No. 109PA22-2 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

**********

DUSTIN MICHAEL MCKINNEY, GEORGE JERMEY MCKINNEY, and JAMES ROBERT TATE,

Plaintiffs-Appellants,

STATE OF NORTH CAROLINA,

Intervenor-Appellant,

v.

GARY SCOTT GOINS and THE GASTON COUNTY BOARD OF EDUCATION,

Defendants-Appellees.

From Wake County
No. COA 22-261
No. 21 CVS 7438

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**PLAINTIFFS-APPELLEES' NEW BRIEF**

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**PLAINTIFFS-APPELLEES' NEW BRIEF**

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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

## STATEMENT OF THE FACTS

On 12 August 2014, Defendant Goins was found guilty of two counts of statutory rape sex offense, six counts of indecent liberty with a child, five counts of indecent liberty with a student by teacher, two counts sex act with student by teacher and two counts of crimes against nature. Defendant Goins appealed his convictions and lost his appeal on 16 December 2015.

Goins repeatedly sexually assaulted Plaintiffs when Plaintiffs were adolescent wrestlers at East Gaston High School and Goins was their coach. (R. pp. 7-12). Plaintiffs contend Goins used his position of authority over them and access to them to commit his repeated sexual assaults and that Defendant Gaston County Board of Education enabled this abhorrent conduct and was negligent in allowing this to happen. (R. pp. 12-13).

## STANDARD OF REVIEW

Appellate review for a facial constitutional challenge is *de novo*. *See Bridges v. Parrish*, 366 N.C. 539, 541 (2013). This Court must presume that legislation is constitutional. A constitutional limitation upon the General Assembly must be explicit and a violation of that limitation must be proved beyond a reasonable doubt. *Harper v. Hall*, 384 N.C. 292, 323 (2023). Any doubt as to the constitutionality of a statute must be resolved in favor of the legislature. *N. Carolina State Bd. of Educ. v. State*, 255 N.C. App. 514, 525 (2017), *aff'd,* 371 N.C. 149 (2018).

## ARGUMENT

". . . there is no such thing as a vested right to do wrong."
Oliver Wendell Holmes[1]

## I. INTRODUCTION

At a time when legislatures across the country are almost unfailingly fractured, North Carolina's General Assembly unanimously passed S.L. 2019-245 entitled AN ACT TO PROTECT CHILDREN FROM SEXUAL ABUSE AND TO STRENGTHEN AND MODERNIZE SEXUAL ASSAULT LAWS -- the SAFE Child Act. (Appx. pp. 1- 10). Faced with this overwhelming unanimity of purpose, the General Assembly clearly stated its intent to protect children from sexual assaults and to provide victims with a path to seek justice. Defendant contends that this Act is illegitimate because perpetrators of sexual assault and their enablers have a constitutionally established vested right to freedom from liability after an arbitrary time limit to sue has expired.

Defendant contends that the North Carolina Constitution guarantees pedophiles and their enablers freedom from civil liability once a statute of limitations expires, no matter how profoundly important to public policy a change in that deadline may be. Defendant asks this Court to adopt the flawed reasoning of the

[1] In *Danforth v. Groton Water Co.*, 176 Mass. 118, 57 N.E. 351 (1900) Chief Justice Oliver Wendell Holmes rejected a state constitutional challenge to a statute which revived an action that would have been barred by the statute of limitations, noting that "multitudes of cases have recognized the power of the Legislature to call a liability into being where there was none before, if the circumstances were such as to appeal with some strength to the prevailing views of justice." Justice Holmes noted that "there is no such thing as a vested right to do wrong."

dissent below, to rely on an antiquated decision that utterly fails to comport with the analytical framework unequivocally adopted by this Court in *Harper v. Hall* and to invalidate the General Assembly's noble and unanimous decision to allow child sexual abuse victims whose statute of limitations had expired a limited two-year window to seek justice.

Plaintiffs' claims are authorized by the non-codified "revival" provision of S.L. 2019-245 which provides:

> Effective from January 1, 2020, until December 31, 2021, this section revives any civil action for child sexual abuse otherwise time-barred under G.S. 1-52 as it existed immediately before the enactment of this act.

S.L. 2019-245, § 4.2.(b). (Appx. p. 1-10)

At the time Plaintiffs filed their Complaint, their claims against the Defendant previously had been barred by the three-year statute of limitations found in N.C.G.S. § 1-52 and applied to Plaintiffs through N.C.G.S. § 1-17.

As will be shown below, the North Carolina Supreme Court has never found a vested right to a limitations defense in the North Carolina Constitution, and long-standing Supreme Court decisions interpreting Article I, § 16 of the North Carolina Constitution -- the *ex post facto* section of our Constitution's Declaration of Rights -- clearly establish that the revival provision of S.L. 2019-245, § 4.2.(b) is not prohibited by our Constitution.

## II. THERE IS NO VESTED RIGHT TO A STATUTE OF LIMITATIONS DEFENSE UNDER THE 14th AMENDMENT TO THE UNITED STATES CONSTITUTION

Federal law is settled. There is no vested right in the lapsing of a statute of limitations and "revival" of a non-statutory, non-contractual, common law cause of action does not violate the 14th Amendment to the Federal Constitution. *Campbell v. Holt*, 115 U.S. 620 (1885). *See also Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945).

In *Campbell,* the United States Supreme Court unmistakably held that there is no vested right in a statute of limitations defense to a common law tort. *Campbell* was a contracts case from the reconstruction era in which the Supreme Court rejected a due process challenge to a provision of the Texas state constitution that revived actions that had become time barred between the end of the Civil War and the reinstatement of Texas to the Union. *Campbell*, 115 U.S. at 621-22. The *Campbell* Court – like the North Carolina Supreme Court has done – characterized statutes of limitations as restrictions only on a remedy:

> The statutes of limitation, as often asserted and especially by this court, are founded in public needs and public policy -- are arbitrary enactments by the law- making power. . . . [N]o right is destroyed when the law restores a remedy which had been lost.

*Id.* at 628-29 (emphasis added).

The *Campbell* Court draws a clear distinction between a statutory bar operating to vest persons with title to tangible real or personal property – a property right protected by the 14th Amendment – and a statute of limitations which constitutes merely a defense to a demand or common law claim and which gets no constitutional protection. *Id.* at 628. The critical distinction between an unconstitutional law that attempts to take away vested tangible property rights and

constitutionally permissible legislation that extends or revives the time within which a citizen can bring a claim is crucial to understanding the issues before this Court. Unfortunately, as discussed in detail below, in its 1933 decision in *Wilkes County v. Forester*, the North Carolina Supreme Court failed to recognize this crucial distinction and that misguided opinion forms the near exclusive basis for the dissent below and for Defendant's flawed argument that a vested right in a limitations defense has been established under the North Carolina Constitution.

In *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945), the United States Supreme Court unanimously reaffirmed its holding in *Campbell.* The *Chase Securities* court recognized that a legislature may take away that which it previously had given:

> [Statutes of limitations] are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. . . . They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a `fundamental' right or what used to be called a `natural' right of the individual.

*Id.* at 314. (citation omitted) (emphasis added).

The *Campbell* and *Chase Securities* decisions holding that there is no vested right in a statute of limitations defense still control federal substantive due process analysis of this issue. *See, e.g.*, *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 229 (1995). Faced with no vested right to a statute of limitations defense under federal law, Defendant attempted to create one in the North Carolina Constitution by erroneously asserting that the *Wilkes County* decision is based on the North Carolina Constitution while at the same time completely ignoring the constitutional provision

that controls this issue. The Court of Appeals majority correctly rejected Defendant's argument.

## III. THE REVIVAL PROVISION OF THE SAFE CHILD ACT CLEARLY IS CONSTITUTIONAL UNDER THE ANALYTICAL FRAMEWORK ESTABLISHED BY THIS COURT IN *HARPER V. HALL*

On 28 April 2023, this Court issued opinions in three separate cases all of which involved a state constitutional challenge to an act of our General Assembly. In all three cases, this Court held that the challenged legislative enactments were constitutional. The decisions were:

- *Holmes v. Moore*, 384 N.C. 426 (2023),
- *Community Success Initiative v. Moore*, 384 N.C. 194 (2023), and
- *Harper v. Hall*, 384 N.C. 292 (2023).

The majority opinions in these cases were written by three different members of this Court -- *Holmes* by Justice Berger, *Community Success* by Justice Allen and *Harper* by Chief Justice Newby -- and each opinion reiterated several fundamental tenants related to the Court's consideration of a state constitutional challenge, including:

- The North Carolina Constitution designates the General Assembly as the public policy making branch of state government;
- As such, our appellate courts should show great deference to legislative enactments;
- The burden is on the party challenging the statute to demonstrate its unconstitutionality; and
- The challenger must establish that the challenged law is unconstitutional beyond a reasonable doubt.

These principles are well-established and oft stated in numerous prior decisions of this Court. In *Harper v. Hall,* however, the majority, writing through Chief Justice Newby, returned the North Carolina judiciary to its designated lane and established a clear and unequivocal analytical framework for assessing state constitutional challenges to an act of the General Assembly. At its core this analytical framework requires all North Carolina courts to presume that legislation is constitutional and:

> A constitutional limitation upon the General Assembly must be **explicit** and a violation of that limitation must be proved **beyond a reasonable doubt**.

*Harper v. Hall*, 384 N.C. at 323 (emphasis added).

### A. The Components of the Analytical Framework Established By This Court In *Harper*

While at its core the analytical framework adopted in *Harper* dictates that an act of the General Assembly will be deemed unconstitutional only if the enactment violates an explicit limitation in our Constitution beyond a reasonable doubt, the broader analytical framework has multiple components.

#### 1. The General Assembly Determines Public Policy for the People of North Carolina

The North Carolina Constitution clearly places the responsibility for making public policy with the General Assembly. This Court has made that abundantly clear in numerous opinions and reiterated it numerous times in *Harper*:

> The General Assembly is the 'policy-making agency' because it is a far more appropriate forum than the courts for implementing policy-based changes to our laws.

*Harper v. Hall*, 384 N.C. at 322–23 (*citing Rhyne v. K-Mart Corp.*, 358 N.C. 160, 169 (2004) (quoting *McMichael v. Proctor,* 243 N.C. 479, 483 (1956)); *see also State v. Berger*, 368 N.C. 633, 653 (2016) (Newby, J., concurring in part and dissenting in part) ("The diversity within the [legislative] branch ... ensures healthy review and significant debate of each proposed statute, the enactment of which frequently reaches final form through compromise."))(cleaned up).

> The people did not intend their courts to serve as the public square for policy debates and political decisions. Instead, the people act and decide policy matters through their representatives in the General Assembly. We are designed to be a government of the people, not of the judges.

*Id.* at 299.

> Courts are not intended to meddle in policy matters. In its decision today, the Court returns to its tradition of honoring the constitutional roles assigned to each branch.

*Id.* at 378–79.

> Since 1776, our constitutions have recognized that all political power resides in the people, and is exercised through their elected officials in the General Assembly.

*Id.* at 322 (*citing* N.C. Const. Art. I, § 2; N.C. Const. of 1868, Art. I, § 2; N.C. Const. of 1776, Declaration of Rights, § I, N.C. Const. Art. II, § 1; N.C. Const. of 1868, Art. II, § 1; N.C. Const. of 1776, § I; *State ex rel. Ewart v. Jones*, 116 N.C. 570, 570, 21 S.E. 787, 787 (1895)).

The revival provision of the SAFE Child Act is unquestionably a significant public policy decision and is part of a broader, comprehensive piece of legislation passed unanimously by the General Assembly with the noble goal of making our state

safer for the children who live here. In these divided political times in which we live it speaks volumes that the SAFE Child Act -- including the challenged revival provision -- was passed unanimously by both the House and the Senate. Every single voting member of the General Assembly supported this legislation -- from the President Pro Tem of the Senate and the Speaker of the House to the least tenured members of both chambers. *See* North Carolina General Assembly voting results for S.L. 2019-245 at https://www.ncleg.gov/BillLookup/2019/S199.

"The legislative power includes the power not just to make statute law, but also to unmake caselaw." John V. Orth, *North Carolina and the Genius of the Common Law,* 41 Campbell L. Rev. 435, 447 (2019). The people of North Carolina spoke loudly, clearly and unanimously through their elected representatives in the General Assembly and this Court should not substitute its public policy opinion over that of the people.

**2. Legislative Enactments of the General Assembly Are Presumed to Be Constitutional**

Because our Constitution gives the General Assembly plenary power to act in setting public policy for the people of this state, any bill passed by the General Assembly and signed into law by the Governor is presumptively constitutional. This presumption is born of the deference shown by this Court to the General Assembly when that body is fulfilling its obligations and responsibilities as established by our Constitution. *Harper* makes this point abundantly clear:

> Historically, North Carolina courts have respected their significant but restrained role of judicial review by adhering to a standard of review that sets the most demanding requirements for reviewing legislative

> action: **courts presume that an act of the General Assembly is constitutional** . . . .

*Id.* at 298 (emphasis added).

> Accordingly, this Court presumes that legislation is constitutional. . . . Because the General Assembly serves as "the agent of the people for enacting laws," it has the presumptive power to act, and possesses plenary power along with the responsibilities explicitly recognized in the constitution.

*Id.* at 323 (citations omitted).

### 3. An Act of the General Assembly Will Be Deemed Unconstitutional Only If It Violates an Express/Explicit Limitation in the North Carolina Constitution

The North Carolina Constitution differs from the Federal Constitution in that while the Federal Constitution is a grant of power, the state Constitution is a limitation on power and provides that all political power resides with the people who exercise that power through the legislative branch. *Id.* at 297. As such, the North Carolina legislature is free to act so long as it does not violate an explicit limitation on its power in the state Constitution. As this Court stated in *Harper*:

> We have recognized that our constitution allows the General Assembly to enact laws unless **expressly prohibited** by the constitutional text.

*Id.* at 379 (emphasis added).

> A constitutional limitation upon the General Assembly must be **explicit** and a violation of that limitation must be proved beyond a reasonable doubt.

*Id.* at 323 (emphasis added).

> [C]ourts presume that an act of the General Assembly is constitutional, and any challenge alleging that an act of the General Assembly is unconstitutional must identify an **express provision** of the

> constitution and demonstrate that the General Assembly violated the provision beyond a reasonable doubt.

*Id.* at 298 (emphasis added).

> [T]he judiciary performs the role of judicial review, but it only declares an act of the General Assembly void when it **directly conflicts with an express provision** of the constitution.

*Id.* at 325 (emphasis added).

> Where there is no **express limitation** on the General Assembly's authority in the text of the constitution, this Court presumes an act of the General Assembly is constitutional.

*Id.* at 351 (emphasis added).

As will be discussed *infra,* there is no explicit provision in our Constitution that prohibits the General Assembly from passing the revival provision at issue. Even Judge Carpenter in his dissent below concedes this point. *McKinney v. Goins*, 892 S.E.2d 460, 481 (N.C. Ct. App. 2023) (Carpenter, J. dissenting).

#### 4. Courts Must Interpret the North Carolina Constitution Based on the Plain Language of the Text While Being Mindful of the Historical Context of the Text's Adoption

The *Harper* opinion further makes it clear that judges are not to insert their own opinions in interpreting the Constitution, especially when such opinions serve to essentially rewrite the Constitution. The plain language of the text in historical context is the proper basis for constitutional interpretation. Again turning to the *Harper* opinion:

> For 200 years our Supreme Court has faithfully sought to implement the intent of the drafters of our state constitution by interpreting that foundational document based on its plain language and the historical context in which each provision arose.

*Id.* at 378.

> The constitution is interpreted based on its plain language. The people used that plain language to express their intended meaning of the text when they adopted it. The historical context of our constitution confirms this plain meaning. As the courts apply the constitutional text, judicial interpretations of that text should consistently reflect what the people agreed the text meant when they adopted it. **There are no hidden meanings or opaque understandings—the kind that can only be found by the most astute justice or academic. The constitution was written to be understood by everyone, not just a select few.**

*Id.* at 297 (emphasis added).

> When this Court looks for constitutional limitations on the General Assembly's authority, it looks to the plain text of the constitution just as it would look to the plain text of a statute.

*Id.* at 324 (citation omitted).

> [C]ourts determine the meaning of a constitutional provision by discerning the intent of its drafters when they adopted it. Courts look first to the plain language of the text, keeping in mind the historical context of the text's adoption.

*Id.* at 351.

As also will be shown *infra,* the plain language of the North Carolina Constitution's *ex post facto* clause, the historical context of the adoption of that clause and the adoption of an amendment to that clause in 1868 unquestionably establish that the North Carolina Constitution limits the General Assembly's ability to pass retroactive civil legislation unrelated to real or personal property rights in only one very specifically defined category -- taxes.

### B. Judge Carpenter Concedes in His Dissent That There Is No Express/Explicit Limitation in the North Carolina Constitution on the Ability of the General Assembly to Pass the Revival Provision of the Safe Child Act

The North Carolina Constitution does not contain an express limitation on the ability of the General Assembly to revive civil tort claims previously barred by a statute of limitations, and neither the plain language of the text or the historical context of our three full constitutions establishes otherwise.

Despite this Court's decision in *Harper* having been issued only six weeks prior to the Court of Appeals hearing oral argument in this case, the dissent below failed to follow the analytical framework mandated by *Harper* for considering challenges under the State Constitution. In fact, the dissent makes only a single passing reference to *Harper*. The dissent did, however, twice acknowledge that there is no express provision in the North Carolina Constitution that would make the revival provision of the SAFE Child Act unconstitutional. Judge Carpenter conceded the following:

> I also agree that the prohibition of reviving time-barred claims is **not a textual** one; the text of the North Carolina Constitution lacks such a provision.

*McKinney v. Goins*, 892 S.E.2d 460, 481 (N.C. Ct. App. 2023) (Carpenter, J. dissenting) (emphasis added). Later in his dissent Judge Carpenter reiterated this fact:

> Given its lack of support from the text of our state Constitution, perhaps *Wilkes* should be overruled.

*McKinney v. Goins*, 892 S.E.2d at 487 (Carpenter, J. dissenting) (*citing Harper v. Hall*, 384 N.C. 292 (2023).

This case was the first case presenting a state constitutional challenge to an act of the General Assembly that was heard by any North Carolina appellate court after this Court issued its decision in *Harper*. It was a mistake for the dissent to ignore the analytical framework established by *Harper* and to instead insert its own opinion of the basis for the *Wilkes County* decision in order to find that antiquated decision controlling. The dissent found the revival provision of the SAFE Child Act to be unconstitutional based on a near century-old decision that never mentions the North Carolina Constitution while conceding that there is nothing in the text of the North Carolina Constitution to prohibit the General Assembly from passing this law.

### C. The Defendant Fails to Identify An Explicit Limitation in the North Carolina Constitution That Prevents the General Assembly From Enacting the Revival Provision of the SAFE Child Act

It is telling that not once in its seventy-five (75) page New Brief does Defendant even attempt to argue that the revival provision of the SAFE Child Act is expressly prohibited by any provision of our Constitution. Instead, Defendant makes a tortured argument that this Court's 1933 decision in *Wilkes County* – a case that never once mentions the North Carolina Constitution nor ever makes a single reference to any provision of the North Carolina Constitution – is controlling in this matter.

Like the dissent below, Defendant essentially ignores *Harper* and the clear analytical framework it establishes for consideration of state constitutional challenges to legislative enactments. If there was an explicit state constitutional

limitation on the ability of our Legislature to pass the revival provision of the SAFE Child Act Defendant surely would have shown that to this Court in big, bold letters. Defendant ignores *Harper* because Defendant knows that its constitutional challenge fails when analyzed under the *Harper* framework.

Defendant exhibits brazen hubris when it argues in its brief that *Wilkes County* controls over earlier decisions of this Court holding that there is no limitation in the North Carolina Constitution on the ability of the General Assembly to pass retroactive civil legislation that does not impact real or personal property rights while at the same time ignoring this Court's unmistakable pronouncements in *Harper v. Hall*. Def. Brief at p. 44.

This case presents this Court with its first test drive of *Harper* and, unfortunately, Defendant – instead of allowing this Court to stay in its lane – is trying to run this Court off the road.

### D. Article I, § 16 (Previously § 24) of the North Carolina Constitution Controls This Issue

Both Defendant and the dissent below are incorrect in their argument that the question of the constitutionality of the challenged provision of the SAFE Child Act is controlled by a vested right established by this Court under the "Law of the Land" provision in Article I, § 19 of the North Carolina Constitution. That argument is based almost exclusively on a misguided, antiquated and opaque decision – *Wilkes County* – which uses dicta to assert that there exists a vested right to a statute of limitations defense under North Carolina law. The dissent below clearly felt constrained by the *Wilkes County* decision despite there being no reasonable

argument that the decision was based on any provision of the North Carolina Constitution.

Defendant's reliance on *Wilkes County* is born of desperation. As discussed at length above, the revival provision of the SAFE Child Act clearly is constitutional under a *Harper* analysis and Defendant bends and twists in an attempt to get this Court to find an act of the General Assembly unconstitutional based on a decision that in no way was based on any provision of the North Carolina Constitution – much less an explicit provision.

In making their argument, both Defendant and the dissent below ignored three significant aspects of North Carolina law:

(1) The plain language and original intent of Article I, § 16[2] of the North Carolina Constitution;

(2) long-standing Supreme Court decisions interpreting the plain language of Art. I, § 16 and determining its original application; and

(3) the historical context of an 1868 amendment to Art. I, § 16 that limits only one specific type of retrospective civil legislation.

Collectively those three considerations clearly establish that the North Carolina Constitution limits only one specific category of retrospective civil legislation -- taxes.

Defendant argues and the dissent below determined that a general provision of the North Carolina Constitution never mentioned in *Wilkes County* – the Law of

[2] The *ex post facto clause* has been a constitutional vagabond. When the people of North Carolina adopted their first Constitution in 1776 the *ex post facto* provision was in Article I, § 24. When the people of North Carolina adopted their second Constitution in 1868, the retrospective laws provision was amended and moved to Article I, § 32. When the people of North Carolina adopted their third Constitution in 1971, the retrospective laws provision as previously amended was moved to Article I, § 16.

the Land clause – controls over a specific constitutional provision governing the very issue before this Court. That argument violates the established principle that one clause of the state constitution cannot overrule another. *See Stephenson v. Bartlett*, 355 N.C. 354, 397 (2002) ("[S]uch a holding appears to hold one clause of the State Constitution as overruling another, in violation of a long-standing tenet of constitutional interpretation.") (citation omitted).

This argument also ignores another well-established principle of constitutional construction which provides that a specific provision of the Constitution controls over a general provision. *See Piedmont Publ'g Co. v. City of Winston-Salem,* 334 N.C. 595, 598 (1993) ("One canon of construction is that when one statute deals with a particular subject matter in detail, and another statute deals with the same subject matter in general and comprehensive terms, the more specific statute will be construed as controlling."); s*ee also State ex rel. Martin v. Preston,* 325 N.C. 438, 449, 385 S.E.2d 473, 479 (1989) ("Issues concerning the proper construction of the Constitution of North Carolina 'are in the main governed by the same general principles which control in ascertaining the meaning of all written instruments.')).

Interpretation and application of the North Carolina Constitution cannot be based on speculation and innuendo but instead must be based on the plain language of the text, its original meaning, and the historical context of the interpretation and application of that text. In the words of Justice Berger:

> [A] challenge to a presumptively valid and facially neutral act of the legislature under Article I, Section 19 of the North Carolina Constitution cannot succeed if it is supported by speculation and innuendo alone.

*Holmes v. Moore*, 384 N.C. 426, 439 (2023); *see also Harper v. Hall*, 384 N.C. at 378 (For 200 years our Supreme Court has faithfully sought to implement the intent of the drafters of our state constitution by interpreting that foundational document based on its plain language and the historical context in which each provision arose.).

When the proper interpretive approach to the Constitution is applied it is immediately clear that the North Carolina Constitution did not limit the Legislature's ability to pass this challenged provision of the SAFE Child Act.

### 1. The Text of Article I, § 24 Cleary Permits Retrospective Civil Legislation

North Carolina's original 1776 Constitution included a criminal law *ex post facto* provision but did not prohibit retrospective civil legislation. Article I, § 24 of the 1776 Constitution originally provided:

> That retrospective laws, punishing acts committed before the existence of such laws, and by them only declared criminal, are oppressive, unjust, and incompatible with liberty; wherefore no *ex post facto* law ought to be made.

N.C. Const. Art. I, § 24 (1776).

Many judges and attorneys when referencing *ex post facto* laws assume that phrase refers only to criminal laws, but the phrase "*ex post facto,*" standing alone, should not be given such a narrow interpretation. Merriam-Webster defines the phrase "*ex post facto*" to mean "after the fact; retroactively." *Ex post facto* Definition, *Merriam Webster Dictionary* (11th ed. 2020) available at merriam-webster.com. Black's Law Dictionary defines "*ex post facto*" as:

> After the fact; by an act or fact occurring after some previous act or fact, and relating thereto; by subsequent matter; the opposite of ab initio[3]. Thus, a deed may be good ab initio.

Black's defines "*ex post facto* law" as:

> A law passed after the occurrence of a fact or commission of an act, which retrospectively changes the legal consequences or relations of such fact or deed.

*Black's Law Dictionary,* 580 (6th ed. 1990).

Had the framers of the North Carolina's Constitution intended to prohibit all retrospective legislation – both civil and criminal – Article I, § 24 could easily have provided:

> That retrospective laws . . . are oppressive, unjust, and incompatible with liberty; wherefore no *ex post facto* law*,* criminal or civil, ought to be made.

Instead, when the framers of our Constitution included the language "punishing acts committed before the existence of such laws, and by them only declared criminal" they made it clear that the only retrospective laws being prohibited by the North Carolina Constitution were retrospective criminal laws. By contrast, the *ex post facto* clause in the U. S. Constitution simply states a duty: "No Bill of Attainder or *ex post facto* Law shall be passed." U.S. Const. Art. I, § 9, Clause 3[4]. When this prohibition

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[3] "ab initio" is an adverb which means "from the beginning." *See Merriam Webster Dictionary* (11th ed. 2020) available at merriam-webster.com.

[4] The U.S. Constitution prohibits the states from passing *ex post facto* laws in Article I, § 10 which provides in full:

**Section 10**
No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

was adopted as part of the original U.S. Constitution, many understood the term "*ex post facto* law" to embrace all retrospective laws, including laws governing or controlling past transactions, whether of a civil or a criminal nature. *Constitution Annotated,* https://constitution.congress.gov/browse/essay/artI-S9-C3-2/ALDE_00001089/ (citing J. Story, Commentaries on the Constitution of the United States 1339 (1983)); s*ee also* John V. Orth & Paul Martin Newby*, The North Carolina State Constitution*, 64 (2d. ed. 2013).

The U. S. Supreme Court limited the reach of the federal *ex post facto* clause in 1789 when it held that under the U. S. Constitution *ex post facto* is a legal term of art referring only to criminal laws. *Calder v. Bull*, 3 U.S. 386 (1798).

It is significant to note that the framers of the North Carolina Constitution began Article I, § 24 by referring to "retrospective laws" and made it unmistakable that the only "retrospective laws" initially prohibited by this section were retrospective criminal laws.

Ten states have specific constitutional provisions banning all retrospective legislation. (Appx. pp. 19-20). For example, Oklahoma's Constitution provides:

> The Legislature shall have no power to revive any right or remedy which may have become barred by lapse of time, or by any statute of this State. After suit has been commenced on any cause of action, the Legislature shall have no power to take away such cause of action, or destroy any existing defense to such suit.

OK Const. Art. V, § 52. (Appx. p. 20).

Since the people of North Carolina adopted their original Constitution in 1776, they have had almost 250 years to amend their Constitution to add a provision similar

to Oklahoma's Article V, § 52 above. The people have repeatedly chosen not to place such a blanket prohibition on retrospective civil legislation in their Constitution and this Court should not rewrite the Constitution to include such a prohibition now.

**2. The Georgia Constitution**

The State of Georgia has in the past addressed the question of whether its legislature could revive a claim that was previously time-barred. The original Georgia Constitution was adopted in 1798 and included an *ex post facto* clause that applied only to criminal laws. Like the original North Carolina Constitution, the original Georgia Constitution did not place any limitation on retroactive civil legislation. *Bussey v. Bishop*, 169 Ga. 251 (1929), *overruled by Canton Textile Mills, Inc. v. Lathem*, 253 Ga. 102 (1984).

The Georgia Constitution was amended in 1861 to add a specific prohibition on any "retroactive law" to the same section where the *ex post facto* clause is found. *Id.* It is interesting to note that despite a neighboring border State having amended its Constitution to prohibit retroactive civil legislation just five years prior, in 1886 North Carolina's *ex post facto* clause was amended to prohibit only retrospective civil tax legislation.

Based on this amendment to the Georgia Constitution, the Georgia Supreme Court held in its 1929 decision *Bussey v. Bishop* that an attempt by the Georgia Legislature to revive a previously time-barred Worker's Compensation claim was unconstitutional. The Georgia Supreme Court stated:

> [A]n act of the Legislature which undertakes to revive a cause of action which was barred at the time of its passage violates the provision of our

state Constitution which inhibits the passage of retroactive legislation. *Bussey v. Bishop*, 169 Ga. 251.

In 1984 – and despite having an express constitutional provision stating that "No . . . retroactive law . . . shall be passed" – the Georgia Supreme Court overruled *Bussey v. Bishop* and adopted the U.S. Supreme Court's reasoning in *Campbell v. Holt.* The *Bussey* Court also noted its agreement with the U.S. Supreme Court decision in *Chase Securities Corp. v. Donaldson* in which the Court stated that there is no fundamental or natural right in a statute of limitations defense unrelated to real or personal property:

> We agree with the view expressed by Justice Jackson in *Chase Securities Corp. v. Donaldson,* that, "Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. . . . They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a 'fundamental' right or what used to be called a 'natural' right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control."

*Canton Textile Mills, Inc. v. Lathem*, 253 Ga. 102, 105 (1984) (cleaned up).

Twelve years later in *Vaughn v. Vulcan Materials Co.* the Georgia Supreme Court reaffirmed this position:

> There is no vested right in a statute of limitation and a "legislature may revive a ... claim which would have been barred by a previous limitation period by enacting a new statute of limitation, without violating our constitutional prohibition against retroactive laws."

*Vaughn v. Vulcan Materials Co.*, 266 Ga. 163, 164 (1996) (*citing Canton Textile Mills v. Lathem,* 253 Ga. 102, 105(1), 317 S.E.2d 189 (1984). Accord *Moore v. Savannah Cocoa,* 217 Ga. App. 869(1), 459 S.E.2d 580 (1995)).

In at least one decision prior to overruling *Bussey v. Bishop* the Georgia Supreme Court had criticized the *Bussey* decision because -- just like in *Wilkes County* -- the issue could have been decided on nonconstitutional grounds and, thus, the part of the *Bussey* opinion addressing the constitutionality of the revival provision in question was necessarily dicta. As the Georgia Supreme Court recognized:

> [T]his court criticized *Bussey* in several respects, the most persuasive of which being the *Bussey* court, in Division 1 of the opinion, decided the legislature did not *intend* the act under consideration be given retrospective operation. This ruling decided the question and anything that might have been added as to the validity of the act, if it had been given a retroactive effect, was necessarily obiter dictum.

*Canton Textile Mills, Inc. v. Lathem*, 253 Ga. 102, 104–05 (1984) (*citing Walker Electrical Co. v. Walton,* 203 Ga. 246, 46 S.E.2d 184 (1948)).

As discussed *infra,* the portion of the *Wilkes County* opinion finding a vested right in a statute of limitations defense was totally unnecessary to the determination of the case before that Court and should now be recognized as dicta.

In overruling *Bussey* the Georgia Supreme Court held that there is no constitutional underpinning to a general statute of limitations adopted as a matter of public policy by the legislature. A legislative decision to revive claims barred by a statute of limitations is no less a policy decision that was adoption of the statute of limitations in the first place. This Court now has the opportunity to recognize the same and to overrule *Wilkes County*.

### 3. This Court's Interpretation of the Original Intent of Article I, § 24

A mere eighteen (18) years after Article I, § 24 was adopted, the North Carolina Superior Courts of Law and Equity -- the precursor to this Court[5] -- considered whether Article I, § 24 prohibited the General Assembly from enacting retrospective civil legislation and concluded that it did not.

In *State v.* _____, 2 N.C. 28 (N.C. Super. L. & E. 1794), the Court considered a challenge to a retrospective law under the North Carolina Constitution and found that the North Carolina Constitution prohibited only criminal *ex post facto* laws. The *State v.* ____ Court agreed with the North Carolina Attorney General's argument that by prohibiting this specific category of retrospective legislation, the Constitution permits all other retrospective legislation. Regarding Article I, § 24, the reporter notes:

> [T]his indeed prohibits the passing of a retrospective law so far as it magnifies the criminality of a former action, but leaves the Legislature free to pass all others, and without such a power no government could exist for any considerable length of time, without experiencing great mischiefs. The Convention foresaw the necessity there would be for sometimes enacting such laws, and therefore **they have been careful to word the 24th section so as not to exclude the power of passing a retrospective law, not falling within the description of**

[5] The North Carolina "Supreme Court" was not established until 1818. From the adoption of the Constitution until the Supreme Court was established, trial judges served on a "Court of Conference" and reviewed decisions made by other trial judges and laws passed by the General Assembly. *State v.* __ was decided by a Court of Conference. Decisions by these Courts of Conference are considered decisions of the Supreme Court. For example, *Bayard v. Singleton*, 1 N.C. (Mart.) 5 (1787) was decided by a Court of Conference and has been repeatedly referred to by our Supreme Court as a decision of the North Carolina Supreme Court. *See, e.g.*, *Harper v. Hall*, 2022-NCSC-17, ¶ 125, 380 N.C. 317, 368 (In *Bayard*, **we concluded** that our courts have the power, and indeed the obligation, to review legislative enactments for compliance with the North Carolina Constitution . . . . (emphasis added)); *State v. Kelliher*, 2022-NCSC-77, ¶ 52 (But as **we long ago established** and have since repeatedly affirmed, the fact that the legislature has enacted a statute does not guarantee its constitutionality as applied in all circumstances . . S*ee, e.g.*, *Bayard v. Singleton*, 1 N.C. 5 (1787) (emphasis added)).

> **an *ex post facto* law -- the Convention meant to leave it with the legislature to pass such laws when the public convenience required it.**

*State v.* __, 2 N.C. at 39 (emphasis added).

The decision in *State v.* ___ establishes that the specific provision of the North Carolina Constitution addressing retrospective legislation unambiguously was not intended to prohibit the legislature from passing a retrospective civil law like that found in Section 4.2.(b) of the SAFE Child Act. The original intent of Article I, § 24 was established by this Court in 1794 and that interpretation of the section's original intent has never been challenged nor altered.

The *State v.*____ decision establishes the validity of Section 4.2.(b) of the SAFE Child Act whether one utilizes originalism, textualism or another interpretive approach. From an originalist perspective, the intent of the framers of North Carolina's original Constitution is readily established by the *State v.* ___ decision. An opinion by this state's highest court adopting an argument made by this state's then-Attorney General decided only a few years after the constitutional provision was adopted is conclusive as to the original intent of that provision, and that original intent still controls today. *See Perry v. Stancil,* 237 N.C. 442 (1953) (Fundamental to the interpretation of provisions of the Constitution is the principle that effect be given to the intent of the framers of the document and of the people adopting it.).

From a textualist perspective, as discussed above, the text of this section makes it self-evident that the only "retrospective laws" prohibited by the Constitution are retrospective criminal laws. Additionally, the absence of any limitations on civil

retrospective legislation in Article I, § 24 establishes that no such limitations were intended by this provision. As discussed below, the North Carolina Supreme Court reached that very conclusion in *State v. Bell,* 61 N.C. 76 (1867).

Prior to the *State v. Bell* decision, this Court in *Phillips v. Cameron*, 48 N.C. 390 (1856) recognized that retrospective legislation reviving a previously time-barred claim is permissible under the North Carolina Constitution. The *Phillips* Court stated:

> We admit, that the Act of 1852, applying as it does to the remedy and not to rights of the parties, might have been made retrospective in its operation; but as it was in some degree intended to disturb a statute of repose, which is always favored, we will not be justified in allowing to it such an operation, unless its language clearly requires it. If the Legislature intended to apply them to a case like the present, the Act ought to have been entitled, "An act to encourage litigation, by reviving stale claims.

*Phillips v. Cameron*, 48 N.C. at 393. (emphasis added). The *Philips* Court recognized what continues to be the only limitation on the legislature's ability to revive time-barred claims -- that the legislature make clear its intent for the legislation to apply retroactively.

In *State v. Bell*, the North Carolina Supreme Court held that retrospective civil taxation legislation was permissible under the North Carolina Constitution. The *State v. Bell* Court – like the Court in *State v.* ___ – noted that Article I, § 24 prohibited only criminal *ex post facto* laws. The *State v. Bell* court held:

> Whenever a retrospective statute applies to crimes and penalties, it is an *ex post facto* law, and as such is prohibited by the Constitution of the United States, not only to the States, as we have already seen, but to Congress. Art. 1, sec. 9, ch. 3. The omission of any such prohibition in the Constitution of the United States, and also of the State, is a strong

> argument to show that **retrospective laws, merely as such, were not intended to be forbidden**. It furnishes an instance for the application of the maxim *expressio unius est exclusio alterius.* We know that retrospective statutes have been enforced in our courts . . . .

*State v. Bell*, 61 N.C. at 82–83 (emphasis added).

The maxim *expressio unius est exclusio alterius* was fundamentally significant to the Supreme Court's decision in *State v. Bell* and is equally significant to this Court's decision on the issue before it now.

**4. The 1868 Amendment to Article I, § 24**

The citizens of North Carolina adopted a new constitution in 1868 and – apparently in response to the *State v. Bell* decision – amended Article I, § 24 (and moved it to § 32) to read as follows:

> Retrospective laws, punishing acts committed before the existence of such laws, and by them only declared criminal, are oppressive, unjust and incompatible with liberty, wherefore no *ex post facto* law ought to be made. **No law taxing retrospectively, sales, purchases, or other acts previously done, ought to be passed.**

N.C. Const. Art. I, § 32 (1868) (emphasis added).

By adopting this amendment the people of North Carolina told us three things:

(1) that the original 1776 Constitution did not prohibit retrospective civil legislation – or else the amendment would not have been necessary;

(2) that through their Constitution the people knew they had the ability to prohibit civil retrospective legislation; and

(3) the people of North Carolina chose to limit only retrospective civil tax legislation.

As the *State v. Bell* court recognized, the principle of *expressio unius est exclusio alterius* -- when one or more things of a class are expressly mentioned others of the

same class are excluded -- established that in 1868 when the people of North Carolina added a constitutional prohibition against retrospective tax legislation they specifically chose not to prohibit any other types of retrospective civil legislation. Quite simply, there would have been no reason to amend Article I, § 24 to prohibit retrospective tax legislation if retrospective civil legislation already was prohibited by our Constitution. The 1868 amendment to § 24 was necessary because the plain language of the section and this Court's decisions interpreting the original intent of that language established that § 24 did not cover retrospective civil laws and the amendment made the limitation applicable to only a single category of civil legislation. *See* John V. Orth & Paul Martin Newby, *The North Carolina State Constitution*, at 64 ("Although civil (as opposed to criminal) laws are not generally covered by the present section, the final sentence, added in 1868, does extend the prohibition to one category of civil legislation: tax laws.).

The *Harper* "explicit limitation" requirement would be met if this case were dealing with a retrospective tax law. Absent other explicit limitations in Article I, § 24, the General Assembly had full constitutional authority to pass the revival provision of the SAFE Child Act.

**5. In 2006 This Court Recognized That The *Ex Post Facto* Clause of the North Carolina Constitution Does Not Prohibit Other Retrospective Civil Legislation**

In its 2006 decision in *Coley v. State*, this Court recognized the continuing validity of its 1867 holding in *State v. Bell*. *Coley* involved a challenge to certain new tax laws that the plaintiff claimed were retrospective in violation of Article I, § 16

(the *ex post facto* clause was moved to this section in the 1971 Constitution). This Court turned to *State v. Bell* to provide historical perspective on the *ex post facto* clause and first noted the basic principle of constitutional interpretation that, "If the meaning of the language of Article I, § 16 is plain, we must follow it." *Coley v. State*, 360 N.C. 493, 498 (2006) (*citing Martin v. State,* 330 N.C. 412, 416, 410 S.E.2d 474, 476 (1991)).

This Court then acknowledged that in *State v. Bell* it had been compelled to hold retrospective tax legislation constitutionally permissible because **the Court found nothing in the North Carolina Constitution to prevent such legislation**. *Id.* at 495-96 (emphasis added). The *Coley* Court reiterated that the *ex post facto* clause in the original 1776 Constitution applied only "to matters of a criminal nature." *Id.* at 495.

It is impossible for *Wilkes County* to control the issue before this Court in this case unless *Wilkes County* overruled this court's holding in *State v. Bell* that the *ex post facto* clause originally prohibited only criminal retrospective legislation. Yet over seventy years (70) after *Wilkes County* was decided this Court, in *Coley v. State,* recognized *State v. Bell* as still both good law and controlling law.

*Coley v. State* makes clear that this Court's original interpretation that Article I, § 16 places no prohibition on retrospective civil legislation still controls today. North Carolina's 1776 Constitution prohibited only criminal *ex post facto* legislation and the amendment to that section in 1868 limited only one specific type of civil retrospective legislation unrelated to property rights.

The Supreme Court decision in *State v. Bell* and this Court's reliance on that holding less than twenty (20) years ago pay homage to the deeply rooted understanding that the North Carolina Constitution is not a grant of power and that an act of the people through the General Assembly is valid unless expressly/explicitly limited by our Constitution – a deeply rooted fundamental understanding which this Court returned to in *Harper v. Hall*.

## IV. THE *WILKES COUNTY* DECISION IS BASED ON DICTA AND IS NOT GROUNDED IN THE NORTH CAROLINA CONSTITUTION

In her insightful law review article entitled *Why Dicta Becomes Holding and Why It Matters*, Judith Stinson identifies some of the problems with modern legal argument that perfectly illustrates the significant flaws in the dissent's and the Defendant's reliance on *Wilkes County* and its "vested right" determination. Professor Stinson notes:

> [L]awyers and judges increasingly **rely on the words found in judicial opinions rather than the underlying components** of those judicial decisions -- facts, issues, holdings, and outcomes.
>
> But understanding the breadth of precedent relevant to a particular legal issue is critical. Likewise, understanding the *holdings* of the controlling case law--not just finding a few choice quotations from a few key cases -- is essential to legal analysis.
>
> We refuse to engage in the deep thinking necessary to determine a particular case's holding. It is simply easier to find and quote some appealing language, even when the quoted phrase has little or nothing to do with the court's holding.

Judith M. Stinson, *Why Dicta Becomes Holding and Why It Matters*, 76 Brook. L. Rev. 219, 245– 46; 247-48; 252; 259 (2010) (italicized emphasis in original, bold emphasis added).

The assertion by the dissent below and by the Defendant that the vested right referenced in *Wilkes County* is found under the North Carolina Constitution is, in a word, wrong.

Citing *Wilkes County* as establishing a vested right in a statute of limitations defense under the North Carolina Constitution begs the question: How can an appellate decision be based on the North Carolina Constitution when that decision NEVER mentions the North Carolina Constitution?

### A. The Dissent's Reliance on "Deductive Reasoning" to Find the Revival Provision of the SAFE Child Act Unconstitutional Fails to Meet the "Beyond a Reasonable Doubt" Standard

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> The main limitation is that deductive reasoning does not allow you to learn anything new at all because all logical argument depends on assumptions or suppositions. At best, deduction may enable you to draw out conclusions that were only implicit in your beliefs, but it cannot add to those beliefs.
>
> The Cambridge Handbook of Thinking in Reasoning p. 170 (Appx. pp. 44-48)

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As previously noted, on two occasions in his dissent Judge Carpenter acknowledged that there is no express or explicit textual limitation in the North Carolina Constitution on the General Assembly's ability to pass retroactive civil legislation. Judge Carpenter then proceeded to find *Wilkes County* controlling based on "deductive reasoning." Quoting from the dissent:

> The Majority also suggests that we are not bound by *Wilkes* because the *Wilkes* Court did not explicitly cite the Law of the Land Clause. I disagree. Granted, the Court in *Wilkes* did not cite the Law of the Land Clause, *see Wilkes Cnty.*, 204 N.C. at 170, 167 S.E. at 695, but **deductive reasoning**, however, shows the Court was indeed interpreting the Law of the Land Clause.

*McKinney v. Goins*, 892 S.E.2d at 483 (Carpenter, J. dissenting) (emphasis added). By utilizing deductive reasoning, Judge Carpenter reached a conclusion that by necessity utilized assumption and surmise -- an approach that could never satisfy the beyond a reasonable doubt standard.

As noted above:

> [A] challenge to a presumptively valid and facially neutral act of the legislature under Article I, Section 19 of the North Carolina Constitution cannot succeed if it is supported by speculation and innuendo alone.

*Holmes v. Moore*, 384 N.C. at 439.

In the words of Chief Justice Newby:

> **There are no hidden meanings or opaque understandings—the kind that can only be found by the most astute justice or academic.** The constitution was written to be understood by everyone, not just a select few.

*Harper v. Hall*, 384 N.C. 292, 297 (2023) (emphasis added).

The same principles should apply to purporting to find a constitutional basis for a decision buried in the weeds of an opaque appellate court opinion.

#### 1. Using Deductive Reasoning to Find a Legislative Act Unconstitutional Directly Contradicts the Requirement of an Express Constitutional Limitation

Deductive reasoning starts with a general theory or hypothesis and then proceeds to reach a conclusion that supports that hypothesis. As long ago recognized:

> Aristotle suggested that there are two types of reasoning used in persuasion, inductive and deductive. Inductive reasoning proceeds by way of examples that are presented, and then a general rule is inferred from those examples. Deductive reasoning starts with a proposition or rule, and an effort is then made to see whether the particular case comes within the rule.

McDonald & Carlson Tex. Civ. Prac. App. Prac. § 40:7 (2d ed.). *See also Deductive Reasoning*, Black's Law Dictionary (11th ed. 2019) ("Reasoning that begins with a general statement or hypothesis and examines the possibilities before drawing a specific, logical conclusion.").

To apply deductive reasoning in this case, the dissent below necessarily started with the hypothesis that the *Wilkes County* decision was based on the North Carolina Constitution and then proceeded to analyze the case in context of that initial proposition. Legal analysis of an appellate opinion, however, requires one to look at the surrounding facts and circumstances, to consider the law relied upon, and then utilize that information to reach a conclusion.

Deductive reasoning is used in an evidentiary context to permit jurors to draw **reasonable inferences**. Here, however, reasonable inferences are insufficient because Defendant must establish that the SAFE Child Act is unconstitutional beyond a reasonable doubt. "Reasonable inferences" do not come close to meeting that elevated burden.

In *Guilford Nat. Bank of Greensboro v. S. Ry. Co.,* the Fourth Circuit, applying North Carolina law, reversed a jury finding of contributory negligence based on

deductive reasoning because such a speculative approach failed to meet even the preponderance burden of proof. *Guilford Nat. Bank of Greensboro v. S. Ry. Co.*, 319 F.2d 825, 827 (4th Cir. 1963) ( "Such deductive reasoning is merely speculative, a process in which juries may not be allowed to indulge.") c*iting Parker v. Wilson*, 247 N.C. 47, 100 S.E.2d 258 (1957); *Sowers v. Marley*, 235 N.C. 607, 70 S.E.2d 670 (1952).

For one to use deductive reasoning to conclude that the *Wilkes County* decision was based on the North Carolina Constitution requires stacking inference upon inference to reach a conclusion. *See Certain Underwriters at Lloyd's, London v. Pettit*, No. C17-259RSM, 2018 WL 4963120, at *3 (W.D. Wash. Oct. 15, 2018) (Deductive reasoning alone cannot suffice where there is a lack of evidence that could support the conclusions reached.). A conclusion based on deductive reasoning is not an appropriate basis for this Court to void an act of the General Assembly.

### 2. The Historical Record Does Not Support the Conclusion That the *Wilkes County* Decision Was Based on the North Carolina Constitution

To determine what issues were before an appellate court on a particular appeal the best source of information is the appellate record for that case. The appellate record for the *Wilkes County v. Forrester* appeal is available through the law libraries at both the University of North Carolina and Duke University. A complete copy of the *Wilkes County v. Forrester* record on appeal is provided for this Court's information in the Appendix to Plaintiffs' Brief at pages 21-43.

The *Wilkes County* record on appeal contains the Complaint, Answer, Plaintiff's Exhibits and Evidence, the Judgment, Appeal Entries, Errors Assigned

and the Briefs of both Plaintiff and Defendant. (Appx. p. 21) Nowhere in the record is the North Carolina Constitution ever mentioned or a constitutional challenge raised.

The Complaint filed by Wilkes County was simply an action in which the plaintiff sought to foreclose on certain tax liens. (Appx. pp. 22-26) In his answer, defendant Forrester asserted the statute of limitations as a defense but did not assert a defense that the statute under which he was being sued was unconstitutional. (Appx. pp. 26-27) The trial court's Judgment indicates that the court granted Defendant's motion for a judgment of nonsuit and taxed costs to the plaintiff. (Appx. pp. 32-33) Wilkes County assigned error to the trial court's entry of judgment of nonsuit and appealed the case to the North Carolina Supreme Court.

In its brief, the plaintiff – Wilkes County – argued that it had complied with all requirements of the applicable statute and that the trial court had erred in failing to submit the case to the jury. (Appx. pp. 34-40) In response defendant Forrester argued that the plaintiff had failed to offer any evidence that the action was instituted within the applicable statute of limitations and further argued that the taxes had already been paid. (Appx. pp. 41-43)

It is clear from the appellate record that defendant Forrester did not assert any violation of the North Carolina Constitution as a basis to uphold the entry of nonsuit on his behalf. There is no such argument in his Answer or in his brief. The defendant made a basic statute of limitations argument combined with some additional evidentiary arguments as to why the taxes were not owed.

It is inconceivable that the defendant in *Wilkes County* would have based his entire argument to both the trial court and the North Carolina Supreme Court on the North Carolina Constitution when the appellate record is completely devoid of any reference to our Constitution.

Perhaps the most logical and likely explanation for the Supreme Court opinion in *Wilkes County* is that it is simply a creature of the jurisprudence of the time. The decision was issued during the much-discredited Lochner era when courts were finding "rights" even if they had to pull the basis for the decision out of thin air.

Given the lack of reference to the North Carolina Constitution in the appellate record, the lack of reference to the North Carolina Constitution in the decision itself and the *Wilkes County* Court's reference to the Federal Constitution and to a New Jersey opinion interpreting the Federal Constitution, it appears that this Court as constituted in 1933 may well have taken it upon itself to address a constitutional issue not raised by either of the litigants and then based its decision either on a misunderstanding of the U.S. Supreme Court's interpretation of the Fourteenth Amendment of the U.S. Constitution and/or on notions of natural law that were prevalent at the time.

Indeed, there was a time in our country's history when some courts felt an obligation to protect certain "rights" even in the absence of constitutional protection. As one scholar wrote regarding retroactive legislation around the time of the *Wilkes County* decision:

> In the earlier opposition to such[retrospective] laws, perhaps by reason of the absence, or supposed absence, of constitutional prohibitions, there

> frequently appear two ideas which in themselves are most interesting and which do violence to modern orthodox notions of constitutional limitations. **The more interesting of these, and the one which found more frequent expression, is the position, frankly stated, that certain laws may be held void without regard to any constitutional objections.**

Bryant Smith, *Retroactive Laws & Vested Rights*, 5 Tex. L. Rev. 231, 234 (1927) (emphasis added). This article further noted:

> The other supposed extra-Constitutional limitation is closely akin to the one just referred to, but sufficiently different, it is believed, to justify separate mention. It is that legislative power, as such, aside from constitutional prohibition and without regard to the three-fold separation of powers, is by its very nature subject to certain limitations which are both inherent and definitive.
> . . .
> It has uniformly been held by the courts of highest authority that **independently of express constitutional provisions there is, in the nature of things, a limit to the legislative power beyond which its acts are void**.

*Id.* at 235 and 248 (emphasis added) (citation omitted).

Additionally, if the *Wilkes County* Court had decided the issue on constitutional grounds it would have violated a fundamental tenet of appellate jurisprudence which requires that a constitutional question be presented in the trial court before that question can become an issue on appeal:

> The well established rule of this Court is that it will not pass upon a constitutional question which was not raised or considered in the court below.

*Midrex Corp. v. Lynch, Sec. of Revenue,* 50 N.C. App. 611, 274 S.E.2d 853, *disc. rev. denied and appeal dismissed,* 303 N.C. 181, 280 S.E.2d 453 (1981), *citing Wilcox v. Highway Comm.,* 279 N.C. 185, 181 S.E.2d 435 (1971); *Boehm v. Board of Podiatry*

*Examiners,* 41 N.C. App. 567, 255 S.E.2d 328, *cert. denied,* 298 N.C. 294, 259 S.E.2d 298 (1979); *see also State v. Creason,* 313 N.C. 122, 326 S.E.2d 24 (1985); *Tetterton v. Long Mfg. Co., Inc.,* 67 N.C. App. 628, 313 S.E.2d 250 (1984).

The recognition by the Court of Appeals majority that the portion of the *Wilkes County* opinion addressing vested rights is dicta is supported by the historical record on appeal. There was no mention of either the North Carolina or Federal Constitution in the *Wilkes County* record on appeal because there was absolutely no need to raise a constitutional challenge.

As the majority below correctly recognized, it was completely unnecessary for the *Wilkes County* court to consider a vested rights issue because the revival statute in that case was inapplicable to the *Wilkes County* litigants. *McKinney v. Goins*, 892 S.E.2d at 474. As the majority noted, *Wilkes County* filed its action to foreclose on tax liens against the defendant's property in 1930 -- some eighteen months after the statute of limitations had expired. *Id.* The revival statute upon which Wilkes County attempted to rely was enacted in 1931 and by its express terms applied only to foreclosure actions brought **after** the revival statute was passed. The relevant language of that revival statute was:

> Any ... *board of commissioners of any county* ... holding a certificate of sale on which an **action to foreclose has not been brought** ... shall have until the first day of December, one thousand nine hundred and thirty-one, to institute such action.

*Id.* (bold emphasis added).

As the majority below recognized:

> The plain language of the revival statute—limiting its applicability to actions filed after enactment and disclaiming any effect on foreclosures already instituted—thus rendered it of no application to the controversy, as the foreclosure action had been filed *before* the revival act was passed. And, because the statute of limitations had run at the time of the foreclosure action's filing and the revival act did not apply, Wilkes County's claim was time-barred under applicable law.

*Id.* (cleaned up).

The revival provision at issue in *Wilkes County* by its express terms simply did not apply to the question before the trial court. All the trial court had to do to grant defendant's motion for nonsuit was simply apply the revival provision as written with no need to resort to constitutional considerations.

Whatever the basis for the Court's decision in *Wilkes County*, there is no support in the historical record that a constitutional question was properly before the Court. Additionally, there is no support in the historical record for any contention that the decision was based on the North Carolina Constitution. Most importantly, the decision unquestionably does not rely upon an explicit textual provision of the Constitution.

### B. Understanding the *Wilkes County* Decision

The North Carolina Supreme Court decisions in *Wilkes County* and in *Whitehurst v. Dey* are the two most often cited cases (cited both directly and indirectly) related to a vested right in a limitations defense. *See* Appendix pp. 11-13. In *Whitehurst v. Dey*, 90 N.C. 542 (1884) this Court stated – in dicta – that a defendant has a vested right in a limitations defense based on the "federal

Constitution." Neither *Wilkes County* nor *Whitehurst* references either a general or a specific provision of the North Carolina Constitution.

**1. Historical Context**

To fully understand what the North Carolina appellate courts have – and have not – established regarding a vested right in a limitations defense, *Wilkes County* must be considered in its historical context. Mid-to-late 19th and early 20th century courts relied heavily on vested rights analysis in determining the validity of legislation, including legislation that revived time-barred claims. Many of these cases were decided before or relatively soon after the 14th Amendment to the U.S. Constitution was ratified, when state constitutions largely were ignored and when substantive due process was a nascent idea. *See* James Kainen, "*The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights*," 79 Cornell L. Rev. 87 (1993).

*Wilkes County* was decided in 1933 – during what is now known as the "*Lochner* era" – when the U.S. Supreme Court used 14th Amendment due process to strike down legislative attempts to regulate such things as the length of the workday. Modern substantive due process analysis at the federal level, which rejected the approach taken during the "*Lochner* era," did not begin to take shape until four years after the *Wilkes County* decision when the U.S. Supreme Court decided *West Coast Hotel Co. v. Parish*, 300 U.S. 379 (1937) which upheld a Washington state minimum

wage law.[6]

Since *West Coast Hotel*, the United States Supreme Court has employed a two-tiered analysis of substantive due process claims. Under that analysis, a law is unconstitutional only if it serves no rational government purpose. If a law impacts a fundamental right, then it is subject to strict scrutiny and will be deemed constitutional only if it is narrowly tailored to serve a compelling government interest. North Carolina has fully adopted this same two-tiered analytical approach for substantive due process claims brought under Article I, § 19. *See Toomer v. Garrett*, 155 N.C. App. 462, 574 S.E.2d 76 (2002).

It is important for this Court to distinguish outdated 19th and early 20th century vested rights jurisprudence from modern substantive due process analysis.

### 2. The Genesis of the Confusion -- *Johnson, Whitehurst* and *Wilkes County*

In 1868 the North Carolina Supreme Court held in *Hinton v. Hinton* that there is no vested right in a limitations defense and that the legislature can retroactively revive claims. The *Hinton* court stated:

> There is in this case no interference with vested rights. The effect of the statute is not to take from the devisee his property and give it to the widow, but merely to take from him *a right conferred by the former statute*, to bar the widow's writ of dower, by suspending the operation of that statute for a given time; in other words, it affects the *remedy* and not the right of property. **The power of the Legislature to pass retroactive statutes affecting remedies is settled.**

[6] The "vested rights" language that is sometimes employed in analyzing substantive due process claims is largely a remnant of an outdated doctrine that culminated in the discredited *Lochner* era of jurisprudence. *See James Kainen,* "The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights," 79 Cornell L. Rev. 87 (1993)("Nineteenth century jurists defining retroactivity looked to events which caused rights to vest. Modern jurists reject the categorical logic of vesting and consider the statute's justifications under the rubric of substantive due process.")

*Hinton v. Hinton*, 61 N.C. at 414-15 (italics in original, bold emphasis added).

Only seventeen (17) months after the *Hinton v. Hinton* decision, this Court decided *Johnson v. Winslow,* 63 N.C. 552 (1869). *Johnson* considered a state law suspending the operation of statutes of limitation during the Civil War. The *Johnson* Court inexplicably ignored its own holding in *Hinton* and stated that the legislature has no power to revive a right of action after it has been barred. The *Johnson* dicta relied exclusively on a vague and obscure footnote in a constitutional treatise written by a Michigan law professor:

> The statute of limitations cannot be suspended in particular cases while allowed to remain in force generally.

Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union*, at 391, n.3 (1868). (Appx. pp. 14-18). *Johnson* makes no reference to the North Carolina Constitution. The *Johnson* decision has no substantive basis in any existing law of the time but instead simply parrots Cooley – a reference later recognized as dicta. *See Pearsall v. Kenan*, 79 N.C. 472, 473 (1878) ("In *Johnson v. Winslow*, 63 N.C. 552, what is said in Cooley is cited *arguendo*, but the point was not before the Court, and no additional force is given to it."). The dicta in *Johnson* is not controlling authority and any reliance on it by subsequent decisions – including *Wilkes County* – was improper.

Sixteen years later in *Whitehurst v. Dey*, 90 N.C. 542 (1884), this Court acknowledged but again ignored its decision in *Hinton* and stated that "statutes of limitation relate only to the remedy and may be altered or repealed before the

statutory bar has become complete but not after . . . " The *Whitehurst* decision did not cite *Johnson* but instead is based exclusively on that court's apparent belief that the United States Constitution required such a result:

> [W]e should be disposed to hold its operation in these cases to be an impairment of vested rights and as falling within the **inhibition of the federal Constitution** . . .

*Whitehurst v. Dey*, 90 N.C. at 545 (emphasis added). The *Whitehurst* Court did not cite a single controlling U.S. Supreme Court opinion nor any specific provision of the U.S. or North Carolina Constitutions.

Subsequent North Carolina Supreme Court decisions acknowledged that *Whitehurst* rests exclusively on the U.S. Constitution. *See e.g., City of Wilmington v. Cronly*, 122 N.C. 388, 391 (1898) ("[A]n act to collect arrearages of taxes is "not an enactment that attempts to revive a demand that has been barred by the statute of limitations, which would be repugnant to the **constitution of the United States**, as was recently declared in *Whitehurst v. Dey*, 90 N. C. 542.")(quoting *Jones v. Arrington*, 91 N.C. 125, 130 (1884)(emphasis added). *Whitehurst* directly contradicts the U.S. Supreme Court decision in *Campbell v. Holt* decided one year later.

The confusion spawned by the *Whitehurst* court ignoring its *Hinton* precedent was acknowledged by the North Carolina Supreme Court in *Dunn v. Beaman* where the court called the vested rights language in *Whitehurst* dicta:

> The ruling, that though a debt is barred by the statute of limitations the Legislature may remove the bar by repealing the limitation after it has accrued, is within the reasoning of *Pearson, C. J., in Hinton v. Hinton,* 61 N.C. 410, and is sustained by *Justice Miller,* in *Campbell v. Holt,* 115 U.S. 620, 29 L. Ed. 483, 6 S. Ct. 209, decided in 1885 On the other hand, it has been held by the Supreme Court of this State (1884), in *Whitehurst*

> *v. Dey,* 90 N.C. 542, that the Legislature can not (sp) revive a right of action as to a debt when it has become barred by the lapse of time, **though it is true the decision was not necessary to the disposition of that case.**

*Dunn v. Beaman*, 126 N.C. 766, 770 (1900) (emphasis added).

As previously noted, the most frequently cited North Carolina Supreme Court opinion purportedly finding a vested right in a limitations defense – and the case upon which the Defendant and the dissent below almost exclusively rely is *Wilkes County*. The *Wilkes County* decision itself relies on the *Whitehurst* dicta for the proposition that "where the right to collect a debt is barred by the statute of limitations, the legislature has no power to revive the right of action." *Wilkes County v. Forrester*, 204 N.C. at 695 (*citing Whitehurst v. Dey*, 90 N.C. at 545).

The *Wilkes County* decision does not find a vested right in a limitations defense in the North Carolina Constitution but instead is based either or both on an apparent misunderstanding of the United States Supreme Court decision in *Campbell v. Holt* and/or concepts of natural law prevalent at the time. The *Wilkes County* court directly relied on the New Jersey Supreme Court decision in *P. Ballantine & Sons v. Macken*, 94 N.J.L. 502, 503 (1920), which itself misunderstood the U. S. Supreme Court's holding in *Campbell v. Holt,* and quoted that opinion as follows:

> [T]he defense of the statute being considered a vested right, which cannot be taken away by legislation without **violating the inhibition of the 14th Amendment to the Federal Constitution.** (*citing Campbell v. Holt;* other citations omitted*).*

*Wilkes County v. Forester*, 204 N.C. at 170 (emphasis added).

As previously discussed, the U.S. Supreme Court in *Campbell* drew a sharp distinction between potentially unconstitutional retrospective legislation that eliminates the title or interest in tangible real or personal property from constitutionally permissible retrospective legislation that revives a remedy. The *Wilkes County* court, partly in reliance on a New Jersey case, erroneously applied the tangible real property aspect of the *Campbell* decision to statutes of limitations related to remedies.

The *Wilkes County* decision quotes the portion of *Campbell* applicable to real property but unfortunately ignores the language from *Campbell* that was applicable to the issue before the *Wilkes County* court. Below is the key passage from *Campbell* that is necessary to understand the U.S. Supreme Court's decision in that case. The error in *Wilkes County* is readily explained when one realizes that the court quoted the portion of *Campbell* related to tangible property rights but omitted that portion – in bold below – that distinguished other statutes of limitation:

> It may, therefore, very well be held that in an action to recover real or personal property, where the question is as to the removal of the bar of the statute of limitations by a legislative act passed after the bar has become perfect, that such act deprives the party of his property without due process of law. . . . **But we are of opinion that to remove the bar which the statute of limitations enables a debtor to interpose to prevent the payment of his debt stands on very different ground.**

*Wilkes County. v. Forester*, 204 N.C. at 169 (*quoting Campbell v. Holt,* 115 U.S. at 623) (emphasis added). Simply stated, in *Wilkes County* the North Carolina Supreme Court relied either upon natural law or upon the wrong part of the *Campbell* decision.

Bafflingly, despite quoting the statement in *Dunn v. Beaman* that the vested rights language in *Whitehurst* is dicta, the *Wilkes County* court cited *Whitehurst* as authority for that very proposition. Like *Whitehurst*, the *Wilkes County* opinion seems to rely exclusively on that court's mistaken belief that the 14th Amendment to the U.S. Constitution found a vested right in a limitations defense. Like *Whitehurst*, the *Wilkes County* opinion is of no precedential value because: (1) it is based on the court's misunderstanding of the holding in *Campbell v. Holt,* (2) it is not based on any provision of the North Carolina Constitution, (3) the opinion's discussion of vested rights is dicta, and (4) it was decided prior to the North Carolina Supreme Court adopting modern substantive due process analysis to address legislation that may impact a fundamental right.

### C. The Portion of the *Wilkes County* Opinion Addressing Vested Rights Is Based on Dicta and Is Itself Dicta

As discussed above, when considering the historical record on appeal from the *Wilkes County* case, the majority below correctly recognized that it was completely unnecessary for the *Wilkes County* court to consider a vested rights issue because the revival statute in that case was, on its face and by its express language, inapplicable to the Wilkes County litigants. As such, the portion of the *Wilkes County* opinion addressing vested rights was completely unnecessary to its decision and is dicta.

It is a fundamental tenet of appellate jurisdiction that an appellate court will not address a constitutional issue unless it is absolutely necessary. As this Court has repeatedly recognized:

> The well established rule of this Court is that it will not pass upon a constitutional question which was not raised or considered in the court below.

*Midrex Corp. v. Lynch, Sec. of Revenue,* 50 N.C. App. 611, *disc. rev. denied and appeal dismissed,* 303 N.C. 181 (1981).

> The courts will not declare an act of the General Assembly unconstitutional, even when clearly so, except in a case properly calling for the determination of its validity.

*State v. Williams*, 209 N.C. 57, 58 (1935) (citations omitted).

> The courts never anticipate a question of constitutional law in advance of the necessity of deciding it.

*State v. Corpening*, 191 N.C. 751, 752 (1926).

> [W]e express no opinions as to those matters in deference to the settled rule that courts will not pass on constitutional questions until the necessity for so doing has arisen.

*Horner v. Chamber of Commerce, Inc.*, 231 N.C. 440, 446 (1950).

> [W]e will not pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the court below. Moreover, appellate courts will not pass upon constitutional questions, even when properly presented, if there be also present some other ground upon which the case may be decided.

*State v. Jones*, 242 N.C. 563, 564 (1955).

In his dissent, Judge Carpenter attempts to reconcile the dicta in *Wilkes County* by asserting that "the constitutionality of the revival provision was expressly presented to the *Wilkes* court [and] the Court properly decided its constitutionality." *McKinney v. Goins*, 892 S.E.2d at 484 (Carpenter, J. dissenting). As was shown in our comprehensive review of the record on appeal for the *Wilkes County* case, Judge Carpenter's assertion is demonstrably incorrect. The *Wilkes County* litigants did not

raise a constitutional question at the trial court nor present a constitutional question to this Court through their briefs. It was completely unnecessary for the *Wilkes County* court to address the vested rights issue.

It is clear that the vested rights assessment in *Wilkes County* is either dicta or the court went rogue and chose to violate numerous fundamental tenants of appellate jurisprudence.

Judge Carpenter further attempts to address the dicta issue by seeming to assert that the *Wilkes County* court may have provided and advisory opinion and cites *In re Separation of Powers,* 305 N.C. 767 (1982) in support of this Court's ability to provide advisory opinions. *McKinney v. Goins*, 892 S.E.2d at 484 (Carpenter, J. dissenting).

As quoted above, this Court has repeatedly stated that it will not address a constitutional question unless that question is properly presented and that this Court will not pass on a constitutional question unless absolutely necessary to do so. In a decision issued near the time of the *Wilkes County* opinion, this Court specifically stated that it does not issue advisory opinions on constitutional questions:

> [The North Carolina Supreme Court] never anticipate[s] questions of constitutional law in advance of the necessity of deciding them, **nor venture[s] advisory opinions on constitutional questions.**

*State v. Lueders*, 214 N.C. 558, 560-61 (1938)(*citing S. v. Corpening,* 191 N.C. 751; *Person v. Doughton,* 186 N.C. 723) (emphasis added).

If the vested right portion of the *Wilkes County* opinion is an advisory opinion it is a stealth advisory opinion in which the court failed to acknowledge what it was

doing. Contrast that with *In re Separation of Powers,* cited by Judge Carpenter, which was an opinion issued at the request of North Carolina's Governor, Lt. Governor and Speaker of the House and in which at the very beginning of the opinion the court states the following in bold capital letters: **ADVISORY OPINION IN RE SEPARATION OF POWERS.**

The *Wilkes County* court utilized dicta from two cases – *Johnson* and *Whitehurst* -- to reach an unnecessary and unwarranted conclusion that there is a vested right in a statute of limitations defense without stating the basis for that determination. Such an opinion deserves no precedential deference.

### D. Other Decisions by This Court Also Have Recognized the Original Meaning and Limited Application of the *Ex Post Facto* Clause in the North Carolina Constitution

The validity of a retrospective legislative enactment operating like Section 4.2.(b) of the SAFE Child Act was addressed by the North Carolina Supreme Court in the same year that Article I, § 24 was amended to prohibit certain types of retrospective civil tax legislation. The question of whether there is a vested right to a limitations defense under Article I, § 19 -- the basis of the Panel's majority opinion -- was long-ago determined by this Court in *Hinton v. Hinton,* 61 N.C. 410 (1868) where this Court held that there is no vested right in a limitations defense and that the legislature can retroactively revive claims. Quoting the *Hinton* Court:

> There is in this case no interference with vested rights. The effect of the statute is not to take from the devisee his property and give it to the widow, but merely to take from him *a right conferred by the former statute*, to bar the widow's writ of dower, by suspending the operation of that statute for a given time; in other words, it affects the *remedy* and not the right of property. **The power of the Legislature to pass retroactive statutes affecting remedies is settled.**

*Hinton v. Hinton*, 61 N.C. at 414-15 (italics in original, bold emphasis added). In both *Phillips* and *Hinton* this Court explicitly recognized our General Assembly's ability to revive time-barred claims. The decisions in *Phillips* and *Hinton* have never been distinguished or overruled and are still good law today.

Just a few years later this Court reaffirmed its holding in *Hinton*:

> Retroactive laws are not only not forbidden by the state constitution but they have been sustained by numerous decisions in our own state. See *State v. Bond,* 4 Jones, 9; *State v. Bell,* Phil., 76; *State v. Pool,* 5 Ired., 105, and *Hinton v. Hinton,* Phil., 410, where it was expressly held "that retroactive legislation is not unconstitutional, and that retroactive legislation is competent to affect remedies not rights."

*Tabor v. Ward*, 83 N.C. 291, 294 (1880) (emphasis added).

The people of North Carolina adopted their third Constitution in 1971 where they moved Article I, § 32 to § 16 and made one minor adjustment by changing the phrase "ought to be passed" to "shall be enacted." Article I, § 16 now reads:

> Retrospective laws, punishing acts committed before the existence of such laws and by them only declared criminal, are oppressive, unjust, and incompatible with liberty, and therefore no *ex post facto* law shall be enacted. No law taxing retrospectively sales, purchases, or other acts previously done shall be enacted.

N.C. Const. Art. I, § 16 (1971) (emphasis added).

At the time this third Constitution was adopted the people of North Carolina, through their representatives, were well aware of the ability to amend the state Constitution to ban retrospective civil legislation. Instead, the people of North Carolina left this constitutional provision intact thereby reaffirming its application as interpreted by this Court soon after its initial adoption in 1776 and also

reaffirming this Court's decisions interpreting this section prior and subsequent to it being amended in 1868. As this Court has stated:

> Constitutional conventions that readopt provisions in earlier constitutions without change are presumed to have confirmed and acquiesced in the prior judicial interpretations of the provision.

*Virmani v. Presbyterian Health Servs. Corp.*, 127 N.C. App. 629, 643–44 (1997), *aff'd in part, rev'd in part on other grounds,* 350 N.C. 449 (1999) (citations omitted).

The North Carolina Supreme Court decisions in *State v. ___, Phillips v. Cameron, State v. Bell, Hinton v. Hinton* and *Tabor v. Ward* are the earliest decisions addressing whether the North Carolina Constitution placed any limits on retrospective civil litigation -- including retrospective civil litigation reviving a time-barred claim -- and not one of those five decisions has ever been implicitly or explicitly overruled. It is Article I, § 16 and these North Carolina Supreme Court decisions interpreting it that control the determination of the issue before this Court and not the vacuous and opaque "vested rights" decision relied upon by the dissent and the Defendant.

## V. N.C.G.S. § 1-52(16) DOES NOT APPLY TO PLAINTIFFS' CLAIMS

Defendant argues it has a vested right in a statute of repose, but the only "repose" statute referenced in its Brief applies to latent injury claims and not to child victims of sexual abuse.

### A. N.C.G.S. § 1-52(16) Applies ONLY to Latent Injury Claims

N.C.G.S. § 1-52(16) has one direct and explicit purpose -- to put a limitation on the discovery rule as it relates to latent injuries. In this case the Plaintiffs

claims accrued when they were first victimized by a sexual predator as children. Their claims do not involve situations of a latent injury where the victim had no idea they had been assaulted, abused or otherwise harmed. Defendant treats the claims of these Plaintiffs and others as if they are all repressed memory claims where a child victim alleges he or she first recalled being sexually abused well into their adult years. Defendant, however, does not point to a single case filed in North Carolina that involves repressed memory. The claims of these Plaintiffs and other plaintiffs who had filed cases in counties across the state accrued when they were sexually assaulted as children and in no way relate to the latent injury provision of N.C.G.S. § 1-52(16). Defendant's assertion sadly ignores the harsh reality of a child being sexually abused. Make no mistake about it . . .

- When a twelve-year-old boy is being sodomized by an adult male the child most certainly is terrified and confused, but he knows what is happening to him and his claim accrued at that time;
- When a fourteen-year-old girl is being raped by an adult to whose care she was entrusted she, too, most certainly is terrified and confused, but she knows what is happening to her and her claim accrued at that time;
- After a nine-year-old little girl has been molested by an adult pedophile, the tears and anxiety that follow make it clear that her claim accrued when she was being sexually abused.

Defendant's assertion, in addition to being illogical and misguided, shows a cold indifference to the life of emotional and psychological torment victims of child sexual abuse are forced to endure – an unrelenting torment that starts from the time they are first sexually abused.

N.C.G.S. § 1-52(16) is designed to address latent claims which relate to such things as chemical exposure, failure to diagnose illness or disease and groundwater contamination. The challenged amendments to N.C.G.S. § 1-52(16) do not seek to extend or eliminate a limitations period on discovery of a latent injury, but instead address the harsh reality that the general three year statute of limitations period established by N.C.G.S. § 1-52 works a grave injustice on victims of childhood sexual assault.

This Court has repeatedly interpreted N.C.G.S. § 1-52(16) to apply only to claims involving latent injury. Addressing subsection 16 and the statutory provision it repealed and replaced in 1979, the Supreme Court stated:

> Both of these statutes modify the sometimes harsh common law rule by protecting a potential plaintiff in the case of a latent injury by providing that a cause of action does not accrue until the injured party becomes aware or should reasonably have become aware of the existence of the injury. That is the extent to which the common law rule is changed; as soon as the injury becomes apparent to the claimant or should reasonably become apparent, the cause of action is complete and the limitation period begins to run. It does not matter that further damage could occur; such further damage is only aggravation of the original injury.

*Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 492-493, (1985) (citations omitted); s*ee also, Stahle v. CTS Corp.*, 817 F.3d 96, 101 (2016) ("Wehighlighted the Supreme Court's finding that the statute's "primary purpose was to change the accrual date from which the period of limitations begins to run on latent injury claims" and to add "a ten-year statute of repose . . . **to latent injury claims**.")(emphasis added).

The North Carolina Supreme Court clearly has established that N.C.G.S. § 1-52 (16) is both remedial and applies only to latent claims:

> The language and the spirit of the statute suggest the legislature intended to allow an otherwise qualified plaintiff to recover damages after the normal expiration of the statute of limitations **if the injury was latent**. We also find this statute to be **remedial in nature** and will construe it liberally to give effect to that intent.

*Misenheimer v. Burris*, 360 N.C. 620, 623 (2006).

As discussed above, a statute that is remedial in nature does not establish substantive rights and is, therefore, subject to revision, alteration and/or revival by the legislature.

A child sexual abuse victim is clearly in a different category than the owner of a home constructed with a defective foundation or someone exposed to toxic chemicals in drinking water. The tort is complete when it happens. The evil the legislature was attempting to remedy was not that the harm these victims endured was not "apparent or ought reasonably to have become apparent," but instead is the evil-upon-evil these victims suffer first by being sexually abused and second by being prohibited from bringing their claims because of short statutes of limitation that expire years or even decades before the childhood victims are able to come to terms with what has happened to them and are strong enough seek redress from these sexual predators and their enablers. Through the revival provision of the SAFE Child Act, the legislature sought to right a wrong and provide a limited timeframe in which former child sexual abuse victims could seek a remedy because their only potential remedy had been taken away from them much too soon.

As the North Carolina Supreme Court has stated:

> [I]f a statute is remedial in nature, seeking to "advance the remedy and repress the evil" it must be liberally construed to effectuate the intent of the legislature.

*Id.* at 623, 637 S.E.2d at 175.

### B. The Court Must Defer to the Express Legislative Intent When Considering Amendments to Limitations Statutes, Including Statutes of Repose

Because the North Carolina Supreme Court has held that N.C.G.S. § 1-52(16) is remedial, it arguably would more appropriately be considered a statute of limitations and not a statute of repose. Our Supreme Court does not seem aware of this contradiction when it calls it a statute of repose while holding that it is remedial. We have shown that the statute does not apply to the Plaintiffs' claims, but, arguendo, *even if it did apply in this case*, the legislature would be fully within its authority if it chose to amend, abolish or exempt that statute as it applies to claims of childhood sexual abuse victims, especially since all these children were victimized while under a legal disability.

It is well-established law in North Carolina that the General Assembly can alter, extend or toll a statute of repose and can also expressly exclude the application of a statute of repose to certain claims including claims of people under disabilities when the claim accrues.

In *Bryant v. Adams*, the North Carolina Court of Appeals held that the then six-year statute of repose for product liability claims was tolled for claims of minors injured by a product defect. The *Bryant* court showed judicial deference to the

legislature and its ability to modify the application of statutes of repose when it is the legislature's express intent to do so.

As the *Bryant* court stated:

> In construing a statute, we must first ascertain the legislative intent to ensure that the purpose and intent of the legislation are satisfied. In making this determination,we look first to the language of the statute itself. If the language used is clear and unambiguous, this Court must not engage in judicial construction but must apply the statute to give effect to the plain and definite meaning of the language. "A fundamental rule of statutory construction is that when the legislature has erected within the statute itself a guide to its interpretation, that guide must be considered by the courts in the construction of other provisions of the act which, in themselves,are not clear and explicit." On its face, the Act instructs us, in Section 6, that G.S. § 1-17 may operate to toll the statute of repose provision.

*Bryant v. Adams*, 116 N.C. App. 448, 457 (1994), *disc. rev. denied*, 339 N.C. 736 (1995).

The express language relied upon by the *Bryant* court under the products liability act stated that "the provisions of this act shall not be construed to amend or repeal the provisions of G.S. 1-17." *Id.* at 456, 448 S.E.2d at 836.

In this case, it is equally clear that the legislature has expressed its intent that the 10-year limitations period of N.C.G.S. § 1-52(16) should not apply to claims related to childhood sexual abuse because the legislature expressly excluded it from application to N.C.G.S. § 1-17(d) and (e). This court need look only at the express language in N.C.G.S. § 1-52(5), (16)and (19) where in each subsection the legislature stated **"except as provided by GS. S. 1-17 (d) and (e).**" The legislature's intent to specifically exclude the extension of the disabilities and limitations periods under N.C.G.S. § 1-17 from the provisions of N.C.G.S. § 1-52(16)could not be clearer or more

expressly stated. In fact, the language in these subsections is more direct than that relied upon by the *Bryant* Court.

Commenting on the legislature's intent under product's liability act, the *Bryant* court stated:

> [T]he express intent of the legislature [was] to provide minors and others with disabilities a longer time in which to file suit for injuries caused by a defective product.

*Id.* at 458. The express intent of the legislature to provide minors who were victims of sexual assault a longer time in which to file suit for their injuries is equally clear in this case.

Finally, as noted in *Bryant*, the court should defer to legislative intent, even in situations where it is altering a statute of repose:

> Defendants also argue that tolling the products liability statute of repose fordisabilities negates the entire purpose of the statute of repose. If the legislative intent is to place a greater value upon the right of a person under certain disabilitiesto have an extended time in which to bring suit than upon the right of a manufacturerto be free from suit after six years, the courts must defer to that intent.

*Id.*

If the Legislature can toll a statute of repose then there is no substantive "vested" right in a limitations defense based on such a statute.

### C. "Unless Otherwise Provided By Law . . ."

The ability of the legislature to exclude or modify limitations periods, including statutes of repose, is further evident in the language of N.C.G.S. § 1-52(16) which begins with the phrase, "unless otherwise provided by law . . .." That language

predates the revival provision challenged by Defendant and shows that the General Assembly intended to reserve the right to exclude application of the provisions of this statute to particular claims. As noted above, when the legislature specifically excepted the application of the statute to the newly enacted limitations periods for childhood victims of sexual assault, the legislature itself "otherwise provided by law" that the limitations periods of N.C.G.S. § 1-52 should not apply to those claims.

## VI. LEGISLATION IMPACTING A FUNDAMENTAL/VESTED RIGHT MUST UNDERGO SUBSTANTIVE DUE PROCESS ANALYSIS

### A. "Vested Rights" Was the Antiquated Approach to Assessing What Are Now Called Fundamental Rights

In his dissent, Judge Carpenter contends that if *Wilkes County* applies to the challenged revival provision of the SAFE Child Act the provision should not be subject to substantive due process analysis. Judge Carpenter asserts that vested rights are a "special species of fundamental rights," and that such rights are "beyond legislative encroachment." *McKinney v.* Goins, 892 S.E.2d at 486 (Carpenter, J. dissenting). Judge Carpenter's assertion is incorrect for many reasons.

Throughout his dissent, Judge Carpenter writes that the *Wilkes County* Court most certainly was addressing vested rights under the Law of the Land provision of the North Carolina Constitution because it is that provision that creates the right. Our Law of the Land provision has repeatedly been acknowledged to be the equivalent of the due process clause of the Federal Constitution. As such, Judge Carpenter necessarily argues that a vested right is a due process right but then proceeds to argue that it is exempt from substantive due process analysis. Despite

his stated fealty to *stare decisis* when finding *Wilkes County* controlling in this case, that commitment wanes when it comes to applying this Court's unquestioned adoption of substantive due process.

### 1. Historical Context Makes It Clear That Substantive Due Process Replaced Vested Rights Jurisprudence

*Wilkes County* was decided in 1933. The United States Supreme Court first used the phrase "substantive due process" in 1948. *See* John V. Orth, *Due Process of Law* 32 n. 36 (2003) (citations omitted). A Westlaw search indicates that the phrase "substantive due process" was first used by a North Carolina appellate court in the 1965 decision *State v. Smith* in which the court stated:

> For these reasons the resolution denies substantive due process. U.S. Const., amend. XIV, § 1; N.C. Const., Art. 1, § 17. . . . In substantive law, due process may be characterized as a standard of reasonableness, and as such it is a limitation upon the exercise of the police power.

*State v. Smith*, 265 N.C. 173, 180 (1965) (other citations omitted) (cleaned up).

The historic transition from vested rights to fundamental rights and substantive due process has been well documented by scholars. In what has been described as a "remarkable work of scholarship,[7]" Professor James Kainen, now the Brendan Moore Chair of Advocacy at Fordham School of Law[8], addressed the historical context of vested rights and retroactive legislation, and traced this

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[7] Jeffrey Omar Usman, *Constitutional Constraints on Retroactive Civil Legislation: The Hollow Promises of the Fed. Constitution & Unrealized Potential of State Constitutions*, 14 Nev. L.J. 63, 98–99 (2013)

[8] https://www.fordham.edu/school-of-law/faculty/directory/full-time/james-kaine

transition from vested rights to substantive due process analysis of fundamental rights. In doing so, Professor Kainen made the following observations:

> In modern retrospectivity analysis, considerations of substantive due process play the same role as vesting analysis once did.
> . . .
>
> [R]etroactivity is a superfluous category in modern due process analysis. The modern analysis treats the notion of vested rights as vacuous and collapses the idea of non-retroactivity into substantive due process.
> . . .
>
> The idea of retroactivity played a central role in the constitutional protection of property and contract rights before the late nineteenth century development of substantive due process. When protecting contracts against impairment or property against deprivation by other than "due process of law" or "the law of the land," nineteenth century courts perceived themselves as shielding individual rights from only retrospective interference.
> . . .
>
> "Questions of retroactive law are essentially questions of substantive due process" and "any attempt to treat retroactivity as a special category to which special rules are to be applied is wasted effort."
> . . .
>
> Consequently, under the modern analysis a right's vulnerability to subsequent legislative interference does not depend upon whether the right has "vested." Substantive due process provides the test. Courts consider the rationality, reasonableness or arbitrariness of legislation - factors which attach no independent significance to a statute's being vested rights-retroactive.

James L. Kainen, *The Historical Framework for Reviving Constitutional Prot. for Prop. & Contract Rights*, 79 Cornell L. Rev. 87, 132 (1993).

Other scholars also have recognized that vested rights analysis was replaced by substantive due process analysis. For example:

> The vested rights doctrine "has long been recognized as the progenitor of our modern law of substantive due process."

Jeffrey Omar Usman, *Constitutional Constraints on Retroactive Civil Legislation: The Hollow Promises of the Fed. Constitution & Unrealized Potential of State Constitutions*, 14 Nev. L.J. 63, 98 (2013) (citation omitted).

### 2. Modern Jurisprudence Asks Whether a Due Process Challenge to a Legislative Act Involves a Fundamental Right

There is no historical basis for either Judge Carpenter or Defendant to assert that a "vested right" is a constitutional right of a different form and character than a fundamental right. Time marches on and so does the law.

Defendant challenged the revival provision of the SAFE Child Act under the Law of the Land/due process provision of the North Carolina Constitution and now asks this Court to find that unanimously adopted piece of legislation unconstitutional without applying the current law related to due process challenges. Whether one characterizes a right as vested or fundamental, such a right must be found in our Constitution. In this case – if the purported "vested right" existed – it would derive from the same word in the Law of the Land clause from which a fundamental right would derive – property.

No matter what this Court may have decided about challenges to other retrospective legislation in years past, modern substantive process jurisprudence now requires that this Court assess the law before it that is being challenged, determine if that law impacts a fundamental constitutional right and then, based on that determination, subject the law to either strict scrutiny or a rational basis review.

Defendant asks this Court to find the challenged revival provision unconstitutional by ignoring established law regarding substantive due process because Defendant knows that the revival provision of the SAFE Child Act easily passes both a rational basis and a strict scrutiny assessment.

### B. The North Carolina Constitution Does Not Protect Pedophiles and their Enablers

"A fundamental right is a right explicitly or impliedly guaranteed to individuals by the United States Constitution or a state constitution." *Comer v. Ammons*, 135 N.C. App. 531, 539, 522 S.E.2d 77, 82 (1999). As discussed at length above, this Court has never found a statute of limitations defense to be a fundamental/vested right under the North Carolina Constitution. Fundamental/vested rights do not exist in the ether but must have a constitutional foundation. To find a fundamental/vested right under our Constitution in this case would elevate pedophiles and their enablers to the same level of constitutional protection afforded such deeply personal rights as tangible real and personal property, bodily health decision-making, family autonomy, and consensual sexual conduct between adults. Child predators and their enabling institutions do not fall in this category. *See Gilbert v. N. Carolina State Bar*, 363 N.C. 70, 82 (2009) ("The protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity.") (citation omitted).

### C. Substantive Due Process Review of the SAFE Child Act's Revival Provision is Required

Even if this Court determines that S.L. 2019-245, § 4.2.(b) impacts a right deemed fundamental/vested, that does not automatically invalidate the legislation. In his dissent from the majority opinion of the three-judge panel, Judge McGee did subject the challenged legislation to substantive due process analysis and concluded that the legislation is constitutional. (R. p. 111-114). Judge McGee also discussed the *State v. Bell* decision and noted that none of the cases cited by the majority tie this purported vested right to any provision of the North Carolina Constitution. Judge McGee disagreed with the three-judge panel's majority's approach to precedent stating that "it is of the utmost importance to understand the lack of clarity in the precedent before this Court." (R. p. 108-110).

The majority below also subjected the challenged revival provision to substantive due process analysis and determined that the legislation passes constitutional muster even under a strict scrutiny assessment.

If a right is fundamental/vested, then any legislation impacting that right **must** be subjected to substantive due process analysis:

> When state action is alleged to abridge recognized personal rights fundamental to every individual . . . **substantive due process review is required**. If state action unduly encroaches on "fundamental personal rights," whether of an individual or a "class" of people, then strict scrutiny review applies. Under strict scrutiny review, "'the party seeking to apply the law must demonstrate that it serves a compelling state interest.'" . . . However, "'[i]f the right infringed upon is not fundamental in the constitutional sense, the party seeking to apply it need only meet the traditional test of establishing that the law is rationally related to a legitimate state interest.'"

*M.E. v. T.J.,* 275 N.C. App. 528, 550–51 (2019), *aff'd as modified*, 380 N.C. 539 (2022) (*quoting Clayton v. Branson*, 170 N.C. App. 438, 455 (2005); *State v. Fowler*, 197 N.C. App. 1 (2009); (other citations omitted) (emphasis added)).

### D. Substantive Due Process Analysis First Requires a Determination That the Right Allegedly Infringed Upon Is a Fundamental Right

"In order to determine whether a law violates substantive due process, we must first determine whether the right infringed upon is a fundamental right." *Affordable Care, Inc. v. N.C. Bd. of Dental Exam'rs,* 153 N.C. App. 527, 535, 571 S.E.2d 52, 59 (2002) (citation omitted). "If the right is constitutionally fundamental, then the court must apply strict scrutiny . . . " *Id.* at 535-36, 571 S.E.2d at 59. "If the right infringed upon is not fundamental in the constitutional sense, the party seeking to apply it need only meet the traditional test of establishing that the law is rationally related to a legitimate state interest." *Id.* at 536, 571 S.E.2d at 59.

Finding a right to be fundamental implicates concepts of property, liberty and justice that are unrelated to statutes of limitation. As the North Carolina Court of Appeals has recognized:

> Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed. Second, we have required in substantive-due-process cases a careful description of the asserted fundamental liberty interest.

*State v. Williams*, 235 N.C. App. 201, 205–06 (2014) (*citing Washington v. Glucksberg,* 521 U.S. 702 (1997)).

Substantive due process is intended to protect the public from egregious overreach by the legislature. "In general, substantive due process protects the public from government action that unreasonably deprives them of a liberty or property interest." *Rhyne v. K-Mart Corp.,* 358 N.C. 160, 181 (2004). Substantive due process protection prevents the government from engaging in conduct that shocks the conscience . . . . *State v. Thompson,* 349 N.C. 483, 491 (1998) (citations omitted)(cleaned up). "Substantive due process is a guaranty against arbitrary legislation, demanding that the law shall not be unreasonable, arbitrary or capricious, and that the law be substantially related to the valid object sought to be obtained." *State v. Joyner,* 286 N.C. 366, 371 (1975). A comprehensive piece of legislation like the SAFE Child Act that was fully debated and unanimously adopted is neither arbitrary nor capricious and most certainly does not shock the conscience.

The United States Supreme Court decision in *Campbell v. Holt* and this Court's decisions in *Hinton* and *Bell* establish that what is "deeply rooted" in this State's and the Nation's history is that there is no fundamental right in a limitations defense and that the North Carolina General Assembly is free to revive remedies when justice so requires.

In addressing an asserted liberty interest under the Law of the Land clause, this Court has recognized the danger of an expansive view of fundamental rights:

> In undertaking such an analysis, we must tread carefully before recognizing a fundamental liberty interest, which would "to a great extent, place the matter outside the arena of public debate and legislative action" and **run the very real risk of transforming the Due Process Clause into nothing more than the "policy preferences of the Members of this Court."**

*Standley v. Town of Woodfin*, 362 N.C. 328, 332 (2008) (emphasis added) (*quoting Washington v. Glucksberg,* 521 U.S. 702 (1997)).

To find a fundamental right in a limitations defense under our Constitution would allow the general law of the land clause to negate the directly applicable *ex post facto* provision of Article I, § 16 and would continue to contradict the numerous decisions by this Court holding that statutes of limitations are procedural devices affecting remedies and that there is no vested right in procedure or a remedy.

### E. If A Limitations Defense is Not a Vested Right, Then the Challenged Revival Provision Need Only Pass Rational Basis Analysis

The inquiry under rational basis analysis is whether the challenged statute bears some rational relationship to a conceivable legitimate governmental interest. *Liebes v. Guilford County Dept. of Public Health*, 213 N.C. App. 426, 724 S.E.2d 70 (2011). "Under the rational basis test, the law in question is presumed to be constitutional." *North Carolina Bd. Of Mortuary Science v. Crown Memorial Park, LLC,* 162 N.C. App. 316, 318 (2004). *See also Clayton v. Branson*, 170 N.C. App. 438, 455, 613 S.E.2d 259, 271 (2005) ("The deference afforded to the government under the rational basis test is so deferential that ... a court can uphold the regulation if the court can *envision* some rational basis for the classification.") (citations omitted).

Without question there is a legitimate government interest in protecting victims of childhood sexual abuse and in both exposing and holding childhood sexual predators and their enablers responsible for the life-altering harm they have caused.

Reviving those claims to accomplish those purposes is a rational approach to achieving these objectives.

### F. The Revival Provision of the SAFE Child Act Easily Passes Strict Scrutiny

***When I was 13 years old and I was standing in the shower getting raped . . .***
***Do you think I knew what a statute of limitations was?***[9]

The compelling state interest addressed by the challenged legislation is evident in the name of the bill:

**AN ACT TO PROTECT CHILDREN FROM SEXUAL ABUSE AND TO STRENGTHEN AND MODERNIZE SEXUAL ASSAULT LAWS**

The challenged revival provision is constitutional even if this court finds it impacts a fundamental/vested right. The State of North Carolina has a compelling interest in identifying and exposing previously unknown child sexual predators, protecting the children of this state, shifting the cost of abuse from victims to those who committed or enabled the abuse, educating the public about the tragic prevalence of child sexual abuse and providing survivors of child sexual abuse access to justice based on current medical, psychological and scientific understandings of how long it takes the vast majority of childhood victims of sexual assault to even attempt to come to terms with what they have suffered. Providing a path to justice for victims who have the courage and emotional strength to come forward has the much-needed societal effect of exposing hidden sexual predators.

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[9] Symone Shinton, *Pedophiles Don't Retire: Why the Statute of Limitations on Sex Crimes Against Children Must Be Abolished*, 92 Chi.-Kent L. Rev. 317 (2017).

A strict scrutiny analysis under Article I, § 19 requires that the State show that the law is narrowly tailored to serve a compelling governmental interest. *State v. Bishop*, 368 N.C. 869, 876-77, 787 S.E.2d 814, 819-20 (2016).

It is undisputed that the state of North Carolina has a compelling interest in protecting minors from sexual predators and their enablers and in providing victims of childhood sexual abuse with a remedy for what they have suffered.

In *State v. Bishop*, our Supreme Court recognized that protecting children from online bullying is a compelling governmental interest. *Id.* 368 N.C. at 876-77, 787 S.E.2d at 819-20 ("That protecting children from online bullying is a compelling governmental interest is undisputed.") (citations omitted). While online bullying is a heavy societal problem, it is not as grave as an adolescent being sexually abused. The *State v. Bishop* Court further stated:

> [H]ere the State asserts, and defendant agrees, that the General Assembly has a compelling interest in protecting children from physical and psychological harm. . . . Accordingly, in line with these consistent and converging strands of precedent, we reaffirm that the State has "a compelling interest in protecting the physical and psychological well-being of minors.

*Id.*

The effects of child sexual abuse include lost earnings; increased healthcare costs; decreased productivity, happiness, and ability to care for children; disrupted or destroyed marriages; PTSD and addiction.

Studies suggest that **the average age of disclosure in a majority of cases involving childhood sex abuse is age fifty-two (52)**. N. Spröber et al., *Child Sexual Abuse in Religiously Affiliated and Secular Institutions*, 14 BMC PUB.

HEALTH 1, 3 (Mar. 27, 2014); CHILD USA, Average Age of Disclosure of Child Sexual Abuse is 52 Years Old, (2018), www.childusa.org/law. At least thirty-three percent (33%) of child sexual abuse cases are never reported.[10]

Through the SAFE Child Act, the North Carolina legislature recognized the difficulty childhood survivors face in coming to terms with their sexual abuse and in seeking justice – especially within the generally applicable statute of limitations periods which were adopted long before society came to understand the grueling emotional and psychological road child victims of sexual abuse must walk. Encouraging victims to identify previously hidden childhood predators and enabling institutions – and holding these actors liable even years later – will send a strong message to other child serving institutions about their responsibility to the children in their care.

Short statutes of limitation play right into the hands of sexual predators and serve to shield these criminals and enhance their ability to abuse again. Shutting the courthouse door to claims against these predators and their enablers turns a blind eye to the realities these victims face.

## VII. THIS COURT SHOULD EXPLICITLY OVERRULE *WILKES COUNTY*

The analytical framework for assessing state constitutional challenges to acts of the General Assembly established in *Harper* is utterly irreconcilable with the *Wilkes County* decision -- no matter what the basis for that decision.

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[10] *See id.*; *see also* MARY-ELLEN PIPE ET AL., CHILD SEXUAL ABUSE: DISCLOSURE, DELAY, AND DENIAL 32 (2013) ("failure to disclose is common among sexually abused children.").

### A. *Wilkes County* Did Not Impliedly Overrule *Hinton* or *State v. Bell*

The dissent below justifies reliance upon *Wilkes County* to find the revival provision of the SAFE Child Act unconstitutional by determining that *Wilkes County* overruled *Hinton* and the holding in that case that retrospective civil legislation was not prohibited by our Constitution. Judge Carpenter wrote:

> Thus, because I agree with the Majority on *Hinton*, and because I read *Wilkes* to authoritatively hold the opposite of *Hinton*, I cannot read the two in harmony. My reconciliation is simpler than the Majority's: In my view, *Wilkes* overruled *Hinton*.

*McKinney v. Goin*s, 892 S.E.2d at 485 (Carpenter, J. dissenting).

*Hinton* was decided by this Court in 1868 and holds that there is no vested right to a statute of limitations defense and that the power of the Legislature to pass retroactive statutes affecting remedies is settled. *Hinton v. Hinton*, 61 N.C. 410, 416 (1868). The *Hinton* decision, however, does not expressly reference the North Carolina Constitution. It is interesting that the dissent determines that *Wilkes County* – a decision that does not reference the North Carolina Constitution – implicitly overruled *Hinton* – another decision that does not reference the North Carolina Constitution. In reaching this conclusion, the dissent failed to address *State v. Bell,* 61 N.C. 76 (1867) which was decided before *Hinton* and in which this Court addressed an explicit provision of the North Carolina Constitution and held that the *ex post facto* clause then found in Article 1, § 16 of the North Carolina Constitution did not prohibit retrospective civil legislation. The dissent does not address whether *Wilkes County* also implicitly overruled *State v. Bell* – which it clearly did not. As

noted above, *State v. Bell* has never been overruled and was cited with favor by this Court as recently as 2006. *See Coley v. State*, 360 N.C. 493.

### B. The Cases Decided Prior to *Wilkes County* and Relied upon by Defendant Which Find a Vested Right in a Limitations Defense All Address a Property Right

When arguing that a defendant has a vested right in a statute of limitations defense based upon the Law of the Land clause in the North Carolina Constitution, both Defendant and the dissent below failed to state what specific provision of that clause grants this purported vested right. The Law of the Land clause provides:

> No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. . . .

N.C. Const. art. I § 19.

This clause gives only three opportunities for finding an explicit limitation on the General Assembly's authority to pass retrospective civil litigation: life, liberty or property. There is no basis to argue that either life or liberty are being deprived by reviving claims previously barred by a statute of limitations. The original intent of and historical context related to the Law of the Land makes it clear that property referred to real or personal property and not some judicially created idea of a right to a limitations defense.

This fundamental truth was recognized by Chief Justice Newby and Professor Orth in their seminal work on the North Carolina Constitution when they wrote the following regarding interpretation of this clause:

> "Disseized" is an ancient word, showing the section's origin in medieval England. Roughly equal to "dispossessed," it refers most often to the taking of property.
> . . .
> Depriving a person of his liberty occurs when he is taken or imprisoned. So, too, being deprived of one's property is being **"disseized of his freehold."**

John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 68-69 (2d ed. 2013).

The clear original intent of the protection of "property" in the Law of the Land clause in our Constitution was to prevent the State from interfering with vested title to real or personal property. Black's Law Dictionary defines "freehold" as:

> An estate in land or other real property, of uncertain duration; that is, either of inheritance or which may possibly last for the life of the tenant at the least, and held by a free tenure.

Black's Law Dictionary at https://thelawdictionary.org/freehold/.

This Court has defined "freeholder" as follows:

> A freeholder is one who owns land in fee, or for life, or for some indeterminate period. As there are legal and equitable estates, so there are legal and equitable freeholds.

*State v. Ragland*, 75 N.C. 12, 13 (1876).

The dissent acknowledged that the *Wilkes County* holding can plausibly be read to prohibit only retroactive statutes affecting real property and, indeed, all the pre-*Wilkes County* cases cited by the Defendant in which the court finds a vested right deal with real or personal property issues. That is exactly what the pre-*Wilkes County* decisions cited by the Defendant do – they protect real and personal property rights.

A case that does not make a single reference to the North Carolina Constitution cannot be the precedent upon which such a vested right purportedly is found in the North Carolina Constitution. Contrast the *Wilkes County* decision with this Court's opinion in *Trustees of University of N. Carolina v. Foy* in which this Court held unconstitutional a legislative attempt to deprive the University of North Carolina of tangible real property that the university had acquired pursuant to its rights to escheats and for which it had a vested title. Unlike the *Wilkes County* decision, the *Foy* Court specifically referenced and relied upon the law of the land provision in reaching this result. *Trustees of University of N. Carolina v. Foy,* 5 N.C. 58 (N.C. Conf. 1805).

### C. All Roads Lead to *Wilkes County*

Judge Carpenter and Defendant cite *Waldrop v. Hodges,* 230 N.C. 370 ( 1949); *Jewell v. Price*, 264 N.C. 459 (1965); and *Troy's Stereo Ctr., Inc. v. Hodson,* 39 N.C. App. 591, 595, 251 S.E. 2d 673, 675 (1979) in support of their contention that North Carolina's appellate courts have repeatedly held that a statute of limitations defense is a constitutionally protected vested right. Those cases are illustrative of all the cases decided subsequent to *Wilkes County* that purport to find such a vested right, because all those decisions simply uncritically cite to *Wilkes County* or to other cases that relied upon *Wilkes County* – a classic case of dicta becoming law. *See* Appendix pp. 11-13. When one looks at a bullet point summary of this Court's analysis in each of those three cases, it is clear that not a single one of those decisions did any analysis to hold that a limitations defense is a "constitutionally protected vested

right." Not a single one of these decisions pointed to an explicit limitation in the North Carolina Constitution. Not a single one of these decisions undertook any constitutional analysis and not a single one of these decisions considered the challenged law under substantive due process analysis. In reality, by citing those three cases Judge Carpenter and Defendant essentially are citing *Wilkes County* over and over again. The decisions break down as follows:

***Waldrop v. Hodges,* 230 N.C. 370 (1949)**

- Does not mention North Carolina Constitution
- Decided prior to the North Carolina Supreme Court adopting substantive due process analysis
- Undertakes no independent analysis
- Cites *Johnson v. Winslow* (dicta)
- Cites *Whitehurst v. Dey* (dicta)
- Cites *Wilkes County*

***Jewell v. Price,* 264 N.C. 459 (1965)**

- Does not mention the North Carolina Constitution
- Decided prior to the North Carolina Supreme Court adopting substantive due process analysis
- Undertakes no independent analysis
- Cites *Whitehurst v. Dey* (dicta)
- Cites *Waldrop v. Hodges*
- Cites *Wilkes County v. Forrester*
- Cites *McCrater v. Stone & Webster Engineering Corp.* which relies on . . .

*Waldrop v. Hodges* which relies on . . .

*Johnson v. Winslow* (Dicta)
*Whitehurst v. Dey* (Dicta)
*Wilkes County* v. Forester

***Troy's Stereo Ctr., Inc. v. Hodson,* 39 N.C. App. 591 (1979)**

- Cites *Waldrop v. Hodges* which relies on . . .

  *Johnson v. Winslow* (Dicta)
  *Whitehurst v. Dey* (Dicta)
  *Wilkes County v. Forester*

- Cites *Jewell v. Price* which relies on . . .
  *Whitehurst v. Dey* (Dicta), *Wilkes County v. Forrester* and *Waldrop v. Hodges*

  *McCrater v. Stone & Webster Engineering Corp.* which relies on . . . *Waldrop v. Hodges*

- Undertakes no independent constitutional analysis
- Does not mention the North Carolina Constitution
- Undertakes no substantive due process analysis

Reliance on *Troy's Stereo* is a glaring example of the reality that any contention that the North Carolina Constitution provides a vested right in a limitations defense is born totally and completely of the wrongly decided and subsequently misapplied *Wilkes County* decision.

Like all vested right decisions subsequent to and relying upon *Wilkes County, Troy's Stereo* undertakes no independent constitutional or substantive due process analysis and simply relies on prior decisions – prior decisions that themselves most often rely on *Wilkes County*. Almost every North Carolina appellate decision to state that there is a vested right in a limitations defense does so in reliance on *Wilkes County* and the dicta-upon-dicta in that opinion. A summary of those cases and the basis for each decision can be found on pages 11-13 of the Appendix to this Brief.

**D. The Law Needs Clarification**

The most basic and fundamental flaw in the dissent and in Defendant's argument is that both rely on *Wilkes County* to find a right under the North Carolina Constitution that the decision never recognized. To this day, not a single North Carolina appellate decision has found a vested right in a limitations defense based on application of and analysis under any provision of the North Carolina Constitution, including the Law of the Land clause.

This Court has the sole authority to clarify nearly a century of misapplication of its holding in *Wilkes County*. There is no doubt that the *Wilkes County* decision states that there is a vested right in a limitations defense. However, that conclusion is based on no analysis of any then-existing North Carolina law, unquestionably was not based on any application of the law of the land clause and is in direct conflict with decisions of this Court interpreting and applying the *ex post facto* clause in the North Carolina Constitution.

### E. Statutes of Limitations are Procedural Devices Affecting Only a Remedy and There is No Vested Right in a Procedure or a Remedy

Another aspect of this State's jurisprudence ripe for this Court's clarification is the significant contradiction between the decision in *Wilkes County* and its progeny and the numerous decisions by North Carolina appellate courts holding that statutes of limitation are procedural devices that affect a remedy and that there is no vested right in a procedure or a remedy.

This Court long ago recognized that a "vested right" relates only to tangible real or personal property:

> The term "vested rights" relates to property rights and "a mere expectancy of future benefit, or a contingent interest in property founded on anticipated continuance of existing laws does not constitute a vested right.

*Stanback v. Citizens' Nat. Bank of Raleigh*, 197 N.C. 292 (1929). Vested rights jurisprudence of the 19th and early 20th centuries focused almost exclusively on protecting property rights. *See* Ryan C. Williams, *The One & Only Substantive Due Process Clause*, 120 Yale L.J. 408, 423–27 (2010). A statute of limitations defense is not a tangible real or personal property interest.

In both *Hinton v. Hinton* (1868) and *Tabor v. Ward* (1880) our Supreme Court held that statutes of limitation are remedial and that Article I, § 16 does not prohibit retrospective legislation reviving time-barred claims. Over the past 150+ years this Court repeatedly has stated that statutes of limitation are procedural devices that affect a remedy and that there is no vested right in a procedure or a remedy. For example, just four years ago this Court stated:

> [S]tatutes of limitation are procedural, not substantive, and determine not whether an injury has occurred, but whether a party can obtain a remedy for that injury.

*Quality Built Homes Inc. v. Town of Carthage*, 371 N.C. 60, 69, 813 S.E.2d 218, 225 (2018) (citations omitted). *See also, State v. Morehead*, 46 N.C. App. 39, 42-43, 264 S.E.2d 400, 402 (1980) ("**There is no vested right in procedure** and statutes affecting procedural matters may be given retroactive effect or applied to pending litigation.") (emphasis added).

This procedural/substantive distinction is in keeping with the approach taken by the U.S. Supreme Court in both *Campbell* and *Chase*. In most federal cases now,

that distinction gives way to a substantive due process analysis to any challenged legislation. *See Shadburne-Vinton v. Dalkon Shield Claimants Tr.,* 60 F.3d 1071 (4th Cir. 1995).

Further, altering statutes of limitation has long been recognized as within the legislative domain:

> The statute of limitations is no satisfaction of plaintiff's demand. It is only a bar when set up to the action of the court**. It does not act on the rights of the parties, but only affects the remedy**. It is created by the Legislature and can be removed by the Legislature.

*Alpha Mills v. Watertown Steam-Engine Co.*, 116 N.C. 797, 804 (1895) (emphasis added).

It is a firmly established principle of North Carolina law that there is no constitutionally protected vested right in procedure:

> There is no vested right in procedure, and therefore statutes affecting procedural matters solely may be given retroactive effect when the statutes express the legislative intent to make them retroactive.

*Speck v. Speck*, 5 N.C. App. 296, 301 (1969).

Retroactive laws that impact remedies do not implicate Article I, § 19:

> [The statute] does not contravene any provision of the Constitution, for it affects a remedy and not the rights of any citizen. . . . And such laws are not unconstitutional, though retroactive.

*Lowe v. Harris*, 112 N.C. 472, 501, 17 S.E. 539, 546 (1893) (Burwell, J. dissenting) (citing *Tabor v. Ward,* 83 N.C. 291; *Hinton v. Hinton,* 61 N.C. 410; *Wilkerson v. Buchanan,* 83 N.C. 296; *Phillips v. Cameron,* 48 N.C. 390)).

This Court has held that N.C.G.S. § 1-52(16) is both remedial and applies only to latent claims:

> The language and the spirit of the statute suggest the legislature intended to allow an otherwise qualified plaintiff to recover damages after the normal expiration of the statute of limitations if the injury was latent. We also find this statute to be remedial in nature and will construe it liberally to give effect to that intent.

*Misenheimer v. Burris*, 360 N.C. 620, 623, 637 S.E.2d 173, 175-176 (2006).

Going back to at least 1895 and as recently as 2018, this Court has held and repeatedly reaffirmed that statutes of limitation are procedural devices which affect a remedy and has held and repeatedly reaffirmed that there is no vested right in procedure or a remedy. If, as the Panel's majority asserted, *Wilkes County* and its progeny find a vested right in a limitations defense under the North Carolina Constitution then *Wilkes County* and the subsequent decisions relying upon it directly contradict the numerous decisions by this Court and the North Carolina Court of Appeals establishing that statutes of limitation are procedural and that there is no vested right in procedure. If this court recognizes the *Wilkes County* decision for what it was – a decision pulled from thin air and not grounded in North Carolina law – then it becomes clear that the SAFE Child Act's revival provision is permissible under both Article I, § 16 and under this Court's recognition that any legislation impacting procedure and/or a remedy is constitutionally permissible.

### F. *Wilkes County* and *Harper* Cannot Coexist Together

The *Wilkes County* decision does exactly what this Court in *Harper* said that an appellate court should never do – it found an act of the General Assembly unconstitutional when there is no explicit provision of our Constitution limiting the

General Assembly's action. It is a classic example of the Court invading the legislature's constitutional space.

This Court has two choices: it can turn its back on the analytical framework for assessing state constitutional challenges it recently returned to in *Harper* or it can overrule *Wilkes County* as being in direct contradiction of the fundamental principles recognized in *Harper* and as a glaring example of judicial overreach and dicta becoming law.

Defendant spends an inordinate amount of time in its brief arguing that the sky will fall if this Court overrules *Wilkes County*. Defendant's assertions are as irrational as they are mendacious and have no basis in fact or reason. There is no historical precedent to support an argument that if *Wilkes County* is overruled the legislature will willy-nilly start reviving all manner of time-barred claims. Given that the revival provision of the SAFE Child Act passed unanimously, it appears that our General Assembly believed it already has the constitutional right to revive a time-barred claim unrelated to real or personal property – but it has done so only in this one, limited instance.

The revival provision and the accompanying extension of the statute of limitations for victims of child sexual abuse are part of a comprehensive piece of legislation designed to make our State safer for our children. Indeed, the revival window has already closed, with the two-year window expiring on 31 December 2021. Not a single additional case can be filed under the revival provision. Far from being some precursor to devastation, the revival provision appears to be a thoughtful and

deliberative attempt on the part of the members of the General Assembly to be fair both to child victims of sexual abuse whose statute of limitations had expired and to the perpetrators and enabling entities who could face lawsuits under that provision.

Defendant pontificates about the age of some of the claims that have been filed pursuant to the revival provision and about how hard it will be for defendants to defend those claims. The General Assembly surely anticipated such claims would be filed when it made the two-year revival window applicable to anyone who was victimized as a child and whose limitations period had expired. Additionally, there is nothing in the SAFE Child Act that alters the burden of proof. These claims are no different from any other claims – if the plaintiff cannot meet his/her burden of proof the defendant wins.

Defendant's repeated references to money in its Brief shows a glaring lack of empathy for the lifelong trauma that follows our fellow citizens who were sexually abused as children and our General Assembly's decision to provide some modicum of relief to them. In making this public policy decision the General Assembly certainly recognized some of the significant hurdles faced by children who are sexually abused:

> Because the children in these horrific situations cannot often rely on the people who are supposed to be protecting them, society must give them more time to be able to protect themselves, and seek redress at a later date.
>
> . . .
>
> First, the child has to recognize what is happening is wrong. Second, the victim needs to be willing to come forward and tell someone about the abuse before any action can proceed, and unfortunately, many children are ashamed and embarrassed about the sexual abuse and, thus, are

> hindered from coming forward. Third, the child needs to be honestly believed by someone who can do something.

Erin Khorram, *Crossing the Limit Line: Sexual Abuse & Whether Retroactive Application of Civil Statutes of Limitation Are Legal*, 16 U.C. Davis J. Juv. L. & Pol'y 391, 404, 407–08 (2012).

Through this challenged legislation, the General Assembly made a public policy decision – for a limited two-year period – to place the interests of sexually abused children ahead of the interests of insurance companies and other organizations and entities. It is neither the place nor the province of this Court to question the propriety of that public policy decision.

## CONCLUSION

The SAFE Child Act was a monumental public policy decision by the North Carolina General Assembly to address the horror that is child sexual abuse. The two-year revival window recognized the tremendous mental, emotional, psychological and personal challenges that impact the life of a child who was sexually abused and further recognized how unjust a three-year statute of limitations is to these child victims.

There is no explicit provision of the North Carolina Constitution that limited the General Assembly's authority to pass the SAFE Child Act's revival provision and, for the reasons stated herein, the decision of the Court of Appeals must be affirmed.

Respectfully submitted this the 28th day of December, 2023.

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**N.C. R. App. P. 33(b) Certification**

I certify that all the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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**CERTIFICATE OF SERVICE**

I, Donald S. Higley, II, hereby certify that a copy of the foregoing **PLAINTIFFS-APPELLEES' NEW BRIEF** by serving a copy via electronic transmission upon filing with the Supreme Court of North Carolina and via email, addressed as follows:

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This the 28th day of December, 2023.

*/s/ Donald S. Higley, II*
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# STATE OF NORTH CAROLINA

## Department of The Secretary of State

**To all whom these presents shall come, Greeting:**

**I, Elaine F. Marshall,** Secretary of State of the State of North Carolina, do hereby certify the following and hereto nine (9) sheets to be a true copy of Session Law 2019-245, Senate Bill 199, of the 2019 Legislative Session, entitled

**AN ACT TO PROTECT CHILDREN FROM SEXUAL ABUSE AND TO STRENGTHEN AND MODERNIZE SEXUAL ASSAULT LAWS**

ratified on the 31st day of October, 2019, by

**The General Assembly of North Carolina**

the original of which is now on file and a matter of record in this office.

**In Witness Whereof,** I have hereunto set my hand and affixed my official seal.

**Done in This Office,** at Raleigh, this the 6th day of July, 2020.

Elaine F. Marshall
**Secretary of State**

**GENERAL ASSEMBLY OF NORTH CAROLINA**
**SESSION 2019**

S.L. 2019-246

**SENATE BILL 199**
**RATIFIED BILL**

RECEIVED NOV 01 2019
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AN ACT TO PROTECT CHILDREN FROM SEXUAL ABUSE AND TO STRENGTHEN AND MODERNIZE SEXUAL ASSAULT LAWS.

The General Assembly of North Carolina enacts:

**PART I. EXPAND DUTY TO REPORT CRIMES AGAINST JUVENILES**

**SECTION 1.(a)** Article 39 of Chapter 14 of the General Statutes is amended by adding a new section to read:

"**§ 14-318.6. Failure to report crimes against juveniles; penalty.**

(a) Definitions. – As used in this section, the following definitions apply:

(1) Juvenile. – As defined in G.S. 7B-101. For the purposes of this section, the age of the juvenile at the time of the abuse or offense governs.

(2) Serious bodily injury. – As defined in G.S. 14-318.4(d).

(3) Serious physical injury. – As defined in G.S. 14-318.4(d).

(4) Sexually violent offense. – An offense committed against a juvenile that is a sexually violent offense as defined in G.S. 14-208.6(5). This term also includes the following: an attempt, solicitation, or conspiracy to commit any of these offenses; aiding and abetting any of these offenses.

(5) Violent offense. – Any offense that inflicts upon the juvenile serious bodily injury or serious physical injury by other than accidental means. This term also includes the following: an attempt, solicitation, or conspiracy to commit any of these offenses; aiding and abetting any of these offenses.

(b) Requirement. – Any person 18 years of age or older who knows or should have reasonably known that a juvenile has been or is the victim of a violent offense, sexual offense, or misdemeanor child abuse under G.S. 14-318.2 shall immediately report the case of that juvenile to the appropriate local law enforcement agency in the county where the juvenile resides or is found. The report may be made orally or by telephone. The report shall include information as is known to the person making it, including the name, address, and age of the juvenile; the name and address of the juvenile's parent, guardian, custodian, or caretaker; the name, address, and age of the person who committed the offense against the juvenile; the location where the offense was committed; the names and ages of other juveniles present or in danger; the present whereabouts of the juvenile, if not at the home address; the nature and extent of any injury or condition resulting from the offense or abuse; and any other information which the person making the report believes might be helpful in establishing the need for law enforcement involvement. The person making the report shall give his or her name, address, and telephone number.

(c) Penalty. – Any person 18 years of age or older, who knows or should have reasonably known that a juvenile was the victim of a violent offense, sexual offense, or misdemeanor child abuse under G.S. 14-318.2, and knowingly or willfully fails to report as required by subsection (b) of this section, or who knowingly or willfully prevents another person from reporting as required by subsection (b) of this section, is guilty of a Class 1 misdemeanor.

(d) Construction. – Nothing in this section shall be construed as relieving a person subject to the requirement set forth in subsection (b) of this section from any other duty to report required by law.

(e) Protection. – The identity of a person making a report pursuant to this section must be protected and only revealed as provided in G.S. 132-1.4(c)(4).

(f) Good-Faith Immunity. – A person who makes a report in good faith under this Article, cooperates with law enforcement in an investigation, or testifies in any judicial proceeding resulting from a law enforcement report or investigation is immune from any civil or criminal liability that might otherwise be incurred or imposed for that action, provided that person was acting in good faith.

(g) Law Enforcement Duty to Report Evidence to the Department of Social Services. – If any law enforcement officer, as the result of a report, finds evidence that a juvenile may be abused, neglected, or dependent as defined in G.S. 7B-101, the law enforcement officer shall make an oral report as soon as practicable and make a subsequent written report of the findings to the director of the department of social services within 48 hours after discovery of the evidence. When a report of abuse, neglect, or dependency is received, the director of the department of social services shall make a prompt and thorough assessment, in accordance with G.S. 7B-302, to determine whether protective services should be provided or the complaint filed as a petition.

(h) Nothing in this section shall be construed as to require a person with a privilege under G.S. 8-53.3, 8-53.7, 8-53.8, or 8-53.12 or with attorney-client privilege to report pursuant to this section if that privilege would prevent them from doing so."

**PART II. EXPANDING THE STATUTE OF LIMITATIONS FOR MISDEMEANOR CRIMES INVOLVING ABUSE AGAINST CHILDREN**

**SECTION 2.(a)** G.S. 15-1 reads as rewritten:

"**§ 15-1. Statute of limitations for misdemeanors.**

(a) The crimes of deceit and malicious mischief, and the crime of petit larceny where the value of the property does not exceed five dollars ($5.00), and all misdemeanors except malicious misdemeanors, shall be charged within two years after the commission of the same, and not afterwards: Provided, that if any pleading shall be defective, so that no judgment can be given thereon, another prosecution may be instituted for the same offense, within one year after the first shall have been abandoned by the State.

(b) Notwithstanding subsection (a) of this section, the following misdemeanors shall be charged within 10 years of the commission of the crime:

(1) G.S. 7B-301(b).
(2) G.S. 14-27.33.
(3) G.S. 14-202.2.
(4) G.S. 14-318.2.
(5) G.S. 14-318.6."

**PART III. PROTECTING CHILDREN ONLINE FROM HIGH-RISK SEX OFFENDERS**

**SECTION 3.(a)** G.S. 14-202.5 reads as rewritten:

"**§ 14-202.5. ~~Ban use of commercial social networking Web sites by sex offenders.~~Ban online conduct by high-risk sex offenders that endangers children.**

(a) Offense. – It is unlawful for a high-risk sex offender ~~who is registered in accordance with Article 27A of Chapter 14 of the General Statutes to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages on the commercial social networking Web site.~~to do any of the following online:

(1) To communicate with a person that the offender believes is under 16 years of age.

(2) To contact a person that the offender believes is under 16 years of age.

(3) To pose falsely as a person under 16 years of age with the intent to commit an unlawful sex act with a person the offender believes is under 16 years of age.

(4) To use a Web site to gather information about a person that the offender believes is under 16 years of age.

(5) To use a commercial social networking Web site in violation of a policy, posted in a manner reasonably likely to come to the attention of users, prohibiting convicted sex offenders from using the site.

(b) Definition of Commercial Social Networking Web Site. – For the purposes of this section, a "commercial social networking Web site" ~~is an~~ includes any Web site, application, portal, or other means of accessing the Internet ~~Web site~~ that meets all of the following requirements:

(1) Is operated by a person who derives revenue from membership fees, advertising, or other sources related to the operation of the Web site.

~~(2) Facilitates the social introduction between two or more persons for the purposes of friendship, meeting other persons, or information exchanges.~~

(3) Allows users to create personal Web pages or ~~personal~~ profiles that contain ~~information such as~~ the user's name or ~~nickname of the user,~~ nickname, photographs ~~placed on the personal Web page by the user,~~ of the user, and other personal ~~information about the user, and links to other personal Web pages on the commercial social networking Web site of friends or associates of the user that may be accessed by other users or visitors to the Web site.~~information.

(4) Provides users or visitors ~~to the commercial social networking Web site mechanisms~~ a mechanism to communicate with ~~other users,~~ others, such as a message board, chat room, ~~electronic mail,~~ or instant messenger.

(c) Exclusions from Commercial Social Networking Web Site Definition. – A commercial social networking Web site does not include ~~an Internet~~ a Web site that ~~either:~~meets either of the following requirements:

~~(1) Provides only one of the following discrete services: photo-sharing, electronic mail, instant messenger, or chat room or message board platform; or~~

(2) Has as its primary purpose the facilitation of commercial ~~transactions involving goods or services between its members or visitors.~~transactions, the dissemination of news, the discussion of political or social issues, or professional networking.

(3) Is a Web site owned or operated by a local, State, or federal governmental entity.

(c1) Definition of High-Risk Sex Offender. – For purposes of this section, the term "high-risk sex offender" means any person registered in accordance with Article 27A of Chapter 14 of the General Statutes that meets any of the following requirements:

(1) Was convicted of an aggravated offense, as that term is defined in G.S. 14-208.6, against a person under 18 years of age.

(2) Is a recidivist, as that term is defined in G.S. 14-208.6, and one offense is against a person under 18 years of age.

(3) Was convicted of an offense against a minor, as that term is defined in G.S. 14-208.6.

(4) Was convicted of a sexually violent offense, as that term is defined in G.S. 14-208.6, against a person under 18 years of age.

(5) Was found by a court to be a sexually violent predator, as that term is defined in G.S. 14-208.6, based on a conviction of a sexually violent offense committed against a minor.

(d) Jurisdiction. – The offense is committed in the State for purposes of determining jurisdiction, if the transmission that constitutes the offense either originates in the State or is received in the State.

(e) Punishment. – A violation of this section is a Class ~~I~~H felony.

(f) Severability. – If any provision of this section or its application is held invalid, the invalidity does not affect other provisions or applications of this section that can be given effect without the invalid provisions or applications, and, to this end, the provisions of this section are severable."

**SECTION 3.(b)** G.S. 14-202.5A reads as rewritten:

"**§ 14-202.5A. Liability of commercial social networking sites.**

(a) A commercial social networking site, as defined in G.S. 14-202.5, that complies with G.S. 14-208.15A or makes other reasonable efforts to prevent a high-risk sex ~~offender who is registered in accordance with Article 27A of Chapter 14 of the General Statutes from accessing its Web site shall not be held civilly liable for damages arising out of a person's communications on the social networking site's system or network regardless of that person's status as a registered sex offender in North Carolina or any other jurisdiction.~~offender, as defined in G.S. 14-202.5, from using its Web site to endanger children shall not be held civilly liable for damages arising out of the sex offender's communications on the social networking site's system or network.

~~(b) For the purposes of this section, "access" is defined as allowing the sex offender to do any of the activities or actions described in G.S. 14-202.5(b)(2) through G.S. 14-202.5(b)(4) by utilizing the Web site.~~"

**PART IV. EXTEND CIVIL STATUTE OF LIMITATIONS AND REQUIRE TRAINING**

**SECTION 4.1.** G.S. 1-17 is amended by adding two new subsections to read:

"(d) Notwithstanding the provisions of subsections (a), (b), (c), and (e) of this section, a plaintiff may file a civil action against a defendant for claims related to sexual abuse suffered while the plaintiff was under 18 years of age until the plaintiff attains 28 years of age.

(e) Notwithstanding the provisions of subsections (a), (b), (c), and (d) of this section, a plaintiff may file a civil action within two years of the date of a criminal conviction for a related felony sexual offense against a defendant for claims related to sexual abuse suffered while the plaintiff was under 18 years of age."

**SECTION 4.2.(a)** G.S. 1-52 reads as rewritten:

"**§ 1-52. Three years.**

Within three years an action –

...

(5) For criminal conversation, or for any other injury to the person or rights of another, not arising on contract and not hereafter ~~enumerated.~~enumerated, except as provided by G.S. 1-17(d) and (e).

...

(16) Unless otherwise provided by law, for personal injury or physical damage to claimant's property, the cause of action, except in causes of actions referred to in G.S. 1-15(c), shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs. Except as provided in ~~G.S. 130A-26.3,~~ G.S. 130A-26.3 or G.S. 1-17(d) and (e), no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action.

...

(19) For assault, battery, or false ~~imprisonment.~~imprisonment, except as provided by G.S. 1-17(d) and (e). Notwithstanding this subdivision, a plaintiff may file a civil action within two years of the date of a criminal conviction for a related felony sexual offense against a defendant for claims related to sexual abuse suffered while the plaintiff was under 18 years of age.

...."

**SECTION 4.2.(b)** Effective from January 1, 2020, until December 31, 2021, this section revives any civil action for child sexual abuse otherwise time-barred under G.S. 1-52 as it existed immediately before the enactment of this act.

**SECTION 4.3.** G.S. 1-56 reads as rewritten:

"**§ 1-56. All other actions, 10 years.**

(a) ~~An~~ Except as provided by subsection (b) of this section, an action for relief not otherwise limited by this subchapter may not be commenced more than 10 years after the cause of action has accrued.

(b) A civil action for child sexual abuse is not subject to the limitation in this section."

**SECTION 4.4.(a)** G.S. 115C-47 is amended by adding a new subdivision to read:

"(64) To adopt a child sexual abuse and sex trafficking training program. – Each local board of education shall adopt and implement a child sexual abuse and sex trafficking training program for school personnel who work directly with students in grades kindergarten through 12, as required by G.S. 115C-375.20."

**SECTION 4.4.(b)** G.S. 115C-218.75 is amended by adding a new subsection to read:

"(g) Child Sexual Abuse and Sex Trafficking Training Program. – A charter school shall adopt and implement a child sexual abuse and sex trafficking training program in accordance with G.S. 115C-375.20."

**SECTION 4.4.(c)** G.S. 115C-238.66 is amended by adding a new subdivision to read:

"(14) Child sexual abuse and sex trafficking training program. – The board of directors shall adopt and implement a child sexual abuse and sex trafficking training program in accordance with G.S. 115C-375.20."

**SECTION 4.4.(d)** G.S. 116-239.8(b) is amended by adding a new subdivision to read:

"(17) Child sexual abuse and sex trafficking training program. – The chancellor shall adopt and ensure implementation of a child sexual abuse and sex trafficking training program in accordance with G.S. 115C-375.20."

**SECTION 4.4.(e)** The title of Article 25A of Chapter 115C of the General Statutes reads as rewritten:

"Article 25A.

"Special Medical Needs of ~~Students.~~Students and Identification of Sexual Abuse of Students."

**SECTION 4.4.(f)** Article 25A of Chapter 115C of the General Statutes is amended by adding a new section to read:

"**§ 115C-375.20. Child sexual abuse and sex trafficking training program required.**

(a) Definitions. – The following definitions shall apply in this section:

(1) School personnel. – Teachers, instructional support personnel, principals, and assistant principals. This term may also include, in the discretion of the employing entity, other school employees who work directly with students in grades kindergarten through 12.

(b) Each employing entity shall adopt and implement a child sexual abuse and sex trafficking training program for school personnel who work directly with students in grades kindergarten through 12 that provides education and awareness training related to child sexual abuse and sex trafficking, including, but not limited to, best practices from the field of prevention, the grooming process of sexual predators, the warning signs of sexual abuse and sex trafficking,

how to intervene when sexual abuse or sex trafficking is suspected or disclosed, legal responsibilities for reporting sexual abuse or sex trafficking, and available resources for assistance. This training may be provided by local nongovernmental organizations with expertise in these areas, local law enforcement officers, or other officers of the court. All school personnel who work with students in grades kindergarten through 12 shall receive two hours of training consistent with this section in even-numbered years beginning in 2020.

(c) No entity required to adopt a child sexual abuse and sex trafficking training program by G.S. 115C-47(64), 115C-218.75(g), 115C-238.66(14), or 116-239.8(b)(17), or its members, employees, designees, agents, or volunteers, shall be liable in civil damages to any party for any loss or damage caused by any act or omission relating to the provision of, participation in, or implementation of any component of a child sexual abuse and sex trafficking training program required by this section, unless that act or omission amounts to gross negligence, wanton conduct, or intentional wrongdoing. Nothing in this section shall be construed to impose any specific duty of care or standard of care on an entity required to adopt a child sexual abuse and sex trafficking training program by G.S. 115C-47(64), 115C-218.75(g), 115C-238.66(14), or 116-239.8(b)(17)."

**SECTION 4.5.** This Part becomes effective December 1, 2019. Each entity required by Section 4.4(a), (b), (c), and (d) to adopt and implement a child sexual abuse and sex trafficking training program shall do so by January 1, 2020, and training shall be required for school personnel beginning with the 2020-2021 school year.

## PART V. RIGHT TO REVOKE CONSENT

**SECTION 5.(a)** G.S. 14-27.20 reads as rewritten:

"**§ 14-27.20. Definitions.**

The following definitions apply in this Article:

(1) Repealed by Session Laws 2018-47, s. 4(a), effective December 1, 2018.

(1a) Against the will of the other person. – Either of the following:

a. Without consent of the other person.

b. After consent is revoked by the other person, in a manner that would cause a reasonable person to believe consent is revoked.

...."

**SECTION 5.(b)** This section becomes effective December 1, 2019, and applies to offenses committed on or after that date.

## PART VI. MODERNIZING SEXUAL ASSAULT LAWS

### CLARIFY DEFINITION OF THE TERM "CARETAKER" USED IN THE JUVENILE CODE

**SECTION 6.(a)** G.S. 7B-101(3) reads as rewritten:

"(3) Caretaker. – Any person other than a parent, guardian, or custodian who has responsibility for the health and welfare of a juvenile in a residential setting. A person responsible for a juvenile's health and welfare means a ~~stepparent,~~ stepparent; foster ~~parent, parent;~~ an adult member of the juvenile's ~~household,~~ household; an adult ~~relative~~ entrusted with the juvenile's ~~care,~~ care; a potential adoptive parent during a visit or trial placement with a juvenile in the custody of a ~~department,~~ department; any person such as a house parent or cottage parent who has primary responsibility for supervising a juvenile's health and welfare in a residential child care facility or residential educational ~~facility,~~ facility; or any employee or volunteer of a division, institution, or school operated by the Department of Health and Human Services. Nothing in this subdivision shall be construed to impose a legal duty of support under Chapter

50 or Chapter 110 of the General Statutes. The duty imposed upon a caretaker as defined in this subdivision shall be for the purpose of this Subchapter only."

**AMEND G.S. 14-401.11 TO PROHIBIT THE KNOWING DISTRIBUTION OF A BEVERAGE THAT CONTAINS ANY SUBSTANCE THAT COULD BE INJURIOUS TO A PERSON'S HEALTH**

**SECTION 6.(b)** G.S. 14-401.11 reads as rewritten:

"**§ 14-401.11. Distribution of certain food ~~at Halloween and all other times~~ or beverage prohibited.**

(a) It shall be unlawful for any person to knowingly distribute, sell, give away or otherwise cause to be placed in a position of human ~~accessibility,~~ accessibility or ingestion, any ~~food~~ food, beverage, or other eatable or drinkable substance which that person knows to ~~contain:~~contain any of the following:

(1) Any noxious or deleterious substance, material or article which might be injurious to a person's health or might cause a person any physical ~~discomfort, or~~discomfort.

(2) Any controlled substance included in any schedule of the Controlled Substances ~~Act, or~~Act.

(3) Any poisonous chemical or compound or any foreign substance such as, but not limited to, razor blades, pins, and ground glass, which might cause death, serious physical injury or serious physical pain and discomfort.

(b) Penalties.

(1) Any person violating the provisions of G.S. 14-401.11(a)(1):

a. Where the actual or possible effect on a person eating or drinking the ~~food~~ food, beverage, or other substance was or would be limited to mild physical discomfort without any lasting effect, shall be guilty of a Class I felony.

b. Where the actual or possible effect on a person eating or drinking the ~~food~~ food, beverage, or other substance was or would be greater than mild physical discomfort without any lasting effect, shall be punished as a Class H felon.

(2) Any person violating the provisions of G.S. 14-401.11(a)(2) shall be punished as a Class F felon.

(3) Any person violating the provisions of G.S. 14-401.11(a)(3) shall be punished as a Class C felon."

**AMEND DEFINITION FOR THE TERM "MENTALLY INCAPACITATED" USED IN ARTICLE 7B OF CHAPTER 14 OF THE GENERAL STATUTES**

**SECTION 6.(c)** G.S. 14-27.20(2) reads as rewritten:

"(2) Mentally incapacitated. – A victim who due to ~~(i) any act committed upon the victim or (ii) a poisonous or controlled substance provided to the victim without the knowledge or consent of the victim~~ any act is rendered substantially incapable of either appraising the nature of his or her conduct, or resisting the act of vaginal intercourse or a sexual act."

**PART VII. SEX OFFENDER VICTIM RIGHTS**

**SECTION 7.(a)** G.S. 14-208.12A reads as rewritten:

"**§ 14-208.12A. Request for termination of registration requirement.**

(a) Ten years from the date of initial county registration, a person required to register under this Part may petition the superior court to terminate the 30-year registration requirement

if the person has not been convicted of a subsequent offense requiring registration under this Article.

If the reportable conviction is for an offense that occurred in North Carolina, the petition shall be filed in the district where the person was convicted of the offense.

If the reportable conviction is for an offense that occurred in another state, the petition shall be filed in the district where the person resides. A person who petitions to terminate the registration requirement for a reportable conviction that is an out-of-state offense shall also do the following: (i) provide written notice to the sheriff of the county where the person was convicted that the person is petitioning the court to terminate the registration requirement and (ii) include with the petition at the time of its filing, an affidavit, signed by the petitioner, that verifies that the petitioner has notified the sheriff of the county where the person was convicted of the petition and that provides the mailing address and contact information for that sheriff.

Regardless of where the offense occurred, if the defendant was convicted of a reportable offense in any federal court, the conviction will be treated as an out-of-state offense for the purposes of this section.

(a1) The court may grant the relief if:

(1) The petitioner demonstrates to the court that he or she has not been arrested for any crime that would require registration under this Article since completing the sentence,

(2) The requested relief complies with the provisions of the federal Jacob Wetterling Act, as amended, and any other federal standards applicable to the termination of a registration requirement or required to be met as a condition for the receipt of federal funds by the State, and

(3) The court is otherwise satisfied that the petitioner is not a current or potential threat to public safety.

(a2) The district attorney in the district in which the petition is filed shall be given notice of the petition at least three weeks before the hearing on the matter. The petitioner may present evidence in support of the petition and the district attorney may present evidence in opposition to the requested relief or may otherwise demonstrate the reasons why the petition should be denied.

(a3) If the court denies the petition, the person may again petition the court for relief in accordance with this section one year from the date of the denial of the original petition to terminate the registration requirement. If the court grants the petition to terminate the registration requirement, the clerk of court shall forward a certified copy of the order to the Department of Public Safety to have the person's name removed from the registry.

(b) If there is a subsequent offense, the county registration records shall be retained until the registration requirement for the subsequent offense is terminated by the court under subsection (a1) of this section.

(c) The victim of the underlying offense may appear and be heard by the court in a proceeding regarding a request for termination of the sex offender registration requirement. If the victim has elected to receive notices of such proceedings, the district attorney's office shall notify the victim of the date, time, and place of the hearing. The district attorney's office may provide the required notification electronically or by telephone, unless the victim requests otherwise. The victim shall be responsible for notifying the district attorney's office of any changes in the victim's address and telephone number or other contact information. The judge in any court proceeding subject to this section shall inquire as to whether the victim is present and wishes to be heard. If the victim is present and wishes to be heard, the court shall grant the victim an opportunity to be reasonably heard. The right to be reasonably heard may be exercised, at the victim's discretion, through an oral statement, submission of a written statement, or submission of an audio or video statement."

**PART VIII. SEX OFFENDER RESIDENTIAL RESTRICTIONS**

**SECTION 8.(a)** G.S. 14-208.16(b) reads as rewritten:

"(b) As used in this section, "school" does not include home schools as defined in G.S. 115C-563 or institutions of higher ~~education.~~ education; however, for the purposes of this section, the term "school" shall include any construction project designated for use as a public school if the governing body has notified the sheriff or sheriffs with jurisdiction within 1,000 feet of the construction project of the construction of the public school. The term "child care center" is defined by G.S. 110-86(3); however, for purposes of this section, the term "child care center" does include the permanent locations of organized clubs of Boys and Girls Clubs of America. The term "registrant" means a person who is registered, or is required to register, under this Article."

**PART IX. SEVERABILITY CLAUSE/SAVINGS CLAUSE/EFFECTIVE DATE**

**SECTION 9.(a)** If any provision of this act or its application is held invalid, the invalidity does not affect other provisions or applications of this act that can be given effect without the invalid provisions or applications, and, to this end, the provisions of this act are severable.

**SECTION 9.(b)** Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions.

**SECTION 9.(c)** Parts I, II, III, V, VI, VII, and VIII of this act become effective December 1, 2019, and apply to offenses committed on or after that date. Part IV of this act becomes effective December 1, 2019, and applies to civil actions commenced on or after that date. The remainder of this act is effective when it becomes law.

In the General Assembly read three times and ratified this the 31st day of October, 2019.

Philip E. Berger
President Pro Tempore of the Senate

Tim Moore
Speaker of the House of Representatives

Roy Cooper
Governor

Approved 3:46 p.m. this 7th day of November, 2019.

## NC Cases Citing *Whitehust* and/or *Wilkes County*

1. *Jones v. Arrington*, 91 N.C. 125 (1884)

   • **Whitehurst v. Dey (Dicta)**

2. *City of Wilmington v. Cronly*, 122 N.C. 383, 30 S.E. 9, 11 (1898)

   • **Whitehurst v. Dey (Dicta)**

3. *In re Will of BEAUCHAMP*, 146 N.C. 254, 255-57, 59 S.E. 687, 688 (1907)

   • **Whitehurst v. Dey (Dicta)**

**4**. ***Wilkes County v. Forester (1933)***

   • P. Ballantine & Sons v. Macken (NJ)
   *Campbell v. Holt (US)*
   *14th Amendment*

5. *High Point v. Clinard*, 204 N.C. 149, 151, 167 S.E. 690, 691 (1933)

   • **Wilkes County v. Forester (14th Amendment)**

6. *Sutton v. Davis*, 205 N.C. 464, 171 S.E. 738, 740 (1933)

   • **Wilkes County v. Forester (14th Amendment)**

7. *Waldrop v. Hodges*, 230 N.C. 370, 373, 53 S.E.2d 263, 265 (1949)

   • Johnson v. Winslow (Dicta)
   • **Whitehurst v. Dey (Dicta)**
   • **Wilkes County v. Forester (14th Amendment)**

8. *Women's Catholic Order of Foresters v. Valleytown* (W.D.N.C. 1940)

   • **Whitehurst v. Dey (Dicta)**
   • **Wilkes County v. Forester (14th Amendment)**

9. *Valleytown Twp. v. Women's Catholic Order of Foresters* (4th Cir. 1940)

   • Booth v. Hairston
   • **Wilkes County v. Forester (14th Amendment)**
   • Dunn v. Beaman

10. *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304 (1945)

- **Wilkes County v. Forester (14th Amendment)**

11. *McCrater v. Stone & Webster Eng'g Corp.*, 248 N.C. 707, 104 S.E.2d 858 (1958)

- 34 Am. Jur., Limitation of Actions, Sec. 29
- Alpha Mills v. Engine Co.
- Waldrop v. Hodges
  *Johnson v. Winslow (Dicta)*
  ***Whitehurst v. Dey (Dicta)***
  ***Wilkes County v. Forester (14th Amendment)***

12. *Jewell v. Price*, 264 N.C. 459, 142 S.E.2d 1(1965)

- **Whitehurst v. Dey (Dicta)**
- McCrater v. Stone & Webster Engineering Corp.
  *Waldrop v. Hodges*
  *Johnson v. Winslow (Dicta)*
  Whitehurst v. Dey (Dicta)
  ***Wilkes County v. Forester (14th Amendment)***

13. *Congleton v. City of Asheboro*, 8 N.C. App. 571, 174 S.E.2d 870 (1970)

- **Wilkes County v. Forester (14th Amendment)**

14. *N. Carolina State Ports Auth. v. Lloyd A. Fry Roofing Co.*, 294 N.C. 73 (1978)

- McCrater v. Engineering Corp.
- **Wilkes County v. Forester (14th Amendment)**

15. *Rutherford v. Bass Air Conditioning Co., Inc.*, 38 N.C. App. 630, 248 S.E.2d 887 (1978)

- **Wilkes County v. Forester (14th Amendment)**
- Ports Authority v. Roofing Co.

16. *Troy's Stereo Center, Inc. v. Hodson*, 251 S.E.2d 673, 9 N.C. App. 591 (1979)

- Waldrop v. Hodges
  *Johnson v. Winslow (Dicta)*
  ***Whitehurst v. Dey (Dicta)***
  ***Wilkes County v. Forester (14th Amendment)***

- Jewell v. Price

***Whitehurst v. Dey** (Dicta)*
*McCrater v. Stone & Webster Engineering Corp.*
*Waldrop v. Hodges*
*Johnson v. Winslow* (Dicta)
***Whitehurst v. Dey** (Dicta)*
***Wilkes County v. Forester** (14th Amendment)*

17. *Perry v. Perry*, 80 N.C. App. 169, 341 S.E.2d 53 (1986)

- Gardner v. Gardner
- Wilson v. Anderson
- Wachovia Bank and Trust Co. v. Andrews

18. *Armstrong v. Armstrong,* 322 N.C. 396, 368 S.E.2d 595 (1988)

- Godfrey v. State, 84 Wash. 2d 959, 963, 530 P. 2d 630, 632 (1975)

19. *Staley v. Lingerfelt*, 134 N.C. App. 294, 299, 517 S.E.2d 392, 396 (1999)

- Congleton v. City of Asheboro
  ***Wilkes County v. Forester** (14th Amendment)*

20. *Brisson v. Kathy A. Santoriello, M.D., P.A.*, 351 N.C. 589 (2000) (Wainwright Dissent)

- **Wilkes County v. Forester (14th Amendment)**

21. *Norton v. Goods*, 196 N.C. App. 177, 674 S.E.2d 479 (2009)

- **Wilkes County v. Forester (14th Amendment)**

22. *Thompson v. Charlotte-Mecklenburg Bd. of Educ.,* 222 N.C. App. 855 (2012)
- Armstrong v. Armstrong
- Staley v. Lingerfelt
  *Congleton v. Asheboro*
  ***Wilkes County v. Forester** (14th Amendment)*

23. *Bryant v. United States*, 768 F.3d 1378 (11th Cir. 2014)

- **Wilkes County v. Forester (14th Amendment)**
- Waldrop v. Hodges
  *Johnson v. Winslow* (Dicta)
  ***Whitehurst v. Dey** (Dicta)*
  ***Wilkes County v. Forester** (14th Amendment)*

A

# TREATISE

ON THE

# CONSTITUTIONAL LIMITATIONS



WHICH REST UPON

## THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION.



BY

THOMAS M. COOLEY,

ONE OF THE JUSTICES OF THE SUPREME COURT OF MICHIGAN, AND JAY PROFESSOR OF LAW IN THE UNIVERSITY OF MICHIGAN.

SECOND EDITION,

WITH CONSIDERABLE ADDITIONS, GIVING THE RESULTS OF THE RECENT CASES.

BOSTON:

LITTLE, BROWN, AND COMPANY.

1871.

CAMBRIDGE:
PRESS OF JOHN WILSON AND SON.

great bulk of private legislation which is adopted from year to year, may at once be dismissed from this discussion.

Laws public in their objects may, unless express constitutional provision forbids,[1] be either general or local in their application; they may embrace many subjects or one, and they may extend to all citizens, or be confined to particular classes, as minors or married women, bankers or traders, and the like. The authority that legislates for the State at large must determine whether particular rules shall extend to the whole State and all its citizens, or, on the other hand, to a subdivision of the State or a single class of its citizens only. The circumstances of a particular locality, or the prevailing public sentiment in that section of the State, may require or make acceptable different police regulations from those demanded in another, or call for different taxation, and a different application of the public moneys. The legislature may therefore prescribe or authorize different laws of police, allow the right of eminent domain to be exercised in different cases and through different agencies, and prescribe peculiar restrictions upon taxation in each distinct municipality, provided the State constitution does not forbid. These discriminations are made constantly; and the fact that the laws are of local or special operation only is not supposed to render them obnoxious in principle. The legislature may also deem it desirable to prescribe peculiar rules for the several occupations, and to establish distinctions in the rights, obligations, duties, and capacities of citizens. The business of common carriers, for instance, or of bankers, may require special statutory regulations for the general benefit, and it may be matter of public policy to give laborers of one class a specific lien for their wages, when it would be impracticable or impolitic to do the same by persons engaged in some other employments. If the laws be otherwise unobjectionable, all that can be required in these cases is, that they be general in their application to the class or locality to which they apply; and they are then public in character, and of their propriety and policy the legislature must judge.

But a statute would not be constitutional which should proscribe

[1] See *ante*, p. 128, note 1, and cases cited. To make a statute a public law of general obligation, it is not necessary that it should be equally applicable to all parts of the State; all that is required is that it shall apply equally to all persons within the territorial limits described in the act. State *v.* County Commissioners of Baltimore, 29 Md. 516.

a class or a party for opinion's sake,[1] or which should [* 391] select particular * individuals from a class or locality, and subject them to peculiar rules, or impose upon them special obligations or burdens from which others in the same locality or class are exempt.[2]

The legislature may suspend the operation of the general laws of the State; but when it does so the suspension must be general, and cannot be made for individual cases or for particular localities.[3]

[1] The sixth section of the Metropolitan Police Law of Baltimore (1859) provided that "no Black Republican, or indorser or supporter of the Helper book, shall be appointed to any office" under the Board of Police which it established. This was claimed to be unconstitutional, as introduing into legislation the principle of proscription for the sake of political opinion, which was directly opposed to the cardinal principles on which the Constitution was founded. The court dismissed the objection in the following words: "That portion of the sixth section which relates to Black Republicans, &c., is obnoxious to the objection urged against it, if we are to consider that class of persons as proscribed on account of their political or religious opinions. But we cannot understand, officially, who are meant to be affected by the proviso, and therefore cannot express a judicial opinion on the question." Baltimore v. State, 15 Md. 468. See also p. 484. This does not seem to be a very satisfactory disposition of so grave a constitutional objection to a legislative act. That courts may take judicial notice of the fact that the electors of the country are divided into parties with well-known designations cannot be doubted; and when one of these is proscribed by a name familiarly applied to it by its opponents, the inference that it is done because of political opinion seems to be too conclusive to need further support than that which is found in the act itself. And we know no reason why courts should decline to take notice of those facts of general notoriety, which, like the names of political parties, are a part of the public history of the times.

[2] Lin Sing v. Washburn, 20 Cal. 534. There is no reason, however, why the law should not take notice of peculiar views held by some classes of people, which unfit them for certain public duties, and excuse them from the performance of such duties; as Quakers are excused from military duty, and persons denying the right to inflict capital punishment are excluded from juries in capital cases. These, however, are in the nature of exemptions, and they rest upon considerations of obvious necessity.

[3] The statute of limitations cannot be suspended in particular cases while allowed to remain in force generally. Holden v. James, 11 Mass. 396; Davison v. Johonnot, 7 Met. 393. The general exemption laws cannot be varied for particular cases or localities. Bull v. Conroe, 13 Wis. 233, 244. The legislature, when forbidden to grant divorces, cannot pass special acts authorizing the courts to grant divorces in particular cases for causes not recognized in the general law. Teft v. Teft, 3 Mich. 67. The authority in emergencies to suspend the civil laws in a part of the State only, by a declaration of martial law, we do not call in question by any thing here stated.

Privileges may be granted to particular individuals when by so doing the rights of others are not interfered with; disabilities may be removed; the legislature as *parens patriæ* may grant authority to the guardians or trustees of incompetent persons to exercise a statutory control over their estates for their assistance, comfort, or support, or for the discharge of legal or equitable liens upon their property; but every one has a right to demand that he be governed by general rules, and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied *in all similar cases, [*392] would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments. Those who make the laws "are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plough."[1] This is a maxim in constitutional law, and by it we may test the authority and binding force of legislative enactments.[2]

[1] Locke on Civil Government, § 142.

[2] In Lewis *v.* Webb, 3 Greenl. 326, the validity of a statute granting an appeal from a decree of the Probate Court in a particular case came under review. The court say: "On principle it can never be within the bounds of legitimate legislation to enact a special law, or pass a resolve dispensing with the general law in a particular case, and granting a privilege and indulgence to one man, by way of exemption from the operation and effect of such general law, leaving all other persons under its operation. Such a law is neither just nor reasonable in its consequences. It is our boast that we live under a government of laws, and not of men; but this can hardly be deemed a blessing, unless those laws have for their immovable basis the great principles of constitutional equality. Can it be supposed for a moment that, if the legislature should pass a general law, and add a section by way of proviso, that it never should be construed to have any operation or effect upon the persons, rights, or property of Archelaus Lewis or John Gordon, such a proviso would receive the sanction or even the countenance of a court of law? And how does the supposed case differ from the present? A resolve passed after the general law can produce only the same effect as such proviso. In fact, neither can have any legal operation." See also Durham *v.* Lewiston, 4 Greenl. 140; Holden *v.* James, 11 Mass. 396; Piquet, Appellant, 5 Pick. 64; Budd *v.* State, 3 Humph. 483; Wally's Heirs *v.* Kennedy, 2 Yerg. 554. In the last case it is said: "The rights of every individual must stand or fall by the same rule or law that governs every other member of the body politic, or land, under similar circumstances; and every partial or private law, which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitu-

## STATE CONSTITUTIONAL PROVISIONS INVALIDATING ALL RETROACTIVE/RETROSPECTIVE LEGISLATION

There can be no law of this state impairing the obligation of contracts by destroying or impairing the remedy for their enforcement; and the general assembly shall have no power to **revive** any right or remedy which may have become barred by lapse of time, or by any statute of this state.

Alabama Const. Art. IV, Sec. 56

No ex post facto law, nor law impairing the obligation of contracts, or **retrospective** in its operation, or making any irrevocable grant of special privileges, franchises or immunities, shall be passed by the general assembly.

Colo. Const. Art. II, Section 11

No bill of attainder, ex post facto law, **retroactive** law, or laws impairing the obligation of contract or making irrevocable grant of special privileges or immunities shall be passed.

Ga. Const. Art. I, § I, Para. X

The legislature shall pass no law for the benefit of a railroad, or other corporation, or any individual, or association of individuals **retroactive** in its operation, or which imposes on the people of any county or municipal subdivision of the state, a new liability in respect to transactions or considerations already past.

Idaho Const. Art. XI, § 12

That no ex post facto law, nor law impairing the obligation of contracts, or **retrospective** in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted.

Mo. Const. Art. I, § 13

**Retrospective** laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offenses.

N.H. Const. Pt. FIRST, Art. 23

The general assembly shall have no power to pass **retroactive** laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state.

Oh. Const. Art. II, § 28

The Legislature shall have no power to **revive** any right or remedy which may have become barred by lapse of time, or by any statute of this State. After suit has been commenced on any cause of action, the Legislature shall have no power to take away such cause of action, or destroy any existing defense to such suit.

Okl. Const. Art. V, § 52

That no **retrospective** law, or law impairing the obligations of contracts, shall be made.

Tenn. Const. Art. I, § 20

No bill of attainder, ex post facto law, **retroactive** law, or any law impairing the obligation of contracts, shall be made.

Tex. Const. Art. I, § 16

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No. 575. SEVENTEENTH DISTRICT.

SUPREME COURT OF NORTH CAROLINA

Fall Term, 1939.

WILKES COUNTY

v.

C. A. FORESTER and wife, LUNA FORESTER.

I N D E X

No. 575 SEVENTEENTH DISTRICT.

SUPREME COURT OF NORTH CAROLINA

Fall Term, 1932.

**********

WILKES COUNTY,

v.

C. A. FORESTER and wife, LUNA FORESTER.

**********

Before MOORE, J., June Term, 1932, Wilkes Superior Court. Plaintiff appealed.

**********

SUMMONS dated May 16, 1930, showing service 5-23-29, appears in transcript.

**********

This was a civil action instituted in the Superior Court of Wilkes County under Section 8037 of Consolidated Statutes of North Carolina, in which action the plaintiff is seeking to foreclose a tax lien on the property described in the complaint for the years 1923, 1924 and 1925.

**********

C O M P L A I N T.

Wilkes County, North Carolina, a corporation under the provisions of Section 1290 Consolidated Statutes of North Carolina, hereinafter styled plaintiff, complains of the adversary parties mentioned in the caption hereof, and therein and hereafter styled defendants, whether one or more:

1. On the first day of May, in the years hereinafter mentioned, the defendants, or some of them, were the owners of land in said county and state, hereinafter referred to as the premises, the year referred to and the description of said land being as follows:-

A tract of land in Wilkes County, lying and being in the town of North Wilkesboro in Block 51, lots Nos. 2, 4 and 6 as shown on Trogdon's Map of the Town of North Wilkesboro, N.C., and being the lands listed for taxes in North Wilkesboro Township for the years 1924 and 1925 in the name of C. A. Forester.

2. The premises and all other property owned by defendants were listed and assessed for taxation in said county, and taxes lawfully levied and assessed and ordered to be collected from the persons liable therefor, and same became a first lien on the premises. For the taxes unpaid thereon said premises were lawfully sold and plaintiff became the purchaser at such sale or sales, and certificates were issued to it for the years, upon the dates, and in the amounts, including cost, and against persons as follows:-

CERTIFICATE OF SALE OF REAL ESTATE FOR TAXES.
North Carolina,
Wilkes County.

I, W. D. Somers, Sheriff of the County of Wilkes, do hereby certify that the following described real estate in said county and state, to-wit:-

C. A. Forester
(Name of taxpayer in which property was listed)

3 town lots listed in North Wilkesboro Township was on the 5th day of November, 1928, duly sold by me, in the manner provided by law for the delinquent taxes for the year 1924, amounting to $116.96, including penalty thereon and cost allowed by law, when and where Wilkes County purchased said real estate at the price of $116.96, it being the highest and best bidder for the same. And I further certify that unless redemption is made of said estate in the manner provided by law, the said purchaser whose name is herein given, his heirs or assigns, shall have the right of foreclosure of this certificate of sale by civil action after the expiration of one year from the date of sale.

de
te

In witness whereof, I have hereunto set my hand, this 20th day of November, 1928.

W. B. SOMERS, Sheriff.
J. M. BUMGARNER,
Tax Collector.

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That in addition to the certificate set forth in this complaint, the plaintiff will ask for judgment for any and all other taxes for which it may hold a receipt and which may become a lien against the premises described in this complaint and which may be chargeable to the defendants in this action.

For the year 1925.
Date of Certif. Nov. 27, 1928. $102.36
C. A. Forester.

3. The premises have not been redeemed from the sales mentioned and there is now due and owing plaintiff the sums mentioned in the preceding paragraph, which are a first lien on the premises, which sums or certificates of sale shall bear interest at the rate provided by law on the entire amount of taxes and sheriffs costs as prescribed by Chapter 221, Public Laws of North Carolina, Session 1927, as amended by Chapter 204, Public Laws of North Carolina, Session 1929, and as amended by Acts of General Assembly, Session 1931, under the provisions of which this action is required to be brought against the defendants who have or claim to have an interest or estate in the premises, as follows:-

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RELIEF:

Wherefore, plaintiff asks the Court to render judgment as follows:-

(a) Declaring a first lien on the premises for the amounts mentioned in the second paragraph above and interest claimed in the third paragraph hereof.

(b) Foreclosure of said liens on the premises and the appointment of a commissioner to make sale according to the usage and practice of the Courts and agreeable to the statute.

(c) An order of publication as provided in

Chapter 221, Public Laws of North Carolina, Session 1927, as amended by Chapter 204, Public Laws of North Carolina, Session 1929, and as amended by Acts of General Assembly, Session 1931.

(d) For costs of action and for such other and further relief as plaintiff may be entitled to under the provisions of the above mentioned statute and amendments thereto and other applicable provisions of law.

A. H. CASEY,
Attorney for Plaintiff.

(Verified May 16, 1930,
(by C. H. Ferguson, County Accountant
(for Wilkes County.)

---

N O T I C E.

The defendant or defendants above named, and all other parties who have paid taxes on, or who hold certificates of sale on, or who have or claim an interest in, or lien upon, the real property, the subject of this action, will take notice that an action entitled as above has been commenced in the Superior Court of Wilkes County, N.C., to foreclose a tax sale certificate for the years 1924, 1925, owned and held by the plaintiff against real property in Wilkes County, N.C., or which said defendant, or defendants, or another party or parties, unknown to plaintiff, whose residence cannot with reasonable diligence be ascertained, have paid taxes, or on which they hold certificates of sale, or in which they have or claim an interest or lien, that the real property, the subject of this action, is described as follows:

A tract of land in Wilkes County, lying and being in the town of North Wilkesboro in Block 51, lots Nos. 2, 4 and 6, as shown on Trogdon's Map of the town of North Wilkesboro, N.C., and being the lands listed for taxes in North Wilkesboro Township for the years 1924 and 1925 in the name of C. A. Forester.

That said named defendant, or defendants, and/or said unknown party or parties aforesaid, are proper and necessary parties to said action,

and the relief demanded consists excluding all defendants and said unknown party or parties from any actual or contingent interest in, or lien upon, said real property and said defendants (unless personally served with summons and copy of complaint herein) and said other unknown parties aforesaid, will further take notice that they are required to appear before the Clerk of the Superior Court of Wilkes County, N.C., at the court house in Wilkesboro, within 6 months from the date of this notice (defendants who are personally served must answer according to summons) and answer or demur to the complaint of the plaintiff then and there set up in said action their claim and/or lien upon above described real property, upon pain of being forever barred and foreclosed of the same, or the plaintiff will apply to the Court for the relief demanded in said complaint.

This 16th day of May, 1930.

PEARL STROUD,
Asst. Clerk Superior Court.

A. H. CASEY, Attorney.

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A N S W E R .

The defendants, answering the complaint of the plaintiff in this cause, say:-

1. That allegations contained in paragraph 1 of the complaint are admitted to be true.

2. Answering allegations contained in paragraph 2, the defendants admit that the property was listed and assessed for taxes, but they deny the remainder of said paragraph and aver the truth to be, that the taxes described in said paragraph have been fully paid, and if said property was sold that the same was an illegal sale, as these defendants are informed, believe and allege, and that the taxes have been paid at the time of the sale and all other allegations in said paragraph are denied.

3. That allegations contained in paragraph 3 of the complaint are not true and the same are denied.

4. These defendants, further answering said complaint, and for further defense, say: That

they are advised, informed and believe under the statute, 8037, Consolidated Statutes, that the plaintiff was required to bring its action within 18 months from the date of the certificate of sale and that the certificate of sale as alleged in the complaint should have been issued on the day of the sale as the bidder was entitled to the certificate on the date of said sale and that the sale in this action was on the 5th day of November, 1928, and that the action was not instituted until the 16th day of May, 1930, and more than 18 months elapsed from the date of the sale before said action was instituted and that the plaintiff's action is barred by said statute, and that said statute of limitation is hereby pleaded as a bar to the plaintiff's right to recover in this action.

WHEREFORE, these defendants, having fully answered the complaint of the plaintiff, pray that this action against them be dismissed; that any tax receipts or certificates which are now held by the county be cancelled of record and surrendered tothese defendants; that these defendants recover their cost expended and for any other and further relief that they may be entitled to recover.

TRIVETTE & HOLSHOUSER,
Attorneys for Defendants.

(Verified June 5, 1929).

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PLAINTIFF'S EXHIBIT "A".

No. 141 CERTIFICATE OF TAX SALE.

State of North Carolina)
Wilkes County )

I. J. M. Bumgarner, Tax Collector of the County of Wilkes, do hereby certify that the following described real estate in said county and state listed as the property of C. A. Forester, to-wit:-

3 Town lots listed in North Wilkesboro Township, was on the 5th day of November, 1928, duly sold by me in the manner provided by law, for delinquent state and county taxes for the year 1924 thereon, amounting to $116.96, including

the costs by law to J. T. Prevette for the sum of $116.96, he being the highest and best bidder for the same, the said lands having been offered at a public sale for taxes and not sold for want of bidders. And I further certify that unless redemption is made of said real estate in -manner provided by law, the said J. T. Prevette, heirs and assigns,will be entitled to a deed therefor on and after the 5th day of November, A. D. 1929 on surrender of this certificate.

In witness whereof, I have hereunto set my hand this the 20th day of November, 1928.

J. M. DUMGARNER, Tax Collector.

Tothe above Certificate of Tax Sale is attached the following Tax Receipt:

North Wilkesboro Township,Wilkes County,N.C.

Taxes for 1924.

Received of: Forester, C. A. 347

Valuation $6410

| | |
|---|---|
| Poll tax | $ |
| County tax | $101.26 |
| Local School Tax | |
| Special RR tax | 3.21 |
| | $104.47 |
| 1924 | |
| Dog tax------ | |
| Penalty or discount | 10.44 |
| | $114.91. |
| Cost Adv.sale & Certificate | 2.05 |
| | $116.96. |

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PLAINTIFF'S EXHIBIT "D"

No. 330

CERTIFICATE OF TAX SALE

State of North Carolina,)
Wilkes County. )

I, J. M. Dumgarner, Tax Collector of the County of Wilkes, in the State of North Carolina, do hereby certify that the following described real estate in said county and state listed as the property of C. A. Forester, to-wit:-

3 Town lots listed in North Wilkesboro Township, was on the 8th day of November,1928,

duly sold by me in the manner provided by law for delinquent State and County Taxes for the year 1925 thereon amounting to $102.36, including the costs by law to J. T. Prevette for the sum of $102.36, he being the highest and best bidder for the same, the said lands having been offered at a public sale for taxes and not sold for want of bidders. And I further certify that unless redemption is made of said real estate in manner provided by law, the said J. T. Prevette, heirs and assigns, will be entitled to a deed therefor on and after the 8th day of November, A. D. 1929, on surrender of this certificate.

In witness whereof I have hereunto set my hand, this the 27th day of November, A.D.1928.

J. M. BUMGARNER,
Tax Collector.

To the above Certificate of Tax Sale is attached the following Tax Receipts:-

334

North Wilkesboro Township, Wilkes County, N.C.
Received of Forester, C. A.
Valuation $2310.
Taxes for 1925.

| | |
|---|---|
| Poll tax | $ |
| County tax | 36.94 |
| Dog tax | |
| Special R. R. Tax | .70 |
| | 37.64 |
| 1925 | |
| Local school tax | |
| TOTAL | 37.64 |
| Penalty | 3.76 |
| | 41.70 |
| Cost. adv. sale and certificate | 2.05 |
| TOTAL | 43.45 |

335

North Wilkesboro Township, Wilkes County, N.C.
Received of Forester, C. A.
Valuation $3400
Taxes for 1925

| | |
|---|---|
| Poll Tax | $ |
| County tax | 54.40 |
| Dog Tax | |

| | |
|---|---|
| Special R. R. Tax | $1.02 |
| TOTAL | 55.42 |
| 1925 | |
| Local School Tax | 55.42 |
| TOTAL | 5.54 |
| Penalty | 60.96 |
| TOTAL | |

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PLAINTIFF'S EVIDENCE.

J. M. BUMGARNER; for plaintiff, testified:- That he was duly appointed Tax Collector of Wilkes County by the Commissioners of said county, and was tax collector for North Wilkesboro Township for the years 1923, 1924 and 1925.

Plaintiff introduced tax certificate and receipt for the year 1924, which is marked, "Plaintiff's Exhibit A", which Mr. Bumgarner identified as the certificate which was executed under his authority and direction as tax collector.

Plaintiff then introduced Tax Certificate for the year 1925 marked Plaintiff's Exhibit "B", and same was identified by Mr. Bumgarner, who stated that it was executed under his authority and direction as tax collector; and there are two tax receipts attached to this certificate, one of which was for personal property and the other for taxes on real estate; that these receipts were turned over to him by the Board of County Commissioners of Wilkes County and charged on the books against him as Tax Collector by said board; that the taxes for the years 1924 and 1925 had not been paid and that the lands had been sold and certificates issued; that no demand was ever made on him as tax collector to sell the personal property of the defendants before he advertised and sold the real estate; that he had a conversation with Mr. Forester at various times about his taxes; that Mr. Forester listed three lots at a valuation of $1600.00 and that he listed personal property at a valuation of $3400.00; that the lands were advertised by him as tax collector in the county paper four issues and for a period of thirty days; that no payments had been made on these tax

receipts and certificates; that said property was sold at the courthouse door in Wilkesboro at public auction; that he issued tax certificates shortly after the sale and dated the certificates showing the date thereof; that the defendant gave him a check made payable to the sheriff of Wilkes County for blank amount and that he wrote on the face of the check $111.52, which check paid the taxes for the year 1926.

The witness was shown the record which he identified as the record of property listed for taxes for the year 1925 in Wilkes County; that the sheet showing the property purported to be listed in C. A. Forester's name was shown to the witness and he identified C. A. Forester's signature at the bottom of the sheet showing three lots listed as a valuation of $1600 and $600 worth of personal property listed for the year 1924; that he listed $3400 worth of personal property for the year 1925.

CROSS-EXAMINATION.

Witness testified on cross-examination as follows:-

That he was tax collector for the years 1923, 1924 and 1925, for Wilkes County, and that it was his duty to collect the taxes on the real property and on the personal property, and that he could not tell from the record how much of the alleged tax was for personal property and how much was for real property; that at the time the levy was made the defendant, C. A. Forester, owned a stock of merchandise worth approximately $3000.00, and that there never was any levy made on the personal property.

That he sold the property in controversy as tax collector and dated the certificate the day the property was sold. The witness was then shown a check in the amount of $111.52, executed by C. A. Forester and marked, "For taxes." The witness identified the signature and testified that he filled in the amount of $111.52 under an agreement that he had with the defendant to fill in the check for taxes,

and ttestified that he did not know why he did not fill in the check for the full amount of the alleged taxes that were due at the time the check was delivered to him, and testified that he knew that it was for taxes that the defendant owed the county, and knew that he had the authority to fill it in. This check paid the taxes for the year 1925. It is his tax receipt for 1926. That was on the 11th day of November, 1926. This check was made to G. G. Elledge, Sheriff, of Wilkes County.

He further testified on cross-examination that he did not know whether the lots listed for taxes were the same as those described in the complaint or not, and testified that the tax rate was $1.60 and that the defendant had $3400 worth of personal property.

Plaintiff Rests.

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At the close of plaintiff's testimony the defendant made a motion for judgment of nonsuit. Motion allowed. Plaintiff excepts. This is plaintiff's

EXCEPTION NO. 1.

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JUDGMENT (June Term, 1932).

This cause coming on to be heard and being heard before His Honor, Walter E. Moore, Judge Presiding, and a jury, and at the close of plaintiff's testimony the defendants through their counsel enter a motion for judgment of nonsuit.

The Court sustains the motion and it is hereby adjudged and decreed by this Court that a judgment of nonsuit be entered in this case; and it is further ordered that the plaintiff be taxed with the costs of this action.

WALTER E. MOORE,
Judge Presiding.

To this judgment the plaintiff objects and excepts and to the signing of the judgment the plaintiff objects and excepts and for errors assigned and to be assigned and appeals to the Supreme Court. Notice of appeal given in open Court, further notice waived. 60 days allowed plaintiff to make up and serve case on appeal and defendant allowed 30 days thereafter to

serve countercase or exceptions.

To the signing of this judgment the plaintiff objects and excepts and for errors assigned and to be assigned appeals to the Supreme Court. This is plaintiff's EXCEPTION NO. 2.

Notice of appeal given in open court. Further notice waived. Plaintiff allowed 60 days to make and serve case on appeal. Defendants allowed 30 days thereafter to serve countercase and exceptions.

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EXCEPTIONS GROUPED & ERRORS ASSIGNED.

1. That His Honor erred in allowing defendants' motion as of nonsuit at the close of the plaintiff's testimony. (R.p.11).

2. That the Court erred in signing the judgment as appears in the record. (R.p.12).

---

AGREEMENT.

It is agreed between A. H. Casey, attorney for plaintiff, and Eugene Trivette, Attorney for defendants, that the time for making up and serving case on appeal shall be extended to September 15, 1932; and the defendants shall have 30 days thereafter in which to file exceptions or serve countercase. This August 1, 1932.

A. H. CASEY, Atty. for Plaintiff.
EUGENE TRIVETTE, Atty. for Defts.

The foregoing is tendered as appellant's case on appeal to the Supreme Court.

A.H. CASEY, Attorney for Plaintiff.

We hereby accept service of the within case on appeal together with copy of same.

This September 15, 1932.

TRIVETTE & HOLSHOUSER,
Attorneys for Appellee.

---

AGREEMENT.

It is agreed by counsel representing plaintiff and counsel representing defendants that the foregoing shall constitute the case on appeal in the above cause. This Nov. 10, 1932.

A. H. CASEY, Attorney for Plaintiff.
TRIVETTE & HOLSHOUSER, Attys. for Defts.

TRANSCRIPT CERTIFIED BY CLERK SUPERIOR COURT.

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No. 575

SEVENTEENTH DISTRICT.

SUPREME COURT OF NORTH CAROLINA

Fall Term, 1932.

WILKES COUNTY,

v.

C. A. FORESTER AND WIFE, LUNA FORESTER

PLAINTIFF APPELLANT'S BRIEF.

No. 575 SEVENTEENTH DISTRICT.

SUPREME COURT OF NORTH CAROLINA

Fall Term, 1932.

**********************************

WILKES COUNTY,

v.

C. A. FORESTER AND WIFE, LUNA FORESTER

**********************************

PLAINTIFF APPELLANT'S BRIEF.

**********************************

Statement of Questions Involved

1. Did His Honor err in allowing the defendants' motion as of nonsuit as set out in the record proper?

2. Did His Honor err in signing the judgment as appears in the record?

********

STATEMENT OF FACTS

This was a civil action brought by Wilkes County, plaintiff, against the defendants in an action to foreclose a tax lien for the years 1924 and 1925 in the amount of $116.96 and $102.38 respectively. Suit was instituted on May 16, 1930, and complaint and answer filed in due time, the plaintiff alleging in its complaint that the defendants were the owners of certain lands in Wilkes County which were listed for taxes for the years 1924 and 1925. The defendants admit that they were the owners of the land and that the same was listed for taxation for the years herein set forth, and, further, allege that they have paid the taxes for said years. The lands described in the complaint were sold and certificates issued to Wilkes County on the 20th day of November, 1928, and on the 27th day of November, 1928, for the years 1924 and 1925 respectively, as set forth in the record proper. Notice to other interested parties was issued on the 16th day of May, 1930, as required by the statute and which appears in the record.

The land described in the petition was properly sold as set forth in the record, which is testified to by J. M. Bumgarner, duly appointed tax collector, who was a witness for the plaintiff. The real estate owned by the defendants was listed at a valuation of $1600.00 and the personal property at a valuation of $3400.00. The land was duly advertised and sold without any protest from either of the defendants or any other person. No demand was made by the defendants or any other person asking that the personal property be sold before selling the real estate. The taxes for the years 1924 and 1925, for which taxes the property of the defendants was sold, have not been paid. J. M. Bumgarner, tax collector, testified for the plaintiff in the trial of this cause that he was the duly appointed tax collector for the county of Wilkes, and that he advertised and sold the property of the defendants for taxes for the years 1924

and 1925; that C. A. Forester, one of the defendants, listed the property himself and in his own handwriting, as set forth on page 10 of the case on appeal, and that said taxes have not been paid, as set forth on page 9 of the case on appeal.

At the close of the plaintiff's testimony the defendants' motion as of nonsuit was allowed.

## A R G U M E N T

This action was instituted under the statute as set forth in Consolidated Statutes, Section 8010 and subsequent sections relative to the sale of real estate, which provides in part as follows:-

"The sheriff's certificate of sale and purchase shall be presumptive of the regularity of all prior proceedings incident to such sale and purchase, and of the due performance of all things essential to the validity thereof." C. S. Section 8027.

"Where actual sales of real estate are made for taxes under the general laws of the state, the taxpayer whose real estate has been sold for taxes shall be precluded thereafter from attacking such sale on the ground that the tax could have been procured from personal property." C. S. 8011.

"No irregularities in making assessments or in making the returns thereof in the equalization of property as provided by law, or in any other proceeding or requirement of law, shall invalidate the sale of real estate when sold by the sheriff for delinquent taxes, nor in any manner invalidate the tax levied on any property or charged against any person." C.S. 8020.

The plaintiff submits that, having complied with the requirements of the statute in instituting this suit, the defendants cannot now contest this action on any irregularities or on the ground that the taxes could have been procured from the sale of personal property, C. S. 8011, neither can they attack it because

of irregularities. See C. S. 8020 above.

The statute further provides that: "It shall be incumbent upon the taxpayer, mortgagee or other lien holder on taxpayer's realty - to point out to the sheriff personalty out of which the taxes may be made or else such taxpayer shall forfeit his right under this section and his real estate shall be subject to the lien for taxes as if no other property had been listed by him." C. S. 8006.

CRAVEN COUNTY V. PARKER, 194 N.C.,561.

The plaintiff submits that, under all of the evidence introduced in this case, it was entitled to have the jury pass upon the weight and sufficiency of the evidence, and that the Court should have submitted the evidence to the jury to pass upon; that it was the duty of the court to examine the evidence and see if in any view of it the plaintiff could recover, and, in doing so, should have rejected all of it which was favorable to the defendants and considered only that which was favorable to the plaintiff, as the plaintiff was entitled to the most favorable view of the evidence and to have the part most favorable to it taken as true. On a motion of nonsuit or to dismiss, under the statute, it is like a demurrer to evidence, the Court is not permitted to pass upon the weight of the evidence, but the evidence must be accepted as true and considered in the light most favorable to the plaintiff, and every fact which it tends to prove must be taken as established.

BRITTIAN V. WESTALL, 135 N.C.,492.

This Court has held that where there is evidence in the case upon which the jury can return a verdict for the plaintiff, as the evidence, upon such a motion, must be construed most favorably in behalf of the plaintiff, and if in any reasonable view of it he is entitled to recover, it should be submitted to the jury.

COLLINS V. CASUALTY COMPANY, 172 N.C., 543, at page 546.

The plaintiff submits that the rule above stated is applicable in this case; that if the evidence which had been produced had been believed by the jury, the plaintiff would have been entitled to recover the amount sued upon.
HUSH V. McPHERSON,,176 N.C., 562.

This Court has also held that on motion by the defendant for nonsuit the evidence must be construed most favorably to the plaintiff, and every fact essential to the cause of action, which it tends to prove, must be taken as established, and the plaintiff also is entitled to the most favorable inferences deducible therefrom, considering only so much of the evidence as is favorable to the plaintiff and rejecting that which is unfavorable. And, the plaintiff submits that, applying this rule to the case now before the Court, the evidence is, in law, fully sufficient to establish plaintiff's cause of action,if taken to be true, as it should be. Our courts have held that it makes no difference if there are discrepancies in it, or inconsistencies, or even contradictions, (the plaintiff contends that there are none), the jury must determine which part is true, and not the Court.

SIKES V. LIFE INS. CO., 144 N.C.,626:
McCASKILL v. WALKER, 145 N.C.,252:
MORTON V. LUMBER CO., 152 N.C.,54:
NEWBY V. REALTY CO., 182 N.C.,34 at p.41.

Again this Court has held that the effect of the motion of nonsuit admits the truth of the plaintiff's evidence in the light most favorable to him. This principle was re-stated in NOWELL V. BASNIGHT, 185 N.C., 142, at page 148, and a long list of cases therein cited.

Again in this case this Court held that the motion of nonsuit should not be allowed when there is any evidence, more than a scintilla, upon which to base a verdict. Citing ROGERSON v. HONTZ, 174 N.C., 27. KING v. RAILROAD, 174 N.C., 39. MEARES V. LUMBER CO.,172 N.C.289.

Again the above principle was re-stated in STIKELEATHER V. BANK, 187 N.C.,860.

The plaintiff further submits that the evidence was sufficient to be submitted to the jury in support of its claim; that the evidence of Mr. Bumgarner that the property was sold as provided by law; that no part of the taxes had yet been paid, and there being no evidence that such taxes had been paid, it was the duty of the Court below to submit the evidence to the jury, and the weight of such evidence was for the jury to determine. SHAW v. HANDLE COMPANY, 188 N.C., 222, at p. 236.

Respectfully submitted,

A. H. CASEY,

Attorney for Wilkes County,
Appellant.

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No. 575

SEVENTEENTH DISTRICT.

SUPREME COURT OF NORTH CAROLINA

Fall Term, 1932.

**************************************

WILKES COUNTY,

v.

C. A. FORESTER and wife, LUNA FORESTER.

**************************************

DEFENDANT APPELLEES' BRIEF.

**************************************

No. 575 SEVENTEENTH DISTRICT.

SUPREME COURT OF NORTH CAROLINA

Fall Term, 1932.

**********************************

WILKES COUNTY,

v.

C. A. FORESTER and wife, LUNA FORESTER.

**********************************

DEFENDANT APPELLEES' BRIEF.

**********************************

QUESTIONS INVOLVED

1. Did the Court err in sustaining motion for judgment of nonsuit?

STATEMENT OF FACTS

This was a civil action tried at June Term, 1932, Wilkes Superior Court. The plaintiff sued the defendants in foreclosure proceedings for collection of alleged taxes due and the defendants and each of them filed answer in which they pleaded the statute of limitations, setting forth that the plaintiff had not instituted its suit within the time required. At the close of plaintiff's testimony the defendants entered a motion for judgment as of nonsuit, the Court allowed the motion and from said judgment the plaintiffs appealed to the Supreme Court.

A R G U M E N T .

The record in this case shows that the land in question was sold on the 5th day of November, 1928, and J. M. Bumgarner, Tax Collector testified that he dated the certificate the day the property was sold which was November 5th, 1928 (R.p.10).

When the statute of limitations is pleaded, we understand that the law then requires the plaintiff to go forward and establish by evidence that his case was instituted within the time required, and unless this is done that the plaintiff will not be entitled to have his case submitted to the jury, for if the action was not instituted within time why should the jury be required to pass on any other element of the case as the plaintiff would not be entitled to recover.

The answer filed by the defendants (R.p.6) shows that the defendants pleaded the statute and there is no place that shows that the plaintiff at any time in the trial introduced any evidence of any nature to repel the statute.

Again we argue that the plaintiff was not entitled to have its case submitted to the jury, for that the evidence of the plaintiff tends to show that one of the defendants, to-wit, C. A. Forester had an agreement with the Tax Collector J. M. Bumgarner, to deliver to the said tax collector a check signed in blank and that the said tax collector was to fill it in for taxes due the county, and Bumgarner the plaintiff's witness testified (R.p.11) that he received the check and that he knew that he had the authority to fill in said check for taxes due and that he filled in said check for the amount of $111.52 and that said check was marked for taxes due the county, and this witness further testified that he knew the tax rate in the county and had the books and knew what the amount of taxes would be for the property of the defendants, and he further testified that he did not know why he did not fill in said check for the full amount of alleged taxes due.

We therefore submit that under all the evidence in this case the plaintiff failed to make out its case and failed to offer any evidence to show that its case was instituted within the time required by statute in suits for the foreclosure of taxes, and that the judgment of the Court below should be affirmed. Respectfully,

TRIVETTE & HOLSHOUSER, Attys. for Defendants.

# The Cambridge Handbook of Thinking and Reasoning

*Edited by*

**Keith J. Holyoak**
**and**
**Robert G. Morrison**

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CHAPTER 8

# Deductive Reasoning

*Jonathan St. B. T. Evans*

The study of deductive reasoning has been a major field of cognitive psychology for the past 40 years or so (Evans, 2002; Evans, Newstead, & Byrne, 1993; Manktelow, 1999). The field has its origins in philosophy, within the ancient discipline of logic, and reflects the once influential view known as logicism in which logic is proposed to be the basis for rational human thinking. This view was prevalent in the 1960s when psychological study of deductive reasoning became an established field in psychology, especially reflecting the theories of the great developmental psychologist Jean Piaget (e.g., Inhelder & Piaget, 1958). Logicism was also influentially promoted to psychologists studying reasoning in a famous paper by Henle (1962). At this time, rationality was clearly tied to logicality.

So what exactly is deductive logic? (See Sloman & Lagnado, Chap. 5, for a contrast with induction.) As a model for human reasoning, it has one great strength but several serious weaknesses. The strength is that an argument deemed valid in logic guarantees that if the premises are true, then the conclusion will also be true. Consider a syllogism (an old form of logic devised by Aristotle) with the following form:

All C are B.
No A are B.
Therefore, no A are C.

This is valid argument and will remain so no matter what terms we substitute for A, B, and C. For example,

All frogs are reptiles.
No cats are reptiles.
Therefore, no cats are frogs.

has two true premises and a true conclusion. Unfortunately, the argument is equally valid if we substitute terms as follows:

All frogs are mammals.
No cats are mammals.
Therefore, no cats are frogs.

A valid argument can allow a true conclusion to be drawn from false premises, as previously, which would make it seem a nonsense to most ordinary people (that is, not

logicians). This is one weakness of logic in describing everyday reasoning, but there are others. The main limitation is that deductive reasoning does not allow you to learn anything new at all because all logical argument depends on assumptions or suppositions. At best, deduction may enable you to draw out conclusions that were only implicit in your beliefs, but it cannot add to those beliefs. There are also severe limitations in applying logic to real world arguments where premises are uncertain and conclusions may be made provisionally and later withdrawn (Evans & Over, 1996; Oaksford & Chater, 1998).

Although these limitations are nowadays widely recognized, the ability of people to reason logically (or the lack of it) was considered an important enough issue in the past for the use of the deduction paradigm to become well established. The standard paradigm consists of giving people premises and asking them to draw conclusions. There are two key instructions that make this a deductive reasoning task. First, people must be told to assume the premises are true and (usually) are told to base their reasoning only on these premises. Second, they must only draw or endorse a conclusion that *necessarily* follows from the premises.

An example of a large deductive reasoning study was that more recently reported by Evans, Handley, Harper, and Johnson-Laird (1999) using syllogistic reasoning. Syllogisms have four kinds of statement as follows:

| | |
|---|---|
| Universal | All A are B. |
| Particular | Some A are B. |
| Negative universal | No A are B. |
| Negative particular | Some A are not B. |

Because a syllogism comprises two premises and a conclusion, there are 64 possible *moods* in which each of the three statements can take each of the four forms. In addition, there are four *figures* produced by changing the order of reference to the three linked terms, A, B, and C, making 256 logically distinct syllogisms. For example, the following syllogisms have the same mood but different figures:

| | |
|---|---|
| No C are B. (1) | No C are B. (2) |
| Some A are B. | Some B are A. |
| Therefore, | Therefore, |
| some A are not C. | some C are not A. |

Although these arguments look very similar, (1) is logically valid and (2) is invalid. Like most invalid arguments, the conclusion to (2) is *possible* given the premises, but not necessary. Hence, it is a fallacy. Here is a case in which a syllogism in form (2) seems persuasive because it has true premises and a true conclusion:

> No voters are under 18 years of age.
> Some film stars are under 18 years of age.
> Therefore, some voters are not film stars.

However, we can easily construct a *counterexample* case. A counterexample proves an argument to be invalid by showing that you could have true premises but a false conclusion, such as

> No bees are carnivores.
> Some animals are carnivores.
> Therefore, some bees are not animals.

Evans et al. (1999) actually gave participants all 64 possible combinations of syllogistic premises and asked them to decide in one group whether each of the four possible conclusions followed necessarily from these premises in line with standard deductive reasoning instructions (in this study, all problem materials were abstract, using capital letters for the terms). A relatively small number of syllogisms have necessary (valid) conclusions or impossible (determinately false) conclusions. Most participants accepted the former and rejected the latter in accord with logic. The interesting cases are the potential fallacies like (2), where the conclusion could be true but does not have to be. In accordance with previous research, Evans et al. found that fallacies were frequently endorsed, although with an interesting qualification to which we return. They ran a second group who were instructed to endorse conclusions that could be true (that is possible) given their premises. The results suggested that ordinary people have a poor understanding

of logical necessity. Possibility instructions should have selectively increased acceptance of conclusions normally marked as fallacies. In fact, participants in the possibility groups accepted conclusions of all kinds more frequently, regardless of the logical argument.

## Rule- Versus Model-Based Accounts of Reasoning

Logical systems can be described using a syntactic or semantic approach, and psychological theories of deductive reasoning can be similarly divided. In the syntactic approach, reasoning is described using a set of abstract inference rules that can be applied in sequence. The approach is algebraic in that one must start by recovering the logical form of an argument and discarding the particular content or context in which it is framed. In standard propositional logic, for example, several inference rules are applied to conditional statements of the form *if p then q*. These rules can be derived from first principles of the logic and provide a short-cut method of deductive reasoning. Here are some examples:

| *Modus Ponens* (MP) | *Modus Tollens* (MT) |
|---|---|
| If *p* then *q* | If *p* then *q* |
| *p* | not-*q* |
| Therefore *q* | Therefore, not-*p* |

For example, suppose we know that "if the switch is down then the light is on." If I notice that the switch is down, then I can obviously deduce that the light is on (MP). If I see that the light is off, I can also validly infer that the switch is not down (MT). One of the difficulties with testing people's logical ability with such arguments, however, is that they can easily imagine counterexample cases that block such valid inferences (Evans et al., 1993). For example, if the light bulb has burned out, neither MP not MT will deliver a true conclusion. That is why the instruction to assume the truth of the premises should be part of the deduction experiment. It also shows why deductive logic may have limited application in real world reasoning, where most rules – such as conditional statements – do have exceptions.

Some more complex rules involve suppositions. In suppositional reasoning, you add a temporary assumption to those given that is later deleted. An example is conditional proof (CP), which states that if by assuming *p* you can derive *q*, then it follows that *if p then q*, a conclusion that no longer depends on the assumption of *p*. Suppose the following information is given:

> If the car is green, then it has four-wheel drive.
>
> The car has either four-wheel drive or power steering, but not both.

What can you conclude? If you make the supposition that the car is in fact green, then you can draw the conclusion, in two steps, that it does not have power steering. Now you do not know if the car is actually green, but the CP rule allows you to draw the conclusion, "If the car is green then it does not have power steering."

Some philosophers described inference rule systems as "natural logics," reflecting the idea that ordinary people reason by applying such rules. This has been developed by modern psychologists into sophisticated psychological theories of rule-based reasoning, often described as "mental logics." The best-developed systems are those of Rips (1994) and Braine and O'Brien (1998). According to these accounts, people reason by abstracting the underlying logical structure of arguments and then applying inference rules. Direct rules of inferences, such as MP, are applied immediately and effortlessly. Indirect, suppositional rules such as CP are more difficult and error prone. Although MT is included as a standard rule in propositional logic, mental logicians do not include this as a direct rule of inference for the simple reason that people find it difficult. Here is an MT argument:

> If the card has an A on the left, then it has a 3 on the right.
>
> The card does not have a 3 on the right.
>
> Therefore, the card does not have an A on the left.