

# THE GENERAL STATUTES OF NORTH CAROLINA

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## 1983 CUMULATIVE SUPPLEMENT

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Annotated, under the Supervision of the Department of  
Justice, by the Editorial Staff of the Publishers

*Under the Direction of*

D. P. HARRIMAN, S. C. WILLARD, W. L. JACKSON  
AND K. S. MAWYER

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## Volume 1B

### 1981 Replacement

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Annotated through 303 S.E.2d 102. For complete scope of  
annotations, see scope of volume page.

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**Place in Pocket of Corresponding Volume of Main Set.  
This Supersedes Previous Supplement, Which  
May Be Retained for Reference Purposes.**

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1:1983  
cum. suppl.  
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# Scope of Volume

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## Statutes:

Permanent portions of the general laws enacted by the General Assembly through the 1983 Regular Session and the 1983 Extra Session affecting Chapters 2 through 14 of the General Statutes.

## Annotations:

Sources of the annotations to the General Statutes appearing in this volume are:

South Eastern Reporter 2nd Series through Volume 303, p. 102.  
Federal Reporter 2nd Series through Volume 707, p. 523.  
Bankruptcy Reports through Volume 29, p. 815.  
Federal Supplement through Volume 562, p. 911.  
Federal Rules Decisions through Volume 97, p. 544.  
Supreme Court Reporter through Volume 103, p. 2468.  
North Carolina Law Review through Volume 61, p. 744.  
Wake Forest Law Review through Volume 19, p. 150.  
Campbell Law Review through Volume 5, p. 262.  
Duke Law Journal through 1983, p. 195.  
North Carolina Central Law Journal through Volume 13, p. 282.  
Opinions of the Attorney General.



## Preface

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This Cumulative Supplement to Replacement Volume 1B contains the general laws of a permanent nature enacted by the General Assembly since publication of the replacement volume through the 1983 Regular Session and the 1983 Extra Session which are within the scope of such volume, and brings to date the annotations included therein.

Amendments are inserted under the same section numbers appearing in the General Statutes, and new laws appear under the proper chapter headings.

Chapter analyses show all affected sections except sections for which catchlines are carried for the purpose of notes only. An index to all statutes codified herein will appear in the Replacement Index Volumes.

A majority of the Session Laws are made effective upon ratification, but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after 30 days after the adjournment of the session" in which passed.

Beginning with the opinions issued by the North Carolina Attorney General on July 1, 1969, any opinion which construes a specific statute is cited as an annotation to that statute. For a copy of an opinion or of its headnotes write the Attorney General, P. O. Box 629, Raleigh, N.C. 27602.

The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes or in this Supplement and any suggestions they may have for improving the General Statutes, to the Department of Justice of the State of North Carolina, or to The Michie Company, Law Publishers, Charlottesville, Virginia.





# The General Statutes of North Carolina

## 1983 Cumulative Supplement

### Volume 1B

### Chapter 4.

### Common Law.

#### § 4-1. Common law declared to be in force.

##### CASE NOTES

##### I. GENERAL CONSIDERATION.

**Sovereign Immunity.** — The concept of sovereign immunity, extant in the English common law, made its way into the common law of colonial North Carolina and remains in force in this State. *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 293 S.E.2d 182 (1982).

##### II. ILLUSTRATIVE CASES.

##### B. Criminal.

**Solicitation to commit a felony** was a misdemeanor at common law. *United States v. MacCloskey*, 682 F.2d 468 (4th Cir. 1982).

## Chapter 5A.

## Contempt.

## ARTICLE 1.

*Criminal Contempt.*

## § 5A-11. Criminal contempt.

## CASE NOTES

## I. GENERAL CONSIDERATION.

Cited in *Broughton v. Baker*, 537 F. Supp. 274 (E.D.N.C. 1982).

## IV. ACTS CONSTITUTING CONTEMPT.

## A. In General.

## "Willful" and "Unlawful" Distinguished.

In accord with original. See *Clayton v. Clayton*, 54 N.C. App. 612, 284 S.E.2d 125 (1981).

## V. PRACTICE AND PROCEDURE.

## Appealability of Acquittal of Criminal

**Contempt.** — In a domestic relations case in which plaintiff sought to have defendant's attorney held in contempt in harboring a child for the purpose of resisting and interfering with a court order granting temporary custody to the plaintiff, the charges were in the nature of criminal contempt, and the court's order finding that the attorney's conduct did not constitute contempt was not appealable, since the acquittal did not affect any substantial right of the plaintiff. *Patterson v. Phillips*, 56 N.C. App. 454, 289 S.E.2d 48 (1982).

## § 5A-12. Punishment; circumstances for fine or imprisonment; reduction of punishment; other measures.

## CASE NOTES

Stated in *Broughton v. Baker*, 537 F. Supp. 274 (E.D.N.C. 1982).

## § 5A-13. Direct and indirect criminal contempt; proceedings required.

## CASE NOTES

Stated in *State v. Johnson*, 52 N.C. App. 592, 279 S.E.2d 77 (1981).

## § 5A-14. Summary proceedings for contempt.

## Legal Periodicals. —

For survey of 1981 criminal law, see 60 N.C.L. Rev. 1289 (1982).



## CASE NOTES

The term "substantially contemporaneously with the contempt" in subsection (a) of this section is construed in light of its legislative purpose of meeting due process safeguards. The word "substantially" qualifies the word "contemporaneously," and clearly does not require that the contempt proceedings immediately follow the misconduct. Factors bearing on the time lapse include the

contemnor's notice or knowledge of the charged misconduct, the nature of the misconduct, and other circumstances that may have some bearing upon the defendant's right to a fair and timely hearing. *State v. Johnson*, 52 N.C. App. 592, 279 S.E.2d 77, cert. denied and appeal dismissed, 303 N.C. 549, 281 S.E.2d 390 (1981).

Applied in *Pierce v. Pierce*, 58 N.C. App. 815, 295 S.E.2d 247 (1982).

## § 5A-15. Plenary proceedings for contempt.

**Legal Periodicals.** — For survey of 1981 criminal law, see 60 N.C.L. Rev. 1289 (1982).

## CASE NOTES

Stated in *State v. Johnson*, 52 N.C. App. 592, 279 S.E.2d 77 (1981).

Cited in *Broughton v. Baker*, 537 F. Supp. 274 (E.D.N.C. 1982).

## § 5A-17. Appeals.

## CASE NOTES

**Appealability of Acquittal of Criminal Contempt.** — In a domestic relations case in which plaintiff sought to have defendant's attorney held in contempt in harboring a child for the purpose of resisting and interfering with a court order granting temporary custody to the plaintiff, the charges were in the nature of criminal contempt, and the court's order

finding that the attorney's conduct did not constitute contempt was not appealable, since the acquittal did not affect any substantial right of the plaintiff. *Patterson v. Phillips*, 56 N.C. 454, 289 S.E.2d 48 (1982).

Quoted in *Patterson v. Phillips*, 56 N.C. App. 454, 289 S.E.2d 48 (1982).

## ARTICLE 2.

*Civil Contempt.*

## § 5A-21. Civil contempt; imprisonment to compel compliance.

**Legal Periodicals.** —

For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1067 (1981).

For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1097 (1981).

## CASE NOTES

## I. GENERAL CONSIDERATION.

**Criminal and Civil Contempt Distinguished. —**

Proceedings instituted to vindicate the dignity of the court and to punish attorney for his alleged interference with a custody order, although arising in a civil case, are criminal in nature. *Patterson v. Phillips*, 56 N.C. App. 454, 289 S.E.2d 48 (1982).

**Disobedience Must Be Willful. —**

The element of willfulness is required for a finding of civil contempt under § 50-13.4(f)(9) and this section. *Jones v. Jones*, 52 N.C. App. 104, 278 S.E.2d 260 (1981).

Civil contempt is based upon acts or neglect constituting a willful violation of a lawful order of the court. A failure to obey an order of the court cannot be punished by attachment for civil contempt unless the disobedience is willful. It is well settled that one does not act willfully in failing to comply with a judgment if it has not been within his power to do so since

the judgment was rendered. *Henderson v. Henderson*, 307 N.C. 401, 298 S.E.2d 345 (1983).

**Thus, Defendant Must Possess Means to Comply. —**

A defendant in a civil contempt action will be fined or incarcerated only after a determination is made that the defendant is capable of complying with the order of the court. *Reece v. Reece*, 58 N.C. App. 404, 293 S.E.2d 662 (1982).

## II. ORDERS ENFORCEABLE AS CIVIL CONTEMPT.

**Consent Judgment in Domestic Relations Setting. —** In a domestic relations setting, a consent judgment which has been adopted by the court, but which contains unequivocal language to the effect that it is not subject to modification, may nevertheless be enforced by civil contempt. *Henderson v. Henderson*, 55 N.C. App. 506, 286 S.E.2d 657 (1982), *aff'd*, 307 N.C. 401, 298 S.E.2d 345 (1983).

## § 5A-23. Proceedings for civil contempt.

## CASE NOTES

Quoted in *Allison v. Allison*, 51 N.C. App. 622, 277 S.E.2d 551 (1981).

## § 5A-24. Appeals.

## CASE NOTES

Stated in *Patterson v. Phillips*, 56 N.C. App. 454, 289 S.E.2d 48 (1982).



## Chapter 6.

### Liability for Court Costs.

#### Article 3.

##### Civil Actions and Proceedings.

Sec.

6-19.1. Attorney's fees to parties appealing or defending against agency decision.

Sec.

6-19.2. Attorney's fees to parties who compel disclosure of public records.

#### ARTICLE 1.

##### *Generally.*

### § 6-1. Items allowed as costs.

**Legal Periodicals.** — For article, "The Legal Theory of Attorney Fee Shifting: A Critical Overview," see 1982 Duke L.J. 651 (1982).

#### ARTICLE 2.

##### *When State Liable for Costs.*

### § 6-13. Civil actions by the State; joinder of private party.

**Legal Periodicals.** —

For article, "The Legal Theory of Attorney

Fee Shifting: A Critical Overview," see 1982 Duke L.J. 651 (1982).

#### ARTICLE 3.

##### *Civil Actions and Proceedings.*

### § 6-18. When costs allowed as of course to plaintiff.

**Legal Periodicals.** — For article, "The Legal Theory of Attorney Fee Shifting: A Critical Overview," see 1982 Duke L.J. 651 (1982).

#### CASE NOTES

##### I. GENERAL CONSIDERATION.

**Cited in** Dorsey v. Dorsey, 53 N.C. App. 622, 281 S.E.2d 429 (1981).

### § 6-19. When costs allowed as of course to defendant.

**Legal Periodicals.** — For article, "The Legal Theory of Attorney Fee Shifting: A Critical Overview," see 1982 Duke L.J. 651 (1982).



### § 6-19.1. Attorney's fees to parties appealing or defending against agency decision.

In any civil action, other than an adjudication for the purpose of establishing or fixing a rate, or a disciplinary action by a licensing board, brought by the State or brought by a party who is contesting State action pursuant to G.S. 150A-43 or any other appropriate provisions of law, unless the prevailing party is the State, the court may, in its discretion, allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against the appropriate agency if:

- (1) The court finds that the agency acted without substantial justification in pressing its claim against the party; and
- (2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust.

The party shall petition for the attorney's fees within 30 days following final disposition of the case. The petition shall be supported by an affidavit setting forth the basis for the request.

Nothing in this section grants permission to bring an action against an agency otherwise immune from suit or gives a right to bring an action to a party who otherwise lacks standing to bring the action.

Any attorney's fees assessed against an agency under this section shall be charged against the operating expenses of the agency and shall not be reimbursed from any other source. (1983, c. 918, s. 1.)

**Editor's Note.** — Session Laws 1983, c. 918, October 1, 1983, and applies to actions commenced on or after that date.

### § 6-19.2. Attorney's fees to parties who compel disclosure of public records.

In any civil action in which a party successfully compels the disclosure of public records pursuant to G.S. 132-9 or other appropriate provisions of law, the court may, in its discretion, allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against the appropriate agency if:

- (1) The court finds that the agency acted without substantial justification in denying access to the public records; and
- (2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust.

The party shall petition for the attorney's fees within 30 days following final disposition of the case. The petition shall be supported by an affidavit setting forth the basis for the request.

Nothing in this section grants permission to bring an action against an agency otherwise immune from suit or gives a right to bring an action to a party who otherwise lacks standing to bring the action.

Any attorney's fees assessed against an agency under this section shall be charged against the operating expenses of the agency and shall not be reimbursed from any other source. (1983, c. 918, s. 1.)

**Editor's Note.** — Session Laws 1983, c. 918, October 1, 1983, and applies to actions commenced on or after that date.



## § 6-20. Costs allowed or not, in discretion of court.

**Legal Periodicals.** — For article, "The Legal Theory of Attorney Fee Shifting: A Critical Overview," see 1982 Duke L.J. 651 (1982).

### CASE NOTES

#### **Discretion Not Reviewable.** —

In accord with 2nd paragraph in original. See Dixon, Odom & Co. v. Sledge, 59 N.C. App. 280, 296 S.E.2d 512 (1982).

**Deposition Expenses.** — As a general rule, recoverable costs may include deposition expenses unless it appears that the depositions

were unnecessary. Even though deposition expenses do not appear expressly in the statutes they may be considered as part of "costs" and taxed in the trial court's discretion. Dixon, Odom & Co. v. Sledge, 59 N.C. App. 280, 296 S.E.2d 512 (1982).

## § 6-21. Costs allowed either party or apportioned in discretion of court.

#### **Legal Periodicals.** —

For survey of 1981 property law, see 60 N.C.L. Rev. 1420 (1982).

For article, "The Legal Theory of Attorney Fee Shifting: A Critical Overview," see 1982 Duke L.J. 651 (1982).

### CASE NOTES

#### **I. GENERAL CONSIDERATION.**

##### **Discretion Not Reviewable.**

In accord with original. See Davis v. Davis, 58 N.C. App. 25, 293 S.E.2d 268, cert. denied, 307 N.C. 127, 297 S.E.2d 399 (1982).

**Discretion as to Counsel Fees.** — The decision to award counsel fees is within the discretion of the trial court, and the Court of Appeals will not disturb what it deems to be a sound exercise of that discretion. Riddle v. Riddle, 58 N.C. App. 594, 293 S.E.2d 819 (1982).

**Stated in** In re North Carolina Nat'l Bank, 52 N.C. App. 353, 278 S.E.2d 330 (1981).

**Cited in** Dorsey v. Dorsey, 53 N.C. App. 622, 281 S.E.2d 429 (1981).

#### **II. COSTS IN PARTICULAR ACTIONS.**

##### **A. Caveats to Wills.**

**Caveat Unsuccessful — Attorneys' Fees.** — This section does not require the court to award attorneys' fees to counsel for unsuccessful caveators to a will but clearly authorizes the court to do so; thus, it is a matter in the discretion of the court, both as to whether to allow fees and the amount of such fees. In re Ridge, 302 N.C. 375, 275 S.E.2d 424 (1981).

## § 6-21.1. Allowance of counsel fees as part of costs in certain cases.

**Cross References.** — As to costs where offer of judgment made, see § 1A-1, Rule 68.

#### **Legal Periodicals.** —

For article, "The Legal Theory of Attorney

Fee Shifting: A Critical Overview," see 1982 Duke L.J. 651 (1982).

### CASE NOTES

#### **I. GENERAL CONSIDERATION.**

##### **The obvious purpose of this section.** —

In accord with 1st paragraph in original. See Purdy v. Brown, 307 N.C. 93, 296 S.E.2d 459 (1982); Hillman v. United States Liab. Ins. Co., 59 N.C. App. 145, 296 S.E.2d 302 (1982).

##### **This section, being remedial, etc.** —

In accord with 1st paragraph in original. See Hillman v. United States Liab. Ins. Co., 59 N.C. App. 145, 296 S.E.2d 302 (1982).

**Section Contemplates Inquiry before Awarding Fee to Counsel.** — The wording of



this section contemplates some type of inquiry by the presiding judge before the court may exercise its discretion in awarding a fee to plaintiff's counsel. *Hillman v. United States Liab. Ins. Co.*, 59 N.C. App. 145, 296 S.E.2d 302 (1982).

**Additional Attorney's Fees on Appeal.** — Authority to award additional attorney's fees for an appeal falls within the purview of this section. *Heins Tel. Co. v. Grain Dealers Mut. Ins. Co.*, 57 N.C. App. 695, 292 S.E.2d 281 (1982).

**Applicability Governed by Amount Obtained.** — The amount of the judgment obtained, not the amount of the judgment sought, governs applicability of this section. *Purdy v. Brown*, 56 N.C. App. 792, 290 S.E.2d 397, rev'd on other grounds, 307 N.C. 93, 296 S.E.2d 459 (1982).

**Discretion of Judge.** —

It is clearly within the discretion of the trial judge as to whether attorney fees shall be allowed. *Yates Motor Co. v. Simmons*, 51 N.C. App. 339, 276 S.E.2d 496, cert. denied, 303 N.C. 320, 281 S.E.2d 660 (1981).

**To overturn trial judge's determination, defendant must show abuse of discretion.** *Hillman v. United States Liab. Ins. Co.*, 59 N.C. App. 145, 296 S.E.2d 302 (1982).

**Stated in** *Plow v. Bug Man Exterminators, Inc.*, 57 N.C. App. 159, 290 S.E.2d 787 (1982).

### III. PROCEDURE.

**Finding of Unwarranted Refusal, etc.** —

A finding of an unwarranted refusal by defendants to pay plaintiff's claim is required only in suits by an insured or beneficiary against an insurance company. *Yates Motor Co. v. Simmons*, 51 N.C. App. 339, 276 S.E.2d 496, cert. denied, 303 N.C. 320, 281 S.E.2d 660 (1981).

**No Fees Where Plaintiff Awarded New Trial.** — Under this section, attorney's fees are taxed as a part of the court costs, and where plaintiff was awarded a new trial by the appellate court, no judgment for damages was obtained, and, consequently, no attorney's fees would be awarded as part of the cost. *Craven v.*

*Chambers*, 56 N.C. App. 151, 287 S.E.2d 905 (1982).

### IV. SETTLEMENT.

**Effect of Settlement.** —

In referring to the "presiding" judge in this section as the official to assess attorney fees, the General Assembly did not contemplate that attorney fees would be properly allowed only if the case could not be settled prior to trial. *Yates Motor Co. v. Simmons*, 51 N.C. App. 339, 276 S.E.2d 496, cert. denied, 303 N.C. 320, 281 S.E.2d 660 (1981).

**Attorney's Fees Where Settlement Offer Made.** — Attorney's fees which were incurred prior to the time the offer of judgment was made are recoverable. The § 1A-1, Rule 68 sanctions only provide protection against the costs incurred after the offer has been made. *Purdy v. Brown*, 307 N.C. 93, 296 S.E.2d 459 (1982).

**Offer of Judgment Exceeding \$5,000.** — An offer of judgment for more than \$5,000, together with costs then accrued, but excluding attorney's fees, is valid. This section would not apply in this case and "costs then accrued" would therefore not include attorney's fees incurred after the offer of judgment was made. The mere fact that judgment for less than \$5,000 is later obtained should have no bearing on costs accrued at the time the offer was made. The trial judge would have had no discretion to award an attorney's fee, even if the defendant had not inserted language excluding them in his offer of judgment. *Purdy v. Brown*, 307 N.C. 93, 296 S.E.2d 459 (1982).

**The fact that third party plaintiff ultimately agreed to accept a judgment for less than the amount offered her by third party defendants' insurance carrier before plaintiff's suit and her cross-claim were filed did not ipso facto deny her the benefit of this section, and the trial judge did not abuse his discretion in awarding a reasonable attorney fee to third party plaintiff in her action against third party defendant.** *Yates Motor Co. v. Simmons*, 51 N.C. App. 339, 276 S.E.2d 496, cert. denied, 303 N.C. 320, 281 S.E.2d 660 (1981).

## § 6-21.2. Attorneys' fees in notes, etc., in addition to interest.

**Legal Periodicals.** —

For survey of 1981 property law, see 60 N.C.L. Rev. 1420 (1982).

For article, "The Legal Theory of Attorney Fee Shifting: A Critical Overview," see 1982 Duke L.J. 651 (1982).

For note on contractual allocation of attorneys' fees as costs of litigation, see 17 Wake Forest L. Rev. 457 (1981).



## CASE NOTES

**This section represents, etc. —**

This section represents a far-reaching exception to the well-established rule against attorneys' fees obligations, and approves specifically an obligation to pay reasonable attorneys' fees found in any note or other evidence of indebtedness. *Reavis v. Ecological Dev., Inc.*, 53 N.C. App. 496, 281 S.E.2d 78 (1981).

**Attorneys' Fees Provisions Enforceable When Specifically Authorized.** — Although provisions calling for a debtor to pay attorneys' fees incurred by a creditor in the collection of a debt have long been considered against public policy, such provisions are enforceable when specifically authorized by statute. *Reavis v. Ecological Dev., Inc.*, 53 N.C. App. 496, 281 S.E.2d 78 (1981).

**Recovery of Attorneys' Fees Pursuant to Promissory Note Not a Deficiency.** — Where a provision for attorneys' fees in a promissory note given by defendant to plaintiffs and incorporated in deeds of trust is properly authorized by this section, recovery of the fees does not represent a deficiency in violation of

§ 45-21.38. *Reavis v. Ecological Dev., Inc.*, 53 N.C. App. 496, 281 S.E.2d 78 (1981).

**Award in Proceeding under § 105-374 Unaffected.** — The amount of an attorney's fee awarded in a tax foreclosure proceeding under § 105-374 is to be determined pursuant to subsection (i) of that section in the discretion of the trial court and is not limited by the provisions of this section. *Town of Sylva v. Gibson*, 51 N.C. App. 545, 277 S.E.2d 115, appeal dismissed and cert. denied, 303 N.C. 319, 281 S.E.2d 659 (1981).

**Subdivision (5) of this section sets no time limit, etc. —**

In accord with original. See *Gillespie v. DeWitt*, 53 N.C. App. 252, 280 S.E.2d 736, cert. denied, 304 N.C. 390, 285 S.E.2d 832 (1981).

**Applied in Independence Nat'l Bank v. Dye Master Realty, Inc.**, 15 Bankr. 932 (Bankr. W.D.N.C. 1981).

**Quoted in American Foods, Inc. v. Goodson Farms, Inc.**, 50 N.C. App. 591, 275 S.E.2d 184 (1981).

## § 6-21.4. Allowance of counsel fees and costs in certain cases involving principals or teachers.

**Legal Periodicals.** — For article, "The Legal Theory of Attorney Fee Shifting: A

Critical Overview," see 1982 Duke L.J. 651 (1982).

## Chapter 7A.

### Judicial Department.

#### SUBCHAPTER II. APPELLATE DIVISION OF THE GENERAL COURT OF JUSTICE.

##### Article 3.

##### The Supreme Court.

Sec.

7A-10. Organization; compensation of justices.

7A-11. Clerk of the Supreme Court; salary; bond; fees; oath.

##### Article 4.

##### Court of Appeals.

7A-18. Compensation of judges.

7A-20. Clerk; oath; bond; salary; assistants; fees.

##### Article 5.

##### Jurisdiction.

7A-28. Decisions of Court of Appeals on post-trial motions for appropriate relief final or valuation of exempt property.

7A-29. Appeals of right from certain administrative agencies.

7A-30. Appeals of right from certain decisions of the Court of Appeals.

7A-31. Discretionary review by the Supreme Court.

##### Article 6.

##### Retirement of Justices and Judges of the Appellate Division; Retirement Com- pensation; Recall to Emergency Service; Disability Retirement.

7A-39.3. Retired justices and judges may become emergency justices and judges subject to recall to active service; compensation for emergency justices and judges on recall.

#### SUBCHAPTER III. SUPERIOR COURT DIVISION OF THE GENERAL COURT OF JUSTICE.

##### Article 7.

##### Organization.

7A-41. Superior court divisions and districts; judges; assistant district attorneys.

7A-44. Salary and expenses of superior court judge.

7A-49.3. Calendar for criminal trial sessions.

##### Article 8.

##### Retirement of Judges of the Superior Court; Retirement Compensation for Superior Court Judges; Recall to Emergency Service of Judges of the District and Superior Court; Disability Retirement for Judges of the Superior Court.

Sec.

7A-52. Retired district and superior court judges may become emergency judges subject to recall to active service; compensation for emergency judges on recall.

##### Article 9.

##### District Attorneys and Judicial Districts.

7A-65. (Effective until July 1, 1984) Compensation and allowances of district attorneys and assistant district attorneys.

7A-65. (Effective July 1, 1984) Compensation and allowances of district attorneys and assistant district attorneys.

##### Article 12.

##### Clerk of Superior Court.

7A-101. (Effective until July 1, 1984) Compensation.

7A-101. (Effective July 1, 1984) Compensation.

7A-108. Accounting for fees and other receipts; annual audit.

7A-111. Receipt and disbursement of insurance and other moneys for minors and incapacitated adults.

#### SUBCHAPTER IV. DISTRICT COURT DIVISION OF THE GENERAL COURT OF JUSTICE.

##### Article 13.

##### Creation and Organization of the District Court Division.

7A-133. Numbers of judges by districts; numbers of magistrates and additional seats of court, by counties.

##### Article 14.

##### District Judges.

7A-144. Compensation.

7A-146. Administrative authority and duties of chief district judge.



Sec.

7A-148. Annual conference of chief district judges.

**Article 16.**

**Magistrates.**

7A-171.1. Duty hours and salary.

**Article 17.**

**Clerical Functions in the District Court.**

7A-180. Functions of clerk of superior court in district court matters.

**Article 19.**

**Small Claim Actions in District Court.**

7A-217. Methods of subjecting person of defendant to jurisdiction.

**SUBCHAPTER V. JURISDICTION AND POWERS OF THE TRIAL DIVISIONS OF THE GENERAL COURT OF JUSTICE.**

**Article 20.**

**Original Civil Jurisdiction of the Trial Divisions.**

7A-243. Proper division for trial of civil actions generally determined by amount in controversy.

**Article 22.**

**Jurisdiction of the Trial Divisions in Criminal Actions.**

7A-273. Powers of magistrates in criminal actions.

**Article 24.**

**Juvenile Services.**

7A-289.6. Duties and powers of court counselors.

**Article 24B.**

**Termination of Parental Rights.**

7A-289.23. Jurisdiction.

7A-289.24. Who may petition.

7A-289.27. Issuance of summons.

7A-289.29. Answer of respondents.

7A-289.31. Disposition.

7A-289.32. Grounds for terminating parental rights.

7A-289.33. Effects of termination order.

7A-289.35. [Repealed.]

**SUBCHAPTER VI. REVENUES AND EXPENSES OF THE JUDICIAL DEPARTMENT.**

**Article 28.**

**Uniform Costs and Fees in the Trial Divisions.**

7A-304. Costs in criminal actions.

Sec.

7A-305. Costs in civil actions.

7A-306. Costs in special proceedings.

7A-307. Costs in administration of estates.

7A-308. Miscellaneous fees and commissions.

7A-309. Magistrate's special fees.

7A-312. Uniform fees for jurors; meals.

7A-314. Uniform fees for witnesses; experts; limit on number.

7A-320. Costs are exclusive.

**SUBCHAPTER VII. ADMINISTRATIVE MATTERS.**

**Article 31.**

**Judicial Council.**

7A-400 to 7A-410. [Repealed.]

**SUBCHAPTER VIII.**

**Article 32.**

**Conference of District Attorneys.**

7A-411. Establishment and purpose.

7A-412. Annual meetings; organization; election of officers.

7A-413. Powers of Conference.

7A-414. Executive Secretary; clerical support.

**SUBCHAPTER IX. REPRESENTATION OF INDIGENT PERSONS.**

**Article 36.**

**Entitlement of Indigent Persons Generally.**

7A-450.1. Responsibility for payment by certain fiduciaries.

7A-450.2. Determination of fiduciaries at indigency determination; summons; service of process.

7A-450.3. Determination of responsibility at hearing.

7A-450.4. Exemptions.

7A-451. Scope of entitlement.

7A-451.1. Counsel fees for outpatient involuntary commitment proceedings.

7A-455. Partial indigency; liens; acquittals.

**Article 37.**

**The Public Defender.**

7A-465. Public defender; defender districts; qualifications; compensation.

7A-466. Selection of defender; term; removal.

**Article 38.**

**Appellate Defender Office.**

7A-478. Duties.

7A-484 to 7A-488. [Reserved.]

**Article 39.**

**Guardian Ad Litem Program.**

7A-489. Office of Guardian Ad Litem Services established.



Sec.

7A-490. Implementation and administration.

7A-491. Conflict of interest or impracticality of implementation.

7A-492. Alternative plans.

7A-493. Civil liability of volunteers.

#### SUBCHAPTER X. NORTH CAROLINA COURTS COMMISSION.

##### Article 40A.

##### North Carolina Courts Commission.

7A-506. Creation; members; terms; qualifications; vacancies.

#### SUBCHAPTER XI. NORTH CAROLINA JUVENILE CODE.

##### Article 42.

##### Jurisdiction.

7A-523. Jurisdiction.

##### Article 43.

##### Screening of Delinquency and Undisciplined Petitions.

7A-531. Preliminary inquiry.

##### Article 44.

##### Screening of Abuse and Neglect Complaints.

7A-548. Duty of county Department of Social Services to report evidence of abuse.

##### Article 46.

##### Temporary Custody; Secure and Nonsecure Custody; Custody Hearings.

7A-573. Authority to issue custody orders; delegation.

Sec.

7A-574. Criteria for secure or nonsecure custody.

7A-576. Place of secure or nonsecure custody.

##### Article 47.

##### Basic Rights.

7A-586. Appointment and duties of guardian ad litem.

7A-588. Payment of court appointed attorney or guardian ad litem.

##### Article 49.

##### Transfer to Superior Court.

7A-610. Procedure upon finding of probable cause.

##### Article 52.

##### Dispositions.

7A-650. Authority over parents of juvenile adjudicated as delinquent, undisciplined, abused, neglected, or dependent.

7A-652. Commitment of delinquent juvenile to Division of Youth Services.

7A-655. Conditional release and final discharge.

7A-659. Post termination of parental rights' placement court review.

7A-660. Review of agency's plan for child placement.

7A-661 to 7A-663. [Reserved.]

##### Article 58.

##### Juvenile Law Study Commission.

7A-740. Creation; members; terms; qualifications; vacancies.

## SUBCHAPTER II. APPELLATE DIVISION OF THE GENERAL COURT OF JUSTICE.

### ARTICLE 3.

#### *The Supreme Court.*

### § 7A-10. Organization; compensation of justices.

(c) In lieu of merit and other increment raises paid to regular State employees, the Chief Justice and each of the Associate Justices shall receive as longevity pay an annual amount equal to four and eight-tenths percent (4.8%) of the annual salary set forth in the Budget Appropriation Act payable monthly after five years of service, and nine and six-tenths percent (9.6%) after 10 years of service. Service shall mean service as justice or judge of the General Court of Justice. (1967, c. 108, s. 1; 1983, c. 761, s. 242.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Editor's Note.** — Session Laws 1983, c. 761,

s. 259, contains a severability clause.

**Effect of Amendments.** — The 1983 amendment, effective July 1, 1983, added subsection (c).

## § 7A-10.1. Authority to prescribe standards of judicial conduct.

**Legal Periodicals.** — For article, "The Discipline and Removal of Judges in North Carolina," see 4 Campbell L. Rev. 1 (1981).

## § 7A-11. Clerk of the Supreme Court; salary; bond; fees; oath.

The clerk of the Supreme Court shall be appointed by the Supreme Court to serve at its pleasure. The annual salary of the clerk shall be fixed by the Administrative Officer of the Courts, subject to the approval of the Supreme Court. The clerk may appoint assistants in the number and at the salaries fixed by the Administrative Officer of the Courts. The clerk shall perform such duties as the Supreme Court may assign, and shall be bonded to the State, for faithful performance of duty, in the same manner as the clerk of the superior court, and in such amount as the Administrative Officer of the Courts shall determine. He shall adopt a seal of office, to be approved by the Supreme Court. A fee bill for services rendered by the clerk shall be fixed by rules of the Supreme Court, and all such fees shall be remitted to the State treasury, except that charges to litigants for the reproduction of appellate records and briefs shall be fixed and administered as provided by rule of the Supreme Court. The operations of the Clerk of the Supreme Court shall be subject to the oversight of the State Auditor pursuant to Article 5A of Chapter 147 of the General Statutes. Before entering upon the duties of his office, the clerk shall take the oath of office prescribed by law. (1967, c. 108, s. 1; 1969, c. 1190, s. 2; 1973, c. 750; 1983, c. 913, s. 3.)

**Effect of Amendments.** — The 1983 amendment, effective July 22, 1983, rewrote the next-to-last sentence, which read "The State

Auditor shall audit the financial accounts of the clerk at least once a year."

## ARTICLE 4.

### *Court of Appeals.*

## § 7A-18. Compensation of judges.

(a) The Chief Judge and each associate judge of the Court of Appeals shall receive the annual salary provided in the budget appropriations act. Each judge is entitled to reimbursement for travel and subsistence expenses at the rate allowed State employees generally.

(b) In lieu of merit and other increment raises paid to regular State employees, a judge of the Court of Appeals shall receive as longevity pay an annual amount equal to four and eight-tenths percent (4.8%) of the annual salary set forth in the Budget Appropriation Act payable monthly after five years of service, and nine and six-tenths percent (9.6%) after 10 years of service. Service shall mean service as a justice or judge of the General Court of Justice. (1967, c. 108, s. 1; 1983, c. 761, s. 243.)



**Editor's Note.** — Session Laws 1983, c. 761, s. 259, contains a severability clause.

**Effect of Amendments.** — The 1983 amend-

ment, effective July 1, 1983, designated the existing provisions as subsection (a) and added subsection (b).

## § 7A-20. Clerk; oath; bond; salary; assistants; fees.

(b) Subject to approval of the Supreme Court, the Court of Appeals shall promulgate from time to time a fee bill for services rendered by the clerk, and such fees shall be remitted to the State Treasurer, except that charges to litigants for the reproduction of appellate records and briefs shall be fixed and administered as provided by rule of the Supreme Court. The operations of the Court of Appeals shall be subject to the oversight of the State Auditor pursuant to Article 5A of Chapter 147 of the General Statutes. (1967, c. 108, s. 1; 1983, c. 913, s. 4.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1983 amend-

ment, effective July 22, 1983, rewrote the last sentence of subsection (b), which read "The State Auditor shall audit the financial accounts of the clerk at least once a year."

## ARTICLE 5.

### *Jurisdiction.*

## § 7A-27. Appeals of right from the courts of the trial divisions.

### **Legal Periodicals.** —

For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1062 (1981). For survey of 1981 law on civil procedure, see 60 N.C.L. Rev. 1214 (1982).

For comment discussing interlocutory appeals in North Carolina in light of *Stephenson v. Stephenson*, 55 N.C. App. 250, 285 S.E.2d 281 (1981), see 18 Wake Forest L. Rev. 857 (1982).

## CASE NOTES

### I. GENERAL CONSIDERATION.

**This statute should be strictly construed** for the purpose of eliminating the unnecessary delay and expense of fragmented appeals and of presenting the whole case for determination in a single appeal from a final judgment. *Buchanan v. Rose*, 59 N.C. App. 351, 296 S.E.2d 508 (1982).

**Particular Facts and Procedural Context Must Be Considered.** — It is usually necessary to resolve the question of whether an appeal is premature in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered. *Bernick v. Jurden*, 306 N.C. 435, 293 S.E.2d 405 (1982).

**Applied** in *State v. Cox*, 303 N.C. 75, 277 S.E.2d 376 (1981); *Green v. Duke Power Co.*, 305 N.C. 603, 290 S.E.2d 593 (1982); *State v. Corn*, 307 N.C. 79, 296 S.E.2d 261 (1982); *State v. Clark*, 307 N.C. 120, 296 S.E.2d 296 (1982); *State v. Sparks*, 307 N.C. 71, 296 S.E.2d 451

(1982); *State v. Woodruff*, 307 N.C. 264, 297 S.E.2d 382 (1982); *State v. Burns*, 307 N.C. 224, 297 S.E.2d 384 (1982); *State v. Reynolds*, 307 N.C. 184, 297 S.E.2d 532 (1982); *State v. Chamberlain*, 307 N.C. 130, 297 S.E.2d 540 (1982); *State v. Woods*, 307 N.C. 213, 297 S.E.2d 574 (1982); *State v. Taylor*, — N.C. —, 301 S.E.2d 358 (1983); *State v. Ricks*, — N.C. —, 302 S.E.2d 770 (1983).

**Stated** in *State v. Martin*, 303 N.C. 246, 278 S.E.2d 214 (1981); *State v. Bass*, 303 N.C. 267, 278 S.E.2d 209 (1981); *State v. Freeman*, 303 N.C. 299, 278 S.E.2d 207 (1981); *Cunningham v. Brown*, 51 N.C. App. 264, 276 S.E.2d 718 (1981); *Bacon v. Leatherwood*, 52 N.C. App. 587, 279 S.E.2d 86 (1981).

**Cited** in *State v. Misenheimer*, 304 N.C. 108, 282 S.E.2d 791 (1981); *State v. Silva*, 304 N.C. 122, 282 S.E.2d 449 (1981); *State v. Poplin*, 304 N.C. 185, 282 S.E.2d 420 (1981); *Green v. Duke Power Co.*, 50 N.C. App. 646, 274 S.E.2d 889 (1981); *Briggs v. Mid-State Oil Co.*, 53 N.C.



App. 203, 280 S.E.2d 501 (1981); *Harris v. Jim Stacy Racing, Inc.*, 53 N.C. App. 597, 281 S.E.2d 455 (1981); *State v. Davis*, 305 N.C. 400, 290 S.E.2d 574 (1982); *State v. Howard*, 305 N.C. 651, 290 S.E.2d 591 (1982); *State v. Black*, 305 N.C. 614, 290 S.E.2d 669 (1982); *State v. Booker*, 306 N.C. 302, 293 S.E.2d 78 (1982); *State v. Schneider*, 306 N.C. 351, 293 S.E.2d 157 (1982); *State v. Breeden*, 306 N.C. 533, 293 S.E.2d 788 (1982); *State v. Weaver*, 306 N.C. 629, 295 S.E.2d 375 (1982); *State v. Meadows*, 306 N.C. 683, 295 S.E.2d 394 (1982); *State v. Powell*, 306 N.C. 718, 295 S.E.2d 413 (1982); *State v. Rankin*, 306 N.C. 712, 295 S.E.2d 416 (1982); *State v. Pratt*, 306 N.C. 673, 295 S.E.2d 462 (1982); *State v. Cabey*, — N.C. —, 299 S.E.2d 194 (1983); *State v. Cheek*, — N.C. —, 299 S.E.2d 633 (1983); *State v. Barnett*, — N.C. —, 300 S.E.2d 340 (1983); *State v. Grier*, — N.C. —, 300 S.E.2d 351 (1983); *State v. Tysor*, — N.C. —, 300 S.E.2d 366 (1983); *State v. Odom*, — N.C. —, 300 S.E.2d 375 (1983); *Swindell v. Overton*, — N.C. App. —, 300 S.E.2d 864 (1983); *Terry's Floor Fashions, Inc. v. Murray*, — N.C. App. —, 300 S.E.2d 888 (1983); *State v. Chatman*, — N.C. —, 301 S.E.2d 71 (1983); *Schmitt v. Schmitt*, — N.C. App. —, 301 S.E.2d 741 (1983).

### III. FINAL JUDGMENTS.

**"Final Judgment" Defined.** — A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court. *Atkins v. Beasley*, 53 N.C. App. 33, 279 S.E.2d 866 (1981).

### IV. INTERLOCUTORY ORDERS.

#### **"Interlocutory Order" Defined.** —

A ruling is interlocutory in nature if it does not determine the issues but directs some further proceeding preliminary to final decree. *Blackwelder v. State Dep't of Human Resources*, — N.C. App. —, 299 S.E.2d 777 (1983).

#### **A. Generally.**

##### **When Interlocutory Order Appealable Generally.** —

In accord with 1st paragraph in original. See *Atkins v. Beasley*, 53 N.C. App. 33, 279 S.E.2d 866 (1981).

In accord with 3rd paragraph in original. See *A.E.P. Indus., Inc. v. McClure*, — N.C. —, 302 S.E.2d 754 (1983).

A party has a right to appeal an interlocutory order only if the order affects some substantial right claimed by appellant which will work an injury to him if not corrected before an appeal from final judgment. *Sims v. Ritter Constr., Inc.*, — N.C. App. —, 302 S.E.2d 293 (1983).

In accord with 4th paragraph in original. See

*Ball v. Ball*, 55 N.C. App. 98, 284 S.E.2d 555 (1981).

**A substantial right is one which will clearly be lost or irretrievably adversely affected if the order is not reviewable before final judgment.** In other words, the right to immediate appeal is reserved for those cases in which the normal course of procedure is inadequate to protect the substantial right affected by the order sought to be appealed. *Blackwelder v. State Dep't of Human Resources*, — N.C. App. —, 299 S.E.2d 777 (1983).

**The "substantial right" test** for appealability of interlocutory orders is more easily stated than applied. It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered. *Blackwelder v. State Dep't of Human Resources*, — N.C. App. —, 299 S.E.2d 777 (1983).

**Avoidance of a rehearing or trial is not a "substantial right"** entitling a party to an immediate appeal. *Blackwelder v. State Dep't of Human Resources*, — N.C. App. —, 299 S.E.2d 777 (1983).

#### **The effect of both § 1-277, etc. —**

In accord with 1st paragraph in original. See *Smart v. Smart*, 59 N.C. App. 533, 297 S.E.2d 135 (1982); *Blackwelder v. State Dep't of Human Resources*, — N.C. App. —, 299 S.E.2d 777 (1983).

Section 1-277 and this section prevent fragmentary, premature and unnecessary appeals by permitting the trial divisions to be done with a case fully and finally before it is presented to the appellate division. *Blackwelder v. State Dep't of Human Resources*, — N.C. App. —, 299 S.E.2d 777 (1983).

#### **No Appeal as Matter of Right from Interlocutory Orders in Criminal Cases.** —

In accord with 2nd paragraph in original. See *State v. Thompson*, 56 N.C. App. 439, 289 S.E.2d 132 (1982).

#### **B. Particular Orders.**

##### **Order Dismissing Counterclaims Except as Set-offs.** —

In an action arising out of a contract between the parties whereby defendants agreed to construct a house on a piece of property owned by them and to convey the completed house and property to plaintiffs, the trial court's order dismissing defendants' counterclaims for overages, interest expenses, liquidated damages, attorneys' fees and trespass but allowing defendants to assert these counterclaims as set-offs to plaintiff's claim was not a final judgment; however, the judgment in question affected a substantial right of defendants, their right to recover on their claims based on



the contract, and the absence of an immediate appeal would work an injury to them, the possibility of being forced to undergo two full trials on the merits and to incur the expense of litigating twice, if not corrected before an appeal from a final judgment. *Roberts v. Heffner*, 51 N.C. App. 646, 277 S.E.2d 446 (1981).

**The denial of summary judgment. —**

Where summary judgment is allowed for fewer than all the defendants and the judgment does not contain a certification pursuant to § 1A-1, Rule 54(b), that there is "no just reason for delay," an appeal is premature unless the order allowing summary judgment affects a substantial right. *Bernick v. Jurden*, 306 N.C. 435, 293 S.E.2d 405 (1982).

Because of the possibility of inconsistent verdicts in separate trials, an order allowing summary judgment for fewer than all the defendants may affect a substantial right. *Bernick v. Jurden*, 306 N.C. 435, 293 S.E.2d 405 (1982).

**Partial Summary Judgment in Favor of Defendant Only Secondarily Liable. —** Plaintiffs had no right to an immediate appeal from summary judgment granted to defendant attorney where plaintiffs sought to recover against defendant attorney only if they were unable to recover against the other defendants on their primary claims. *Blue Ridge Sportcycle Co. v. Schroeder*, 53 N.C. App. 354, 280 S.E.2d 799 (1981).

**Orders and awards pendente lite** are interlocutory decrees which necessarily do not affect a substantial right from which lies an immediate appeal pursuant to subsection (d) of this section. *Peeler v. Peeler*, 7 N.C. App. 456, 172 S.E.2d 915 (1970) and other prior decisions recognizing a right of immediate appeal from orders and awards pendente lite are overruled. Thus, where a husband in a divorce action appealed an order by the trial court for alimony pendente lite, child support pendente lite, and attorney fees pendente lite, the appeal was premature and therefore was dismissed. See *Stephenson v. Stephenson*, 55 N.C. App. 250, 285 S.E.2d 281 (1981).

**Denial of Attorney's Motion for Admission Pro Hac Vice. —** Order denying plaintiff's motion to reconsider order denying attorney's motion for admission pro hac vice is an interlocutory order and is not immediately appealable; it does not come within the statutory appeals in § 1-277(a) or subsection (d) of this section. *Leonard v. Johns-Manville Sales Corp.*, 57 N.C. App. 553, 291 S.E.2d 828 (1982).

**Order Allowing Surveyor to Enter Upon Land. —** An interlocutory order by which defendants are simply ordered to allow a neutral third party, a surveyor, to enter upon their land for the purpose of completing an accurate survey of the property is not appealable. *Ball v. Ball*, 55 N.C. App. 98, 284 S.E.2d 555 (1981).

## § 7A-28. Decisions of Court of Appeals on post-trial motions for appropriate relief final or valuation of exempt property.

(a) Decisions of the Court of Appeals upon review of motions for appropriate relief listed in G.S. 15A-1415(b) are final and not subject to further review in the Supreme Court by appeal, motion, certification, writ, or otherwise.

(b) Decisions of the Court of Appeals upon review of valuation of exempt property under G.S. 1C are final and not subject to further review in the Supreme Court by appeal, motion, certification, writ, or otherwise. (1981, c. 470, s. 1; 1981 (Reg. Sess., 1982), c. 1224, s. 16.)

**Effect of Amendments. —** The 1981 (Reg. Sess., 1982) amendment, effective Sept. 1, 1982, designated the former provisions of this section as subsection (a) and added subsection (b).

Session Laws 1981 (Reg. Sess., 1982), c. 1224, s. 22, provides: "This act shall become effective September 1, 1982, and applies to all pro-

ceedings to enforce money judgments begun on or after that date. When a proceeding to enforce the money judgment has begun before the effective date of this act, the clerk may enter appropriate transitional orders."

Session Laws 1981 (Reg. Sess., 1982), c. 1224, s. 21, contains a severability clause.



## CASE NOTES

**Exhaustion Requirement in Federal Habeas Corpus.** — The fact that the respondent in an appeal from the order of a United States Magistrate dismissing a claim for habeas corpus relief incorrectly pleaded that the appellant had exhausted his state court

remedies and was entitled to adjudication on the merits was neither conclusive nor a waiver of the exhaustion requirement by the State. *Strader v. Allsbrook*, 656 F.2d 67 (4th Cir. 1981).

## § 7A-29. Appeals of right from certain administrative agencies.

(a) From any final order or decision of the North Carolina Utilities Commission not governed by subsection (b) the North Carolina Industrial Commission, the North Carolina State Bar pursuant to G.S. 84-28, the Property Tax Commission pursuant to G.S. 105-290 and 105-342, the Board of State Contract Appeals pursuant to G.S. 143-135.9, or an appeal from the Commissioner of Insurance pursuant to G.S. 58-9.4 or from the Governor pursuant to the Waste Management Act of 1981, G.S. 130-166.17B and G.S. 104E-6.2, appeal as of right lies directly to the Court of Appeals.

(b) From any final order or decision of the Utilities Commission in a general rate case, appeal as of right lies directly to the Supreme Court. (1967, c. 108, s. 1; 1971, c. 703, s. 5; 1975, c. 582, s. 12; 1979, c. 584, s. 1; 1981, c. 704, s. 28; 1983, c. 526, s. 1; c. 761, s. 188.)

**Cross References.** — As to jurisdiction of the Supreme Court to review, when authorized by law, direct appeals from a final order or decision of the North Carolina Utilities Commission, see N.C. Const., Art. IV, § 12(1).

**Editor's Note.** — Session Laws 1983, c. 761, s. 192, provides that this section is effective upon ratification and shall apply to decisions made by the Secretary of Administration and the State Highway Administrator on or after Jan. 1, 1984. The act was ratified July 15, 1983.

Session Laws 1983, c. 761, s. 259, contains a

severability clause.

### Effect of Amendments. —

The first 1983 amendment, effective July 1, 1983, and applicable to final orders of the Utilities Commission entered on or after that date, designated the first paragraph as subsection (a), in subsection (a) inserted "not governed by subsection (b)," and added subsection (b).

The second 1983 amendment, effective July 15, 1983, inserted "the Board of State Contract Appeals pursuant to G.S. 143-135.9" in subsection (a).

## CASE NOTES

**Appeal of Decisions under § 143-166.4.** — The Court of Appeals has no jurisdiction to review an appeal of a decision by the North Carolina Industrial Commission made pursuant to § 143-166.4. *In re Vandiford*, 56 N.C. App. 224, 287 S.E.2d 912 (1982).

**Applied** in *Fisher v. E.I. Du Pont De Nemours*, 54 N.C. App. 176, 282 S.E.2d 543 (1981).

**Cited** in *State ex rel. Utilities Comm'n v. Duke Power Co.*, 305 N.C. 1, 287 S.E.2d 786 (1982).

## § 7A-30. Appeals of right from certain decisions of the Court of Appeals.

Except as provided in G.S. 7A-28, an appeal lies of right to the Supreme Court from any decision of the Court of Appeals rendered in a case:

- (1) Which directly involves a substantial question arising under the Constitution of the United States or of this State, or
- (2) In which there is a dissent. (1967, c. 108, s. 1; 1983, c. 526, s. 2.)



**Cross References.** — As to jurisdiction of the Supreme Court to review, when authorized by law, direct appeals from a final order or decision of the North Carolina Utilities Commission, see N.C. Const., Art. IV, § 12(1).

**Effect of Amendments.** — The 1983 amendment, effective July 1, 1983, and applicable to final orders of the Utilities Commission entered on or after that date, inserted "an appeal lies of right to the Supreme Court" in the introductory

paragraph, deleted "or" at the end of subdivision (2), and deleted subdivision (3), which read "Which involves review of a decision of the North Carolina Utilities Commission in a general rate-making case, an appeal lies of right to the Supreme Court."

**Legal Periodicals.** —

For article, "The Discipline and Removal of Judges in North Carolina," see 4 Campbell L. Rev. 1 (1981).

## CASE NOTES

**Legislative Intent.** —

In accord with 1st paragraph in original. See *State v. Hageman*, 307 N.C. 1, 296 S.E.2d 433 (1982).

**Applied** in *State v. Maher*, 305 N.C. 544, 290 S.E.2d 694 (1982); *State v. Barnes*, 307 N.C. 104, 296 S.E.2d 291 (1982); *Felton v. Hospital Guild*, 307 N.C. 121, 296 S.E.2d 297 (1982); *Beck v. Carolina Power & Light Co.*, 307 N.C. 267, 297 S.E.2d 397 (1982); *State v. Tate*, 307 N.C. 242, 297 S.E.2d 581 (1982); *A.E.P. Indus., Inc. v. McClure*, — N.C. —, 302 S.E.2d 754 (1983).

**Stated** in *State ex rel. Utilities Comm'n v. Duke Power Co.*, 51 N.C. App. 698, 277 S.E.2d 444 (1981).

**Cited** in *Morrison v. Burlington Indus.*, 304 N.C. 1, 282 S.E.2d 458 (1981); *Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E.2d 101 (1981); *In re McElwee*, 304 N.C. 68, 283 S.E.2d 115 (1981); *Rental Towel & Uniform Serv. v. Bynum Int'l, Inc.*, 304 N.C. 174, 282 S.E.2d 426 (1981); *State v. Cooper*, 304 N.C. 180, 282 S.E.2d 436 (1981); *Worthington v. Bynum*, 305 N.C. 478, 290 S.E.2d 599 (1982); *In re Peal*, 305 N.C. 640, 290 S.E.2d 664 (1982); *Dealers Specialties, Inc. v. Neighborhood Hous. Servs., Inc.*, 305 N.C. 633, 291 S.E.2d 137 (1982); *Love v. Moore*, 305 N.C. 575, 291 S.E.2d 141 (1982); *State v. Andrews*, 306 N.C. 144, 291 S.E.2d 581

(1982); *State v. LeDuc*, 306 N.C. 62, 291 S.E.2d 607 (1982); *State v. Cooke*, 306 N.C. 132, 291 S.E.2d 618 (1982); *State v. Brackett*, 306 N.C. 138, 291 S.E.2d 660 (1982); *Snipes v. Snipes*, 306 N.C. 373, 293 S.E.2d 187 (1982); *State v. Hannah*, 306 N.C. 374, 293 S.E.2d 188 (1982); *State v. Morrison*, 306 N.C. 375, 293 S.E.2d 188 (1982); *Taylor v. Cone Mills Corp.*, 306 N.C. 314, 293 S.E.2d 189 (1982); *Hoyle v. Isenhour Brick & Tile Co.*, 306 N.C. 248, 293 S.E.2d 196 (1982); *Bolick v. American Barmag Corp.*, 306 N.C. 364, 293 S.E.2d 415 (1982); *Cianfarra v. N.C. Dep't of Transp.*, 306 N.C. 737, 295 S.E.2d 457 (1982); *Rorie v. Holly Farms Poultry Co.*, 306 N.C. 706, 295 S.E.2d 458 (1982); *Caviness v. Administrative Office of Courts*, 306 N.C. 738, 295 S.E.2d 469 (1982); *State v. Murphy*, 306 N.C. 739, 295 S.E.2d 470 (1982); *Page v. Tao*, 306 N.C. 734, 295 S.E.2d 470 (1982); *Allen v. Investors Heritage Life Ins. Co.*, 306 N.C. 732, 295 S.E.2d 471 (1982); *State v. Allison*, 307 N.C. 411, 298 S.E.2d 365 (1983); *State v. Williams*, 307 N.C. 452, 298 S.E.2d 372 (1983); *North Carolina Nat'l Bank v. Virginia Carolina Bldrs.*, — N.C. —, 299 S.E.2d 629 (1983); *State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co.*, — N.C. —, 299 S.E.2d 763 (1983); *Department of Transp. v. Harkey*, — N.C. —, 301 S.E.2d 64 (1983); *North Carolina Dep't of Cor. v. Gibson*, — N.C. —, 301 S.E.2d 78 (1983).

## § 7A-31. Discretionary review by the Supreme Court.

(a) In any cause in which appeal is taken to the Court of Appeals, except a cause appealed from the North Carolina Industrial Commission, the North Carolina State Bar pursuant to G.S. 84-28, the Property Tax Commission pursuant to G.S. 105-345, the Board of State Contract Appeals pursuant to G.S. 143-135.9, or the Commissioner of Insurance pursuant to G.S. 58-9.4, or a motion for appropriate relief or valuation of exempt property pursuant to G.S. 7A-28, the Supreme Court may, in its discretion, on motion of any party to the cause or on its own motion, certify the cause for review by the Supreme Court, either before or after it has been determined by the Court of Appeals. A cause appealed to the Court of Appeals from any of the administrative bodies listed in the preceding sentence may be certified in similar fashion, but only after determination of the cause in the Court of Appeals. The effect of such certification is to transfer the cause from the Court of Appeals to the Supreme Court for review by the Supreme Court. If the cause is certified for transfer to the



Supreme Court before its determination in the Court of Appeals, review is not had in the Court of Appeals but the cause is forthwith transferred for review in the first instance by the Supreme Court. If the cause is certified for transfer to the Supreme Court after its determination by the Court of Appeals, the Supreme Court reviews the decision of the Court of Appeals.

Except in motions within the purview of G.S. 7A-28, the State may move for certification for review of any criminal cause, but only after determination of the cause by the Court of Appeals.

(1967, c. 108, s. 1; 1969, c. 1044; 1975, c. 555; 1977, c. 711, s. 5; 1981, c. 470, s. 2; 1981 (Reg. Sess., 1982), c. 1224, s. 17; c. 1253, s. 1; 1983, c. 526, s. 3; c. 761, s. 189.)

**Only Part of Section Set Out.** — As the rest of the section was not changed by the amendments, it is not set out.

**Cross References.** — As to jurisdiction of the Supreme Court to review, when authorized by law, direct appeals from a final order or decision of the North Carolina Utilities Commission, see N.C. Const., Art. IV, § 12(1).

**Editor's Note.** —

Session Laws 1981 (Reg. Sess., 1982), c. 1224, s. 22, provides: "This act shall become effective September 1, 1982, and applies to all proceedings to enforce money judgments begun on or after that date. When a proceeding to enforce the money judgment has begun before the effective date of this act, the clerk may enter appropriate transitional orders."

Session Laws 1981 (Reg. Sess., 1982), c. 1224, s. 21, contains a severability clause.

Session Laws 1983, c. 761, s. 192, provides that this section is effective upon ratification and shall apply to decisions made by the Secretary of Administration and the State Highway Administrator on or after Jan. 1, 1984. The act was ratified July 15, 1983.

Session Laws 1983, c. 761, s. 259, contains a severability clause.

**Effect of Amendments.** —

The first 1981 (Reg. Sess., 1982) amendment, effective Sept. 1, 1982, substituted "or valuation of exempt property pursuant to G.S. 7A-28" for "embracing subject matter covered by G.S. 7A-28" in the first sentence of subsection (a).

The second 1981 (Reg. Sess., 1982) amendment inserted the present second sentence of subsection (a).

The first 1983 amendment, effective July 1, 1983, and applicable to final orders of the Utilities Commission entered on or after that date, deleted "the North Carolina Utilities Commission" following "except a cause appealed from" in the first sentence of subsection (a).

The second 1983 amendment, effective July 15, 1983, inserted "the Board of State Contract Appeals pursuant to G.S. 143-135.9" in the first sentence of subsection (a).

## CASE NOTES

**Exhaustion Requirement in Federal Habeas Corpus.** — The fact that the respondent in an appeal from the order of a United States Magistrate dismissing a claim for habeas corpus relief incorrectly pleaded that the appellant had exhausted his state court remedies and was entitled to adjudication on the merits was neither conclusive nor a waiver of the exhaustion requirement by the State. *Strader v. Allsbrook*, 656 F.2d 67 (4th Cir. 1981).

**Applied** in *State v. Cox*, 303 N.C. 75, 277 S.E.2d 376 (1981); *State v. Maher*, 305 N.C. 544, 290 S.E.2d 694 (1982); *Long v. City of Charlotte*, 306 N.C. 187, 293 S.E.2d 101 (1982); *In re Moore*, 306 N.C. 394, 293 S.E.2d 127 (1982); *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 293 S.E.2d 182 (1982); *State v. Ricks*, — N.C. —, 302 S.E.2d 770 (1983).

**Stated** in *State v. Bass*, 303 N.C. 267, 278 S.E.2d 209 (1981); *Cromer v. Cromer*, 303 N.C. 307, 278 S.E.2d 518 (1981).

**Cited** in *Chateau X, Inc. v. State ex rel. Andrews*, 302 N.C. 321, 275 S.E.2d 443 (1981); *North Carolina Sav. & Loan League v. North Carolina Credit Union Comm'n*, 302 N.C. 458, 276 S.E.2d 404 (1981); *Brooks v. McWhirter Grading Co.*, 303 N.C. 573, 281 S.E.2d 24 (1981); *State v. Irwin*, 304 N.C. 93, 282 S.E.2d 439 (1981); *Hill v. Pinelawn Mem. Park*, 304 N.C. 159, 282 S.E.2d 779 (1981); *Zarn, Inc. v. Southern Ry.*, 304 N.C. 189, 282 S.E.2d 421 (1981); *Green v. Duke Power Co.*, 305 N.C. 603, 290 S.E.2d 593 (1982); *Adcock v. Perry*, 305 N.C. 625, 290 S.E.2d 608 (1982); *State v. Jones*, 305 N.C. 520, 290 S.E.2d 675 (1982); *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 290 S.E.2d 682 (1982); in *Deese v. Southern Lawn & Tree*



Expert Co., 306 N.C. 275, 293 S.E.2d 140 (1982); State v. McGraw, 306 N.C. 372, 293 S.E.2d 161 (1982); Godley v. County of Pitt, 306 N.C. 357, 293 S.E.2d 167 (1982); State v. Walden, 306 N.C. 466, 293 S.E.2d 780 (1982); In re Foreclosure of Deed of Trust Executed by Bonder, 306 N.C. 451, 293 S.E.2d 798 (1982); Hoffman v. Ryder Truck Lines, 306 N.C. 502, 293 S.E.2d 807 (1982); State v. Lombardo, 306 N.C. 594, 295 S.E.2d 399 (1982); State v. Pratt,

306 N.C. 673, 295 S.E.2d 462 (1982); Appeal of Willett, 306 N.C. 617, 295 S.E.2d 469 (1982); State v. Whitaker, 307 N.C. 115, 296 S.E.2d 273 (1982); In re Denial of Approval to Issue Hous. Bonds, 307 N.C. 52, 296 S.E.2d 281 (1982); Purdy v. Brown, 307 N.C. 93, 296 S.E.2d 459 (1982); State v. Woods, 307 N.C. 213, 297 S.E.2d 574 (1982); Henderson v. Henderson, 307 N.C. 401, 298 S.E.2d 345 (1983).

## § 7A-32. Power of Supreme Court and Court of Appeals to issue remedial writs.

### CASE NOTES

**Although the State cannot appeal from a verdict of not guilty, it may seek a writ of mandamus to compel a trial court to set aside action taken in excess of its authority.** State v. Surles, 55 N.C. App. 179, 284 S.E.2d 738 (1981), cert. denied, 305 N.C. 307, 290 S.E.2d 707 (1982).

The State's attempt appeal of a district court's action in setting aside guilty verdicts in a misdemeanor case entered by it five months previously and entering verdicts of not guilty would be treated as a petition for a writ of mandamus pursuant to subsection (c) of this section and Rule 22, Rules of App. Proc. State v.

Surles, 55 N.C. App. 179, 284 S.E.2d 738 (1981), cert. denied, 305 N.C. 307, 290 S.E.2d 707 (1982).

**Exercise of Discretionary Duties of Public Official.** — Neither mandamus nor a mandatory injunction may be issued to control the manner of a public official's exercise of a discretionary duty. White v. Pate, 58 N.C. App. 402, 293 S.E.2d 601, cert. granted, 306 N.C. 752, 295 S.E.2d 764 (1982).

**Applied in** Ziglar v. E.I. Du Pont De Nemours & Co., 53 N.C. App. 147, 280 S.E.2d 510 (1981).

## § 7A-33. Supreme Court to prescribe appellate division rules of practice and procedure.

### CASE NOTES

**Applied in** State v. Bennett, 59 N.C. App. 418, 297 S.E.2d 138 (1982).

## § 7A-34. Rules of practice and procedure in trial courts.

### CASE NOTES

**Provision of rule of practice must give way to statute.** — Subsection (b) of § 15A-1231 clearly contemplates that a defendant is required to request an instruction conference as a prerequisite for assigning error to the trial court's failure to conduct one. Pursuant to the provisions of this section, the provision of Rule of Practice 21 which requires the trial judge to conduct a jury instruction conference conflicts with subsection (b) of § 15A-1231

and must give way to the provisions of the statute. State v. Morris, — N.C. App. —, 300 S.E.2d 46 (1983).

**Applied in** State v. Bennett, — N.C. —, 302 S.E.2d 786 (1983).

**Cited in** Hensgen v. Hensgen, 53 N.C. App. 331, 280 S.E.2d 766 (1981); in Lee v. Jenkins, 57 N.C. App. 522, 291 S.E.2d 797 (1982); Four Seasons Homeowners Ass'n v. Sellers, — N.C. App. —, 302 S.E.2d 848 (1983).



## ARTICLE 6.

*Retirement of Justices and Judges of the Appellate Division; Retirement Compensation; Recall to Emergency Service; Disability Retirement.***§ 7A-39.3. Retired justices and judges may become emergency justices and judges subject to recall to active service; compensation for emergency justices and judges on recall.**

(a) Justices of the Supreme Court and judges of the Court of Appeals who have not reached the mandatory retirement age specified in G.S. 7A-4.20, but who have retired under the provisions of G.S. 7A-39.2, or under the Uniform Judicial Retirement Act after having completed 12 years of creditable service, may apply as provided in G.S. 7A-39.6 to become emergency justices and emergency judges of the court from which they retired, and upon being commissioned as an emergency justice or emergency judge shall be subject to temporary recall to active service on that court in the place of any justice of the Supreme Court or judge of the Court of Appeals, respectively, who is temporarily incapacitated to the extent that he cannot perform efficiently and promptly all the duties of his office.

(b) In addition to the compensation or retirement allowance he would otherwise be entitled to receive by law, each emergency justice or emergency judge recalled for temporary active service shall be paid by the State his actual expenses, plus seventy-five dollars (\$75.00) for each day of active service rendered upon recall. No recalled retired or emergency justice or judge shall receive from the State total annual compensation for judicial services in excess of that received by an active justice or judge of the bench to which the justice or judge is being recalled. (1967, c. 108, s. 1; 1973, c. 640, s. 3; 1977, c. 736, s. 1; 1979, c. 884, s. 1; 1981, c. 455, s. 3; c. 859, s. 46; 1981 (Reg. Sess., 1982), c. 1253, s. 2; 1983, c. 784.)

**Effect of Amendments. —**

The 1981 (Reg. Sess., 1982) amendment added the last sentence of subsection (b).

The 1983 amendment, effective July 18, 1983, substituted "12 years" for "15 years" in subsection (a).

**SUBCHAPTER III. SUPERIOR COURT DIVISION OF THE GENERAL COURT OF JUSTICE.**

## ARTICLE 7.

*Organization.***§ 7A-41. Superior court divisions and districts; judges; assistant district attorneys.**

The counties of the State are organized into four judicial divisions and 34 judicial districts, and each district has the counties, the number of regular resident superior court judges, and the number of full-time assistant district attorneys set forth in the following table:



Judicial Division	Judicial District	Counties	No. of Resident Judges	No. of Full-Time Asst. District Attorneys
First	1	Camden, Chowan, Currituck, Dare, Gates, Pasquotank, Perquimans	1	5
	2	Beaufort, Hyde, Martin, Tyrrell, Washington	1	3
	3	Carteret, Craven, Pamlico, Pitt	2	8
	4	Duplin, Jones, Onslow, Sampson	2	8
	5	New Hanover, Pender	2	7
	6	Bertie, Halifax, Hertford, Northampton	1	4
	7	Edgecombe, Nash, Wilson	2	7
	8	Greene, Lenoir, Wayne	2	8
Second	9	Franklin, Granville, Person, Vance, Warren	1	5
	10	Wake	4	15
	11	Harnett, Johnston, Lee	1	5
	12	Cumberland, Hoke	3	11
	13	Bladen, Brunswick, Columbus	1	5
	14	Durham	3	8
	15A	Alamance	1	3
	15B	Orange, Chatham	1	3
Third	16	Robeson, Scotland	1	7
	17A	Caswell, Rockingham	1	3
	17B	Stokes, Surry	1	2
	18	Guilford	3	13
	19A	Cabarrus, Rowan	2	5
	19B	Montgomery, Randolph	1	3
	20	Anson, Moore, Richmond, Stanly, Union	2	7
	21	Forsyth	3	9
Fourth	22	Alexander, Davidson, Davie, Iredell	2	6
	23	Alleghany, Ashe, Wilkes, Yadkin	1	3
	24	Avery, Madison, Mitchell, Watauga, Yancey	1	2
	25	Burke, Caldwell, Catawba	2	7
	26	Mecklenburg	5	19
	27A	Gaston	2	5
	27B	Cleveland, Lincoln	1	3
	28	Buncombe	2	5
	29	Henderson, McDowell, Polk, Rutherford, Transylvania	1	5
	30	Cherokee, Clay, Graham, Haywood, Jackson, Macon, Swain	1	4



In a district having more than one regular resident judge, the judge who has the most continuous service on the superior court is the senior regular resident superior court judge. If two judges are of equal seniority, the oldest judge is the senior regular resident judge. In a single-judge district, the single judge is the senior regular resident judge.

Senior regular resident judges and regular resident judges possess equal judicial jurisdiction, power, authority and status, but all duties placed by the Constitution or statutes on the resident judge of a judicial district, including the appointment to and removal from office, which are not related to a case, controversy or judicial proceeding and which do not involve the exercise of judicial power, shall be discharged by the senior regular resident judge. A senior regular resident superior court judge in a multi-judge district, by notice in writing to the Administrative Officer of the Courts, may decline to exercise the authority vested in him by this section, in which event such authority shall be exercised by the regular resident judge next senior in point of service or age, respectively.

In the event the senior regular resident judge of a multi-judge district is unable, due to mental or physical incapacity, to exercise the authority vested in him by the statute, and the Chief Justice, in his discretion, has determined that such incapacity exists, the Chief Justice shall appoint an acting senior regular resident judge from the other regular resident judges of the district, to exercise, temporarily, the authority of the senior regular resident judge. Such appointee shall serve at the pleasure of the Chief Justice and until his temporary appointment is vacated by appropriate order. (1969, c. 1171, ss. 1-3; c. 1190, s. 4; 1971, c. 377, s. 5; c. 997; 1973, c. 47, s. 2; c. 646; c. 855, s. 1; 1975, c. 529; c. 956, ss. 1, 2; 1975, 2nd Sess., c. 983, s. 114; 1977, c. 1119, ss. 1, 3, 4; c. 1130, ss. 1, 2; 1977, 2nd Sess., c. 1238, s. 1; c. 1243, s. 4; 1979, c. 838, s. 119; c. 1072, s. 1; 1979, 2nd Sess., c. 1221, s. 1; 1981, c. 964, ss. 1, 2; 1981 (Reg. Sess., 1982), c. 1282, s. 71.2.)

#### **Effect of Amendments. —**

The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982, changed the number of full-time assistant district attorneys in judicial district 17A from two to three and in judicial district 29 from four to five.

Session Laws 1981 (Reg. Sess., 1982), c. 1282, s. 81, contains a severability clause.

**Legal Periodicals. —** For article on plea bargaining statutes and practices in North Carolina, see 59 N.C.L. Rev. 477 (1981).

## **§ 7A-44. Salary and expenses of superior court judge.**

(a) A judge of the superior court, regular or special, shall receive the annual salary set forth in the Budget Appropriations Act, and in addition shall be paid the same travel allowance as State employees generally by G.S. 138-6(a)(1) and (2), provided that no travel allowance be paid for travel within his county of residence. In addition, a judge of the superior court shall be allowed five thousand five hundred dollars (\$5,500) per year, payable monthly, in lieu of necessary subsistence expenses while attending court or transacting official business at a place other than in the county of his residence and in lieu of other professional expenses incurred in the discharge of his official duties. The Administrative Officer of the Courts may also reimburse superior court judges, in addition to the above funds for travel and subsistence, for travel and subsistence expenses incurred for professional education.

(b) In lieu of merit and other increment raises paid to regular State employees, a judge of the superior court, regular or special, shall receive as



longevity pay an annual amount equal to four and eight-tenths percent (4.8%) of the annual salary set forth in the Budget Appropriation Act payable monthly after five years of service, and nine and six-tenths percent (9.6%) after 10 years of service. Service shall mean service as a justice or judge of the General Court of Justice. (Code, ss. 918, 3734; 1891, c. 193; 1901, c. 167; 1905, c. 208; Rev., s. 2765; 1907, c. 988; 1909, c. 85; 1911, c. 82; 1919, c. 51; C. S., s. 3884; 1921, c. 25, s. 3; 1925, c. 227; 1927, c. 69, s. 2; 1949, c. 157, s. 1; 1953, c. 1080, s. 1; 1957, c. 1416; 1961, c. 957, s. 2; 1963, c. 839, s. 2; 1965, c. 921, s. 2; 1967, c. 691, s. 40; 1969, c. 1190, s. 36; 1973, c. 1474; 1975, 2nd Sess., c. 983, s. 13; 1977, c. 802, s. 41.1; 1979, 2nd Sess., c. 1137, s. 28; 1981, c. 964, s. 18; 1983, c. 761, s. 244.)

**Editor's Note.** —

Session Laws 1983, c. 761, s. 259, contains a severability clause.

**Effect of Amendments.** —

The 1983 amendment, effective July 1, 1983,

designated the existing provisions as subsection (a) and added subsection (b).

## § 7A-45. Special judges; appointment; removal; vacancies; authority.

**Legal Periodicals.** — For article on plea bargaining statutes and practices in North Carolina, see 59 N.C.L. Rev. 477 (1981).

## § 7A-46. Special sessions.

**Legal Periodicals.** — For article on plea bargaining statutes and practices in North Carolina, see 59 N.C.L. Rev. 477 (1981).

## § 7A-49.3. Calendar for criminal trial sessions.

(a1) If he has not done so before the beginning of each session of superior court at which criminal cases are to be heard, the District Attorney, after calling the calendar and disposing of nonjury matters, including guilty pleas, if any such nonjury matters are to be disposed of prior to the calling of cases for trial, shall announce to the court the order in which he intends to call for trial the cases remaining on the calendar. Deviations from the announced order require approval by the presiding judge, if the defendant whose case is called for trial objects; but the defendant may not object if all the cases scheduled to be heard before his case have been disposed of or delayed with the approval of the presiding judge or by consent.

(1949, c. 169; 1969, c. 1190, s. 45; 1973, c. 47, s. 2; 1983, c. 761, s. 153.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Editor's Note.** — Session Laws 1983, c. 761, s. 259, contains a severability clause.

**Effect of Amendments.** — The 1983 amend-

ment, effective Oct. 1, 1983, added subsection (a1).

**Legal Periodicals.** —

For article on plea bargaining statutes and practices in North Carolina, see 59 N.C.L. Rev. 477 (1981).



## ARTICLE 8.

*Retirement of Judges of the Superior Court; Retirement Compensation for Superior Court Judges; Recall to Emergency Service of Judges of the District and Superior Court; Disability Retirement for Judges of the Superior Court.*

**§ 7A-52. Retired district and superior court judges may become emergency judges subject to recall to active service; compensation for emergency judges on recall.**

(a) Judges of the district court and judges of the superior court who have not reached the mandatory retirement age specified in G.S. 7A-4.20, but who have retired under the provisions of G.S. 7A-51, or under the Uniform Judicial Retirement Act after having completed 12 years of creditable service, may apply as provided in G.S. 7A-53 to become emergency judges of the court from which they retired. The Chief Justice of the Supreme Court may order any emergency judge of the district or superior court who, in his opinion, is competent to perform the duties of a judge of the court from which such judge retired, to hold regular or special sessions of such court, as needed. Order of assignment shall be in writing and entered upon the minutes of the court to which such emergency judge is assigned.

(b) In addition to the compensation or retirement allowance he would otherwise be entitled to receive by law, each emergency judge of the district or superior court who is assigned to temporary active service by the Chief Justice shall be paid by the State his actual expenses, plus seventy-five dollars (\$75.00) for each day of active service rendered upon recall. No recalled retired trial judge shall receive from the State total annual compensation for judicial services in excess of that received by an active judge of the bench to which the judge is recalled. (1967, c. 108, s. 2; 1973, c. 640, s. 4; 1977, c. 736, s. 3; 1979, c. 878, s. 2; 1981, c. 455, s. 6; c. 859, s. 47; 1981 (Reg. Sess., 1982), c. 1253, s. 3; 1983, c. 784.)

**Effect of Amendments. —**

The 1981 (Reg. Sess., 1982) amendment added the last sentence of subsection (b).

The 1983 amendment, effective July 18, 1983, substituted "12 years" for "15 years" in the first sentence of subsection (a).

## ARTICLE 9.

*District Attorneys and Judicial Districts.*

**§ 7A-65. (Effective until July 1, 1984) Compensation and allowances of district attorneys and assistant district attorneys.**

(a) The annual salary of district attorneys and full-time assistant district attorneys shall be as provided in the Budget Appropriations Act. When traveling on official business, each district attorney and assistant district attorney is entitled to reimbursement for his subsistence and travel expenses to the same extent as State employees generally.



(b) In lieu of merit and other increment raises paid to regular State employees, a district attorney shall receive as longevity pay an amount equal to four and eight-tenths percent (4.8%) of the annual salary set forth in the Budget Appropriation Act payable monthly after five years of service. Service shall mean service in the elective position of a district attorney and shall not include service as an assistant deputy or acting district attorney. (1967, c. 1049, s. 1; 1973, c. 47, s. 2; 1983, c. 761, s. 246.)

**Section Set Out Twice.** — The section above is effective until July 1, 1984. For this section as amended effective July 1, 1984, see the following section, also numbered 7A-65.

**Editor's Note.** — Session Laws 1983, c. 761,

s. 259, contains a severability clause.

**Effect of Amendments.** — The 1983 amendment, effective July 1, 1983, designated the existing provisions as subsection (a) and added subsection (b).

## § 7A-65. (Effective July 1, 1984) Compensation and allowances of district attorneys and assistant district attorneys.

(a) The annual salary of district attorneys and full-time assistant district attorneys shall be as provided in the Budget Appropriations Act. When traveling on official business, each district attorney and assistant district attorney is entitled to reimbursement for his subsistence and travel expenses to the same extent as State employees generally.

(b) In lieu of merit and other increment raises paid to regular State employees, a district attorney shall receive as longevity pay an amount equal to four and eight-tenths percent (4.8%) of the annual salary set forth in the Budget Appropriation Act payable monthly after five years of service. Service shall mean service in the elective position of a district attorney and shall not include service as an assistant deputy or acting district attorney.

(c) In lieu of merit and other increment raises paid to regular State employees, a district attorney shall receive as longevity pay an amount equal to four and eight-tenths percent (4.8%) of the annual salary set forth in the Budget Appropriation Act payable monthly after five years of service, and nine and six-tenths percent (9.6%) after 10 years of service. Service shall mean service in the elective position of a district attorney and shall not include service as an assistant, deputy, or acting district attorney. (1967, c. 1049, s. 1; 1973, c. 47, s. 2; 1983, c. 761, ss. 246, 248.)

**Section Set Out Twice.** — The section above is effective July 1, 1984. For this section as in effect until July 1, 1984, see the preceding section, also numbered 7A-65.

**Effect of Amendments.** — The 1983 amend-

ment, effective July 1, 1983, designated the existing provisions as subsection (a) and added subsection (b). In addition, the 1983 amendment, effective July 1, 1984, added subsection (c).

## § 7A-68. Administrative assistants.

### OPINIONS OF ATTORNEY GENERAL

**Oath of Office.** — Administrative and investigatorial assistants to the district attorney appointed pursuant to this section and § 7A-69 are not required to take an oath of office as public officials, unless the district

attorney assigns such duties the performance of which would involve the exercise of sovereign authority of the State. See opinion of Attorney General to Mr. Herbert F. Pierce, Fifteen-A Prosecutorial District, 50 N.C.A.G. 79 (1981).



## § 7A-69. Investigatorial assistants.

### OPINIONS OF ATTORNEY GENERAL

**Oath of Office.** — Administrative and investigatorial assistants to the district attorney appointed pursuant to § 7A-68 and this section are not required to take an oath of office as public officials, unless the district attorney

assigns such duties the performance of which would involve the exercise of sovereign authority of the State. See opinion of Attorney General to Mr. Herbert F. Pierce, Fifteen-A Prosecutorial District, 50 N.C.A.G. 79 (1981).

### ARTICLE 12.

#### *Clerk of Superior Court.*

## § 7A-101. (Effective until July 1, 1984) Compensation.

The clerk of superior court is a full-time employee of the State and shall receive an annual salary, payable in equal monthly installments, based on the population of the county, as determined by the 1970 federal decennial census, according to the following schedule:

<i>Population</i>	<i>Salary</i>
Less than 19,999	\$ 21,024
20,000 to 49,999	24,852
50,000 to 99,999	28,668
100,000 to 199,999	32,484
200,000 and above	39,492

When a county changes from one population group to another as a result of any future decennial census, the salary of the clerk shall be changed to the salary appropriate for the new population group on July 1 of the first full biennium subsequent to the taking of the census (July 1, 1981; July 1, 1991; etc.), except that the salary of an incumbent clerk shall not be decreased by any change in population group during his continuance in office.

The clerk shall receive no fees or commission by virtue of his office. The salary set forth in this section is the clerk's sole official compensation, but if, on June 30, 1975, the salary of a particular clerk, by reason of previous but no longer authorized merit increments, is higher than that set forth in the table, that higher salary shall not be reduced during his continuance in office.

In lieu of merit and other increment raises paid to regular State employees, a clerk of superior court shall receive as longevity pay an amount equal to four and eight-tenths percent (4.8%) of the annual salary set forth in the Budget Appropriation Act payable monthly after five years of service. Service shall mean service in the elective position of clerk of superior court and shall not include service as an assistant, deputy, or acting clerk. (1965, c. 310, s. 1; 1967, c. 691, s. 5; 1969, c. 1186, s. 3; 1971, c. 877, ss. 1, 2; 1973, c. 571, ss. 1, 2; 1975, c. 956, s. 7; 1975, 2nd Sess., c. 983, s. 11; 1977, c. 802, s. 42; 1977, 2nd Sess., c. 1136, s. 13; 1979, c. 838, s. 85; 1979, 2nd Sess., c. 1137, s. 12; 1981, c. 964, s. 14; c. 1127, s. 12; 1983, c. 761, ss. 200, 247.)

**Section Set Out Twice.** — The section above is effective until July 1, 1984. For this section as amended effective July 1, 1984, see the following section, also numbered 7A-101.

**Editor's Note.** — Session Laws 1983, c. 761, s. 259, contains a severability clause.

#### **Effect of Amendments.** —

The 1981 amendment, effective January 1,



1982, increased the salaries in the table at the end of the first paragraph to their present levels from \$19,056, \$22,536, \$25,992, \$29,460, and \$35,808, respectively.

Session Laws 1981, c. 1127, s. 89, contains a severability clause.

The 1983 amendment, effective July 1, 1983, increased the salaries in the salary schedule set forth in the first paragraph and added the fourth paragraph.

### § 7A-101. (Effective July 1, 1984) Compensation.

The clerk of superior court is a full-time employee of the State and shall receive an annual salary, payable in equal monthly installments, based on the population of the county, as determined by the 1970 federal decennial census, according to the following schedule:

<i>Population</i>	<i>Salary</i>
Less than 19,999	\$ 21,024
20,000 to 49,999	24,852
50,000 to 99,999	28,668
100,000 to 199,999	32,484
200,000 and above	39,492

When a county changes from one population group to another as a result of any future decennial census, the salary of the clerk shall be changed to the salary appropriate for the new population group on July 1 of the first full biennium subsequent to the taking of the census (July 1, 1981; July 1, 1991; etc.), except that the salary of an incumbent clerk shall not be decreased by any change in population group during his continuance in office.

The clerk shall receive no fees or commission by virtue of his office. The salary set forth in this section is the clerk's sole official compensation, but if, on June 30, 1975, the salary of a particular clerk, by reason of previous but no longer authorized merit increments, is higher than that set forth in the table, that higher salary shall not be reduced during his continuance in office.

In lieu of merit and other increment raises paid to regular State employees, a clerk of superior court shall receive as longevity pay an amount equal to four and eight-tenths percent (4.8%) of the annual salary set forth in the Budget Appropriation Act payable monthly after five years of service. Service shall mean service in the elective position of clerk of superior court and shall not include service as an assistant, deputy, or acting clerk.

In lieu of merit and other increment raises paid to regular State employees, a clerk of superior court shall receive as longevity pay an amount equal to four and eight-tenths percent (4.8%) of the annual salary set forth in the Budget Appropriation Act payable monthly after five years of service, and nine and six-tenths percent (9.6%) after 10 years of service. Service shall mean service in the elective position of clerk of superior court and shall not include service as an assistant, deputy, or acting clerk. (1965, c. 310, s. 1; 1967, c. 691, s. 5; 1969, c. 1186, s. 3; 1971, c. 877, ss. 1, 2; 1973, c. 571, ss. 1, 2; 1975, c. 956, s. 7; 1975, 2nd Sess., c. 983, s. 11; 1977, c. 802, s. 42; 1977, 2nd Sess., c. 1136, s. 13; 1979, c. 838, s. 85; 1979, 2nd Sess., c. 1137, s. 12; 1981, c. 964, s. 14; c. 1127, s. 12; 1983, c. 761, ss. 200, 247, 249.)

**Section Set Out Twice.** — The section above is effective July 1, 1984. For this section as in effect until July 1, 1984, see the preceding section, also numbered 7A-101.

**Editor's Note.** — Session Laws 1983, c. 761, s. 259 contains a severability clause.

**Effect of Amendments.** — The 1983 amendment, effective July 1, 1983, increased the salaries in the salary schedule set forth in the first paragraph and added the fourth paragraph. In addition, the 1983 amendment, effective July 1, 1984, added the fifth paragraph.



## § 7A-103. Authority of clerk of superior court.

**Legal Periodicals.** — For survey of 1980 law on civil procedure developments generally, see 59 N.C.L. Rev. 1067 (1981).

## § 7A-104. Disqualification; waiver; removal; when judge acts.

### CASE NOTES

**Jurisdiction Vests in Clerk Upon Filing of Foreclosure Upset Bid.** — When an upset bid is filed in foreclosure proceedings under a power of sale, jurisdiction over the proceedings immediately vests in the clerk of superior court.

From that point forward, the proceedings are judicially supervised and determined by the clerk. *Swindell v. Overton*, — N.C. App. —, 300 S.E.2d 864 (1983).

## § 7A-108. Accounting for fees and other receipts; annual audit.

The Administrative Office of the Courts, subject to the approval of the State Auditor, shall establish procedures for the receipt, deposit, protection, investment, and disbursement of all funds coming into the hands of the clerk of superior court. The fees to be remitted to counties and municipalities shall be paid to them monthly by the clerk of superior court.

The operations of the Administrative Office of the Courts and the Clerks of Superior Court shall be subject to the oversight of the State Auditor pursuant to Article 5A of Chapter 147 of the General Statutes. (1965, c. 310, s. 1; 1969, c. 1190, s. 9; 1971, c. 363, s. 10; 1983, c. 913, s. 5.)

**Effect of Amendments.** — The 1983 amendment, effective July 22, 1983, rewrote the last paragraph, which read "The State Auditor shall conduct an annual post audit of the receipts,

disbursements, and fiscal transactions of each clerk of superior court, and furnish a copy to the Administrative Office of the Courts."

## § 7A-109.1. List of prisoners furnished to judges.

**Cross References.** — As to jailers' reports of jailed defendants, see § 153A-229.

## § 7A-111. Receipt and disbursement of insurance and other moneys for minors and incapacitated adults.

(a) When a minor under 18 years of age, or an adult who is mentally incapable on account of sickness, old age, disease or other infirmity to manage his property and affairs, is named beneficiary in a policy or policies of insurance, and the insured dies prior to the majority of such minor or during the incapacity of such adult, and the proceeds of each individual policy do not exceed five thousand dollars (\$5,000) such proceeds may be paid to and, if paid, shall be received by the public guardian or clerk of the superior court of the county wherein the beneficiary is domiciled. A certificate of mental incapacity, signed by a physician or reputable person who has had an opportunity to observe the



mental condition of an adult beneficiary, filed with the clerk, is prima facie evidence of the mental incapacity of such adult, and authorizes the clerk to receive and administer funds under this section. The receipt of the public guardian or clerk shall be a full and complete discharge of the insurer issuing the policy or policies to the extent to the amount paid to such public guardian or clerk.

(b) Any person, firm, corporation or association having in its possession five thousand dollars (\$5,000) or less for any minor child or incapacitated adult, as described in (a), for whom there is no guardian, may pay such moneys into the office of the public guardian, if any, or the office of the clerk of superior court of the county of the recipient's domicile. The clerk of the superior court is hereby authorized to receive and administer funds under this section. The clerk's receipt shall constitute a valid release of the payor's obligation to the extent of the sum delivered to the clerk.

(1899, c. 82; Rev., s. 924; 1911, c. 29, s. 1; 1919, c. 91; C.S., s. 962; Ex. Sess., 1924, c. 1, s. 1; 1927, c. 76; 1929, c. 15; 1933, c. 363; 1937, c. 201; 1945, c. 160, ss. 1, 2; 1949, c. 188; 1953, c. 101; 1959, c. 794, ss. 1, 2; 1961, c. 377; 1971, c. 363, s. 8; c. 1231, s. 1; 1983, c. 65, s. 3.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1983 amend-

ment, effective October 1, 1983, substituted "five thousand dollars (\$5,000)" for "two thousand dollars (\$2,000)" in subsections (a) and (b).

## SUBCHAPTER IV. DISTRICT COURT DIVISION OF THE GENERAL COURT OF JUSTICE.

### ARTICLE 13.

#### *Creation and Organization of the District Court Division.*

### § 7A-133. Numbers of judges by districts; numbers of magistrates and additional seats of court, by counties.

Each district court district shall have the numbers of judges and each county within the district shall have the numbers of magistrates and additional seats of court, as set forth in the following table:

District	Judges	County	Magistrates Min.-Max.		Additional Seats of Court
1	3	Camden	1	2	
		Chowan	2	3	
		Currituck	1	2	
		Dare	3	5	
		Gates	2	3	
		Pasquotank	3	4	
		Perquimans	2	3	
		Martin	5	8	
2	2	Beaufort	4	5	
		Tyrrell	1	2	
		Hyde	2	4	
		Washington	3	4	

District	Judges	County	Magistrates Min.-Max.		Additional Seats of Court
3	6	Craven Pitt	7 10	10 12	Farmville, Ayden
		Pamlico	2	3	
		Carteret	5	8	
4	5	Sampson	6	8	
		Duplin	9	11	
		Jones	2	3	
		Onslow	8	11	
5	4	New Hanover	6	10	
		Pender	4	6	
6	3	Northampton	5	6	
		Halifax	9	14	Roanoke Rapids, Scotland Neck
		Bertie	4	5	
		Hertford	5	6	
7	4	Nash	7	10	Rocky Mount
		Edgecombe	4	6	Rocky Mount
		Wilson	4	6	
8	5	Wayne	5	8	Mount Olive
		Greene	2	4	
		Lenoir	4	7	La Grange
9	4	Person	3	4	
		Granville	3	7	
		Vance	3	5	
		Warren	3	4	
		Franklin	3	6	
10	8	Wake	12	16	Apex Wendell Fuquay-Varina Wake Forest
11	4	Harnett	7	11	Dunn
		Johnston	10	12	Benson and Selma
		Lee	4	6	
12	5	Cumberland	10	17	
		Hoke	4	5	
13	4	Bladen	4	6	
		Brunswick	4	7	
		Columbus	6	8	Tabor City
14	4	Durham	8	11	
15A	3	Alamance	7	9	Burlington
15B	3	Orange	4	8	Chapel Hill
		Chatham	3	6	Siler City
16	4	Robeson	8	16	Fairmont Maxton Pembroke Red Springs Rowland St. Pauls



District	Judges	County	Magistrates Min.-Max.		Additional Seats of Court
17A	2	Scotland	3	5	Reidsville Eden Madison
		Caswell	2	5	
		Rockingham	4	9	
17B	2	Stokes	2	4	Mt. Airy High Point Kannapolis
		Surry	5	8	
		Guilford	20	26	
18	8	Cabarrus	5	9	Liberty
19A	4	Rowan	5	10	
19B	2	Montgomery	2	4	
20	5	Randolph	5	8	Hamlet Southern Pines Kernersville
		Stanly	5	6	
		Union	4	6	
		Anson	4	5	
		Richmond	5	6	
		Moore	5	8	
21	5	Forsyth	3	15	Thomasville
22	4	Alexander	2	3	
		Davidson	7	10	
23	3	Davie	2	3	Mooresville
		Iredell	4	8	
		Alleghany	1	2	
		Ashe	3	4	
		Wilkes	4	6	
		Yadkin	3	5	
24	3	Avery	3	4	Hickory
		Madison	4	5	
		Mitchell	3	4	
		Watauga	4	6	
		Yancey	2	4	
		Burke	4	7	
25	5	Caldwell	4	7	Hickory
		Catawba	6	9	
		Mecklenburg	15	26	
26	10	Gaston	11	20	Canton
27A	4	Cleveland	5	8	
27B	3	Lincoln	4	6	
28	4	Buncombe	6	13	Canton
29	4	Henderson	4	6	
		McDowell	3	4	
		Polk	3	4	
		Rutherford	6	8	
30	3	Transylvania	2	4	
		Cherokee	3	4	
		Clay	1	2	
		Graham	2	3	
		Haywood	5	7	
		Jackson	3	4	
		Macon	3	4	
		Swain	2	3	

(1965, c. 310, s. 1; 1967, c. 691, s. 8; 1969, c. 1190, s. 10; c. 1254; 1971, c. 377, s. 7; cc. 727, 840, 841, 842, 843, 865, 866, 898; 1973, cc. 132, 373, 483; c. 838, s. 1; c. 1376; 1975, c. 956, ss. 8, 10; 1977, cc. 121, 122; c. 678, s. 2; c. 947, s. 1; c. 1130, ss. 4, 5; 1977, 2nd Sess., c. 1238, s. 3; c. 1243, ss. 3, 6; 1979, c. 465; c. 838, ss. 117, 118; c. 1072, ss. 2, 3; 1979, 2nd Sess., c. 1221, s. 2; 1981, c. 964, s. 4; 1983, c. 881, s. 5.)

**Editor's Note.** —

Session Laws 1981, c. 964, s. 4(b) as amended by Session Laws 1981, c. 997, s. 1, provides: "The four current district court judges allocated to the seventeenth judicial district are to serve in both judicial districts 17A and 17B until the first Monday in December, 1982. In 1982 and quadrennially thereafter, two district judges shall be elected in judicial district 17A for four-year terms, with filing in accordance with G.S. 163-106(d). In 1982 two district judges shall be elected in judicial district 17B for

four-year terms, with filing for the two seats to be at-large and without designation of vacancy; and in 1986 and quadrennially thereafter, two district judges shall be elected in judicial district 17B for four-year terms, with filing in accordance with G.S. 163-106(d)."

**Effect of Amendments.** —

The 1983 amendment, effective July 20, 1983, amended the table by changing the notations under Dare, Hyde, Scotland and Yadkin counties with respect to the minimum and maximum number of magistrates.

## ARTICLE 14.

### *District Judges.*

#### **§ 7A-140. Number; election; term; qualification; oath.**

**Effect of Amendments.** —

The amendment to this section in Session Laws 1981, c. 504, s. 6, was made effective upon certification of approval of the constitutional amendments proposed by ss. 1-3 of the act. The

constitutional amendments were submitted to the people at an election held June 29, 1982, and were defeated. The 1981 amendment to this section therefore never went into effect.

#### **§ 7A-144. Compensation.**

(a) Each judge shall receive the annual salary provided in the Budget Appropriations Act, and reimbursement on the same basis as State employees generally, for his necessary travel and subsistence expenses.

(b) Notwithstanding merit, longevity and other increment raises paid to regular State employees, a judge of the district court shall receive as longevity pay an annual amount equal to four and eight-tenths percent (4.8%) of the annual salary set forth in the Budget Appropriation Act payable monthly after five years of service, and nine and six-tenths percent (9.6%) after 10 years of service. Service shall mean service as a justice or judge of the General Court of Justice. (1965, c. 310, s. 1; 1967, c. 691, s. 10; 1983, c. 761, s. 245.)

**Editor's Note.** — Session Laws 1983, c. 761, s. 259, contains a severability clause.

**Effect of Amendments.** — The 1983 amend-

ment, effective July 1, 1983, designated the existing provisions as subsection (a) and added subsection (b).

#### **§ 7A-146. Administrative authority and duties of chief district judge.**

The chief district judge, subject to the general supervision of the Chief Justice of the Supreme Court, has administrative supervision and authority over the operation of the district courts and magistrates in his district. These powers and duties include, but are not limited to, the following:



- (8) Promulgating a schedule of traffic offenses, hunting and fishing offenses under Chapter 113, and boating offenses under Chapter 75A for which magistrates and clerks of court may accept written appearances, waivers of trial, and pleas of guilty, and establishing a schedule of fines therefor;

(1965, c. 310, s. 1; 1971, c. 377, s. 8; 1977, c. 945, s. 1; 1983, c. 586, s. 1.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1983 amend-

ment, effective Jan. 1, 1984, inserted "hunting and fishing offenses under Chapter 113, and boating offenses under Chapter 75A" in subdivision (8).

## § 7A-148. Annual conference of chief district judges.

(a) The chief district judges of the various district court districts shall meet at least once a year upon call of the Chief Justice of the Supreme Court to discuss mutual problems affecting the courts and the improvement of court operations, to prepare and adopt a uniform schedule of traffic offenses, hunting and fishing offenses under Chapter 113, and boating offenses under Chapter 75A for which magistrates and clerks of court may accept written appearances, waivers of trial and pleas of guilty, and establish a schedule of fines therefor, and to take such further action as may be found practicable and desirable to promote the uniform administration of justice.

(1965, c. 310, s. 1; 1967, c. 691, s. 11; 1983, c. 586, s. 2.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1983 amend-

ment, effective Jan. 1, 1984, inserted "hunting and fishing offenses under Chapter 113, and boating offenses under Chapter 75A" in subsection (a).

## ARTICLE 16.

### *Magistrates.*

## § 7A-171.1. Duty hours and salary.

The Administrative Officer of the Courts, after consultation with the chief district judge and pursuant to the following provisions, shall set an annual salary for each magistrate.

- (1) A full-time magistrate, so designated by the Administrative Officer of the Courts, shall be paid the annual salary indicated in the table below according to the number of years he has served as a magistrate. The salary steps shall take effect on the anniversary of the date the magistrate was originally appointed:

*Table of Salaries of Full-Time Magistrates*

<i>Number of prior years of service</i>	<i>Annual salary</i>
Less than 1	\$ 10,440
1 or more but less than 3	11,340
3 or more but less than 5	12,396
5 or more but less than 7	13,512
7 or more but less than 9	14,760
9 or more	16,152

A "Full-time magistrate" is a magistrate who is assigned to work an average of not less than 40 hours a week during his term of office.

Notwithstanding any other provision of this subdivision, a full-time magistrate, who was serving as a magistrate on December 31, 1978, and who was receiving an annual salary in excess of that which would ordinarily be allowed under the provisions of this subdivision, shall not have the salary, which he was receiving reduced during any subsequent term as a full-time magistrate. That magistrate's salary shall be fixed at the salary level from the table above which is nearest and higher than the latest annual salary he was receiving on December 31, 1978, and, thereafter, shall advance in accordance with the schedule in the table above.

(1977, c. 945, s. 5; 1979, c. 838, s. 84; c. 991; 1979, 2nd Sess., c. 1137, s. 11; 1981, c. 914, s. 1; c. 1127, s. 11; 1983, c. 761, s. 199; c. 923, s. 217.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Editor's Note.** — Session Laws 1981, c. 1127, s. 89, contains a severability clause.

Session Laws 1983, c. 761, s. 259, contains a severability clause.

**Effect of Amendments.** —

Session Laws 1981, c. 1127, s. 11, effective January 1, 1982, increased all salaries in subdivision (1).

Session Laws 1983, c. 761, s. 199, effective July 1, 1983, increased the salaries in the salary schedule set forth in subdivision (1).

Session Laws 1983, c. 923, s. 217, effective July 15, 1983, substituted "13,512" for "13,572" in the schedule of salaries in subdivision (1), as such schedule was amended by Session Laws, c. 761, s. 199.

## § 7A-173. Suspension; removal; reinstatement.

Sections 7A-173 and 7A-376 are not irreconcilably in conflict with § 14-230. State v. Greer, — N.C. —, 302 S.E.2d 774 (1983).

And Legislature did not intend to exempt magistrates from indictment and criminal prosecution under § 14-230 when it included magistrates under the sanctions of this section

and § 7A-376. Section 14-230 applies to misconduct in office unless another statute provides for the "indictment" of the officer, but neither this section nor § 7A-376 provide for criminal charges to be brought against a magistrate who is guilty of misconduct in office. State v. Greer, — N.C. —, 302 S.E.2d 774 (1983).

## § 7A-175. Records to be kept.

### CASE NOTES

Quoted in Lewis v. Blackburn, 555 F. Supp. 713 (W.D. N.C. 1983).

### ARTICLE 17.

#### *Clerical Functions in the District Court.*

## § 7A-180. Functions of clerk of superior court in district court matters.

The clerk of superior court:

- (4) Has the power to accept written appearances, waivers of trial and pleas of guilty to certain traffic offenses, hunting and fishing offenses under



Chapter 113, and boating offenses under Chapter 75A in accordance with a schedule of offenses and fines promulgated by the chief district judge, and, in such cases, to enter judgment and collect the fines and costs;

(1965, c. 310, s. 1; 1967, c. 691, s. 16; 1969, c. 1190, s. 14; 1973, c. 503, ss. 3, 4; c. 1286, s. 6; 1975, c. 166, s. 23; c. 626, s. 2; 1981, c. 142; 1983, c. 586, s. 4.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** —

The 1983 amendment, effective Jan. 1, 1984,

inserted "hunting and fishing offenses under Chapter 113, and boating offenses under Chapter 75A" in subdivision (4).

## ARTICLE 18.

### *District Court Practice and Procedure Generally.*

#### § 7A-192. By whom power of district court to enter interlocutory orders exercised.

##### CASE NOTES

Cited in *Condie v. Condie*, 51 N.C. App. 522, 277 S.E.2d 122 (1981).

#### § 7A-196. Jury trials.

##### CASE NOTES

The effect of a verdict of guilty by the district court in a trial of a misdemeanor is tantamount to a verdict of guilty returned by a jury. *State v. Surles*, 55 N.C. App. 179, 284 S.E.2d 738 (1981), cert. denied, 305 N.C. 307, 290 S.E.2d 707 (1982).

The trial judge's authority over its nonjury verdict is no greater than the authority of the trial judge over a jury verdict. *State v. Surles*, 55 N.C. App. 179, 284 S.E.2d 738 (1981), cert. denied, 305 N.C. 307, 290 S.E.2d 707 (1982).

#### § 7A-198. Reporting of civil trials.

##### CASE NOTES

Applied in *In re Peirce*, 53 N.C. App. 373, 281 S.E.2d 198 (1981).

## ARTICLE 19.

### *Small Claim Actions in District Court.*

#### § 7A-217. Methods of subjecting person of defendant to jurisdiction.

When by order or rule a small claim action is assigned to a magistrate, the

defendant may be subjected to the jurisdiction of the court over his person by the following methods:

- (2) When the defendant is not under any legal disability, he may be served by registered or certified mail as provided in G.S. 1A-1, Rule 4(j). Proof of service is as provided in G.S. 1A-1, Rule 4(j2).

(1965, c. 310, s. 1; 1969, c. 1190, s. 20; 1973, c. 90; 1983, c. 332, s. 3.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Editor's Note.** — Session Laws 1983, c. 332, s. 4, provides that the act shall apply to process

served on or after Oct. 1, 1983.

**Effect of Amendments.** — The 1983 amendment, effective Oct. 1, 1983, rewrote subdivision (2).

## SUBCHAPTER V. JURISDICTION AND POWERS OF THE TRIAL DIVISIONS OF THE GENERAL COURT OF JUSTICE.

### ARTICLE 20.

#### *Original Civil Jurisdiction of the Trial Divisions.*

### § 7A-240. Original civil jurisdiction generally.

#### CASE NOTES

**Institution of Action in Improper Trial Division.** — It is fairly common practice for an attorney to institute an action in district court, although not the proper division, in order to schedule an earlier trial date than would be available on the superior court calendar. This practice is allowed since original civil jurisdiction is vested concurrently in both divisions and since a judgment is not void or voidable solely because it was rendered in the improper trial division. *Circle J. Farm Center, Inc. v. Fulcher*, 57 N.C. App. 206, 290 S.E.2d 798 (1982).

**Absent proper objection, an action begun in the wrong division may continue** in that division to its conclusion. *Circle J. Farm Center, Inc. v. Fulcher*, 57 N.C. App. 206, 290 S.E.2d 798 (1982).

**Action to Recover for Breach of Duties, Negligence, and Fraud in Administration**

**of Estate.** — In action to recover for breach of fiduciary duties, negligence, and fraud arising from administration of estate of plaintiff's husband and a trust created under his will, dismissal for want of subject matter jurisdiction on the ground that the claims alleged should be brought initially before the clerk was improper, since the claims were "justiciable matters of a civil nature," original general jurisdiction over which was vested in the trial division, and their resolution was not part of the administration, settlement, or distribution of an estate so as to make jurisdiction properly exercisable initially by the clerk; moreover, inclusion by plaintiff in her complaint of matters which should have been brought initially before the clerk did not require dismissal for want of subject matter jurisdiction of the entire action. *Ingle v. Allen*, 53 N.C. App. 627, 281 S.E.2d 406 (1981).

### § 7A-241. Original jurisdiction in probate and administration of decedents' estates.

#### CASE NOTES

**Quoted** in *Kimrey v. Dorsett*, 10 Bankr. 466 (Bankr.M.D.N.C. 1981).

**Cited** in *Ingle v. Allen*, 53 N.C. App. 627, 281 S.E.2d 406 (1981).



## § 7A-242. Concurrently held original jurisdiction allocated between trial divisions.

### CASE NOTES

**Institution of Action in Improper Trial Division.** — It is fairly common practice for an attorney to institute an action in district court, although not the proper division, in order to schedule an earlier trial date than would be available on the superior court calendar. This practice is allowed since original civil jurisdiction is vested concurrently in both divisions and since a judgment is not void or voidable solely

because it was rendered in the improper trial division. *Circle J. Farm Center, Inc. v. Fulcher*, 57 N.C. App. 206, 290 S.E.2d 798 (1982).

**Absent proper objection, an action begun in the wrong division may continue in that division to its conclusion.** *Circle J. Farm Center, Inc. v. Fulcher*, 57 N.C. App. 206, 290 S.E.2d 798 (1982).

## § 7A-243. Proper division for trial of civil actions generally determined by amount in controversy.

Except as otherwise provided in this Article, the district court division is the proper division for the trial of all civil actions in which the amount in controversy is ten thousand dollars (\$10,000) or less; and the superior court division is the proper division for the trial of all civil actions in which the amount in controversy exceeds ten thousand dollars (\$10,000).

For purposes of determining the amount in controversy, the following rules apply whether the relief prayed is monetary or nonmonetary, or both, and with respect to claims asserted by complaint, counterclaim, cross-complaint or third-party complaint:

- (1) The amount in controversy is computed without regard to interest and costs.
- (2) Where monetary relief is prayed, the amount prayed for is in controversy unless the pleading in question shows to a legal certainty that the amount claimed cannot be recovered under the applicable measure of damages. The value of any property seized in attachment, claim and delivery, or other ancillary proceeding, is not in controversy and is not considered in determining the amount in controversy.
- (3) Where no monetary relief is sought, but the relief sought would establish, enforce, or avoid an obligation, right or title, the value of the obligation, right, or title is in controversy. The judge may require by rule or order that parties make a good faith estimate of the value of any nonmonetary relief sought.
- (4)
  - a. Except as provided in subparagraph c of this subdivision, where a single party asserts two or more properly joined claims, the claims are aggregated in computing the amount in controversy.
  - b. Except as provided in subparagraph c, where there are two or more parties properly joined in an action and their interests are aligned, their claims are aggregated in computing the amount in controversy.
  - c. No claims are aggregated which are mutually exclusive and in the alternative, or which are successive, in the sense that satisfaction of one claim will bar recovery upon the other.
  - d. Where there are two or more claims not subject to aggregation the highest claim is the amount in controversy.
- (5) Where the value of the relief to a claimant differs from the cost thereof to an opposing party, the higher amount is used in determining the amount in controversy. (1965, c. 310, s. 1; 1981 (Reg. Sess., 1982), c. 1225.)

**Effect of Amendments.** — The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982, substituted "ten thousand dollars (\$10,000)" for

"five thousand dollars (\$5,000)" in two places in the first paragraph.

#### CASE NOTES

**Stated** in *Circle J. Farm Center, Inc. v. Fulcher*, 57 N.C. App. 206, 290 S.E.2d 798 (1982).

**Cited** in *Ingle v. Allen*, 53 N.C. App. 627, 281 S.E.2d 406 (1981).

### § 7A-244. Domestic relations.

#### CASE NOTES

**Jurisdiction Generally.** —

In accord with 1st paragraph in original. See

*Smith v. Smith*, 56 N.C. App. 812, 290 S.E.2d 390 (1982).

### § 7A-250. Review of decisions of administrative agencies.

#### CASE NOTES

**Stated** in *City of Raleigh v. Stell*, 53 N.C. App. 776, 281 S.E.2d 774 (1981).

#### ARTICLE 21.

### *Institution, Docketing, and Transferring Civil Causes in the Trial Divisions.*

### § 7A-257. Waiver of proper division.

#### CASE NOTES

**Quoted** in *Northwestern Bank v. Morrison*, — N.C. App. —, 299 S.E.2d 830 (1983).

### § 7A-258. Motion to transfer.

#### CASE NOTES

**Quoted** in *Northwestern Bank v. Morrison*, — N.C. App. —, 299 S.E.2d 830 (1983).

**Fulcher**, 57 N.C. App. 206, 290 S.E.2d 798 (1982).

**Stated** in *Circle J. Farm Center, Inc. v.*



## ARTICLE 22.

*Jurisdiction of the Trial Divisions in Criminal Actions.*

## § 7A-271. Jurisdiction of superior court.

## CASE NOTES

## I. GENERAL CONSIDERATION.

**Express Exception Where Conviction Based on Guilty Plea.** — This section sets forth an express exception where the conviction appealed from is the product of a plea agreement. *State v. Monroe*, 57 N.C. App. 597, 292 S.E.2d 21 (1982).

**Stated** in *State v. Huff*, 56 N.C. App. 721, 289 S.E.2d 604 (1982).

**Cited** in *State v. Lambert*, 53 N.C. App. 799, 281 S.E.2d 754 (1981); *State v. Killian*, — N.C. App. —, 300 S.E.2d 257 (1983).

## II. JURISDICTION OVER MISDEMEANORS.

## C. Consolidation with Felony.

**Death by Vehicle and Failure to Stop at**

**Scene of Accident.** — In a prosecution on separate bills of indictment for failing to stop an automobile at the scene of an accident in which an individual was killed (§ 20-166(a)) and death by vehicle (§ 20-141.4), where the two offenses were based on the same act or transaction, the superior court had jurisdiction of the misdemeanor offense of death by vehicle. *State v. Fearing*, 304 N.C. 471, 284 S.E.2d 487 (1981).

## § 7A-272. Jurisdiction of district court.

## CASE NOTES

## I. GENERAL CONSIDERATION.

**Stated** in *State v. Huff*, 56 N.C. App. 721, 289 S.E.2d 604 (1982).

**Cited** in *State v. Fearing*, 304 N.C. 471, 284

S.E.2d 487 (1981); *State v. Surles*, 55 N.C. App. 179, 284 S.E.2d 738 (1981); *State v. Killian*, — N.C. App. —, 300 S.E.2d 257 (1983).

## § 7A-273. Powers of magistrates in criminal actions.

In criminal actions, any magistrate has power:

- (2) In misdemeanor cases involving traffic offenses, hunting and fishing offenses under Chapter 113, and boating offenses under Chapter 75A, to accept written appearances, waivers of trial and pleas of guilty, in accordance with a schedule of offenses and fines promulgated by the chief district judge, and, in such cases, to enter judgment and collect the fine and costs;
- (1965, c. 310, s. 1; 1969, c. 876, s. 2; c. 1190, s. 25; 1973, c. 6; c. 503, s. 8; c. 1286, s. 7; 1975, c. 626, s. 4; 1977, c. 873, s. 1; 1979, c. 144, s. 3; 1981, c. 555, s. 3; 1983, c. 586, s. 5.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** —

The 1983 amendment, effective Jan. 1, 1984,

inserted "hunting and fishing offenses under Chapter 113, and boating offenses under Chapter 75A" in subdivision (2).

## CASE NOTES

**Applied** in *State v. Warren*, 59 N.C. App. 264, 296 S.E.2d 671 (1982).

## ARTICLE 24.

*Juvenile Services.*

## § 7A-289.2. Definitions.

**Legal Periodicals.** — For a note on the indigent parent's right to have counsel furnished by State in parental status termination pro-

ceedings, see 17 Wake Forest L. Rev. 961 (1981).

## § 7A-289.6. Duties and powers of court counselors.

The court counselors in each district shall have the duties and powers of juvenile probation officers as provided by G.S. 110-23 and as follows:

- (1) To conduct a prehearing social study of any child alleged to be delinquent or undisciplined, provided that no social study shall be made prior to an adjudication that the child is within the juvenile jurisdiction of the court unless the child and his parent or attorney or guardian or custodian files a written statement with the court counselor granting permission and giving consent to such prehearing social study; when such a prehearing social study has been completed, the court counselor shall prepare a written report for the court summarizing the findings which shall contain recommendations as to the type of care and/or treatment needed by the child and which shall be in the form developed by the Administrator for such reports. (1973, c. 1339, s. 1; 1981, c. 469, s. 22; 1983, c. 276, s. 2.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** —

The 1983 amendment, effective Oct. 1, 1983, in subdivision (1) deleted "if so instructed by the court" preceding "provided that no social

study," substituted "granting permission" for "declaring the child's intention to admit the allegations contained in the juvenile petition," and deleted "which may be reviewed by the court prior to the juvenile hearing and" preceding "which shall contain recommendations."

## ARTICLE 24B.

*Termination of Parental Rights.*

## § 7A-289.22. Legislative intent; construction of Article.

## CASE NOTES

**This Article exclusively controls procedure to be followed in termination of parental rights**, and the Rules of Civil Procedure (§ 1A-1) are inapplicable to such a proceeding. In *re Peirce*, 53 N.C. App. 373, 281 S.E.2d 198 (1981).

**Rules of Civil Procedure Not Superimposed on Hearings under Article.** — This article comprehensively delineates in detail the judicial procedure to be followed in the termination of parental rights. It provides for the basic procedural elements which are to be utilized in



these cases. Due to the Legislature's prefatory statement in this section with regard to its intent to establish judicial procedures for the termination of parental rights, and due to the specificity of the procedural rules set out in the article, the legislative intent was that this article exclusively control the procedure to be followed in the termination of parental rights. It was not the intent that the requirements of the Rules of Civil Procedure, § 1A-1, be superimposed upon the requirements of this article. In *re Allen*, 58 N.C. App. 322, 293 S.E.2d 607 (1982).

The judicial procedure to be used in termination of parental rights cases is prescribed by the Legislature in this Article. The Rules of Civil Procedure, § 1A-1, while they are not to be ignored, are not superimposed upon these hearings. In *re Allen*, 58 N.C. App. 322, 293 S.E.2d 607 (1982).

**The parental rights of a parent in his child are not to be bartered away at the parent's whim.** *Foy v. Foy*, 57 N.C. App. 128, 290 S.E.2d 748 (1982).

## § 7A-289.23. Jurisdiction.

The district court shall have exclusive original jurisdiction to hear and determine any petition relating to termination of parental rights to any child who resides in, is found in, or is in the legal or actual custody of a county department of social services or licensed child-placing agency in the district at the time of filing of the petition. The court shall have jurisdiction to terminate the parental rights of any parent irrespective of the age of the parent. The parent has the right to counsel and to appointed counsel in cases of indigency unless the parent waives the right. The fees of appointed counsel shall be borne by the Administrative Office of the Courts. In addition to the right to appointed counsel set forth above, a guardian ad litem shall be appointed in accordance with the provisions of G.S. 1A-1, Rule 17, to represent a parent in the following cases:

- (1) Where it is alleged that a parent's rights should be terminated pursuant to G.S. 7A-289.32(7); or
- (2) Where the parent is under the age of 18 years.

The fees of the guardian ad litem shall be borne by the Administrative Office of the Courts when the court finds that the respondent is indigent. In other cases the fees of the court appointed guardian ad litem shall be a proper charge against the respondent, if the respondent does not secure private legal counsel. Provided that, before exercising jurisdiction under this Article the court shall find that it would have jurisdiction to make a child custody determination under the provisions of G.S. 50A-3. Provided further, that the clerk of superior court shall have jurisdiction for adoptions under the provisions of G.S. 48-12 and Chapter 48 generally. (1977, c. 879, s. 8; 1979, c. 110, s. 7; 1979, 2nd Sess., c. 1206, s. 1; 1981, c. 996, s. 1; 1983, c. 89, s. 1.)

### Effect of Amendments. —

The 1983 amendment, effective March 23, 1983, added the last sentence.

**Legal Periodicals.** — For survey of 1981 family law, see 60 N.C.L. Rev. 1379 (1982).

For a note on the indigent parent's right to have counsel furnished by State in parental status termination proceedings, see 17 Wake Forest L. Rev. 961 (1981).

## CASE NOTES

**Appointment of Counsel for Indigent Parents in Proceedings Brought Prior to August 9, 1981.** — In proceedings to terminate parental rights brought prior to August 9, 1981, the effective date of the 1981 amendment to this section, relating to appointment of counsel for indigent parents, where other circumstances do not dictate to the contrary an indigent parent is

not entitled to appointment of counsel as a matter of law; rather, the right to appointed counsel must be determined on a case by case basis. In *re Clark*, 303 N.C. 592, 281 S.E.2d 47 (1981).

**Payment of Fees of Counsel Appointed in Proceedings Brought Prior to August 9, 1981.** — Attorney's fees allowed by the court for

attorneys appointed in proceedings to terminate parental rights, whether as separate counsel or as guardian ad litem, brought before August 9, 1981, the effective date of the 1981

amendment to this section, shall be borne by the Administrative Office of the Courts. In re Clark, 303 N.C. 592, 281 S.E.2d 47 (1981).

## § 7A-289.24. Who may petition.

A petition to terminate the parental rights of either or both parents to his, her, or their minor child may only be filed by:

- (5) Any person with whom the child has resided for a continuous period of two years or more next preceding the filing of the petition; or
- (6) Any guardian ad litem appointed to represent the minor child pursuant to G.S. 7A-586, who has not been relieved of this responsibility and who has served in this capacity for at least one continuous year. (1977, c. 879, s. 8; 1983, c. 870, s. 1.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1983 amendment, effective July 20, 1983, and applicable to petitions filed on or after this date, substituted “; or” for a period at the end of subdivision (5)

and added subdivision (6).

**Legal Periodicals.** — For a note on the indigent parent's right to have counsel furnished by State in parental status termination proceedings, see 17 Wake Forest L. Rev. 961 (1981).

### CASE NOTES

**Stated in** In re Peirce, 53 N.C. App. 373, 281 S.E.2d 198 (1981).

## § 7A-289.25. Petition.

**Legal Periodicals.** — For a note on the indigent parent's right to have counsel furnished by State in parental status termination pro-

ceedings, see 17 Wake Forest L. Rev. 961 (1981).

### CASE NOTES

**Stated in** In re Peirce, 53 N.C. App. 373, 281 S.E.2d 198 (1981).

## § 7A-289.26. Preliminary hearing; unknown parent.

### CASE NOTES

**Stated in** In re Peirce, 53 N.C. App. 373, 281 S.E.2d 198 (1981).

## § 7A-289.27. Issuance of summons.

(a) Except as provided in G.S. 7A-289.26, upon the filing of the petition, the court shall cause a summons to be issued, directed to the following persons or agency, not otherwise a party petitioner, who shall be named as respondents:



- (1) The parents of the child;
- (2) Any person who has been judicially appointed as guardian of the person of the child;
- (3) The custodian of the child appointed by a court of competent jurisdiction;
- (4) Any county department of social services or licensed child-placing agency to whom a child has been released by one parent pursuant to G.S. 48-9(a)(1); and
- (5) The child, if he or she is 12 years of age or older at the time the petition is filed.

Provided, no summons need be directed to or served upon any parent who has previously surrendered the child to a county department of social services or licensed child-placing agency, nor to any parent who has consented to the adoption of the child by the petitioner. The summons shall notify the respondents to file a written answer within 30 days after service of the summons and petition. Service of the summons shall be completed as provided under the procedures established by G.S. 1A-1, Rule 4(j); but the parent of the child shall not be deemed to be under disability even though such parent is a minor.

(b) The summons shall be issued for the purpose of terminating parental rights pursuant to the provisions of subsection (a) of this section and shall include:

- (1) The name of the minor child;
- (2) Notice that a written answer to the petition must be filed with the clerk who signed the petition within 30 days after service of the summons and a copy of the petition, or the parent's rights may be terminated;
- (3) Notice that if they are indigent, the parents are entitled to appointed counsel. The parents may contact the clerk immediately to request counsel;
- (4) Notice that this is a new case. Any attorney appointed previously will not represent the parents in this proceeding unless ordered by the court;
- (5) Notice that the date, time and place of the hearing will be mailed by the clerk upon filing of the answer or 30 days from the date of service if no answer is filed;
- (6) Notice of the purpose of the hearing and notice that the parents may attend the termination hearing. (1977, c. 879, s. 8; 1981, c. 966, s. 2; 1983, c. 581, ss. 1, 2.)

#### **Effect of Amendments. —**

The 1983 amendment, effective Oct. 1, 1983, designated the first two paragraphs as subsection (a), in the second paragraph of subsection (a) substituted the present second sentence for the former second and third sentences, and

added subsection (b).

#### **Legal Periodicals. —**

For a note on the indigent parent's right to have counsel furnished by State in parental status termination proceedings, see 17 Wake Forest L. Rev. 961 (1981).

### **CASE NOTES**

Cited in *In re Clark*, 303 N.C. 592, 281 S.E.2d 47 (1981); *Wake County ex rel.* Carrington v. Townes, 306 N.C. 333, 293 S.E.2d 95 (1982).



## § 7A-289.29. Answer of respondents.

(b) If an answer denies any material allegation of the petition, the court shall appoint a guardian ad litem for the child to represent the best interests of the child, unless the petition was filed by the guardian ad litem pursuant to G.S. 7A-289.24(6). A licensed attorney shall be appointed to assist those guardians ad litem who are not attorneys licensed to practice in North Carolina. The appointment, duties and payment of the guardian ad litem shall be the same as in G.S. 7A-586 and 7A-588. The court shall conduct a special hearing after notice of not less than 10 days nor more than 30 days to the petitioner, the answering respondent(s), and the guardian ad litem for the child, to determine the issues raised by the petition and answer(s). Notice of the hearing shall be deemed to have been given upon the depositing thereof in the United States mail, first-class postage prepaid, and addressed to the petitioner, respondent, and guardian ad litem or their counsel of record, at the addresses appearing in the petition and responsive pleading. (1977, c. 879, s. 8; 1981 (Reg. Sess., 1982), c. 1331, s. 3; 1983, c. 870, s. 2.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1981 (Reg. Sess., 1982) amendment, applicable to actions commencing on or after June 11, 1982, deleted "licensed attorney as" following "appoint a" in the first sentence of subsection (b) and added the present third sentence of subsection (b).

The 1983 amendment, effective July 20, 1983, and applicable to petitions filed on or

after this date, in subsection (b), added "unless the petition was filed by the guardian ad litem pursuant to G.S. 7A-289.24(6)" at the end of the first sentence and inserted the present second sentence.

**Legal Periodicals.** — For a note on the indigent parent's right to have counsel furnished by State in parental status termination proceedings, see 17 Wake Forest L. Rev. 961 (1981).

### CASE NOTES

**No Right to File Counterclaim.** — Statutorily established procedure for termination of parental rights under this section does

not include the right to file a counterclaim. In re Peirce, 53 N.C. App. 373, 281 S.E.2d 198 (1981).

## § 7A-289.30. Adjudicatory hearing on termination.

### Legal Periodicals. —

For survey of 1981 constitutional law, see 60 N.C.L. Rev. 1272 (1982).

### CASE NOTES

**This Article is not unconstitutional in depriving the parties of trial by jury;** under Art. I, § 19 of the State Constitution, trial by jury is guaranteed only where the prerogative existed at common law or by statute at the time the Constitution was adopted, and proceedings to terminate parental rights in children were unknown at common law and did not exist by statute until 1969. In re Clark, 303 N.C. 592, 281 S.E.2d 47 (1981).

**The North Carolina constitutional requirement of trial by jury is not applicable to a proceeding for termination of**

parental rights. In re Ferguson, 50 N.C. App. 681, 274 S.E.2d 879 (1981).

**Standard for Review on Appeal.** — On appeal, when a trial court's order is reviewed as not being supported by the evidence, the appellate court looks to see whether there is clear, cogent, and convincing competent evidence to support the findings. If there is such competent evidence, the findings are binding upon the court on appeal. In re Allen, 58 N.C. App. 322, 293 S.E.2d 607 (1982).

**Applied in** In re Moore, 306 N.C. 394, 293 S.E.2d 127 (1982).



Stated in *In re Peirce*, 53 N.C. App. 373, 281 S.E.2d 198 (1981).

## § 7A-289.31. Disposition.

(c1) Repealed by Session Laws 1983, c. 607, s. 3, effective October 1, 1983.

(c2) Counsel for the petitioner shall serve a copy of the termination of parental rights order upon the guardian ad litem for the child, if any, and upon the child if he is 12 years of age or older.

(1977, c. 879, s. 8; 1981 (Reg. Sess., 1982), c. 1131, s. 1; 1983, c. 581, s. 3; c. 607, s. 3.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Editor's Note.** — Session Laws 1983, c. 607, s. 5, provides: "This act shall become effective October 1, 1983, and shall apply to all children in the custody of a county department of social services or licensed child-placing agency as of that date."

**Effect of Amendments.** — The 1981 (Reg. Sess., 1982) amendment, applicable to actions commencing on or after June 11, 1982, added subsection (c1).

The first 1983 amendment, effective Oct. 1, 1983, added subsection (c2).

The second 1983 amendment, effective Oct. 1,

1983, and applicable to all children in the custody of a county department of social services or licensed child-placing agency as of that date, deleted subsection (c1), relating to a review hearing to be conducted within six months after the entry of an order terminating the parental rights of parent.

**Legal Periodicals.** —

For article on rights and interest of parent, child, family and state, see 4 Campbell L. Rev. 85 (1981).

For a note on the indigent parent's right to have counsel furnished by State in parental status termination proceedings, see 17 Wake Forest L. Rev. 961 (1981).

## CASE NOTES

**The children's best interests are paramount,** not the rights of the parent. In *re Smith*, 56 N.C. App. 142, 287 S.E.2d 440, cert. denied 306 N.C. 385, 294 S.E.2d 212 (1982).

**Family Integrity May Be Considered.** — It is within the court's discretion to consider such factors as family integrity in making its decision of whether termination is in the best interests of the children. In *re Smith*, 56 N.C. App. 142, 287 S.E.2d 440, cert. denied, 306 N.C. 385,

294 S.E.2d 212 (1982).

**Entry of Judgment Not Addressed by Section.** — This section refers to the court issuing an order. It does not speak of the entry of judgment and nowhere is it found that the court is under a 10-day rule to enter a written judgment. In *re Allen*, 58 N.C. App. 322, 293 S.E.2d 607 (1982).

**Cited in** *In re Clark*, 303 N.C. 592, 281 S.E.2d 47 (1981).

## § 7A-289.32. Grounds for terminating parental rights.

The court may terminate the parental rights upon a finding of one or more of the following:

- (2) The parent has abused or neglected the child. The child shall be deemed to be abused or neglected if the court finds the child to be an abused child within the meaning of G.S. 7A-517(1), or a neglected child within the meaning of G.S. 7A-517(21).
- (3) The parent has willfully left the child in foster care for more than two consecutive years without showing to the satisfaction of the court that substantial progress has been made within two years in correcting those conditions which led to the removal of the child or without showing positive response within two years to the diligent efforts of a county Department of Social Services, a child-caring institution or licensed child-placing agency to encourage the parent to strengthen the parental relationship to the child or to make and follow through with constructive planning for the future of the child.



(1977, c. 879, s. 8; 1979, c. 669, s. 2; 1979, 2nd Sess., c. 1088, s. 2; c. 1206, s. 2; 1983, c. 89, s. 2; c. 512.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** —

The first 1983 amendment, effective March 23, 1983, deleted "for neglect" following "which led to the removal of the child" in subdivision (3).

The second 1983 amendment, effective June 13, 1983, substituted "G.S. 7A-517(1)" for "G.S.

110-117(1)(a), (b) or (c)" and substituted "G.S. 7A-517(21)" for "G.S. 7A-278(4)" in subdivision (2).

**Legal Periodicals.** —

For survey of 1981 family law, see 60 N.C.L. Rev. 1379 (1982).

For a note on the indigent parent's right to have counsel furnished by State in parental status termination proceedings, see 17 Wake Forest L. Rev. 961 (1981).

## CASE NOTES

**Section Is Not Unconstitutional.** —

Subsection (4) of this section, which permits termination when a child is in the custody of a department of social services and the parent has failed to pay a reasonable portion of the cost of child care for six months preceding filing of the petition, is not unconstitutionally vague and overbroad, since the phrase "reasonable portion of the cost of care for the child" is, by all normal standards, understandable by people of common intelligence without any necessity of guessing as to its meaning or differing as to its application, contains words of such common usage and understanding as to give parents notice of their responsibilities and of the type of conduct which is condemned, and provides boundaries sufficiently distinct that judges may interpret and administer it uniformly. In re Clark, 303 N.C. 592, 281 S.E.2d 47 (1981).

Subdivision (2) of this section is not unconstitutionally vague, because the definition of a neglected child is clearly set out in § 7A-517(21). In re Allen, 58 N.C. App. 322, 293 S.E.2d 607 (1982).

Subdivisions (2) and (3) of this section are not unconstitutionally vague. In re Moore, 306 N.C. 394, 293 S.E.2d 127 (1982), appeal dismissed, — U.S. —, 103 S. Ct. 776, 74 L.Ed.2d 987 (1983).

Subdivision (4) of this section is not unconstitutionally vague. It is sufficiently definite to be applied in a uniform manner to protect both the State's substantial interest in the welfare of minor children and the parents' fundamental right to the integrity of their family unit. In re Allen, 58 N.C. App. 322, 293 S.E.2d 607 (1982).

There is no constitutional defect for vagueness in subdivision (4) of this section. In re Bradley, 57 N.C. App. 475, 291 S.E.2d 800 (1982).

**Reference in Subdivision (2) to Repealed § 7A-278.** — Section 7A-278, referred to in subdivision (2) was repealed, and reference is made to the North Carolina Juvenile Code, including the definition of a neglected juvenile in

§ 7A-517(21), which tracks the language appearing in former § 7A-278(4). In re Smith, 56 N.C. App. 142, 287 S.E.2d 440, cert. denied, 306 N.C. 385, 294 S.E.2d 212 (1982).

**"Abandonment" Defined.** — Abandonment imports any willful or intentional conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child. Abandonment has also been defined as willful neglect and refusal to perform the natural and legal obligations of parental care and support. It has been held that if a parent withholds his presence, his love, his care, the opportunity to display filial affection, and willfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child. In re APA, 59 N.C. App. 322, 296 S.E.2d 811 (1982).

**Neglect may be manifested in ways less tangible than failure to provide physical necessities.** Therefore, on the question of neglect, the trial judge may consider, in addition, a parent's complete failure to provide the personal contact, love, and affection that inheres in the parental relationship. In re APA, 59 N.C. App. 322, 296 S.E.2d 811 (1982).

**Ability to Pay Controls What Is "Reasonable Portion".** — In determining what is a "reasonable portion," of child's cost of care, the parent's ability to pay is the controlling characteristic. In re Bradley, 57 N.C. App. 475, 291 S.E.2d 800 (1982).

**Where parent had opportunity to provide for some of the cost of care of the child, and forfeited that opportunity by his or her own misconduct, such parent will not be heard to assert that he or she has no ability or means to contribute to the child's care and is therefore excused from contributing any amount.** In re Bradley, 57 N.C. App. 475, 291 S.E.2d 800 (1982).

**Finding of Failure to Pay Reasonable Portion.** — Findings of fact that minor children had been in the custody of county depart-



ment of social services since July 1974, that the parent had failed to pay any portion of the cost of care for the minor children since June 1979, and that while incarcerated in the North Carolina Prison System, he had the opportunity to participate in the work-release program but was removed from the program due to his violation of prison regulations by returning from the work-release program in an intoxicated condition were sufficient to support the court's con-

clusion that he failed to pay a reasonable portion of the costs of care of his minor children. In re Bradley, 57 N.C. App. 475, 291 S.E.2d 800 (1982).

**Applied in** In re Wilkerson, 57 N.C. App. 63, 291 S.E.2d 182 (1982).

**Quoted in** In re Burney, 57 N.C. App. 203, 291 S.E.2d 177 (1982).

**Cited in** In re Huber, 57 N.C. App. 453, 291 S.E.2d 916 (1982).

## § 7A-289.33. Effects of termination order.

An order terminating the parental rights completely and permanently terminates all rights and obligations of the parent to the child and of the child to the parent, arising from the parental relationship, except that the child's right of inheritance from his or her parent shall not terminate until such time as a final order of adoption is issued. Such parent is not thereafter entitled to notice of proceedings to adopt the child and may not object thereto or otherwise participate therein.

- (1) If the child had been placed in the custody of or released for adoption by one parent to, a county department of social services or licensed child-placing agency and is in the custody of such agency at the time of such filing of the petition, including a petition filed pursuant to G.S. 7A-289.24(6), that agency shall, upon entry of the order terminating parental rights, acquire all of the rights for placement of said child as such agency would have acquired had the parent whose rights are terminated released the child to that agency pursuant to the provisions of G.S. 48-9(a)(1), including the right to consent to the adoption of such child.

(1977, c. 879, s. 8; 1983, c. 870, s. 3.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1983 amendment, effective July 20, 1983, and applicable to petitions filed on or after this date, inserted "including a petition filed pursuant to G.S.

7A-289.24(6)" in subdivision (1).

**Legal Periodicals.** —

For a note on the indigent parent's right to have counsel furnished by State in parental status termination proceedings, see 17 Wake Forest L. Rev. 961 (1981).

## CASE NOTES

### Rights of Foster Parents. —

In plaintiffs' action to obtain custody of a child placed in their home pursuant to a foster parent agreement, Court of Appeals erred in relying on this section as the controlling statute, since this section sets forth the effects of a court order terminating the parental rights of a natural parent on the grounds of abuse or

neglect of a minor child, and such a court order was not involved, as the natural parents of the child had voluntarily released their parental rights and surrendered the child to defendant for adoptive placement; rather, the action was governed by § 48-9.1. *Oxendine v. Catawba County Dep't of Social Servs.*, 303 N.C. 699, 281 S.E.2d 370 (1981).

## § 7A-289.35: Repealed by Session Laws 1983, c. 607, s. 4, effective October 1, 1983.

**Editor's Note.** — Session Laws 1983, c. 607, s. 5, provides: "This act shall become effective October 1, 1983, and shall apply to all children

in the custody of the county department of social services or licensed child-placing agency as of that date."



## ARTICLE 26.

*Additional Powers of District Court Judges and Magistrates.***§ 7A-292. Additional powers of magistrates.**

**Legal Periodicals.** — For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1067 (1981).

## SUBCHAPTER VI. REVENUES AND EXPENSES OF THE JUDICIAL DEPARTMENT.

## ARTICLE 28.

*Uniform Costs and Fees in the Trial Divisions.***§ 7A-304. Costs in criminal actions.**

(a) In every criminal case in the superior or district court, wherein the defendant is convicted, or enters a plea of guilty or nolo contendere, or when costs are assessed against the prosecuting witness, the following costs shall be assessed and collected, except that when the judgment imposes an active prison sentence, costs shall be assessed and collected only when the judgment specifically so provides:

- (1) For each arrest or personal service of criminal process, including citations and subpoenas, the sum of four dollars (\$4.00), to be remitted to the county wherein the arrest was made or process was served, except that in those cases in which the arrest was made or process served by a law-enforcement officer employed by a municipality, the fee shall be paid to the municipality employing the officer.
- (2) For the use of the courtroom and related judicial facilities, the sum of five dollars (\$5.00) in the district court, including cases before a magistrate, and the sum of twenty-three dollars (\$23.00) in superior court, to be remitted to the county in which the judgment is rendered. In all cases where the judgment is rendered in facilities provided by a municipality, the facilities fee shall be paid to the municipality. Funds derived from the facilities fees shall be used exclusively by the county or municipality for providing, maintaining, and constructing adequate courtroom and related judicial facilities, including: adequate space and furniture for judges, district attorneys, public defenders, magistrates, juries, and other court related personnel; office space, furniture and vaults for the clerk; jail and juvenile detention facilities; free parking for jurors; and a law library (including books) if one has heretofore been established or if the governing body hereafter decides to establish one. In the event the funds derived from the facilities fees exceed what is needed for these purposes, the county or municipality may, with the approval of the Administrative Officer of the Courts as to the amount, use any or all of the excess to retire outstanding indebtedness incurred in the construction of the facilities, or to reimburse the county or municipality for funds expended in constructing or renovating the facilities (without incurring any indebtedness) within a period of two years before or after the date a district court is established in such county, or to supplement the operations of the General Court of Justice in the county.



(3) For the Law-Enforcement Officers' Benefit and Retirement Fund, the sum of three dollars (\$3.00), to be remitted to the State Treasurer and administered as provided in Chapter 143, Article 12, of the General Statutes.

(4) For support of the General Court of Justice, the sum of twenty-three dollars (\$23.00) in the district court, including cases before a magistrate, and the sum of thirty dollars (\$30.00) in the superior court, to be remitted to the State Treasurer.

(c) Witness fees, expenses for blood tests and comparisons incurred by G.S. 8-50.1(a), jail fees and cost of necessary trial transcripts shall be assessed as provided by law in addition to other costs set out in this section. Nothing in this section shall limit the power or discretion of the judge in imposing fines or forfeitures or ordering restitution.

(1965, c. 310, s. 1; 1967, c. 601, s. 2; c. 691, ss. 27-29; 1049, s. 5; 1969, c. 1013, s. 3; c. 1190, ss. 28, 29; 1971, c. 377, ss. 19-21; c. 1129; 1973, c. 47, s. 2; 1975, c. 558, ss. 1, 2; 1975, 2nd Sess., c. 980, s. 1; 1979, c. 576, s. 3; 1981, c. 369; c. 691, s. 1; c. 896, s. 2; c. 959, s. 1; 1983, c. 713, ss. 2, 3.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Editor's Note.** — Session Laws 1983, c. 713, s. 109, provides that the amendments made by Part I of the act, consisting of ss. 1 through 21, shall become effective Aug. 1, 1983, and shall apply to all actions initiated on and after that date.

**Effect of Amendments.** —

The 1983 amendment, effective Aug. 1, 1983, and applicable to all actions initiated on and after that date, substituted "twenty-three dollars (\$23.00)" for "nineteen dollars (\$19.00)" and "thirty dollars (\$30.00)" for "twenty-eight dollars (\$28.00)" in subdivision (a)(4) and rewrote the first sentence of subsection (c).

## § 7A-305. Costs in civil actions.

(a) In every civil action in the superior or district court the following costs shall be assessed:

(1) For the use of the courtroom and related judicial facilities, the sum of five dollars (\$5.00) in cases heard before a magistrate, and the sum of nine dollars (\$9.00) in district and superior court, to be remitted to the county in which the judgment is rendered, except that in all cases in which the judgment is rendered in facilities provided by a municipality, the facilities fee shall be paid to the municipality. Funds derived from the facilities fees shall be used in the same manner, for the same purposes, and subject to the same restrictions, as facilities fees assessed in criminal actions.

(2) For support of the General Court of Justice, the sum of thirty-seven dollars (\$37.00) in the superior court, and the sum of twenty-two dollars (\$22.00) in the district court except that if the case is assigned to a magistrate the sum shall be ten dollars (\$10.00). Sums collected under this subsection shall be remitted to the State Treasurer.

(b1) When a defendant files an answer in an action filed as a small claim which requires the entire case to be withdrawn from a magistrate and transferred to the district court, the difference between the General Court of Justice fee and facilities fee applicable to the district court and the General Court of Justice fee and facilities fee applicable to cases heard by a magistrate shall be assessed. The defendant is responsible for paying the fee.

(d) The following expenses, when incurred, are also assessable or recoverable, as the case may be:

- (1) Witness fees, as provided by law.
- (2) Jail fees, as provided by law.



- (3) Counsel fees, as provided by law.
- (4) Expense of service of process by certified mail and by publication.
- (5) Costs on appeal to the superior court, or to the appellate division, as the case may be, of the original transcript of testimony, if any, insofar as essential to the appeal.
- (6) Fees for personal service and civil process and other sheriff's fees, as provided by law.
- (7) Fees of guardians ad litem, referees, receivers, commissioners, surveyors, arbitrators, appraisers, and other similar court appointees, as provided by law. The fee of such appointees shall include reasonable reimbursement for stenographic assistance, when necessary.
- (8) Fees of interpreters, when authorized and approved by the court.
- (9) Premiums for surety bonds for prosecution, as authorized by G.S. 1-109.

(1965, c. 310, s. 1; 1967, c. 108, s. 10; c. 691, s. 30; 1971, c. 377, ss. 23, 24; c. 1181, s. 1; 1973, c. 503, ss. 12-14; c. 1267, s. 3; 1975, c. 558, s. 3; 1975, 2nd Sess., c. 980, ss. 2, 3; 1979, 2nd Sess., c. 1234, s. 1; 1981, c. 555, s. 6; c. 691, s. 2; 1983, c. 713, ss. 4-6.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Editor's Note.** —

Session Laws 1983, c. 713, s. 109, provides that the amendments made by Part I of the act, consisting of ss. 1 through 21, shall become effective Aug. 1, 1983, and shall apply to all actions initiated on and after that date.

**Effect of Amendments.** — The 1983 amendment, effective Aug. 1, 1983, and applicable to all actions initiated on and after that date, substituted "thirty-seven dollars (\$37.00)" for

"twenty-eight dollars (\$28.00)," "twenty-two dollars (\$22.00)" for "eighteen dollars (\$18.00)," "if the case is assigned to a magistrate" for "in the district court if the amount sued for does not exceed one thousand dollars (\$1,000), excluding interest," and "ten dollars (\$10.00)" for "five dollars (\$5.00)" in subdivision (a)(2), inserted subsection (b1), and deleted "The uniform costs set forth in this section are complete and exclusive, and in lieu of any and all other costs and fees, except that" at the beginning of subsection (d).

## CASE NOTES

**Stated in** In re Clark, 303 N.C. 592, 281 S.E.2d 47 (1981).

## § 7A-306. Costs in special proceedings.

(a) In every special proceeding in the superior court, the following costs shall be assessed:

- (1) For the use of the courtroom and related judicial facilities, the sum of three dollars (\$3.00), to be remitted to the county. Funds derived from the facilities fees shall be used in the same manner, for the same purposes, and subject to the same restrictions, as facilities fees assessed in criminal actions.
- (2) For support of the General Court of Justice the sum of twenty-two dollars (\$22.00). In addition, in proceedings involving land, except boundary disputes, if the fair market value of the land involved is over one hundred dollars (\$100.00), there shall be an additional sum of thirty cents (30¢) per one hundred dollars (\$100.00) of value, or major fraction thereof, not to exceed a maximum additional sum of two hundred dollars (\$200.00). Fair market value is determined by the sale price if there is a sale, the appraiser's valuation if there is no sale, or the appraised value from the property tax records if there is neither a sale nor an appraiser's valuation. Sums collected under this subsection shall be remitted to the State Treasurer.



(b) The facilities fee and twenty-two dollars (\$22.00) of the General Court of Justice fee are payable at the time the proceeding is initiated.

(c) The following additional expenses, when incurred, are assessable or recoverable, as the case may be:

- (1) Witness fees, as provided by law.
- (2) Counsel fees, as provided by law.
- (3) Costs on appeal, of the original transcript of testimony, if any, insofar as essential to the appeal.
- (4) Fees for personal service of civil process, and other sheriff's fees, and for service by publication, as provided by law.
- (5) Fees of guardians ad litem, referees, receivers, commissioners, surveyors, arbitrators, appraisers, and other similar court appointees, as provided by law. The fees of such appointees shall include reasonable reimbursement for stenographic assistance, when necessary.
- (6) Fees for special jury, if any, at six dollars (\$6.00) per special juror for each proceeding, except that if a special proceeding lasts more than one-half day each juror shall receive ten dollars (\$10.00) per day.

(1965, c. 310, s. 1; 1967, c. 24, s. 2; 1971, c. 377, s. 25; c. 1181, s. 1; 1973, c. 503, s. 15; 1981, c. 691, s. 3; 1983, c. 713, ss. 7-9; c. 881, s. 4.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Editor's Note.** — Session Laws 1983, c. 713, s. 109, provides that the amendments made by Part I of the act, consisting of ss. 1 through 21, shall become effective Aug. 1, 1983, and shall apply to all actions initiated on and after that date.

**Effect of Amendments.** —

The first 1983 amendment, effective Aug. 1, 1983, and applicable to all actions initiated on and after that date, substituted "twenty-two dollars (\$22.00)" for "thirteen dollars (\$13.00)" at the end of the first sentence of subdivision (a)(2), substituted "thirty cents (30¢)" for "twenty cents (20¢)" and "two hundred dollars

(\$200.00)" for "one hundred dollars (\$100.00)" in the second sentence of subdivision (a)(2), substituted "twenty-two dollars (\$22.00)" for "thirteen dollars (\$13.00)" in subsection (b), and deleted "The uniform costs set forth in this section are complete and exclusive, and in lieu of any and all other costs, fees, and commissions, except that" at the beginning of subsection (c).

The second 1983 amendment, effective July 20, 1983, in subdivision (c)(6), substituted "six dollars (\$6.00)" for "two dollars (\$2.00)," substituted "except that" for a period thereby merging the former first and second sentences and substituted "each juror shall receive ten dollars (\$10.00) per day" for "the same daily compensation as regular jurors."

## CASE NOTES

**Fees of Guardian in Defense of Petition for Advancement.** — Where petitioner entered a voluntary dismissal of a special proceeding to obtain an advancement from the estate of her incompetent father, the trial court had no authority to order that legal fees incurred by the incompetent's guardian in

defending the petition for advancement be charged as part of the costs of the proceeding to be paid by petitioner. *In re North Carolina Nat'l Bank*, 52 N.C. App. 353, 278 S.E.2d 330, cert. denied, 303 N.C. 544, 281 S.E.2d 393 (1981).

**Stated in** *In re Clark*, 303 N.C. 592, 281 S.E.2d 47 (1981).

## § 7A-307. Costs in administration of estates.

(a) In the administration of the estates of decedents, minors, incompetents, or missing persons, and of trusts under wills and under powers of attorney, and in collections of personal property by affidavit, the following costs shall be assessed:

- (1) For the use of the courtroom and related judicial facilities, the sum of three dollars (\$3.00), to be remitted to the county. Funds derived from the facilities fees shall be used in the same manner, for the same purposes, and subject to the same restrictions, as facilities fees assessed in criminal actions.



- (2) For support of the General Court of Justice, the sum of twenty-two dollars (\$22.00), plus an additional forty cents (40¢) per one hundred dollars (\$100.00), or major fraction thereof, of the gross estate. Gross estate shall include the fair market value of all personalty when received, and all proceeds from the sale of realty coming into the hands of the fiduciary, but shall not include the value of realty. This fee shall be computed from the information reported in the inventory and shall be paid when the inventory is filed with the clerk. If additional gross estate, including income, comes into the hands of the fiduciary after the filing of the inventory, the fee for such additional value shall be assessed and paid upon the filing of any account or report disclosing such additional value. For each filing the minimum fee shall be five dollars (\$5.00). Sums collected under this subsection shall be remitted to the State Treasurer.
  - (3) For probate of a will without qualification of a personal representative, the clerk shall assess a facilities fee as provided in subdivision (1) of this subsection and shall assess for support of the General Court of Justice, the sum of twelve dollars (\$12.00).
  - (b) The facilities fee and twenty-two dollars (\$22.00) of the General Court of Justice fee shall be paid at the time of filing of the first inventory. If the sole asset of the estate is a cause of action, the twenty-five dollars (\$25.00) shall be paid at the time of the qualification of the fiduciary.
  - (b1) The clerk shall assess the following miscellaneous fees:
    - (1) Filing a will with no probate
      - first page . . . . . \$ 1.00
      - each additional page or fraction thereof . . . . . .25
    - (2) Issuing letters testamentary, per letter over five letters issued 1.00
    - (3) Inventory of safe deposits of a decedent, per box, per day . . . 15.00
    - (4) Taking a deposition . . . . . 5.00
  - (c) The following additional expenses, when incurred, are also assessable or recoverable, as the case may be:
    - (1) Witness fees, as provided by law.
    - (2) Counsel fees, as provided by law.
    - (3) Costs on appeal, of the original transcript of testimony, if any, insofar as essential to the appeal.
    - (4) Fees for personal service of civil process, and other sheriff's fees, as provided by law.
    - (5) Fees of guardians ad litem, referees, receivers, commissioners, surveyors, arbitrators, appraisers, and other similar court appointees, as provided by law.
- (1965, c. 310, s. 1; 1967, c. 691, s. 31; 1969, c. 1190, s. 30; 1971, c. 1181, s. 1; 1973, c. 1335, s. 1; 1981, c. 691, s. 4; 1983, c. 713, ss. 10-17.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Editor's Note.** — Session Laws 1983, c. 713, s. 109, provides that the amendments made by Part I of the act, consisting of ss. 1 through 21, shall become effective Aug. 1, 1983, and shall apply to all actions initiated on and after that date.

**Effect of Amendments.** —

The 1983 amendment, in subsection (a), inserted "and in collections of personal property by affidavit" in the introductory language, in subdivision (a)(2) substituted "twenty-two

dollars (\$22.00)" for "eight dollars (\$8.00)" and "forty cents (40¢)" for "ten cents (10¢)" for the first sentence, substituted "five dollars (\$5.00)" for "one dollar (\$1.00)" at the end of the fifth sentence, and deleted the sixth sentence, which read "In no case shall the cumulative fee exceed two thousand dollars (\$2,000)", added subdivision (a)(3), in subsection (b) substituted "twenty-two dollars (\$22.00)" for "eight dollars (\$8.00)" and "twenty-five dollars (\$25.00)" for "ten dollars (\$10.00)," inserted subsection (b1), and deleted "The uniform costs set forth in this section are complete and exclusive, and in lieu of any and all other costs, fees, and



commissions, except that" at the beginning of subsection (c).

## § 7A-308. Miscellaneous fees and commissions.

(a) The following miscellaneous fees and commissions shall be collected by the clerk of superior court and remitted to the State for the support of the General Court of Justice:

- (1) Foreclosure under power of sale in deed of trust or mortgage \$25.00  
Plus an additional sum of thirty cents (30¢) per one hundred dollars (\$100.00), or major fraction thereof, of the final sale price shall be collected. In no case shall the additional sum exceed two hundred dollars (\$200.00).
- (2) Proceeding supplemental to execution . . . . . 20.00
- (3) Confession of judgment . . . . . 15.00
- (4) Taking a deposition . . . . . 5.00
- (5) Execution . . . . . 15.00
- (6) Notice of resumption of maiden name . . . . . 5.00
- (7) Taking an acknowledgment or administering an oath, or both, with or without seal, each certificate (except that oaths of office shall be administered to public officials without charge) . . . 1.00
- (8) Bond, taking justification or approving . . . . . 5.00
- (9) Certificate, under seal . . . . . 2.00
- (10) Exemplification of records . . . . . 5.00
- (11) Recording or docketing (including indexing) any document, per page or fraction thereof . . . . . 4.00
- (12) Preparation of copies  
— first page . . . . . 1.00  
— each additional page or fraction thereof . . . . . .25
- (13) Preparation of transcript of judgment . . . . . 5.00
- (14) Substitution of trustee in deed of trust . . . . . 5.00
- (15) Execution of passport application — the amount allowed by federal law
- (16) On all funds placed with the clerk by virtue or color of his office, to be administered, invested, or administered in part and invested in part, a commission of five percent (5%), with a minimum fee of fifteen dollars (\$15.00) and a maximum fee of one thousand dollars (\$1,000). For purposes of assessing a commission, receipts are cumulative for the life of an account —
- (17) Criminal record search except if search is requested by an agency of the State or any of its political subdivisions or by an agency of the United States or by a petitioner in a proceeding under Article 2 of General Statutes Chapter 20 . . . . . 5.00
- (18) Filing the affirmations, acknowledgements, agreements and resulting orders entered into under the provisions of G.S. 110-132 and G.S. 110-133 . . . . . 4.00

(b) The fees and commissions set forth in this section are not chargeable when the service is performed as a part of the regular disposition of any action or special proceeding or the administration of an estate. When a transaction involves more than one of the services set forth in this section, only the greater service fee shall be charged. (1965, c. 310, s. 1; 1967, c. 691, ss. 32, 33; 1969, c. 1190, s. 31; 1971, c. 956, s. 2; 1973, c. 503, s. 16; c. 886; 1975, c. 829; 1981, c. 313, s. 1; 1983, c. 713, s. 18.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Editor's Note.** — Session Laws 1983, c. 713, s. 109, provides that the amendments made by Part I of the act, consisting of ss. 1 through 21,



shall become effective Aug. 1, 1983, and shall apply to all actions initiated on and after that date.

**Effect of Amendments.** —  
The 1983 amendment, effective Aug. 1, 1983,

and applicable to all actions initiated on and after that date, rewrote this section.

§ 7A-309. Magistrate's special fees.

The following special fees shall be collected by the magistrate and remitted to the clerk of superior court for the use of the State in support of the General Court of Justice:

- (1) Performing marriage ceremony . . . . . \$10.00
  - (2) Hearing petition for year's allowance to surviving spouse or child, issuing notices to commissioners, allotting the same, and making return . . . . . 4.00
  - (3) Taking a deposition . . . . . 5.00
  - (4) Proof of execution or acknowledgment of any instrument . . . 1.00
  - (5) Performing any other statutory function not incident to a civil or criminal action . . . . . 1.00.
- (1965, c. 310, s. 1; 1973, c. 503, s. 17; 1983, c. 713, s. 19.)

**Editor's Note.** — Session Laws 1983, c. 713, s. 109, provides that the amendments made by Part I of the act, consisting of ss. 1 through 21, shall become effective Aug. 1, 1983, and shall apply to all actions initiated on and after that date.

**Effect of Amendments.** — The 1983 amend-

ment, effective Aug. 1, 1983, and applicable to all actions initiated on and after that date, deleted "the" preceding "superior court" in the introductory language, and increased the fees in subdivisions (1), (3), and (4) from \$5.00 to \$10.00, from \$3.00 to \$5.00, and from \$0.50 to \$1.00, respectively.

§ 7A-312. Uniform fees for jurors; meals.

A juror in the General Court of Justice including a petit juror, or a coroner's juror, but excluding a grand juror, or a juror in a special proceeding shall receive twelve dollars (\$12.00) per day, except that if any person serves as a juror for more than five days in any 24-month period, the juror shall receive thirty dollars (\$30.00) per day for each day of service in excess of five days. A grand juror shall receive twelve dollars (\$12.00) per day. A juror required to remain overnight at the site of the trial shall be furnished adequate accommodations and subsistence. If required by the presiding judge to remain in a body during the trial of a case, meals shall be furnished the jurors during the period of sequestration. A juror in a special proceeding shall receive six dollars (\$6.00) for each proceeding, except that if a special proceeding lasts more than one-half day, the special jurors shall receive ten dollars (\$10.00) per day. Jurors from out of the county summoned to sit on a special venire shall receive mileage at the same rate as State employees. (1965, c. 310, s. 1; 1967, c. 1169; 1969, c. 1190, s. 32; 1971, c. 377, s. 26; 1973, c. 503, s. 19; 1979, c. 985; 1983, c. 881, ss. 2, 3.)

**Effect of Amendments.** — The 1983 amendment, effective July 20, 1983, in the first sentence, substituted "twelve dollars (\$12.00)" for "eight dollars (\$8.00)" and in the fifth sentence,

substituted "six dollars (\$6.00)" for "two dollars (\$2.00)" and substituted "ten dollars (\$10.00) per day" for "the same daily compensation as regular jurors."



## § 7A-314. Uniform fees for witnesses; experts; limit on number.

(f) In a criminal case when a person who does not speak or understand the English language is an indigent defendant, a witness for an indigent defendant, or a witness for the State and the court appoints a language interpreter to assist that defendant or witness in the case, the reasonable fee for the interpreter's services, as set by the court, are payable from funds appropriated to the Administrative Office of the Courts. (1965, c. 310, s. 1; 1969, c. 1190, s. 34; 1971, c. 377, s. 27; 1973, c. 503, ss. 21, 22; 1983, c. 713, s. 20.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Editor's Note.** — Session Laws 1983, c. 713, s. 109, provides that the amendments made by Part I of the act, consisting of ss. 1 through 21, shall become effective Aug. 1, 1983, and shall

apply to all actions initiated on and after that date.

**Effect of Amendments.** — The 1983 amendment, effective Aug. 1, 1983, and applicable to all actions initiated on and after that date, added subsection (f).

### CASE NOTES

**Where the witnesses did not testify in obedience to a subpoena, etc.** —

It is error for a trial court to tax an expert witness fee as part of the costs when the expert has not testified pursuant to a subpoena. *Craven v. Chambers*, 56 N.C. App. 151, 287

S.E.2d 905 (1982).

**Applied** in *Wright v. American Gen. Life Ins. Co.*, 59 N.C. App. 591, 297 S.E.2d 910 (1982).

**Cited** in *State v. Tedder*, — N.C. App. —, 302 S.E.2d 318 (1983).

## § 7A-320. Costs are exclusive.

The costs set forth in this Article are complete and exclusive, and in lieu of any other costs and fees. (1983, c. 713, s. 1.)

**Editor's Note.** — Session Laws 1983, c. 713, s. 109 makes this section effective Aug. 1, 1983,

and applicable to all actions initiated on and after that date.

## SUBCHAPTER VII. ADMINISTRATIVE MATTERS.

### ARTICLE 30.

#### *Judicial Standards Commission.*

## § 7A-375. Judicial Standards Commission.

**Legal Periodicals.** —

For article, "The Discipline and Removal of Judges in North Carolina," see 4 Campbell L. Rev. 1 (1981).

For survey of 1981 administrative law, see 60 N.C.L. Rev. 1165 (1982).

## CASE NOTES

**Applied** in *In re Greene*, 306 N.C. 376, 297 S.E.2d 379 (1982).

## § 7A-376. Grounds for censure or removal.

**Legal Periodicals.** —

For article, "The Discipline and Removal of

Judges in North Carolina," see 4 Campbell L. Rev. 1 (1981).

## CASE NOTES

**I. GENERAL CONSIDERATION.**

**Sections 7A-173 and 7A-376 are not irreconcilably in conflict with § 14-230.** *State v. Greer*, — N.C. —, 302 S.E.2d 774 (1983).

**And Legislature did not intend to exempt magistrates from indictment and criminal prosecution under § 14-230** when it included magistrates under the sanctions of § 7A-173 and this section. Section 14-230 applies to misconduct in office unless another statute provides for the "indictment" of the officer, but neither § 7A-173 nor this section provide for criminal charges to be brought against a magistrate who is guilty of misconduct in office. *State v. Greer*, — N.C. —, 302 S.E.2d 774 (1983).

**Focus of Inquiry.** — Whether the conduct of a judge can fairly be characterized as "private" or "public" is not the inquiry that the Judicial Standards Commission needs to make; rather, the proper focus is on, among other things, the nature and type of conduct, the frequency of occurrences, the impact which knowledge of the conduct would likely have on the prevailing attitudes of the community, and whether the judge acted knowingly or with a reckless disregard for the high standards of the judicial office. *In re Martin*, 302 N.C. 299, 275 S.E.2d 412 (1981).

**Applied** in *In re Greene*, 306 N.C. 376, 297 S.E.2d 379 (1982); *In re Hunt*, — N.C. —, 302 S.E.2d 235 (1983).

**II. DEFINITIONS.**

**Willful Misconduct Not Limited to Time in Court.** — Willful misconduct in office is not limited to the hours of the day when a judge is actually presiding over court, and thus, a judicial official's duty to conduct himself in a manner befitting his professional office does not end at the courthouse door. *In re Martin*, 302 N.C. 299, 275 S.E.2d 412 (1981).

**III. ILLUSTRATIVE CASES.****A. Wrongful Conduct.****Sexual Advances to Female Defendants.**

— Evidence was sufficient to support findings

by the Judicial Standards Commission concerning respondent's behavior toward and with two female criminal defendants who had appeared before him that the respondent's conduct constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute where the evidence tended to show that respondent followed one defendant in his automobile, indicated that he wanted defendant to get into his car, discussed the pending criminal cases against her, and indicated his willingness to appoint an attorney for her in exchange for sexual favors; respondent subsequently met this same defendant in a parking lot to discuss her situation, and during the course of the conversation made improper advances; respondent went uninvited to the home of the second defendant and there attempted to force himself upon the defendant. *In re Martin*, 302 N.C. 299, 275 S.E.2d 412 (1981).

**Presiding Over Session Where Respondent to Appear as Defendant.** — Evidence was sufficient to support the conclusion of the Judicial Standards Commission that respondent's conduct constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute and the evidence was sufficient to support its recommendation of censure where it tended to show that respondent was charged with failure to stop at a stop sign; he was to appear in district court at a session over which he was scheduled to preside; he knew that it would be improper to preside over that session; he said nothing when his case was called; he did not offer to recuse himself; and the assistant district attorney, upon learning that respondent was the defendant, took a voluntary dismissal in the case. *In re Martin*, 302 N.C. 299, 275 S.E.2d 412 (1981).



## § 7A-377. Procedures; employment of executive secretary, special counsel or investigator.

**Legal Periodicals.** —

For article, "The Discipline and Removal of

Judges in North Carolina," see 4 Campbell L. Rev. 1 (1981).

### CASE NOTES

**Appointment of Attorney Employee of State Bar.** — The Judicial Standards Commission was authorized to appoint an attorney who was a full-time employee of the North Carolina

State Bar as special counsel in a proceeding to investigate alleged misconduct by a district court judge. In re Martin, 302 N.C. 299, 275 S.E.2d 412 (1981).

## § 7A-378. Censure or removal of justice of Supreme Court.

**Legal Periodicals.** —

For article, "The Discipline and Removal of

Judges in North Carolina," see 4 Campbell L. Rev. 1 (1981).

### ARTICLE 31.

#### *Judicial Council.*

§§ 7A-400 to 7A-410: Repealed by Session Laws 1983, c. 774, s. 1, effective July 15, 1983.

**Editor's Note.** — Sections 7A-409 and 7A-410, which were reserved for future codification purposes by Session Laws 1983, c. 761,

s. 152, were repealed by Session Laws 1983, c. 774, s. 1.

### SUBCHAPTER VIII.

### ARTICLE 32.

#### *Conference of District Attorneys.*

## § 7A-411. Establishment and purpose.

There is created the Conference of District Attorneys of North Carolina, of which every district attorney in North Carolina is a member. The purpose of the Conference is to assist in improving the administration of justice in North Carolina by coordinating the prosecution efforts of the various district attorneys, by assisting them in the administration of their offices, and by exercising the powers and performing the duties provided for in this Article. (1983, c. 761, s. 152.)

**Editor's Note.** — Session Laws 1983, c. 761, s. 260, makes this Article effective upon ratification. The act was ratified July 15, 1983.

Session Laws 1983, c. 761, s. 152, provides that the organizational meeting of the Conference shall be convened by the Director of the

Administrative Office of the Courts as soon as feasible. Officers elected at that organizational meeting shall serve until their successors take office on July 1, 1984.

Session Laws 1983, c. 761, s. 259, contains a severability clause.

## § 7A-412. Annual meetings; organization; election of officers.

(a) Annual Meetings. — The Conference shall meet annually at a time and place selected by the President of the Conference.

(b) Election of Officers. — Officers of the Conference are a President, a President-elect, a Vice-president, and other officers from among its membership that the Conference may designate in its bylaws. Officers are elected for one-year terms at the annual Conference, and take office on July 1 immediately following their election.

(c) Executive Committee. — The Executive Committee of the Conference consists of the President, the President-elect, the Vice-president, and four other members of the Conference. One of these four members shall be the immediate past president if there is one and if he continues to be a member.

(d) Organization and Functioning; Bylaws. — The bylaws may provide for the organization and functioning of the Conference, including the powers and duties of its officers and committees. The bylaws shall state the number of members required to constitute a quorum at any meeting of the Conference or the Executive Committee. The bylaws shall set out the procedure for amending the bylaws.

(e) Calling Meetings; Duty to Attend. — The President or the Executive Committee may call a meeting of the Conference upon 10 days' notice to the members, except upon written waiver of notice signed by at least three-fourths of the members. A member should attend each meeting of the Conference and the Executive Committee of which he is given notice. Members are entitled to reimbursement for travel and subsistence expenses at the rate applicable to State employees. (1983, c. 761, s. 152.)

**Editor's Note.** — Session Laws 1983, c. 761, s. 152, provides that the organizational meeting of the Conference shall be convened by the Director of the Administrative Office of the

Courts as soon as feasible. Officers elected at that organizational meeting shall serve until their successors take office on July 1, 1984.

## § 7A-413. Powers of Conference.

(a) The Conference may:

- (1) Cooperate with citizens and other public and private agencies to promote the effective administration of criminal justice.
- (2) Assist prosecutors in the effective prosecution and trial of criminal offenses, and develop an advisory trial manual.
- (3) Develop advisory manuals to assist prosecutors in the organization and administration of their offices, case management, calendaring, case tracking, filing, and office procedures.
- (4) Cooperate with the Administrative Office of the Courts and the Institute of Government concerning education and training programs for prosecutors and staff.

(b) The Conference may not adopt rules pursuant to Chapter 150A of the General Statutes. (1983, c. 761, s. 152.)

## § 7A-414. Executive Secretary; clerical support.

The Conference may employ an executive secretary and any necessary supporting staff to assist it in carrying out its duties. (1983, c. 761, s. 152.)



## SUBCHAPTER IX. REPRESENTATION OF INDIGENT PERSONS.

### ARTICLE 36.

#### *Entitlement of Indigent Persons Generally.*

### § 7A-450. Indigency; definition; entitlement; determination; change of status.

#### **Legal Periodicals. —**

For survey of 1980 law on criminal procedure, see 59 N.C.L. Rev. 1140 (1981). For survey of 1981 law on criminal procedure, see 60 N.C.L. Rev. 1302 (1982).

For note discussing failure to communicate and effective assistance of counsel in light of *State v. Hutchins*, 303 N.C. 321, 279 S.E.2d 788 (1981), see 13 N.C. Cent. L.J. 101 (1981).

### CASE NOTES

#### II. APPOINTMENT OF COUNSEL.

##### **Determination of Right to More Than One Lawyer. —**

The appointment of additional counsel is a matter within the discretion of the trial judge and required only upon a showing by a defendant that there is a reasonable likelihood that it will materially assist the defendant in the preparation of his defense or that without such help it is probable that defendant will not receive a fair trial. *State v. Williams*, 304 N.C. 394, 284 S.E.2d 437 (1981).

##### **Appointment of Counsel Where Defendant Conducts Own Defense Generally. —**

Although a criminal defendant cannot be required to accept the services of court-appointed counsel, a criminal defendant cannot represent himself and, at the same time, accept the services of court-appointed counsel. *State v. Williams*, 304 N.C. 394, 284 S.E.2d 437 (1981).

**Indigent defendant does not have the right to a lawyer of his choice.** *State v. Weaver*, 306 N.C. 629, 295 S.E.2d 375 (1982).

**Nor to Choose Who Will Deliver Closing Argument. —** An indigent defendant represented by two lawyers does not have the right to require that the lawyer of his choice deliver the closing argument at his trial. *State v. Weaver*, 306 N.C. 629, 295 S.E.2d 375 (1982).

#### III. APPOINTMENT OF EXPERTS.

##### **Discretion of Trial Judge. —**

In accord with 1st paragraph in original. See *State v. Williams*, 304 N.C. 394, 284 S.E.2d 437 (1981); *State v. Brown*, 59 N.C. App. 411, 296 S.E.2d 839 (1982).

The decision whether to provide a defendant with an investigator under the provisions of this section and § 7A-454 is a matter within the

discretion of the trial judge and will not be disturbed on appeal absent an abuse of that discretion. *State v. Parton*, 303 N.C. 55, 277 S.E.2d 410 (1981).

Whether an expert should be appointed to assist an indigent in the preparation of his case is a question which depends upon the facts of each case and which lies within the discretion of the trial judge. *State v. Sellars*, 52 N.C. App. 380, 278 S.E.2d 907, appeal dismissed and cert. denied, 304 N.C. 200, 285 S.E.2d 108 (1981).

**Whether investigative assistance is constitutionally mandated** must be determined after consideration of the facts of the case; defendant must demonstrate that the State's failure to provide funds with which to hire an investigator substantially prejudiced his ability to obtain a fair trial. *State v. Parton*, 303 N.C. 55, 277 S.E.2d 410 (1981).

##### **When Right to Investigator Arises.**

In accord with 3rd paragraph in original. See *State v. Parton*, 303 N.C. 55, 277 S.E.2d 410 (1981); *State v. Williams*, 304 N.C. 394, 284 S.E.2d 437 (1981).

In accord with 4th paragraph in original. See *State v. Sellars*, 52 N.C. App. 380, 278 S.E.2d 907, appeal dismissed and cert. denied, 304 N.C. 200, 285 S.E.2d 108 (1981).

**When Right to Expert Arises. —** Defendant's constitutional and statutory right to a state-appointed expert arises only upon a showing that there is a reasonable likelihood that such an expert would discover evidence which would materially assist defendant in the preparation of his defense. There is no requirement that an indigent defendant be provided with investigative assistance merely upon the defendant's request. *State v. Brown*, 59 N.C. App. 411, 296 S.E.2d 839 (1982).

Expert assistance must be provided only upon a showing by defendant that there is a



reasonable likelihood that it will materially assist the defendant in the preparation of his defense or that without such help it is probable that defendant will not receive a fair trial. The appointment of such an expert depends really upon the facts and circumstances of each case and lies, finally, within the discretion of the trial judge. *State v. Hefler*, — N.C. App. —, 299 S.E.2d 456 (1983).

**Must Show Trial Otherwise Likely to Be Unfair.** — Expert assistance need only be provided by the State when the defendant can show that it is probable that he will not receive a fair trial without the requested assistance. *State v. Craig*, — N.C. —, 302 S.E.2d 740 (1983).

**The appointment of an investigator as an expert witness should be made with caution** and only upon a clear showing that specific evidence is reasonably available and necessary for a proper defense. *State v. Williams*, 304 N.C. 394, 284 S.E.2d 437 (1981).

#### IV. FURNISHING TRANSCRIPTS.

**Test for Determining Right to Free Transcript.** — A free transcript need not always be provided. Instead, availability is determined by the trial court through the implementation of a two-step process which examines (1) whether a transcript is necessary for preparing an effective

defense and (2) whether there are alternative devices available to the defendant which are substantially equivalent to a transcript. If the trial court finds there is either no need of a transcript for an effective defense or there is an available alternative which is substantially equivalent to a transcript, one need not be provided and denial of such a request would not be prejudicial. *State v. Rankin*, 306 N.C. 712, 295 S.E.2d 416 (1982).

Indigents are to be provided free transcripts of prior proceedings if the trial court determines it necessary for an effective defense or appeal. This determination by the trial court requires a consideration of two factors: (1) the value of the transcript to the defendant in connection with the matters for which it is sought; and (2) whether alternative devices are available which are substantially equivalent to a transcript. *State v. Jackson*, 59 N.C. App. 615, 297 S.E.2d 610 (1982).

**Denial of Free Transcript Where Second Trial Not Yet Scheduled.** — In a case where the second trial has not even been rescheduled, denial of an indigent defendant's motion for a free transcript of the record as being untimely is improper because such a holding could only have been based on speculation. *State v. Rankin*, 306 N.C. 712, 295 S.E.2d 416 (1982).

### § 7A-450.1. Responsibility for payment by certain fiduciaries.

It is the intent of the General Assembly that, whenever possible, if an attorney or guardian ad litem is appointed pursuant to G.S. 7A-451 for a person who is less than 18 years old or who is at least 18 years old but remains dependent on and domiciled with a parent or guardian, the parent, guardian, or any trustee in possession of funds or property for the benefit the person, shall reimburse the State for the attorney or guardian ad litem fees, pursuant to the procedures established in G.S. 7A-450.2 and G.S. 7A-450.3. This section shall not apply in any case in which the person for whom an attorney or guardian ad litem is appointed prevails. (1983, c. 726, s. 1.)

**Editor's Note.** — Session Laws 1983, c. 726, s. 4, makes this section effective Oct. 1, 1983,

and applicable to appointments of attorneys or guardians ad litem on or after that date.

### § 7A-450.2. Determination of fiduciaries at indigency determination; summons; service of process.

At the same time as a person who is less than 18 years old or who is at least 18 years old but remains dependent on and domiciled with a parent or guardian is determined to be indigent, and has an attorney or guardian ad litem appointed pursuant to G.S. 7A-451, the court shall determine the identity and address of the parent, guardian or any trustee in possession of funds or property for the benefit of the person. The court shall issue a summons to the parent, guardian or trustee to be present at the dispositional hearing or the sentencing hearing or other appropriate hearing and to be a party to these hearings for the purpose of being determined responsible for reimbursing the State for the



person's attorney or guardian ad litem fees, or to show cause why he should not be held responsible.

Both the issuance of the summons and the service of process shall be pursuant to G.S. 1A-1, Rule 4. (1983, c. 726, s. 1.)

**Editor's Note.** — Session Laws 1983, c. 726, s. 4, makes this section effective Oct. 1, 1983, and applicable to appointments of attorneys or guardians ad litem on or after that date.

### § 7A-450.3. Determination of responsibility at hearing.

At the dispositional, sentencing or other hearing of the person who is less than 18 years old or who is at least 18 years old but remains dependent on and domiciled with a parent or guardian, the court shall make a determination whether the parent, guardian or trustee should be held responsible for reimbursing the State for the person's attorney or guardian ad litem fees. This determination shall include the financial situation of the parent, guardian or trustee, the relationship of responsibility the parent, guardian or trustee bears to the person and any showings by the parent, guardian or trustee that the person is emancipated or not dependent. The test of the party's financial ability to pay is the test applied to appointment of an attorney in cases of indigency. Any provision of any deed, trust or other writing, which, if enforced, would defeat the intent or purpose of this section is contrary to the public policy of this State and is void insofar as it may apply to prohibit reimbursement to the State.

If the court determines that the parent, guardian or trustee is responsible for reimbursing the State for the attorney or guardian ad litem fees, the court shall so order. If the party does not comply with the order within 90 days, the court shall file a judgment against him for the amount due the State. (1983, c. 726, s. 1.)

**Editor's Note.** — Session Laws 1983, c. 726, s. 4, makes this section effective Oct. 1, 1983, and applicable to appointments of attorneys or guardians ad litem on or after that date.

### § 7A-450.4. Exemptions.

General Statutes 7A-450.1, 7A-450.2 and 7A-450.3 do not authorize the court to require the Department of Human Resources or any county Department of Social Services to reimburse the State for fees. (1983, c. 726, s. 1.)

**Editor's Note.** — Session Laws 1983, c. 726, s. 4, makes this section effective Oct. 1, 1983, and applicable to appointments of attorneys or guardians ad litem on or after that date.

### § 7A-451. Scope of entitlement.

(a) An indigent person is entitled to services of counsel in the following actions and proceedings:

- (1) Any case in which imprisonment, or a fine of five hundred dollars (\$500.00), or more, is likely to be adjudged;
- (2) A hearing on a petition for a writ of habeas corpus under Chapter 17 of the General Statutes;
- (3) A motion for appropriate relief under Chapter 15A of the General Statutes if the defendant has been convicted of a felony, has been fined five hundred dollars (\$500.00) or more, or has been sentenced to a term of imprisonment;



- (4) A hearing for revocation of probation;
  - (5) A hearing in which extradition to another state is sought;
  - (6) A proceeding for an inpatient involuntary commitment to a treatment facility under Article 5A of Chapter 122.
  - (7) In any case of execution against the person under Chapter 1, Article 28 of the General Statutes, and in any civil arrest and bail proceeding under Chapter 1, Article 34, of the General Statutes;
  - (8) In the case of a juvenile, a hearing as a result of which commitment to an institution or transfer to the superior court for trial on a felony charge is possible;
  - (9) A hearing for revocation of parole at which the right to counsel is provided in accordance with the provisions of Chapter 148, Article 4, of the General Statutes;
  - (10) A proceeding for sterilization under Chapter 35, Article 7 (Sterilization of Persons Mentally Ill and Mentally Retarded) of the General Statutes; and
  - (11) A proceeding for the provision of protective services according to Chapter 108, Article 4, of the General Statutes;
  - (12) In the case of a juvenile alleged to be neglected under Chapter 7A, Article 23 of the General Statutes;
  - (13) A proceeding to find a person incompetent under Chapter 35, Article 1A, of the General Statutes;
  - (14) A proceeding to terminate parental rights where a guardian ad litem is appointed pursuant to G.S. 7A-289.23;
  - (15) An action brought pursuant to Article 24B of Chapter 7A of the General Statutes to terminate an indigent person's parental rights.
- (1969, c. 1013, s. 1; 1973, c. 151, ss. 1, 3; c. 616; c. 726, s. 4; c. 1116, s. 1; c. 1125; c. 1320; c. 1378, s. 2; 1977, c. 711, ss. 7, 8; c. 725, s. 2; 1979, 2nd Sess., c. 1206, s. 3; 1981, c. 966, s. 4; 1983, c. 638, s. 23; c. 864, s. 4.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Editor's Note.** — Session Laws 1983, c. 638, s. 27, as amended by Session Laws 1983, c. 864, s. 4, provides that the act shall become effective January 1, 1984.

Section 25 of Session Laws 1983, ch. 638 contains a severability clause.

#### **Effect of Amendments.** —

The 1983 amendment, effective Jan. 1, 1984, rewrote subdivision (a)(6), which read "A proceeding for judicial hospitalization under Chap-

ter 122, Article 7 (Judicial Hospitalization) or Article 11 (Mentally Ill Criminals) or the General Statutes and a proceeding for involuntary commitment to a treatment facility under Article 5A of Chapter 122 of the General Statutes."

#### **Legal Periodicals.** —

For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1097 (1981).

For a note on the indigent parent's right to have counsel furnished by state in parental status termination proceedings, see 17 Wake Forest L. Rev. 961 (1981).

## **CASE NOTES**

### **I. GENERAL CONSIDERATION.**

**Cited in** *In re Smith*, 56 N.C. App. 142, 287 S.E.2d 440 (1982); *Wake County ex rel. Carrington v. Townes*, 306 N.C. 333, 293 S.E.2d 95 (1982).

### **II. RIGHT TO COUNSEL IN PARTICULAR ACTIONS.**

**This section does not cover appointment of counsel, etc.** —

An action under 42 U.S.C. § 1983 "to obtain redress for the deprivation, under color of State

law, of rights secured by the United States Constitution" is not covered by subsection (a) of this section. *Loren v. Jackson*, 57 N.C. App. 216, 291 S.E.2d 310 (1982).

**Active Sentence May Not Be Imposed Absent Opportunity for Counsel.** — If the crime for which the defendant is charged carries a possible prison sentence of any length, the judge may not impose an active prison sentence on the defendant, unless defendant has been afforded the opportunity to have counsel represent him. *State v. Neeley*, 307 N.C. 247, 297 S.E.2d 389 (1982).



**Nor May Suspended Sentence Be Activated.** — When a court activates a suspended prison sentence, defendant may, upon appeal of such activation, raise the claim that he was

unconstitutionally denied counsel at his original trial. *State v. Neeley*, 307 N.C. 247, 297 S.E.2d 389 (1982).

## § 7A-451.1. Counsel fees for outpatient involuntary commitment proceedings.

The State shall pay counsel fees for persons appointed pursuant to G.S. 122-58.7A:1. (1983, c. 638, s. 24; c. 864, s. 4.)

**Editor's Note.** — Session Laws 1983, c. 638, s. 27, as amended by Session Laws 1983, c. 864, s. 4, makes this section effective January 1, 1984.

Section 25 of Session Laws 1983, ch. 638 contains a severability clause.

## § 7A-452. Source of counsel; fees; appellate records.

### CASE NOTES

**Stated in** *In re Wharton*, 305 N.C. 565, 290 S.E.2d 688 (1982).

**Cited in** *In re Wharton*, 54 N.C. App. 447, 283 S.E.2d 528 (1981).

## § 7A-454. Supporting services.

### CASE NOTES

**The basis for this section is to provide a fair trial**, but the defendant must show that specific evidence is reasonably available and necessary for a proper defense. *State v. Sandlin*, — N.C. App. —, 300 S.E.2d 893 (1983).

**For the applicable standard for appointment of expert assistance to indigent defendants**, see *State v. Sandlin*, — N.C. App. —, 300 S.E.2d 893 (1983).

Expert assistance must be provided only upon a showing by defendant that there is a reasonable likelihood that it will materially assist the defendant in the preparation of his defense or that without such help it is probable that defendant will not receive a fair trial. The appointment of such an expert depends really upon the facts and circumstances of each case and lies, finally, within the discretion of the trial judge. *State v. Hefler*, — N.C. App. —, 299 S.E.2d 456 (1983).

It is practically and financially impossible for the State to give indigents charged with crime every jot of advantage enjoyed by the more financially privileged, and the assistance contemplated by this section will be provided only upon a showing by defendant that there is a reasonable likelihood that it will materially assist the defendant in the preparation of his

defense or that without such help it is probable that defendant will not receive a fair trial. *State v. Chatman*, — N.C. —, 301 S.E.2d 71 (1983).

#### **When Private Investigators, etc. —**

In accord with original. See *State v. Parton*, 303 N.C. 55, 277 S.E.2d 410 (1981); *State v. Williams*, 304 N.C. 394, 284 S.E.2d 437 (1981); *State v. Corbett*, 307 N.C. 169, 297 S.E.2d 553 (1982).

Defendant's constitutional and statutory right to a state-appointed expert arises only upon a showing that there is a reasonable likelihood that such an expert would discover evidence which would materially assist defendant in the preparation of his defense. There is no requirement that an indigent defendant be provided with investigative assistance merely upon the defendant's request. *State v. Brown*, 59 N.C. App. 411, 296 S.E.2d 839 (1982).

#### **Discretion of Trial Judge. —**

In accord with 1st paragraph in original. See *State v. Williams*, 304 N.C. 394, 284 S.E.2d 437 (1981); *State v. Brown*, 59 N.C. App. 411, 296 S.E.2d 839 (1982).

The decision whether to provide a defendant with an investigator under the provisions of those statutes is a matter within the discretion of the trial judge and will not be disturbed on

appeal absent an abuse of that discretion. *State v. Parton*, 303 N.C. 55, 277 S.E.2d 410 (1981); *State v. Corbett*, 307 N.C. 169, 297 S.E.2d 553 (1982).

The grant or denial of motions for appointment of associate counsel or expert witnesses lies within the trial court's discretion and a trial court's ruling should be overruled only upon a showing of abuse of discretion. *State v.*

*Sandlin*, — N.C. App. —, 300 S.E.2d 893 (1983).

**The appointment of an investigator as an expert witness should be made with caution** and only upon a clear showing that specific evidence is reasonably available and necessary for a proper defense. *State v. Williams*, 304 N.C. 394, 284 S.E.2d 437 (1981).

## § 7A-455. Partial indigency; liens; acquittals.

(b) In all cases the court shall fix the money value of services rendered by assigned counsel or the public defender, and such sum, to the extent not reimbursed to the State by the indigent person as provided in subsection (a), plus any sums allowed by the court for other necessary expenses of representing the indigent person, shall be entered as a judgment in the office of the clerk of superior court, and shall constitute a lien as prescribed by the general law of the State applicable to judgments. Funds collected by reason of any such judgment shall be deposited in the State treasury, but counsel fees ordered paid to the clerk on behalf of the appointed counsel pursuant to G.S. 15A-1343(e) may be paid directly to the counsel.

(1969, c. 1013, s. 1; 1983, c. 135, s. 2.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Editor's Note.** — Session Laws 1983, c. 135, s. 3, provides that the act shall expire July 1, 1985.

**Effect of Amendments.** — The 1983 amendment, effective April 4, 1983, inserted the language beginning "but counsel fees ordered paid" at the end of the last sentence of subsection (b).

### CASE NOTES

**Notice and Opportunity to Be Heard Required.** — This section provides that the court may enter a civil judgment against a convicted indigent for attorney's fees and costs. The courts have upheld the validity of such a judgment provided that the defendant is given

notice of the hearing held in reference thereto and an opportunity to be heard. *State v. Washington*, 51 N.C. App. 458, 276 S.E.2d 470 (1981).

**Applied** in *State v. Bass*, 53 N.C. App. 40, 280 S.E.2d 7 (1981).

## § 7A-459. Implementing regulations by State Bar Council.

### CASE NOTES

**Cited** in *Noell v. Winston*, 51 N.C. App. 455, 276 S.E.2d 766 (1981).



## ARTICLE 37.

*The Public Defender.***§ 7A-465. Public defender; defender districts; qualifications; compensation.**

The office of public defender is established, effective January 1, 1970, in the following judicial districts: the twelfth and the eighteenth.

The office of public defender is established, effective July 1, 1973, in the twenty-eighth judicial district.

The office of public defender is established, effective July 1, 1975, in the twenty-sixth and twenty-seventh judicial districts. Effective July 1, 1978, the twenty-seventh judicial district is divided into judicial districts 27A and 27B. On that date the current public defender of the twenty-seventh district shall become the public defender for district 27A.

Effective January 1, 1981, the office of public defender is established in the third judicial district.

Effective June 1, 1983, the office of public defender is established in judicial district 15B.

The public defender shall be an attorney licensed to practice law in North Carolina, and shall devote his full time to the duties of his office. (1969, c. 1013, s. 1; 1973, c. 47, s. 2; c. 799, s. 1; 1975, c. 956, s. 14; 1977, c. 802, s. 41.2; c. 1130, s. 6; 1977, 2nd Sess., c. 1219, s. 43.3; 1979, 2nd Sess., c. 1284, s. 1; 1981 (Reg. Sess., 1982), c. 1282, s. 72.)

**Effect of Amendments.** — The 1981 (Reg. Sess., 1982) amendment, effective June 1, 1983, inserted the present next-to-last paragraph.

Session Laws 1981 (Reg. Sess., 1982), c. 1282, s. 81, contains a severability clause.

**Legal Periodicals.** —

For note discussing failure to communicate and effective assistance of counsel in light of *State v. Hutchins*, 303 N.C. 321, 279 S.E.2d 788 (1981), see 13 N.C. Cent. L.J. 101 (1981).

**§ 7A-466. Selection of defender; term; removal.**

The public defender in the third, twelfth, fifteenth-B, eighteenth, twenty-sixth and twenty-seventh-A judicial districts shall be appointed by the Governor from a list of not less than two and not more than three names nominated by written ballot of the attorneys resident in the district who are licensed to practice law in North Carolina. The public defender in the twenty-eighth judicial district shall be appointed by the senior resident superior court judge of that judicial district from a list of not less than two names and not more than three names nominated by written ballot of the attorneys resident in the district who are licensed to practice law in North Carolina. The balloting shall be conducted pursuant to regulations promulgated by the Administrative Office of the Courts. The terms of office of the public defenders authorized in G.S. 7A-465 are for four years, beginning on the dates specified in that section for each district, and each fourth year thereafter.

A vacancy in the office of public defender is filled, in the same manner as the original appointment, for the unexpired term.

A public defender or assistant public defender may be suspended or removed from office, and reinstated, for the same causes and under the same procedures as are applicable to removal of a superior court district attorney. (1969, c. 1013, s. 1; 1973, c. 47, s. 2; c. 148, s. 5; c. 799, s. 2; 1975, c. 956, ss. 15, 16; 1977, c. 1130, s. 7; 1979, 2nd Sess., c. 1284, s. 2; 1981 (Reg. Sess., 1982), c. 1282, s. 73.)



**Effect of Amendments. —**

The 1981 (Reg. Sess., 1982) amendment, effective June 1, 1983, inserted "fifteenth-B" in the first sentence.

Session Laws 1981 (Reg. Sess., 1982), c. 1282, s. 81, contains a severability clause.

**§ 7A-468. Investigative services.****CASE NOTES****No Equal Protection Violation. —**

In accord with 1st paragraph in original. See

State v. Parton, 303 N.C. 55, 277 S.E.2d 410 (1981).

**ARTICLE 38.*****Appellate Defender Office.*****§ 7A-478. Duties.**

The appellate defender shall:

- (1) Represent indigent persons subsequent to conviction in trial courts pursuant to assignments by trial court judges under the general supervision of the Chief Justice of the Supreme Court of North Carolina. The Chief Justice may, following consultation with the appellate defender and consistent with the resources available to the appellate defender to insure quality criminal defense services by the appellate defender's office, authorize the appellate defender not to accept assignments of certain appeals but instead to cause those appeals to be assigned either to a local public defender's office or to private assigned counsel.

(1981, c. 964, s. 11; 1983, c. 761, s. 163.)

**Only Part of Section Set Out. —** As the rest of the section was not affected by the amendment, it is not set out.

**Editor's Note. —** Session Laws 1983, c. 761, s. 259, contains a severability clause.

**Effect of Amendments. —** The 1983 amendment, effective July 15, 1983, rewrote the sec-

ond sentence of subdivision (1), which read "The appellate defender shall only accept that number of assignments and maintain that caseload which will insure quality criminal defense appellate services consistent with the resources available to the appellate defender."

**§§ 7A-484 to 7A-488:** Reserved for future codification purposes.

**ARTICLE 39.*****Guardian Ad Litem Program.*****§ 7A-489. Office of Guardian Ad Litem Services established.**

There is established within the Administrative Office of the Courts an Office of Guardian Ad Litem Services to provide services in accordance with G.S. 7A-586 to abused and neglected juveniles involved in judicial proceedings, and to assure that all participants in these proceedings are adequately trained to carry out their responsibilities. Beginning on July 15, 1983, and ending July



1, 1987, the Administrative Office of the Courts shall establish in phases a statewide guardian ad litem program comprised of local district programs to be established in all judicial districts of the State. Each local district program shall consist of volunteer guardians ad litem, at least one program attorney, a program coordinator who is a paid State employee, and such clerical staff as the Administrative Office of the Courts in consultation with the local district program deems necessary. The Administrative Office of the Courts shall promulgate rules and regulations necessary and appropriate for the administration of the program. (1983, c. 761, s. 160.)

**Editor's Note.** — Session Laws 1983, c. 761, s. 160, makes this Article effective upon ratification. The act was ratified July 15, 1983.

Session Laws 1983, c. 761, s. 259, contains a severability clause.

## § 7A-490. Implementation and administration.

(a) Local District Programs. — The Administrative Office of the Courts shall, in cooperation with each chief district court judge and other district personnel, implement and administer the program mandated by this Article. Local district programs shall be established in eight judicial districts in fiscal year 1983-84. Where a local district program has not yet been established in accordance with this Article, the district shall operate a guardian ad litem program approved by the Administrative Office of the Courts.

(b) Advisory Committee Established. — The Director of the Administrative Office of the Courts shall appoint a Guardian Ad Litem Advisory Committee consisting of at least five members to advise the Office of Guardian Ad Litem Services in matters related to this program. The members of the Advisory Committee shall receive the same per diem and reimbursement for travel expenses as members of State boards and commissions generally. (1983, c. 761, s. 160.)

## § 7A-491. Conflict of interest or impracticality of implementation.

If a conflict of interest prohibits a local district program from providing representation to an abused or neglected juvenile, the court may appoint any member of the district bar to represent said juvenile. If the Administrative Office of the Courts determines that within a particular judicial district the implementation of a local district program is impractical, or that an alternative plan meets the conditions of G.S. 7A-492, the Administrative Office of the Courts shall waive the establishment of the program within the district. (1983, c. 761, s. 160.)

## § 7A-492. Alternative plans.

A district shall be granted a waiver from the implementation of a local district program if the Administrative Office of the Courts determines that the following conditions are met:

1. An alternative plan has been developed to provide adequate guardian ad litem services for every child consistent with the duties stated in G.S. 7A-586; and
2. The proposed alternative plan will require no greater proportion of State funds than the district's abuse and neglect caseload represents to the State's abuse and neglect caseload. Computation of abuse and neglect caseloads shall include such factors as child population, number of substantiated child abuse and neglect reports, number of child



abuse and neglect petitions, number of abused and neglected children in care to be reviewed pursuant to G.S. 7A-657, nature of the district's caseload, and number of petitions to terminate parental rights.

When an alternative plan is approved pursuant to this section, the Administrative Office of the Courts shall retain authority to monitor implementation of the said plan in order to assure compliance with the requirements of this Article and G.S. 7A-586. In any district where the Administrative Office of the Courts determines that implementation of an alternative plan is not in compliance with the requirements of this section, the Administrative Office of the Courts may implement and administer a program authorized by this Article. (1983, c. 761, s. 160.)

### **§ 7A-493. Civil liability of volunteers.**

Any volunteer participating in a judicial proceeding pursuant to the program authorized by this Article shall not be civilly liable for acts or omissions committed in connection with the proceeding if he acted in good faith and was not guilty of gross negligence. (1983, c. 761, s. 160.)

## **SUBCHAPTER X. NORTH CAROLINA COURTS COMMISSION.**

### **ARTICLE 40A.**

#### *North Carolina Courts Commission.*

### **§ 7A-506. Creation; members; terms; qualifications; vacancies.**

(a) The North Carolina Courts Commission is hereby created. Effective July 1, 1983, it shall consist of 24 members, six to be appointed by the Governor, six to be appointed by the Speaker of the House of Representatives, six to be appointed by the President of the Senate, and six to be appointed by the Chief Justice of the Supreme Court.

(b) Of the appointees of the Chief Justice of the Supreme Court, one shall be a Justice of the Supreme Court, one shall be a Judge of the Court of Appeals, two shall be judges of superior court, and two shall be district court judges.

(c) Of the six appointees of the Governor, one shall be a district attorney, one shall be a practicing attorney, one shall be a clerk of superior court, at least three shall be members or former members of the General Assembly, and at least one shall not be an attorney.

(d) Of the six appointees of the Speaker of the House, at least three shall be practicing attorneys, at least three shall be members or former members of the General Assembly, and at least one shall not be an attorney.

(e) Of the six appointees of the President of the Senate, at least three shall be practicing attorneys, at least three shall be members or former members of the General Assembly, and at least one shall be a magistrate.

(f) Of the initial appointments of each appointing authority, three shall be appointed for four-year terms to begin July 1, 1983, and three shall be appointed for two-year terms to begin July 1, 1983. Successors shall be appointed for four-year terms.

(g) A vacancy in membership shall be filled for the remainder of the unexpired term by the appointing authority who made the original appointment. A member whose term expires may be reappointed. (1979, c. 1077, s. 1; 1981, c. 847; 1981 (Reg. Sess., 1982), c. 1253, s. 4; 1983, c. 181, ss. 1, 2; c. 774, s. 2.)



**Effect of Amendments. —**

The 1981 (Reg. Sess., 1982) amendment substituted "earlier" for "later" at the end of the sixth sentence of the second paragraph of this section, as it read prior to being rewritten.

Session Laws 1983, c. 181, ss. 1, 2, effective July 1, 1983, deleted the former last two sentences of a second paragraph, which read "A vacancy in an additional voting membership

shall be filled for the unexpired term by the appointing authority who made the original appointment. An additional voting member whose term expires may be reappointed," and added a third paragraph of this section, as it read prior to being rewritten.

Session Laws 1983, c. 774, s. 2, effective July 15, 1983, rewrote this section, as amended by Session Laws 1983, c. 181, ss. 1, 2.

## SUBCHAPTER XI. NORTH CAROLINA JUVENILE CODE.

### ARTICLE 41.

#### *Purpose; Definitions.*

#### § 7A-516. Purpose.

**Legal Periodicals. —**

For article on rights and interest of parent, child, family and state, see 4 Campbell L. Rev.

85 (1981). For note on community-based care for juvenile offenders, see 18 Wake Forest L. Rev. 610 (1982).

#### CASE NOTES

Cited in *Willie M. v. Hunt*, 657 F.2d 55 (4th Cir. 1981); In re *Wharton*, 305 N.C. 565, 290 S.E.2d 688 (1982).

#### § 7A-517. Definitions.

**Cross References. —** As to prevention of child abuse and neglect, see §§ 110-147 through 110-150.

**Legal Periodicals. —**

For article on the efficacy of a probable cause requirement in juvenile proceedings, see 59 N.C.L. Rev. 723 (1981). For article on rights and interest of parent, child, family and state, see 4 Campbell L. Rev. 85 (1981). For article on

a model act to prevent the sexual exploitation of children, see 17 Wake Forest L. Rev. 535 (1981).

For a note on the indigent parent's right to have counsel furnished by State in parental status termination proceedings, see 17 Wake Forest L. Rev. 961 (1981). For note on community-based care for juvenile offenders, see 18 Wake Forest L. Rev. 610 (1982).

#### CASE NOTES

**"Abandonment" Defined. —** Abandonment imports any willful or intentional conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child. Abandonment has also been defined as willful neglect and refusal to perform the natural and legal obligations of parental care and support. It has been held that if a parent withholds his presence, his love, his care, the opportunity to display filial affection, and willfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child. In re *APA*, 59 N.C. App. 332, 296 S.E.2d 811 (1982).

**Probation Violation Not Basis for Adjudication of Delinquency. —** The amendment of former § 7A-278(2), removing the violation of probation from the definition of "delinquent child," indicates an intent that only criminal activity could provide the basis for an adjudication of delinquency. The legislative purpose in removing probation violations as the basis for adjudications of delinquency would be frustrated if the courts take those very same violations, treat them as criminal contempt, and then base adjudications of delinquency on the contempt proceedings. In re *Jones*, 59 N.C. App. 547, 297 S.E.2d 168 (1982).



**Definition of "Neglected Juvenile" Not Unconstitutional.** — The statutory definition of a "neglected juvenile" is not unconstitutional by reason of vagueness, nor does it violate constitutional safeguards as to equal protection. In re Huber, 57 N.C. App. 453, 291 S.E.2d 916, appeal dismissed & cert. denied, 306 N.C. 557, 294 S.E.2d 223 (1982).

Subdivision (21) of this section is not unconstitutionally vague. In re Moore, 306 N.C. 394, 293 S.E.2d 127 (1982), appeal dismissed, — U.S. —, 103 S. Ct. 776, 74 L. Ed. 2d 987 (1983).

**Classification of Neglected Children Is Reasonable.** — The classification of neglected children by this section is founded upon reasonable distinctions, affects all persons similarly situated without discrimination, and has a reasonable relation to the public peace, welfare and safety. In re Huber, 57 N.C. App. 453, 291 S.E.2d 916, appeal dismissed & cert. denied, 306 N.C. 557, 294 S.E.2d 223 (1982).

**Facts Insufficient to Prove Child Delinquent.** — On a petition alleging that a child was delinquent, as defined in subdivision (12) of this section where the State established only that child of 12 entered an unlocked door into a lighted store during daylight hours, that he did so in front of at least one known witness, and that he took nothing, the State's evidence failed to establish the elements of the crime charged (breaking and entering with intent to commit larceny) and dismissal of the action was improperly denied. In re Wallace, 57 N.C. App. 593, 291 S.E.2d 796 (1982).

**Neglect may be manifested in ways less tangible than failure to provide physical necessities.** Therefore, on the question of

neglect, the trial judge may consider, in addition, a parent's complete failure to provide the personal contact, love, and affection that inheres in the parental relationship. In re APA, 59 N.C. App. 322, 296 S.E.2d 811 (1982).

**To deprive a child of the opportunity for normal growth and development** is perhaps the greatest neglect a parent can impose upon a child. In re Huber, 57 N.C. App. 453, 291 S.E.2d 916, appeal dismissed & cert. denied, 306 N.C. 557, 294 S.E.2d 223 (1982).

**Failure to Provide Medical Care Constitutes Neglect.** — This section provides that if a child is not provided necessary medical care, it is neglected. In re Huber, 57 N.C. App. 453, 291 S.E.2d 916, appeal dismissed & cert. denied, 306 N.C. 557, 294 S.E.2d 223 (1982).

Child with a severe speech defect which could be treated by medical or other remedial care, as well as a hearing defect, which problems could be overcome with proper treatment and therapy which were available to child without expense to her mother, was "neglected" where her mother refused to permit her to receive this opportunity to progress toward her full development. In re Huber, 57 N.C. App. 453, 291 S.E.2d 916, appeal dismissed & cert. denied, 306 N.C. 557, 294 S.E.2d 223 (1982).

**Applied in** In re Register, 303 N.C. 149, 277 S.E.2d 356 (1981); In re Smith, 56 N.C. App. 142, 287 S.E.2d 440 (1982); In re Allen, 58 N.C. App. 322, 293 S.E.2d 607 (1982).

**Cited in** In re Stedman, 305 N.C. 92, 286 S.E.2d 527 (1982); In re Tucker, 57 N.C. App. 705, 292 S.E.2d 151 (1982); In re Jones, — N.C. App. —, 302 S.E.2d 259 (1983).

## ARTICLE 42.

### *Jurisdiction.*

## § 7A-523. Jurisdiction.

(a) The court has exclusive, original jurisdiction over any case involving a juvenile who is alleged to be delinquent, undisciplined, abused, neglected, or dependent. This jurisdiction does not extend to cases involving adult defendants alleged to be guilty of abuse or neglect. For purposes of determining jurisdiction, the age of the juvenile either at the time of the alleged offense or when the conditions causing the juvenile to be abused, neglected, or dependent arose, governs. There is no minimum age for juveniles alleged to be abused, dependent or neglected. For juveniles alleged to be delinquent or undisciplined, the minimum age is six years of age.

The court also has exclusive original jurisdiction of the following proceedings:

- (1) Proceedings under the Interstate Compact on Juveniles and the Interstate Parole and Probation Hearing Procedures for Juveniles;
- (2) Proceedings to determine whether a juvenile who is on conditional release and under the aftercare supervision of the court counselor has violated the terms of his conditional release established by the Division of Youth Services;



(3) Proceedings involving judicial consent for emergency surgical or medical treatment for a juvenile when his parent, guardian, legal custodian, or other person standing in loco parentis refuses to consent for treatment to be rendered;

(4) Proceedings to determine whether a juvenile should be emancipated;

(5) Proceedings to terminate parental rights.

(b) The court shall have jurisdiction over the parent of a juvenile who has been adjudicated delinquent, undisciplined, abused, neglected or dependent, as provided by the special hearing prescribed by G.S. 7A-650, provided the parent has been properly served with notice of the special hearing. (1979, c. 815, s. 1; 1983, c. 837, s. 1.)

**Effect of Amendments.** — The 1983 amendment, effective Oct. 1, 1983, designated the existing provisions as subsection (a) and added subsection (b).

**Legal Periodicals.** —

For article on the efficacy of a probable cause requirement in juvenile proceedings, see 59 N.C.L. Rev. 723 (1981).

**CASE NOTES**

**Stated** in *In re Stedman*, 305 N.C. 92, 286 S.E.2d 527 (1982).

**Cited** in *In re Wharton*, 305 N.C. 565, 290 S.E.2d 688 (1982).

**§ 7A-524. Retention of jurisdiction.**

**CASE NOTES**

**Applied** in *State v. McGaha*, 306 N.C. 699, 295 S.E.2d 449 (1982).

**Stated** in *In re Stedman*, 305 N.C. 92, 286 S.E.2d 527 (1982).

**ARTICLE 43.**

*Screening of Delinquency and Undisciplined Petitions.*

**§ 7A-530. Intake services.**

**CASE NOTES**

**Cited** in *In re Wharton*, 305 N.C. 565, 290 S.E.2d 688 (1982).

**§ 7A-531. Preliminary inquiry.**

When a complaint is received, the intake counselor shall make a preliminary determination as to whether the juvenile is within the jurisdiction of the court as a delinquent or undisciplined juvenile. If the intake counselor finds that the facts contained in the complaint do not state a case within the jurisdiction of the court, that legal sufficiency has not been established, or that the matters alleged are frivolous, he shall, without further inquiry, refuse authorization to file the complaint.

When requested by the intake counselor, the prosecutor shall assist in determining the sufficiency of evidence as it affects the quantum of proof and the elements of offenses.

If the intake counselor finds reasonable grounds to believe that the juvenile has committed one of the following offenses, he shall, without further inquiry, authorize the complaint to be filed as a petition: murder; first or second degree rape; first or second degree sexual offense; arson; any violation of Article 5, Chapter 90 of the North Carolina General Statutes which would constitute a felony if committed by an adult; first degree burglary; crime against nature; or any felony which involves the willful infliction of serious bodily injury upon another or which was committed by use of a deadly weapon. (1979, c. 815, s. 1; 1983, c. 251, s. 1.)

**Editor's Note.** — Session Laws 1983, c. 251, s. 2, provides: "This act shall become effective October 1, 1983, and applies to offenses committed on and after that date."

**Effect of Amendments.** — The 1983 amendment, effective Oct. 1, 1983, and applicable to offenses committed on and after that date, sub-

stituted "first or second degree rape; first or second degree sexual offense" for "rape" in the third paragraph.

**Legal Periodicals.** —

For article on the efficacy of a probable cause requirement in juvenile proceedings, see 59 N.C.L. Rev. 723 (1981).

## § 7A-532. Evaluation.

### CASE NOTES

**Applied in** *In re Tate*, 56 N.C. App. 241, 287 S.E.2d 416 (1982).

## ARTICLE 44.

### *Screening of Abuse and Neglect Complaints.*

## § 7A-542. Protective services.

### CASE NOTES

**Cited in** *In re Wharton*, 305 N.C. 565, 290 S.E.2d 688 (1982).

### OPINIONS OF ATTORNEY GENERAL

**Investigation of Abuse and Neglect at Day-Care Facilities.** — This section requires county departments of social services to investigate reports of child abuse and child neglect at

day-care facilities and day-care plans. See opinion of Attorney General to Mr. J. Randolph Riley, District Attorney, 51 N.C.A.G. 6 (1981).

## § 7A-543. Duty to report child abuse or neglect.

**Cross References.** —

As to the duty of school personnel to report child abuse, see § 15C-400.



## CASE NOTES

**Applied** in *Susan B. v. Planavsky*, 60 N.C. App. 77, 298 S.E.2d 397 (1982).

## § 7A-548. Duty of county Department of Social Services to report evidence of abuse.

If the Director finds evidence that a juvenile has been abused as defined by G.S. 7A-517(1), he shall immediately make a written report of the findings of his investigation to the district attorney, who shall determine if criminal prosecution is appropriate, and who may request the Director or his designee to appear before a magistrate.

If the Director receives information that a juvenile has been physically harmed in violation of any criminal statute by any person other than the juvenile's parent or other person responsible for his care, he shall make an oral or written report of that information to the district attorney or the district attorney's designee within 24 hours after receipt of the information. The district attorney shall determine whether criminal prosecution is appropriate.

The Director of the Department of Social Services shall submit a report of alleged abuse or neglect to the central registry under the policies adopted by the Social Services Commission. (1979, c. 815, s. 1; 1983, c. 199.)

**Effect of Amendments.** — The 1983 amendment, effective Oct. 1, 1983, rewrote the former first sentence as the first and second paragraphs.

## § 7A-549. Authority of medical professionals in abuse cases.

**Legal Periodicals.** — For survey of 1981 family law, see 60 N.C.L. Rev. 1379 (1982).

## § 7A-551. Privileges not grounds for excluding evidence.

**Legal Periodicals.** — For a note on spousal testimony in criminal proceedings, see 17 Wake Forest L. Rev. 990 (1981).

## ARTICLE 45.

### *Venue; Petition; Summons.*

## § 7A-558. Venue.

## CASE NOTES

**Cited** in *In re Wharton*, 305 N.C. 565, 290 S.E.2d 688 (1982).

**§ 7A-565. Service of summons.****CASE NOTES**

**Stated in** *Yow v. Crater*, 526 F. Supp. 240 (M.D.N.C. 1981).

**ARTICLE 46.*****Temporary Custody; Secure and Nonsecure Custody; Custody Hearings.*****§ 7A-571. Taking a juvenile into temporary custody.****Legal Periodicals. —**

For article on the efficacy of a probable cause requirement in juvenile proceedings, see 59

N.C.L. Rev. 723 (1981). For article on rights and interest of parent, child, family and state, see 4 Campbell L. Rev. 85 (1981).

**CASE NOTES**

**Cited in** *In re Wharton*, 305 N.C. 565, 290 S.E.2d 688 (1982).

**§ 7A-573. Authority to issue custody orders; delegation.**

In the case of any juvenile alleged to be within the jurisdiction of the court, when the judge finds it necessary to place the juvenile in custody, he may order that the juvenile be placed in secure or nonsecure custody pursuant to criteria set out in G.S. 7A-574.

Any district court judge shall have the authority to issue secure and nonsecure custody orders pursuant to G.S. 7A-574. The chief district judge may delegate the court's authority to persons other than district court judges by administrative order which shall be filed in the office of the clerk of superior court. The administrative order shall specify which persons shall be contacted for approval of a secure or nonsecure custody order pursuant to G.S. 7A-574 and may include intake counselors and other members of the chief court counselor's staff. The authority to issue a nonsecure or secure custody order is limited to a judge or the chief court counselor or his counseling staff when a juvenile is alleged to have committed a delinquent or undisciplined act. (1979, c. 815, s. 1; 1981, c. 425; 1983, c. 590, s. 1.)

**Effect of Amendments. —**

The 1983 amendment, effective Oct. 1, 1983,

added the last sentence of the second paragraph.

**§ 7A-574. Criteria for secure or nonsecure custody.**

(a) When a request is made for nonsecure custody, the judge shall first consider release of the juvenile to his parent, relative, guardian, custodian or other responsible adult. An order for nonsecure custody shall be made only when there is a reasonable factual basis to believe the matters alleged in the petition are true, and



- (1) The juvenile has been abandoned; or
- (2) The juvenile has suffered physical injury or sexual abuse; or
- (3) The juvenile is exposed to a substantial risk of physical injury or sexual abuse because the parent, guardian, or custodian has created the conditions likely to cause injury or abuse or has failed to provide, or is unable to provide, adequate supervision or protection; or
- (4) The juvenile is in need of medical treatment to cure, alleviate, or prevent suffering serious physical harm which may result in death, disfigurement, or substantial impairment of bodily functions, and his parent, guardian, or custodian is unwilling or unable to provide or consent to the medical treatment; or
- (5) The parent, guardian or custodian consents to the nonsecure custody order;
- (6) The juvenile is a runaway and consents to nonsecure custody; or
- (7) The juvenile meets one or more of the criteria for secure custody but the court finds it in the best interest of the juvenile that the juvenile be placed in a nonsecure placement.

In no case shall a juvenile alleged to be abused, neglected, or dependent be placed in secure custody.

(b) When a request is made for secure custody, the judge may order secure custody only where he finds there is a reasonable factual basis to believe that the juvenile actually committed the offense as alleged in the petition, and

- (1) That the juvenile is presently charged with a felony, and has demonstrated that he is a danger to property or persons; or
- (2) That the juvenile has willfully failed to appear on a pending delinquency charge or on charges of violation of probation or conditional release, providing the juvenile was properly notified; or
- (3) That a delinquency charge is pending against the juvenile and there is a reasonable cause to believe the juvenile will not appear in court; or
- (4) That the juvenile is an absconder from any State training school or detention facility in this or another state; or
- (5) That there is reasonable cause to believe the juvenile should be detained for his own protection because the juvenile has recently suffered self-inflicted physical injury or recently attempted to do so; in such case, the juvenile must have been refused admission by one appropriate hospital and the period of secure custody is limited to 24 hours to determine the need for inpatient hospitalization; if such a juvenile is placed in secure custody, he shall receive continuous supervision while in secure custody and a physician shall be notified immediately; or
- (6) That the juvenile is alleged to be undisciplined by virtue of his being a runaway and is found to be inappropriate for nonsecure custody placement or because he refuses nonsecure custody and the court finds that the juvenile needs secure custody for up to 72 hours to evaluate the juvenile's need for medical or psychiatric treatment or to facilitate reunion with his parents; or
- (7) That the juvenile is alleged to be undisciplined and has willfully failed to appear in court after proper notice; such a juvenile shall be brought to court as soon as possible and in no event should be held more than 72 hours.

(c) When a juvenile has been adjudicated delinquent, the judge may order secure custody pending the dispositional hearing or pending placement of a delinquent juvenile pursuant to G.S. 7A-649. The judge may also order secure custody for a juvenile who is alleged to have violated the conditions of his probation or conditional release only if the juvenile is alleged to have committed acts that damage property or injure persons.



(d) If the criteria for secure custody as set out in subsections (b) or (c) are met, the judge may enter an order directing an officer or other authorized person to assume custody of the juvenile and to take the juvenile to the place as is designated in the order. (1979, c. 815, s. 1; 1981, c. 426, ss. 1-4; c. 526; 1983, c. 590, ss. 2-6.)

**Effect of Amendments. —**

The 1983 amendment, effective Oct. 1, 1983, rewrote the introductory language of subsection (a), added subdivisions (a) (6) and (a) (7), rewrote subsection (b), substituted "conditions of his probation or conditional release only if the juvenile is alleged to have committed acts that damage property or injure persons" for "terms of his probation or conditional release"

at the end of the second sentence of subsection (c), and deleted the former first sentence of subsection (d), which set out certain criteria in determining whether secure custody should be ordered.

**Legal Periodicals. —**

For article on rights and interest of parent, child, family and state, see 4 Campbell L. Rev. 85 (1981).

## § 7A-576. Place of secure or nonsecure custody.

(c) Until July 1, 1984, if no juvenile detention home is available, a juvenile meeting the criteria set out in G.S. 7A-574(b) may be detained in a holdover facility which shall be inspected pursuant to G.S. 108-79 through 108-81, and 153A-222, and shall meet the State standards provided for in G.S. 153A-221.

(d) Subsection (c) expires on June 30, 1984. (1979, c. 815, s. 1; 1983, c. 639, ss. 1, 2.)

**Only Part of Section Set Out. —** As the rest of the section was not affected by the amendment, it is not set out.

**Editor's Note. —** Sections 108-79 to 108-81, referred to in subsection (c) of this section, were recodified as §§ 131D-11 to 131D-13 by Session Laws 1981, c. 275, s. 2.

**Effect of Amendments. —** The 1983 amendment, effective June 29, 1983, substituted "Until July 1, 1984" for "Until July 1, 1983" at the beginning of subsection (c) and substituted "June 30, 1984" for "June 30, 1983" at the end of subsection (d).

## ARTICLE 47.

### *Basic Rights.*

## § 7A-584. Juvenile's right to counsel; presumption of indigence.

**Legal Periodicals. —**

For article on rights and interest of parent,

child, family and state, see 4 Campbell L. Rev. 85 (1981).

## CASE NOTES

**Cited in** *In re Wharton*, 305 N.C. 565, 290 S.E.2d 688 (1982).

## § 7A-586. Appointment and duties of guardian ad litem.

When in a petition a juvenile is alleged to be abused or neglected, the judge shall appoint a guardian ad litem to represent the juvenile. The appointment shall be made pursuant to the program established by Article 39 of this Chapter unless representation is otherwise provided pursuant to G.S. 7A-491 or G.S. 7A-492. In every case where a nonattorney is appointed as a guardian ad litem,



an attorney shall be appointed in the case in order to assure protection of the child's legal rights within the proceeding. The duties of the guardian ad litem shall be to make an investigation to determine the facts, the needs of the juvenile, and the available resources within the family and community to meet those needs; to facilitate, when appropriate, the settlement of disputed issues; to explore options with the judge at the dispositional hearing; and to protect and promote the best interest of the juvenile until formally relieved of the responsibility by the judge. When the appointed guardian ad litem is not an attorney licensed to practice in the State of North Carolina, he may employ an attorney when the employment is authorized by the court and pursuant to Chapter 7A or request the appointment of an attorney to appear on behalf of the juvenile in the court proceeding and to assist the guardian ad litem by performing necessary and appropriate legal services on the juvenile's behalf, to present relevant facts to the judge at the adjudicatory hearing and to appeal, when advisable, from an adjudication or order of disposition to the Court of Appeals.

The judge may order the Department of Social Services or the guardian ad litem to conduct follow-up investigations to insure that the orders of the court are being properly executed and to report to the court when the needs of the juvenile are not being met. The judge may also authorize the guardian ad litem to accompany the juvenile to court in any criminal action wherein he may be called on to testify in a matter relating to abuse.

The judge may grant the guardian ad litem the authority to demand any information or reports whether or not confidential, that may in the guardian ad litem's opinion be relevant to the case. Neither the physician-patient privilege nor the husband-wife privilege may be invoked to prevent the guardian ad litem and the court from obtaining such information. The confidentiality of the information or reports shall be respected by the guardian ad litem and no disclosure of any information or reports shall be made to anyone except by order of the judge. (1979, c. 815, s. 1; 1981, c. 528; 1983, c. 761, s. 159.)

**Editor's Note.** — Session Laws 1983, c. 761, s. 259, contains a severability clause. 1983, added the present second and third sentences of the first paragraph.

**Effect of Amendments.** —

The 1983 amendment, effective July 15,

#### CASE NOTES

**Stated** in *In re Peirce*, 53 N.C. App. 373, 281 S.E.2d 198 (1981).

### § 7A-588. Payment of court appointed attorney or guardian ad litem.

An attorney or guardian ad litem appointed pursuant to G.S. 7A-584, 7A-586 or 7A-587 of this Article or pursuant to any other provision of the Juvenile Code shall be paid a reasonable fee fixed by the court in the same manner as fees for attorneys appointed in cases of indigency. The judge may require payment of the attorney or guardian ad litem fee from a person other than the juvenile as provided in G.S. 7A-450.1, 7A-450.2 and 7A-450.3. In no event shall the parent or guardian be required to pay the fees for an attorney or guardian ad litem in an abuse or neglect proceeding unless abuse or neglect has been found to have occurred. A person who does not comply with the court's order of payment may be punished for contempt as provided in G.S. 5A-21. (1979, c. 815, s. 1; 1983, c. 726, ss. 2, 3.)



**Editor's Note.** — Session Laws 1983, c. 726, s. 4, makes the act effective Oct. 1, 1983, and applicable to appointments of attorneys or guardians ad litem on or after that date.

**Effect of Amendments.** — The 1983 amendment, effective Oct. 1, 1983, and applicable to appointments of attorneys or guardians ad litem on or after that date, inserted "or pursuant to any other provision of the Juvenile

Code" in the first sentence and rewrote the second and third sentences, which read "The judge may require the parent or a custodian other than a Department of Social Services to pay the attorney's fee or reimburse the State unless the parent or custodian is indigent. The test of the parent's or custodian's ability to pay shall be the test applied to appointment of an attorney in cases of indigency."

#### CASE NOTES

Cited in *In re Wharton*, 54 N.C. App. 447, 283 S.E.2d 528 (1981).

### ARTICLE 48.

#### *Law-Enforcement Procedures in Delinquency Proceedings.*

### § 7A-594. Role of the law-enforcement officer.

**Legal Periodicals.** — For article on rights and interest of parent, child, family and state, see 4 Campbell L. Rev. 85 (1981).

#### CASE NOTES

Cited in *In re Wharton*, 305 N.C. 565, 290 S.E.2d 688 (1982).

### § 7A-595. Interrogation procedures.

#### CASE NOTES

This section sets out mandatory procedures which must be followed when juvenile is interrogated by a law-enforcement officer. In *re Riley*, — N.C. App. —, 301 S.E.2d 750 (1983).

And clearly provides that before any statement flowing from custodial interrogation is admitted the judge must make the required findings. In *re Riley*, — N.C. App. —, 301 S.E.2d 750 (1983).

### § 7A-596. Authority to issue nontestimonial identification order where juvenile alleged to be delinquent.

#### CASE NOTES

**Applicability to Juvenile Committing Crime Prior to Effective Date of Section.** — Application of the provisions of this section and § 7A-598 to take the fingerprints of a juvenile accused of a crime committed prior to their effective date does not offend N.C. Const., Art. I, § 16, which forbids the enactment of any ex

post facto law or a like prohibition found in U.S. Const., Art. I, § 10. In *re Stedman*, 305 N.C. 92, 286 S.E.2d 527 (1982).

Section 15A-502(c) and this section are procedural statutes, and a change in the evidentiary or procedural law between the time of the offense and the time of trial does not preclude the



State from utilizing the new procedure even though at the time of the offense it was unavailable. In re Stedman, 305 N.C. 92, 286 S.E.2d 527 (1982).

### § 7A-597. Time of application for nontestimonial identification order.

#### CASE NOTES

**Stated** in In re Stedman, 305 N.C. 92, 286 S.E.2d 527 (1982).

### § 7A-598. Grounds for order.

#### CASE NOTES

**Applicability to Juvenile Committing Crime Prior to Effective Date of Section.** — Application of the provisions of § 7A-596 and this section to take the fingerprints of a juvenile accused of a crime committed prior to their effective date does not offend N.C. Const., Art. I, § 16, which forbids the enactment of any ex post facto law or a like prohibition found in U.S. Const., Art. I, § 10. In re Stedman, 305 N.C. 92, 286 S.E.2d 527 (1982).

### § 7A-599. Issuance of order.

#### CASE NOTES

**Stated** in In re Stedman, 305 N.C. 92, 286 S.E.2d 527 (1982).

### § 7A-600. Nontestimonial identification order at request of juvenile.

#### CASE NOTES

**Stated** in In re Stedman, 305 N.C. 92, 286 S.E.2d 527 (1982).

#### ARTICLE 49.

#### *Transfer to Superior Court.*

### § 7A-608. Transfer of jurisdiction of juvenile to superior court.

**Legal Periodicals.** — requirement in juvenile proceedings, see 59 N.C.L. Rev. 723 (1981).  
For article on the efficacy of a probable cause

## CASE NOTES

**Applied** in *State v. Conrad*, 55 N.C. App. 63, 284 S.E.2d 557 (1981).

**Cited** in *In re Wharton*, 305 N.C. 565, 290 S.E.2d 688 (1982).

**Stated** in *In re Stedman*, 305 N.C. 92, 286 S.E.2d 688 (1982).

## § 7A-610. Procedure upon finding of probable cause.

(a) If probable cause is found, the prosecutor or the juvenile may move that the case be transferred to the superior court for trial as in the case of adults. If the alleged felony does not constitute a capital offense, the judge may proceed to determine whether the needs of the juvenile or the best interest of the State will be served by transfer of the case to superior court for trial as in the case of adults. When the case is transferred to superior court, the superior court has jurisdiction over that felony, any offense based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan of that felony, and any greater or lesser included offense of that felony.

(1979, c. 815, s. 1; 1983, c. 532, s. 1.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Editor's Note.** —

Session Laws 1983, c. 532, s. 2, provides: "This act shall become effective October 1,

1983, and applies to offenses committed on or after that date."

**Effect of Amendments.** — The 1983 amendment, effective Oct. 1, 1983, added the last sentence of subsection (a).

## § 7A-612. When jeopardy attaches.

## CASE NOTES

**Juvenile Not Placed in Jeopardy Where Only Probable Cause Determined.** —

A probable cause hearing does not suffice to place a juvenile in jeopardy; it may not be

equated with an adjudicatory hearing where jeopardy attaches when the judge begins to hear evidence. *In re Stedman*, 305 N.C. 92, 286 S.E.2d 527 (1982).

## ARTICLE 50.

*Discovery.*

## § 7A-618. Disclosure of evidence by petitioner.

## CASE NOTES

**Stated** in *In re Coleman*, 55 N.C. App. 673, 286 S.E.2d 621 (1982).

**Cited** in *In re Wharton*, 305 N.C. 565, 290 S.E.2d 688 (1982).



## ARTICLE 51.

*Hearing Procedures.*

## § 7A-627. Amendment of petition.

## CASE NOTES

Cited in *In re Wharton*, 305 N.C. 565, 290 S.E.2d 688 (1982).

## § 7A-631. Conduct of hearing.

**Legal Periodicals.** —

For article on rights and interest of parent,

child, family and state, see 4 Campbell L. Rev. 85 (1981).

## CASE NOTES

## I. GENERAL CONSIDERATION.

**Standards for Evaluation of Evidence.** —

The North Carolina Juvenile Code gives defendants in juvenile adjudication hearings, with certain exceptions, all rights afforded adult offenders, and thus the juvenile respondents are entitled to have the evidence presented in their adjudicatory hearing evaluated by the same standards as apply in criminal proceedings against adults. In *re Meaut*, 51 N.C. App. 153, 275 S.E.2d 200 (1981).

## II. DUE PROCESS RIGHTS.

**Limitation on Right to Confront Witness.**

— Although this section guarantees respondent

the right to confront and cross-examine the witnesses, the right to confront witnesses in civil cases is subject to "due limitations." In *re Barkley*, — N.C. App. —, 300 S.E.2d 713 (1983).

Where the excluded party's presence during testimony might intimidate the witness and influence his answers, due to that party's position of authority over the testifying witness, any right under Article 51 of this Chapter to confront the witnesses is properly limited. In *re Barkley*, — N.C. App. —, 300 S.E.2d 713 (1983).

## § 7A-632. Continuances.

## CASE NOTES

The grounds for a motion for a continuance must be fully established. In *re Lail*, 55 N.C. App. 238, 284 S.E.2d 731 (1981).

**Motion Based Upon Absence of Witness.**

— When the motion for a continuance is based

upon the absence of a witness, the motion should be supported by an affidavit indicating the facts to be proved by the witness. In *re Lail*, 55 N.C. App. 238, 284 S.E.2d 731 (1981).

## § 7A-635. Quantum of proof in adjudicatory hearing.

## CASE NOTES

Applied in *In re Tucker*, 57 N.C. App. 705, 292 S.E.2d 151 (1982).

## § 7A-636. Record of proceedings.

### CASE NOTES

**Stated in In re Lail**, 55 N.C. App. 238, 284 S.E.2d 731 (1981).

## § 7A-639. Predisposition investigation and report.

### CASE NOTES

**Applied in In re Barkley**, — N.C. App. —, 300 S.E.2d 713 (1983).

**Quoted in In re Lail**, 55 N.C. App. 238, 284 S.E.2d 731 (1981).

## § 7A-640. Dispositional hearing.

### CASE NOTES

**Consideration of Unadjudicated Acts Unrelated to Petition.** —

This section permits the use of unadjudicated acts as evidence to be considered for disposition. **In re Barkley**, — N.C. App. —, 300 S.E.2d 713 (1983).

**Effect of Failure to Hold Hearing.** — Where the judge held no dispositional hearing, and denied juvenile the opportunity to present

evidence as to disposition, and there was no evidence to support the findings made by the judge with respect to disposition, the commitment order would be reversed so that the court could conduct a dispositional hearing. **In re Lail**, 55 N.C. App. 238, 284 S.E.2d 731 (1981).

**Continuance at Request of Juvenile.** —

In accord with original. See **In re Lail**, 55 N.C. App. 238, 284 S.E.2d 731 (1981).

## ARTICLE 52.

### *Dispositions.*

## § 7A-646. Purpose.

**Legal Periodicals.** — For article on rights and interest of parent, child, family and state, see 4 Campbell L. Rev. 85 (1981).

For note on community-based care for juvenile offenders, see 18 Wake Forest L. Rev. 610 (1982).

### CASE NOTES

**District Court Not Authorized to Require Creation of Foster Home.** — The district court is not authorized to require a county department of social services, either by itself or in conjunction with another agency, to implement the creation of a foster home with appropriate staff, wherein juveniles might be

permanently domiciled for program treatment and delivery of services. **In re Wharton**, 305 N.C. 565, 290 S.E.2d 688 (1982).

**Cited in Willie M. v. Hunt**, 657 F.2d 55 (4th Cir. 1981); **In re Wharton**, 305 N.C. 565, 290 S.E.2d 688 (1982).



## § 7A-647. Dispositional alternatives for delinquent, undisciplined, abused, neglected, or dependent juvenile.

**Legal Periodicals.** — For a note on the indigent parent's right to have counsel furnished by State in parental status termination proceedings, see 17 Wake Forest L. Rev. 961

(1981). For note on community-based care for juvenile offenders, see 18 Wake Forest L. Rev. 610 (1982).

### CASE NOTES

**"Cost of care,"** does not include counsel fees for the juvenile under which are governed by § 7A-588. In re Wharton, 54 N.C. App. 447, 283 S.E.2d 528 (1981), rev'd on other grounds, 305 N.C. 565, 290 S.E.2d 688 (1982).

**District Court Not Authorized to Require Creation of Foster Home.** — The district court is not authorized to require a county department of social services, either by itself or

in conjunction with another agency, to implement the creation of a foster home with appropriate staff, wherein juveniles might be permanently domiciled for program treatment and delivery of services. In re Wharton, 305 N.C. 565, 290 S.E.2d 688 (1982).

Cited in Willie M. v. Hunt, 657 F.2d 55 (4th Cir. 1981).

## § 7A-648. Dispositional alternatives for delinquent or undisciplined juvenile.

**Legal Periodicals.** —

For note on community-based care for juvenile offenders, see 18 Wake Forest L. Rev. 610

(1982).

### CASE NOTES

**District Court Not Authorized to Require Creation of Foster Home.** — The district court is not authorized to require a county department of social services, either by itself or in conjunction with another agency, to imple-

ment the creation of a foster home with appropriate staff, wherein juveniles might be permanently domiciled for program treatment and delivery of services. In re Wharton, 305 N.C. 565, 290 S.E.2d 688 (1982).

## § 7A-649. Dispositional alternatives for delinquent juvenile.

**Legal Periodicals.** —

For note on community-based care for juvenile offenders, see 18 Wake Forest L. Rev. 610

(1982).

### CASE NOTES

**District Court Not Authorized to Require Creation of Foster Home.** — The district court is not authorized to require a county department of social services, either by itself or in conjunction with another agency, to implement the creation of a foster home with appropriate staff, wherein juveniles might be permanently domiciled for program treatment and delivery of services. In re Wharton, 305 N.C. 565, 290 S.E.2d 688 (1982).

Cited in Willie M. v. Hunt, 657 F.2d 55 (4th Cir. 1981).

## § 7A-650. Authority over parents of juvenile adjudicated as delinquent, undisciplined, abused, neglected, or dependent.

(b1) In any case where a juvenile has been adjudicated as delinquent, undisciplined, abused, neglected or dependent, the judge may conduct a special hearing to determine if the court should order the parents to participate in medical, psychiatric, psychological or other treatment. The notice of this hearing shall be by special petition and summons to be filed by the court and served upon the parents at the conclusion of the adjudication hearing. If, at this hearing, the court finds it in the best interest of the juvenile for the parent to be directly involved in treatment, the judge may order the parent to participate in medical, psychiatric, psychological or other treatment.

(1979, c. 815, s. 1; 1983, c. 837, ss. 2, 3.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1983 amendment, effective Oct. 1, 1983, added subsection (b1).

## § 7A-652. Commitment of delinquent juvenile to Division of Youth Services.

(f) When the judge commits a juvenile to the Division of Youth Services, the Director shall prepare a plan for care or treatment within 30 days after assuming custody of the juvenile.

(1979, c. 815, s. 1; 1983, c. 133, s. 2.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1983 amendment, effective April 4, 1983, substituted "30 days" for "15 days" in subsection (f).

### CASE NOTES

**Findings Must Be Supported by Evidence in Hearing Record.** — The essential element in the commitment order is not that it recites detailed findings beyond the two tests enumerated in this section, but that those enumerated findings are supported by some evidence in the record of the dispositional hearing. In re Lail, 55 N.C. App. 238, 284 S.E.2d 731 (1981).

**Effect of Lack of Evidence to Support**

**Findings.** — Where the judges held no dispositional hearing, and denied juvenile the opportunity to present evidence as to disposition, and there was no evidence to support the findings made by the judge with respect to disposition, the commitment order would be reversed so that the court could conduct a dispositional hearing. In re Lail, 55 N.C. App. 238, 284 S.E.2d 731 (1981).

## § 7A-655. Conditional release and final discharge.

The Division of Youth Services shall release a juvenile either by conditional release or by final discharge. The decision as to which type of release is appropriate shall be made by the Director based on the needs of the juvenile and the best interests of the State under rules and regulations governing release which shall be promulgated by the Division of Youth Services, according to the following guidelines:

- (1) Conditional release is appropriate for a juvenile needing supervision after leaving the institution. As part of the prerelease planning process, the terms of conditional release shall be set out in writing and



a copy given to the juvenile, his parent, the committing court, and the court counselor who will provide aftercare supervision. The time that a juvenile spends on conditional release shall be credited toward his maximum period of commitment to the Division of Youth Services.

- (2) Final discharge is appropriate when the juvenile does not require supervision, has completed a maximum commitment for his offense, or is 18 years of age. (1979, c. 815, s. 1; 1983, c. 133, s. 1; c. 276, s. 1.)

**Effect of Amendments.** — The first 1983 amendment, effective April 4, 1983, added the last sentence of subdivision (1).

The second 1983 amendment, effective Oct. 1, 1983, inserted "has completed a maximum commitment for his offense" in subdivision (2).

## § 7A-657. Review of custody order.

### CASE NOTES

**Stated** in *In re Wilkerson*, 57 N.C. App. 63, 291 S.E.2d 182 (1982).

## § 7A-659. Post termination of parental rights' placement court review.

(a) The purpose of each placement review is to insure that every reasonable effort is being made to provide for a permanent placement plan for the child who has been placed in the custody of a county director or licensed child-placing agency, which is consistent with the child's best interest. At each review hearing the court may consider information from the Department of Social Services, the licensed child-placing agency, the guardian ad litem, the child, the foster parent, and any other person or agency the court determines is likely to aid in the review.

(b) The court shall conduct a placement review not later than six months from the date of the termination hearing when parental rights have been terminated by a petition brought by any person or agency designated in G.S. 7A-289.24(2) through (5) and a county director or licensed child-placing agency has custody of the child. The court shall conduct reviews every six months until the child is placed for adoption and the adoption petition is filed by the adoptive parents.

- (1) No more than 30 days and no less than 15 days prior to each review, the clerk shall give notice of the review to the child if he is at least 12 years of age, the legal custodian of the child, the foster parent, the guardian ad litem, if any, and any other person the court may specify. Only the child if he is at least 12 years of age, the legal custodian of the child, the foster parent, and the guardian ad litem shall attend the review hearings, except as otherwise directed by the court.

- (2) If a guardian ad litem for the child has not been appointed previously by the court in the termination proceeding, the court, at the initial six-month review hearing, may appoint a guardian ad litem to represent the child. The court may continue the case for such time as is necessary for the guardian ad litem to become familiar with the facts of the case.

- (c) The court shall consider at least the following in its review:

- (1) The adequacy of the plan developed by the county department of social services or a licensed child-placing agency for a permanent placement relative to the child's best interest and the efforts of the department or agency to implement such plan;



- (2) Whether the child has been listed for adoptive placement with the North Carolina Adoption Resource Exchange, the North Carolina Photo Adoption Listing Service (PALS), or any other specialized adoption agency; and
- (3) The efforts previously made by the department or agency to find a permanent home for the child.
- (d) The court, after making findings of fact, shall affirm the county department's or child-placing agency's plans or require specific additional steps which are necessary to accomplish a permanent placement which is in the best interests of the child.
- (e) If the child has been placed for adoption prior to the date scheduled for the review, written notice of said placement shall be given to the clerk to be placed in the court file and the review hearing shall be cancelled, with notice of said cancellation given by the clerk to all persons previously notified.
- (f) The process of selection of specific adoptive parents shall be the responsibility of and within the discretion of the county department of social services or licensed child-placing agency. The guardian ad litem may request information from and consult with the county department or child-placing agency concerning the selection process. Any issue of abuse of discretion by the county department or child-placing agency in the selection process must be raised by the guardian ad litem within 10 days following the date the agency notifies the court and the guardian ad litem in writing of the filing of the adoption petition. (1983, c. 607, s. 1.)

**Editor's Note.** — Session Laws 1983, c. 607, s. 5, provides: "This act shall become effective October 1, 1983, and shall apply to all children

in the custody of a county department of social services or licensed child-placing agency as of that date."

## § 7A-660. Review of agency's plan for child placement.

- (a) The director of social services or the director of the licensed private child-placing agency shall promptly notify the clerk to calendar the case for review of the department's or agency's plan for the child at a session of court scheduled for the hearing of juvenile matters in any case where:
  - (1) One parent has surrendered a child for adoption under the provisions of G.S. 48-9(a)(1) and the termination of parental rights proceedings have not been instituted against the non-surrendering parent within six months of the surrender by the other parent, or
  - (2) Both parents have surrendered a child for adoption under the provisions of G.S. 48-9(a)(1) and that child has not been placed for adoption within six months from the date of the more recent parental surrender.
- (b) In any case where an adoption is dismissed or withdrawn and the child returns to foster care with a department of social services or a licensed private child-placing agency, then the department of social services or licensed child-placing agency shall notify the clerk within six months from the date the child returns to care to calendar the case for review of the agency's plan for the child at a session of court scheduled for the hearing of juvenile matters.
- (c) Notification of the court required under subsections (a) or (b) of this section shall be by a petition for review. The petition shall set forth the circumstances necessitating the review under subsections (a) or (b). The review shall be conducted within 30 days following the filing of the petition for review unless the court shall otherwise direct. The court shall conduct reviews every six months until the child is placed for adoption and the adoption petition is filed by the adoptive parents. The initial review and all subsequent reviews shall be conducted pursuant to G.S. 7A-659. (1983, c. 607, s. 2.)



**Editor's Note.** — Session Laws 1983, c. 607, s. 5, provides: "This act shall become effective October 1, 1983, and shall apply to all children

in the custody of a county department of social services or licensed child-placing agency as of that date."

**§§ 7A-661 to 7A-663:** Reserved for future codification purposes.

## ARTICLE 53.

### *Modification and Enforcement of Dispositional Orders; Appeals.*

#### **§ 7A-664. Authority to modify or vacate.**

##### CASE NOTES

**Applied** in *Yow v. Crater*, 526 F. Supp. 240 (M.D.N.C. 1981).

**Cited** in *In re Wharton*, 305 N.C. 565, 290 S.E.2d 688 (1982).

#### **§ 7A-666. Right to appeal.**

##### CASE NOTES

**Under this section an adjudication of delinquency is not a final order.** No appeal may be taken from such order unless no disposi-

tion is made within 60 days of the adjudication of delinquency. In *re Taylor*, 57 N.C. App. 213, 290 S.E.2d 797 (1982).

#### **§ 7A-667. Proper parties for appeal.**

##### CASE NOTES

**Cited** in *In re Wharton*, 54 N.C. App. 447, 283 S.E.2d 528 (1981).

#### **§ 7A-668. Disposition pending appeal.**

##### CASE NOTES

**Section Controls over § 1-294.** — Although § 1-294 states the general rule regarding jurisdiction of the trial court pending appeal, it is not controlling where there is a specific statute, such as this section, addressing the matter in question. In *re Huber*, 57 N.C. App. 453, 291 S.E.2d 916, appeal dismissed & cert. denied, 307 N.C. 557, 294 S.E.2d 223 (1982).

**Section Permits Court to Circumvent**

**Recalcitrant Parties.** — Without authority of the district court to provide for the treatment of neglected child pending appeal, a recalcitrant party could frustrate the efforts of the court to provide for the child's best interests by simply entering notice of appeal. In *re Huber*, 57 N.C. App. 453, 291 S.E.2d 916, appeal dismissed & cert. denied, 307 N.C. 557, 294 S.E.2d 223 (1982).

## ARTICLE 54.

*Juvenile Records and Social Reports.***§ 7A-675. Confidentiality of records.**

## CASE NOTES

Cited in *In re Wharton*, 305 N.C. 565, 290 S.E.2d 688 (1982).

## ARTICLE 57.

*Judicial Consent for Emergency Surgical or Medical Treatment.***§ 7A-732. Judicial authorization of emergency treatment; procedure.**

**Legal Periodicals.** — For article on rights and interest of parent, child, family and state, see 4 Campbell L. Rev. 85 (1981).

## ARTICLE 58.

*Juvenile Law Study Commission.***§ 7A-740. Creation; members; terms; qualifications; vacancies.**

The Juvenile Law Study Commission is hereby created. It shall consist of 17 voting members, 13 to be appointed by the Governor, two by the President of the Senate, and two by the Speaker of the House of Representatives. Of the members appointed by the Governor, two shall be district court judges, one from an urban district, one from a rural. Three shall be a chief court counselor and two court counselors representing the Intake Division, one from an urban district, one from a rural. Two shall be from Social Services, one from the State level and one from the county. One shall be from the Division of Youth Services. One shall be from a local facility of Community Based Alternatives. Two shall be persons under the age of 21 at the time of their appointment. One shall be from Law Enforcement. One shall be from the North Carolina Juvenile Detention Association. The district court judges and the Social Services members shall serve for three years. The chief court counselor and the court counselors shall serve for two years. The representatives from the Division of Youth Services, Law Enforcement, Community Based Alternatives, and the Juvenile Detention Association shall serve for one year. Two of the legislative members shall serve for four-year terms; two shall serve for two years. All initial terms shall begin July 1, 1980. A vacancy in membership shall be filled by the appointing authority who made the initial appointment. When the members' terms expire, their successors shall serve for the same length of time their



predecessors served. A member whose term expires may be reappointed. (1979, 2nd Sess., c. 1283, s. 1; 1981 (Reg. Sess., 1982), c. 1189, s. 1.)

**Effect of Amendments.** — The 1981 (Reg. Sess., 1982) amendment substituted "17" for "15" and "13" for "11" in the second sentence and added the present eighth sentence.

## Chapter 8.

### Evidence.

#### Article 3.

##### Public Records.

Sec.

- 8-35.1. Division of Motor Vehicles' record admissible as prima facie evidence of convictions of offenses involving impaired driving.

#### Article 4.

##### Other Writings in Evidence.

- 8-44.1. Hospital medical records.

#### Article 7.

##### Competency of Witnesses.

- 8-50.2. Results of speed-measuring instruments; admissibility.  
8-53. Communications between physician and patient.

Sec.

- 8-53.3. Communications between psychologist and client.  
8-53.4. School counselor privilege.  
8-53.5. Communications between marital and family therapist and client(s).  
8-53.6. No disclosure in alimony and divorce actions.  
8-53.7. Social worker privilege.  
8-53.8. Counselor privilege.  
8-57. Husband and wife as witnesses in criminal actions.  
8-58.1. Injured party as witness when medical charges at issue.  
8-98 to 8-102. [Reserved.]

#### Article 14.

##### Chain of Custody.

- 8-103. Courier service and contract carriers.

## ARTICLE 1.

### Statutes.

## § 8-4. Judicial notice of laws of United States, other states and foreign countries.

### CASE NOTES

**Law of Foreign Countries.** — When State courts are confronted with cases involving questions of the law of foreign countries, this section requires that they, sua sponte, take notice of such law. *La Grenade v. Gordon*, — N.C. App. —, 299 S.E.2d 809 (1983).

**Absence of Reference by Parties.** — Under this section judicial notice of foreign law

is required, even in the absence of reference thereto by the parties, when foreign law governs the action. *Cunningham v. Brown*, 51 N.C. App. 264, 276 S.E.2d 718 (1981).

**Stated** in *Employment Sec. Comm'n v. Lachman*, 305 N.C. 492, 290 S.E.2d 616 (1982); *Leonard v. Johns-Manville Sales Corp.*, 59 N.C. App. 454, 297 S.E.2d 147 (1982).

## ARTICLE 2.

### Grants, Deeds and Wills.

## § 8-6. Copies certified by Secretary of State or State Archivist.

### CASE NOTES

**Cited** in *Whichard v. Oliver*, 56 N.C. App. 219, 287 S.E.2d 461 (1982).



# § 8-18. Certified copies of registered instruments evidence.

## CASE NOTES

Cited in *Whichard v. Oliver*, 56 N.C. App. 219, 287 S.E.2d 461 (1982).

## ARTICLE 3.

### *Public Records.*

# § 8-34. Copies of official writings.

## CASE NOTES

**Document Reclassifying Prisoner's Status.** — An authenticated copy of a department of correction document reclassifying a person's status as a prisoner and disclosing that he had been removed from the work release program for having returned therefrom in a highly

intoxicated condition was a relevant and properly certified copy of an official record and was admissible in action to terminate parental rights. In *re Bradley*, 57 N.C. App. 475, 291 S.E.2d 800 (1982).

# § 8-35.1. Division of Motor Vehicles' record admissible as prima facie evidence of convictions of offenses involving impaired driving.

Notwithstanding the provisions of G.S. 15A-924(d), a properly certified copy under G.S. 8-35 or G.S. 20-26(b) of the license records of a defendant kept by the Division of Motor Vehicles under G.S. 20-26(a) is admissible as prima facie evidence of any prior conviction of a defendant for an offense involving impaired driving as defined in G.S. 20-4.01(24a). (1975, c. 642, s. 1; c. 716, s. 5; 1983, c. 435, s. 3.)

**Editor's Note.** — Session Laws 1983, c. 435, s. 1, provides that the act shall be known as the Safe Roads Act of 1983.

Section 41.1 of the act provides: "The original inclusion and ultimate deletion in the course of passing this act of statutory liability for certain persons who sell or furnish alcoholic beverages to intoxicated persons does not reflect any legislative intent one way or the other with respect to the issue of civil liability for negligence by persons who sell or furnish those beverages to such persons."

Section 42 of the act provides: "Prosecutions for offenses occurring before the effective date of this act and administrative actions affecting drivers' licenses based on these offenses are not

abated or affected by the repeal or amendment in this act of statutes creating or punishing the offense or authorizing administrative action concerning a driver's license, and the statutes that would be applicable but for the amendments and repealers in this act remain applicable to those prosecutions and administrative actions."

Section 45 of the act contains a severability clause.

Section 46 of the act provides that except as provided in s. 42 (quoted above) and s. 43 (relating to §§ 1-54, 18B-120 through 18B-129, 18B-900 and 18B-1003) the act becomes effective Oct. 1, 1983.

**Effect of Amendments.** — The 1983 amend-

ment rewrote this section, which formerly read, "Notwithstanding the provisions of G.S. 15A-924(d), a properly certified copy under G.S. 8-35 of the license records of a defendant kept

by the Division of Motor Vehicles under G.S. 20-26(a) is admissible as prima facie evidence of any prior convictions of a defendant under G.S. 20-138 and 20-139."

## ARTICLE 4.

### *Other Writings in Evidence.*

## § 8-40. Proof of handwriting by comparison.

### CASE NOTES

#### **Judge Must Make Preliminary Determinations before Submission to Jury.** —

Before handwritings can be submitted to the jury for its comparison, the trial judge must satisfy himself that one of the handwritings is genuine. The trial judge must also be satisfied that there is enough similarity between the genuine handwriting and the disputed handwriting that the jury could reasonably infer that the disputed handwriting is also genuine. Both of these preliminary determinations by the trial judge are questions of law fully reviewable on appeal. *State v. LeDuc*, 306 N.C. 62, 291 S.E.2d 607 (1982).

**Section does not mandate that writings be submitted only with evidence of wit-**

nesses; it merely states that writings and testimony may be submitted to the trier of fact as evidence of the authenticity of a contested document. *State v. LeDuc*, 306 N.C. 62, 291 S.E.2d 607 (1982).

#### **Comparison May Be Made Without Aid of Lay or Expert Testimony.** —

At trial the fact-finder may compare a known sample of a person's handwriting with handwriting on a contested document and thereby determine whether the handwriting is the same on both without the aid of competent lay or expert testimony. *State v. LeDuc*, 306 N.C. 62, 291 S.E.2d 607 (1982).

**Cited in** *State v. Daniels*, 51 N.C. App. 294, 276 S.E.2d 738 (1981).

## § 8-40.1. Statements in published treatises, periodicals, or pamphlets.

#### **Legal Periodicals.** —

For article recommending the adoption of an evidence code in this State based upon the Federal Rules of Evidence and pointing out

some problems with piecemeal changes in the North Carolina law of evidence, see 13 N.C. Cent. L.J. 1 (1981).

### CASE NOTES

**Applied in** *Gunther v. Blue Cross/Blue Shield*, 58 N.C. App. 341, 293 S.E.2d 597 (1982).

## § 8-44.1. Hospital medical records.

Copies or originals of hospital medical records shall not be held inadmissible in any court action or proceeding on the grounds that they lack certification, identification, or authentication, and shall be received as evidence if otherwise admissible, in any court or quasi-judicial proceeding, if they have been tendered to the presiding judge or designee by the custodian of the records, in accordance with G.S. 1A-1, Rule 45(c), or if they are certified, identified, and authenticated by the live testimony of the custodian of such records.



Hospital medical records are defined for purposes of this section and G.S. 1A-1, Rule 45(c) as records made in connection with the diagnosis, care and treatment of any patient or the charges for such services except that records covered by G.S. 122-8.1, G.S. 90-109.1 and federal statutory or regulatory provisions regarding alcohol and drug abuse, are subject to the requirements of said statutes. (1973, c. 1332, s. 1; 1983, c. 665, s. 2.)

**Effect of Amendments.** — The 1983 amendment, effective July 1, 1983, rewrote this section.

## § 8-45. Itemized and verified accounts.

### CASE NOTES

**Unverified Statements of Account Admissible as Business Records.** — In an action to recover for labor and materials supplied by plaintiff in repairing defendant's truck, plaintiff's exhibit which consisted of itemized statements of account for materials supplied and labor performed by plaintiff upon defendant's truck was not admissible pursuant

to this section because it was not verified; however, the exhibit was admissible under the business records exception to the hearsay rule where there was testimony that the exhibit properly reflected the work done by plaintiff's shop foreman and charges made pursuant to the work he performed. *Bond Park Truck Serv. v. Hill*, 53 N.C. App. 443, 281 S.E.2d 61 (1981).

### ARTICLE 4A.

#### *Photographic Copies of Business and Public Records.*

## § 8-45.1. Photographic reproductions admissible; destruction of originals.

### CASE NOTES

**Photocopies are admissible as originals.** *Pinner v. Southern Bell Tel. & Tel. Co.*, — N.C. App. —, 298 S.E.2d 749 (1983).

**Business records are admissible as an exception to the hearsay rule when they** (1) are made in the regular course of business, at or near the time of the events recorded; (2) are

original entries; (3) are based on the personal knowledge of the individual making the entries; and (4) are authenticated by a witness familiar with the system by which they were made. *Pinner v. Southern Bell Tel. & Tel. Co.*, — N.C. App. —, 298 S.E.2d 749 (1983).

### ARTICLE 5.

#### *Life Tables.*

## § 8-46. Mortuary tables as evidence.

### CASE NOTES

**Where testimony tended to show that plaintiff's injuries were permanent, etc.** —

Before evidence of life expectancy under this section can be introduced, there must be evi-

dence to a reasonable certainty of permanent injury. *Mitchem v. Sims*, 55 N.C. App. 459, 285 S.E.2d 839 (1982).

## ARTICLE 7.

### *Competency of Witnesses.*

#### § 8-49. Witness not excluded by interest or crime.

**Legal Periodicals.** — For a note on spousal testimony in criminal proceedings, see 17 *Wake Forest L. Rev.* 990 (1981).

#### CASE NOTES

Cited in *In re Farmer*, — N.C. App. —, 299 S.E.2d 262 (1983).

#### § 8-50. Parties competent as witnesses.

#### CASE NOTES

Cited in *In re Farmer*, — N.C. App. —, 299 S.E.2d 262 (1983).

#### § 8-50.1. Competency of blood tests; jury charge; taxing of expenses as costs.

**Legal Periodicals.** —  
For note discussing an indigent's right to a

blood test in a paternity suit, see 4 *Campbell L. Rev.* 169 (1981).

#### CASE NOTES

**Personal Performance of Test by Witness Not Required.** — This section allows testimony of paternity test results without requiring personal performance of the test. *State v. Green*, 55 N.C. App. 255, 284 S.E.2d 688 (1981), appeal dismissed, 305 N.C. 304, 291 S.E.2d 152 (1982).

**Indigent defendant's right to a free blood-grouping test may be rendered meaningless without counsel** to advise him of his right to demand such a test, to explain the test's significance, to ensure that the test is properly administered and to ensure that the results are properly admitted into evidence. *Wake County ex rel. Carrington v. Townes*, 53 N.C. App. 649, 281 S.E.2d 765 (1981), modified,

306 N.C. 333, 293 S.E.2d 95 (1982), cert. denied, — U.S. —, 103 S. Ct. 745, 74 L. Ed. 2d 965 (1983).

**Effect Where Principle of Res Judicata, etc.** —

Before a court is required to order a blood-grouping test in a civil action, the question of paternity must arise. If a defendant is barred by res judicata or estoppel from raising the issue of paternity, the statutorily imposed obligation of the court to order that the parties submit to blood-grouping tests never arises, and it is error for the court to enter such order. *Withrow v. Webb*, 53 N.C. App. 67, 280 S.E.2d 22 (1981).



**Cited in** Wake County ex rel. Carrington v. Davie County Dep't of Social Servs. v. Jones, — Townes, 306 N.C. 333, 293 S.E.2d 95 (1982); N.C. App. —, 301 S.E.2d 926 (1983).

## § 8-50.2. Results of speed-measuring instruments; admissibility.

(c) All radio microwave and other electronic speed-measuring instruments shall be tested for accuracy by a technician possessing at least a second-class or general radiotelephone license from the Federal Communications Commission within a period of six months prior to the alleged violation. A written certificate by such technician showing that the test was made within the required period and that the instrument was accurate shall be competent and prima facie evidence of those facts in any proceeding referred to in subsection (a) of this section.

(1979, 2nd Sess., c. 1184, s. 3; 1983, c. 34.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1983 amend-

ment, effective February 24, 1983, inserted "or general" preceding "radiotelephone license" in the first sentence of subsection (c).

## § 8-51. A party to a transaction excluded, when the other party is dead.

### **Legal Periodicals.** —

For article recommending the adoption of an evidence code in this State based upon the Federal Rules of Evidence and the abolition of the Dead Man's Act, see 13 N.C. Cent. L.J. 1 (1981).

For a note on spousal testimony in criminal proceedings, see 17 Wake Forest L. Rev. 990 (1981).

## CASE NOTES

### I. GENERAL CONSIDERATION.

#### **Purpose of Section.** —

In accord with 4th paragraph in original. See Burns v. McElroy, 57 N.C. App. 299, 291 S.E.2d 278 (1982).

#### **When Testimony Is Incompetent, etc.** —

In accord with 1st paragraph in original. See Davis v. Flynn, 57 N.C. App. 575, 291 S.E.2d 818 (1982).

**Quoted in** Wachovia Bank & Trust Co. v. Rubish, 306 N.C. 417, 293 S.E.2d 749 (1982).

**Cited in** Cash v. Craver, — N.C. App. —, 302 S.E.2d 819 (1983).

### III. WHEN THE DISQUALIFICATION EXISTS.

#### B. Testimony Not Disqualified.

**Testimony in Behalf of Spouse.** — Where husband and wife each testified regarding services rendered the decedent by the other and neither plaintiff testified in his own behalf or interest, this section was inapplicable. Davis v. Flynn, 57 N.C. App. 575, 291 S.E.2d 818 (1982).

### IV. SUBJECT MATTER OF THE TRANSACTION.

#### B. Particular Transactions.

##### **Personal Services.** —

The performance of services for the deceased by a witness is a personal transaction. A claimant is incompetent under this section to testify as to the value of personal services rendered by him to a decedent. Davis v. Flynn, 57 N.C. App. 575, 291 S.E.2d 818 (1982).

### V. EXCEPTIONS.

**Purpose of Exception.** — The exception to the prohibition of the survivor's testimony when "the executor . . . is examined in his own behalf" is designed to prevent the estate from using this section as both a shield and a sword. Burns v. McElroy, 57 N.C. App. 299, 291 S.E.2d 278 (1982).

**An exception to this section is noted in actions to set aside a purported will on grounds which include the lack of mental capacity.** In re Bethune, — N.C. App. —, 299 S.E.2d 259 (1983).



**Examination under the discovery statutes is a waiver** of the protection afforded by this section to the extent that either party may use it upon the trial. A waiver at one stage of the trial continues throughout the proceedings. *Wilkie v. Wilkie*, 58 N.C. App. 624, 294 S.E.2d 230, cert. denied, 306 N.C. 752, 295 S.E.2d 764 (1982).

**Cross-Examination May Remove Incompetence.** — The incompetence of the adverse party to testify may be removed by his being cross-examined as to the transaction in question by the personal representative of the deceased. *Davis v. Flynn*, 57 N.C. App. 575, 291 S.E.2d 818 (1982).

**Exception for Similar Evidence, etc.** —

Waiver of an exception to incompetent evidence under this section occurs when the objecting party first succeeds in eliciting the incompetent evidence. *Wilkie v. Wilkie*, 58 N.C. App. 624, 294 S.E.2d 230, cert. denied, 306 N.C. 752, 295 S.E.2d 764 (1982).

Counsel of personal representative of decedent by cross-examining plaintiff as to services rendered and the value thereof, "opened the door" for her to testify regarding her expectation of being compensated, as her testimony on both cross and redirect examination involved

the same transaction, i.e., personal services performed for decedent. *Davis v. Flynn*, 57 N.C. App. 575, 291 S.E.2d 818 (1982).

**Executor Must Be Voluntary Witness.** — The door is opened to the survivor's testimony under the exception in this section only when the executor is a voluntary witness testifying in his own behalf, and not when he is forced upon the witness stand to testify against his interest. *Burns v. McElroy*, 57 N.C. App. 299, 291 S.E.2d 278 (1982).

**A party cannot remove his own incompetency by calling the administrator** as a witness and examining him concerning the transaction in controversy. *Burns v. McElroy*, 57 N.C. App. 299, 291 S.E.2d 278 (1982).

**Responsive Averment Not Sufficient to Open Door to Plaintiff's Testimony.** — Where plaintiff's allegations in her complaint against defendant executor put the defendant in a situation in which he had to aver something as required by § 1A-1, Rule 8(b), such a responsive averment did not suffice to "open the door" for testimony of the plaintiff which otherwise would be excluded under this section. *Burns v. McElroy*, 57 N.C. App. 299, 291 S.E.2d 278 (1982).

## § 8-51.1. Dying declarations.

### CASE NOTES

**It is not necessary for the declarant to state, etc.** —

In accord with original. See *State v. Richardson*, — N.C. —, 302 S.E.2d 799 (1983).

The party seeking admission of the out-of-court statement need not show that the declarant stated he had given up all hope of living or considered himself to be in the throes of death. All that must be shown is that the declarant believes he is going to die. This belief is best shown by his express communication to

this effect. However, it is not necessary that declarant personally express his belief that he has no chance of recovery. This may be shown by the circumstances. *State v. Hamlette*, 302 N.C. 490, 276 S.E.2d 338 (1981).

**The admissibility of a declaration, etc.** —

In accord with 2nd paragraph of original. See *State v. Richardson*, — N.C. —, 302 S.E.2d 799 (1983).

**Applied** in *State v. Richardson*, 59 N.C. App. 558, 297 S.E.2d 921 (1982).

## § 8-53. Communications between physician and patient.

No person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon, and no such information shall be considered public records under G.S. 132-1. Confidential information obtained in medical records shall be furnished only on the authorization of the patient, or if deceased, the executor, administrator, or, in the case of unadministered estates, the next of kin. Any resident or presiding judge in the district, either at the trial or prior thereto, or the Industrial Commission pursuant to law may, subject to G.S. 8-53.6, compel disclosure if in his opinion disclosure is necessary to a proper administration



of justice. If the case is in district court the judge shall be a district court judge, and if the case is in superior court the judge shall be a superior court judge. (1885, c. 159; Rev., s. 1621; C.S., s. 1798; 1969, c. 914; 1977, c. 1118; 1983, c. 410, ss. 1, 2; c. 471.)

**Effect of Amendments.** — The first 1983 amendment, effective Oct. 1, 1983, deleted "provided, that the court, either at the trial or prior thereto, or the Industrial Commission pursuant to law may compel such disclosure, if in his opinion the same is necessary to a proper administration of justice" at the end of the second sentence, and added the last two sentences.

The second 1983 amendment, effective June 8, 1983, inserted "and no such information shall be considered public records under G.S. 132-1" at the end of the first sentence.

**Legal Periodicals.** —

For article discussing the psychotherapist-patient privilege, see 60 N.C.L. Rev. 893 (1982).

## CASE NOTES

### II. NATURE AND SCOPE OF PRIVILEGE.

**Examination as to Criminal Defendant's Competence.** — No physician-patient privilege is created between a physician and a criminal defendant examined by the physician for the purpose of passing on defendant's ability to proceed to trial. *State v. Taylor*, 304 N.C. 249, 283 S.E.2d 761 (1981).

A psychiatrist appointed by the court for a sanity examination of the defendant is a witness for the court, not the prosecution, and the statements made by the defendant to the psychiatrist are not privileged under the doctor-patient relationship. *State v. Taylor*, 304 N.C. 249, 283 S.E.2d 761 (1981).

**Optometrists Not Covered by Privilege.** — The physician-patient privilege against disclosure of confidential communications and information does not extend to optometrists. *State v. Shaw*, 305 N.C. 327, 289 S.E.2d 325 (1982).

### IV. COMPELLED DISCLOSURE.

#### **Trial Judge May Compel Disclosure.** —

The procedural aspects of the statutory physician-patient privilege, established in this sec-

tion, are qualified. It is within the discretion of the trial judge alone to compel a physician called as a witness to testify for the proper administration of justice as to matters within the physician-patient relationship. *Carter v. Colonial Life & Accident Ins. Co.*, 52 N.C. App. 520, 278 S.E.2d 893, cert. denied, 304 N.C. 193, 285 S.E.2d 96 (1981).

This section creates only a limited physician-patient privilege, because a trial judge may compel disclosure and deny defendant the benefit of the privilege if this is necessary for the proper administration of justice. *State v. Taylor*, 304 N.C. 249, 283 S.E.2d 761 (1981).

**But Appellate Court Cannot Exercise Trial Judge's Authority.** — In order to protect the privilege from abusive treatment by those not directly involved in a case, it is important that only the trial judge, either at trial or prior to trial, be the one to order disclosure by a physician of privileged information. Only the actual trial judge is so involved in the case as to be able adequately to protect the rights of a party who asserts his privilege. *Carter v. Colonial Life & Accident Ins. Co.*, 52 N.C. App. 520, 278 S.E.2d 893, cert. denied, 304 N.C. 193, 285 S.E.2d 96 (1981).

## § 8-53.2. Communications between clergymen and communicants.

### CASE NOTES

**Cited in *Spencer v. Spencer*, — N.C. App. —, 301 S.E.2d 411 (1983).**



### § 8-53.3. Communications between psychologist and client.

No person, duly authorized as a practicing psychologist or psychological examiner, nor any of his employees or associates, shall be required to disclose any information which he may have acquired in rendering professional psychological services, and which information was necessary to enable him to render professional psychological services. Any resident or presiding judge in the district in which the action is pending may, subject to G.S. 8-53.6, compel disclosure, either at the trial or prior thereto, if in his opinion disclosure is necessary to a proper administration of justice. If the case is in district court the judge shall be a district court judge, and if the case is in superior court the judge shall be a superior court judge. (1967, c. 910, s. 18; 1983, c. 410, ss. 3, 7.)

**Effect of Amendments.** — The 1983 amendment, effective Oct. 1, 1983, deleted "Provided, that the presiding judge of a superior court may compel such disclosure, if in his opinion the same is necessary to a proper administration of justice" at the end of the first sentence and

added the last two sentences.

#### **Legal Periodicals.** —

For article discussing the psychotherapist-patient privilege, see 60 N.C.L. Rev. 893 (1982).

### § 8-53.4. School counselor privilege.

No person certified by the State Department of Public Instruction as a school counselor and duly appointed or designated as such by the governing body of a public school system within this State or by the head of any private school within this State shall be competent to testify in any action, suit, or proceeding concerning any information acquired in rendering counseling services to any student enrolled in such public school system or private school, and which information was necessary to enable him to render counseling services; provided, however, that this section shall not apply where the student in open court waives the privilege conferred. Any resident or presiding judge in the district in which the action is pending may compel disclosure, either at the trial or prior thereto, if in his opinion disclosure is necessary to a proper administration of justice. If the case is in district court the judge shall be the district court judge, and if the case is in superior court the judge shall be a superior court judge. (1971, c. 943; 1983, c. 410, ss. 4, 5.)

**Effect of Amendments.** — The 1983 amendment, effective Oct. 1, 1983, deleted "provided further that the presiding judge may compel such disclosure, if in his opinion the same is

necessary to a proper administration of justice" at the end of the first sentence and added the last two sentences.

### § 8-53.5. Communications between marital and family therapist and client(s).

No person, duly authorized as a certified marital and family therapist, nor any of his employees or associates, shall be required to disclose any information which he may have acquired in rendering professional marital and family therapy services, and which information was necessary to enable him to render professional marital and family therapy services. Any resident or presiding judge in the district in which the action is pending may, subject to G.S. 8-53.6, compel disclosure, either at the trial or prior thereto, if in his opinion disclosure is necessary to a proper administration of justice. If the case is in district court the judge shall be a district court judge, and if the case is in superior court the judge shall be a superior court judge. (1979, c. 697, s. 2; 1983, c. 410, ss. 6, 7.)



**Effect of Amendments.** — The 1983 amendment, effective Oct. 1, 1983, deleted "provided, that the presiding judge of a superior court may compel such disclosure, if in his opinion the

same is necessary to a proper administration of justice" at the end of the first sentence and added the last two sentences.

### § 8-53.6. No disclosure in alimony and divorce actions.

In an action pursuant to G.S. 50-5, 50-6, 50-7, 50-16.2 and 50-16.3 if either or both of the parties have sought and obtained marital counseling by a licensed physician, licensed psychologist, or certified marital family therapist, the person or persons rendering such counseling shall not be competent to testify in the action concerning information acquired while rendering such counseling. (1983, c. 410, s. 8.)

**Editor's Note.** — Session Laws 1983, c. 410, s. 9, makes this section effective Oct. 1, 1983.

### § 8-53.7. Social worker privilege.

No person engaged in delivery of private social work services, duly certified pursuant to Chapter 90B of the General Statutes shall be required to disclose any information which he or she may have acquired in rendering professional social services, and which information was necessary to enable him or her to render professional social services: provided, that the presiding judge of a superior or district court may compel such disclosure, if in the court's opinion the same is necessary to a proper administration of justice and such disclosure is not prohibited by other statute or regulation. (1983, c. 495, s. 2.)

**Editor's Note.** — Session Laws 1983, c. 495, which enacted Chapter 90B, the Social Worker Certification Act, as well as this section, provides in s. 4, that for the purposes of the appointment of the initial North Carolina Certification Board for Social Work, and of administrative preparation for the implementation of

Chapter 90B, the act becomes effective July 1, 1983, and that for all other purposes, the act shall become effective Jan. 1, 1984.

Section 3 of the act provides: "Nothing herein contained shall be construed to obligate the General Assembly to make any appropriation to implement the provisions of this act."

### § 8-53.8. Counselor privilege.

No person, duly registered pursuant to Chapter 90, Article 24, of the General Statutes, shall be required to disclose any information which he or she may have acquired in rendering professional counseling services, and which information was necessary to enable him or her to render professional counseling services: Provided, that the presiding judge of a superior or district court may compel such disclosure, if in the court's opinion the same is necessary to a proper administration of justice and such disclosure is not prohibited by other statute or regulation. (1983, c. 755, s. 2.)

**Editor's Note.** — Session Laws 1983, c. 755, s. 3, provides: "Nothing herein contained shall be construed to obligate the General Assembly to make any appropriation to implement the provisions of this act."

Session Laws 1983, c. 755, s. 4, provides: "For

the purposes of the appointment of the initial Board and of administrative preparation for implementation of this Article, this act shall become effective July 1, 1983. For all other purposes, this act shall become effective January 1, 1984."



## § 8-54. Defendant in criminal action competent but not compellable to testify.

### Legal Periodicals. —

For comment on impeaching a criminal

defendant by prior acquittals, see 17 Wake Forest L. Rev. 561 (1981).

### CASE NOTES

#### I. GENERAL CONSIDERATION.

**Court's Comment Not Improper.** — Trial court in a prosecution for armed robbery did not improperly comment on defendant's failure to testify when defense counsel stated he was going to introduce defendant into evidence and the court replied, "He'll have to take the witness stand," since the court's remark merely explained evidentiary procedure. *State v. Hughes*, 54 N.C. App. 117, 282 S.E.2d 504 (1981).

**Error in Sustaining Objections Held Waived.** — In a prosecution for first-degree murder, where defendant contended that the trial court erred in sustaining the State's objections to several of his attempts to explain his answers, thereby violating his right to testify in his own behalf pursuant to this section, any error by the trial court in sustaining the State's objections was cured when the evidence sought to be admitted was subsequently admitted without objection. *State v. Rinck*, 303 N.C. 551, 280 S.E.2d 912 (1981).

**Applied in** *State v. Joseph*, 59 N.C. App. 436, 297 S.E.2d 173 (1982).

#### III. CROSS-EXAMINATION OF DEFENDANT.

##### B. Particular Areas of Inquiry.

##### And Specific Acts of Misconduct. —

When a defendant becomes a witness and testifies in his own behalf, he is subject to cross-examination like any other witness, and, for purposes of impeachment, he may be cross-examined by the district attorney concerning any specific acts of misconduct which tend to impeach his character. *State v. Galloway*, 304 N.C. 485, 284 S.E.2d 509 (1981).

#### IV. DEFENDANT NOT TESTIFYING.

##### A. Effect.

This section unquestionably prohibits

any comment before the jury concerning defendant's failure to testify. *State v. Hughes*, 54 N.C. App. 117, 282 S.E.2d 504 (1981).

#### IV. DEFENDANT NOT TESTIFYING.

##### B. Fact Commented on by Prosecution.

##### Same — How Far Subject to Comment. —

In accord with 4th paragraph in original. See *State v. Boone*, 307 N.C. 198, 297 S.E.2d 585 (1982).

##### C. Instructions to Jury.

##### 2. Necessity of Request.

##### Instruction Discretionary, etc. —

Under this section the trial judge is not required to instruct the jury that a defendant's failure to testify creates no presumption against him unless defendant requests the instruction. In fact, it is better not to give such an instruction unless defendant requests it. *State v. Chambers*, 52 N.C. App. 713, 280 S.E.2d 175 (1981).

##### 3. Proper.

##### Proper Instruction. —

It is not always prejudicial error to give an unrequested instruction regarding defendant's failure to testify or present evidence. There is no prejudicial error if the instruction makes clear to the jury that the defendant has the right to offer or to refrain from offering evidence as he sees fit and that his failure to testify should not be considered by the jury as basis for any inference adverse to him. *State v. Chambers*, 52 N.C. App. 713, 280 S.E.2d 175 (1981).

## § 8-56. Husband and wife as witnesses in civil action.

### Legal Periodicals. —

For a note on spousal testimony in criminal proceedings, see 17 Wake Forest L. Rev. 990 (1981).

For a comment on adverse marital testimony

in criminal actions after the modification of the common-law rule by *State v. Freeman*, 302 N.C. 591, 276 S.E.2d 450 (1981), see 60 N.C.L. Rev. 874 (1982).



## CASE NOTES

## I. GENERAL CONSIDERATION.

**Nonwitness spouse holds the privilege** and may prevent the witness spouse from testifying about confidential communications. *Scott v. Kiker*, 59 N.C. App. 458, 297 S.E.2d 142 (1982).

## II. AS WITNESS IN PARTICULAR ACTIONS.

## A. Proceeding in Consequence of Adultery.

**Neither Husband Nor Wife May Testify in Action or Proceeding in Consequence of Adultery.** —

In accord with bound volume. See *Spencer v. Spencer*, — N.C. App. —, 301 S.E.2d 411 (1983).

**Where plaintiff's ex-wife was not a party to the action**, nothing prohibited plaintiff from testifying about her adultery. *Scott v. Kiker*, 59 N.C. App. 458, 297 S.E.2d 142 (1982).

**Testimony by spouse concerning his or her relationship with another party has been held admissible** in cases in which there is no clear implication of intercourse. *Spencer v. Spencer*, — N.C. App. —, 301 S.E.2d 411 (1983).

In an action for alimony without divorce, a wife's testimony that her husband spent a great deal of time with another woman was admissi-

ble for proving indignities rendering the wife's condition intolerable and life burdensome. *Spencer v. Spencer*, — N.C. App. —, 301 S.E.2d 411 (1983).

Testimony by the offended party of his or her spouse's adulterous activities may be admissible to prove indignities in some cases, as when an adulterous wife boasts of her extramarital affairs to taunt the cuckold with his trusting ignorance of her deceit. In such a situation, the very manner of the revelation itself could rise to the level of an indignity, rendering the wronged party's condition intolerable and his life burdensome. *Spencer v. Spencer*, — N.C. App. —, 301 S.E.2d 411 (1983).

## III. CONFIDENTIAL COMMUNICATIONS.

## B. Unprotected.

**Transactions between Spouse and Ward.**

— Where testimony did not relate to confidential communications between the witness and her husband during their marriage, but to the relationship and transactions between the witness and the ward and between defendant and the ward, there was no error in admitting it. *Ashley v. Delp*, 59 N.C. App. 608, 297 S.E.2d 905 (1982).

## § 8-57. Husband and wife as witnesses in criminal actions.

(a) The spouse of the defendant shall be a competent witness for the defendant in all criminal actions, but the failure of the defendant to call such spouse as a witness shall not be used against him. Such spouse is subject to cross-examination as are other witnesses.

(b) The spouse of the defendant shall be competent but not compellable to testify for the State against the defendant, except that the spouse of the defendant shall be both competent and compellable to so testify:

- (1) In a prosecution for bigamy or criminal cohabitation, to prove the fact of marriage and facts tending to show the absence of divorce or annulment;
- (2) In a prosecution for assaulting or communicating a threat to the other spouse;
- (3) In a prosecution for trespass in or upon the separate lands or residence of the other spouse when living separate and apart from each other by mutual consent or court order;
- (4) In a prosecution for abandonment of or failure to provide support for the other spouse or their child;
- (5) In a prosecution of one spouse for any other criminal offense against the minor child of either spouse, including any illegitimate or adopted or foster child of either spouse.

(c) No husband or wife shall be compellable in any event to disclose any confidential communication made by one to the other during their marriage. (1856-7, c. 23; 1866, c. 43; 1868-9, c. 209; 1881, c. 110; Code, ss. 588, 1353, 1354; Rev., ss. 1634, 1635, 1636; C.S., s. 1802; 1933, c. 13, s. 1; c. 361; 1951, c. 296; 1957, c. 1036; 1967, c. 116; 1971, c. 800; 1973, c. 1286, s. 11; 1983, c. 170, s. 1.)



**Editor's Note.** — Session Laws 1983, c. 170, s. 2, provides: "This act shall become effective October 1, 1983, and shall apply to all criminal prosecutions instituted after that date."

**Effect of Amendments.** — The 1983 amendment, effective Oct. 1, 1983, rewrote this section.

**Legal Periodicals.** —

For article recommending adoption of a broader privilege for spouses who do not want to

testify against their husbands or wives in criminal cases, see 13 N.C. Cent. L.J. 1 (1981).

For a note on spousal testimony in criminal proceedings, see 17 Wake Forest L. Rev. 990 (1981).

For a comment on adverse marital testimony in criminal actions after the modification of the common-law rule by *State v. Freeman*, 302 N.C. 591, 276 S.E.2d 450 (1981), see 60 N.C.L. Rev. 874 (1982).

## CASE NOTES

### I. GENERAL CONSIDERATION.

#### A. Spouse Incompetent to Testify.

##### **Relationship of Section to Common Law.** —

This section is a codification of a common-law rule of evidence and, as such, is subject to the same exceptions which pertain to the common-law rule. One of the exceptions is that, when one spouse is made the agent of the other spouse, the statements of the agent are admissible against the principal despite the spousal relationship. *State v. Overton*, — N.C. App. —, 298 S.E.2d 695 (1982).

**Common-Law Rule Modified.** — The common-law rule prohibiting one spouse from testifying against another in a criminal action is modified so as to prohibit such testimony only if the substance of the testimony concerns a "confidential communication" between the marriage partners made during the duration of their marriage. *State v. Freeman*, 302 N.C. 591, 276 S.E.2d 450 (1981).

In effect, this section left intact the common-law rule that a spouse is incompetent to testify against the other spouse in a criminal case. However, the common-law rule was modified so that spouses are now incompetent to testify against one another in a criminal proceeding only if the substance of the testimony concerns a confidential communication. *State v. Waters*, — N.C. —, 302 S.E.2d 188 (1983).

A wife's testimony that her husband shot and killed her brother in her presence in a public place was competent in a prosecution of the husband for first-degree murder of her brother, since the actions of the husband in a public place and in the presence of a third person could not have been a communication made in the confidence of the marital relationship or one which was induced by affection and loyalty in the marriage. *State v. Freeman*, 302 N.C. 591, 276 S.E.2d 450 (1981).

##### **Relationship of Section to Common Law.**

— This section does not codify the common-law rule prohibiting one spouse from testifying against the other in a criminal action but merely provides that, aside from the exceptions listed therein, the common-law rule remains unchanged and in full effect, and the Supreme Court possesses the authority to alter such judicially created common-law rule. *State v. Freeman*, 302 N.C. 591, 276 S.E.2d 450 (1981).

##### **Effect of Section.** —

This section prohibits the admission of evidence of statements made by one spouse implicating the other. *State v. Overton*, 60 N.C. App. 1, 298 S.E.2d 695 (1982).

**Criminal Cases.** — Although this section makes a spouse competent to testify as a witness for the defense, it does not make a spouse competent to testify in a criminal case for the State. *State v. Waters*, — N.C. —, 302 S.E.2d 188 (1983).

### IV. CONFIDENTIAL COMMUNICATIONS.

**When Communication Confidential.** — In determining whether a spouse's testimony includes a "confidential communication," the question is whether the communication, whatever it contains, was induced by the marital relationship and prompted by the affection, confidence, and loyalty engendered by such relationship. *State v. Freeman*, 302 N.C. 591, 276 S.E.2d 450 (1981).

**Testimony of Wife Who Witnessed Killing by Husband.** — This section does not render the testimony invalid of a wife who witnessed the killing by her husband of a passenger in the car she was driving as such testimony does not fit the definition of a "confidential communication" between marriage partners. *State v. Funderburk*, 56 N.C. App. 119, 286 S.E.2d 884 (1982).



## § 8-57.1. Husband-wife privilege waived in child abuse.

### Legal Periodicals. —

For a note on spousal testimony in criminal

proceedings, see 17 Wake Forest L. Rev. 990 (1981).

## § 8-57.2. Presumed father or mother as witnesses where paternity at issue.

**Legal Periodicals.** — For survey of 1981 law on evidence, see 60 N.C.L. Rev. 1359 (1982).

For a note on spousal testimony in criminal

proceedings, see 17 Wake Forest L. Rev. 990 (1981).

### CASE NOTES

**Rule rendering wife incompetent to prove nonaccess has now been abrogated** entirely in all civil and criminal proceedings in which paternity is at issue. *Carpenter v. Hawley*, 53 N.C. App. 715, 281 S.E.2d 783, cert.

denied and appeal dismissed, 304 N.E. 587, 289 S.E.2d 564 (1981).

**Cited in** *Wake County ex rel. Manning v. Green*, 53 N.C. App. 26, 279 S.E.2d 901 (1981).

## § 8-58.1. Injured party as witness when medical charges at issue.

Whenever an issue of hospital, medical, dental, pharmaceutical, or funeral charges arises in any civil proceeding, the injured party or his guardian, administrator, or executor is competent to give evidence regarding the amount of such charges, provided that records or copies of such charges accompany such testimony. The testimony of such a person establishes a rebuttable presumption of the reasonableness of the amount of the charges. (1983, c. 776, s. 1.)

**Editor's Note.** — Session Laws 1983, c. 776, s. 2, provides that this section shall become

effective Oct. 1, 1983, and shall apply to all civil trials commencing on or after that date.

### ARTICLE 7A.

#### *Restrictions on Evidence in Rape Cases.*

## § 8-58.6. Restrictions on evidence in rape or sex offenses cases.

### Legal Periodicals. —

For survey of 1980 law on evidence, see 59 N.C.L. Rev. 1173 (1981).

For note discussing the constitutionality of North Carolina's Rape-Shield Law, see 17 Wake Forest L. Rev. 781 (1981).

### CASE NOTES

**Separate Classification of Rape Victims as Witnesses Has Reasonable Basis.** — The Legislature had a reasonable basis for placing rape victims into a class of witnesses different from other witnesses, to-wit, to avoid undue prejudice in the minds of the jury which is

caused by questions concerning irrelevant sexual conduct. There is no violation of one's right to equal protection under the law when a discrepancy in treatment exists between classifications. *State v. Waters*, — N.C. —, 302 S.E.2d 188 (1983).



**Codification of Rule of Relevance. —**

Naked inferences of prior sexual activity by a rape victim with third persons, without more, are irrelevant to the defense of consent in a rape trial. This section merely codifies this rule. *State v. Galloway*, 304 N.C. 485, 284 S.E.2d 509 (1981).

In accord with original. See *State v. Baron*, 58 N.C. App. 150, 292 S.E.2d 741 (1982); *State v. Younger*, 306 N.C. 692, 295 S.E.2d 453 (1982); *State v. Wilhite*, 58 N.C. App. 654, 294 S.E.2d 396, cert. denied and appeal dismissed, 307 N.C. 129, 297 S.E.2d 403 (1982).

**Intent. —** The Legislature intended to exclude the actual sexual history of the complainant, not prior accusations of the complainant. *State v. Baron*, 58 N.C. App. 150, 292 S.E.2d 741 (1982).

This section clearly was not designed to preclude the admission of all evidence relating to sex. *State v. Baron*, 58 N.C. App. 150, 292 S.E.2d 741 (1982).

**Purpose. —** In order to avoid prejudice and insure that the effects of antiquated beliefs as to the probative value of the prosecuting witness's general reputation for unchastity would not linger, the legislature passed this section which set out in clear language four categories in which evidence of the sexual behavior of the prosecutrix may be brought out at trial. *State v. Younger*, 306 N.C. 692, 295 S.E.2d 453 (1982).

**Policy. —** It is the policy of this State to prevent unnecessary intrusions into the privacy of victims of sex crimes which are irrelevant to the prosecution of an individual charged with such crimes. *State v. Clontz*, 305 N.C. 116, 286 S.E.2d 793 (1982).

**Section does not transcend the bounds of relevance but only clarifies its use.** It stands for the realization that prior sexual conduct by a witness, absent some factor which ties it to the specific act which is the subject of the trial, is irrelevant due to its low probative value and high prejudicial effect. *State v. Younger*, 306 N.C. 692, 295 S.E.2d 453 (1982).

**Previous Sexual Behavior Not Per Se Relevant. —** This section cast aside the idea that any previous sexual behavior of a rape victim is per se relevant to a rape proceeding. *State v. Younger*, 306 N.C. 692, 295 S.E.2d 453 (1982).

**Applicability Generally. —** Except when the exceptions are applicable, this section declares as irrelevant the sexual history of rape victims; it does not exclude otherwise admissible evidence. *State v. Baron*, 58 N.C. App. 150, 292 S.E.2d 741 (1982).

The rape victim shield statute does not exclude evidence that is otherwise admissible. *State v. Wilhite*, 58 N.C. App. 654, 294 S.E.2d 396, cert. denied & appeal dismissed, 307 N.C. 129, 297 S.E.2d 403 (1982).

This section was not intended to act as a barricade against evidence which is used to prove issues common to all trials. Inconsistent statements are, without a doubt, an issue common to all trials. *State v. Younger*, 306 N.C. 692, 295 S.E.2d 453 (1982).

**Section Inapplicable Absent Any Contention as to Sexual Activity. —** Where there was no contention that complainant ever engaged in sexual activity, there was no need to invoke this section to prevent disclosure of complainant's prior statements accusing others of improper sexual advances. *State v. Baron*, 58 N.C. App. 150, 292 S.E.2d 741 (1982).

**Section Inapplicable to Kidnapping for Purpose of Committing Rape. —** A trial on the charge of kidnapping the prosecuting witness for the purpose of committing the felony of rape is not a trial regarding a sex offense and therefore is not subject to this section. *State v. Wilhite*, 58 N.C. App. 654, 294 S.E.2d 396, cert. denied & appeal dismissed, 307 N.C. 129, 297 S.E.2d 403 (1982).

**And Evidence of Prostitution Admissible as to Kidnapping Charge. —** Evidence of acts of prostitution allegedly committed by the prosecuting witness is clearly relevant to impeach her credibility as to a kidnapping charge. The fact that the evidence of prostitution is inadmissible as to the rape charge would not prevent its admission for purposes of impeaching the prosecuting witness' credibility as to the kidnapping charge. The general rule is that the incompetency of evidence for one purpose will not prevent its admission for other purposes. *State v. Wilhite*, 58 N.C. App. 654, 294 S.E.2d 396, cert. denied and appeal dismissed, 307 N.C. 129, 297 S.E.2d 403 (1982).

**Language or conversation does not constitute sexual behavior.** *State v. Baron*, 58 N.C. App. 150, 292 S.E.2d 741 (1982).

**Evidence that the victim was using birth control pills. —**

In rape prosecution, testimony of prosecuting witness that she told the defendant just prior to sexual intercourse that she was taking birth control pills is not excludable under this section as evidence of sexual activity of the complainant. However, the context and relevancy of such an argument must be developed at the voir dire hearing. *State v. Ward*, — N.C. App. —, 300 S.E.2d 855 (1983).

**Section Not Designed to Exclude Evidence of Acts of Prosecuting Witness Bearing on Alleged Offense. —** This statute was designed to protect the witness from unnecessary humiliation and embarrassment while shielding the jury from unwanted prejudice that might result from evidence of sexual conduct which has little relevance to the case and has a low probative value. However, as each of the four categories under subsection (b) of this section so vividly illustrates, the statute



was not designed to shield the prosecuting witness from her own actions which have a direct bearing on the alleged sexual offense. *State v. Younger*, 306 N.C. 692, 295 S.E.2d 453 (1982).

**Such as Her Own Inconsistent Statements.** — The statute was not designed to shield the prosecutrix from the effects of her own inconsistent statements which cast a grave doubt on the credibility of her story. *State v. Younger*, 306 N.C. 692, 295 S.E.2d 453 (1982).

**Evidence of Victim's Untruthfulness.** — This section does not prevent introduction of evidence by a defendant which tends to show untruthfulness on the part of the victim merely because such evidence also tends to reveal past sexual behavior of the victim. *State v. Burns*, 307 N.C. 224, 297 S.E.2d 384 (1982).

**Relevance of Victim's Living Environment.** — Whether the victim lived in an environment of sexual immorality or in a cloistered convent has no relevance to the issues in a case where defendant denies that any act of intercourse or other assault took place. *State v. Wilhite*, 58 N.C. App. 654, 294 S.E.2d 396, cert. denied and appeal dismissed, 307 N.C. 129, 297 S.E.2d 403 (1982).

**Inconsistent Statements as to When Prosecuting Witness Last Had Sex.** — As in most sex offense cases, the prosecuting witness' testimony is crucial to the State's evidence and her credibility as a witness can easily determine the outcome at trial. Therefore, the prosecutrix's prior statement to the examining physician, only hours after the alleged rape, as to when she last had sex, which was inconsistent with her testimony on that point at district court, has a strong probative value, especially since it relates directly to her account of the incident and those events leading up to it. The relevance and probative value of such an inconsistent statement must be weighed against its prejudicial effect. Since such evidence produces a high prejudicial impact upon the jury, the trial court should hold an in-camera hearing in which the court can hear and evaluate the arguments of counsel before making a ruling. *State v. Younger*, 306 N.C. 692, 295 S.E.2d 453 (1982).

**Exceptions Merely Define When Prior**

**Behavior Relevant.** — The exceptions in subdivisions (b)(1) to (4) of this section merely define those times when the prior sexual behavior of the complainant is relevant to issues raised in a rape trial. *State v. Baron*, 58 N.C. App. 150, 292 S.E.2d 741 (1982).

**Subsection (b) Directed at Clearly Relevant Behavior.** — Each category under subsection (b) of this section is directed at those instances where specific prior sexual behavior of the prosecutrix is clearly relevant to the alleged sexual offense at trial. *State v. Younger*, 306 N.C. 692, 295 S.E.2d 453 (1982).

**And Prejudice Is Far Outweighed in Such Instances.** — In each of the four categories under subsection (b) of this section, the relevance and the probative value of such behavior far outweighs any prejudice such conduct might arouse in the minds of the jury. *State v. Younger*, 306 N.C. 692, 295 S.E.2d 453 (1982).

**Homosexuality of Victim.** — Question asked of alleged victim of sexual offense as to whether he was a homosexual was not permissible by virtue of subdivision (b)(2) of this section, as it did not relate to specific "instances of sexual behavior." *State v. Gilley*, 306 N.C. 125, 291 S.E.2d 645 (1982).

**Evidence that the victim was using birth control pills** at the time of the alleged rape was evidence of sexual activity excluded by this section, the probative value of which was outweighed by the prejudicial effect on the victim. *State v. Bridwell*, 56 N.C. App. 572, 289 S.E.2d 842 (1982).

**Psychiatric Examination May Not Be Forced Upon Unwilling Witness.** — A trial judge does not have the discretionary power to compel an unwilling witness to submit to a psychiatric examination. To order the victim of a sex crime to unwillingly submit to a psychiatric examination would result in a profound invasion of her privacy which would deter innocent victims of such crimes from ever making complaints. *State v. Clontz*, 305 N.C. 116, 286 S.E.2d 793 (1982).

**Applied in** *State v. Shoffner*, — N.C. App. —, 302 S.E.2d 830 (1983).

## ARTICLE 7B.

### *Expert Testimony.*

## § 8-58.12. Hypothetical question not required.

**Legal Periodicals.** — For article recommending the adoption of an evidence code in this State based upon the Federal Rules of Evidence and pointing out some problems with

piecemeal changes in the North Carolina law of evidence, see 13 N.C. Cent. L.J. 1 (1981).

For article, "Examination of expert witnesses in North Carolina," see 61 N.C.L. Rev. 2 (1982).



For note discussing expert testimony on bite marks, see 4 Campbell L. Rev. 179 (1981).

### CASE NOTES

**This section allows opinion testimony without hypothetical questions.** *LaGasse v. Gardner*, 60 N.C. App. 165, 298 S.E.2d 393 (1982).

The legislature, by enacting this section, has eliminated the requirement that expert opinion testimony be in response to hypothetical questions. Nevertheless, hypothetical questions may still be used, and in instances where there had been no foundation laid to show that the witness is familiar with the facts pertaining to the case being tried hypothetical questions may yet be required. *Warren v. Canal Indus., Inc.*, — N.C. App. —, 300 S.E.2d 557 (1983).

**Expert opinion must be founded upon expert knowledge.** *Watson v. Storie*, — N.C. App. —, 300 S.E.2d 55 (1983).

**Expert medical evidence is admissible to show the nature and extent of a plaintiff's injuries, the effect of such injuries on the plain-**

tiff's capacity to work or to use his physical powers, and the probable result of future medical or surgical treatment of the plaintiff. *Watson v. Storie*, — N.C. App. —, 300 S.E.2d 55 (1983).

While speculative answers are not approved, a qualified medical expert can testify through appropriate questions as to the type, nature, and extent of medical attention and treatment a person who had received specific injuries could or would have received had he sought medical attention promptly. *Watson v. Storie*, — N.C. App. —, 300 S.E.2d 55 (1983).

**Quoted in** *Simons v. Georgiade*, 55 N.C. App. 483, 286 S.E.2d 596 (1982).

**Cited in** *Owens v. Green Valley Supply Co.*, 56 N.C. App. 561, 289 S.E.2d 591 (1982); *Aarhus v. Wake Forest Univ.*, 57 N.C. App. 405, 291 S.E.2d 837 (1982).

## § 8-58.13. Opinion testimony permitted.

**Legal Periodicals.** — For article recommending the adoption of an evidence code in this State based upon the Federal Rules of Evidence and pointing out some problems with

piecemeal changes in the North Carolina law of evidence, see 13 N.C. Cent. L.J. 1 (1981). For article, "Examination of expert witnesses in North Carolina," see 61 N.C.L. Rev. 2 (1982).

### CASE NOTES

**To be an expert the witness need not be a specialist or have a license from an examining board or have had experience with the exact type of subject matter under investigation, nor need he be engaged in any particular profession or other calling; it is enough that, through study or experience or both, he has acquired such skill that he is better qualified than the jury to form an opinion on the particular subject.** *In re Peirce*, 53 N.C. App. 373, 281 S.E.2d 198 (1981); *Cochran v. City of Charlotte*, 53 N.C. App. 390, 281 S.E.2d 179 (1981).

**Question of whether a witness is sufficiently qualified to be an expert is one of fact ordinarily to be determined at the discretion of the trial judge.** *In re Peirce*, 53 N.C. App. 373, 281 S.E.2d 198 (1981).

**Finding of Requisite Skill Not Reversed Absent Abuse of Discretion.** — Finding by the trial judge that a witness possesses the requisite skill will not be reversed on appeal unless there is no evidence to support it or the judge abuses his discretion. *Cochran v. City of Charlotte*, 53 N.C. App. 390, 281 S.E.2d 179 (1981), cert. denied, 304 N.C. 725, 288 S.E.2d 380 (1982).

**Value of Specific Real Property.** — A witness who has knowledge of value gained from experience, information, and observation, may generally give his opinion of the value of specific real property. *Steel Creek Dev. Corp. v. James*, 58 N.C. App. 506, 294 S.E.2d 23, cert. denied, 306 N.C. 740, 295 S.E.2d 763 (1982).

**Cited in** *Aarhus v. Wake Forest Univ.*, 57 N.C. App. 405, 291 S.E.2d 837 (1982).



## § 8-58.14. Disclosure of facts or data underlying expert opinion.

**Legal Periodicals.** — For article recommending the adoption of an evidence code in this State based upon the Federal Rules of Evidence and pointing out some problems with

piecemeal changes in the North Carolina law of evidence, see 13 N.C. Cent. L.J. 1 (1981).

For article, "Examination of expert witnesses in North Carolina," see 61 N.C.L. Rev. 2 (1982).

### CASE NOTES

**This section provides that** an expert may give his opinion first, without prior disclosure of the underlying facts or data, so long as an adverse party does not require otherwise. This provision appears to assume that at some point during the direct examination the expert will disclose the basis of his opinion. The statute merely provides that the expert need not give the basis first. If, however, the expert does not disclose the basis of his opinion on direct examination he can be required to give the basis on cross-examination. *State v. Allison*, 307 N.C. 411, 298 S.E.2d 365 (1983).

An expert may give his opinion and his reasons therefor without prior disclosure of the underlying facts or data, absent a request from the opposing party. *Warren v. Canal Indus., Inc.*, — N.C. App. —, 300 S.E.2d 557 (1983).

**And essentially deals with the order in which an expert is to give the various parts**

**of his testimony.** It sets out the condition under which an expert is allowed to give his opinion before disclosing the basis upon which that opinion rests. *State v. Allison*, 307 N.C. 411, 298 S.E.2d 365 (1983).

**Physician's opinion need not be based on personal knowledge or observation, but may be based on reliable information** supplied to him by others. *Warren v. Canal Indus., Inc.*, — N.C. App. —, 300 S.E.2d 557 (1983).

**Basis for Psychiatric Opinion.** — In a criminal case where the defendant claims he is not guilty by reason of insanity, it is especially imperative that the jury hear not only the expert's opinion as to the defendant's state of mind, but the basis for the expert's psychiatric opinion as well. *State v. Allison*, 307 N.C. 411, 298 S.E.2d 365 (1983).

## ARTICLE 10.

### *Depositions.*

## § 8-83. When deposition may be read on the trial.

### CASE NOTES

**Insofar as it does not conflict with § 1A-1, Rule 32, this section remains in effect.** *Wright v. American Gen. Life Ins. Co.*, 59 N.C.

App. 591, 297 S.E.2d 910 (1982), cert. denied, — N.C. —, 299 S.E.2d 653 (1983).

## ARTICLE 13.

### *Photographs.*

## § 8-97. Photographs as substantive or illustrative evidence.

**Legal Periodicals.** — For survey of 1981 law on evidence, see 60 N.C.L. Rev. 1359 (1982).

CASE NOTES

Under this section videotapes now may be introduced as substantive evidence upon laying a proper foundation. However, the particular nature of the video portrayal on the tape may place upon the State the burden to meet other applicable evidentiary requirements. *State v. Peoples*, — N.C. App. —, 299 S.E.2d 311 (1983).

A tape recording of a hypnosis session is

not admissible as corroboration of the testimony of a witness stating his present recall of prior incidents. *State v. Peoples*, — N.C. App. —, 299 S.E.2d 311 (1983).

**Stated in** *State v. Woods*, 56 N.C. App. 193, 287 S.E.2d 431 (1982).

**Cited in** *State v. Cabey*, — N.C. —, 299 S.E.2d 194 (1983).

§§ 8-98 to 8-102: Reserved for future codification purposes.

ARTICLE 14.

*Chain of Custody.*

§ 8-103. Courier service and contract carriers.

For purposes of maintaining a chain of custody for any item of evidence, depositing the item with the State courier service operated by the Department of Administration or a common or contract carrier shall be considered the same as depositing such item in first class United States mail. (1983, c. 375, s. 1.)

**Editor's Note.** — Session Laws 1983, c. 375, s. 3, makes this section effective upon ratification. The act was ratified May 23, 1983.



## Chapter 8B.

### Interpreters for Deaf Persons.

#### § 8B-1. Definitions; right to interpreter; determination of competence.

##### CASE NOTES

Cited in *State v. McLellan*, 56 N.C. App. 101, 286 S.E.2d 873 (1982).

## Chapter 8C.

### Evidence Code.

(This Chapter is effective July 1, 1984.)

Sec.

8C-1. Rules of Evidence.

#### Article 1.

##### General Provisions.

Rule

- 101. Scope.
- 102. Purpose and construction.
- 103. Rulings on evidence.
- 104. Preliminary questions.
- 105. Limited admissibility.
- 106. Remainder of or related writings or recorded statements.

#### Article 2.

##### Judicial Notice.

- 201. Judicial notice of adjudicative facts.

#### Article 3.

##### Presumptions in Civil Actions and Proceedings.

- 301. Presumptions in general in civil actions and proceedings.
- 302. Applicability of federal law in civil actions and proceedings.

#### Article 4.

##### Relevancy and Its Limits.

- 401. Definition of "relevant evidence."
- 402. Relevant evidence generally admissible; irrelevant evidence inadmissible.
- 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.
- 404. Character evidence not admissible to prove conduct; exceptions; other crimes.
- 405. Methods of proving character.
- 406. Habit; routine practice.
- 407. Subsequent remedial measures.
- 408. Compromise and offers to compromise.
- 409. Payment of medical and other expenses.
- 410. Inadmissibility of pleas, plea discussions, and related statements.
- 411. Liability insurance.
- 412. Rape or sex offense cases; relevance of victim's past behavior.

#### Article 5.

##### Privileges.

- 501. General rule.

#### Article 6.

##### Witnesses.

Rule

- 601. General rule of competency; disqualification of witness.
- 602. Lack of personal knowledge.
- 603. Oath or affirmation.
- 604. Interpreters.
- 605. Competency of judge as witness.
- 606. Competency of juror as witness.
- 607. Who may impeach.
- 608. Evidence of character and conduct of witness.
- 609. Impeachment by evidence of conviction of crime.
- 610. Religious beliefs or opinions.
- 611. Mode and order of interrogation and presentation.
- 612. Writing or object used to refresh memory.
- 613. Prior statements of witnesses.
- 614. Calling and interrogation of witnesses by court.
- 615. Exclusion of witnesses.

#### Article 7.

##### Opinions and Expert Testimony.

- 701. Opinion testimony by lay witness.
- 702. Testimony by experts.
- 703. Bases of opinion testimony by experts.
- 704. Opinion on ultimate issue.
- 705. Disclosure of facts or data underlying expert opinion.
- 706. Court appointed experts.

#### Article 8.

##### Hearsay.

- 801. Definitions and exception for admissions of a party-opponent.
- 802. Hearsay rule.
- 803. Hearsay exceptions; availability of declarant immaterial.
- 804. Hearsay exceptions; declarant unavailable.
- 805. Hearsay within hearsay.
- 806. Attacking and supporting credibility of declarant.

#### Article 9.

##### Authentication and Identification.

- 901. Requirement of authentication or identification.
- 902. Self-authentication.



Rule  
903. Subscribing witness' testimony unnecessary.

**Article 10.**

**Contents of Writings, Recordings and Photographs.**

- 1001. Definitions.
- 1002. Requirement of original.
- 1003. Admissibility of duplicates.
- 1004. Admissibility of other evidence of contents.

- Rule
- 1005. Public records.
  - 1006. Summaries.
  - 1007. Testimony or written admission of party.
  - 1008. Functions of court and jury.

**Article 11.**

**Miscellaneous Rules.**

- 1101. Applicability of rules.
- 1102. Short title.

**§ 8C-1. Rules of Evidence.**

The North Carolina Rules of Evidence are as follows:

**Editor's Note.** — Session Laws 1983, c. 701, s. 3, provides that this Chapter shall become effective July 1, 1984, and shall apply to actions and proceedings commenced after that date. The section further provides that this Chapter shall also apply to further procedure in actions and proceedings then pending, except to the extent that application of the Chapter would not be feasible or would work injustice, in which event former evidentiary principles apply.

Session Laws 1983, c. 701, s. 2 provides: "The

Revisor of Statutes shall cause the Commentary to each rule to be printed with the rule in the General Statutes. The Commentary is found in the Report on Evidence Laws of the 1983 General Assembly. In order to clarify legislative intent or reflect amendments to the rules, any changes to the Commentary made during legislative consideration of this act shall be incorporated into the Commentary by the Revisor of Statutes."

**ARTICLE 1.**

**General Provisions.**

**Rule 101. Scope.**

These rules govern proceedings in the courts of this State to the extent and with the exceptions stated in Rule 1101. (1983, ch. 701, s. 1.)

**COMMENTARY**

This rule differs from Fed. R. Evid. 101 only in that "courts of this State" has been substituted for "courts of the United States and before

United States magistrates." Rule 1101 provides greater details regarding the applicability of these rules in various proceedings.

**Rule 102. Purpose and construction.**

(a) *In general.* — These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

(b) *Subordinate divisions.* — For the purpose of these rules only, the subordinate division of any rule which is labeled with a lower case letter shall be a subdivision. (1983, c. 701, s. 1.)



## COMMENTARY

This rule differs from Fed. R. Evid. 102 by the addition of subdivision (b) which is explained below. The commentary to each rule indicates whether the rule is identical to or different from its counterpart in the federal rules. The intent is to make applicable, as an aid in construction, the federal decisional law construing identical or similar provisions of the Federal Rules of Evidence.

Of course, federal precedents are not binding on the courts of this State in construing these rules. Nonetheless, these rules are not adopted in a vacuum. A substantial body of law construing these rules exists and should be looked to by the courts for enlightenment and guidance in ascertaining the intent of the General Assembly in adopting these rules. Uniformity of evidence rulings in the courts of this State and federal courts is one motivating factor in adopting these rules and should be a goal of our courts in construing those rules that are identical.

Problems of construction may arise that have not been settled by federal precedents. In these instances, our courts should examine North Carolina cases as well as federal cases for enlightenment.

Although these rules answer the vast majority of evidence questions that arise in our courts, there are some evidentiary questions that are not within the coverage of these rules. In these instances, North Carolina precedents will continue to control unless changed by our courts.

The commentary to each rule indicates whether the rule is consistent with current North Carolina practice. The discussion of North Carolina law is included to highlight the changes made by these rules.

Wherever the commentary refers to "the Advisory Committee's Note", the reference is to the Advisory Committee on Rules of Evidence appointed by United States Chief Justice Warren on March 8, 1965. See Saltzburg and Redden, *Federal Rules of Evidence Manual*, p. 2-4 (3d ed. 1982).

Rule 102 provides that these rules shall be construed to promote growth and development of the law of evidence. Of course, this provision is not intended to give discretion to construe the rules unfettered by the language of the rules. Rather, the language of Rule 102 permits a flexible approach to problems not explicitly covered by the rules.

Subdivision (b) was added to this rule to make it clear that the scheme of subordinate divisions being followed is that of the federal rules. The North Carolina statutory scheme would term the subordinate divisions referred to as "subsections." It was felt by the drafters of the North Carolina rules and commentary that following the federal scheme would avoid confusion in comparing the federal rules to the North Carolina rules and in applying authorities which refer to the federal rules.

## Rule 103. Rulings on evidence.

(a) *Effect of erroneous ruling.* — Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

- (1) Objection. — In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record. No particular form is required in order to preserve the right to assert the alleged error upon appeal if the motion or objection clearly presented the alleged error to the trial court;
- (2) Offer of proof. — In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

(b) *Record of offer and ruling.* — The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) *Hearing of jury.* — In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.



(d) *Review of errors where justice requires.* — Notwithstanding the requirements of subdivision (a) of this rule, an appellate court may review errors affecting substantial rights if it determines, in the interest of justice, it is appropriate to do so. (1983, c. 701, s. 1.)

## COMMENTARY

This rule is identical to Fed. R. Evid. 103, except for subsection (1) of subdivision (a), and subdivision (d).

Subdivision (a) adopts the "substantial rights" language used in the majority of states in testing for harmless error. North Carolina Civ. Pro. Rule 61 provides that no error is grounds for reversal unless the error amounts to the denial of a substantial right. Subdivision (a) is not intended to affect the additional requirement in criminal cases that a reasonable possibility exist that a different result would have been reached if the error had not been committed. See G.S. 15A-1443.

Subdivision (a) also provides that rulings on evidence cannot be assigned as error unless the nature of the error was called to the attention of the judge, so as to alert him to the proper course of action and enable opposing counsel to take proper corrective measures. This is in accord with North Carolina practice. See *Brandis on North Carolina Evidence* §27, at 107 (1982); G.S. 15A-1446. The wording of subsection (1) differs from the federal rule by borrowing the language of G.S. 15A-1446(a) to describe the minimum requirements of an objection or motion to strike.

The provisions of subdivision (b) are substantially the same as current North Carolina prac-

tice. North Carolina Civ. Pro. Rule 43(c) and G.S. 15A-1446(a) should be amended where necessary to conform to Rule 103.

Subdivision (c) is in accord with North Carolina practice.

Subdivision (d) differs from Fed. R. Evid. 103(d). The federal rule provides that, although an error was not brought to the court's attention (as required by subdivision (a)), the court may nevertheless review "plain error affecting substantial rights." Subdivision (d) of this rule borrows its language from G.S. 15A-1446(b), which applies in criminal proceedings, and makes that the standard for both criminal and civil proceedings, but with the addition that "substantial rights" must be affected. This represents an expansion of the areas in civil cases in which North Carolina appellate courts may review error where no proper objection or motion was previously made. See *Brandis on North Carolina Evidence* § 27 (1982).

It is anticipated that in civil cases appellate courts will rarely exercise the authority to take notice of errors that were not brought to the attention of the trial court. G.S. 15A-1446(b) should be amended to reflect the adoption of Rule 103(d).

## Rule 104. Preliminary questions.

(a) *Questions of admissibility generally.* — Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) *Relevancy conditioned on fact.* — When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) *Hearing of jury.* — Hearings on the admissibility of confessions or other motions to suppress evidence in criminal trials in Superior Court shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if he so requests.

(d) *Testimony by accused.* — The accused does not, by testifying upon a preliminary matter, subject himself to cross-examination as to other issues in the case.

(e) *Weight and credibility.* — This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility. (1983, ch. 701, s. 1.)



## COMMENTARY

This rule is identical to Fed. R. Evid. 104 with the exception of subdivision (c) which is discussed below.

Subdivision (a) states as a general rule that preliminary questions shall be determined by the judge. This is in accord with North Carolina practice. See H. Brandis, *Brandis on North Carolina Evidence* § 8 (1982). The Advisory Committee's Note to the federal rule states:

"The applicability of a particular rule of evidence often depends upon the existence of a condition. Is the alleged expert a qualified physician? Is a witness whose former testimony is offered unavailable? Was a stranger present during a conversation between attorney and client? In each instance the admissibility of evidence will turn upon the answer to the question of the existence of the condition. Accepted practice, incorporated in the rule, places on the judge the responsibility for these determinations. McCormick § 53; Morgan, *Basic Problems of Evidence* 45-50 (1962).

To the extent that these inquiries are factual, the judge acts as a trier of fact. Often, however, rulings on evidence call for an evaluation in terms of a legally set standard. Thus when a hearsay statement is offered as a declaration against interest, a decision must be made whether it possesses the required against-interest characteristics. These decisions, too, are made by the judge.

In view of these considerations, this subdivision refers to preliminary requirements generally by the broad term 'question,' without attempt at specification.

This subdivision is of general application. It must, however, be read as subject to the special provisions for 'conditional relevancy' in subdivision (b) and those for confessions in subdivision (d)."

The second sentence of subdivision (b) provides that in making its determination on preliminary questions, the court is not bound by the rules of evidence except those with respect to privileges. The Advisory Committee's Note states:

"If the question is factual in nature, the judge will of necessity receive evidence pro and con on the issue. The rule provides that the rules of evidence in general do not apply to this process. McCormick § 53, p. 123, n. 8, points out that the authorities are 'scattered and inconclusive,' and observes:

'Should the exclusionary law of evidence, "the child of the jury system" in Thayer's phrase, be applied to this hearing before the judge? Sound sense backs the view that it should not, and that the judge should be empowered to hear any relevant evidence, such as affidavits or other reliable hearsay.'

This view is reinforced by practical necessity in certain situations. An item, offered and objected to, may itself be considered in ruling on admissibility, though not yet admitted in evidence. Thus the content of an asserted declaration against interest must be considered in ruling whether it is against interest. \*\*\* Another example is the requirement of Rule 602 dealing with personal knowledge. In the case of hearsay, it is enough, if the declarant 'so far as appears [has] had an opportunity to observe the fact declared'. McCormick § 10, p. 19.

If concern is felt over the use of affidavits by the judge in preliminary hearings on admissibility, attention is directed to the many important judicial determinations made on the basis of affidavits. \*\*\*

The rules of Civil Procedure are more detailed. Rule 43(e), dealing with motions generally, provides:

'When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.'

... Rule 56 provides in detail for the entry of summary judgment based on affidavits. Affidavits may supply the foundation for temporary restraining orders under Rule 65(b)."

Subdivision (b) concerns relevancy conditioned on fact. The Advisory Committee's Note states:

"In some situations, the relevancy of an item of evidence, in the large sense, depends upon the existence of a particular preliminary fact. Thus when a spoken statement is relied upon to prove notice to X, it is without probative value unless X heard it. Or if a letter purporting to be from Y is relied upon to establish an admission by him, it has no probative value unless Y wrote or authorized it. Relevance in this sense has been labelled 'conditional relevancy'. Morgan, *Basic Problems of Evidence* 45-46 (1962). Problems arising in connection with it are to be distinguished from problems of logical relevancy, e.g., evidence in a murder case that accused on the day before purchased a weapon of the kind used in the killing, treated in Rule 401.

If preliminary questions of conditional relevancy were determined solely by the judge, as provided in subdivision (1), the functioning of the jury as a trier of fact would be greatly restricted and in some cases virtually destroyed. These are appropriate questions for juries. Accepted treatment, as provided in the rule, is consistent with that given fact questions generally. The judge makes a preliminary determination whether the foundation evidence



is sufficient to support a finding of fulfillment of the condition. If so, the item is admitted. If after all the evidence on the issue is in, pro and con, the jury could reasonably conclude that fulfillment of the condition is not established, the issue is for them. If the evidence is not such as to allow a finding, the judge withdraws the matter from their consideration. \*\*\*

The order of proof here, as generally, is subject to the control of the judge."

Subdivision (b) is in accord with North Carolina practice in making an exception to the general rule that preliminary questions are for the court. When the relevancy of evidence depends upon the existence of some other fact which also requires proof, the determination of the preliminary fact question is for the jury. *Brandis on North Carolina Evidence* § 8, p. 27-28 (1982).

Subdivision (c) concerns when hearings on preliminary questions will be out of the hearing of the jury. The Advisory Committee's Note states:

"Preliminary hearings on the admissibility of confessions must be conducted outside the hearing of the jury. See *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). Otherwise, detailed treatment of when preliminary matters should be heard outside the hearing of the jury is not feasible. The procedure is time consuming. Not infrequently the same evidence which is relevant to the issue of establishment of fulfillment of a condition precedent to admissibility is also relevant to weight or credibility, and time is saved by taking foundation proof in the presence of the jury. Much evidence on preliminary questions, though not relevant to jury issues, may be heard by the jury with no adverse effect. A great deal must be left to the discretion of the judge who will act as the interests of justice require."

Subdivision (c) has been changed from the federal rule by the addition of language requiring other motions to suppress evidence in criminal cases in superior court to be conducted out of the hearing of the jury. This is in accord with G.S. 15A-977(e) which should be amended to reflect the adoption of this rule.

Subdivision (d) provides that the accused does not, by testifying upon a preliminary matter, subject himself to cross-examination as to other issues in the case. As the Advisory Committee's Note states:

"The limitation upon cross-examination is designed to encourage participation by the accused in the determination of preliminary matters. He may testify concerning them without exposing himself to cross-examination generally. The provision is necessary because of the breadth of cross-examination under Rule 611(b).

The rule does not address itself to questions of the subsequent use of testimony given by an accused at a hearing on a preliminary matter. See *Walder v. United States*, 347 U.S. 62 (1954); *Simmons v. United States*, 390 U.S. 377 (1968); *Harris v. New York*, 401 U.S. 222 (1971)."

There are no North Carolina cases on this point.

Subdivision (e) makes it clear that after the court makes its determination on a preliminary question of fact, the party opposing the ruling is entitled to introduce before the jury evidence that relates to the weight or credibility of certain evidence. For example, even if the court determines that a confession was not coerced, the defendant may introduce evidence of coercion, since this is relevant to the weight of the evidence.

Subdivision (e) is in accord with North Carolina practice.

## Rule 105. Limited admissibility.

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly. (1983, c. 701, s. 1.)

### COMMENTARY

This rule is identical to Fed. R. Evid. 105. The Advisory Committee's Note states:

"A close relationship exists between this rule and Rule 403 which requires exclusion when 'probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.' The present rule recognizes the practice of admitting evidence

for a limited purpose and instructing the jury accordingly. The availability and effectiveness of this practice must be taken into consideration in reaching a decision whether to exclude for unfair prejudice under Rule 403. In *Bruton v. United States*, 389 U.S. 818, 88 S.Ct. 126, 19 L.Ed.2d 70 (1968), the Court ruled that a limiting instruction did not effectively protect



the accused against the prejudicial effect of admitting in evidence the confession of a codefendant which implicated him. The decision does not, however, bar the use of limited admissibility with an instruction where the risk of prejudice is less serious."

Rule 105 is in accord with the general rule in North Carolina that evidence that is inadmissible for one purpose may be admitted for other and proper purposes. See *Brandis on North Carolina Evidence* § 79 (1982).

## Rule 106. Remainder of or related writings or recorded statements.

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it. (1983, c. 701, s. 1.)

### COMMENTARY

This rule is identical to Fed. R. Evid. 106. The Advisory Committee's Note states:

"The rule is an expression of the rule of completeness. McCormick § 56. It is manifested as to depositions in Rule 32(a) (4) of the Federal Rules of Civil Procedure, of which the proposed rule is substantially a restatement.

The rule is based on two considerations. The first is the misleading impression created by taking matters out of context. The second is the

inadequacy of repair work when delayed to a point later in the trial. \* \* \* The rule does not in any way circumscribe the right of the adversary to develop the matter on cross-examination or as part of his own case.

For practical reasons, the rule is limited to writings and recorded statements and does not apply to conversations."

N. C. Civ. Pro. Rule 32(a) (5), which applies to depositions, is similar to Rule 106.

## ARTICLE 2.

### Judicial Notice.

## Rule 201. Judicial notice of adjudicative facts.

(a) *Scope of rule.* — This rule governs only judicial notice of adjudicative facts.

(b) *Kinds of facts.* — A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) *When discretionary.* — A court may take judicial notice, whether requested or not.

(d) *When mandatory.* — A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) *Opportunity to be heard.* — In a trial court, a party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) *Time of taking notice.* — Judicial notice may be taken at any stage of the proceeding.

(g) *Instruction jury.* — In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed. (1983, c. 701, s. 1.)



## COMMENTARY

This rule is identical to Fed. R. Evid. 201, except subdivision (e) which is discussed below. The Advisory Committee's Note states:

"This is the only evidence rule on the subject of judicial notice. It deals only with judicial notice of 'adjudicative' facts. No rule deals with judicial notice of 'legislative' facts. \*\*\*

The omission of any treatment of legislative facts results from fundamental differences between adjudicative facts and legislative facts. Adjudicative facts are simply the facts of the particular case. Legislative facts, on the other hand, are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body. \*\*\*

What, then, are 'adjudicative' facts? Davis refers to them as those 'which relate to the parties,' or more fully:

'When a court or an agency finds facts concerning the immediate parties — who did what, where, when, how, and with what motive or intent — the court or agency is performing an adjudicative function, and the facts are conveniently called adjudicative facts. . . .

'Stated in other terms, the adjudicative facts are those to which the law is applied in the process of adjudication. They are the facts that normally go to the jury in a jury case. They relate to the parties, their activities, their properties, their businesses.' 2 Administrative Law Treatise 353."

Current North Carolina law does not deal with procedure for taking judicial notice of facts. Judicial notice of domestic and foreign law is dealt with in G.S. Chapter 8, Article 1, which remains in force.

Subdivision (b) concerns the kinds of facts that may be judicially noticed. The Advisory Committee's Note states:

"With respect to judicial notice of adjudicative facts, the tradition has been one of caution in requiring that the matter be beyond reasonable controversy. This tradition of circumspection appears to be soundly based, and no reason to depart from it is apparent."

Subdivision (b) is consistent with current North Carolina practice. See *Brandis on North Carolina Evidence* § 11 (1982).

Subdivisions (c) and (d) govern when judicial notice is discretionary and when it is mandatory. The Advisory Committee's Note states:

"Under subdivision (c) the judge has a discretionary authority to take judicial notice, regardless of whether he is so requested by a party. The taking of judicial notice is mandatory, under subdivision (d), only when a party requests it and the necessary information is supplied. This scheme is believed to reflect

existing practice. It is simple and workable. It avoids troublesome distinctions in the many situations in which the process of taking judicial notice is not recognized as such."

Subdivisions (c) and (d) are in accord with North Carolina practice. See *Brandis on North Carolina Evidence* § 11 (1982).

Subdivision (e) entitles a party, upon timely request, to an opportunity to be heard as to the propriety of taking judicial notice. It differs from the federal rule by its limitation to a trial court. The Advisory Committee's Note states:

"Basic considerations of procedural fairness demand an opportunity to be heard on the propriety of taking judicial notice and the tenor of the matter noticed. The rule requires the granting of that opportunity upon request. No formal scheme of giving notice is provided. An adversely affected party may learn in advance that judicial notice is in contemplation, either by virtue of being served with a copy of a request by another party under subdivision (d) that judicial notice be taken, or through an advance indication by the judge. Or he may have no advance notice at all. The likelihood of the latter is enhanced by the frequent failure to recognize judicial notice as such. And in the absence of advance notice, a request made after the fact could not in fairness be considered untimely. . . ."

Subdivision (e) departs from current North Carolina practice which generally does not require an opportunity to be heard prior to the court taking judicial notice on its own initiative. See *Brandis on North Carolina Evidence* § 11 (1982).

With respect to notice at administrative hearings, see G.S. 150A-30.

Subdivision (f) is in accord with North Carolina practice in allowing judicial notice to be taken at any stage of the proceedings, whether in the trial court or on appeal.

Subdivision (g) concerns instructing the jury with respect to judicially noticed facts. The Advisory Committee's Note states:

"Within its relatively narrow area of adjudicative facts, the rule contemplates there is to be no evidence before the jury in disproof. The judge instructs the jury to take judicially noticed facts as established. This position is justified by the undesirable effects of the opposite rule in limiting the rebutting party, though not his opponent, to admissible evidence, in defeating the reasons for judicial notice, and in affecting the substantive law to an extent and in ways largely unforeseeable. Ample protection and flexibility are afforded by the broad provision for opportunity to be heard on request, set forth in subdivision (e)."



Subdivision (g) is in accord with North Carolina practice in civil cases by not allowing evidence to be introduced to dispute a fact that has been judicially noticed. See *Brandis on North Carolina Evidence* § 11, at 34 (1982).

However, subdivision (g) differs from North Carolina practice by permitting evidence to be

introduced in a criminal trial to rebut a fact that has been judicially noticed. In adopting subdivision (g), Congress was of the view that a mandatory instruction to a jury in a criminal case to accept as conclusive any fact judicially noticed is contrary to the spirit of the right to a jury trial.

## ARTICLE 3.

### *Presumptions in Civil Actions and Proceedings.*

#### **Rule 301. Presumptions in general in civil actions and proceedings.**

In all civil actions and proceedings when not otherwise provided for by statute, by judicial decision, or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast. The burden of going forward is satisfied by the introduction of evidence sufficient to permit reasonable minds to conclude that the presumed fact does not exist. If the party against whom a presumption operates fails to meet the burden of producing evidence, the presumed fact shall be deemed proved, and the court shall instruct the jury accordingly. When the burden of producing evidence to meet a presumption is satisfied, the court must instruct the jury that it may, but is not required to, infer the existence of the presumed fact from the proved fact. (1983, c. 701, s. 1.)

#### COMMENTARY

The first sentence of this rule is identical to Fed. R. Evid. 301, except that the phrase "by statute, by judicial decision" is used in lieu of the phrase "by Act of Congress." The last three sentences of the rule, which were modeled upon Alaska Rule of Evidence 301 (1979), clarify the effect of the rule.

A presumption is an assumption of fact resulting from a rule of law which requires such fact to be assumed or inferred from another fact established in the action. The term "basic fact" is used to designate the fact from which the assumption or inference is made and the term "presumed fact" is used to indicate the fact assumed or inferred.

The rule does not apply to "conclusive presumptions", which are merely statements of substantive law and have nothing to do with the law of evidence. See *Brandis on North Carolina Evidence* § 215, at 170 (1982).

In some situations, when the basic fact has been established, the presumed fact may (but need not) be found to exist. The existence of the presumed fact is for the trier of fact to determine from all the evidence *pro* and *con*. The term "permissive presumption" is used to de-

scribe this situation. *Id.* at 171. Or it is said that the basic fact is *prima facie* evidence of the fact to be inferred. Rule 301 does not apply in situations where a statute or judicial decision creates a "permissive presumption" or merely provides that one fact shall be "*prima facie*" evidence of another.

The term "mandatory presumption" is used when the presumed fact *must* be found when the basic fact has been established, unless sufficient evidence of the nonexistence of the presumed fact is forthcoming. *Id.* at 171. Rule 301 is intended to govern mandatory presumptions.

Care should be taken to determine whether the presumption in question is within the scope of this rule since the term presumption is often misused. The first sentence of the rule makes it clear that the General Assembly and the courts retain power to create presumptions having an effect different from that provided for in this rule. Nonetheless, a presumption created by a prior statute or judicial decision should be construed to come within the scope of this rule unless it is clear that the presumption was not intended to be a "mandatory presumption".



Under Rule 301, the presumption satisfies the burden of producing evidence of the presumed fact. Evidence sufficient to prove the basic fact is sufficient proof of the presumed fact to survive a directed verdict at the end of the proponent's case-in-chief. This is in accord with North Carolina practice.

The general rule in North Carolina is in accord with Rule 301 in that a presumption does not shift the burden of proof. *Id.* § 218, at 179. However, with respect to some presumptions in North Carolina, the opponent has the burden of persuading the jury, by a preponderance of the evidence or otherwise, that the presumed fact does not exist. *Id.* If by statute or judicial decision a particular presumption shifts the burden of proof, Rule 301 does not apply.

Proof of the basic fact not only discharges the proponent's burden of producing evidence of the

presumed fact but also places upon the opponent the burden of producing evidence that the presumed fact does not exist. If the opponent does not introduce any evidence, or the evidence is not sufficient to permit reasonable minds to conclude that the presumed fact does not exist, the proponent is entitled to a peremptory instruction that the presumed fact shall be deemed proved. This is in accord with North Carolina practice. *Id.* § 222, at 189.

If the opponent introduces evidence sufficient to permit reasonable minds to conclude that the presumed fact does not exist, no peremptory instruction should be given. Rather, the court must instruct the jury that it may, but is not required to, infer the existence of the presumed fact from proof of the basic fact.

Of course, the opponent may avoid the effect of a presumption by proving that the basic fact does not exist.

## Rule 302. Applicability of federal law in civil actions and proceedings.

In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which federal law supplies the rule of decision is determined in accordance with federal law. (1983, c. 701, s. 1.)

### COMMENTARY

This rule differs from Fed. R. Evid. 302 in that "federal law" has been substituted for "state law." The Comment to Rule 302 of the Uniform Rules of Evidence (1974) explains the purpose of the change:

"Parallel jurisdiction in state and federal courts exists in many instances. The rule prescribes that when a federally created right is litigated in a state court, any prescribed federal presumption shall be applied."

### ARTICLE 4.

#### *Relevancy and Its Limits.*

## Rule 401. Definition of "relevant evidence."

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. (1983, c. 701, s. 1.)

### COMMENTARY

This rule is identical to Fed. R. Evid. 401. The Advisory Committee's Note states:

"Problems of relevancy call for an answer to the question whether an item of evidence, when tested by the processes of legal reasoning, possesses sufficient probative value to justify

receiving it in evidence. Thus, assessment of the probative value of evidence that a person purchased a revolver shortly prior to a fatal shooting with which he is charged is a matter of analysis and reasoning.

The variety of relevancy problems is



coextensive with the ingenuity of counsel in using circumstantial evidence as a means of proof. An enormous number of cases fall in no set pattern, and this rule is designed as a guide for handling them. On the other hand, some situations recur with sufficient frequency to create patterns susceptible of treatment by specific rules. Rule 404 and those following it are of that variety; they also serve as illustrations of the application of the present rule as limited by the exclusionary principles of Rule 403.

Passing mention should be made of so-called 'conditional' relevancy. Morgan, *Basic Problems of Evidence* 45-46 (1962). In this situation, probative value depends not only upon satisfying the basic requirement of relevancy as described above but also upon the existence of some matter of fact. For example, if evidence of a spoken statement is relied upon to prove notice, probative value is lacking unless the person sought to be charged heard the statement. The problem is one of fact, and the only rules needed are for the purpose of determining the respective functions of judge and jury. See Rules 104(b) and 901. The discussion which follows in the present note is concerned with relevancy generally, not with any particular problem of conditional relevancy.

Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case. Does the item of evidence tend to prove the matter sought to be proved? Whether the relationship exists depends upon principles evolved by experience or science, applies logically to the situation at hand. James, *Relevancy, Probability and the Law*, 29 *Calif.L.Rev.* 689, 696, n. 15 (1941), in *Selected Writings on Evidence and Trial* 610, 615, n. 15 (Fryer ed. 1957). The rule summarizes this relationship as a 'tendency to make the existence' of the fact to be proved 'more probable or less probable.' Compare Uniform Rule 1(2) which states the crux of relevancy as 'a tendency in reason,' thus perhaps emphasizing unduly the logical process and ignoring the need to draw upon experience or science to validate the general principle upon which relevancy in a particular situation depends.

The standard of probability under the rule is

'more . . . probable than it would be without the evidence.' Any more stringent requirement is unworkable and unrealistic. As McCormick § 152, p. 317, says, 'A brick is not a wall,' or, as Falknor, *Extrinsic Policies Affecting Admissibility*, 10 *Rutgers L. Rev.* 574, 576 (1956), quotes Professor McBaine, '... [I]t is not to be supposed that every witness can make a home run.' Dealing with probability in the language of the rule has the added virtue of avoiding confusion between questions of admissibility and questions of the sufficiency of the evidence.

The rule uses the phrase 'fact that is of consequence to the determination of the action' to describe the kind of fact to which proof may properly be directed. The language is that of California Evidence Code § 210; it has the advantage of avoiding the loosely used and ambiguous word 'material'. \*\*\* The fact to be proved may be ultimate, intermediate, or evidentiary; it matters not, so long as it is of consequence in the determination of the action. Cf. Uniform Rule 1(2) which requires that the evidence relate to a 'material' fact.

The fact to which the evidence is directed need not be in dispute. While situations will arise which call for the exclusion of evidence offered to prove a point conceded by the opponent, the ruling should be made on the basis of such considerations as waste of time and undue prejudice (see Rule 403), rather than under any general requirement that evidence is admissible only if directed to matters in dispute. Evidence which is essentially background in nature can scarcely be said to involve disputed matter, yet it is universally offered and admitted as an aid to understanding. Charts, photographs, views of real estate, murder weapons, and many other items of evidence fall in this category. A rule limiting admissibility to evidence directed to a controversial point would invite the exclusion of this helpful evidence, or at least the raising of endless questions over its admission."

While North Carolina courts have used slightly different definitions of relevant evidence, the rule is unlikely to alter significantly North Carolina practice. See *Brandis on North Carolina Evidence* § 78 (1982). Although the rule speaks in terms of relevancy, the definition includes what is often referred to in our courts as materiality. *Id.* § 77.

## **Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible.**

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of North Carolina, by Act of Congress, by Act of the General Assembly or by these rules. Evidence which is not relevant is not admissible. (1983, c. 701, s. 1.)



## COMMENTARY

This rule is identical to Fed. R. Evid. 402 except that the phrases "by the Constitution of North Carolina" and "by Act of the General Assembly" were added and the phrase "by other rules prescribed by the Supreme Court pursuant to statutory authority" was deleted. The Advisory Committee's Note states:

"The provisions that all relevant evidence is admissible, with certain exceptions, and that evidence which is not relevant is not admissible are 'a presupposition involved in the very conception of a rational system of evidence.' Thayer, *Preliminary Treatise on Evidence* 264 (1898). They constitute the foundation upon which the structure of admission and exclusion rests. \*\*\*

Not all relevant evidence is admissible. The exclusion of relevant evidence occurs in a variety of situations and may be called for by these rules, by the Rules of Civil . . . Procedure . . . , by Act of Congress, or by constitutional considerations.

Succeeding rules in the present article, in response to the demands of particular policies, require the exclusion of evidence despite its relevancy. In addition, . . . Article VI imposes limitations upon witnesses and the manner of dealing with them; Article VII specifies requirements with respect to opinions and

expert testimony; Article VIII excludes hearsay not falling within an exception; Article IX spells out the handling of authentication and identification; and Article X restricts the manner of proving the contents of writings and recordings.

The Rules of Civil . . . Procedure in some instances require the exclusion of relevant evidence. For example, . . . the Rules of Civil Procedure, by imposing requirements of notice and unavailability of the deponent, place limits on the use of relevant depositions.

\*\*\*\*\*

The rule recognizes but makes no attempt to spell out the constitutional considerations which impose basic limitations upon the admissibility of relevant evidence. Examples are evidence obtained by unlawful search and seizure, *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914); *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); incriminating statement elicited from an accused in violation of right to counsel, *Massiah v. United States*, 377 U.S. 201 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964)."

Rule 402 is consistent with North Carolina practice.

## Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. (1983, c. 701, s. 1.)

## COMMENTARY

This rule is identical to Fed. R. Evid. 403. The Advisory Committee's Note states:

"The case law recognizes that certain circumstances call for the exclusion of evidence which is of unquestioned relevance. These circumstances entail risks which range all the way from inducing decision on a purely emotional basis, at one extreme, to nothing more harmful than merely wasting time, at the other extreme. Situations in this area call for balancing the probative value of and need for the evidence against the harm likely to result from its admission. \*\*\* The rules which follow in this Article are concrete applications evolved for particular situations. However, they reflect the policies underlying the present rule, which is designed as a guide for the handling of situa-

tions for which no specific rules have been formulated.

Exclusion for risk of unfair prejudice, confusion of issues, misleading the jury, or waste of time, all find ample support in the authorities. 'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one.

The rule does not enumerate surprise as a ground for exclusion, in this respect following Wigmore's view of the common law. 6 Wigmore § 1849. Cf. McCormick § 152, p. 320, n. 29, listing unfair surprise as a ground for exclusion but stating that it is usually 'coupled with the danger of prejudice and confusion of issues'. \*\*\* While it can scarcely be doubted that



claims of unfair surprise may still be justified despite procedural requirements of notice and instrumentalities of discovery, the granting of a continuance is a more appropriate remedy than exclusion of the evidence. \*\*\* Moreover, the impact of a rule excluding evidence on the ground of surprise would be difficult to estimate."

The rule is substantially in accord with North Carolina practice. See *Brandis on North Carolina Evidence* § 77 *et seq.* (1982). In North Carolina, unfair surprise appears to be a ground for exclusion of evidence. *Id.* § 77, p. 287. However, as the Advisory Committee

states, the rule does not enumerate surprise as a ground for exclusion. Nonetheless, surprise may be covered by unfair prejudice, confusion of issues, or undue delay. See Wright and Graham, *Federal Practice and Procedure: Evidence* § 5218, at 298.

The Advisory Committee's Note states that:

"In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction. See Rule 106 and Advisory Committee's Note thereunder. The availability of other means of proof may also be an appropriate factor."

## **Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes.**

(a) *Character evidence generally.* — Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

- (1) Character of accused. — Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;
- (2) Character of victim. — Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;
- (3) Character of witness. — Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) *Other crimes, wrongs, or acts.* — Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident. (1983, c. 701, s. 1.)

### **COMMENTARY**

This rule is identical to Fed. Evid. Rule 404, except for the addition of the word "entrapment" in the last sentence of subdivision (b).

Subdivision (a) deals with the basic question whether character evidence should be admitted. The Advisory Committee's Note states:

"Once the admissibility of character evidence in some form is established under this rule, reference must then be made to Rule 405, which follows, in order to determine the appropriate method of proof. If the character is that of a witness, see Rules 608 and 610 for methods of proof.

Character questions arise in two fundamentally different ways. (1) Character may itself be an element of a crime, claim, or defense. A situation of this kind is commonly referred to as 'character in issue.' Illustrations

are: the chastity of the victim under a statute specifying her chastity as an element of the crime of seduction, or the competency of the driver in an action for negligently entrusting a motor vehicle to an incompetent driver. No problem of the general relevancy of character evidence is involved, and the present rule therefore has no provision on the subject. The only question relates to allowable methods of proof, as to which see Rule 405, immediately following. (2) Character evidence is susceptible of being used for the purpose of suggesting an inference that the person acted on the occasion in question consistently with his character. This use of character is often described as 'circumstantial.' Illustrations are: evidence of a violent disposition to prove that the person was the aggressor in an affray, or evidence of honesty in disproof of a charge of theft. This



circumstantial use of character evidence raises questions of relevancy as well as questions of allowable methods of proof."

The rule is consistent with North Carolina practice in that character evidence is generally not admissible as circumstantial evidence of conduct.

Subdivision (a)(1) creates an exception which permits an accused to introduce pertinent evidence of good character, in which event the prosecution may rebut with evidence of bad character. The exception is consistent with North Carolina practice except that subdivision (a)(1) speaks in terms of a "pertinent trait of his character". This limits the exception to relevant character traits, whereas North Carolina practice permits use of evidence of general character. Professor Brandis states that:

"The North Carolina rule on this subject is unique, and appears to have had its origin in a misinterpretation of the earlier opinions.

In a majority of jurisdictions, character evidence must be confined to the particular trait of character involved in the conduct which is being investigated: In the case of a witness, his character for truth and veracity; of a defendant charged with a crime of violence, his peaceable or violent character; of an alleged embezzler, his honesty and integrity, etc.; a few courts will also admit evidence of general moral character, and this view was adopted by the North Carolina Court at an early date. For at least eighty years it was permissible to prove either the general character or the specific relevant trait of character of the person in question. When, during this period, the Court stated that only 'general character' could be shown, it meant that the only method of proving character was by general reputation, as distinguished from 'particular facts and the opinion of witnesses.' In *State v. Hairston* the principle of the earlier cases seems to have been misunderstood, and the rule was stated: 'A party introducing a witness as to character can only prove the general character of the person asked about. The witness, of his own motion, may say in what respect it is good or bad.' \*\*\*

When the witness is asked whether he knows the general 'reputation' or 'reputation and character' of the subject, if he answers 'No' he should be stood aside; but if he answers 'Yes' it seems that he need not confine his testimony to that reputation, but may testify to reputation for some specific trait of character. This may be highly relevant, as when witness character is at stake and the answer deals with reputation for veracity. However, it may deal with reputation for liquor-selling, or horse trading, or domestic cruelty, even though the trait is wholly irrelevant to any issue in the case.

The Court recently reviewed the history of the rule, but did not change it. It explicitly held

that it is proper for counsel to prepare his witness by explaining the rule and that this does not render the specific trait evidence inadmissible unless, at counsel's suggestion, it is false. To this writer this is convincing proof that the rule should be scrapped. When counsel ascertains in advance a trait which the witness will specify, his question to elicit it should surely not merely be allowed, but be required to deal with that trait. In such case, objection may be made to the question and relevance rationally appraised. As it is, the question is foolproof and there is no opportunity to object until the specific trait evidence is actually given and the damage is done." *Brandis on North Carolina Evidence* §114 (1982) (footnotes omitted):

Brandis also notes that:

"At best the present rule requires use of an ambiguous and misleading formula in examining character witnesses. At worst it has positively undesirable consequences. It opens the door to evidence of character traits which are irrelevant and prejudicial, and permits the prosecution, under the guise of impeaching the defendant as a witness, to prove traits having no relation to veracity but which are relevant on the issue of guilt, thus evading the rule (see § 104) prohibiting the State from attacking the defendant's character unless he first puts it in issue. These consequences would be avoided, and logic and symmetry restored, by confining the inquiry to traits relevant for the particular purpose and holding the witness to responsive answers." *Id.* at 114, n. 91.

Subdivision (a)(2) creates an exception to permit an accused to introduce pertinent evidence of character of the victim and to permit the prosecution to introduce similar evidence in rebuttal of the character evidence. The subdivision extends the exception recognized in North Carolina homicide and assault and battery cases to include all criminal cases. See *Brandis on North Carolina Evidence* § 106 (1982).

North Carolina practice permits evidence of the character of the victim tending to show that the defendant had a reasonable apprehension of death or bodily harm. *Id.* Such evidence when introduced to show the reasonable apprehension of death or bodily harm to the accused, rather than to prove that the victim acted in conformity with his character trait on a particular occasion, would not be within the ban created by subdivision (a).

North Carolina practice also permits evidence of the character of the victim tending to show that the victim was the first aggressor. Unlike Rule 404, current North Carolina practice permits such evidence to be introduced only if the State's evidence is wholly circumstantial or the nature of the transaction is in doubt.

Subdivision (a)(2) permits proof of any pertinent trait of the victim. North Carolina



practice has confined the evidence to character for violence. *Id.*

Subdivision (a)(2) is consistent with North Carolina practice in that evidence of the character of the victim for peace and quiet would be admissible to rebut evidence of the deceased's character for violence and evidence of the victim's good general character would not. *Id.* at 397.

The second part of subdivision (a)(2) permits introduction of "evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor." In North Carolina the prosecution may offer evidence of the deceased's character for peace and quiet only if the defendant has introduced evidence of the deceased's character for violence. See *Nance v. Fike*, 244 N. C. 368, 372 (1956). Thus in North Carolina the accused can apparently claim self-defense without opening the door to character evidence relating to the victim. Subdivision (a)(2) would alter this practice and permit the prosecution to offer evidence of the peacefulness of the victim to rebut any evidence that the victim was the first aggressor.

The North Carolina exception, unlike the rule, applies to cases of civil assault and battery. See *Brandis on North Carolina Evidence* § 106, at 393 (1982). The Advisory Committee's Note states:

"The argument is made that circumstantial use of character ought to be allowed in civil cases to the same extent as in criminal cases, i.e., evidence of good (nonprejudicial) character would be admissible in the first instance, subject to rebuttal by evidence of bad character. \*\*\* The difficulty with expanding the use of character evidence in civil cases is set forth by the California Law Revision Commission \*\*\*.

'Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the the main ques-

tion of what actually happened on on the particular occasion. It subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened.'"

Subdivision (a)(3) creates an exception to the general rule and permits the introduction of evidence of the character of a witness, as provided in Rules 607, 608, and 609, to prove that he acted in conformity therewith on a particular occasion.

Subdivision (b) permits the introduction of specific "crimes, wrongs, or acts" for a purpose other than to prove the conduct of a person. The Advisory Committee's Note states:

"Subdivision (b) deals with a specialized but important application of the general rule excluding circumstantial use of character evidence. Consistently with that rule, evidence of other crimes, wrongs, or acts is not admissible to prove character as a basis for suggesting the inference that conduct on a particular occasion was in conformity with it. However, the evidence may be offered for another purpose, such as proof of motive, opportunity, and so on, which does not fall within the prohibition. In this situation the rule does not require that the evidence be excluded. No mechanical solution is offered. The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence, in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403."

The list in the last sentence of subdivision (b) is nonexclusive and the fact that evidence cannot be brought within a category does not mean that the evidence is inadmissible.

Subdivision (b) is consistent with North Carolina practice.

Relevance of the complainant's past behavior in a rape or sex offense case is governed by Rule 412.

## Rule 405. Methods of proving character.

(a) *Reputation or opinion.* — In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct. Expert testimony on character or a trait of character is not admissible as circumstantial evidence of behavior.

(b) *Specific instances of conduct.* — In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct. (1983, c. 701, s. 1.)



COMMENTARY

This rule is identical to Fed. R. Evid. 405 except for the addition of the last sentence to subdivision (a).

The Advisory Committee's Note states:

"The rule deals only with allowable methods of proving character, not with admissibility of character evidence, which is covered by Rule 404.

Of the three methods of proving character provided by the rule, evidence of specific instances of conduct is the most convincing. At the same time it possesses the greatest capacity to arouse prejudice, to confuse, to surprise, and to consume time. Consequently the rule confines the use of evidence of this kind to cases in which character is, in the strict sense, in issue and hence deserving of a searching inquiry. When character is used circumstantially and hence occupies a lesser status in the case, proof may be only by reputation and opinion. These latter methods are also available when character is in issue."

With respect to specific instances of conduct and reputation, this treatment is consistent with North Carolina practice. See *Brandis on North Carolina Evidence* §110 (1982).

With respect to opinion evidence, the Advisory Committee's Note states:

"In recognizing opinion as a means of proving character, the rule departs from usual contemporary practice in favor of that of an earlier day. See 7 Wigmore §1986, pointing out that the earlier practice permitted opinion and arguing strongly for evidence based on personal knowledge and belief as contrasted with 'the secondhand, irresponsible product of multiplied guesses and gossip which we term "reputation".' It seems likely that the persistence of reputation evidence is due to its largely being opinion in disguise. Traditionally character has been regarded primarily in moral overtones of good and bad: chaste, peaceable, truthful, honest. Nevertheless, on occasion nonmoral considerations crop up, as in the case of the incompetent driver, and this seems bound to happen increasingly. If character is defined as the kind of person one is, then account must be taken of varying ways of arriving at the estimate.\*\*\* No effective dividing line exists between character and mental capacity, and the latter traditionally has been provable by opinion."

In permitting opinion evidence as a means of proving character, the rule departs from current North Carolina practice. The general practice in this state is to frame questions in terms of reputation. However, if the witness is questioned concerning the "general character" or the "reputation and character" of another person, it is understood that the real subject of

inquiry is reputation. *State v. King*, 224 N.C. 329 (1944); *State v. Hicks*, 200 N.C. 539 (1933); *State v. Cathey*, 170 N.C. 794 (1916). Professor Brandis points out that:

"If as e.g., in the initial question in *State v. Cathey* . . . 'reputation' is entirely omitted from the question, or if the question refers, as in *State v. Hicks* . . . to 'reputation and character,' the judge and counsel may know that the witness should confine himself to reputation, but, in the absence of further enlightenment, it seems most doubtful that the witness is so legally learned. Therefore, the practical result may well be to admit opinion evidence while giving lip service to the prohibition against it. Since, additionally, as a practical matter, many witnesses will in fact give opinion in answering a question ostensibly calling only for reputation, it seems to the author of this edition that it would be much more realistic for the Court to scrap the present stated rule and frankly admit either opinion or reputation testimony." *Stansbury's North Carolina Evidence* (Brandis ed.) §110, at 338, n. 99.

Since Fed. R. Evid. 405 opens up the possibility of proving character by means of expert witnesses, the last sentence was added to subdivision (a) to prohibit expert testimony on character as it relates to the likelihood of whether or not the defendant committed the act he is accused of. This sentence is not intended to exclude expert testimony of a personality or character change as it relates to the issue of damages.

The second sentence of subdivision (a) permits inquiry on cross-examination into relevant specific instances of conduct. The Advisory Committee's Note states:

"According to the great majority of cases, on cross-examination inquiry is allowable as to whether the reputation witness has heard of particular instances of conduct pertinent to the trait in question. \*\*\* The theory is that, since the reputation witness relates what he has heard, the inquiry tends to shed light on the accuracy of his hearing and reporting. Accordingly, the opinion witness would be asked whether he knew, as well as whether he had heard. The fact is, of course, that these distinctions are of slight if any practical significance, and the second sentence of subdivision (a) eliminates them as a factor in formulating questions. This recognition of the propriety of inquiring into specific instances of conduct does not circumscribe inquiry otherwise into the bases of opinion and reputation testimony."

Under current North Carolina practice, inquiry into specific instances of conduct on cross-examination is available only on the cross-examination of the person whose char-



acter is in question. *Brandis on North Carolina Evidence* §§111, 115 (1982). It is not permissible in North Carolina to ask a character witness whether he has heard of the person in question having committed a particular act. *Id.* §115. However, to some extent the North Carolina rule may be circumvented by cross-examination as to specific traits. *Id.*

Also, the Advisory Committee's Note states:

"The express allowance of inquiry into specific instances of conduct on cross-examination in subdivision (a) and the express allowance of it as part of a case in chief

when character is actually in issue in subdivision (b) contemplate that testimony of specific instances is not generally permissible on the direct examination of an ordinary opinion witness to character. Similarly as to witnesses to the character of witnesses under Rule 608(b). Opinion testimony on direct in these situations ought in general to correspond to reputation testimony as now given, *i.e.*, be confined to the nature and extent of observation and acquaintance upon which the opinion is based. See Rule 701."

## Rule 406. Habit; routine practice.

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice. (1983, c. 701, s. 1.)

### COMMENTARY

This rule is identical to Fed. R. Evid. 406.

The Advisory Committee's Note states:

"An oft-quoted paragraph, McCormick §162, p. 340, describes habit in terms effectively contrasting it with character.

'Character and habit are close akin. "Character" is a generalized description of one's disposition, or of one's disposition in respect to a general trait, such as honesty, temperance, or peacefulness. "Habit," in modern usage, both lay and psychological, is more specific. It describes one's regular response to a repeated specific situation. If we speak of character for care, we think of the person's tendency to act prudently in all the varying situations of life, in business, family life, in handling automobiles and in walking across the street. A habit, on the other hand, is the person's regular practice of meeting a particular kind of situation with a specific type of conduct, such as the habit of going down a particular stairway two stairs at a time, or of giving the hand-signal for a left turn, or of alighting from railway cars while they are moving. The doing of the habitual acts may become semi-automatic.'

Equivalent behavior on the part of a group is designated 'routine practice of an organization' in the rule.

Agreement is general that habit evidence is highly persuasive as proof of conduct on a particular occasion. Again quoting McCormick §162, p. 341:

'Character may be thought of as the sum of one's habits though doubtless it is more than this. But unquestionably the uniformity of one's response to habit is far greater than the

consistency with which one's conduct conforms to character or disposition. Even though character comes in only exceptionally as evidence of an act, surely any sensible man in investigating whether X did a particular act would be greatly helped in his inquiry by evidence as to whether he was in the habit of doing it.'

When disagreement has appeared, its focus has been upon the question what constitutes habit, and the reason for this is readily apparent. The extent to which instances must be multiplied and consistency of behavior maintained in order to rise to the status of habit inevitably gives rise to difference of opinion. Lewan, *Rationale of Habit Evidence*, 16 *Syracuse L.Rev.* 39, 49 (1964). While adequacy of sampling and uniformity of response are key factors, precise standards for measuring their sufficiency for evidence purposes cannot be formulated.

The rule is consistent with prevailing views. Much evidence is excluded simply because of failure to achieve the status of habit. Thus, evidence of intemperate 'habits' is generally excluded when offered as proof of drunkenness in accident cases, *Annot.*, 46 *A.L.R.2d* 103, and evidence of other assaults is inadmissible to prove the instant one in a civil assault action, *Annot.*, 66 *A.L.R.2d* 806. In *Levin v. United States*, 119 *U.S.App. D.C.* 156, 338 *F.2d* 265 (1964), testimony as to the religious 'habits' of the accused, offered as tending to prove that he was at home observing the Sabbath rather than out obtained money through larceny by trick, was held properly excluded:



'It seems apparent to us that an individual's religious practices would not be the type of activities which would lend themselves to the characterization of "invariable regularity." (1 Wigmore 520.) Certainly the very volitional basis of the activity raises serious questions as to its invariable nature, and hence its probative value.' *Id.* at 272.

These rulings are not inconsistent with the trend towards admitting evidence of business transactions between one of the parties and a third person as tending to prove that he made the same bargain or proposal in the litigated situation. *Slough, Relevancy Unraveled*, 6 Kan.L.Rev. 38-41 (1957). Nor are they inconsistent with such cases as *Whittemore v. Lockheed Aircraft Corp.*, 65 Cal.App.2d 737, 151 P.2d 670 (1944), upholding the admission of evidence that plaintiff's intestate had on four other occasions flown planes from defendant's

factory for delivery to his employer airline, offered to prove that he was piloting rather than a guest on a plane which crashed and killed all on board while en route for delivery.

A considerable body of authority has required that evidence of the routine practice of an organization be corroborated as a condition precedent to its admission in evidence. *Slough, Relevancy Unraveled*, 5 Kan.L.Rev. 404, 449 (1957). This requirement is specifically rejected by the rule on the ground that it relates to the sufficiency of the evidence rather than admissibility. \*\*\* The rule also rejects the requirement of the absence of eyewitnesses, sometimes encountered with respect to admitting habit evidence to prove freedom from contributory negligence in wrongful death cases."

Rule 406 is consistent with North Carolina practice. See *Brandis on North Carolina Evidence* § 95 (1982).

## Rule 407. Subsequent remedial measures.

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if those issues are controverted, or impeachment. (1983, c. 701, s. 1.)

### COMMENTARY

This rule is identical to Fed. R. Evid. 407 except that the phrase "those issues are" has been inserted to clarify what must be controverted.

The Advisory Committee's Note states:

"The rule incorporates conventional doctrine which excludes evidence of subsequent remedial measures as proof of an admission of fault. The rule rests on two grounds. (1) The conduct is not in fact an admission, since the conduct is equally consistent with injury by mere accident or through contributory negligence. Or, as Baron Bramwell put it, the rule rejects the notion that 'because the world gets wiser as it gets older, therefore it was foolish before'. *Hart v. Lancashire & Yorkshire Ry. Co.*, 21 L.T.R.N.S. 261, 263 (1869). Under a liberal theory of relevancy this ground alone would not support exclusion as the inference is still a possible one. (2) The other, and more impressive, ground for exclusion rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety. The courts have applied this principle to exclude evidence of subsequent repairs, installation of safety devices, changes in company rules, and dis-

charge of employees, and the language of the present rule is broad enough to encompass all of them. See *Falknor, Extrinsic Policies Affecting Admissibility*, 10 Rutgers L.Rev. 574, 590 (1956).

The second sentence of the rule directs attention to the limitations of the rule. Exclusion is called for only when the evidence of subsequent remedial measures is offered as proof of negligence or culpable conduct. In effect it rejects the suggested inference that fault is admitted. Other purposes are, however, allowable, including ownership or control, existence of duty, and feasibility of precautionary measures, if controverted, and impeachment. 2 Wigmore § 283; Annot., 64 A.L.R.2d 1296. Two recent federal cases are illustrative. *Boeing Airplane Co. v. Brown*, 291 F.2d 310 (9th Cir. 1961), an action against an airplane manufacturer for using an allegedly defectively designed alternator shaft which caused a plane crash, upheld the admission of evidence of subsequent design modification for the purpose of showing that design changes and safeguards were feasible. And *Powers v. J. B. Michael & Co.*, 329 F.2d 674 (6th Cir. 1964), an action against a road contractor for negligent failure



to put out warning signs, sustained the admission of evidence that defendant subsequently put out signs to show that the portion of the road in question was under defendant's control. The requirement that the other purpose be controverted calls for automatic exclusion unless a genuine issue be present and allows the opposing party to lay the groundwork for exclusion by making an admission. Otherwise the factors of undue prejudice, confusion of issues, misleading the jury, and waste of time remain for consideration under Rule 403."

## Rule 408. Compromise and offers to compromise.

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or evidence of statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. (1983, c. 701, s. 1.)

### COMMENTARY

This rule is identical to Fed. R. Evid. 408 except that the words "evidence of" were added to the second sentence. The addition is for the purpose of clarification and is not intended as a material change. The Advisory Committee's Note states:

"As a matter of general agreement, evidence of an offer to compromise a claim is not receivable in evidence as an admission of, as the case may be, the validity or invalidity of the claim. As with evidence of subsequent remedial measures, dealt with in Rule 407, exclusion may be based on two grounds. (1) The evidence is irrelevant, since the offer may be motivated by a desire for peace rather than from any concession of weakness of position. The validity of this position will vary as the amount of the offer varies in relation to the size of the claim and may also be influenced by other circumstances. (2) A more consistently impressive ground is promotion of the public policy favoring the compromise and settlement of disputes. McCormick §§ 76, 251. While the rule is ordinarily phrased in terms of offers of compromise, it is apparent that a similar attitude must be taken with respect to completed compromise when offered against a party thereto. This latter situation will not, of course, ordinarily occur except when

The increasing tendency of federal courts is to hold that Rule 407 is not applicable to product liability cases. North Carolina courts have applied the rule excluding evidence of subsequent remedial measures in product liability cases. See *Jenkins v. Helgren*, 26 N.C. App. 653 (1975). It is the intent of the Committee that the rule should apply to all types of actions.

Rule 407 is consistent with North Carolina practice. See *Brandis on North Carolina Evidence* § 180 (1982).

a party to the present litigation has compromised with a third person."

North Carolina practice is consistent with Rule 408 in that an offer of compromise, as such, is not admissible to prove liability for or invalidity of a claim or its amount. See *Brandis on North Carolina Evidence* § 180 (1982). The same rule applies to an offer to settle, or the actual settlement of, a third person's claim arising out of the transaction in litigation. *Id.* at 56. The words "the claim" in the first sentence should be interpreted to include the claim that is the subject of the lawsuit and any other claim arising out of the same occurrence.

The Advisory Committee's Note states:

"The policy considerations which underlie the rule do not come into play when the effort is to induce a creditor to settle an admittedly due amount for a lesser sum. McCormick § 251, p. 540. Hence the rule requires that the claim be disputed as to either validity or amount."

The phrase "which was disputed" should be interpreted consistently with North Carolina decisional law concerning what constitutes a dispute. See *Wilson County Board of Education v. Lamm*, 276 N.C. 487 (1970).

With respect to the second sentence of the rule, the Advisory Committee's Note states:



"The practical value of the common law rule has been greatly diminished by its inapplicability to admissions of fact, even though made in the course of compromise negotiations, unless hypothetical, stated to be 'without prejudice,' or so connected with the offer as to be inseparable from it. McCormick § 251, pp. 540-541. An inevitable effect is to inhibit freedom of communication with respect to compromise, even among lawyers. Another effect is the generation of controversy over whether a given statement falls within or without the protected area. These considerations account for the expansion of the rule herewith to include evidence of conduct or statements made in compromise negotiations, as well as the offer or completed compromise itself."

Thus Rule 408 changes the current North Carolina practice that allows a "distinct admission of an independent fact" made during compromise negotiations to be received in evidence. See *Brandis on North Carolina Evidence* § 180, at 56-57 (1982).

Policy reasons for the compromise rule do not apply to evidence discoverable outside of settlement negotiations. Thus the third sentence of Rule 408 states that evidence otherwise

discoverable need not be excluded merely because it is presented in compromise discussions. There is not any North Carolina case law on this point.

The Advisory Committee's Note states that:

"The final sentence of the rule serves to point out some limitations upon its applicability. Since the rule excludes only when the purpose is proving the validity or invalidity of the claim or its amount, an offer for another purpose is not within the rule. The illustrative situations mentioned in the rule are supported by the authorities. As to proving bias or prejudice of a witness, see Annot., 161 A.L.R. 395, contra, *Fenberg v. Rosenthal*, 348 Ill.App. 510, 109 N.E.2d 402 (1952), and negating a contention of lack of due diligence in presenting a claim, 4 Wigmore § 1061. An effort to 'buy off' the prosecution or a prosecuting witness in a criminal case is not within the policy of the rule of exclusion. McCormick, § 251, p. 542."

The final sentence of the rule is consistent with North Carolina practice in that an offer for a purpose other than to prove the validity or invalidity of the claim or its amount is not within the rule. See *Brandis on North Carolina Evidence* § 180, at 55, 56 (1982).

## Rule 409. Payment of medical and other expenses.

Evidence of furnishing or offering or promising to pay medical, hospital, or other expenses occasioned by an injury is not admissible to prove liability for the injury. (1983, c. 701, s. 1.)

### COMMENTARY

This rule is identical to Fed. R. Evid. 409, except that the phrase "other expenses" has been established for the phrase "similar expenses."

The Advisory Committee's Note states:

"The considerations underlying this rule parallel those underlying Rules 407 and 408, which deal respectively with subsequent remedial measures and offers of compromise. As stated in Annot., 20 A.L.R.2d 291, 293:

'[G]enerally, evidence of payment of medical, hospital, or similar expenses of an injured party by the opposing party, is not admissible, the reason often given being that such payment or offer is usually made from humane impulses and not from an admission of liability, and that to hold otherwise would tend to discourage assistance to the injured person.'"

Under current North Carolina law, rendering aid to an injured person or promising to render aid is not an admission of fault.

Rule 409 does not cover rendering aid but does not change existing North Carolina law

that rendering aid to an injured person or promising to render aid is not an admission of fault. *Brandis on North Carolina Evidence* § 180, at 58 (1982).

Unlike the federal rule, which applies to "medical, hospital, or similar expenses," this rule applies to "medical, hospital, or other expenses." The phrase "other expenses" is intended to include, but is not limited to, lost wages and damage to property. The phrase "occasioned by an injury" is intended to include a property injury as well as a personal injury. The rule's coverage of nonmedical expenses occasioned by either a personal or property injury is an expansion of the current North Carolina rule. See *Id.* However, this rule is intended to apply only to tort claims and not to claims in other actions such as child support.

Rule 409 is consistent with North Carolina practice in that evidence inadmissible under the rule to prove liability may be admissible for another purpose. See *Id.* § 180, at 58-59 (1982). The rule is also consistent with North Carolina



practice in that it does not bar evidence of conduct and statements outside of the simple act of furnishing or offering to pay medical expenses. As the Advisory Committee's Note states:

"Contrary to Rule 408, dealing with offers of compromise, the present rule does not extend to conduct or statements not a part of the act of furnishing or offering or promising to pay. This

difference in treatment arises from fundamental differences in nature. Communication is essential if compromises are to be effected, and consequently broad protection of statements is needed. This is not so in cases of payments or offers or promises to pay medical expenses, where factual statements may be expected to be incidental in nature."

## Rule 410. Inadmissibility of pleas, plea discussions, and related statements.

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible for or against the defendant who made the plea or was a participant in the plea discussions:

- (1) A plea of guilty which was later withdrawn;
- (2) A plea of no contest;
- (3) Any statement made in the course of any proceedings under Article 58 of Chapter 15A of the General Statutes or comparable procedure in district court, or proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable procedure in another state, regarding a plea of guilty which was later withdrawn or a plea of no contest;
- (4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it. (1983, c. 701, s. 1.)

### COMMENTARY

This rule is identical to Fed. R. Evid. 410, except as noted below.

The Advisory Committee's Note states:

"Withdrawn pleas of guilty were held inadmissible in federal prosecutions in *Kercheval v. United States*, 274 U.S. 220, 47 S.Ct. 582, 71 L.Ed. 1009 (1927). The Court pointed out that to admit the withdrawn plea would effectively set at naught the allowance of withdrawal and place the accused in a dilemma utterly inconsistent with the decision to award him a trial. The New York Court of Appeals, in *People v. Spitaleri*, 9 N.Y.2d 168, 212 N.Y.S.2d 53, 173 N.E.2d 35 (1961), reexamined and overturned its earlier decisions which had allowed admission. In addition to the reasons set forth in *Kercheval*, which was quoted at length, the court pointed out that the effect of admitting the plea was to compel defendant to take the stand by way of explanation and to open the way for the prosecution to call the lawyer who had represented him at the time of entering the plea. State court decisions for and against admissibility are collected in Annot., 86 A.L.R.2d 326."

Subsection (2), regarding pleas of no contest is the same as the federal rule and is consistent with North Carolina law. *Brandis on North Carolina Evidence* § 177, at 41, 42 (1982).

The third paragraph differs from Fed. R. Evid. 410 by making a reference to Article 58 of General Statutes Chapter 15A, which specifies the procedure relating to guilty pleas in superior court. The third paragraph also refers to comparable procedures in district court, although no statutory scheme regulates plea negotiations in district court. See Official Commentary to G.S. Ch. 15A, Art. 58.

Prior to the 1979 amendments to Fed. R. Evid. 410 and Fed. R. Crim. P. 11(e)(6), it was questionable whether an otherwise voluntary admission to law enforcement officials was rendered inadmissible merely because it was made in hope of obtaining leniency by a plea. The Notes of the Advisory Committee on the amendment to Fed. R. Crim. P. 11(e)(6) state that the rule:

"makes inadmissible statements made 'in the course of any proceedings under this rule regarding' either a plea of guilty later with-



drawn or a plea of no contest later withdrawn and also statements 'made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.' It is not limited to statements by the defendant himself, and thus would cover statements by defense counsel regarding defendant's incriminating admissions to him. It thus fully protects the plea discussion process . . . without attempting to deal with confrontations between suspects and law enforcement agents, which involve problems of quite different dimensions . . . This change, it must be emphasized, does not compel the conclusion that statements made to law enforcement agents, especially when the agents purport to have authority to bargain, are inevitably admissible. Rather, the point is that such cases . . . must be resolved by that body of law dealing with police interrogations."

If there has been a plea of guilty later withdrawn or a plea of no contest, the third paragraph of Rule 410 makes inadmissible statements made in the course of any proceedings relating to guilty pleas in the superior or district courts. This includes, for example, admissions by the defendant when he makes his plea in court and also admissions made to provide the factual basis for the plea. However, the rule is not limited to statements made in court. If the court were to defer its decision on a plea agreement pending examination of the presentence report, statements made to the probation officer in connection with the preparation of that report would come within the third paragraph. See Notes of Advisory Committee on the Amendment to Fed. R. Crim. P. 11(e)(6).

The last sentence of Rule 410 provides an

exception to the general rule of nonadmissibility of the described statements. Such a statement is admissible "in any proceedings wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it."

" . . . when evidence of statements made in the course of or as consequence of a certain plea or plea discussions are introduced under circumstances not prohibited by this rule (e.g., not 'against' the person who made the plea), other statements relating to the same plea or plea discussions may also be admitted when relevant to the matter at issue. For example, if a defendant upon a motion to dismiss a prosecution on some ground were able to admit certain statements made in aborted plea discussions in his favor, then other relevant statements made in the same plea discussions should be admissible against the defendant in the interest of determining the truth of the matter at issue. The language . . . follows closely that in Fed. R. Evid. 106, as the considerations involved are very similar." *Id.*

Unlike the federal rule, Rule 410 does not contain an exception permitting a statement made by the defendant under oath, on the record, and in the presence of counsel to be introduced in a criminal proceeding for perjury or false statement.

Rule 410 differs from the federal rule by making the described evidence inadmissible in favor of the defendant as well as against him. North Carolina practice in this area is governed in part by G.S. 15A-1025 which is consistent with this rule. G.S. 15A-1025 should be amended after Rule 410 is adopted.

## Rule 411. Liability insurance.

Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness. (1983, c. 701, s. 1.)

### COMMENTARY

This rule is identical to Fed. R. Evid. 411. The Advisory Committee's Note states:

"The courts have with substantial unanimity rejected evidence of liability insurance for the purpose of proving fault, and absence of liability insurance as proof of lack of fault. At best the inference of fault from the fact of insurance coverage is a tenuous one, as is its converse. More important, no doubt, has been the feeling that knowledge of the presence or absence of

liability insurance would induce juries to decide cases on improper grounds. McCormick § 168; Annot., 4 A.L.R.2d 761. The rule is drafted in broad terms so as to include contributory negligence or other fault of a plaintiff as well as fault of a defendant.

The second sentence points out the limits of the rule, using well established illustrations. *Id.*"



Rule 411 is consistent with North Carolina practice in barring evidence of insurance unless offered for a purpose other than to prove negli-

gence. See *Brandis on North Carolina Evidence* § 88 (1982).

## **Rule 412. Rape or sex offense cases; relevance of victim's past behavior.**

(a) As used in this rule, the term "sexual behavior" means sexual activity of the complainant other than the sexual act which is at issue in the indictment on trial.

(b) Notwithstanding any other provision of law, the sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior:

- (1) Was between the complainant and the defendant; or
- (2) Is evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant; or
- (3) Is evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented; or
- (4) Is evidence of sexual behavior offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged.

(c) Sexual behavior otherwise admissible under this rule may not be proved by reputation or opinion.

(d) Notwithstanding any other provision of law, no evidence of sexual behavior shall be introduced at any time during the trial of a charge of rape or any lesser included offense thereof or a sex offense or any lesser included offense thereof, nor shall any reference to any such behavior be made in the presence of the jury, unless and until the court has determined that such behavior is relevant under subdivision (b). Before any questions pertaining to such evidence are asked of any witness, the proponent of such evidence shall first apply to the court for a determination of the relevance of the sexual behavior to which it relates. The proponent of such evidence may make application either prior to trial pursuant to G.S. 15A-952, or during the trial at the time when the proponent desires to introduce such evidence. When application is made, the court shall conduct an in camera hearing, which shall be transcribed, to consider the proponent's offer of proof and the argument of counsel, including any counsel for the complainant, to determine the extent to which such behavior is relevant. In the hearing, the proponent of the evidence shall establish the basis of admissibility of such evidence. Notwithstanding subdivision (b) of Rule 104, if the relevancy of the evidence which the proponent seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the in camera hearing or at a subsequent in camera hearing scheduled for that purpose, shall accept evidence on the issue of whether that condition of fact is fulfilled and shall determine that issue. If the court finds that the evidence is relevant, it shall enter an order stating that the evidence may be admitted and the nature of the questions which will be permitted.

(e) The record of the in camera hearing and all evidence relating thereto shall be open to inspection only by the parties, the complainant, their attorneys and the court and its agents, and shall be used only as necessary for appellate review. At any probable cause hearing, the judge shall take cognizance of the evidence, if admissible, at the end of the in camera hearing without the questions being repeated or the evidence being resubmitted in open court. (1983, c. 701, s. 1.)



## COMMENTARY

This rule differs substantially from Fed. R. Evid. 412. Except as noted below, the rule is the same as the current shield law, G.S. 8-58.6.

Subdivision (c), which is derived from the federal rule, was added to the current shield law to make it clear that sexual behavior otherwise admissible under this rule may not be proved by reputation or opinion.

The next to the last sentence of subdivision (d), which is derived from the federal rule, was added to the shield law to address the issue of conditional relevancy. The sentence provides that, notwithstanding Rule 104(b), if the relevancy of the evidence depends upon the fulfillment of a condition of fact, the court will

hear evidence in the in camera proceeding and decide whether the condition of fact is fulfilled. The court should decide whether the defendant has presented sufficient evidence for a reasonable jury to find the proposition asserted to be true. If so, the defendant's evidence should be admitted. If not, the evidence should be excluded. See S. Saltzburg and K. Redden, *Federal Rules of Evidence Manual*, at 221 — 27 (3d ed. 1982). Evidence should not be admitted on behalf of the defendant subject to connecting-up. The court should make sure, before any evidence of prior sexual activity is admitted, that the conditional relevance analysis has been satisfied. *Id.* at 90.

## ARTICLE 5.

### *Privileges.*

#### **Rule 501. General rule.**

Except as otherwise required by the Constitution of the United States, the privileges of a witness, person, government, state, or political subdivision thereof shall be determined in accordance with the law of this State. (1983, c. 701, s. 1.)

## COMMENTARY

This rule differs from Fed. R. Evid. 501. After reviewing rules on privilege proposed by the Supreme Court, Congress rejected the proposal and substituted a rule that applies the common law of privileges in federal civil and criminal cases. In civil actions in which state law supplies the rule of decision, the state law on privileges applies.

The Uniform Rules of Evidence (1974) adopted the federal draft and several states have modeled their privilege laws on the federal draft. However, there is not a great deal

of uniformity among the federal courts and various states with respect to privileges. Adoption of the federal draft would modify and delete privileges currently recognized in North Carolina and add other privileges currently not recognized in North Carolina.

Because of the extensive effort needed to clarify this confused area, the Committee decided not to draft new rules of privilege at this time but to continue the present statutory and common law system. See generally *Brandis on North Carolina Evidence* § 54 *et seq.* (1982).

## ARTICLE 6.

### *Witnesses.*

#### **Rule 601. General rule of competency; disqualification of witness.**

(a) *General rule.* — Every person is competent to be a witness except as otherwise provided in these rules.

(b) *Disqualification of witness in general.* — A person is disqualified to testify as a witness when the court determines that he is (1) incapable of expressing himself concerning the matter as to be understood, either directly



or through interpretation by one who can understand him, or (2) incapable of understanding the duty of a witness to tell the truth.

(c) *Disqualification of interested persons.* — Upon the trial of an action, or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest, against the executor, administrator or survivor of a deceased person, or the committee of a lunatic, or a person deriving his title or interest from, through or under a deceased person or lunatic, by assignment or otherwise, concerning any oral communication between the witness and the deceased person or lunatic. However, this subdivision shall not apply when:

- (1) The executor, administrator, survivor, committee or person so deriving title or interest is examined in his own behalf regarding the subject matter of the oral communication.
- (2) The testimony of the lunatic or deceased person is given in evidence concerning the same transaction or communication.
- (3) Evidence of the subject matter of the oral communication is offered by the executor, administrator, survivor, committee or person so deriving title or interest.

Nothing in this subdivision shall preclude testimony as to the identity of the operator of a motor vehicle in any case. (1983, c. 701, s. 1.)

#### COMMENTARY

Subdivision (a) is identical to the first sentence of Fed. R. Evid. 601. The second sentence of Fed. R. Evid. 601 concerns the application of state law in diversity cases and was omitted. Fed. R. Evid. 601 does not contain subdivision (b) on disqualification of a witness.

This rule eliminates all grounds of incompetency not specifically recognized in subdivision (b) or (c) or the succeeding rules of this Article.

At common law husband and wife were incompetent to testify in an action to which either was a party. However, by statute, each spouse has been competent to testify for or against the other in all civil actions and proceedings, with two rigidly defined exceptions. One exception makes one spouse incompetent to testify "for or against the other . . . in any action or proceeding for or on account of criminal conversation. . . ." G.S. 8-56. With respect to this exception Professor Brandis states:

"It is hard to find a purpose except one based on notions of delicacy, and even this is frustrated by permitting the plaintiff husband to testify to his wife's improper relations with the defendant. Danger of collusion would seem to be no greater than in any other case, and the interest of the state in the marriage relation, which only doubtfully justifies extreme measures to prevent collusion in divorce litigation, is no excuse for a rule of incompetency in crim-

inal conversation actions." *Brandis on North Carolina Evidence* § 58, at 232, n. 28 (1982).

The other exception bars a spouse from testifying "for or against the other in any action or proceeding in consequence of adultery." G.S. 8-56. This exception is supplemented by G.S. 50-10 which provides that in divorce actions "neither the husband nor the wife shall be a competent witness to prove the adultery of the other, nor shall the admissions of either party be received as evidence to prove such fact." With respect to this exception, Professor Brandis notes that if the original purpose was to prevent collusion in divorce actions, "[I]t would seem that the prohibition should have been repealed when a relatively short period of separation was made a ground for divorce." *Brandis on North Carolina Evidence* § 58, at 230, n. 20 (1982).

At common law the spouse of a criminal defendant was incompetent to testify. This incompetence was removed by G.S. 8-57 so far as testifying for the defendant was concerned. With respect to testimony against the other spouse, G.S. 8-57 left in force the common law rule of incompetence. In *State v. Freeman*, 302 N.C. 591 (1981), the court removed the incompetence to testify against the other spouse (except to the extent that it preserved the privilege against disclosure of confidential communications). During the 1983 Legislative



Session G.S. 8-57 was rewritten and now provides that the spouse of the defendant is competent but not compellable to testify for the State against the defendant except that the spouse is both competent and compellable to testify in the following cases:

(1) In a prosecution for bigamy or criminal cohabitation, to prove the fact of marriage and facts tending to show the absence of divorce or annulment;

(2) In a prosecution for assaulting or communicating a threat to the other spouse;

(3) In a prosecution for trespass in or upon the separate lands or residence of the other spouse when living separate and apart from each other by mutual consent or court order;

(4) In a prosecution for abandonment of or failure to provide support for the other spouse or their child;

(5) In a prosecution of one spouse for any other criminal offense against the minor child of either spouse, including any illegitimate or adopted or foster child of either spouse.

The provisions of the previous G.S. 8-57 which provided that the spouse is a competent witness for the defendant in a criminal action and which also provided that a spouse was not compellable to disclose any confidential communications made by one to the other during their marriage are retained in the rewrite of the statute.

Upon adoption of Rule 601, G.S. 8-56 and 50-10 should be rewritten to make it clear that a husband or wife are competent to testify. The privilege against disclosure of confidential communications should be retained.

Subdivision (b) establishes a minimum standard for competency of a witness and is consistent with North Carolina practice. See *Brandis on North Carolina Evidence* § 55 (1982).

Subdivision (c) represents a narrowing of the scope of G.S. 8-51, the Dead Man's Statute. The Dead Man's Statute will now be applicable only

to oral communications between the party interested in the event and the deceased person or lunatic, rather than to "a personal transaction or communication between the witness and the deceased person or lunatic." Subdivision (c) preserves the exceptions already existing in G.S. 8-51 and adds subsection (3) which is a statement of the North Carolina case law having to do with one way in which "the door can be opened." See *Carswell v. Greene*, 253 N.C. 266, 270 (1960); *Brandis on North Carolina Evidence* § 75, at 282, 283 (1982).

It was not the intent of the drafters of subdivision (c) to change any existing cases where the Dead Man's Statute has been held to be inapplicable, or where, because of the actions of one party or the other the protection of the rule has been held to be waived. For example, subdivision (c) would not change the results in *Smith v. Perdue*, 258 N.C. 686 (1963) or *In re Chisman*, 175 N.C. 420 (1918). The report of the Legislative Research Commission's Study Committee on the Laws of Evidence to the 1983 General Assembly did not contain subdivision (c), nor did the original versions of House Bill 96 and Senate Bill 43. This would have completely eliminated the Dead Man's Statute, which has been much criticized. In Professor Brandis' view, for example:

"[T]he statute has fostered more injustice than it has prevented and has led to an unholy waste of the time and ingenuity of judges and counsel. The situation calls for more than legislative tinkering. What is needed is repeal of the statute." *Brandis on North Carolina Evidence* § 66 at 258, n. 62 (1982).

However, subdivision (c) was added to Rule 601 because of a concern that fraud and hardship could result if an interested party could testify concerning an oral communication with the deceased or lunatic.

G.S. 8-51 should be repealed after this rule is adopted.

## Rule 602. Lack of personal knowledge.

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses. (1983, c. 701, s. 1.)

### COMMENTARY

This rule, which is identical to Fed. R. Evid. 602, restates the traditional common-law rule in North Carolina barring a witness from testifying to a fact of which he has no direct personal knowledge. See *Robbins v. C. W. Myers Trading Post, Inc.*, 251 N.C. 663 (1960).

A witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe and must have actually observed the facts. The Advisory Committee's Note states that:



"These foundation requirements may, of course, be furnished by the testimony of the witness himself; hence personal knowledge is not an absolute but may consist of what the witness thinks he knows from personal perception. \*\*\* It will be observed that the rule is in fact a specialized application of the provisions of Rule 104(b) on conditional relevancy."

Preliminary determination of personal knowledge need not be explicit but may be implied from the witness' testimony.

Rule 602 applies to hearsay statements

admitted under the hearsay exception rules in that admissibility of a hearsay statement is predicated on the foundation requirement of the witness' personal knowledge of the making of the statement itself. However, it is not intended that firsthand knowledge be required where a hearsay exception necessarily embraces secondhand knowledge (e.g. Rules 803(8)(C) and 803(23)).

Rule 602 is subject to Rule 703 relating to expert witnesses.

## Rule 603. Oath or affirmation.

Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so. (1983, c. 701, s. 1.)

### COMMENTARY

This rule is identical to Fed. R. Evid. 603 and is in accord with North Carolina practice. The Advisory Committee's Note states that:

"The rule is designed to afford the flexibility required in dealing with religious adults,

atheists, conscientious objectors, mental defectives, and children. Affirmation is simply a solemn undertaking to tell the truth; no special verbal formula is required."

## Rule 604. Interpreters.

An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation that he will make a true translation. (1983, c. 701, s. 1.)

### COMMENTARY

This rule is identical to Fed. R. Evid. 604. There are no North Carolina cases on this point.

## Rule 605. Competency of judge as witness.

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point. (1983, c. 701, s. 1.)

### COMMENTARY

This rule, which is identical to Fed. R. Evid. 605, prevents a judge from testifying in a trial over which he is presiding. The Advisory Committee's Note states that:

"The rule provides for an 'automatic objection'. To require an actual objection would confront the opponent with a choice between not objecting, with the result of allowing the testi-

mony, and objecting, with the probable result of excluding the testimony but at the price of continuing the trial before a judge likely to feel that his integrity had been attacked by the objector."

G.S. 15A-1223 requires a judge in a criminal case to disqualify himself if he is a witness in the case upon motion of the State or the defen-



dant. Upon adoption of Rule 605, a conforming amendment should be made to G.S. 15A-1223 to remove the requirement for a motion to disqualify.

The question of whether a judge may testify

in civil proceedings over which he is presiding does not appear to have arisen in North Carolina. See *Brandis on North Carolina Evidence* § 53, at 198 (1982).

## Rule 606. Competency of juror as witness.

(a) *At the trial.* — A member of the jury may not testify as a witness before that jury in the trial of the case in which he is sitting as a juror. If he is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) *Inquiry into validity of verdict or indictment.* — Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes. (1983, c. 701, s. 1.)

### COMMENTARY

This rule is identical to Fed. R. Evid. 606.

Subdivision (a) provides that a juror may not testify as a witness in the trial in which he is sitting as a juror. There are no North Carolina cases on this point.

The Advisory Committee's Note to subdivision (a) states:

"The considerations which bear upon the permissibility of testimony by a juror in the trial in which he is sitting as juror bear an obvious similarity to those evoked when the judge is called as a witness. See Advisory Committee's Note to Rule 605. The judge is not, however, in this instance so involved as to call for departure from usual principles requiring objection to be made; hence the only provision on objection is that opportunity be afforded for its making out of the presence of the jury. Compare Rule 605."

Subdivision (b) concerns an inquiry into the validity of a verdict or indictment. The Advisory Committee's Note states:

"Whether testimony, affidavits, or statements of jurors should be received for the purpose of invalidating or supporting a verdict or indictment, and if so, under what circumstances, has given rise to substantial differences of opinion. The familiar rubric that a juror may not impeach his own verdict, dating from Lord Mansfield's time, is a gross oversimplification. The values sought to be promoted by excluding the evidence include freedom of deliberation, stability and finality of

verdicts, and protection of jurors against annoyance and embarrassment. *McDonald v. Pless*, 238 U.S. 264 (1915). On the other hand, simply putting verdicts beyond effective reach can only promote irregularity and injustice. The rule offers an accommodation between these competing considerations.

The mental operations and emotional reactions of jurors in arriving at a given result would, if allowed as a subject of inquiry, place every verdict at the mercy of jurors and invite tampering and harassment. \*\*\* The authorities are in virtually complete accord in excluding the evidence. \*\*\* As to matters other than mental operations and emotional reactions of jurors, substantial authority refuses to allow a juror to disclose irregularities which occur in the jury room, but allows his testimony as to irregularities occurring outside and allows outsiders to testify as to occurrences both inside and out. \*\*\* However, the door of the jury room is not necessarily a satisfactory dividing point, and the Supreme Court has refused to accept it for every situation. *Mattox v. United States*, 146 U.S. 140, ... (1892). Under the federal decisions the central focus has been upon insulation in the manner in which the jury reached its verdict, and this protection extends to each of the components of deliberation, including arguments, statements, discussions, mental and emotional reactions, votes, and any other feature of the process. Thus testimony or affidavits of jurors have been held incompetent to



show a compromise verdict, *Hyde v. United States*, 225 U.S. 347, 382 (1912); a quotient verdict, *McDonald v. Pless*, 238 U.S. 264, (1915); speculation as to insurance coverage, *Holden v. Porter*, 405 F.2d 878 (10th Cir. 1969), *Farmers Coop. Elev. Ass'n v. Strand*, 382 F.2d 224, 230 (8th Cir. 1967), cert. denied, 389 U.S. 1014; misinterpretation of instructions, *Farmers Coop. Elev. Ass'n v. Strand*, supra; mistake in returning verdict, *United States v. Chere-ton*, 309 F.2d 197 (6th Cir. 1962); interpretation of guilty plea by one defendant as implicating others, *United States v. Crosby*, 294 F.2d 928, 949 (2d Cir. 1961). The policy does not, however, foreclose testimony by jurors as to prejudicial extraneous information or influences injected into or brought to bear upon the deliberative process. Thus a juror is recognized as competent to testify to statements by the bailiff or the introduction of a prejudicial newspaper account into the jury room, *Mattox v. United States*, 146 U.S. 140 (1892). See also *Parker v. Gladden*, 385 U.S. 363 (1966)."

The exclusion is intended to encompass testimony about mental processes and testimony about any matter or statement occurring

during the deliberations, except that testimony of either of these two types can be admitted if it relates to extraneous prejudicial information or improper outside influence.

The general rule in North Carolina has been that a juror's testimony or affidavit will not be received to impeach the verdict of the jury. *Brandis on North Carolina Evidence* § 65 (1982). The North Carolina rule, unlike Rule 606, does not apply to attempts to support a verdict. *Id.* An express, though limited exception to the anti-impeachment rule is provided in G.S. 15A-1240, which should be amended to conform to Rule 606.

Also, the Advisory Committee's Note states:

"This rule does not purport to specify the substantive grounds for setting aside verdicts for irregularity; it deals only with the competency of jurors to testify concerning those grounds. Allowing them to testify as to matters other than their own inner reactions involves no particular hazard to the values sought to be protected. The rule is based upon this conclusion. It makes no attempt to specify the substantive grounds for setting aside verdicts for irregularity."

## Rule 607. Who may impeach.

The credibility of a witness may be attacked by any party, including the party calling him. (1983, c. 701, s. 1.)

### COMMENTARY

This rule is identical to Fed. R. Evid. 607. The rule abandons the traditional common law rule that a party "vouches" for a witness by calling him and, therefore, may not impeach his own witness. The traditional rule has been the subject of numerous exceptions. See N.C. Civ. Pro. Rule 43(b); *Brandis on North Carolina Evidence* § 40 (1982). The substantial inroads into the old rule made by statutes and decisions are evidence of doubts as to its basic soundness and workability. As the Advisory Committee's Note states:

"The traditional rule against impeaching one's own witness is abandoned as based on false premises. A party does not hold out his witnesses as worthy of belief, since he rarely has a free choice in selecting them. Denial of the right leaves the party at the mercy of the witness and the adversary."

The impeaching proof must be relevant within the meaning of Rule 401 and Rule 403 and must in fact be impeaching. See Ordovery, *Surprise! That Damaging Turncoat Witness Is Still With Us*, 5 Hofstra L. Rev. 65, 70 (1976).

## Rule 608. Evidence of character and conduct of witness.

(a) *Opinion and reputation evidence of character.* — The credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion as provided in Rule 405(a), but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) *Specific instances of conduct.* — Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than



conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility. (1983, c. 701, s. 1.)

## COMMENTARY

This rule is identical to Fed. R. Evid. 608, except for the addition of the phrase "as provided in Rule 405(a)" to subdivision (a).

Subdivision (a) allows the credibility of a witness to be attacked or supported by evidence in the form of reputation or opinion. Admitting opinion evidence to prove character is a change in North Carolina practice. See Commentary to Rule 405. The reference to Rule 405(a) is to make it clear that expert testimony on the credibility of a witness is not admissible.

The rule in North Carolina has been that evidence of a specific trait of character is admissible only if asked on cross-examination or if "volunteered" by the witness on direct examination in answer to a question which asks if the witness knows the general reputation or reputation and character of the subject. In both cases, the witness may testify to character traits that are wholly irrelevant to any issue in the case. *Brandis on North Carolina Evidence* §§ 114, 115 (1982). The North Carolina rule is unique, and appears to have its origin in a misinterpretation of earlier opinions. *Id.* § 114.

The first limitation of subdivision (a) changes this result by confining evidence of specific traits of a witness to character for truthfulness or untruthfulness and permitting counsel to ask questions regarding these traits on direct examination or cross-examination. However, evidence of *truthfulness* is permitted only after the character of the witness for truthfulness has been attacked.

In North Carolina the necessity for impeachment as a prerequisite to corroboration has been more theoretical than real. *Id.* § 50. Adoption of this rule strengthens the limitation. The Advisory Committee's Note states that:

"Opinion or reputation that the witness is untruthful specifically qualifies as an attack under the rule, and evidence of misconduct, including conviction of crime, and of corruption also fall within this category. Evidence of bias or interest does not. McCormick § 49; 4 Wigmore §§ 1106, 1107. Whether evidence in the form of contradiction is an attack upon the character of the witness must depend upon the

circumstances. McCormick § 49. (Cf. 4 Wigmore §§ 1108, 1109)."

As to the use of specific instances on direct by an opinion witness, see the Commentary to Rule 405, *supra*.

Subdivision (b) generally bars evidence of specific instances of conduct of a witness for the purpose of attacking or supporting his credibility. Evidence of wrongful acts admissible under Rule 404(b) is not within this rule and is admissible by extrinsic evidence or by cross-examination of any witness.

There are two exceptions under subdivision (b). Conviction of a crime as a technique of impeachment is treated in detail in Rule 609 and is merely recognized in this rule as an exception to the general rule excluding evidence of specific incidents for impeachment purposes.

The second exception allows particular instances of conduct, though not the subject of criminal conviction, to be inquired into on cross-examination of the principal witness himself or of a witness who testifies concerning his character for truthfulness. Current North Carolina practice allows only inquiry concerning the specific acts of the principal witness himself. *Brandis on North Carolina Evidence* §§ 111, 115 (1982). The Advisory Committee's Note states that:

"Effective cross-examination demands that some allowance be made for going into matters of this kind, that the possibilities of abuse are substantial. Consequently safeguards are erected in the form of specific requirements that the instances inquired into be probative of truthfulness or its opposite and not remote in time. Also, the overriding protection of Rule 403 requires that the probative value not be outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury, and that of Rule 611 bars harassment and undue embarrassment."

The last sentence of Rule 608 constitutes a rejection of the doctrine of such cases as *State v. Foster*, 284 N.C. 259 (1973), that any past criminal act relevant to credibility may be



inquired into on cross-examination, in apparent disregard of the privilege against self-incrimination. As the Advisory Committee's Note states:

"While it is clear that an ordinary witness cannot make a partial disclosure of incriminating matter and then invoke the privilege on cross-examination, no tenable contention can be made that merely by testifying he waives his right to foreclose inquiry on cross-examination into criminal activities for the purpose of attacking his credibility. So to hold would reduce the privilege to a nullity. While it is true that an accused, unlike an ordinary witness, has an option whether to testify, if the option can be exercised only at the price of opening up inquiry as to any and all criminal acts committed during his lifetime, the right to testify could scarcely be said to possess much

vitality. In *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965), the Court held that allowing comment on the election of an accused not to testify exacted a constitutionally impermissible price, and so here. While no specific provision in terms confers constitutional status on the right of an accused to take the stand in his own defense, the existence of the right is so completely recognized that a denial of it or substantial infringement upon it would surely be of due process dimensions. See *Ferguson v. Georgia*, 365 U.S. 570, 81 S.Ct. 756, 5 L.Ed.2d 783 (1961); McCormick, § 131; 8 Wigmore § 2276 (McNaughton Rev. 1961). In any event, wholly aside from constitutional considerations, the provision represents a sound policy."

See *Brandis on North Carolina Evidence* § 111, at 409, n. 28 (1982).

## Rule 609. Impeachment by evidence of conviction of crime.

(a) *General rule.* — For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime punishable by more than 60 days confinement shall be admitted if elicited from him or established by public record during cross-examination or thereafter.

(b) *Time limit.* — Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) *Effect of pardon.* — Evidence of a conviction is not admissible under this rule if the conviction has been pardoned.

(d) *Juvenile adjudications.* — Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) *Pendency of appeal.* — The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible. (1983, c. 701, s. 1.)

### COMMENTARY

Subdivision (a) differs from Fed. R. Evid. 609(a), which permits, for purposes of attacking the credibility of a witness, evidence of conviction of a felony or a crime that involves dishonesty or false statement. The current practice in North Carolina is that any sort of

criminal offense may be the subject of inquiry for the purpose of attacking credibility.

Subdivision (a) provides that evidence of a crime punishable by more than 60 days confinement shall be admissible. This is the standard used in the Fair Sentencing Act in defining an



aggravating factor. See G.S. 15A-1340.4(a)(1)(o). This includes convictions occurring in other states, the District of Columbia, and the United States even though the crime for which the defendant was convicted would not have been a crime if committed in this state.

Under current North Carolina practice a witness' denial of a prior conviction "may not be contradicted by introducing the record of his conviction or otherwise proving by other witnesses that he was, in fact, convicted." However, this prohibition has often been circumvented. *Brandis on North Carolina Evidence* § 112, at 414 (1982). Subdivision (a) allows the record of the conviction to be introduced.

Subdivision (a) also deletes the requirement in Fed. R. Evid. 609(a) that the court determine that the probative value of admitting evidence of the prior conviction outweighs its prejudicial effect to the defendant.

Subdivision (b) is identical to Fed. R. Evid. 609 (b) and departs from the common law in North Carolina in providing a time limit on the use of prior convictions. Generally, evidence of a prior conviction is not admissible under subdivision (b) if more than 10 years has elapsed since the date of the conviction or of the release of the witness from confinement imposed for that conviction, whichever is the later date. Evidence of such a conviction is admissible, however, if the court determines, in the interests of justice, that the probative value of the

conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. A party must give written notice if he intends to use a conviction falling outside the 10-year period.

Subdivision (c) differs from Fed. R. Evid. 609(c) and provides an absolute prohibition of evidence of a conviction that has been pardoned. Current North Carolina practice does not prohibit evidence of such convictions.

Subdivision (d) is identical to Fed. R. Evid. 609(d) and provides that evidence of a juvenile adjudication is generally inadmissible. However, the court in a criminal case may "allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence." This is intended to satisfy the requirement of *Davis v. Alaska*, 415 U.S. 308 (1974). G.S. 7A-677, which provides that the defendant or another witness in a criminal case may be ordered to testify with respect to whether he was adjudicated delinquent, should be amended to conform to this subdivision. Conforming amendments also should be made to G.S. 15-223(b), G.S. 90-96, and G.S. 90-113.14.

Subdivision (e) is the same as Fed. R. Evid. 609(e) and conforms to current North Carolina practice. See *Brandis on North Carolina Evidence* § 112, at 411 (1982).

## Rule 610. Religious beliefs or opinions.

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature his credibility is impaired or enhanced; provided, however, such evidence may be admitted for the purpose of showing interest or bias. (1983, c. 701, s. 1.)

### COMMENTARY

This rule is identical to Fed. R. Evid. 610 except for the proviso that explicitly states that evidence of religious beliefs or opinions may be admitted to show interest or bias. The rule clarifies unsettled law in North Carolina concerning whether, for impeachment purposes, a

witness may be cross-examined as to his religious beliefs. See *Brandis on North Carolina Evidence* § 55, at 205 (1982). Evidence probative of something other than veracity is not prohibited by the rule.

## Rule 611. Mode and order of interrogation and presentation.

(a) *Control by court.* — The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.



(b) *Scope of cross-examination.* — A witness may be cross-examined on any matter relevant to any issue in the case, including credibility.

(c) *Leading questions.* — Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions. (1983, c. 701, s. 1.)

### COMMENTARY

This rule, except for subdivision (b), is identical to Fed. R. Evid. 611.

The rule sets forth the objectives the court should seek to obtain rather than spelling out detailed rules. Specific statutes relating to the mode and order of interrogating witnesses and presenting evidence, e.g., G.S. 15A-1226 dealing with when rebuttal evidence may be presented, will not be overridden by the general guidelines set by this rule.

The Advisory Committee's Note says that:

"Item (1) restates in broad terms the power and obligation of the judge as developed under common law principles. It covers such concerns as whether testimony shall be in the form of a free narrative or responses to specific questions, McCormick § 5, the order of calling witnesses and presenting evidence, 6 Wigmore § 1867, the use of demonstrative evidence, McCormick § 179, and the many other questions arising during the course of a trial which can be solved only by the judge's common sense and fairness in view of the particular circumstances.

Item (2) is addressed to avoidance of needless consumption of time, a matter of daily concern in the disposition of cases. A companion piece is found in the discretion vested in the judge to exclude evidence as a waste of time in Rule 403(b).

Item (3) calls for a judgment under the particular circumstances whether interrogation tactics entail harassment or undue embarrassment. Pertinent circumstances include the importance of the testimony, the nature of the inquiry, its relevance to credibility, waste of time, and confusion. McCormick § 42. In *Alford v. United States*, 282 U.S. 687, 694, 51 S.Ct. 218, 75 L.Ed. 624 (1931), the Court pointed out that, while the trial judge should protect the witness from questions which 'go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate,' this protection by no means forecloses efforts to discredit the witness. Reference to the transcript of the prosecutor's cross-examination in *Berger v. United States*, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935), serves to lay at rest any doubts as to the need for judicial control in this area.

The inquiry into specific instances of conduct of a witness allowed under Rule 608(b) is, of course, subject to this rule."

Subdivision (b) deals with the scope of cross-examination. "In North Carolina the substantive cross-examination is not confined to the subject matter of direct testimony plus impeachment, but may extend to any matter relevant to the issues." *Brandis on North Carolina Evidence* § 35, at 143 (1982). Subdivision (b) rejects the more restricted approach to cross-examination found in Fed. R. Evid. 611(b) and adopts the current North Carolina wide-open cross-examination rule.

Subdivision (c) continues the traditional view that the suggestive powers of the leading question are as general propositions undesirable. Within this tradition numerous exceptions have achieved recognition: The witness who is hostile, unwilling or biased; the child witness or the adult with communication problems; the witness whose recollection is exhausted; and undisputed preliminary matters. 3 Wigmore §§ 774-778; *State v. Greene*, 285 N.C. 482 (1974). As the Advisory Committee's Note points out: "The matter clearly falls within the area of control by the judge over the mode and order of interrogation and presentation and accordingly is phrased in words of suggestion rather than command."

The Note states that:

"The rule also conforms to tradition in making the use of leading questions on cross-examination a matter of right. The purpose of the qualification 'ordinarily' is to furnish a basis for denying the use of leading questions when the cross-examination is cross-examination in form only and not in fact, as for example the 'cross-examination' of a party by his own counsel after being called by the opponent (savoring more of redirect) or of an insured defendant who proves to be friendly to the plaintiff."

The last sentence of subdivision (c) deals with categories of witnesses automatically regarded and treated as hostile. N.C. Civ. Pro. Rule 43(b) permits leading questions to "an adverse party or an agent or employee of an adverse party, or an officer, director, or employee of a private cor-



poration or of a partnership or association which is an adverse party, or an officer, agent or employee of a state, county or municipal government or agency thereof which is an adverse party." The phrase of the rule "witness identified with" an adverse party is designed to enlarge the category of witnesses who may

safely be regarded as hostile without further demonstration. Upon adoption of this rule, N.C. Civ. Pro. Rule 43(b) should be repealed. N.C. Civ. Pro. Rule 30 should be amended to state that depositions are subject to the North Carolina Rules of Evidence.

## Rule 612. Writing or object used to refresh memory.

(a) *While testifying.* — If, while testifying, a witness uses a writing or object to refresh his memory, an adverse party is entitled to have the writing or object produced at the trial, hearing, or deposition in which the witness is testifying.

(b) *Before testifying.* — If, before testifying, a witness uses a writing or object to refresh his memory for the purpose of testifying and the court in its discretion determines that the interests of justice so require, an adverse party is entitled to have those portions of any writing or of the object which relate to the testimony produced, if practicable, at the trial, hearing, or deposition in which the witness is testifying.

(c) *Terms and conditions of production and use.* — A party entitled to have a writing or object produced under this rule is entitled to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If production of the writing or object at the trial, hearing, or deposition is impracticable, the court may order it made available for inspection. If it is claimed that the writing or object contains privileged information or information not directly related to the subject matter of the testimony, the court shall examine the writing or object in camera, excise any such portions, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing or object is not produced, made available for inspection, or delivered pursuant to order under this rule, the court shall make any order justice requires, but in criminal cases if the prosecution elects not to comply, the order shall be one striking the testimony or, if justice so requires, declaring a mistrial. (1983, c. 701, s. 1.)

### COMMENTARY

This rule is a reorganization of Fed. R. Evid. 612 and differs substantively from the federal rule in five ways. The rule omits a reference to the Jencks Act. Also, it states explicitly that it applies to trials, hearings and depositions and that it applies to objects as well as writings. The rule explicitly provides for inspection of the writing or object if production of the object or writing at the trial is impracticable. Finally, subsection (c) adds privileged information to the grounds which may be the basis of an *in camera* examination and excision by the court.

If the writing is used by the witness while testifying to refresh his memory, the adverse party is entitled to production. If the writing is used before testifying for the purpose of testifying, disclosure is in the discretion of the court. Requiring disclosure of writings used before testifying is a change in North Carolina

practice. See, e.g., *State v. Cross*, 293 N.C. 296 (1977).

As the Advisory Committee's Note points out:

"The purpose of the phrase 'for the purpose of testifying' is to safeguard against using the rule as a pretext for wholesale exploration of an opposing party's files and to insure that access is limited only to those writings which may fairly be said in fact to have an impact upon the testimony of the witness."

The phrase "for the purpose of testifying" read together with the phrase "and the court in its discretion determines that the interests of justice so require" are intended to maintain the work product "privilege" for lawyers and others who assist in preparation for trial and in most instances it is likely that the judge will exercise his discretion in such a manner to prevent discovery of statements used before testifying to



refresh a witness' recollection. Saltzburg and Redden, *Federal Rules of Evidence Manual*, p. 417 (3d ed. 1982).

In subsection (c), by adding privileged information to those items which the court may consider *in camera* with possible excision of the material, the intention was to make it clear that the rule does not invade the existing

authority of the court in areas such as protecting the confidentiality of the informants.

On the other hand, exculpatory writings are available to criminal defendants irrespective of Rule 612. See *United States v. Agurs*, 427 U.S. 97 (1976); *United States v. Nobles*, 422 U.S. 225 (1975); *Brady v. Maryland*, 373 U.S. 83 (1963); *State v. Hardy*, 293 N.C. 105 (1977).

## Rule 613. Prior statements of witnesses.

In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel. (1983, c. 701, s. 1.)

### COMMENTARY

This rule is identical to subdivision (a) of Fed. R. Evid. 613. There are no North Carolina cases on the subject matter of subdivision (a).

The Advisory Committee's Note states:

"The Queen's Case, 2 Br. & B. 284, 129 Eng. Rep. 976 (1820), laid down the requirement that a cross-examiner, prior to questioning the witness about his own prior statement in writing, must first show it to the witness. Abolished by statute in the country of its origin, the requirement nevertheless gained currency in the United States. This rule abolishes this useless impediment to cross-examination. \*\*\* Both oral and written statements are included.

The provision for disclosure to counsel is designed to protect against unwarranted insinuations that a statement has been made when the fact is to the contrary.

The rule does not defeat the application of Rule 1002 relating to production of the original when the contents of a writing are sought to be proved. Nor does it defeat the application of Rule 26(b)(3) of the Rules of Civil Procedure, as revised, entitling a person on request to a copy of his own statement, though the operation of the latter may be suspended temporarily."

The federal rule includes a subdivision (b) barring evidence of a prior inconsistent statement unless the witness has been given an opportunity to explain or deny it. Since subdivision (b) is omitted, foundation requirements for admitting inconsistent statements will be governed by case law. See *Brandis on North Carolina Evidence* § 48 (1982).

## Rule 614. Calling and interrogation of witnesses by court.

(a) *Calling by court.* — The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(b) *Interrogation by court.* — The court may interrogate witnesses, whether called by itself or by a party.

(c) *Objections.* — No objections are necessary with respect to the calling of a witness by the court or to questions propounded to a witness by the court but it shall be deemed that proper objection has been made and overruled. (1983, c. 701, s. 1.)

### COMMENTARY

Subdivisions (a) and (b) of this rule are identical to Fed. R. Evid. 614(a) and (b).

Subdivision (a) authorizes the court to call witnesses and is consistent with North

Carolina practice. See *Brandis on North Carolina Evidence* § 37 (1982).

Subdivision (b) authorizes the court to examine witnesses, whether called by itself or by a



party, and is consistent with North Carolina practice. *Id.*

It is anticipated that the court will exercise its authority to call or interrogate a witness only in extraordinary circumstances.

The court may not in calling or interrogating a witness do so in a manner as to suggest an opinion as to the weight of the evidence or the credibility of the witness in violation of G.S. 15A-1222 or G.S. 1A-1, Rule 51(a). *Id.*

Subdivision (c) differs from Fed. R. Evid. 614(c) by providing for an automatic objection to the calling or interrogation of witnesses by the court. Subdivision (c) is consistent with N. C. Civ. Pro. Rule 46(a)(3) which provides that no objections are necessary with respect to questions propounded to a witness by the court.

## Rule 615. Exclusion of witnesses.

At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party that is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause, or (4) a person whose presence is determined by the court to be in the interest of justice. (1983, c. 701, s. 1.)

### COMMENTARY

This rule is similar to Fed. R. Evid. 615 except that the word "shall" in the first sentence has been changed to "may order witnesses excluded," and the phrase "a person whose presence is determined by the court to be in the interest of justice" has been added as a fourth exception.

The use of "may order witnesses excluded" rather than "shall," as in the federal rule, is intended to preserve discretion in the trial judge, allowing him to take into account such things as the physical setting of the trial. However, the practice should be to sequester witnesses on request of either party unless some reason exists not to.

In North Carolina the usual practice has been to separate witnesses and send them out of the hearing of the court when requested, but this has been discretionary with the trial judge and not a matter of right. See *Brandis on North Carolina Evidence* § 20 (1982). G.S. 15A-1225, which codifies this practice, should be amended to conform to Rule 615.

The Advisory Committee's Note states:

"The efficacy of excluding or sequestering witnesses has long been recognized as a means of discouraging and exposing fabrication, inaccuracy and collusion. 6 Wigmore §§ 1837-1838. The authority of the judge is admitted, the only question being whether the matter is committed to his discretion or one of right. The rule takes the latter position. No time is specified for making the request.

Several categories of persons are excepted. (1) Exclusion of persons who are parties would raise serious problems of confrontation and due

process. Under accepted practice they are not subject to exclusion. 6 Wigmore § 1841. (2) As the equivalent of the right of a natural-person party to be present, a party which is not a natural person is entitled to have a representative present. Most of the cases have involved allowing a police officer who has been in charge of an investigation to remain in court despite the fact that he will be a witness. \*\*\* Designation of the representative by the attorney rather than by the client may at first glance appear to be an inversion of the attorney-client relationship, but it may be assumed that the attorney will follow the wishes of the client, and the solution is simple and workable. \*\*\* (3) The category contemplates such persons as an agent who handled the transaction being litigated or an expert needed to advise counsel in the management of the litigation. See 6 Wigmore § 1841, n. 4."

A government investigative agent would be within the second exception. See S. Rept. No. 93-1277, 93d Cong., 2d Sess. (1974). The third category would include an expert listening to testimony for the purpose of testifying in his capacity as an expert.

A fourth exception to Rule 615 was added to provide that the rule does not authorize the exclusion of a person whose presence is determined by the court to be in the interest of justice. For example, when a minor child is testifying the court may determine that it is in the interest of justice for the parent or guardian to be present even though the parent or guardian is to be called subsequently. When this exception is relied upon the court should state



the reasons supporting its determination that the presence of the person is in the interest of justice.

## ARTICLE 7.

### *Opinions and Expert Testimony.*

#### **Rule 701. Opinion testimony by lay witness.**

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue. (1983, c. 701, s. 1.)

#### COMMENTARY

This rule is identical to Fed. R. Evid. 701.

Limitation (a) retains the traditional requirement that lay opinion be based on firsthand knowledge or observation. See *Brandis on North Carolina Evidence*, § 122, at 468 (1982).

Limitation (b) is phrased in terms of requiring testimony to be helpful in resolving issues. This is a different test from the more traditional "collective facts exception" which allows lay opinions or inferences only where a shorthand expression is "necessary" because articulation of more primary components is impossible or highly impracticable. P. Rothstein, *Rules of Evidence for United States Courts and Magistrates*, at 257 (1980). See *Brandis on North Carolina Evidence* § 125, at 474-76 (1982). Nothing in the rule would bar evidence that is commonly referred to as a "shorthand statement of fact." *Id.* at 476.

As the Advisory Committee's Note points out: "[N]ecessity as a standard for permitting opinions and conclusions has proved too elusive and too unadaptable to particular situations for purposes of satisfactory judicial administration. The rule assumes that the natural characteristics of the adversary system will generally lead to an acceptable result, since the detailed account carries more conviction than the broad assertion, and a lawyer can be expected to display his witness to the best advantage. If he fails to do so, cross-examination and argument will point up the weakness. \*\*\* If, despite these considerations, attempts are made to introduce meaningless assertions which amount to little more than choosing up sides, exclusion for lack of helpfulness is called for by the rule."

#### **Rule 702. Testimony by experts.**

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion. (1983, c. 701, s. 1.)

#### COMMENTARY

This rule is identical to Fed. R. Evid. 702, except that the words "or otherwise" which appear at the end of the federal rule after the word "opinion" have been deleted.

The rule is identical to G.S. 8-58.13, which

should be repealed when Rule 702 becomes effective. The rule is consistent with North Carolina practice. *Brandis on North Carolina Evidence* § 134, at 520, n. 25 (1982).



## Rule 703. Bases of opinion testimony by experts.

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. (1983, c. 701, s. 1.)

### COMMENTARY

This rule is identical to Fed. R. Evid. 703.

Under the rule, facts or data upon which an expert bases an opinion may be derived from three possible sources. The first is the personal observation of the witness. The second source is presentation at trial by a hypothetical question or by having the expert attend the trial and hear the testimony establishing the facts. The third source consists of presentation of data to the expert outside of court. See Comment, *Expert Medical Testimony: Differences Between the North Carolina Rules and the Federal Rules of Evidence* 12 W.F.L.R. 833, 837 (1976).

In *State v. Wade*, 296 N.C. 454 (1978), the Court stated that a "physician, as an expert witness, may give his opinion, including a diagnosis, based either on personal knowledge or observation or on information supplied him by others, including the patient, if such informa-

tion is inherently reliable even though it is not independently admissible into evidence." Although the rule requires that the facts or data "be of a type reasonably relied upon by experts in the particular field" rather than that they be "inherently reliable," the thrust of *State v. Wade* is consistent with the rule. See W. Blakey, *Examination of Expert Witnesses in North Carolina*, 61 N.C.L.Rev. 1, 20-32 (1982).

The rule provides that the facts or data need not be admissible in evidence if of a type reasonably relied upon by experts in the particular field. In *State v. Wade* the Court stated that: "If his opinion is admissible the expert may testify to the information he relied on in forming it for the purpose of showing the basis of the opinion." Thus an expert may testify as to the facts upon which his opinion is based, even though the facts would not be admissible as substantive evidence.

## Rule 704. Opinion on ultimate issue.

Testimony in this form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. (1983, c. 701, s. 1.)

### COMMENTARY

This rule is identical to Fed. R. Evid. 704.

The rule would abrogate the doctrine that excludes evidence in the form of an opinion if it purports to resolve the "ultimate issue" to be decided by the trier of fact.

In *State v. Wilkerson*, 295 N.C. 559 (1978), the Court held that admissibility of expert opinion depends not on whether it would invade the jury's province, but rather on "whether the witness . . . is in a better position to have an opinion . . . than is the trier of fact." Professor Brandis states that: "It is hoped that a comparable reexamination of the rule as applied to lay testimony will be forthcoming. The rule has been condemned by thoughtful commentators, and judicial expressions of doubt are not wanting." *Brandis on North Carolina Evidence* § 126, at 480-81 (1982) (footnotes omitted).

The Advisory Committee's Note states:

"The abolition of the ultimate issue rule does not lower the bars so as to admit all opinions. Under Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence which wastes time. These provisions afford ample assurance against the admission of opinions which would merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day. They also stand ready to exclude opinions phrased in terms of inadequately explored legal criteria. Thus the question, 'Did T have capacity to make a will?' would be excluded, while the question, 'Did T have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?' would be allowed. McCormick § 12."



## Rule 705. Disclosure of facts or data underlying expert opinion.

The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless an adverse party requests otherwise, in which event the expert will be required to disclose such underlying facts or data on direct examination or *voir dire* before stating the opinion. The expert may in any event be required to disclose the underlying facts or data on cross-examination. There shall be no requirement that expert testimony be in response to a hypothetical question. (1983, c. 701, s. 1.)

### COMMENTARY

This rule differs from Fed. R. Evid. 705 in two respects.

Fed. R. Evid. 705 leaves it to the court, rather than opposing counsel, to determine whether to require prior disclosure of the underlying facts. Rule 705 is consistent with G.S. 8-58.14, which should be repealed after the rule is adopted.

The second difference is that the last sentence of this rule does not appear in the Fed. R. Evid. 705. This sentence is identical to G.S. 8-58.12 which should be repealed after this rule is adopted. Although hypothetical questions are no longer required, neither the rule nor G.S. 8-58.12 prohibits their voluntary use.

Prior to 1982, when the facts upon which an opinion was based were within the expert's own knowledge, the court had discretion to permit the expert to give his opinion first and leave the facts to be brought out by cross-examination. *Brandis on North Carolina Evidence* § 136 (1982). Facts not within the personal knowledge of the expert had to be incorporated into a hypothetical question and thus disclosed prior to the opinion. *Id.* The 1981 legislation eliminated the requirement of the hypothetical question and allowed the expert to give his opinion without prior disclosure of the underlying facts unless an adverse party requests otherwise. G.S. 8-58.14. Upon the request of an adverse

party, the judge must require the expert to disclose the underlying facts on direct examination or *voir dire* before stating the opinion. This rule continues that requirement.

The second sentence of Rule 705 gives the opposing side the right to require disclosure of the underlying facts or data on cross-examination. The cross-examiner is under no compulsion to bring out any facts or data except those unfavorable to the opinion. N.C. Civ. Pro. Rule 26(b)(4) provides for substantial discovery of the facts underlying the opinion prior to trial.

Under Rule 611, the court exercises control over the mode and order of interrogating witnesses and presenting evidence. The court may allow the opposing party to cross-examine concerning the factual basis of the opinion immediately after the opinion is given rather than at a later point in the trial.

Except where an adverse party requests it, this rule eliminates the requirement that the basis of an expert opinion must be stated. However, the requirement that there must be a basis for the expert opinion would not be abolished. See W. Blakey, *Examination of Expert Witnesses in North Carolina*, 61 N.C.L.Rev. 1, 9 (1982).

## Rule 706. Court appointed experts.

(a) *Appointment.* — The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify by the court or any party. He shall be subject to cross-examination by each party, including a party calling him as a witness.



(b) *Compensation.* — Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation for the taking of property. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) *Disclosure of appointment.* — In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) *Parties' experts of own selection.* — Nothing in this rule limits the parties in calling expert witnesses of their own selection. (1983, c. 701, s. 1.)

#### COMMENTARY

This rule is identical to Fed. R. Evid. 706 except that "for the taking of property" has been inserted in subdivision (b) in lieu of "under the Fifth Amendment".

A trial judge has the discretion to call an expert witness. *State v. Horne*, 171 N.C. 787

(1916). This rule provides the procedure for calling such a witness.

Subdivision (b) provides the method of compensating experts called by the court but does not require an additional appropriation.

### ARTICLE 8.

#### *Hearsay.*

### **Rule 801. Definitions and exception for admissions of a party-opponent.**

The following definitions apply under this Article:

(a) *Statement.* — A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(b) *Declarant.* — A "declarant" is a person who makes a statement.

(c) *Hearsay.* — "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) *Exception for Admissions by a Party-Opponent.* — A statement is admissible as an exception to the hearsay rule if it is offered against a party and it is (A) his own statement, in either his individual or a representative capacity, or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship or (E) a statement by a coconspirator of such party during the course and in furtherance of the conspiracy. (1983, c. 701, s. 1.)

#### COMMENTARY

This rule is identical to Fed. R. Evid. 801, except for subdivision (d) which is discussed below.

Subdivision (a) defines "statement" for purposes of the hearsay rule. The Advisory Committee's Note states:

"The definition of 'statement' assumes importance because the term is used in the definition of hearsay in subdivision (c). The effect of the definition of 'statement' is to exclude from the operation of the hearsay rule all evidence of conduct, verbal or nonverbal, not intended as



an assertion. The key to the definition is that nothing is an assertion unless intended to be one.

It can scarcely be doubted that an assertion made in words is intended by the declarant to be an assertion. Hence verbal assertions readily fall into the category of 'statement'. Whether nonverbal conduct should be regarded as a statement for purposes of defining hearsay requires further consideration. Some nonverbal conduct, such as the act of pointing to identify a suspect in a lineup, is clearly the equivalent of words, assertive in nature, and to be regarded as a statement. Other nonverbal conduct, however, may be offered as evidence that the person acted as he did because of his belief in the existence of the condition sought to be proved, from which belief the existence of the condition may be inferred. This sequence is, arguably, in effect an assertion of the existence of the condition and hence properly includable within the hearsay concept. \*\*\* Admittedly evidence of this character is untested with respect to the perception, memory, and narration (or their equivalents) of the actor, but the Advisory Committee is of the view that these dangers are minimal in the absence of an intent to assert and do not justify the loss of the evidence on hearsay grounds. No class of evidence is free of the possibility of fabrication, but the likelihood is less with nonverbal than with assertive verbal conduct. The situations giving rise to the nonverbal conduct are such as virtually to eliminate questions of sincerity. Motivation, the nature of the conduct, and the presence or absence of reliance will bear heavily upon the weight to be given the evidence. \*\*\* Similar considerations govern nonassertive verbal conduct and verbal conduct which is assertive but offered as a basis for inferring something other than the matter asserted, also excluded from the definition of hearsay by the language of subdivision (c)."

Subdivision (a) differs from current North Carolina law by excluding from the hearsay rule all evidence of conduct, verbal or nonverbal, not intended as an assertion. Some North Carolina cases have barred evidence of conduct even though the conduct was nonassertive. In other cases, comparable evidence has been admitted, either as nonhearsay or without noticing its possible hearsay nature. *Brandis on North Carolina Evidence* § 142 (1982).

With respect to subdivision (a), the Advisory Committee's Note also states:

"When evidence of conduct is offered on the theory that it is not a statement, and hence not hearsay, a preliminary determination will be required to determine whether an assertion is intended. The rule is so worded as to place the burden upon the party claiming that the intention existed; ambiguous and doubtful cases will

be resolved against him and in favor of admissibility. The determination involves no greater difficulty than many other preliminary questions of fact."

Subdivision (b), which defines declarant as a person who makes a statement, is consistent with North Carolina practice.

Subdivision (c) defines hearsay as a statement, other than one made by the declarant while testifying at the trial or hearing, offered to prove the truth of the matter asserted. The Advisory Committee's Note states:

"The definition follows along familiar lines in including only statements offered to prove the truth of the matter asserted. McCormick § 225; 5 Wigmore § 1361, 6 id. § 1766. If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay. \*\*\* The effect is to exclude from hearsay the entire category of 'verbal acts' and 'verbal parts of an act,' in which the statement itself affects the legal rights of the parties or is a circumstance bearing on conduct affecting their rights.

The definition of hearsay must, of course, be read with reference to the definition of statement set forth in subdivision (a).

Testimony given by a witness in the course of court proceedings is excluded since there is compliance with all the ideal conditions for testifying."

This definition of hearsay is consistent with the definitions used by North Carolina courts. See *Brandis on North Carolina Evidence* § 138 (1982). With respect to the definition of hearsay excluding "verbal acts" from the hearsay ban, see *Brandis*, § 141.

Subdivision (d)(1) of Fed. R. Evid. 801 departs markedly from the common law in North Carolina by excluding from the hearsay ban several statements that come within the common law definition of hearsay. Accordingly, the language of Fed. R. Evid. 801(d), which provides that in certain circumstances prior inconsistent statements, prior consistent statements, and out-of-court identifications are not hearsay, was deleted. See *Brandis on North Carolina Evidence* § 46 (prior inconsistent statements), §§ 51 and 52 (prior consistent statements); *State v. Neville*, 175 N.C. 751 (1918) (identification).

Subdivision (d)(2) of Fed. R. Evid. 801 excludes certain admissions of a party-opponent from the hearsay ban by stating that such statements are not hearsay. Subdivision (d) of Rule 801 achieves the same result in a manner consistent with current North Carolina practice by providing that such a statement may be admitted as an exception to the hearsay rule.



Subdivision (d) specifies five categories of statements for which the responsibility of a party is considered sufficient to justify reception in evidence against the party.

With respect to category (A), a party's own statement is the classic example of an admission.

Category (A) is in accord with North Carolina practice. See *Brandis on North Carolina Evidence* §§ 167, 176 (1982).

With respect to category (B), the Advisory Committee's Note states:

"Under established principles an admission may be made by adopting or acquiescing in the statement of another. While knowledge of contents would ordinarily be essential, this is not inevitably so: 'X is a reliable person and knows what he is talking about.' See McCormick § 246, p. 527, n. 15. Adoption or acquiescence may be manifested in any appropriate manner. When silence is relied upon, the theory is that the person would, under the circumstances, protest the statement made in his presence, if untrue. The decision in each case calls for an evaluation in terms of probable human behavior. In civil cases, the results have generally been satisfactory. In criminal cases, however, troublesome questions have been raised by decisions holding that failure to deny is an admission: the inference is a fairly weak one, to begin with; silence may be motivated by advice of counsel or realization that 'anything you say may be used against you'; unusual opportunity is afforded to manufacture evidence; and encroachment upon the privilege against self-incrimination seems inescapably to be involved. However, recent decisions of the Supreme Court relating to custodial interrogation and the right to counsel appear to resolve these difficulties. Hence the rule contains no special provisions concerning failure to deny in criminal cases."

Admission of a statement of which a party has adopted is in accord with North Carolina practice. See *Brandis on North Carolina Evidence* § 179 (1982).

With respect to category (C), the Advisory Committee's Note states:

"No authority is required for the general proposition that a statement authorized by a party to be made should have the status of an admission by the party. However, the question arises whether only statements to third persons should be so regarded, to the exclusion of statements by the agent to the principal. The rule is phrased broadly so as to encompass both. While it may be argued that the agent authorized to make statement to his principal does not speak for him, Morgan, *Basic Problems of Evidence* 273 (1962), communication to an outsider has not generally been thought to be an essential characteristic of an admission. Thus a party's books or records are usable

against him, without regard to any intent to disclose to third persons. 5 Wigmore § 1557. See also McCormick § 78, pp. 159-161."

North Carolina courts currently admit statements when an agent is, in fact, authorized to speak for the principal. *Brandis on North Carolina Evidence* § 169, at 15 (1982). However, it is unclear whether such statements are admissible when the statement was made only to the principal. *Id.* at 17. The rule would clarify North Carolina law by encompassing statements by an agent to the principal or to a third party.

With respect to category (D), the Advisory Committee's Note states:

"The tradition has been to test the admissibility of statement by agents, as admissions, by applying the usual test of agency. Was the admission made by the agent acting in the scope of his employment? Since few principals employ agents for the purpose of making damaging statements, the usual result was exclusive of the statement. Dissatisfaction with this loss of valuable and helpful evidence has been increasing. A substantial trend favors admitting statements related to a matter within the scope of the agency or employment."

In *Hubbard v. R.R.*, 203 N.C. 675 (1932), the Court states:

"What an agent or employee says relative to an act presently being done by him within the scope of his agency or employment is admissible . . . against the principal or employer, but what he says afterwards, and merely narrative of a past occurrence, though his agency or employment may continue as to other matters, or generally, is only hearsay and is not competent as against the principal or employer."

The North Carolina rule has been the subject of several dissenting opinions and has been criticized by Professor Brandis. See *Branch v. Dempsey*, 265 N.C. 733 (1965) (Sharp, J., dissenting); *Pearce v. Telephone Co.*, 299 N.C. 64 (1980) (Copeland, Carlton and Exum, J.J., dissenting); *Brandis on North Carolina Evidence* § 169 (1982). Rule 801(d)(D) would change North Carolina practice and make admissible any statements related to a matter within the scope of the agency or employment. The only additional requirement is that the statement be made during the existence of the relationship.

With respect to category (E), the Advisory Committee's Note states:

"The limitation upon the admissibility of statement of co-conspirators to those made 'during the course and in furtherance of the conspiracy' is in the accepted pattern. While the broadened view of agency taken in item (iv) might suggest wider admissibility of statements of co-conspirators, the agency theory of conspiracy is at best a fiction and ought not to serve as a basis for admissibility beyond



that already established. \*\*\* The rule is consistent with the position of the Supreme Court in denying admissibility to statements made after the objectives of the conspiracy have either failed or been achieved. *Krulewitch v. United States*, 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed. 790

(1949); *Wong Sun v. United States*, 371 U.S. 471, 490, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).” Rule 801(d)(E) is in accord with North Carolina practice. See *Brandis on North Carolina Evidence* § 173 (1982).

## Rule 802. Hearsay rule.

Hearsay is not admissible except as provided by statute or by these rules. (1983, c. 701, s. 1.)

### COMMENTARY

This rule is identical to Fed. R. Evid. 802 except that the phrase “by statute or by these rules” is used in lieu of the phrase “by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.”

Rule 802 provides for the standard exclusion of hearsay evidence; hearsay is simply inad-

missible unless an exception is applicable. This is in accord with North Carolina practice. Unless an exception to the hearsay rule is provided in these rules, the courts are not free to create new hearsay exceptions by adjudication. Rules 803(24) and 804(b)(5) allow for the admission of evidence in particular cases, but not for more general policy formulation.

## Rule 803. Hearsay exceptions; availability of declarant immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

- (1) Present Sense Impression. — A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.
- (2) Excited Utterance. — A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.
- (3) Then Existing Mental, Emotional, or Physical Condition. — A statement of the declarant’s then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant’s will.
- (4) Statements for Purposes of Medical Diagnosis or Treatment. — Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.
- (5) Recorded Recollection. — A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.



- (6) Records of Regularly Conducted Activity. — A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.
- (7) Absence of Entry in Records Kept in Accordance with the Provisions of Paragraph (6). — Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.
- (8) Public Records and Reports. — Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law-enforcement personnel, or (C) in civil actions and proceedings and against the State in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.
- (9) Records of Vital Statistics. — Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.
- (10) Absence of Public Record or Entry. — To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.
- (11) Records of Religious Organizations. — Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.
- (12) Marriage, Baptismal, and Similar Certificates. — Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.
- (13) Family Records. — Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.



- (14) **Records of Documents Affecting an Interest in Property.** — The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.
- (15) **Statements in Documents Affecting an Interest in Property.** — A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.
- (16) **Statements in Ancient Documents.** — Statements in a document in existence 20 years or more the authenticity of which is established.
- (17) **Market Reports, Commercial Publications.** — Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.
- (18) **Learned Treatises.** — To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.
- (19) **Reputation Concerning Personal or Family History.** — Reputation among members of his family by blood, adoption, or marriage, or among his associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history.
- (20) **Reputation Concerning Boundaries or General History.** — Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.
- (21) **Reputation as to Character.** — Reputation of a person's character among his associates or in the community.
- (22) (Reserved).
- (23) **Judgment as to Personal, Family or General History, or Boundaries.** — Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.
- (24) **Other Exceptions.** — A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it gives written notice stating his intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of



offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement. (1983, c. 701, s. 1.)

## COMMENTARY

This rule is identical to Fed. R. Evid. 803, except as noted below. The Advisory Committee's Note states:

"The exceptions are phrased in terms of nonapplication of the hearsay rule, rather than in positive terms of admissibility, in order to repel any implication that other possible grounds for exclusion are eliminated from consideration.

The present rule proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available. The theory finds vast support in the many exceptions to the hearsay rule developed by the common law in which unavailability of the declarant is not a relevant factor. The present rule is a synthesis of them, with revisions where modern developments and conditions are believed to make that course appropriate.

In a hearsay situation, the declarant is, of course, a witness, and neither this Rule nor Rule 804 dispenses with the requirement of firsthand knowledge. It may appear from his statement or be inferable from circumstances. See Rule 602."

As the Advisory Committee's Note indicates, the exceptions are phrased in terms of nonapplication of the hearsay rule. Evidence that is otherwise inadmissible may be stricken from a writing.

Exception (1) concerns present sense impressions and Exception (2) concerns excited utterances. The Advisory Committee's Note states:

"In considerable measure these two examples overlap, though based on somewhat different theories. The most significant practical difference will lie in the time lapse allowable between event and statement.

The underlying theory of Exception (1) is that substantial contemporaneity of event and statement negates the likelihood of deliberate or conscious misrepresentation. Moreover, if the witness is the declarant, he may be examined on the statement. If the witness is not the declarant, he may be examined as to the circumstances as an aid in evaluating the statement. (Citation omitted.)

The theory of Exception (2) is simply that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication. 6 Wigmore § 1747, p.

135. Spontaneity is the key factor in each instance, though arrived at by somewhat different routes. Both are needed in order to avoid needless niggling.

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With respect to the *time element*, Exception (1) recognizes that in many, if not most, instances precise contemporaneity is not possible, and hence a slight lapse is allowable. Under Exception (2) the standard of measurement is the duration of the state of excitement. 'How long can excitement prevail? Obviously there are no pat answers and the character of the transaction or event will largely determine the significance of the time factor.'"

North Carolina courts have recognized a hearsay exception for spontaneous utterances that is substantially the same as Exception (2). See *Brandis on North Carolina Evidence* § 164 (1982). Exception (2) would clarify discordant rulings in this area, particularly as to the element of time. *Id.* at 650. Exception (1) would be a new exception to the hearsay rule in North Carolina. *Id.* at 653.

Exception (3) concerns statements of the declarant's then existing mental, emotional or physical condition. The Advisory Committee's Note states:

"The exclusion of 'statements of memory or belief to prove the fact remembered or believed' is necessary to avoid the virtual destruction of the hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as the basis for an inference of the happening of the event which produced the state of mind."

Exception (3) is similar to the corresponding North Carolina exception to the hearsay rule. See *Brandis on North Carolina Evidence* § 161 (1982). However, the North Carolina exception differs from Exception (3) in that in North Carolina declarations that are made in a criminal case after the commission of the crime are generally not included within the exception for fear that admissibility would permit the defendant to create evidence for himself. *Id.* at 636.

In North Carolina, when the issue is one of undue influence or fraud with respect to the execution of a will, the declarations of a testator are admitted only as corroborative evidence and are not alone sufficient to establish the previous conduct of another person by means of which the alleged fraud was perpetrated or the undue influence exerted. *Brandis on North Carolina Evidence* § 163, at 647-48. Exception



(3) would change this result and permit such declarations to be admitted as substantive proof.

Exception (4) concerns statements made for purposes of medical diagnosis and treatment. The Advisory Committee's Note states:

"Even those few jurisdictions which have shied away from generally admitting statements of present condition have allowed them if made to a physician for purposes of diagnosis and treatment in view of the patient's strong motivation to be truthful.\*\*\* The same guarantee of trustworthiness extends to statements of past conditions and medical history, made for purposes of diagnosis or treatment. It also extends to statements as to causation, reasonably pertinent to the same purposes, in accord with the current trend.\*\*\* Statements as to fault would not ordinarily qualify under this latter language. Thus a patient's statement that he was struck by an automobile would qualify but not his statement that the car was driven through a red light. Under the exception the statement need not have been made to a physician. Statements to hospital attendants, ambulance drivers, or even members of the family might be included.

Under current North Carolina practice, statements of past condition made by a patient to a treating physician or psychiatrist, when relevant to diagnosis or treatment and therefore inherently reliable, are admissible to show the basis for the expert's opinion. *Brandis on North Carolina Evidence* § 161, at 635 (1982). In some instances, a statement to a nontreating physician is currently admissible. *State v. Franks*, 300 N.C. 1 (1980). Professor Brandis states that when qualifying as basis for the expert's opinion statements of past condition "should be (though, as yet, they are not) admissible as substantive evidence as an exception to the hearsay rule." *Brandis, supra*, at 636.

Exception (5) concerns past recollection recorded, which is currently admissible in North Carolina. See *Brandis on North Carolina Evidence* § 33 (1982).

The phrase "or adopted by a witness" was added by Congress to make it clear that statements adopted by a witness would come within the rule. The language chosen by Congress may be read to suggest that the statement does not qualify for admission unless the witness made the recordation himself or actually adopted the recordation of another. The exception should be construed so as not to require that the recordation of another be actually adopted by the witness. Thus the statement may be one that was made by the witness, one that was adopted by the witness, or one that was made by the witness and recorded by another. This construction would be in accord with North Carolina practice which permits use

of the recorded statement if the witness is able to testify that he saw it at a time when the facts were fresh in his memory, and that it actually represented his recollection at the time. See *Brandis, supra*, at 127.

To prevent a jury from giving too much weight to a written statement that cannot be effectively cross-examined, the last sentence of Exception (5) provides that the memorandum or record may be read into evidence but may not be received as an exhibit unless offered by an adverse party. Current North Carolina practice apparently permits the writing itself, or a reading thereof by the authenticating witness, to be admitted. *Brandis, supra*, at 126, n. 75.

Exception (6) concerns records of regularly conducted activity. The exception is derived from the traditional business records exception. The exception is limited to business records, but business is defined to include the records of institutions and associations like schools, churches and hospitals. This appears to be a slight expansion of the current North Carolina business records exception. See *Brandis, supra*, § 155.

The exception is consistent with North Carolina practice in that the person making the record is not required to have personal knowledge of the transactions entered. See *Brandis, supra*, § 155, at 617. However, it must be shown that the record was actually based (or it was the regular practice of the activity to base the record) upon a person with knowledge acting pursuant to a regularly conducted activity.

The exception specifically includes both diagnoses and opinions, in addition to acts, events and conditions, as proper subjects of admissible entries. See *State v. DeGregory*, 285 N.C. 122 (1977).

In addition, the Advisory Committee's Note states that:

"Problems of the motivation of the informant have been a source of difficulty and disagreement.

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The formulation of specific terms which would assure satisfactory results in all cases is not possible. Consequently the rule proceeds from the base that records made in the course of a regularly conducted activity will be taken as admissible but subject to authority to exclude if 'the sources of information or other circumstances indicate lack of trustworthiness.'" Apparently, there are no North Carolina cases on this point.

The rule is in accord with North Carolina practice in that it includes computer storage. *Brandis, supra*, § 155, at 619.

Exception (7) concerns the absence of an entry in the records of regularly conducted activity. As the Advisory Committee's Note



states: "Failure of a record to mention a matter which would ordinarily be mentioned is satisfactory evidence of its nonexistence." This is existing North Carolina law. See *Brandis on North Carolina Evidence* § 155 (1982).

Exception (8) differs from Fed. R. Evid. 803(8) in that the word "State" is used in lieu of the word "government".

Part (A) of the exception is for records, reports, statements or data compilations setting forth the activities of the public office or agency. Part (A) is in accord with North Carolina practice. See *Brandis on North Carolina Evidence* § 153 (1982).

Part (B) covers matters observed pursuant to duty imposed by law when there is also a duty to report. Part (B) is in general accord with North Carolina practice. *Id.* In criminal cases, Part (B) does not cover matters observed by police officers and other law enforcement personnel. Note that the right to confrontation may exclude evidence in criminal cases even if the matter is not one observed by law enforcement personnel.

Part (C) covers factual findings resulting from an investigation made pursuant to legal authority. The term "factual findings" is not intended to preclude the introduction of evaluative reports containing conclusions or opinions. Apparently North Carolina courts currently exclude statements in reports that only amount to an expression of opinion. *Id.* at 609.

The Advisory Committee's Note states:

"Factors which may be of assistance in passing upon the admissibility of evaluative reports include: (1) the timeliness of the investigation . . . ; (2) the special skill or experience of the official . . . ; (3) whether a hearing was held and the level at which conducted; (4) possible motivation problems suggested by *Palmer v. Hoffman*, 318 U.S. 109 . . . (1943). Others no doubt could be added.

The formulation of an approach which would give appropriate weight to all possible factors in every situation is an obvious impossibility. Hence the rule, as in Exception (6), assumes admissibility in the first instance but with ample provision for escape if sufficient negative factors are present. In one respect, however, the rule with respect to evaluative reports under item (c) is very specific: they are admissible only in civil cases and against the government in criminal cases in view of the almost certain collision with confrontation rights which would result from their use against the accused in a criminal case."

The phrase "unless the sources of information or other circumstances indicate lack of trustworthiness" applies to all three parts of the exception.

Public records and reports that are not

admissible under Exception (8) are not admissible as business records under Exception (6).

Exception (9) excludes from the hearsay ban records of vital statistics and is similar to G.S. 130-49 and G.S. 130-66.

One purpose of the exception is to admit a death certificate to prove that a death occurred. G.S. 130-66 also provides that a death certificate is prima facie evidence of the cause of death. However, in *State v. Watson*, 281 N.C. 221 (1972), the Court held that the admission of the "hearsay and conclusory statement" of the cause of death in the victim's death certificate violated the right to confrontation. Exception (9) is not intended to permit the use of statements of the cause of death in a death certificate against a defendant in a criminal case.

Exception (10) concerns the absence of a public record or entry. The Advisory Committee's Note states:

"The principle of proving nonoccurrence of an event by evidence of the absence of a record which would regularly be made of its occurrence, developed in Exception (7) with respect to regularly conducted activities, is here extended to public records of the kind mentioned in Exceptions (8) and (9). 5 Wigmore § 1633(6), p. 519. Some harmless duplication no doubt exists with Exception (7).\*\*\*

The rule includes situations in which absence of a record may itself be the ultimate focal point of inquiry, e.g., *People v. Love*, 310 Ill. 558, 142 N.E. 204 (1923), certificate of secretary of state admitted to show failure to file documents required by Securities Law, as well as cases where the absence of a record is offered as proof of the nonoccurrence of an event ordinarily recorded."

Exception (10) is similar to G.S. 1A-1, Civ. Pro. Rules 44(b) and 44(c). See also *Brandis on North Carolina Evidence* § 153, at 610 (1982).

Exception (11) concerns records of religious organizations. The Advisory Committee's Note states:

"Records of activities of religious organizations are currently recognized as admissible at least to the extent of the business records exception to the hearsay rule, 5 Wigmore § 1523, p. 371, and Exception (6) would be applicable. However, both the business record doctrine and Exception (6) require that the person furnishing the information be one in the business or activity. The result is such decisions as *Daily v. Grand Lodge*, 311 Ill. 184, 142 N.E. 478 (1924), holding a church record admissible to prove fact, date, and place of baptism, but not age of child except that he had at least been born at the time. In view of the unlikelihood that false information would be furnished on occasions of this kind, the rule contains no requirement that the information be in the course of the activity."



Currently in North Carolina records of activities of religious organizations are admissible to the extent of the business records exception to the hearsay rule. See *Brandis on North Carolina Evidence* § 155 (1982).

Exception (12) concerns marriage, baptismal, and similar certificates. The Advisory Committee's Note states:

"The principle of proof by certification is recognized as to public officials in Exceptions (8) and (10), and with respect to authentication in Rule 902. The present exception is a duplication to the extent that it deals with a certificate by a public official, as in the case of a judge who performs a marriage ceremony. The area covered by the rule is, however, substantially larger and extends the certification procedure to clergymen and the like who perform marriages and other ceremonies or administer sacraments. Thus certificates of such matters as baptism or confirmation, as well as marriage, are included. In principle they are as acceptable evidence as certificates of public officers. See 5 Wigmore §1645, as to marriage certificates. When the person executing the certificate is not a public official, the self-authenticating character of documents purporting to emanate from public officials, see Rule 902, is lacking and proof is required that the person was authorized and did make the certificate. The time element, however, may safely be taken as supplied by the certificate, once authority and authenticity are established, particularly in view of the presumption that a document was executed on the date it bears."

Under current North Carolina practice, these items are admissible only to the extent they are part of a public record.

Exception (13) concerns family records.

The North Carolina exception for family records is more restrictive in that statements of family history and pedigree are admissible only if the declarant (1) is unavailable; (2) made the statement before the beginning of the controversy; and (3) bore a relationship to the family such that he was likely to have known the truth. *Brandis on North Carolina Evidence* § 149 (1982).

Exception (14) concerns records of documents affecting an interest in property. The Advisory Committee's Note states:

"The recording of title documents is a purely statutory development. Under any theory of the admissibility of public records, the records would be receivable as evidence of the contents of the recorded document, else the recording process would be reduced to a nullity. When, however, the record is offered for the further purpose of proving execution and delivery, a problem of lack of firsthand knowledge by the recorder, not present as to contents, is presented. This problem is solved, seemingly in

all jurisdictions, by qualifying for recording only those documents shown by a specified procedure, either acknowledgement or a form of probate, to have been executed and delivered. 5 Wigmore §§ 1647-1651."

Exception (14) is consistent with North Carolina practice. See G.S. 47-20 through 47-20.4; G.S. 47-14; and G.S. 47-17.

Exception (15) concerns statements in documents affecting an interest in property. The Advisory Committee's Note states:

"Dispositive documents often contain recitals of fact. Thus a deed purporting to have been executed by an attorney in fact may recite the existence of the power of attorney, or a deed may recite that the grantors are all the heirs of the last record owner. Under the rule, these recitals are exempted from the hearsay rule. The circumstances under which dispositive documents are executed and the requirement that the recital be germane to the purpose of the document are believed to be adequate guarantees of trustworthiness, particularly in view of the nonapplicability of the rule if dealings with the property have been inconsistent with the document. The age of the document is of no significance, though in practical application the document will most often be an ancient one."

The extent to which recitals of fact in a deed or other dispositive documents are admissible in North Carolina is not entirely certain. *Brandis on North Carolina Evidence* § 152 (1982). Adoption to Exception (15) would somewhat expand admissibility and clarify North Carolina law in this area.

Exception (16) concerns statements in ancient documents. The Advisory Committee's Note states:

"Authenticating a document as ancient, essentially in the pattern of the common law, as provided in Rule 901(b)(8), leaves open as a separate question the admissibility of assertive statements contained therein as against a hearsay objection. 7 Wigmore § 2145a. Wigmore further states that the ancient document technique of authentication is universally conceded to apply to all sorts of documents, including letters, records, contracts, maps, and certificates, in addition to title documents, citing numerous decisions. *Id.* § 2145. Since most of these items are significant evidentially only insofar as they are assertive, their admission in evidence must be as a hearsay exception. But see 5 *id.* § 1573, p. 429, referring to recitals in ancient deeds as a 'limited' hearsay exception. The former position is believed to be the correct one in reason and authority. As pointed out in McCormick § 298, danger of mistake is minimized by authentication requirements, and age affords assurance that the writing antedates the present controversy."



North Carolina courts currently recognize as exceptions to the hearsay rule recitals in deeds more than 30 years old. "The North Carolina cases have involved deeds, but it may be assumed that the rule extends here, as it does elsewhere, to other dispositive instruments such as wills and powers of attorney." *Brandis on North Carolina Evidence* § 152, at 604 (1982). Exception (16) would expand the North Carolina exception to include statements in many types of documents more than 20 years old.

Exception (17) concerns market reports and commercial publications. The Advisory Committee's Note states:

"Ample authority at common law supported the admission in evidence of items falling in this category. While Wigmore's text is narrowly oriented to lists, etc., prepared for the use of a trade or profession, 6 Wigmore § 1702, authorities are cited which include other kinds of publications, for example, newspaper market reports, telephone directories, and city directories. *Id.* §§ 1702-1706. The basis of trustworthiness is general reliance by the public or by a particular segment of it, and the motivation of the compiler to foster reliance by being accurate."

North Carolina courts have admitted into evidence a variety of published compilations used or relied on by the public or particular professions. See *Brandis on North Carolina Evidence* § 165 (1982).

Exception (18) concerns learned treatises. The Advisory Committee's Note states:

"The writers have generally favored the admissibility of learned treatises . . . , but the great weight of authority has been that learned treatises are not admissible as substantive evidence though usable in the cross-examination of experts. The foundation of the minority view is that the hearsay objection must be regarded as unimpressive when directed against treatises since a high standard of accuracy is engendered by various factors: the treatise is written primarily and impartially for professionals, subject to scrutiny and exposure for inaccuracy, with the reputation of the writer at stake. \*\*\* Sound as this position may be with respect to trustworthiness, there is, nevertheless, an additional difficulty in the likelihood that the treatise will be misunderstood and misapplied without expert assistance and supervision. This difficulty is recognized in the cases demonstrating unwillingness to sustain findings relative to disability on the basis of judicially noticed medical texts. \*\*\* The rule avoids the danger of misunderstanding and misapplication by limiting the use of treatises as substantive evidence to situations in which an expert is on the stand and available to explain and assist in the application of the treatise if desired. The limi-

tation upon receiving the publication itself physically in evidence, contained in the last sentence, is designed to further this policy.

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The rule does not require that the witness rely upon or recognize the treatise as authoritative, thus avoiding the possibility that the expert may at the outset block cross-examination by refusing to concede reliance or authoritativeness. \*\*\* Moreover, the rule avoids the unreality of admitting evidence for the purpose of impeachment only, with an instruction to the jury not to consider it otherwise."

Exception (18) is substantially the same as G.S. 8-40.1. Although G.S. 8-40.1 was modeled after Exception (18), there has been some doubt whether the statements, once received, are substantive evidence or are merely for impeachment or corroboration. *Brandis on North Carolina Evidence* § 136, at 543 (1982). It is intended that Exception (18) authorize admission of such statements as substantive evidence.

The last sentence of G.S. 8-40.1 differs from Exception (18) by providing that the statements may not be received as exhibits "unless agreed to by counsel for the parties." The quoted language was viewed as superfluous since evidence excluded by this rule and other rules may be admitted upon stipulation by counsel for the parties.

Exception (19) concerns matters of personal and family history. The advisory Committee's Note states:

"Marriage is universally conceded to be a proper subject of proof by evidence of reputation in the community. \*\*\* As to such items as legitimacy, relationship, adoption, birth, and death, the decisions are divided. \*\*\* All seem to be susceptible to being the subject of well founded repute. The 'world' in which the reputation may exist may be family, associates, or community. This world has proved capable of expanding with changing times from the single uncomplicated neighborhood, in which all activities take place, to the multiple and unrelated worlds of work, religious affiliation, and social activity, in each of which a reputation may be generated."

Under current North Carolina law only reputation among family members is admissible concerning matters of family history and pedigree, except for marriage which may be proved by both family and community reputation. *Brandis on North Carolina Evidence* § 149, at 599 (1982). Exception (19) would permit proof by reputation among family and associates, or in the community.

Exception (20) concerns reputation as to land boundaries or general history. The Advisory Committee's Note states:



"The first portion of Exception (20) is based upon the general admissibility of evidence of reputation as to land boundaries and land customs, expanded in this country to include private as well as public boundaries. McCormick § 299, p. 625. The reputation is required to antedate the controversy, though not to be ancient. The second portion is likewise supported by authority, id., and is designed to facilitate proof of events when judicial notice is not available. The historical character of the subject matter dispenses with any need that the reputation antedate the controversy with respect to which it is offered."

Exception (20) is in accord with North Carolina practice. See *Brandis on North Carolina Evidence* § 150 (1982).

Exception (21) concerns reputation as to character. The Advisory Committee's Note states:

"Exception (21) recognizes the traditional acceptance of reputation evidence as a means of proving human character. McCormick §§ 44, 158. The exception deals only with the hearsay aspect of this kind of evidence. Limitations upon admissibility based on other grounds will be found in Rules 404, relevancy of character evidence generally, and 608, character of witness. The exception is in effect a reiteration, in the context of hearsay, of Rule 405(a)."

Exception (21) is consistent with North Carolina practice.

Exception (22) is reserved for future codification. Fed. R. Evid. 803(22) concerns use of a judgment of previous conviction to prove a fact essential to sustain the judgment. Under current North Carolina practice, the judgment or finding of a court generally cannot be used in another case as evidence of the fact found, except where the principle of *res judicata* is involved. *Brandis on North Carolina Evidence* § 143 (1982). By not adopting a hearsay exception for judgments of previous conviction, it is intended that North Carolina practice with respect to previous convictions remain the same.

Exception (23) concerns a judgment as proof of matters of personal, family or general history, or boundaries. The Advisory Committee's Note states:

"A hearsay exception in this area was originally justified on the ground that verdicts were evidence of reputation. As trial by jury graduated from the category of neighborhood inquests, this theory lost its validity. It was never valid as to chancery decrees. Nevertheless the rule persisted, though the judges and writers shifted ground and began saying that the judgment or decree was as good evidence as reputation. \*\*\* The shift appears to be correct, since the process of inquiry, sifting, and scrutiny which is relied upon to render reputation reliable is present in perhaps greater measure in the process of litigation.

While this might suggest a broader area of application, the affinity to reputation is strong, and paragraph (23) goes no further, not even including character."

A judgment admitted under this exception is some evidence of the matter essential to the judgment, but is not a binding determination of the matter for purposes of the current proceeding.

Generally, a judgment cannot be used under current North Carolina practice to prove a fact essential to the judgment, except where the principle of *res judicata* is involved. *Brandis on North Carolina Evidence* § 143 (1982).

Exception (24) differs from Fed. R. Evid. 803(24) in that the last sentence of the federal rule does not require written notice. Also, Exception (24) requires the notice to be given sufficiently in advance of offering the statement while Fed. R. Evid. 803(24) requires the notice to be given sufficiently in advance of the trial or hearing.

This exception makes admissible a hearsay statement not specifically covered by any of the previous twenty-three exceptions if the statement has equivalent circumstantial guarantees of trustworthiness and the court makes the determinations required by the rule. This exception does not contemplate an unfettered exercise of judicial discretion, but it does provide for treating new and presently unanticipated situations which demonstrate a trustworthiness within the spirit of the specifically stated exceptions.

Writing for the majority in *State v. Vestal*, 278 N.C. 561, 589 (1971), Justice Lake stated that:

"No branch of the law should be less firmly bound to a past century than the rules of evidence. The purpose of the rules of evidence is to assist the jury to arrive at the truth. Exceptions to the hearsay rule, evolved by the experience and wisdom of our predecessors for that purpose, should not be transformed by us into rigid molds precluding all testimony not capable of being squeezed neatly into one of them."

North Carolina courts have admitted hearsay evidence in many instances on the ground that the evidence was part of the "*res gestae*". The *res gestae* formula has been frequently resorted to in cases that would seem to be more appropriately governed by independent hearsay rules. See *Brandis on North Carolina Evidence* § 158 (1982). The phrase *res gestae* "has been accountable for so much confusion that it had best be denied any place whatever in legal terminology." *U.S. v. Matot*, 146 F.2d 197 (2d Cir. 1944) (Learned Hand). Although evidence previously governed by the *res gestae* formula may now fall within the specific hearsay exceptions or the catch-all in Exception 24, the *res gestae* formula should not be relied on by the courts.



## **Rule 804. Hearsay exceptions; declarant unavailable.**

(a) *Definition of unavailability.* — "Unavailability as a witness" includes situations in which the declarant:

- (1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or
- (2) Persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or
- (3) Testifies to a lack of memory of the subject matter of his statement; or
- (4) Is unable to be present or to testify at the hearing because of death of then existing physical or mental illness or infirmity; or
- (5) Is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(b) *Hearsay exceptions.* — The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

- (1) *Former Testimony.* — Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.
- (2) *Statement Under Belief of Impending Death.* — A statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.
- (3) *Statement Against Interest.* — A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability is not admissible in a criminal case unless corroborating circumstances clearly indicate the trustworthiness of the statement.
- (4) *Statement of Personal or Family History.* — (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.
- (5) *Other Exceptions.* — A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts;



and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it gives written notice stating his intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement. (1983, c. 701, s. 1.)

### COMMENTARY

This rule is identical to Fed. R. Evid. 804 except for the last sentence of Exception (3), which is discussed below.

Subdivision (a) defines unavailability. The Advisory Committee's Note states:

"The definition of unavailability implements the division of hearsay exceptions into two categories by Rules 803 and 804(b).

At common law the unavailability requirement was evolved in connection with particular hearsay exceptions rather than along general lines. \*\*\* However, no reason is apparent for making distinctions as to what satisfies unavailability for the different exceptions. The treatment in the rule is therefore uniform.\*\*\*

Five instances of unavailability are specified:

(1) Substantial authority supports the position that exercise of a claim of privilege by the declarant satisfies the requirement of unavailability (usually in connection with former testimony).\*\*\* A ruling by the judge is required, which clearly implies that an actual claim of privilege must be made.

(2) A witness is rendered unavailable if he simply refuses to testify concerning the subject matter of his statement despite judicial pressures to do so, a position supported by similar considerations of practicality.\*\*\*

(3) The position that a claimed lack of memory by the witness of the subject matter of his statement constitutes unavailability likewise finds support in the cases, though not without dissent. If the claim is successful, the practical effect is to put the testimony beyond reach, as in the other instances. In this instance, however, it will be noted that the lack of memory must be established by the testimony of the witness himself, which clearly contemplates his production and subjection to cross-examination.

(4) Death and infirmity find general recognition as grounds.\*\*\*

(5) Absence from the hearing coupled with inability to compel attendance by process or other reasonable means also satisfies the requirement.\*\*\*

If the conditions otherwise constituting unavailability result from procurement or wrongdoing of the proponent of the statement,

the requirement is not satisfied. The rule contains no requirement that an attempt be made to take the deposition of a declarant."

Under North Carolina law the unavailability requirement varies with respect to particular hearsay requirements.

Under the hearsay exception for former testimony, North Carolina courts recognize grounds (1), (4), and (5). *Brandis on North Carolina Evidence* § 145 (1982). Although grounds (2) and (3) are not explicitly accepted or rejected by existing North Carolina precedents, Professor Brandis asserts that they should be accepted when occasion arises. *Id.* at 575.

Under the hearsay exception for dying declarations, G.S. 8-51.1 requires that the declarant be dead.

Under the exception for statements against interest, apparently any legitimate reason for unavailability is sufficient. *Brandis on North Carolina Evidence* § 147, at 589, n. 80 (1982).

With respect to statements of family history, it was said in the older cases that the declarant must be dead. However, Professor Brandis asserts that any legitimate reason for unavailability should be acceptable. *Id.* at 597.

The Advisory Committee's Note states:

"If the conditions otherwise constituting unavailability result from the procurement or wrongdoing of the proponent of the statement, the requirement is not satisfied. The rule contains no requirement that an attempt be made to take the deposition of a declarant."

Exception (1) concerns former testimony.

In North Carolina, the "testimony must have been given at a former trial of the same cause, or a preliminary stage of the same cause, or the trial of another cause involving the issue and subject matter to which the testimony is directed at the current trial." *Brandis on North Carolina Evidence* § 145, at 575-76 (1982) (footnotes omitted). The Advisory Committee's Note states:

"The common law did not limit the admissibility of former testimony to that given in an earlier trial of the same case, although it did require identity of issues as a means of insuring that the former handling of the witness was the equivalent of what would now be done if the



opportunity were presented. Modern decisions reduce the requirement to 'substantial' identity. McCormick § 233. Since identity of issues is significant only in that it bears on motive and interest in developing fully the testimony of the witness, expressing the matter in the latter terms is preferable. *Id.*"

Also, the Advisory Committee's Note states:

"Under the exception, the testimony may be offered (1) against the party *against* whom it was previously offered or (2) *against* the party *by* whom it was previously offered. In each instance the question resolves itself into whether fairness allows imposing, upon the party against whom now offered, the handling of the witness on the earlier occasion. (1) If the party against whom now offered is the one *against* whom the testimony was offered previously, no unfairness is apparent in requiring him to accept his own prior conduct of cross-examination or decision not to cross-examine. Only demeanor has been lost, and that is inherent in the situation. (2) If the party against whom now offered is the one *by* whom the testimony was offered previously, a satisfactory answer becomes somewhat more difficult. One possibility is to proceed somewhat along the line of an adoptive admission, i.e., by offering the testimony proponent in effect adopts it. However, this theory savors of discarded concepts of witnesses' belonging to a party, of litigants' ability to pick and choose witnesses, and of vouching for one's own witnesses. \*\*\* A more direct and acceptable approach is simply to recognize direct and redirect examination of one's own witness as the equivalent of cross-examining an opponent's witness. \*\*\* Allowable techniques for dealing with hostile, double-crossing, forgetful, and mentally deficient witnesses leave no substance to a claim that one could not adequately develop his own witness at the former hearing. An even less appealing argument is presented when failure to develop fully was the result of a deliberate choice."

North Carolina practice currently permits testimony against the party *against* whom it was offered. *Brandis on North Carolina Evidence* § 145, at 577 (1982). There are no North Carolina cases concerning testimony offered against the party *by* whom it was previously offered.

With respect to identity of the parties, the Advisory Committee's Note states:

"As a further assurance of fairness in thrusting upon a party the prior handling of the witness, the common law also insisted upon identity of parties, deviating only to the extent of allowing substitution of successors in a narrowly construed privity. Mutuality as an aspect of identity is now generally discredited, and the requirement of identity of the offering party disappears except as it might affect

motive to develop the testimony. \*\*\* The question remains whether strict identity, or privity, should continue as a requirement with respect to the party against whom offered."

North Carolina practice apparently departs from the privity requirement to the extent of allowing former testimony "if the party against whom it was admitted had not merely an opportunity for cross-examination but the same motive for cross-examination as the party against whom it is offered." *Brandis on North Carolina Evidence* § 145, at 577 (1982). Exception (1) permits former testimony in civil cases if a predecessor in interest had an opportunity and similar motive to develop the testimony.

Under certain circumstances, Exception (1) permits a broader use of depositions than does N.C. Civ. Pro. Rule 32. See also G.S. 8-83.

Exception (2) differs from Fed. R. Evid. 804(b)(2) in that it omits the phrase "In a prosecution for homicide or in a civil action or proceeding".

The exception is similar to G.S. 8-51.1. Unlike Fed. R. Evid. 804(b)(2) which limits admissibility of dying declarations in criminal cases to homicide prosecution, Exception (2) and G.S. 8-51.1 permit dying declarations to be admitted in all types of criminal and civil actions and proceedings. Under G.S. 8-51.1 the declarant must have died from the causes or circumstances on which he commented. Upon adoption of Exception (2), G.S. 8-51.1 should be repealed.

Exception (3) concerns statements against interest and differs from Fed. R. Evid. 804(b)(3) as noted below. The Advisory Committee's Note states:

"The circumstantial guaranty of reliability for declarations against interest is the assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true. \*\*\* If the statement is that of a party, offered by his opponent, it comes in as an admission, \*\*\* and there is no occasion to inquire whether it is against interest, this not being a condition precedent to admissibility of admissions by opponents."

North Carolina cases have recognized declarations against pecuniary or proprietary interest as an exception to the hearsay rule. See *Brandis on North Carolina Evidence* § 147 (1982). In *State v. Haywood*, 295 N.C. 709, the North Carolina Supreme Court abandoned the Court's previous approach that excluded from the exception declarations against penal interest.

The last sentence of Fed. R. Evid. 804(b)(3) provides that: "A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."



Requiring corroborating circumstances to indicate clearly the trustworthiness of statements exculpating the accused while imposing no such requirement with respect to statements implicating the accused raises serious constitutional questions. Accordingly, Exception (3) differs from Fed. R. Evid. 804(b) (3) in that it imposes the requirement of corroborating circumstances with respect to both exculpating and implicating statements.

In *Haywood*, the Court listed several very restrictive requirements that a declaration against penal interest must meet. The exception should not be construed to add requirements in addition to the requirement that "corroborating circumstances clearly indicate the trustworthiness of the statement." As the Advisory Committee's Note states: "The requirement of corroboration should be construed in such a manner as to effectuate its purpose of circumventing fabrication."

Declarations against penal interests are admissible in both criminal and civil cases. However, the requirement of corroborating circumstances applies only in criminal cases.

The exception does not purport to deal with questions of the right to confrontation.

Exception (4) concerns statements of personal or family history.

The common law requirement in North Carolina that a declaration in this area must have been made before the beginning of the

controversy was dropped in Fed. R. Evid. 804(b) (3), which is identical to this exception, as bearing more appropriately on weight than admissibility. See *Brandis on North Carolina Evidence* § 149 (1982); Advisory Committee's Note. Unlike North Carolina law that requires that the declarant be dead, Rule 804 merely requires that the declarant be unavailable. See *Brandis, supra*.

The first part of the rule specifically disclaims any need of firsthand knowledge respecting declarant's own personal history. Advisory Committee's Note.

The second part of the rule deals with declarations concerning the history of another person. North Carolina common law provides that the declarant is qualified if related by blood or marriage. *Brandis, supra*. In addition, and contrary to the common law in North Carolina, the declarant qualifies under the exception by virtue of intimate association with the family.

The Advisory Committee's Note states that: "The requirement sometimes encountered that when the subject of the statement is the relationship between two other persons the declarant must qualify as to both is omitted. Relationship is reciprocal." There are no North Carolina cases on this point.

Exception (5) is identical to Rule 803(24) and differs from the federal rule. See commentary to Rule 803(24).

## Rule 805. Hearsay within hearsay.

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules. (1983, c. 701, s. 1.)

### COMMENTARY

This rule is identical to Fed. R. Evid. 805. The Advisory Committee's Note states:

"On principle it scarcely seems open to doubt that the hearsay rule should not call for exclusion of a hearsay statement which includes a further hearsay statement when both conform to the requirements of a hearsay exception. Thus a hospital record might contain an entry of the patient's age based on information furnished by his wife. The hospital record would qualify as a regular entry except that the person who furnished the information was not

acting in the routine of the business. However, her statement independently qualifies as a statement of pedigree (if she is unavailable) or as a statement made for purposes of diagnosis or treatment, and hence each link in the chain falls under sufficient assurance. Or, further to illustrate, a dying declaration may incorporate a declaration against interest by another declarant. See McCormick § 290, p. 611."

Rule 805 is consistent with North Carolina practice. See, e.g., *State v. Connley*, 295 N.C. 327 (1978).



## Rule 806. Attacking and supporting credibility of declarant.

When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination. (1983, c. 701, s. 1.)

### COMMENTARY

This rule is identical to Fed. R. Evid. 806 except that the phrase "or a statement defined in 801(d)(2)(C), (D), or (E)" has been omitted from the first sentence. Fed. R. Evid. 801 treats admissions by a party-opponent as statements that are not hearsay. Since Rule 801 treats such statements as exceptions to the hearsay rule, the above phrase is superfluous.

The Advisory Committee's Note states:

"The declarant of a hearsay statement which is admitted in evidence is in effect a witness. His credibility should in fairness be subject to impeachment and support as though he had in fact testified. See Rules 608 and 609. There are however, some special aspects of the impeaching of a hearsay declarant which require consideration. These special aspects center upon impeachment by inconsistent statement, arise from factual differences which exist between the use of hearsay and an actual witness and also between various kinds of hearsay, and involve the question of applying to declarants the general rule disallowing evidence of an inconsistent statement to impeach a witness unless he is afforded an opportunity to deny or explain. \*\*\*

The principal difference between using hearsay and an actual witness is that the inconsistent statement will in the case of the witness almost inevitably of necessity in the nature of things be a prior statement, which it is entirely possible and feasible to call to his attention, while in the case of hearsay the inconsistent statement may well be a subsequent one, which practically precludes calling it to the attention of the declarant. The result of insisting upon observation of this impossible requirement in the hearsay situation is to deny the opponent, already barred from cross-examination, any benefit of this important technique of impeachment. The writers favor allowing the subsequent statement. McCormick § 37, p. 69; 3 Wigmore § 1033. \*\*\*

When the impeaching statement was made prior to the hearsay statement, differences in the kinds of hearsay appear which arguably may justify differences in treatment. If the hearsay consisted of a simple statement by the witness, e.g., a dying declaration or a declaration against interest, the feasibility of affording him an opportunity to deny or explain encounters the same practical impossibility as where the statement is a subsequent one, just discussed, although here the impossibility arises from the total absence of anything resembling a hearing at which the matter could be put to him. The courts by a large majority have ruled in favor of allowing the statement to be used, under these circumstances. McCormick § 37, p. 69; 3 Wigmore § 1033. If, however, the hearsay consists of former testimony or a deposition, the possibility of calling the prior statement to the attention of the witness or deponent is not ruled out, since the opportunity to cross-examine was available. It might thus be concluded that with former testimony or depositions the conventional foundation should be insisted upon. Most of the cases involve depositions, and Wigmore describes them as divided. 3 Wigmore § 1031. Deposition procedures at best are cumbersome and expensive, and to require the laying of the foundation may impose an undue burden. Under the federal practice, there is no way of knowing with certainty at the time of taking a deposition whether it is merely for discovery or will ultimately end up in evidence. With respect to both former testimony and depositions the possibility exists that knowledge of the statement might not be acquired until after the time of the cross-examination. Moreover, the expanded admissibility of former testimony and depositions under Rule 804(b)(1) calls for a correspondingly expanded approach to impeachment. The rule dispenses with the requirement in all hearsay situations, which is readily administered and best calculated to lead to fair results."



In *Hooper v. Moore*, 48 N.C. 428 (1856), the court stated that in order to impeach the credibility of a declarant by showing an inconsistent statement made before the time when a deposition was taken, the declarant must be given an opportunity to explain. Professor Brandis is uncertain whether the requirement of an opportunity to explain bars proof of statements or conduct showing bias on

the part of a hearsay declarant not present to testify; but in his view it should not. *Brandis on North Carolina Evidence* § 48, p. 183 (1982).

The provision for cross-examination of a declarant upon his hearsay statement is a corollary of general principles of cross-examination and is consistent with North Carolina practice. See N.C. Civ. Pro. Rule 32(c).

## ARTICLE 9.

### *Authentication and Identification.*

#### **Rule 901. Requirement of authentication or identification.**

(a) *General provision.* — The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) *Illustrations.* — By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

- (1) *Testimony of Witness with Knowledge.* — Testimony that a matter is what it is claimed to be.
- (2) *Nonexpert Opinion on Handwriting.* — Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.
- (3) *Comparison by Trier or Expert Witness.* — Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.
- (4) *Distinctive Characteristics and the Like.* — Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.
- (5) *Voice Identification.* — Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.
- (6) *Telephone Conversations.* — Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.
- (7) *Public Records or Reports.* — Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.
- (8) *Ancient Documents or Data Compilations.* — Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.
- (9) *Process or System.* — Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.



(10) Methods Provided by Statute. — Any method of authentication or identification provided by statute. (1983, c. 701, s. 1.)

COMMENTARY

This rule is identical to Fed. R. Evid. 901 except that in example (10) the word "statute" is inserted in lieu of the phrase "Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority."

The Advisory Committee's Note states:

"Subdivision (a). Authentication and identification represent a special aspect of relevancy. \*\*\* Thus a telephone conversation may be irrelevant because on an unrelated topic or because the speaker is not identified. The latter aspect is the one here involved. Wigmore describes the need for authentication as "an inherent logical necessity." 7 Wigmore § 2129, p. 564.

This requirement of showing authenticity or identity falls in the category of relevancy dependent upon fulfillment of a condition of fact and is governed by the procedure set forth in Rule 104(b).

The common law approach to authentication of documents has been criticized as an 'attitude of agnosticism,' McCormick, *Cases on Evidence* 388, n. 4 (3rd ed. 1956), as one which 'departs sharply from men's customs in ordinary affairs,' and as presenting only a slight obstacle to the introduction of forgeries in comparison to the time and expense devoted to proving genuine writings which correctly show their origin on their face, McCormick § 185, pp. 395, 396. Today, such available procedures as requests to admit and pretrial conference afford the means of eliminating much of the need for authentication or identification. Also, significant inroads upon the traditional insistence on authentication and identification have been made by accepting as at least prima facie genuine items of the kind treated in Rule 902, *infra*. However, the need for suitable methods of proof still remains, since criminal cases pose their own obstacles to the use of preliminary procedures, unforeseen contingencies may arise, and cases of genuine controversy will still occur."

Subdivision (a) is in accord with North Carolina practice.

With respect to subdivision (b), the Advisory Committee's Note states:

"The treatment of authentication and identification draws largely upon the experience embodied in the common law and in statutes to furnish illustrative applications of the general principle set forth in subdivision (a). The examples are not intended as an exclusive enumeration of allowable methods but are meant to guide and suggest, leaving room for growth and development in this area of the law.

The examples relate for the most part to documents, with some attention given to voice communications and computer printouts. As Wigmore noted, no special rules have been developed for authenticating chattels. Wigmore, *Code of Evidence* § 2086 (3rd ed. 1942).

It should be observed that compliance with requirements of authentication or identification by no means assures admission of an item into evidence, as other bars, hearsay for example, may remain.

Example (1) contemplates a broad spectrum ranging from testimony of a witness who was present at the signing of a document to testimony establishing narcotics as taken from an accused and accounting for custody through the period until trial, including laboratory analysis."

Example (1) is in accord with North Carolina practice.

The Advisory Committee's Note states:

"Example (2) states conventional doctrine as to lay identification of handwriting, which recognizes that a sufficient familiarity with the handwriting of another person may be acquired by seeing him write, by exchanging correspondence, or by other means, to afford a basis for identifying it on subsequent occasions, McCormick § 189. \*\*\* Testimony based upon familiarity acquired for purposes of the litigation is reserved to the expert under the example which follows."

Example (2) is in accord with North Carolina practice. See *Brandis on North Carolina Evidence* § 197 (1982).

Example (3) is comparison by the trier of fact or by expert witnesses with specimens that have been authenticated. In *State v. LeDuc*, 306 N.C. 62 (1982), the Court permitted handwriting comparisons by the jury unaided by lay or expert testimony. G.S. 8-40, which should be repealed upon enactment of this rule, requires that the exemplar used for comparison be "proved to the satisfaction of the judge to be genuine". However, the Advisory Committee's Note states:

"The history of common law restrictions upon the technique of proving or disproving the genuineness of a disputed specimen of handwriting through comparison with a genuine specimen, by either the testimony of expert witnesses or direct viewing by the triers themselves, is detailed in 7 Wigmore §§ 1991-1994. In breaking away, the English Common Law Procedure Act of 1854, 17 and 18 Vict., c. 125,



§27, cautiously allowed expert or trier to use exemplars 'proved to the satisfaction of the judge to be genuine' for purposes of comparison. The language found its way into numerous statutes in this country, e.g., California Evidence Code §§ 1417, 1418. While explainable as a measure of prudence in the process of breaking with precedent in the handwriting situation, the reservation to the judge of the question of the genuineness of exemplars and the imposition of an unusually high standard of persuasion are at variance with the general treatment of relevancy which depends upon fulfillment of a condition of fact. Rule 104(b). No similar attitude is found in other comparison situations, e.g., ballistics comparison by jury . . . or by experts . . . and no reason appears for its continued existence in handwriting cases. Consequently Example (3) sets no higher standard for handwriting specimens and treats all comparison situations alike, to be governed by Rule 104(b).

Precedent supports the acceptance of visual comparison as sufficiently satisfying preliminary authentication requirements for admission in evidence. \*\*\*

Example (4). The characteristics of the offered item itself, considered in the light of circumstances, afford authentication techniques in great variety. Thus a document or telephone conversation may be shown to have emanated from a particular person by virtue of its disclosing knowledge of facts known peculiarly to him . . . ; similarly, a letter may be authenticated by content and circumstances indicating it was in reply to a duly authenticated one. \*\*\* Language patterns may indicate authenticity or its opposite."

Example (4) is in accord with North Carolina practice. See generally *Brandis, supra*, §§ 195, 236.

The Advisory Committee's Note states:

"Example (5). Since aural voice identification is not a subject of expert testimony, the requisite familiarity may be acquired either before or after the particular speaking which is the subject of the identification, in this respect resembling visual identification of a person rather than identification of handwriting. Cf. Example (2), *supra*."

Example (5) is in accord with North Carolina practice. See generally *Brandis, supra*, § 96.

The Advisory Committee's Note states:

"Example (6). The cases are in agreement that a mere assertion of his identity by a person talking on the telephone is not sufficient evidence of the authenticity of the conversation and that additional evidence of his identity is required. The additional evidence need not fall in any set pattern. Thus the content of his statements or the reply technique, under Example (4), *supra*, or voice identification, under Example (5), may furnish the necessary

foundation. Outgoing calls made by the witness involve additional factors bearing upon authenticity. The calling of a number assigned by the telephone company reasonably supports the assumption that the listing is correct and that the number is the one reached. If the number is that of a place of business, the mass of authority allows an ensuing conversation if it relates to business reasonably transacted over the telephone, on the theory that the maintenance of the telephone connection is an invitation to do business without further identification. Otherwise, some additional circumstance of identification of the speaker is required. The authorities divide on the question whether the self-identifying statement of the person answering suffices. Example (6) answers in the affirmative on the assumption that usual conduct respecting telephone calls furnish adequate assurances of regularity, bearing in mind that the entire matter is open to exploration before the trier of fact."

Part (A) of Example (6) is in accord with North Carolina practice. See *Brandis, supra*, § 96. Part (B) permits identity to be established by evidence that the call was made to a place of business and the conversation related to business reasonably transacted over the telephone. There are no North Carolina cases directly on this point.

The Advisory Committee's Note states:

"Example (7). Public records are regularly authenticated by proof of custody, without more. McCormick § 191; 7 Wigmore §§ 2158, 2159. The example extends the principle to include data stored in computers and similar methods, of which increasing use in the public records area may be expected."

Example (7) is in accord with North Carolina practice. See *Brandis, supra*, § 195.

The Advisory Committee's Note States:

"Example (8). The familiar ancient document rule of the common law is extended to include data stored electronically or by other similar means. Since the importance of appearance diminishes in this situation, the importance of custody or place where found increases correspondingly. This expansion is necessary in view of the widespread use of methods of storing data in forms other than conventional written records.

Any time period selected is bound to be arbitrary. The common law period of 30 years is here reduced to 20 years, with some shift of emphasis from the probable unavailability of witnesses to the unlikelihood of a still viable fraud after the lapse of time. \*\*\*

The application of Example (8) is not subject to any limitation to title documents or to any requirement that possession, in the case of a title document, has been consistent with the document. See McCormick § 190."



Example (8) is in accord with North Carolina practice, except that the period of 30 years is reduced to 20 years. See *Brandis, supra*, § 196.

The Advisory Committee's Note states:

"Example (9) is designed for situations in which the accuracy of a result is dependent upon a process or system which produces it. X-rays afford a familiar instance. Among more recent developments is the computer. . . . Example (9) does not, of course, foreclose taking judicial notice of the accuracy of the process or system."

Example (9) is in accord with North Carolina practice.

Example (10) makes clear that methods of authentication provided by the Rules of Civil Procedure or other statutes are not intended to be superseded. Illustrative are the provisions for authentication of official records in Civil Procedure Rule 44 and for the authentication of depositions in Civil Procedure Rule 30(f).

## Rule 902. Self-authentication.

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

- (1) Domestic Public Documents Under Seal. — A document bearing a seal purporting to be that of the United States, or of any state, district, commonwealth, territory or insular possession thereof, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.
- (2) Domestic Public Documents Not Under Seal. — A document purporting to bear the signature in his official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.
- (3) Foreign Public Documents. — A document purporting to be executed or attested in his official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.
- (4) Certified Copies of Public Records. — A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) or complying with any law of the United States or of this State.
- (5) Official Publications. — Books, pamphlets, or other publications purporting to be issued by public authority.



- (6) Newspapers and Periodicals. — Printed materials purporting to be newspapers or periodicals.
- (7) Trade Inscriptions and the Like. — Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.
- (8) Acknowledged Documents. — Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.
- (9) Commercial Paper and Related Documents. — Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.
- (10) Presumptions Created by Law. — Any signature, document, or other matter declared by any law of the United States or of this State to be presumptively or prima facie genuine or authentic. (1983, c. 701, s. 1.)

### COMMENTARY

This rule differs from Fed. R. Evid. 902 in that the phrase "or the Panama Canal Zone" has been deleted from paragraph (1). Paragraph (4) differs from the federal rule in that the phrase "any law of the United States or of this State" has been substituted in lieu of the phrase "of this Rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority." Paragraph (10) differs from the federal rule in that the phrase "any law of the United States or of this State" is used in lieu of the phrase "Act of Congress".

The Advisory Committee's Note states:

"Case law and statutes have, over the years, developed a substantial body of instances in which authenticity is taken as sufficiently established for purposes of admissibility without extrinsic evidence to that effect, sometimes for reasons of policy but perhaps more often because practical considerations reduce the possibility of unauthenticity to a very small dimension. The present rule collects and incorporates these situations, in some instances expanding them to occupy a larger area which their underlying considerations justify. In no instance is the opposite party foreclosed from disputing authenticity."

Paragraph (1) provides that a document bearing the seal of an officer of the government and a signature purporting to be an attestation or execution does not require extrinsic evidence of authenticity as a condition precedent to admissibility. See *Brandis on North Carolina Evidence* § 153, at 610 (1982). The Advisory Committee's Note states:

"The acceptance of documents bearing a public seal and signature, most often encountered in practice in the form of acknowledgments or certificates authenticating copies of public records is actually of broad application.

Whether theoretically based in whole or in part upon judicial notice, the practical underlying considerations are that forgery is a crime and detection is fairly easy and certain. 7 Wigmore § 2161, p. 638. . . ."

Paragraph (2) is derived from Federal Civil Procedure Rule 44. North Carolina Civil Procedure Rule 44, which is similar, should be amended to conform to Rule 902. Paragraph (2) applies to documents as well as public records. The Advisory Committee's Note states:

"While statutes are found which raise a presumption of genuineness of purported official signatures in the absence of an official seal, 7 Wigmore § 2167 . . . the greater ease of effecting a forgery under these circumstances is apparent. Hence this paragraph of the rule calls for authentication by an officer who has a seal. Notarial acts by members of the armed forces and other special situations are covered in paragraph (10)."

Paragraph (3) is derived from Federal Civil Procedure Rule 44(a) (2), which was amended in 1966 to provide for greater clarity, efficiency, and flexibility in the procedure for authenticating copies of foreign official records. North Carolina Civil Procedure Rule 44 should be amended to conform to Rule 902. Paragraph (3) applies to public documents rather than being limited to public records.

Paragraph (4) is confined to official records and reports, and documents authorized to be recorded or filed and actually recorded or filed. The Advisory Committee's Note states:

"The common law and innumerable statutes have recognized the procedure of authenticating copies of public records by certificate. The certificate qualifies as a public document, receivable as authentic when in conformity with paragraphs (1), (2), or (3). \*\*\* It will be observed that the certification proce-



dures here provided extends only to public records, reports, and recorded documents, all including data compilations, and does not apply to public documents generally. Hence documents provable when presented in original form under paragraphs (1), (2), or (3) may not be provable by certified copy under paragraph (4)."

G.S. 1A-1, Rule 44, G.S. 8-34, G.S. 8-35, G.S. 8-18, G.S. 8-20, G.S. 47-31, and G.S. 47-34 should be amended to conform to Rule 902.

Paragraph (5) has the same effect as North Carolina Civil Procedure Rule 44(a), which should be amended to conform to Rule 902. The Advisory Committee's Note states:

"Dispensing with preliminary proof of the genuineness of purportedly official publications, most commonly encountered in connection with statutes, court reports, rules, and regulations, has been greatly enlarged by statutes and decisions. 5 Wigmore § 1684. Paragraph (5), it will be noted, does not confer admissibility upon all official publications; it merely provides a means whereby their authenticity may be taken as established for purposes of admissibility. Rule 44(a) of the Rules of Civil Procedure has been to the same effect."

Paragraph (6) changes North Carolina practice by providing that printed materials purporting to be newspapers or periodicals are self-authenticating. The Advisory Committee's Note states:

"The likelihood of forgery of newspapers or periodicals is slight indeed. Hence no danger is apparent in receiving them. Establishing the authenticity of the publication may, of course, leave still open questions of authority and responsibility for items therein contained. See 7 Wigmore § 2150."

Paragraph (7) changes North Carolina practice by providing that inscriptions, signs, tags, or labels purporting to have been affixed in the

course of business and indicating ownership, control, or origin are self-authenticating. The Advisory Committee's Note states:

"Several factors justify dispensing with preliminary proof of genuineness of commercial and mercantile labels and the like. The risk of forgery is minimal. Trademark infringement involves serious penalties. Great efforts are devoted to inducing the public to buy in reliance on brand names, and substantial protection is given them."

Paragraph (8) extends the exception for acknowledged title documents to include other acknowledged documents. The Advisory Committee's Note states:

"In virtually every state, acknowledged title documents are receivable in evidence without further proof. Statutes are collected in 5 Wigmore § 1676. If this authentication suffices for documents of the importance of those affecting titles, logic scarcely permits denying this method when other kinds of documents are involved."

Paragraph (9) provides that commercial paper, signatures thereon, and documents relating thereto are authenticated to the extent provided by general commercial law. The term "general commercial law" refers to the Uniform Commercial Code, except that federal commercial law will apply when federal commercial paper is involved. Pertinent provisions of the Uniform Commercial Code are G.S. 25-1-202, 25-3-307, and 25-3-510, dealing with third-party documents, signatures on negotiable instruments, protests, and statements of dishonor.

Paragraph (10) provides for the authentication of any signature, document, or other matter declared by any federal or North Carolina statute to be presumptively or prima facie genuine or authentic.

## Rule 903. Subscribing witness' testimony unnecessary.

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing. (1983, c. 701, s. 1.)

### COMMENTARY

This rule is identical to Fed. R. Evid. 903.

The Advisory Committee's Note states:

"The common law required that attesting witnesses be produced or accounted for. Today the requirement has generally been abolished except with respect to documents which must be attested to be valid, e.g., wills in some states."

The requirement of proof by the attesting witness was abolished by G.S. 8-38, which should be repealed upon enactment of Rule 903. Rule 903 is not intended to affect the method and manner of proving instruments for registration.



## ARTICLE 10.

### *Contents of Writings, Recordings and Photographs.*

#### **Rule 1001. Definitions.**

For the purposes of this Article the following definitions are applicable:

- (1) Writings and Recordings. — "Writings" and "recordings" consist of letters, words, sounds, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.
- (2) Photographs. — "Photographs" include still photographs, x-ray films, video tapes, and motion pictures.
- (3) Original. — An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."
- (4) Duplicate. — A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduce the original. (1983, c. 701, s. 1.)

#### COMMENTARY

This rule is identical to Fed. R. Evid. 1001 except that the word "sounds" has been added to paragraph (1) between "words" and "or numbers".

The Advisory Committee's Note states:

"Paragraph (1). Traditionally the rule requiring the original centered upon accumulations of data and expressions affecting legal relations set forth in words and figures. This meant that the rule was one essentially related to writings. Present day techniques have expanded methods of storing data, yet the essential form which the information ultimately assumes for usable purposes is words and figures. Hence the considerations underlying the rule dictate its expansion to include computers, photographic systems, and other modern developments."

Paragraph (1) clarifies North Carolina law by providing that the best evidence rule applies to recordings and photographs. See *Brandis on North Carolina Evidence* § 190 (1982).

With respect to Paragraph (3), the Advisory Committee's Note states:

"In most instances, what is an original will be self-evident and further refinement will be unnecessary. However, in some instances particularized definition is required. A carbon copy

of a contract executed in duplicate becomes an original, as does a sales ticket carbon copy given to a customer. While strictly speaking the original of a photograph might be thought to be only the negative, practicality and common usage require that any print from the negative be regarded as a original. Similarly, practicality and usage confer the status or original upon any computer printout."

Paragraph (3) is substantially in accord with North Carolina practice. See *Brandis, supra*, § 190; G.S. 55-37.1 and G.S. 55A-27.1.

With respect to Paragraph (4), the Advisory Committee's Note states:

"The definition describes 'copies' produced by methods possessing an accuracy which virtually eliminates the possibility of error. Copies thus produced are given the status of originals in large measure by Rule 1003, *infra*. Copies subsequently produced manually, whether handwritten or typed, are not within the definition. It should be noted that what is an original for some purposes may be a duplicate for others. Thus a bank's microfilm record of checks cleared is the original as a record. However, a print offered as a copy of a check whose contents are in controversy is a duplicate."



## Rule 1002. Requirement of original.

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute. (1983, c. 701, s. 1.)

### COMMENTARY

This rule is identical to Fed. R. Evid. 1002.

The rule is the familiar "best evidence rule" expanded to include explicitly writings, recordings, and photographs, as defined in Rule 1001(1) and (2), *supra*. See *Brandis on North Carolina Evidence* § 190, at 100 (1982). However, the requirement for the original is overridden in many instances by other rules such as Rule 1003, which allows duplicates to be admitted.

The rule in North Carolina is consistent with Rule 1002 in that it requires the original of a writing only when its content is sought to be proved. *Id.*

The Advisory Committee's Note states:

"Application of the rule requires a resolution of the question whether contents are sought to be proved. Thus an event may be proved by nondocumentary evidence, even though a written record of it was made. If, however, the event is sought to be proved by the written record, the rule applies. For example, payment may be proved without producing the written receipt which was given. Earnings may be proved without producing books of account in which they are entered. \*\*\* Nor does the rule apply to testimony that books or records have been examined and found not to contain any reference to a designated matter.

The assumption should not be made that the rule will come into operation on every occasion when use is made of a photograph in evidence. On the contrary, the rule will seldom apply to ordinary photographs. In most instances a party wishes to introduce the item and the

question raised is the propriety of receiving it in evidence. Cases in which an offer is made of the testimony of a witness as to what he saw in a photograph or motion picture, without producing the same, are most unusual. The usual course is for a witness on the stand to identify the photograph or motion picture as a correct representation of events which he saw or of a scene with which he is familiar. In fact he adopts the picture as his testimony, or, in common parlance, uses the picture to illustrate his testimony. Under these circumstances, no effort is made to prove the contents of the picture, and the rule is inapplicable. \*\*\*

On occasion, however, situations arise in which contents are sought to be proved. Copy-right, defamation, and invasion of privacy by photograph or motion picture fall in this category. Similarly as to situations in which the picture is offered as having independent probative value, *e.g.*, automatic photograph of bank robber. \*\*\* The most commonly encountered of this latter group is of course, the X-ray, with substantial authority calling for production of the original.

It should be noted, however, that Rule 703, *supra*, allows an expert to give an opinion based on matters not in evidence, and the present rule must be read as being limited accordingly in its application. Hospital records which may be admitted as business records under Rule 803(6) commonly contain reports interpreting X-rays by the staff radiologist, who qualifies as an expert, and these reports need not be excluded from the records by the instant rule."

## Rule 1003. Admissibility of duplicates.

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original. (1983, c. 701, s. 1.)

### COMMENTARY

This rule is identical to Fed. R. Evid. 1003.

Rule 1003 departs from the common law in North Carolina and other jurisdictions by providing that a duplicate is admissible to the same extent as an original unless a genuine question as to the authenticity of the original is

raised or it would be unfair to admit the duplicate in the particular case. Traditionally, in North Carolina no special showing has been necessary in order to require production of the original.

The Advisory Committee's Note states:



"When the only concern is with getting the words or other contents before the court with accuracy and precision, then a counterpart serves equally as well as the original, if the counterpart is the product of a method which insures accuracy and genuineness. By definition in Rule 1001(4), *supra*, a 'duplicate' possesses this character. Therefore, if no genuine issue exists as to authenticity and no other reason exists for requiring the original, a duplicate is admissible under the rule. Other reasons for requiring the original may be present when only a part of the original is reproduced and the

remainder is needed for cross-examination or may disclose matters qualifying the part offered or otherwise useful to the opposing party."

Courts should be liberal in permitting questions of genuineness to be raised. The court should examine the quality of the duplicate, the specificity and sincerity of the challenge, the importance of the evidence to the case, and the burdens of producing the original before determining whether a genuine question of authenticity is raised.

## Rule 1004. Admissibility of other evidence of contents.

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:

- (1) **Originals Lost or Destroyed.** — All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or
- (2) **Original Not Obtainable.** — No original can be obtained by any available judicial process or procedure; or
- (3) **Original in Possession of Opponent.** — At a time when an original was under the control of a party against whom offered, he was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and he does not produce the original at the hearing; or
- (4) **Collateral Matters.** — The writing, recording, or photograph is not closely related to a controlling issue. (1983, c. 701, s. 1.)

### COMMENTARY

This rule is identical to Fed. R. Evid. 1004. The Advisory Committee's Note states:

"Basically the rule requiring the production of the original as proof of contents has developed as a rule of preference: if failure to produce the original is satisfactorily explained, secondary evidence is admissible. The instant rule specifies the circumstances under which production of the original is excused.

The rule recognizes no 'degrees' of secondary evidence."

Paragraph (1) provides that loss or destruction of the original, unless due to bad faith of the proponent, is a satisfactory explanation of nonproduction. See McCormick § 201. This paragraph is consistent with current North Carolina practice. See *Brandis on North Carolina Evidence* § 192 (1982).

Paragraph (2) provides that when the original is in the possession of a third person, inability to procure it from him by resort to process or other judicial procedure is a sufficient explanation of nonproduction. The Advisory Committee's Note states that: "Judicial procedure includes subpoena duces tecum as an incident to the taking of a deposition in

another jurisdiction. No further showing is required. See McCormick § 202." Extreme expense and inconvenience in obtaining the document will not constitute unavailability.

Paragraph (3) is consistent with North Carolina practice in that secondary evidence of the contents of a writing is admissible if the opponent who is in possession of the original fails, after notice, to produce it at the trial. See *Brandis on North Carolina Evidence* § 193 (1982). The Advisory Committee's Note states:

"A party who has an original in his control has no need for the protection of the rule if put on notice that proof of contents will be made. He can ward off secondary evidence by offering the original. The notice procedure here provided is not to be confused with orders to produce or other discovery procedures, as the purpose of the procedure under this rule is to afford the opposite party an opportunity to produce the original, not to compel him to do so. McCormick § 203."

Under the rule, notice may be given by the pleadings. There are no North Carolina cases on this point.



Paragraph (4) is consistent with North Carolina cases in that production of the original is not required if the writing is only collaterally involved in the case. See *Brandis on North Carolina Evidence* § 191 (1982). The Advisory Committee's Note states:

"While difficult to define with precision, situations arise in which no good purpose is served by production of the original. Examples are the

newspaper in an action for the price of publishing defendant's advertisement, *Foster-Holcomb Investment Co. v. Little Rock Publishing Co.*, 151 Ark. 449, 236 S.W. 597 (1922), and the streetcar transfer of plaintiff claiming status as a passenger, *Chicago City Ry. Co. v. Carroll*, 206 Ill. 318, 68 N.E. 1087 (1903). Numerous cases are collected in McCormick § 200, p. 412, n. 1."

## Rule 1005. Public records.

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given. (1983, c. 701, s. 1.)

### COMMENTARY

This rule is identical to Fed. R. Evid. 1005.

Admission of certified copies of registered instruments and official records are currently governed by G.S. 18-18, G.S. 8-34, and G.S. 1A-1, Rule 44.

The Advisory Committee's Note states:

"Public records call for somewhat different treatment. Removing them from their usual place of keeping would be attended by serious inconvenience to the public and to the custodian. As a consequence judicial decisions and statutes commonly hold that no

explanation need be given for failure to produce the original of a public record. McCormick § 204; 4 Wigmore §§ 1215-1228. This blanket dispensation from producing or accounting for the original would open the door to the introduction of every kind of secondary evidence of contents of public records were it not for the preference given certified or compared copies. Recognition of degrees of secondary evidence in this situation is an appropriate *quid pro quo* for not applying the requirement of producing the original."

## Rule 1006. Summaries.

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court. (1983, c. 701, s. 1.)

### COMMENTARY

This rule is identical to Fed. R. Evid. 1006.

Where documents are so voluminous that it would be impracticable to produce and examine them in court, North Carolina Courts have

allowed a qualified witness to testify to the results of his examination of the documents. *Brandis on North Carolina Evidence* § 192 (1982).



## Rule 1007. Testimony or written admission of party.

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by his written admission, without accounting for the nonproduction of the original. (1983, c. 701, s. 1.)

### COMMENTARY

This rule is identical to Fed. R. Evid. 1007.

This rule is consistent with North Carolina practice in that the original writing need not be produced where the opponent admits that the copy offered in evidence is correct. See *Brandis on North Carolina Evidence* § 192, at 113 (1982). The rule clarifies North Carolina law by not allowing proof of contents by oral evidence of an oral admission. See *Norcum v. Savage*, 140 N.C. 472 (1906). The Advisory Committee's Note states:

"While the parent case, *Slatterie v. Pooley*, 6 M. & W. 664, 151 Eng. Rep. 579 (Exch. 1840), allows proof of contents by evidence of an oral admission by the party against whom offered,

without accounting for nonproduction of the original, the risk of inaccuracy is substantial and the decision is at odds with the purpose of the rule giving preference to the original. See 4 Wigmore § 1255. The instant rule follows Professor McCormick's suggestion of limiting this use of admissions to those made in the course of giving testimony or in writing. McCormick § 208, p. 424. The limitation, of course, does not call for excluding evidence of an oral admission when nonproduction of the original has been accounted for and secondary evidence generally has become admissible. Rule 1004, *supra*."

## Rule 1008. Functions of court and jury.

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of Rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact. (1983, c. 701, s. 1.)

### COMMENTARY

This rule is identical to Fed. R. Evid. 1008.

The Advisory Committee's Note states:

"Most preliminary questions of fact in connection with applying the rule preferring the original as evidence of contents are for the judge, under the general principles announced in Rule 104, *supra*. Thus, the question whether the loss of the originals has been established, or of the fulfillment of other conditions specified in Rule 1004, *supra*, is for the judge. However, questions may arise which go beyond the mere administration of the rule preferring the original and into the merits of the controversy. For example, plaintiff offers secondary evidence of the contents of an alleged contract, after first introducing evidence of loss of the original, and defendant counters with evidence that no such contract was ever executed. If the judge decides

that the contract was never executed and excludes the secondary evidence, the case is at an end without ever going to the jury on a central issue. Levin, *Authentication and Content of Writings*, 10 Rutgers L. Rev. 632, 644 (1956). The latter portion of the instant rule is designed to insure treatment of these situations as raising jury questions. The decision is not one for uncontrolled discretion of the jury but is subject to the control exercised generally by the judge over jury determinations. See Rule 104(b), *supra*."

Although there are no North Carolina cases directly on point, Rule 1008 follows the division of function between the court and the jury with respect to competency and conditional relevancy. See *Brandis on North Carolina Evidence* § 8 (1982).



## ARTICLE 11.

### Miscellaneous Rules.

#### Rule 1101. Applicability of rules.

(a) Proceedings generally. — Except as otherwise provided in subdivision (b) or by statute, these rules apply to all actions and proceedings in the courts of this State.

(b) Rules inapplicable. — The rules other than those with respect to privileges do not apply in the following situations:

- (1) Preliminary Questions of Fact. — The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104(a).
- (2) Grand Jury. — Proceedings before grand juries.
- (3) Miscellaneous Proceedings. — Proceedings for extradition or rendition; first appearance before district court judge on probable cause hearing in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; proceedings with respect to release on bail or otherwise; juvenile proceedings, except those under G.S. 7A-634(a).
- (4) Contempt Proceedings. — Contempt proceedings in which the court is authorized by law to act summarily. (1983, c. 701, s. 1.)

#### COMMENTARY

This rule resembles Fed. R. Evid. 1101 with appropriate modifications.

Subdivision (b) (1) restates, for convenience, the provisions of the second sentence of Rule 104(a), *supra*. See Advisory Committee's Note to that rule.

Current North Carolina practice with respect to voir dire, sentencing hearings, probation revocation hearings, and juvenile proceedings is not meant to be changed by adoption of these rules.

#### Rule 1102. Short title.

These rules shall be known and may be cited as the "North Carolina Rules of Evidence." (1983, c. 701, s. 1.)



## Chapter 9.

### Jurors.

#### Article 1.

#### Jury Commissions, Preparation of Jury Lists, and Drawing of Panels.

Sec.

9-2. Preparation of jury list; sources of names.

#### ARTICLE 1.

#### *Jury Commissions, Preparation of Jury Lists, and Drawing of Panels.*

### § 9-1. Jury commission in each county; membership; selection; oath; terms.

#### Legal Periodicals. —

For comment discussing the constitutionality

of North Carolina's nuisance abatement statute, see 61 N.C.L. Rev. 685 (1983).

#### CASE NOTES

Cited in *State v. Williams*, 305 N.C. 656, 292 S.E.2d 243 (1982).

### § 9-2. Preparation of jury list; sources of names.

(a) It shall be the duty of the jury commission beginning July 1, 1981, (and each biennium thereafter) to prepare a list of prospective jurors qualified under this Chapter to serve in the biennium beginning January 1, 1982, (and each biennium thereafter). Instead of providing a list for an entire biennium, the commission may prepare a list each year if the senior regular resident superior court judge requests in writing that it do so.

(f) The jury list shall contain not less than one and one-quarter times and not more than three times as many names as were drawn for jury duty in all courts in the county during the previous biennium, or, if an annual list is being prepared as requested under subsection (a) of this section the jury list shall contain not less than one and one-quarter times and not more than three times as many names as were drawn for jury duty in all courts in the county during the previous year but in no event shall the list include fewer than 500 names, except that in counties in which a different panel of jurors is selected for each day of the week, there is no limit to the number of names that may be placed on the jury list.

(1806, c. 694, P. R.; Code, ss. 1722, 1723; 1889, c. 559; 1897, cc. 117, 539; 1899, c. 729; Rev., s. 1957; C. S., s. 2312; 1947, c. 1007, s. 1; 1967, c. 218, s. 1; 1969, c. 205, s. 1; c. 1190, s. 49½; 1973, c. 83, ss. 1, 2; 1981, c. 430, s. 1; c. 720, s. 1; 1981 (Reg. Sess., 1982), c. 1226, s. 1; 1983, c. 197, s. 2.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

#### Effect of Amendments. —

The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982, added the second sentence of subsection (a).

Session Laws 1981 (Reg. Sess., 1982), c. 1226, s. 2, provides that a jury commission may prepare a list for the calendar year 1983 pursuant to the provisions of this act, even though the commission in 1981 prepared a jury list for the entire 1982-83 biennium.

The 1983 amendment, effective beginning



with lists prepared for use in 1984, inserted the language beginning "or, if an annual list is

being prepared" and ending "during the previous year" in subsection (f).

## CASE NOTES

### III. PROOF OF DISCRIMINATION.

#### Discrimination Not Established. —

Where the evidence showed that jury lists were compiled in strict compliance with this section, the mere fact that only 15 percent of the

jury pool was black in a county of 24 percent black was insufficient to show systematic discrimination. *State v. Taylor*, 304 N.C. 249, 283 S.E.2d 761 (1981).

## ARTICLE 2.

### *Petit Jurors.*

## § 9-11. Supplemental jurors; special venire.

## CASE NOTES

**Sheriff Not Always Disqualified Where Deputy Testifies.** — The Legislature did not intend to disqualify sheriffs from summoning extra jurors in all cases in which deputy sheriffs testify. If this were so, the Legislature would have designated some other official to summon

extra jurors. If the sheriff were disqualified from summoning jurors in every case in which a defendant feels the sheriff is harassing him, there would be few if any sheriffs qualified to summon a juror. *State v. Yancey*, 58 N.C. App. 52, 293 S.E.2d 298 (1982).

## § 9-14. Jury sworn; judge decides competency.

## CASE NOTES

### I. GENERAL CONSIDERATION.

**Cited in** *State v. Wright*, 52 N.C. App. 166, 278 S.E.2d 579 (1981).

### II. CHALLENGE TO JURORS.

#### The right of challenge, etc. —

A party has no right to seat a particular juror, but only to reject one who is prejudiced against him. *State v. Duvall*, 50 N.C. App. 684, 275 S.E.2d 842, rev'd on other grounds, 304 N.C.

557, 284 S.E.2d 495 (1981).

### III. COMPETENCY OF JURORS.

**The question of whether a juror is competent, etc. —**

The trial judge is vested with broad discretion in determining the competency of the jurors. *State v. Duvall*, 50 N.C. App. 684, 275 S.E.2d 842, rev'd on other grounds, 304 N.C. 557, 284 S.E.2d 495 (1981).



§ 9-15. Questioning jurors without challenge; challenges for cause.

CASE NOTES

II. QUESTIONING PROSPECTIVE JURORS.

A. Nature and Scope of Inquiry.

Purpose of Voir Dire. —

In accord with 1st paragraph in original. See *State v. Bracey*, 303 N.C. 112, 277 S.E.2d 390 (1981).

The voir dire examination of jurors allowed by this section serves the dual purpose of ascer-

taining whether grounds exist for challenge for cause to enable counsel to exercise intelligently the peremptory challenges allowed by law. *State v. Brown*, 53 N.C. App. 82, 280 S.E.2d 31, cert. denied, 304 N.C. 197, 285 S.E.2d 102 (1981).

Regulation of Voir Dire, etc. —

In accord with 1st paragraph in original. See *State v. Bracey*, 303 N.C. 112, 277 S.E.2d 390 (1981).



## Chapter 10.

### Notaries.

Sec.

10-1. Appointment and commission; term of office; revocation of commission.

10-1.1. Requirements for appointment.

10-12. Acts of certain notaries prior to and

after qualification and whose commissions have expired validated.

### § 10-1. Appointment and commission; term of office; revocation of commission.

The Secretary of State may, from time to time, at his discretion, appoint one or more fit persons in every county to act as notaries public and shall issue to each a commission upon payment of a fee of fifteen dollars (\$15.00). the commission shall show that it is for a term of five years and shall show the effective date and the date of expiration. The term of the commission shall be computed by including the effective date and shall end at midnight of the day preceding the anniversary of the effective date, five years thereafter. The commission shall be sent to the register of deeds of the county in which the appointee lives and a copy of the letter of transmittal to the register of deeds shall be sent to the appointee concerned. The commission shall be retained by the register of deeds until the appointee has qualified in the manner provided in G.S. 10-2.

Any commission so issued by the Secretary of State or his predecessor, shall be recoverable by him in his discretion upon complaint being made against such notary public and when he shall be satisfied that the interest of the public will be best served by the revocation of said commission. Whenever the Secretary of State shall have revoked the commission of any notary public appointed by him, or his predecessor in office, it shall be his duty to file with the register of deeds in the county of such notary public a copy of said order and mail a copy of same to said notary public. The Secretary of State may revoke the commission of a notary who in the performance of his duties fails to comply with the laws of the State.

Any person holding himself out to the public as a notary public, or any person attempting to act in such capacity after his commission shall have been revoked by the Secretary of State, shall be guilty of a misdemeanor and upon conviction shall be fined or imprisoned, or both, in the discretion of the court. (Code, ss. 3304, 3305; Rev., ss. 2347, 2348; C. S., s. 3172; 1927, c. 117; 1959, c. 1161, s. 2; 1969, c. 563, s. 1; c. 912, s. 1; 1973, c. 680, s. 1; 1983, c. 427, s. 2; c. 713, s. 22.)

**Effect of Amendments.** — The first 1983 amendment, effective Oct. 1, 1983, inserted the last sentence of the second paragraph.

The second 1983 amendment, effective Aug.

1, 1983, substituted "fifteen dollars (\$15.00)" for "ten dollars (\$10.00)" at the end of the first sentence of the first paragraph.

### § 10-1.1. Requirements for appointment.

(a) To be eligible for appointment as a notary public a person shall:

- (1) Apply for appointment on a form to be provided by the Secretary of State to be made available at the office of the register of deeds of each county.
- (2) Be 18 years of age or older and registered to vote in the State of North Carolina.



- (3) Possess a high school diploma or its equivalent.
  - (4) Obtain a recommendation as to character and fitness from one publicly elected official in North Carolina.
  - (5) Satisfactorily complete a course of study approved by the Secretary of State which shall consist of not less than three hours nor more than six hours of classroom instruction; except that practicing attorneys at law shall be exempt from this requirement. Local bar associations shall be qualified to teach or conduct a course of instruction upon authorization by the Secretary of State.
  - (6) Purchase a manual approved by the Secretary of State that describes the duties, authority and ethical responsibilities of notaries public.
- (b) The Secretary of State may waive the requirements in subdivisions (a)(3), (a)(4), (a)(5), and (a)(6) of this section when a person applies for a second or subsequent commission. (1983, c. 427, s. 1.)

**Editor's Note.** — Session Laws 1983, c. 427, s. 3, makes this section effective Oct. 1, 1983.

## § 10-7. Certificates of official character.

**Editor's Note.** — The case of *Crissman v. Palmer*, 225 N.C. 472, 35 S.E.2d 422 (1945), was decided under former § 10-7, prior to the amendment of this Chapter in 1973, and should be deleted from the case notes to existing § 10-7.

## § 10-9. Official acts of notaries public; signatures; appearance of names; notarial stamps or seals; expiration of commissions.

**Editor's Note.** — The historical citation to this section should read: "(Rev., ss. 2351a, 2352; C. S., ss. 3177, 3179; 1953, c. 836; 1961, c. 733; 1967, c. 984; 1973, c. 680, s. 1.)"

## § 10-12. Acts of certain notaries prior to and after qualification and whose commissions have expired validated.

(a) All acknowledgments taken and other official acts done by any person who has heretofore been appointed or reappointed as a notary public, but who at the time of acting had failed to qualify as provided by law, shall, notwithstanding, be in all respects valid and sufficient; and property conveyed by instruments in which the acknowledgments were taken by such notary public are hereby validated and shall convey the properties therein purported to be conveyed as intended thereby.

(b) All acknowledgments taken and other official acts done by any person who has heretofore been appointed as a notary public, but whose commission has expired at the time of acting, shall be in all respects valid and sufficient. Instruments conveying property acknowledged by this notary public are validated and convey the properties they purport to convey.

(c) All acknowledgments taken and other official acts done by any person who has heretofore been appointed or reappointed and who has qualified as a notary public, but who, prior to the expiration of the commission, fails to continue to satisfy voting registration or residence requirements promulgated by the Secretary of State shall, notwithstanding, be in all respects valid and sufficient; and property conveyed by instruments in which the acknowl-



edgements were taken by such notary public are hereby validated and shall convey the properties therein purported to be conveyed as intended thereby.

(d) This section shall apply to notarial acts prior to April 1, 1983. (1945, c. 665; 1973, c. 680, s. 1; 1977, c. 734, s. 1; 1979, c. 226, s. 2; 1981, c. 164, s. 1; 1983, c. 205, s. 1.)

**Editor's Note. —**

Session Laws 1983, c. 205, which added subsections (c) and (d) of this section, provides in section 2: "Nothing herein contained shall

affect pending litigation."

**Effect of Amendments. —**

The 1983 amendment, effective April 21, 1983, added subsections (c) and (d).



## Chapter 11.

### Oaths.

#### Article 1.

##### General Provisions

Sec.

11-7.1. Who may administer oaths of office.

#### ARTICLE 1.

##### *General Provisions.*

### § 11-7.1. Who may administer oaths of office.

(a) Except as otherwise specifically required by statute, an oath of office may be administered by:

- (1) A justice, judge, magistrate, clerk, assistant clerk, or deputy clerk of the General Court of Justice, a retired justice or judge of the General Court of Justice, or any member of the federal judiciary;
  - (2) The Secretary of State;
  - (3) A notary public;
  - (4) A register of deeds;
  - (5) A mayor of any city, town, or incorporated village;
  - (6) The chairman of a committee of the House or Senate of the General Assembly, or either of the cochairmen of a joint committee;
  - (7) The clerk of any county, city, town or incorporated village.
- (1953, c. 23; 1969, c. 44, s. 25; c. 499; c. 713, s. 1; 1971, c. 381, s. 10; 1977, c. 344, s. 2; 1979, c. 757; 1981, c. 682, s. 2; 1983, c. 648, s. 1.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Editor's Note.** — Session Laws 1983, c. 648, s. 2, provides: "The administration of an oath by any county, city or town clerk prior to date of

ratification is hereby validated." The act was ratified June 30, 1983.

#### **Effect of Amendments.** —

The 1983 amendment, effective June 30, 1983, added subdivision (a)(7).



## Chapter 12.

### Statutory Construction.

#### § 12-2. Repeal of statute not to affect actions.

**Editor's Note.** — The first entry in the historical citation to this section should read "1830, c. 44."

#### § 12-3. Rules for construction of statutes.

##### CASE NOTES

##### I. GENERAL CONSIDERATION.

**Particular Statute Controls over General Statute.** — Where one statute deals with a subject in detail with reference to a particular situation and another statute deals with the same subject in general and comprehensive terms, the particular statute will be construed as controlling in the particular situation, unless it clearly appears that the General Assembly intended to make the general act controlling in regard thereto. *State v. Leeper*, 59 N.C. App. 199, 296 S.E.2d 7, cert. denied, 307 N.C. 272, 299 S.E.2d 218 (1982).

**Applied** in *State v. Camp*, 59 N.C. App. 38, 295 S.E.2d 766 (1982).

##### II. DETERMINATION OF INTENT AND MEANING.

###### A. In General.

**Indicia Bearing on Intent.** — The legislative intent will be ascertained by such indicia as the purposes appearing from the statute taken as a whole, the phraseology, the words ordinary or technical, the law as it prevailed before the statute, the mischief to be remedied, the remedy, the end to be accomplished, statutes in *pari materia*, the preamble, the title, and other like means. *State v. White*, 58 N.C. App. 558, 294 S.E.2d 1 (1982).

###### When Court May Interpolate, etc. —

When a statute is unclear in its meaning, the courts will interpret the statute to give effect to the legislative intent. *State v. White*, 58 N.C.

App. 558, 294 S.E.2d 1 (1982).

##### V. CONSTRUCTION IN ACCORD WITH CONSTITUTION.

###### A. Construction.

**Unconstitutionality of the statute must appear clearly.** *State v. White*, 58 N.C. App. 558, 294 S.E.2d 1 (1982).

###### Construction so as to Avoid, etc. —

If the statute is susceptible of two interpretations, one constitutional and the other unconstitutional, the former will be adopted. *State v. White*, 58 N.C. App. 558, 294 S.E.2d 1 (1982).

###### Presumption in Favor of Validity. —

In accord with 1st paragraph in original. See *In re Denial of Approval to Issue Hous. Bonds*, 307 N.C. 52, 296 S.E.2d 281 (1982).

In accord with 2nd paragraph in original. See *State v. White*, 58 N.C. App. 558, 294 S.E.2d 1 (1982).

###### Existence of Facts, etc. —

When the constitutionality of a statute depends on the existence or nonexistence of certain facts and circumstances, the existence of such facts and circumstances will generally be presumed for the purpose of giving validity to the statute, if such a state of facts can reasonably be presumed to exist, and if any such facts may be reasonably conceived in the mind of the court. *In re Denial of Approval to Issue Hous. Bonds*, 307 N.C. 52, 296 S.E.2d 281 (1982).



Chapter 13.  
Citizenship Restored.

§ 13-1. Restoration of citizenship.

CASE NOTES

Restoration of rights of citizenship under subdivision (4) does not meet the requirements of 18 U.S.C. § 1203(2), which exempts certain felons from the federal prohibition

against possession of firearms, unless it expressly authorizes the possession of firearms. United States v. Hardin, 696 F.2d 1078 (4th Cir. 1982).



## Chapter 14. Criminal Law.

### SUBCHAPTER I. GENERAL PROVISIONS.

#### Article 1.

##### Felonies and Misdemeanors.

Sec.

- 14-2.4. Punishment for conspiracy to commit a felony.

### SUBCHAPTER II. OFFENSES AGAINST THE STATE.

#### Article 4A.

##### Prohibited Secret Societies and Activities.

- 14-12.7. Wearing of masks, hoods, etc., on public ways.
- 14-12.9. Entry, etc., upon premises of another while wearing mask, hood or other disguise.
- 14-12.10. Holding meetings or demonstrations while wearing masks, hoods, etc.

### SUBCHAPTER III. OFFENSES AGAINST THE PERSON.

#### Article 7A.

##### Rape and Other Sex Offenses.

- 14-27.2. First-degree rape.
- 14-27.4. First-degree sexual offense.

#### Article 8.

##### Assaults.

- 14-33. Misdemeanor assaults, batteries, and affrays, simple and aggravated; punishments.
- 14-34.3. Manufacture, sale, purchase, or possession of teflon-coated types of bullets prohibited.

#### Article 10.

##### Kidnapping and Abduction.

- 14-39. Kidnapping.
- 14-43.2. Involuntary servitude.

### SUBCHAPTER IV. OFFENSES AGAINST THE HABITATION AND OTHER BUILDINGS.

#### Article 14.

##### Burglary and Other Housebreakings.

- 14-55. Preparation to commit burglary or other housebreakings.

### SUBCHAPTER V. OFFENSES AGAINST PROPERTY.

#### Article 16.

##### Larceny.

Sec.

- 14-72.3. Removal of shopping cart from shopping premises.
- 14-84. Animals subject to larceny.
- 14-86.1. Seizure and forfeiture of conveyances used in committing larceny and similar crimes.

#### Article 19.

##### False Pretenses and Cheats.

- 14-107. Worthless checks.
- 14-111.2. Obtaining ambulance services without intending to pay therefor — certain named counties.
- 14-111.3. Making false ambulance request in Ashe, Buncombe, Cherokee, Clay, Davie, Duplin, Haywood, Hoke, Macon, Madison, Wilkes and Yadkin Counties.

#### Article 21.

##### Forgery.

- 14-119. Forgery of notes, checks, and other securities.
- 14-120. Uttering forged paper or instrument containing a forged endorsement.

### SUBCHAPTER VI. CRIMINAL TRESPASS.

#### Article 22.

##### Trespasses to Land and Fixtures.

- 14-139. [Repealed.]
- 14-151.1. Interfering with electric, gas or water meters; prima facie evidence of intent to alter, tamper with or bypass electric, gas or water meters; unlawful reconnection of electricity, gas, or water; civil liability.
- 14-159.1. Contaminating a public water system.
- 14-159.2 to 14-159.5. [Reserved.]

#### Article 23.

##### Trespasses to Personal Property.

- 14-163.1. Injuring or killing law enforcement agency animal.



**SUBCHAPTER VII. OFFENSES AGAINST  
PUBLIC MORALITY AND DECENCY.**

**Article 26.**

**Offenses against Public Morality  
and Decency.**

Sec.

- 14-190.6. Employing or permitting minor to assist in offense under Article.
- 14-190.8. Dissemination to minors under the age of 13 years.
- 14-190.12. Sexual performance by child.

**Article 27.**

**Prostitution.**

- 14-204.1. Loitering for the purpose of engaging in prostitution offense.

**SUBCHAPTER VIII. OFFENSES AGAINST  
PUBLIC JUSTICE.**

**Article 29.**

**Bribery.**

- 14-219. [Repealed.]

**Article 31.**

**Misconduct in Public Office.**

- 14-234. Director of public trust contracting for his own benefit; participation in business transaction involving public funds; exemptions.
- 14-239. Allowing prisoners to escape; punishment.
- 14-243. Failing to surrender tax list for inspection and correction.
- 14-247. Private use of publicly owned vehicle.
- 14-250. Publicly owned vehicles to be marked.

**Article 33.**

**Prison Breach and Prisoners.**

- 14-256. Prison breach and escape from county or municipal confinement facilities or officers.
- 14-258.2. Possession of dangerous weapon in prison.
- 14-259. Haboring or aiding certain persons.
- 14-260, 14-261. Recodified.
- 14-264. Recodified.

**SUBCHAPTER IX. OFFENSES AGAINST  
THE PUBLIC PEACE.**

**Article 35.**

**Offenses against the Public Peace.**

- 14-269. Carrying concealed weapons.
- 14-269.1. Confiscation and disposition of deadly weapons.
- 14-272 to 14-275. [Repealed.]
- 14-277.2. Weapons at parades, etc., prohibited.

**SUBCHAPTER X. OFFENSES AGAINST  
THE PUBLIC SAFETY.**

**Article 36A.**

**Riots and Civil Disorders.**

Sec.

- 14-288.4. Disorderly conduct.
- 14-288.8. Manufacture, assembly, possession, storage, transportation, sale, purchase, delivery, or acquisition of weapon of mass death and destruction; exceptions.

**SUBCHAPTER XI. GENERAL POLICE  
REGULATIONS.**

**Article 37.**

**Lotteries, Gaming, Bingo and Raffles.**

**Part 1. Lotteries and Gaming.**

- 14-289. Advertising lotteries.
- 14-290. Dealing in lotteries.
- 14-291. Selling lottery tickets and acting as agent for lotteries.
- 14-291.1. Selling "numbers" tickets; possession prima facie evidence of violation.
- 14-291.2. Pyramid and chain schemes prohibited.
- 14-292. Gambling.
- 14-292.1. [Repealed.]
- 14-309.2 to 14-309.4. [Reserved.]

**Part 2. Bingo and Raffles.**

- 14-309.5. Bingo and raffles.
- 14-309.6. Definitions.
- 14-309.7. Licensing procedure.
- 14-309.8. Limit on sessions.
- 14-309.9. Bingo and raffle prizes.
- 14-309.10. Operation of raffles and bingo.
- 14-309.11. Accounting and use of proceeds.
- 14-309.12. Violation is gambling.
- 14-309.13. Public sessions.
- 14-309.14. Beach bingo.

**Article 39.**

**Protection of Minors.**

- 14-316.1. Contributing to delinquency and neglect by parents and others.
- 14-318. Exposing children to fire.
- 14-318.4. Child abuse a felony.
- 14-320.1. Transporting child outside the State with intent to violate custody order.

**Article 40.**

**Protection of the Family.**

- 14-322.1. Abandonment of child or children for six months.



**Article 43.****Vagrants and Tramps.**

Sec.

14-336. [Repealed.]

14-338, 14-339. [Repealed.]

**Article 46.****Regulation of Landlord and Tenant.**

14-358. Local: Violation of certain contracts between landlord and tenant.

**Article 52.****Miscellaneous Police Regulations.**

14-399. Littering.

14-401.6. Unlawful to possess, etc., tear gas except for certain purposes.

**Article 52A.****Salē of Weapons in Certain Counties.**

Sec.

14-403. Permit issued by sheriff; form of permit.

14-404. Issuance or refusal of permit; appeal from refusal; grounds for refusal; sheriff's fee.

**Article 53.****Sale of Weapons in Certain Other Counties.**

14-409.2. Permit issued by clerk of court; form of permit.

14-409.3. Issuance or refusal of permit; appeal from refusal; grounds for refusal; clerk's fee.

**SUBCHAPTER I. GENERAL PROVISIONS.****ARTICLE 1.*****Felonies and Misdemeanors.*****§ 14-1. Felonies and misdemeanors defined.****CASE NOTES**

**Fair Sentencing Act.** — Although the principal provisions of the Fair Sentencing Act are codified in Chapter 15A, Article 81A of the General Statutes, the act resulted in revisions to other portions of the general statutes. See e.g., Chapter 14, Articles 1, 2, 2A, 33; Chapter 15A, Articles 58, 81A, 82, 83, 85, 85A, 89, 91; Chapter 148, Article 2, and Chapter 162, Article 4. State v. Ahearn, — N.C. —, 300 S.E.2d 689 (1983).

For discussion of the historical background, policies, purposes, and implementation of the new Fair Sentencing Act, see State v. Ahearn, — N.C. —, 300 S.E.2d 689 (1983).

**Attempt to commit a felony is a misdemeanor, absent statutory provisions to the contrary.** State v. Hageman, 307 N.C. 1, 296 S.E.2d 433 (1982).

**§ 14-1.1. Punishment for felonies occurring on and after July 1, 1981.**

**Legal Periodicals.** — For survey of 1980 criminal law, see 59 N.C.L. Rev. 1123 (1981).

For comment clarifying the law of parties in North Carolina by punishing accessories before the fact as principals, see 17 Wake Forest L. Rev. 599 (1981).

For a comment discussing the North Carolina Fair Sentencing Act, see 60 N.C.L. Rev. 631 (1982).

**CASE NOTES**

**Aggravating and mitigating factors.** — In deciding upon the length of a sentence of imprisonment differing from the presumptive

term listed in subsection (f) of § 15A-1340.4, a judge must consider 16 possible aggravating factors and 14 possible mitigating factors listed



in subsection (a) of § 15A-1340.4. He may also consider any aggravating and mitigating factors that he finds are proved by the preponderance of the evidence, and that are reasonably related to the purposes of sentencing, whether or not such aggravating and mitigating factors are set forth in subsection (a) of § 15A-1340.4. However, evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation. *State v. Melton*, 307 N.C. 370, 298 S.E.2d 673 (1983).

**Applied** in *State v. Woods*, 307 N.C. 213, 297 S.E.2d 574 (1982); *State v. Morris*, 59 N.C. App. 157, 296 S.E.2d 309 (1982); *State v. Jones*, 59 N.C. App. 472, 297 S.E.2d 132 (1982); *State v. Thobourne*, 59 N.C. App. 584, 297 S.E.2d 774 (1982).

**Quoted** in *State v. Abee*, 60 N.C. App. 99, 298 S.E.2d 184 (1982).

**Cited** in *State v. Smith*, 304 N.C. 706, 285 S.E.2d 800 (1982); *State v. Farmer*, — N.C. App. —, 299 S.E.2d 842 (1983).

## § 14-2. Punishment of felonies occurring before July 1, 1981.

### CASE NOTES

**Applied** in *State v. Christopher*, 58 N.C. App. 788, 295 S.E.2d 487 (1982); *State v. Massey*, 59 N.C. App. 704, 298 S.E.2d 63 (1982); *United States v. MacCloskey*, 682 F.2d 468 (4th Cir. 1982).

**Cited** in *State v. Douglas*, 54 N.C. App. 85, 282 S.E.2d 832 (1981).

### § 14-2.2. Sentencing of person convicted of repeated felony using deadly weapon.

**Legal Periodicals.** — For a comment discussing the North Carolina Fair Sentencing Act, see 60 N.C.L. Rev. 631 (1982).

### § 14-2.4. Punishment for conspiracy to commit a felony.

Unless a different punishment is expressly stated, a person who is convicted of a conspiracy to commit a felony is guilty:

- (1) Of a Class J felony if the felony he conspired to commit was a Class H, I, or J felony;
- (2) Of a Class H felony if the felony he conspired to commit was any other class of felony. (1983, c. 451, s. 1.)

**Editor's Note.** — Session Laws 1983, c. 451, s. 2, makes this section effective Oct. 1, 1983.

## § 14-3. Punishment of misdemeanors, infamous offenses, offenses committed in secrecy and malice or with deceit and intent to defraud.

### CASE NOTES

#### I. GENERAL CONSIDERATION.

**Intent of Subsection (b).** — When the leg-

islature used the words "done in secrecy and malice, or with deceit and intent to defraud," its manifest purpose was to describe offenses in



which either secrecy and malice, or the employment of deceit with intent to defraud are elements necessary to their criminality as defined by law. *State v. Hageman*, 307 N.C. 1, 296 S.E.2d 433 (1982).

**Meaning of "infamous" must be determined with reference to the degrading nature of the offense** and not the measure of punishment. *State v. Hageman*, 307 N.C. 1, 296 S.E.2d 433 (1982).

**But That Misdemeanor Is Infamous Affects Only Punishment.** — Under North Carolina law a determination that a misdemeanor is infamous affects only the punishment. *United States v. MacCloskey*, 682 F.2d 468 (4th Cir. 1982).

## II. PARTICULAR OFFENSES.

**Infamous Offenses — Solicitation to Commit Murder.** —

Solicitation to commit murder constitutes an "infamous" offense. *United States v. MacCloskey*, 682 F.2d 468 (4th Cir. 1982).

**Attempting to receive stolen property** is a crime of the same degree as attempted robbery, attempted burglary and an attempt to commit a crime against nature. The crime of attempted receipt of stolen property includes secrecy, malice, deceit or intent to defraud as necessary elements. *State v. Hageman*, 307 N.C. 1, 296 S.E.2d 433 (1982).

**Attempt to break and enter** was a misdemeanor punishable under subsection (a) of this section. Certainly the crime of attempted breaking and entering would more readily support a finding that it was an infamous misdemeanor than would the offense of attempting to receive stolen property. *State v. Hageman*, 307 N.C. 1, 296 S.E.2d 433 (1982).

**Driving while License Permanently Revoked.** — A maximum term of 18 months and a minimum term of 12 months does not exceed the statutory maximum for the crime of driving while license permanently revoked. Since only the minimum punishment of not less than one year is specified in § 20-28(b), this statute must be read together with this section, applicable to motor vehicle misdemeanors contained in sections other than Article 3 of Chapter 20, to find the maximum term of imprisonment. *State v. Wells*, 59 N.C. App. 682, 298 S.E.2d 73 (1982).

**Quoted in** *State v. Jarvis*, 50 N.C. App. 679, 274 S.E.2d 852 (1981); *State v. Hageman*, 56 N.C. App. 274, 289 S.E.2d 89 (1982).

**Stated in** *State v. Perry*, 52 N.C. App. 48, 278 S.E.2d 273 (1981).

**Cited in** *State v. Huff*, 56 N.C. App. 721, 289 S.E.2d 604 (1982); *United States v. Ward*, 676 F.2d 94 (4th Cir. 1982).

## § 14-4. Violation of local ordinances misdemeanor.

**Local Modification.** — Mecklenburg: 1983, c. 118; City of Charlotte: 1983, c. 71.

## ARTICLE 2.

### *Principals and Accessories.*

## § 14-5.2. Accessory before fact punishable as principal felon.

**Legal Periodicals.** —

For survey of 1980 criminal law in general, see 59 N.C.L. Rev. 1123 (1981).

For comment clarifying the law of parties in North Carolina by punishing accessories before

the fact as principals, see 17 Wake Forest L. Rev. 599 (1981).

For survey of 1981 criminal law, see 60 N.C.L. Rev. 1289 (1982).



## CASE NOTES

## I. GENERAL CONSIDERATION.

**Fair Sentencing Act.** — Although the principal provisions of the Fair Sentencing Act are codified in Chapter 15A, Article 81A of the General Statutes, the act resulted in revisions to other portions of the general statutes. See e.g., Chapter 14, Articles 1, 2, 2A, 33; Chapter 15A, Articles 58, 81A, 82, 83, 85, 85A, 89, 91; Chapter 148, Article 2, and Chapter 162, Article 4. *State v. Ahearn*, — N.C. —, 300 S.E.2d 689 (1983).

For discussion of the historical background, policies, purposes, and implementation of the new Fair Sentencing Act, see *State v. Ahearn*, — N.C. —, 300 S.E.2d 689 (1983).

**Intent May Be Inferred.** — The intent to aid or the showing of a felonious purpose may be inferred from the defendant's actions and his relation to the perpetrators. There need be no express words communicating the intent to aid or indicating that defendant shared a felonious purpose. *State v. Pryor*, 59 N.C. App. 1, 295 S.E.2d 610 (1982).

**Quoted in** *State v. Overton*, 60 N.C. App. 1, 298 S.E.2d 695 (1982).

## III. ELEMENTS OF FORMER OFFENSE.

**Elements Generally.** —

In accord with 1st paragraph in original. See *State v. Woods*, 307 N.C. 213, 297 S.E.2d 574 (1982).

**Cases under Former §§ 14-5, 14-5.1, and 14-6 Still Applicable.** — The language of this section indicates that the essential elements of the offense have not changed. The legislature merely abolished the difference in guilt and sentencing treatment between the principal to the felony and an accessory in repealing §§ 14-5, 14-5.1 and 14-6 and replacing them with this section. Therefore, cases decided under the repealed statutes delineating the essential elements of accessory before the fact of felony are applicable to cases brought under the new statute. *State v. Woods*, 307 N.C. 213, 297 S.E.2d 574 (1982).

**Elements of crime of being accessory after the fact are separate and distinct from those involved in crimes of being principal or accessory before the fact.** *State v. Cabey*,

— N.C. —, 299 S.E.2d 194 (1983).

## IV. PRESENCE AT SCENE.

**Constructive Presence.** —

The actual distance of a person from the place where a crime is perpetrated is not always material in determining whether the person is constructively present. A guard who has been posted to give warning or the driver of a "get-away" car may be constructively present at the scene of a crime although stationed a convenient distance away. *State v. Pryor*, 59 N.C. App. 1, 295 S.E.2d 610 (1982).

**Remaining in Vicinity of Offense.** — A person may be guilty as an aider and abettor if that person accompanies the actual perpetrator to the vicinity of the offense and, with the knowledge of the actual perpetrator, remains in that vicinity for the purpose of aiding and abetting in the offense and sufficiently close to the scene of the offense to render aid in its commission, if needed, or to provide a means by which the actual perpetrator may get away from the scene upon the completion of the offense. *State v. Pryor*, 59 N.C. App. 1, 295 S.E.2d 610 (1982).

## V. PRACTICE AND PROCEDURE.

## A. In General.

**Jurisdiction Where Accessorial Acts Occur Outside State.** — This state may constitutionally assert jurisdiction over a defendant who commits the crime of accessory before the fact to a felony committed within the State when the counselling, procuring or commanding took place without the State. (Decided under former § 14-5). *State v. Darroch*, 305 N.C. 196, 287 S.E.2d 856 (1982).

## B. Indictment.

**Allegation of Underlying Felony.** — In order to state a violation of former § 14-5, the indictment had to allege an underlying felony. *State v. Hanson*, 57 N.C. App. 595, 291 S.E.2d 912, cert. granted, 306 N.C. 561, 294 S.E.2d 374 (1982), cert. withdrawn as improvidently granted, 307 N.C. 466, 298 S.E.2d 385 (1983).

## § 14-7. Accessories after the fact; trial and punishment.

**Legal Periodicals.** — For survey of 1980 criminal law, see 59 N.C.L. Rev. 1123 (1981).



## CASE NOTES

**Elements of Crime. —**

In order to convict a defendant of being an accessory after the fact under this section, the State must prove the following: (1) the felony has been committed by the principal; (2) the alleged accessory gave personal assistance to that principal to aid in his escaping detection, arrest, or punishment; and (3) the alleged accessory knew the principal committed the felony. *State v. Duvall*, 50 N.C. App. 684, 275 S.E.2d 842, rev'd on other grounds, 304 N.C. 557, 284 S.E.2d 495 (1981).

Under this section, the State had to prove three things in its prosecution of defendant as an accessory after the fact: (1) the principal committed a felony; (2) the alleged accomplice personally aided the principal in his attempts to avoid criminal liability by any means calculated to assist him in doing so; and (3) the accomplice gave such help with knowledge that the principal had committed a felony. *State v. Fearing*, 304 N.C. 499, 284 S.E.2d 479 (1981).

In order to prove a person was an accessory after the fact three essential elements must be

shown: (1) a felony was committed; (2) the accused knew that the person he received, relieved or assisted was the person who committed the felony; and (3) the accused rendered assistance to the felon personally. *State v. Earnhart*, 307 N.C. 162, 296 S.E.2d 649 (1982).

The elements of the crime of being an accessory after the fact are separate and distinct from those involved in the crimes of being a principal or an accessory before the fact. *State v. Cabey*, — N.C. —, 299 S.E.2d 194 (1983).

**Accepting part of the proceeds of a crime** does not make one an accessory after the fact; rather, it constitutes the crime of receiving stolen goods. *State v. Lewis*, 58 N.C. App. 348, 293 S.E.2d 638 (1982).

**Evidence that witness was accessory after the fact does not subject her testimony to rules relating to accomplice testimony.** *State v. Cabey*, — N.C. —, 299 S.E.2d 194 (1983).

**Cited in** *State v. Duvall*, 304 N.C. 557, 284 S.E.2d 495 (1981).

## ARTICLE 2A.

*Habitual Felons.*

## § 14-7.1. Persons defined as habitual felons.

## CASE NOTES

**Fair Sentencing Act.** — Although the principal provisions of the Fair Sentencing Act are codified in Chapter 15A, Article 81A of the General Statutes, the act resulted in revisions to other portions of the general statutes. See e.g., Chapter 14, Articles 1, 2, 2A, 33; Chapter 15A, Articles 58, 81A, 82, 83, 85, 85A, 89, 91;

Chapter 148, Article 2, and Chapter 162, Article 4. *State v. Ahearn*, — N.C. —, 300 S.E.2d 689 (1983).

For discussion of the historical background, policies, purposes, and implementation of the new Fair Sentencing Act, see *State v. Ahearn*, — N.C. —, 300 S.E.2d 689 (1983).

## § 14-7.2. Punishment.

## CASE NOTES

**Quoted in** *State v. Keyes*, 56 N.C. App. 75, 286 S.E.2d 861 (1982).



### § 14-7.3. Charge of habitual felon.

#### CASE NOTES

**Quoted in State v. Keyes**, 56 N.C. App. 75, 286 S.E.2d 861 (1982).

### § 14-7.5. Verdict and judgment.

#### CASE NOTES

**Principal Felony Indictment Need Not Mention Recidivist Status.** — The legislature did not intend the first indictment notifying the defendant of the substantive charge against

him to include a mention of the defendant's recidivist status. *State v. Keyes*, 56 N.C. App. 75, 286 S.E.2d 861 (1982).

### § 14-7.6. Sentencing of habitual felons.

**Legal Periodicals.** — For a comment discussing the North Carolina Fair Sentencing Act, see 60 N.C.L. Rev. 631 (1982).

#### CASE NOTES

**Quoted in State v. Keyes**, 56 N.C. App. 75, 286 S.E.2d 861 (1982).

## SUBCHAPTER II. OFFENSES AGAINST THE STATE.

### ARTICLE 4A.

#### *Prohibited Secret Societies and Activities.*

### § 14-12.7. Wearing of masks, hoods, etc., on public ways.

No person or persons at least 16 years of age shall, while wearing any mask, hood or device whereby the person, face or voice is disguised so as to conceal the identity of the wearer, enter, be or appear upon any lane, walkway, alley, street, road, highway or other public way in this State. (1953, c. 1193, s. 6; 1983, c. 175, ss. 1, 10; c. 720, s. 4.)

**Editor's Note.** — Session Laws 1983, c. 175, s. 10, as amended by Session Laws 1983, c. 720, s. 4, makes the amendment effective Oct. 1, 1983.

**Effect of Amendments.** — The 1983 amendment, effective Oct. 1, 1983, substituted "at least 16" for "over 16."



### § 14-12.9. Entry, etc., upon premises of another while wearing mask, hood or other disguise.

No person or persons at least 16 years of age shall, while wearing a mask, hood or device whereby the person, face or voice is disguised so as to conceal the identity of the wearer, demand entrance or admission, enter or come upon or into, or be upon or in the premises, enclosure or house of any other person in any municipality or county of this State. (1953, c. 1193, s. 8; 1983, c. 175, ss. 2, 10; c. 720, s. 4.)

**Editor's Note.** — Session Laws 1983, c. 175, s. 10, as amended by Session Laws 1983, c. 720, s. 4, makes the amendment effective Oct. 1, 1983.

**Effect of Amendments.** — The 1983 amendment, effective Oct. 1, 1983, substituted "at least 16" for "over 16."

### § 14-12.10. Holding meetings or demonstrations while wearing masks, hoods, etc.

No person or persons at least 16 years of age shall while wearing a mask, hood or device whereby the person, face or voice is disguised so as to conceal the identity of the wearer, hold any manner of meeting, or make any demonstration upon the private property of another unless such person or persons shall first obtain from the owner or occupier of the property his or her written permission to do so, which said written permission shall be recorded in the office of the register of deeds of the county in which said property is located before the beginning of such meeting or demonstration. (1953, c. 1193, s. 9; 1983, c. 175, ss. 3, 10; c. 720, s. 4.)

**Editor's Note.** — Session Laws 1983, c. 175, s. 10, as amended by Session Laws 1983, c. 720, s. 4, makes the amendment effective Oct. 1, 1983.

**Effect of Amendments.** — The 1983 amendment, effective Oct. 1, 1983, substituted "at least 16" for "over 16."

## SUBCHAPTER III. OFFENSES AGAINST THE PERSON.

### ARTICLE 6.

#### *Homicide.*

### § 14-17. Murder in the first and second degree defined; punishment.

#### **Legal Periodicals.** —

For comment on capital punishment in North Carolina, see 59 N.C.L. Rev. 911 (1981).

For survey of 1980 criminal law, see 59 N.C.L. Rev. 1123 (1981).

For survey of 1981 criminal law, see 60 N.C.L. Rev. 1289 (1982).

For note discussing the availability of the imperfect right of self-defense in homicide cases in light of State v. Norris, 303 N.C. 526, 279 S.E.2d 570 (1981), see 4 Campbell L. Rev. 427 (1982).



## CASE NOTES

## I. GENERAL CONSIDERATION.

**For history of statute**, see *State v. Davis*, 305 N.C. 400, 290 S.E.2d 574 (1982); *State v. Strickland*, 307 N.C. 274, 298 S.E.2d 645 (1983).

**"Without justification or excuse" as an element of murder in the first or second degree** means the defendant did not believe it was necessary to kill the victim in order to save herself from death or great bodily harm; or, if she did believe this, her belief under the circumstances as they appeared to her at that time was unreasonable. *State v. Norris*, 303 N.C. 526, 279 S.E.2d 570 (1981).

**Applied** in *State v. Irwin*, 304 N.C. 93, 282 S.E.2d 439 (1981); *State v. Stanley*, 56 N.C. App. 109, 286 S.E.2d 865 (1982); *State v. Chamberlain*, 307 N.C. 130, 297 S.E.2d 540 (1982).

**Quoted** in *O'Tuel v. Osborne*, 706 F.2d 498 (4th Cir. 1983).

**Stated** in *State v. Griffin*, — N.C. —, 302 S.E.2d 447 (1983).

**Cited** in *State v. Cason*, 51 N.C. App. 144, 275 S.E.2d 221 (1981); *State v. Powell*, 51 N.C. App. 224, 275 S.E.2d 528 (1981); *State v. Williams*, 304 N.C. 394, 284 S.E.2d 437 (1981); *State v. Richardson*, 59 N.C. App. 558, 297 S.E.2d 921 (1982); *State v. Wood*, — N.C. App. —, 300 S.E.2d 903 (1983).

## III. MURDER IN THE FIRST DEGREE.

## A. Defined.

**Murder in the first degree, etc. —**

In accord with 1st paragraph in original. See *State v. Martin*, 303 N.C. 246, 278 S.E.2d 214, cert. denied, 454 U.S. 933, 102 S. Ct. 431, 70 L. Ed. 2d 240, rehearing denied, 454 U.S. 1117, 102 S. Ct. 693, 70 L. Ed. 2d 655 (1981); *State v. Hutchins*, 303 N.C. 321, 279 S.E.2d 788 (1981); *State v. Norris*, 303 N.C. 526, 279 S.E.2d 570 (1981); *State v. Misenheimer*, 304 N.C. 108, 282 S.E.2d 791 (1981); *State v. Marshall*, 304 N.C. 167, 282 S.E.2d 422 (1981); *State v. Calloway*, 305 N.C. 747, 291 S.E.2d 622 (1982).

**Same — Deliberation Defined. —**

In accord with 3rd paragraph in original. See *State v. Marshall*, 304 N.C. 167, 282 S.E.2d 422 (1981); *State v. Bush*, 307 N.C. 152, 297 S.E.2d 563 (1982); *State v. Tysor*, — N.C. —, 300 S.E.2d 366 (1983).

In accord with 5th paragraph in original. See *State v. Hutchins*, 303 N.C. 321, 279 S.E.2d 788 (1981).

An unlawful killing is committed with deliberation if it is done in a "cool state of blood," without legal provocation, and in furtherance of a fixed design to gratify a feeling of revenge, or

to accomplish some unlawful purpose. *State v. Corn*, 303 N.C. 293, 278 S.E.2d 221 (1981).

Deliberation means that the intent to kill was formed while defendant was in a cool state of blood and not under the influence of a violent passion suddenly aroused by sufficient provocation. *State v. Misenheimer*, 304 N.C. 108, 282 S.E.2d 791 (1981).

Deliberation means an intention to kill executed by the defendant in a cool state of blood in furtherance of a fixed design to gratify a feeling of revenge or, to accomplish some unlawful purpose. *State v. Calloway*, 305 N.C. 747, 291 S.E.2d 622 (1982).

**For discussion of language found in this section which defines murder in the first degree**, see *State v. Strickland*, 307 N.C. 370, 298 S.E.2d 645 (1983).

**"Cool state of blood"** does not mean the absence of passion and emotion, but an unlawful killing is deliberate and premeditated if done pursuant to a fixed design to kill, notwithstanding that defendant was angry or in an emotional state at the time. *State v. Marshall*, 304 N.C. 167, 282 S.E.2d 422 (1981).

"Cool state of blood" does not, in the context of determining the existence of deliberation, mean an absence of passion and emotion; although there may have been time for deliberation, if the purpose to kill was formed and immediately executed in a passion, especially if the passion was aroused by a recent provocation or by mutual combat, the murder is not deliberate and premeditated. *State v. Misenheimer*, 304 N.C. 108, 282 S.E.2d 791 (1981).

The term "cool state of blood" does not mean that the defendant must be calm or tranquil or display the absence of emotion; rather, the defendant's anger or emotion must not have been such as to disturb the defendant's faculties and reason. *State v. Tysor*, — N.C. —, 300 S.E.2d 366 (1983).

## B. Premeditation and Deliberation.

## 1. In General.

**Same — Premeditation Defined. —**

In accord with 1st paragraph in original. See *State v. Corn*, 303 N.C. 293, 278 S.E.2d 221 (1981); *State v. Marshall*, 304 N.C. 167, 282 S.E.2d 422 (1981); *State v. Calloway*, 305 N.C. 747, 291 S.E.2d 622 (1982); *State v. Tysor*, — N.C. —, 300 S.E.2d 366 (1983).

In accord with 2nd paragraph in original. See *State v. Hutchins*, 303 N.C. 321, 279 S.E.2d 788 (1981).

Premeditation means that defendant formed the specific intent to kill the victim for some period of time, however short, before the actual killing. *State v. Misenheimer*, 304 N.C. 108, 282 S.E.2d 791 (1981).



### **Premeditation and Deliberation Are Essential Elements, etc. —**

In accord with 4th paragraph in original. See *State v. Martin*, 303 N.C. 246, 278 S.E.2d 214, cert. denied, 454 U.S. 933, 102 S. Ct. 431, 70 L. Ed. 2d 240, rehearing denied, 454 U.S. 1117, 102 S. Ct. 693, 70 L. Ed. 2d 655 (1981).

Murder in the first degree differs from murder in the second degree in that the former requires premeditation and deliberation. *State v. Marshall*, 304 N.C. 167, 282 S.E.2d 422 (1981).

**When Premeditation Must Be Proved. —** This section's plain language requires proof of premeditation only in a murder committed by some means not specifically stated in the statute. *Barfield v. Harris*, 540 F. Supp. 451 (E.D.N.C. 1982).

#### **Length of Time Immaterial. —**

No fixed length of time is required for the mental processes of premeditation and deliberation constituting first-degree murder. *State v. Hutchins*, 303 N.C. 321, 279 S.E.2d 788 (1981).

**Killing committed during the course of a quarrel or scuffle may constitute first-degree murder** provided defendant formed the intent to kill in a cool state of blood before the quarrel or scuffle began and the killing during the quarrel was the product of this earlier formed intent. *State v. Misenheimer*, 304 N.C. 108, 282 S.E.2d 791 (1981).

**Passion does not always reduce the crime** since a man may deliberate, may premeditate, and may intend to kill after premeditation and deliberation, although prompted and to a large extent controlled by passion at the time; if the design to kill was formed with deliberation and premeditation, it is immaterial that defendant was in a passion or excited when the design was carried into effect. *State v. Misenheimer*, 304 N.C. 108, 282 S.E.2d 791 (1981).

**Intent Formed Simultaneous with Act, etc. —**

Where the killing was the product of a specific intent to kill formed under the influence of the provocation of the quarrel or struggle itself, then there would be no deliberation and hence no murder in the first degree. *State v. Misenheimer*, 304 N.C. 108, 282 S.E.2d 791 (1981).

## **2. Proof.**

### **Proof by Circumstantial Evidence. —**

In accord with 3rd paragraph in original. See *State v. Hutchins*, 303 N.C. 321, 279 S.E.2d 788 (1981).

Premeditation and deliberation must ordinarily be proved by circumstantial evidence. *State v. Calloway*, 305 N.C. 747, 291 S.E.2d 622 (1982).

Since premeditation and deliberation are processes of the mind, they are not susceptible to direct proof and must almost always be proved by circumstantial evidence. *State v. Corn*, 303 N.C. 293, 278 S.E.2d 221 (1981).

Generally, premeditation and deliberation must be proved by circumstantial evidence because they are not susceptible of proof by direct evidence. *State v. Misenheimer*, 304 N.C. 108, 282 S.E.2d 791 (1981).

Deliberation is seldom capable of actual proof, but must be determined by the jury from the circumstances. *State v. Marshall*, 304 N.C. 167, 282 S.E.2d 422 (1981).

### **Circumstances Which May Be Considered. —**

Among the circumstances which may be considered as tending to prove premeditation and deliberation are: lack of provocation by the deceased; defendant's acts and comments before and after the killing; the use of grossly excessive force or the infliction of lethal blows after the deceased has been felled; and any history of altercations or ill will between the parties. *State v. Corn*, 303 N.C. 293, 278 S.E.2d 221 (1981).

Among the circumstances to be considered in determining premeditation and deliberation are: (1) want of provocation on the part of the deceased, (2) conduct and statements of the defendant before and after the killing, (3) threats made against the victim by defendant, (4) ill will or previous difficulty between the parties, and (5) evidence that the killing was done in a brutal manner. *State v. Calloway*, 305 N.C. 747, 291 S.E.2d 622 (1982).

The nature and number of the victims' wounds, as defendant notes, is one circumstance from which an inference of premeditation and deliberation can be drawn. *State v. Brown*, 306 N.C. 151, 293 S.E.2d 569, cert. denied, — U.S. —, 103 S. Ct. 503, 74 L. Ed. 2d 642 (1982).

**Proof of First Degree Murder by Means Other Than Specified in Section. —** To convict a defendant of murder in the first degree, when the killing was not perpetrated by one of the means specified by this section, the State must prove beyond a reasonable doubt that the killing was with premeditation and deliberation. *Barfield v. Harris*, 540 F. Supp. 451 (E.D.N.C. 1982).

## **C. Murder by Poison.**

**Evidence of Other Poisonings. —** In capital poisoning case, there was no error in admission of evidence tending to show that defendant was responsible for the poisoning deaths of four other individuals, not including the murder for which she was convicted, based upon long-established state law permitting use of "other crime" evidence when probative of a defendant's knowledge of a relevant set of cir-



cumstances, specific intent to commit the crime, motive for the crime, or plan or design to commit the crime. *Barfield v. Harris*, 540 F. Supp. 451 (E.D.N.C. 1982).

### **E. Murder Committed in Perpetration of a Felony.**

**And Premeditation and Deliberation, etc. —**

In accord with 7th paragraph in original. See *State v. Wall*, 304 N.C. 609, 286 S.E.2d 68 (1982).

In accord with 9th paragraph in original. See *State v. Wall*, 304 N.C. 609, 286 S.E.2d 68 (1982).

A homicide which is committed in the perpetration or attempted perpetration of a felony is murder in the first degree, irrespective of premeditation and deliberation. In such cases, the law presumes premeditation and deliberation and the State is not put to further proof of either. *State v. Hutchins*, 303 N.C. 321, 279 S.E.2d 788 (1981).

When the law and evidence justify the use of the felony murder rule under this section, the State is not required to prove premeditation and deliberation, nor need the lesser offenses of second-degree murder or manslaughter be submitted to the jury unless there is evidence to support such a finding. *State v. Irwin*, 304 N.C. 93, 282 S.E.2d 439 (1981).

#### **Same — Robbery. —**

In accord with 4th paragraph in original. See *State v. Wall*, 304 N.C. 609, 286 S.E.2d 68 (1982).

An essential element of armed robbery, indeed the heart of the offense, is that a firearm or other dangerous weapon be used whereby the life of a person is endangered or threatened. This act is by its nature inherently dangerous to human life; and if this danger against which the statute is aimed occurs and the robber kills, the act is ordinarily murder under the felony-murder rule. *State v. Barnett*, — N.C. —, 300 S.E.2d 340 (1983).

**Circumstance of pecuniary gain is not an essential element of felony murder;** this circumstance examines the motive of the defendant rather than his acts, and while motive does not constitute an element of the offense, it is appropriate to be considered on the question of sentence. *State v. Irwin*, 304 N.C. 93, 282 S.E.2d 439 (1981).

#### **Unbroken Chain of Events Required. —**

In accord with 1st paragraph in original. See *State v. Hutchins*, 303 N.C. 321, 279 S.E.2d 788 (1981).

A killing is committed in the perpetration or attempted perpetration of a felony when there is no break in the chain of events leading from the initial felony to the act causing death, and the underlying felony is not deemed terminated prior to the killing merely because the partici-

pants have proceeded far enough to be convicted of the underlying felony. *State v. Rinck*, 303 N.C. 551, 280 S.E.2d 912 (1981).

#### **What Unspecified Felonies, etc. —**

In accord with 2nd paragraph in original. See *State v. Hutchins*, 303 N.C. 321, 279 S.E.2d 788 (1981).

#### **Same — Discharging Firearm into Occupied Property. —**

In accord with 3rd paragraph in original. See *State v. Wall*, 304 N.C. 609, 286 S.E.2d 68 (1982).

#### **And No Additional Punishment, etc. —**

When a defendant is convicted of first-degree murder pursuant to the felony murder rule, and a verdict of guilty is also returned on the underlying felony, this latter conviction provides no basis for an additional sentence, hence it merges into the murder conviction, and any judgment imposed on the underlying felony must be arrested. *State v. Silhan*, 302 N.C. 223, 275 S.E.2d 450 (1981).

In a prosecution where defendants were charged with first-degree murder under the felony murder doctrine, the underlying felony became part of the first-degree murder charge, and further prosecution for the underlying felony was prohibited; therefore, the trial court was not required to instruct the jury as to the lesser included offenses of the underlying felony. *State v. Rinck*, 303 N.C. 551, 280 S.E.2d 912 (1981).

#### **Punishment Where Other Felony Not Element. —**

When a defendant has been convicted of first-degree murder on a theory of premeditation and deliberation and in the process commits some other felony, the other felony is not an element of the murder conviction although the other felony may be part of the same continuous transaction, and therefore, a defendant may in such cases be sentenced upon both the murder conviction and the other felony conviction. *State v. Silhan*, 302 N.C. 223, 275 S.E.2d 450 (1981).

**When a jury is properly instructed upon both theories of premeditation and deliberation and felony murder,** and returns a first-degree murder verdict without specifying whether it relied on either or both theories, the case is treated as if the jury relied upon the felony murder theory for purposes of applying the merger rule, and judgment imposed on a conviction for the underlying felony must be arrested. *State v. Silhan*, 302 N.C. 223, 275 S.E.2d 450 (1981).

### **F. Death Penalty.**

**Legislature May Constitutionally Impose Death as Punishment. —** Just as the Legislature acts within its constitutional power in defining first-degree murder to include felony murder, it is also within its constitutional power to determine that first-degree murder,



including felony murder, may be punished by death, providing that the death penalty statute itself is constitutional. *State v. Williams*, 305 N.C. 656, 292 S.E.2d 243 (1982), rehearing denied, — U.S. —, 103 S. Ct. 839, 74 L. Ed. 2d 1031, cert. denied, — U.S. —, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1983).

**Notice of Penalty Not Constitutionally Required.** — The United States Constitution does not require that notice be given that the first-degree murder charge carried with it the possibility that defendant might receive the death penalty upon conviction. *State v. Woods*, 307 N.C. 213, 297 S.E.2d 574 (1982).

#### IV. MURDER IN THE SECOND DEGREE.

##### A. In General.

**Meaning of Final Sentence.** — The final sentence of this section merely indicates that all crimes which were murder at common law remain murder in the second degree, unless otherwise made murder in the first degree under one of the specific classifications of the statutes. *State v. Davis*, 305 N.C. 400, 290 S.E.2d 574 (1982).

The second and final sentence of this section requires only that all intentional and unlawful killings with malice aforethought be classified as murder in the second degree, unless they have for one or more reasons been declared murder in the first degree by the express terms of the statute. *State v. Davis*, 305 N.C. 400, 290 S.E.2d 574 (1982).

**What Constitutes Second-Degree Murder.** —

In accord with 1st paragraph in original. See *State v. Hutchins*, 303 N.C. 321, 279 S.E.2d 788 (1981); *State v. Simpson*, 303 N.C. 439, 279 S.E.2d 542 (1981); *State v. Norris*, 303 N.C. 526, 279 S.E.2d 570 (1981); *State v. Marshall*, 304 N.C. 167, 282 S.E.2d 422 (1981); *State v. Cooke*, 306 N.C. 117, 291 S.E.2d 649 (1982).

**Elements of the Offense — Proximate Cause.** —

In accord with 1st paragraph of 1981 Cumulative Supplement. See *State v. Brock*, 305 N.C. 532, 290 S.E.2d 566 (1982).

**A person is criminally responsible for a homicide only if his act caused or directly contributed to the death of the victim.** *State v. Brock*, 305 N.C. 532, 290 S.E.2d 566 (1982).

**Burden of Proof.** — In offering evidence of "all other kinds of murder" as that phrase is employed in the second sentence of this section, the State must bear the burden of proving that the killing was intentional, unlawful and done with malice aforethought, even though it may have been proximately caused by the unlawful distribution of controlled substances or proximately caused by the commission or the attempted commission of any felony not speci-

fied in the first sentence of this section and without the use of a deadly weapon. *State v. Davis*, 305 N.C. 400, 290 S.E.2d 574 (1982).

If the State is to carry its burden of proof on a charge of murder in cases in which a killing occurs during the commission of a felony committed or attempted without the use of a deadly weapon and not one of the felonies specified in this section, it must show that the killing was murder as at common law by proof beyond a reasonable doubt that it was an intentional and unlawful killing with malice aforethought. In such cases the State will have borne the burden of proof necessary to sustain a conviction of murder in the second degree. If the State additionally can prove beyond a reasonable doubt that the murder was premeditated and deliberate, it will have borne its burden of proving the offense was murder in the first degree. *State v. Davis*, 305 N.C. 400, 290 S.E.2d 574 (1982).

**Sentencing.** — Murder in the second degree is a Class C felony and therefore the judge sentencing a defendant guilty of this crime must impose a 15-year term of imprisonment unless aggravating or mitigating factors merit imposition of a longer or shorter term. *State v. Melton*, 307 N.C. 370, 298 S.E.2d 673 (1983).

##### B. Malice in General.

**Express Malice Not Required.** —

The State is not required to prove malice and unlawfulness unless there is some evidence of their nonexistence. *State v. Pinch*, 306 N.C. 1, 292 S.E.2d 203 (1982), rehearing denied, — U.S. —, 103 S. Ct. 839, 74 L. Ed. 2d 1031, cert. denied, — U.S. —, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1983).

**Heat of Passion.** — When there is some evidence of heat of passion on sudden provocation (which negates malice) then in order to prove the existence of malice the State must prove the absence of heat of passion beyond a reasonable doubt. *State v. Bush*, 307 N.C. 152, 297 S.E.2d 563 (1982).

##### C. Intentional Killing with a Deadly Weapon.

**Intentional Killing with Deadly Weapon Creates Presumptions, etc.** —

Upon showing that there has been an intentional killing with a deadly weapon, the law permits the jury to infer that the homicide was committed with malice. *State v. Hutchins*, 303 N.C. 321, 279 S.E.2d 788 (1981).

An instruction to the jury that the law implies malice and unlawfulness from the intentional use of a deadly weapon proximately resulting in death is not a conclusive, irrebuttable presumption. The presumption is mandatory in that defendant, to avoid its effect, must produce some evidence raising an issue on the existence of malice and unlawfulness or



rely on such evidence as the State may have adduced. In the presence of evidence raising such issues, the presumption disappears altogether, leaving only a permissible inference which the jury may accept or reject. *State v. Reynolds*, 307 N.C. 184, 297 S.E.2d 532 (1982).

## V. DEFENSES AND DENIALS.

### B. Accident.

**Instruction Held Not Necessary.** — In a prosecution for second-degree murder, where the victim died of drowning, it was not error for the court not to charge the jury on the defense of accident. If the victim died as the result of an accidental drowning, it was an accident with which the defendant had nothing to do. If the jury had accepted the defendant's version of the event, the jury should have found the defendant not guilty under the charge given to them by the court. It was not necessary for the court to charge on accident. *State v. Willoughby*, 58 N.C. App. 746, 294 S.E.2d 407, cert. denied, 307 N.C. 129, 297 S.E.2d 403 (1982).

### F. Self-Defense.

**Elements of Perfect Self-Defense.** — The law of perfect self-defense excuses a killing altogether if, at the time of the killing, these four elements existed: (1) It appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; (2) Defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; (3) Defendant was not the aggressor in bringing on the affray, i.e., he did not aggressively and willingly enter into the fight without legal excuse or provocation; and (4) Defendant did not use excessive force, i.e., did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm. *State v. Norris*, 303 N.C. 526, 279 S.E.2d 570 (1981); *State v. Cooke*, 306 N.C. 117, 291 S.E.2d 649 (1982); *State v. Bush*, 307 N.C. 152, 297 S.E.2d 563 (1982); *State v. Vaughan*, 59 N.C. App. 318, 296 S.E.2d 516 (1982), cert. denied, — N.C. —, 299 S.E.2d 650 (1983).

#### Or He Will Not Be Excused, etc. —

In accord with 2nd paragraph in original. See *State v. Norris*, 303 N.C. 526, 279 S.E.2d 570 (1981); *State v. Cooke*, 306 N.C. 117, 291 S.E.2d 649 (1982).

If defendant believed it was necessary to kill the deceased in order to save herself from death or great bodily harm, and if defendant's belief was reasonable in that the circumstances as they appeared to her at the time were sufficient to create such a belief in the mind of a person of ordinary firmness, but defendant, although

without murderous intent, was the aggressor in bringing on the difficulty, or defendant used excessive force, the defendant under those circumstances has only the imperfect right of self-defense, and is guilty at least of voluntary manslaughter. *State v. Norris*, 303 N.C. 526, 279 S.E.2d 570 (1981); *State v. Vaughan*, 59 N.C. App. 318, 296 S.E.2d 516 (1982), cert. denied, — N.C. —, 299 S.E.2d 650 (1983).

**Perfect Self-Defense Requires Verdict of Not Guilty to Lesser Included Offenses.** — The existence of the elements of perfect right of self-defense requires a verdict of not guilty, not only as to the charge of murder in the first degree but as to all lesser included offenses as well. *State v. Vaughan*, 59 N.C. App. 318, 296 S.E.2d 516 (1982), cert. denied, — N.C. —, 299 S.E.2d 650 (1983).

**Proof that Victim Was Aggressor.** — If defendant seeks to offer evidence for the purpose of showing the victim was the aggressor, it must be done through testimony concerning the victim's general reputation for violence, but this rule does not render admissible evidence of specific acts of violence which have no connection with the homicide. *State v. Corn*, 307 N.C. 79, 296 S.E.2d 261 (1982).

When self-defense is raised as a defense, the defendant may produce evidence of the victim's character tending to show, (1) that the victim was the aggressor or (2) that defendant had a reasonable apprehension of death or bodily harm, or both. *State v. Corn*, 307 N.C. 79, 296 S.E.2d 261 (1982).

**When Entitled to Instruction on Self-Defense.** — A defendant is entitled to an instruction on self-defense if there is any evidence in the record from which it can be determined that it was necessary or reasonably appeared to be necessary for him to kill his adversary in order to protect himself from death or great bodily harm. If, however, there is no evidence from which the jury reasonably could find that the defendant in fact believed that it was necessary to kill his adversary to protect himself from death or great bodily harm, the defendant is not entitled to have the jury instructed on self-defense. It is for the court to determine in the first instance as a matter of law whether there is any evidence that the defendant reasonably believed it to be necessary to kill his adversary in order to protect himself from death or great bodily harm. *State v. Bush*, 307 N.C. 152, 297 S.E.2d 563 (1982).

## VI. PRACTICE AND PROCEDURE.

### B. Indictment.

#### Form — Felony Murder. —

When the State prosecutes a defendant for first-degree murder under the felony-murder rule, the solicitor need not secure a separate



indictment for the underlying felony. *State v. Williams*, 305 N.C. 656, 292 S.E.2d 243 (1982), rehearing denied, — U.S. —, 103 S. Ct. 839, 74 L. Ed. 2d 1031, cert. denied, — U.S. —, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1983).

### E. Admissibility of Evidence.

#### 1. Testimony.

**Use of Admission of Second-Degree Murder to Prove First-Degree Murder.** — Where defendant made affirmative admissions of the existence of malice and unlawfulness by admitting commission of two second-degree murders, there could not possibly be any constitutional transgressions or prejudice in the remarks of either the prosecutor or the trial court concerning the presumption of the existence of those very same elements in the charges of first-degree murder. *State v. Pinch*, 306 N.C. 1, 292 S.E.2d 203 (1982), rehearing denied, — U.S. —, 103 S. Ct. 839, 74 L. Ed. 2d 1031, cert. denied, — U.S. —, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1983).

### G. Instructions to Jury.

#### 1. Instructions Concerning Degree of Offense Charged.

##### Where Jury May Be Instructed, etc. —

In a prosecution where defendants were charged with first-degree murder and the evidence tended to show that defendants killed decedent in the perpetration of the underlying felony of burglary, but there was no evidence that decedent was killed other than in the course of the commission of burglary, the trial court was not required to submit lesser included offenses of second-degree murder and voluntary manslaughter to the jury. *State v. Rinck*, 303 N.C. 551, 280 S.E.2d 912 (1981).

#### 2. Other Instructions.

##### Aggravating Factor of Pecuniary Gain.

— Submission to the jury of the aggravating factor of pecuniary gain does not relitigate the question of intentional killing or any element of the offense of first-degree murder under the felony-murder rule. *State v. Irwin*, 304 N.C. 93, 282 S.E.2d 439 (1981).

**Self-Defense — Use of Force in Resisting Unlawful Arrest.** — In a prosecution for the murder of a military policeman while defendant was in a holding cell after he had been unlawfully arrested, trial court did not err in failing to charge that defendant was entitled to use deadly force if such was required to prevent the arrest or to free himself from unlawful confinement, since the victim of an unlawful arrest is not ipso facto entitled to kill or to use deadly force against the person attempting arrest. *State v. Sanders*, 303 N.C. 608, 281 S.E.2d 7, cert. denied, 454 U.S. 973, 102 S. Ct. 523, 70 L. Ed. 2d 392 (1981).

### Same — Provocation of Fight or Assault.

— In a prosecution for the murder of a military policeman while defendant was in a holding cell after having been illegally arrested, trial court's instruction, dealing with the right to kill in self-defense, that "one enters a fight voluntarily if he uses toward his opponent such abusive language which considering all of the circumstances is calculated and intended to bring on a fight, and if a person precipitates an altercation or a fight with the intent to provoke a deadly assault by the victim in order that he might kill him the subsequent killing of the victim in response to the attack is murder" was a correct statement of the law and was supported by the evidence. *State v. Sanders*, 303 N.C. 608, 281 S.E.2d 7, cert. denied, 454 U.S. 973, 102 S. Ct. 523, 70 L. Ed. 2d 392 (1981).

### H. Verdict.

#### Effect of Perfect Right of Self-Defense. —

The existence of a perfect right of self-defense requires a verdict of not guilty, not only as to the charge of murder in the first degree but as to all lesser included offenses as well. *State v. Norris*, 303 N.C. 526, 279 S.E.2d 570 (1981).

#### Effect of Imperfect Right of Self-Defense.

— Where the issue in a homicide case narrows to the exercise of either the perfect or imperfect right of self-defense, as the jury may find, the question for the jury is not limited to whether defendant is guilty of first-degree murder or not guilty by reason of self-defense. When the defendant has exercised the imperfect right of self-defense, the homicide is reduced from murder to manslaughter. *State v. Norris*, 303 N.C. 526, 279 S.E.2d 570 (1981).

**Manslaughter Held Necessarily Disproved.** — In proving the elements of first-degree murder beyond any reasonable doubt in the jurors' minds, the State necessarily disproved manslaughter beyond a reasonable doubt. *State v. Bush*, 307 N.C. 152, 297 S.E.2d 563 (1982).

**Heat of Passion Held Necessarily Disproved.** — When the jury finds beyond a reasonable doubt that the defendant killed his victim with premeditation, they also necessarily find beyond a reasonable doubt that the State has shown that the defendant did not act in the heat of passion. *State v. Bush*, 307 N.C. 152, 297 S.E.2d 563 (1982).

Where the defendant is convicted of premeditated and deliberate murder in the first degree, the State has not relied upon a mere presumption of malice. In finding the defendant guilty beyond a reasonable doubt of the willful, deliberate and premeditated killing of the victim, the jury necessarily rejected beyond a reasonable doubt the possibility that the defendant acted in the heat of passion. *State v. Bush*, 307 N.C. 152, 297 S.E.2d 563 (1982).



**I. Appeal.**

**Review of State's Argument in Capital Case.** — Despite trial counsel's laxity, the State's argument in capital cases is subject to limited appellate review for the existence of gross improprieties which make it plain that the trial court abused its discretion in failing to correct the prejudicial matters *ex mero motu*. *State v. Pinch*, 306 N.C. 1, 292 S.E.2d 203 (1982), rehearing denied, — U.S. —, 103 S. Ct. 839, 74 L. Ed. 1031, cert. denied, — U.S. —, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1983).

**J. Miscellaneous.**

**Sentencing Factors.** — As premeditation and deliberation are not elements of murder in the second degree, if a defendant charged with murder in the first degree pleads guilty to murder in the second degree, the sentencing judge may conclude that for purposes of sentencing premeditation and deliberation have been established by a preponderance of the evidence and therefore may be used as an aggravating factor. *State v. Melton*, 300 N.C. 370, 298 S.E.2d 673 (1983).

**§ 14-17.1. Crime of suicide abolished.****CASE NOTES**

**Stated** in *State v. Hunt*, 305 N.C. 238, 287 S.E.2d 818 (1982).

**§ 14-18. Punishment for manslaughter.****Legal Periodicals.** —

For note discussing the availability of the imperfect right of self-defense in homicide cases

in light of *State v. Norris*, 303 N.C. 526, 279 S.E.2d 570 (1981), see 4 *Campbell L. Rev.* 427 (1982).

**CASE NOTES****II. MANSLAUGHTER.****A. In General.****Definitions.** —

In accord with 1st paragraph in original. See *State v. Marshall*, 304 N.C. 167, 282 S.E.2d 422 (1981); *State v. Best*, 59 N.C. App. 96, 295 S.E.2d 774 (1982).

**B. Voluntary.****Definitions.** —

In accord with 1st paragraph in original. See *State v. Norris*, 303 N.C. 526, 279 S.E.2d 570 (1981).

Voluntary manslaughter is the unlawful killing of a human being without malice, express or implied, and without premeditation and deliberation. *State v. Rinck*, 303 N.C. 551, 280 S.E.2d 912 (1981).

**C. Involuntary.****Definitions.** —

In accord with 4th paragraph in original. See *State v. Norris*, 303 N.C. 526, 279 S.E.2d 570 (1981); *State v. Best*, 59 N.C. App. 96, 295 S.E.2d 774 (1982).

In accord with 5th paragraph in original. See *State v. McAdams*, 51 N.C. App. 140, 275 S.E.2d 500 (1981).

In accord with 7th paragraph in original. See *State v. Martin*, 52 N.C. App. 373, 278 S.E.2d 305, cert. denied, 303 N.C. 549, 281 S.E.2d 399 (1981); *State v. Flaherty*, 55 N.C. App. 14, 284 S.E.2d 565 (1981).

Involuntary manslaughter is the unintentional killing of a human being without malice by (1) some unlawful act not amounting to a felony or naturally dangerous to human life, or (2) an act or omission constituting culpable negligence. *State v. Norris*, 303 N.C. 526, 279 S.E.2d 570 (1981); *State v. Atkins*, 58 N.C. App. 146, 292 S.E.2d 744, cert. denied & appeal dismissed, 306 N.C. 744, 295 S.E.2d 480 (1982).

Involuntary manslaughter is an unintentional killing proximately resulting from culpable negligence or the commission of an unlawful act not amounting to a felony. *State v. Matthis*, 59 N.C. App. 233, 296 S.E.2d 20 (1982).

Although involuntary manslaughter does not concern intent to kill, it does connote an intentional act, like the defendant voluntarily drawing his gun. *State v. Boyd*, — N.C. App. —, 300 S.E.2d 578 (1983).

**IV. RECKLESS USE OF FIREARMS.****Deaths Caused, etc.** —

In accord with 2nd paragraph in original. See



State v. Boyd, — N.C. App. —, 300 S.E.2d 578 (1983).

With few exceptions, every unintentional killing of a human being proximately caused by a wanton or reckless use of firearms, in the absence of intent to discharge the weapon and under circumstances not evidencing a heart devoid of a sense of social duty, is involuntary manslaughter. State v. Best, 59 N.C. App. 96, 295 S.E.2d 774 (1982).

### V. CULPABLE NEGLIGENCE.

#### Culpable Negligence Defined. —

In accord with 3rd paragraph in original. See State v. Flaherty, 55 N.C. App. 14, 284 S.E.2d 565 (1981).

Culpable negligence may arise from the intentional, willful or wanton violation of a statute or ordinance, designed for the protection of human life or limb, which proximately results in death. State v. Atkins, 58 N.C. App. 146, 292 S.E.2d 744, cert. denied & appeal dismissed, 306 N.C. 744, 295 S.E.2d 480 (1982).

### VI. SELF-DEFENSE.

**Defense Unavailable for Involuntary Manslaughter.** — In a prosecution for second-degree murder in which all the evidence

showed that the defendant intentionally shot deceased and thereby caused his death, and the defendant relied on the defense of self-defense which is unavailable for a charge of involuntary manslaughter, the trial court committed prejudicial error in submitting involuntary manslaughter to the jury, and where the jury found the defendant guilty of involuntary manslaughter and acquitted the defendant of all other degrees of homicide, the defendant was entitled to be discharged. State v. Cason, 51 N.C. App. 144, 275 S.E.2d 221 (1981).

**Evidence of Previous Assaults Properly Excluded.** — Exclusion of evidence of previous assaults by the deceased on the defendant was proper, where there was no evidence that the defendant acted in self-defense. State v. Matthis, 59 N.C. App. 233, 296 S.E.2d 20 (1982).

### VII. INSTRUCTIONS TO JURY.

**Charge as to Lesser Degrees of Same Crime.** —

Because involuntary manslaughter is a lesser included offense of the indicted crime of murder, an instruction on its elements is proper only if there is evidence to support it. State v. Boyd, — N.C. App. —, 300 S.E.2d 578 (1983).

## ARTICLE 7A.

### *Rape and Other Sex Offenses.*

## § 14-27.1. Definitions.

**Legal Periodicals.** — For article on a model act to prevent the sexual exploitation of children, see 17 Wake Forest L. Rev. 535 (1981).

### CASE NOTES

**"Any Object" Includes Parts of Human Body.** — In defining a "sexual act" in subdivision (4) as "the penetration, however slight, by any object into the genital or anal opening of another person's body," the legislature intended the words "any object" to embrace parts of the human body as well as inanimate or foreign objects; therefore, the State's evidence was sufficient for the jury in a prosecution for second-degree sexual offense where it tended to show that the defendant penetrated the genital opening of the prosecutrix's body with his fingers. State v. Lucas, 302 N.C. 342, 275 S.E.2d 433 (1981).

**Penetration is not a necessary element of cunnilingus** as the term is used in subdivision (4) of this section; rather, cunnilingus means

stimulation by the tongue or lips of any part of a female's genitalia, and the required stimulation is accomplished when there has been the slightest touching by the lips or tongue of another to any part of the female's genitalia. State v. Ludlum, 303 N.C. 666, 281 S.E.2d 159 (1981).

Degradation to the person of a woman forced to submit to or a small girl incapable of consent is complete in the case of cunnilingus once the perpetrator's lips or tongue have touched any part of her genitalia, whether or not any actual "penetration" of the genitalia takes place. State v. Ludlum, 303 N.C. 666, 281 S.E.2d 159 (1981).

**Applied** in State v. Williams, 303 N.C. 507, 279 S.E.2d 592 (1981).

**Quoted** in State v. Locklear, 304 N.C. 534, 284 S.E.2d 500 (1981).



Cited in *State v. Edwards*, 305 N.C. 378, 289 S.E.2d 360 (1982).

## § 14-27.2. First-degree rape.

(a) A person is guilty of rape in the first degree if the person engages in vaginal intercourse:

- (1) With a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim; or
- (2) With another person by force and against the will of the other person, and:
  - a. Employs or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon; or
  - b. Inflicts serious personal injury upon the victim or another person; or
  - c. The person commits the offense aided and abetted by one or more other persons.

(1979, c. 682, s. 1; 1979, 2nd Sess., c. 1316, s. 4; 1981, c. 106, ss. 1, 2; 1983, c. 175, ss. 4, 10; c. 720, s. 4.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

### Editor's Note. —

Session Laws 1983, c. 175, s. 10, as amended by Session Laws 1983, c. 720, s. 4, makes the amendment effective Oct. 1, 1983.

### Effect of Amendments. —

The 1983 amendment, effective Oct. 1, 1983, substituted "a child under the age of 13 years" for "a child of the age of 12 years or less," "at least 12 years old" for "of the age of 12 years or more," and "at least four years older" for "four

or more years older" in subdivision (a)(1).

### Legal Periodicals. —

For an article on plea bargaining statutes and practices in North Carolina, see 59 N.C.L. Rev. 477 (1981).

For article on a model act to prevent the sexual exploitation of children, see 17 Wake Forest L. Rev. 535 (1981).

For note discussing the constitutionality of North Carolina's Rape-Shield Law, see 17 Wake Forest L. Rev. 781 (1981).

For survey of 1981 criminal law, see 60 N.C.L. Rev. 1289 (1982).

## CASE NOTES

### I. GENERAL CONSIDERATION.

**In enacting subsection (a), the General Assembly has provided for a "shortened form" of the rape indictment** which explicitly eliminates the requirement that the indictment contain allegations of every element of the offense. *State v. Corbett*, 307 N.C. 169, 297 S.E.2d 553 (1982).

**Statutory Rape Does Not Include Assault on Child under 12.** — Vaginal intercourse with a child under 12 is not itself an assault, since the crime of assault has essential elements which are not also essential elements of statutory rape. For example, assault generally requires proof of state of mind of either the defendant or the victim — the defendant's intent to do immediate bodily harm or the victim's reasonable apprehension of such harm. The statutory rape law, subdivision (a)(1) of this section, does not contain a state of mind element, however. Assault on a child

under 12, § 14-33(b)(3), is not, therefore, a lesser included offense of first-degree rape of a child under 12, under subdivision (a)(1) of this section. *State v. Weaver*, 306 N.C. 629, 295 S.E.2d 375 (1982).

The offense of assaulting a child under the age of 12, § 14-33(b)(3), is not, as a matter of law, a lesser included offense of first degree rape of a child of the age of 12 or less, under subdivision (a)(1) of this section. *State v. Weaver*, 306 N.C. 629, 295 S.E.2d 375 (1982).

### Nor Assault on Female by Male over 18.

— The offense of assault on a female by a male over the age of 18, § 14-33(b)(2), is not, as a matter of law, a lesser included offense of first-degree rape of a child of the age of 12 or less, under subdivision (a)(1) of this section. *State v. Weaver*, 306 N.C. 629, 295 S.E.2d 375 (1982).

**Nor Taking Indecent Liberties with Child under Age 16.** — The offense of taking inde-



cent liberties with a child under the age of 16, § 14-202.1, is not, as a matter of law, a lesser included offense of first-degree rape of a child of the age of 12 or less, under subdivision (a)(1) of this section. *State v. Weaver*, 306 N.C. 629, 295 S.E.2d 375 (1982), overruling *State v. Shaw*, 293 N.C. 616, 239 S.E.2d 439 (1977).

The offense of taking indecent liberties with a child under § 14-202.1 is not a lesser included offense of statutory rape under subdivision (a)(1) of this section because the age elements are different and, while sexual purpose may be inherent in an act of forcible vaginal intercourse, it is not required to be proved in order to convict a defendant of rape. *State v. Weaver*, 306 N.C. 629, 295 S.E.2d 375 (1982), overruling *State v. Shaw*, 293 N.C. 616, 239 S.E.2d 439 (1977).

**Intoxication is not a defense to the crime of rape.** *State v. Boone*, 307 N.C. 198, 297 S.E.2d 585 (1982).

**For discussion of sufficiency of evidence to justify an inference of intent to rape**, see *State v. Rushing*, — N.C. App. —, 300 S.E.2d 445 (1983).

**Sentencing factors.** — Where a defendant has been charged with rape in the first degree under subdivision (a)(2)a of this section but has pled guilty to rape in the second degree under subdivision (a)(2) of § 14-27.3, if the sentencing judge concludes by a preponderance of the evidence that the defendant had used a gun during the rape, this would be a factor that must be considered in deciding whether to sentence the defendant beyond the presumptive term for the admitted offense. *State v. Melton*, 307 N.C. 370, 298 S.E.2d 673 (1983).

**Applied** in *State v. McDougall*, — N.C. — 301 S.E.2d 308 (1983).

**Quoted** in *State v. Rick*, 54 N.C. App. 104, 282 S.E.2d 497 (1981).

**Cited** in *State v. Lucas*, 302 N.C. 342, 275 S.E.2d 433 (1981); *State v. Jones*, 304 N.C. 323, 283 S.E.2d 483 (1981); *State v. Glenn*, 51 N.C. App. 694, 277 S.E.2d 477 (1981); *State v. Brown*, 56 N.C. App. 228, 287 S.E.2d 421 (1982); *State v. Jordan*, 305 N.C. 274, 287 S.E.2d 827 (1982).

## II. WHO MAY BE GUILTY OF RAPE.

**Aider and Abettor of Rape Defined.** — An aider or abettor of first-degree rape is a person who is actually or constructively present at the scene of the crime and who aids, advises, counsels, instigates or encourages another to commit the offense. Even though not actually present during the commission of the crime, a person may be an aider or abettor if he shares the criminal intent of the perpetrator and if, during the commission of the crime, he is in a position to render any necessary aid to the perpetrator. *State v. Barnette*, 304 N.C. 447, 284 S.E.2d 298 (1981).

## III. ELEMENTS OF THE OFFENSE.

**First and Second Degree Rape Distinguished.** — The sole distinction between the crimes of first and second-degree rape is the element of the use of a deadly weapon or aiding and abetting. If serious bodily injury is inflicted, the crime is also first-degree rape. *State v. Barnette*, 304 N.C. 447, 284 S.E.2d 298 (1981).

**Child in Thirteenth Year.** — By changing the language of the statute from "under the age of 12 years" to "12 years or less" the legislature intended to include within the purview of this section a child who is in her thirteenth year at the time of the rape. *State v. Ashley*, 54 N.C. App. 386, 283 S.E.2d 805 (1981), cert. denied, 305 N.C. 153, 289 S.E.2d 381 (1982).

**"By Force".** —

The phrase "by force and against her will," (now "by force and against the will of the other person") used in this section and §§ 14-27.3, 14-27.4 and 14-27.5, means the same as it did at common law when it was used to describe some of the elements of rape. *State v. Locklear*, 304 N.C. 534, 284 S.E.2d 500 (1981); *State v. Booher*, 305 N.C. 554, 290 S.E.2d 561 (1982).

**The words "against the will" connote the victim's lack of consent.** *State v. Booher*, 305 N.C. 554, 290 S.E.2d 561 (1982).

**Intent to commit the crime of rape is inferred from the commission of the act.** *State v. Boone*, 307 N.C. 198, 297 S.E.2d 585 (1982).

**Legislative Intent Regarding Use of Deadly Weapon.** — The legislature intended to make implicit under this section a matter of ordinary common sense: that the use of a deadly weapon, in any manner, in the course of a rape offense, always has some tendency to assist, if not entirely enable, the perpetrator to accomplish his evil design upon the victim, who is usually unarmed. *State v. Sturdivant*, 304 N.C. 293, 283 S.E.2d 719 (1981); *State v. Powell*, 306 N.C. 718, 295 S.E.2d 413 (1982).

**Formerly, it was necessary to show specifically that the weapon was used to overcome the victim's resistance or to procure her submission**, but this section, however, simply necessitates a showing that a dangerous or deadly weapon was employed or displayed in the course of a rape. *State v. Powell*, 306 N.C. 718, 295 S.E.2d 413 (1982).

**Penetration without Emission, etc.** —

As vaginal intercourse requires only the slightest penetration, the absence of sperm and other physical symptoms such as swelling or abrasions does not support a finding of attempted rape. *State v. Ashley*, 54 N.C. App. 386, 283 S.E.2d 805 (1981), cert. denied, 305 N.C. 153, 289 S.E.2d 381 (1982).

**"Serious Personal Injury".** —

The term "inflicts serious injury" means physical or bodily injury resulting from an



assault with a deadly weapon with intent to kill. The injury must be serious but it must fall short of causing death. Further definition seems neither wise nor desirable. Whether such serious injury has been inflicted must be determined according to the particular facts of each case. *State v. Boone*, 307 N.C. 198, 297 S.E.2d 585 (1982).

**Mental Injury May Constitute "Serious Personal Injury".** — Proof of the element of infliction of "serious personal injury" as required by subdivision (2)b of this section and § 14-27.4(2)b may be met by the showing of mental injury as well as bodily injury. *State v. Boone*, 307 N.C. 198, 297 S.E.2d 585 (1982).

**But Must Be Greater Than That Present in Every Rape.** — The legislature intended that ordinarily the mental injury inflicted must be more than the *res gestae* results present in every forcible rape and sexual offense. In order to support a jury finding of serious personal injury because of injury to the mind or nervous system, the State must ordinarily offer proof that such injury was not only caused by the defendant but that the injury extended for some appreciable time beyond the incidents surrounding the crime itself. *State v. Boone*, 307 N.C. 198, 297 S.E.2d 585 (1982).

**Question Must Be Decided on Facts of Case.** — Obviously, the question of whether there was such mental injury as to result in "serious personal injury" must be decided upon the facts of each case. It is impossible to enunciate a "bright line" rule as to when the acts of an accused cause mental upset which could support a finding of "serious personal injury." *State v. Boone*, 307 N.C. 198, 297 S.E.2d 585 (1982).

**No Assault Required for Statutory Rape.** — The lack of an assault requirement under the statutory rape law, subdivision (a)(1) of this section, is understandable given the purpose of the statute. Unlike the provision of the first-degree rape statute that applies if the victim is an adult, subdivision (a)(2) of this section, the forbidden conduct under the statutory rape provision, subdivision (a)(1) of this section, is the act of intercourse itself; any force used in the act, any injury inflicted in the course of the act, or the apparent lack of consent of the child are not essential elements. This is so because the statutory rape law, subdivision (a)(1), was designed to protect children under 12 from sexual acts. *State v. Weaver*, 306 N.C. 629, 295 S.E.2d 375 (1982).

One is guilty of a misdemeanor assault under § 14-33(b)(3) if he assaults a child under the age of 12 years. This crime has an essential element which is not also an essential element of the crime of first-degree rape of a child of the age of 12 years or less. Subdivision (a)(1) of this section provides that a person is guilty of first-degree rape only if he "engages in vaginal intercourse" with the young victim; no concomi-

tant assault is required. *State v. Weaver*, 306 N.C. 629, 295 S.E.2d 375 (1982).

**Evidence of Force Held Sufficient.** — Where it was established that the victim, a 78-year-old lady, had been severely beaten, resulting in multiple contusions and a large bite on her arm, multiple abrasions on her face, a one and one-half inch long laceration on the left side of her scalp, abrasions on both legs, and fractured ribs on her left side, there was evidence sufficient to support a conviction under this section. *State v. Green*, 305 N.C. 465, 290 S.E.2d 625 (1982).

#### IV. DEFENSE OF CONSENT.

**Explicit Threat Unnecessary.** — The absence of an explicit threat inducing consent is not determinative; it is enough if the totality of the circumstances surrounding the actions of defendant give rise to a reasonable inference that the unspoken purpose of the threat was to force the victim to submit to unwanted sexual contact. *State v. Barnette*, 304 N.C. 447, 284 S.E.2d 298 (1981).

#### V. PRACTICE AND PROCEDURE.

##### C. Evidence.

##### 1. Admissibility of Evidence Generally.

**Scope of Medical Expert's Testimony.** — A medical expert may not testify that the defendant raped the prosecuting witness; however, a physician who is properly qualified as an expert may offer an opinion as to whether the victim in a rape prosecution had been penetrated and whether internal injuries had been caused thereby. *State v. Galloway*, 304 N.C. 485, 284 S.E.2d 509 (1981).

Testimony that an examination revealed evidence of traumatic and forcible penetration consistent with an alleged rape is a proper expression for an expert witness to establish whether the victim had been penetrated by force. *State v. Galloway*, 304 N.C. 485, 284 S.E.2d 509 (1981).

##### Assaults on Other Women on Same Date.

— In a prosecution for first-degree rape, evidence that defendant committed assaults on two other women on the same date as the rape was competent to show defendant's state of mind and his common scheme and design to apply physical force in the commission of crimes of violence; furthermore, the two assaults were sufficiently close in time to the alleged rape that the incidents presented circumstances, not too remote in time to have probative value, which tended to aid the jury in understanding the conduct and motives of defendant. *State v. Rick*, 51 N.C. App. 383, 276 S.E.2d 768, *aff'd*, 304 N.C. 356, 283 S.E.2d 512 (1981).

**Testimony as to Statements Made by Defendant to Victim.** — Testimony by rape



victim that defendant acknowledged prior sexual offenses and that he stated he enjoyed degrading white women was admissible evidence relevant to show both defendant's motive for assaulting prosecutrix and possession of criminal intent before the fact. *State v. Searles*, 304 N.C. 149, 282 S.E.2d 430 (1981).

**Pubic Hair.** — Where pubic hair found on the victim was "microscopically consistent" with defendant's pubic hair and could have originated from the defendant, it is admissible although an expert could not positively identify the defendant from the hair comparison. *State v. Pratt*, 306 N.C. 673, 295 S.E.2d 462 (1982).

#### D. Instructions.

**Reasonableness of Fear and Fear of Violence.** — The failure of the trial judge in a prosecution for first degree rape to instruct the jury that the fear which induces consent must be reasonable and that the fear must be of violence was not error. Statements contained in prior cases do not establish an objective standard of reasonableness by which the jury must judge consent, and, even if the reasonableness standard were the rule, instructions that the victim's fear must be reasonable and of violence were unnecessary under the facts of the case.

*State v. Barnette*, 304 N.C. 447, 284 S.E.2d 298 (1981).

**Knowledge of Aider and Abettor's Threats.** — For defendant to be convicted of first-degree rape based in part on the actions of codefendant, it is necessary to show only that the two share a common unlawful purpose, i.e., that the two aid and abet one another in the commission of the crime; it is not necessary for each to have full knowledge of all acts committed by the other. Thus, where the trial court fully and adequately instructed on the elements of aiding and abetting, the court did not err in failing to instruct that the defendant must be found to have known of codefendant's threats which induced consent. *State v. Barnette*, 304 N.C. 447, 284 S.E.2d 298 (1981).

**Charge That Fake Gun Can Be Deadly or Dangerous Weapon.** — Where the indictment charges violation of this section with the use of deadly weapons, "to wit: a rifle, a shotgun, and a pistol," a jury instruction that the deadly weapon element of this section would be met if the victim reasonably believed a fake gun to be a dangerous or deadly weapon does not change the theory alleged in the indictment. *State v. McKinnon*, 306 N.C. 288, 293 S.E.2d 118 (1982).

## § 14-27.3. Second-degree rape.

### CASE NOTES

**First and Second Degree Rape Distinguished.** — The sole distinction between the crimes of first and second-degree rape is the element of the use of a deadly weapon or aiding and abetting. If serious bodily injury is inflicted, the crime is also first-degree rape. *State v. Barnette*, 304 N.C. 447, 284 S.E.2d 298 (1981).

#### "By Force". —

Phrase "by force and against her will" (now "by force and against the will of the other person") used in this section and §§ 14-27.2, 14-27.4 and 14-27.5, means the same as it did at common law when it was used to describe some of the elements of rape. *State v. Locklear*, 304 N.C. 534, 284 S.E.2d 500 (1981); *State v. Booher*, 305 N.C. 554, 290 S.E.2d 561 (1982).

**For discussion of sufficiency of evidence to justify an inference of intent to rape**, see *State v. Rushing*, — N.C. App. —, 300 S.E.2d 445 (1983).

**Penetration Must Be Established.** — It is necessary to establish penetration by the male sex organ of the female sex organ. *State v. Barnes*, 307 N.C. 104, 296 S.E.2d 291 (1982).

**Evidence of Defendant's Good Character.** — Where defendant's testimony contra-

dicts that of the prosecuting witness, the jury is required, in reaching a verdict, to pass on the defendant's credibility. Therefore, it is error for the court to fail to instruct the jury that evidence introduced by the defendant as to his good character could also be considered as bearing on his credibility. *State v. Williams*, 59 N.C. App. 549, 297 S.E.2d 604 (1982).

**Failure of the trial court to define "sexual intercourse" in jury instructions is not usually error.** *State v. Barnes*, 307 N.C. 104, 296 S.E.2d 291 (1982).

**When Instruction Beyond "Sexual Intercourse" Not Required.** — Special instructions beyond the phrase "sexual intercourse" as to penetration are not required when there is plenary evidence before the jury that the female sex organ had been penetrated by the male sex organ. *State v. Barnes*, 307 N.C. 104, 296 S.E.2d 291 (1982).

**When Instruction on Penetration Element Required.** — Where (1) the evidence of penetration by a male sex organ is weak, (2) there is a suggestion from the examining physician that penetration could have been by some other object, and (3) a prior erroneous instruction on second-degree sex offense, equating



sexual intercourse with penetration of an object might have misled the jury, the failure to instruct on the penetration element of the offense is prejudicial error. Under these circumstances it was necessary for the trial judge to have included, in his instruction on second-degree rape, language sufficient to establish that penetration must be of the female sex organ by the male sex organ. *State v. Barnes*, 307 N.C. 104, 296 S.E.2d 291 (1982).

**Evidence of Prior Use of Tampon by Complainant.** — In prosecution for second-degree rape, and incest involving 13-year-old complainant, where physical examination revealed no bruising or tearing of the genital or rectal area and no sperm within the vagina, but did reveal an opening in the hymen, evidence concerning complainant's prior use of tampon was relevant and should have been admitted. *State v. Baron*, 58 N.C. App. 150, 292 S.E.2d 741 (1982).

**Evidence of Flight from First Trial on Offense.** — In prosecution for second-degree rape, probative value of evidence of defendant's flight from first trial on such offense was not outweighed by its prejudicial effect, despite the fact that he was without counsel in the trial from which he fled. *State v. Jeffries*, 57 N.C. App. 416, 291 S.E.2d 859, cert. denied & appeal dismissed, 306 N.C. 561, 294 S.E.2d 374 (1982).

**Charge as to Lesser Offense Improper Where Consent Is Only Issue.** — In prosecutions for rape, when all the evidence tends to show a completed act of intercourse and the only issue is whether the act was with the prosecuting witness's consent or by force and against her will, it is not proper to submit to the jury lesser offenses included within a charge of rape. *State v. Jeffries*, 57 N.C. App. 416, 291

S.E.2d 859, cert. denied & appeal dismissed, 306 N.C. 561, 294 S.E.2d 374 (1982).

**When Lesser Offense May Be Withdrawn from Jury Consideration.** — Where under the evidence the jury could not reasonably find that defendant's intercourse with female was consensual and therefore that he did not commit the offense of second degree rape as charged in the indictment, but that he did commit the lesser included offense of assault on a female, it was not error to withdraw the lesser included offense from the jury's consideration. *State v. Jeffries*, 57 N.C. App. 416, 291 S.E.2d 859, cert. denied & appeal dismissed, 306 N.C. 561, 294 S.E.2d 374 (1982).

**Sentencing factors.** — Where a defendant has been charged with rape in the first degree under subdivision (a)(1)a of § 14-27.2 but has pled guilty to rape in the second degree under subdivision (a)(2) of this section, if the sentencing judge concludes by a preponderance of the evidence that the defendant had used a gun during the rape, this would be a factor that must be considered in deciding whether to sentence the defendant beyond the presumptive term for the admitted offense. *State v. Melton*, 307 N.C. 370, 298 S.E.2d 673 (1983).

**Applied in** *State v. Jones*, 304 N.C. 323, 283 S.E.2d 483 (1981); *State v. Barnes*, 56 N.C. App. 515, 289 S.E.2d 580 (1982).

**Stated in** *State v. Ashley*, 54 N.C. App. 386, 283 S.E.2d 805 (1981); *State v. Clontz*, 305 N.C. 116, 286 S.E.2d 793 (1982).

**Cited in** *State v. Lucas*, 302 N.C. 342, 275 S.E.2d 433 (1981); *State v. Pace*, 51 N.C. App. 79, 275 S.E.2d 249 (1981); *State v. McKinnon*, 306 N.C. 288, 293 S.E.2d 118 (1982); *State v. McDougall*, — N.C. —, 301 S.E.2d 308 (1983).

## § 14-27.4. First-degree sexual offense.

(a) A person is guilty of a sexual offense in the first degree if the person engages in a sexual act:

- (1) With a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim; or
- (2) With another person by force and against the will of the other person, and:
  - a. Employs or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon; or
  - b. Inflicts serious personal injury upon the victim or another person; or
  - c. The person commits the offense aided and abetted by one or more other persons.

(1979, c. 682, s. 1; 1979, 2nd Sess., c. 1316, s. 6; 1981, c. 106, ss. 3, 4; 1983, c. 175, ss. 5, 10; c. 720, s. 4.)



**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Editor's Note.** — Session Laws 1983, c. 175, s. 10, as amended by Session Laws 1983, c. 720, s. 4, makes the amendment effective Oct. 1, 1983.

## CASE NOTES

**First and Second Degree Offenses Distinguished.** — A second degree offense differs from a first degree offense only in the absence of the alternative elements of aiding and abetting, use or display of a deadly weapon, or infliction of serious bodily injury. *State v. Barnette*, 304 N.C. 447, 284 S.E.2d 298 (1981).

Where the only theory that would sustain defendant's conviction of a sexual offense was aiding and abetting, defendant could only be tried for a first-degree sexual offense and the court's instruction on second-degree sexual offense was error, since the offense is always first degree when aiding and abetting is proven. *State v. Barnette*, 304 N.C. 447, 284 S.E.2d 298 (1981).

**Elements of Proof.** — To convict a defendant of a first-degree sexual offense with a child of 12 years or less, the State need only prove that (1) the defendant engaged in a "sexual act," (2) the victim was at the time of the act 12 years old or less, and (3) the defendant was at that time four or more years older than the victim. *State v. Ludlum*, 303 N.C. 666, 281 S.E.2d 159 (1981).

**"By Force".** — Phrase "by force and against her will," (now "by force and against the will of the other person") used in this section, §§ 14-27.2, 14-27.3, and 14-27.5, means the same as it did at common law when it was used to describe some of the elements of rape. *State v. Locklear*, 304 N.C. 534, 284 S.E.2d 500 (1981).

Under the sexual offense statutes, actual physical force is not required to satisfy the statutory requirement that the sexual act be committed "by force and against the will" of the victim. Fear of serious bodily harm reasonably engendered by threats or other actions of a defendant and which causes the victim to consent to the sexual act takes the place of force and negates the consent. *State v. Locklear*, 304 N.C. 534, 284 S.E.2d 500 (1981).

**Lack of Consent Essential.** — Both a first and second-degree sexual offense, insofar as they may be committed against an adult not physically or mentally handicapped, have as an essential element the lack of the victim's consent because they must be committed "by force and against the will" of the victim. *State v. Booher*, 305 N.C. 554, 290 S.E.2d 561 (1982).

## Effect of Amendments. —

The 1983 amendment, effective Oct. 1, 1983, substituted "under the age of 13 years" for "of the age of 12 years or less," "at least 12 years old" for "of the age of 12 years or more," and "at least four years older" for "four or more years older" in subdivision (a)(1).

**Subdivision (a)(1) Inapplicable Where Child 12 Years and Eight Months Old.** — One cannot be lawfully indicted under subdivision (a)(1) of this section for engaging in a sexual act with a child 12 years and eight months old because the age requirement of the statute is not satisfied; the victim is not of the age of "12 years or less." Once a child passes his twelfth birthday he is over 12 years of age; he is no longer "12 years or less." *State v. McGaha*, 306 N.C. 699, 295 S.E.2d 449 (1982).

**Construction of "12 years or less".** — Although the "common practice" is that most people will state their age by giving the number of birthdays celebrated, (hence, one is still 12 until the thirteenth birthday) and most adults state their ages in this manner, this "common practice" is based on the fiction that we grow older only at yearly intervals, the truth, of course, being that we grow older a day (or less) at a time. Therefore, after a child celebrates his twelfth birthday, he is no longer "12 or less," he is 12 and more. *State v. McGaha*, 306 N.C. 699, 295 S.E.2d 449 (1982).

**Intent to commit the crime of sexual offense is inferred from the commission of the act.** *State v. Boone*, 307 N.C. 198, 297 S.E.2d 585 (1982).

**"Serious Personal Injury".** — The term "inflicts serious injury" means physical or bodily injury resulting from an assault with a deadly weapon with intent to kill. The injury must be serious but it must fall short of causing death. Further definition seems neither wise nor desirable. Whether such serious injury has been inflicted must be determined according to the particular facts of each case. *State v. Boone*, 307 N.C. 198, 297 S.E.2d 585 (1982).

**Mental Injury May Constitute "Serious Personal Injury".** — Proof of the element of infliction of "serious personal injury" as required by § 14-27.2(2)b and subdivision (2)b of this section may be met by the showing of mental injury as well as bodily injury. *State v. Boone*, 307 N.C. 198, 297 S.E.2d 585 (1982).

**But Must Be Greater Than That Present in Every Sexual Offense.** — The legislature intended that ordinarily the mental injury inflicted must be more than the *res gestae* results present in every forcible rape and sexual offense. In order to support a jury finding of serious personal injury because of injury to the



mind or nervous system, the State must ordinarily offer proof that such injury was not only caused by the defendant but that the injury extended for some appreciable time beyond the incidents surrounding the crime itself. *State v. Boone*, 307 N.C. 198, 297 S.E.2d 585 (1982).

**Question Must Be Decided on Facts of Cases.** — Obviously, the question of whether there was such mental injury as to result in "serious personal injury" must be decided upon the facts of each case. It is impossible to enunciate a "bright line" rule as to when the acts of an accused cause mental upset which could support a finding of "serious personal injury." *State v. Boone*, 307 N.C. 198, 297 S.E.2d 585 (1982).

**Intoxication Not a Defense.** — Since intent is not an essential element of the crime of first-degree sexual offense, intoxication is not a defense of that crime. *State v. Boone*, 307 N.C. 198, 297 S.E.2d 585 (1982).

**Testimony of Four Year Old Victim Sufficient Evidence of Cunnilingus.** — Testimony of four-year-old girl that defendant "touched me . . . with his tongue . . . between my legs," while indicating the place of touching to the jury, constituted sufficient evidence of cunnilingus to support a conviction for a first-degree sexual offense. *State v. Ludlum*, 303 N.C. 666, 281 S.E.2d 159 (1981).

**Taking Indecent Liberties Not Lesser Included Offense.** — In a prosecution of defendant under subsection (a) of this section for engaging in a sexual act with children under 12, the trial court did not err in failing to instruct on taking indecent liberties with children in violation of § 14-202.1, since taking indecent liberties with children is not a lesser included offense of the crime proscribed by subsection (a). *State v. Williams*, 303 N.C. 507, 279 S.E.2d 592 (1981).

**Crime against Nature as Lesser Included Offense.** — See *State v. Warren*, 59 N.C. App. 264, 296 S.E.2d 671 (1982), cert. granted, — N.C. —, 299 S.E.2d 653 (1983).

**Submission to Jury of Crime against Nature.** — Where, under the facts in a prosecution for a first-degree sexual offense, it was necessary for the State to prove a penetration, which is an element of a crime against nature, the crime against nature was a lesser included offense of the first-degree sexual offense for which the defendant was tried, and it was not error to submit the crime against nature to the jury. *State v. Hill*, 59 N.C. App. 216, 296 S.E.2d 17, cert. granted, 307 N.C. 128, 297 S.E.2d 401, — N.C. —, 297 S.E.2d 404 (1982).

**Sufficiency of Indictment.** — Section 15-144.2(a) authorizes, for sexual offense, an abbreviated form of indictment which omits allegations of the particular elements that dis-

tinguish first-degree and second-degree sexual offense. *State v. Berkley*, 56 N.C. App. 163, 287 S.E.2d 445 (1982).

While it is essential that the State prove a "sexual act" as defined by § 14-27.1(4) in order to convict a defendant under this section, an indictment which is drafted pursuant to the provisions of § 15-144.2(b) without specifying which "sexual act" was committed is sufficient to charge the crime of the first-degree sexual offense and to inform a defendant of such accusation. If a defendant wishes additional information in the nature of the specific "sexual act" with which he stands charged, he may move for a bill of particulars. *State v. Edwards*, 305 N.C. 378, 289 S.E.2d 360 (1982).

**Fatal Variance.** — Where all of the State's evidence tended to show that defendant penetrated the vaginal and rectal orifices of two girls by using a tampon, and no evidence in the record tended to show that defendant committed the act of cunnilingus or of anal intercourse with either victim as alleged in the indictment, the trial court erred in failing to dismiss the charges on grounds of a fatal variance between the allegations and the proof at trial. *State v. Williams*, 303 N.C. 507, 279 S.E.2d 592 (1981).

**The defendant was not guilty of a first-degree sexual offense** where the victim actively encouraged and ultimately induced the defendant to commit the crime of fellatio on him for the purpose of documenting certain facts relative to their relationship and not for the purpose of having the defendant arrested for his acts. *State v. Booher*, 305 N.C. 554, 290 S.E.2d 561 (1982).

**Charge That Fake Gun May Be Deadly or Dangerous Weapon.** — Where the indictment charges violation of this section with the use of deadly weapons, "to wit: a rifle, a shotgun, and a pistol," a jury instruction that the deadly weapon element of this section would be met if the victim reasonably believed a fake gun to be a dangerous or deadly weapon does not change the theory alleged in the indictment. *State v. McKinnon*, 306 N.C. 288, 293 S.E.2d 118 (1982).

**Applied** in *State v. Barrett*, 58 N.C. App. 515, 293 S.E.2d 896 (1982); *State v. Clark*, 307 N.C. 120, 296 S.E.2d 296 (1982).

**Stated** in *State v. Jones*, 304 N.C. 323, 283 S.E.2d 483 (1981).

**Cited** in *State v. Lucas*, 302 N.C. 342, 275 S.E.2d 433 (1981); *State v. Jordan*, 305 N.C. 274, 287 S.E.2d 827 (1982); *State v. Schneider*, 306 N.C. 351, 293 S.E.2d 157 (1982); *State v. Rankin*, 306 N.C. 712, 295 S.E.2d 416 (1982); *State v. Barrett*, — N.C. —, 302 S.E.2d 632 (1982).



## § 14-27.5. Second-degree sexual offense.

### CASE NOTES

**First and Second Degree Offenses Distinguished.** — A second-degree offense differs from a first-degree offense only in the absence of the alternative elements of aiding and abetting, use or display of a deadly weapon, or infliction of serious bodily injury. *State v. Barnette*, 304 N.C. 447, 284 S.E.2d 298 (1981).

Under § 14-27.4(a) and subsection (a) of this section, when aiding and abetting is proven, the offense is first degree; it can never be a second-degree offense. *State v. Barnette*, 304 N.C. 447, 284 S.E.2d 298 (1981).

Where the only theory that would sustain defendant's conviction of a sexual offense was aiding and abetting, defendant could only be tried for a first-degree sexual offense and the court's instruction on second-degree sexual offense was error, since the offense is always first degree when aiding and abetting is proven. *State v. Barnette*, 304 N.C. 447, 284 S.E.2d 298 (1981).

**Conduct Included in "Sexual Act".** — In defining a "sexual act" in § 14-27.1(4) as "the penetration, however slight, by any object into the genital or anal opening of another person's body," the legislature intended the words "any object" to embrace parts of the human body as well as inanimate or foreign objects; therefore, the State's evidence was sufficient for the jury in a prosecution for second-degree sexual offense where it tended to show that the defendant penetrated the genital opening of the prosecutrix's body with his fingers. *State v. Lucas*, 302 N.C. 342, 275 S.E.2d 433 (1981).

**"By Force".** — The phrase "by force and against her will," (now "by force and against the will of the other person") used in this section and §§ 14-27.2, 14-27.3, and 14-27.4, means the same as it did at common law when it was used to describe some of the elements of rape. *State v. Locklear*, 304 N.C. 534, 284 S.E.2d 500 (1981).

Under the sexual offense statutes, actual physical force is not required to satisfy the statutory requirement that the sexual act be committed "by force and against the will" of the victim. Fear of serious bodily harm reasonably engendered by threats or other actions of a defendant and which causes the victim to consent to the sexual act takes the place of force and negates the consent. *State v. Locklear*, 304 N.C. 534, 284 S.E.2d 500 (1981).

The threat of serious bodily harm which reasonably induces fear thereof constitutes sufficient force for a second-degree sexual offense under subdivision (a)(1) of this section. *State v. Berkley*, 56 N.C. App. 163, 287 S.E.2d 445 (1982).

**Lack of Consent Essential.** — Both a first and second-degree sexual offense, insofar as they may be committed against an adult not physically or mentally handicapped, have as an essential element the lack of the victim's consent because they must be committed "by force and against the will" of the victim. *State v. Booher*, 305 N.C. 554, 290 S.E.2d 561 (1982).

**Sufficiency of Indictment.** — Section 15-144.2(a) authorizes, for sexual offense, an abbreviated form of indictment which omits allegations of the particular elements that distinguish first-degree and second-degree sexual offense. *State v. Berkley*, 56 N.C. App. 163, 287 S.E.2d 445 (1982).

**Applied** in *State v. Abee*, 60 N.C. App. 99, 298 S.E.2d 184 (1982).

**Quoted** in *State v. Ludlum*, 303 N.C. 666, 281 S.E.2d 159 (1981).

**Stated** in *State v. Jones*, 304 N.C. 323, 283 S.E.2d 483 (1981).

**Cited** in *State v. Pace*, 51 N.C. App. 79, 275 S.E.2d 254 (1981); *State v. Abee*, — N.C. —, 302 S.E.2d 230 (1983).

## § 14-27.6. Penalty for attempt.

### CASE NOTES

Section was enacted to replace the former crime of assault with intent to commit rape. *State v. Boone*, 307 N.C. 198, 297 S.E.2d 585 (1982).

**Assault with Intent to Commit Rape under Former § 14-22.** —

See *State v. Little*, 51 N.C. App. 64, 275 S.E.2d 249 (1981).

**Elements of Proof.** — In order to prove the offense set forth in this section, the State must prove that an accused had the intent to commit the crime and committed an act that goes beyond mere preparation, but falls short of actual commission of the offense. *State v. Boone*, 307 N.C. 198, 297 S.E.2d 585 (1982).

**Intent is an essential element of**



**attempted rape.** State v. Boone, 307 N.C. 198, 297 S.E.2d 585 (1982).

**Conviction under This Section and § 14-32 Not Double Jeopardy.** — In a criminal prosecution defendant was not subjected to double jeopardy where he was charged and convicted of assault with a deadly weapon with intent to kill inflicting serious injury and attempt to commit first-degree rape, though both crimes arose from the same series of events, since each offense charged included an element not common to the other offense. State v. Glenn, 51 N.C. App. 694, 277 S.E.2d 477 (1981).

**Assault on a female is a lesser included offense of charge of attempted first-degree rape** as set forth in this section. State v. Rick, 54 N.C. App. 104, 282 S.E.2d 497 (1981).

**Intoxication may be a valid defense** to the crime of attempted rape. State v. Boone, 307 N.C. 198, 297 S.E.2d 585 (1982).

**Admissibility of Other Acts Establishing Pattern of Conduct.** — In a prosecution for attempted rape by defendant of his stepdaughter, testimony which tends to show that defendant systematically engaged in nonconsensual sexual relations with his stepdaughters as they matured physically, a pattern of conduct embracing the offense charged, is properly admitted. State v. Goforth, 59 N.C. App. 504, 297 S.E.2d 128 (1982).

**Cited in** State v. Jordan, 305 N.C. 274, 287 S.E.2d 827 (1982); State v. Freeman, 307 N.C. 445, 298 S.E.2d 376 (1983).

## § 14-27.7. Intercourse and sexual offenses with certain victims; consent no defense.

### Legal Periodicals. —

For article on a model act to prevent the

sexual exploitation of children, see 17 Wake Forest L. Rev. 535 (1981).

## ARTICLE 8.

### Assaults.

## § 14-32. Felonious assault with deadly weapon with intent to kill or inflicting serious injury; punishments.

### CASE NOTES

#### I. GENERAL CONSIDERATION.

**Purpose.** — This section is designed for the protection of life or limb. State v. Cass, 55 N.C. App. 291, 285 S.E.2d 337, cert. denied, 305 N.C. 396, 290 S.E.2d 366 (1982).

#### Prosecution under § 14-34.2 and This Section Not Double Jeopardy. —

Where a defendant was charged and convicted for assault upon a law officer with a firearm while he was in the performance of his duties and also for assault on the same officer with a deadly weapon with intent to kill inflicting serious injuries, the defendant was not placed in double jeopardy, however, judgment was arrested in the case charging the lesser included offense of assault upon the officer with a firearm while he was in the performance of his duties because the constitutional guarantee against double jeopardy protects a defendant from multiple punishment for the same offense. State v. Byrd, 50

N.C. App. 736, 275 S.E.2d 522, cert. denied, 303 N.C. 316, 281 S.E.2d 654 (1981).

**Nor Is Prosecution under § 14-27.6 and This Section.** — In a criminal prosecution defendant was not subjected to double jeopardy where he was charged and convicted of assault with a deadly weapon with intent to kill inflicting serious injury and attempt to commit first-degree rape, though both crimes arose from the same series of events, since each offense charged included an element not common to the other offense. State v. Glenn, 51 N.C. App. 694, 277 S.E.2d 477 (1981).

**Prosecution under § 14-318.2 and Subsection (b) Not Double Jeopardy.** — Neither subsection (b) of this section nor § 14-318.2 proscribes a crime which is a lesser included offense of the other, and conviction or acquittal of one will not support a plea of former jeopardy against a charge for violation of the other. State v. Walden, 306 N.C. 466, 293 S.E.2d 780 (1982).



**Asportation of the victim is not an inherent or inevitable feature of an assault;** therefore, removal of a victim from the front porch of her home to a more secluded wooded area clearly facilitated the commission of the felony of assault, and thus a separate charge for kidnapping was proper. *State v. Coffey*, 54 N.C. App. 78, 282 S.E.2d 492 (1981).

**Aiding and Abetting through Failure to Defend Victim.** — A mother may be found guilty of assault on a theory of aiding and abetting solely on the basis that she was present when her child was assaulted but failed to take reasonable steps to prevent the assault. *State v. Walden*, 306 N.C. 466, 293 S.E.2d 780 (1982).

The failure of a parent who is present to take all steps reasonably possible to protect the parent's child from an attack by another person constitutes an act of omission by the parent showing the parent's consent and contribution to the crime being committed. *State v. Walden*, 306 N.C. 466, 293 S.E.2d 780 (1982).

Trial court properly allowed the jury to consider a verdict of guilty of assault with a deadly weapon inflicting serious injury, upon a theory of aiding and abetting, solely on the ground that defendant mother was present when her child was brutally beaten by third party but failed to take all steps reasonable to prevent the attack or otherwise protect the child from injury. *State v. Walden*, 306 N.C. 466, 293 S.E.2d 780 (1982).

In a prosecution against defendant mother for assault with a deadly weapon inflicting serious injury, upon a theory of aiding and abetting, on the ground that defendant was present when third party brutally beat her child but failed to take all steps reasonable to prevent the attack or otherwise protect the child, testimony tending to show that the third party had committed other attacks against her children in the presence of the defendant was competent as it tended to exhibit a chain of circumstances in respect to the matter on trial which were so connected with the offense charged as to throw light upon the identity of the child's attacker and to make out the *res gestae*. *State v. Walden*, 306 N.C. 466, 293 S.E.2d 780 (1982).

**Aiding and Abetting Assault on Child Through Silence.** — In a prosecution of defendant for aiding and abetting another in assault on defendant's one-year-old child, where the only evidence for the State tended to show that, during the assault, defendant did absolutely nothing, the totality of the circumstances warranted the inference by the jury that defendant knew her silent presence during the beating inflicted upon her son would be regarded by the principal as encouragement and support, particularly in light of testimony that defendant had witnessed prior beatings by

the principal, indicating that defendant was aware of the severity of his treatment of her children; that defendant had never interfered in the past; that defendant had herself beaten her children in the principal's presence; and that defendant lied and instructed her children to lie to conceal the principal's complicity in the assault. *State v. Walden*, 53 N.C. App. 196, 280 S.E.2d 505 (1981), *rev'd* on other grounds, 306 N.C. 466, 293 S.E.2d 780 (1982).

**Statement That Defendant Is Charged with "Equivalent of Attempted Murder".** — In a prosecution under this section, where the court made the statement that defendant was charged with the "North Carolina equivalent of attempted murder" at the very beginning of defendant's trial, which was not repeated in the court's charge to the jury, and the statement was an apparent attempt to paraphrase a portion of the indictment, while it cannot be said that the trial court gave the jury a distorted view of the case through the use of the "stilted" language of the indictment, a distorted view was given through the use of an inaccurate and misleading paraphrase. "Intent to kill" and "attempted murder" do not mean the same thing. *State v. Hall*, 59 N.C. App. 567, 297 S.E.2d 614 (1982).

**Applied** in *State v. Hall*, 305 N.C. 77, 286 S.E.2d 552 (1982); *State v. Daniels*, 59 N.C. App. 63, 295 S.E.2d 508 (1982).

**Quoted** in *State v. Morris*, — N.C. App. —, 300 S.E.2d 46 (1983).

**Cited** in *In re Stedman*, 305 N.C. 92, 286 S.E.2d 527 (1982); *State v. Richardson*, 59 N.C. App. 558, 297 S.E.2d 921 (1982); *Bryant v. Cherry*, 687 F.2d 48 (4th Cir. 1982); *State v. Pettiford*, 60 N.C. App. 92, 298 S.E.2d 389 (1982).

## II. ELEMENTS OF OFFENSE.

**Victim Need Not Have Been Placed in Fear.** — It is not necessary that the victim be placed in fear in order to sustain a conviction for assault. All that is necessary to sustain a conviction for assault is evidence of an overt act showing an intentional offer by force and violence to do injury to another sufficient to put a person of reasonable firmness in apprehension of immediate bodily harm. *State v. Musselwhite*, 59 N.C. App. 477, 297 S.E.2d 181 (1982).

### V. INTENT TO KILL.

**Proof of an assault with a deadly weapon, etc.** —

In accord with 2nd paragraph in original. See *State v. White*, 307 N.C. 42, 296 S.E.2d 267 (1982).

**Intent to Kill May Be Inferred, etc.** —

In accord with 1st paragraph in original. See *State v. Musselwhite*, 59 N.C. App. 477, 297 S.E.2d 181 (1982).



In accord with 7th paragraph in original. See *State v. White*, 307 N.C. 42, 296 S.E.2d 267 (1982).

**Evidence of Other Offenses as Proof of Mental State or Intent.** — When a specific mental state is an essential element of the crime charged, evidence of commission of another offense is admissible to establish requisite mental state or intent. The evidence of a threat with a knife two days earlier and a slap two weeks prior to the incident tended to show design or intent on the part of the defendant. *State v. Musselwhite*, 59 N.C. App. 477, 297 S.E.2d 181 (1982).

## VI. SERIOUS INJURY.

**The term "inflicts serious injury" etc.** —

"Serious injury" as employed in subsection (b) of this section, means physical or bodily injury resulting from an assault with a deadly weapon. *State v. Musselwhite*, 59 N.C. App. 477, 297 S.E.2d 181 (1982).

**Facts of Particular Case Are Determinative.** —

In accord with 2nd paragraph in original. See *State v. Rotenberry*, 54 N.C. App. 504, 284 S.E.2d 197 (1981), cert. denied, 305 N.C. 306, 290 S.E.2d 705 (1982).

The question of whether a serious injury has occurred is determined by the facts of each case and is a jury question. *State v. Musselwhite*, 59 N.C. App. 477, 297 S.E.2d 181 (1982).

**Evidence that the victim was hospitalized, etc.** —

The injury must be serious, but evidence of hospitalization is not required. *State v. Rotenberry*, 54 N.C. App. 504, 284 S.E.2d 197 (1981), cert. denied, 305 N.C. 306, 290 S.E.2d 705 (1982); *State v. Musselwhite*, 59 N.C. App. 477, 297 S.E.2d 181 (1982).

## VII. SELF-DEFENSE.

**Evidence of Dangerous Character of Victim.** — Where the defendant pleads and offers evidence of self-defense, evidence of the character of the victim as a violent and dangerous fighting man is admissible if such character was known to the defendant, and further, such evidence is relevant on the question of the defendant's reasonable apprehension of death or bodily harm in his confrontation with the victim, and it may include specific acts of violence by the deceased. When such evidence is introduced by the defendant, the court, even in the absence of a request, should instruct the jury as to the bearing which this evidence might have on defendant's reasonable apprehension of death or great bodily harm from the attack to which his evidence pointed. *State v.*

*Powell*, 51 N.C. App. 224, 275 S.E.2d 528 (1981).

**Reasonableness of Apprehension of Death or Bodily Harm.** — In determining the reasonableness of defendant's apprehension of death or great bodily harm the reasonableness of the apprehension must be determined by the jury on the basis of all facts and circumstances as they appeared to defendant at the time of the shooting. *State v. Tann*, 57 N.C. App. 527, 291 S.E.2d 824 (1982).

Among the circumstances to be considered by the jury are the size, age and strength of defendant's assailant in relation to that of defendant; the fierceness or persistence of the assault upon defendant; whether the assailant had or appeared to have a weapon in his possession; and the reputation of the assailant for danger and violence. *State v. Tann*, 57 N.C. App. 527, 291 S.E.2d 824 (1982).

**Proof of Assailant's Reputation as Violent and Dangerous.** — In assault cases when defendant pleads and offers evidence of self defense, he may then offer evidence tending to show the bad general reputation of his assailant as a violent and dangerous fighting man. *State v. Tann*, 57 N.C. App. 527, 291 S.E.2d 824 (1982).

**Instruction as to Defendant's Knowledge of Victim's Violent and Dangerous Character.** — When evidence tending to show the dangerous and violent character of a victim is introduced, the court, even in the absence of a request, should instruct the jury as to the bearing defendant's knowledge thereof might have on his reasonable apprehension of death or great bodily injury. *State v. Tann*, 57 N.C. App. 527, 291 S.E.2d 824 (1982).

**Where Victim Is Initial Assailant Self-Defense Instruction Improper.** — Trial court erred in its instructions to the effect that self defense was unavailable to defendant if he was the aggressor where the testimony of both victim and defendant pointed to the victim as the initial assailant. *State v. Tann*, 57 N.C. App. 527, 291 S.E.2d 824 (1982).

**Erroneous Instruction on Self-Defense.** — Where although trial judge related in his summary some evidence that victim had threatened defendant prior to the shooting, judge failed to establish a relation between the previous incidents and defendant's claim of self-defense, and did not directly explain and apply the law of self-defense to any of the evidence except to say that the jury should consider whether or not victim had a weapon in his pocket, this was error. *State v. Tann*, 57 N.C. App. 527, 291 S.E.2d 824 (1982).



## § 14-33. Misdemeanor assaults, batteries, and affrays, simple and aggravated; punishments.

(b) Unless his conduct is covered under some other provision of law providing greater punishment, any person who commits any assault, assault and battery, or affray is guilty of a misdemeanor punishable by a fine, imprisonment for not more than two years, or both such fine and imprisonment if, in the course of the assault, assault and battery, or affray, he:

- (1) Inflicts, or attempts to inflict, serious injury upon another person or uses a deadly weapon; or
- (2) Assaults a female, he being a male person at least 18 years of age; or
- (3) Assaults a child under the age of 12 years; or
- (4) Assaults a law-enforcement officer, a custodial officer of the State Department of Correction, personnel of a detention facility or personnel of a training school, while the officer or personnel is discharging or attempting to discharge a duty of his office; or
- (5) Assaults an officer of the North Carolina General Court of Justice while engaged in official judicial duties or on account of the performance of official judicial duties; or
- (6) Assaults a school administrator, school teacher, substitute school teacher, or school teacher aide when any of these persons is discharging or attempting to discharge his official duties. (1870-1, c. 43, s. 2; 1873-4, c. 176, s. 6; 1879, c. 92, ss. 2, 6; Code, s. 987; Rev., s. 3620, 1911, c. 193; C.S., s. 4215; 1933, c. 189; 1949, c. 298; 1969, c. 618, s. 1; 1971, c. 765, s. 2; 1973, c. 229, s. 4; c. 1413; 1979, cc. 524, 656; 1981, c. 180; 1983, c. 175, ss. 6, 10; c. 720, s. 4.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Editor's Note.** — Session Laws 1983, c. 175, s. 10, as amended by Session Laws 1983, c. 720, s. 4, makes the amendment effective Oct. 1, 1983.

### Effect of Amendments. —

The 1983 amendment, effective Oct. 1, 1983, substituted "at least 18 years of age" for "over the age of 18 years" in subdivision (b)(2).

## CASE NOTES

### I. GENERAL CONSIDERATION.

**Conviction of misdemeanor assault requires proof of infliction of or attempt to inflict serious injury**, while conviction of common-law robbery does not. *State v. Malloy*, 53 N.C. App. 369, 280 S.E.2d 640 (1981).

**When Use of Force Justified.** — One without fault in provoking or continuing an assault is privileged to use such force as is reasonably necessary to protect himself from bodily harm or offensive physical contact. *State v. Grant*, 57 N.C. App. 589, 291 S.E.2d 913, cert. denied, 306 N.C. 560, 294 S.E.2d 225 (1982).

**When Failure to Instruct on Self-Defense Erroneous.** — If defendant's evidence, even though contradicted by the State, raises the issue of self-defense, it is error for the court not to charge on the defense. *State v. Grant*, 57 N.C. App. 589, 291 S.E.2d 913, cert. denied, 306 N.C. 560, 294 S.E.2d 225 (1982).

**When Instruction on Justification Improper.** — Where there is no evidence from

which a jury could find that defendant reasonably believed himself in need of protection, it would be improper for the court to instruct on justification. *State v. Grant*, 57 N.C. App. 589, 291 S.E.2d 913, cert. denied, 306 N.C. 560, 294 S.E.2d 225 (1982).

**Cited in** *Mazza v. Huffaker*, — N.C. App. —, 300 S.E.2d 833 (1983); *State v. Barneycastle*, — N.C. App. —, 301 S.E.2d 711 (1983).

### II. INCLUDED OFFENSES.

**Simple assault is a lesser included offense of assault with intent to commit rape.** *State v. Little*, 51 N.C. App. 64, 275 S.E.2d 249 (1981).

**When Assault Not Lesser Included Offense of Rape.** — Where evidence showed that defendant hit victim while having intercourse with her, and in its proof of second-degree rape, the State did not need to rely on this evidence of defendant's blow, since there was ample evidence that he had used other forceful measures



to subdue her and subject her to intercourse against her will, the evidence revealed two distinct offenses involving distinct occurrences, and was not of a greater offense and lesser included offense. *State v. Jeffries*, 57 N.C. App. 416, 291 S.E.2d 859, cert. denied & appeal dismissed, 306 N.C. 561, 294 S.E.2d 374 (1982).

**When Assault May Be Withdrawn from Consideration in Rape Trial.** — Where under the evidence the jury could not reasonably find that defendant's intercourse with female was consensual and therefore that he did not commit the offense of second degree rape as charged in the indictment, but that he did commit the lesser included offense of assault on a female, it was not error to withdraw the lesser included offense from the jury's consideration. *State v. Jeffries*, 57 N.C. App. 416, 291 S.E.2d 859, cert. denied & appeal dismissed, 306 N.C. 561, 294 S.E.2d 374 (1982).

**Assault on Female by Male over Age 18 Not Included in Statutory Rape.** — The offense of assault on a female by a male over the age of 18, subdivision (b)(2) of this section, is not, as a matter of law, a lesser included offense of first-degree rape of a child of the age of 12 or less, under § 14-27.2(a)(1). *State v. Weaver*, 306 N.C. 629, 295 S.E.2d 375 (1982).

**Assault on Child under Age 12 Not Included in Statutory Rape.** — The offense of assaulting a child under the age of 12, subdivision (b)(3), of this section, is not, as a matter of law, a lesser included offense of first-degree rape of a child of the age of 12 or less, under § 14-27.2(a)(1). *State v. Weaver*, 306 N.C. 629, 295 S.E.2d 375 (1982).

One is guilty of a misdemeanor assault under subdivision (b)(3) of this section if he assaults a child under the age of 12 years. This crime has an essential element, an assault, which is not also an essential element of the crime of first-degree rape of a child of the age of 12 years or less. Section 14-27.2(a)(1) provides that a person is guilty of first-degree rape only if he "engages in vaginal intercourse" with the young victim; no concomitant assault is required. *State v. Weaver*, 306 N.C. 629, 295 S.E.2d 375 (1982).

Vaginal intercourse with a child under 12 is not itself an assault, since the crime of assault has essential elements which are not also essential elements of statutory rape. For example, assault generally requires proof of state of mind of either the defendant or the victim — the defendant's intent to do immediate bodily harm or the victim's reasonable apprehension of such harm. The statutory rape law, § 14-27.2(a)(1), does not contain a state of mind element, however. Assault on a child under 12, subdivision (b)(3) of this section, is not, therefore, a lesser included offense of first-degree rape of a child under 12, § 14-27.2(a)(1). *State v. Weaver*, 306 N.C. 629,

295 S.E.2d 375 (1982).

### III. ASSAULTS ON FEMALES.

**For discussion of sufficiency of evidence to justify an inference of intent to rape, see *State v. Rushing*, — N.C. App. —, 300 S.E.2d 445 (1983).**

**Assault on female requires only proof of assault on female person by male person over age of 18 years.** *State v. Rushing*, — N.C. App. —, 300 S.E.2d 445 (1983).

**Assault is a requisite element of assault on a female, and is defined as an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm.** *State v. Jeffries*, 57 N.C. App. 416, 291 S.E.2d 859, cert. denied & appeal dismissed, 306 N.C. 561, 294 S.E.2d 374 (1982).

**Defendant's Age Not Essential Element of Crime.** — Although this section prescribes a greater punishment if defendant is over 18 years of age, defendant's age is not an essential element of the crime of assault upon a female and need not be alleged. *State v. Rick*, 54 N.C. App. 104, 282 S.E.2d 497 (1981).

**Fact that defendant is a male person need not be alleged specifically** when the indictment charges a rape or related offense, since defendant's sex may be assumed from the nature of the offense charged. *State v. Rick*, 54 N.C. App. 104, 282 S.E.2d 497 (1981).

**Preliminaries to Consensual Intercourse Not Assault.** — Although defendant's wrestling, kissing, and pressing himself against another without that other's consent may constitute assault, when such acts are merely the preliminaries to consensual sexual intercourse they can hardly suffice as an overt act of force and violence to do harm to another sufficient to put a reasonable person in fear of bodily harm. *State v. Jeffries*, 57 N.C. App. 416, 291 S.E.2d 859, cert. denied & appeal dismissed, 306 N.C. 561, 294 S.E.2d 374 (1982).

### IV. ASSAULTS ON LAW-ENFORCEMENT OFFICERS.

**Burden on State.** — To obtain a conviction under this section, the burden is on the State to satisfy the jury from the evidence beyond a reasonable doubt that the party assaulted was a law-enforcement officer performing the duty of his office, and that the defendant knew his victim was a law-enforcement officer. *State v. Rowland*, 54 N.C. App. 458, 283 S.E.2d 543 (1981).

**Sufficiency of Evidence.** — Where evidence established that defendant did assault a deputy sheriff by swinging his elbow at him,



either offensively or in trying to free himself; and that this assault occurred while the deputy sheriff was discharging or attempting to discharge a duty of his office, such conduct violated

subsection (b)(4), and arrest therefor was thus lawful and proper. *State v. Sampley*, — N.C. App. —, 299 S.E.2d 460 (1983).

### § 14-34.1. Discharging certain barreled weapons or a firearm into occupied property.

#### CASE NOTES

##### When section violated. —

In accord with original. See *State v. Hicks*, — N.C. App. —, 300 S.E.2d 33 (1983).

##### And Can Result in Conviction of First-Degree Murder. —

Conviction for first-degree felony murder based on the underlying felony of discharging a firearm into occupied property is proper. *State v. Wall*, 304 N.C. 609, 286 S.E.2d 68 (1982).

##### Instruction Held Proper. —

Trial court properly instructed the jury on theory of acting in concert in prosecution for discharging a firearm into an occupied dwelling, where there was evidence tending to show

that defendant and two companions were standing together at the scene of the incident and all were armed; that after a shot was fired from victims' dwelling, defendant and his companions all fired shots; that a witness saw all three men fire shots at the dwelling but could not tell whose shots struck the dwelling; and that defendant made conflicting statements as to whether he had fired into the dwelling or had fired only into the air. *State v. Musselwhite*, 54 N.C. App. 68, 283 S.E.2d 149 (1981), *aff'd*, 305 N.C. 295, 287 S.E.2d 897 (1982).

Cited in *State v. Brooks*, — N.C. App. —, 301 S.E.2d 421 (1983).

### § 14-34.2. Assault with a firearm or other deadly weapon upon law-enforcement officer, fireman, or emergency medical services personnel.

#### CASE NOTES

##### Prosecution under This Section and § 14-32, etc. —

Where a defendant was charged and convicted for assault upon a law officer with a firearm while he was in the performance of his duties and also for assault on the same officer with a deadly weapon with intent to kill inflicting serious injuries, the defendant was not placed in double jeopardy, however, judg-

ment was arrested in the case charging the lesser included offense of assault upon the officer with a firearm while he was in the performance of his duties because the constitutional guarantee against double jeopardy protects a defendant from multiple punishment for the same offense. *State v. Byrd*, 50 N.C. App. 736, 275 S.E.2d 522, *cert. denied*, 303 N.C. 316, 281 S.E.2d 654 (1981).

### § 14-34.3. Manufacture, sale, purchase, or possession of teflon-coated types of bullets prohibited.

(a) It is unlawful for any person to import, manufacture, possess, store, transport, sell, offer to sell, purchase, offer to purchase, deliver or give to another, or acquire any teflon-coated bullet.

(b) This section does not apply to:

- (1) Officers and enlisted personnel of the armed forces of the United States when in discharge of their official duties as such and acting under orders requiring them to carry arms or weapons, civil officers of the United States while in the discharge of their official duties, officers and soldiers of the militia and the State guard when called into actual



service, officers of the State, or of any county, city or town, charged with the execution of the laws of the State, when acting in the discharge of their official duties;

- (2) Importers, manufacturers, and dealers validly licensed under the laws of the United States or the State of North Carolina who possess for the purpose of sale to authorized law-enforcement agencies only;
- (3) Inventors, designers, ordinance consultants and researchers, chemists, physicists, and other persons employed by or under contract with a manufacturing company engaged in making or doing research designed to enlarge knowledge or to facilitate the creation, development, or manufacture of more effective police-type body armor.

(c) Any person who violates any provision of this section is guilty of a misdemeanor punishable as provided in G.S. 14-3(a). (1981 (Reg. Sess., 1982), c. 1272, s. 1.)

**Editor's Note.** — Session Laws 1981 (Reg. Sess., 1982), c. 1272, s. 2, makes this section effective Oct. 1, 1982.

## ARTICLE 10.

### *Kidnapping and Abduction.*

#### § 14-39. Kidnapping.

(a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:

- (1) Holding such other person for ransom or as a hostage or using such other person as a shield; or
- (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or
- (3) Doing serious bodily harm to or terrorizing the person so confined, restraining or removed or any other person.
- (4) Holding such other person in involuntary servitude in violation of G.S. 14-43.2.

(1933, c. 542; 1975, c. 843, s. 1; 1979, c. 760, s. 5; 1983, c. 746, s. 2.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** —

The 1983 amendment, effective Oct. 1, 1983, added subdivision (4) of subsection (a).

## CASE NOTES

### I. GENERAL CONSIDERATION.

**Term "aggravated kidnapping" is a misnomer** and should not be used in connection with this statute. *State v. Pratt*, 306 N.C. 673, 295 S.E.2d 462 (1982).

**Kidnapping and False Imprisonment Distinguished.** — Whether a defendant who confines, restrains, or removes another is guilty of kidnapping or false imprisonment, depends

upon whether the act was committed to accomplish one of the purposes enumerated in this section. *State v. Lang*, 58 N.C. App. 117, 293 S.E.2d 255, cert. denied, 306 N.C. 747, 295 S.E.2d 761 (1982).

**Crime of false imprisonment is a lesser included offense** of the crime of kidnapping. *State v. Lang*, 58 N.C. App. 117, 293 S.E.2d 255, cert. denied, 306 N.C. 747, 295 S.E.2d 761 (1982).



**But Forcible Trespass Is Not.** — Since forcible trespass requires proof of an element not essential to kidnapping, i.e., entry into a person's premises, it cannot be a lesser included offense of kidnapping. *State v. McRae*, 58 N.C. App. 225, 292 S.E.2d 778 (1982).

**Applied in** *State v. Thompson*, 306 N.C. 526, 294 S.E.2d 314 (1982); *State v. Abee*, 60 N.C. App. 99, 298 S.E.2d 184 (1982); *State v. Newman*, — N.C. —, 302 S.E.2d 174 (1983).

**Cited in** *State v. Jones*, 304 N.C. 323, 283 S.E.2d 483 (1981); *In re Stedman*, 305 N.C. 92, 286 S.E.2d 527 (1982); *Bryant v. Cherry*, 687 F.2d 48 (4th Cir. 1982); *State v. McDougall*, — N.C. —, 301 S.E.2d 308 (1983); *State v. Baldwin*, — N.C. App. —, 301 S.E.2d 725 (1983).

## II. WHAT CONSTITUTES KIDNAPPING.

### A. In General.

#### "Kidnapping" Defined. —

The term "kidnap," by itself, continues to have a precise and definite legal meaning under subsection (a) of this section, to wit, the unlawful seizure of a person against his will. In short, common sense dictates that one cannot unlawfully kidnap or unlawfully restrain another with his consent. *State v. Hall*, 305 N.C. 77, 286 S.E.2d 552 (1982).

Kidnapping, as defined by this section, is the confinement, restraint or removal of a person against his will for a felonious purpose. *State v. McRae*, 58 N.C. App. 225, 292 S.E.2d 778 (1982).

**Where restraint or asportation is not inherent feature of some other felony**, then the unlawful restraint or asportation of a person against that person's will for the purpose of committing a felony is kidnapping. *State v. Alston*, — N.C. App. —, 300 S.E.2d 857 (1983).

To constitute kidnapping, removal must be separate and apart from that which is an inherent, inevitable part of the commission of another felony. *State v. Battle*, — N.C. App. —, 300 S.E.2d 276 (1983).

#### Listed Purposes Not Mutually Exclusive.

— The purposes specified in subsection (a) of this section are not mutually exclusive. *State v. Hall*, 305 N.C. 77, 286 S.E.2d 552 (1982).

**The victim's age is not an essential element, etc. —**

In accord with original. See *State v. Froneberger*, 55 N.C. App. 148, 285 S.E.2d 119 (1981), appeal dismissed, 305 N.C. 397, 290 S.E.2d 367 (1982).

#### And Threats Are Equivalent, etc. —

Where defendant entered victim's car without her permission and ordered her to drive him around, telling her that if she did as he said, no one would be hurt, and victim thought defendant had a pistol under his jacket, a jury could reasonably infer from such evidence that

victim acquiesced to defendant's demands because she feared for her safety; it was not necessary for the State to prove use of actual physical force. *State v. McRae*, 58 N.C. App. 225, 292 S.E.2d 778 (1982).

**Likewise Crime May Be Committed by Means of Fraud, etc. —**

A kidnapping can be just as effectively accomplished by fraudulent means as by the use of force, threats or intimidation. *State v. Sturdivant*, 304 N.C. 293, 283 S.E.2d 719 (1981).

**Aiding and Abetting.** — In a prosecution for kidnapping the defendant could be convicted upon the State's showing that he accompanied the principal during the removal of the victim for the purpose of facilitating the commission of the victim's murder, since the overall circumstances, including the defendant's actual presence throughout the entire criminal episode and the defendant's handing of guns to the actual perpetrators of the murder, warranted the inference that the defendant intended to aid and abet the principal by accompanying him. *State v. Easter*, 51 N.C. App. 190, 275 S.E.2d 861, cert. denied, 303 N.C. 183, 280 S.E.2d 455 (1981).

### C. Kidnapping to Facilitate Commission of Felony.

**Restraint Which Is Inherent to Another Offense Not Also Kidnapping.** — Legislature's intent in enacting this section does not make a restraint which was an inherent, inevitable element of another felony, such as armed robbery or rape, a distinct offense of kidnapping, thus permitting conviction and punishment for both crimes; to construe this section otherwise would allow defendant to be punished twice for essentially the same offense, violating the constitutional prohibition against double jeopardy. *State v. Irwin*, 304 N.C. 93, 282 S.E.2d 439 (1981).

**Elements of Kidnapping and Felony, etc. —**

Asportation of the victim is not an inherent or inevitable feature of an assault; therefore, removal of a victim from the front porch of her home to a more secluded wooded area clearly facilitated the commission of the felony of assault, and thus a separate charge for kidnapping was proper. *State v. Coffey*, 54 N.C. App. 78, 282 S.E.2d 492 (1981).

**Felonious Intent May Be Inferred.** — When an indictment alleges an intent to commit a particular felony, the State must prove the particular felonious intent alleged. Intent, or the absence of it, may be inferred from the circumstances surrounding the event and must be determined by the jury. *State v. White*, 307 N.C. 42, 296 S.E.2d 267 (1982).

**Asportation Insufficient to Support Separate Offense.** — Forced removal of clerk



to prescription counter of drug store during attempted armed robbery with intent to steal drugs was a mere technical asportation and insufficient to support conviction of separate offense of kidnapping. *State v. Irwin*, 304 N.C. 93, 282 S.E.2d 439 (1981).

### III. PRACTICE AND PROCEDURE.

#### B. Indictment.

**Evidence of More Than One Purpose Where Indictment Charges Only One.** — So long as the evidence proves the purpose charged in the indictment, the fact that it also shows the kidnapping was effectuated for another purpose enumerated in subsection (a) of this section is immaterial and may be disregarded. *State v. Hall*, 305 N.C. 77, 286 S.E.2d 552 (1982).

Where the indictment for a crime alleges a theory of the crime, the State is held to proof of that theory and the jury is only allowed to convict on that theory. Therefore, where the indictment charged that defendant kidnapped one victim for the purpose (1) of committing armed robbery and assault on him, and (2) to facilitate his flight after committing the felonies of armed robbery and murder in his crimes against another victim and in charging the jury the trial judge did not specify either purpose expressed in the indictment, there was error in the vagueness of the judge's charge because the jury could have convicted the defendant of kidnapping the first victim to facilitate his flight after the armed robbery, a charge not named in the indictment. *State v. Taylor*, 304 N.C. 249, 283 S.E.2d 761 (1981).

#### C. Burden of Proof.

**Only One Purpose Need Be Proved.** — Indictments under the kidnapping statute may allege one or several of the purposes set forth in

subsection (a), but the State need prove only one purpose in order to sustain its burden of proof as to that element of the crime. *State v. Sellars*, 52 N.C. App. 380, 278 S.E.2d 907, appeal dismissed and cert. denied, 304 N.C. 200, 285 S.E.2d 108 (1981).

#### D. Evidence.

**Victim's Credibility May Be Impeached by Evidence of Prostitution.** — Evidence of acts of prostitution allegedly committed by the prosecuting witness is clearly relevant to impeach her credibility as to a kidnapping charge. The fact that the evidence of prostitution is inadmissible as to a rape charge would not prevent its admission for purposes of impeaching the prosecuting witness' credibility as to the kidnapping charge. The general rule is that the incompetency of evidence for one purpose will not prevent its admission for other purposes. *State v. Wilhite*, 58 N.C. App. 654, 294 S.E.2d 396, cert. denied & appeal dismissed, 307 N.C. 129, 297 S.E.2d 403 (1982).

#### E. Instructions to Jury.

**Refusal to Instruct on Unproved Purposes.** — When a trial judge determines that the State has failed to prove one or more of the purposes of kidnapping alleged in the indictment, he may properly refuse to instruct on that purpose or those purposes. *State v. Sellars*, 52 N.C. App. 380, 278 S.E.2d 907, appeal dismissed and cert. denied, 304 N.C. 200, 285 S.E.2d 108 (1981).

#### F. Sentencing.

##### Determination Made by Judge. —

In accord with 3rd paragraph in original. See *State v. Boone*, 302 N.C. 561, 276 S.E.2d 354 (1981).

## § 14-43.2. Involuntary servitude.

(a) As used in this section, "involuntary servitude" means the unlawful holding of a person against his will:

- (1) For the performance of labor, whether or not for compensation, or whether or not for the satisfaction of a debt, and
- (2) By coercion or intimidation using violence or the threat of violence, or by any other means of coercion or intimidation.

(b) It is unlawful to knowingly and willfully:

- (1) Hold another in involuntary servitude, or
- (2) Entice, persuade or induce another to go to another place with the intent that the other be held in involuntary servitude.

A person violating this subsection shall be guilty of a Class I felony.

(c) Nothing in this section shall be construed to affect the laws governing the relationship between an unemancipated minor and his parents or legal guardian.

(d) If any person reports a violation of subsection (b) of this section, which violation arises out of any contract for labor, to any party to the contract, the party shall immediately report the violation to the sheriff of the county in



which the violation is alleged to have occurred, for appropriate action. A person violating this subsection shall be guilty of a misdemeanor and upon conviction shall be fined or imprisoned, or both, in the discretion of the court. (1983, ch. 746, s. 1.)

**Editor's Note.** — Session Laws 1983, c. 746, s. 3, makes this section effective Oct. 1, 1983.

## ARTICLE 11.

### *Abortion and Kindred Offenses.*

#### § 14-45.1. When abortion not unlawful.

**Abortion Cannot Be Performed, etc.** —  
The correct citation to the opinion of the

Attorney General cited under this catchline in the bound volume is 48 N.C.A.G. 136.

## SUBCHAPTER IV. OFFENSES AGAINST THE HABITATION AND OTHER BUILDINGS.

## ARTICLE 14.

### *Burglary and Other Housebreakings.*

#### § 14-51. First and second degree burglary.

### CASE NOTES

#### I. GENERAL CONSIDERATION.

**Forcible trespass and trespass are not lesser included offenses of attempted first-degree burglary.** Attempted first-degree burglary does not require a commandment forbidding entry for an order to leave as does trespass under § 14-134. It also does not require that the defendant enter the lands of another by force, threats of force or a show of strength by a multitude of people, as does forcible trespass under § 14-126. *State v. McAlister*, 59 N.C. App. 58, 295 S.E.2d 501 (1982), cert. denied, 307 N.C. 471, 299 S.E.2d 226 (1983).

**Stated** in *State v. Wright*, 304 N.C. 349, 283 S.E.2d 502 (1981).

**Cited** in *State v. Andrews*, 52 N.C. App. 26, 277 S.E.2d 857 (1981); *State v. Jordan*, 305 N.C. 274, 287 S.E.2d 827 (1982); *State v. Andrews*, 306 N.C. 144, 291 S.E.2d 581 (1982); *State v. Schneider*, 306 N.C. 351, 293 S.E.2d 157 (1982).

#### II. ELEMENTS OF OFFENSE.

##### A. In General.

##### **Intent.** —

In accord with 4th paragraph in original. See

*State v. Thomas*, 52 N.C. App. 186, 278 S.E.2d 535 (1981), cert. denied, 305 N.C. 591, 292 S.E.2d 16, cert. withdrawn as improvidently granted, 305 N.C. 654, 290 S.E.2d 613 (1982).

First-degree burglary and second-degree burglary under this section and felonious breaking and entering under subsection (a) of § 14-54 require, for conviction, proof of intent to commit a felony. *State v. Freeman*, 307 N.C. 445, 298 S.E.2d 376 (1983).

The offense of burglary is the breaking and entering with the requisite intent. It is complete when the building is entered or it does not occur. A breaking and an entry without the intent to commit a felony in the building is not converted into burglary by the subsequent commission therein of a felony subsequently conceived. *State v. Freeman*, 307 N.C. 445, 298 S.E.2d 376 (1983).

**Storage room built at the back of a house behind a bedroom was "appurtenant" to the main dwelling** and a robbery therefrom would constitute first-degree burglary. *State v. Green*, 305 N.C. 463, 290 S.E.2d 625 (1982).

##### B. First Degree.

##### **Burglary in the first degree, etc.** —

In accord with 3rd paragraph in original. See



State v. Rinck, 303 N.C. 551, 280 S.E.2d 912 (1981).

In accord with 5th paragraph in original. See State v. Simpson, 303 N.C. 439, 279 S.E.2d 542 (1981); State v. Meadows, 306 N.C. 683, 295 S.E.2d 394 (1982).

**Concealed Officers as Persons in Actual Occupation.** — Police officers concealed in a dwelling house with the knowledge and consent

of the absent owner are persons in actual occupation within the meaning of this section; breaking and entering such a dwelling house would thus constitute burglary in the first degree. State v. Thomas, 52 N.C. App. 186, 278 S.E.2d 535 (1981), cert. denied, 305 N.C. 591, 292 S.E.2d 16, cert. withdrawn as unprovidently granted, 305 N.C. 654, 290 S.E.2d 613 (1982).

## § 14-52. Punishment for burglary.

### Legal Periodicals. —

For comment on capital punishment in North Carolina, see 59 N.C.L. Rev. 911 (1981).

## § 14-54. Breaking or entering buildings generally.

### Legal Periodicals. —

For survey of 1980 criminal law, see 59 N.C.L. Rev. 1123 (1981).

### CASE NOTES

#### I. GENERAL CONSIDERATION.

**Applied** in State v. Thomas, 52 N.C. App. 186, 278 S.E.2d 535 (1981); State v. Chambers, 52 N.C. App. 713, 280 S.E.2d 175 (1981); State v. Quilliams, 55 N.C. App. 349, 285 S.E.2d 617 (1982); State v. Dawkins, 305 N.C. 289, 287 S.E.2d 885 (1982); State v. Massey, 59 N.C. App. 704, 298 S.E.2d 63 (1982).

**Stated** in State v. Wright, 304 N.C. 349, 283 S.E.2d 502 (1981); State v. Jorgenson, 51 N.C. App. 425, 276 S.E.2d 707 (1981).

**Cited** in State v. Daniels, 51 N.C. App. 294, 276 S.E.2d 738 (1981); State v. Douglas, 304 N.C. 713, 285 S.E.2d 802 (1982); State v. Perry, 305 N.C. 225, 287 S.E.2d 810 (1982); State v. Rush, 56 N.C. App. 787, 290 S.E.2d 383 (1982); State v. Locklear, — N.C. App. —, 298 S.E.2d 766 (1983).

#### II. ELEMENTS OF THE OFFENSE.

##### A. In General.

##### What Constitutes Offense Generally. —

Misdemeanor, breaking and entering, subsection (b), requires only proof of the wrongful breaking or entry into any building. State v. Freeman, 307 N.C. 445, 298 S.E.2d 376 (1983); State v. Rushing, — N.C. App. —, 300 S.E.2d 445 (1983).

Items listed in this section denote qualities of permanence and immobility, while those listed in § 14-56 are characterized

by a high degree of mobility. State v. Douglas, 54 N.C. App. 85, 282 S.E.2d 832 (1981), aff'd, 304 N.C. 713, 285 S.E.2d 802 (1982); State v. Bost, 55 N.C. App. 612, 286 S.E.2d 632, cert. denied, 305 N.C. 588, 292 S.E.2d 572 (1982).

**What Constitutes "Building" — Mobile Home.** — An unoccupied mobile home not affixed to the premises and intended for retail sale is a "building" within the meaning of this section. State v. Douglas, 51 N.C. App. 594, 277 S.E.2d 467 (1981), aff'd, 304 N.C. 713, 285 S.E.2d 802 (1982).

An unoccupied mobile home located on a dealer's lot is a "building" within the meaning of this section. State v. Douglas, 54 N.C. App. 85, 282 S.E.2d 832 (1981), aff'd, 304 N.C. 713, 285 S.E.2d 802 (1982).

A mobile home, as used in the sense of a residence, distinctly differs in terms of mobility from a "trailer" which is used to haul goods and personal property from place to place or for camping or vacation purposes, as the chief quality of the latter is its mobility, while the former is normally anchored to a foundation and left stationary; thus, a mobile home is a "building" within the meaning of this section and is not covered by § 14-56. State v. Douglas, 54 N.C. App. 85, 282 S.E.2d 832 (1981), aff'd, 304 N.C. 713, 285 S.E.2d 802 (1982).

The mere fact of a mobile home's capability of being transported from place to place on wheels attached to its frame should not remove it from



the ambit of this section. *State v. Douglas*, 51 N.C. App. 594, 277 S.E.2d 467 (1981), *aff'd*, 304 N.C. 713, 285 S.E.2d 802 (1982).

**Same — "Trailers" and Other Items Named in § 14-56.** — Whether "trailers," "railroad cars" or other items specifically named in § 14-56 qualify as "buildings" under this section depends upon the circumstances in each case; they may qualify as "buildings" if under the circumstances of their use and location at the time in question they have lost their character of mobility and have attained a character of permanence. *State v. Bost*, 55 N.C. App. 612, 286 S.E.2d 632, *cert. denied*, 305 N.C. 588, 292 S.E.2d 572 (1982).

**Same — Fenced-In Area.** — The word "building" in this section is restricted to that which has, or is intended to have, one or more walls and a roof, thus, as any structure must be *ejusdem generis* with this definition, a fenced-in area is not contemplated by this section. *State v. Gamble*, 56 N.C. App. 55, 286 S.E.2d 804 (1982).

**Completion of Intended Felony, etc.** —

In accord with 2nd paragraph in original. See *State v. Costigan*, 51 N.C. App. 442, 276 S.E.2d 467 (1981).

The crime of larceny has an element not present in the crime of felonious breaking or entering, to wit, a wrongful taking and carrying away of the personal property of another. As a result it was not inconsistent for the jury to determine that the defendant entered a mobile home with the intent to commit larceny yet find that no larceny was in fact committed. *State v. Brown*, — N.C. —, 301 S.E.2d 89 (1983).

**Occupancy is not an element of this section and § 14-72.** *State v. Young*, — N.C. App. —, 299 S.E.2d 834 (1983).

**Ownership of Property Is Immaterial.** —

In the prosecution for feloniously breaking and entering it was incumbent upon the State to establish, at the time the defendant broke and entered, that he intended to steal something. However, it was not incumbent upon the State to establish ownership of the property which he intended to steal, the particular ownership being immaterial. *State v. Young*, — N.C. App. —, 299 S.E.2d 834 (1983).

**Consent.** — While the statute does not make absence of consent an element of the offense, an entry with consent of the owner of a building, or anyone empowered to give effective consent to entry, cannot be the basis of a conviction for felonious entry. *State v. Thompson*, 59 N.C. App. 425, 297 S.E.2d 177 (1982), *cert. denied & appeal dismissed*, — N.C. —, 299 S.E.2d 650 (1983).

## B. Intent.

**Intent Must Be Shown to Establish, etc.** —

In accord with 6th paragraph in original. See

*State v. Costigan*, 51 N.C. App. 442, 276 S.E.2d 467 (1981).

First-degree burglary and second-degree burglary under § 14-51 and felonious breaking and entering under subsection (a) of this section require, for conviction, proof of intent to commit a felony. *State v. Freeman*, 307 N.C. 445, 298 S.E.2d 376 (1983).

The offense of burglary is the breaking and entering with the requisite intent. It is complete when the building is entered or it does not occur. A breaking and an entry without the intent to commit a felony in the building is not converted into burglary by the subsequent commission therein of a felony subsequently conceived. *State v. Freeman*, 307 N.C. 445, 298 S.E.2d 376 (1983).

**For discussion of sufficiency of evidence to justify an inference of intent to rape**, see *State v. Rushing*, — N.C. App. —, 300 S.E.2d 445 (1983).

**Intent May Be Inferred from Circumstances.** — Without other explanation for breaking into building or a showing of the owner's consent, intent may be inferred from the circumstances. *State v. Myrick*, 306 N.C. 110, 291 S.E.2d 577 (1982).

## C. Unlawful Breaking or Entering.

**But Both Breaking and Entering, etc.** —

By the disjunctive language of this section, the State meets its burden by offering substantial evidence that defendant either "broke" or "entered" the building with the requisite unlawful intent. The State need not show both a breaking and an entering. *State v. Myrick*, 306 N.C. 110, 291 S.E.2d 577 (1982).

**Any Act of Force, However Slight, Constitutes Breaking.** — A breaking in the law of burglary constitutes any act of force, however slight, employed to effect an entrance through any usual or unusual place of ingress, whether open, partly open, or closed. *State v. Myrick*, 306 N.C. 110, 291 S.E.2d 577 (1982).

**Dislocation of a door of a grill from its locked position** was a sufficient breaking even if defendant did not otherwise enter the building. *State v. Myrick*, 306 N.C. 110, 291 S.E.2d 577 (1982).

**Proof.** —

In accord with 1st paragraph in original. See *State v. Costigan*, 51 N.C. App. 442, 276 S.E.2d 467 (1981).

The jury may infer the requisite specific intent to commit larceny at the time of the breaking or entering from the acts and conduct of defendant and the general circumstances existing at the time of the alleged commission of the offense charged. *State v. Costigan*, 51 N.C. App. 442, 276 S.E.2d 467 (1981).



## IV. TRIAL.

## D. Instructions to Jury.

**Editor's Note.** — Annotations under this heading are found in the 1981 Replacement Volume beginning on p. 699.

**Proper Instruction — Instruction Allowing Conviction, etc.** —

In accord with 1st paragraph in original. See *State v. Sellars*, 52 N.C. App. 380, 278 S.E.2d 907, appeal dismissed and cert. denied, 304 N.C. 200, 285 S.E.2d 108 (1981).

## E. Verdict.

**Editor's Note.** — Annotations under this

heading are found in the 1981 Replacement Volume on p. 700.

**Larceny Verdict after Acquittal of Felonious Breaking and Entering.** — Where a defendant is acquitted of felonious breaking or entering, he cannot be convicted of felonious larceny based on the felonious breaking or entering charge, and a jury's verdict of guilty of felonious larceny must be treated as a verdict of guilty of misdemeanor larceny. *State v. Cornell*, 51 N.C. App. 108, 275 S.E.2d 857 (1981).

## § 14-55. Preparation to commit burglary or other housebreakings.

If any person shall be found armed with any dangerous or offensive weapon, with the intent to break or enter a dwelling, or other building whatsoever, and to commit any felony or larceny therein; or shall be found having in his possession, without lawful excuse, any picklock, key, bit, or other implement of housebreaking; or shall be found in any such building, with intent to commit any felony of larceny therein such person shall be punished as a Class H felon. (Code, s. 997; Rev., s. 3334; 1907, c. 822; C.S., s. 4236; 1969, c. 543, s. 4; 1979, c. 760, s. 5.)

**Editor's Note.** — This section is set out above to correct an error in the 1981 Replac-

ment Volume by substituting "Class H felon" for "Class E felon" at the end of the section.

## CASE NOTES

**Applied** in *State v. McAlister*, 59 N.C. App. 58, 295 S.E.2d 501 (1982).

**Cited** in *State v. Andrews*, 306 N.C. 144, 291 S.E.2d 581 (1982).

## § 14-56. Breaking or entering into or breaking out of railroad cars, motor vehicles, trailers, aircraft, boats, or other watercraft.

## CASE NOTES

**Items Listed Characterized by High Degree of Mobility.** — Items listed in § 14-54 denote qualities of permanence and immobility, while those listed in this section are characterized by a high degree of mobility. *State v. Douglas*, 54 N.C. App. 85, 282 S.E.2d 832 (1981).

The chief distinction between the categories of items enumerated in § 14-54 and this section is the property of permanence. The items listed in § 14-54 denote the qualities of permanence and immobility while those listed in this section are characterized by a high degree of mobility. *State v. Bost*, 55 N.C. App. 612, 286 S.E.2d 632,

cert. denied, 305 N.C. 588, 292 S.E.2d 572 (1982).

**When "Trailers," etc., Qualify as Buildings under § 14-54.** — Whether "trailers," "railroad cars" or other items specifically named in this section qualify as "buildings" under § 14-54 depends upon the circumstances in each case; they may qualify as "buildings" if under the circumstances of their use and location at the time in question they have lost their character of mobility and have attained a character of permanence. *State v. Bost*, 55 N.C. App. 612, 286 S.E.2d 632, cert. denied, 305 N.C. 588, 292 S.E.2d 572 (1982).



The term "trailer" and other property specifically named in this section applies to the specifically named property when being primarily used for its intended purpose. *State v. Bost*, 55 N.C. App. 612, 286 S.E.2d 632, cert. denied, 305 N.C. 588, 292 S.E.2d 572 (1982).

**Mobile Home Not Covered by Section.** — A mobile home, as used in the sense of a residence, distinctly differs in terms of mobility from a "trailer" which is used to haul goods and personal property from place to place or for camping or vacation purposes, as the chief quality of the latter is its mobility, while the former is normally anchored to a foundation and left stationary; thus, a mobile home is a building

within the meaning of § 14-54 and is not covered by this section. *State v. Douglas*, 54 N.C. App. 85, 282 S.E.2d 832 (1981).

**Trailer on Construction Site.** — A trailer used for the storage of tools and equipment of a construction company on the construction site during the building of a bridge lost its characteristics of mobility and became a structure used primarily for storage of property so that it attained the status of a building within the meaning of § 14-54. *State v. Bost*, 55 N.C. App. 612, 286 S.E.2d 632, cert. denied, 305 N.C. 588, 292 S.E.2d 572 (1982).

**Quoted in** *State v. Douglas*, 51 N.C. App. 594, 277 S.E.2d 467 (1981).

## ARTICLE 15.

### *Arson and Other Burnings.*

## § 14-58. Punishment for arson.

### **Legal Periodicals.** —

For comment on capital punishment in North Carolina, see 59 N.C.L. Rev. 911 (1981).

## CASE NOTES

### **The common-law definition, etc.** —

In this State, the crime of arson has not been defined by statute, therefore the common-law definition of arson remains in force. *State v. Vickers*, 306 N.C. 90, 291 S.E.2d 599 (1982).

**"Arson" Defined.** — As defined at common law, arson is the willful and malicious burning of the dwelling house of another person. *State v. Vickers*, 306 N.C. 90, 291 S.E.2d 599 (1982).

**"Burning"** — To satisfy the proof of a "burning" it is not necessary that the building be wholly consumed or even materially damaged. It is sufficient if any part, however small, is consumed. A building is burned within the common-law definition of arson when it is charred. *State v. Shaw*, 305 N.C. 327, 289 S.E.2d 325 (1982).

The crime of arson is consummated by the burning of any, the smallest part of the house, and it is burned within the common-law definition of the offense when it is charred, that is, when the wood is reduced to coal and its identity changed, but not merely scorched or discolored by heat. *State v. Oxendine*, 305 N.C. 126, 286 S.E.2d 546 (1982).

Some portion of the dwelling itself, in contrast to its mere contents, must be burned to constitute arson; however, the least burning of any part of the building, no matter how small, is sufficient, and it is not necessary that the building be consumed or materially damaged

by the fire. *State v. Oxendine*, 305 N.C. 126, 286 S.E.2d 546 (1982).

**"Dwelling house"** as contemplated in the definition of arson means an inhabited house. *State v. Vickers*, 306 N.C. 90, 291 S.E.2d 599 (1982).

**Dwelling of "Another"** — The need for protection from willful and malicious burning of a dwelling house is so compelling that the common-law arson requirement that the dwelling burned be that of "another" is satisfied by a showing that some other person or persons, together with the arsonist, were joint occupants of the same dwelling unit. *State v. Shaw*, 305 N.C. 327, 289 S.E.2d 325 (1982).

**Property Must Be Inhabited.** — Since arson is an offense against the security of the habitation and not the property, an essential element of the crime is that the property be inhabited by some person. *State v. Vickers*, 306 N.C. 90, 291 S.E.2d 599 (1982).

**Temporary Absence of Occupants.** — Common-law arson results from the burning of a dwelling even if its occupants are temporarily absent at the time of the burning. *State v. Vickers*, 306 N.C. 90, 291 S.E.2d 599 (1982).

**Burning of Interior Wallpaper Substantiates Charring.** — Wallpaper affixed to an interior wall is unquestionably a part of the dwelling's framework, and where the evidence discloses that the wallpaper in a dwelling has



been burned, it competently substantiates the charring element of arson. *State v. Oxendine*, 305 N.C. 126, 286 S.E.2d 546 (1982).

**Aggravating and Mitigating Factors.** — It is incorrect for the trial judge to find as an aggravating factor the fact that the inhabitants were not at home when the offense was committed. If anything, this should be considered a mitigating factor. *State v. Jones*, 59 N.C. App. 472, 297 S.E.2d 132 (1982).

**Instructions.** —

A trial court is not obligated *ex mero motu* to

make a distinction between a partial burning or slight charring of some portion of the building and a mere scorching or discoloration thereof, not constituting arson, for the jury, where no serious question concerning the nature of the damage caused by the fire is ever raised during trial. *State v. Oxendine*, 305 N.C. 126, 286 S.E.2d 546 (1982).

**Cited in** *State v. Freeman*, 307 N.C. 445, 298 S.E.2d 331 (1983); *State v. Riggs*, — N.C. App. —, 302 S.E.2d 315 (1983).

## § 14-60. Burning of schoolhouses or buildings of educational institutions.

### CASE NOTES

**Cited in** *In re Coleman*, 55 N.C. App. 673, 286 S.E.2d 621 (1982).

## § 14-62. Burning of churches and certain other buildings.

### CASE NOTES

#### I. GENERAL CONSIDERATION.

**Farm Buildings.** — This section is intended to encompass, *inter alia*, all farm buildings that do not fall within the common law definition of arson. *State v. Vickers*, 306 N.C. 90, 291 S.E.2d 599 (1982).

**Applied in** *State v. Brooks*, 58 N.C. App. 407, 293 S.E.2d 653 (1982).

**Cited in** *State v. Oxendine*, 305 N.C. 126, 286 S.E.2d 546 (1982); *State v. Jeffries*, 55 N.C. App. 269, 285 S.E.2d 307 (1982); *State v. Tew*, — N.C. App. —, 302 S.E.2d 633 (1983).

#### II. INDICTMENT.

**Indictment for Burning Tobacco Barn or Storage Building.** — Since a "tobacco house" does not have a generally accepted connotation or definition, an indictment under this section

for burning a tobacco barn or a tobacco storage building is proper; hence, defendant's contention that he should have been charged under § 14-64 was without merit. *State v. Vickers*, 306 N.C. 90, 291 S.E.2d 599 (1982).

#### III. EVIDENCE.

**Unrelated Previous Fires.** — In a prosecution for procuring another to burn a building used for trade, evidence of unrelated previous fires, absent a showing that they had been deliberately set, that they were criminal in nature, and that charges were ever brought or convictions entered against either defendant or defendant's wife for any of the previous burnings was prejudicial and reversible error. *State v. Alley*, 54 N.C. App. 647, 284 S.E.2d 215 (1981).

## § 14-64. Burning of ginhouses and tobacco houses.

### CASE NOTES

**Indictment under § 14-62 for Burning Tobacco Barn.** — Since a "tobacco house" does not have a generally accepted connotation or definition, an indictment under § 14-62 for burning a tobacco barn or a tobacco storage

building is proper; hence, defendant's contention that he should have been charged under this section was without merit. *State v. Vickers*, 306 N.C. 90, 291 S.E.2d 599 (1982).



## § 14-65. Fraudulently setting fire to dwelling houses.

### CASE NOTES

#### **Essential Element of Crime. —**

For a burning of a dwelling to be criminal under this section as a willful and wanton burning, it must be shown to have been done intentionally, without legal excuse or justification, and with the knowledge that the act will endanger the rights or safety of others or with reasonable grounds to believe that the rights or safety of others may be endangered. *State v. Brackett*, 306 N.C. 138, 291 S.E.2d 660 (1982).

**Elements of Proof of Willful and Wanton Burning. —** Where the indictment upon which defendant was tried charged her with wanton and willful burning and not with burning for a fraudulent purpose, in order to prove that defendant's conduct violated this section the State was required to prove (1) that she was the owner or occupier (2) of a dwelling house (3) that she burned or set on fire (4) wantonly and willfully. *State v. Brackett*, 306 N.C. 138, 291 S.E.2d 660 (1982).

**Public Interest Does Not Make Burning Wanton. —** The public's interest in not having

the building destroyed is not the sort of right which would make defendant's conduct in setting fire to his dwelling wanton. *State v. Brackett*, 306 N.C. 138, 291 S.E.2d 660 (1982).

**Nor Does Burning so as to Collect Insurance. —** Intent to set fire to home for the purpose of collecting insurance proceeds worth more than home is not wanton. *State v. Brackett*, 306 N.C. 138, 291 S.E.2d 660 (1982).

**When Evidence of Willfulness and Wantonness Insufficient. —** Viewed in the light most favorable to the State, there was no substantial evidence of willfulness and wantonness where there was no evidence that defendant set fire to her dwelling house with reckless disregard of the rights or safety of others, where her house was located on a large lot and the fire did not endanger other homes, defendant herself reported the fire, and she was alone at her home when the fire started. *State v. Brackett*, 306 N.C. 138, 291 S.E.2d 660 (1982).

## § 14-66. Burning of personal property.

### CASE NOTES

**Intent to Injure or Prejudice May Be Inferred. —** The specific intent to injure or prejudice the owner of the property may be proven by circumstances from which it may be

inferred, such as the nature of the act and the manner in which it was done. *State v. Jordan*, 59 N.C. App. 527, 296 S.E.2d 823 (1982).

## § 14-67. Attempting to burn dwelling houses and certain other buildings.

### CASE NOTES

**Aggravating and Mitigating Factors. —** In defining the degrees of arson, § 14-58 distinguishes first degree from second degree in that the more serious offense occurs when the dwelling is occupied. Thus, the fact that the house was unoccupied when an offense under this section was committed should be considered a mitigating factor. *State v. Jones*, 59 N.C. App. 472, 297 S.E.2d 132 (1982).

It is incorrect for the trial judge to find as an aggravating factor the fact that the inhabitants were not at home when the offense was committed. If anything, this should be considered a mitigating factor. *State v. Jones*, 59 N.C. App. 472, 297 S.E.2d 132 (1982).



## SUBCHAPTER V. OFFENSES AGAINST PROPERTY.

## ARTICLE 16.

*Larceny.*

## § 14-71. Receiving stolen goods.

## CASE NOTES

## I. GENERAL CONSIDERATION.

**The effect of the 1975 amendment** to this section was to alter the standard of proof established in prosecutions thereunder. *State v. Fearing*, 304 N.C. 471, 284 S.E.2d 487 (1981).

**Accepting part of the proceeds of a crime** does not make one an accessory after the fact; rather, it constitutes the crime of receiving stolen goods. *State v. Lewis*, 58 N.C. App. 348, 293 S.E.2d 638 (1982).

**Possessing stolen property in violation of § 14-71.1 is not a lesser included offense** of receiving stolen property in violation of this section. *State v. Davis*, 302 N.C. 370, 275 S.E.2d 491 (1981).

The unlawful receipt of stolen property is a single, specific act occurring at a specific time; possession, however, is a continuing offense beginning at the time of receipt and continuing until divestment; therefore, the legislature intended possession and receiving of stolen goods to be distinct, separate crimes of equal degree rather than the former to be a lesser included offense of the latter. *State v. Davis*, 302 N.C. 370, 275 S.E.2d 491 (1981); *State v. Andrews*, 52 N.C. App. 26, 277 S.E.2d 857 (1981), *aff'd*, 306 N.C. 144, 291 S.E.2d 581 (1982).

**But a defendant may not be convicted and punished for both receiving and possession** of the same stolen property. *State v. Perry*, 305 N.C. 225, 287 S.E.2d 810 (1982).

While receiving and possession are distinct and separate crimes for which the legislature could have provided punishment for the same individual, this was not intended by the enactment of the possession statutes. *State v. Perry*, 305 N.C. 225, 287 S.E.2d 810 (1982).

Although a defendant may be indicted and tried on charges of larceny, receiving, and possession of the same property, he may be convicted of only one of those offenses. *State v. Perry*, 305 N.C. 225, 287 S.E.2d 810 (1982).

**Upon Recovery by Owner, Character as**

**Stolen Property Lost.** — When the actual, physical possession of stolen property has been recovered by the owner or his agent, its character as stolen property is lost and the subsequent delivery of the property by the owner or agent to a particeps criminis, for the purpose of entrapping him as the receiver of stolen goods, does not establish the crime, for in a legal sense he does not receive stolen property. *State v. Hageman*, 307 N.C. 1, 296 S.E.2d 433 (1982).

**Applied in** *State v. Leggett*, — N.C. App. —, 300 S.E.2d 823 (1983).

## II. ELEMENTS OF THE OFFENSE.

**Elements of attempted receipt of stolen property** are: (1) guilty knowledge at the time that the property had been stolen; and (2) the commission of some overt act with the intent to commit the major offense; and (3) a reasonable belief, at the time the property was received, that the property was stolen. *State v. Hageman*, 307 N.C. 1, 296 S.E.2d 433 (1982).

**Predisposition is not an element included in the definition of attempted receipt of stolen property.** Rather, it relates to defendant's propensity in general to attempt to receive stolen property. The State was required to prove that defendant received the property with a dishonest purpose, to wit, the intent to deprive the true owner of her property. While evidence of this intent may tend to show defendant's predisposition, such evidence does not make predisposition an element of the crime. *State v. Hageman*, 307 N.C. 1, 296 S.E.2d 433 (1982).

**Nor Are Secrecy, Malice, Deceit, or Intent to Defraud.** — Attempting to receive stolen property is a crime of the same degree as attempted robbery, attempted burglary and an attempt to commit a crime against nature. The crime of attempted receipt of stolen property includes secrecy, malice, deceit or intent to defraud as necessary elements. *State v. Hageman*, 307 N.C. 1, 296 S.E.2d 433 (1982).



## § 14-71.1. Possessing stolen goods.

**Legal Periodicals.** — For survey of 1981 law on criminal procedure, see 60 N.C.L. Rev. 1302 (1982).

### CASE NOTES

#### **Purpose.** —

In accord with original. See *State v. Perry*, 305 N.C. 225, 287 S.E.2d 810 (1982).

**Legislative Intent.** — The legislature's intent was to provide for the State a position to which to recede when it cannot establish the elements of breaking and entering or larceny but can effect proof of possession of the stolen goods. *State v. Perry*, 305 N.C. 225, 287 S.E.2d 810 (1982).

The legislative purpose set forth with regard to this section is to provide protection for society in those incidents where the State does not have sufficient evidence to prove who committed the larceny, or the elements of receiving. *State v. Perry*, 52 N.C. App. 48, 278 S.E.2d 273 (1981), modified and aff'd, 305 N.C. 225, 287 S.E.2d 810 (1982).

This section is useful where the State has no evidence as to who committed the larceny and has, by the passage of time, lost the probative benefit of the doctrine of possession of recently stolen property. *State v. Perry*, 52 N.C. App. 48, 278 S.E.2d 273 (1981), modified and aff'd, 305 N.C. 225, 287 S.E.2d 810 (1982).

The possession statutes were enacted to plug a loophole in the law as it then existed when one was found in possession of stolen goods and the State was unable to prove either the larceny or receiving. *State v. Perry*, 305 N.C. 225, 287 S.E.2d 810 (1982).

**Possession is a sort of secondary crime** based upon a prior commission of the primary crime of larceny. *State v. Perry*, 305 N.C. 225, 287 S.E.2d 810 (1982).

**Elements of Felonious Possession of Stolen Property.** — The essential elements of feloniously possessing stolen property are (1) possession of personal property, (2) valued at more than \$400.00, (3) which has been stolen, (4) the possessor knowing or having reasonable grounds to believe the property to have been stolen, and (5) the possessor acting with a dishonest purpose. *State v. Davis*, 302 N.C. 370, 275 S.E.2d 491 (1981).

The essential elements of possession of stolen property are: (1) possession of personal property; (2) which has been stolen; (3) the possessor knowing or having reasonable grounds to believe the property to have been stolen; and (4) the possessor acting with a dishonest purpose. *State v. Perry*, 305 N.C. 225, 287 S.E.2d 810 (1982).

**Larceny and possession of property stolen in the larceny are separate crimes.** *State v. Perry*, 305 N.C. 225, 287 S.E.2d 810 (1982).

**And Legislature May Constitutionally Punish a Defendant for Both.** — Nothing in the United States Constitution or in the Constitution of North Carolina prohibits the legislature from punishing a defendant for both larceny and possession of property stolen in the larceny. *State v. Perry*, 305 N.C. 225, 287 S.E.2d 810 (1982).

Nothing in the United States Constitution or in the Constitution of North Carolina prohibits the Legislature from punishing a defendant for both offenses of larceny and possession, since each crime requires proof of an additional fact which the other does not. *State v. Andrews*, 306 N.C. 144, 291 S.E.2d 581 (1982).

**But Legislature Did Not Intend to Punish for Both.** — The legislature did not intend to punish an individual for larceny of property and the possession of the same property which he stole. *State v. Perry*, 305 N.C. 225, 287 S.E.2d 810 (1982); *State v. Andrews*, 306 N.C. 144, 291 S.E.2d 581 (1982).

**Similarly, Receiving and Possession of Same Stolen Property Separate Crimes.** — The unlawful receipt of stolen property is a single, specific act occurring at a specific time; possession, however, is a continuing offense beginning at the time of receipt and continuing until divestment; therefore, the legislature intended possession and receiving of stolen goods to be distinct, separate crimes of equal degree rather than the former to be a lesser included offense of the latter. *State v. Davis*, 302 N.C. 370, 275 S.E.2d 491 (1981); *State v. Andrews*, 52 N.C. App. 26, 277 S.E.2d 857 (1981), aff'd, 306 N.C. 144, 291 S.E.2d 581 (1982).

Possessing stolen property in violation of this section is not a lesser included offense of receiving stolen property in violation of § 14-71. *State v. Davis*, 302 N.C. 370, 275 S.E.2d 491 (1981).

**And Legislature Did Not Intend Punishment for Both.** — While receiving and possession are distinct and separate crimes for which the legislature could have provided punishment for the same individual, this was not intended by the enactment of the possession statutes. *State v. Perry*, 305 N.C. 225, 287 S.E.2d 810 (1982).



**Thus, Conviction May Be of Only One of Offenses of Larceny, Receipt, or Possession.** — Although a defendant may be indicted and tried on charges of larceny, receiving, and possession of the same property, he may be convicted of only one of those offenses. *State v. Perry*, 305 N.C. 225, 287 S.E.2d 810 (1982); *State v. Andrews*, 306 N.C. 144, 291 S.E.2d 581 (1982).

A defendant may not be convicted and pun-

ished for both receiving and possession of the same stolen property. *State v. Perry*, 305 N.C. 225, 287 S.E.2d 810 (1982).

**Applied** in *State v. Harper*, 51 N.C. App. 493, 277 S.E.2d 72 (1981); *State v. Bizzell*, 53 N.C. App. 450, 281 S.E.2d 57 (1981).

**Cited** in *State v. Andrews*, 56 N.C. App. 91, 286 S.E.2d 850 (1982); *State v. Haskins*, 60 N.C. App. 199, 298 S.E.2d 188 (1982); *State v. Malloy*, — N.C. App. —, 298 S.E.2d 735 (1983).

## § 14-72. Larceny of property; receiving stolen goods or possessing stolen goods not exceeding \$400.00 in value.

### Legal Periodicals. —

For survey of 1981 law on criminal procedure, see 60 N.C.L. Rev. 1302 (1982).

## CASE NOTES

### I. GENERAL CONSIDERATION.

**Larceny and possession of the property stolen in the larceny** are separate and distinct offenses. *State v. Perry*, 305 N.C. 225, 287 S.E.2d 810 (1982).

**And therefore double jeopardy considerations do not prohibit punishment of the same person for both offenses.** *State v. Perry*, 305 N.C. 225, 287 S.E.2d 810 (1982).

**Punishment for Both Larceny and Possession Is Constitutional.** — Nothing in the United States Constitution or in the Constitution of North Carolina prohibits the Legislature from punishing a defendant for both offenses of larceny and possession, since each crime requires proof of an additional fact which the other does not. *State v. Andrews*, 306 N.C. 144, 291 S.E.2d 581 (1982).

**But Legislature Did Not Intend Punishment for Both Larceny and Possession.** — The legislature did not intend to punish an individual for larceny of property and the possession of the same property which he stole. *State v. Perry*, 305 N.C. 225, 287 S.E.2d 810 (1982); *State v. Andrews*, 306 N.C. 144, 291 S.E.2d 581 (1982).

Although it could have done so, the legislature, by creation of the statutory offense of possession of stolen property, did not intend to punish an individual for both larceny and possession. *State v. Perry*, 305 N.C. 225, 287 S.E.2d 810 (1982).

**And Conviction May Be of Only One of Offenses of Larceny, Receiving, or Possession.** — Although a defendant may be indicted and tried on charges of larceny, receiving, and possession of the same property, he may be convicted of only one of those of-

fenses. *State v. Perry*, 305 N.C. 225, 287 S.E.2d 810 (1982); *State v. Andrews*, 306 N.C. 144, 291 S.E.2d 581 (1982).

**Armed robbery and larceny are separate crimes.** *State v. Beaty*, 306 N.C. 491, 293 S.E.2d 760 (1982).

**Two Counts of Armed Robbery May Not Be Based on Single Assault.** — A person may not be convicted of two counts of armed robbery where, in addition to the theft of an employer's money or property, the robber takes money or property belonging to an employee, as in such a case there is only a single assault; however, such defendant could be convicted of one count of armed robbery and one count of larceny, if so charged. *State v. Beaty*, 306 N.C. 491, 293 S.E.2d 760 (1982).

**Larceny from the person is a lesser included offense of common-law robbery**, which differs from common-law robbery in that it lacks the essential element that the victim be put in fear. *State v. Henry*, 57 N.C. App. 168, 290 S.E.2d 775, cert. denied, 306 N.C. 561, 294 S.E.2d 226 (1982).

**Misdemeanor larceny is a lesser included offense of felony larceny**, which lacks the essential elements of larceny that the property have a value of over \$400.00, or that the larceny was from the person. *State v. Henry*, 57 N.C. App. 168, 290 S.E.2d 775, cert. denied, 306 N.C. 561, 294 S.E.2d 226 (1982).

**Larceny Not Lesser Included Offense of Larceny by Employee.** —

In accord with original. See *State v. Brown*, 56 N.C. App. 228, 287 S.E.2d 421 (1982).

**Unauthorized Use of Conveyance, etc.** —

Unauthorized use of a motor vehicle in violation of § 14-72.2 is considered a lesser included



offense of larceny, under this section, where there is evidence to support the charge. *State v. McRae*, 58 N.C. App. 225, 292 S.E.2d 778 (1982).

**Defense of Abandonment.** — Property which has been abandoned by the owner cannot be the subject of larceny. *State v. Hall*, 57 N.C. App. 544, 291 S.E.2d 873, cert. denied, 305 N.C. 761, 293 S.E.2d 593 (1982).

Party relying on defense of abandonment must affirmatively show by clear, unequivocal and decisive evidence the intent of the owner to permanently terminate his ownership of the disputed property. *State v. Hall*, 57 N.C. App. 544, 291 S.E.2d 873, cert. denied, 305 N.C. 761, 293 S.E.2d 593 (1982).

**Entrapment Aspects of "Sting" Operations.** — See *State v. Luster*, 306 N.C. 566, 295 S.E.2d 421 (1982).

**Applied in** *State v. Lowe*, — N.C. App. —, 299 S.E.2d 466 (1983).

**Quoted in** *State v. Harper*, 51 N.C. App. 493, 277 S.E.2d 72 (1981).

**Stated in** *State v. Jorgenson*, 51 N.C. App. 425, 276 S.E.2d 707 (1981); *State v. Thomas*, 52 N.C. App. 186, 278 S.E.2d 535 (1981).

**Cited in** *State v. Cornell*, 51 N.C. App. 108, 275 S.E.2d 857 (1981); *State v. Daniels*, 51 N.C. App. 294, 276 S.E.2d 738 (1981); *State v. Coward*, 54 N.C. App. 488, 283 S.E.2d 536 (1981); *State v. Young*, 305 N.C. 391, 289 S.E.2d 374 (1982); *State v. Locklear*, — N.C. App. —, 298 S.E.2d 766 (1983).

## II. ELEMENTS OF OFFENSES.

### What Constitutes Larceny. —

To establish the offense of larceny, the State must show that defendant took and carried away the goods of another with the intent to deprive the owner thereof permanently. *State v. Perry*, 52 N.C. App. 48, 278 S.E.2d 273 (1981), modified and aff'd, 305 N.C. 225, 287 S.E.2d 810 (1982); *State v. Thompson*, 59 N.C. App. 425, 297 S.E.2d 177 (1982), cert. denied & appeal dismissed, — N.C. —, 299 S.E.2d 650 (1983).

The essential elements of larceny are that the defendant: (1) took the property of another; (2) carried it away; (3) without the owner's consent; and (4) with the intent to deprive the owner of his property permanently. *State v. Perry*, 305 N.C. 225, 287 S.E.2d 810 (1982); *State v. Beaty*, 306 N.C. 491, 293 S.E.2d 760 (1982).

To convict a defendant of larceny, it must be shown that he (1) took the property of another; (2) carried it away; (3) without the owner's consent; and (4) with the intent to deprive the owner of the property permanently. *State v. Reeves*, — N.C. App. —, 302 S.E.2d 658 (1983).

The crime of larceny has an element not present in the crime of feloniously breaking or entering, to wit, a wrongful taking and carrying

away of the personal property of another. As a result it was not inconsistent for the jury to determine that the defendant entered a mobile home with the intent to commit larceny yet find that no larceny was in fact committed. *State v. Brown*, — N.C. —, 301 S.E.2d 89 (1983).

### Same — Title to Property Taken. —

In the prosecution for feloniously breaking and entering it was incumbent upon the State to establish, at the time the defendant broke and entered, that he intended to steal something. However, it was not incumbent upon the State to establish ownership of the property which he intended to steal, the particular ownership being immaterial. *State v. Young*, — N.C. App. —, 299 S.E.2d 834 (1983).

**Occupancy is not an element of § 14-54 and this section.** *State v. Young*, — N.C. App. —, 299 S.E.2d 834 (1983).

**Elements of Armed Robbery and Larceny Distinguished.** — For proof of armed robbery it is necessary to show the use or threatened use of a weapon but unnecessary to show asportation, while for proof of larceny it is necessary to show asportation but unnecessary to show the use or threatened use of a weapon; each crime requires proof of an additional fact which the other does not. *State v. Beaty*, 306 N.C. 491, 293 S.E.2d 760 (1982).

**Felonious Intent Essential to Robbery and Larceny.** — In robbery, as in larceny, the taking of the property must be with the felonious intent permanently to deprive the owner of his property. *State v. Jones*, 57 N.C. App. 460, 291 S.E.2d 869 (1982).

### Receiving Stolen Property. —

The essential elements of feloniously receiving stolen property are (1) receiving or aiding in the concealment of personal property, (2) valued at more than \$400.00, (3) which has been stolen, (4) by someone else, (5) the receiver knowing or having reasonable grounds to believe the property to have been stolen, and (6) the receiver acting with a dishonest purpose. *State v. Davis*, 302 N.C. 370, 275 S.E.2d 491 (1981).

**Property Must Belong to Another.** — An essential element of larceny is that the property taken must belong to another person. *State v. Bost*, 55 N.C. App. 612, 286 S.E.2d 632, cert. denied, 305 N.C. 588, 292 S.E.2d 572 (1982).

**Obtaining Title Through Fraud.** — When, in addition to possession, the owner voluntarily passes title as well to the alleged thief, not expecting the property to be returned to him or to be disposed of in accordance with his directions, trespass is involved and the taker is not guilty of larceny, even where the owner is induced to part with the title through the fraud and misrepresentation of the alleged thief. Although the acts of the perpetrator of the fraud may be criminal in such a case, they constitute some other crime than common-law



larceny. *State v. Robertson*, 55 N.C. App. 659, 286 S.E.2d 612 (1982).

#### **Possession of Stolen Goods. —**

The essential elements of feloniously possessing stolen property are (1) possession of personal property, (2) valued at more than \$400.00, (3) which has been stolen, (4) the possessor knowing or having reasonable grounds to believe the property to have been stolen, and (5) the possessor acting with a dishonest purpose. *State v. Davis*, 302 N.C. 370, 275 S.E.2d 491 (1981).

The essential elements of possession of stolen property are: (1) possession of personal property; (2) which has been stolen; (3) the possessor knowing or having reasonable grounds to believe the property to have been stolen; and (4) the possessor acting with a dishonest purpose. *State v. Perry*, 305 N.C. 225, 287 S.E.2d 810 (1982).

The elements of taking and carrying away of the property are not essential to the offense of possession of stolen property. *State v. Andrews*, 52 N.C. App. 26, 277 S.E.2d 857 (1981), *aff'd*, 306 N.C. 144, 291 S.E.2d 581 (1982).

### **III. DEGREES OF OFFENSES.**

#### **A. Determined by Value of Property.**

**"Market value" of a stolen item is the criterion used to determine the worth of personal property which was the subject of a larceny.** *State v. Hall*, 57 N.C. App. 544, 291 S.E.2d 873, *cert. denied*, 305 N.C. 762, 293 S.E.2d 593 (1982).

**Fire Insurance Coverage Immaterial to Value after Fire. —** The extent of fire insurance obtained prior to fire was immaterial to the issue of whether personal property stolen after the fire had any value. *State v. Hall*, 57 N.C. App. 544, 291 S.E.2d 873, *cert. denied*, 305 N.C. 762, 293 S.E.2d 593 (1982).

#### **B. Offenses Which Are Felonies Regardless of Value of Property.**

**Larceny of a firearm** is a felony regardless of the value of the weapon stolen and without regard to whether the larceny was accomplished by means of a felonious breaking or entering. *State v. Robinson*, 51 N.C. App. 567, 277 S.E.2d 79 (1981).

**Larceny Following Breaking and Entering by Stranger. —** This section cannot reasonably be interpreted to permit defendant's conviction of felonious larceny merely because he committed the larceny pursuant to or after a breaking or entering by some stranger. *State v. Perry*, 305 N.C. 225, 287 S.E.2d 810 (1982).

It is improper, absent the jury's finding that the property stolen exceeded the diacritical amount set forth in the statute, for the trial judge to accept a verdict of guilty of felonious

larceny where the jury has failed to find the defendant guilty of the felonious breaking or entering pursuant to which the larceny occurred. *State v. Perry*, 305 N.C. 225, 287 S.E.2d 810 (1982).

### **IV. PRACTICE AND PROCEDURE.**

#### **A. Indictment.**

##### **Ownership of Property. —**

In accord with 5th paragraph in original. See *State v. Perkins*, 57 N.C. App. 516, 291 S.E.2d 865 (1982).

It is sufficient if the person alleged in the indictment to be the owner of the property taken has a special property interest, such as that of a bailee or a custodian, or otherwise has possession and control of it. *State v. Bost*, 55 N.C. App. 612, 286 S.E.2d 632, *cert. denied*, 305 N.C. 588, 292 S.E.2d 572 (1982).

A bill of indictment is fatally defective where it fails to charge the defendant with the larceny from a legal entity capable of owning property. *State v. Strange*, 58 N.C. App. 756, 294 S.E.2d 403, *cert. denied & appeal dismissed*, 307 N.C. 128, 297 S.E.2d 403 (1982).

Where indictment did not allege that "Metropolitan YMCA t/d/b/a Hayes-Taylor YMCA Branch" was a corporation or other legal entity capable of owning property, nor did the name indicate that it was a corporation or a natural person, the larceny count in such indictment was fatally defective. *State v. Perkins*, 57 N.C. App. 516, 291 S.E.2d 865 (1982).

**Ownership Need Not Be Laid in Particular Person. —** As long as it can be shown defendant was not taking his own property, ownership need not be laid in a particular person to allege and prove robbery. *State v. Pratt*, 306 N.C. 673, 295 S.E.2d 462 (1982).

##### **Variance — Description of Property. —**

A material element in an indictment charging the offense of larceny is the identification of the "personal property" taken and carried away. Thus, a variance in the indictment and proof at trial in this regard is a material variance; further, such is a fatal variance if it hampers defendant's ability to defend himself on the charge at trial and does not insure that defendant will be protected from another prosecution for the same offense. *State v. Simmons*, 57 N.C. App. 548, 291 S.E.2d 815 (1982).

Where defendant was charged in larceny count of indictment with taking eight heavy duty freezers, serial numbers of which were listed, the personal property of Southern Food Service, Inc., in the custody and possession of Patterson Storage Warehouse Company, Inc., but the officers' inventory of the property seized described a 21 cubic foot freezer of a different serial number, even though there was evidence that the name brand, general appearance, and serial number of the recovered freezer matched



one of those on the company's inventory, absent proof at trial that defendant took any of the freezers identified by the serial numbers in the indictment, there was a fatal variance in the indictment and proof at trial on the larceny count and defendant's motion to dismiss that charge should have been granted. *State v. Simmons*, 57 N.C. App. 548, 291 S.E.2d 815 (1982).

#### B. Evidence.

##### Evidence Insufficient. —

In a prosecution for larceny of an automobile, owner's testimony that if he had been planning to sell the automobile he would not have sold it for less than \$2,000 was incompetent to show value, and where there was no evidence of the value of the stolen automobile, the jury's verdict of guilty of felonious larceny must be treated as a verdict of guilty of misdemeanor larceny. *State v. Rick*, 54 N.C. App. 104, 282 S.E.2d 497 (1981).

#### C. Presumption from Possession of Recently Stolen Property.

##### In General. —

In accord with 7th paragraph in original. See *State v. Joseph*, 59 N.C. App. 436, 297 S.E.2d 173 (1982).

**Constitutionality.** — Application of the doctrine of possession of recently stolen property is not unconstitutional. *State v. McNeill*, 54 N.C. App. 675, 284 S.E.2d 206 (1981).

#### E. Verdict.

**Verdict Where Court Failed to Instruct, etc. —**

Where a defendant is tried for breaking or

entering and felonious larceny and the jury returns a verdict of not guilty of felonious breaking or entering and guilty of felonious larceny, it is improper for the trial judge to accept the verdict of guilty of felonious larceny unless the jury has been instructed as to its duty to fix the value of the property stolen; the jury having to find that the value of the property taken exceeds \$400.00 for the larceny to be felonious. *State v. Perry*, 52 N.C. App. 48, 278 S.E.2d 273 (1981), *aff'd*, 305 N.C. 225, 287 S.E.2d 810 (1982).

If a defendant is found not guilty of breaking or entering and the felonious larceny charge is based upon its having been accomplished by means of a felonious breaking or entering pursuant to subdivision (b)(2) of this section, it is necessary for the judge to submit to the jury the question of the value of the stolen property in order for the jury to return a verdict of guilty of felonious larceny. *State v. Robinson*, 51 N.C. App. 567, 277 S.E.2d 79 (1981).

Where the court in its charge did not instruct the jury to fix the value of the property taken but told them to find defendant guilty of felonious larceny if they were satisfied beyond a reasonable doubt that the property was taken during burglary or after a breaking or entering, and defendant was found not guilty of the burglary and breaking or entering, the jury could not find him guilty of felonious larceny under these circumstances and the court should have treated the jury's verdict as a finding of guilty of misdemeanor larceny. *State v. Hall*, 57 N.C. App. 561, 291 S.E.2d 812 (1982).

## § 14-72.2. Unauthorized use of a motor-propelled conveyance.

### CASE NOTES

#### Lesser Included Offense of Larceny. —

In accord with original. See *State v. Coward*, 54 N.C. App. 488, 283 S.E.2d 536 (1981).

Unauthorized use of a motor vehicle in violation of this section is considered a lesser included offense of larceny, under § 14-72, where there is evidence to support the charge. *State v. McRae*, 58 N.C. App. 225, 292 S.E.2d 778 (1982).

Where all evidence tends to show that defendant intended to permanently deprive victim of her car, it would be improper for the court to instruct on unauthorized use of a conveyance. *State v. McRae*, 58 N.C. App. 225, 292 S.E.2d 778 (1982).

## § 14-72.3. Removal of shopping cart from shopping premises.

(a) As used in this section:

(1) "Shopping cart" means the type of push cart commonly provided by grocery stores, drugstores, and other retail stores for customers to



transport commodities within the store and from the store to their motor vehicles outside the store.

(2) "Premises" includes the motor vehicle parking area set aside for customers of the store.

(b) It is unlawful for any person to remove a shopping cart from the premises of a store without the consent, given at the time of the removal, of the store owner, manager, agent or employee.

(c) Violation of this section is a misdemeanor punishable by a fine of not more than one hundred dollars (\$100.00), imprisonment for not more than thirty days, or both. (1983, c. 705, s. 1.)

**Editor's Note.** — Session Laws 1983, c. 705, s. 2, makes this section effective Oct. 1, 1983.

## § 14-74. Larceny by servants and other employees.

### CASE NOTES

#### **And Must Be Alleged.** —

In accord with original. See *State v. Brown*, 56 N.C. App. 228, 287 S.E.2d 421 (1982).

**Age Not Essential Element.** — The phrase, "Provided, that nothing contained in this section shall extend to . . . servants within the age of 16 years" withdraws a class of defendants from the crime of larceny by an employee, while the language before the phrase completely and definitely defines the offense; hence, age is not

an essential element which the indictment must allege and the State initially prove. *State v. Brown*, 56 N.C. App. 228, 287 S.E.2d 421 (1982).

**Burden of Raising Age Exception.** — To place the burden on defendant to raise the age exception to this section and to prove that he comes within it is not unconstitutional. *State v. Brown*, 56 N.C. App. 228, 287 S.E.2d 421 (1982).

## § 14-84. Animals subject to larceny.

All common-law distinctions among animals with respect to their being subject to larceny are abolished. Any animal that is in a person's possession is the subject of larceny. (1919, c. 116, s. 9; C.S., s. 4263; 1955, c. 804; 1983, c. 35, s. 1.)

**Effect of Amendments.** — The 1983 amendment, effective for offenses committed on or

after Oct. 1, 1983, rewrote this section, which formerly referred to the larceny of dogs.

## § 14-86.1. Seizure and forfeiture of conveyances used in committing larceny and similar crimes.

(a) All conveyances, including vehicles, watercraft or aircraft, used to unlawfully conceal, convey or transport property in violation of G.S. 14-71, 14-71.1, or 20-106, or used by any person in the commission of armed or common-law robbery, or used by any person in the commission of any larceny when the value of the property taken is more than four hundred dollars (\$400.00) shall be subject to forfeiture as provided herein, except that:

(1) No conveyance used by any person as a common carrier in the transaction of the business of the common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in custody or control of such conveyance was a consenting party or privy to a violation that may subject the conveyance to forfeiture under this section;



- (2) No conveyance shall be forfeited under the provisions of this section by reason of any act or omission committed or omitted while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or any state;
  - (3) No conveyance shall be forfeited pursuant to this section unless the violation involved is a felony;
  - (4) A forfeiture of a conveyance encumbered by a bona fide security interest is subject to the interest of the secured party who neither had knowledge of nor consented to the act or omission;
  - (5) No conveyance shall be forfeited under the provisions of this section unless the owner knew or had reason to believe the vehicle was being used in the commission of any violation that may subject the conveyance to forfeiture under this section;
  - (6) The trial judge in the criminal proceeding which may subject the conveyance to forfeiture may order the seized conveyance returned to the owner if he finds forfeiture inappropriate. If the conveyance is not returned to the owner the procedures provided in subsection (e) shall apply.
- (e) All conveyances subject to forfeiture under the provisions of this section shall be forfeited pursuant to the procedures for forfeiture of conveyances used to conceal, convey, or transport intoxicating beverages found in G.S. 18B-504. Provided, nothing in this section or G.S. 18B-504 shall be construed to require a conveyance to be sold when it can be used in the performance of official duties of the law-enforcement agency. (1979, c. 592; 1983, c. 74; c. 768, s. 2.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendments, it is not set out.

**Effect of Amendments.** — The first 1983 amendment, effective Oct. 1, 1983, inserted "or used by any person in the commission of armed

or common-law robbery" in the introductory paragraph of subsection (a).

The second 1983 amendment, effective July 15, 1983, substituted "G.S. 18B-504" for "G.S. 18A-21" in two places in subsection (e).

## ARTICLE 17.

### *Robbery.*

## § 14-87. Robbery with firearms or other dangerous weapons.

### **Legal Periodicals.** —

For article on plea bargaining statutes and practices in North Carolina, see 59 N.C.L. Rev. 477 (1981).

For survey of 1981 criminal law, see 60 N.C.L. Rev. 1289 (1982).

## CASE NOTES

### I. GENERAL CONSIDERATION.

#### A. In General.

#### **The primary purpose, etc.** —

This section seeks retribution by punishing a specific offender, rather than deterrence by creating a new crime of possession of a firearm during a robbery. *State v. Gibbons*, 303 N.C. 484, 279 S.E.2d 574 (1981).

**This section creates no new offense, etc.** —

This section does not create a new crime, it merely increases the punishment which may be imposed from common-law robbery where the perpetrator employs a weapon. *State v. Gibbons*, 303 N.C. 484, 279 S.E.2d 574 (1981).

The focus of this section is not the creation of a new crime for commission of an offense with



a firearm, but the punishment of a specific person who has committed a robbery which endangers a specific victim. *State v. Gibbons*, 303 N.C. 484, 279 S.E.2d 574 (1981).

**Applied** in *State v. Reid*, 55 N.C. App. 72, 284 S.E.2d 519 (1981); *State v. Whitaker*, 55 N.C. App. 666, 286 S.E.2d 640 (1982); *State v. Thompson*, 57 N.C. App. 142, 291 S.E.2d 266 (1982); *State v. Richardson*, 58 N.C. App. 558, 297 S.E.2d 921 (1982); *State v. Waters*, — N.C. —, 302 S.E.2d 188 (1983); *State v. Gonzalez*, — N.C. App. —, 302 S.E.2d 463 (1983).

**Quoted** in *State v. Mullen*, 53 N.C. App. 106, 280 S.E.2d 11 (1981); *State v. Melvin*, 53 N.C. App. 421, 281 S.E.2d 97 (1981).

**Cited** in *State v. Anderson*, 303 N.C. 185, 278 S.E.2d 238 (1981); *State v. Smith*, 304 N.C. 706, 285 S.E.2d 800 (1982); *In re Stedman*, 305 N.C. 92, 286 S.E.2d 527 (1982); *State v. Hall*, 305 N.C. 77, 286 S.E.2d 552 (1982); *State v. Stevens*, 305 N.C. 712, 291 S.E.2d 585 (1982); *Bryant v. Cherry*, 687 F.2d 48 (4th Cir. 1982); *State v. Melton*, 307 N.C. 370, 298 S.E.2d 673 (1983); *State v. Thompson*, — N.C. App. —, 302 S.E.2d 310 (1983).

## B. Common Law Robbery.

### Definitions. —

In accord with 1st paragraph in original. See *State v. Melvin*, 57 N.C. App. 503, 291 S.E.2d 885, cert. denied, 306 N.C. 748, 295 S.E.2d 484 (1982).

Common-law robbery is the felonious, nonconsensual taking of money or personal property from the person or presence of another by means of violence or fear. *State v. Smith*, 305 N.C. 691, 292 S.E.2d 264, cert. denied, — U.S. —, 103 S. Ct. 474, 74 L.Ed.2d 622 (1982).

Both principals in the first degree and principals in the second degree are considered principals and are equally guilty of common-law robbery. *State v. Melvin*, 57 N.C. App. 503, 291 S.E.2d 885, cert. denied, 306 N.C. 748, 295 S.E.2d 484 (1982).

## C. Attempted Robbery.

### What Constitutes Attempt. —

One of the elements of an attempt to commit a crime is that defendant must have intent to commit the substantive offense. *State v. Irwin*, 304 N.C. 93, 282 S.E.2d 439 (1981).

## II. ELEMENTS OF CRIME.

### A. In General.

Gravamen of the offense of armed robbery is the endangering or threatening of human life by the use or threatened use of firearms or other dangerous weapons in the perpetration of or even in the attempt to perpetrate the crime of robbery. *State v. Beaty*, 306 N.C. 491, 293 S.E.2d 760 (1982).

### Prerequisite to conviction for armed robbery, etc. —

In accord with 1st paragraph in original. See *State v. Gibbons*, 303 N.C. 484, 279 S.E.2d 574 (1981).

### Under this section, an armed robbery, etc. —

An armed robbery occurs when an individual takes or attempts to take personal property from the person of another, or in his presence, or from any place of business or residence where there is a person or persons in attendance, by the use or threatened use of a dangerous weapon, whereby the life of a person is endangered or threatened. *State v. Porter*, 303 N.C. 680, 281 S.E.2d 377 (1980).

Attempted armed robbery occurs when a person with the requisite intent does some overt act calculated to unlawfully deprive another of personal property by endangering or threatening his life with a firearm. *State v. Irwin*, 304 N.C. 93, 282 S.E.2d 439 (1981).

### This section requires, etc. —

In accord with 2nd paragraph in original. See *State v. Gibbons*, 303 N.C. 484, 279 S.E.2d 574 (1981); *State v. Chambers*, 53 N.C. App. 358, 280 S.E.2d 636, cert. denied, 304 N.C. 197, 285 S.E.2d 103 (1981); *State v. Beaty*, 306 N.C. 491, 293 S.E.2d 760 (1982); *State v. Willis*, — N.C. App. —, 300 S.E.2d 829 (1983).

The elements necessary to constitute armed robbery under this section are: (1) the unlawful taking or an attempt to take personal property from the person or in the presence of another; (2) by use or threatened use of a firearm or other dangerous weapon; and (3) whereby the life of a person is endangered or threatened. *State v. Beaty*, 306 N.C. 491, 293 S.E.2d 760 (1982).

Ownership of the property is generally immaterial to the offense of armed robbery as long as the proof is sufficient to establish ownership in someone other than the defendant. *State v. Beaty*, 306 N.C. 491, 293 S.E.2d 760 (1982).

**Felony-Murder Rule.** — An essential element of armed robbery, indeed the heart of the offense, is that a firearm or other dangerous weapon be used whereby the life of a person is endangered or threatened. This act is by its nature inherently dangerous to human life; and if this danger against which the statute is aimed occurs and the robber kills, the act is ordinarily murder under the felony-murder rule. *State v. Barnett*, — N.C. —, 300 S.E.2d 340 (1983).

The use of force or intimidation must necessarily precede or be concomitant with the taking before the defendant can properly be found guilty of armed robbery. That is, the use of force or violence must be such as to induce the victim to part with his or her property. *State v. Richardson*, — N.C. —, 302 S.E.2d 799 (1983).



### **B. Use or Threatened Use of Dangerous Weapons.**

#### **The main element of the offense. —**

In accord with original. See *State v. Beaty*, 306 N.C. 491, 293 S.E.2d 760 (1982).

#### **State Must Show, etc. —**

Mere possession of a firearm during the course of a robbery is insufficient to support an armed robbery conviction under this section; rather, the section includes an additional requirement that the possession of the firearm threaten or endanger the life of a person. *State v. Gibbons*, 303 N.C. 484, 279 S.E.2d 574 (1981).

In determining whether evidence of the use of a particular instrument constitutes evidence of use of "any firearms or other dangerous weapon, implement or means" within the prohibition of this section, the determinative question is whether the evidence was sufficient to support a jury finding that a person's life was in fact endangered or threatened. *State v. Alston*, 305 N.C. 647, 290 S.E.2d 614 (1982).

**Dangerous Character of Weapon Presumed from Conduct. —**When a person perpetrates a robbery by brandishing an instrument which appears to be a firearm, or other dangerous weapon, in the absence of any evidence to the contrary, the law will presume the instrument to be what his conduct represents it to be — a firearm or other dangerous weapon. *State v. Quick*, — N.C. App. —, 299 S.E.2d 815 (1983).

**A weapon does not have to be a firearm to be a life-threatening weapon.** *State v. Funderburk*, — N.C. App. —, 299 S.E.2d 822 (1983).

**A pistol used as a club could be as dangerous as a blackjack.** *State v. Funderburk*, — N.C. App. —, 299 S.E.2d 822 (1983).

**BB Rifle. —**Testimony of defendant that the rifle was a BB rifle constituted affirmative evidence which indicated that the victims' lives were not endangered or threatened in fact by his possession, use or threatened use of the rifle and was affirmative testimony tending to prove the absence of an element of the offense charged under this section; such evidence required submission of the case to the jury on the lesser included offense of common-law robbery as well as the greater offense of robbery with firearms or other dangerous weapons. *State v. Alston*, 305 N.C. 647, 290 S.E.2d 614 (1982).

**Remington Pellet Gun. —**The testimony by defendant that the rifle he used during the robbery was a Remington pellet gun was sufficient to support a jury finding that the lives of the victims were endangered or threatened by his possession, use or threatened use of the rifle. *State v. Alston*, 305 N.C. 647, 290 S.E.2d 614 (1982).

#### **Inability to Identify Weapon. —**

A robbery victim should not be required to

force the issue merely to determine the true character of the weapon. Thus, when a witness testified that he was robbed by use of a firearm or other dangerous weapon, his admission on cross-examination that he could not positively say it was a gun or dangerous weapon is without probative value. *State v. Quick*, — N.C. App. —, 299 S.E.2d 815 (1983).

Evidence elicited on cross-examination that the witness or witnesses could not positively testify that the instrument used was in fact a firearm or dangerous weapon was not of sufficient probative value to warrant submission of the lesser included offense of common-law robbery. *State v. Quick*, — N.C. App. —, 299 S.E.2d 815 (1983).

Whether an instrument is a dangerous weapon or a firearm can only be judged by the victim of a robbery from its appearance and the manner of its use. The court cannot perceive how the victims could have determined with certainty that the firearm was real unless defendant had actually fired a shot. *State v. Quick*, — N.C. App. —, 299 S.E.2d 815 (1983).

### **C. Taking and Intent.**

#### **A taking with "felonious intent," etc. —**

In robbery, as in larceny, the taking of the property must be with the felonious intent permanently to deprive the owner of his property. *State v. Jones*, 57 N.C. App. 460, 291 S.E.2d 869 (1982).

### **III. LESSER INCLUDED OFFENSES.**

**Armed robbery and larceny are separate crimes.** *State v. Beaty*, 306 N.C. 491, 293 S.E.2d 760 (1982).

**Elements of Armed Robbery and Larceny Distinguished. —**For proof of armed robbery it is necessary to show the use or threatened use of a weapon but unnecessary to show asportation, while for proof of larceny it is necessary to show asportation but unnecessary to show the use or threatened use of a weapon; each crime requires proof of an additional fact which the other does not. *State v. Beaty*, 306 N.C. 491, 293 S.E.2d 760 (1982).

### **IV. INDICTMENT.**

#### **Sufficiency of Allegation of Ownership.**

— In an indictment for robbery the allegation of ownership of the property taken is sufficient when it negatives the idea that the accused was taking his own property. *State v. Beaty*, 306 N.C. 491, 293 S.E.2d 760 (1982).

#### **It is not necessary that ownership, etc. —**

It is not necessary that ownership of the property be laid in a particular person in order to allege and prove armed robbery. The gist of the offense of robbery is the taking by force or putting in fear. An indictment for robbery will



not fail if the description of the property is sufficient to show it to be the subject of robbery and negates that idea that the accused was taking his own property. *State v. Jackson*, 306 N.C. 642, 295 S.E.2d 383 (1982).

**Name of Person in Attendance.** — It is plain from this section that it is not necessary that the name of the person in attendance in the place of business be set out in the bill of indictment. It is only required that, upon trial, the State must prove that someone was in attendance. *State v. Rankin*, 55 N.C. App. 478, 286 S.E.2d 119, appeal dismissed and cert. denied, 305 N.C. 590, 292 S.E.2d 11 (1982).

**Charge of Aiding and Abetting Unnecessary.** — Person who aids or abets another in the commission of armed robbery is guilty under this section, and it is not necessary that the indictment charge him with aiding and abetting. *State v. Ferree*, 54 N.C. App. 183, 282 S.E.2d 587 (1981).

## V. EVIDENCE.

**Evidence held sufficient to be submitted, etc. —**

Evidence was sufficient to be submitted to the jury in a prosecution for armed robbery where it tended to show that a store employee was robbed at gunpoint by more than one person; that the persons who robbed him fled from the scene in a red Dodge Aspen; that at least one person fled into the woods at the end of a high speed chase by a county police officer; that police officers used a bloodhound to follow the trail of that person to a location where both defendants were found hiding under a bridge; and that a .32 caliber revolver was also found at that location. *State v. Porter*, 303 N.C. 680, 281 S.E.2d 377 (1980).

**Variance as to Ownership.** — In respect of armed robbery, variance between the allegations of the indictment and the proof in respect of the ownership of the property taken is not material. *State v. Beaty*, 306 N.C. 491, 293 S.E.2d 760 (1982).

## VI. INSTRUCTIONS.

**Instruction on Common-Law Robbery Not Required Where Use or Threat of Weapon Uncontradicted.** — While common-law robbery is a lesser included offense of armed robbery, and an indictment for armed robbery will support a conviction of common-law robbery, trial judge is not required to instruct on common-law robbery when defendant is indicted for armed robbery if the uncontradicted evidence indicates that the robbery was perpetrated by the use or threatened use of what appeared to be a dangerous weapon. *State v. Porter*, 303 N.C. 680, 281 S.E.2d 377 (1980).

Trial court in an armed robbery case properly refused defendants' request for an instruction

on common-law robbery, where victim testified that all he observed during the incident before being rendered unconscious was the barrel of a gun held at his forehead, and there was no evidence in the record to contradict this testimony. *State v. Porter*, 303 N.C. 680, 281 S.E.2d 377 (1980).

## VII. PUNISHMENT.

**Subsection (d) Controls over Fair Sentencing Act.** — The legislature clearly intended the provisions of subsection (d) of this section to control over the conflicting provisions of the Fair Sentencing Act, § 15A-1340.1 et seq. *State v. Leeper*, 59 N.C. App. 199, 296 S.E.2d 7, cert. denied, 307 N.C. 272, 299 S.E.2d 218 (1982).

**Minimum and Presumptive Sentence Is 14 Years.** — Considering (1) the combined effect of subsection (d) of this section and § 15A-1340.4(f) excepting robbery with a firearm from the 12-year presumptive sentence of other class D felonies, and (2) the amendment of subsection (a) of this section specifically to state that one who robs with a firearm shall be guilty of a Class D felony (and not that the person shall be punished as a Class D felon), 14 years is not only the minimum, but also the presumptive, sentence in robbery with firearm cases. *State v. Morris*, 59 N.C. App. 157, 296 S.E.2d 309 (1982), cert. denied & appeal dismissed, — N.C. —, 299 S.E.2d 227 (1983).

The language of subsection (d) of this section is unambiguous and its effect is clear. Any person convicted of armed robbery must receive no less than a 14-year sentence, notwithstanding any other provision of law. Thus, there is no room for judicial construction on this point. *State v. Leeper*, 59 N.C. App. 199, 296 S.E.2d 7, cert. denied, 307 N.C. 272, 299 S.E.2d 218 (1982).

**And May Not Be Reduced Except for Good Behavior.** — As the General Assembly has chosen to remove much of the discretionary power which judges previously exercised in the sentencing process, the 14-year sentence for armed robbery specified in subsection (d) of this section is a minimum which may not be reduced under the Fair Sentencing Act, § 15A-1340.1 et seq., except by credit for good behavior. *State v. Leeper*, 59 N.C. App. 199, 296 S.E.2d 7, cert. denied, 307 N.C. 272, 299 S.E.2d 218 (1982).

**Findings as to Aggravating and Mitigating Factors Not Required Where Presumptive Sentence Imposed.** — Where the court imposes the presumptive sentence specified in subsection (d) of this section, it is not required to make any findings regarding aggravating and mitigating factors. *State v. Horne*, 59 N.C. App. 576, 297 S.E.2d 788 (1982).

**Possession or use of a firearm should not be used as an aggravating factor to lengthen the sentence in a robbery with firearm case.**



*State v. Morris*, 59 N.C. App. 157, 296 S.E.2d 309 (1982), cert. denied & appeal dismissed, — N.C. —, 299 S.E.2d 227 (1983).

**Pecuniary Gain As Aggravating Factor.**

— If the pecuniary gain at issue in a case is inherent in the offense, then that "pecuniary gain" should not be considered an aggravating factor. Pecuniary incentive is not always inherent in the crime. Thus, the determination, whether pecuniary gain as an aggravating factor, is also an element of the underlying offense, is a factual one. For example, if A hires or pays B to disarm C with the threatened use of a firearm and to throw C's weapon in the river, B could be convicted of robbery with a firearm, and B's sentence could be enhanced by the aggravating fact that the offense was committed for hire or pecuniary gain. *State v. Morris*, 59 N.C. App. 157, 296 S.E.2d 309 (1982), cert. denied & appeal dismissed, — N.C. —, 299 S.E.2d 227 (1983).

**VIII. DOUBLE JEOPARDY.**

**Multiple Convictions Proper Where Several Persons Each Threatened and**

**Robbed.** — Where more than one person is present during a robbery wherein the life of each is threatened and property is taken from the person of each, the robber can be convicted of more than one armed robbery offense. *State v. Beaty*, 306 N.C. 491, 293 S.E.2d 760 (1982).

**But Not Where Property Taken From Only One.** — Where two persons, both employees, are present during a robbery

wherein the life of each is threatened incident to the theft only of property or money belonging to the employer, a single armed robbery is committed. *State v. Beaty*, 306 N.C. 491, 293 S.E.2d 760 (1982).

**Two Counts of Armed Robbery May Not Be Based on Single Assault.** — A person may not be convicted of two counts of armed robbery where, in addition to the theft of an employer's money or property, the robber takes money or property belonging to an employee, as in such a case there is only a single assault; however, such defendant could be convicted of one count of armed robbery and one count of larceny, if so charged. *State v. Beaty*, 306 N.C. 491, 293 S.E.2d 760 (1982).

**§ 14-87.1. Punishment for common-law robbery and attempted common-law robbery.**

**Legal Periodicals.** —

For article on plea bargaining statutes and practices in North Carolina, see 59 N.C.L. Rev. 477 (1981).

Cited in *State v. Melton*, 307 N.C. 370, 298 S.E.2d 673 (1983); *State v. Eure*, — N.C. App. —, 301 S.E.2d 452 (1983).

**§ 14-89.1. Safecracking.**

**CASE NOTES**

**Safecracking Not Identical to Former Crime of Burglary with Explosives.** —

Elements of the crimes of burglary with explosives and safecracking are not identical for offenses committed before October 1, 1977; the predecessor to this section provided as an essen-

tial element that the safe or vault be used for storing money or other valuables. *State v. Pennell*, 54 N.C. App. 252, 283 S.E.2d 397 (1981), appeal dismissed, 304 N.C. 732, 288 S.E.2d 804 (1982).

**ARTICLE 18.**

***Embezzlement.***

**§ 14-90. Embezzlement of property received by virtue of office or employment.**

**Legal Periodicals.** — For survey of 1981 criminal law, see 60 N.C.L. Rev. 1289 (1982).



## CASE NOTES

**II. WHO MAY BE GUILTY OF EMBEZZLEMENT.****Debtor and Creditor. —**

Where the parties' conduct indicates a debtor-creditor relation, funds that come into the hands of the debtor belong to him and his subsequent use of them is not embezzlement. *Great Am. Ins. Co. v. Storms*, 28 Bankr. 761 (Bankr. E.D.N.C. 1983).

**III. ELEMENTS OF THE OFFENSE.****Elements Generally. —**

Elements of embezzlement are as follows: (1) defendant must be the agent of the prosecutor; (2) by the terms of his employment he must receive the property of his principal; (3) he must receive the property in the course of his employment; and (4) he must convert the property to his own use knowing it not to be his own. *State v. Sutton*, 53 N.C. App. 281, 280 S.E.2d 751 (1981).

Embezzlement consists of four essential elements: (1) Defendant was the agent of the complainant; (2) pursuant to the terms of his employment he was to receive property of his principal; (3) he received such property in the course of his employment; and (4) knowing it was not his, he either converted it to his own

use or fraudulently misapplied it. *State v. Tedder*, — N.C. App. —, 302 S.E.2d 318 (1983).

**Actual or Constructive Possession. —** The phrase "which shall have come into his possession or under his care" contemplates actual and constructive possession. Thus, the possession required by this section to make out a prima facie case of embezzlement may be actual or constructive possession. *State v. Jackson*, 57 N.C. App. 71, 291 S.E.2d 190, cert. denied, 306 N.C. 389, 294 S.E.2d 216 (1982).

**IV. PRACTICE AND PROCEDURE.****C. Evidence.**

**The elements of embezzlement must be proved by clear and convincing evidence** to establish a debt as nondischargeable, and, as previously stated herein, a written agreement between the parties may be refuted by the actions of the parties. *Great Am. Ins. Co. v. Storms*, 28 Bankr. 761 (Bankr. E.D.N.C. 1983).

**Evidence of Motive. —** Evidence which tended to show that defendant was living far and away above the standard to be expected of one earning \$265.00 a week was relevant to establish motive under this section. *State v. Sutton*, 53 N.C. App. 281, 280 S.E.2d 751 (1981).

**§ 14-92. Embezzlement of funds by public officers and trustees.**

**Legal Periodicals. —** For survey of 1981 criminal law, see 60 N.C.L. Rev. 1289 (1982).

## ARTICLE 19.

*False Pretenses and Cheats.***§ 14-100. Obtaining property by false pretenses.****Legal Periodicals. —**

For survey of 1980 criminal law, see 59 N.C.L. Rev. 1123 (1981).

## CASE NOTES

**I. GENERAL CONSIDERATION.**

**Prosecution under this Section Where Other Sections More Specifically Fit Alleged Activities. —** A person may be prosecuted under this section although other stat-

utes, such as §§ 14-106 or 14-107, more specifically fit the alleged activities, since a single act or transaction may violate different statutes. *State v. Freeman*, 59 N.C. App. 84, 295 S.E.2d 619, cert. granted, — N.C. —, 299 S.E.2d 224, 225 (1982).



**Applied** in *State v. Freeman*, — N.C. —, 302 S.E.2d 779 (1983).

**Cited** in *Wilson v. Goodwyn*, 522 F. Supp. 1214 (E.D.N.C. 1981); *In re Gullledge*, 17 Bankr. 311 (Bankr. M.D.N.C. 1982).

## II. ELEMENTS OF THE OFFENSE.

### **Elements Generally.** —

It is an essential element of obtaining property by false pretense that the act be done knowingly and designedly with intent to cheat or defraud. *State v. Hines*, 54 N.C. App. 529, 284 S.E.2d 164 (1981).

**Economic Harm Irrelevant.** — The court is not required to instruct the jury that the resulting economic harm to the defendant is not the essence of the crime. Such an economic result to the defendant is irrelevant for the

purposes of this section. *State v. Bass*, 53 N.C. App. 40, 280 S.E.2d 7 (1981).

## IV. ILLUSTRATIVE CASES.

**Evidence of Similar Representations to Others.** — Evidence that defendant previously had represented to some five other parties that he would help them obtain houses, and that they had neither obtained houses nor received their money back, was relevant to show defendant's fraudulent intent in transactions which were the subject of the present prosecution, and such relevant evidence was not rendered inadmissible merely because it may have shown the commission of a separate offense. *State v. Wilson*, 57 N.C. App. 444, 291 S.E.2d 830, cert. denied, 306 N.C. 563, 294 S.E.2d 375 (1982).

## § 14-106. Obtaining property in return for worthless check, draft or order.

### CASE NOTES

**Person may be prosecuted under § 14-100 although this section more specifically fits alleged activities.** A single act or transaction may violate different statutes. *State v. Freeman*, 59 N.C. App. 84, 295

S.E.2d 619, cert. granted, — N.C. —, 299 S.E.2d 224, 225 (1982).

**Cited** in *State v. Freeman*, — N.C. —, 302 S.E.2d 779 (1983).

## § 14-107. Worthless checks.

It shall be unlawful for any person, firm or corporation, to draw, make, utter or issue and deliver to another, any check or draft on any bank or depository, for the payment of money or its equivalent, knowing at the time of the making, drawing, uttering, issuing and delivering such check or draft as aforesaid, that the maker or drawer thereof has not sufficient funds on deposit in or credit with such bank or depository with which to pay the same upon presentation.

It shall be unlawful for any person, firm or corporation to solicit or to aid and abet any other person, firm or corporation to draw, make, utter or issue and deliver to any person, firm or corporation, any check or draft on any bank or depository for the payment of money or its equivalent, being informed, knowing or having reasonable grounds for believing at the time of the soliciting or the aiding and abetting that the maker or the drawer of the check or draft has not sufficient funds on deposit in, or credit with, such bank or depository with which to pay the same upon presentation.

The word "credit" as used herein shall be construed to mean an arrangement or understanding with the bank or depository for the payment of any such check or draft.

Any person, firm or corporation violating any provision of this section shall be guilty of a misdemeanor and upon conviction shall be punished as follows:

- (1) If the amount of such check or draft is not over fifty dollars (\$50.00), the punishment shall be by a fine not to exceed fifty dollars (\$50.00) or imprisonment for not more than 30 days. Provided, however, if such person has been convicted three times of violating G.S. 14-107, he shall on the fourth and all subsequent convictions be punished in the



discretion of the district or superior court as for a general misdemeanor.

- (2) If the amount of such check or draft is over fifty dollars (\$50.00), the punishment shall be by a fine not to exceed five hundred dollars (\$500.00) or imprisonment for not more than six months, or both. Provided, however, if such person has been convicted three times of violating G.S. 14-107, he shall on the fourth and all subsequent convictions be punished in the discretion of the district or superior court as for a general misdemeanor.
- (3) If such check or draft is drawn upon a nonexistent account, the punishment shall be by a fine not to exceed one thousand dollars (\$1,000) or imprisonment for not more than two years, or both.
- (4) If such check or draft is drawn upon an account that has been closed by the drawer prior to time the check is drawn, the punishment shall be a fine not to exceed four hundred dollars (\$400.00) or imprisonment for not more than five months or both.
- (5) In deciding to impose any sentence other than an active prison sentence, the sentencing judge shall consider and may require, in accordance with the provisions of G.S. 15A-1343, restitution to the victim for the amount of the check or draft and each prosecuting witness (whether or not under subpoena) shall be entitled to a witness fee as provided by G.S. 7A-314 which shall be taxed as part of the cost and assessed to the defendant. (1925, c. 14; 1927, c. 62; 1929, c. 273, ss. 1, 2; 1931, cc. 63, 138; 1933, cc. 43, 64, 93, 170, 265, 362, 458; 1939, c. 346; 1949, cc. 183, 332; 1951, c. 356; 1961, c. 89; 1963, cc. 73, 547, 870; 1967, c. 49, s. 1; c. 661, s. 1; 1969, c. 157; c. 876, s. 1; cc. 909, 1014; c. 1224, s. 10; 1971, c. 243, s. 1; 1977, c. 885; 1979, c. 837; 1983, c. 741.)

**Effect of Amendments.** — The 1983 amendment, effective Oct. 1, 1983, inserted "shall consider and" in subdivision (5).

#### CASE NOTES

**Person may be prosecuted under § 14-100 although this section more specifically fits alleged activities.** A single act or transaction may violate different statutes. *State v. Freeman*, 59 N.C. App. 84, 295 S.E.2d 619, cert. granted, — N.C. —, 299 S.E.2d

224, 225 (1982).

**Applied** in *Contemporary Plumbing, Inc. v. North Carolina*, 16 Bankr. 479 (E.D.N.C. 1981).

**Cited** in *State v. Freeman*, — N.C. —, 302 S.E.2d 779 (1983).

### § 14-107.1. Prima facie evidence in worthless check cases.

**Cited** in *State v. Freeman*, — N.C. —, 302 S.E.2d 779 (1983).

### § 14-111.2. Obtaining ambulance services without intending to pay therefor — certain named counties.

Any person who with intent to defraud shall obtain ambulance services without intending at the time of obtaining such services to pay, if financially able, any reasonable charges therefor shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars (\$500.00), imprisonment for



not more than six months, or both. A determination by the court that the recipient of such services has willfully failed to pay for the services rendered for a period of 90 days after request for payment, and that the recipient is financially able to do so, shall raise a presumption that the recipient at the time of obtaining the services intended to defraud the provider of the services and did not intend to pay for the services.

The section shall apply to Anson, Ashe, Beaufort, Caldwell, Caswell, Catawba, Chatham, Cherokee, Clay, Cleveland, Cumberland, Davie, Duplin, Forsyth, Gaston, Guilford, Haywood, Henderson, Hoke, Hyde, Iredell, Macon, Mecklenburg, Montgomery, Orange, Pasquotank, Person, Randolph, Rockingham, Scotland, Stanly, Surry, Transylvania, Union, Vance, Wilkes and Yadkin Counties only. (1967, c. 964; 1969, cc. 292, 753; c. 1224, s. 4; 1971, cc. 125, 203, 300, 496; 1973, c. 880, s. 2; 1977, cc. 63, 144; 1983, c. 42, s. 1.)

**Effect of Amendments.** — The 1983 amendment, effective March 3, 1983, inserted references to the counties of Cherokee, Clay, Hoke, and Macon in the second paragraph.

### § 14-111.3. Making false ambulance request in Ashe, Buncombe, Cherokee, Clay, Davie, Duplin, Haywood, Hoke, Macon, Madison, Wilkes and Yadkin Counties.

It shall be unlawful for any person or persons to willfully obtain or attempt to obtain ambulance service that is not needed, or to make a false request or report that an ambulance is needed. Every person convicted of violating this section shall upon conviction be punished by a fine of fifty dollars (\$50.00) or imprisonment not to exceed 30 days or both such fine and imprisonment.

This section shall apply only to the Counties of Ashe, Buncombe, Cherokee, Clay, Davie, Duplin, Haywood, Hoke, Macon, Madison, Wilkes and Yadkin. (1965, c. 976, s. 2; 1971, c. 496; 1977, c. 96; 1983, c. 42, s. 2.)

**Effect of Amendments.** — The 1983 amendment, effective March 3, 1983, inserted references to the counties of Cherokee, Clay, Davie, Hoke, Macon, Wilkes and Yadkin in the second paragraph.

## ARTICLE 19B.

### *Financial Transaction Card Crime Act.*

### § 14-113.9. Financial transaction card theft.

#### CASE NOTES

**Subdivision (a)(1) may be violated in four ways:** one may (1) take, (2) obtain, or (3) withhold a financial transaction card from the person, possession, custody or control of another without the cardholder's consent and with the intent to use it; or one may (4) receive a financial transaction card with intent to use it or sell it or transfer it to a person other than the issuer or cardholder, knowing at the time that the card has been so taken, obtained or withheld, i.e., knowing at the time he received

it that another person had taken, obtained or withheld the card from the person, possession, custody or control of another without the cardholder's consent and with the intent to use it. *State v. Brunson*, 51 N.C. App. 413, 276 S.E.2d 455 (1981).

**Elements of Receiving under Subdivision (a)(1).** — The necessary implication from the use of the qualifier "so" in subdivision (a)(1) is that when a defendant is charged with a violation of the receiving portion of the statute, he



must have received a card from a third party who also intended to use it. Although this interpretation hinges upon a linguistic technicality, criminal laws must be strictly construed in favor of the defendant. *State v. Brunson*, 51 N.C. App. 413, 276 S.E.2d 455 (1981).

**Indictment for Receiving under Subdivision (a)(1).** — In order to charge receiving under the present wording of subdivision (a)(1), it must be alleged, among other elements, that at the time of receipt the defendant knew that the financial transaction card had been taken, obtained or withheld from the person, possession, custody or control of another without

the cardholder's consent and with the intent to use it. *State v. Brunson*, 51 N.C. App. 413, 276 S.E.2d 455 (1981).

An indictment attempting to charge a defendant under the receiving portion of subdivision (a)(1) of this section which failed to allege that the defendant knew that the card had been taken, obtained or withheld with the intent to use it, an essential element of the crime for which defendant was tried, failed to charge a crime, and defendant's motion to dismiss should have been allowed. *State v. Brunson*, 51 N.C. App. 413, 276 S.E.2d 455 (1981).

## ARTICLE 20.

### *Frauds.*

## § 14-117. Fraudulent and deceptive advertising.

**Legal Periodicals.** — For article on lawyer advertising, see 18 Wake Forest L. Rev. 503 (1982).

## ARTICLE 21.

### *Forgery.*

## § 14-119. Forgery of notes, checks, and other securities.

(a) If a person makes, forges, or counterfeits:

- (1) Any bill, note, warrant, check, order, or similar instrument in imitation of, or purporting to be, a bill, note, warrant, check, order, or similar instrument of or on any financial institution or governmental unit, or any cashier or officer of such an institution or unit; or
- (2) Any security purporting to be issued by, or on behalf of, any corporation, financial institution, or governmental unit,

with the intent to injure or defraud any person, corporation, financial institution, or governmental unit, he shall be punished as a Class I felon.

(b) For purposes of this section:

- (1) "Financial institution" means any mutual fund, money market fund, credit union, savings and loan association, bank, or similar institution.
- (2) "Governmental unit" means the United States, any United States territory, any state of the United States, or any political subdivision of any state. (1819, c. 994, s. 1, P.R.; R.C., c. 34, s. 60; Code, s. 1030; Rev., s. 3419; C.S., s. 4293; 1979, c. 760, s. 5; 1983, c. 397, s. 1.)

### **Effect of Amendments. —**

The 1983 amendment, effective for offenses

committed on or after Oct. 1, 1983, rewrote this section.



## CASE NOTES

**Forging Signature of Another — Presumption of Authority. —**

In a prosecution for forgery and uttering forged checks, the trial court did not err in refusing to charge that when a defendant signs the name of another to an instrument it is presumed he did so with authority where the defendant offered no evidence that he signed the checks with authority but testified that he had never seen the checks. *State v. Roberts*, 51 N.C. App. 221, 275 S.E.2d 536, cert. denied, 303 N.C. 318, 281 S.E.2d 657 (1981).

**Instruction as to Presumption of Forgery. —** In a prosecution for forging and uttering forged checks, the trial court's instruction that when a person in possession of a forged check attempts to obtain money or advances upon it, a presumption is raised that the defendant either forged or consented to the forging of such check and, nothing appearing, the defend-

dant would be presumed guilty of forgery described a mere permissive inference which did not violate due process since (1) there was a rational connection between the basic and elemental facts such that upon proof of the basic facts (possession of a forged check and attempting to obtain money from it), the elemental facts (either forged or consented to forging of such check) are more likely to exist, and (2) there was other evidence in the case which, taken together with the inference, was sufficient for a jury to find the elemental facts beyond a reasonable doubt. *State v. Roberts*, 51 N.C. App. 221, 275 S.E.2d 536, cert. denied, 303 N.C. 318, 281 S.E.2d 657 (1981).

**Stated** in *Sneed v. Smith*, 670 F.2d 1348 (4th Cir. 1982).

**Cited** in *State v. McDougall*, — N.C. —, 301 S.E.2d 308 (1983); *State v. Locklear*, — N.C. App. —, 301 S.E.2d 437 (1983).

## § 14-120. Uttering forged paper or instrument containing a forged endorsement.

If any person, directly or indirectly, whether for the sake of gain or with intent to defraud or injure any other person, shall utter or publish any such false, forged or counterfeited instrument as is mentioned in G.S. 14-119, or shall pass or deliver, or attempt to pass or deliver, any of them to another person (knowing the same to be falsely forged or counterfeited) the person so offending shall be punished as a Class I felon. If any person, directly or indirectly, whether for the sake of gain or with intent to defraud or injure any other person, shall falsely make, forge or counterfeit any endorsement on any instrument described in the preceding section, whether such instrument be genuine or false, or shall knowingly utter or publish any such instrument containing a false, forged or counterfeited endorsement or, knowing the same to be falsely endorsed, shall pass or deliver or attempt to pass or deliver any such instrument containing a forged endorsement to another person, the person so offending shall be guilty of a felony and punishable by the same punishment provided in the preceding sentence. (1819, c. 994, s. 2, P.R.; R.C., c. 34, s. 61; Code, s. 1031; Rev., s. 3427; 1909, c. 666; C.S., s. 4294; 1961, c. 94; 1979, c. 760, s. 5; 1983, c. 397, s. 2.)

**Effect of Amendments. —**

The 1983 amendment, effective for offenses committed on or after Oct. 1, 1983, substituted "instrument as is mentioned in G.S. 14-119" for

"bill, note, order, check or security as is mentioned in the preceding section" in the first sentence.

## CASE NOTES

**Elements of the Offense. —**

In accord with 3rd paragraph in original. See *State v. Thompson*, — N.C. App. —, 303 S.E.2d 85 (1983).

**Pecuniary Gain. —** It is error for a trial court to consider pecuniary gain as a factor in aggravation of a sentence for feloniously

uttering a check, since pecuniary gain is inherent in the offense of felonious uttering. *State v. Thompson*, — N.C. App. —, 303 S.E.2d 85 (1983).

**Instructions as to Forgery — Presumption of Authority. —** In a prosecution for forgery and uttering forged checks, the trial



court did not err in refusing to charge that when a defendant signs the name of another to an instrument it is presumed he did so with authority where the defendant offered no evidence that he signed the checks with authority but testified that he had never seen the checks. *State v. Roberts*, 51 N.C. App. 221, 275 S.E.2d 536, cert. denied, 303 N.C. 318, 281 S.E.2d 657 (1981).

**Same — Inference Arising from Attempt to Obtain Money.** — In a prosecution for forging and uttering forged checks, the trial court's instruction that when a person in possession of a forged check attempts to obtain money or advances upon it, a presumption is raised that the defendant either forged or consented to the forging of such check and, nothing appearing, the defendant would be pre-

sumed guilty of forgery described a mere permissive inference which did not violate due process since (1) there was a rational connection between the basic and elemental facts such that upon proof of the basic facts (possession of a forged check and attempting to obtain money from it), the elemental facts (either forged or consented to forging of such check) are more likely to exist, and (2) there was other evidence in the case which, taken together with the inference, was sufficient for a jury to find the elemental facts beyond a reasonable doubt. *State v. Roberts*, 51 N.C. App. 221, 275 S.E.2d 536, cert. denied, 303 N.C. 318, 281 S.E.2d 657 (1981).

**Cited in** *State v. Locklear*, — N.C. App. —, 301 S.E.2d 437 (1983).

## SUBCHAPTER VI. CRIMINAL TRESPASS.

### ARTICLE 22.

#### *Trespasses to Land and Fixtures.*

### § 14-126. Forcible entry and detainer.

#### **Legal Periodicals.** —

For a comment on landlords' eviction remedies in the light of *Spinks v. Taylor*, 303 N.C. 256, 278 S.E.2d 501 (1981), and the 1981 "An Act to Clarify Landlord Eviction Remedies in Residential Tenancies," see 60 N.C.L. Rev. 885 (1982).

For a comment on the Landlord Eviction

Remedies Act in light of *Spinks v. Taylor*, 47 N.C. App. 68, 266 S.E.2d 857 (1980), rev'd in part, 303 N.C. 256, 278 S.E.2d 501 (1981), see 18 Wake Forest L. Rev. 25 (1982).

For article discussing self help residential eviction by landlords in light of the Landlord Eviction Remedies Act, see 13 N.C. Cent. L.J. 195 (1982).

### CASE NOTES

**Forcible trespass and trespass are not lesser included offenses of attempted first-degree burglary.** Attempted first-degree burglary does not require a commandment forbidding entry or an order to leave as does trespass under § 14-134. It also does not require that the defendant enter the lands of another by force, threats of force or a show of strength by a multitude of people, as does forcible trespass under this section. *State v. McAlister*, 59 N.C. App. 58, 295 S.E.2d 501 (1982), cert. denied, — N.C. —, 299 S.E.2d 226 (1983).

**Forcible trespass is the unlawful invasion of the premises of another.** *State v. McRae*, 58 N.C. App. 225, 292 S.E.2d 778 (1982).

**Forcible Trespass Not a Lesser Included Offense of Kidnapping.** — Since forcible trespass requires proof of an element not essential to kidnapping, i.e., entry into a person's premises, it cannot be a lesser included offense of kidnapping. *State v. McRae*, 58 N.C. App. 225, 292 S.E.2d 778 (1982).



## § 14-127. Willful and wanton injury to real property.

### CASE NOTES

**Cited** in *State v. Oxendine*, 305 N.C. 126, 286 S.E.2d 546 (1982); *United States v. Ward*, 676 F.2d 94 (4th Cir. 1982).

## § 14-134. Trespass on land after being forbidden; license to look for estrays.

### CASE NOTES

**Forcible trespass and trespass are not lesser included offenses of attempted first-degree burglary.** Attempted first-degree burglary does not require a commandment forbidding entry or an order to leave as does trespass under this section. It also does not require that the defendant enter the lands of another by force, threats of force or a show of strength by a multitude of people, as does

forcible trespass under § 14-126. *State v. McAlister*, 59 N.C. App. 58, 295 S.E.2d 501 (1982), cert. denied, — N.C. —, 299 S.E.2d 226 (1983).

**Stated** in *State v. Freeman*, 303 N.C. 299, 278 S.E.2d 207 (1981).

**Cited** in *State v. Churchill*, — N.C. App. —, 302 S.E.2d 290 (1983).

## § 14-139: Repealed by Session Laws 1981, c. 1100, s. 1.

**Cross References.** — For present statute regulating open fires, see § 113-60.21 et seq.

## § 14-151. Interfering with gas, electric and steam appliances.

**Editor's Note.** — The second word in subdivision (5) of this section in the 1981 replacement volume should read "possession."

### § 14-151.1. Interfering with electric, gas or water meters; prima facie evidence of intent to alter, tamper with or bypass electric, gas or water meters; unlawful reconnection of electricity, gas, or water; civil liability.

(b1) It is unlawful for any unauthorized person to reconnect electricity, gas, or water connections or otherwise turn back on one or more of those utilities when they have been lawfully disconnected or turned off by the provider of the utility.

(1977, c. 735, s. 1; 1983, c. 508, ss. 1, 2.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1983 amendment, effective Oct. 1, 1983, added subsection (b1) and rewrote the catchline to this section.



## § 14-159.1. Contaminating a public water system.

(a) A person commits the offense of contaminating a public water system, as defined in G.S. 130-166.41(12), if he willfully or wantonly:

- (1) Contaminates, adulterates or otherwise impurifies or attempts to contaminate, adulterate or otherwise impurify the water in a public water system, including the water source, with any toxic chemical, biological agent or radiological substance that is harmful to human health, except those added in approved concentrations for water treatment operations; or
- (2) Damages or tampers with the property or equipment of a public water system with the intent to impair the services of the public water system.

(b) Any person who commits the offense defined in this section is guilty of a Class I felony. (1983, c. 507, s. 1.)

**Editor's Note.** — Session Laws 1983, c. 507, s. 2, makes this section effective upon ratification. The act was ratified June 13, 1983.

§§ 14-159.2 to 14-159.5: Reserved for future codification purposes.

## ARTICLE 22A.

### *Trespassing upon "Posted" Property to Hunt, Fish or Trap.*

## § 14-159.6. Trespass for purposes of hunting, etc., without written consent a misdemeanor.

**Local Modification.** — Avery, Mitchell and Watauga: 1967, c. 644.

**Prohibited Activities.** — This section prohibits hunting, fishing or trapping on properly posted lands or waters without the written consent of the owner or his agent, provided that in designated counties, including Halifax County, no arrest may be made for such violation without consent of the owner or his agent. *State v. Manning*, 3 N.C. App. 451, 165 S.E.2d 13 (1969), decided under former § 113-120.1.

**Term "Owner" Does Not Include Lessee.** — In a prosecution in Halifax County under this section for a trespass by fishing on properly posted lands and waters of a private club without the written consent of the owner or his agent, defendants' motion for nonsuit should have been allowed where the State's evidence disclosed that the private club was the lessee of

the land under and around the lake upon which defendants were fishing, a lessee not being included within the term "owner" as used in § 113-130, and there being no showing that defendants were fishing without the written consent of the actual owner, or that the owner consented to their arrest, or that the private club was the agent of the owner for these purposes. *State v. Manning*, 3 N.C. App. 451, 165 S.E.2d 13 (1969), decided under former § 113-120.1.

**Whether a body of water is a "private pond" is not relevant** to a prosecution for trespass under this section, there being no requirement that a pond must be a "private pond" in order to post the notices and signs described in § 113-120.2 (now § 14-159.7). *State v. Manning*, 3 N.C. App. 451, 165 S.E.2d 13 (1969), decided under former § 113-120.1.



## ARTICLE 23.

*Trespasses to Personal Property.***§ 14-160. Willful and wanton injury to personal property; punishments.**

## CASE NOTES

**Elements Generally.** — Proof of four elements appears essential to sustain an adjudication of delinquency based upon violation of this section: (1) that personal property was injured; (2) that the personal property was that "of another," i.e., someone other than the person or persons accused; (3) that the injury was inflicted "wantonly and willfully"; and (4) that

the injury was inflicted by the person or persons accused. In re Meaut, 51 N.C. App. 153, 275 S.E.2d 200 (1981).

**Applied** in State v. Jordan, 59 N.C. App. 527, 296 S.E.2d 823 (1982).

**Cited** in State v. Casey, — N.C. App. —, 299 S.E.2d 235 (1983).

**§ 14-163.1. Injuring or killing law enforcement agency animal.**

Any person who knows or has reason to know that an animal is used for law-enforcement purposes such as investigation, detection of narcotics or explosives, or crowd control, by any law-enforcement agency and who willfully and not in self defense, causes serious injury to or kills that animal is guilty of a misdemeanor and shall be fined or imprisoned, or both, in the discretion of the court. (1983, c. 646, s. 1.)

**Editor's Note.** — Session Laws 1983, c. 646, s. 2, makes this section effective Oct. 1, 1983.

## SUBCHAPTER VII. OFFENSES AGAINST PUBLIC MORALITY AND DECENCY.

## ARTICLE 26.

*Offenses against Public Morality and Decency.***§ 14-177. Crime against nature.**

## CASE NOTES

**Lesser Included Offense of First-Degree Sexual Offense.** — See State v. Warren, 59 N.C. App. 264, 296 S.E.2d 671 (1982), cert. denied, — N.C. —, 299 S.E.2d 653 (1983).

**When a Lesser Included Offense of First-Degree Sexual Offense.** — Where, under the facts in a prosecution for a first-degree sexual offense, it was necessary for the State to prove a penetration, which is an element of a crime against nature, the crime

against nature was a lesser included offense of the first-degree sexual offense for which the defendant was tried, and it was not error to submit the crime against nature to the jury. State v. Hill, 59 N.C. App. 216, 296 S.E.2d 17, cert. granted, 307 N.C. 128, 297 S.E.2d 401, 404 (1982).

**Proof of penetration, etc.** —

Proof of penetration is required in order to convict of a crime against nature under this



section. *State v. Hill*, 59 N.C. App. 216, 296 S.E.2d 17, cert. granted, 307 N.C. 128, 297 S.E.2d 401, 404 (1982).

**Applied** in *Creech v. Sparkman*, 523 F. Supp. 1157 (E.D.N.C. 1981); *State v. Barrett*, 58

N.C. App. 515, 293 S.E.2d 896 (1982).

**Cited** in *State v. Ludlum*, 303 N.C. 666, 281 S.E.2d 159 (1981); *State v. Shane*, 304 N.C. 643, 285 S.E.2d 813 (1982); *State v. Jordan*, 305 N.C. 274, 287 S.E.2d 827 (1982).

## § 14-190.1. Obscene literature and exhibitions.

### **Legal Periodicals.** —

For article on a model act to prevent the sexual exploitation of children, see 17 *Wake Forest L. Rev.* 535 (1981).

For note on control of obscenity through enforcement of a nuisance statute, see 4 *Campbell L. Rev.* 139 (1981).

## § 14-190.2. Adversary hearing prior to seizure or criminal prosecution.

### **Legal Periodicals.** —

For note on control of obscenity through

enforcement of a nuisance statute, see 4 *Campbell L. Rev.* 139 (1981).

## § 14-190.6. Employing or permitting minor to assist in offense under Article.

Every person 18 years of age or older who intentionally, in any manner, hires, employs, uses or permits any minor under the age of 16 years to do or assist in doing any act or thing constituting an offense under this Article other than G.S. 14-190.12 and involving any material, act or thing he knows or reasonably should know to be obscene within the meaning of G.S. 14-190.1, shall be guilty of a misdemeanor, and unless a greater penalty is expressly provided for in this Article, shall be punishable in the discretion of the court. (1971, c. 405, s. 1; 1983, c. 916, s. 2.)

**Effect of Amendments.** — The 1983 amendment, effective Oct. 1, 1983, and applicable to

offenses committed on or after that date, inserted "other than G.S. 14-190.12."

## § 14-190.8. Dissemination to minors under the age of 13 years.

Every person 18 years of age or older who knowingly disseminates to any minor under the age of 13 years any material which he knows or reasonably should know to be obscene within the meaning of G.S. 14-190.1 shall be punished as a Class I felon, except this statute shall not apply to a teacher, a member of the clergy, priests, and rabbis, physician, nurse, or a librarian in the discharge of official responsibilities. (1971, c. 405, s. 1; 1977, c. 440, s. 3; 1979, c. 760, s. 5; 1983, c. 175, ss. 7, 10; c. 720, s. 10.)

**Editor's Note.** — Session Laws 1983, c. 175, s. 10, as amended by Session Laws 1983, c. 720, s. 4, makes the amendment effective Oct. 1, 1983.

substituted "under the age of 13 years" for "12 years of age or younger" near the beginning of the section.

### **Effect of Amendments.** —

The 1983 amendment, effective Oct. 1, 1983,



## § 14-190.9. Indecent exposure.

### CASE NOTES

**Stated** in *State v. Freeman*, 303 N.C. 299, 278 S.E.2d 207 (1981).

## § 14-190.12. Sexual performance by child.

(a) The use of a child in a sexual performance or the promotion of such a performance by a child shall be punished as a Class I felony. A person is guilty of the use of a child in a sexual performance if, knowing the character and content of the performance, he employs, authorizes, or induces a child whom he knows or reasonably should know is less than 16 years of age to engage in such performance. The parent, legal guardian, or custodian of a child less than 16 years of age is guilty of the use of a child in a sexual performance if he consents to the child's participation in such performance. A person is guilty of the promotion of a sexual performance by a child if, knowing the character and content of the performance, he produces, directs, or promotes such performance by a child who he knows or reasonably should know is less than 16 years of age.

For purposes of this section, promotion includes manufacture, delivery, or dissemination. A sexual performance is any play, motion picture, photograph, dance, or other visual presentation exhibited before an audience which includes sexual intercourse, buggery, bestiality, masturbation, sadomasochism, or lewd and lascivious exhibition of the genitals by a child less than 16 years of age.

(b) In addition to any other penalty imposed by law, a person found guilty of violating subsection (a) may be remanded by the court to a State authorized psychiatric facility to receive treatment and counseling for at least 90 days, to be served as a concurrent portion of any imposed sentence. (1983, c. 916, s. 3.)

**Editor's Note.** — Session Laws 1983, c. 916, § 4, provides that this section shall become effective Oct. 1, 1983, and shall apply to offenses committed on or after that date.

## § 14-196. Using profane, indecent or threatening language to any person over telephone; annoying or harassing by repeated telephoning or making false statements over telephone.

### Legal Periodicals. —

For note on intentional infliction of emo-

tional distress, see 18 Wake Forest L. Rev. 624 (1982).

### CASE NOTES

**Subdivision (a)(3) Constitutional.** — Because subdivision (a)(3) of this section prohibits conduct rather than speech, it survives constitutional challenge. Statutes prohibiting annoying telephoning were directed at the conduct of using telephones to annoy, offend, terrify or harass others and not directed at prohibiting the communication of thoughts or ideas. *State v. Camp*, 59 N.C. App.

38, 295 S.E.2d 766, cert. denied, — N.C. —, 299 S.E.2d 216 (1982).

Subdivision (a)(3) of this section is not unconstitutionally vague, because the statute adequately warns of the activity it prohibits. *State v. Camp*, 59 N.C. App. 38, 295 S.E.2d 766, cert. denied, — N.C. —, 299 S.E.2d 216 (1982).

**Essential elements of a violation of subdivision (a)(3)** of this section are (1) repeatedly



telephoning another person, (2) with the intent or purpose of abusing, annoying, threatening, terrifying, harassing or embarrassing any person at the called number. *State v. Camp*, 59 N.C. App. 38, 295 S.E.2d 766, cert. denied, — N.C. —, 299 S.E.2d 216 (1982).

**"Another" does not refer only to "another person."** A sheriff's department is a person under subdivision (a)(3) of this section. The fact that defendant called more than one employee does not make the statute inapplicable, because § 12-3(1) provides that "Every word importing the singular number only shall extend and be applied to several persons or things, as well as to one person or thing." *State v. Camp*, 59 N.C. App. 38, 295 S.E.2d 766, cert. denied, — N.C. —, 299 S.E.2d 216 (1982).

## § 14-202.1. Taking indecent liberties with children.

**Legal Periodicals.** — For article on a model act to prevent the sexual exploitation of children, see 17 *Wake Forest L. Rev.* 535 (1981).

### CASE NOTES

**The purpose of this section** is to give broader protection to children than the prior laws provided. *State v. Turman*, 52 N.C. App. 376, 278 S.E.2d 574 (1981).

**Touching Not Required.** — It is not necessary that there be a touching of the child by the defendant in order to constitute an indecent liberty within the meaning of this section. *State v. Turman*, 52 N.C. App. 376, 278 S.E.2d 574 (1981); *State v. Kistle*, 59 N.C. App. 724, 297 S.E.2d 626 (1982), cert. denied, — N.C. —, 298 S.E.2d 694 (1983).

The word "with" is not limited to mean only a physical touching. *State v. Turman*, 52 N.C. App. 376, 278 S.E.2d 574 (1981).

**Taking photographs of nude female child in clearly sexually suggestive position violates section.** *State v. Kistle*, 59 N.C. App. 724, 297 S.E.2d 626 (1982), cert. denied, — N.C. —, 298 S.E.2d 694 (1983).

**Not Lesser Included Offense of Statutory Rape.** — The offense of taking indecent liberties with a child, under this section, is not a lesser included offense of statutory rape under § 14-27.2(a)(1) because the age elements are different and, while sexual purpose may be inherent in an act of forcible vaginal intercourse, it is not required to be proved in order to convict a defendant of rape. *State v. Weaver*, 306 N.C. 629, 295 S.E.2d 375 (1982), overruling

**Conduct Held Not Protected under U.S. Const., Amend. 1.** — Where despite warnings, defendant continued telephoning the sheriff's department, threatening to shoot the blue lights off patrol cars, calling the deputies and sheriff names, using curse words, etc., these calls are not protected speech. The content and number of telephone calls defendant placed support the conclusion that defendant intended to annoy, harass, and threaten employees of the sheriff's department. This conduct is not protected by U.S. Const., Amend. 1 and, therefore, subdivision (a)(3) of this section which prohibits such unprotected conduct is not unconstitutionally overbroad. *State v. Camp*, 59 N.C. App. 38, 295 S.E.2d 766, cert. denied, — N.C. —, 299 S.E.2d 216 (1982).

*State v. Shaw*, 293 N.C. 616, 239 S.E.2d 439 (1977).

• The offense under this section of taking indecent liberties with a child under the age of 16 is not, as a matter of law, a lesser included offense of first-degree rape of a child of the age of 12 or less, under § 14-27.2(a)(1). *State v. Weaver*, 306 N.C. 629, 295 S.E.2d 375 (1982), overruling *State v. Shaw*, 293 N.C. 616, 239 S.E.2d 439 (1977).

**Violation Not Lesser Included Offense of § 14-27.4(a).** — In a prosecution of defendant under § 14-27.4(a) for engaging in a sexual act with children under 12, the trial court did not err in failing to instruct on taking indecent liberties with children in violation of this section, since taking indecent liberties with children is not a lesser included offense of the crime proscribed by § 14-27.4(a). *State v. Williams*, 303 N.C. 507, 279 S.E.2d 592 (1981).

**Evidence of Defendant's Age.** — An officer's testimony that he had contacted the defendant and had taken a statement from him provided the officer with the observation necessary to render his opinion as to the age of the defendant admissible in a prosecution under this section. *State v. Campbell*, 51 N.C. App. 418, 276 S.E.2d 726 (1981).

**Cited in** *State v. Ludlum*, 303 N.C. 666, 281 S.E.2d 159 (1981).



## ARTICLE 26A.

*Adult Establishments.*

## § 14-202.10. Definitions.

## CASE NOTES

**Cited in Harts Book Stores, Inc. v. City of Raleigh**, 53 N.C. App. 753, 281 S.E.2d 761 (1981).

## ARTICLE 27.

*Prostitution.*

## § 14-203. Definition of terms.

**Legal Periodicals.** — For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1088 (1981).

For article on a model act to prevent the sexual exploitation of children, see 17 Wake Forest L. Rev. 535 (1981).

## CASE NOTES

**This section unequivocally defines prostitution as an act of sexual intercourse, and nothing else.** Sexual intercourse is defined as, "the actual contact of the sexual organs of a man and a woman, and an actual penetration into the body of the latter." *State v. Richardson*, — N.C. —, 300 S.E.2d 379 (1983).

If the legislature wishes to include within § 14-204 other sexual acts, such as cunnilingus, fellatio, masturbation, buggery or sodomy, it should do so with specificity since the court is bound to construe a criminal statute

strictly in favor of the defendant. *State v. Richardson*, — N.C. —, 300 S.E.2d 379 (1983).

**"Sexual intercourse" for purposes of a rape case encompasses actual penetration.** *State v. Richardson*, — N.C. —, 300 S.E.2d 379 (1983).

**The sexual act of masturbation for hire is not included in the definition of prostitution**, as found in this section and prohibited by § 14-204. *State v. Richardson*, — N.C. —, 300 S.E.2d 379 (1983).

## § 14-204. Prostitution and various acts abetting prostitution unlawful.

**Legal Periodicals.** — For article on a model act to prevent the sexual exploitation of children, see 17 Wake Forest L. Rev. 535 (1981).

## CASE NOTES

**Meaning of "Solicit".** — Nothing appears with regard to subdivision (5) of this section, from the context or otherwise, to indicate an intent to give the word "solicit" anything other than its ordinary meaning. *State v. Haggard*, 59 N.C. App. 727, 297 S.E.2d 635 (1982).

**The sexual act of masturbation for hire is not included in the definition of prostitution**, as found in § 14-203 and prohibited by this section. *State v. Richardson*, — N.C. —, 300 S.E.2d 379 (1983).

If the legislature wishes to include within



this section other sexual acts, such as cunnilingus, fellatio, masturbation, buggery or sodomy, it should do so with specificity since the

court is bound to construe a criminal statute strictly in favor of the defendant. *State v. Richardson*, — N.C. —, 300 S.E.2d 379 (1983).

## § 14-204.1. Loitering for the purpose of engaging in prostitution offense.

- (b) If a person remains or wanders about in a public place and
- (1) Repeatedly beckons to, stops, or attempts to stop passers-by, or repeatedly attempts to engage passers-by in conversation; or
  - (2) Repeatedly stops or attempts to stop motor vehicles; or
  - (3) Repeatedly interferes with the free passage of other persons for the purpose of violating any subdivision of G.S. 14-204 or 14-177,
- that person is guilty of a misdemeanor and, upon conviction, shall be punished as for a violation of G.S. 14-204. (1979, c. 873, s. 2.)

**Only Part of Section Set Out.** — Subsection (b) of this section is set out to correct the indentation in the bound volume.

## SUBCHAPTER VIII. OFFENSES AGAINST PUBLIC JUSTICE.

### ARTICLE 28.

#### *Perjury.*

## § 14-209. Punishment for perjury.

### CASE NOTES

**Solicitation to commit perjury is a felony** within the terms of § 14-3(b) and is properly within the jurisdiction of the superior court.

*State v. Huff*, 56 N.C. App. 721, 289 S.E.2d 604, cert. denied, 306 N.C. 389, 294 S.E.2d 215 (1982).

## § 14-210. Subornation of perjury.

### CASE NOTES

**Solicitation to commit perjury is a felony** within the terms of § 14-3(b) and is properly within the jurisdiction of the superior court.

*State v. Huff*, 56 N.C. App. 721, 289 S.E.2d 604, cert. denied, 306 N.C. 389, 294 S.E.2d 215 (1982).

## § 14-214. False statement to procure benefit of insurance policy or certificate.

### CASE NOTES

**Criminal Actions Provide Guidance.** — Although criminal actions under this section

cannot establish the standard for judging misrepresentation in civil actions, they do pro-



vide guidance. *Shields v. Nationwide Mut. Fire Ins. Co.*, — N.C. App. —, 301 S.E.2d 439 (1983).

## ARTICLE 29.

### *Bribery.*

#### § 14-217. Bribery of officials.

##### CASE NOTES

##### **Bribery Defined.** —

A person is guilty of bribery if, while holding a public office, he receives something of value for omitting to perform an official act with the

express or implied understanding that his official action or inaction was to be influenced by the thing of value. *State v. Stanley*, — N.C. App. —, 299 S.E.2d 464 (1983).

§ 14-219: Repealed by Session Laws 1983, c. 780, s. 1, effective July 18, 1983.

**Editor's Note.** — Session Laws 1983, c. 780, s. 3, provides: "Prosecutions for offenses occurring 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."

## ARTICLE 30.

### *Obstructing Justice.*

#### § 14-221.1. Altering, destroying, or stealing evidence of criminal conduct.

##### CASE NOTES

**Conviction of defendant was not obtained in violation of this section** where unidentifiable fingerprints lifted from the scene of the crime were thrown away by the State as

irrelevant. *State v. Pennell*, 54 N.C. App. 252, 283 S.E.2d 397 (1981), appeal dismissed, 304 N.C. 732, 288 S.E.2d 804 (1982).

#### § 14-223. Resisting officers.

##### CASE NOTES

##### **I. GENERAL CONSIDERATION.**

**Cited in** *State v. McNeil*, 54 N.C. App. 454, 283 S.E.2d 565 (1981); *State v. Rhodes*, 305 N.C. 294, 287 S.E.2d 898 (1982).

##### **II. WHAT CONSTITUTES THE OFFENSE.**

**Defendant may not rely on self-defense where State's evidence is that defendant**



**provoked the incident** after his lawful arrest, and the officer used only the amount of force necessary to bring the situation under control. *State v. Wells*, 59 N.C. App. 682, 298 S.E.2d 73 (1982).

### III. PRACTICE AND PROCEDURE.

#### Warrant or Indictment, etc. —

To charge a violation of this section, the

warrant or bill must indicate the specific official duty the officer was discharging or attempting to discharge. *State v. Wells*, 59 N.C. App. 682, 298 S.E.2d 73 (1982).

An indictment for resisting arrest must only include a general description of the defendant's actions. *State v. Baldwin*, 59 N.C. App. 430, 297 S.E.2d 188 (1982).

## § 14-226. Intimidating or interfering with witnesses.

### CASE NOTES

**Applied** in *State v. Isom*, 52 N.C. App. 331, 278 S.E.2d 327 (1981).

### ARTICLE 31.

#### *Misconduct in Public Office.*

## § 14-230. Willfully failing to discharge duties.

### CASE NOTES

**Sections 7A-173 and 7A-376 are not irreconcilably in conflict with this section.** *State v. Greer*, — N.C. —, 302 S.E.2d 774 (1983).

**Magistrates Not Exempted.** — The Legislature did not intend to exempt magistrates from indictment and criminal prosecution under this section when it included magistrates under the sanctions of §§ 7A-173 and 7A-376. This section applies to misconduct in office

unless another statute provides for the "indictment" of the officer, but neither §§ 7A-173 nor 7A-376 provide for criminal charges to be brought against a magistrate who is guilty of misconduct in office. *State v. Greer*, — N.C. —, 302 S.E.2d 774 (1983).

**Applied** in *State v. Stanley*, — N.C. App. —, 299 S.E.2d 464 (1983).

**Cited** in *State v. Jarvis*, 50 N.C. App. 679, 274 S.E.2d 852 (1981).

## § 14-234. Director of public trust contracting for his own benefit; participation in business transaction involving public funds; exemptions.

(c) No director, board member, commissioner, or employee of any State department, agency, or institution shall directly or indirectly enter into or otherwise participate in any business transaction involving public funds with any firm, corporation, partnership, person or association which at any time during the preceding two-year period had a financial association with such director, board member, commissioner or employee.

(c1) The fact that a person owns ten percent (10%) or less of the stock of a corporation or has a ten percent (10%) or less ownership in any other business entity or is an employee of said corporation or other business entity does not make the person "in any manner interested" or "concerned or interested in making such contract, or in the profits thereof," as such phrase is used in subsection (a) of this section, and does not make the person one who "had a



financial association," as defined in subsection (c) of this section; provided that in order for the exception provided by this subsection to apply, such undertaking or contracting must be authorized by the governing board by specific resolution on which such public official shall not vote.

(1825, c. 1269, P.R.; 1826, c. 29; R.C., c. 34, s. 38; Code, s. 1011; Rev., s. 3572; C.S., s. 4388; 1929, c. 19, s. 1; 1969, c. 1027; 1975, c. 409; 1977, cc. 240, 761; 1979, c. 720; 1981, c. 103, ss. 1, 2, 5; 1983, c. 544, ss. 1, 2.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Local Modification.** — Pamlico: 1981 (Reg. Sess., 1982), c. 1198; city of New Bern: 1983, c. 364; city of Reidsville: 1983, c. 893.

**Cross References.** —

As to liability of board of education members, see § 115C-48.

**Effect of Amendments.** —

The 1983 amendment, effective June 16, 1983, deleted "employed or otherwise" following "during the preceding two-year period" in subsection (c) and added subsection (c1).

## § 14-235. Speculating in claims against towns, cities and the State.

**Cross References.** — As to liability of board of education members, see § 115C-48.

## § 14-236. Acting as agent for those furnishing supplies for schools and other State institutions.

**Cross References.** — As to liability of board of education members, see § 115C-48.

As to applicability to community colleges and technical institutes, see § 115D-26.

## § 14-237. Buying school supplies from interested officer.

**Cross References.** — As to liability of board of education members, see § 115C-48.

## § 14-239. Allowing prisoners to escape; punishment.

If any sheriff, deputy sheriff, or jailer, shall willfully or wantonly allow the escape of any person committed to his custody who is (i) a person charged with a crime, or (ii) a person sentenced by the court upon conviction of any offense, he shall be guilty of a misdemeanor. No prosecution shall be brought against any such officer pursuant to this section by reason of a prisoner being allowed to participate pursuant to court order in any work release, work study, community service, or other lawful program, or by reason of any such prisoner failing to return from participation in any such program. (1791, c. 343, s. 1, P.R.; R.C., c. 34, s. 35; Code, s. 1022; 1905, c. 350; Rev., s. 3577; C.S., s. 4393; 1973, c. 108, s. 7; 1983, c. 694.)

**Effect of Amendments.** — The 1983 amendment, effective Oct. 1, 1983, rewrote this section.



### § 14-243. Failing to surrender tax list for inspection and correction.

If any tax collector shall refuse or fail to surrender his tax list for inspection or correction upon demand by the authorities imposing the tax, or their successors in office, he shall be guilty of a misdemeanor, and shall be imprisoned not more than five years, and fined not exceeding one thousand dollars (\$1,000), at the discretion of the court. (1870-1, c. 177, s. 2; Code, s. 3823; Rev., s. 3788; C.S., s. 4397; 1983, c. 670, s. 23.)

**Effect of Amendments.** — The 1983 amendment, effective July 1, 1983, deleted "sheriff or" following "If any."

### § 14-247. Private use of publicly owned vehicle.

It shall be unlawful for any officer, agent or employee of the State of North Carolina, or of any county or of any institution or agency of the State, to use for any private purpose whatsoever any motor vehicle of any type or description whatsoever belonging to the State, or to any county, or to any institution or agency of the State. It is not a private purpose to drive a permanently assigned state-owned motor vehicle between one's official work station and one's home as provided in G.S. 143-341(8)i7a.

It shall be unlawful for any person to violate a rule or regulation adopted by the Department of Administration and approved by the Governor concerning the control of all state-owned passenger motor vehicles as provided in G.S. 143-341(8)i with the intent to defraud the State of North Carolina. (1925, c. 239, s. 1; 1981, c. 859, ss. 52, 53; 1983, c. 717, s. 75.)

**Editor's Note.** — Session Laws 1983, c. 717, s. 1, provides: "This act may be cited as the Separation of Powers Act of 1983."

**Effect of Amendments.** —

The 1983 amendment, effective July 11,

1983, deleted "and the Advisory Budget Commission" following "the Governor" in the second paragraph.

### § 14-250. Publicly owned vehicle to be marked.

It shall be the duty of the executive head of every department of the State government, and of any county, or of any institution or agency of the State, to have painted on every motor vehicle owned by the State, or by any county, or by any institution or agency of the State, a statement that such car belongs to the State or to some county, or institution or agency of the State. Provided, however, that no automobile used by any county officer or county official for the purpose of transporting, apprehending or arresting persons charged with violations of the laws of the State of North Carolina, shall be required to be lettered. Provided, further, that in lieu of the above method of marking motor vehicles owned by any agency or department of the State government, it shall be deemed a compliance with the law if such vehicles have imprinted on the license tags thereof, above the license number, the words "State Owned" and that such vehicles have affixed to the front thereof a plate with the statement "State Owned." Provided, further, that in lieu of the above method of marking vehicles owned by any county, it shall be deemed a compliance with the law if such vehicles have painted or affixed on the side thereof a circle not less than eight inches in diameter showing a replica of the seal of such county. Provided, further, that in lieu of the above method of marking vehicles owned by the State and permanently assigned to members of the Council of State, it shall be deemed a compliance with the law if such vehicles have imprinted on the



license tags thereof the license number assigned to the appropriate member of the Council of State pursuant to G.S. 20-81(4); a member of the Council of State shall not be assessed any registration fee if he elects to have a state-owned motor vehicle assigned to him designated by his official plate number.

The General Assembly may authorize exemptions from the provisions of this section for each fiscal year. Each agency shall submit requests for private tags to the Division of Motor Fleet Management of the Department of Administration. The Division shall report the requests to the Appropriations Committees of the General Assembly by June 1. If urgent need for an exemption arises when the General Assembly is not in session, the Division shall review the request and report it to the Council of State. The Council of State may authorize the exemption if it finds it is expedient and necessary in undercover work by those charged with enforcing the criminal laws of the State. Every 90 days, the Council of State shall report all requests and actions taken on them to the Joint Legislative Commission on Governmental Operations. Exemptions authorized by the Council of State shall expire at the end of the fiscal year in which they are granted or when the General Assembly acts on exemptions for the next fiscal year, whichever is sooner. (1925, c. 239, s. 4; 1929, c. 303, s. 1; 1945, c. 866; 1957, c. 1249; 1961, c. 1195; 1965, c. 1186; 1971, c. 3; 1981 (Reg. Sess., 1982), c. 1282, ss. 59, 60.)

**Effect of Amendments.** — The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982, in the first paragraph substituted "county officer or county official" for "officer or official in any county in the State" in the second sentence, deleted the former fourth and fifth sentences, relating to authorization of exemptions from

the section with respect to any state-owned vehicle if in the public interest, and added the present last sentence. The amendment also added the second paragraph.

Session Laws 1981 (Reg. Sess., 1982), c. 1282, s. 81, contains a severability clause.

## ARTICLE 33.

### *Prison Breach and Prisoners.*

#### § 14-255. Escape of hired prisoners from custody.

#### CASE NOTES

**Fair Sentencing Act.** — Although the principal provisions of the Fair Sentencing Act are codified in Chapter 15A, Article 81A of the General Statutes, the act resulted in revisions to other portions of the general statutes. See e.g., Chapter 14, Articles 1, 2, 2A, 33; Chapter 15A, Articles 58, 81A, 82, 83, 85, 85A, 89, 91; Chapter 148, Article 2, and Chapter 162,

Article 4. State v. Ahearn, — N.C. —, 300 S.E.2d 689 (1983).

For case discussing the historical background, policies, purposes, and implementation of the new Fair Sentencing Act, see State v. Ahearn, — N.C. —, 300 S.E.2d 689 (1983).

#### § 14-256. Prison breach and escape from county or municipal confinement facilities or officers.

If any person shall break any prison, jail or lockup maintained by any county or municipality in North Carolina, being lawfully confined therein, or shall escape from the lawful custody of any superintendent, guard or officer of such prison, jail or lockup, he shall be guilty of a misdemeanor, except that the person is guilty of a Class J felony if:



- (1) He has been convicted of a felony and has been committed to the facility pending transfer to the State prison system; or
- (2) He is serving a sentence imposed upon conviction of a felony. (1 Edw. II, st. 2d; R.C., c. 34, s. 19; Code, s. 1021; Rev., s. 3657; 1909, c. 872; C.S., s. 4404; 1955, c. 279, s. 1; 1983, c. 455, s. 1.)

**Effect of Amendments.** — The 1983 amendment, effective Oct. 1, 1983, added the language "except that the person is guilty of a Class J felony if:" and subdivisions (1) and (2), at the end of this section.

### § 14-258.1. Furnishing poison, controlled substances, deadly weapons, cartridges, ammunition or alcoholic beverages to inmates of charitable, mental or penal institutions or local confinement facilities.

#### CASE NOTES

**Quoted** in *State v. Hanson*, 57 N.C. App. 595, 291 S.E.2d 912 (1982).

### § 14-258.2. Possession of dangerous weapon in prison.

(a) Any person while in the custody of the Division of Prisons, or any person under the custody of any local confinement facility as defined in G.S. 153A-217, who shall have in his possession without permission or authorization a weapon capable of inflicting serious bodily injuries or death, or who shall fabricate or create such a weapon from any source, shall be guilty of a misdemeanor; and any person who commits any assault with such weapon and thereby inflicts bodily injury or by the use of said weapon effects an escape or rescue from imprisonment shall be punished as a Class H felon.

(b) A person is guilty of a Class H felony if he assists a prisoner in the custody of the Division of Prisons or of any local confinement facility as defined in G.S. 153A-217 in escaping or attempting to escape and:

- (1) In the perpetration of the escape or attempted escape he commits an assault with a deadly weapon and inflicts bodily injury; or
- (2) By the use of a deadly weapon he effects the escape of the prisoner. (1975, c. 316, s. 1; 1979, c. 760, s. 5; 1983, c. 455, s. 2.)

**Effect of Amendments.** —

The 1983 amendment, effective Oct. 1, 1983,

designated the first paragraph of this section as subsection (a) and added subsection (b).

### § 14-259. Harboring or aiding certain persons.

It shall be unlawful for any person knowing or having reasonable cause to believe, that any person has escaped from any prison, jail, reformatory, or from the criminal insane department of any State hospital, or from the custody of any peace officer who had such person in charge, or that such person is a convict or prisoner whose parole has been revoked, or that such person is a fugitive from justice or is otherwise the subject of an outstanding warrant for arrest or order of arrest, to conceal, hide, harbor, feed, clothe or otherwise aid and comfort in any manner to any such person. Fugitive from justice shall, for



the purpose of this provision, mean any person who has fled from any other jurisdiction to avoid prosecution for a crime."

Every person who shall conceal, hide, harbor, feed, clothe, or offer aid and comfort to any other person in violation of this section shall be guilty of a felony, if such other person has been convicted of, or was in custody upon the charge of a felony, and shall be punished as a Class I felon; and shall be guilty of a misdemeanor, if such other person had been convicted of, or was in custody upon a charge of a misdemeanor, and shall be punished in the discretion of the court.

The provisions of this section shall not apply to members of the immediate family of such person. For the purposes of this section "immediate family" shall be defined to be the mother, father, brother, sister, wife, husband and child of said person. (1939, c. 72; 1979, c. 760, s. 5; 1983, c. 564, ss. 1-3.)

#### Effect of Amendments. —

The 1983 amendment, effective Oct. 1, 1983, deleted "other" preceding "person has escaped from any prison," inserted "or that such person is a fugitive from justice or is otherwise the subject of an outstanding warrant for arrest or order of arrest," and substituted "or otherwise

aid" for "or offer aid" in the first sentence of the first paragraph, added the second sentence of the first paragraph and, in the last paragraph, substituted "person" for "escapee" in the first and second sentences. The amendment also rewrote the catchline.

§ 14-260: Recodified as § 162-55 by Session Laws 1983, c. 631, s. 1.

§ 14-261: Recodified as § 162-56 by Session Laws 1983, c. 631, s. 2.

§ 14-264: Recodified as § 162-57 by Session Laws 1983, c. 631, s. 3.

## SUBCHAPTER IX. OFFENSES AGAINST THE PUBLIC PEACE.

### ARTICLE 35.

#### *Offenses Against the Public Peace.*

#### § 14-269. Carrying concealed weapons.

(a) It shall be unlawful for any person, except when on his own premises, willfully and intentionally to carry concealed about his person any bowie knife, dirk, dagger, slung shot, loaded cane, metallic knuckles, razor, pistol, gun or other deadly weapon of like kind.

(b) This prohibition shall not apply to the following persons:

- (1) Officers and enlisted personnel of the armed forces of the United States when in discharge of their official duties as such and acting under orders requiring them to carry arms and weapons;
- (2) Civil officers of the United States while in the discharge of their official duties;
- (3) Officers and soldiers of the militia and the national guard when called into actual service;
- (4) Officers of the State, or of any county, city, or town, charged with the execution of the laws of the State, when acting in the discharge of their official duties;
- (5) Full-time sworn law-enforcement officers, when off-duty, in the jurisdiction where they are assigned, if:



- a. Written regulations authorizing the carrying of concealed weapons have been filed with the clerk of superior court in the county where the law-enforcement unit is located by the sheriff or chief of police or other superior officer in charge; and
- b. Such regulations specifically prohibit the carrying of concealed weapons while the officer is consuming or under the influence of alcoholic beverages.

(c) Any person violating the provisions of this section shall be guilty of a misdemeanor, and shall be punished by a fine not to exceed five hundred dollars (\$500.00), imprisonment for not more than six months, or both. (Code, s. 1005; Rev., s. 3708; 1917, c. 76; 1919, c. 197, s. 8; C.S., s. 4410; 1923, c. 57; Ex. Sess. 1924, c. 30; 1929, cc. 51, 224; 1947, c. 459; 1949, c. 1217; 1959, c. 1073, s. 1; 1965, c. 954, s. 1; 1969, c. 1224, s. 7; 1977, c. 616; 1981, c. 412, s. 4; c. 747, s. 66; 1983, c. 86.)

**Effect of Amendments.** —

The 1983 amendment, effective October 1, 1983, rewrote this section.

### CASE NOTES

#### I. GENERAL CONSIDERATION.

**Cited** in *State v. Grainger*, 60 N.C. App. 188, 298 S.E.2d 203 (1982).

## § 14-269.1. Confiscation and disposition of deadly weapons.

Upon conviction of any person for violation of G.S. 14-269 or any other offense involving the use of a deadly weapon of a type referred to in G.S. 14-269, the deadly weapon with reference to which the defendant shall have been convicted shall be ordered confiscated and disposed of by the presiding judge at the trial in one of the following ways in the discretion of the presiding judge.

- (5) By ordering such weapon turned over to the North Carolina State Bureau of Investigation's Crime Laboratory Weapons Reference Library for official use by that agency. The State Bureau of Investigation shall maintain a record and inventory of all such weapons received. (1965, c. 954, s. 2; 1967, c. 24, s. 3; 1983, c. 517.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1983 amendment, effective June 13, 1983, added subdivision (5).

### CASE NOTES

**Applied** in *In re Greene*, 306 N.C. 376, 297 S.E.2d 379 (1982).

## § 14-269.2. Weapons on campus or other educational property.

### CASE NOTES

**Applied** in *In re Greene*, 306 N.C. 376, 297 S.E.2d 379 (1982).



**§§ 14-272 to 14-275:** Repealed by Session Laws 1983, c. 39, ss. 1-4, effective October 1, 1983.

**Cross References.** — As to disrupting, disturbing or interfering with a religious service or assembly, see now § 14-288.4(a)(7).

## § 14-277.1. Communicating threats.

### **Legal Periodicals.** —

For note on intentional infliction of emo-

tional distress, see 18 Wake Forest L. Rev. 624 (1982).

## CASE NOTES

**Cited in** Town of Winterville v. King, — N.C. App. —, 299 S.E.2d 838 (1983).

## § 14-277.2. Weapons at parades, etc., prohibited.

(a) It shall be unlawful for any person participating in, affiliated with, or present as a spectator at any parade, funeral procession, picket line, or demonstration upon any public place owned or under the control of the State or any of its political subdivisions to willfully or intentionally possess or have immediate access to any dangerous weapon. Violation of this subsection shall be a misdemeanor. It shall be presumed that any rifle or gun carried on a rack in a pickup truck at a holiday parade or in a funeral procession does not violate the terms of this act.

(1981, c. 684, s. 1; 1983, c. 633.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1983 amend-

ment, effective Oct. 1, 1983 and applicable to acts committed on or after that date, inserted "at a holiday parade or in a funeral procession" in the last sentence of subsection (a).

## ARTICLE 36.

### *Offenses against the Public Safety.*

## § 14-284. Keeping for sale or selling explosives without a license.

**Local Modification.** — Catawba: 1983, c. 116; Forsyth: 1983, c. 21; Union: 1983, c. 116.



## SUBCHAPTER X. OFFENSES AGAINST THE PUBLIC SAFETY.

### ARTICLE 36A.

#### *Riots and Civil Disorders.*

#### § 14-288.1. Definitions.

**Cross References.** — As to the Governor ordering a cessation of all sales, manufacture, and delivery of alcoholic beverages during a state of emergency, see § 18B-110.

**Editor's Note.** — In line four of subdivision (2) of this section as set out in the 1981 replace-

ment volume, the word "carriers" should be "carries." In subdivision (3) of this section as set out in the 1981 replacement volume, "of" should be inserted between "State" and "North Carolina" in the third line from the end of the subdivision.

#### § 14-288.2. Riot; inciting to riot; punishments.

#### CASE NOTES

**Quoted** in *State v. Yarborough*, 55 N.C. App. 52, 284 S.E.2d 550 (1981).

#### § 14-288.4. Disorderly conduct.

(a) Disorderly conduct is a public disturbance intentionally caused by any person who:

- (1) Engages in fighting or other violent conduct or in conduct creating the threat of imminent fighting or other violence; or
- (2) Makes or uses any utterance, gesture, display or abusive language which is intended and plainly likely to provoke violent retaliation and thereby cause a breach of the peace; or
- (3) Takes possession of, exercises control over, or seizes any building or facility of any public or private educational institution without the specific authority of the chief administrative officer of the institution, or his authorized representative; or
- (4) Refuses to vacate any building or facility of any public or private educational institution in obedience to:
  - a. An order of the chief administrative officer of the institution, or his authorized representative; or
  - b. An order given by any fireman or public health officer acting within the scope of his authority; or
  - c. If a state of emergency is occurring or is imminent within the institution, an order given by any law-enforcement officer acting within the scope of his authority; or
- (5) Shall, after being forbidden to do so by the chief administrative officer, or his authorized representative, of any public or private educational institution:
  - a. Engage in any sitting, kneeling, lying down, or inclining so as to obstruct the ingress or egress of any person entitled to the use of any building or facility of the institution in its normal and intended use; or



- b. Congregate, assemble, form groups or formations (whether organized or not), block, or in any manner otherwise interfere with the operation or functioning of any building or facility of the institution so as to interfere with the customary or normal use of the building or facility; or
- (6) Disrupts, disturbs or interferes with the teaching of students at any public or private educational institution or engages in conduct which disturbs the peace, order or discipline at any public or private educational institution or on the grounds adjacent thereto.
- (7) Disrupts, disturbs, or interferes with a religious service or assembly or engages in conduct which disturbs the peace or order at any religious service or assembly.

As used in this section the term "building or facility" includes the surrounding grounds and premises of any building or facility used in connection with the operation or functioning of such building or facility.

(1969, c. 869, s. 1; 1971, c. 668, s. 1; 1973, c. 1347; 1975, c. 19, s. 4; 1983, c. 39, s. 5.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1983 amendment, effective October 1, 1983, added subdivision (a)(7).

## **§ 14-288.8. Manufacture, assembly, possession, storage, transportation, sale, purchase, delivery, or acquisition of weapon of mass death and destruction; exceptions.**

(c) The term "weapon of mass death and destruction" includes:

- (1) Any explosive, incendiary, poison gas or radioactive material:
  - a. Bomb; or
  - b. Grenade; or
  - c. Rocket having a propellant charge of more than four ounces; or
  - d. Missile having an explosive or incendiary charge of more than one-quarter ounce; or
  - e. Mine; or
  - f. Device similar to any of the devices described above; or
- (2) Any type of weapon (other than a shotgun or a shotgun shell of a type particularly suitable for sporting purposes) which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter; or
- (3) Any firearm capable of fully automatic fire, any shotgun with a barrel or barrels of less than 18 inches in length or an overall length of less than 26 inches, any rifle with a barrel or barrels of less than 16 inches in length or an overall length of less than 26 inches, any muffler or silencer for any firearm, whether or not such firearm is included within this definition. For the purposes of this section, rifle is defined as a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder.
- (4) Any combination of parts either designed or intended for use in converting any device into any weapon described above and from which a weapon of mass death and destruction may readily be assembled;
- (5) Radioactive material, which means any solid, liquid or gas which emits or may emit ionizing radiation spontaneously or which becomes capa-



ble of producing radiation or nuclear particles when controls or triggering mechanisms of any associated device are operable.

The term "weapon of mass death and destruction" does not include any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line-throwing, safety, or similar device; surplus ordnance sold, loaned, or given by the Secretary of the Army pursuant to the provisions of section 4684(2), 4685, or 4686 of Title 10 of the United States Code; or any other device which the Secretary of the Treasury finds is not likely to be used as a weapon, is an antique, or is a rifle which the owner intends to use solely for sporting purposes, in accordance with Chapter 44 of Title 18 of the United States Code.

(d) Any person who violates any provision of this section is guilty of a Class I felony. (1969, c. 869, s. 1; 1975, c. 718, ss. 6, 7; 1977, c. 810; 1983, c. 413, ss. 1, 2.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1983 amend-

ment, effective Oct. 1, 1983, rewrote subdivision (c)(3) and, in subsection (d), substituted "a Class I felony" for "a misdemeanor punishable as provided in G.S. 14-3(a)."

## CASE NOTES

Cited in *State v. Jones*, 304 N.C. 323, 283 S.E.2d 483 (1981).

## OPINIONS OF ATTORNEY GENERAL

**Effect on Permit Requirements.** — The provisions of this section relating to weapons of mass death and destruction do not abrogate or abolish permit requirements of §§ 14-409 and

14-409.9. See opinion of Attorney General to Mr. T.A. Radewicz, Sheriff, New Hanover County, 50 N.C.A.G. 109 (1981).

## § 14-288.20. Certain weapons at civil disorders.

**Editor's Note.** —

In subdivision (a)(3) of this section as set out in the 1981 replacement volume, "composed or

any material" in line six should be "composed of any material."

## SUBCHAPTER XI. GENERAL POLICE REGULATIONS.

### ARTICLE 37.

#### *Lotteries, Gaming, Bingo and Raffles.*

#### Part 1. Lotteries and Gaming.

## § 14-289. Advertising lotteries.

Except in connection with a lawful raffle as provided in Part 2 of this Article, if anyone by writing or printing or by circular or letter or in any other way, advertise or publish an account of a lottery, whether within or without this State, stating how, when or where the same is to be or has been drawn, or what are the prizes therein or any of them, or the price of a ticket or any share or



interest therein, or where or how it may be obtained, he shall be guilty of a misdemeanor. (1887, c. 211; Rev., s. 3725; C.S., s. 4427; 1979, c. 893, s. 3; 1983, c. 896, s. 1.)

**Editor's Note.** — Session Laws 1983, c. 896, s. 3, effective Oct. 1, 1983, designated existing Article 37 of Chapter 14 as Part 1 of such Article and added a new Part 2.

Session Laws 1983, c. 896, ss. 5.1 and 6, provide: "Sec. 5.1. Should the Supreme Court of North Carolina or a federal court having jurisdiction over North Carolina find and determine in any manner, whether on the merits or by denial of petition for discretionary review, that the General Assembly may not constitutionally allow 'exempt organizations' as defined herein to conduct bingo or raffles, while denying that

privilege to all other persons, then this act and G.S. 14-292.1 are repealed in their entirety, and no person may conduct bingo or raffles under any circumstances not permitted by the gambling laws of North Carolina.

"Sec. 6. Prosecutions for offenses occurring 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."

**Effect of Amendments.** — The 1983 amendment, effective Oct. 1, 1983, substituted "Part 2 of this Article" for "G.S. 14-292.1."

## § 14-290. Dealing in lotteries.

Except in connection with a lawful raffle as provided in Part 2 of this Article, if any person shall open, set on foot, carry on, promote, make or draw, publicly or privately, a lottery, by whatever name, style or title the same may be denominated or known; or if any person shall, by such way and means, expose or set to sale any house, real estate, goods, chattels, cash, written evidence of debt, certificates of claims or any other thing of value whatsoever, every person so offending shall be guilty of a misdemeanor, and shall be fined not exceeding two thousand dollars (\$2,000) or imprisoned not exceeding six months, or both, in the discretion of the court. Any person who engages in disposing of any species of property whatsoever, including money and evidences of debt, or in any manner distributes gifts or prizes upon tickets, bottle crowns, bottle caps, seals on containers, other devices or certificates sold for that purpose, shall be held liable to prosecution under this section. Any person who shall have in his possession any tickets, certificates or orders used in the operation of any lottery shall be held liable under this section, and the mere possession of such tickets shall be prima facie evidence of the violation of this section. (1834, c. 19, s. 1; R.C., c. 34, s. 69; 1874-5, c. 96; Code, s. 1047; Rev., s. 3726; C.S., s. 4428; 1933, c. 434; 1937, c. 157; 1979, c. 893, s. 4; 1983, c. 896, s. 1.)

**Editor's Note.** — Session Laws 1983, c. 896, ss. 5.1 and 6, provide: "Sec. 5.1. Should the Supreme Court of North Carolina or a federal court having jurisdiction over North Carolina find and determine in any manner, whether on the merits or by denial of petition for discretionary review, that the General Assembly may not constitutionally allow 'exempt organizations' as defined herein to conduct bingo or raffles, while denying that privilege to all other persons, then this act and G.S. 14-292.1 are repealed in their entirety, and no person may

conduct bingo or raffles under any circumstances not permitted by the gambling laws of North Carolina.

"Sec. 6. Prosecutions for offenses occurring 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."

**Effect of Amendments.** — The 1983 amendment, effective Oct. 1, 1983, substituted "Part 2 of this Article" for "G.S. 14-292.1" in the first sentence.



## CASE NOTES

**"Lottery" Defined.** — A lottery is any scheme for the distribution of prizes, by lot or chance, by which one, on paying money or giving any other thing of value to another, obtains a token which entitles him to receive a larger or smaller value, or nothing, as some formula of chance may determine. *State v. Simmons*, 59 N.C. App. 287, 296 S.E.2d 805 (1982).

**Legal Effect of Lottery Ticket.** — A lottery ticket entitles the holder to demand and receive one of the prizes awarded. It is a thing which is the holder's means of making good his rights.

The essence of it is that it is in the hands of the other party to the contract with the lottery as a document of title. *State v. Simmons*, 59 N.C. App. 287, 296 S.E.2d 805 (1982).

**First clause of the last sentence creates a separate offense** that is applicable to those participating in a lottery as well as to those conducting the lottery. This offense comprises the possession of tickets, certificates or orders that are used in the operation of a lottery. *State v. Simmons*, 59 N.C. App. 287, 296 S.E.2d 805 (1982).

## § 14-291. Selling lottery tickets and acting as agent for lotteries.

Except in connection with a lawful raffle as provided in Part 2 of this Article, if any person shall sell, barter or otherwise dispose of any lottery ticket or order for any number of shares in any lottery, or shall in anywise be concerned in such lottery, by acting as agent in the State for or on behalf of any such lottery, to be drawn or paid either out of or within the State, such person shall be guilty of a misdemeanor, and shall be punished as provided for in G.S. 14-290. (1834, c. 19, s. 2; R.C., c. 34, s. 70; Code, s. 1048; Rev., s. 3727; C.S., s. 4429; 1979, c. 893, s. 5; 1983, c. 896, s. 1.)

**Editor's Note.** — Session Laws 1983, c. 896, ss. 5.1 and 6, provide: "Sec. 5.1. Should the Supreme Court of North Carolina or a federal court having jurisdiction over North Carolina find and determine in any manner, whether on the merits or by denial of petition for discretionary review, that the General Assembly may not constitutionally allow 'exempt organizations' as defined herein to conduct bingo or raffles, while denying that privilege to all other persons, then this act and G.S. 14-292.1 are repealed in their entirety, and no person may

conduct bingo or raffles under any circumstances not permitted by the gambling laws of North Carolina.

"Sec. 6. Prosecutions for offenses occurring 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."

**Effect of Amendments.** — The 1983 amendment, effective Oct. 1, 1983, substituted "Part 2 of this Article" for "G.S. 14-292.1."

## § 14-291.1. Selling "numbers" tickets; possession prima facie evidence of violation.

Except in connection with a lawful raffle as provided in Part 2 of this Article, if any person shall sell, barter or cause to be sold or bartered, any ticket, token, certificate or order for any number or shares in any lottery, commonly known as the numbers or butter and egg lottery, or lotteries of similar character, to be drawn or paid within or without the State, such person shall be guilty of a misdemeanor and shall be punished by fine or imprisonment, or both, in the discretion of the court. Any person who shall have in his possession any tickets, tokens, certificates or orders used in the operation of any such lottery shall be guilty under this section, and the possession of such tickets shall be prima facie evidence of the violation of this section. (1943, c. 550; 1979, c. 893, s. 6; 1983, c. 896, s. 1.)



**Editor's Note.** — Session Laws 1983, c. 896, ss. 5.1 and 6, provide: "Sec. 5.1. Should the Supreme Court of North Carolina or a federal court having jurisdiction over North Carolina find and determine in any manner, whether on the merits or by denial of petition for discretionary review, that the General Assembly may not constitutionally allow 'exempt organizations' as defined herein to conduct bingo or raffles, while denying that privilege to all other persons, then this act and G.S. 14-292.1 are repealed in their entirety, and no person may

conduct bingo or raffles under any circumstances not permitted by the gambling laws of North Carolina.

"Sec. 6. Prosecutions for offenses occurring 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."

**Effect of Amendments.** — The 1983 amendment, effective Oct. 1, 1983, substituted "Part 2 of this Article" for "G.S. 14-292.1" in the first sentence.

## § 14-291.2. Pyramid and chain schemes prohibited.

(c) Any judge of the superior court shall have jurisdiction, upon petition by the Attorney General of North Carolina or district attorney of the superior court, to enjoin, as an unfair or deceptive trade practice, the continuation of the scheme described in subsection (a); in such proceeding the court may assess civil penalties and attorneys' fees to the Attorney General or the District Attorney pursuant to G.S. 75-15.2 and 75-16.1; and the court may appoint a receiver to secure and distribute assets obtained by any defendant through participation in any such scheme.

(1971, c. 875, s. 1; 1973, c. 47, s. 2; 1983, c. 721, s. 2.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1983 amendment, effective July 11, 1983, substituted "civil penalties and attorneys' fees to the Attorney General or the District Attorney pursuant to G.S. 75-15.2 and G.S. 75-16.1" for "a civil penalty against any defendant found to have

engaged in the willful promotion of such a scheme with knowledge that such conduct violated this section, in an amount not to exceed two thousand dollars (\$2,000) which shall be for the benefit of the general fund of the State of North Carolina as reimbursement for expenses incurred in the institution and prosecution of the action" in subsection (c).

## CASE NOTES

**Applied** in *State ex rel. Edmisten v. Challenge, Inc.*, 54 N.C. App. 513, 284 S.E.2d 333 (1981).

## § 14-292. Gambling.

Except as provided in Part 2 of this Article, any person or organization that operates any game of chance or any person who plays at or bets on any game of chance at which any money, property or other thing of value is bet, whether the same be in stake or not, shall be guilty of a misdemeanor. (1891, c. 29; Rev., s. 3715; C.S., s. 4430; 1979, c. 893, s. 1; 1983, c. 896, s. 1.)

**Editor's Note.** — Session Laws 1983, c. 896, ss. 5.1 and 6, provide: "Sec. 5.1. Should the Supreme Court of North Carolina or a federal court having jurisdiction over North Carolina find and determine in any manner, whether on the merits or by denial of petition for discretionary review, that the General Assembly may not constitutionally allow 'exempt organizations' as defined herein to conduct bingo or

raffles, while denying that privilege to all other persons, then this act and G.S. 14-292.1 are repealed in their entirety, and no person may conduct bingo or raffles under any circumstances not permitted by the gambling laws of North Carolina.

"Sec. 6. Prosecutions for offenses occurring 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.”

**Effect of Amendments.** — The 1983 amend-

ment, effective Oct. 1, 1983, substituted “Part 2 of this Article” for “G.S. 14-292.1.”

### CASE NOTES

**Quoted in** *Walter Kidde & Co. v. Bradshaw*, 56 N.C. App. 718, 289 S.E.2d 571 (1982).

**Cited in** *United States v. Smith*, 704 F.2d 723 (4th Cir. 1983).

**§ 14-292.1:** Repealed by Session Laws 1983, c. 896, s. 2, effective October 1, 1983.

**Cross References.** — For present provisions concerning bingo and raffles, see § 14-309.5 et seq.

**Editor's Note.** —

Session Laws 1983, c. 896, ss. 5.1 and 6, provide: “Sec. 5.1. Should the Supreme Court of North Carolina or a federal court having jurisdiction over North Carolina find and determine in any manner, whether on the merits or by denial of petition for discretionary review, that the General Assembly may not constitutionally allow ‘exempt organizations’ as defined herein

to conduct bingo or raffles, while denying that privilege to all other persons, then this act and G.S. 14-292.1 are repealed in their entirety, and no person may conduct bingo or raffles under any circumstances not permitted by the gambling laws of North Carolina.

“Sec. 6. Prosecutions for offenses occurring 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.”

**§ 14-295. Keeping gaming tables, illegal punchboards or slot machines, or betting thereat.**

### CASE NOTES

**This section prohibits establishing, using or keeping an illegal punchboard.** Actual operation of the device is not an element of the

offense. *State v. Warren*, — N.C. App. —, 301 S.E.2d 126 (1983).

**§§ 14-309.2 to 14-309.4:** Reserved for future codification purposes.

## Part 2. Bingo and Raffles.

**§ 14-309.5. Bingo and raffles.**

It is lawful for an exempt organization to conduct raffles and bingo games in accordance with the provisions of this Part. Any licensed exempt organization who conducts a raffle or bingo game in violation of any provision of this Part shall be guilty of a misdemeanor under G.S. 14-292 and shall be punished in accordance with G.S. 14-3. Upon conviction such person shall not conduct a raffle or bingo game for a period of one year. It is lawful to participate in a raffle or bingo game conducted pursuant to this Part. It shall be a Class H felony for any person: (i) to operate a raffle or bingo game without a license; (ii) to operate a raffle or bingo game while license is revoked or suspended; (iii) to willfully misuse or misapply any moneys received in connection with any bingo game or raffle; or (iv) to contract with or provide consulting services to any licensee. It shall not constitute a violation of any State law to advertise a raffle or bingo game conducted in accordance with this Part. (1983, c. 896, s. 3.)



**Editor's Note.** — Session Laws 1983, c. 896, s. 7, makes this part effective Oct. 1, 1983.

Session Laws 1983, c. 896, ss. 5.1 and 6, provide: "Sec. 5.1. Should the Supreme Court of North Carolina or a federal court having jurisdiction over North Carolina find and determine in any manner, whether on the merits or by denial of petition for discretionary review, that the General Assembly may not constitutionally allow 'exempt organizations' as defined herein to conduct bingo or raffles, while denying that

privilege to all other persons, then this act and G.S. 14-292.1 are repealed in their entirety, and no person may conduct bingo or raffles under any circumstances not permitted by the gambling laws of North Carolina.

"Sec. 6. Prosecutions for offenses occurring 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."

## § 14-309.6. Definitions.

For purposes of this Part, the term:

- (1) "Exempt organization" means an organization that has been in continuous existence in the county of operation of the raffle or bingo game for at least one year and that is exempt from taxation under section 501(c)(3), 501(c)(4), 501(c)(8), 501(c)(10), 501(c)(19), or 501(d) of the Internal Revenue Code and is exempt under similar provisions of the General Statutes as a bona fide nonprofit charitable, civic, religious, fraternal, patriotic or veterans' organization or as a nonprofit volunteer fire department, or as a nonprofit volunteer rescue squad or a bona fide homeowners' or property owners' association. (If the organization has local branches or chapters, the term "exempt organization" means the local branch or chapter operating the raffle or bingo game);
- (2) "Bingo game" means a specific game of chance played with individual cards having numbered squares ranging from one to 75, in which prizes are awarded on the basis of designated numbers on such cards conforming to a predetermined pattern of numbers (but shall not include "instant bingo" which is a game of chance played by the selection of one or more prepackaged cards, with winners determined by the appearance of a preselected designation on the card);
- (3) "Raffle" means a lottery in which the prize is won by random drawing of the name or number of one or more persons purchasing chances, and which is held in accordance with the provisions of G.S. 14-309.8 and G.S. 14-309.9;
- (4) "Local law-enforcement agency" means for any raffle or bingo game conducted outside the corporate limits of a municipality or inside the corporate limits of a municipality having no municipal police force:
  - a. The county police force; or
  - b. The county sheriff's office in a county with no county police force;
- (5) "Local law-enforcement agency" means the municipal police for any raffle or bingo game conducted within the corporate limits of a municipality having a police force;
- (6) "Beach bingo games" means bingo games which have prizes of ten dollars (\$10.00) or less or merchandise that is not redeemable for cash and that has a value of ten dollars (\$10.00) or less; and
- (7) "Licensed exempt organization" means an exempt organization which possesses a currently valid license. (1983, c. 896, s. 3.)

**Editor's Note.** — Session Laws 1983, c. 896, ss. 5.1 and 6, provide: "Sec. 5.1. Should the Supreme Court of North Carolina or a federal court having jurisdiction over North Carolina find and determine in any manner, whether on the merits or by denial of petition for discre-

tionary review, that the General Assembly may not constitutionally allow 'exempt organizations' as defined herein to conduct bingo or raffles, while denying that privilege to all other persons, then this act and G.S. 14-292.1 are repealed in their entirety, and no person may



conduct bingo or raffles under any circumstances not permitted by the gambling laws of North Carolina.

"Sec. 6. Prosecutions for offenses occurring

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."

### § 14-309.7. Licensing procedure.

(a) Any exempt organization desiring to obtain a license to operate bingo games or raffles shall make application to the Department of Revenue on forms prescribed by the Department. Such license shall expire one year after the granting of the license. This license may be renewed from year to year. A copy of the application and license shall be furnished to the local law-enforcement agency in the county or municipality in which the licensee intends to operate before bingo is conducted by the licensee.

(b) Each application and renewal application shall contain the following information:

- (1) The name and address of the applicant and if the applicant is a corporation, association or other similar legal entity, the name and home address of each of the officers of the organization as well as the name and address of the directors, or other persons similarly situated, of the organization.
- (2) The name and home address of each of the members of the special committee.
- (3) A copy of the application for recognition of exemptions and a determination letter from the Internal Revenue Service and the Department of Revenue that indicates that the organization is an exempt organization and stating the section under which that exemption is granted; except that if the organization is a State or local branch, lodge, post, or chapter of a national organization, a copy of the determination letter of the national organization satisfies this requirement.
- (4) The location at which the applicant will conduct the bingo games or raffles. If the premises are leased, a copy of the lease or rental agreement.

(c) In order for an exempt organization to have a member familiar with the operation of bingo present on the premises at all times when bingo is being played and for this member to be responsible for the receiving, reporting and depositing of all revenues received, the exempt organization may pay one member for conducting a bingo game. Such pay shall be on an hourly basis only for the time bingo is actually being played and shall not exceed one and one-half times the existing minimum wage in North Carolina. The member paid under this provision shall be a member in good standing of the exempt organization for at least one year and shall not be the lessor or an employee or agent of the lessor. No other person may be compensated for conducting a raffle or bingo game from funds derived from any activities occurring in, or simultaneously with, the playing of bingo, including funds derived from concessions. An exempt organization shall not contract with any person for the purpose of conducting a raffle or bingo game. Except as provided in subsection (e) of this section, an exempt organization may hold a bingo game only in or on property owned (either legally or equitably and the buildings must be of a permanent nature with approved plumbing for bathrooms and not movable or of a temporary nature such as a tent or lean-to) or leased by the organization from the owner or bona fide property management agent (no subleasing is permitted) at a total monthly rental in an amount not to exceed one and one-quarter percent (1¼%) of the total assessed ad valorem tax value of the portion of the building actually used for the bingo games or raffles and the land value on which the building is located (not to exceed two acres) for all activities



conducted therein including the playing of bingo for a period of not less than one year and actually occupied and used by that organization on a regular basis for purposes other than bingo for at least six months before the game; and all equipment used by the exempt organization in conducting the bingo game must be owned by the organization. Unless the exempt organization leases the property in accordance with this subsection, an exempt organization may conduct a bingo game only in or on property that is exempt from property taxes levied under Subchapter II of Chapter 105 of the General Statutes, or that is classified and not subject to any property taxes levied under Subchapter II of Chapter 105 of the General Statutes. It shall be unlawful for any person to operate beach bingo games at a location which is being used by any licensed exempt organization for the purpose of conducting bingo games.

(d) Conduct of a bingo game or raffle under this Part on such property shall not operate to defeat an exemption or classification under Subchapter II of Chapter 105 of the General Statutes.

(e) An exempt organization desiring to conduct an annual or semi-annual bingo game may apply to the Department of Revenue for a single occasion permit. The Department of Revenue may require such information as is reasonable and necessary to determine that the bingo game is conducted in accordance with the provisions of this Part but may not require more information than previously specified in this section for application of a regular license. The application shall be made to the Department on prescribed forms at least 30 days prior to the scheduled date of the bingo game. In lieu of the reporting requirements of G.S. 14-309.11(b) the exempt organization shall file with the licensing agency and local law-enforcement a report on prescribed forms no later than 30 days following the conduct of the bingo game for which the permit was obtained. Such report may require such information as is reasonable and necessary to determine that the bingo game was conducted in accordance with the provisions of this Part but may not require more information than specified in G.S. 14-309.11(b). Any licensed exempt organization may donate or loan its equipment or use of its premises to an exempt organization which has secured a single occasion permit provided such arrangement is disclosed in the single occasion permit application and is approved by the Department of Revenue. Except as stated above, all provisions of this Part shall apply to any exempt organization operating a bingo game under this provision. (1983, c. 896, s. 3; c. 923, s. 217.)

**Editor's Note.** — Session Laws 1983, c. 896, ss. 5.1 and 6, provide: "Sec. 5.1. Should the Supreme Court of North Carolina or a federal court having jurisdiction over North Carolina find and determine in any manner, whether on the merits or by denial of petition for discretionary review, that the General Assembly may not constitutionally allow 'exempt organizations' as defined herein to conduct bingo or raffles, while denying that privilege to all other persons, then this act and G.S. 14-292.1 are repealed in their entirety, and no person may

conduct bingo or raffles under any circumstances not permitted by the gambling laws of North Carolina.

"Sec. 6. Prosecutions for offenses occurring 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."

**Effect of Amendments.** — The 1983 amendment, effective July 22, 1983, rewrote subsection (c).

## § 14-309.8. Limit on sessions.

The number of sessions of bingo conducted or sponsored by an exempt organization shall be limited to two sessions per week and such sessions must not exceed a period of five hours each per session. No two sessions of bingo shall be held within a 48-hour period of time. No more than two sessions of bingo shall be operated or conducted in any one building, hall or structure during any



one calendar week and if two sessions are held, they must be held by the same exempt organization. Raffles shall be limited to one per month per organization per county. This section shall not apply to bingo games or raffles conducted at a fair or other exhibition conducted pursuant to Article 45 of Chapter 106 of the General Statutes. (1983, c. 896, s. 3; c. 923, s. 217.)

**Editor's Note.** — Session Laws 1983, c. 896, ss. 5.1 and 6, provide: "Sec. 5.1. Should the Supreme Court of North Carolina or a federal court having jurisdiction over North Carolina find and determine in any manner, whether on the merits or by denial of petition for discretionary review, that the General Assembly may not constitutionally allow 'exempt organizations' as defined herein to conduct bingo or raffles, while denying that privilege to all other persons, then this act and G.S. 14-292.1 are repealed in their entirety, and no person may conduct bingo or raffles under any circum-

stances not permitted by the gambling laws of North Carolina.

"Sec. 6. Prosecutions for offenses occurring 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."

**Effect of Amendments.** — The 1983 amendment, effective July 22, 1983, added "and if two sessions are held, they must be held by the same exempt organization" at the end of the third sentence.

### § 14-309.9. Bingo and raffle prizes.

(a) The maximum prize in cash or merchandise that may be offered or paid for any one game of bingo is five hundred dollars (\$500.00). The maximum aggregate amount of prizes, in cash and/or merchandise, that may be offered or paid at any one session of bingo is one thousand five hundred dollars (\$1,500). Provided, however, that if an exempt organization holds only one session of bingo during a calendar week, the maximum aggregate amount of prizes, in cash and/or merchandise, that may be offered or paid at any one session is two thousand five hundred dollars (\$2,500).

(b) A raffle conducted pursuant to this Part shall be lawful only if the amount of a prize paid in cash is five hundred dollars (\$500.00) or less, or if merchandise used as a prize, not redeemable in cash, has a market value of twenty thousand dollars (\$20,000) or less.

(c) This section shall not apply to bingo games or raffles conducted at a fair or other exhibition conducted pursuant to Article 45 of Chapter 106 of the General Statutes. (1983, c. 896, s. 3.)

**Editor's Note.** — Session Laws 1983, c. 896, ss. 5.1 and 6, provide: "Sec. 5.1. Should the Supreme Court of North Carolina or a federal court having jurisdiction over North Carolina find and determine in any manner, whether on the merits or by denial of petition for discretionary review, that the General Assembly may not constitutionally allow 'exempt organizations' as defined herein to conduct bingo or raffles, while denying that privilege to all other

persons, then this act and G.S. 14-292.1 are repealed in their entirety, and no person may conduct bingo or raffles under any circumstances not permitted by the gambling laws of North Carolina.

"Sec. 6. Prosecutions for offenses occurring 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."

### § 14-309.10. Operation of raffles and bingo.

The operation of raffles or bingo games shall be the direct responsibility of, and controlled by, a special committee selected by the governing body of the exempt organization in the manner provided by the rules of the exempt organization. (1983, c. 896, s. 3.)



**Editor's Note.** — Session Laws 1983, c. 896, ss. 5.1 and 6, provide: "Sec. 5.1. Should the Supreme Court of North Carolina or a federal court having jurisdiction over North Carolina find and determine in any manner, whether on the merits or by denial of petition for discretionary review, that the General Assembly may not constitutionally allow 'exempt organizations' as defined herein to conduct bingo or raffles, while denying that privilege to all other

persons, then this act and G.S. 14-292.1 are repealed in their entirety, and no person may conduct bingo or raffles under any circumstances not permitted by the gambling laws of North Carolina.

"Sec. 6. Prosecutions for offenses occurring 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."

## § 14-309.11. Accounting and use of proceeds.

(a) All funds received in connection with a raffle or bingo game shall be placed in a separate bank account. No funds may be disbursed from this account except the exempt organization may expend proceeds for prizes, advertising, utilities, and the purchase of supplies and equipment used in conducting the raffle and in playing bingo, taxes and license fees related to raffles and bingo and the payment of compensation as authorized by G.S. 14-309.7(c) and for the purposes set forth below for the remaining proceeds. Such payments shall be made by consecutively numbered checks. Any proceeds available in the account after payment of the above expenses shall inure to the exempt organization to be used for religious, charitable, civic, scientific, testing, public safety, literary, or educational purposes or for purchasing, constructing, maintaining, operating or using equipment or land or a building or improvements thereto owned by and for the exempt organization and used for civic purposes or made available by the exempt organization for use by the general public from time to time, or to foster amateur sports competition, or for the prevention of cruelty to children or animals, provided that no proceeds shall be used or expended for social functions for the members of the exempt organization.

(b) An audit of the account required by subsection (a) of this section shall be prepared annually for the period of January 1 through December 31 or otherwise as directed by the Department of Revenue and shall be filed with the Department of Revenue and the local law-enforcement agency at a time directed by the Department of Revenue. The audit shall be prepared on a form approved by the Department of Revenue and shall include the following information:

- (1) The number of raffles or bingo games conducted or sponsored by the exempt organization;
- (2) The location and date at which each raffle or bingo game was conducted and the prize awarded;
- (3) The gross receipts of each raffle or bingo game;
- (4) The cost or amount of any prize given at each raffle or bingo game;
- (5) The amount paid in prizes at each session;
- (6) The net return to the exempt organization; and
- (7) The disbursements from the separate account and the purpose of those disbursements, including the date of each transaction and the name and address of each payee.

(c) Any person who shall willfully furnish, supply, or otherwise give false information in any audit or statement filed pursuant to this section shall be guilty of a misdemeanor.

(d) All books, papers, records and documents relevant to determining whether an organization has acted or is acting in compliance with this section shall be open to inspection by the law-enforcement agency or its designee, or the district attorney or his designee, or the Department of Revenue at reasonable times and during reasonable hours. (1983, c. 896, s. 3.)



**Editor's Note.** — Session Laws 1983, c. 896, ss. 5.1 and 6, provide: "Sec. 5.1. Should the Supreme Court of North Carolina or a federal court having jurisdiction over North Carolina find and determine in any manner, whether on the merits or by denial of petition for discretionary review, that the General Assembly may not constitutionally allow 'exempt organizations' as defined herein to conduct bingo or raffles, while denying that privilege to all other

persons, then this act and G.S. 14-292.1 are repealed in their entirety, and no person may conduct bingo or raffles under any circumstances not permitted by the gambling laws of North Carolina.

"Sec. 6. Prosecutions for offenses occurring 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."

## § 14-309.12. Violation is gambling.

A raffle or bingo game conducted otherwise than in accordance with the provisions of this Part is "gambling" within the meaning of G.S. 19-1 et seq., and proceedings against such raffle or bingo game may be instituted as provided for in Chapter 19 of the General Statutes. (1983, c. 896, s. 3.)

**Editor's Note.** — Session Laws 1983, c. 896, ss. 5.1 and 6, provide: "Sec. 5.1. Should the Supreme Court of North Carolina or a federal court having jurisdiction over North Carolina find and determine in any manner, whether on the merits or by denial of petition for discretionary review, that the General Assembly may not constitutionally allow 'exempt organizations' as defined herein to conduct bingo or raffles, while denying that privilege to all other

persons, then this act and G.S. 14-292.1 are repealed in their entirety, and no person may conduct bingo or raffles under any circumstances not permitted by the gambling laws of North Carolina.

"Sec. 6. Prosecutions for offenses occurring 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."

## § 14-309.13. Public sessions.

Any exempt organization operating a bingo game or raffle which is open to persons other than members of the exempt organization, their spouses, and their children shall make such bingo game or raffle open to the general public. (1983, c. 896, s. 3.)

**Editor's Note.** — Session Laws 1983, c. 896, ss. 5.1 and 6, provide: "Sec. 5.1. Should the Supreme Court of North Carolina or a federal court having jurisdiction over North Carolina find and determine in any manner, whether on the merits or by denial of petition for discretionary review, that the General Assembly may not constitutionally allow 'exempt organizations' as defined herein to conduct bingo or raffles, while denying that privilege to all other

persons, then this act and G.S. 14-292.1 are repealed in their entirety, and no person may conduct bingo or raffles under any circumstances not permitted by the gambling laws of North Carolina.

"Sec. 6. Prosecutions for offenses occurring 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."

## § 14-309.14. Beach bingo.

Nothing in this Article shall apply to "beach bingo" games nor shall it apply to any raffle held in conjunction with a convention or other meeting open only to members of the exempt organization, their spouses, and their children. G.S. 18B-308 shall apply to such games. (1983, c. 896, s. 3.)

**Editor's Note.** — Session Laws 1983, c. 896, ss. 5.1 and 6, provide: "Sec. 5.1. Should the Supreme Court of North Carolina or a federal court having jurisdiction over North Carolina

find and determine in any manner, whether on the merits or by denial of petition for discretionary review, that the General Assembly may not constitutionally allow 'exempt organiza-



tions' as defined herein to conduct bingo or raffles, while denying that privilege to all other persons, then this act and G.S. 14-292.1 are repealed in their entirety, and no person may conduct bingo or raffles under any circumstances not permitted by the gambling laws of North Carolina.

"Sec. 6. Prosecutions for offenses occurring 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."

## ARTICLE 39.

### *Protection of Minors.*

#### § 14-316.1. Contributing to delinquency and neglect by parents and others.

Any person who is at least 16 years old who knowingly or willfully causes, encourages, or aids any juvenile within the jurisdiction of the court to be in a place or condition, or to commit an act whereby the juvenile could be adjudicated delinquent, undisciplined, abused, or neglected as defined by G.S. 7A-517 shall be guilty of a misdemeanor.

It is not necessary for the district court exercising juvenile jurisdiction to make an adjudication that any juvenile is delinquent, undisciplined, abused, or neglected in order to prosecute a parent or any person, including an employee of the Department of Human Resources under this section. An adjudication that a juvenile is delinquent, undisciplined, abused, or neglected shall not preclude a subsequent prosecution of a parent or any other person including an employee of the Division of Youth Services who contributes to the delinquent, undisciplined, abused, or neglected condition of any juvenile. (1919, c. 97, s. 19; C.S., s. 5057; 1959, c. 1284; 1969, c. 911, s. 4; 1971, c. 1180, s. 5; 1979, c. 692; 1983, c. 175, ss. 8, 10; c. 720, s. 4.)

#### **Editor's Note. —**

Session Laws 1983, c. 175, s. 10, as amended by Session Laws 1983, c. 720, s. 4, makes the amendment effective Oct. 1, 1983.

**Effect of Amendments. —** The 1983 amendment, effective Oct. 1, 1983, substituted "who is at least 16 years old" for "over 16 years of age".

near the beginning of the first paragraph.

#### **Legal Periodicals. —**

For a note on the indigent parent's right to state furnished counsel in parental status termination proceedings, see 17 Wake Forest L. Rev. 961 (1981).

## CASE NOTES

**Duty to Protect and Provide for Minor Children. —** Parents in this State have an affirmative legal duty to protect and provide for their minor children. *State v. Walden*, 306 N.C. 466, 293 S.E.2d 780 (1982).

**Duty to Prevent Harm to Child Is Reasonable. —** To require a parent as a matter of law to take affirmative action to prevent harm to his or her child or be held criminally liable imposes a reasonable duty upon the parent; this duty is and has always been inherent in the duty of parents to provide for the safety and welfare of their children, which duty has long been recognized by the common law and by statute. *State v. Walden*, 306 N.C. 466, 293 S.E.2d 780 (1982).

**And Requires Reasonable Steps to Prevent Harm. —** While parents do not have the legal duty to place themselves in danger of death or great bodily harm in coming to the aid of their children, parents do have the duty to take every step reasonably possible under the circumstances of a given situation to prevent harm to their children. What is reasonable in any given case will be a question for the jury after proper instructions from the trial court. *State v. Walden*, 306 N.C. 466, 293 S.E.2d 780 (1982).

**Failure to Protect Child from Assault. —** A mother may be found guilty of assault on a theory of aiding and abetting solely on the basis that she was present when her child was assaulted but failed to take reasonable steps to



prevent the assault. *State v. Walden*, 306 N.C. 466, 293 S.E.2d 780 (1982).

The failure of a parent who is present to take all steps reasonably possible to protect the parent's child from an attack by another person constitutes an act of omission by the parent showing the parent's consent and contribution to the crime being committed. *State v. Walden*, 306 N.C. 466, 293 S.E.2d 780 (1982).

Trial court properly allowed the jury to con-

sider a verdict of guilty of assault with a deadly weapon inflicting serious injury, upon a theory of aiding and abetting, solely on the ground that defendant mother was present when her child was brutally beaten by third party but failed to take all steps reasonable to prevent the attack or otherwise protect the child from injury. *State v. Walden*, 306 N.C. 466, 293 S.E.2d 780 (1982).

## § 14-318. Exposing children to fire.

If any person shall leave any child under the age of eight years locked or otherwise confined in any dwelling, building or enclosure, and go away from such dwelling, building or enclosure without leaving some person of the age of discretion in charge of the same, so as to expose the child to danger by fire, the person so offending shall be guilty of a misdemeanor, and shall be punished at the discretion of the court. (1893, c. 12; Rev., s. 3795; C.S., s. 4443; 1983, c. 175, s. 9, 10; c. 720, s. 4.)

**Editor's Note.** — Session Laws 1983, c. 175, s. 10, as amended by Session Laws 1983, c. 720, s. 4, makes the amendment effective Oct. 1, 1983.

**Effect of Amendments.** — The 1983 amendment, effective Oct. 1, 1983, substituted "under the age of eight years" for "of the age of seven years or less" near the beginning of the section.

## § 14-318.2. Child abuse a general misdemeanor.

### **Legal Periodicals.** —

For article on a model act to prevent the

sexual exploitation of children, see 17 Wake Forest L. Rev. 535 (1981).

### CASE NOTES

Neither § 14-32(b) nor this section proscribes a crime which is a lesser included offense of the other, and conviction or acquittal of one will not support a plea of former jeopardy against a charge for violation of the other. *State v. Walden*, 306 N.C. 466, 293 S.E.2d 780 (1982).

**Battered child syndrome is a medical term.** It refers to children who have injuries that are inconsistent with accidental origins by virtue of the distribution of the injuries. *State v. Byrd*, — N.C. App. —, 300 S.E.2d 49 (1983).

Battered child syndrome does not have by itself any legal consequences. *State v. Byrd*, — N.C. App. —, 300 S.E.2d 49 (1983).

### **State's Burden of Proof.** —

In accord with 1st paragraph in original. See *State v. Armistead*, 54 N.C. App. 358, 283 S.E.2d 162 (1981).

The proof in cases where there is evidence of battered child syndrome is no different from ordinary murder and manslaughter cases. *State v. Byrd*, — N.C. App. —, 300 S.E.2d 49 (1983).

**Circumstantial Evidence.** — Evidence of battered child syndrome is circumstantial evidence which should be treated as any other circumstantial evidence in a murder or manslaughter case. *State v. Byrd*, — N.C. App. —, 300 S.E.2d 49 (1983).

If a young child is home with his parents and receives an injury which cannot be explained as an accidental injury, it is evidence from which the jury may find the parents are guilty after considering it with all other evidence. *State v. Byrd*, — N.C. App. —, 300 S.E.2d 49 (1983).

**Evidence of Separate Incident of Abuse Held Not Prejudicial.** — Although in a prosecution for child abuse it was error to allow introduction of testimony concerning a separate incident in which defendant struck his child, the error was not prejudicial where there was ample uncontradicted evidence that defendant intentionally inflicted some physical injury on his child and defendant failed to meet the burden of proving a reasonable probability that a different result would have occurred had the court not admitted the testimony. *State v. Armistead*, 54 N.C. App. 358, 283 S.E.2d 162 (1981).



### § 14-318.4. Child abuse a felony.

(a) Any parent of a child less than 16 years of age, or any other person providing care to or supervision of the child who intentionally inflicts any serious physical injury which results in:

- (1) Permanent disfigurement, or
- (2) Bone fracture, or
- (3) Substantial impairment of physical health, or
- (4) Substantial impairment of the function of any organ, limb, or appendage of such child,

is guilty of child abuse and shall be punished as a Class I felon.

(a1) Any parent of a child less than 16 years of age, or any other person providing care to or supervision of the child, who commits, permits, or encourages any act of prostitution with or by the juvenile is guilty of child abuse and shall be punished as a Class I felon.

(a2) Any parent or legal guardian of a child less than 16 years of age who commits or allows the commission of any sexual act upon a juvenile is guilty of a Class I felony.

(1979, c. 897, s. 1; 1979, 2nd Sess., c. 1316, s. 18; 1983, c. 653, s. 1; c. 916, § 1.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The first 1983 amendment, effective Oct. 1, 1983, substituted "Class H felony" for "Class I felony" at the of subsection (a).

The second 1983 amendment, effective Oct. 1, 1983, and applicable to offenses committed on or after that date, substituted "is guilty of child

abuse and shall be punished as a Class I felon" for "is guilty of a Class I felony" at the end of subsection (a) and added subsections (a1) and (a2). Subsections (a), (a1) and (a2) have been set out as amended by the second 1983 amendment.

#### **Legal Periodicals.** —

For article on a model act to prevent the sexual exploitation of children, see 17 Wake Forest L. Rev. 535 (1981).

### CASE NOTES

**Youth of the victim may not be considered an aggravating factor** in a felony child abuse case, since the youth of the victim is a necessary element of felonious child abuse under this section, and evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation under § 15A-1340.4(a)(1). *State v. Ahearn*, 59 N.C.

App. 44, 295 S.E.2d 621 (1982).

**Applied** in *State v. Ahearn*, — N.C. —, 300 S.E.2d 689 (1983).

**Quoted** in *State v. Medlin*, — N.C. App. —, 302 S.E.2d 483 (1983).

**Cited** in *State v. Farmer*, — N.C. App. —, 299 S.E.2d 842 (1983).

### § 14-320.1. Transporting child outside the State with intent to violate custody order.

When any federal court or state court in the United States shall have awarded custody of a child under the age of 16 years, it shall be a felony for any person with the intent to violate the court order to take or transport, or cause to be taken or transported, any such child from any point within this State to any point outside the limits of this State or to keep any such child outside the limits of this State. Such crime shall be punishable as a Class J felony. Provided that keeping a child outside the limits of the State in violation of a court order for a period in excess of 72 hours shall be prima facie evidence that the person charged intended to violate the order at the time of taking. (1969, c. 81; 1979, c. 760, s. 5; 1983, c. 563, s. 1.)



**Effect of Amendments.** — The 1983 amendment, effective Oct. 1, 1983, and applicable to offenses committed on or after that date, substituted "When any federal court or state court in

the United States" for "When any court of competent jurisdiction in this State" at the beginning of the first sentence.

# CASE NOTES

**Cited in** *Fungaroli v. Fungaroli*, 51 N.C. App. 363, 276 S.E.2d 521 (1981); *Clayton v.*

*Clayton*, 54 N.C. App. 612, 284 S.E.2d 125 (1981).

## ARTICLE 40.

### *Protection of the Family.*

## § 14-322. Abandonment and failure to support spouse and children.

### **Legal Periodicals.** —

For survey of 1980 family law, see 59 N.C.L. Rev. 1194 (1981).

For article on the rights of individuals to control the distributional consequences of

divorce by private contract and on the interests of the State in preserving its role as a third party to marriage and divorce, see 59 N.C.L. Rev. 819 (1981).

# CASE NOTES

## I. GENERAL CONSIDERATION.

**Applied in** *State v. Neeley*, 307 N.C. 247, 297 S.E.2d 389 (1982).

## III. NONSUPPORT OF CHILDREN.

**Limitation on Prosecution for Nonsupport of Illegitimate Children Held Constitutional.** — The three-year statute of limitations contained in § 49-4(1) for prosecutions under § 49-2 does not violate the Equal Protection Clause of the federal Constitution in

that it prescribes a limitations period for the prosecution of persons who willfully fail to support their illegitimate children whereas there is no limitations period for the prosecution under subsection (d) of this section of persons who willfully fail to support their legitimate children. *State v. Beasley*, 57 N.C. App. 208, 290 S.E.2d 730, cert. denied, 306 N.C. 559, 294 S.E.2d 225 (1982).

**Cited in** *State v. Neeley*, 57 N.C. App. 211, 290 S.E.2d 727 (1982).

## § 14-322.1. Abandonment of child or children for six months.

Any man or woman who, without just cause or provocation, willfully abandons his or her child or children for six months and who willfully fails or refuses to provide adequate means of support for his or her child or children during the six months' period, and who attempts to conceal his or her whereabouts from his or her child or children with the intent of escaping his lawful obligation for the support of said child or children, shall be punished as a Class I felon. (1963, c. 1227; 1979, c. 760, s. 5; 1983, c. 653, s. 2.)

### **Effect of Amendments.** —

The 1983 amendment, effective Oct. 1, 1983,

substituted "Class I felon" for "Class H felon" at the end of the section.



## ARTICLE 43.

*Vagrants and Tramps.*

§ 14-336: Repealed by Session Laws 1983, c. 17, s. 1, effective February 17, 1983.

§§ 14-338, 14-339: Repealed by Session Laws 1983, c. 17, ss. 2, 3, effective February 17, 1983.

## ARTICLE 45.

*Regulation of Employer and Employee.*

§ 14-355. **Blacklisting employees.**

## CASE NOTES

Quoted in *Wright v. Fiber Indus., Inc.*, —  
N.C. App. —, 299 S.E.2d 284 (1983).

## ARTICLE 46.

*Regulation of Landlord and Tenant.*

§ 14-358. **Local: Violation of certain contracts between landlord and tenant.**

If any tenant or cropper shall procure advances from his landlord to enable him to make a crop on the land rented by him, and then willfully abandon the same without good cause and before paying for such advances with intent to defraud the landlord; or if any landlord shall contract with a tenant or cropper to furnish him advances to enable him to make a crop, and shall willfully fail or refuse, without good cause, to furnish such advances according to his agreement with intent to defraud the tenant, he shall be guilty of a misdemeanor and shall be fined not exceeding fifty dollars (\$50.00) or imprisoned not exceeding 30 days. Any person employing a tenant or cropper who has violated the provisions of this section, with knowledge of such violation, shall be liable to the landlord furnishing such advances for the amount thereof, and shall also be guilty of a misdemeanor, and fined not exceeding fifty dollars (\$50.00) or imprisoned not exceeding 30 days. This section shall apply to the following counties only: Alamance, Alexander, Beaufort, Bertie, Bladen, Cabarrus, Camden, Caswell, Chowan, Cleveland, Columbus, Craven, Cumberland, Currituck, Duplin, Edgecombe, Gaston, Gates, Greene, Halifax, Harnett, Hertford, Johnston, Jones, Lee, Lenoir, Lincoln, Martin, Mecklenburg, Montgomery, Nash, Northampton, Onslow, Pamlico, Pender, Perquimans, Person, Pitt, Randolph, Robeson, Rockingham, Rowan, Rutherford, Sampson, Stokes, Surry, Tyrrell, Vance, Wake, Warren, Washington, Wayne, Wilson and Yadkin. (1905, cc. 297, 383, 445, 820; Rev., s. 3366; 1907, c. 8; c. 84, s. 1; c. 595, s. 1; cc. 639, 719, 869; Pub. Loc. 1915, c. 18; C.S., s. 4480; Ex. Sess. 1920, c. 26; 1925; c. 285, s. 2; Pub. Loc. 1925, c. 211; Pub. Loc. 1927, c. 614; 1931, c. 136, s. 1; 1945, c. 635; 1953, c. 474; 1983, c. 623.)



**Effect of Amendments.** — The 1983 amendment, effective Oct. 1, 1983, deleted "Chatham" from the list of counties in the last sentence.

## ARTICLE 52.

### *Miscellaneous Police Regulations.*

#### § 14-394. Anonymous or threatening letters, mailing or transmitting.

**Legal Periodicals.** — For note on intentional infliction of emotional distress, see 18 Wake Forest L. Rev. 624 (1982).

#### § 14-398. Theft or destruction of property of public libraries, museums, etc.

**Local Modification.** — Dare: 1983, c. 349.

the fifth line of this section in the bound volume should read "apparatus."

**Editor's Note.** — The word "apparauts" in

#### § 14-399. Littering.

(b) When litter is so blown, scattered, spilled, thrown or placed from a vehicle or watercraft, the operator thereof shall be presumed to have committed such offense. This presumption, however, does not apply to a vehicle transporting agricultural products or supplies when the litter from that vehicle is a nontoxic, biodegradable agricultural product or supply.

(1935, c. 457; 1937, c. 446; 1943, c. 543; 1951, c. 975, s. 1; 1953, cc. 387, 1011; 1955, c. 437; 1957, cc. 73, 175; 1959, c. 1173; 1971, c. 165; 1973, c. 877; 1977, c. 887, s. 1; 1979, c. 1065, s. 1; 1983, c. 890.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Local Modification.** — Avery, Burke, Caldwell, Mitchell and Wilkes counties: 1981 (Reg. Sess., 1982), c. 1155; City of Charlotte: 1983, c. 362.

**Effect of Amendments.** — The 1983 amend-

ment, effective July 20, 1983, added the second sentence of subsection (b).

**Legal Periodicals.** — For comment discussing aesthetics-based municipal regulation in light of State v. Jones, 305 N.C. 520, 290 S.E.2d 675 (1982), see 18 Wake Forest L. Rev. 1167 (1982).

## CASE NOTES

### **Former Section Unconstitutional.** —

State v. Brown, 250 N.C. 54, 108 S.E.2d 74 (1959), noted in the replacement volume under this heading, was overruled by State v. Jones,

305 N.C. 520, 290 S.E.2d 675 (1982).

**Cited in** Town of Winterville v. King, — N.C. App. —, 299 S.E.2d 838 (1983).



## § 14-401. Putting poisonous foodstuffs, etc., in certain public places prohibited.

### Legal Periodicals. —

For survey of 1980 criminal law, see 59 N.C.L. Rev. 1123 (1981).

### § 14-401.6. Unlawful to possess, etc., tear gas except for certain purposes.

(a) It is unlawful for any person, firm, corporation or association to possess, use, store, sell, or transport within the State of North Carolina, any form of that type of gas generally known as "tear gas," or any container or device for holding or releasing that gas; except this section does not apply to the possession, use, storage, sale or transportation of that gas or any container or device for holding or releasing that gas:

- (1) By officers and enlisted personnel of the armed forces of the United States or this State while in the discharge of their official duties and acting under orders requiring them to carry arms or weapons;
- (2) By or for any governmental agency for official use of the agency;
- (3) By or for county, municipal or State law-enforcement officers in the discharge of their official duties;
- (4) By or for security guards sanctioned under Chapters 74A and 74C of the General Statutes, provided those security guards are on duty and have received training according to standards prescribed by the State Bureau of Investigation;
- (5) For bona fide scientific, educational, or industrial purposes;
- (6) In safes, vaults, and depositories, as a means or protection against robbery;
- (7) For use in the home for protection and elsewhere by individuals, who have not been convicted of a felony, for self-defense purposes only, as long as the capacity of any tear gas cartridge, shell, device or container does not exceed 50 cubic centimeters, and any tear gas device or container does not have the capability of discharging any cartridge, shell, or container larger than 50 cubic centimeters.

(1951, c. 592; 1969, c. 1224, s. 8; 1977, c. 126; 1979, c. 661; 1983, c. 794, s. 9.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1983 amend-

ment, effective July 18, 1983, substituted "Chapters 74A and 74C" for "Chapters 74A and 74B" in subdivision (4) of subsection (a).

## ARTICLE 52A.

### *Sale of Weapons in Certain Counties.*

### § 14-402. Sale of certain weapons without permit forbidden.

**Certain Counties Excepted from Application of Article.**

Bertie was deleted from the list of counties

excepted from the application of the 1959 amendment to the article by Session Laws 1983, c. 151.



### § 14-403. Permit issued by sheriff; form of permit.

The sheriffs of any and all counties of this State are hereby authorized and directed to issue to any person, firm, or corporation in any such county a license or permit to purchase or receive any weapon mentioned in this Article from any person, firm, or corporation offering to sell or dispose of the same, which said license or permit shall be in the following form, to wit:

North Carolina,

..... County.

I, ....., Sheriff of said County, do hereby certify that ..... whose place of residence is ..... in ..... (or) in ..... Township, ..... County, North Carolina, having this day satisfied me as to his, her (or) their good moral character, a license or permit is therefore hereby given said ..... to purchase one pistol from any person, firm or corporation authorized to dispose of the same.

This ..... day of ....., 19 .....

.....  
Sheriff.

(1919, c. 197, s. 2; C.S., s. 5107; 1959, c. 1073, s. 2; 1981 (Reg. Sess., 1982), c. 1395, s. 3.)

**Effect of Amendments.** — The 1981 (Reg. Sess., 1982) amendment, in the sheriff's form, deleted a reference to the applicant's street address, following "moral character" deleted "and that the possession of one of the weapons

described is necessary for self-defense or the protection of the home," and deleted a comma and "(or if any other weapon is named strike out the word pistol)" following "one pistol."

### § 14-404. Issuance or refusal of permit; appeal from refusal; grounds for refusal; sheriff's fee.

Upon application, the sheriff shall issue such license or permit to a resident of that county unless the purpose of the permit is for collecting, in which case a sheriff can issue a permit to a nonresident when the sheriff shall have fully satisfied himself by affidavits, oral evidence, or otherwise, as to the good moral character of the applicant therefor, and that such person, firm, or corporation desires the possession of the weapon mentioned for (i) the protection of the home, business, or property, (ii) target shooting, (iii) collecting, or (iv) hunting. If said sheriff shall not be so fully satisfied, he may, for good cause shown, decline to issue said license or permit and shall provide to said applicant within seven days of such refusal a written statement of the reason(s) for such refusal. An appeal from such refusal shall lie by way of petition to the chief judge of the district court for the district in which the application was filed. The determination by the court, on appeal, shall be upon the facts, the law, and the reasonableness of the sheriff's refusal, and shall be final. A permit may not be issued to the following persons: (i) one who is under an indictment or information for or has been convicted in any state, or in any court of the United States, of a felony (other than an offense pertaining to antitrust violations, unfair trade practices, or restraints of trade), except that if a person has been convicted and later pardoned, he may obtain a permit; (ii) one who is a fugitive from justice; (iii) one who is an unlawful user of or addicted to marijuana or any depressant, stimulant, or narcotic drug (as defined in 21 U.S.C. section 802); (iv) one who has been adjudicated incompetent on the ground of mental illness or has been committed to any mental institution. Provided, that nothing in this Article shall apply to officers authorized by law to carry firearms if such officers identify themselves to the vendor or donor as being officers authorized by law to carry firearms and state that the purpose for the purchase of the



firearms is directly related to the law officers' official duties. The sheriff shall charge for his services upon issuing such license or permit a fee of five dollars (\$5.00). Each applicant for any such license or permit shall be informed by said sheriff within 30 days of the date of such application whether such license or permit will be granted or denied and, if granted, such license or permit shall be immediately issued to said applicant. (1919, c. 197, s. 3; C.S., s. 5108; 1959, c. 1073, s. 2; 1969, c. 73; 1981 (Reg. Sess., 1982), c. 1395, s. 1.)

**Local Modification.** — Craven: 1981 (Reg. Sess., 1982), c. 1200.

By virtue of Session Laws 1981 (Reg. Sess., 1982), c. 1395, s. 5, Chatham and Orange should be stricken from the replacement volume.

By virtue of Session Laws 1983, cc. 101 and

145, Forsyth and Mecklenburg should be stricken from the replacement volume.

**Effect of Amendments.** — The 1981 (Reg. Sess., 1982) amendment rewrote this section to the extent that a detailed comparison is not possible.

ARTICLE 53.

*Sale of Weapons in Certain Other Counties.*

§ 14-409.1. Sale of certain weapons without permit forbidden.

**Counties to Which Article Applies.** —

Bertie was deleted from the list of counties excepted from Article 52A, §§ 14-402 through

14-409, and governed by this Article, by Session Laws 1983, c. 151.

§ 14-409.2. Permit issued by clerk of court; form of permit.

The clerks of the superior courts of any and all counties of this State are hereby authorized and directed to issue to any person, firm, or corporation in any such county a license or permit to purchase or receive any weapon mentioned in this Article from any person, firm, or corporation offering to sell or dispose of the same, which said license or permit shall be in the following form, to wit:

North Carolina,

..... County.

I, ....., Clerk of the Superior Court of said County, do hereby certify that ....., whose place of residence is ..... in ..... (or) in ..... Township, ..... County, North Carolina, having this day satisfied me as to his, her (or) their good moral character, a license or permit is therefore hereby given said ..... to purchase one pistol from any person, firm or corporation authorized to dispose of the same.

This ..... day of ....., 19 .....

.....  
Clerk of the Superior Court.

(1919, c. 197, s. 2; C.S., s. 5107; 1981 (Reg. Sess., 1982), c. 1395, s. 4.)

**Effect of Amendments.** — The 1981 (Reg. Sess., 1982) amendment, in the clerk's form, deleted reference to the street address of the applicant, following "good moral character" deleted "and that the possession of one of the

weapons described is necessary for self-defense or the protection of the home," and deleted a comma and "(or if any other weapon is named strike out the word pistol)" following "one pistol."



### § 14-409.3. Issuance or refusal of permit; appeal from refusal; grounds for refusal; clerk's fee.

Upon application, the clerk of the superior court shall issue such license or permit to a resident of that county, unless the purpose of the permit is for collecting, in which case a clerk can issue a permit to a nonresident, when the clerk shall have fully satisfied himself by affidavits, oral evidence, or otherwise, as to the good moral character of the applicant therefor, and that such person, firm, or corporation desires the possession of the weapon mentioned for (i) the protection of the home, business, or property, (ii) target shooting, (iii) collecting, or (iv) hunting. If said clerk of the superior court shall not be so fully satisfied, he may, for good cause shown, decline to issue said license or permit and shall provide to said applicant within seven days of such refusal a written statement of the reason(s) for such refusal. An appeal from such refusal shall lie by way of petition to the chief judge of the district court for the district in which the application was filed. The determination by the court, on appeal, shall be upon the facts, the law, and the reasonableness of the clerk of the superior court's refusal, and shall be final. A permit may not be issued to the following persons: (i) one who is under an indictment or information for or has been convicted in any state, or in any court of the United States, of a felony (other than an offense pertaining to antitrust violations, unfair trade practices, or restraints of trade), except that if a person has been convicted and later pardoned, he may obtain a permit; (ii) one who is a fugitive from justice; (iii) one who is an unlawful user of or addicted to marijuana or any depressant, stimulant, or narcotic drug (as defined in 21 U.S.C. section 802); (iv) one who has been adjudicated incompetent on the ground of mental illness or has been committed to any mental institution. Provided, that nothing in this Article shall apply to officers authorized by law to carry firearms if such officers identify themselves to the vendor or donor as being officers authorized by law to carry firearms and state that the purpose for the purchase of the firearms is directly related to the law officers' official duties. The clerk of the superior court shall charge for his services upon issuing such license or permit a fee of five dollars (\$5.00). Each applicant for any such license or permit shall be informed by said clerk of the superior court within 30 days of the date of such application whether such license or permit will be granted or denied and, if granted, such license or permit shall be immediately issued to said applicant. (1919, c. 197, s. 3; C.S., s. 5108; 1969, c. 73; 1981 (Reg. Sess., 1982), c. 1395, s. 2.)

**Effect of Amendments.** — The 1981 (Reg. Sess., 1982) amendment rewrote this section to the extent that a detailed comparison is not possible.

## ARTICLE 54.

### *Sale, etc., of Pyrotechnics.*

### § 14-410. Manufacture, sale and use of pyrotechnics prohibited; public exhibitions permitted; common carriers not affected.

**Local Modification.** — Catawba, except Town of Longview: 1983, c. 116; Forsyth: 1983, c. 21; Union: 1983, c. 116.



§ 14-413. Permits for use at public exhibitions.

**Local Modification.** — Catawba, except  
Town of Longview: 1983, c. 116; Forsyth: 1983,  
c. 21; Union: 1983, c. 116.



1983 CUMULATIVE SUPPLEMENT

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

*November 1, 1983*

I, Rufus L. Edmisten, Attorney General of North Carolina, do hereby certify that the foregoing 1983 Supplement to the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Department of Justice of the State of North Carolina.

RUFUS L. EDMISTEN

*Attorney General of North Carolina*



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