors

Trial court did not err in denying defendant's motion for a mistrial made on the ground that a prosecuting witness entered the jury room during a recess at the conclusion of the trial but prior to the charge of the court. *S. v. Billups*, 607.

§ 101.4. Conduct Affecting Jury's Deliberation

Trial judge's refusal of the jury's request to have testimony read back to it on the grounds that the judge did not have the authority to grant the request was prejudicial error. *S. v. Lang*, 508.

CRIMINAL LAW—Continued

§ 112.6. Charge Concerning Burden of Proof on Defendant; Insanity

Trial court did not err in placing upon defendant the burden of proving his defense of insanity to the satisfaction of the jury. *S. v. Clark*, 176.

Trial court did not err in failing to instruct that the jury could find defendant not guilty by reason of insanity when the court instructed that if the jury had a reasonable doubt as to one of the elements of the offense charged it should return a "verdict of not guilty" or when the court instructed that " all twelve minds must agree on a verdict of guilty or not guilty." *S. v. Ward*, 469.

Instruction that defendant had the burden of proving his defense of insanity to the "reasonable satisfaction" rather than to the "satisfaction" of the jury was favorable to defendant and he cannot complain thereof. *Ibid.*

§ 113.1. Instructions; Recapitulation or Summary of Evidence

There was no merit to defendant's contention that the trial court erred in its summary of evidence to the jury by failing to relate any of the evidence favorable to defendant. *S. v. Moore*, 262.

While a trial judge must summarize evidence favorable to defendant which is brought out on cross-examination, there is no requirement that this be done when the evidence does not go to the establishment of a substantive defense. *S. v. McDowell*, 279.

Trial court in a kidnapping and rape case did not state a fact not in evidence when he stated during recapitulation of the evidence that after four men had engaged in intercourse with the victim "she was thereafter taken by [defendant] to a place to pick up her child." *S. v. Ashford*, 512.

§ 133.7. Charge as to Acting in Concert or Aiding and Abetting

The evidence in an armed robbery case warranted the court's instructions on acting in concert and aiding and abetting. *S. v. Davis*, 394.

§ 114.2. No Expression of Opinion in Court's Statement of Evidence

Trial court did not express an opinion in instructing the jury that evidence had been received as corroboration "tending to show" that certain State's witnesses had made statements to officers which were consistent with their testimony at trial. *S. v. Allen*, 489.

§ 116. Charge on Defendant's Failure to Testify

Trial court's instruction on defendant's failure to testify was not reversible error. *S. v. McDowell*, 279.

§ 117.2 Charge on Interested Witnesses

Evidence was insufficient to show that two witnesses were interested witnesses so as to require the trial court to give the jury special instructions with respect to them, and the court's general instruction concerning interested witnesses was an adequate statement of the existing law. *S. v. Moore*, 262.

§ 117.3. Charge on Credibility of State's Witnesses

Trial court did not err in refusing to give requested instructions on the difficulty of identifying persons of a different race. *S. v. Allen*, 489.

§ 126. Unanimity of Verdict

The verdict of the jury was unanimous and the trial court properly accepted it, though a juror, when asked if the guilty verdict was her verdict, made a response which referred to the instructions which had been given by the trial judge. *S. v. Coats*, 216.

CRIMINAL LAW—Continued

Trial court's instruction on unanimity of the verdict was sufficient, and the court's failure to instruct that the individual jurors were not to surrender their own convictions solely in order to reach a verdict was not error. *S. v. Ward*, 469.

§ 128.2 Particular Grounds for Mistrial

Trial court properly denied defendant's motion for mistrial on the ground of improper questioning by the prosecutor where the court sustained defendant's objection and instructed the jury to disregard the prosecutor's question. *S. v. Bright*, 243.

§ 138.7 Severity of Sentence; Particular Matters Considered

Presentence remarks made by the trial judge concerning defendant's plea of not guilty did not show that defendant was more severely punished because he exercised his constitutional right to a trial by jury. *S. v. Bright*, 243.

§ 162.6 General Objection to Evidence

Defendant's objection to the form of a question was insufficient to present an issue as to the relevancy of evidence elicited by the question. *S. v. Ward*, 469.

DEEDS

§ 11. Rules of Construction

In a declaratory judgment action where plaintiffs asked the court to adjudge that they owned interests in a particular tract of land, trial court properly entered summary judgment for defendants. *Beveridge v. Howland*, 498.

§ 21. Stipulation for Reconveyance of Land to Grantor

A restrictive covenant which required any grantee of certain land who desired to sell such land to offer the grantors the option to repurchase at a price no higher than the grantee was willing to accept from any other purchaser and which provided that the right should last the lifetime of the male grantor plus 20 years was reasonable as to price and time and created a valid preemptive right. *Smith v. Mitchell*, 58.

DIVORCE AND ALIMONY

§ 16.5. Alimony Without Divorce; Competency and Relevancy of Evidence

Trial court in an alimony action properly excluded a handwritten statement by plaintiff which forecast the value of his interest in a corporation, since the statement extended indefinitely into the future and since no basis for the valuation was established. *Clark v. Clark*, 123.

§ 16.9. Alimony Without Divorce; Amount and Manner of Payment

Trial court's finding that all of the items in the budget submitted by defendant wife were not "necessary" items did not show that the court applied an improper standard in determining the amount of alimony for the wife of a wealthy man. *Clark v. Clark*, 123.

An award of alimony to defendant wife was not erroneous on the ground the trial judge failed to consider income tax consequences of the award. *Ibid.*

Trial court did not abuse its discretion in failing to make some provision in its alimony order for possession of the parties' homeplace. *Ibid.*

§ 18.16. Alimony Pendente Lite; Attorney's fees

Trial court's award of only $500 in legal fees to defendant in an alimony action constituted an abuse of discretion, though defendant had a separate estate of approximately $87,000. *Clark v. Clark*, 123.

EASEMENTS

§ 6.1. Prescriptive Easements; Presumptions and Evidence

The Supreme Court will adhere to the presumption of permissive use in prescriptive easement cases and will not adopt the presumption of hostile us. *Potts v. Burnette*, 663.

Plaintiffs' evidence was sufficient to rebut the presumption of permissive use of a roadway across defendants' land and to allow a jury to conclude that the roadway was used under such circumstances as to give defendants notice that the use was adverse, hostile and under a claim of right. *Ibid.*

EVIDENCE

§ 22. Evidence at Former Trial of Same Case

A transcript of a trial on plaintiffs' complaint in which the jury determined that the parties intended a contract to be enforceable as written was hearsay and not admissible in a trial on defendant's counterclaim for specific performance of the contract absent the laying of a proper foundation for its admission, but the trial court's admission of the transcript was harmless error in this case. *Munchak Corp v. Caldwell*, 689.

FORGERY

§ 2.2. Sufficiency of Evidence

Trial court erred in accepting defendant's plea of no contest to eight forgery indictments, since the record did not reveal a sufficient factual basis to support defendant's pleas. *S. v. Sinclair*, 193.

HOMICIDE

§ 17.1. Evidence of Intent and Motive in Prosecutions for Uxoricide

While evidence tending to show that defendant had had sexual relations with other women might have been competent to show defendant's motive for hiring someone to kill his wife, trial court erred in admission of testimony detailing the manner in which defendant engaged in sexual relations with other women. *S. v. Small*, 407.

Defendant in a prosecution as an accessory before the fact to the murder of his wife could properly be asked on cross-examination for impeachment purposes about his sexual relations with other women. *Ibid.*

§ 19.1. Evidence of Character or Reputation Competent on Question of Self-Defense

There was no merit to defendant's contention in a homicide case that the trial court erred in excluding evidence concerning the predisposition to violent behavior of the victims. *S. v. Price*, 437.

§ 20. Real and Demonstrative Evidence Generally

There was no merit to defendant's contention that the trial court erred in admitting into evidence a .38 caliber revolver because the State failed to establish a continuous chain of custody to the date of trial. *S. v. Moore*, 262.

§ 21.5. Sufficiency of Evidence of Guilt of First Degree Murder

Evidence was sufficient for the jury in a prosecution for first degree murder. *S. v. Cohen*, 220.

HOMICIDE—Continued

§ 21.7. Sufficiency of Evidence of Guilt of Second Degree Murder

Evidence was sufficient for the jury in a second degree murder case where it tended to show that defendant shot a fellow automobile passenger in the back of the head. *S. v. Fletcher*, 515.

The State's evidence was sufficient to support defendant's conviction of second degree murder of a person from whom defendant had agreed to purchase a stolen M-16 rifle. *State v. Fletcher*, 709.

§ 27.2. Involuntary Manslaughter; Culpable Negligence

Trial court's definitions of "an unlawful act" and "criminal negligence" and its application of those definitions to the offense of involuntary manslaughter did not amount to an expression of opinion on the evidence. *S. v. Cummings*, 374.

§ 30.3. Guilt of Involuntary Manslaughter

The State's evidence was sufficient to show that assault by defendants was one of the proximate causes of the victim's death and to support defendants' conviction of involuntary manslaughter. *S. v. Cummings*, 374.

§ 31. Verdict Generally; Specifying Degree of Crime

First degree murder conviction of a defendant who hired another to kill his wife and was not present at the crime scene is set aside and the case is remanded for imposition of a sentence for accessory before the fact to murder. *S. v. Small*, 407.

HOSPITALS

§ 3. Liability of Charitable Hospital for Negligence of Employees

Evidence was sufficient for the jury in an action to recover for the negligence of defendant hospital in failing to treat a patient who was suffering from appendicitis. *Vassey v. Burch*, 68.

INDICTMENT AND WARRANT

§ 8.4. Election Between Offenses

Trial court did not err in denying defendant's pretrial motion to require the State to elect between the charges of felonious assault with a deadly weapon upon a law enforcement officer in the performance of his duties and felonious assault with a deadly weapon with intent to kill inflicting serious injury. *S. v. Ward*, 469.

§ 17.2. Variance as to Time

Defendant was not denied a fair trial in a rape case because of the court's failure to limit the jury's consideration to the specific date charged in the indictment where the jury's consideration of the crime was restricted to defendant's actions "on or about" the specific date alleged *S. v. Summitt*, 591.

§ 18. Sufficiency of Indictment to Support Conviction of Other Degrees of Crime

The Statute which changes the prior rule that one indicted for the principal felony may be convicted upon that indictment as an accessory before the fact is to be applied prospectively only. *S. v. Small*, 407.

INFANTS

§ 20. Juvenile Delinquents; Judgments and Orders; Dispositional Alternatives

District court did not have authority to require Wake County to pay for the treatment of a deliquent juvenile at a facility in another state. *In re Brownlee*, 532.

§ 21. Juvenile Delinquents; Appellate Review of Judgments and Orders

Wake County did not have the right to appeal from orders entered by the district court in a juvenile delinquency proceeding directing the county to pay for the juvenile's treatment at the Brown Schools in Austin, Texas. *In re Brownlee*, 532.

INSURANCE

§ 3.1. Validity of Contract as Affected by Statute Concerning Insurance

A binder for medical malpractice insurance issued while general liability insurers were required by the Health Care Liability Reinsurance Exchange Act to write such insurance was not void because the Reinsurance Exchange Act was thereafter declared unconstitutional. *Insurance Co. v. Ingram, Comr. of Insurance*, 138.

§ 130. Fire Insurance; Notice and Proof of Loss

In an action to recover on a fire insurance policy, trial court properly submitted to the jury an issue as to whether plaintiff filed with defendant insurance company a proof of loss as required by the insurance contract. *Brandon v. Insurance Co.*, 366.

§ 130.1 Fire Insurance; Notice and Proof of Loss; Waiver and Estoppel

In an action to recover on a fire insurance policy, defendant insurer did not waive the defense of failure to file required proofs of loss by asserting, as an alternative defense, that plaintiff was guilty of arson. *Brandon v. Insurance Co.*, 366.

In an action to recover on a fire insurance policy, evidence was sufficient to permit, but not compel, the jury to find that defendant by words and conduct waived the requirement of proofs of loss. *Ibid.*

§ 136. Actions on Fire Policies

In an action to recover on a fire insurance policy, trial court's charge amounted to a peremptory instruction on the issue of timeliness of filing of proofs of loss. *Brandon v. Insurance Co.*, 366.

JUDGMENTS

§ 30. Procedure to Attack Judgment; Motion in Cause or Separate Suit

Plaintiffs could properly attack a foreclosure proceeding either by motion in the cause or by independent action. *Hassell v. Wilson*, 307.

JURY

§ 1. Nature and Extent of Right to Jury Trial

The procedure for annexation by cities of 5000 or more is not unconstitutional because it does not provide for trial by jury on issues of fact. *Moody v. Town of Carrboro*, 318.

§ 7.1. Grounds for Challenge to the Array

The N.C. Supreme Court does not recognize young people as a distinct group for the purpose of determining whether a jury panel represents a fair cross-section of the community. *S. v. Price*, 437.

Defendant failed to show that the representation of young people between the

LIMITATION OF ACTIONS

§ 4.1. Accrual of Tort Cause of Action

The professional malpractice statute of limitations set forth in G.S. 1-15(c) could not constitutionally be applied to bar plaintiff's claim for medical expenses and loss of services of her child. *Flippin v. Jarrell*, 108.

§ 8.1. Fraud as Exception to Operation of Limitation Laws

Actions for fraud are not subject to the 10 year limitation of G.S. 1-15(b), and under G.S. 1-52(9) the three year limitation for an action for fraud accrues at the time of discovery regardless of the length of time between the fraudulent act and discovery of it. *Feibus & Co. v. Construction Co.*, 294.

Plaintiff in an action for fraud made a prima facie showing of reasonable discovery within three years prior to the suit. *Ibid.*

§ 8.3. Fraud as Exception to Operation of Limitation Laws; Particular Actions

The six year statute of limitations of G.S. 1-50 did not apply to an action for fraud arising out of the collapse of the floor of a building where plaintiff was in possession of the building as the tenant at the time of the injury. *Feibus & Co. v. Construction Co.*, 294.

MARRIAGE

§ 2. Creation and Validity of Marriage

A ceremony solemnized by a Roman Catholic layman in the mail order business who bought for $10 a mail order certificate giving him credentials of minister in the Universal Life Church was not a ceremony of marriage to be recognized for purposes of a bigamy prosecution in this State. *S. v. Lynch*, 479.

MUNICIPAL CORPORATIONS

§ 2. Annexation

Publication of notice of a public hearing on annexation in a newspaper does not provide inadequate notice to property owners affected by the annexation in violation of their right to due process. *Texfi Industries v. City of Fayetteville*, 1.

A corporation is not denied equal protection because resident voters but not corporations are given the right to vote in an annexation referendum. *Ibid.*

The procedure for annexation by cities of 5000 or more is not unconstitutional because it does not provide for trial by jury on issues of fact. *Moody v. Town of Carrboro*, 318.

The procedure for annexation by cities of 5000 or more does not authorize a taking of private property without just compensation on the alleged ground that petitioner will pay a substantial sum in ad valorem taxes without receiving any substantial benefits or major services he does not already receive. *Ibid.*

§ 2.3. Annexation; Compliance with Statutory Requirements

Maps prepared by a town as part of its annexation plan report substantially complied with G.S. 160A-47(1) although the eastern boundary and approximately one-fifth of the town area were omitted. *Moody v. Town of Carrboro*, 318.

A statement in an annexation plan report that the annexation is designed to promote sound urban development and assure adequate provision of government services is a sufficient statement of the policy objectives to be met by the annexation to comply with G.S. 160A-45. *Ibid.*

MUNICIPAL CORPORATIONS—Continued

§ 2.4. Remedies to Attack Annexation

Trial court did not err in the denial of plaintiff's motion to amend his pleading in an action attacking an annexation ordinance to allege failure on the part of defendant town to state in the annexation report the plans of the town to extend bus service into the annexed area. *Moody v. Town of Carrboro*, 318.

§ 2.5. Effect of Annexation

The effective date of an annexation ordinance was postponed by appellate procedures until the date the final judgment of the Supreme Court was certified to the clerk of superior court. *Moody v. Town of Carrboro*, 318.

§ 2.6. Extension of Utilities to Annexed Territory

A revised annexation plan report was sufficiently specific with respect to provision of police and garbage collection services and extension of street maintenance services, and was not deficient in failing to provide for the extension of water and sewer lines where this was not a service provided by the town to anyone. *Moody v. Town of Carboro*, 318.

PARENT AND CHILD

§ 5.1. Right of Parent to Recover for Injuries to child

A divorced mother who had legal custody of her minor child and provided at least one-half of the support for that child had standing to bring a claim for medical expenses and loss of services resulting from an injury to the child. *Flippin v. Jarrell*, 108.

PENALTIES

§ 1. Generally

Monies voluntarily paid by motorists to a city upon citations for violations of a city overtime parking ordinance constitute a penalty or fine for breach of a State penal law and should be used exclusively for maintaining free public schools in the county. *Cauble v. City of Asheville*, 340.

PHYSICIANS, SURGEONS, AND ALLIED PROFESSIONS

§ 11 Malpractice Generally

A binder for medical malpractice insurance issued while general liability insurers were required by the Health Care Liability Reinsurance Exchange Act to write such insurance was not void because the Reinsurance Exchange Act was thereafter declared unconstitutional. *Insurance Co. v. Ingram, Comr. of Insurance*, 138.

§ 13. Limitations of Action for Malpractice

The professional malpractice statute of limitations set forth in G.S. 1-15(c) could not constitutionally be applied to bar plaintiff's claim for medical expenses and loss of services of her child. *Flippin v. Jarrell*, 108.

PRINCIPAL AND SURETY

§ 1. Generally; Nature and Construction of Surety Contract

Defendant's signing of a suretyship contract manifested her assent to accept primary liability for the payment of her husband's debt to plaintiff. *Trust Co. v. Creasy*, 44.

PRINCIPAL AND SURETY—Continued

§ 1.1. Liability of Surety Generally

By signing a continuing guaranty and returning it to her attorney, defendant armed him with what appeared to be an absolute suretyship contract, complete in all respects, and defendant in no way manifested her intention that the agreement not be delivered to plaintiff. *Trust Co. v. Creasy*, 44.

In an action to recover on a continuing guaranty executed by defendant, who alleged nondelivery, there was no evidence that the document was stolen from defendant or her attorney. *Ibid.*

In an action to recover on an agreement executed by defendant which made her primarily liable for her husband's debt to plaintiff, there was no merit to defendant's contention that a consent judgment or restitution entered into between defendant's husband and seven banks served to discharge her from her contract. *Ibid.*

§ 5. Bonds for Particular Terms, Successive and Substituted Bonds

Renewals of a surety bond on plaintiff's town clerk through the payment of annual premiums should be construed with the original bond as one contract only, with the maximum liability fixed by the principal amount of the bond. *Town of Scotland Neck v. Surety Co.*, 331.

PROCESS

§ 5. Amendment of Process

Although an officer's return was insufficient to show service upon plaintiff husband in a mortgage foreclosure proceeding because it did not show the place where the papers were left, such defect was not necessarily fatal and the matter is remanded for the trial judge to determine whether the sheriff's return ought to be amended. *Hassell v. Wilson*, 307.

RAPE

§ 4. Relevancy and Competency of Evidence

Testimony by the prosecutrix that defendant "raped me" was competent as a shorthand statement of fact. *S. v. See*, 388.

§ 4.1. Proof of other Acts and Crimes

Testimony by a kidnapping and rape victim that defendant told her he had previously kidnapped another girl was competent to show that the victim's will was overcome by her fears for her safety. *S. v. See*, 388.

§ 4.3. Character or Reputation of Prosecutrix

The rape victim shield statute, G.S. 8-58.6, does not violate a rape defendant's constitutional right to confront the witnesses against him and was not unconstitutionally applied to defendant when the trial court excluded evidence that three different semen stains were found on the clothing worn by the alleged rape victim. *S. v. Fortney*, 31.

§ 5. Sufficiency of Evidence

Evidence that defendant raped his victim at gunpoint was sufficient to be submitted to the jury. *S. v. Revelle*, 153.

Testimony by a rape victim that defendant had "sex" and "intercourse" with her was sufficient to support a finding that there was penetration. *S. v. Ashford*, 512.

The State's evidence was sufficient for the jury in a prosecution for first degree rape of an 11 year old girl. *S. v. Summitt*, 752. Testimony by the prosecutrix that she was forced to have intercourse against her will was sufficient to show penetration and to withstand motion for nonsuit. *S. v. Hammonds*, 713.

RAPE—Continued

§ 6. Instructions

In a prosecution for rape, larceny and burglary, trial court properly instructed the jury that it could consider defendant's possession of recently stolen property as a relevant circumstance in determining whether defendant was guilty of all the crimes charged where all of the crimes occurred as part of the same criminal enterprise. *S. v. Joyner*, 18.

Trial court did not err by substituting the words "sexual intercourse" for the words "carnal knowledge" and failing to define sexual intercourse. *S. v. Thacker*, 348.

Defendant was not denied a fair trial in a rape case because of the court's failure to limit the jury's consideration to the specific date charged in the indictment where the jury's consideration of the crime was restricted to defendant's actions "on or about" the specific date alleged. *S. v. Summitt*, 752.

In a prosecution for first degree rape, the trial court properly instructed that defendant's admission that he was in the car with the rape victim could be considered by the jury as an admission of fact relating to the crime charged. *S. v. Hammonds*, 713.

§ 6.1. Instructions on Lesser Degrees of Crime

Medical testimony in a rape case that the 11 year old victim had engaged in sexual intercourse prior to an examination a year after the incident in question and testimony by the victim that the rape did not cause any bleeding was insufficient to permit the jury to find that the victim was not virtuous at the time of the alleged rape so as to support the court's submission of the lesser offense of second degree rape. *S. v. Summitt*, 752.

§ 18.2. Sufficiency of Evidence of Assault with Intent to Commit Rape

State's evidence was sufficient to support defendant's conviction for assault with intent to commit rape on a seven year old girl. *S. v. Bright*, 243.

RECEIVERS

§ 1. Appointment of Receiver; Jurisdiction

The trial judge who appointed receivers for the corporate defendant could properly enter an order retaining jurisdiction in himself of all matters in an action notwithstanding his rotation out of the district. *Lowder v. Mills, Inc.*, 561.

REFORMATION OF INSTRUMENTS

§ 7. Sufficiency of Evidence

Plaintiff's evidence was sufficient to show a mutual mistake as to what land was being conveyed by a 1971 deed from plaintiff to defendant's predecessors in title so as to justify a reformation of the deed where it showed that the deed conveyed a portion of plaintiff's homeplace and that plaintiff intended to convey and the purchasers intended to receive by the deed only certain other land and not any portion of plaintiff's homeplace. *Hice v. Hi-Mil, Inc.*, 647.

§ 9. Rights of Third Persons

In an action to reform a deed which mistakenly included a portion of plaintiff's homeplace in the description of the tracts conveyed, knowledge of one original grantee as to what land was intended to be conveyed at the time the property was reconveyed to the corporate defendant was imputed to the corporation, and the corporation was thus not an innocent bona fide purchaser for value against whom reformation of the deed could not be granted. *Hice v. Hi-Mil, Inc.*, 647.

ROBBERY

§ 4.3. Sufficiency of Evidence of Armed Robbery

Evidence that defendant took a gun and money from his victims at gunpoint was sufficient for the jury in an armed robbery prosecution. *S. v. Revelle*, 153.

§ 4.5 Sufficiency of Evidence in Cases Involving Aiders and Abettors

State's evidence was sufficient for the jury on the issue of defendant's guilt of armed robbery where it tended to show that defendant was the driver of the getaway car. *S. v. Davis*, 394.

§ 5.4 Instructions on Lesser Included Offenses

In a prosecution for armed robbery, defendant's denial of his participation in the robbery and his denial that he saw a gun during the robbery did not constitute evidence sufficient to require the trial court to submit an issue of common law robbery to the jury. *S. v. Coats*, 216.

RULES OF CIVIL PRCEDURE

§ 4. Process

Plaintiffs were entitled to attack a foreclosure proceeding either by a motion in the cause or by an independent action because an officer's return was insufficient on its face to show service upon plaintiff husband. *Hassell v. Wilson*, 307.

§ 50.5. Motion for Directed Verdict; Appeal

The Court of Appeals erred in upholding a directed verdict for defendants on a ground different from that upon which the trial court reached its decision when the ground relied upon by the Court of Appeals was not stated in defendant's motion in the trial court. *Feibus & Co. v. Construction Co.*, 294.

SCHOOLS

§ 1. Establishment, Maintenance and Supervision in General

Monies voluntarily paid by motorists to a city upon citations for violations of a city overtime parking ordinance constitute a penalty or fine for breach of a State penal law and should be used exclusively for maintaining free public schools in the county. *Cauble v. City of Asheville*, 340.

SEARCHES AND SEIZURES

§ 1. What Constitutes Search or Seizure; Scope of Protection Generally

Defendant's Fourth Amendment right to be free from unreasonable searches and seizures was not violated by the taking of his photograph. *S. v. McDowell*, 279.

§ 8. Search and Seizure Incident to Warrantless Arrest

An officer had probable cause to arrest defendant 3½ blocks from a rape victim's apartment seven to ten minutes following the commission of the offenses of burglary, larceny and rape, and items obtained as a result of the seizure of defendant's person were admissible in evidence. *S. v. Joyner*, 18.

§ 23. Application for Search Warrant; Sufficiency of Evidence to Show Probable Cause

An affidavit upon which a warrant to search defendant's automobile was issued contained sufficient facts to support a finding by the magistrate that there was reasonable cause to believe that the search would reveal the presence of articles sought and that such objects would aid in the apprehension or conviction of the offender. *S. v. Bright*, 243.

SEARCHES AND SEIZURES—Continued

§ 25. Application for Search Warrant; Insufficiency of Evidence to Show Probable Cause

The affidavit upon which a search warrant for defendant's motel room was issued was fatally defective in that it was insufficient to support a finding that the articles sought would be in defendant's motel room or would aid in the apprehension or conviction of the offender. *S. v. Bright*, 243.

§ 37. Scope of Search Incident to Arrest; Vehicles

Search of a pocketbook found on the rear seat of defendant's automobile subsequent to his warrantless arrest for possession of marijuana was proper since defendant offered no evidence to show any legitimate property or possessory interest in the pocketbook. *S. v. Greenwood*, 705.

TRUSTS

§ 10.2. Termination; Distribution of Corpus

Where testator's will made no provision as to the ultimate distribution of the trust corpus following termination of the trust, the corpus should not pass by intestacy but should pass to the ultimate income beneficiaries, the natural born great nieces and great nephews of testator. *Wing v. Trust Co.*, 456.

§ 13.4 Creation of Resulting Trust; Effect of Domestic Relationship Between Grantee and Payor

Where plaintiff wife provided all of the $19,800 down payment for realty conveyed to plaintiff and her husband as tenants by the entirety, the presumption arose that she did not intend to make a gift to her husband of an entirety interest but that she intended that the husband hold such an interest in trust for her, and this presumption was not rebutted by evidence that both parties signed a note and deed of trust for the balance of the purchase price. *Tarkington v. Tarkington*, 502.

UNIFORM COMMERCIAL CODE

§ 28. Commercial Paper; Definitions

A continuing guaranty signed by defendant was not a negotiable instrument since it did not specify the amount of liability that was to be paid and since there was no provision in the agreement that it was payable to order or bearer. *Trust Co. v. Creasy*, 44.

§ 30. Commercial Paper; Transfer and Negotiations

Summary judgment was properly entered for defendant movants in an action on a negotiable promissory note where defendants offered evidence that plaintiff corporation was not the holder of the note by showing that the note was not indorsed to plaintiff and that the last indorsee and plaintiff were two separate and distinct corporate entities. *Hotel Corp. v. Taylor*, 200.

VENDOR AND PURCHASER

§ 1. Requisites and Validity of Contracts to Convey and Options

A restrictive covenant which required any grantee of certain land who desired to sell such land to offer the grantors the option to repurchase at a price no higher than the grantee was willing to accept from any other purchaser and which provided that the right should last the lifetime of the male grantor plus 20 years was reasonable as to price and time and created a valid preemptive right. *Smith v. Mitchell*, 58

WILLS

§ 61.5. Dissent of Spouse; Waiver or Estoppel

Plaintiff's dissent to her husband's will precluded her from maintaining an action for construction of the will or claiming property passing under the residuary clause of the will. *Taylor v. Taylor*, 357.

HUNTER PUBLISHING COMPANY
PRINTERS TO THE SUPREME COURT AND THE COURT OF APPEALS