

THE GENERAL STATUTES OF NORTH CAROLINA

1973 CUMULATIVE SUPPLEMENT

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

UNDER THE DIRECTION OF
W. M. WILLSON, J. H. VAUGHAN AND SYLVIA FAULKNER

Volume 1C

Discard 1971 Cumulative Supplement

THE MICHIE COMPANY, LAW PUBLISHERS
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Preface

This Cumulative Supplement to Replacement Volume 1C contains the general laws of a permanent nature enacted at the 1966, 1967, 1969, 1971 and 1973 Sessions of the General Assembly, which are within the scope of such volume, and brings to date the annotations included therein.

Amendments of former laws are inserted under the same section numbers appearing in the General Statutes, and new laws appear under the proper chapter headings. Editors' notes point out many of the changes effected by the amendatory acts.

Chapter analyses show new sections and also old sections with changed captions. An index to all statutes codified herein appears in Replacement Volumes 4B, 4C and 4D and the 1973 Supplements thereto.

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 thirty days after the adjournment of the session" in which passed. All legislation appearing herein became effective upon ratification, unless noted to the contrary in an editor's note or an effective date note.

Beginning with the opinions issued by the North Carolina Attorney General on July 1, 1969, any opinion which construes a specific statute will be 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.

Scope of Volume

Statutes:

Permanent portions of the general laws enacted at the 1967, 1969, 1971 and 1973 Sessions of the General Assembly affecting Chapters 15 through 20 of the General Statutes.

Annotations:

Sources of the annotations:

North Carolina Reports volumes 265 (p. 218)-283 (p. 588).
North Carolina Court of Appeals Reports volumes 1-18 (p. 351).
Federal Reporter 2nd Series volumes 347 (p. 321)-476 (p. 656).
Federal Supplement volumes 242 (p. 513)-356.
United States Reports volumes 381 (p. 532)-411 (p. 525).
Supreme Court Reporter volumes 86-93 (p. 2788).
North Carolina Law Review volumes 43 (p. 667)-49 (p. 1006).
Wake Forest Intramural Law Review volumes 2-6 (p. 568).
Opinions of the Attorney General.

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VOLUME 1C

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ARTICLE 1.*General Provisions.***§ 15-1. Statute of limitations for misdemeanors.**

Editor's Note.—For case law survey as to criminal law and procedure, see 44 N.C.L. Rev. 970 (1966); 45 N.C.L. Rev. 910 (1967). For note on the potential defendant's right to a speedy trial, see 48 N.C.L. Rev. 121 (1969).

No statute of limitations bars the prosecution of a felony. *State v. Johnson*, 275 N.C. 264, 167 S.E.2d 274 (1969).

Date on Which, etc.—

In accord with 1st paragraph in original. See *State v. Hundley*, 272 N.C. 491, 158 S.E.2d 582 (1968).

In accord with 2nd paragraph in original. See *State v. Hundley*, 272 N.C. 491, 158 S.E.2d 582 (1968).

An indictment or presentment marks the

beginning of the prosecution so as to toll the statute of limitations, even though defendant be apprehended and tried more than two years after the offense was committed. *State v. Best*, 10 N.C. App. 62, 177 S.E.2d 772 (1970).

The issuance of a void warrant in a misdemeanor prosecution does not toll the running of this section, and where on appeal from a conviction upon such warrant in an inferior court defendant is tried upon an identical indictment returned by the grand jury more than two years after the commission of the offense, he is entitled to quashal of the indictment. *State v. Hundley*, 272 N.C. 491, 158 S.E.2d 582 (1968).

§ 15-4. Accused entitled to counsel.**Counsel Allowed Reasonable Time, etc.—**

Since the law regards substance rather than form, the constitutional guaranty of the right of counsel contemplates not only that a person charged with crime shall have the privilege of engaging counsel, but also that he and his counsel shall have a reasonable opportunity in the light of all attendant circumstances to investigate, prepare and present his defense. *State v. Hill*, 9 N.C. App. 279, 176 S.E.2d 41 (1970).

Every defendant is entitled under the Constitution to have a reasonable opportunity to prepare his defense. This includes the right to consult with his counsel and to have a fair and reasonable opportunity, in the light of all attendant circumstances, to investigate, to prepare, as well as to present his defense. This right must be accorded every person charged with a crime. *State v. Hill*, 9 N.C. App. 279, 176 S.E.2d 41 (1970).

Both the State and federal constitutions secure to every man the right to be defended in all criminal prosecutions by counsel whom he selects and retains and this right is not intended to be an empty formality. It would be futile to give a person accused of crime a day in court if he is denied a chance to prepare for it, or to guarantee him the right of representation by counsel if his counsel is afforded no opportunity to ascertain the facts or the law of the case. *State v. Hill*, 9 N.C. App. 279, 176 S.E.2d 41 (1970).

This constitutional privilege would amount to nothing if the counsel for the accused is not allowed sufficient time to prepare his defense; it would be a poor boon indeed. This would be to keep the word of promise to our ear and break it to our hope. *State v. Hill*, 9 N.C. App. 279, 176 S.E.2d 41 (1970).

Refusal of jailer to permit defendant's

attorney to confer with him while he was in jail is a denial of a constitutional right. *State v. Hill*, 9 N.C. App. 279, 176 S.E.2d 41 (1970).

But Such Refusal Does Not Destroy Validity of Prior Observations and Tests on Defendant's Intoxication.—The refusal of the jailer to release a defendant on the night that defendant had given bail bond for the offense of drunken driving, and the jailer's refusal to permit defendant's attorney to confer with defendant during the night in jail, did not destroy the validity of the police officers' observations and tests on defendant's intoxication, although the

jailer's conduct violated defendant's rights to counsel and to bail, where the officers' observations and tests were completed prior to the denial of these rights, and where the record failed to show that defendant was prejudiced in his defense on the trial. *State v. Hill*, 9 N.C. App. 279, 176 S.E.2d 41 (1970).

Applied in *State v. Davis*, 270 N.C. 1, 153 S.E.2d 749 (1967), commented on in 46 N.C.L. Rev. 379 (1968).

Cited in *State v. Hill*, 276 N.C. 1, 170 S.E.2d 885 (1969); *State v. Anderson*, 281 N.C. 261, 188 S.E.2d 336 (1972).

§§ 15-4.1 to 15-5.1: Repealed by Session Laws 1969, c. 1013, s. 12, effective July 1, 1969.

§ 15-5.2: Repealed by Session Laws 1969, c. 1013, s. 6, effective January 1, 1971.

§§ 15-5.3, 15-5.4: Repealed by Session Laws 1969, c. 1013, s. 12, effective July 1, 1969.

§ 15-6.1. Changing place of confinement of prisoner committing offense.—In all cases where a defendant has been convicted in a court inferior to the superior court and sentenced to a term in the county jail or to serve in some county institution other than under the supervision of the State Department of Correction, and such defendant is subsequently brought before such court for an offense committed prior to the expiration of the term to be served in such county institution, upon conviction, plea of guilty or nolo contendere, the judge shall have the power and authority to change the place of confinement of the prisoner and commit such defendant to work under the supervision of the State Department of Correction. This provision shall apply whether or not the terms of the new sentence are to run concurrently with or consecutive to the remaining portion of the old sentence. (1953, c. 778; 1957, c. 65, s. 11; 1967, c. 996, s. 16.)

Editor's Note. — The 1967 amendment, effective Aug. 1, 1967, substituted "State Department of Correction" for "State

Highway Commission" in two places in the first sentence.

§ 15-6.2. Concurrent sentences for offenses of different grades or to be served in different places.

Concurrent sentences may be imposed for separate offenses, even though one is for a misdemeanor and the other a felony, so that one is required to be served in the State's prison and one in the county jail. *State v. Brooks*, 271 N.C. 462, 156 S.E.2d 676 (1967).

Applied in *State v. Efrid*, 271 N.C. 730, 157 S.E.2d 538 (1967).

Cited in *State v. Fields*, 11 N.C. App. 708, 182 S.E.2d 213 (1971).

§ 15-6.3. Credit for service of sentence while in another jurisdiction.—When a person in actual confinement under sentence of another jurisdiction is brought for trial before a court of this State, the court may, upon sentencing, specifically impose a sentence to be concurrently served and direct that such person receive credit against the sentence imposed for all time subsequently served in the jurisdiction possessing physical custody of such person. (1971, c. 828.)

§ 15-10. Speedy trial or discharge on commitment for felony.

This section, etc.—

In accord with original. See *State v.*

Johnson, 3 N.C. App. 420, 165 S.E.2d 27 (1969).

It requires simply, etc.—

In accord with original. See *State v. Johnson*, 3 N.C. App. 420, 165 S.E.2d 27 (1969); *State v. Cavallaro*, 274 N.C. 480, 164 S.E.2d 168 (1968).

This section merely provides that under certain circumstances a defendant who has not been speedily tried shall be released from custody. It does not require that the prosecution against him be dismissed. *State v. Johnson*, 275 N.C. 264, 167 S.E.2d 274 (1969).

And not that, etc.—

In accord with original. See *State v. Johnson*, 3 N.C. App. 420, 165 S.E.2d 27 (1969); *State v. Cavallaro*, 274 N.C. 480, 164 S.E.2d 168 (1968).

The fundamental law of this State grants to every accused the right to a speedy trial. *State v. Johnson*, 3 N.C. App. 420, 165 S.E.2d 27 (1969).

Such Right Is a Shield for Accused's Protection.—The right to a speedy trial on the merits is not designed as a sword for defendant's escape, but a shield for his protection. *State v. Johnson*, 3 N.C. App. 420, 165 S.E.2d 27 (1969).

Both the State and the accused should desire a speedy trial. Both want to preserve the means of proof of the case. From the standpoint of the State, an old case is more vulnerable to cross-examination and less easily persuades the jury. The accused is anxious to escape the public suspicion created by the accusation and the mental strain of standing accused. The right to a speedy trial, however, is the

personal right of the accused, and it is not designed as a sword for his escape, but rather as a shield for his protection. *State v. Johnson*, 3 N.C. App. 420, 165 S.E.2d 27 (1969).

The right to a speedy trial is designed to prohibit arbitrary and oppressive delays which might be caused by the fault of the prosecution. *State v. Johnson*, 3 N.C. App. 420, 165 S.E.2d 27 (1969).

There is no statutory formula dictating the time within which trial must be had. *State v. Johnson*, 3 N.C. App. 420, 165 S.E.2d 27 (1969).

But Four Factors Are Considered in Determining Whether Denial of Speedy Trial Is Unconstitutional.—The four generally accepted interrelated factors to be considered together in reaching a determination of whether the denial of a speedy trial assumes due process proportions are the length of the delay, the reason for the delay, the prejudice to the defendant, and waiver by defendant. *State v. Johnson*, 3 N.C. App. 420, 165 S.E.2d 27 (1969).

The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice. *State v. Johnson*, 3 N.C. App. 420, 165 S.E.2d 27 (1969).

An accused waives his right to a speedy trial unless he demands it. *State v. Johnson*, 3 N.C. App. 420, 165 S.E.2d 27 (1969).

Cited in *Pitts v. North Carolina*, 267 F. Supp. 870 (M.D.N.C. 1967).

§ 15-10.1. Detainer; purpose; manner of use.—Any person confined in the State prison of North Carolina, subject to the authority and control of the State Department of Correction, or any person confined in any other prison of North Carolina, may be held to account for any other charge pending against him only upon a written order from the clerk or judge of the court in which the charge originated upon a case regularly docketed, directing that such person be held to answer the charge pending in such court; and in no event shall the prison authorities hold any person to answer any charge upon a warrant or notice when the charge has not been regularly docketed in the court in which the warrant or charge has been issued: Provided, that this section shall not apply to any State agency exercising supervision over such person or prisoner by virtue of a judgment, order of court or statutory authority. (1949, c. 303; 1953, c. 603; 1957, c. 349, s. 10; 1967, c. 996, s. 13.)

Editor's Note. — The 1967 amendment, effective Aug. 1, 1967, substituted "State Department of Correction" for "State Prison Department" near the beginning of this section.

Cited in *Pitts v. North Carolina*, 267 F. Supp. 870 (M.D.N.C. 1967).

§ 15-10.2. Mandatory disposition of detainees—request for final disposition of charges; continuance; information to be furnished pris-

oner.—(a) Any prisoner serving a sentence or sentences within the State prison system who, during his term of imprisonment, shall have lodged against him a detainer to answer to any criminal charge pending against him in any court within the State, shall be brought to trial within eight (8) months after he shall have caused to be sent to the solicitor of the court in which said criminal charge is pending, by registered mail, written notice of his place of confinement and request for a final disposition of the criminal charge against him; said request shall be accompanied by a certificate from the Commissioner of Correction stating the term of the sentence or sentences under which the prisoner is being held, the date he was received, and the time remaining to be served; provided that, for good cause shown in open court, the prisoner or his counsel being present, the court may grant any necessary and reasonable continuance.

(b) The Commissioner of Correction shall, upon request by the prisoner, inform the prisoner in writing of the source and contents of any charge for which a detainer shall have been lodged against such prisoner as shown by said detainer, and furnished the prisoner with the certificate referred to in subsection (a). (1957, c. 1067, s. 1; 1967, c. 996, s. 15.)

Editor's Note. — The 1967 amendment, effective Aug. 1, 1967, substituted "Commissioner of Correction" for "Director of Prisons" in subsections (a) and (b).

Purpose of Section.—The primary purpose of this section is to provide a prisoner with a means by which he may require the State to try all the criminal charges against him to the end that he and the authorities may know the full extent of his debt to society for his criminal activities and that he may plan for his release when the debt has been satisfied. The presence of a detainer in his prison files jeopardizes his chances for parole, for proper good behavior credits, and for work release. State v. White, 270 N.C. 78, 153 S.E.2d 774 (1967).

What Section Requires. — This section

requires the solicitor to try a prisoner who has a detainer lodged against him and who is serving a sentence in the State prison within eight months after the prisoner shall have requested a trial as provided therein. State v. Johnson, 3 N.C. App. 420, 165 S.E.2d 27 (1969).

Prisoner Must Follow Section's Requirements.—Where defendant did not follow the requirements of this section by making his demand upon the solicitor by registered mail, but instead he sent a letter to the clerk of the superior court and the solicitor did not receive the notice, the defendant is not entitled to his release for failure of the State to bring him to trial within eight months. State v. White, 270 N.C. 78, 153 S.E.2d 774 (1967).

§ 15-10.3. Mandatory disposition of detainees—procedure; return of prisoner after trial.—The solicitor, upon receipt of the written notice and request for a final disposition as hereinbefore specified, shall make application to the court in which said charge is pending for a writ of habeas corpus ad prosequendum and the court upon such application shall issue such writ to the Commissioner of Correction requiring the prisoner to be delivered to said court to answer the pending charge and to stand trial on said charge within the time hereinbefore provided; upon completion of said trial, the prisoner shall be returned to the State prison system to complete service of the sentence or sentences under which he was held at the time said writ was issued. (1957, c. 1067, s. 2; 1967, c. 996, s. 15.)

Editor's Note. — The 1967 amendment, effective Aug. 1, 1967, substituted "Commissioner of Correction" for "Director of Prisons."

ARTICLE 2.

Record and Disposition of Seized, etc., Articles.

§ 15-12. Publication of notice of unclaimed property; advertisement and sale of unclaimed bicycles.

Editor's Note.—

Session Laws 1965, c. 807, s. 2½, was amended by Session Laws 1973, c. 182,

which deleted Gaston from the list of counties.

ARTICLE 3.

Warrants.

§ 15-18. **Who may issue warrant.**—The following persons respectively have power to issue process for the apprehension of persons charged with any offense, and to execute the powers and duties conferred in this chapter, namely: Any justice, judge, or magistrate of the General Court of Justice, presiding officers of inferior courts, justices of the peace, mayors of cities, or other chief officers of incorporated towns. (1868-9, c. 178, subc. 3, s. 1; Code, s. 1132; Rev., s. 3156; C. S., s. 4522; 1969, c. 44, s. 27.)

Editor's Note.—The 1969 amendment substituted "Any justice, judge, or magistrate of the General Court of Justice" for "The Chief Justice and the associate justices of the Supreme Court, the judges of the superior court, judges of criminal courts" following the colon.

The issuance of a warrant of arrest is a judicial act. *State v. Matthews*, 270 N.C. 35, 153 S.E.2d 791 (1967).

Justice of the Peace.—While this section confers authority to issue warrants upon justices of the peace, a justice of the peace may lawfully exercise such authority only by complying with the requirements of §§ 15-19 and 15-20. *State v. Matthews*, 270 N.C. 35, 153 S.E.2d 791 (1967).

Fourth Amendment Applies to Both Arrest Warrants and Search Warrants.—The Fourth Amendment requirement that no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the persons or things to be seized, applies to arrest warrants as well as to search warrants. *State v. Harvey*, 281 N.C. 1, 187 S.E.2d 706 (1972).

Sufficiency of Evidence.—The judicial

officer issuing an arrest warrant must be supplied with sufficient information to support an independent judgment that there is probable cause for issuing the arrest warrant. *State v. Harvey*, 281 N.C. 1, 187 S.E.2d 706 (1972).

Information received from a reliable informant is sufficient to support a conclusion that probable cause for arrest exists. *State v. Harvey*, 281 N.C. 1, 187 S.E.2d 706 (1972).

State Bureau of Investigation agent's affidavit and testimony before a magistrate that another State Bureau of Investigation agent had purchased heroin from defendant furnished sufficient evidence to support the magistrate's determination that probable cause existed for defendant's arrest. *State v. Harvey*, 281 N.C. 1, 187 S.E.2d 706 (1972).

Applied in *Wilson v. North Carolina*, 314 F. Supp. 249 (E.D.N.C. 1969); *Vance v. North Carolina*, 432 F.2d 984 (4th Cir. 1970); *State v. Teasley*, 9 N.C. App. 477, 176 S.E.2d 838 (1970).

Cited in *Sutton v. Figgatt*, 280 N.C. 89, 185 S.E.2d 97 (1971).

§ 15-19. **Complainant examined on oath.**

Opinions of Attorney General.—Honorable H.M. Shelton, Sheriff of Polk County, 40 N.C.A.G. 176 (1969).

Justice Must Comply with Requirements of Section.—While § 15-18 confers authority to issue warrants upon justices of the peace, a justice of the peace may lawfully exercise such authority only by complying with the requirements of this section and § 15-20. *State v. Matthews*, 270 N.C. 35, 153 S.E.2d 791 (1967).

Same—No Special Form Required.—

In accord with original. See *State v. Higgins*, 266 N.C. 589, 146 S.E.2d 681 (1966).

A valid warrant of arrest must be based on an examination of the complainant under oath; it must identify the person charged; it must contain directly or by proper reference at least a defective state-

ment of the crime charged; and it must be directed to a lawful officer or to a class of officers commanding the arrest of the accused. *State v. Powell*, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

Signature of Affiant Not Essential.—This section requires the magistrate, before issuing a warrant, to examine the complainant on oath. It does not provide that the signature of affiant is necessary to the validity of the complaint or affidavit. *State v. Higgins*, 266 N.C. 589, 146 S.E.2d 681 (1966).

Where the warrant discloses that the affiant was duly sworn before a competent official and is signed by such official, and the name of the affiant is set forth, the fact that the affiant does not subscribe the affidavit is not a fatal defect. *State v. Higgins*, 266 N.C. 589, 146 S.E.2d 681 (1966).

A Police Officer May Rely on Information Reported by Other Officers.—A police officer making the affidavit for issuance of a warrant may do so in reliance upon information reported to him by other officers in the performance of their duties. *State v. Harvey*, 281 N.C. 1, 187 S.E.2d 706 (1972).

The relation shown to exist between one State Bureau of Investigation agent and the affiant State Bureau of Investigation agent was sufficient evidence of circumstances upon which the affiant could conclude that the information furnished to the magistrate was credible and reliable. *State v. Harvey*, 281 N.C. 1, 187 S.E.2d 706 (1972).

§ 15-20. Warrant issued; contents; summons instead of warrant in misdemeanor cases.—If it shall appear from such examination that any criminal offense has been committed, the magistrate shall issue a proper warrant under his hand, with or without seal, reciting the accusation, and commanding the officer to whom it is directed forthwith to take the person accused of having committed the offense, and bring him before a magistrate, to be dealt with according to law. A justice of the peace or a chief officer of a city or town shall direct his warrant to the sheriff or other lawful officer of his county.

In all cases of misdemeanors any officer authorized by law to issue warrants in criminal actions may issue a summons instead of a warrant of arrest when he has reasonable ground to believe that the person accused will appear in response to the same. The Chief Judge of the District Court Division of the General Court of Justice of each district shall devise and issue a recommended policy which may be followed on the use of a summons instead of a warrant of arrest. The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before a magistrate, or some officer having the jurisdiction of a magistrate, at a stated time and place. If any person summoned fail, without good cause, to appear as commanded by the summons, he may be punished by a fine of not more than twenty-five dollars (\$25.00). Upon such failure to appear the said officer shall issue a warrant of arrest. If after issuing a summons the said officer becomes satisfied that the person summoned will not appear as commanded by the summons he may at once issue a warrant of arrest. In all proceedings held pursuant to said summons the hearing and trial shall be upon the summons in the same manner and with the same effect as if the hearing and trial were on a warrant. (1868-9, c. 178, subc. 3, s. 3; Code, s. 1134; 1901, c. 668; Rev., s. 3158; C. S., s. 4524; 1955, c. 332; 1969, c. 1062, s. 1.)

Editor's Note.—

The 1969 amendment, effective July 1, 1969, added the second sentence of the second paragraph.

Opinions of Attorney General.—Honorable H.M. Shelton, Sheriff of Polk County, 40 N.C.A.G. 176 (1969).

Justice Must Comply with Requirements of Section.—While § 15-18 confers authority to issue warrants upon justices of the peace, a justice of the peace may lawfully exercise such authority only by complying with the requirements of § 15-19 and this section. *State v. Matthews*, 270 N.C. 35, 153 S.E.2d 791 (1967).

Issuance of a writ of mandamus was refused where the magistrate was ready, able, and willing to accord plaintiffs their legal rights under this section, and in open court had announced his readiness to examine plaintiffs under oath with reference to their complaints. *Sutton v. Figgatt*, 280 N.C. 89, 185 S.E.2d 97 (1971).

Warrants' Issuance Discretionary.—See opinion of Attorney General to Mr. Gerard J. Anderson, Director, Alamance County Department of Social Services, 4/21/70.

Quoted in *Wilson v. North Carolina*, 314 F. Supp. 249 (E.D.N.C. 1969).

A warrant will issue only if it appears to the magistrate from his examination that a criminal offense has been committed. *Sutton v. Figgatt*, 280 N.C. 89, 185 S.E.2d 97 (1971).

Test of Warrant and Affidavit. — A warrant and the affidavit upon which it is based are tested by rules less strict than those applicable to indictments. *State v. Teasley*, 9 N.C. App. 477, 176 S.E.2d 838 (1970).

Sufficiency of Warrant. — A warrant of arrest is sufficient if it clearly gives the defendant notice of the charge against him, so that he may prepare his defense, and if

it enables him to plead former acquittal or former conviction should he again be brought to trial for the same offense. It must also enable the court to pronounce judgment in case of conviction. *State v. Teasley*, 9 N.C. App. 477, 176 S.E.2d 838 (1970).

A warrant should not be quashed or the judgment arrested for mere informalities or absence of refinements. *State v. Teasley*, 9 N.C. App. 477, 176 S.E.2d 838 (1970).

This section vests discretionary power, etc.—

After the required examination on oath of the complainant and any witnesses who may be produced by him, the justice of the peace is authorized to issue the warrant upon his determination there is sufficient ground for the arrest and prosecution of the accused person for the described criminal offense. *State v. Matthews*, 270 N.C. 35, 153 S.E.2d 791 (1967).

Warrants' Issuance Discretionary.—See opinion of Attorney General to Mr. Gerard J. Anderson, Director, Alamance County Department of Social Services, 40 N.C.A.G. 191 (1970).

Issuance of a writ of mandamus was refused where the magistrate was ready, able, and willing to accord plaintiffs their legal rights under § 15-19, and in open court had announced his readiness to examine plaintiffs under oath with reference to their complaints. *Sutton v. Figgatt*, 280 N.C. 89, 185 S.E.2d 97 (1971).

§ 15-21. Where warrant may be executed; noting day of delivery to officer; copy to each defendant.—Warrants issued by any justice, judge, clerk, or magistrate of the General Court of Justice, or any judge of a criminal court, may be executed in any part of this State; warrants issued by a justice of the peace, or by the chief officer of any city or incorporated town, may be executed in any part of the county of such justice, or in which such city or town is situated, and on any river, bay or sound forming the boundary between that and some other county, and not elsewhere, unless indorsed as prescribed in § 15-22.

The officer to whom the warrant is addressed shall note on it the day of its delivery to him and deliver a copy thereof to each of the defendants. A failure to comply shall not invalidate the arrest. (1868-9, c. 178, subc. 3, s. 4; Code, s. 1135; Rev., s. 3159; C. S., s. 4525; 1957 c. 346; 1969, c. 44, s. 28.)

Local Modification.—By virtue of Session Laws 1973, c. 319, s. 2, city court of Raleigh should be stricken from the bound volume.

Editor's Note.—The 1969 amendment substituted "justice, judge, clerk, or mag-

Uniform Traffic Ticket as Warrant.—The Court of Appeals disapproves the use of the Uniform Traffic Ticket as a warrant of arrest. *State v. Teasley*, 9 N.C. App. 477, 176 S.E.2d 838 (1970).

Order of Arrest Referring to Attached Affidavit or Complaint.—When the order of arrest refers to attached affidavit or complaint, the affidavit or complaint becomes a part of the warrant of arrest. *State v. Teasley*, 9 N.C. App. 477, 176 S.E.2d 838 (1970).

Motion to Quash Made after Waiver Is Addressed to Discretion of Trial Judge.—By pleading and participating in a trial, defendant waives any defect incident to the authority of the person issuing a warrant, and a motion to quash made after the State has rested is addressed to the discretion of the trial judge. *State v. Teasley*, 9 N.C. App. 477, 176 S.E.2d 838 (1970).

Police to Give Notice and Demand Entry.—Even though police officers have a valid search or arrest warrant, absent invitation or permission, ordinarily they may not enter a private home unless they first give notice of their authority and purpose and make a demand for entry. *State v. Miller*, 16 N.C. App. 1, 190 S.E.2d 888 (1972), modified, 282 N.C. 633, 194 S.E.2d 353 (1973).

Applied in *State v. Hatcher*, 277 N.C. 380, 177 S.E.2d 892 (1970).

Quoted in *Wilson v. North Carolina*, 314 F. Supp. 249 (E.D.N.C. 1969).

istrate of the General Court of Justice, or any judge of a criminal court" for "justice of the Supreme Court, or by any judge of the superior court, or of a criminal court" in the first paragraph.

§ 15-22. Warrant indorsed or certified and served in another county.—If the person against whom any warrant is issued by a justice of the peace or chief officer of a city or town shall escape, or be in any other county out of the jurisdiction of such justice or chief officer, it shall be the duty of any justice of the peace, or any other magistrate within the county where such offender shall

be, or shall be suspected to be, upon proof of the handwriting of the magistrate or chief officer issuing the warrant, to indorse his name on the same, and thereupon the person, or officer to whom the warrant was directed, may arrest the offender in that county: Provided, that an officer to whom a warrant charging the commission of a felony is directed, who is in the actual pursuit of a person known to him to be the one charged with the felony, may continue the pursuit without such indorsement. The justice of the peace or a chief officer of a city or town shall direct his warrant to the sheriff or other lawful officer of his county, and such warrant when so indorsed as herein prescribed shall authorize and compel the sheriff or other officer of any county in the State, in which such indorsement is made, to execute the same. Whenever a justice of the peace or the chief officer of a city or town shall attach to his warrant a certificate under the hand and seal of the clerk of the superior court of his county certifying that he is a justice of the peace of the county or the chief officer of a city or town in the county and that the warrant bears his genuine signature, the warrant may be executed in any part of the State in like manner as warrants issued by justices or judges of the appellate division, judges of the superior court, or judges of criminal courts without any indorsement of any justice of the peace or magistrate of the county in which it may be served. (1868-9, c. 178, subc. 3, s. 5; Code, s. 1136; 1901, c. 668; Rev., s. 3160; 1917, c. 30; C. S., s. 4526; 1949, c. 168; 1969, c. 44, s. 29.)

Editor's Note.—

The 1969 amendment substituted "justices or judges of the appellate division"

for "justices of the Supreme Court" in the last sentence.

ARTICLE 4.

Search Warrants.

§ 15-25. Search warrants for contraband, evidence, and instrumentalities of crime.—(a) Any justice, judge, clerk, or assistant or deputy clerk of any court of record, any justice of the peace, or any magistrate of the General Court of Justice may issue a warrant to search for any contraband, evidence, or instrumentality of crime upon finding probable cause for the search.

(b) Any search warrant issued by any Justice of the Supreme Court, judge of the Court of Appeals, or judge of the superior court may be executed anywhere within the State. Any search warrant issued by any other official of the General Court of Justice may be executed as provided in chapter 7A of the General Statutes. Any search warrant issued by any other judicial official or officer of any other court may be executed only within the territorial jurisdiction of such official or court.

(c) The warrant may be executed by any law-enforcement officer acting within his territorial jurisdiction whose subject matter jurisdiction encompasses the crime with which the object of the search is involved.

(d) The search warrant shall be returnable as other criminal process is required to be. (1868-9, c. 178, subc. 3, s. 38; Code, s. 1171; Rev., s. 3163; C. S., s. 4529; 1941, c. 53; 1949, c. 1179; 1955, c. 7; 1965, c. 377; 1969, c. 869, s. 8.)

Revision of Article. — Session Laws 1969, c. 869, s. 8, rewrote this article, which formerly consisted of six sections, to appear as the present four sections. No attempt has been made to point out the changes made, but where appropriate the historical citations to the former sections have been added to the sections of the revised article.

Editor's Note.—For case law survey as to searches and seizures, see 45 N.C.L.

Rev. 931 (1967). For article on "An Inquiry into Mapp v. Ohio in North Carolina," see 45 N.C.L. Rev. 119 (1966).

No Variance between State Law and Fourth Amendment Requirements. — With regard to search warrants, there is no variance between the law of this State as declared by the decisions of the Supreme Court, and the requirements of the Fourth Amendment as interpreted by the Supreme Court of the United States. *State v. Vestal*,

278 N.C. 561, 180 S.E.2d 755 (1971); *State v. Miller*, 282 N.C. 633, 194 S.E.2d 353 (1973).

Sufficiency of Affidavit.—The affidavit is sufficient if it supplies reasonable cause to believe that the proposed search for evidence of the commission of the designated criminal offense will reveal the presence upon the described premises of the objects sought and that they will aid in the apprehension or conviction of the offender. *State v. Vestal*, 278 N.C. 561, 180 S.E.2d 755 (1971); *State v. Campbell*, 282 N.C. 125, 191 S.E.2d 752 (1972).

A valid search warrant may be issued upon the basis of an affidavit setting forth information which may not be competent as evidence. *State v. Vestal*, 278 N.C. 561, 180 S.E.2d 755 (1971); *State v. Spillars*, 280 N.C. 341, 185 S.E.2d 881 (1972); *State v. Spencer*, 281 N.C. 121, 187 S.E.2d 779 (1972).

A finding of probable cause for the issuance of search warrants may rest upon evidence which is not competent in a criminal trial. *State v. Flowers*, 12 N.C. App. 487, 183 S.E.2d 820 (1971).

If the facts before the magistrate supply reasonable cause to believe that the proposed search for evidence of the commission of the designated criminal offense will reveal the presence upon the described premises of the objects sought and that they will aid in the apprehension or conviction of the offender, it is sufficient basis for the issuance of the search warrant. *State v. Spillars*, 280 N.C. 341, 185 S.E.2d 881 (1972); *State v. Spencer*, 281 N.C. 121, 187 S.E.2d 779 (1972).

The failure of the affidavit to establish reasonable grounds to believe that the crime was occurring on the premises to be searched invalidates the warrant issued thereon. *State v. Campbell*, 282 N.C. 125, 191 S.E.2d 752 (1972).

Sufficiency Must Be Determined by Magistrate.—Whether the affidavit is sufficient to show probable cause must be determined by the issuing magistrate rather than the affiant. *State v. Campbell*, 282 N.C. 125, 191 S.E.2d 752 (1972).

Magistrate Must Be Informed of Some of Underlying Circumstances.—Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the articles to be searched for were where he claimed they were, and some of the underlying

circumstances from which the officer concluded that the informant, whose identity need not be disclosed, was "credible" or his information "reliable." *State v. Vestal*, 278 N.C. 561, 180 S.E.2d 755 (1971).

An affidavit may be based on hearsay information if the magistrate is informed of underlying circumstances upon which the informant bases his conclusion as to the whereabouts of the articles and the underlying circumstances upon which the officer concluded that the informant was credible. *State v. Spillars*, 280 N.C. 341, 185 S.E.2d 881 (1972).

Police Officer May Rely on Information Reported by Other Officers.—The police officer making the affidavit may do so in reliance upon information reported to him by other officers in the performance of their duties. *State v. Vestal*, 278 N.C. 561, 180 S.E.2d 755 (1971).

The police officer may state in his affidavit reports made to him by competent experts, such as the personnel of the FBI laboratories, concerning their examinations of materials forwarded by him to them for such examination and report. *State v. Vestal*, 278 N.C. 561, 180 S.E.2d 755 (1971).

Search Based on Magistrate's Determination of Probable Cause.—When a search is based upon a magistrate's, rather than a police officer's, determination of probable cause, the reviewing court will accept evidence of a less "judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant, and will sustain the judicial determination so long as "there was substantial basis for the magistrate to conclude that the articles searched for were probably present." *State v. Vestal*, 278 N.C. 561, 180 S.E.2d 755 (1971).

The magistrate's determination of probable cause should be paid great deference by the reviewing court. *State v. Spillars*, 280 N.C. 341, 185 S.E.2d 881 (1972); *State v. Spencer*, 281 N.C. 121, 187 S.E.2d 779 (1972).

"Probable Cause."—In dealing with probable cause, as the very name implies, the Supreme Court deals with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. *State v. Vestal*, 278 N.C. 561, 180 S.E.2d 755 (1971).

Probable cause deals with probabilities which are factual and practical considerations of everyday life upon which reasonable and prudent men may act. *State v.*

Spillars, 280 N.C. 341, 185 S.E.2d 881 (1972); State v. Spencer, 281 N.C. 121, 187 S.E.2d 779 (1972).

Probable cause does not mean actual and positive cause, nor does it import absolute certainty. State v. Campbell, 282 N.C. 125, 191 S.E.2d 752 (1972).

Probable cause means a reasonable ground to believe that the proposed search will reveal the presence upon the premises to be searched of the objects sought and that those objects will aid in the apprehension or conviction of the offender. State v. Campbell, 282 N.C. 125, 191 S.E.2d 752 (1972).

When Probable Cause Exists.—Probable cause under the Fourth Amendment exists where the facts and circumstances within the affiant's knowledge, and of which he has reasonably trustworthy information, are sufficient unto themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed. State v. Flowers, 12 N.C. App. 487, 183 S.E.2d 820 (1971).

If the apparent facts set out in an affidavit for a search warrant are such that a reasonable discreet and prudent man would be led to believe that there was a commission of the offense charged, there is probable cause justifying the issuance of a search warrant. State v. Campbell, 282 N.C. 125, 191 S.E.2d 752 (1972).

The determination of the existence of probable cause is not concerned with the question of whether the offense charged has been committed in fact, or whether the accused is guilty or innocent, but only with whether the affiant has reasonable grounds for his belief. State v. Campbell, 282 N.C. 125, 191 S.E.2d 752 (1972).

Probable cause cannot be shown by affidavits which are purely conclusory, stating only the affiant's or an informer's belief that probable cause exists without detailing any of the "underlying circumstances" upon which that belief is based. Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for

the police. State v. Campbell, 282 N.C. 125, 191 S.E.2d 752 (1972).

Resolution of Doubtful Cases of Probable Cause.—Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants. State v. Altman, 15 N.C. App. 257, 189 S.E.2d 793 (1972).

Admission into Evidence of Warrant and Affidavit Containing Hearsay Held Erroneous.—Where the affidavit contained hearsay statements indicating defendant's complicity in another crime without showing that he had been convicted of that crime, the admission into evidence of the search warrant and the accompanying affidavit was erroneous and resulted in error prejudicial to defendant. State v. Spillars, 280 N.C. 341, 185 S.E.2d 881 (1972).

Finding of Probable Cause Upheld.—Statement in an affidavit given to obtain a search warrant concerning defendant's prior narcotics conviction was error because it was based on erroneous information though the error was not known to the officer making the affidavit; however, the error was immaterial because the trial court found that the affidavit was nevertheless sufficient on its face to support a finding of probable cause for the issuance of the search warrant for narcotics, and evidence obtained as a result of the search under the warrant was properly admitted. State v. Steele, 18 N.C. App. 126, 196 S.E.2d 379 (1973).

Officers to Give Notice and Demand Entry.—Even though police officers have a valid search or arrest warrant, absent invitation or permission, ordinarily they may not enter a private home unless they first give notice of their authority and purpose and make a demand for entry. State v. Miller, 16 N.C. App. 1, 190 S.E.2d 888 (1972), modified, 282 N.C. 633, 194 S.E.2d 353 (1973).

Applied in State v. Shirley, 12 N.C. App. 440, 183 S.E.2d 880 (1971).

§§ 15-25.1, 15-25.2: Repealed by Session Laws 1969, c. 869, s. 8.

§ 15-26. Contents of search warrant.—(a) The search warrant must describe with reasonable certainty the person, premises, or other place to be searched and the contraband, instrumentality, or evidence for which the search is to be made.

(b) An affidavit signed under oath or affirmation by the affiant or affiants and indicating the basis for the finding of probable cause must be a part of or attached to the warrant.

(c) The warrant must be signed by the issuing official and bear the date and

hour of its issuance above his signature. (1868-9, c. 178, subc. 3, s. 39; Code, s. 1172; Rev., s. 3164; C. S., s. 4530; 1961, c. 1069; 1969, c. 869, s. 8.)

Cross References.—

See note to § 15-25.

Search Warrant and Affidavit Requirements. — A search warrant and affidavit meet the requirements of this section, as well as the requirements of the Fourth Amendment to the U.S. Constitution, where (1) the warrant describes with reasonable certainty the premises to be searched and the contraband for which the search was to be made, (2) the affidavit indicates the basis for a finding of probable cause, and (3) the warrant is signed by the magistrate and bears the date and hour of its issuance. *State v. Bush*, 10 N.C. App. 247, 178 S.E.2d 313 (1970).

A search warrant will be presumed regular if irregularity does not appear on the face of the record. *State v. Spillars*, 280 N.C. 341, 185 S.E.2d 881 (1972).

Common-sense Interpretation of Affidavits. — Affidavits for search warrants must be tested and interpreted by magistrates and courts in a common-sense and realistic fashion. *State v. Flowers*, 12 N.C. App. 487, 183 S.E.2d 820 (1971); *State v. Foye*, 14 N.C. App. 200, 188 S.E.2d 67 (1972).

Affidavits are normally drafted by non-lawyers in the midst and haste of a criminal investigation and technical requirements of elaborate specificity once exacted under common-law pleadings have no proper place in this area. *State v. Flowers*, 12 N.C. App. 487, 183 S.E.2d 820 (1971); *State v. Foye*, 14 N.C. App. 200, 188 S.E.2d 67 (1972).

Purpose of Particularity Requirement. — The requirement that warrants shall particularly describe the things to be seized is to prevent the seizure of one thing under a warrant describing another and to leave nothing to the discretion of the officer executing the warrant in determining what is to be taken. *State v. Foye*, 14 N.C. App. 200, 188 S.E.2d 67 (1972); *State v. Shanklin*, 16 N.C. App. 712, 193 S.E.2d 341 (1972).

The particularity requirement is to be accorded the most scrupulous exactitude when the things are books, and the basis for the seizure is the ideas which they contain. But when First Amendment rights are not involved, the specificity requirement is more flexible. *State v. Foye*, 14 N.C. App. 200, 188 S.E.2d 67 (1972).

Warrant Authorizing Seizure of Limited Class of Things Is Not Prohibited. — A warrant empowering officers to seize a limited class of things, i.e., unlawfully pos-

sessed narcotic drugs, is not prohibited. *State v. Foye*, 14 N.C. App. 200, 188 S.E.2d 67 (1972).

Incorporation of Description in Warrant by Reference to Affidavit. — It is permissible to incorporate the description of the items to be searched for and the place to be searched in the warrant by reference to the affidavit. *State v. Flowers*, 12 N.C. App. 487, 183 S.E.2d 820 (1971); *State v. Shanklin*, 16 N.C. App. 712, 193 S.E.2d 341 (1972).

Description in Warrant Held Particular. — The description in the search warrant was particular enough to prevent the warrant from being a general search warrant within the prohibition of the Fourth Amendment to the Constitution of the United States and of N.C. Const., Art. I, § 20, and subsection (a) of this section where the affidavit upon which it was based referred only to "narcotic drugs, the possession of which is a crime" and did not describe the things to be seized with more particularity. *State v. Foye*, 14 N.C. App. 200, 188 S.E.2d 67 (1972).

A description of the premises to be searched was not rendered uncertain by the fact that the affidavit incorrectly described the premises as "a brick structure" when in fact it was made of stone. *State v. Shirley*, 12 N.C. App. 440, 183 S.E.2d 880 (1971).

The words "illegally held narcotic drugs" described the things to be seized with sufficient particularity to prevent the warrant from being a general search warrant within the prohibition of the Fourth Amendment to the Constitution of the United States and of N.C. Const., Art. I, § 20. *State v. Shirley*, 12 N.C. App. 440, 183 S.E.2d 880 (1971).

Subsection (b) of this section requires only that the affidavit indicate the basis for the finding of probable cause. *State v. Spillars*, 280 N.C. 341, 185 S.E.2d 881 (1972); *State v. Bandy*, 15 N.C. App. 175, 189 S.E.2d 771 (1972).

Such as Material and Essential Facts. — Better practice would be for the issuing official to require that the affidavit contain the material and essential facts (but not all the evidentiary details) necessary to support the finding of probable cause before issuing a search warrant. *State v. Flowers*, 12 N.C. App. 487, 183 S.E.2d 820 (1971).

It is not necessary that the affidavit contain all the evidence properly presented to the magistrate. *State v. Spillars*, 280

N.C. 341, 185 S.E.2d 881 (1972); *State v. Bandy*, 15 N.C. App. 175, 189 S.E.2d 771 (1972).

Subsection (b) of this section does not impose a requirement upon the magistrate to transcribe all the evidence before him supporting probable cause. *State v. Spillers*, 280 N.C. 341, 185 S.E.2d 881 (1972); *State v. Bandy*, 15 N.C. App. 175, 189 S.E.2d 771 (1972).

Sufficiency of Affidavit. — The affidavit is sufficient if it supplies reasonable cause to believe that the proposed search for evidence of the commission of the designated criminal offense will reveal the presence upon the described premises of the objects sought and that they will aid in the apprehension or conviction of the offender. *State v. Campbell*, 14 N.C. App. 493, 188 S.E.2d 560 (1972).

Resolution of Doubtful Cases of Probable Cause.—Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants. *State v. Altman*, 15 N.C. App. 257, 189 S.E.2d 793 (1972).

An affidavit may be based on hearsay information if the magistrate is informed of underlying circumstances upon which the informant bases his conclusion as to the whereabouts of the articles and the underlying circumstances upon which the officer concluded that the informant was credible. *State v. Spencer*, 281 N.C. 121, 187 S.E.2d 779 (1972).

The affidavit may be based on hearsay from an undisclosed informant and need not reflect the personal observations of affiant, but the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were present and some of the underlying circumstances from which the affiant concluded that the informant was credible and reliable. *State v. Altman*, 15 N.C. App. 257, 189 S.E.2d 793 (1972); *State v. Campbell*, 282 N.C. 125, 191 S.E.2d 752 (1972).

The mere characterization of the informant as being reliable might not, in itself, provide a sufficient factual basis for the magistrate to credit the report of the informer; there must be facts, recited and sworn to in the affidavit as being within the personal knowledge of the affiant, which furnish a sufficiently substantial basis to support the magistrate's independent finding crediting the report of the unidentified informer. *State v. Shirley*, 12 N.C. App. 440, 183 S.E.2d 880 (1971).

An affidavit for a search warrant complied with subsection (b) of this section and met the constitutional standard of reasonableness and probable cause, where the affiant stated that he had received information from a reliable informant that defendant had marijuana in his residence and was growing marijuana some distance from his residence, that the informant was credible because he had given information in the past which led to arrests and convictions, that affiant confirmed the information as to growing marijuana by personal observation, and that affiant, by personal surveillance, observed large amounts of traffic to and from defendant's residence. *State v. Spencer*, 281 N.C. 121, 187 S.E.2d 779 (1972).

While an affidavit does not have to reflect the personal observations of the affiant, a two-pronged test is required to sustain a search warrant. The first requirement is that the magistrate be informed of some of the underlying circumstances from which the informant drew his conclusions. The second standard is that the magistrate be informed of the underlying circumstances from which affiant concluded that the informant was credible and reliable. *State v. McKoy*, 16 N.C. App. 349, 191 S.E.2d 897 (1972).

The statement that the informant has proven reliable in the past is a statement of fact and not a mere conclusion. *State v. Altman*, 15 N.C. App. 257, 189 S.E.2d 793 (1972).

And Tends to Show That Informer Is Credible.—Where the affidavit stated that the informer had furnished information in the past which had resulted in the seizure of narcotic drugs and subsequent conviction, that tended to show that the informer was credible and his information reliable. *State v. Foye*, 14 N.C. App. 200, 188 S.E.2d 67 (1972).

And Does Meet Minimum Standards.—The statement that the informant has proven reliable in the past does meet the minimum standards. *State v. Altman*, 15 N.C. App. 257, 189 S.E.2d 793 (1972); *State v. McKoy*, 16 N.C. App. 349, 191 S.E.2d 897 (1972).

Where the circumstances set forth in support of the informant's reliability were that he "has proven reliable and credible in the past," those circumstances were the irreducible minimum on which a warrant could be sustained. *State v. Altman*, 15 N.C. App. 257, 189 S.E.2d 793 (1972); *State v. McKoy*, 17 N.C. App. 349, 191 S.E.2d 897 (1972).

An affiant's statement that a confidential informant had given this agent good and

reliable information in the past that had been checked by the affiant and found to be true meets the minimum standard to sustain a warrant. *State v. McKoy*, 16 N.C. App. 349, 191 S.E.2d 897 (1972).

An affidavit indicating the reliability of its information by naming an informant, indicating the value of his past assistance and corroborating that information with statements from other officers was sufficient to support the issuance of a search warrant for defendant's premises under section (b). *State v. McCuilen*, 17 N.C. App. 109, 193 S.E.2d 349 (1972).

Personal and recent observations by an unidentified informer of criminal activity show that the information was gained in a reliable manner and is more than a bald and unilluminating assertion of suspicion. *State v. Foye*, 14 N.C. App. 200, 188 S.E.2d 67 (1972).

Information contained in affidavits was sufficient for the magistrate to find probable cause for issuance of search warrants for defendants' premises where such information included a statement that a reliable informer had seen part of the stolen property in defendants' premises. *State v. Shanklin*, 16 N.C. App. 712, 193 S.E.2d 341 (1972).

Judicial Official May Rely on Sworn Statement of Affiant Appearing in Person.—A judicial official is entitled to rely upon the sworn statement of affiant, A.B.C. officer, who appears before him in person, in concluding that the affiant is correctly reciting what has been told him by an informer. *State v. Foye*, 14 N.C. App. 200, 188 S.E.2d 67 (1972).

A magistrate is entitled to rely upon the sworn statement of an affiant police officer who appears before the magistrate in person, in concluding that the affiant is correctly reciting what has been told him by his informant. *State v. Shirley*, 12 N.C. App. 440, 183 S.E.2d 880 (1971).

Independent Determination by Magistrate Required.—A magistrate, by simply signing without reading the paper which a police officer places before him, utterly fails to perform the important judicial function which it is his duty to perform as a neutral and detached magistrate of making his own independent determination from the affidavit submitted to him as to whether probable cause exists for issuance of the search warrant. *State v. Miller*, 16 N.C. App. 1, 190 S.E.2d 888 (1972), modified, 282 N.C. 633, 194 S.E.2d 353 (1973).

Where Sole Witness Had No Independent Recollection of Speaking with Judge about Warrant.—Where the sole witness who appeared before the district judge at

the time the search warrant was issued had no independent recollection of speaking with the judge about this warrant, a finding of probable cause had to be based solely upon the allegations in the affidavit. *State v. Campbell*, 14 N.C. App. 493, 188 S.E.2d 560 (1972).

Decision Whether Affidavit Must Always Be Attached to Warrant Found Unnecessary Under Facts of Case.—Where the record disclosed that the affidavit was executed according to the statutory requirements, and that when the State was called upon to produce the search warrant by defendant's objection, it produced the search warrant and the affidavit, the Supreme Court found it unnecessary to decide whether under subsection (b) of this section the affidavit to obtain the search warrant must at all times be attached to the search warrant in order to insure its efficacy. *State v. Spillars*, 280 N.C. 341, 185 S.E.2d 881 (1972).

Search Warrant Held to Comply with Section by Reference to Affidavit.—Where an affidavit complied with the provisions of this section and met the constitutional standard of reasonableness and probable cause requisite to the issuance of a search warrant, the search warrant, by reference to the affidavit, which was made a part of the warrant, described with reasonable certainty the premises to be searched, sufficiently indicated the basis for the finding of probable cause, and sufficiently described the contraband for which the search was to be conducted. *State v. Murphy*, 15 N.C. App. 420, 190 S.E.2d 361 (1972).

Affidavit Held Not to Furnish Adequate Basis for Finding Probable Cause.—Affidavit failed to furnish an adequate basis for the finding of probable cause since nothing in the affidavit supported the conclusion that any of the events referred to occurred on or in connection with the premises to be searched. *State v. Campbell*, 14 N.C. App. 493, 188 S.E.2d 560 (1972).

Statements in the affidavit that affiant "is holding" arrest warrants charging defendant with possession or sale of narcotics on various dates in April, 1971, furnished no rational basis for finding probable cause to believe that on 19 May 1971 narcotic drugs would be found in the house. *State v. Campbell*, 14 N.C. App. 493, 188 S.E.2d 560 (1972).

Statement that persons "have sold" narcotics to the special State Bureau of Investigation agent furnished no additional support for the finding of probable cause where the time and place such sales were

made is not stated. *State v. Campbell*, 14 N.C. App. 493, 188 S.E.2d 560 (1972).

Affidavit was held insufficient to support a finding of probable cause for issuance of a warrant to search defendant's premises for LSD, as the affidavit contained no allegation that either the affiant or the confidential informant had personal knowledge that LSD was on defendant's premises. *State v. Graves*, 16 N.C. App. 389, 192 S.E.2d 122 (1972).

A search warrant which authorized officers to search for and seize intoxicating liquor possessed for the purpose of sale, while the affidavit upon which the warrant was issued alleged that the occupants had "cards, money, dice and gambling paraphernalia" on the premises to be searched was wholly invalid because it was issued without any showing of the existence of probable cause to search for illicit liquor. *State v. Miller*, 282 N.C. 633, 194 S.E.2d 353 (1973).

Constitutional Guaranties Do Not Apply

§ 15-27. **Exclusionary rule.**—(a) No evidence obtained or facts discovered by means of an illegal search shall be competent as evidence in any trial.

(b) No search may be regarded as illegal solely because of technical deviations in a search warrant from requirements not constitutionally required. (1969, c. 869, s. 8.)

The language of this section is broad enough to make the exclusionary rule applicable in any trial, not just in a trial for the offense by reason of which the illegal search was initially undertaken. *State v. Miller*, 16 N.C. App. 1, 190 S.E.2d 888 (1972), modified, 282 N.C. 633, 194 S.E.2d 353 (1973).

No Variance between State Law and Fourth Amendment Requirements.—With regard to search warrants, there is no variance between the law of this State as declared by the decisions of the Supreme Court, and the requirements of the Fourth Amendment as interpreted by the Supreme Court of the United States. *State v. Vestal*, 278 N.C. 561, 180 S.E.2d 755 (1971); *State v. Miller*, 282 N.C. 633, 194 S.E.2d 353 (1973).

The same probable-cause standards under the Fourth and Fourteenth Amendments apply to both federal and State warrants. *State v. Harvey*, 281 N.C. 1, 187 S.E.2d 706 (1972).

Evidence unconstitutionally obtained is excluded in state courts as an essential of due process under the Fourteenth Amendment of the United States Constitution. *State v. Miller*, 282 N.C. 633, 194 S.E.2d 353 (1973).

It is well settled, in both federal and State courts, that evidence obtained by

to Open Fields.—There was no merit in defendant's contention that a search warrant was invalid on the ground that the affidavit for the warrant revealed that the affiant had illegally searched a cornfield in which marijuana was growing some distance behind defendant's residence prior to issuance of the warrant, since the constitutional guaranties against unreasonable search and seizure do not apply to open fields or other lands not an immediate part of the dwelling site. *State v. Spencer*, 281 N.C. 121, 187 S.E.2d 779 (1972).

Applied in *State v. Moye*, 12 N.C. App. 178, 182 S.E.2d 814 (1971); *State v. Hood*, 13 N.C. App. 170, 184 S.E.2d 916 (1971); *State v. Williams*, 13 N.C. App. 423, 185 S.E.2d 604 (1972); *State v. Brady*, 16 N.C. App. 555, 192 S.E.2d 640 (1972); *State v. Dover*, 17 N.C. App. 150, 193 S.E.2d 477 (1972); *State v. Hardy*, 17 N.C. App. 167, 193 S.E.2d 459 (1972); *State v. Salem*, 17 N.C. App. 269, 193 S.E.2d 755 (1973).

unreasonable search and seizure is inadmissible. *State v. Reams*, 277 N.C. 391, 178 S.E.2d 65 (1970); *State v. Allen*, 282 N.C. 503, 194 S.E.2d 9 (1973); *State v. Wooten*, 18 N.C. App. 269, 196 S.E.2d 603 (1973).

Evidence obtained by an illegal search without a search warrant is inadmissible. *State v. Robbins*, 275 N.C. 537, 169 S.E.2d 858 (1969).

However, this constitutional protection does not extend to all searches and seizures. *State v. Reams*, 277 N.C. 391, 178 S.E.2d 65 (1970); *State v. Turnbull*, 16 N.C. App. 542, 192 S.E.2d 689 (1972).

But extends only to those which are unreasonable. *State v. Reams*, 277 N.C. 391, 178 S.E.2d 65 (1970); *State v. Turnbull*, 16 N.C. App. 542, 192 S.E.2d 689 (1972).

The constitutional rights of a defendant are not violated by a warrantless search unless the search is unreasonable and the reasonableness of the search must be determined by the court from the facts and circumstances of each individual case. *State v. Robbins*, 275 N.C. 537, 169 S.E.2d 858 (1969).

The Constitution does not prohibit all searches and seizures but only those which are unreasonable. *State v. Ratliff*, 281 N.C. 397, 189 S.E.2d 179 (1972).

Constitutional rights of a defendant are not violated by a warrantless search un-

less the search is unreasonable. *State v. Faison*, 17 N.C. App. 200, 193 S.E.2d 334 (1972).

The limits of reasonableness which are placed upon searches are equally applicable to seizures, and whether a search or seizure is reasonable is to be determined on the facts of the individual case. *State v. Parks*, 14 N.C. App. 97, 187 S.E.2d 462 (1972).

A search warrant will be presumed regular if irregularity does not appear on the face of the record. *State v. Spillars*, 280 N.C. 341, 185 S.E.2d 881 (1972).

This section is not applicable where no search is made. The law does not prohibit a seizure without a warrant by an officer in the discharge of his official duties where the article seized is in plain view. *State v. Robbins*, 275 N.C. 537, 169 S.E.2d 858 (1969); *State v. Parks*, 14 N.C. App. 97, 187 S.E.2d 462 (1972).

Seizure of contraband, such as burglary tools, does not require a warrant when its presence is fully disclosed without necessity of search. *State v. Simmons*, 278 N.C. 468, 180 S.E.2d 97 (1971).

The constitutional guaranty against unreasonable searches and seizures does not prohibit a seizure of evidence without a warrant where no search is required. *State v. Reams*, 277 N.C. 391, 178 S.E.2d 65 (1970).

When the evidence is delivered to a police officer upon request and without compulsion or coercion, there is no search within the constitutional prohibition against unreasonable searches and seizures. *State v. Reams*, 277 N.C. 391, 178 S.E.2d 65 (1970).

Where a petitioner's privacy was not invaded, and where there was no inspection or examination of his household, there was no search either in an actual or legal sense. *State v. Reams*, 277 N.C. 391, 178 S.E.2d 65 (1970).

The incriminating heroin in this case was not obtained in the course of an illegal search, since it was obtained when the defendant, in an apparent attempt to voluntarily dispose of it, unintentionally exposed it to the view of the officers. *State v. Powell*, 11 N.C. App. 465, 181 S.E.2d 754 (1971).

It is lawful and proper for an officer to seize an article in the discharge of his official duties without a warrant where the article is in plain view. *State v. Powell*, 11 N.C. App. 465, 181 S.E.2d 754 (1971).

Before the reasonableness or legality of an alleged search may be questioned it is necessary to first determine whether there has actually been a search. *State v. Reams*, 277 N.C. 391, 178 S.E.2d 65 (1970).

The constitutional guaranty against unreasonable searches and seizures does not apply where a search is not necessary, and where the contraband subject matter is fully disclosed and open to the eye and the hand. *State v. Harvey*, 281 N.C. 1, 187 S.E.2d 706 (1972).

A search ordinarily involves prying into hidden places, and a seizure contemplates forcible dispossession. However, a police officer may seize and use what he sees in plain sight if he is at a place where he is lawfully entitled to be. *State v. Fry*, 13 N.C. App. 39, 185 S.E.2d 256 (1971).

An arresting officer has the authority to seize and hold articles which he sees the accused trying to hide. *State v. Fry*, 13 N.C. App. 39, 185 S.E.2d 356 (1971).

Where a police officer lawfully entered defendants home to serve a valid arrest warrant, the officer did not need a search warrant to seize marijuana seeds lying in plain view on the top of a freezer some three or four feet from the officer or to seize marijuana which the officer saw inside a plastic jar that he picked up to use as a container for the seized marijuana seeds, no warrant being necessary for the seizure of articles in plain view, and the marijuana in the plastic jar not being discovered by a general exploratory search or an unreasonable search. *State v. Harvey*, 281 N.C. 1, 187 S.E.2d 706 (1972).

The failure of an officer to actually arrest a defendant for a traffic violation did not render inadmissible the evidence of possession of marijuana which was in plain view while the officer was investigating, before arrest, a crime that he had probable cause to believe had been committed in his presence. *State v. Fry*, 13 N.C. App. 39, 185 S.E.2d 256 (1971).

Evidence obtained by officers without a search warrant is admissible in evidence where the articles are seized in plain view without necessity of search. *State v. Allen*, 282 N.C. 503, 194 S.E.2d 9 (1973).

The Exclusionary Rule Applies Where Evidence Is Obtained in Course of Illegal Search.—Evidence is not rendered incompetent under the exclusionary rule now set forth in this section unless it is obtained in the course of an illegal search. *State v. Powell*, 11 N.C. App. 465, 181 S.E.2d 754 (1971).

Evidence Rendered Incompetent by This Section.—This section renders incompetent all evidence obtained (1) in the course of a search, (2) without a legal search warrant, (3) under conditions requiring a search warrant. *State v. Ratliff*, 281 N.C. 397, 189 S.E.2d 179 (1972).

Evidence is not rendered incompetent under this section unless it was obtained (1) in the course of a search, (2) under conditions requiring a search warrant, and (3) without a legal search warrant. *State v. Wooten*, 18 N.C. App. 269, 196 S.E.2d 603 (1973).

Section Does Not Exclude Evidence of Crimes Directed against Officers.—Subsection (a) of this section was not designed to exclude evidence of crimes directed against the persons of trespassing officers. *State v. Miller*, 282 N.C. 633, 194 S.E.2d 353 (1973).

The exclusionary rule does not require the exclusion of evidence obtained after an illegal entry when that evidence is offered to prove the murder of one of the officers making the entry. *State v. Miller*, 282 N.C. 633, 194 S.E.2d 353 (1973).

"Search".—The term "search," as applied to searches and seizures, is an examination of a man's house or other buildings or premises, or of his person, with a view to the discovery of contraband or illicit or stolen property, or some evidence of guilt to be used in the prosecution of a criminal action for some crime or offense with which he is charged. *State v. Reams*, 277 N.C. 391, 178 S.E.2d 65 (1970); *State v. Wooten*, 18 N.C. App. 269, 196 S.E.2d 603 (1973).

The term "search" implies some exploratory investigation, or an invasion and quest, a looking for or seeking out. The quest may be secret, intrusive, or accomplished by force. *State v. Reams*, 277 N.C. 391, 178 S.E.2d 65 (1970).

It has been held that a search implies some sort of force, either actual or constructive, much or little. *State v. Reams*, 277 N.C. 391, 178 S.E.2d 65 (1970).

A "search" implies a prying into hidden places for that which is concealed and that the object searched for has been hidden or intentionally put out of the way. *State v. Reams*, 277 N.C. 391, 178 S.E.2d 65 (1970).

While it has been said that ordinarily searching is a function of sight, it is generally held that the mere looking at that which is open to view is not a "search." *State v. Reams*, 277 N.C. 391, 178 S.E.2d 65 (1970).

A "search" ordinarily implies a quest by an officer of the law, a prying into hidden places for that which is concealed. *State v. Reams*, 277 N.C. 391, 178 S.E.2d 65 (1970).

A "search" implies an examination of one's premises or person with a view to the discovery of contraband or evidence of guilt to be used in prosecution of a criminal

action and implies exploratory investigation or quest. *State v. Reams*, 277 N.C. 391, 178 S.E.2d 65 (1970).

No "Search" within Meaning of Section.—It is not a "search" when a police officer, investigating a violation of the traffic laws, opens the door of the vehicle involved when necessary to see the occupants thereof. *State v. Fry*, 13 N.C. App. 39, 185 S.E.2d 256 (1971).

There was no "search" of defendant within the purview of this section and constitutional provisions forbidding unreasonable searches when a nurse undressed the unconscious defendant at a physician's direction in a hospital emergency room and discovered heroin on defendant's person. *State v. Wooten*, 18 N.C. App. 269, 196 S.E.2d 603 (1973).

"Illegal Search".—An illegal search is one made without a proper search warrant under conditions which require a search warrant. *State v. Powell*, 11 N.C. App. 465, 181 S.E.2d 754 (1971).

"Unreasonable Search".—An unreasonable search has been defined as an examination or inspection without authority of law of one's premises or person, with a view to the discovery of some evidence of guilt, to be used in the prosecution of a criminal action. *State v. Ratliff*, 281 N.C. 397, 189 S.E.2d 179 (1972).

"Seizure".—A seizure contemplates forcible dispossession of the owner. *State v. Reams*, 277 N.C. 391, 178 S.E.2d 65 (1970).

"Probable Cause".—Probable cause for a search can be defined to be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty. *State v. Allen*, 282 N.C. 503, 194 S.E.2d 9 (1973).

"Probable cause" and "reasonable ground to believe" are substantially equivalent terms. *State v. Allen*, 282 N.C. 503, 194 S.E.2d 9 (1973).

Probable cause is a pragmatic question to be determined in each case in the light of the particular circumstances and the particular offense involved. *State v. Allen*, 282 N.C. 503, 194 S.E.2d 9 (1973).

The existence of "probable cause," justifying a search without a warrant, is determined by factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. *State v. Allen*, 282 N.C. 503, 194 S.E.2d 9 (1973).

To establish probable cause the evidence need not amount to proof of guilt, or even to prima facie evidence of guilt, but it must be such as would actuate a reasonable

man acting in good faith. *State v. Allen*, 282 N.C. 503, 194 S.E.2d 9 (1973).

One does not have probable cause unless he has information of facts which, if submitted to a magistrate, would require the issuance of an arrest warrant. *State v. Allen*, 282 N.C. 503, 194 S.E.2d 9 (1973).

A police officer may search the person of one whom he has lawfully arrested as an incident of such arrest. *State v. Jackson*, 280 N.C. 122, 185 S.E.2d 202 (1971).

A warrantless search and seizure may be made when it is incident to a valid arrest. *State v. Allen*, 282 N.C. 503, 194 S.E.2d 9 (1973).

Property Which May Be Taken in Course of Search Incident to Lawful Arrest.—In the course of a search incident to a lawful arrest, a police officer may lawfully take from the person arrested any property which such person has about him and which is connected with the crime charged or which may be required as evidence thereof. If such article is otherwise competent, it may properly be introduced in evidence by the State. *State v. Jackson*, 280 N.C. 122, 185 S.E.2d 202 (1971).

When a person is lawfully arrested, the police have the right, without a search warrant, to make a contemporaneous search of the person of the accused for weapons or for the fruits of or implements used to commit the crime. *State v. Jackson*, 280 N.C. 122, 185 S.E.2d 202 (1971); *State v. Streeter*, 283 N.C. 203, 185 S.E.2d 502 (1973).

But Search and Seizure Must Be Substantially Contemporaneous with Arrest.—For a search and seizure incident to a lawful arrest to be constitutionally permissible, it must be substantially contemporaneous with the arrest. *State v. Jackson*, 280 N.C. 122, 185 S.E.2d 202 (1971).

Search Made after Defendant in Custody Not Justified as Search Incident to Arrest.—A search yielding burglary tools cannot be justified as a search incident to defendant's arrest where the search was made after defendant was under arrest and in custody at the police station. *State v. Allen*, 282 N.C. 503, 194 S.E.2d 9 (1973).

Arrest Held Complete for Purposes of Search Incident Thereto.—Where it was not clear whether the arresting officers stated to the defendant that he was under arrest when they took him into custody, but where it was clear that defendant was deprived of his liberty when he was detained and later taken to jail, then his arrest was complete for purposes of making a search incident to the arrest. *State v. Jackson*, 280 N.C. 122, 185 S.E.2d 202 (1972).

Search Incident to Arrest Held Proper.—Where facts fully support the conclusion that the arresting officers had reasonable grounds to believe that defendant had committed a felony and unless defendant was apprehended, he might escape and destroy any narcotic drugs he had on his person, the arrest without a warrant was justified, and a search incident to the arrest was proper. *State v. Jackson*, 280 N.C. 122, 185 S.E.2d 202 (1971).

Search Held Not Remote in Time or Place.—Neither the removal of a female defendant to the jail nor the delay of 30 to 45 minutes waiting for the matron to search her made a search too remote in time or place to be invalid as a search incident to a lawful arrest. *State v. Jackson*, 280 N.C. 122, 185 S.E.2d 202 (1971).

Where the arresting officers had information that defendant had narcotic drugs concealed inside her brassiere when they took her into custody, this was probable cause for her arrest and the officers could have searched her immediately but instead, the officers took her to jail where she could be searched in privacy by a police matron, police officers acted lawfully and the search was valid as an incident to a lawful arrest, and the heroin found on the defendant's person was properly introduced in evidence. *State v. Jackson*, 280 N.C. 122, 185 S.E.2d 202 (1971).

The absence of a stop-and-frisk statute is not fatal to the authority of law-enforcement officers in North Carolina to stop suspicious persons for questioning and to search those persons for dangerous weapons, since those practices are valid under the common law. *State v. Streeter*, 283 N.C. 203, 195 S.E.2d 502 (1973).

Officers May Conduct Limited Protective Search.—When law officers stopped to learn defendant's identity and his reason for being on deserted street near business establishments at 2:45 A.M., and the officers saw a bulge protruding from beneath defendant's shirt which appeared to be a gun, it was reasonable for the officers to conduct a limited protective search for weapons immediately, even if the officers had no probable cause to arrest defendant, and burglary tools necessarily exposed by the limited weapons search were lawfully obtained and are not excluded by either the Fourth Amendment or subsection (a). *State v. Streeter*, 283 N.C. 203, 195 S.E.2d 502 (1973).

When an officer temporarily detains a person because of suspicious circumstances and has reason to believe that the suspect is armed, he may conduct a weapons search which is limited to the protective purpose.

State v. Streeter, 17 N.C. App. 48, 193 S.E.2d 347 (1972).

Exposure of Evidence through Limited Weapons Search. — If, in the conduct of the limited weapons search, contraband or evidence of a crime is of necessity exposed, the officer is not required by the Fourth Amendment to disregard such contraband or evidence of crime. State v. Streeter, 17 N.C. App. 48, 193 S.E.2d 347 (1972).

The owner of the premises may consent to a search thereof and thus waive the necessity of a valid search warrant so as to render the evidence obtained in the search competent, but to have such effect, the consent of the owner must be freely and intelligently given, without coercion, duress or fraud, and the burden is upon the State to prove that it was so, the presumption being against the waiver of fundamental constitutional rights. State v. Vestal, 278 N.C. 561, 180 S.E.2d 755 (1971); State v. Lindquist, 14 N.C. App. 361, 188 S.E.2d 686 (1972).

One may submit or consent to a warrantless search or seizure. State v. Allen, 282 N.C. 503, 194 S.E.2d 9 (1973).

And Miranda Warnings Are Not Required. — The warnings required by Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966), in order to make competent a confession made in custody, need not be given by officers before obtaining the consent of the owner to a search of his premises. State v. Vestal, 278 N.C. 561, 180 S.E.2d 755 (1971); State v. Lindquist, 14 N.C. App. 361, 188 S.E.2d 686 (1972).

Standing of Person "in Charge" of Premises. — Defendant as agent of the lessee of the premises, and as a joint venturer with him in operating a gambling establishment thereon, was the person in charge of the premises at the time the search was made, and had sufficient standing to invoke protection against an unlawful search of the premises. State v. Miller, 16 N.C. App. 1, 190 S.E.2d 888 (1972), modified, 282 N.C. 633, 194 S.E.2d 353 (1973).

Trespassers Have No Standing to Challenge Lawfulness of Search of Premises. — Defendants had no standing to challenge the lawfulness of a search of a premises occupied by defendants where defendants were trespassers on the property, notwithstanding the State relied on the doctrine of recent possession of stolen property found in the premises in prosecuting defendants for breaking and entering and larceny. State v. Eppley, 14 N.C. App. 314, 188 S.E.2d 758 (1972).

Defendants were not prejudiced by the trial court's denial of their motion for a voir dire examination on the question of the legality of a search of a premises occupied by defendants, where the evidence showed that defendants were trespassers on the premises and had no standing to contest the validity of the search. State v. Eppley, 14 N.C. App. 314, 188 S.E.2d 758 (1972).

Search and Seizure Directed to Someone Other Than Defendant. — Where the search and seizure was directed to a rifle in a friend's residence, defendant came within the class who can only claim prejudice through the use of evidence gathered as a consequence of a search or seizure directed to someone else. This class is not one for whose sake the constitutional protection is given. Thus defendant was not the victim of an invasion of privacy and had no standing to object to the introduction of the evidence. State v. Nickerson, 13 N.C. App. 125, 185 S.E.2d 326 (1971).

Consent by Person in Possession of Automobile. — Evidence obtained pursuant to the search of an automobile with the permission of the one in possession is competent against him and the occupants. State v. Faison, 17 N.C. App. 200, 193 S.E.2d 334 (1972).

Automobiles and other conveyances may be searched without a warrant under circumstances that would not justify the search of a house, and a police officer in the exercise of his duties may search an automobile or other conveyance without a search warrant when the existing facts and circumstances are sufficient to support a reasonable belief that the automobile or other conveyance carries contraband materials. State v. Simmons, 278 N.C. 468, 180 S.E.2d 97 (1971); State v. Faison, 17 N.C. App. 200, 193 S.E.2d 334 (1972).

Automobiles, because of their mobility, may be searched without a warrant upon facts not justifying a warrantless search of a residence or office; however, the officers conducting the search must have reasonable or probable cause to believe that they will find the instrumentality of a crime or evidence pertaining to a crime before they begin their warrantless search. State v. Ratliff, 281 N.C. 397, 189 S.E.2d 179 (1972).

In recognition of the mobility of automobiles, a search of an automobile without a warrant is constitutionally permissible if there is probable cause to make the search. State v. Ratliff, 281 N.C. 397, 189 S.E.2d 179 (1972).

If there is probable cause to search an automobile, the officer may either seize and

hold the vehicle before presenting the probable-cause issue to a magistrate, or he may carry out an immediate search without a warrant. *State v. Ratliff*, 281 N.C. 397, 189 S.E.2d 179 (1972).

The search of an automobile on probable cause proceeds on a theory entirely different from that justifying the search incident to an arrest. *State v. Ratliff*, 281 N.C. 397, 189 S.E.2d 179 (1972).

The right to search an automobile on probable cause and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law. *State v. Ratliff*, 281 N.C. 397, 189 S.E.2d 179 (1972).

A warrantless search of a vehicle capable of movement may be made by officers when they have probable cause to search, and exigent circumstances make it impracticable to secure a search warrant. *State v. Allen*, 282 N.C. 503, 194 S.E.2d 9 (1973).

Sufficient Reasonable Cause. — When officers saw the liquid in containers generally used to contain and transport nontax-paid liquor, under the circumstances then existing, they had sufficient reasonable cause to believe that the jars contained nontax-paid liquor to justify the seizure of the contraband without a search warrant. *State v. Simmons*, 278 N.C. 468, 180 S.E.2d 97 (1971).

Seizure of Evidence and Its Introduction in Subsequent Prosecution Not Prohibited. — The constitutional and statutory guarantee against unreasonable search and seizure does not prohibit seizure of evidence and its introduction into evidence on a subsequent prosecution where no search is required. *State v. Simmons*, 278 N.C. 468, 180 S.E.2d 97 (1971).

Burden of Justifying Search without Warrant. — One who seeks to justify a warrantless search has the burden of showing that the exigencies of the situation made search without a warrant imperative. *State v. McCloud*, 276 N.C. 518, 173 S.E.2d 753 (1970).

Whether a search is unreasonable is determined by the court upon the facts of each individual case. *State v. Reams*, 277 N.C. 391, 178 S.E.2d 65 (1970).

The reasonableness of a search is a sub-

stantive determination to be made by the trial court from the facts and circumstances of the case and in the light of the criteria laid down by the Fourth Amendment and opinions which apply that amendment. *State v. Turnbull*, 16 N.C. App. 542, 192 S.E.2d 689 (1972).

Upon voir dire hearing, the court should receive evidence and make findings of fact. In this respect there is no distinction between the admissibility of a confession and the admissibility of evidence obtained by a search without a warrant. The determining fact in each of these instances is whether the confession or the consent to the search was given voluntarily and without compulsion by the officers. *State v. Vestal*, 278 N.C. 561, 180 S.E.2d 755 (1971).

Persons stopped pursuant to § 20-183 may not be indiscriminately searched or arrested without probable cause in contravention of recognized constitutional principles. *State v. Allen*, 282 N.C. 503, 194 S.E.2d 9 (1973).

Seizure Invalid Where Officers Acted under Invalid Search Warrant.—Fact that officers could observe gambling after passing through two doors of a house and opening a third door did not give them authority to enter and seize the gambling apparatus in use where they arrived at the position to observe the gambling while purporting to act under an invalid search warrant and under circumstances in which a valid warrant was required. *State v. Miller*, 16 N.C. App. 1, 190 S.E.2d 888 (1972), modified, 282 N.C. 633, 194 S.E.2d 353 (1973).

Redress for Warrantless Arrest by Civil Action for Damages. — Nothing in State law requires the exclusion of evidence obtained following an arrest which is constitutionally valid but illegal for failure to first obtain an arrest warrant. Defendant may, if so advised, redress his grievance for the warrantless arrest by a civil action for damages. *State v. Eubanks*, 283 N.C. 556, 196 S.E.2d 706 (1973).

Applied in *State v. Campbell*, 282 N.C. 125, 191 S.E.2d 752 (1972); *State v. Campbell*, 14 N.C. App. 493, 188 S.E.2d 560 (1972).

Quoted in *State v. Flowers*, 12 N.C. App. 487, 183 S.E.2d 820 (1971).

§ 15-27.1. Application of Article to all search warrants; exception as to inspection warrants.—The requirements of this Article apply to search warrants issued for any purpose, including those issued pursuant to Chapter 18A of the General Statutes, except that the contents of and procedure relating to inspection warrants authorized under Article 4A of this Chapter and G.S. 14-288.11

are to be governed by the provisions set out in the sections relating to them. (1957, c. 496; 1969, c. 869, s. 8; 1971, c. 872, s. 4.)

Editor's Note.—The 1971 amendment, effective Oct. 1, 1971, substituted "Chapter 18A of the General Statutes" for "§ 18-13."

When Evidence Incompetent.—

In accord with 1st paragraph in original. See *State v. Ratliff*, 281 N.C. 397, 189 S.E.2d 179 (1972).

Persons stopped pursuant to § 20-183 may not be indiscriminately searched or arrested without probable cause in contravention of recognized constitutional principles. *State v. Allen*, 282 N.C. 503, 194 S.E.2d 9 (1973).

ARTICLE 4A.

Administrative Search and Inspection Warrants.

§ 15-27.2. Warrants to conduct inspections authorized by law.—

(a) Notwithstanding the provisions of article 4 of this chapter, any official or employee of the State or of a unit of county or local government of North Carolina may, under the conditions specified in this section, obtain a warrant authorizing him to conduct a search or inspection of property if such a search or inspection is one that is elsewhere authorized by law, either with or without the consent of the person whose privacy would be thereby invaded, and is one for which such a warrant is constitutionally required.

(b) The warrant may be issued by any magistrate of the general court of justice, judge, clerk, or assistant or deputy clerk of any court of record whose territorial jurisdiction encompasses the property to be inspected.

(c) The issuing officer shall issue the warrant when he is satisfied the following conditions are met:

- (1) The one seeking the warrant must establish under oath or affirmation that the property to be searched or inspected is to be searched or inspected as part of a legally authorized program of inspection which naturally includes that property, or that there is probable cause for believing that there is a condition, object, activity or circumstance which legally justifies such a search or inspection of that property;
- (2) An affidavit indicating the basis for the establishment of one of the grounds described in (1) above must be signed under oath or affirmation by the affiant;
- (3) The issuing official must examine the affiant under oath or affirmation to verify the accuracy of the matters indicated by the statement in the affidavit;

(d) The warrant shall be validly issued only if it meets the following requirements:

- (1) It must be signed by the issuing official and must bear the date and hour of its issuance above his signature with a notation that the warrant is valid for only 24 hours following its issuance;
- (2) It must describe, either directly or by reference to the affidavit, the property where the search or inspection is to occur and be accurate enough in description so that the executor of the warrant and the owner or the possessor of the property can reasonably determine from it what person or property the warrant authorizes an inspection of;
- (3) It must indicate the conditions, objects, activities or circumstances which the inspection is intended to check or reveal;
- (4) It must be attached to the affidavit required to be made in order to obtain the warrant.

(e) Any warrant issued under this section for a search or inspection shall be valid for only 24 hours after its issuance, must be personally served upon the

owner or possessor of the property between the hours of 8:00 A.M. and 8:00 P.M. and must be returned within 48 hours.

(f) No facts discovered or evidence obtained in a search or inspection conducted under authority of a warrant issued under this section shall be competent as evidence in any civil, criminal or administrative action, nor considered in imposing any civil, criminal, or administrative sanction against any person, nor as a basis for further seeking to obtain any warrant, if the warrant is invalid or if what is discovered or obtained is not a condition, object, activity or circumstance which it was the legal purpose of the search or inspection to discover; but this shall not prevent any such facts or evidence to be so used when the warrant issued is not constitutionally required in those circumstances.

(g) The warrants authorized under this section shall not be regarded as search warrants for the purposes of application of article 4 of chapter 15 of the General Statutes of North Carolina. (1967, c. 1260.)

Editor's Note. — For comment as to inspections, see 4 Wake Forest Intra. L. warrants required for administrative health Rev. 117 (1968).

ARTICLE 5.

Peace Warrants.

§ 15-28. Officers authorized to issue peace warrants.

Cited in *State v. Matthews*, 270 N.C. 35, 153 S.E.2d 791 (1967).

ARTICLE 6.

Arrest.

§ 15-39. Persons present may arrest for breach of peace.

Article Is Mainly Declaratory of Common Law.—

In accord with 2nd paragraph in original. See *State v. Tripp*, 9 N.C. App. 518, 176 S.E.2d 892 (1970).

This section is a law of this State and citizens are entitled to rely on it and the courts are obligated to apply and interpret it until the General Assembly sees fit to amend or repeal. *State v. Tripp*, 9 N.C. App. 518, 176 S.E.2d 892 (1970).

Peace Officers and Private Persons on Equal Terms. — This section confers on peace officers and private persons, on equal terms, the power of arrest without warrant in certain misdemeanor cases. *State v. Tripp*, 9 N.C. App. 518, 176 S.E.2d 892 (1970).

Right to Arrest for Breach of Peace. — A private person's right to arrest for an affray or breach of the peace exists while it is continuing or immediately after it has been committed. *State v. Tripp*, 9 N.C. App. 518, 176 S.E.2d 892 (1970).

If a person's right to arrest for a breach of the peace committed in his presence terminated immediately when the breach of the peace ceased, the right of arrest would be completely negated. *State v. Tripp*, 9 N.C. App. 518, 176 S.E.2d 892 (1970).

Power of Arrest, etc.—

The power of arrest without warrant is referable entirely to the question of breach of the peace. The test is not whether the offense is a misdemeanor, but, rather, whether an arrest is necessary in order to "suppress and prevent" a breach of the peace. *State v. Tripp*, 9 N.C. App. 518, 176 S.E.2d 892 (1970).

When Arrest Necessary, etc.—

This section's language is plain and clear. An arrest without warrant may be made under the provisions of this section by anyone when it is necessary to "suppress and prevent" a breach of the peace. This means that either a peace officer or a private person may arrest anyone who in his presence is (1) actually committing or (2) threatening to commit a breach of the peace. *State v. Tripp*, 9 N.C. App. 518, 176 S.E.2d 892 (1970).

When Breach of Peace, etc.—

In accord with 1st paragraph in original. See *State v. Tripp*, 9 N.C. App. 518, 176 S.E.2d 892 (1970).

Reasonable Ground for Belief, etc.—

A citizen's arrest or attempted arrest can create a dangerous situation and one who attempts it does so at his peril. *State v. Tripp*, 9 N.C. App. 518, 176 S.E.2d 892 (1970).

Whether Force Used in Making Arrest Is Reasonable and Necessary Is Jury Question.—A private citizen making or attempting to make a lawful arrest may use reasonable force in making the arrest, and whether the force used in any particular case is reasonable and necessary or excessive and unnecessary is ordinarily a question for the jury. *State v. Tripp*, 9 N.C. App. 518, 176 S.E.2d 892 (1970).

§ 15-40. Arrest for felony, without warrant.

In order to properly charge an assault, there must be a victim named, since by failing to name the particular person assaulted, the defendant would not be protected from a subsequent prosecution for assault upon a named person. *State v. Powell*, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

Arrest of Judgment Where Warrant Altered.—Where defendant was arrested, tried and convicted in district court for permitting a person under the influence of intoxicating liquor to operate his automom-

The driving or riding without arms on horseback through a courthouse or crowded street at such a rate or in such a manner as to endanger safety of the inhabitants amounts to a breach of the peace and is an indictable offense at common law. *State v. Tripp*, 9 N.C. App. 518, 176 S.E.2d 892 (1970).

Applied in *State v. Robinson*, 15 N.C. App. 155, 189 S.E.2d 567 (1972).

bile, but the warrant was altered after trial in district court and before any evidence was heard in superior court so that defendant was tried and convicted in superior court on a warrant charging him with driving while under the influence, judgment of the superior court must be arrested since a defendant may be tried upon a warrant in superior court only after there has been a trial and appeal from a conviction by an inferior court having jurisdiction. *State v. Chappell*, 18 N.C. App. 288, 196 S.E.2d 558 (1973).

§ 15-41. When officer may arrest without warrant.

Editor's Note.—

For article surveying recent decisions by the North Carolina Supreme Court in the area of criminal procedure, see 49 N.C.L. Rev. 262 (1971).

This section has two independent provisions. Subdivision (1) applies to two situations, the first being where the person to be arrested has actually committed a felony or misdemeanor in the presence of the arresting officer, and the second being where, whether or not the offense has actually been committed, the officer has reasonable ground to believe that the person arrested has committed a felony or misdemeanor in his presence. Subdivision (2) relates to the arrest of a person whom the arresting officer has reasonable ground to believe has committed a felony, irrespective of whether it is believed that such felony was committed in the presence of the arresting officer or elsewhere. *State v. Roberts*, 276 N.C. 98, 171 S.E.2d 440 (1970).

This section was never intended to legalize a warrantless entry upon premises which could not otherwise be lawfully entered except under authority of a valid warrant. *State v. Miller*, 16 N.C. App. 1, 190 S.E.2d 888 (1972), modified, 282 N.C. 633, 194 S.E.2d 353 (1973).

Need for Arrest Warrant Determined by State Law.—The Constitution does not dictate the circumstances under which arrest warrants are required. Whether an arrest warrant must be obtained is determined by State law alone. Likewise, state

law alone determines the sanction to be applied for failure to obtain an arrest warrant where one is required. *State v. Eubanks*, 283 N.C. 556, 196 S.E.2d 706 (1973).

An arrest without warrant except as authorized by statute is illegal. *State v. Moore*, 275 N.C. 141, 166 S.E.2d 53 (1969); *State v. Jacobs*, 277 N.C. 151, 176 S.E.2d 744 (1970); *State v. Harris*, 9 N.C. App. 649, 177 S.E.2d 445 (1970); *State v. Harris*, 279 N.C. 307, 182 S.E.2d 364 (1971); *State v. Cooper*, 17 N.C. App. 184, 193 S.E.2d 352 (1972); *State v. Denton*, 17 N.C. App. 684, 195 S.E.2d 334 (1973).

An arrest of a defendant without a warrant for the offense of operating a motor vehicle on a public highway while under the influence of an intoxicant is illegal where the defendant has not operated the vehicle in the arresting officer's presence. *State v. Hill*, 277 N.C. 547, 178 S.E.2d 462 (1971).

Since defendant did not operate his motor vehicle on a public street or highway "in the presence of the officer," and since the officer had no reasonable ground to believe defendant had done so, defendant's arrest without a warrant was illegal. *State v. Eubanks*, 283 N.C. 556, 196 S.E.2d 706 (1973).

Where the right and power of arrest without warrant is regulated by statute, an arrest without warrant except as authorized by statute is illegal. *State v. Hill*, 277 N.C. 547, 178 S.E.2d 462 (1971).

It is an essential of jurisdiction that a criminal offense shall be sufficiently charged in a warrant, etc.—

In accord with original. See *State v. Jones*, 17 N.C. App. 54, 193 S.E.2d 314 (1972).

But it is not an essential of jurisdiction that a warrant be issued prior to arrest, etc.—

In accord with original. See *State v. Jones*, 17 N.C. App. 54, 193 S.E.2d 314 (1972).

Finding Defendant Taken into Custody Is Tantamount to Finding Defendant under Arrest.—A finding and conclusion that defendant was taken into custody is tantamount to finding and concluding that defendant was under arrest at the time of a search. *State v. Jackson*, 11 N.C. App. 682, 182 S.E.2d 271, aff'd, 280 N.C. 122, 185 S.E.2d 202 (1971).

An illegal arrest, unaccompanied by violent or oppressive circumstances, would not be more coercive than a legal arrest. *State v. Faulkner*, 5 N.C. App. 113, 168 S.E.2d 9 (1969).

Every statement made by a person in custody as a result of an illegal arrest is not ipso facto involuntary and inadmissible, but the facts and circumstances surrounding such arrest and the in-custody statement should be considered in determining whether the statement is voluntary and admissible. Voluntariness remains as the test of admissibility. *State v. Faulkner*, 5 N.C. App. 113, 168 S.E.2d 9 (1969).

A formal declaration of arrest by the officer is not a prerequisite to the making of an arrest. *State v. Tippet*, 270 N.C. 588, 155 S.E.2d 269 (1967).

Reasonable Ground for Belief Excuses Officer.—

The courts have held that a description of an assailant's physical characteristics and his clothing may supply reasonable grounds for believing that he had committed a felony. *State v. Dickens*, 278 N.C. 537, 180 S.E.2d 845 (1971).

Reasonable grounds existed for an arrest without a warrant in a case where the arresting officer had information that a robbery had been committed by a person who fled and the officer was furnished a description of the assailant and the clothing which he wore. The officer was also advised that the assailant had a cut on his leg and that he could probably be found at a certain address. Upon arriving at the given address, he found defendant, whose appearance coincided with the description furnished, and arrest was made without warrant. *State*

v. Jacobs, 277 N.C. 151, 176 S.E.2d 744 (1970).

A description of either a person or an automobile furnishes reasonable ground for arresting and detaining a criminal suspect. *State v. Jacobs*, 277 N.C. 151, 176 S.E.2d 744 (1970).

In order to justify an arrest under this section, it is not required that a felony be shown actually to have been committed; it is only necessary that the officer have reasonable ground to believe that such an offense has been committed. *State v. Alexander*, 279 N.C. 527, 184 S.E.2d 275 (1971).

Where the police had a description of defendants, including their height, weight, estimated age, clothing, color and complexion, one defendant had been identified from photographs by two eyewitnesses and one informer, a second informer whose information had led to the conviction of seven persons within the past two years, had told police that defendants were the individuals involved in this robbery, had told police how he came into possession of this information and how it was revealed to him, the totality of these facts and circumstances would warrant a prudent man in believing that the felony of armed robbery had been committed and that these defendants participated in commission of the crime, the Supreme Court held that the officers acted on reasonable ground and with probable cause. *State v. Alexander*, 279 N.C. 527, 184 S.E.2d 275 (1971).

The patrolman was justified in assuming, based upon the radio alert that he had just received, that the four Negro men he observed traveling north from Greensboro in a 1968 blue and white Dodge Charger automobile bearing the District of Columbia license plate "GWYNN" were the same men as those just described to him as the perpetrators of an armed robbery, and he had reasonable grounds to stop and take them into custody. *State v. Westry*, 15 N.C. App. 1, 189 S.E.2d 618 (1972).

A police officer had reasonable grounds to arrest defendant without a warrant for the felony of possessing heroin for purpose of sale, where a person suffering from a narcotics overdose told the officer that the defendant had administered hypodermically narcotic drugs to him and that the defendant had narcotic drugs on his person. *State v. Jackson*, 11 N.C. App. 682, 182 S.E.2d 271, aff'd, 280 N.C. 122, 185 S.E.2d 202 (1971).

Where a felonious breaking and entering and a felonious larceny had occurred, and footprints led from the scene of the felonies to a wooded area, and the stolen

items were found in that wooded area, and later the police saw a person enter that area and look around, then the police had reasonable ground upon which to believe that person had committed the two felonies; that he would evade arrest if not immediately taken into custody; and thus the search of his person (which produced positive evidence of his guilt) was legal. *State v. Harris*, 279 N.C. 307, 182 S.E.2d 364 (1971).

The facts and circumstances surrounding defendant's arrest furnished plenary evidence to support a reasonable belief on the part of the officers that defendant had committed a felony; the very nature of the crime of armed robbery suffices to support a reasonable belief that defendant would evade arrest if not immediately taken into custody. *State v. Alexander*, 279 N.C. 527, 184 S.E.2d 275 (1971).

Where one defendant broke a window in the clothing store in the presence of police officers, and the only other person present was the other defendant, who was standing beside the first defendant when the latter broke the window, who then moved across the street and back with the first defendant, who left the scene with the first defendant when the marked police car appeared, and who was still with the first defendant some 15 minutes later when the officers found them together in the restaurant, under the circumstances, the officers had reasonable ground to believe that the second defendant was actively aiding and abetting the first defendant and was equally guilty with the first defendant of at least the misdemeanor of window breaking. *State v. Gibson*, 15 N.C. App. 445, 190 S.E.2d 315 (1972).

The failure of the State to satisfy the jury beyond a reasonable doubt of defendant's guilt of the offense charged is a far cry from a failure to satisfy the jury beyond a reasonable doubt that the arresting officer had reasonable ground to believe defendant had committed the offense in the officer's presence. In order to justify an officer in making an arrest without a warrant, it is not essential that the offense be shown to have been actually committed. It is only necessary that the officer have reasonable ground to believe such offense has been committed. *State v. Jefferies*, 17 N.C. App. 195, 193 S.E.2d 388 (1972).

Violation of Motor Vehicle Act. — An officer has a right to make an arrest without a warrant if a violation of the Motor Vehicle Act is actually committed in his presence. *State v. McCaskill*, 270 N.C. 788, 154 S.E.2d 907 (1967).

If the officer saw the commission of a

violation of the Motor Vehicle Act, a misdemeanor, he would have the right to enter the premises where the defendant lived in order to make an arrest without a warrant. *State v. McCaskill*, 270 N.C. 788, 154 S.E.2d 907 (1967).

Driving Motor Vehicle While under Influence of Intoxicants. — A highway patrolman apprehending a person driving a motor vehicle on the public highway while under the influence of intoxicating liquor is authorized, by virtue of the provisions of § 20-188 and subdivision (1) of this section, to arrest such person without a warrant, and such arrest is legal. *State v. Broome*, 269 N.C. 661, 153 S.E.2d 384 (1967).

Where an officer sees a person intoxicated at a public bar, the officer may arrest such person without a warrant for violation of § 14-335. *State v. Shirlen*, 269 N.C. 695, 153 S.E.2d 364 (1967).

When police officers stopped an automobile fitting the description of one used in conjunction with a robbery and observed a pistol on the seat of the automobile, they had reasonable ground to believe that defendant had committed a felony and would evade arrest if not taken into custody. *State v. Bell*, 270 N.C. 25, 153 S.E.2d 741 (1967).

Police officers stopped an automobile which fitted the description of one used in connection with a robbery, and at that time observed a pistol lying on the seat of the car. The Supreme Court held that the officers had reasonable ground to believe that the defendant had committed a felony and would evade arrest if not taken into custody. *State v. Dickens*, 278 N.C. 537, 180 S.E.2d 845 (1971).

Information Sufficient to Authorize Arrest. — Where arresting officer knew that a robbery had been committed by one who had fled and had a general description of the felon, of his checkered pants, and of the cut on the rear of his right leg, and defendant was found at the location described in the officer's information and had property on his person similar to that taken in the robbery, such information in possession of the officers was amply sufficient to authorize the arrest without a warrant. *State v. Grier*, 268 N.C. 296, 150 S.E.2d 443 (1966).

Where a police officer who had been informed of a felony committed by a barefooted white man, wearing coveralls, was looking for such a man and at about 3 A.M. he found the defendant, who answered the description, hiding behind a bush two blocks from the scene of the crime, it was lawful for him to arrest the defendant with-

out a warrant. *State v. Tippet*, 270 N.C. 588, 155 S.E.2d 269 (1967).

Police officers knew that a robbery had been committed, and they had information that the robber wore checkered pants and had a cut on the rear of his right leg. When the police apprehended the defendant, dressed in checkered pants, with a cut on the rear of his right leg, they placed him under arrest. Incident to the arrest, the officers searched the defendant and found property on his person similar to that taken in the robbery. The Supreme Court held that the police officers had reasonable grounds to arrest the defendant, and that the arrest without a warrant was valid. *State v. Dickens*, 278 N.C. 537, 180 S.E.2d 845 (1971).

Police officers were informed that a felony had been committed by a barefooted white man wearing coveralls. Police officers arrested the defendant without a warrant upon finding him dressed as described and hiding behind a bush two blocks from the scene of the crime. The Supreme Court held that under these circumstances it was lawful to arrest the defendant without a warrant. *State v. Dickens*, 278 N.C. 537, 180 S.E.2d 845 (1971).

"Arrest without Warrant".—By the term "arrest without warrant" is meant the situation where no warrant for arrest has been issued. But in addition, that phrase also includes the situation where a warrant for arrest is in existence, but not in the possession of the arresting officer, or someone acting in conjunction with him, at the time and place of arrest. When the arresting officer does not have the warrant in his possession at the time of arrest, the arrest is unlawful, unless it is one which could be validly and legally made without a warrant. *State v. Denton*, 17 N.C. App. 684, 195 S.E.2d 334 (1973).

In order to justify a warrantless arrest under subdivision (2), the State must show two things: (1) that the officer had probable cause to believe the person arrested had committed a felony, and (2) that the officer had probable cause to believe the person arrested would escape if not immediately taken into custody. *State v. Denton*, 17 N.C. App. 684, 195 S.E.2d 334 (1973).

Redress for Warrantless Arrest by Civil Action.—Nothing in State law requires the exclusion of evidence obtained following an arrest which is constitutionally valid but illegal for failure to first obtain an arrest warrant. Defendant may, if so advised, redress his grievance for the warrantless arrest by a civil action for damages. *State*

v. Eubanks, 283 N.C. 556, 196 S.E.2d 706 (1973).

Arrest without Warrant Upheld.—An arrest without warrant was upheld when the evidence disclosed that the officer had information that the felony of breaking and entering had been committed, and the defendants fitted the description of the perpetrators of the crimes. *State v. Roberts*, 6 N.C. App. 312, 170 S.E.2d 193 (1969).

The entry of police officers into the house in which the defendant and his companions were hiding, and the arrest without warrant of the occupants therein for the offense of armed robbery, was proper and lawful, where (1) the felony of armed robbery had been committed at an ABC store, (2) within a few minutes after the robbery the officers discovered in the driveway of the house the automobile which they reasonably believed had been used in the robbery, (3) all curtains on the windows of the house were drawn, and (4) the occupants of the house failed to respond to the officers' knock at the front door. *State v. Basden*, 8 N.C. App. 401, 174 S.E.2d 613 (1970).

The warrantless arrest of a defendant for the felonious possession of LSD and the subsequent warrantless searches of his person were held lawful, where (1) the arresting officer received information from a reliable informant that two unknown persons, accompanied by the defendant, were on a certain street and that the two unknown persons had narcotic drugs in their possession; (2) the officer briefly observed the three suspects walking on the sidewalk; (3) the officer arrested the defendant on the street for the possession of narcotic drugs, but the search of defendant's person at that time uncovered no drugs; and (4) a subsequent "strip search" at the police station resulted in the finding of LSD tablets in defendants' clothing. *State v. Parker*, 11 N.C. App. 648, 182 S.E.2d 264 (1971).

Discovery by police of a bag of money, together with previous observations of the defendants and a defendant's resulting flight gave officers sufficient probable cause to believe that a felony had been committed and subsequently to place all three defendants under arrest without a warrant. *State v. Allen*, 15 N.C. App. 670, 190 S.E.2d 714 (1972), rev'd on other grounds, 282 N.C. 503, 194 S.E.2d 9 (1973).

Where police officers stopped defendant's car to make a routine driver's license check and defendant removed revolver from a bag in the back seat, the police properly arrested him without a warrant inasmuch as they had reasonable ground to believe

defendant was committing a misdemeanor—carrying a concealed weapon in violation of § 14-269—in their presence. *State v. White*, 18 N.C. App. 31, 195 S.E.2d 576 (1973).

Likelihood of Escape. — The likelihood of evasion of arrest, frequently referred to as the likelihood of escape, by the person to be arrested is not a factor to be considered in determining the right of a police officer to arrest without a warrant when the offense, felony or misdemeanor, has been committed in the presence of the officer, or when the officer has reasonable ground to believe that the offense has been committed in his presence by the person to be arrested. *State v. Roberts*, 276 N.C. 98, 171 S.E.2d 440 (1970).

It is only in the situation to which subdivision (2) of this section is applicable that the statute makes it a condition to the right of the officer to arrest without a warrant that the arresting officer has reasonable ground to believe the person to be arrested will evade arrest if not immediately taken into custody. *State v. Roberts*, 276 N.C. 98, 171 S.E.2d 440 (1970).

In determining whether officers had reasonable grounds to believe that the defendant would evade arrest if not taken into immediate custody, the nature of the felony, the hour of the day or night, the character and reputation of the neighborhood where the arrest was made, the number of suspects, and of the officers available for assistance, and the likely consequences of the officers' failure to act promptly must necessarily be taken into consideration. *State v. Roberts*, 6 N.C. App. 312, 170 S.E.2d 193 (1969).

The very nature of the crime of rape suffices to support a reasonable belief that a defendant would evade arrest if not immediately taken into custody. *State v. Jacobs*, 277 N.C. 151, 176 S.E.2d 744 (1970).

The very nature of the crime of armed robbery suffices to support a reasonable belief that defendant would evade arrest if not immediately taken into custody. *State v. Alexander*, 279 N.C. 527, 184 S.E.2d 275 (1971).

Reasonable Ground for Belief May Be Based on Information Given Officer by Another. — Reasonable ground for belief, which is an element of the officer's right to arrest without a warrant under subdivision (2) of this section and under one of the situations provided for in subdivision (1) of this section, may be based upon information given to the officer by another, the source of such information being rea-

sonably reliable. Upon this question it is immaterial that such information, being hearsay, is not, itself, competent in evidence at the trial of the person arrested. *State v. Roberts*, 276 N.C. 98, 171 S.E.2d 440 (1970).

And Is Jury Question. — The reasonableness of the officer's grounds to believe the defendant had committed a misdemeanor in the officer's presence, when properly raised, is a factual question to be decided by the jury. *State v. Jefferies*, 17 N.C. App. 195, 193 S.E.2d 388 (1972).

Verdict of Not Guilty Not Tantamount to Finding of No Reasonable Grounds. — Verdict of not guilty of the misdemeanor for which defendant was arrested—drunken driving—was not tantamount to a finding that the arresting officer did not have reasonable grounds to believe that defendant had committed such offense in his presence and that defendant therefore could lawfully resist the arrest. *State v. Jefferies*, 17 N.C. App. 195, 193 S.E.2d 388 (1972).

Arrest for Misdemeanor. — Unless the misdemeanor is committed in the presence of the officer in the sense that at the time of its commission through his sensory perception he might know that a misdemeanor is being committed in his presence or have reasonable ground to believe that a misdemeanor has been committed in his presence, an arrest cannot be made without warrant. *State v. McCloud*, 276 N.C. 518, 173 S.E.2d 753 (1970).

The presence of the defendant and his driver upon the streets, while the curfew was in effect, was a violation of the ordinance, declared thereby to be a misdemeanor, unless they were traveling for an excepted purpose. The arresting officer having, at least, reasonable ground to believe that the defendant had committed a misdemeanor in his presence, the arrest without a warrant was lawful. *State v. Dobbins*, 277 N.C. 484, 178 S.E.2d 449 (1971).

Search Incident to Arrest Is Lawful. — Having every reason to believe that a defendant was an armed robber, fleeing from the scene of a crime just perpetrated, it is lawful for the officer, as an incident of the arrest, to search a defendant then and there for weapons and for the fruits of the robbery. *State v. Woody*, 277 N.C. 646, 178 S.E.2d 407 (1971).

The search of the defendant's person was incidental to arrest and, consequently, the four shotgun shells found tucked in the tops of his boots were properly admitted in evidence. *State v. Dobbins*, 277 N.C. 484, 178 S.E.2d 449 (1971).

A police officer may search the person of one whom he has lawfully arrested as an incident of such arrest. *State v. Parker*, 11 N.C. App. 648, 182 S.E.2d 264 (1971); *State v. Jackson*, 11 N.C. App. 682, 182 S.E.2d 271, *aff'd*, 280 N.C. 122, 185 S.E.2d 202 (1971); *State v. Harris*, 279 N.C. 307, 182 S.E.2d 364 (1971); *State v. Gibson*, 15 N.C. App. 445, 190 S.E.2d 315 (1972).

Even Where Continued after Interruption by Hostile Crowd.—Where the officers cut short that initial search because of a growing and hostile crowd, and the danger from possible concealed weapons was not entirely eliminated by the initial quick search, it was reasonable to continue the search at the police station. *State v. Gibson*, 15 N.C. App. 445, 190 S.E.2d 315 (1972).

Property Which May Be Taken in Course of Search Incident to Lawful Arrest.—In the course of a search incident to an arrest, an officer may lawfully take from the person arrested any property which such person has about him and which is connected with the crime charged or which may be required as evidence thereof; if such article is otherwise competent, it may properly be introduced in evidence by the State. *State v. Parker*, 11 N.C. App. 648, 182 S.E.2d 264 (1971); *State v. Harris*, 279 N.C. 307, 182 S.E.2d 364 (1971).

A police officer may lawfully take from a prisoner lawfully arrested any property which he has about him which is connected with the crime charged or which may be required as evidence, and, if otherwise competent, such property may be introduced as evidence by the State. *State v. Jackson*, 11 N.C. App. 682, 182 S.E.2d 271, *aff'd*, 280 N.C. 122, 185 S.E.2d 202 (1971).

When a person is lawfully arrested, the police have the right, without a search warrant, to make a contemporaneous search of the person of the accused for weapons or for the fruits of or implements used to commit the crime. *State v. Harris*, 279 N.C. 307, 182 S.E.2d 364 (1971).

Arrest Must Be Made with Probable Cause.—Although a search without a warrant is, within limits, permissible if incident to a lawful arrest, if an arrest without a warrant is to support an incidental search, the arrest must be made with probable cause. *State v. Harris*, 9 N.C. App. 649, 177 S.E.2d 445 (1970).

"Probable Cause."—Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed. *State v. Harris*, 9 N.C. App. 649, 177

S.E.2d 445 (1970); *State v. Streeter*, 283 N.C. 203, 195 S.E.2d 502 (1973).

Probable cause for an arrest has been defined to be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty. *State v. Harris*, 279 N.C. 307, 82 S.E.2d 364 (1971); *State v. Alexander*, 279 N.C. 527, 184 S.E.2d 275 (1971); *State v. Cooper*, 17 N.C. App. 184, 193 S.E.2d 352 (1972).

An arrest without a warrant is based upon probable cause if the facts and circumstances known to the arresting officer warrant a prudent man in believing that a felony has been committed and the person to be arrested is the felon. *State v. Alexander*, 279 N.C. 527, 184 S.E.2d 275 (1971).

One does not have probable cause unless he has information of facts which, if submitted to a magistrate, would require the issuance of an arrest warrant. *State v. Harris*, 279 N.C. 307, 182 S.E.2d 364 (1971); *State v. Alexander*, 279 N.C. 527, 184 S.E.2d 275 (1971); *State v. Cooper*, 17 N.C. App. 184, 193 S.E.2d 352 (1972).

Probable cause to believe that the person has committed a felony exists without question where the officer has personal knowledge that a warrant has been issued for the arrest of such person, which warrant charges a felony. *State v. Denton*, 17 N.C. App. 684, 195 S.E.2d 334 (1973).

Probable cause and reasonable ground to believe are substantially equivalent terms. *State v. Harris*, 279 N.C. 307, 182 S.E.2d 364 (1971); *State v. Cooper*, 17 N.C. App. 184, 193 S.E.2d 352 (1972).

The terms "probable cause," as used in the Fourth Amendment to the federal Constitution, and "reasonable ground," as used in this section, are substantially equivalents having virtually the same meaning. *State v. Alexander*, 279 N.C. 527, 184 S.E.2d 275 (1971).

Where one defendant broke a window in the clothing store in the presence of police officers, and the only other person present was the other defendant, who was standing beside the first defendant when the latter broke the window, who then moved across the street and back with the first defendant, who left the scene with the first defendant when the marked police car appeared, and who was still with the first defendant some 15 minutes later when the officers found them together in the restaurant, under the circumstances, the officers had reasonable ground to believe that the second defendant was actively aiding and abetting the first defendant and was equally guilty with the first defendant of

at least the misdemeanor of window breaking. In this context, "probable cause" and "reasonable ground to believe" are substantially equivalent terms. *State v. Gibson*, 15 N.C. App. 445, 190 S.E.2d 315 (1972).

To establish probable cause, the evidence need not amount to proof of guilt, or even to prima facie evidence of guilt, but it must be such as would actuate a reasonable man acting in good faith. *State v. Harris*, 279 N.C. 307, 182 S.E.2d 364 (1971); *State v. Alexander*, 279 N.C. 527, 184 S.E.2d 275 (1971); *State v. Cooper*, 17 N.C. App. 184, 193 S.E.2d 352 (1972).

The existence of probable cause is a pragmatic question to be determined in each case in the light of the particular circumstances and the particular offense involved. *State v. Harris*, 279 N.C. 307, 182 S.E.2d 364 (1971); *State v. Cooper*, 17 N.C. App. 184, 193 S.E.2d 352 (1972).

The existence of probable cause justifying an arrest without a warrant is determined by factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. *State v. Harris*, 279 N.C. 307, 182 S.E.2d 364 (1971); *State v. Gibson*, 15 N.C. App. 445, 190 S.E.2d 315 (1972); *State v. Cooper*, 17 N.C. App. 184, 193 S.E.2d 352 (1972).

Evidence of Probable Cause. — Where the victim of a robbery gave officers a description of the men who robbed him and the vehicle in which they were riding, and where on the same night men fitting the description given the officers and riding in a vehicle similar to the one described to the officers were apprehended and arrested by the officers, the Supreme Court held that the officers had ample evidence of probable cause to authorize the making of the arrest. *State v. Jacobs*, 277 N.C. 151, 176 S.E.2d 744 (1970).

§ 15-43. House broken open to prevent felony.

Cited in *State v. Miller*, 16 N.C. App. 1, 190 S.E.2d 888 (1972).

§ 15-44. When officer may break and enter houses.

Compliance with the requirement that admittance be "demanded and denied" serves to identify the official status of those seeking admittance. The requirement is for the protection of the officers as well as for the protection of the occupant and the recognition of his constitutional rights. *State v. Covington*, 273 N.C. 690, 161 S.E.2d 140 (1968); *State v. Harvey*, 281 N.C. 1, 187 S.E.2d 706 (1972).

The requirement that admittance be "demanded and denied" would seem to apply even though the officers have a search warrant or warrant of arrest. *State*

Constitutionally Valid Arrest. — The words "illegal" and "unconstitutionally" are not synonymous. An arrest is constitutionally valid when the officers have probable cause to make it. Thus an arrest may be constitutionally valid and yet "illegal" under State law. *State v. Eubanks*, 283 N.C. 566, 196 S.E.2d 706 (1973).

Evidence Not Excluded When Arrest Constitutionally Valid. — When an arrest is constitutionally valid but illegal under the law of North Carolina, the facts discovered or the evidence obtained as a result of the arrest need not be excluded as evidence in the trial of the action. *State v. Eubanks*, 283 N.C. 566, 196 S.E.2d 706 (1973).

The law does not discharge a defendant from criminal liability merely because his arrest is not lawful, unless the offense charged stems from such arrest. *State v. Jones*, 17 N.C. App. 54, 193 S.E.2d 314 (1972).

Applied in *Hamilton v. North Carolina*, 260 F. Supp. 632 (E.D.N.C. 1966); *State v. Covington*, 273 N.C. 690, 161 S.E.2d 140 (1968); *State v. Hill*, 9 N.C. App. 279, 176 S.E.2d 41 (1970); *State v. Summrell*, 13 N.C. App. 1, 185 S.E.2d 241 (1971); *State v. Gaddy*, 14 N.C. App. 599, 188 S.E.2d 745 (1972); *State v. Robinson*, 15 N.C. App. 155, 189 S.E.2d 567 (1972); *State v. Summrell*, 282 N.C. 157, 192 S.E.2d 569 (1972); *State v. Harrington*, 17 N.C. App. 221, 193 S.E.2d 294 (1972); *State v. Harrington*, 283 N.C. 527, 196 S.E.2d 742 (1973); *Hill v. Rowland*, 474 F.2d 1374 (4th Cir. 1973).

Cited in *State v. Peele*, 274 N.C. 106, 161 S.E.2d 568 (1968); *State v. Howard*, 274 N.C. 186, 162 S.E.2d 495 (1968).

v. Covington, 273 N.C. 690, 161 S.E.2d 140 (1968); *State v. Harvey*, 281 N.C. 1, 187 S.E.2d 706 (1972).

Under this section, even where there is reasonable ground to believe that a person guilty of a felony is concealed in a house, there exists no right, in the absence of special and emergency circumstance, to break into the house and arrest the person unless and until admittance has been demanded and denied. *State v. Sparrow*, 276 N.C. 499, 173 S.E.2d 897 (1970).

There was sufficient compliance with the requirement that entrance be demanded

and denied before a police officer can forcibly enter a dwelling for the purpose of making an arrest, where defendant had observed the officer's uniform and was aware of his official status, the officer had seen defendant looking out a door and knew that defendant had observed him, and the officer twice called out defendant's name and received no reply before he opened the door to defendant's residence. *State v. Harvey*, 281 N.C. 1, 187 S.E.2d 706 (1972).

The requirement that a police officer, armed with an arrest warrant or search warrant, must demand and be denied admittance before making forcible entry, serves to identify his official status and to protect both the officer and the occupant. *State v. Shue*, 16 N.C. App. 696, 193 S.E.2d 481 (1972).

Officers Admitted by Owner of House.—The arrest without warrant of the defendant for armed robbery, the defendant having been discovered hiding in the attic of a house, is lawful where the discovery and arrest of the defendant occurred after the owner of the house had admitted the officers by the front door. *State v. Basden*, 8 N.C. App. 401, 174 S.E.2d 613 (1970).

Entry Held Lawful.—The entry of police officers into the house in which the defendant and his companions were hiding,

and the arrest without warrant of the occupants therein for the offense of armed robbery, was proper and lawful where (1) the felony of armed robbery had been committed at an ABC store, (2) within a few minutes after the robbery the officers discovered in the driveway of the house the automobile which they reasonably believed had been used in the robbery, (3) all curtains on the windows of the house were drawn, and (4) the occupants of the house failed to respond to the officers' knock at the front door. *State v. Basden*, 8 N.C. App. 401, 174 S.E.2d 613 (1970).

The fact that silence greeted the officers' demands for entrance and that defendant was not found in the house did not make their entry illegal. *State v. Hoffman*, 281 N.C. 727, 190 S.E.2d 842 (1972).

Reasonable grounds for belief can be based upon information given to an officer by another, the source of such information being reasonably reliable. *State v. Hoffman*, 281 N.C. 727, 190 S.E.2d 842 (1972).

The question of whether there was an actual breaking of the door is not determinative of the issue of whether or not this statute is applicable. *State v. Turnbull*, 16 N.C. App. 542, 192 S.E.2d 689 (1972).

Cited in *State v. Howard*, 274 N.C. 186, 162 S.E.2d 495 (1968); *State v. Miller*, 16 N.C. App. 1, 190 S.E.2d 888 (1972).

§ 15-46. Procedure on arrest without warrant.

Editor's Note.—For comment on admissibility of confessions, see 43 N.C.L. Rev. 972 (1965). For article surveying recent decisions by the North Carolina Supreme Court in the area of criminal procedure, see 49 N.C.L. Rev. 262 (1971).

Opinions of Attorney General.—Mr. Lee J. Greer, Prosecutor, Thirteenth Judicial District, 40 N.C.A.G. 351 (1969).

Section does not prescribe mandatory procedures affecting validity of trial. *Carroll v. Turner*, 262 F. Supp. 486 (E.D.N.C. 1966); *State v. Broome*, 269 N.C. 661, 153 S.E.2d 384 (1967); *State v. McCloud*, 276 N.C. 518, 173 S.E.2d 753 (1970); *State v. Able*, 13 N.C. App. 365, 185 S.E.2d 422 (1971).

Court did not err in not allowing defen-

dant's motion to quash the warrant charging him with resisting arrest for the reason that he was arrested without a warrant and was not taken before a magistrate as provided by this section, because the State Supreme Court has held that this section does not prescribe mandatory procedures affecting the validity of a trial. *State v. Foust*, 18 N.C. App. 133, 196 S.E.2d 375 (1973).

It is not an essential of jurisdiction that a warrant be issued prior to the arrest and that defendant be initially arrested thereunder. *State v. Broome*, 269 N.C. 661, 153 S.E.2d 384 (1967).

Applied in *Thomas v. North Carolina*, 447 F.2d 1320 (4th Cir. 1971).

§ 15-47. Arresting officer to inform offender of charge, allow bail except in capital cases, and permit communication with counsel or friends.—Upon the arrest, detention, or deprivation of the liberties of any person by an officer in this State, with or without warrant, it shall be the duty of the officer making the arrest to immediately inform the person arrested of the charge against him, and it shall further be the duty of the officer making said arrest, except in capital cases, to have bail fixed in a reasonable sum, and the person so arrested shall be permitted to give bail bond; and it shall be the duty of the officer making the arrest to permit the person so arrested to communicate with coun-

sel and friends immediately, and the right of such persons to communicate with counsel and friends shall not be denied. Provided that in no event shall the prisoner be kept in custody for a longer period than twelve hours without a warrant. In the event the arresting officer fails to have bail fixed as required by this section, the custodian of the person arrested shall have bail fixed in a reasonable sum, and take bail as authorized in G.S. 15-108.

Any officer who shall violate the provisions of this section shall be guilty of a misdemeanor and shall be fined or imprisoned, or both, in the discretion of the court. (1937, c. 257, ss. 1, 2; 1955, c. 889; 1969, c. 296.)

Editor's Note.—

The 1969 amendment added the last sentence of the first paragraph.

For article surveying recent decisions by the North Carolina Supreme Court in the area of criminal procedure, see 49 N.C.L. Rev. 262 (1971).

Opinions of Attorney General.—Mr. Lee J. Greer, Prosecutor, Thirteenth Judicial District, 40 N.C.A.G. 351 (1969).

To implement the constitutional rights under N.C. Const., Art. I, § 23, the General Assembly enacted this section. State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

This section, etc.—

This section does not prescribe mandatory procedures affecting the validity of a trial. Carroll v. Turner, 262 F. Supp. 486 (E.D.N.C. 1966); State v. McCloud, 276 N.C. 518, 173 S.E.2d 753 (1970); State v. Able, 13 N.C. App. 365, 185 S.E.2d 422 (1971).

This section means that when the required bail bond is given and approved, the accused is to be released. State v. Hill, 9 N.C. App. 279, 176 S.E.2d 41 (1970).

The conduct of a jailer who refuses to release a defendant after the proper bail bond is given and he is informed thereof, violates the statute and is indefensible. State v. Hill, 9 N.C. App. 279, 176 S.E.2d 41 (1970).

The Violation of This Section, etc.—

The refusal of the jailer to release a defendant on the night that defendant had given bail bond for the offense of drunken driving, and the jailer's refusal to permit defendant's attorney to confer with defendant during the night in jail, did not destroy the validity of the police officers' observations and tests on defendant's intoxication, although the jailer's conduct violated defendant's rights to counsel and to bail, where the officers' observations and tests were completed prior to the denial of these rights, and where the record failed to show that defendant was prejudiced in his defense on the trial. State v. Hill, 9 N.C. App. 279, 176 S.E.2d 41 (1970).

A defendant is entitled to counsel at every critical stage of the proceedings against him. State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

A critical stage has been reached in a defendant's case when, immediately after officers have interrogated the defendant and conducted their test for sobriety, they charge him with the offense of driving while intoxicated and the denial of counsel at this point makes it impossible for a defendant to have disinterested witnesses observe his condition and to obtain a blood test by a doctor—the only means by which defendant might prove his innocence. State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

The fact that a person is defendant's lawyer as well as his friend, does not impair his right to see the defendant at a critical time of the proceedings. State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

The Rights of Communication, etc. —

In accord with original. See State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

Compliance in Case Where Accused Is Intoxicated.—See opinion of Attorney General to Mr. R.T. Price, 41 N.C.A.G. 295 (1971).

Communication When Intoxication Is Essential Element of Offense.—

When one is taken into police custody for an offense of which intoxication is an essential element, time is of the essence. Intoxication does not last. Ordinarily a drunken man will "sleep it off" in a few hours. Thus, if one accused of driving while intoxicated is to have witnesses for his defense, he must have access to his counsel, friends, relatives, or some disinterested person within a relatively short time after his arrest. This section says he is entitled to communicate with them immediately, and this is true whether he is arrested at 2:00 in the morning or 2:00 in the afternoon. State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

The denial of request for permission to contact counsel as soon as a person is charged with a crime involving the element of intoxication is a denial of a constitutional right resulting in irreparable prejudice to his defense. State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

A defendant's guilt or innocence under § 20-138 depends upon whether he is intoxicated at the time of his arrest. His condi-

tion then is the crucial and decisive fact to be proven. Permission to communicate with counsel and friends is of no avail if those who come to the jail in response to a prisoner's call are not permitted to see for themselves whether he is intoxicated. In this situation, the right of a defendant to communicate with counsel and friends implies, at the very least, the right to have them see him, observe and examine him, with reference to his alleged intoxication. *State v. Hill*, 277 N.C. 547, 178 S.E.2d 462 (1971).

One who is detained by police officers under a charge of driving while under the influence of an intoxicant has the same constitutional and statutory rights, including the rights given under N.C. Const., Art. I, § 23 and this section, as any other accused. *State v. Hill*, 277 N.C. 547, 178 S.E.2d 462 (1971).

Right to Communication Includes Right of Access.—A defendant is entitled to consult with friends and relatives and to have them make observations of his person. The right to communicate with counsel and friends necessarily includes the right of access to them. *State v. Hill*, 277 N.C. 547, 178 S.E.2d 462 (1971).

Under N.C. Const., Art. I, § 23 and this

section, a defendant's communication and contacts with the outside world are not limited to receiving professional advice from his attorney. *State v. Hill*, 277 N.C. 547, 178 S.E.2d 462 (1971).

Defendant's Confession Held Involuntary.—Defendant's youth, his low mentality, and limited education, his incommunicado detention and interrogation for 19 hours by a number of different police officers who allowed him only scant time to rest, the inadequate explanation of his constitutional rights and the suggestions that it would be better for him to confess, the failure of the police to notify his parents or to afford him the opportunity to consult with a lawyer, and the delay in producing him before a magistrate: All of these elements combined to establish that defendant's confession could not be deemed a voluntary act and that its admission into evidence denied him due process of law. *Thomas v. North Carolina*, 447 F.2d 1320 (4th Cir. 1971).

Applied in *State v. Hines*, 266 N.C. 1, 145 S.E.2d 363 (1965); *Griffin v. Ross*, 259 F. Supp. 594 (E.D.N.C. 1966).

Cited in *State v. Foust*, 18 N.C. App. 133, 196 S.E.2d 375 (1973).

ARTICLE 7.

Fugitives from Justice.

§ 15-48. Outlawry for felony.—In all cases where any two justices of the peace, or any justice or judge of the General Court of Justice, or any judge of a criminal court shall, on written affidavit, filed and retained by such justice or judge, receive information that a felony has been committed by any person, and that such person flees from justice, conceals himself and evades arrest and service of the usual process of the law, the judge, or the two justices, being justices of the county wherein such person is supposed to lurk or conceal himself, are hereby empowered and required to issue proclamation against him reciting his name, if known, and thereby requiring him forthwith to surrender himself; and also, when issued by any judge, empowering and requiring the sheriff of any county in the State in which such fugitive shall be, and when issued by two justices, empowering and requiring the sheriff of the county of the justices, to take such power with him as he shall think fit and necessary for the going in search and pursuit of, and effectually apprehending, such fugitive from justice, which proclamation shall be published at the door of the courthouse of any county in which such fugitive is supposed to lurk or conceal himself, and at such other places as the judge or justices shall direct; and if any person against whom proclamation has been thus issued, continued to stay out, lurk and conceal himself, and do not immediately surrender himself, any citizen of the State may capture, arrest and bring him to justice, and in case of flight or resistance by him, after being called on and warned to surrender, may slay him without accusation or impeachment of any crime. (1866, c. 62; 1868-9, c. 178, subc. 1, s. 8; Code, s. 1131; Rev., s. 3183; C. S., s. 4549; 1969, c. 44, s. 30.)

Editor's Note.—

The 1969 amendment substituted "justice or judge of the General Court of Justice, or any judge of a criminal court" for

"judge of the Supreme, superior, or criminal courts" near the beginning of the section.

§ 15-49. Fugitives from another state arrested.—Any justice, judge, or magistrate of the General Court of Justice, or any judge of a criminal court, or any justice of the peace, or mayor of any city, or chief magistrate of any incorporated town, on satisfactory information laid before him that any fugitive or other person in the State has committed, out of the State and within the United States, any offense which, by law of the state in which the offense was committed, is punishable either capitally or by imprisonment for one year or upwards in any state prison, has full power and authority, and is hereby required, to issue a warrant for such fugitive or other person and commit him to any jail within the State for the space of six months, unless sooner demanded by the public authorities of the state wherein the offense may have been committed, pursuant to the act of Congress in that case made and provided. If no demand be made within that time the fugitive or other person shall be liberated, unless sufficient cause be shown to the contrary. (1868-9, c. 178, subc. 3, s. 34; Code, s. 1165; 1895, c. 103; Rev., s. 3184; C. S., s. 4550; 1969, c. 44, s. 31.)

Editor's Note.—

The 1969 amendment substituted "Any justice, judge, or magistrate of the General Court of Justice, or any judge of a criminal court" for "Any justice of the Supreme Court, or any judge of the superior court or of any criminal court" at the beginning of the section.

nal court" for "Any justice of the Supreme Court, or any judge of the superior court or of any criminal court" at the beginning of the section.

§ 15-52. Person surrendered on order of Governor.

Cited in *State v. Conrad*, 275 N.C. 342, 168 S.E.2d 39 (1969).

§ 15-53. Governor may employ agents, and offer rewards. — The Governor, on information made to him of any person, whether the name of such person be known or unknown, having committed a felony or other infamous crime within the State, and of having fled out of the jurisdiction thereof, or who conceals himself within the State to avoid arrest, or who, having been convicted, has escaped and cannot otherwise be apprehended, may either employ a special agent, with a sufficient escort, to pursue and apprehend such fugitive, or issue his proclamation, and therein offer a reward, not exceeding ten thousand dollars, according to the nature of the case, as in his opinion may be sufficient for the purpose, to be paid to him who shall apprehend and deliver the fugitive to such person and at such place as in the proclamation shall be directed. (1800, c. 561, P. R.; R. C., c. 35, s. 4; 1866, c. 28; 1868-9, c. 52; 1870-1, c. 15; 1871-2, c. 29; Code, s. 1169; 1891, c. 421; Rev., s. 3188; C. S., s. 4554; 1925, c. 275, s. 6; 1967, c. 165, s. 1.)

Editor's Note.—

The 1967 amendment increased the maximum reward from four hundred dollars to

ten thousand dollars.

§ 15-53.1. Governor may offer rewards for information leading to arrest and conviction.—When it shall appear to the Governor, upon satisfactory information furnished to him, that a felony or other infamous crime has been committed within the State, whether the name or names of the person or persons suspected of committing the said crime be known or unknown, the Governor may issue his proclamation and therein offer an award not exceeding ten thousand dollars (\$10,000), according to the nature of the case as, in his opinion, may be sufficient for the purpose, to be paid to him who shall provide information leading to the arrest and conviction of such person or persons. The proclamation shall be upon such terms as the Governor may deem proper, but it shall identify the felony or felonies and the authority to whom the information is to be delivered and shall state such other terms as the Governor may require under which the reward is payable. (1967, c. 165, s. 2.)

§ 15-54. Officer entitled to reward.

Applied in *State v. Virgil*, 276 N.C. 217,
172 S.E.2d 28 (1970).

ARTICLE 8.

Extradition.

§ 15-55. Definitions.

Cited in *Pitts v. North Carolina*, 267 F. Rhoades, 7 N.C. App. 388, 172 S.E.2d 235
Supp. 870 (M.D.N.C. 1967); *Texas v.* (1970).

§ 15-59. Extradition of persons imprisoned or awaiting trial in another state or who have left the demanding state under compulsion.

Quoted in *Pitts v. North Carolina*, 395 F.2d 182 (4th Cir. 1968). Cited in *Pitts v. North Carolina*, 267 F. Supp. 870 (M.D.N.C. 1967).

§ 15-76. Fugitives from this State; duty of governors.

Requirements of Agents' Commission
Form.—Mrs. Claire Nickels, Office of the
Governor, 40 N.C.A.G. 169 (1970).

§ 15-77. Application for issuance of requisition; by whom made; contents.

Cited in *Pitts v. North Carolina*, 267 F. Supp. 870 (M.D.N.C. 1967).

§ 15-80. Written waiver of extradition proceedings.

Waiver May Not Be Made before Magistrate.—See opinion of Attorney General to Mr. E. Maurice Braswell, 42 N.C.A.G. 267 (1973).

§ 15-84. Short title.

Applied in *State v. Duboise*, 279 N.C. 73,
181 S.E.2d 393 (1971).

ARTICLE 9.

Preliminary Examination.

§ 15-85. Waiver of examination.—If any person arrested desires to waive examination and give bail, it is the duty of the officer making the arrest to take him before any magistrate of the county in which the offense is charged to have been committed, or before any justice or judge of the General Court of Justice. (1868-9, c. 178, subc. 3, ss. 7, 8; Code, ss. 1138, 1139; Rev., s. 3190; C. S., s. 4557; 1969, c. 44, s. 32.)

Editor's Note.—The 1969 amendment substituted "justice or judge of the General Court of Justice" for "judge of the Supreme or superior court" at the end of the section.

This section and § 15-87 do not prescribe mandatory procedures, etc.—

This section does not prescribe mandatory procedures affecting the validity of a trial. *State v. Able*, 13 N.C. App. 365, 185 S.E.2d 422 (1971).

One of the principal functions of the preliminary hearing is to inquire into the validity of the arrest and restraint of a person charged with the commission of a crime by bringing him before a magistrate

to determine whether an offense has been committed and whether there is probable cause to believe that the prisoner is the offender. *Carroll v. Turner*, 262 F. Supp. 486 (E.D.N.C. 1966).

A preliminary, etc.—

In accord with 1st paragraph in original. See *Gasque v. State*, 271 N.C. 323, 156 S.E.2d 740 (1967), quoting *State v. Hackney*, 240 N.C. 230, 81 S.E.2d 778 (1954); *State v. Able*, 13 N.C. App. 365, 185 S.E.2d 422 (1971); *State v. Foster*, 282 N.C. 189, 192 S.E.2d 320 (1972).

In accord with 2nd paragraph in original. See *State v. Able*, 13 N.C. App. 365, 185

S.E.2d 422 (1971); *State v. Foster*, 282 N.C. 189, 192 S.E.2d 320 (1972).

The State may dispense with the proceeding, since it is not essential to the finding of an indictment. *Vance v. North Carolina*, 432 F.2d 984 (4th Cir. 1970).

A preliminary hearing is not a constitutional requirement nor is it essential to the finding of an indictment. *State v. Hairston*, 280 N.C. 220, 185 S.E.2d 633 (1972).

Neither the North Carolina nor the United States Constitution requires a preliminary hearing. *State v. Foster*, 282 N.C. 189, 192 S.E.2d 320 (1972).

There is no statute requiring a preliminary hearing. *State v. Foster*, 282 N.C. 189, 192 S.E.2d 320 (1972).

If the grand jury finds an indictment, there is no need to conduct a preliminary examination. *State v. Foster*, 282 N.C. 189, 192 S.E.2d 320 (1972).

A preliminary hearing is not an arraignment. *Carroll v. Turner*, 262 F. Supp. 486 (E.D.N.C. 1966).

There is no provision in the North Carolina Constitution or United States Constitution requiring a preliminary hearing. *Carroll v. Turner*, 262 F. Supp. 486 (E.D.-N.C. 1966).

The general rule in the United States is that in absence of a statute, a preliminary hearing is not a prerequisite or an indispensable step in the prosecution of a person accused with crime, and an accused person is not entitled to a preliminary hearing as a matter of substantive right. *Carroll v. Turner*, 262 F. Supp. 486 (E.D.-N.C. 1966); *State v. Foster*, 282 N.C. 189, 192 S.E.2d 320 (1972).

Nor is it a trial. *Carroll v. Turner*, 262 F. Supp. 486 (E.D.N.C. 1966).

It is merely a course of procedure where-by a possible abuse of power may be prevented. *Carroll v. Turner*, 262 F. Supp. 486 (E.D.N.C. 1966).

A preliminary hearing is a critical stage in a criminal proceeding. *Vance v. North Carolina*, 432 F.2d 984 (4th Cir. 1970).

Under § 7A-451(b)(4) a preliminary hearing is a critical stage in a criminal proceeding and an indigent person is entitled to services of counsel at such hearing. *State v. Hairston*, 280 N.C. 220, 185 S.E.2d 633 (1972).

At which the assistance of counsel for an indigent accused is required.—See *Vance v. North Carolina*, 432 F.2d 984 (4th Cir. 1970).

A preliminary hearing may be held unless waived by defendant. *State v. Foster*, 282 N.C. 189, 192 S.E.2d 320 (1972).

A defendant may waive the preliminary hearing and consent to be bound over to the superior court to await grand jury action without forfeiting any defense or right available to him. *Gasque v. State*, 271 N.C. 323, 156 S.E.2d 740 (1967).

It has been the practice in this State for generations that a defendant can waive a preliminary examination and be bound over to the superior court. *Gasque v. State*, 271 N.C. 323, 156 S.E.2d 740 (1967).

The accused party may waive the hearing, even in the absence of counsel. *Vance v. North Carolina*, 432 F.2d 984 (4th Cir. 1970).

The preliminary hearing may be waived in which case the defendant is bound over to the superior court to await grand jury action without forfeiting any right or defense available to him. *State v. Hairston*, 280 N.C. 220, 185 S.E.2d 633 (1972).

Waiver without Benefit of Counsel.—The contention that the defendant's constitutional right was violated when he was permitted to waive the preliminary hearing without the benefit of counsel presents no prejudicial error that would justify disturbing the result of the trial where the defendant was furnished with court-appointed counsel to represent him at his trial in the superior court and, when the hearing was waived, no plea was entered. *State v. Cason*, 267 N.C. 316, 148 S.E.2d 137 (1966).

The hearing of probable cause before a committing magistrate or inferior judge can be readily dispensed with by the State in this jurisdiction since a preliminary hearing is not an essential prerequisite to the finding of an indictment. *Gasque v. State*, 271 N.C. 323, 156 S.E.2d 740 (1967).

Failure to Provide Preliminary Hearing Did Not Preclude Prosecution of Defendant.—Where nothing in the record disclosed that defendant was adversely affected at trial on account of the postponement of the scheduled preliminary hearings and the eventual abandonment of this procedure after the grand jury had returned the indictments, those irregularities as may have occurred in connection with the failure to provide a preliminary hearing for defendant were insufficient to preclude prosecution of defendant for the crimes for which he was indicted. *State v. Foster*, 282 N.C. 189, 192 S.E.2d 320 (1972).

§ 15-87. Duty of examining magistrate.

This section and § 15-85 do not prescribe mandatory procedures, etc.—

This section does not prescribe mandatory procedures affecting the validity of a trial. *State v. Able*, 13 N.C. App. 365, 185 S.E.2d 422 (1971).

A preliminary hearing may be held unless waived by defendant. *State v. Foster*, 282 N.C. 189, 192 S.E.2d 320 (1972).

§ 15-88. Testimony reduced to writing; right to counsel.

Requirement to Reduce Witnesses' Evidence to Writing Is Directory.—The requirement that the examining magistrate reduce to writing the evidence given by the several witnesses is directory only and not mandatory. *State v. Bass*, 280 N.C. 435, 186 S.E.2d 384 (1972).

The testimony of witnesses at the hearing is subject to cross-examination by the accused, or by his lawyer should he have counsel. *Vance v. North Carolina*, 432 F.2d 984 (4th Cir. 1970).

§ 15-89. Prisoner examined; advised of rights.

Accused may be examined in relation to the charged offense, although not under

oath. *Vance v. North Carolina*, 432 F.2d 984 (4th Cir. 1970).

§ 15-90. Exclusion of witnesses at examination.

Both prosecution and defense witnesses are prohibited from being present while other witnesses are examined. *Vance v.*

North Carolina, 432 F.2d 984 (4th Cir. 1970).

§ 15-92. Witnesses for defendant examined.

This section permits the accused to introduce his own witnesses. *Vance v.*

North Carolina, 432 F.2d 984 (4th Cir. 1970).

§ 15-94. When prisoner discharged.

Discharge of Accused by District Judge Sitting as Committing Magistrate Is Not Acquittal.—The district judge, when sitting as a committing magistrate as authorized by § 7A-272(b), does not render a verdict; and a discharge of the accused is not an acquittal and does not bar a later indictment. *State v. Cradle*, 281 N.C. 198, 188 S.E.2d 296 (1972).

The purpose of the hearing is to determine whether there has been an offense committed, and, if so, whether there is probable cause to believe that the accused committed it. *Vance v. North Carolina*, 432 F.2d 984 (4th Cir. 1970).

Cited in *State v. Bass*, 280 N.C. 435, 186 S.E.2d 384 (1972).

§ 15-95. When prisoner held to answer charge.

Accused needs counsel to effectively argue for benefits such as bail. *Vance v. North Carolina*, 432 F.2d 984 (4th Cir. 1970).

A preliminary hearing is not a trial; and the district judge, in his capacity as committing magistrate, passes only on the nar-

row question of whether probable cause exists and, if so, the fixing of bail if the offense is bailable. *State v. Cradle*, 281 N.C. 198, 188 S.E.2d 296 (1972).

Cited in *State v. Bass*, 280 N.C. 435, 186 S.E.2d 384 (1972).

§ 15-96. Witnesses against prisoner recognized.

This section requires the magistrate to bind over all witnesses who appear against the defendant to testify at trial. *Vance v.*

North Carolina, 432 F.2d 984 (4th Cir. 1970).

§ 15-97. Witnesses required to give security for appearance.

Security May Be Required.—In appropriate circumstances, the magistrate may require the witnesses to give security to

insure their presence. *Vance v. North Carolina*, 432 F.2d 984 (4th Cir. 1970).

§ 15-100. Proceedings certified to court; used as evidence.

Use of Examination Taken at Hearing.
—Examinations taken at the hearing may be used before the grand jury or, if the accused was present and had an opportunity

to examine the witnesses, at trial. *Vance v. North Carolina*, 432 F.2d 984 (4th Cir. 1970).

ARTICLE 10.*Bail.*

§ 15-102. Officers authorized to take bail, before imprisonment.—Officers before whom persons charged with crime, but who have not been committed to prison by an authorized magistrate, may be brought, have power to fix and take bail as follows:

- (1) Any justice or judge of the General Court of Justice, in all cases.
- (2) Any clerk of the superior court, any justice of the peace, any chief magistrate of any incorporated city or town, or any person authorized to issue warrants of arrest, in all cases of misdemeanor, and in all cases of felony not capital. (1868-9, c. 178, subc. 3, s. 29; 1871-2, c. 37; Code, s. 1160; Rev., s. 3209; C. S., s. 4574; 1951, c. 85; 1963, c. 1099, s. 1; 1969, c. 44, s. 33.)

Editor's Note.—

The 1969 amendment substituted "Any justice or judge of the General Court of Justice" for "Any justice of the Supreme Court, or a judge of a superior court" in subdivision (1).

For comment on bail in North Carolina, see 5 Wake Forest Intra. L. Rev. 300 (1969).

Cited in *State v. Brown*, 282 N.C. 117, 191 S.E.2d 659 (1972).

§ 15-103. Officers authorized to take bail, after imprisonment.—Any justice or judge of the General Court of Justice has power to fix and take bail for persons committed to prison charged with crime in all cases; any justice of the peace, any chief magistrate of any incorporated city or town, or any person authorized to issue warrants of arrest has the same power in all cases where the punishment is not capital. (1868-9, c. 178, subc. 3, s. 30; Code, s. 1161; Rev., s. 3210; C. S., s. 4575; 1963, c. 1099, s. 2; 1969, c. 44, s. 34.)

Editor's Note.—

The 1969 amendment substituted "Any justice or judge of the General Court of

Justice" for "Any justice of the Supreme Court or any judge of a superior court" at the beginning of the section.

§ 15-103.1. Release prior to trial or hearing other than on bail.—

(a) Except as otherwise provided in this section, every officer authorized to fix and take bail in any situation is empowered in his discretion to release from custody, pending trial or hearing, any person charged with a noncapital felony or a misdemeanor, upon such person's own recognizance or upon the execution of an unsecured appearance bond in an amount specified by the officer.

(b) Every person in custody pending trial as a defendant in a criminal case, other than a person charged with a capital felony, may be released other than upon bail if it appears likely that he will appear and surrender himself to the jurisdiction of the court at the proper time. The officer authorized to fix and take bail in any case may cause an investigation to be made into the background of the defendant and to require him to provide under oath a statement of his circumstances with respect to residence, employment, and family situation whereupon the officer may make a finding upon which to base the decision as to whether or not to allow the defendant's release on recognizance or unsecured appearance bond. The officer is further authorized to set such terms and conditions as reasonably appear to him to be required to insure the appearance of the defendant. In determining which conditions of release will reasonably assure appearance, the officer shall, on the basis of available information and without hav-

ing to conform to the rules of evidence, take into account the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings. The officer is further empowered to cause the arrest and recommitment of the accused if he has reasonable grounds to believe that the accused is about to depart the jurisdiction or for other reason may fail to appear or if the defendant has violated any condition of release.

(c) Every person released from custody under this section who wilfully fails to appear for trial or hearing, or knowingly violates any condition of his release, shall be guilty of a misdemeanor.

(d) For the purposes of payment of expenses of extradition under the provisions of the Uniform Criminal Extradition Act every person who becomes a fugitive from justice during a period of release under this section, other than on bail, shall be deemed a felon.

The term "officer" when used herein shall mean and include any officer or official authorized to fix and take bail under the provisions of article 10 of chapter 15 of the General Statutes of North Carolina.

Nothing in this section shall be construed as requiring any person accused to be released without bail. (1967, c. 1041.)

Editor's Note.—The act adding this section became effective July 1, 1967. (1969). For note on right to pretrial release when charged with capital offense, see 6 Wake Forest Intra. L. Rev. 327 (1970).

For comment on bail in North Carolina, see 5 Wake Forest Intra. L. Rev. 300 (1970).

§ 15-103.2. Chief judges to issue policies.—The Chief Judge of the District Court Division of the General Court of Justice of each district shall devise and issue recommended policies which may be followed on the use of bail and the amounts thereof; the use of release on a person's own recognizance, and the use of unsecured appearance bonds and the amounts thereof. (1969, c. 1062, s. 2.)

Editor's Note. — Session Laws 1969, c. 1062, s. 4, makes the act effective July 1, 1969.

§ 15-104.1. Recognizances and appearance bonds conditioned upon the defendant's appearance throughout the division of the General Court of Justice.—(a) Whether or not a recognizance or appearance bond which authorizes the release of a defendant includes a condition which obligates the defendant to appear for hearing or trial from day to day and session to session until final judgment is entered in the trial divisions of the General Court of Justice, such condition shall be deemed to be included in every recognizance or appearance bond and shall be deemed to be a condition of the filing of every other type of recognizance. Within the meaning of this section, entry of judgment in the district court from which an appeal is taken shall not be considered a final judgment.

(b) A recognizance or appearance bond or other type of recognizance previously set for a defendant may be increased or decreased, modified or discharged, at any time by a judge of any court of the General Court of Justice then having jurisdiction of the defendant. (1971, c. 344.)

§ 15-105. Bail allowed on preliminary examination.

Editor's Note.—For note on right to pre-trial release when charged with capital offense, see 6 Wake Forest Intra. L. Rev. 327 (1970).

ARTICLE 11.

*Forfeiture of Bail.***§ 15-110. In recognizance to keep the peace.****Recognizance Binds to Three Things.—**

In accord with original. See *State v. Mallory*, 266 N.C. 31, 145 S.E.2d 335 (1965).

§ 15-113. Notice of judgment nisi before execution.**Editor's Note.—**

For comment on bail in North Carolina, see 5 *Wake Forest Intra. L. Rev.* 300 (1969).

Judgment against Bond on Same Day Defendant Failed to Appear Was Error.—
The trial court erred in entering judgment

absolute against defendant's cash bond on the same day that defendant was called and failed to appear. *State v. Hawkins*, 14 N.C. App. 127, 187 S.E.2d 418 (1972).

Quoted in *State v. Mallory*, 266 N.C. 31, 145 S.E.2d 335 (1965).

§ 15-116. Judges may remit forfeited recognizances.—The judges of the superior and district courts may hear and determine the petition of all persons who shall conceive they merit relief on their recognizances forfeited; and may lessen, or absolutely remit, the same, and do all and anything therein as they shall deem just and right and consistent with the welfare of the State and the persons praying such relief, as well before as after final judgment entered and execution awarded. (1788, c. 292, s. 1, P. R.; R. C., c. 35, s. 38; Code, s. 1205; Rev., s. 3220; C. S., s. 4588; 1969, c. 1190, s. 51½.)

Editor's Note. — The 1969 amendment, effective July 1, 1969, inserted "and district" near the beginning of the section.

For comment on bail in North Carolina, see 5 *Wake Forest Intra. L. Rev.* 300 (1969).

Trial Judge Has Discretion.—

In accord with 1st paragraph in original. See *State v. Hawkins*, 14 N.C. App. 129, 187 S.E.2d 417 (1972).

Petition after Final Judgment.—

In accord with 3rd paragraph in original. See *State v. Hawkins*, 14 N.C. App. 129, 187 S.E.2d 417 (1972).

A superior court judge had authority to review an order of bond forfeiture entered by another superior court judge. *State v. Hawkins*, 14 N.C. App. 129, 187 S.E.2d 417 (1972).

§ 15-122. Right of bail to surrender principal. — The bail shall have liberty, at any time before execution awarded against him, to surrender to the court from which the process issued, or to the sheriff having such process to return, during the session, or in the recess of such court, the principal, in discharge of himself; and such bail shall, at any time before such execution awarded, have full power and authority to arrest the body of his principal, and secure him until he shall have an opportunity to surrender him to the sheriff or court as aforesaid; and the sheriff is hereby required to receive such surrender, and hold the body of the defendant in custody as if bail had never been given: Provided, that in criminal proceedings the surrender by the bail, after the recognizance has been forfeited, shall not have the effect to discharge the bail, but the forfeiture may be remitted in the manner provided for. Provided, further, that if the defendant is in legal custody or imprisoned in the State of North Carolina or in any other state or territory of the United States at the time such defendant is bonded to appear in court, then the hearing on the writ of scire facias shall be continued for not less than ninety (90) days in order to give the surety an opportunity to produce the defendant.

If upon conviction of the principal, the court shall continue prayer for judgment, impose a sentence suspended upon condition that the principal perform or refrain from performing any act, suspend sentence and place the principal on probation, or impose any other judgment or sentence which subjects the principal to the continued jurisdiction and supervision of the court, the surety may surrender the principal to the court and shall thereupon be released from all obligation under

the recognizance. Upon surrender of the principal in such instance, the principal may give new bail as provided in G.S. 15-123 for the faithful performance of the conditions of the judgment or sentence. (1777, c. 115, s. 20, P. R.; 1848, c. 7; R. C., c. 11, s. 5; Code, s. 1230; Rev., s. 3226; C. S., s. 4594; 1955, c. 873; 1969, c. 1005.)

Editor's Note. — The 1969 amendment added the second paragraph.

For comment on bail in North Carolina, see 5 Wake Forest Intra. L. Rev. 300 (1969).

Quoted in *State v. Mallory*, 266 N.C. 31, 145 S.E.2d 335 (1965).

ARTICLE 13.

Venue.

§ 15-134. Improper venue met by plea in abatement; procedure.

Purpose of Section.—

The mischief intended to be remedied by this section was the difficulty encountered by the court in effecting the conviction of persons who had violated the criminal law of the state where the offense was committed near the boundaries of counties which were undetermined or unknown. And it often happened that, where the boundaries were established and known, it was uncertain from the proof whether the offense was committed on the one or the other side of the line, and, in consequence of the uncertainty and the doubt arising from it, offenders went "unwhipped of justice." This was the evil intended to be remedied. *State v. Overman*, 269 N.C. 453, 153 S.E.2d 44 (1967).

Crime Deemed, etc.—

An offense is deemed to have been committed in the county in which it is laid in the indictment unless the defendant shall

deny the same by plea in abatement, which ordinarily must be filed not later than the arraignment. *State v. Dozier*, 277 N.C. 615, 178 S.E.2d 412 (1971).

An offense, if proven, shall be deemed and taken as having been committed in the county laid in the charge, unless the defendant, by plea in abatement, under oath, shall allege the transaction took place in another county, whereupon the case may be removed there for trial. *State v. Dozier*, 277 N.C. 615, 178 S.E.2d 412 (1971).

Burden of Proof. — This section does not state which party has the burden of proof if a plea in abatement is filed. At common law, the burden of proof was upon the State to prove that the offense occurred in the county named in the bill of indictment. *State v. Overman*, 269 N.C. 453, 153 S.E.2d 44 (1967).

Applied in *State v. Midyette*, 270 N.C. 229, 154 S.E.2d 66 (1967).

ARTICLE 14.

Presentment.

§ 15-137. No arrest or trial on presentment.

Trial in the superior court, etc.—

A defendant may be tried in superior court upon a warrant only if there has been a trial and appeal from a conviction by an inferior court having jurisdiction. *State v. Guffey*, 283 N.C. 94, 194 S.E.2d 827 (1973).

There can be no trial, conviction, or punishment for a crime without a formal and sufficient accusation. In the absence of an accusation the court acquires no jurisdiction whatever, and if it assumes jurisdiction a trial and conviction are a nullity. *McClure v. State*, 267 N.C. 212, 148 S.E.2d 15 (1966); *State v. Cassada*, 6 N.C. App. 629, 170 S.E.2d 575 (1969).

When the court sentenced petitioner, who had been indicted for a violation of § 14-26 (carnal knowledge of female virgins

between twelve and sixteen years of age), to imprisonment for a term of not less than twelve nor more than fifteen years upon his plea of guilty to a violation of § 14-22 (assault with intent to commit rape) when there was no formal and sufficient accusation against him for the offense to which he pleaded guilty, it would seem to be without precedent, and the sentence of imprisonment was a nullity, and violates petitioner's rights as guaranteed by N.C. Const., Art. I, § 19, and by § 1 of the 14th Amendment to the United States Constitution and must be vacated in post-conviction proceedings. *McClure v. State*, 267 N.C. 212, 148 S.E.2d 15 (1966).

"Presentment". — A presentment is an accusation of crime made by a grand jury on its own motion upon its own knowledge

or observation, or upon information from others without any bill of indictment. *State v. Elledge*, 13 N.C. App. 462, 186 S.E.2d 192 (1972).

Pursuant to this section trials upon presentments have been abolished and a presentment amounts to nothing more than

an instruction by the grand jury to the public prosecuting attorney to frame a bill of indictment. *State v. Elledge*, 13 N.C. App. 462, 186 S.E.2d 192 (1972).

Cited in *State v. Wall*, 271 N.C. 675, 157 S.E.2d 363 (1967).

ARTICLE 15.

Indictment.

§ 15-140. Waiver of indictment in misdemeanor cases.—In any criminal action in the superior court where the offense charged is a misdemeanor, the defendant may waive the finding and return into court of a bill of indictment. If the defendant pleads not guilty, the prosecution shall be on a written information, signed by the solicitor, which information shall contain as full and complete a statement of the accusation as would be required in an indictment. No waiver of a bill of indictment shall be allowed by the court unless by the consent of the defendant's counsel. Pursuant to G.S. 7A-271(a)(5), the superior court is authorized to accept a plea to a related charge in misdemeanors appeals from the district court if the related charge is contained in the written information authorized by this section. (1907, c. 71; C.S., s. 4610; 1951, c. 726, s. 1; 1971, c. 377, s. 30.1.)

Editor's Note.—The 1971 amendment, effective Oct. 1, 1971, deleted at the end of the third sentence "in such action who shall be one either employed by the defendant to defend him in the action or one appointed by the court to examine into the defendant's case and report as to the same to the court." The amendment also deleted the former last sentence, excepting from the application of the section cases heard in the superior court on appeal from an inferior court, and added the present last sentence of the section.

Trial in the superior court, etc.—

A defendant may be tried in superior court upon a warrant only if there has been a trial and appeal from a conviction by an inferior court having jurisdiction. *State v. Guffey*, 283 N.C. 94, 194 S.E.2d 827 (1973).

Preparation of Information Is Better Practice.—Although this section does not require trial on an information signed by the solicitor when the defendant pleads guilty to a misdemeanor, whether the plea be guilty or not guilty, in all cases the better practice is the preparation of an information. *State v. Snipes*, 16 N.C. App. 416, 192 S.E.2d 62 (1972).

The requirements for a waiver of indictment and for trial upon an information signed by the solicitor are the same as in noncapital felony cases, where the defendant pleads not guilty to a misdemeanor. *State v. Bethea*, 272 N.C. 521, 158 S.E.2d 591 (1968).

When the offense charged is a misde-

meanor and defendant's plea is not guilty, the requirements for a waiver of indictment and trial upon an information signed by the solicitor are the same as in "non-capital" felony cases under § 15-140.1. *State v. Snipes*, 16 N.C. App. 416, 192 S.E.2d 62 (1972).

Order of Arrest and Affidavit Constitute Warrant.—The order of arrest and the attached affidavit on which it is based are to be read and considered as a single document and together constitute a warrant. *State v. Powell*, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

Prerequisites of Valid Warrant of Arrest.—A valid warrant of arrest must be based on an examination of the complainant under oath; it must identify the person charged; it must contain directly or by proper reference at least a defective statement of the crime charged; and it must be directed to a lawful officer or to a class of officers commanding the arrest of the accused. *State v. Powell*, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

Effect of Defects in Warrant.—Defects, if any, in the warrant affect its validity as a basis for a criminal prosecution on the charge set forth in the affidavit as well as its validity as a basis for a legal arrest. *State v. Powell*, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

Warrants Were Insufficient to Be Treated as an Information.—Neither of the instruments purporting to be warrants in this case was sufficient to be treated as an information under the provisions of this

section. *State v. Powell*, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

Defective Warrants.—The warrant in the instant case was fatally defective and void because of the combination of failing to identify the assaulted officer by name in the affidavit and failing to order the defendant arrested in the order of arrest. *State v. Powell*, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

Where, in the order of arrest portion of the purported warrant, the person ordered arrested was "Dempsey Roy Smith" and not the defendant, "Dempsey Roy Powell," the instrument did not meet the requirement that it be directed to a lawful officer commanding the arrest of the accused. *State v. Powell*, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

An instrument setting forth the charge of

assault by the use of the words "assault on an officer" to identify the person assaulted was not sufficient to charge the offense of assault. *State v. Powell*, 10 N.C. App. 443, 179 S.E.2d 143 (1971).

A "North Carolina uniform traffic ticket" setting forth the charge of resisting arrest by using only the two words "resist arrest" was not sufficient to charge the offense. *State v. Powell*, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

Verdict and judgment were vacated because the warrant was fatally defective. *State v. Powell*, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

But this did not bar further prosecution of defendant if the solicitor deemed it advisable. *State v. Powell*, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

§ 15-140.1. Waiver of indictment in noncapital felony cases.

Failure of Solicitor to Sign Statement of Accusation.—This section contemplates that the prosecution shall be upon an information signed by the solicitor, and the failure of the solicitor to sign the statement of accusation to which defendant pled guilty renders the plea void. *State v. Bethea*, 272 N.C. 521, 158 S.E.2d 591 (1968); *State v. Glover*, 283 N.C. 379, 196 S.E.2d 207 (1973).

The requirement that the prosecution be on an information signed by the solicitor is mandatory. *State v. Glover*, 283 N.C. 379, 196 S.E.2d 207 (1973).

Use of Warrant in Lieu of Information Expressly Disapproved.—The practice of the solicitor in attempting to use a warrant in lieu of an information as required by this section is expressly disapproved by the Supreme Court. *State v. Bethea*, 272 N.C. 521, 158 S.E.2d 591 (1968).

Waiver of Finding Includes Waiver of Return.—The waiver of the finding of a bill of indictment also includes the waiver

of the return. *State v. Hodge*, 267 N.C. 238, 147 S.E.2d 881 (1966).

New Indictment Not Required for Lesser Included Offense.—It is not necessary that accused be tried under a new indictment charging him with assault with intent to commit rape, since assault with intent to commit rape is a lesser included offense of rape and accused therefore could be tried on the original indictment. *Godlock v. Ross*, 259 F. Supp. 659 (E.D.N.C. 1966).

Applied in *State v. Summerlin*, 9 N.C. App. 457, 176 S.E.2d 356 (1970); *State v. Elledge*, 13 N.C. App. 462, 186 S.E.2d 192 (1972).

Cited in *State v. Harrington*, 5 N.C. App. 622, 169 S.E.2d 32 (1969); *State v. Cassada*, 6 N.C. App. 629, 170 S.E.2d 575 (1969); *State v. Young*, 11 N.C. App. 440, 181 S.E.2d 261 (1971); *State v. Snipes*, 16 N.C. App. 416, 192 S.E.2d 62 (1972); *State v. Watkins*, 283 N.C. 17, 194 S.E.2d 800 (1973).

§ 15-141. Bills returned by foreman except in capital cases.

This section does not make it mandatory that the grand jury foreman personally deliver bills of indictment to the courts. *State v. Reep*, 12 N.C. App. 125, 182 S.E.2d 623 (1971).

A bill of indictment was not improperly delivered to the court where the foreman delivered it to the officer serving the grand jury, and the officer gave the indictment to the solicitor who carried it into the courtroom. *State v. Reep*, 12 N.C. App. 125, 182 S.E.2d 623 (1971).

When Lack of Endorsement on Indict-

ment Will Not Support Motion to Quash.—When a bill of indictment in a capital case has been returned in open court by a majority of the grand jury as a true bill, and the action of the grand jury is duly recorded in the court's records, the lack of endorsement on the bill will not support a motion to quash. *State v. Cox*, 280 N.C. 689, 187 S.E.2d 1 (1972).

Minutes of Court as Evidence of Compliance.—The minutes of the court show that the requirements of this section as to return of an indictment in a capital case in

open court were strictly complied with. *State v. Childs*, 269 N.C. 307, 152 S.E.2d 453 (1967).

Defendant is not entitled to be present in court, either in person or by his attorney, when the indictments are returned as true bills by the grand jury, and his motion to

§ 15-143. Bill of particulars.

When Section Applies.—

In accord with original. See *State v. Ingram*, 271 N.C. 538, 157 S.E.2d 119 (1967).

This section does not cure a defect in the bill of indictment. *State v. Ingram*, 271 N.C. 538, 157 S.E.2d 119 (1967).

The function of a bill, etc.—

The function of a bill of particulars is (1) to inform the defense of the specific occurrences intended to be investigated on the trial, and (2) to limit the course of the evidence to the particular scope of inquiry. *State v. Overman*, 269 N.C. 453, 153 S.E.2d 44 (1967); *State v. Spence*, 271 N.C. 23, 155 S.E.2d 802 (1967).

The function of a bill of particulars is to inform the defendant of the nature of the evidence which the State proposes to offer. *State v. Overman*, 269 N.C. 453, 153 S.E.2d 44 (1967); *State v. Cameron*, 283 N.C. 191, 195 S.E.2d 481 (1973).

The "particulars" authorized are not, etc.—

A bill of particulars is not a part of the indictment, nor a substitute therefor, nor an amendment thereto. *State v. Overman*, 269 N.C. 453, 153 S.E.2d 44 (1967).

When Denial, etc.—

Where defense counsel had been furnished copies of the officers' reports, the reports of the autopsies, and had been permitted to interrogate the State's key witness, and was present when the defendant made admissions to investigating officers, and the State introduced nothing which should have been of surprise to the defendant, the court's refusal to order any addi-

quash the indictments because neither he nor his attorney was present in court when the indictments were returned was properly overruled. *State v. Childs*, 269 N.C. 307, 152 S.E.2d 453 (1967), citing *State v. Stanley*, 227 N.C. 650, 44 S.E.2d 196 (1947).

tional bill of particulars was not error. *State v. Porth*, 269 N.C. 329, 153 S.E.2d 10 (1967).

Granting Order Is within Court's Discretion.—

In accord with 2nd paragraph in original. See *State v. Overman*, 269 N.C. 453, 153 S.E.2d 44 (1967).

In accord with 3rd paragraph in original. See *State v. Vandiver*, 265 N.C. 325, 144 S.E.2d 54 (1965); *State v. Spence*, 271 N.C. 23, 155 S.E.2d 802 (1967); *State v. Conrad*, 4 N.C. App. 50, 165 S.E.2d 771 (1969); *State v. Cameron*, 283 N.C. 191, 195 S.E.2d 481 (1973).

A motion for a bill of particulars is addressed to the discretion of the trial judge, and his ruling thereon is not subject to review, except for palpable and gross abuse thereof. *State v. Robinson*, 15 N.C. App. 362, 190 S.E.2d 270 (1972).

Indictment for First-Degree Murder. — If a defendant is charged with murder in the first degree by bill of indictment drawn under § 15-144, and desires to know whether the State relies on proof the killing was done with premeditation and deliberation, or in the perpetration or attempt to perpetrate a robbery, he should apply for a bill of particulars as provided in this section. *State v. Haynes*, 276 N.C. 150, 171 S.E.2d 435 (1970).

Applied in *State v. Conrad*, 275 N.C. 342, 168 S.E.2d 39 (1969).

Cited in *State v. Green*, 2 N.C. App. 170, 162 S.E.2d 641 (1968); *State v. Rogers*, 273 N.C. 208, 159 S.E.2d 525 (1968).

§ 15-144. Essentials of bill for homicide.

Cross Reference.—As to verdict in prosecution for homicide, see § 15-172 and the note thereto.

History of Section.—See *State v. Talbert*, 282 N.C. 718, 194 S.E.2d 822 (1973); *State v. Watkins*, 283 N.C. 17, 194 S.E.2d 800 (1973).

An indictment must be sufficient in form to allege murder and support a conviction of murder in the first degree under this section. *State v. Frazier*, 280 N.C. 181, 185 S.E.2d 652 (1972).

What Is Sufficient under Section.—

An indictment in the form prescribed by

this section is sufficient. *State v. Duncan*, 282 N.C. 412, 193 S.E.2d 65 (1972).

When Indictment for Murder Is Sufficient.—An indictment for murder in the form prescribed by this section is sufficient to support a verdict of guilty of murder in the first degree if the jury finds from the evidence beyond a reasonable doubt that defendant killed the deceased with malice and after premeditation and deliberation or in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony. *State v. Thompson*, 280 N.C. 202, 185 S.E.2d 666 (1972).

An indictment for homicide in the words of this section will support a verdict of murder in the first degree, murder in the second degree, or manslaughter. *State v. Talbert*, 282 N.C. 718, 194 S.E.2d 822 (1973).

Statements Not Necessary.—

It is not required that an indictment allege that a murder was committed in the perpetration of a robbery or other felony in order that it be sufficient to support a verdict of murder in the first degree. *State v. Frazier*, 280 N.C. 181, 185 S.E.2d 652 (1972).

An indictment for murder need not allege deliberation and premeditation. *State v. Duncan*, 282 N.C. 412, 193 S.E.2d 65 (1972).

Killing with Malice, Premeditation and Deliberation or in Perpetration of Robbery.—A bill is sufficient to sustain a verdict of murder in the first degree if the jury should find from the evidence, beyond a reasonable doubt, that the killing was done with malice and after premeditation and deliberation; or in the perpetration or attempt to perpetrate a robbery. *State v. Haynes*, 276 N.C. 150, 171 S.E.2d 435 (1970).

If a defendant is charged with murder in the first degree by bill of indictment drawn under this section, and desires to know whether the State relies on proof the killing was done with premeditation and deliberation, or in the perpetration or attempt to perpetrate a robbery, he should apply for a bill of particulars as provided

in § 15-143. *State v. Haynes*, 276 N.C. 150, 171 S.E.2d 435 (1970).

Felony murder may be proven by State although bill of indictment charges murder in statutory language of this section. *State v. Lee*, 277 N.C. 205, 176 S.E.2d 751 (1970).

Hearsay Testimony of Qualified Witness.—Indictment will not be quashed on the ground that some of the testimony of the qualified witness heard by the grand jury may have been hearsay and incompetent. *State v. Cade*, 268 N.C. 438, 150 S.E.2d 756 (1966).

Applied in *State v. Davis*, 266 N.C. 633, 146 S.E.2d 646 (1966); *State v. White*, 271 N.C. 391, 156 S.E.2d 721 (1967); *State v. Godwin*, 271 N.C. 571, 157 S.E.2d 6 (1967); *State v. Crump*, 277 N.C. 573, 178 S.E.2d 366 (1971); *State v. Allred*, 279 N.C. 398, 183 S.E.2d 553 (1971); *State v. Fields*, 279 N.C. 460, 183 S.E.2d 666 (1971); *State v. Roberts*, 279 N.C. 500, 183 S.E.2d 647 (1971); *State v. Smith*, 279 N.C. 505, 183 S.E.2d 649 (1971); *State v. Gladden*, 279 N.C. 566, 184 S.E.2d 249 (1971); *State v. Stimpson*, 279 N.C. 716, 185 S.E.2d 168 (1971); *State v. Jones*, 280 N.C. 60, 184 S.E.2d 862 (1971); *State v. Tart*, 280 N.C. 172, 184 S.E.2d 842 (1971); *State v. Bolin*, 281 N.C. 415, 189 S.E.2d 235 (1972); *State v. Watkins*, 283 N.C. 17, 194 S.E.2d 800 (1973).

Cited in *State v. Swann*, 272 N.C. 215, 158 S.E.2d 80 (1967); *State v. Parker*, 279 N.C. 168, 181 S.E.2d 432 (1971); *State v. Bunn*, 283 N.C. 444, 196 S.E.2d 777 (1973).

§ 15-147. Former conviction alleged in bill for second offense.

Editor's Note.—For note on "Constitutional Law—Current Trends in Recidivist Statute Procedures," see 45 N.C.L. Rev. 1039 (1967).

In General.—

Where a person is charged in a bill of indictment with an offense which, on conviction thereof, is punishable with a greater penalty than on the first conviction and the indictment properly alleges a prior conviction, this section provides that a transcript of the record of the first conviction, duly certified, shall, upon proof of the identity of the person of the offender, be sufficient evidence of the first conviction. *State v. Walls*, 4 N.C. App. 661, 167 S.E.2d 547 (1969).

The record itself in the former action, being in existence, is the only evidence admissible to prove its contents. *Jones v. Jones*, 241 N.C. 291, 85 S.E.2d 156 (1954); *State v. Michaels*, 11 N.C. App. 110, 180 S.E.2d 442 (1971).

Admission of Secondary Evidence.—In order to admit secondary evidence of the contents of a court record, it is necessary that the foundation be laid by showing the original record has been destroyed or lost. *Jones v. Jones*, 241 N.C. 291, 85 S.E.2d 156 (1954); *State v. Michaels*, 11 N.C. App. 110, 180 S.E.2d 442 (1971).

The words "third offense" are not sufficient.—The words "third offense," even if included in the body of the indictment, are not sufficient to charge the offense of felonious escape. *State v. Bennett*, 271 N.C. 423, 156 S.E.2d 725 (1967).

In addition, etc.—

It is necessary also to allege in the indictment facts showing that at a certain time and place the defendant was convicted of the previous offense or offenses. *State v. Bennett*, 271 N.C. 423, 156 S.E.2d 725 (1967).

Cited in *State v. Jackson*, 280 N.C. 563, 187 S.E.2d 27 (1972).

§ 15-148. Manner of alleging joint ownership of property.

Quoted in *State v. Gallimore*, 272 N.C. 528, 158 S.E.2d 505 (1968).

Cited in *State v. Haigler*, 14 N.C. App. 501, 188 S.E.2d 586 (1972).

§ 15-149. Description in bill for larceny of money.

Cited in *State v. Haigler*, 14 N.C. App. 501, 188 S.E.2d 586 (1972).

§ 15-150. Description in bill for embezzlement.

Cited in *State v. Haigler*, 14 N.C. App. 501, 188 S.E.2d 586 (1972).

§ 15-151. Intent to defraud; larceny and receiving.

Cited in *State v. Haigler*, 14 N.C. App. 501, 188 S.E.2d 586 (1972).

§ 15-152. Separate counts; consolidation.**In General.—**

In accord with original. See *State v. Parker*, 271 N.C. 414, 156 S.E.2d 677 (1967); *State v. Conrad*, 4 N.C. App. 50, 165 S.E.2d 771 (1969); *State v. Mourning*, 4 N.C. App. 569, 167 S.E.2d 501 (1969); *State v. Wright*, 18 N.C. App. 76, 195 S.E.2d 801 (1973).

The trial court is authorized by this section to order that prosecutions of several defendants for offenses growing out of the same transaction be consolidated for trial. *State v. Mourning*, 4 N.C. App. 569, 167 S.E.2d 501 (1969).

When two or more indictments are founded on one criminal transaction this section contemplates that the court will consolidate them for trial. *State v. Fox*, 277 N.C. 1, 175 S.E.2d 561 (1970).

Where two defendants are charged in separate bills of indictment with identical crimes, and the offenses charged are so connected and tied together in time, place, and circumstances as to make one continuous criminal episode, in such cases there is statutory authority for a consolidation. *State v. Walker*, 6 N.C. App. 447, 170 S.E.2d 627 (1969).

When a defendant is charged with crimes of the same class and the offenses are not so separate in time or place and not so distinct in circumstances as to render a consolidation unjust and prejudicial, consolidation is authorized in the discretion of the court. *State v. Anderson*, 281 N.C. 261, 188 S.E.2d 336 (1972).

Where the offenses charged were so connected and tied together in time, place, and circumstances as to make one continuous criminal episode, the trial court did not err in consolidating the prosecutions for trial. *State v. McCall*, 12 N.C. App. 85, 182 S.E.2d 617 (1971).

Where defendants were charged in separate bills of indictment with identical

crimes, and the offenses charged were of the same class, related to the same crime, and were so connected in time and place that most of the evidence at the trial upon one of the indictments would be competent and admissible at the trial on the other, the trial judge was authorized by this section, in his discretion, to order their consolidation for trial. *State v. Bass*, 280 N.C. 435, 186 S.E.2d 384 (1972).

This section authorizes the consolidation for trial of separate charges against two or more defendants when the offenses charged are of the same class and are so connected in time or place that most of the evidence at trial upon one of the charges would be admissible at a trial on the others. *State v. Salem*, 17 N.C. App. 269, 193 S.E.2d 755 (1973).

In an indictment containing several counts, each count should be complete in itself. *State v. Russell*, 15 N.C. App. 594, 190 S.E.2d 414 (1972).

Where the first count in each bill of indictment for forgery was complete and sufficient as it contained with exactitude the bank check involved, but the second count did not, it would have been preferable for the second count to have again set out in detail the particular check involved; however, since the check was set out in detail in the first count and that was an integral part of the bill of indictment, the reference to the same check in the second count was sufficient. *State v. Russell*, 15 N.C. App. 594, 190 S.E.2d 414 (1972).

Where the second count in each of two bills of indictment should be quashed for insufficiency, the judgment entered should not be arrested where two sufficient counts were consolidated with the two insufficient counts for judgment; either one of the two sufficient counts, upon defendant's pleas of guilty, would support the judgment en-

tered. *State v. Horton*, 15 N.C. App. 604, 190 S.E.2d 274 (1972).

Three cases may be consolidated where three charges included in two bills of indictment were so connected as to make the three offenses one continuous criminal episode. *State v. Patton*, 5 N.C. App. 501, 168 S.E.2d 500 (1969).

Exercise of Discretion by Court.—

In accord with original. See *State v. Mitchell*, 17 N.C. App. 1, 193 S.E.2d 400 (1972).

Consolidation Is within, etc.—

An order consolidating cases for trial is discretionary. *State v. Conrad*, 4 N.C. App. 50, 165 S.E.2d 771 (1969).

The motion by the State to consolidate four cases for trial and the opposing motion by the defendants for separate trials were addressed to the sound discretion of the presiding judge. *State v. Yoes*, 271 N.C. 616, 157 S.E.2d 386 (1967).

Motions made under this section are addressed to the sound discretion of the trial judge. *State v. McCall*, 12 N.C. App. 85, 182 S.E.2d 617 (1971).

Where defendants were charged in separate bills of indictment with identical crimes, and the offenses charged were of the same class, related to the same crime, and were so connected in time and place that most of the evidence at the trial upon one of the indictments would be competent and admissible at the trial on the other, the trial judge was authorized by this section, in his discretion, to order their consolidation for trial. *State v. Bass*, 280 N.C. 435, 186 S.E.2d 384 (1972).

When a defendant is charged with crimes of the same class and the offenses are not so separate in time or place and not so distinct in circumstances as to render a consolidation unjust and prejudicial, consolidation is authorized in the discretion of the court. *State v. Anderson*, 281 N.C. 261, 188 S.E.2d 336 (1972).

When two or more defendants are charged in separate bills of indictment with identical crimes and the offense charged against each is so connected in time and place as to constitute one continuous criminal offense, the trial court may order the cases consolidated for trial and his decision will not be disturbed in the absence of a showing of abuse of discretion. *State v. Garcia*, 16 N.C. App. 344, 192 S.E.2d 2 (1972).

The trial court did not abuse its discretion in permitting the State to consolidate for trial multiple charges against a defendant where, at the time the consolidation was ordered, the court accepted the State's

theory that the defendant may have committed the several offenses as part of a single act. *State v. Blizzard*, 280 N.C. 11, 184 S.E.2d 851 (1971).

The trial court did not err in consolidating a charge of assault upon a law officer in the performance of his duty with three charges of assault with a deadly weapon with intent to kill inflicting serious injury where all of the alleged assaults occurred within a period of a few minutes at the same place. *State v. Mitchell*, 17 N.C. App. 1, 193 S.E.2d 400 (1972).

Consolidation of Minor Offense and Capital Charge. — Ordinarily, unless the evidence showing guilt of a minor offense fits into the proof on the capital charge, the minor offenses should not be included. *State v. Old*, 272 N.C. 42, 157 S.E.2d 651 (1967).

Indictments charging defendants as accessories before the fact in the slaying of the same person, the defendants being present together at the time of the offense, held to authorize the consolidation of the indictments for trial. *State v. Parker*, 271 N.C. 414, 156 S.E.2d 677 (1967).

Transactions Occurring on Same Evening in Close Proximity.—Where two warrants and an indictment were consolidated for trial, there was no denial of petitioner's constitutional rights, since all the charges grew out of transactions occurring on the same evening in close proximity to each other. *Doss v. North Carolina*, 252 F. Supp. 298 (M.D.N.C. 1966).

Burglary and Larceny.—An indictment charged two offenses, (1) burglary in the first degree, and (2) larceny of money from the building allegedly feloniously broken into and entered, as alleged in the first count, but the bill was not defective. These two counts, by virtue of this section, may be joined in one indictment in separate counts. *State v. Childs*, 269 N.C. 307, 152 S.E.2d 453 (1967).

Kidnapping and Assault. — Where the kidnapping and assault charges arose out of the same transaction and elements of the assault charge were essentials of the kidnapping charge, the consolidation of the assault and kidnapping charges was permissible under this section. *State v. Barbour*, 278 N.C. 449, 180 S.E.2d 115 (1971).

Felonious Entry, Kidnapping, and Forcible Taking of Automobile.—The felonious entry into a dwelling house, the kidnapping of one of the occupants of the house, and the forcible taking of an automobile in which the perpetrators attempted to make their getaway were so connected and tied together as to make the three offenses one

continuous criminal episode. The evidence of the whole affair was pertinent and necessary to establish the identity of the accused as one of the guilty parties. The three charges were properly consolidated and tried together. *State v. Arsad*, 269 N.C. 184, 152 S.E.2d 99 (1967).

Larceny and receiving may be included in the same indictment, even though the charges are inconsistent and a defendant cannot be guilty of both. *Doss v. North Carolina*, 252 F. Supp. 298 (M.D.N.C. 1966).

When a defendant pleads guilty to the indictment, and a single judgment is pronounced thereon, it is regarded as immaterial whether the judgment is considered as relating to the larceny count or to the receiving count. It is only when there is some defect in either the larceny count or the receiving count that knowledge of which count the defendant is pleading guilty to is required. *Doss v. North Carolina*, 252 F. Supp. 298 (M.D.N.C. 1966).

Rape and kidnapping.—The consolidation of indictments, charging defendant with rape and kidnapping based upon a single occurrence, rests within the discre-

tionary power of the trial court. *State v. Turner*, 268 N.C. 225, 150 S.E.2d 406 (1966).

Murder of One Person and Kidnapping and Robbery of Another.—Where the State contended that the murder of one person, and the kidnapping and robbery of another person were all parts of a continuing program of action by the defendant covering a period of approximately three hours, evidence of the whole affair was pertinent to the several charges and there was no error in consolidating the charges for trial. *State v. Frazier*, 280 N.C. 181, 185 S.E.2d 652 (1972).

The facts required to convict defendant of murder would necessarily have convicted him of the burglary charged in the instant case. *State v. Fox*, 277 N.C. 1, 175 S.E.2d 561 (1970).

Applied in *State v. Vandiver*, 265 N.C. 325, 144 S.E.2d 54 (1965); *State v. Craddock*, 272 N.C. 160, 158 S.E.2d 25 (1967); *State v. Perry*, 8 N.C. App. 83, 173 S.E.2d 521 (1970); *State v. Duncan*, 282 N.C. 412, 193 S.E.2d 65 (1972); *State v. Edmondson*, 283 N.C. 533, 196 S.E.2d 505 (1973).

§ 15-153. Bill or warrant not quashed for informality.

I. NATURE AND PURPOSE.

Purpose, etc.—

The purpose of the warrant or indictment is (1) to give the defendant notice of the charge against him to the end that he may prepare his defense and to be in a position to plead former acquittal or former conviction in the event he is again brought to trial for the same offense; (2) to enable the court to know what judgment to pronounce in case of conviction. *State v. Dorsett*, 272 N.C. 227, 158 S.E.2d 15 (1967).

This section was designed to free the courts from the fetters of form, technicality and refinement not concerned with the substance of the charge. *State v. Taylor*, 280 N.C. 273, 185 S.E.2d 677 (1972).

This section was enacted to simplify forms of indictment. *State v. Russell*, 282 N.C. 240, 192 S.E.2d 294 (1972).

The verdict and judgment were vacated because the warrant was fatally defective. *State v. Powell*, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

But this did not bar further prosecution of the defendant if the solicitor deemed it advisable. *State v. Powell*, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

Quashing, etc.—

In accord with original. See *State v.*

Russell, 282 N.C. 240, 192 S.E.2d 294 (1972).

Quashing of indictments and warrants is not favored. *State v. Abernathy*, 265 N.C. 724, 145 S.E.2d 2 (1965).

A motion to quash is a proper method of testing the sufficiency of the warrant to charge a criminal offense; it is not a means of testing the guilt or innocence of the defendant with respect to a crime properly charged. *State v. Tenore*, 280 N.C. 238, 185 S.E.2d 644 (1972).

A motion to quash for redundancy in the affidavit portion of a warrant upon which the order of arrest portion is based is addressed to the sound discretion of the trial judge. *State v. Powell*, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

Approved Forms Should Be Followed.—

In accord with original. See *State v. Russell*, 282 N.C. 240, 192 S.E.2d 294 (1972).

Prosecuting officers should ordinarily follow approved forms in drafting bills of indictment so as to avoid raising questions unnecessarily as to what are refinements and what are essential allegations. *State v. Taylor*, 280 N.C. 273, 185 S.E.2d 677 (1972).

Applied in *State v. Bowden*, 272 N.C. 481, 158 S.E.2d 493 (1968); *State v. Ship-*

man, 14 N.C. App. 577, 188 S.E.2d 741 (1972).

Quoted in *State v. Crutchfield*, 5 N.C. App. 586, 169 S.E.2d 43 (1969).

Stated in *State v. Teasley*, 9 N.C. App. 477, 176 S.E.2d 838 (1970).

Cited in *State v. Greenlee*, 272 N.C. 651, 159 S.E.2d 22 (1968).

II. GENERAL EFFECT.

Liberal Construction.—

In accord with 4th paragraph in original. See *State v. Russell*, 282 N.C. 240, 192 S.E.2d 294 (1972); *State v. Beach*, 283 N.C. 261, 196 S.E.2d 214 (1973).

Since the enactment of this section it has been liberally construed. *State v. Sparrow*, 276 N.C. 499, 173 S.E.2d 897 (1970).

This section does not dispense, etc.—

In accord with original. See *State v. Guffey*, 265 N.C. 331, 144 S.E.2d 14 (1965); *State v. McBane*, 276 N.C. 60, 170 S.E.2d 913 (1969); *State v. Beach*, 283 N.C. 261, 196 S.E.2d 214 (1973); *State v. Cannady*, 18 N.C. App. 213, 196 S.E.2d 617 (1973).

It is an essential of jurisdiction that a criminal offense shall be sufficiently charged in the indictment. *State v. Guffey*, 265 N.C. 331, 144 S.E.2d 14 (1965).

A charge in a bill of indictment must be complete in itself, and contain all of the material allegations which constitute the offense charged. *State v. Guffey*, 265 N.C. 331, 144 S.E.2d 14 (1965).

In order to constitute a valid charge under a statute, the essential elements of the offense must be set forth in the warrant. *State v. Williams*, 1 N.C. App. 312, 161 S.E.2d 198 (1968).

Where a warrant does not charge that defendant operated a motor vehicle on a public highway, such warrant fails to allege an essential element of the offense as defined in § 20-28 (a). *State v. Cook*, 272 N.C. 728, 158 S.E.2d 820 (1968).

A warrant charging that defendant did "unlawfully and wilfully appear off of his premises in a drunken condition" is insufficient to charge the offense of public drunkenness proscribed by § 14-335, since it fails to charge that defendant was in a public place. *State v. Williams*, 1 N.C. App. 312, 161 S.E.2d 198 (1968).

Plain, Intelligible and Explicit, etc.—

In accord with 3rd paragraph in original. See *State v. Hunt*, 265 N.C. 714, 144 S.E.2d 890 (1965); *Godlock v. Ross*, 259 F. Supp. 659 (E.D.N.C. 1966); *State v. Pinyatello*, 272 N.C. 312, 158 S.E.2d 596 (1968); *State v. Clontz*, 4 N.C. App. 667, 167 S.E.2d 520 (1969).

In accord with 4th paragraph in original. See *State v. Lackey*, 271 N.C. 171, 155

S.E.2d 465 (1967); *State v. Cook*, 272 N.C. 728, 158 S.E.2d 820 (1968).

A warrant or indictment following substantially the language of the statute is sufficient if and when it thereby charges the essentials of the offense in a plain, intelligible, and explicit manner. If the statutory words fail to do this they must be supplemented by other allegations which so plainly, intelligibly and explicitly set forth every essential element of the offense as to leave no doubt in the mind of the accused and the court as to the offense intended to be charged. *State v. McBane*, 276 N.C. 60, 170 S.E.2d 913 (1969); *State v. Kelly*, 13 N.C. App. 588, 186 S.E.2d 631 (1972).

A bill is sufficient if it charges the offense in a plain, intelligible and explicit manner, with averments sufficient to enable the court to proceed to judgment and to bar a subsequent prosecution for the same offense. *State v. Taylor*, 280 N.C. 273, 185 S.E.2d 677 (1972).

This section provides against quashal for informality if the charge be plain, intelligible, and explicit, and sufficient matter appear in the bill to enable the court to proceed to judgment. *State v. Russell*, 282 N.C. 240, 192 S.E.2d 294 (1972).

The general rule in this State and elsewhere is that an indictment for a statutory offense is sufficient, if the offense is charged in the words of the statute, either literally or substantially, or in equivalent words. This rule does not apply where the words of the statute do not, without uncertainty or ambiguity, set forth all the essential elements necessary to constitute the offense sought to be charged in the indictment. In such a situation the statutory words must be supplemented in the indictment by other allegations which explicitly and accurately set forth every essential element of the offense with such exactitude as to leave no doubt in the minds of the accused and the court as to the specific offense intended to be charged. *State v. Beach*, 283 N.C. 261, 196 S.E.2d 214 (1973).

Same—Describing Property.—

The description of the property alleged to have been stolen must be of sufficient certainty to enable the jury to say that the article proved to be stolen is the same. *State v. Haigler*, 14 N.C. App. 501, 188 S.E.2d 586 (1972).

The description in a warrant or bill of indictment of the goods alleged to have been stolen is sufficient if from it defendant can have a fair and reasonable opportunity to prepare his defense, can avail himself of his conviction or acquittal as a

bar to subsequent prosecution for the same offense, and the court is enabled, on conviction, to pronounce sentence according to law. *State v. Fuller*, 13 N.C. App. 193, 185 S.E.2d 312 (1971).

The description of property alleged to have been stolen must be plain and intelligible, and must correspond to the different forms of existence in which the same article is found. In its raw or unmanufactured state it may be described by its ordinary name, but if it be worked up into some other forms, etc., when stolen, it must be described by the name by which it is generally known. *State v. Haigler*, 14 N.C. App. 501, 188 S.E.2d 586 (1972).

The object of describing property stolen by its quality and quantity, is that it may appear to the court to be of value. *State v. Haigler*, 14 N.C. App. 501, 188 S.E.2d 586 (1972).

The object of describing property stolen by its usual name, ownership, etc., is to enable the defendant to make his defense, and to protect himself against a second conviction. *State v. Haigler*, 14 N.C. App. 501, 188 S.E.2d 586 (1972).

Trend Is Not to Consider Objections Founded on Mere Matter of Form.—The trend of judicial decision and the tendency of legislation is towards the practical view that objections founded upon mere matter of form should not be considered by the courts unless there is reason to believe that a defendant has been misled by the form of the charge, or was not apprised by its terms of the nature of the offense which he was held to answer. *State v. Russell*, 282 N.C. 240, 192 S.E.2d 294 (1972).

The requirements for a valid indictment are (1) such certainty in the statement of the accusation as will identify the offense with which the accused is sought to be charged; (2) to protect the accused from being twice put in jeopardy for the same offense; (3) to enable the accused to prepare for trial, and (4) to enable the court, on conviction or plea of *nolo contendere* or guilty to pronounce sentence according to the rights of the case. *State v. Sparrow*, 276 N.C. 499, 173 S.E.2d 897 (1970); *State v. Hinson*, 17 N.C. App. 25, 193 S.E.2d 415 (1972); *State v. Beach*, 283 N.C. 261, 196 S.E.2d 214 (1973).

Order of Arrest and Affidavit Constitute Warrant.—The order of arrest and the attached affidavit on which it is based are to be read and considered as a single document and together constitute a warrant. *State v. Powell*, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

Requirements for Valid Warrant. — A

warrant meets minimum standards for validity if it (1) informed the defendant of the charge against him, (2) enabled him to prepare his defense, and (3) enabled the court to proceed to judgment and thereby barred another prosecution for the same offense. *State v. Letterlough*, 6 N.C. App. 36, 169 S.E.2d 269 (1969).

A valid warrant must charge the offense with sufficient certainty to apprise the defendant of the specific accusation against him so as to enable him to prepare his defense and to protect him from a subsequent prosecution for the same offense, and to enable the court to proceed to judgment. *State v. Powell*, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

A valid warrant of arrest must be based on an examination of the complainant under oath; it must identify the person charged; it must contain directly or by proper reference at least a defective statement of the crime charged; and it must be directed to a lawful officer or to a class of officers commanding the arrest of the accused. *State v. Powell*, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

The prerequisites of the affidavit portion of a warrant properly charging the offense of resisting arrest are set forth in *State v. Wiggs*, 269 N.C. 507, 153 S.E.2d 84 (1967) and *State v. Fenner*, 263 N.C. 694, 140 S.E.2d 349 (1965). *State v. Powell*, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

One of the prerequisites of the affidavit portion of a warrant properly charging the offense of resisting arrest is that the affidavit upon which the order of arrest is based shall identify by name the person alleged to have been resisted, delayed or obstructed, and describe his official character with sufficient certainty to show that he was a public officer within the purview of the statute. *State v. Powell*, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

Defects, if any, in the warrant affect its validity as a basis for a criminal prosecution on the charge set forth in the affidavit as well as its validity as a basis for a legal arrest. *State v. Powell*, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

The warrant in the instant case was fatally defective and void because of the combination of failing to identify the assaulted officer by name in the affidavit and failing to order the defendant arrested in the order of arrest. *State v. Powell*, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

Where, in the order of arrest portion of the purported warrant, the person ordered arrested was "Dempsey Roy Smith" and not the defendant, "Dempsey Roy Powell," the instrument did not meet the require-

ment that it be directed to a lawful officer commanding the arrest of the accused. *State v. Powell*, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

Merely charging, etc.—

In accord with original. See *State v. Cook*, 272 N.C. 728, 158 S.E.2d 820 (1968).

A warrant or indictment merely charging in general terms a breach of the statute and referring to it in the indictment is not sufficient. *State v. McBane*, 276 N.C. 60, 170 S.E.2d 913 (1969).

Following Words of Statute.—

Ordinarily, an indictment for a statutory offense is sufficient if the offense is charged in the words of the statute. *State v. Sparrow*, 276 N.C. 499, 173 S.E.2d 897 (1970).

The use of abbreviations in warrants and indictments is not to be encouraged. *State v. Letterlough*, 6 N.C. App. 36, 169 S.E.2d 269 (1969).

A warrant and the affidavit upon which it is based will be construed together and will be tested by rules less strict than those applicable to indictments, but, nevertheless, the warrant and the affidavit together must charge facts sufficient to constitute an offense. *State v. Williams*, 1 N.C. App. 312, 161 S.E.2d 198 (1968).

A warrant must contain directly or by proper reference at least a defective statement of the crime charged. *State v. Williams*, 1 N.C. App. 312, 161 S.E.2d 198 (1968).

Fatal Defect Cannot Be Cured by Amendment.—Where a warrant or indictment is fatally defective in failing to charge an essential element of the offense, the defect cannot be cured by amendment. *State v. Williams*, 1 N.C. App. 312, 161 S.E.2d 198 (1968).

Substance of Indictment May Not Be Amended After Returned as True Bill.—The substance of a bill of indictment used in a trial may not be amended by the court or the solicitor after it has been returned by the grand jury as a true bill. *State v. Haigler*, 14 N.C. App. 501, 186 S.E.2d 586 (1972).

An indictment for an offense, etc.—

In a criminal prosecution for a statutory offense, including the violation of a municipal ordinance, the warrant or indictment is sufficient if and when it follows the language of the statute or ordinance and thereby charges the essentials of the offense "in a plain, intelligible, and explicit manner." If the words of the statute fail to do this they must be supplemented by other allegations which so plainly, intelligibly and explicitly set forth every essential element of the offense as

to leave no doubt in the mind of the accused and the court as to the offense intended to be charged. *State v. Dorsett*, 272 N.C. 227, 158 S.E.2d 15 (1967).

The indictment should not charge a party disjunctively or alternatively, in such a manner as to leave it uncertain what is relied on as the accusation against him. *State v. Kelly*, 13 N.C. App. 588, 186 S.E.2d 631 (1972).

Two or more offenses cannot, in the absence of statutory permission, be alleged alternatively in the same count. *State v. Kelly*, 13 N.C. App. 588, 186 S.E.2d 631 (1972).

Where a statute specifies several means or ways in which an offense may be committed in the alternative, it is bad pleading to allege such means or ways in the alternative; the proper way is to connect the various allegations in the accusing pleading with the conjunctive term "and" not with the word "or." *State v. Kelly*, 13 N.C. App. 588, 186 S.E.2d 631 (1972).

In an indictment it is always the better practice to use the conjunctive "and" rather than the disjunctive "or" where a statute sets forth disjunctively several means or ways by which an offense may be committed. *State v. Kelly*, 13 N.C. App. 588, 186 S.E.2d 631 (1972).

Determination Whether Improper Use of Disjunctive Constitutes Fatal Defect.—Whether the improper use of the disjunctive constitutes a fatal defect in an indictment, or simply poor pleading, depends upon whether such use renders the indictment uncertain. *State v. Kelly*, 13 N.C. App. 588, 186 S.E.2d 631 (1972).

It is not necessary that the indictment refer to a particular statute. *Godlock v. Ross*, 259 F. Supp. 659 (E.D.N.C. 1966).

Reference to a specific statute, upon which the charge in a warrant or bill of indictment is laid, is not necessary to its validity. *State v. Hunt*, 265 N.C. 714, 144 S.E.2d 890 (1965).

An indictment need not set forth the specific facts or means by which an accused aided and abetted in the commission of a crime. *State v. Beach*, 283 N.C. 261, 196 S.E.2d 214 (1973).

The uniform traffic ticket's use as a warrant should not be encouraged. This form lacks that degree of clarity desirable in a warrant which should "express the charge against the defendant in a plain, intelligible, and explicit manner." *State v. Letterlough*, 6 N.C. App. 36, 169 S.E.2d 269 (1969).

Cited in *Klopfert v. North Carolina*, 368

U.S. 213, 87 Sup. Ct. 226, 17 L. Ed. 2d 141 (1967).

III. DEFECTS CURED.

A. In General.

Sufficiency of Warrant as to Definiteness.

—A charge must be sufficiently definite to enable the defendant to prepare his defense, to enable the court to proceed to judgment and to bar a subsequent prosecution for the same offense. This is the test of the sufficiency of a warrant as to the definiteness of its allegations. *State v. Tenore*, 280 N.C. 238, 185 S.E.2d 644 (1972).

Superfluous Words Disregarded.—

The use of superfluous words in a bill should be disregarded. *State v. Taylor*, 280 N.C. 273, 185 S.E.2d 677 (1972).

Nonessential Allegations May Be Treated as Surplusage.—Allegations beyond the

essential elements of the crime sought to be charged are irrelevant and may be treated as surplusage. *State v. Taylor*, 280 N.C. 273, 185 S.E.2d 677 (1972).

Waiver of Duplicity in Indictment.—By going to trial without making a motion to quash, defendant waived any duplicity that might have existed in the bill of indictment. *State v. Kelly*, 13 N.C. App. 588, 186 S.E.2d 631 (1972).

Incorporation of Essential Information by Reference.—Reference in the second count of an indictment for forgery and for uttering a bad check to the first count, wherein the check was fully described, was sufficient to incorporate by reference essential information necessary to sustain the second count. *State v. Russell*, 282 N.C. 240, 192 S.E.2d 294 (1972).

§ 15-155. Defects which do not vitiate.

Nothing in § 15-153 or in this section, etc.—

In accord with original. See *State v. McBane*, 276 N.C. 60, 170 S.E.2d 913 (1969).

When Time Need Not Be Charged.—

Where time is not of the essence of the offense and the statute of limitations is not involved, a discrepancy between the date alleged in the indictment and the date shown by the State's evidence is ordinarily not fatal; this rule, however, cannot be used to ensnare a defendant and thereby deprive him of an opportunity to present his defense adequately, as where he relies upon alibi. *State v. Lemmond*, 12 N.C. App. 128, 182 S.E.2d 636 (1971).

Variance.—

Variance between allegation and proof as to time is not material where no statute of limitations is involved. *State v. Davis*, 282 N.C. 107, 191 S.E.2d 664 (1972).

Variance between indictments which charged the defendant with purchasing heroin on July 8 and marijuana on July 11 and evidence which showed that the dates of purchase were reversed was not such a fatal variance as to require a new trial.

State v. Knight, 9 N.C. App. 62, 175 S.E.2d 232 (1970).

Substance of Indictment May Not Be Amended After Returned as True Bill.—

The substance of a bill of indictment used in a trial may not be amended by the court or the solicitor after it has been returned by the grand jury as a true bill. *State v. Haigler*, 14 N.C. App. 501, 186 S.E.2d 586 (1972).

Amendment of Description of Stolen Property Did Not Invalidate Breaking and Entering Court.—

An amendment by the solicitor of the description of the stolen property in felonious larceny and receiving counts of an indictment, if error, did not invalidate a count charging felonious breaking and entering, and was not prejudicial where the only sentence imposed was for breaking and entering. *State v. Haigler*, 14 N.C. App. 501, 188 S.E.2d 586 (1972).

Applied in *State v. Foster*, 282 N.C. 189, 192 S.E.2d 320 (1972).

Quoted in *State v. Lilley*, 3 N.C. App. 276, 164 S.E.2d 498 (1968).

Cited in *Klopfer v. North Carolina*, 368 U.S. 213, 87 Sup. Ct. 226, 17 L. Ed. 2d 141 (1967); *State v. Greenlee*, 272 N.C. 651, 159 S.E.2d 22 (1968).

ARTICLE 15A.

Investigation of Offenses Involving Abandonment and Nonsupport of Children.

§ 15-155.1. Reports to solicitors of aid to dependent children and illegitimate births.

Editor's Note.—

Session Laws 1973, c. 476, s. 138, effective July 1, 1973, amends this section by substituting "Department of Human Re-

sources" for "State Board of Public Welfare" and "Secretary of Human Resources" for "Director of Public Assistance."

§ 15-155.2. Solicitor to take action on report of aid to dependent child or illegitimate birth.—(a) Upon receipt of such reports as are provided for in G.S. 15-155.1, the solicitor of superior court may make an investigation to determine whether the mother of an illegitimate child or who is a recipient of aid to a dependent child or children, has abandoned, is wilfully neglecting or is refusing to support and maintain the child within the meaning of G.S. 14-326 or G.S. 49-2 or is diverting any part of the funds received as aid to a dependent child to any purpose other than for the support and maintenance of such dependent child in violation of G.S. 108-76.1. In making this investigation the solicitor is authorized to call upon:

- (1) Any county board of social services or the Department of Human Resources for personal, clerical or investigative assistance and for access to any records kept by either such board and relating to the matter under investigation and such boards are hereby directed to assist in all investigations hereunder and to furnish all records relating thereto when so requested by the solicitor;
- (2) The board of county commissioners of any county within his district for legal or clerical assistance in making any investigation or investigations in such county and such boards are hereby authorized to furnish such assistance in their discretion; and
- (3) The solicitor of any inferior court in his district for personal assistance in making any investigation or investigations in the county in which the court is located and any solicitor so called upon is hereby authorized to furnish such assistance by and with the consent of the board of county commissioners of the county in which the court is located, which board shall provide and fix his compensation for assistance furnished.

(1969, c. 982; 1973, c. 476, s. 138.)

Editor's Note.—The 1973 amendment, effective July 1, 1973, substituted "Department of Human Resources" for "State Board of Public Welfare" in subdivision (a)(1).

As the rest of the section was not changed by the amendment, only subsection (a) is set out.

ARTICLE 15B.

Pre-Trial Examination of Witnesses and Exhibits of the State.

§ 15-155.4. In general.—In all criminal cases before the superior court, the superior court judge assigned to hold the courts of the district wherein the case is pending, or the resident superior court judge of the district, shall for good cause shown, direct the solicitor or other counsel for the State to produce for inspection, examination, copying and testing by the accused or his counsel any specifically identified exhibits to be used in the trial of the case sufficiently in advance of the trial to permit the accused to prepare his defense; and such judge shall for good cause shown and regardless of any objection of the solicitor or other counsel for the State, direct that the accused or his counsel be permitted to examine before any clerk of superior court, or any other person designated by the judge for the purpose, any expert witnesses to be offered by the State in the trial of the case regarding the proposed testimony of such expert witnesses.

Prior to issuance of any order for the inspecting, examining, copying or testing of any exhibit or the examination of any expert witness under this section the accused or his counsel shall have made a written request to the solicitor or other counsel for the State for such inspection, examination, copying or testing of one or more specifically identified exhibits or the examination of a specific expert witness and have had such request denied by the solicitor or other counsel for the

State or have had such request remain unanswered for a period of more than 15 days. (1967, c. 1064.)

The purpose of this section is to enable a defendant to guard against surprise documents and surprise expert witnesses. *State v. Peele*, 281 N.C. 253, 188 S.E.2d 326 (1972); *State v. Davis*, 282 N.C. 107, 191 S.E.2d 664 (1972).

The common law recognizes no right to discovery in criminal cases. *State v. Davis*, 282 N.C. 107, 191 S.E.2d 664 (1972).

When Accused Entitled to Benefits of Section.—Under this section, an accused is entitled to the benefits provided therein when either he or his counsel (1) has made written request to the State's counsel that the State produce for defendant's inspection, examination, copying and testing sufficiently in advance of the trial to permit him to prepare his defense, (2) a specifically identified exhibit to be used in the trial of the case, and (3) said request has been denied or gone unanswered for more than fifteen days. *State v. Macon*, 276 N.C. 466, 173 S.E.2d 286 (1970); *State v. Mason*, 17 N.C. App. 44, 193 S.E.2d 324 (1972).

Pursuant to this section, the solicitor in a criminal trial is obligated to furnish certain specifically identified exhibits to the defendant to better enable him to prepare his defense. *State v. McDonald*, 11 N.C. App. 497, 181 S.E.2d 744 (1971); *State v. Summrell*, 13 N.C. App. 1, 185 S.E.2d 241 (1971).

This section does not contemplate that the solicitor be required to furnish defendant the names and addresses of all witnesses known to the State who might offer testimony favorable to defendant, and copies of written statements or transcripts of oral statements made by any witness. *State v. Peele*, 281 N.C. 253, 188 S.E.2d 326 (1972).

Defendant is not entitled to the granting of his motion for a fishing expedition. *State v. Davis*, 282 N.C. 107, 191 S.E.2d 664 (1972).

This section does not contemplate anything resembling the demand embraced in a motion for discovery of "any and all evidence in the possession of or known to the State of North Carolina favorable to or tending to favor the defendant." *State v. Gaines*, 283 N.C. 33, 194 S.E.2d 839 (1973).

Nor to receive the work product of police or State investigators. *State v. Davis*, 282 N.C. 107, 191 S.E.2d 664 (1972).

There is no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case. *State v. Davis*, 282 N.C. 107, 191 S.E.2d 664 (1972).

Applied in *State v. Macon*, 6 N.C. App. 245, 170 S.E.2d 144 (1969).

§ 15-155.5. Contents of order for examination of expert witnesses.—Such order for examination of the expert witnesses of the State may contain such protective provisions on behalf of the State or the witnesses as the judge deems just and reasonable, and may also direct the attendance of such witnesses for such examination. (1967, c. 1064.)

ARTICLE 17.

Trial in Superior Court.

§ 15-162. Prisoner standing mute, plea of "not guilty" entered.

Applied in *State v. Childs*, 265 N.C. 575, 144 S.E.2d 653 (1965); *State v. Childs*, 269 N.C. 307, 152 S.E.2d 453 (1967).

Cited in *State v. Spence*, 274 N.C. 536, 164 S.E.2d 593 (1968).

§ 15-162.1: Repealed by Session Laws 1971, c. 1225.

Editor's Note.—Former § 15-162.1 was enacted by Session Laws 1953, c. 616, and repealed by Session Laws 1969, c. 117. The repealing act was itself repealed, and the

section reenacted, by Session Laws 1971, c. 562, which was in turn repealed by Session Laws 1971, c. 1225.

§§ 15-163 to 15-165: Repealed by Session Laws 1967, c. 218, s. 4.

Cross References. — For present provisions as to peremptory challenges in crim-

inal cases, see § 9-21. As to challenge to special venire, see § 9-11.

§ 15-166. Exclusion of bystanders in trials for rape.

Exclusion of Bystanders Does Not Deny Right to Public Trial. — There was no merit in the contention of the defendants that the exclusion of bystanders during the

testimony of the prosecutrix in a prosecution for rape denied them the right to a public trial. *State v. Yoes*, 271 N.C. 616, 157 S.E.2d 386 (1967).

§ 15-169. Conviction of assault, when included in charge.

When Section Applicable.—

In accord with original. See *State v. Williams*, 275 N.C. 77, 165 S.E.2d 481 (1969); *State v. Stalnaker*, 1 N.C. App. 524, 162 S.E.2d 76 (1968); *State v. Murry*, 277 N.C. 197, 176 S.E.2d 738 (1970); *State v. Thompson*, 280 N.C. 202, 185 S.E.2d 666 (1972).

This section and § 15-170 are applicable only when there is evidence tending to show that the defendant may be guilty of a lesser offense. *State v. Carnes*, 279 N.C. 549, 184 S.E.2d 235 (1971).

This section is not applicable where all the evidence for the State, uncontradicted by any evidence for the defendant, if believed by the jury, shows that the crime charged in the indictment was committed as alleged therein, and there is no evidence tending to support a contention that the defendants, if not guilty of the crime charged in the indictment, were guilty of a crime of less degree. *State v. Cox*, 201 N.C. 357, 160 S.E. 358 (1931); *State v. Smith*, 268 N.C. 167, 150 S.E.2d 194 (1966).

This section is not applicable, where all the evidence for the State, uncontradicted by any evidence for the defendant, if believed by the jury, shows that the crime charged in the indictment was committed as alleged therein. *State v. LeGrande*, 1 N.C. App. 25, 159 S.E.2d 265 (1968).

Duty of Judge—Failure to Charge upon Lesser Degree.—

In a prosecution for armed robbery, where the evidence tends to show that the defendant had committed the armed robbery as alleged in the indictment or that the defendant was innocent, the trial court is not required to instruct the jury on the lesser included offenses of assault with a deadly weapon and simple assault. *State v. Martin*, 6 N.C. App. 616, 170 S.E.2d 539 (1969).

Where the evidence tended to show that defendant was apprehended by the owner of a filling station after defendant had broken into the station, and that defendant, by the use of a pistol, disarmed such owner and took his rifle, even conceding that defendant took the rifle "for a temporary use" and that he intended thereafter to abandon the rifle at the first opportunity, the evidence conclusively showed that defendant

intended to deprive the owner permanently of the rifle or to leave the recovery of the rifle by the owner to mere chance; therefore the evidence disclosed the *animus furandi*, and did not require the court to submit the question of defendant's guilt of assault as a less degree of the offense of robbery with firearms. *State v. Smith*, 268 N.C. 167, 150 S.E.2d 194 (1966).

The trial court in a rape prosecution did not err in failing to submit to the jury the lesser included offenses of assault with intent to commit rape and of assault on a female, where the State's evidence was positive as to each and every element of the crime of rape and there was no conflict in the evidence relating to any element thereof. *State v. Flippin*, 280 N.C. 682, 186 S.E.2d 917 (1972).

The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The presence of such evidence is the determinative factor. *State v. Williams*, 275 N.C. 77, 165 S.E.2d 481 (1969); *State v. Murry*, 277 N.C. 197, 176 S.E.2d 738 (1970); *State v. Carnes*, 279 N.C. 549, 184 S.E.2d 235 (1971).

The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The presence of such evidence is the determinative factor. Hence, there is no such necessity if the State's evidence tends to show a completed robbery and there is no conflicting evidence relating to elements of the crime charged. Mere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice. *State v. Legrande*, 1 N.C. App. 25, 159 S.E.2d 265 (1968); *State v. Norman*, 14 N.C. App. 394, 188 S.E.2d 667 (1972).

The court is not required to submit to the jury a lesser included offense when there is no evidence of such lesser included offense. *State v. LeGrande*, 1 N.C. App. 25, 159 S.E.2d 265 (1968).

The trial judge is not required to submit

to the jury a lesser included offense unless there is evidence thereof. *State v. Alexander*, 13 N.C. App. 216, 185 S.E.2d 302 (1971).

Applied in *State v. Fletcher*, 268 N.C.

140, 150 S.E.2d 54 (1966); *State v. Hamm*, 1 N.C. App. 444, 161 S.E.2d 758 (1968).

Cited in *Bumper v. North Carolina*, 391 U.S. 543, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (1968).

§ 15-170. Conviction for a less degree or an attempt.

Application of Section.—

In accord with 3rd paragraph in original. See *State v. Williams*, 275 N.C. 77, 165 S.E.2d 481 (1969); *State v. Stalnaker*, 1 N.C. App. 524, 162 S.E.2d 76 (1968); *State v. Murry*, 277 N.C. 197, 176 S.E.2d 738 (1970); *State v. Carnes*, 279 N.C. 549, 184 S.E.2d 235 (1971).

When a defendant is indicted for a criminal offense he may be convicted of the charged offense or of a lesser included offense when the greater offense charged in the bill contains all the essential elements of the lesser offense, all of which could be proved by proof of the allegations of fact contained in the indictment. *State v. Riera*, 276 N.C. 361, 172 S.E.2d 535 (1970).

Section 15-169 and this section are applicable only when there is evidence tending to show the defendant may be guilty of an included crime of lesser degree. *State v. Thompson*, 280 N.C. 202, 185 S.E.2d 666 (1972).

Election by Solicitor.—Upon the return of an indictment sufficient in form to support a conviction of the defendant of either the maximum degree of the offense charged, a lesser degree thereof or a lesser offense, all of the elements of which are included in the crime charged, the solicitor has the authority to elect not to try the defendant on the maximum degree of the offense charged but to put him on trial for the lesser degree thereof and lesser offenses included therein. The effect of such election by the solicitor, announced in open court, is that of a verdict of not guilty upon the maximum degree of the offense charged, leaving for trial the lesser degree and the lesser included offenses. *State v. Allen*, 279 N.C. 115, 181 S.E.2d 453 (1971).

Crime of Accessory Included.—

The crime of accessory before the fact to the crime charged in an original indictment is, in North Carolina, a lesser includable offense. *Richardson v. Ross*, 310 F. Supp. 134 (E.D.N.C. 1970).

Equivalent of Verdict of Not Guilty.—When, upon arraignment, or thereafter in open court, and in the presence of the defendant, the solicitor announces the State will not ask for a verdict of guilty of the maximum crime charged but will ask for a verdict of guilty on a designated

and included lesser offense embraced in the bill, and the announcement is entered in the minutes of the court, the announcement is the equivalent of a verdict of not guilty on the charge or charges the solicitor has elected to abandon. *State v. Gaston*, 4 N.C. App. 575, 167 S.E.2d 510 (1969).

A defendant may plead guilty to less degrees of the same crimes charged in the indictments against him, and the State may accept such pleas. *State v. Woody*, 271 N.C. 544, 157 S.E.2d 108 (1967).

Sufficiency of Indictment or Information.—An indictment or information is insufficient to charge the accused with the commission of a minor offense, or one of less degree, unless, in charging the major offense, it necessarily includes within itself all of the essential elements of the minor offense. *State v. Chavis*, 9 N.C. App. 430, 176 S.E.2d 388 (1970).

Evidence Must Justify, etc.—

This section does not make mandatory the submission to the jury of a lesser included offense where the indictment does not charge such offense and where there is no evidence of such offense. *State v. McLean*, 2 N.C. App. 460, 163 S.E.2d 125 (1968); *State v. Stevenson*, 3 N.C. App. 46, 164 S.E.2d 24 (1968).

Measuring Sufficiency of Evidence to Support Conviction of Lesser Degree. —

When the solicitor announces that he will not seek a conviction upon the maximum degree of the crime charged in the bill of indictment, and the defendant interposes no objection to being tried upon the lesser degree of the offense, the sufficiency of the evidence to support a conviction of the lesser degree must be measured by the same standards which would be applied had the bill of indictment charged only the lesser degree of the offense. *State v. Allen*, 279 N.C. 115, 181 S.E.2d 453 (1971).

A conviction of the maximum degree of the offense, for which the defendant was indicted and tried, will not be disturbed because of his contention that the trial court failed to instruct the jury as to a lesser degree of the offense, or failed to instruct them that they might return a verdict of guilty of such lesser degree, or expressly withheld from their consideration a verdict of guilty of such lesser de-

gree. *State v. Allen*, 279 N.C. 115, 181 S.E.2d 453 (1971).

Uncontradicted Evidence Showing, etc.—

When the State, either through a bill of indictment as returned by the grand jury or through the election of its solicitor to seek a lesser verdict, brings the defendant to trial on a lesser degree of the offense charged, the case can be submitted to the jury if the uncontradicted evidence, as thereafter developed, shows the defendant is guilty of the more serious degree of the crime. *State v. Allen*, 279 N.C. 115, 181 S.E.2d 453 (1971).

Where the uncontradicted evidence is that the deceased was murdered by poison, there is no basis for a verdict of second-degree murder or manslaughter. *State v. Allen*, 279 N.C. 115, 181 S.E.2d 453 (1971).

Simple assault is a lesser degree of the crime of aggravated assault. *State v. Jeffries*, 3 N.C. App. 218, 164 S.E.2d 398 (1968).

In a prosecution for murder, etc.—

Where the evidence in a first-degree murder prosecution is susceptible to the interpretation that defendant killed in self-defense, the court must submit the question of defendant's guilt of manslaughter. *State v. Holloway*, 7 N.C. App. 147, 171 S.E.2d 475 (1970).

An original indictment of murder in the first degree, handed down by a grand jury, is sufficient to support a plea of guilty to the lesser includable offense of accessory before the fact. *Richardson v. Ross*, 310 F. Supp. 134 (E.D.N.C. 1970).

In a prosecution for assault with a deadly weapon, etc.—

An indictment sufficiently charging defendant with assault with a deadly weapon, to wit, a pistol, with intent to kill and inflicting serious injury not resulting in death, includes the offense of assault with a deadly weapon. *State v. Caldwell*, 269 N.C. 521, 153 S.E.2d 34 (1967).

In a prosecution for burglary, etc.—

A felonious entering into a house otherwise than burglariously with intent to commit larceny, a violation of § 14-54, is a less degree of the felony of burglary in the first degree. *State v. Fikes*, 270 N.C. 780, 155 S.E.2d 277 (1967).

The defendant was charged with burglary in the first degree in the bill of indictment. And when the solicitor stated that he would not ask for a verdict of first degree burglary, but would only ask for a verdict of second degree burglary on the indictment, it was tantamount to taking a nolle prosequi with leave on the capital

charge. *State v. Gaston*, 4 N.C. App. 575, 167 S.E.2d 510 (1969).

Where the bill of indictment returned by the grand jury charged all elements of burglary in the first degree, the bill of indictment would have supported a verdict of guilty of either first-degree burglary or second-degree burglary as the evidence might warrant. *State v. Allen*, 279 N.C. 115, 181 S.E.2d 453 (1971).

Upon a trial under an indictment for first-degree burglary, there being no announcement by the solicitor of his intent to seek a milder verdict, the prosecuting witness testified that the defendant broke and entered her dwelling house in the nighttime and assaulted and raped her therein and the defense is alibi, to instruct the jury that it might return a verdict of second-degree burglary is simply to invite a compromise verdict. *State v. Allen*, 279 N.C. 115, 181 S.E.2d 453 (1971).

Where the solicitor's announcement precluded a verdict of guilty of burglary in the first degree, it was, in effect, a stipulation by the State that the house was not actually occupied at the time of the breaking and entering. The defendant, not having objected thereto at the time of the announcement, may not await the outcome of the trial and then attack the validity of the verdict that he was guilty of second-degree burglary on the ground that the house was occupied and so he was guilty of the more serious crime. *State v. Allen*, 279 N.C. 115, 181 S.E.2d 453 (1971).

If the bill of indictment, by omitting any allegation as to occupancy of the building, charged second-degree burglary only, and if the evidence is sufficient to show all of the elements thereof, proof of actual occupancy of the dwelling at the time of the breaking and entering is not a defense to the charge. *State v. Allen*, 279 N.C. 115, 181 S.E.2d 453 (1971).

In Prosecution for Robbery.—

It is true that in a prosecution for robbery with firearms, an accused may be acquitted of the major charge and convicted of an included or lesser offense, such as common-law robbery, or assault, or larceny from the person, or simple larceny, if a verdict for the included or lesser offense is supported by allegations of the indictment and by evidence on the trial. *State v. McLean*, 2 N.C. App. 460, 163 S.E.2d 125 (1968).

An indictment for armed robbery under § 14-87 will support a verdict of guilty of common-law robbery. *State v. Jackson*, 6 N.C. App. 406, 170 S.E.2d 137 (1969).

Where the evidence was not sufficient to make out a case of common-law robbery,

the court properly submitted the case on larceny from the person. *State v. Kirk*, 17 N.C. App. 68, 193 S.E.2d 377 (1972).

A violation of § 14-54 is a less degree of the felony of burglary in the first degree. *State v. Gaston*, 4 N.C. App. 575, 167 S.E.2d 510 (1969).

In Prosecution for Rape.—The trial court in a rape prosecution did not err in failing to submit to the jury the lesser included offenses of assault with intent to commit rape and of assault on a female, where the State's evidence was positive as to each and every element of the crime of rape and there was no conflict in the evidence relating to any element thereof. *State v. Flippin*, 280 N.C. 682, 186 S.E.2d 917 (1972).

Necessity for instructing jury, etc.—

In accord with original. See *State v. Williams*, 2 N.C. App. 194, 162 S.E.2d 688 (1968); *State v. Williams*, 275 N.C. 77, 165 S.E.2d 481 (1969); *State v. Stevenson*, 3 N.C. App. 46, 164 S.E.2d 24 (1968); *State v. Lilley*, 3 N.C. App. 276, 164 S.E.2d 498 (1968); *State v. Bailey*, 4 N.C. App. 407, 167 S.E.2d 24 (1969); *State v. Jones*, 6 N.C. App. 712, 171 S.E.2d 17 (1970); *State v. Parker*, 7 N.C. App. 191, 171 S.E.2d 665 (1970); *State v. Murry*, 277 N.C. 197, 176 S.E.2d 738 (1970); *State v. Carnes*, 279 N.C. 549, 184 S.E.2d 235 (1971).

When there is evidence to support a milder verdict, the court must charge upon it even when there is no specific prayer for the instruction. *State v. Riera*, 276 N.C. 361, 172 S.E.2d 535 (1970).

When a lesser included offense is supported by some evidence, a defendant is entitled to have the different views arising on the evidence presented to the jury upon proper instructions, and an error in this respect is not cured by a verdict finding the defendant guilty of a higher degree of the same crime, for in such case, it cannot be known whether the jury would have convicted of the lesser degree if the different views, arising on the evidence, had been correctly presented in the court's charge. *State v. Riera*, 276 N.C. 361, 172 S.E.2d 535 (1970).

Where there is evidence of defendant's guilt of a lesser degree of the crime charged in the indictment, the court must submit to the jury the issue of defendant's guilt of such lesser included offense, and the error of failure to submit such issue to the jury is not cured by a verdict convicting defendant of the offense as charged.

State v. Jones, 6 N.C. App. 712, 171 S.E.2d 17 (1969).

Where there is evidence that would support a lesser degree of the crime charged in the bill of indictment, a defendant is entitled to have the question of his guilt of the lesser crime submitted to the jury. If the court fails to do so, the error is not cured by a verdict of guilty of a higher offense. *State v. Holloway*, 7 N.C. App. 147, 171 S.E.2d 475 (1970).

The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The presence of such evidence is the determinative factor. Hence, there is no such necessity if the State's evidence tends to show a completed robbery and there is no conflicting evidence relating to elements of the crime charged. Mere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice. *State v. McLean*, 2 N.C. App. 460, 163 S.E.2d 125 (1968).

This section does not compel the trial court to charge on the lesser included offense where the evidence is such that the jury could not find that such lesser crime was committed. *State v. Stevenson*, 3 N.C. App. 46, 164 S.E.2d 24 (1968).

Where one is indicted for a crime and under the same bill it is permissible to convict the defendant of a less degree of the same crime and there is evidence tending to support a milder verdict the prisoner is entitled to have the different views presented to the jury under a proper charge, but where there is no evidence to support such milder verdict the court is not required to submit the question of such verdict to the jury. *State v. Thacker*, 13 N.C. App. 299, 185 S.E.2d 455 (1971).

Applied in *State v. Fletcher*, 268 N.C. 140, 150 S.E.2d 54 (1966); *State v. Worthey*, 270 N.C. 444, 154 S.E.2d 515 (1967); *State v. Jones*, 275 N.C. 432, 168 S.E.2d 380 (1969); *State v. Martin*, 6 N.C. App. 616, 170 S.E.2d 539 (1969); *State v. Accor*, 281 N.C. 287, 188 S.E.2d 332 (1972).

Quoted in *State v. Perry*, 265 N.C. 517, 144 S.E.2d 591 (1965); *State v. Barksdale*, 16 N.C. App. 559, 192 S.E.2d 659 (1972).

Cited in *Bumper v. North Carolina*, 391 U.S. 543, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (1968); *State v. Dickens*, 272 N.C. 515, 158 S.E.2d 614 (1968).

§ 15-172. Verdict for murder in first or second degree.

History of Section.—See *State v. Talbert*, 282 N.C. 718, 194 S.E.2d 822 (1973); *State v. Watkins*, 283 N.C. 17, 194 S.E.2d 800 (1973).

Purpose of Requirement That Jury Determine Degree.—The purpose of the requirement that the jury determine whether one charged under the statutory form is guilty of murder in the first or second degree was merely to eliminate that uncertainty when the defendant's plea was not guilty. *State v. Watkins*, 283 N.C. 17, 194 S.E.2d 800 (1973).

In requiring the jury to determine the degree of homicide of which defendant is guilty, this section merely codified the well established rule that a verdict which leaves the matter in conjecture will not support a judgment. *State v. Talbert*, 282 N.C. 718, 194 S.E.2d 822 (1973).

Such Requirement Is Only Incidentally Related to Death Penalty.—The statutory requirement that the jury determine the degree of murder of which a defendant is guilty is only incidentally related to the death penalty. *State v. Watkins*, 283 N.C. 17, 194 S.E.2d 800 (1973).

A defendant will not be permitted, etc.—

In accord with original. See *State v. Watkins*, 283 N.C. 17, 194 S.E.2d 800 (1973).

Though there is no statute in this State specifically prohibiting a court from accepting a plea of guilty to a capital crime, the judiciary has observed that prohibition and it has become the public policy of the State. *State v. Watkins*, 283 N.C. 17, 194 S.E.2d 800 (1973).

But He May Plead Guilty Where Maximum Punishment Is Life Imprisonment.—There is no rule which precludes a plea of guilty to a crime for which the maximum

punishment is life imprisonment. *State v. Watkins*, 283 N.C. 17, 194 S.E.2d 800 (1973).

The basis of the rule that a defendant cannot plead guilty to a capital crime is the fixed belief that a person should not sign his own death warrant and hang himself. *State v. Watkins*, 283 N.C. 17, 194 S.E.2d 800 (1973).

Verdicts of "guilty as charged" in prosecutions under § 15-144 have been held sufficient to support the judgment when the judge has instructed the jury to return a verdict of murder in the first degree or not guilty and there was no evidence to warrant a verdict of guilty of murder in the second degree or manslaughter. In such a situation the verdict will be taken with reference to the charge and the evidence in the case and interpreted as a verdict of guilty of the only charge submitted. This holding is an application of the general rule that a verdict apparently ambiguous may be given significance and correctly interpreted by reference to the allegations, the facts in evidence, and the instructions of the court. *State v. Talbert*, 282 N.C. 718, 194 S.E.2d 822 (1973).

When, in a prosecution for homicide upon an indictment drawn under § 15-144, the judge accepts a verdict of "guilty as charged" after having instructed the jury that it might return a verdict of guilty of murder in the first or second degree, or guilty of murder in either degree or manslaughter, such a verdict on such an indictment cannot be sustained. In such case the verdict is a general one without a response as to what grade of homicide the defendant was guilty, and a new trial must be ordered. *State v. Talbert*, 282 N.C. 718, 194 S.E.2d 822 (1973).

§ 15-173. Demurrer to the evidence.

Compared with § 1-183.—

Former § 1-183 was the statute setting forth the procedure to make a motion for judgment of compulsory nonsuit in civil actions and this section is the statute setting forth the procedure to make a motion for judgment of compulsory nonsuit in criminal actions. *Jenkins v. Hawthorne*, 269 N.C. 672, 153 S.E.2d 339 (1967).

No Difference in Motion to Dismiss and Motion for Judgment as in Case of Nonsuit.—As used in this section, there is no difference in legal significance between a motion "to dismiss the action" and a motion "for judgment as in case of nonsuit." *State v. Cooper*, 275 N.C. 283, 167 S.E.2d 266 (1969).

A motion for judgment as in case of nonsuit challenges the sufficiency of the State's evidence to warrant its submission to the jury and to support a verdict of guilty of the criminal offense charged in the warrant or indictment on which the prosecution is based. *State v. Vaughan*, 268 N.C. 105, 150 S.E.2d 31 (1966).

Means of Raising Objection, etc.—

In accord with original. See *State v. Wiggs*, 269 N.C. 507, 153 S.E.2d 84 (1967).

The objection that the evidence is not sufficient to carry the case to the jury must be raised during the trial by a motion for a compulsory nonsuit under this section or by a prayer for instruction to the jury. *State v. Glover*, 270 N.C. 319, 154 S.E.2d

305 (1967); *State v. Spencer*, 281 N.C. 121, 187 S.E.2d 779 (1972).

In a criminal case the proper motion to test the sufficiency of the State's evidence to carry the case to the jury is a motion to dismiss the action or a motion for judgment as in case of nonsuit. *State v. Dickens*, 278 N.C. 537, 180 S.E.2d 845 (1971).

On motion to nonsuit, the court is required, etc.—

The question for the court in considering a motion for judgment of nonsuit is whether there is reasonable basis upon which the jury might find that an offense charged in the indictment has been committed and the defendant is the perpetrator, or one of the perpetrators, of it. *State v. Price*, 280 N.C. 154, 184 S.E.2d 866 (1971).

On a motion for nonsuit the sole question for decision is whether upon a consideration of all the evidence admitted—whether competent or incompetent—in the light most favorable to the State, there is substantial evidence to support the finding that the offenses charged in the bills of indictment were committed by defendant. *State v. Allen*, 279 N.C. 406, 183 S.E.2d 680 (1971).

To withstand defendant's motion for judgment as of nonsuit, there must be substantial evidence against the accused of every essential element that goes to make up the crime charged and whether the State has offered such substantial evidence presents a question of law for the court. *State v. Allred*, 279 N.C. 398, 183 S.E.2d 553 (1971).

Whether Competent or Incompetent.—

In accord with original. See *State v. Walker*, 266 N.C. 269, 145 S.E.2d 833 (1966).

All of the evidence actually admitted, whether competent or incompetent, including that offered by defendant, if any, which is favorable to the State, must be taken into account and so considered by the court in ruling upon a motion for nonsuit. *State v. Jones*, 6 N.C. App. 712, 171 S.E.2d 17 (1969).

Admitted evidence, whether competent or incompetent must be considered in passing on defendant's motion under this section for judgment as in case of nonsuit. *State v. Accor*, 277 N.C. 65, 175 S.E.2d 583 (1970).

Effect of Defendant Introducing Testimony at Trial.—By introducing testimony at the trial, a defendant waives his right to except on appeal to the denial of his motion for nonsuit at the close of the State's evidence. His later exception to the denial of his motion for nonsuit made at

the close of all the evidence, however, draws into question the sufficiency of all the evidence to go to the jury. *State v. McWilliams*, 277 N.C. 680, 178 S.E.2d 476 (1971).

Motion Must Be Renewed—Waiver.—

In accord with 2nd paragraph in original. See *State v. Fikes*, 270 N.C. 780, 155 S.E.2d 277 (1967).

By introducing evidence after the denial of his motion for judgment of nonsuit, made when the State had rested its case, defendant waived the motion for dismissal which he made prior to the introduction of his evidence. *State v. Prince*, 270 N.C. 769, 154 S.E.2d 897 (1967).

When a defendant offers evidence after his motion for judgment as of nonsuit is overruled, he thereby waives all right to urge that denial as error upon appeal. *State v. McLamb*, 13 N.C. App. 705, 187 S.E.2d 458 (1972).

When the defendant offers evidence, he waives a motion for nonsuit lodged, either actually or by statute, at the close of the State's evidence and only the motion lodged at the close of all the evidence is considered. *State v. Paschall*, 14 N.C. App. 591, 188 S.E.2d 521 (1972).

Defendant's motions for nonsuit must be considered in light of all the evidence since he introduced evidence and thereby waived the motions made at the close of the State's evidence. *State v. Allen*, 279 N.C. 406, 183 S.E.2d 680 (1971).

Later Testimony of Codefendant Not Considered.—Where the defendant had not offered evidence, he was entitled to have his motion for nonsuit passed upon based on the facts in evidence when the State rested its case, and the Court of Appeals did not consider the later testimony of the codefendant. *State v. Berryman*, 10 N.C. App. 649, 179 S.E.2d 875 (1971).

When Motion Allowed.—When all the evidence, that of the State and that of the defendant, is to the same effect and tends only to exculpate the defendant, his motion for judgment as of nonsuit should be allowed. *State v. McWilliams*, 277 N.C. 680, 178 S.E.2d 476 (1971).

When Motion Denied.—

If there is any evidence which reasonably tends to show guilt of the offense charged and from which a jury might legitimately convict, a nonsuit motion should be denied. *State v. McWilliams*, 277 N.C. 680, 178 S.E.2d 476 (1971).

If there be substantial evidence from which a jury could find that the offense charged has been committed and that defendant committed it, regardless of whether

that evidence be direct or circumstantial or some combination of both, the motion to nonsuit should be overruled. *State v. Reynolds*, 18 N.C. App. 10, 195 S.E.2d 581 (1973).

Sufficiency of Evidence.—

In accord with 6th paragraph in original. See *State v. Walker*, 266 N.C. 269, 145 S.E.2d 833 (1966); *State v. Murphy*, 280 N.C. 1, 184 S.E.2d 845 (1971).

In accord with 7th paragraph in original. See *State v. Bogan*, 266 N.C. 99, 145 S.E.2d 374 (1965); *State v. Allred*, 279 N.C. 398, 183 S.E.2d 553 (1971); *State v. Bolin*, 281 N.C. 415, 189 S.E.2d 235 (1972); *State v. White*, 18 N.C. App. 31, 195 S.E.2d 576 (1973).

Upon a motion for judgment of nonsuit the evidence offered by the State must be taken in the light most favorable to the State and conflicts therein must be resolved in the State's favor, the credibility and effect of such evidence being a question for the jury. *State v. Church*, 265 N.C. 534, 144 S.E.2d 624 (1965).

Upon a motion for judgment of nonsuit, the evidence is taken in the light most favorable to the State and it is entitled to the benefit of every reasonable inference to be drawn therefrom. *State v. Beaver*, 266 N.C. 115, 145 S.E.2d 330 (1965).

On motion for judgment of nonsuit the evidence must be considered in the light most favorable to the State and contradictions and discrepancies therein do not warrant the granting of the motion. *State v. Jackson*, 265 N.C. 558, 144 S.E.2d 584 (1965).

On a motion to nonsuit, the evidence is to be considered in its most favorable light for the State, and the State is entitled to every inference of fact which may reasonably be deduced from the evidence, and contradictions and discrepancies in the State's evidence are for the jury to resolve and do not warrant the granting of the motion of nonsuit. *State v. Carter*, 265 N.C. 626, 144 S.E.2d 826 (1965).

If there be any evidence tending to prove the fact in issue, or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury. *State v. Bogan*, 266 N.C. 99, 145 S.E.2d 374 (1965).

There must be substantial evidence of all material elements of the offense to withstand the motion to dismiss. *State v. Bogan*, 266 N.C. 99, 145 S.E.2d 374 (1965).

On motion to nonsuit, the evidence must be considered in the light most favorable

to the State, and the State is entitled to every reasonable intendment thereon and every reasonable inference therefrom. Contradictions and discrepancies, even in the State's evidence, are for the jury to resolve, and do not warrant nonsuit. Only the evidence favorable to the State will be considered, and defendant's evidence relating to matters of defense, or defendant's evidence in conflict with that of the State, will not be considered. *State v. Henderson*, 276 N.C. 430, 173 S.E.2d 291 (1970).

In passing upon a motion for nonsuit in a criminal case, the evidence must be considered by the court in the light most favorable to the State and the State must be given the benefit of every reasonable inference to be drawn therefrom. *State v. Berryman*, 10 N.C. App. 649, 179 S.E.2d 875 (1971).

On motion for judgment as of nonsuit, the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference therefrom. *State v. Moore*, 279 N.C. 455, 183 S.E.2d 456 (1971).

On motion for nonsuit in a criminal case the evidence must be considered in the light most favorable to the State, the State is entitled to every reasonable inference which may legitimately be drawn from the evidence. *State v. Sallie*, 13 N.C. App. 499, 186 S.E.2d 667 (1972).

Motion to nonsuit requires the trial judge to consider the evidence in the light most favorable to the State, take it as true, and give the State the benefit of every reasonable inference to be drawn therefrom. *State v. McNeil*, 280 N.C. 159, 185 S.E.2d 156 (1971).

In considering a motion for nonsuit in a criminal case, the evidence must be considered in the aspect most favorable to the State. *State v. Jones*, 280 N.C. 60, 184 S.E.2d 862 (1971).

Upon motion for nonsuit in a criminal case the evidence must be viewed in the light most favorable to the State. *State v. Reynolds*, 18 N.C. App. 10, 195 S.E.2d 581 (1973).

On motion for nonsuit, all the evidence will be taken in the light most favorable to the State. *State v. Ferguson*, 17 N.C. App. 367, 194 S.E.2d 217 (1973).

In considering a trial court's denial of a motion for judgment of nonsuit, the evidence for the State, considered in the light most favorable to it, is deemed to be true and inconsistencies or contradictions therein are disregarded. *State v. Price*, 280 N.C. 154, 184 S.E.2d 866 (1971).

Upon a motion for judgment of nonsuit,

only the evidence favorable to the State is considered, and contradictions and discrepancies, even in the State's evidence, are matters for the jury and do not warrant nonsuit. *State v. Murphy*, 280 N.C. 1, 184 S.E.2d 845 (1971).

Contradictions and discrepancies, even in the State's evidence, are for the jury to resolve, and do not warrant nonsuit. *State v. Allred*, 279 N.C. 398, 183 S.E.2d 553 (1971); *State v. Bolin*, 281 N.C. 415, 189 S.E.2d 235 (1972). *State v. Sallie*, 13 N.C. App. 499, 186 S.E.2d 667 (1972).

Ordinarily contradictions and discrepancies bear solely upon the weight to be given the testimony of a witness, a matter within the province of the jury. *State v. Allred*, 279 N.C. 398, 183 S.E.2d 553 (1971).

Motion for nonsuit brings in question the sufficiency of all the evidence to take the case to the jury. *State v. Sallie*, 13 N.C. App. 499, 186 S.E.2d 667 (1972).

When considering a motion for nonsuit the court is not concerned with the weight of the testimony but only with its sufficiency to carry the case to the jury and sustain the indictment. *State v. McNeil*, 280 N.C. 159, 185 S.E.2d 156 (1971).

On a motion for judgment as of nonsuit the defendant's evidence, unless favorable to the State, is not to be taken into consideration; however, when not in conflict with the State's evidence, it may be used to explain or clarify that offered by the State. *State v. Jones*, 280 N.C. 60, 184 S.E.2d 862 (1971); *State v. Sallie*, 13 N.C. App. 499, 186 S.E.2d 667 (1972).

On a motion to nonsuit, the defendant's evidence which explains or makes clear the evidence of the State may be considered. *State v. Blizzard*, 280 N.C. 11, 184 S.E.2d 851 (1971).

On a motion for nonsuit, defendant's evidence which rebuts the inference of guilt may be considered when it is not inconsistent with the State's evidence. *State v. Blizzard*, 280 N.C. 11, 184 S.E.2d 851 (1971).

In considering a motion for judgment of nonsuit evidence of the defendant which is favorable to the State is considered, but his evidence in conflict with that of the State is not considered. *State v. Price*, 280 N.C. 154, 184 S.E.2d 866 (1971).

In considering a motion for nonsuit lodged at the close of all the evidence, any portion of defendant's evidence which is favorable to the State and any portion of defendant's evidence which explains or clarifies the State's evidence is to be considered, thus by omitting defendant's evidence from the record on appeal, defen-

dant would deprive the State of the benefit of such portions of defendant's evidence, which are entitled to consideration. *State v. Paschall*, 14 N.C. App. 591, 188 S.E.2d 521 (1972).

Evidence given by a qualified expert that fingerprints found at the scene of a crime correspond with those of an accused, when accompanied by substantial evidence of circumstances from which the jury can find that such fingerprints could have been impressed only at the time the offense was committed, is sufficient to withstand a motion for nonsuit. *State v. Reynolds*, 18 N.C. App. 10, 195 S.E.2d 581 (1973).

Same—Circumstantial Evidence.—

Motion to nonsuit should be denied if there is substantial evidence tending to prove each essential element of the offense charged. This rule applies whether the evidence is direct or circumstantial, or a combination of both. *State v. Stephens*, 244 N.C. 380, 93 S.E.2d 431 (1956).

The rule for determining the sufficiency of circumstantial evidence to withstand a motion for judgment as in case of nonsuit as set forth in *State v. Stephens*, 244 N.C. 380, 93 S.E.2d 431 (1956), is established law in this jurisdiction. *State v. Chavis*, 270 N.C. 306, 154 S.E.2d 340 (1967).

When the motion questions the sufficiency of circumstantial evidence, the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. *State v. Spencer*, 281 N.C. 121, 187 S.E.2d 779 (1972).

To warrant a conviction on circumstantial evidence, the facts and circumstances must be sufficient to constitute substantial evidence of every essential element of the crime charged. *State v. Blizzard*, 280 N.C. 11, 184 S.E.2d 851 (1971).

When the facts and circumstances warranted by the evidence do no more than raise a suspicion of guilt, they are insufficient to make out a case and a motion to dismiss should be allowed. *State v. Blizzard*, 280 N.C. 11, 184 S.E.2d 851 (1971).

Regardless of whether the evidence is direct, circumstantial, or both, if there is evidence from which a jury could find that the offense charged has been committed and that defendant committed it, the motion to nonsuit should be overruled. *State v. McNeil*, 280 N.C. 159, 185 S.E.2d 156 (1971).

When a motion is made for a judgment of nonsuit or for a directed verdict of not guilty, the trial judge must determine whether there is substantial evidence of every essential element of the offense, and

it is immaterial whether the substantial evidence is circumstantial, or direct, or both. *State v. Jones*, 280 N.C. 60, 184 S.E.2d 862 (1971).

Where all of the evidence introduced by the State is circumstantial in nature, it is not necessary that such evidence must establish facts so connected and related as to point unerringly to defendant's guilt and exclude any other reasonable hypothesis, but only that there be substantial evidence of all elements of the crime sufficient to submit the case to the jury. *State v. Griffin*, 18 N.C. App. 14, 195 S.E.2d 569 (1973).

Same—When State's Evidence Is Conflicting.—

The introduction in evidence by the State of a statement made by defendant which may tend to exculpate him, does not prevent the State from showing that the facts concerning the homicide were different from what the defendant said about them. *State v. Bolin*, 281 N.C. 415, 189 S.E.2d 235 (1972).

Same—When State Is Bound by Defendant's Extrajudicial Statement.—When the State introduced the defendant's extrajudicial statement, it was bound by what he said except insofar as it was contradicted and shown to be false. *State v. Bolin*, 281 N.C. 415, 189 S.E.2d 235 (1972).

When the State introduces in evidence exculpatory statements of the defendant which are not contradicted or shown to be false by any other facts or circumstances in evidence, the State is bound by these statements. *State v. Bolin*, 281 N.C. 415, 189 S.E.2d 235 (1972).

Same—Prosecution for Homicide.—

When the evidence taken in the light most favorable to the State, is sufficient to require submission of the case to the jury on the charge of second-degree murder and the lesser included offense of voluntary manslaughter, the judge does not commit error in denying defendant's motion for nonsuit made at the close of all the evidence. *State v. Barr*, 15 N.C. App. 116, 189 S.E.2d 638 (1972).

The evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of second degree murder of a three-year-old child where it tended to show that the child died as a result of receiving a severe blow on her abdomen, that the blow was received at a time when defendant and the child were alone together in a house trailer, that the blow causing death left a bruise mark on the child's abdomen which closely approximated the size and shape of the heel of a

man's boot, that defendant was wearing boots, that there were other bruises and cuts on the head and body which occurred close to or at the time of death, that the child had been horribly abused over a period of time prior to her death and that such abuse did not commence until defendant started living in the trailer with the child's mother. *State v. Sallie*, 13 N.C. App. 499, 186 S.E.2d 667 (1972).

Where the State's evidence established a brutal murder, showed that defendant had the opportunity to commit it and raised suspicion in imaginative minds, it did not suffice to sustain a conviction. *State v. Jones*, 280 N.C. 60, 184 S.E.2d 862 (1971).

Although the evidence raises suspicions as to defendant's involvement and possible guilt in respect of the death of the deceased the State failed to offer substantial evidence that the bullet which caused death was from a pistol fired by defendant. On account of the inadequacy of the evidence in respect of this essential element of the crime charged, the circumstantial evidence was held insufficient for submission to the jury. *State v. Allred*, 279 N.C. 398, 183 S.E.2d 553 (1971).

Evidence was sufficient in a murder case to withstand nonsuit where it tended to show that defendant and her deceased husband were driving along a rural road at the time of the homicide, that five gunshots sounded in rapid succession as the car came to a halt, that five bullet holes were observed on the right side of deceased's head, that a .22 caliber six-shot revolver was on the seat beside deceased when an officer arrived, that a search of defendant's purse revealed five spent .22 caliber cartridge casings, that deceased had changed his life-insurance beneficiary to his wife's name two months before his death, and that defendant had previously threatened to kill her husband. *State v. Griffin*, 18 N.C. App. 14, 195 S.E.2d 569 (1973).

Same—Personal Presence of Defendant.—

When two or more persons aid and abet each other in the commission of a crime, all being present, all are principals and equally guilty without regard to which one actually commits the offense. *State v. Wright*, 18 N.C. App. 76, 195 S.E.2d 801 (1973).

In a prosecution charging defendant with larceny of \$15 from the victim, evidence was sufficient to be submitted to the jury where it tended to show that defendant was present when the purse snatcher snatched the victim's purse, that he immediately ran away with the purse snatcher, that he accompanied the purse

snatcher on foot down the street some several minutes later, that he entered a department store with the purse snatcher for the purpose of making a purchase, and that he fled when accosted by police officers. *State v. Rankin*, 18 N.C. App. 252, 196 S.E.2d 621 (1973).

Same—Breaking and Entering and Larceny.—Where the evidence tended to show that fingerprints on vending machines in the refreshment area of a manufacturing company matched those of defendant, that the fingerprints could have been impressed only at the time the offenses charged were committed, that the refreshment area was not open to the public in general or to defendant in particular and that defendant had never lawfully been in or around the place of business before, evidence was sufficient to withstand nonsuit in a felonious breaking and entering and felonious larceny case. *State v. Reynolds*, 18 N.C. App. 10, 195 S.E.2d 581 (1973).

Same—Manslaughter.—In a prosecution for manslaughter, defendant's motion for nonsuit was properly denied where there was ample evidence that defendant operated his vehicle at the time in question at a speed in excess of the posted speed limit in a careless and reckless manner while under the influence of intoxicating beverages and that the death of the victim was proximately caused by the culpable negligence of defendant. *State v. Alexander*, 16 N.C. App. 95, 191 S.E.2d 395 (1972).

Same—Public Drunkenness and Resisting Arrest.—In a prosecution for public drunkenness and resisting arrest, evidence was sufficient to withstand nonsuit where it tended to show that defendant was a passenger in a car whose driver was arrested for drunken driving, that defendant, who appeared to be drunk himself, got out of the car and cursed at police, that defendant was then arrested for public drunkenness but refused to get into the police car, and that he could not be controlled and spat in policeman's face. *State v. Foust*, 18 N.C. App. 133, 196 S.E.2d 375 (1973).

Section 15-173.1 Does Not Change Waiver Rule in This Section.—The provisions of § 15-173.1, allowing review on appeal of the sufficiency of the State's evidence in a criminal case without regard to whether motion for nonsuit has been made or not, does not change the rule in this section which provides that if the defendant introduces evidence, he thereby waives any motion for dismissal or judgment as in case of nonsuit which he may have made prior to the introduction of his evidence

and cannot urge such prior motion as ground for appeal. *State v. Paschall*, 14 N.C. App. 591, 188 S.E.2d 521 (1972).

Variance.—

The defendant in a criminal action may raise the question of variance between the indictment and proof by a motion for nonsuit. *State v. Bell*, 270 N.C. 25, 153 S.E.2d 741 (1967); *State v. Overman*, 257 N.C. 464, 125 S.E.2d 920 (1962).

A fatal variance results in larceny cases where title to the property is laid in one person by the indictment and proof shows it in another. *State v. Spillars*, 280 N.C. 341, 185 S.E.2d 881 (1972).

In a prosecution on indictment charging the larceny of personal property of a named person, where evidence tended to show that the only property missing was that belonging to another person the motion for judgment as of nonsuit on the ground of fatal variance should have been granted. *State v. Thompson*, 280 N.C. 202, 185 S.E.2d 666 (1972).

Demurrer to the Evidence Properly Denied.—

See *State v. Hill*, 266 N.C. 103, 145 S.E.2d 346 (1965) (prosecution for assault with a brick); *State v. Burgess*, 266 N.C. 363, 145 S.E.2d 905 (1966) (prosecution for larceny).

Assignment of Error Where Defendant Has Offered Evidence in His Own Behalf.

—Where defendant offers evidence in his own behalf, his assignment of error must be directed to the court's refusal to grant his motion for compulsory nonsuit at the close of all the evidence. *State v. Jones*, 6 N.C. App. 712, 171 S.E.2d 17 (1969).

Supreme Court Will Consider Only Denial of Motion Made at Close of All the Evidence.—Where defendant offered evidence after his motion for judgment as of nonsuit at the close of the State's evidence, the Supreme Court on appeal will consider only the denial of the motion made at the close of all the evidence, and the court must act in light of all the evidence. *State v. Robbins*, 275 N.C. 537, 169 S.E.2d 858 (1969).

Judgment of Nonsuit Has Effect of Verdict of "Not Guilty".—Whether correct or erroneous, a judgment of nonsuit has the force and effect of a verdict of "not guilty." *State v. Ballard*, 280 N.C. 479, 186 S.E.2d 372 (1972).

Applied in *State v. Frazier*, 268 N.C. 249, 150 S.E.2d 431 (1966); *State v. Canady*, 8 N.C. App. 320, 174 S.E.2d 140 (1970); *State v. Stevens*, 9 N.C. App. 665, 177 S.E.2d 339 (1970); *State v. Pitts*, 10 N.C. App. 355, 178 S.E.2d 632 (1971); *State*

v. Harvey, 281 N.C. 1, 187 S.E.2d 706 (1972); State v. Fountain, 282 N.C. 58, 191 S.E.2d 674 (1972); State v. Davis, 282 N.C. 107, 191 S.E.2d 664 (1972).

Cited in State v. Meadows, 272 N.C. 327, 158 S.E.2d 638 (1968); State v. Howard, 274 N.C. 186, 162 S.E.2d 495 (1968); State v. Conrad, 275 N.C. 342, 168 S.E.2d

39 (1969); State v. Collins, 5 N.C. App. 516, 168 S.E.2d 514 (1969); State v. Parker, 279 N.C. 168, 181 S.E.2d 432 (1971); State v. Williams, 13 N.C. App. 233, 185 S.E.2d 27 (1971); State v. Black, 14 N.C. App. 373, 188 S.E.2d 634 (1972); State v. Wiggins, 16 N.C. App. 527, 192 S.E.2d 680 (1972).

§ 15-173.1. Review of sufficiency of evidence on appeal.—The sufficiency of the evidence of the State in a criminal case is reviewable upon appeal without regard to whether a motion has been made pursuant to G.S. 15-173 in the trial court. (1967, c. 762.)

This Section Does Not Change Waiver Rule in § 15-173.—The provisions of this section, allowing review on appeal of the sufficiency of the State's evidence in a criminal case without regard to whether motion for nonsuit has been made or not, does not change the rule in § 15-173 which provides that if the defendant introduces evidence, he thereby waives any motion for dismissal or judgment as in case of nonsuit which he may have made prior to the introduction of his evidence and cannot urge such prior motion as ground for appeal. State v. Paschall, 14 N.C. App. 591, 188 S.E.2d 521 (1972).

Review by Court of Appeals.—Pursuant to this section the Court of Appeals reviews the sufficiency of the evidence to sustain the verdict in a criminal case, notwithstanding the defendant failed to make

motions for nonsuit or directed verdict at the close of the State's evidence and at the conclusion of all the evidence. State v. Robinson, 13 N.C. App. 200, 184 S.E.2d 888 (1971).

Applied in State v. Conrad, 275 N.C. 342, 168 S.E.2d 39 (1969); State v. Canady, 8 N.C. App. 320, 174 S.E.2d 140 (1970); State v. Pitts, 10 N.C. App. 355, 178 S.E.2d 632 (1971); State v. Williams, 13 N.C. App. 233, 185 S.E.2d 27 (1971); State v. Black, 14 N.C. App. 373, 188 S.E.2d 634 (1972); State v. Hamlin, 15 N.C. App. 561, 190 S.E.2d 394 (1972); State v. Wiggins, 16 N.C. App. 527, 192 S.E.2d 680 (1972).

Quoted in State v. Davis, 273 N.C. 349, 160 S.E.2d 75 (1968).

Cited in State v. Broadnax, 13 N.C. App. 319, 185 S.E.2d 442 (1971).

§ 15-174. New trial to defendant.

Discretion of Trial Court.—The granting of a new trial in a criminal case on the ground of newly discovered evidence rests

in the sound discretion of the trial court. State v. Blalock, 13 N.C. App. 711, 187 S.E.2d 404 (1972).

§ 15-175. Nol. pros. after two terms; when capias and subpoenas to issue.

Editor's Note.—For note on nolle prosequi with leave, see 44 N.C.L. Rev. 1126 (1966).

Applied in Klopfer v. North Carolina, 368 U.S. 213, 87 Sup. Ct. 226, 17 L. Ed. 2d 141 (1967).

§ 15-176. Prisoner not to be tried in prison uniform.

This section does not explicitly make it unlawful for a defendant to be tried in prison clothes. State v. Westry, 15 N.C. App. 1, 189 S.E.2d 618 (1972).

Where Defendants Refuse to Wear Other than Prison Clothing.—Defendants who are tried in a gray shirt and gray trousers,

entirely as the result of their own refusal to wear the other clothing offered or to obtain other attire suffer prejudice, if any, entirely as a result of their own making. State v. Westry, 15 N.C. App. 1, 189 S.E.2d 618 (1972).

§ 15-176.1. Solicitor may argue for death penalty.

Policy of State.—It is the policy of this State, as declared in N.C. Const., Art. XI, § 1, and by the General Assembly in § 14-17, that one convicted of murder in the first degree, after a fair trial in accordance with the law, shall be put to death if the jury does not, in its discretion, recommend

punishment by imprisonment for life. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971).

The State is entitled to ask the jury, not only to find the defendant guilty of murder in the first degree, but also to impose the death penalty, and it follows, necessarily,

that it may introduce evidence, otherwise competent, to support such a verdict. *State v. Westbrook*, 279 N.C. 18, 181 S.E.2d 572 (1971).

Prosecuting Attorney Need Not Be Neutral.—In the discharge of his duties the prosecuting attorney is not required to be, and should not be, neutral. He is not the judge, but the advocate of the State's interest in the matter at hand. *State v. Westbrook*, 279 N.C. 18, 181 S.E.2d 572 (1971).

The argument of counsel must be left largely to the control and discretion of the presiding judge. *State v. Westbrook*, 279 N.C. 18, 181 S.E.2d 572 (1971).

And counsel must be allowed wide latitude in the argument of hotly contested cases. *State v. Westbrook*, 279 N.C. 18, 181 S.E.2d 572 (1971).

Scope of Proper Argument.—The prosecuting attorney may not, by argument, insinuating questions, or other means, place before the jury incompetent and prejudicial matters not legally admissible in evidence, and may not travel outside of the record or inject into his argument facts of his own knowledge or other facts not included in the evidence. *State v. Westbrook*, 279 N.C. 18, 181 S.E.2d 572 (1971).

The prosecuting attorney may use appropriate epithets which are warranted by the evidence. *State v. Westbrook*, 279 N.C. 18, 181 S.E.2d 572 (1971).

And he may vigorously urge the jury to convict and to impose the death penalty in the light of the evidence. *State v. Westbrook*, 279 N.C. 18, 181 S.E.2d 572 (1971).

The grand jury, an agency of the State, after investigation according to law, indicted the defendant for murder in the first degree, and the solicitor, an officer of the State, after investigation, determined, on behalf of the State, that the defendant should be tried for this offense and that the death penalty should be sought. These determinations having been made on behalf of the State, it was the right and duty of the prosecuting attorney, vigorously, but fairly and in accordance with law, both in the presentation of evidence and in his argument, to seek that result. *State v. Westbrook*, 279 N.C. 18, 181 S.E.2d 572 (1971).

Vigorous Denunciation of Defendant.—If the prosecuting attorney passed over the boundary of his right and duty in his argument to the jury by his vigorous denunciation of the defendant and thereby denied him a fair trial, the defendant is entitled to a new trial. *State v. Westbrook*, 279 N.C. 18, 181 S.E.2d 572 (1971).

Characterization of Defendant in Uncomplimentary Terms.—When the prosecuting attorney does not go outside of the record and his characterizations of the defendant are supported by evidence, the defendant is not entitled to a new trial by reason of being characterized in uncomplimentary terms in the argument. *State v. Westbrook*, 279 N.C. 18, 181 S.E.2d 572 (1971).

The Supreme Court must determine whether the solicitor violated the right of the defendant to a fair trial by the nature of his argument to the jury, from the record, irrespective of its view as to the policy of the State with regard to the punishment of the offense in question and without regard to the sufficiency of the evidence to support the verdict and sentence. *State v. Westbrook*, 279 N.C. 18, 181 S.E.2d 572 (1971).

Arguments by Solicitor Held Proper, etc.—

See *State v. Spence*, 271 N.C. 23, 155 S.E.2d 802 (1967).

In a first-degree murder prosecution, it was permissible for the solicitor to argue that in view of the brutality of defendant's conduct in the killing of his victim, the jury should find the defendant guilty of murder in the first degree without any recommendation that punishment be life imprisonment. *State v. Williams*, 276 N.C. 703, 174 S.E.2d 503 (1970).

Where the prosecuting attorney, while making a vigorous plea for the imposition of the death penalty, did not depart from or distort the record, and there was nothing in his argument which would tend to mislead the jury or deprive the defendant of a fair trial, the argument was proper. *State v. Westbrook*, 279 N.C. 18, 181 S.E.2d 572 (1971).

A judgment imposing the death penalty was affirmed, although the solicitor reviewed the evidence and argued with great zeal and fervor that in the light of the defendant's conduct in connection with the killing of the victim, the punishment therefor should be death and the jury should bring a verdict of guilty of murder in the first degree without a recommendation that the punishment should be life imprisonment. *State v. Westbrook*, 279 N.C. 18, 181 S.E.2d 572 (1971).

Arguments Held Improper.—Where the prosecuting attorney, in his argument, traveled outside the record, used language offensive in its nature, and, in support of his plea for the death penalty, injected into his argument his own account of his record as a solicitor in other cases for the purpose of persuading the jury that he did not

ask the death penalty where it was not deserved, the argument was improper. *State v. Westbrook*, 279 N.C. 18, 181 S.E.2d 572 (1971).

§ 15-176.2: Repealed by Session Laws 1973, c. 44, s. 1.

Cross Reference.—As to credits against the service of sentences and for attainment of prison privileges, see §§ 15-196.1 through 15-196.4.

ARTICLE 18.

Appeal.

§ 15-177.1. Appeal from justice of the peace or inferior court; trial anew or de novo.

Right of Appeal Secures Constitutional Right to Trial by Jury.—The fact that a right of appeal was given where the defendant was convicted in the lower court without the intervention of a jury has generally been regarded as a sufficient reason, in support of the validity of such trials without a jury in the inferior tribunal, as by appealing the defendant secures his right to a jury trial, in the superior court, and therefore cannot justly complain that he has been deprived of his constitutional right. *State v. Spencer*, 276 N.C. 535, 173 S.E.2d 765 (1970); *State v. Coats*, 17 N.C. App. 407, 194 S.E.2d 366 (1973).

A defendant has the right to appeal free of the fear of reprisal on the part of the sentencing judge. *Wood v. Ross*, 434 F.2d 297 (4th Cir. 1970).

Annulment of Judgment Appealed from.—When appeals are taken from a justice's court upon questions of law and fact, the judgment appealed from is completely annulled, and is not thereafter available for any purpose. *Wood v. Ross*, 434 F.2d 297 (4th Cir. 1970).

Definition.—The words "without prejudice from the former proceedings of the court below, irrespective of the plea entered or the judgment pronounced thereon" mean, among other things, that evidence as to a plea of guilty entered by a defendant in the inferior court is not competent against him on his trial de novo on his appeal in the superior court. To hold otherwise in a criminal case on appeal would render meaningless the words "without prejudice" and "irrespective of the plea entered." *State v. Overby*, 4 N.C. App. 280, 166 S.E.2d 461 (1969).

Trial De Novo.—It is established law in this State that trial de novo in the superior court is a new trial from beginning to end, on both law and facts, disregarding completely the plea, trial, verdict and judgment below; and the superior court judgment entered upon conviction there is wholly independent of any judgment which was entered in the inferior court. *State v. Spencer*, 276 N.C. 535, 173

S.E.2d 765 (1970); *State v. Coats*, 17 N.C. App. 407, 194 S.E.2d 366 (1973).

When an appeal of right is taken to the superior court in contemplation of law it is as if the case had been brought there originally and there had been no previous trial. The judgment appealed from is completely annulled and is not thereafter available for any purpose. *State v. Sparrow*, 276 N.C. 499, 173 S.E.2d 897 (1970); *State v. Coats*, 17 N.C. App. 407, 194 S.E.2d 366 (1973).

Defendants are entitled to a trial de novo in the superior court even though their trials in the inferior court were free from error. *State v. Spencer*, 276 N.C. 535, 173 S.E.2d 765 (1970).

Upon appeal from a county court to the superior court, a defendant, by virtue of the provisions of this section, is entitled to a trial de novo by a jury, without prejudice from the former proceedings of the court below and regardless of his plea of guilty and the judgment pronounced thereon in the county court. *State v. Broome*, 269 N.C. 661, 153 S.E.2d 384 (1967).

Whenever the accused in a criminal action appeals to the superior court from an inferior court, the action is to be tried anew from the beginning to the end in the superior court on both the law and the facts, without regard to the plea, the trial, the verdict, or the judgment in the inferior court. *Spriggs v. North Carolina*, 243 F. Supp. 57 (M.D.N.C. 1965); *Doss v. North Carolina*, 252 F. Supp. 298 (M.D.N.C. 1966).

By virtue of this section whenever the accused in a criminal action appeals to the superior court from an inferior court, the action is to be tried anew from the beginning to the end in the superior court on both the law and the facts, without regard to the plea, the trial, the verdict, or the judgment in the inferior court. *State v. Stilley*, 4 N.C. App. 638, 167 S.E.2d 529 (1969).

When a defendant in a criminal action appeals to the superior court from an inferior court, he is entitled to a trial anew

and de novo by a jury from the beginning to the end in the superior court on both the law and the facts, without regard to the plea, the trial, the verdict, or the judgment in the inferior court. *State v. Overby*, 4 N.C. App. 280, 166 S.E.2d 461 (1969).

The primary purpose of this section is to allow a completely new trial in superior court without the burden of the plea, judgment, or proceedings in the inferior court in the trial from which defendant appealed, but this section does not remove from consideration in the trial de novo the plea, judgment, and proceedings of a trial in district court which occurred prior to the trial appealed from. *State v. Coats*, 17 N.C. App. 407, 194 S.E.2d 366 (1973).

This section constitutes no impediment upon defendant's right to assert his plea of former jeopardy upon his trial de novo in superior court. *State v. Coats*, 17 N.C. App. 407, 194 S.E.2d 366 (1973).

A superior court judge erred in declaring this section unconstitutional upon an erroneous determination that this section bars a plea of former jeopardy upon defendant's trial de novo. *State v. Coats*, 17 N.C. App. 407, 194 S.E.2d 366 (1973).

Sentence of Superior Court, etc.—

In accord with original. See *State v. Morris*, 2 N.C. App. 262, 163 S.E.2d 108 (1968); *State v. Thompson*, 2 N.C. App. 508, 163 S.E.2d 410 (1968); *State v. Sparrow*, 276 N.C. 499, 173 S.E.2d 897 (1970).

Upon appeal from an inferior court for a trial de novo in the superior court, the superior court may impose punishment in excess of that imposed in the inferior court provided the punishment imposed does not exceed the statutory maximum. *State v. Spencer*, 276 N.C. 535, 173 S.E.2d 765 (1970); *State v. Coats*, 17 N.C. App. 407, 194 S.E.2d 366 (1973).

In the sound discretion of the superior court judge, the defendant's sentence may be lighter or heavier than that imposed in the district court. *State v. Spencer*, 276 N.C. 535, 173 S.E.2d 765 (1970).

And Imposition of Heavier Sentence Does Not Violate Constitutional or Statutory Rights.—The fact that a defendant received a greater sentence in the superior court than he received in a recorder's court is no violation of his constitutional or statutory rights. *State v. Sparrow*, 276 N.C. 499, 173 S.E.2d 897 (1970); *State v. Coats*, 17 N. C. App. 407, 194 S.E.2d 366 (1973).

The fact that defendants received a greater sentence in the superior court than they received in the district court is no

violation of their constitutional rights. *State v. Spencer*, 276 N.C. 535, 173 S.E.2d 765 (1970).

But Reasons for Heavier Sentence Must Affirmatively Appear.—Whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal. *State v. Sparrow*, 276 N.C. 499, 173 S.E.2d 897 (1970).

A more stringent sentence on appeal constitutes withdrawal of federal due process when there is no proof of intervening detrimental department. *Wood v. Ross*, 434 F.2d 297 (4th Cir. 1970).

A defendant can be tried solely on the appeal, but only then with assurance of no enhancement of punishment in the event of another conviction without proof of supervening misconduct. *Wood v. Ross*, 434 F.2d 297 (4th Cir. 1970).

Where the record reveals nothing which warrants the imposition of the harsher sentence at the de novo trial in the superior court, the harsher active and suspended sentences imposed at the trial de novo were a denial of due process. *McDougald v. Ivester*, 321 F. Supp. 943 (E.D.N.C. 1971).

A judge may constitutionally impose a harsher sentence at a new trial only if his reasons for doing so affirmatively appear and are based on adequate factual data of objective information appearing of record concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding; and the rationale underlying this holding is equally valid where the petitioner has "appealed" his original conviction and received harsher sentence upon a trial de novo. *McDougald v. Ivester*, 321 F. Supp. 943 (E.D.N.C. 1971).

Where petitioner was tried and convicted in the general county court of Buncombe County upon the charge of driving while intoxicated and was sentenced to imprisonment for nine months, and on appeal to the Superior Court of Buncombe County he was again convicted and sentenced to imprisonment for two years, and where the record revealed nothing which warranted the increased punishment, the harsher sentence on the second trial was a denial

of federal due process. *McDougald v. Ivester*, 321 F. Supp. 943 (E.D.N.C. 1971).

In the superior court the defendant may be tried upon the original accusation of the district court and without an indictment by a grand jury. *State v. Thompson*, 2 N.C. App. 508, 163 S.E.2d 410 (1968).

Judge of superior court is necessarily required to enter his own independent judgment, since the trial in the superior court is without regard to the proceedings in the inferior court. *Spriggs v. North Carolina*, 243 F. Supp. 57 (M.D.N.C. 1965); *Doss v. North Carolina*, 252 F. Supp. 298 (M.D.-N.C. 1966).

Amendment to Warrant.—As a general proposition the superior court, on an appeal from an inferior court upon a conviction of a misdemeanor, has power to allow an amendment to the warrant, provided the charge as amended does not change the offense with which defendant was originally charged. *State v. Thompson*, 2 N.C. App. 508, 163 S.E.2d 410 (1968).

Absence of Original Warrant as Ground for Attacking Jurisdiction of Superior Court.—In North Carolina appeals to the superior court from inferior courts, a defendant may be tried on the original warrant issued in the inferior court, but only after a defendant has been tried and convicted on the original warrant in the inferior court. Therefore, petitioner may attack the jurisdiction of the superior court by attacking the absence of the original warrant. *Spriggs v. North Carolina*, 243 F. Supp. 57 (M.D.N.C. 1965).

Absence of Counsel in Inferior Court.—Where petitioner is given a trial de novo in the superior court with the aid and benefit of counsel, and nothing done in the inferior court is used against him or to his prejudice, lack of counsel in the inferior court in no way denies petitioner due process of law. *Doss v. North Carolina*, 252 F. Supp. 298 (M.D.N.C. 1966).

Cited in *State v. Speights*, 280 N.C. 137, 185 S.E.2d 152 (1971); *Perry v. Blackledge*, 453 F.2d 856 (4th Cir. 1971).

§ 15-179. When State may appeal.—An appeal to the appellate division or superior court may be taken by the State in the following cases, and no other. Where judgment has been given for the defendant—

- (1) Upon a special verdict.
- (2) Upon a demurrer.
- (3) Upon a motion to quash.
- (4) Upon arrest of judgment.
- (5) Upon a motion for a new trial on the ground of newly discovered evidence, but only on questions of law.
- (6) Upon declaring a statute unconstitutional.
- (7) Upon a motion to bar prosecution based on the prohibition against double jeopardy. (Code, s. 1237; Rev., s. 3276; C. S., s. 4649; 1945, c. 701; 1969, c. 44, s. 35; 1973, c. 467.)

Editor's Note.—

The 1969 amendment substituted "appellate division" for "Supreme Court" in the first sentence.

The 1973 amendment added subdivision (7).

Legislative Intent. — The General Assembly, by the 1945 amendment to this section, intended to give the State the right to appeal when a criminal action is dismissed on the ground the statute purporting to create and to define the purported criminal offense on which the prosecution is based is unconstitutional and therefore affords no basis for such prosecution. *State v. Vaughan*, 268 N.C. 105, 150 S.E.2d 31 (1966).

Strict Construction.—Statutes authorizing an appeal by the prosecution will be strictly construed. *State v. Horton*, 7 N.C. App. 497, 172 S.E.2d 887 (1970); *State v.*

Harrell, 279 N.C. 464, 183 S.E.2d 638 (1971).

Right Is Statutory.—

As a general rule the prosecution cannot appeal or bring error proceedings from a judgment in favor of the defendant in a criminal case, in the absence of a statute clearly conferring that right. *State v. Horton*, 7 N.C. App. 497, 172 S.E.2d 887 (1970); *State v. Harrell*, 279 N.C. 464, 183 S.E.2d 638 (1971).

When Subdivision (6) of Section Gives Right to Appeal.—Subdivision (6) of this section gives the State the right to appeal when a criminal action is dismissed on the ground that the statute purporting to create and to define the purported criminal offense on which the prosecution is based is unconstitutional and therefore affords no basis for such prosecution. *State v. Harrell*, 279 N.C. 464, 183 S.E.2d 638 (1971).

Subdivision (6) of this section does not give the State the right to appeal from a judgment of "not guilty" notwithstanding the finding that the judgment is based in part on a finding that the statute under which defendant is charged is unconstitutional. *State v. Harrell*, 279 N.C. 464, 183 S.E.2d 638 (1971).

Designation of Proper Court for Appeal.

—If the State's right to appeal arises in the district court, the appeal is to the superior court; if it arises in the superior court, the appeal is to the appellate division. *State v. Greenwood*, 12 N.C. App. 584, 184 S.E.2d 386 (1971).

Section Does Not Specify Trial to Be De Novo.—This section permits the State to appeal under the limited circumstances enumerated but does not specify that the trial must be de novo. *State v. Greenwood*, 12 N.C. App. 584, 184 S.E.2d 386 (1971).

The word "demurrer," etc.—

The word "demurrer" is used in this section in its usual and ordinary significance, as understood and defined in criminal pleading. In criminal law a demurrer is a pleading by which the legality of the last preceding pleading is denied and put in issue, and the issue is then determined by the court. A demurrer is pleaded either to the indictment or to a special plea. *State v. Horton*, 7 N.C. App. 497, 172 S.E.2d 887 (1970).

A "motion to quash" is designed to test the validity of a warrant or bill of indictment. *State v. Horton*, 7 N.C. App. 497, 172 S.E.2d 887 (1970).

Motion to Dismiss Not Included.—This section does not list "upon a motion to dismiss" as one of the instances in which the State can appeal from an adverse judgment. *State v. Horton*, 7 N.C. App. 497, 172 S.E.2d 887 (1970).

Defendant's motion to dismiss a prosecution on the ground that he had been

denied his constitutional right to a speedy trial is neither a demurrer nor a motion to quash within the meaning of this section. *State v. Horton*, 7 N.C. App. 497, 172 S.E.2d 887 (1970).

Order of Mistrial Not Included.—The judgments from which the State can appeal are listed in this section, and an order of mistrial is not included therein. *State v. Allen*, 279 N.C. 492, 183 S.E.2d 659 (1971).

The State has no right of appeal from an order of mistrial. *State v. Helms*, 16 N.C. App. 162, 191 S.E.2d 375 (1972).

No Appeal from Judgment as in Case of Nonsuit.—This section contains no provision authorizing an appeal by the State from a judgment as in case of nonsuit. *State v. Vaughan*, 268 N.C. 105, 150 S.E.2d 31 (1966).

The 1945 amendment to this section does not authorize an appeal by the State from a judgment as in case of nonsuit notwithstanding such judgment is based in part upon a ruling that a statute purporting to create a rule of evidence is unconstitutional. *State v. Vaughan*, 268 N.C. 105, 150 S.E.2d 31 (1966).

Order Sustaining, etc.—

In accord with 2nd paragraph in original. See *State v. Peguise*, 2 N.C. App. 526, 163 S.E.2d 294 (1968).

Applied in *State v. Matthews*, 270 N.C. 35, 153 S.E.2d 791 (1967); *State v. McBane*, 276 N.C. 60, 170 S.E.2d 913 (1969); *State v. Lassiter*, 9 N.C. App. 255, 175 S.E.2d 689 (1970); *State v. Cox*, 13 N.C. App. 221, 185 S.E.2d 31 (1971); *State v. Williams*, 283 N.C. 550, 196 S.E.2d 756 (1973); *State v. Coats*, 17 N.C. App. 407, 194 S.E.2d 366 (1973).

Cited in *State v. Hundley*, 272 N.C. 491, 158 S.E.2d 582 (1968); *State v. Dorsett*, 3 N.C. App. 331, 164 S.E.2d 607 (1968); *State v. Martin*, 7 N.C. App. 532, 173 S.E.2d 47 (1970).

§ 15-180. Appeal by defendant to appellate division.—In all cases of conviction in the superior court for any criminal offense, the defendant shall have the right to appeal, on giving adequate security to abide the sentence, judgment or decree of the appellate division; and the appeal shall be perfected and the case for the appellate division settled, as provided in civil actions. (1818, c. 962, s. 4, P. R.; R. C., c. 4, s. 21; Code, s. 1234; Rev., s. 3277; C. S., s. 4650; 1969, c. 44, s. 36.)

Cross References.—

As to when appeal taken, see § 1-279.

Editor's Note.—

The 1969 amendment substituted "appellate division" for "Supreme Court" twice in the section.

The rules governing appeals are mandatory, not directory. *State v. Lewis*, 9 N.C. App. 323, 176 S.E.2d 1 (1970).

The right of appeal is unlimited in the courts of North Carolina. *State v. Darnell*, 266 N.C. 640, 146 S.E.2d 800 (1966).

In criminal cases the right of appeal by a convicted defendant from a final judgment is unlimited in the courts of North Carolina. *State v. Rhinehart*, 267 N.C. 470, 148 S.E.2d 651 (1966); *State v. May*, 8 N.C. App. 423, 174 S.E.2d 633 (1970);

State v. Lowry, 10 N.C. App. 717, 179 S.E.2d 888 (1971).

In the same statute wherein provision was made for the organization of the Supreme Court in 1818, it was declared that appeals might be taken from the sentence or judgment of the superior court "in any cause of action, civil or criminal," thus establishing the policy, ever since adhered to, of unlimited right of appeal to the Supreme Court by any party aggrieved. This right ought not to be denied or abridged, nor should the attempt to exercise this right impose upon the defendant an additional penalty or the enlargement of his sentence. State v. May, 8 N.C. App. 423, 174 S.E.2d 633 (1970).

And Is Easily Abused.—The unlimited right of a defendant to appeal is easily abused by an indigent defendant who may appeal without cost to himself. State v. Darnell, 266 N.C. 640, 146 S.E.2d 800 (1966).

This right of appeal is a substantial right. State v. Rhinehart, 267 N.C. 470, 148 S.E.2d 651 (1966); State v. May, 8 N.C. App. 423, 174 S.E.2d 633 (1970); State v. Lowry, 10 N.C. App. 717, 179 S.E.2d 888 (1971).

And Sentence May Not Be Suspended on Conditions Conflicting with Such Right.

—The execution of a sentence in a criminal action may not be suspended on conditions that conflict with the defendant's right of appeal. State v. Rhinehart, 267 N.C. 470, 148 S.E.2d 651 (1966); State v. May, 8 N.C. App. 423, 174 S.E.2d 633 (1970).

It is an unwarranted interference with defendant's right of appeal where the trial court, upon learning of defendant's intention to appeal, strikes defendant's suspended sentences and imposes active sentences. State v. May, 8 N.C. App. 423, 174 S.E.2d 633 (1970).

Authority of Court from Which Appeal Taken. — After an appeal is taken, the court from which it is taken has no authority with reference to the appellate procedure except that specifically conferred upon it by the statute. State v. Atkinson, 275 N.C. 288, 167 S.E.2d 241 (1969).

Period in Which Appeal to Be Taken.— Under this section and § 1-279 an appeal must be taken by a defendant in a criminal action within ten days after rendition of judgment, unless the record shows an appeal taken at the trial. Van Mitchell v. North Carolina, 247 F. Supp. 139 (E.D.N.C. 1964).

This section, by incorporating the provisions of § 1-279, provides that notice of

appeal must be filed within ten days after rendition of judgment. The constitutionality of this requirement was upheld by the Supreme Court of the United States in Brown v. Allen, 344 U.S. 443, 73 Sup. Ct. 397, 97 L. Ed. 469 (1953). Fox v. North Carolina, 266 F. Supp. 19 (E.D.N.C. 1967).

In the absence of a case on appeal served within the time fixed by the statute, or by valid enlargement, the appellate court will review only the record proper and determine whether errors of law are disclosed on the face thereof. State v. Lewis, 9 N.C. App. 323, 176 S.E.2d 1 (1970).

Extension of Time for Serving Statement of Case on Appeal.—Under this section and § 1-282, only the judge who tried a case can extend the time for serving the statement of the case on appeal. State v. Lewis, 9 N.C. App. 323, 176 S.E.2d 1 (1970).

This section and § 1-282 do not authorize a trial judge to grant an appellant another extension of time to serve statement of case on appeal after the expiration of the session at which the judgment was entered. However, the trial judge is given authority to do this under Rule 50 of the Rules of Practice in the Court of Appeals. State v. Lewis, 9 N.C. App. 323, 176 S.E.2d 1 (1970).

Appeal Lies Only from Final Judgment.

—A denial of a motion to suppress evidence is not a final judgment, and therefore appeal from such an order is premature. State v. Bryant, 12 N.C. App. 530, 183 S.E.2d 824 (1971).

Exercise of Right, etc.—

In accord with 1st paragraph in original. See State v. Rhinehart, 267 N.C. 470, 148 S.E.2d 651 (1966).

The trial judge may not impose a penalty on the exercise of the right to appeal. State v. Lowry, 10 N.C. App. 717, 179 S.E.2d 888 (1971).

If an appeal is allowed, it is not to be supposed that any penalty is attached thereto or imposed as a result thereof. State v. May, 8 N.C. App. 423, 174 S.E.2d 633 (1970).

Increase in Sentence.—A trial judge may increase the sentence given a defendant only where the record does not sustain the suggestion that the defendant was being penalized for announcing his intention to appeal. State v. Lowry, 10 N.C. App. 717, 179 S.E.2d 888 (1971).

It is incumbent upon the trial judge to correct a sentence which is less than the statutory minimum in such a manner as to preclude any inference that the greater sentence was given as a penalty for exer-

cising the right of appeal. Such an inference has a chilling effect on the exercise of the right to appeal and cannot be tolerated. *State v. Lowry*, 10 N.C. App. 717, 179 S.E.2d 888 (1971).

Defendant Entitled to Lesser Sentence.—Where a defendant was convicted and sentenced to forty-five days in jail, and the minimum statutory sentence was six months, and the sentence was increased to six months only after the defendant had notified the court of his intention to appeal, the trial judge was held to have allowed the inference that the greater sentence was imposed as a penalty for exercising the right of appeal, and the defendant was entitled to the lesser sentence. *State v. Lowry*, 10 N.C. App. 717, 179 S.E.2d 888 (1971).

Appeal Not Waived by Consent to Terms of Judgment.—Defendant's consent to the terms of a judgment does not constitute a waiver of his right of appeal for errors to be assigned. *State v. Rhinehart*, 267 N.C. 470, 148 S.E.2d 651 (1966); *State v. May*, 8 N.C. App. 423, 174 S.E.2d 633 (1970).

A defendant has the right to appeal even if he pleads guilty. *State v. May*, 8 N.C. App. 423, 174 S.E.2d 633 (1970).

The views of counsel concerning the trial and probable outcome of an appeal are not permitted to thwart an indigent's exercise of his right to appeal. *Virgil v. Harris*, 299 F. Supp. 509 (E.D.N.C. 1969).

Every lawyer, retained or appointed, has a primary obligation to give his client sound professional advice and a candid opinion of the merits and probable result of an appeal, and to attempt to dissuade his client from appealing on frivolous grounds, but in the final analysis the decision to appeal belongs to the client. *Virgil v. Harris*, 299 F. Supp. 509 (E.D.N.C. 1969).

A layman is not required to act as co-counsel on appeal and to comb the record for errors in the trial for the benefit of court-assigned counsel. *Virgil v. Harris*, 299 F. Supp. 509 (E.D.N.C. 1969).

Withdrawal of Court-Appointed Counsel.—If a court-appointed counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court—not counsel—then proceeds, after a full examination of all the

proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal. *Virgil v. Harris*, 299 F. Supp. 509 (E.D.N.C. 1969).

Defendant Held Not to Have Knowingly and Intelligently Waived His Right of Appeal.—See *Fox v. North Carolina*, 266 F. Supp. 19 (E.D.N.C. 1967).

Appeal Held Not Intelligently Waived, etc.—

Indigent did not knowingly and intentionally waive his right to an appellate review and did not instruct his counsel to abandon the appeal. *Virgil v. Harris*, 299 F. Supp. 509 (E.D.N.C. 1969).

It is the duty of appellant, etc.—

In accord with original. See *State v. Childs*, 269 N.C. 307, 152 S.E.2d 453 (1967).

Although the primary duty of preparing and docketing a true and adequate transcript of the record and case on appeal in a criminal case rests upon defense counsel, it is the duty of the solicitor to scrutinize the copy which appellant serves upon him. If it contains omissions, errors, or misleading juxtapositions, it is the solicitor's responsibility to file exceptions or a counter-case within his allotted time. *State v. Fox*, 277 N.C. 1, 175 S.E.2d 561 (1970); *State v. Fields*, 279 N.C. 460, 183 S.E.2d 666 (1971).

It is the duty of the defendant to see that the record is properly made up and transmitted, and when the matter complained of does not appear of record, defendant has failed to show prejudicial error. *State v. Kirby*, 15 N.C. App. 480, 190 S.E.2d 320 (1972).

Defense counsel, as officers of the court, have a duty to see that reporting errors are corrected; their duty to a client does not embrace the right to perpetuate and take advantage of such mistakes. *State v. Fields*, 279 N.C. 460, 183 S.E.2d 666 (1971).

Right to Review and Equal Protection Denied.—Where, on April 21, 1962, petitioner wrote trial judge a letter expressing his desire to appeal and delivered the letter to prison authorities on April 21 to be mailed to the trial judge, and it was so mailed on April 27, and thereafter, the trial judge informed petitioner that he had failed to give notice of appeal in apt time,

the petitioner, being an indigent prisoner without counsel at the time of his attempted appeal, was denied the statutory right to appellate review and his constitutional right of equal protection of the law. *Van Mitchell v. North Carolina*, 247 F. Supp. 139 (E.D.N.C. 1964).

Applied in *State v. Staten*, 271 N.C. 600, 157 S.E.2d 225 (1967).

Quoted in *Pitts v. North Carolina*, 267 F. Supp. 870 (M.D.N.C. 1967).

Cited in *State v. White*, 274 N.C. 220, 162 S.E.2d 473 (1968); *State v. Hickman*, 2 N.C. App. 627, 163 S.E.2d 632 (1968); *Anders v. Turner*, 379 F.2d 46 (4th Cir. 1967).

§ 15-180.1. Defendant may appeal from a suspended sentence.

Applied in *State v. Beach*, 283 N.C. 261, 196 S.E.2d 214 (1973).

Quoted in *State v. Baynard*, 4 N.C. App. 645, 167 S.E.2d 514 (1969).

Stated in *State v. Gallamore*, 6 N.C. App. 608, 170 S.E.2d 573 (1969).

§ 15-180.2. Appeal after plea of guilty or nolo contendere.—Notwithstanding any other provision of law, when a defendant pleads guilty or nolo contendere to a charge pending in the superior court division of the General Court of Justice, there shall be no right of appeal to the appellate division of such plea of guilty or nolo contendere but such defendant shall have the right to petition the appellate division for the issuance of a writ of certiorari to review the proceedings in the superior court division of the General Court of Justice. In the event the sentence imposed is life imprisonment the petition shall be directed to the Supreme Court; in all other cases it shall be directed to the Court of Appeals.

Petitions for writ of certiorari made under the provisions of this section shall be as provided in the Rules of Practice in the appellate division. (1973, c. 122, s. 1.)

Editor's Note.—Session Laws 1973, c. 122, s. 2, provides: "The provisions of this act shall apply to all pleas of guilty or nolo contendere entered in the Superior

Court Division of the General Court of Justice after the ratification of this act." The act was ratified Mar. 30, 1973.

§ 15-181. Defendant may appeal without security for costs.—Whenever an indigent entitled to counsel under the provisions of chapter 7A, subchapter IX, has been convicted in the superior court, he shall have the right to appeal without giving security for costs. (1869-70, c. 196, s. 1; Code, s. 1235; Rev., s. 3278; C. S., s. 4651; 1933, c. 197; 1937, c. 330; 1951, c. 81; 1963, c. 954; 1969, c. 1013, s. 7.)

Editor's Note.—

The 1969 amendment, effective July 1, 1969, rewrote this section.

Applied in *Virgil v. Harris*, 299 F. Supp. 509 (E.D.N.C. 1969).

Cited in *State v. White*, 274 N.C. 220, 162 S.E.2d 473 (1968); *Turner v. North Carolina*, 412 F.2d 486 (4th Cir. 1969).

§ 15-183. Bail pending appeal; custody of convicted persons not released on bail.—When any person convicted of a misdemeanor or felony other than a capital offense and sentenced by the court, shall appeal, the court shall allow such person to give bail pending appeal; provided, in capital cases where the sentence is life imprisonment, the court, in its discretion, may allow such person to give bail pending appeal.

Any person who shall appeal to the Appellate Division of the General Court of Justice, having been sentenced to a term of imprisonment for longer than thirty days, and is not released pursuant to this section pending appeal, such person may be placed in the custody of the Commissioner of Correction until such time as he may be released upon bail or by other lawful means and pend-

ing the action of the Appellate Division. (1850-1, c. 2; R. C., c. 35, s. 12; Code, s. 1181; Rev., s. 3280; C. S., s. 4653; 1953, c. 56; 1969, c. 542, s. 1.)

Editor's Note.—

The 1969 amendment added the second paragraph.

Session Laws 1969, c. 542, s. 3 provides: "This act shall become effective upon its ratification and shall apply to all persons who have appeals pending from and after ratification." The act was ratified May 19, 1969.

Amount of Bail.—

In accord with original. See *In re Reddy*, 16 N.C. App. 520, 192 S.E.2d 621 (1972).

Opinions of Attorney General. — Mr. Martin R. Peterson, N.C. Department of Correction, 40 N.C.A.G. 163 (1969).

§ 15-183.1: Repealed by Session Laws 1971, c. 377, s. 32, effective October 1, 1971.

§ 15-184. **Appeal not to vacate judgment; stay of execution.** — In criminal cases an appeal to the appellate division shall not have the effect of vacating the judgment appealed from, but upon perfecting the appeal as now required by law, either by giving bond or obtaining an order allowing appeal in forma pauperis, there shall be a stay of execution during the pendency of the appeal. The clerk of the superior court shall, after execution is stayed, as provided in this section, notify the Attorney General thereof. Said notice shall give the name of defendant, the crime of which he was convicted and if the statutory time for perfecting the appeal has been extended by agreement or otherwise, the time of such extension. If for any reason the defendant should wish to withdraw his appeal before the same is docketed in the appellate division, he may appear before the clerk of the superior court in which he was convicted and request in writing withdrawal of the appeal. The said clerk shall file and make an entry of such withdrawal and shall, if a sentence be called for, issue a commitment and deliver same to the sheriff. The sentence shall begin as of the date of the issuance of the commitment. (1887, c. 191, s. 1; c. 192, s. 4; Rev., s. 3281; 1919, c. 5; C. S., s. 4654; 1955, c. 882; 1969, c. 44, s. 38.)

Editor's Note.—The 1969 amendment substituted "appellate division" for "Supreme Court" in the first and fourth sentences.

Session Laws 1969, c. 266, which also amended this section, was repealed by Session Laws 1969, c. 888, which enacted § 15-186.1 in its place.

The constitutional guarantee against double jeopardy absolutely requires that punishment already exacted must be fully credited in imposing sentence upon a new conviction for the same offense. *Wilson v. North Carolina*, 438 F.2d 284 (4th Cir. 1971).

Denial of credit to a prisoner for the time he spent in jail from the date of his first conviction until the affirmance of his second appeal is multiple punishment. Such time must be fully credited insofar as possible as "punishment already exacted." Although it cannot be credited against his life sentence, which by its very nature is indefinite, it can be credited toward the 10 years he must wait to be considered for parole. *Wilson v. North Carolina*, 438 F.2d 284 (4th Cir. 1971).

Essence of Section Obliterated by

Former § 15-186.1.—See *Brooks v. Blackledge*, 353 F. Supp. 955 (W.D.N.C. 1973).

Life Sentence Not Reduced by Credits. —Because a life sentence lasts for the prisoner's natural life, no reduction in sentence by credits of any kind is possible. *Wilson v. North Carolina*, 438 F.2d 284 (4th Cir. 1971).

Withdrawal of Appeal by Indigent.—If an indigent's court-appointed counsel was under the impression that the indigent desired to withdraw his appeal, he should have followed the statutory procedure under this section rather than abandoning the appeal simply because the indigent failed affirmatively to instruct him to proceed. *Virgil v. Harris*, 299 F. Supp. 509 (E.D.N.C. 1969).

Applied in *State v. Hardee*, 6 N.C. App. 147, 169 S.E.2d 533 (1969); *Cole v. North Carolina*, 419 F.2d 127 (4th Cir. 1969).

Quoted in *Anders v. Turner*, 379 F.2d 46 (4th Cir. 1967).

Cited in *State v. Harrington*, 5 N.C. App. 622, 169 S.E.2d 32 (1969); *State v. Lewis*, 7 N.C. App. 178, 171 S.E.2d 793 (1970); *Haynes v. State*, 16 N.C. App. 407, 192 S.E.2d 95 (1972).

§ 15-185. Judgment for fines docketed; lien and execution.—When the sentence in whole or in part directs the payment of a fine, the judgment shall be docketed by the clerk and be a lien on the real estate of the defendant in the same manner as judgments in civil actions, and executions thereon shall only be stayed, upon an appeal taken, by security being given in like manner as is required in civil cases. Should the judgment be affirmed upon appeal to the appellate division, the clerk of the superior court, on receipt of the certificate from the appellate division, shall issue execution on such judgment. (1887, c. 191, s. 3; Rev., s. 3282; C. S., s. 4655; 1969, c. 44, s. 39.)

Editor's Note.—The 1969 amendment substituted "appellate division" for "Supreme Court" twice in the second sentence. Cited in *State v. Ferebee*, 266 N.C. 606, 146 S.E.2d 666 (1966).

§ 15-186. Procedure upon receipt of certificate of appellate division.—The clerk of the superior court in all cases where the judgment has been affirmed (except where the conviction is a capital felony), shall forthwith on receipt of the certificate of the opinion of the appellate division notify the sheriff, who shall proceed to execute the sentence which was appealed from. In criminal cases where the judgment is not affirmed the cases shall be placed upon the docket for trial at the first ensuing term of the court after the receipt of such certificate. (1887, c. 192, s. 3; Rev., s. 3283; C. S., s. 4656; 1969, c. 44, s. 40.)

Editor's Note.—The 1969 amendment substituted "appellate division" for "Supreme Court" in the first sentence. Cited in *State v. Lewis*, 7 N.C. App. 178, 171 S.E.2d 793 (1970).

§ 15-186.1: Repealed by Session Laws 1973, c. 44, s. 1.

Cross Reference.—As to credits against the service of sentences and for attainment of prison privileges, see §§ 15-196.1 through 15-196.4.

ARTICLE 19.

Execution.

§ 15-187. Death by administration of lethal gas.

Death Penalty Held Unconstitutional.—The imposition and carrying out of the death penalty, under statutes making the penalty discretionary with the judge or jury, was found to constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972).

§ 15-189. Sentence of death; prisoner taken to penitentiary.

No Distinction between Conviction by Plea or by Verdict.—Since an accused may be convicted by his plea as well as by a verdict, there is no reason to read into this section a legislative attempt to distinguish between conviction by plea and by verdict. *State v. Watkins*, 283 N.C. 17, 194 S.E.2d 800 (1973).
Applied in *State v. Talbert*, 282 N.C. 718, 194 S.E.2d 822 (1973).

ARTICLE 19A.

Credits against the Service of Sentences and for Attainment of Prison Privileges.

§ 15-196.1. Credits allowed.—The term of a determinate sentence or the minimum and maximum term of an indeterminate sentence shall be credited with and diminished by the total amount of time a defendant has spent, committed to or in confinement in any State or local correctional, mental or other institution as a result of the charge that culminated in the sentence. The credit provided shall be calculated from the date custody under the charge commenced and shall include credit for all time spent in custody pending trial, trial de novo, appeal, retrial, or

pending parole and probation revocation hearing: Provided, however, the credit available herein shall not include any time that is credited on the term of a previously imposed sentence to which a defendant is subject. (1973, c. 44, s. 1.)

Editor's Note.—Session Laws 1973, c. 44, s. 2, provides: "This act shall become effective upon ratification. This act is applicable to all prisoners, including those convicted prior to its enactment who are entitled to, but who have not heretofore received all such allowable credit." The act was ratified March 1, 1973.

Credit withheld for inability to make bail discriminatory.—Denial of credit for pre-trial custody necessitated by financial inability to make bail is discrimination based on financial status. *Steele v. North Carolina*, 348 F. Supp. 1023 (W.D.N.C. 1972), decided under former § 15-176.2.

§ 15-196.2. Allowance in cases of multiple sentences.—In the event time creditable under this section shall have been spent in custody as the result of more than one pending charge, resulting in imprisonment for more than one offense, credit shall be allowed as herein provided. Consecutive sentences shall be considered as one sentence for the purpose of providing credit, and the creditable time shall not be multiplied by the number of consecutive offenses for which a defendant is imprisoned. Each concurrent sentence shall be credited with so much of the time as was spent in custody due to the offense resulting in the sentence. When both concurrent and consecutive sentences are imposed, both of the above rules shall obtain to the applicable extent. (1973, c. 44, s. 1.)

§ 15-196.3. Effect of credit.—Time creditable under this section shall reduce the determinate term or the minimum and maximum term of an indeterminate sentence; and, irrespective of sentence, shall reduce the time required to attain privileges made available to inmates in the custody of the State Department of Correction which are dependent, in whole or in part, upon the passage of a specific length of time in custody, including parole consideration by the State Board of Paroles. However, nothing in this section shall be construed as requiring an automatic award of privileges by virtue of the passage of time. (1973, c. 44, s. 1.)

§ 15-196.4. Procedures for judicial award.—Upon sentencing or activating a sentence, the judge presiding shall determine the credits to which the defendant is entitled and shall cause the clerk to transmit to the custodian of the defendant a statement of allowable credits. Upon committing a defendant upon the conclusion of an appeal, or a parole or probation revocation, the committing authority shall determine any credits allowable on account of these proceedings and shall cause to be transmitted, as in all other cases, a statement of the allowable credit to the custodian of the defendant. Upon reviewing a petition seeking credit not previously allowed, the court shall determine the credits due and forward an order setting forth the allowable credit to the custodian of the petitioner. (1973, c. 44, s. 1.)

ARTICLE 20.

Suspension of Sentence and Probation.

§ 15-197. Suspension of sentence and probation.

Editor's Note.—

For a brief comparison of criminal law sanctions in two civil rights cases, see 43 N.C.L. Rev. 667 (1965).

Probation and Parole Distinguished.—Probation relates to judicial action taken before the prison door is closed, whereas parole relates to executive action taken after the door has closed on a convict. *State v. Hewett*, 270 N.C. 348, 154 S.E.2d 476 (1967).

Probation or suspension of sentence is

not a right granted by either the Constitution of the United States or the Constitution of this State, but is an act of grace to one convicted of crime. *State v. Hewett*, 270 N.C. 348, 154 S.E.2d 476 (1967).

An order suspending the imposition, etc.—

When a sentence of imprisonment in a criminal case is suspended upon certain valid conditions expressed in a probation judgment, defendant has a right to rely upon such conditions, and as long as he

complies therewith the suspension must stand. In such a case, defendant carries the keys to his freedom in his willingness to comply with the court's sentence. *State v. Hewett*, 270 N.C. 348, 154 S.E.2d 476 (1967).

Applied in *State v. Boggs*, 16 N.C. App. 403, 192 S.E.2d 29 (1972).

§ 15-198. Investigation by probation officer.

Applied in *State v. Pigg*, 13 N.C. App. 345, 185 S.E.2d 438 (1971).

Stated in *State v. Beach*, 283 N.C. 261, 196 S.E.2d 214 (1973).

Cited in *State v. Baynard*, 4 N.C. App. 645, 167 S.E.2d 514 (1969); *Hewett v. North Carolina*, 415 F.2d 1316 (4th Cir. 1969); *In re Walker*, 282 N.C. 28, 191 S.E.2d 702 (1972).

§ 15-199. Conditions of probation.

Editor's Note.—

Subdivision (7) in the replacement volume should read as follows: "(7) Deposit with the clerk of the court a bond for his appearance at such time or times as the court may direct. In the event the probationer is unable to provide the bond otherwise, the court may require the bond to be paid in cash from his earnings in such installments and at such intervals as the court may direct;"

The condition that a probationer avoid injurious or vicious habits is a valid condition of probation. *State v. Hewett*, 270 N.C. 348, 154 S.E.2d 476 (1967).

The condition that probationer shall avoid persons or places of disreputable or harmful character, is within the power of the court to impose. *State v. Boggs*, 16 N.C. App. 403, 192 S.E.2d 29 (1972).

Persons of Disreputable or Harmful Character.—In the exercise of common reasoning in the interpretation and understanding of the meaning of the English language, persons who use heroin and

marijuana and who have been convicted of a conspiracy to bomb an occupied building are "persons of a disreputable or harmful character." *State v. Boggs*, 16 N.C. App. 403, 192 S.E.2d 29 (1972).

Condition That Defendant Reimburse State for Cost of Court-Appointed Counsel.

—A condition of probation requiring the defendant to reimburse the State for the cost of court-appointed counsel, while not among those specifically listed, is permissible under this section. *State v. Foust*, 13 N.C. App. 382, 185 S.E.2d 718 (1972).

Reparation of injuries to a party aggrieved as a result of or incident to an offense committed by a criminal defendant as a condition to suspension of sentence has long been recognized in North Carolina judicially and by statute. *State v. Gallamore*, 6 N.C. App. 608, 170 S.E.2d 573 (1969).

Applied in *Hewett v. North Carolina*, 415 F.2d 1316 (4th Cir. 1969).

Quoted in *State v. Seagraves*, 266 N.C. 112, 145 S.E.2d 327 (1965).

§ 15-200. Termination of probation, arrest, subsequent disposition.

—The period of probation or suspension of sentence shall not exceed a period of five years and shall be determined by the judge of the court and may be continued or extended, terminated or suspended by the court at any time, within the above limit. Upon the satisfactory fulfillment of the conditions of probation or suspension of sentence the court shall by order duly entered discharge the defendant. At any time during the period of probation or suspension of sentence, the court may issue a warrant and cause the defendant to be arrested for violating any of the conditions of probation or suspension of sentence. Any police officer, or other officer with power of arrest, upon the request of the probation officer, may arrest a probationer without a warrant. In case of an arrest without a warrant the arresting officer shall have a written statement signed by said probation officer setting forth that the probationer has, in his judgment, violated the conditions of probation; and said statement shall be sufficient warrant for the detention of said probationer in the county jail, or other appropriate place of detention, until said probationer shall be brought before the judge of the court. Such probation officer shall forthwith report such arrest and detention to the judge of the court, or in superior court cases to the judge holding the courts of the district, or the resident judge, or any judge commissioned at the time to hold court in said district, and submit in writing a report showing in what man-

ner the probationer has violated probation. Upon such arrest, with or without warrant, the court shall cause the defendant to be brought before it in or out of term and may revoke the probation or suspension of sentence, and shall proceed to deal with the case as if there had been no probation or suspension of sentence. If at any time during the period of probation or suspension of sentence a warrant is issued and the defendant is arrested for a violation of any of the conditions of probation or suspension of sentence, or in the event any person is arrested at the instance of a probation officer, the defendant shall be allowed to give bond pending a hearing before the judge of the court, and the court issuing the order of arrest shall in said order, fix the amount of the appearance bond, or if appearance bond should not be fixed by the court, the officer having the defendant in charge shall take sufficient justified bail for the defendant's appearance at said hearing and the bond shall be returnable at such time and place as shall be designated by the probation officer.

Where a probationer resides in, or violates the terms of his probation in, a county and judicial district other than that in which said probationer was placed on probation, concurrent jurisdiction is hereby vested in the resident judge of superior court of the district in which said probationer resides or in which he violates the terms of his probation, or the judge of superior court holding the courts of such district, or a judge of the superior court commissioned to hold court in such district, to issue warrants for the arrest of such probationer, to discharge such probationer from probation, to continue, extend, suspend or terminate the period of probation of such probationer, and to revoke probation and enter judgment or put into effect suspended sentences of probation judgment, for breach of the conditions of probation, as fully as same might be done by the courts of the county and district in which such probationer was placed on probation, when such probationer was originally placed on probation by a superior court judge; provided, that the court may, in its discretion, for good cause shown, and shall on request of the probationer, return such probationer for hearing and disposition to the county or judicial district in which such probationer was originally placed on probation; provided, that in cases where the probation is revoked in a county other than the county of original conviction, the clerk in such county revoking probation may record the order of revocation in the judge's minute docket, which shall constitute sufficient permanent record of the proceedings in that court, and shall send one copy of the order revoking probation to the North Carolina Department of Correction to serve as a temporary commitment, and shall send the original order revoking probation and all other papers pertaining thereto, to the county of original conviction to be filed with the original records; the clerk of the county of original conviction shall then issue a formal commitment to the North Carolina Department of Correction. The provisions of this section apply also to the District Court Division. When a probationer resides in, or violates the terms of his probation in, a county and judicial district other than that in which the probationer was placed on probation by a district court, concurrent jurisdiction is hereby vested in the judges of the district court of the district in which the probationer resides or in which he violates the terms of his probation. (1937, c. 132, s. 4; 1939, c. 373; 1953, c. 43; 1955, c. 120; 1959, c. 424; 1961, c. 1185; 1967, c. 996, s. 13; 1971, c. 377, s. 31.)

Editor's Note.—

The 1967 amendment, effective Aug. 1, 1967, substituted "Department of Correction" for "Prison Department" in two places near the end of the first sentence of the second paragraph.

The 1971 amendment, effective Oct. 1, 1971, added the last two sentences of the second paragraph.

Purpose.—The primary purpose of a suspended sentence or parole is to further

the reform of the defendant. *State v. Baynard*, 4 N.C. App. 645, 167 S.E.2d 514 (1969).

Prisoner Has Right to Rely on Conditions of Suspension.—Where a sentence in a criminal case is suspended upon certain valid conditions expressed in the sentence imposed, the prisoner has a right to rely upon such conditions. *State v. Seagraves*, 266 N.C. 112, 145 S.E.2d 327 (1965).

And so long as he complies with such

conditions, the suspension should stand. *State v. Seagraves*, 266 N.C. 112, 145 S.E.2d 327 (1965).

The provision of this section wherein it is stated "the period of probation or suspension of sentence shall not exceed a period of five years" has nothing to do with the length of a sentence that may be suspended but limits the period of time for which it may be suspended. *State v. Ray*, 12 N.C. App. 646, 184 S.E.2d 391 (1971).

The provision that the judge "shall proceed to deal with the case as if there had been no probation or suspension of sentence" is not statutory authority for the judge, at a probation revocation hearing, to order the sentence imposed by the trial judge to run consecutively with some other sentence unless the trial judge ordered it at the time the sentence was imposed. *State v. Fields*, 11 N.C. App. 708, 182 S.E.2d 213 (1971).

Jurisdiction of Judge to Conduct a Revocation Hearing.—The resident judge of a judicial district, the judge holding the courts of a judicial district, or any judge commissioned at the time to hold court in a judicial district, is clothed with jurisdiction to conduct a revocation hearing with respect to all probationers who reside in the district or who were placed on probation in any county in the district or who violated the conditions of probation in any county in the district. *State v. Braswell*, 283 N.C. 332, 196 S.E.2d 185 (1973).

The judge has discretion whether to revoke a probation upon his finding that a condition of probation has been violated. Thus, liberty hangs in the balance. *Hewett v. North Carolina*, 415 F.2d 1316 (4th Cir. 1969).

The question of whether a condition of probation has been violated is always for the court and not for a jury. *State v. Butcher*, 10 N.C. App. 93, 177 S.E.2d 924 (1970).

A proceeding to revoke probation is not a criminal prosecution. *State v. Butcher*, 10 N.C. App. 93, 177 S.E.2d 924 (1970).

And there is no statute in this State requiring a formal trial in such a proceeding. *State v. Butcher*, 10 N.C. App. 93, 177 S.E.2d 924 (1970).

Proceedings to revoke probation are often regarded as informal or summary. *State v. Butcher*, 10 N.C. App. 93, 177 S.E.2d 924 (1970).

In a probation hearing, the court is not bound by strict rules of evidence. *State v. Butcher*, 10 N.C. App. 93, 177 S.E.2d 924 (1970).

And the alleged violation of a valid condition of probation need not be proven be-

yond a reasonable doubt. *State v. Butcher*, 10 N.C. App. 93, 177 S.E.2d 924 (1970).

But substantial rights are litigated in every revocation of probation proceeding, irrespective of the preciseness of the claimed violation or the complexity of the factual inquiry. *Hewett v. North Carolina*, 415 F.2d 1316 (4th Cir. 1969).

At stake in a revocation of probation proceeding is individual liberty, and the substantiality of this right may not be disputed. *Hewett v. North Carolina*, 415 F.2d 1316 (4th Cir. 1969).

And appointment of counsel is constitutionally required when proceedings to revoke probation are conducted. *Hewett v. North Carolina*, 415 F.2d 1316 (4th Cir. 1969).

A defendant charged with the violation of conditions of a probation sentence is entitled to representation by an attorney. *State v. Atkinson*, 7 N.C. App. 355, 172 S.E.2d 249 (1970).

While the right to counsel applies to "criminal proceedings," there is little doubt that the revocation of probation is a stage of criminal proceedings. Even if a new sentence is not imposed, it is the event which makes operative the loss of liberty. *Hewett v. North Carolina*, 415 F.2d 1316 (4th Cir. 1969).

This section does not involve defendant's Sixth Amendment rights since a hearing to determine whether the terms of a suspended sentence have been violated is not a criminal prosecution and is not a jury matter. *State v. Braswell*, 283 N.C. 332, 196 S.E.2d 185 (1973).

This section authorizes issuance of a probation violation warrant at any time during the period of probation. *State v. Best*, 10 N.C. App. 62, 177 S.E.2d 772 (1970).

But it does not require that the defendant be apprehended and brought into court for hearing within that time. *State v. Best*, 10 N.C. App. 62, 177 S.E.2d 772 (1970).

To argue that the language of this section must be interpreted to require that the warrant not only be issued but that it also be actually served on the defendant and he be taken into custody during the probationary period, else the court lacks power to hear the matter, obviously rewards the defaulting probationer for his skill in eluding the officers, and is required neither by reason nor authority. *State v. Best*, 10 N.C. App. 62, 177 S.E.2d 772 (1970).

Hearing May Be Held after Period of Probation Has Expired.—If a probation violation warrant and order of arrest is issued during the probationary period, a

valid probation revocation hearing may be held and order entered after the period of probation has expired, at least in situations where the delay is not due to any lack of diligence on the part of the probation authorities or the court. *State v. Best*, 10 N.C. App. 62, 177 S.E.2d 772 (1970).

Written Notice of Hearing.—The courts of this State recognize the principle that a defendant on probation or a defendant under a suspended sentence, before any sentence of imprisonment is put into effect and activated, shall be given notice in writing of the hearing in apt time and an opportunity to be heard. *State v. Butcher*, 10 N.C. App. 93, 177 S.E.2d 730 (1970).

Breach of Condition Need Not Be "Willful."—It is not necessary for a court to find that a defendant's breach of a condition of his probation was "willful" in order to activate defendant's suspended sentence where the court found that such breach was without lawful excuse. *State v. Butcher*, 10 N.C. App. 93, 177 S.E.2d 924 (1970).

But Must Be without Lawful Excuse.—If a court concludes that a breach of a probationary condition by a defendant is without lawful excuse, this is sufficient to support the activation of a suspended sentence. *State v. Butcher*, 10 N.C. App. 93, 177 S.E.2d 924 (1970).

All that is required in a probation hearing is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation or that the defendant has violated, without lawful excuse, a valid condition upon which the sentence was suspended. *State v. Butcher*, 10 N.C. App. 93, 177 S.E.2d 924 (1970).

It is not incumbent upon a court in a probation revocation proceeding to find that a defendant's voluntary payment of certain expenses was a "lawful excuse" for his failure to make periodic payments into the office of the clerk of court as required by a condition of his probation. *State v. Butcher*, 10 N.C. App. 93, 177 S.E.2d 924 (1970).

Conduct Violating Condition of Suspension on Good Behavior.—Behavior such as will warrant a finding that a defendant has breached the condition of suspension on good behavior must be conduct which constitutes a violation of some criminal

law of the State. *State v. Seagraves*, 266 N.C. 112, 145 S.E.2d 327 (1965).

Burden of proof is upon the State to show that the defendant has violated one of the conditions of his probation. *State v. Seagraves*, 266 N.C. 112, 145 S.E.2d 327 (1965).

It Need Not Be Proved, etc.—

Upon a hearing to determine whether or not probation should be revoked, and a sentence previously suspended should be activated, all that is required is that the evidence be such as reasonably to satisfy the judge, in the exercise of his sound discretion, that the defendant has violated a valid condition upon which the sentence was so suspended. *State v. Seagraves*, 266 N.C. 112, 145 S.E.2d 327 (1965).

Motion to Be Returned to County in Which Defendant Was Originally Placed on Probation.—Where a defendant charged with a violation of probation makes a motion to be returned to the county in which he was originally placed on probation, the superior court judge is required by statute to grant the motion; and it is error for the judge himself to conduct a hearing on the violation and to extend the period of probation. *State v. Triplett*, 9 N.C. App. 443, 176 S.E.2d 399 (1970).

A "Probation Violation Warrant and Order for Capias" directing that defendant be returned for hearing to the county where he was originally placed on probation was entered in response to defendant's request to be returned to that county and was required by this section. *State v. Triplett*, 10 N.C. App. 165, 178 S.E.2d 38 (1970).

Question Not Moot. — The fact that whether or not a person was actually incarcerated will have an effect upon the time at which he may, under state law, petition the courts for restoration of his civil rights is a sufficiently important legal distinction to preserve his case, as to the constitutionality of his probation revocation, from being moot, although he had served his prison term. *Hewett v. North Carolina*, 415 F.2d 1316 (4th Cir. 1969).

Suspension of sentence for a period of five years is within the limits provided by law. *State v. Baynard*, 4 N.C. App. 645, 167 S.E.2d 514 (1969).

Cited in *State v. Langley*, 3 N.C. App. 189, 164 S.E.2d 529 (1968).

§ 15-200.1. Notice of intention to pray revocation of probation or suspension; appeal from revocation.—In all cases of probation or suspension of sentence in the superior courts and in courts inferior to the superior courts, before a probation or suspension of sentence may be revoked, the probation officer, solicitor or other officer shall inform the probationer in writing of

his intention to pray the court to revoke probation or suspension and to put the suspended sentence into effect, and shall set forth in writing the grounds upon which revocation is prayed. The probationer shall be entitled to representation by counsel, including court-appointed counsel if he is indigent and had counsel at the trial or if more than six month's confinement is possible as a result of revocation of probation. He is also entitled to a reasonable time to prepare his defense. In all cases where probation or suspension of sentence entered in a court inferior to the superior court is revoked and sentence is placed into effect, the defendant shall have the right of appeal therefrom to the superior court, and, upon such appeal, the matter shall be determined by the judge without a jury, but only upon the issue of whether or not there has been a violation of the terms of probation or of the suspended sentence. Upon its finding that the conditions were violated, the superior court shall enforce the judgment of the lower court unless the judge finds as a fact that circumstances and conditions surrounding the terms of the probation and the violation thereof have substantially changed, so that enforcement of the judgment of the lower court would not accord justice to the defendant, in which case the judge may modify or revoke the terms of the probationary or suspended sentence in the court's discretion. Appeals from lower courts to the superior courts from judgments revoking probation or invoking suspended sentences may be heard in term or out of term, in the county or out of the county by the resident superior court judge of the district or the superior court judge assigned to hold the courts of the district, or a judge of the superior court commissioned to hold court in the district, or a special superior court judge residing in the district. (1951, c. 1038; 1963, c. 632, s. 3; 1969, c. 1013, s. 8.)

Cross Reference.—See note to § 15-200.

Editor's Note.—

The 1969 amendment, effective July 1, 1969, added the second sentence and rewrote the third sentence.

Notice and Opportunity to Be Heard Required.—A defendant on probation or a defendant under a suspended sentence, before any sentence of imprisonment is put into effect and activated, shall be given notice in writing of the hearing in apt time and an opportunity to be heard. *State v. Hewett*, 270 N.C. 348, 154 S.E.2d 476 (1967); *State v. Duncan*, 270 N.C. 241, 154 S.E.2d 53 (1967).

But a proceeding to revoke probation is not a criminal prosecution. *State v. Hewett*, 270 N.C. 348, 154 S.E.2d 476 (1967); *State v. Duncan*, 270 N.C. 241, 154 S.E.2d 53 (1967).

The rights of an offender in a proceeding to revoke his conditional liberty under probation are not coextensive with the federal constitutional rights of one on trial in a criminal prosecution. *State v. Hewett*, 270 N.C. 348, 154 S.E.2d 476 (1967).

The difference between hearings as to whether probation shall be revoked and criminal trials is so great that procedural requirements in criminal trials ought not to be imposed in absolute terms in hearings to revoke probation. *State v. Hewett*, 270 N.C. 348, 154 S.E.2d 476 (1967).

And Formal Trial Is Not Required.—There is no statute in this State requiring

a formal trial in a proceeding to revoke probation. *State v. Duncan*, 270 N.C. 241, 154 S.E.2d 53 (1967); *State v. Hewett*, 270 N.C. 348, 154 S.E.2d 476 (1967).

Proceedings to revoke probation are often regarded as informal or summary. *State v. Duncan*, 270 N.C. 241, 154 S.E.2d 53 (1967); *State v. Hewett*, 270 N.C. 348, 154 S.E.2d 476 (1967).

A *capias* issued to defendant constitutes substantial compliance with the notice requirement of this section. *State v. Noles*, 12 N.C. App. 676, 184 S.E.2d 409 (1971).

Court Is Not Bound by Strict Rules of Evidence.—Upon a hearing to revoke probation, the court is not bound by strict rules of evidence, and the alleged violation of a valid condition of probation need not be proven beyond a reasonable doubt. *State v. Duncan*, 270 N.C. 241, 154 S.E.2d 53 (1967); *State v. Hewett*, 270 N.C. 348, 154 S.E.2d 476 (1967).

Whether defendant has violated valid conditions of probation is not an issue of fact for a jury, but is a question of fact for the judge to be determined in the exercise of his sound discretion. *State v. Hewett*, 270 N.C. 348, 154 S.E.2d 476 (1967).

Sufficiency of Evidence.—All that is required in a hearing to revoke probation is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation or that the defendant has violated

without lawful excuse a valid condition upon which the sentence was suspended. *State v. Hewett*, 270 N.C. 348, 154 S.E.2d 476 (1967); *State v. Duncan*, 270 N.C. 241, 154 S.E.2d 53 (1967).

Where there was no factual basis for any change in the sentence imposed by the trial judge, it was error for the judge at the probation revocation hearing, after finding that the conditions were violated, to do anything other than enforce the judgment of the lower court. *State v. Fields*, 11 N.C. App. 708, 182 S.E.2d 213 (1971).

Permissible Inquiries on Appeal from Order Activating Suspended Sentence.—When appealing from an order activating a suspended sentence, inquiries are permissible only to determine whether there is evidence to support a finding of a breach of the conditions of the suspension, or whether the condition which has been broken is invalid because it is unreasonable or is imposed for an unreasonable length of time. *State v. Noles*, 12 N.C. App. 676, 184 S.E.2d 409 (1971).

Collateral Attack on Original Judgment Is Impermissible.—Questioning the validity of the original judgment where sentence was suspended, on appeal from an order activating the sentence, is an impermissible

collateral attack. *State v. Noles*, 12 N.C. App. 676, 184 S.E.2d 409 (1971).

Provision for Payment of Fine within 48 Hours as Alternative to Going to Jail.—Where the superior court undertook to modify the 30-day sentence to provide for the payment of a fine within 48 hours as an alternative to going to jail, defendant was not in a position to argue that the requirement of the judgment that he pay the fine within 48 hours deprived him of the right to appeal from the imposition of the excessive fine, and that therefore the judgment should be reversed, because his appeal stayed the execution of the entire judgment and he suffered no loss of rights. *State v. Stafford*, 11 N.C. App. 520, 181 S.E.2d 741 (1971).

Applied in *State v. Atkinson*, 7 N.C. App. 355, 172 S.E.2d 249 (1970); *State v. Young*, 7 N.C. App. 393, 172 S.E.2d 74 (1970); *State v. Case*, 12 N.C. App. 11, 182 S.E.2d 19 (1971).

Quoted in *State v. Langley*, 3 N.C. App. 189, 164 S.E.2d 529 (1968).

Cited in *State v. Hill*, 266 N.C. 107, 145 S.E.2d 346 (1965); *State v. Hicks*, 9 N.C. App. 61, 175 S.E.2d 365 (1970); *State v. Braswell*, 283 N.C. 332, 196 S.E.2d 185 (1973).

§ 15-200.2. Bill of particulars as prerequisite to praying that suspended sentence be placed in effect.

Sentences to Which Section Applies.—This section applies only to sentences which have been suspended upon specified terms and conditions. *State v. Thompson*, 267 N.C. 653, 148 S.E.2d 613 (1966).

When prayer for judgment has been continued, this section does not require that the solicitor, before praying judg-

ment, shall serve defendant with a bill of particulars setting forth his reasons for doing so. *State v. Thompson*, 267 N.C. 653, 148 S.E.2d 613 (1966).

Cited in *State v. Hill*, 266 N.C. 107, 145 S.E.2d 346 (1965); *State v. Braswell*, 283 N.C. 332, 196 S.E.2d 185 (1973).

§ 15-201. Establishment and organization of a State Probation Commission.

State Government Reorganization.—The Probation Commission was transferred to the Department of Social Rehabilitation

and Control by § 143A-167, enacted by Session Laws 1971, c. 864.

§ 15-205.1. Mandatory review of probation.—It shall be the duty of the probation officer in all cases referred to him to bring the probationer before the appropriate court having jurisdiction for review by the judge to determine whether the probationer should be released from probation after the probationer has actually been on probation for one year, if the period of probation was three years or less, or he has been on probation for three years if the period of probation was for more than three years. The court shall review the probationer's case file and determine whether he should be released from probation. This section shall not restrict the court's power to continue, extend, suspend or terminate the period of probation at any time as provided in G.S. 15-200. (1969, c. 615.)

§ 15-206. Cooperation with Commissioner of Parole and officials of local units.—It shall be the duty of the Director of Probation and the Com-

missioner of Parole to cooperate with each other to the end that the purposes of probation and parole may be more effectively carried out. When requested, each shall make available to the other case records in his possession, and in cases of emergency, where time and expense can be saved, shall provide investigation service.

It is hereby made the duty of every city, county, or State official or department to render all assistance and cooperation within his or its fundamental power which may further the objects of this Article. The State Probation Commission, the Director of Probation, and the probation officers are authorized to seek the cooperation of such officials and departments, and especially of the county superintendents of social services and of the Department of Human Resources. (1937, c. 132, s. 10; 1961, c. 139, s. 2; 1969, c. 982; 1973, c. 476, s. 138.)

Editor's Note.—The 1973 amendment, ment of Human Resources" for "State effective July 1, 1973, substituted "Depart- Board of Public Welfare."

§ 15-208. Payment of salaries and expenses. — All salaries and expenses necessary for carrying out the provisions of this Article shall be fixed in accordance with the Executive Budget Act and the Personnel Act, and shall be paid by the Board of Transportation out of the State highway funds, under direction of the Director of the Budget. (1937, c. 132, s. 12; 1973, c. 507, s. 5.)

Editor's Note.—The 1973 amendment, of Transportation" for "State Highway effective July 1, 1973, substituted "Board and Public Works Commission."

ARTICLE 21.

Segregation of Youthful Offenders.

§§ 15-210 to 15-216: Repealed by Session Laws 1967, c. 996, s. 17, effective August 1, 1967.

ARTICLE 22.

Review of Criminal Trials.

§ 15-217. Institution of proceeding; effect on other remedies.—Any person imprisoned in the penitentiary, Central Prison, common jail of any county or imprisoned in the common jail of any county and assigned to work under the supervision of the State Department of Correction, who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of North Carolina or both, or that the court was without jurisdiction to impose the sentence, or that the sentence exceeds the maximum authorized by law, or that the sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under a writ of habeas corpus, writ of coram nobis, or other common-law or statutory remedy, as to which there has been no prior adjudication by any court of competent jurisdiction, may institute a proceeding under this article.

The remedy herein provided is not a substitute for nor does it affect any remedies which are incident to the proceedings in the trial court, or any remedy of direct review of the sentence or conviction, but, except as otherwise provided in this article it comprehends and takes the place of all other common-law and statutory remedies which have heretofore been available for challenging the validity of incarceration under sentence of death or imprisonment, and shall be used exclusively in lieu thereof. (1951, c. 1083, s. 1; 1957, c. 349, s. 10; 1959, c. 21; 1965, c. 352, s. 1; 1967, c. 996, s. 13.)

Editor's Note.—

The 1967 amendment, effective Aug. 1, 1967, substituted "State Department of Correction" for "State Prison Department" in the first sentence.

Dantzic v. State, 279 N.C. 212, 182 S.E.2d 563 (1971), overrules In re Taylor, 230 N.C. 566, 53 S.E.2d 857 (1949); State v. Daniels, 231 N.C. 509, 57 S.E.2d 653 (1950); and State v. Green, 277 N.C. 188,

176 S.E.2d 756 (1970) in its holding that permission need not first be obtained from the Supreme Court before a writ of error coram nobis could be issued by the court which rendered the judgment.

For article on the North Carolina Post-Conviction Hearing Act, see 5 Wake Forest Intra. L. Rev. 287 (1969).

For comment on this article, see 44 N.C.L. Rev. 153 (1965).

Patton v. North Carolina, 256 F. Supp. 225 (W.D.N.C. 1966), cited in the note below, was commented on in 5 Wake Forest Intra. L. Rev. 202 (1969).

Patton v. North Carolina, 381 F.2d 636 (4th Cir. 1967), cited in the note below, was commented on in 46 N.C.L. Rev. 407 (1968).

And Resembles Common-Law Writ of Coram Nobis.—

The procedure and function of the writ of error coram nobis are substantially the same as provided by petition under this Article. Dantzic v. State, 279 N.C. 212, 182 S.E.2d 563 (1971).

Purpose of Article.—

In accord with 1st paragraph in original. See State v. White, 274 N.C. 220, 162 S.E.2d 473 (1968).

In accord with 2nd paragraph in original. See State v. White, 274 N.C. 220, 162 S.E.2d 473 (1968).

In accord with 4th paragraph in original. See State v. White, 274 N.C. 220, 162 S.E.2d 473 (1968).

The purpose of the proceeding under the Post-Conviction Hearing Act is not to determine petitioner's guilt or innocence. That matter has already been determined in the trial and judgment which is the subject of post-conviction review. The purpose of post-conviction review is to determine whether in the proceedings leading to the conviction there occurred any substantial denial of petitioner's constitutional rights. Parker v. State, 2 N.C. App. 27, 162 S.E.2d 526 (1968).

Article Provides Adequate and Enlightened Procedure. — Under this Article North Carolina has a wholly adequate and enlightened procedure under which State prisoners may obtain from State courts a review of the constitutionality of their trial and imprisonment. Patton v. North Carolina, 256 F. Supp. 225 (W.D.N.C. 1966).

The Post-Conviction Hearing Act provides every defendant adequate opportunity for the adjudication of claimed deprivations of constitutional rights which prevented him from obtaining a fair trial, provided factors beyond his control pre-

vented him from claiming them earlier. State v. White, 274 N.C. 220, 162 S.E.2d 473 (1968).

The State of North Carolina has provided an adequate, available avenue of collateral attack to correct a denial of federal constitutional rights. Having thus assumed the responsibility of reviewing its trial court proceeding and correcting any deprivation of constitutional rights, it is incumbent upon the State to administer its own laws with an even hand. Tyler v. Croom, 288 F. Supp. 870 (E.D.N.C. 1968).

This Article provides a procedure by which a person convicted of crime may thereafter obtain a hearing upon the question whether he was denied due process of law. It affords an opportunity to inquire into the constitutional integrity of his conviction. State v. White, 274 N.C. 220, 162 S.E.2d 473 (1968).

Federal and state courts have concurrent jurisdiction in collateral proceedings seeking vindication of federal constitutional rights. Although federal courts are not required to abstain or decline to exercise jurisdiction simply because the rights asserted may be adjudicated in some other forum; nevertheless, comity requires that the federal courts recognize the primary responsibility of the state courts to correct their own errors of constitutional magnitude. Tyler v. Croom, 288 F. Supp. 870 (E.D.N.C. 1968).

Prior to the 1965 amendment to this Article, a plethora of remedies confronted a defendant attacking his conviction, the appropriate one depending upon the grounds of his challenge. Occasionally, a defendant would pursue an inappropriate State remedy, be denied relief, come into the federal district court on habeas, and be returned to the State courts to seek the proper writ. The 1965 amendments, however, abolished "all other common-law and statutory remedies" and substituted a unitary proceeding in which all challenges to a conviction may be raised. Anders v. Turner, 379 F.2d 46 (4th Cir. 1967).

The inquiry under this Article is limited to a determination whether the petitioners were denied the right to be represented by counsel, to have witnesses, and a fair opportunity to prepare and to present their defense. State v. White, 274 N.C. 220, 162 S.E.2d 473 (1968).

This Article is not available to a petitioner whose sentence was suspended and who is not a person imprisoned in the penitentiary, Central Prison, common jail of any county . . . assigned to work under

the supervision of the State Department of Correction. Thus, such a defendant properly selects the relatively quiescent remedy of *coram nobis* as a means of seeking redress. *Dantzic v. State*, 10 N.C. App. 369, 178 S.E.2d 790 (1971).

The writ of error coram nobis is an established common-law writ available under this State's procedure to challenge the validity of a conviction by reason of matters extraneous to the record. *State v. Green*, 277 N.C. 188, 176 S.E.2d 756 (1970).

It has been supplanted by this Article with reference to "any person imprisoned." *State v. Green*, 277 N.C. 188, 176 S.E.2d 756 (1970).

The North Carolina Post-Conviction Hearing Act (§§ 15-217 through 15-222) was passed to replace the writ of error *coram nobis* insofar as the constitutionality of criminal trials is concerned, and, as now written, it incorporates habeas corpus, *coram nobis* and any other common-law or statutory remedy under which a person may collaterally attack his sentence. *Dantzic v. State*, 10 N.C. App. 369, 178 S.E.2d 790 (1971).

The procedure under this Article is available when an imprisoned person seeks relief by petition for writ of error *coram nobis*. *Dantzic v. State*, 279 N.C. 212, 182 S.E.2d 563 (1971).

If petitioner is presently imprisoned, he may proceed under this Article. *Dantzic v. State*, 279 N.C. 212, 182 S.E.2d 563 (1971).

Otherwise, the writ remains as at common law and is available under this State's procedure. *State v. Green*, 277 N.C. 188, 176 S.E.2d 756 (1970).

A writ of error coram nobis will not lie in the superior court after an appeal to the Supreme Court and an affirmation of the judgment in that court. *Dantzic v. State*, 10 N.C. App. 369, 178 S.E.2d 790 (1971).

A similar restriction does not apply when a defendant is proceeding under the post-conviction statute. *Dantzic v. State*, 10 N.C. App. 369, 178 S.E.2d 790 (1971).

Permission from Appellate Court to Petition for Writ of Error Coram Nobis Is Not Required.—There is no requirement that an imprisoned person seeking relief by petition for writ of error *coram nobis* obtain leave from an appellate court even though on direct appeal the appellate court has affirmed the judgment the petitioner seeks to attack. This is because the collateral attack is based on facts not disclosed by the record on appeal. *Dantzic v. State*, 279 N.C. 212, 182 S.E.2d 563 (1971).

The Supreme Court perceived no justification for a rule that would require a

person who is not in prison to obtain permission from an appellate court in order to file a petition for a writ of error *coram nobis* to attack collaterally a final judgment of a trial court from which no appeal was taken. *Dantzic v. State*, 279 N.C. 212, 182 S.E.2d 563 (1971).

Nor Is Permission from Supreme Court.—The Supreme Court has concluded that a requirement upon the ancient common-law writ of error *coram nobis*, namely, a requirement that permission be first obtained from the Supreme Court, such permission to be granted under the supervisory power presently conferred upon the Supreme Court by N.C. Const., Art. IV, § 12(1), is neither necessary nor desirable under present conditions with reference to a final judgment of a trial court from which there was no appeal. *Dantzic v. State*, 279 N.C. 212, 182 S.E.2d 563 (1971).

The procedure established by this article is not a substitute for an appeal from the judgment entered at the trial of the criminal charge. *Branch v. State*, 269 N.C. 642, 153 S.E.2d 343 (1967).

The Post-Conviction Hearing Act is not a substitute for appeal. *State v. White*, 274 N.C. 220, 162 S.E.2d 473 (1968).

Post-conviction proceedings, whether instituted under the authority of the statute or the common law, cannot be used as a substitute for, or as an alternative to, direct appeal. *Dantzic v. State*, 10 N.C. App. 369, 178 S.E.2d 790 (1971).

This article does not afford to a person heretofore convicted of crime the right to present to the Supreme Court assignments of error in the trial in which he was convicted and from which he did not appeal. *State v. White*, 274 N.C. 220, 162 S.E.2d 473 (1968).

Proceedings under this article are not a substitute or an alternative to direct appeal. *State v. White*, 274 N.C. 220, 162 S.E.2d 473 (1968).

This article does not license a collateral attack upon any ruling which could have properly been presented by a direct appeal from the judgment pronounced in the original trial. *State v. White*, 274 N.C. 220, 162 S.E.2d 473 (1968).

Errors in a petitioner's trial which could have been reviewed on appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings. *State v. White*, 274 N.C. 220, 162 S.E.2d 473 (1968).

This article cannot be used to raise the question whether errors were committed in the course of the trial. *State v. White*, 274 N.C. 220, 162 S.E.2d 473 (1968).

The burden is upon the petitioner seeking a federal habeas corpus to prove, by a preponderance of the evidence, the alleged violations of his constitutional rights. A petitioner does not bear that burden when he has had substantially identical issues previously determined adversely to him in a State post-conviction hearing, this hearing having been held in accordance with the standards required and enunciated in *Townsend v. Sain*, 372 U.S. 293, 83 Sup. Ct. 745, 9 L. Ed. 2d 770 (1963). *Paige v. Ross*, 257 F. Supp. 27 (E.D.N.C. 1966), rev'd on other grounds, 372 F.2d 426 (4th Cir. 1967).

Federal Court May Accept Findings of Fact Made by State Court.—In a federal habeas corpus proceeding, the federal court is free to accept the findings of fact made by the State court after it offered petitioner a full day of hearings in a State post-conviction hearing. *Paige v. Ross*, 257 F. Supp. 27 (E.D.N.C. 1966), rev'd on other grounds, 372 F.2d 426 (4th Cir. 1967).

A federal district judge may, and ordinarily should, accept the facts found in the hearing in the State court. But he need not. In every case he has the power, constrained only by his sound discretion, to receive evidence bearing upon the applicant's constitutional claim. *State v. White*, 274 N.C. 220, 162 S.E.2d 473 (1968).

Or May Try Facts Anew.—The federal district judge may try the facts anew whenever he supposes that the State court judge has not reliably found the relevant facts. *State v. White*, 274 N.C. 220, 162 S.E.2d 473 (1968).

Were a prisoner to have both direct and collateral review in the State court of his claim that he was deprived of constitutional rights in his trial, he might still have a de novo evidentiary hearing in federal habeas corpus proceedings if the district judge concludes that the facts found by the State court were not reliable findings. *State v. White*, 274 N.C. 220, 162 S.E.2d 473 (1968).

But conclusory finding by post-conviction court that plea of guilty was voluntarily made was unacceptable in federal habeas corpus proceeding, where state court records contain no resolution of the historic facts, either explicitly or implicitly, as required by *Townsend v. Sain*, 372 U.S. 293, 83 Sup. Ct. 745, 9 L. Ed. 2d 770 (1963). *Neal v. Taylor*, 264 F. Supp. 418 (E.D.N.C. 1967).

This article seems to require that a complainant be in custody under the sentence which he attacks, or otherwise prej-

udiced by it. *Norkett v. Stallings*, 251 F. Supp. 662 (E.D.N.C. 1966).

Habeas Corpus Was Not Available Where Petitioner Was Not Illegally Imprisoned.—Petitioner could not proceed by petition for a writ of habeas corpus to attack an order of the Board of Paroles relating to the order in which his sentences are to be served because he was not illegally imprisoned. *Jernigan v. State*, 279 N.C. 556, 184 S.E.2d 259 (1971).

Punishment upon Retrial May Not Be Increased.—Increasing a defendant's punishment upon retrial after the reversal of his initial conviction at a post-conviction hearing constitutes a violation of his Fourteenth Amendment rights in that it exacts an unconstitutional condition to the exercise of his right to a fair trial, arbitrarily denies him the equal protection of the law, and places him twice in jeopardy of punishment for the same offense. *Patton v. North Carolina*, 381 F.2d 636 (4th Cir. 1967).

The equal protection clause of the Fourteenth Amendment compels a rule barring a sentence upon retrial in excess of the one invalidated, and this protection extends even to one seeking to avail himself of a state's post-conviction remedies because of nonconstitutional errors in the original trial. *Patton v. North Carolina*, 381 F.2d 636 (4th Cir. 1967).

A defendant's rights are not adequately protected even if a second sentencing judge is restricted to increasing sentence only on the basis of new evidence. A sentence may not be increased following a successful appeal, even where additional testimony has been introduced at the second trial. In order to prevent abuses, the fixed policy must necessarily be that the new sentence shall not exceed the old. *Patton v. North Carolina*, 381 F.2d 636 (4th Cir. 1967).

Credit for Time Served under Vacated Sentence.—Where there is a new trial, in which the defendant's guilt is predicated upon the same conduct from which a previous invalid judgment and sentence arose, time served under the vacated sentence must be fully credited against the time defendant is required to serve under the sentence imposed at the new trial. *Kelly v. North Carolina*, 276 F. Supp. 200 (E.D.N.C. 1967).

The constitutional protection against double jeopardy would be violated if an increased sentence or a denial of credit is permitted on retrial. *Patton v. North Carolina*, 381 F.2d 636 (4th Cir. 1967).

A prisoner's exercise of his right to

seek a new trial will not be predicated on the fiction that he has "waived" the benefits of his initial sentence, because of the restrictive effect this has on access to post-conviction remedies. In seeking correction of an erroneous sentence, a defendant does not waive his double jeopardy right not to be subjected to multiple punishment. *Patton v. North Carolina*, 381 F.2d 636 (4th Cir. 1967).

Consent to Be Tried Again.—Before a new trial may be ordered as a result of post-conviction review of a criminal case, the record must clearly show defendant's consent to be tried again. *Williams v. State*, 3 N.C. App. 212, 164 S.E.2d 501 (1968).

Where a petitioner for post-conviction review under this article alleges facts which, if true, entitle him to nothing else but a new trial, he thereby gives consent to be tried again, which consent continues unless the court permits him to withdraw the petition. *Williams v. State*, 3 N.C. App. 212, 164 S.E.2d 501 (1968).

And Hearing Is Precluded, etc.—

Only claims as to which there has been no prior adjudication are justiciable under this article. *State v. White*, 274 N.C. 220, 162 S.E.2d 473 (1968).

North Carolina's failure to conduct a post-conviction hearing within a reasonable time in accordance with an order of the federal district court deprived petitioner of equal protection or due process of law, entitling him to federal habeas corpus relief. *Tyler v. Croom*, 288 F. Supp. 870 (E.D.N.C. 1968).

Prisoner May Not Be Punished for Obtaining New Trial.—The North Carolina Supreme Court adheres to the basic constitutional principles that a prisoner may not be denied credit for time served, nor punished for obtaining a new trial. *Patton v. North Carolina*, 256 F. Supp. 225 (W.D.N.C. 1966).

Effect of Harsher Punishment.—The frequency of harsher punishment (whether by the device of refusing credit for time served, or by a longer sentence, or both) upon retrial doubtless intimidates persons held in prison under unconstitutional convictions from attempting to secure their right to a new trial. *Patton v. North Carolina*, 256 F. Supp. 225 (W.D.N.C. 1966).

Appeal.—No appeal lies from a final judgment entered upon a petition and proceeding for post-conviction review under the Post-Conviction Hearing Act, review being available only upon application by the petitioner or by the State for a writ of

certiorari. *Nolan v. State*, 1 N.C. App. 618, 162 S.E.2d 88 (1968).

Prerequisites to Review by Federal Court.—The power of a federal district court to consider a state prisoner's petition for writ of habeas corpus and to review the constitutionality of his state trial is conferred by 28 U.S.C. § 2254. In conferring that jurisdiction upon the federal courts, the Congress has specifically provided that this court shall not grant the writ unless the state prisoner (1) has exhausted remedies available in the courts of the state, or (2) there is no available state corrective process, or (3) there are circumstances rendering the state process ineffective to protect the rights of the prisoner. *Patton v. North Carolina*, 256 F. Supp. 225 (W.D.N.C. 1966).

The federal habeas judge may in his discretion deny relief to an applicant who has deliberately by-passed the orderly procedure of State courts and in so doing has forfeited his State court remedies. *State v. White*, 274 N.C. 220, 162 S.E.2d 473 (1968).

Article Affords Review Only, etc.—

The inquiry in a post-conviction proceeding is whether there was a substantial denial of the constitutional rights of petitioners in the original criminal action in which they were convicted and whether a different result would likely have ensued had petitioners not been denied such rights. *Branch v. State*, 269 N.C. 642, 153 S.E.2d 343 (1967).

Article May Not Be Used Where Only Attack Is on Administrative Order.—

Where petitioner concedes the validity of his trial and the sentences under which he is now being held and his only attack is upon the subsequent order of the Board of Paroles under § 148-62 relating to the administration or order in which the sentences are to be served, this Article may not be used for this purpose. *Jernigan v. State*, 279 N.C. 556, 184 S.E.2d 259 (1971).

Burden Is on Petitioner to Show Denial of Constitutional Right.—

In a proceeding under this article, the burden is upon the petitioner to show a denial of some right guaranteed to him by the Constitution of North Carolina or by the Constitution of the United States in the trial or investigatory procedures resulting in his conviction. *Branch v. State*, 269 N.C. 642, 153 S.E.2d 343 (1967).

Want of Formal and Sufficient Accusation.—

When the court sentenced petitioner, who had been indicted for a violation of § 14-26 (carnal knowledge of female virgins between twelve and sixteen years of age), to imprisonment for a term of

not less than twelve nor more than fifteen years upon his plea of guilty to a violation of § 14-22 (assault with intent to commit rape) when there was no formal and sufficient accusation against him for the offense to which he pleaded guilty, it would seem to be without precedent, and the sentence of imprisonment was a nullity, and violates petitioner's rights as guaranteed by N.C. Const., Art. I, § 19, and by § 1 of the 14th Amendment to the United States Constitution and must be vacated in post-conviction proceedings. *McClure v. State*, 267 N.C. 212, 148 S.E.2d 15 (1966).

Exhaustion of a state procedure to a foregone conclusion is not a prerequisite to federal habeas corpus jurisdiction. It is well established that under such circumstances jurisdiction exists in the federal district court to entertain the petition for habeas corpus and to review the constitutionality of the trial and imprisonment. *Patton v. North Carolina*, 256 F. Supp. 225 (W.D.N.C. 1966).

Where petitioner for habeas corpus in a federal court maintained that he was detained pursuant to an unconstitutional judgment based upon unconstitutional statutes, and he had raised this issue at his trial, and again on direct appeal, and the Supreme Court of North Carolina had passed upon his constitutional objections, it was not necessary for him to raise them again in State collateral proceedings, i.e., via the Post-Conviction Hearing Act. *Walker v. North Carolina*, 262 F. Supp. 102 (W.D.N.C. 1966).

Where accused has not sought review of his second trial and sentence pursuant to the North Carolina Post-Conviction Hearing Act, federal habeas corpus jurisdiction, if it exists, therefore depends upon the existence of circumstances rendering such process ineffective. Such circumstances exist where prior decisions of the Supreme Court of North Carolina foreclosing in the state courts accused's contentions that (a) he is entitled to credit for time served, and (b) that he cannot be more harshly punished at a second trial. *Patton v. North Carolina*, 256 F. Supp. 225 (W.D.-N.C. 1966).

Forcing a petitioner for habeas corpus in the federal court to present again to the state courts, in a proceeding under this section, claims which had already been considered and denied by those courts in habeas corpus proceedings would be an unwarranted, hyper-technical application of the exhaustion doctrine. The doctrine of exhaustion does not require that the peti-

tioner himself be exhausted in repetitious litigation. *Whitley v. North Carolina*, 357 F.2d 75 (4th Cir. 1966).

In habeas corpus proceedings in a federal court, the State may waive petitioner's failure to exhaust available State court remedies under this article. *Kelly v. North Carolina*, 276 F. Supp. 200 (E.D.N.C. 1967).

When State Remedies Exhausted.—One who has proceeded under this article and been denied certiorari by the North Carolina Supreme Court has exhausted all presently available State remedies. *Anders v. Turner*, 379 F.2d 46 (4th Cir. 1967).

Effect of Declaring Trial a Nullity.—Once a trial has been declared a nullity in a post-conviction proceeding, this nullity cannot be resuscitated and made to serve as the basis for a sentence. When a trial is annulled, so is the sentence, and it cannot be reimposed without a new trial. *State v. Hollars*, 266 N.C. 45, 145 S.E.2d 309 (1965).

No Credit Allowed, etc.—

Under the law of North Carolina, it is plain that the fortunate recipient of a new trial may be (1) denied credit for all time served in prison under the vacated judgment and sentence imposed at the first trial, unless given the maximum sentence at the second trial, and/or (2) be given a longer sentence than that previously imposed, so long as it is within the maximum permitted by the statute. *Patton v. North Carolina*, 256 F. Supp. 225 (W.D.-N.C. 1966).

Denial of credit at a second trial for time served while in the de facto status of state prisoner is so fundamentally unfair as to constitute a violation of the due process and equal protection clauses of the Fourteenth Amendment of the federal Constitution. *Patton v. North Carolina*, 256 F. Supp. 225 (W.D.N.C. 1966).

The district court properly issued a writ of habeas corpus and ordered the release of petitioner for the reason that he had served the maximum term imposed on him at his original trial, notwithstanding that on retrial, after successful post-conviction attack, he was sentenced to a longer term. *Pearce v. North Carolina*, 397 F.2d 253 (4th Cir. 1968).

Method of Selecting Jury. — Petitioner for habeas corpus argued that the practice of obtaining a so-called "death-qualified" jury, by the allowance of successful challenge for cause of all persons with conscientious scruples against capital punishment, interfered with the "unbridled discretion" of the jury to recommend life imprisonment. This was a question of State

law which the federal court considered settled adversely to petitioner's contention by *State v. Arnold*, 258 N.C. 363, 129 S.E.2d 229 (1963), and *State v. Childs*, 269 N.C. 307, 152 S.E.2d 453 (1967). *Crawford v. Bounds*, 395 F.2d 297 (4th Cir. 1968), holding that the method of selecting the jury violated the Fourteenth Amendment to the federal Constitution.

Applied in *State v. Stafford*, 267 N.C. 201, 147 S.E.2d 925 (1966); *State v. Wilson*, 269 N.C. 297, 152 S.E.2d 223 (1967); *Petway v. Stallings*, 248 F. Supp. 991 (E.D.N.C. 1965); *Tyler v. Croom*, 264 F. Supp. 415 (E.D.N.C. 1967); *Patton v. Ross*, 267 F. Supp. 387 (E.D.N.C. 1967); *McNeil v. North Carolina*, 368 F.2d 313 (4th Cir. 1966); *State v. Stafford*, 274 N.C. 519, 164 S.E.2d 371 (1968); *State v. Swann*, 275 N.C. 644, 170 S.E.2d 611 (1969).

Cited in *State v. Rhinehart*, 267 N.C. 470, 148 S.E.2d 651 (1966); *State v. Conyers*, 267 N.C. 618, 148 S.E.2d 569 (1966); *State v. Sutton*, 268 N.C. 165, 150 S.E.2d 50 (1966); *Sligh v. North Carolina*, 246 F. Supp. 865 (E.D.N.C. 1965); *McNeil v. North Carolina*, 248 F. Supp. 867 (E.D.N.C. 1965); *Wells v. Stallings*, 253 F. Supp. 748 (E.D.N.C. 1966); *Creighton v. North Carolina*, 257 F. Supp. 806

(E.D.N.C. 1966); *Newsome v. Ross*, 258 F. Supp. 671 (E.D.N.C. 1966); *Fox v. North Carolina*, 256 F. Supp. 19 (E.D.N.C. 1967); *Gainey v. Turner*, 266 F. Supp. 95 (E.D.N.C. 1967); *Stem v. Turner*, 370 F.2d 895 (4th Cir. 1966); *Lassiter v. Turner*, 279 F. Supp. 231 (E.D.N.C. 1968); *Davis v. State*, 273 N.C. 533, 160 S.E.2d 697 (1968); *State v. Hamrick*, 2 N.C. App. 227, 162 S.E.2d 567 (1968); *Glover v. State*, 3 N.C. App. 210, 164 S.E.2d 400 (1968); *Aldridge v. State*, 4 N.C. App. 297, 166 S.E.2d 485 (1969); *Parker v. North Carolina*, 397 U.S. 790, 90 S. Ct. 1458, 25 L. Ed. 2d 785 (1970); *Garner v. State*, 8 N.C. App. 109, 174 S.E.2d 92 (1970); *Battle v. State*, 8 N.C. App. 192, 174 S.E.2d 299 (1970); *State v. Smith*, 8 N.C. App. 348, 174 S.E.2d 651 (1970); *Dixon v. State*, 8 N.C. App. 408, 174 S.E.2d 683 (1970); *State v. Swann*, 9 N.C. App. 18, 175 S.E.2d 382 (1970); *McCabe v. North Carolina*, 314 F. Supp. 917 (M.D.N.C. 1970); *Bennett v. Hurley*, 315 F. Supp. 1131 (E.D.N.C. 1970); *Harris v. North Carolina*, 320 F. Supp. 770 (M.D.N.C. 1970); *State v. Noles*, 12 N.C. App. 676, 184 S.E.2d 409 (1971); *Garrett v. Bounds*, 328 F. Supp. 1175 (W.D.N.C. 1971); *State v. Thompson*, 15 N.C. App. 416, 190 S.E.2d 355 (1972).

§ 15-218. Contents of petition; waiver of claims not alleged.—The petition shall identify the proceeding or trial in which the petitioner was convicted, give the date of the rendition of the final judgment complained of, and shall clearly set forth the respects in which petitioner's constitutional rights were violated or in which he is illegally detained, and shall state that the questions raised have not heretofore been raised or passed upon by any court of competent jurisdiction. The petition shall have attached thereto affidavits, records or other evidence supporting its allegations or shall state why the same are not attached. The petition shall also identify any previous proceedings that the petitioner may have taken to secure relief from his conviction. Argument and citations and discussion of authorities shall be omitted from the petition. Any claims of substantial denial of constitutional rights or of other error remediable under this article not raised or set forth in the original or any amended petition shall be deemed waived, unless the court, upon consideration of a subsequent petition, finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately asserted in the original or amended petition. (1951, c. 1083, s. 1; 1953, c. 675, s. 3; 1965, c. 352, s. 1; 1969, c. 877, s. 1.)

Editor's Note.—

The 1969 amendment added at the end of the last sentence the language beginning "unless the court."

A petitioner for habeas corpus in a federal court no longer had available a state remedy to vindicate the claimed denials of constitutional rights which could have been, but were not, raised in his application for post-conviction relief, made before his application for a writ of habeas cor-

pus, since the North Carolina statute on post-conviction relief clearly prohibits raising a ground in a successive petition which could have been raised earlier. *Stem v. Turner*, 370 F.2d 895 (4th Cir. 1966), commented on in 45 N.C.L. Rev. 1056 (1967).

Stated in *State v. Green*, 2 N.C. App. 391, 163 S.E.2d 14 (1968).

Cited in *State v. Case*, 268 N.C. 330, 150 S.E.2d 509 (1966).

§ 15-219. Petitioner unable to pay costs or procure counsel.—If the petition alleges that the petitioner is without funds to pay the costs of the proceeding, and is unable to give a costs bond with sureties for the payment of the costs for the proceeding and is unable to furnish security for costs by means of a mortgage or lien upon property to secure the costs, the court may order that the petitioner be permitted to proceed to prosecute such proceeding without providing for the payment of costs. If the petitioner is an indigent person, the provisions of chapter 7A, subchapter IX are applicable. (1951, c. 1083, s. 1; 1963, c. 1180; 1965, c. 352, s. 1; 1969, c. 1013, s. 9.)

Editor's Note.—

The 1969 amendment, effective July 1, 1969, substituted the present second sentence for the former second, third and fourth sentences, relating to appointment of counsel.

Applied in *State v. Fowler*, 266 N.C. 528, 146 S.E.2d 418 (1966); *McClure v. State*, 267 N.C. 212, 148 S.E.2d 15 (1966).

§ 15-220. Answer of the State; amendments; costs of records.—Unless the reviewing judge shall have ordered an earlier date, within 30 days after the date of delivery of the petition to the solicitor of the district, or within such further time as the court may fix, the solicitor shall answer or move to dismiss on behalf of the State. No other or further pleadings shall be filed except as the court may order on its own motion or on that of either party. The court may, in its discretion, grant leave at any stage of the proceeding prior to entry of judgment to withdraw the petition. The court may, in its discretion make such orders as to amendment of the petition or any other pleading, or as to pleading over, or filing further pleadings, or extending the time for filing any pleading other than the original petition, as shall seem to the court appropriate, just and reasonable.

If it shall appear to the court that records, including a transcript of testimony, of the proceedings which resulted in the conviction of petitioner are necessary for a proper determination of the proceedings, the judge shall, upon finding that the petitioner is indigent or upon motion of the State, order the State of North Carolina in counties which do not yet have district court to pay the necessary cost of obtaining the records specified by the judge. In counties in which a district court is established the State is liable for payment of the costs assessed in this paragraph. (1951, c. 1083, s. 1; 1965, c. 352, s. 1; 1969, c. 877, s. 2; c. 1013, s. 10; c. 1296.)

Editor's Note.—

The first 1969 amendment deleted the former fourth sentence, relating to the effect of withdrawal of a petition as waiver of any claim of denial of constitutional rights or other errors.

The second 1969 amendment, effective July 1, 1969, inserted, in the first sentence of the second paragraph, "in counties which do not yet have district court," and added the second sentence of the second paragraph.

The third 1969 amendment, effective July 1, 1969, substituted "State of North Carolina" for "county" in the first sentence of the second paragraph.

Applied in *State v. Hollars*, 266 N.C. 45, 145 S.E.2d 309 (1965).

Quoted in *Aldridge v. State*, 4 N.C. App. 297, 166 S.E.2d 485 (1969).

Cited in *State v. Case*, 268 N.C. 330, 150 S.E.2d 509 (1966).

§ 15-221. Hearing.

Nature of Hearing.—A post-conviction hearing is a post-conviction remedy to determine whether a defendant was deprived of any constitutional right in his original trial. This is a question of law for the court. *State v. Gainey*, 265 N.C. 437, 144 S.E.2d 249 (1965).

A post-conviction hearing is not a trial.

State v. Gainey, 265 N.C. 437, 144 S.E.2d 249 (1965).

It is not designed to be a second day in court. *State v. Gainey*, 265 N.C. 437, 144 S.E.2d 249 (1965).

Nor is it a substitute for appeal. *State v. Gainey*, 265 N.C. 437, 144 S.E.2d 249 (1965).

There is no requirement that a defendant be present at a post-conviction hearing. *State v. Gainey*, 265 N.C. 437, 144 S.E.2d 249 (1965).

There Is No Trial by Jury.—In a post-conviction proceeding, there is no trial by jury but that the judge holding the hearing shall hear the evidence and make appropriate factual findings as to all material issues or questions of fact raised by the petition and supported by the evidence. *Battle v. State*, 8 N.C. App. 192, 174 S.E.2d 299 (1970).

Burden Is on Petitioner to Show Denial of Constitutional Right.—When a petitioner in a post-conviction proceeding alleges error in the investigatory procedures or trial, resulting in his sentence and imprisonment, the burden of proof is on him to show a denial of some right guaranteed to him by the Constitution of North Carolina or by the Constitution of the United

States. *Battle v. State*, 8 N.C. App. 192, 174 S.E.2d 299 (1970).

Necessity for Finding of Fact by Court.—The trial court in a post-conviction hearing committed error in failing to make a factual finding with respect to a material issue raised by the petitioner, that is, whether petitioner's plea of guilty at his trial on a charge of kidnapping was freely, understandingly and voluntarily entered. *Battle v. State*, 8 N.C. App. 192, 174 S.E.2d 299 (1970).

Order Appointing Counsel to Perfect Appeal.—In a hearing under the Post-Conviction Hearing Act, a finding by the court that an indigent defendant had been denied right of appeal to the Supreme Court fully supports an order appointing counsel to perfect an appeal and directing the county to furnish a transcript of the trial. *State v. Staten*, 271 N.C. 600, 157 S.E.2d 225 (1967).

§ 15-222. Review by application for certiorari.—Any final judgment entered upon such a petition and proceeding may be reviewed by the Court of Appeals of North Carolina upon application by the petitioner or by the State for a writ of certiorari brought within 60 days from the entry of the judgment in such proceeding.

If the judge is satisfied that a petitioner is unable to procure the records required for an adequate and effective consideration by the Court of Appeals of an application for writ of certiorari, he shall order the State of North Carolina to make available such records, including the transcript.

The law of this State governing the application, granting and disposition of writs of certiorari shall be applicable to any application for writ of certiorari brought under the provisions of this article for the purpose of seeking a review of such judgment or proceeding. (1951, c. 1083, s. 1; 1965, c. 352, s. 1; 1967, c. 108, s. 11; c. 523, ss. 1, 2; 1969, c. 1013, s. 11; c. 1296.)

Editor's Note.—

Session Laws 1967, c. 108 and c. 523, s. 2, substituted "Court of Appeals" for "Supreme Court."

The first 1969 amendment, effective July 1, 1969, deleted the former second, third and fourth sentences of the first paragraph, relating to appointment of counsel, and also deleted the second paragraph. The deleted sentences and paragraph had been added by Session Laws 1967, c. 523, s. 1.

The second 1969 amendment, effective July 1, 1969, substituted "State of North Carolina" for "county" in the second paragraph.

Notwithstanding its deletion by the first 1969 amendment, the second paragraph of the section, as amended by the second 1969 amendment, appears in the section as set out above.

Judgments under this Article may be reviewed by the Court of Appeals under this section. *Dantzic v. State*, 10 N.C. App. 369, 178 S.E.2d 790 (1971).

No appeal lies from an order entered in a post-conviction hearing denying defendant a new trial, but such an order may be reviewed only upon allowance of a writ of certiorari. *In re McBride*, 267 N.C. 93, 147 S.E.2d 597 (1966).

No appeal lies from a final judgment entered upon a petition and proceeding for post-conviction review under the North Carolina Post-Conviction Hearing Act, review being available only upon application by the petitioner or by the State for a writ of certiorari. *Nolan v. State*, 1 N.C. App. 618, 162 S.E.2d 88 (1968); *State v. Green*, 2 N.C. App. 391, 163 S.E.2d 14 (1968); *Aldridge v. State*, 4 N.C. App. 297, 166 S.E.2d 485 (1969).

And its decisions rendered thereon are not subject to further review in the courts of this State. *Dantzic v. State*, 10 N.C. App. 369, 178 S.E.2d 790 (1971).

The State, as well as a prisoner, may petition for certiorari to review a final judgment in proceedings under the Post-

Conviction Hearing Act. *State v. White*, 274 N.C. 220, 162 S.E.2d 473 (1968).

That Defendant Is on Parol Does Not Affect Right to Review.—The fact that a defendant is on parol at the time of his application for certiorari does not affect his right to review by the Supreme Court (now Court of Appeals), since conditions of parol are a restraint upon his liberty not shared by the public generally. *State v.*

Rhinehart, 267 N.C. 470, 148 S.E.2d 651 (1966).

Applied in *Patton v. Ross*, 267 F. Supp. 387 (E.D.N.C. 1967); *State v. Childs*, 280 N.C. 576, 187 S.E.2d 78 (1972).

Cited in *State v. Case*, 268 N.C. 330, 150 S.E.2d 509 (1966); *Kelly v. North Carolina*, 276 F. Supp. 200 (E.D.N.C. 1967); *Lassiter v. Turner*, 279 F. Supp. 231 (E.D.N.C. 1968).

ARTICLE 23.

Expunction of Records of Youthful Offenders.

§ 15-223. Expunction of records for first offenders under the age of 18 at the time of conviction of misdemeanor.—(a) Whenever any person who has not yet attained the age of 18 years and has not previously been convicted of any felony, or misdemeanor other than a traffic violation, under the laws of the United States, the laws of this State or any other state, pleads guilty to or is guilty of a misdemeanor, he may file a petition in the court where he was convicted for expunction of the misdemeanor from his criminal record. The petition cannot be filed earlier than two years after the date of the conviction or any period of probation, whichever occurs later, and the petition shall contain, but not be limited to, the following:

- (1) An affidavit by the petitioner that he has been of good behavior for the two-year period since the date of conviction of the misdemeanor in question and has not been convicted of any felony, or misdemeanor other than a traffic violation, under the laws of the United States or the laws of this State or any other state.
- (2) Verified affidavits of two persons who are not related to the petitioner or to each other by blood or marriage, that they know the character and reputation of the petitioner in the community in which he lives and that his character and reputation are good.
- (3) A statement that the petition is a motion in the cause in the case wherein the petitioner was convicted.
- (4) Affidavits of the clerk of superior court, chief of police, where appropriate, sheriff of the county wherein the petitioner was convicted, and official records of the Federal Bureau of Investigation and the State Bureau of Investigation, all showing that the petitioner has not been convicted of a felony or misdemeanor under the laws of the United States or the laws of this State or any other state at any time prior to the conviction for the misdemeanor in question or during the two-year period following the conviction for the misdemeanor in question.

The petition shall be served upon the solicitor of the court wherein the case was tried resulting in conviction. The solicitor shall have 10 days thereafter in which to file any objection thereto and shall be duly notified as to the date of the hearing of the petition.

(b) If the court, after hearing, finds that the petitioner had remained of good behavior and been free of conviction of any felony or misdemeanor, other than a traffic violation, for two years from the date of conviction of the misdemeanor in question, and petitioner was not 18 years old at the time of the conviction in question, it shall order that such person be restored, in the contemplation of the law, to the status he occupied before such arrest or indictment or information. No person as to whom such order has been entered shall be held thereafter under any provision of any laws to be guilty of perjury or otherwise giving a false statement

by reason of his failure to recite or acknowledge such arrest, or indictment, information, or trial, or response to any inquiry made of him for any purpose.

(c) The court shall also order that said misdemeanor conviction be expunged from the records of the court, and direct all law-enforcement agencies bearing record of the same to expunge their records of the conviction and the clerk shall forward a certified copy of the order to all law-enforcement agencies concerned and to the F.B.I. and S.B.I. with the cost thereof to be taxed against the petitioner.

(d) The clerk of superior court in each county in North Carolina shall, as soon as practicable after each term of court in his county, file with the North Carolina Department of Justice, the names of those persons granted a discharge under the provisions of this section, and the North Carolina Department of Justice shall maintain a confidential file containing the names of persons granted conditional discharges. The information contained in such file shall be disclosed only to judges of the General Court of Justice of North Carolina for the purpose of ascertaining whether any person charged with an offense has been previously granted a discharge. (1973, c. 748.)

Applicable to Offenses Which Occurred at Any Time and Were Committed by Individual under 18 Years of Age. — See

opinion of Attorney General to Mr. Ray H. Garland, Deputy Director, State Bureau of Investigation, 43 N.C.A.G. 1 (1973).

Chapter 17.

Habeas Corpus.

Article 2.

Application.

Sec.
17-6. To judge of Appellate Division or superior court in writing.

Article 7.

Habeas Corpus for Custody of Children in Certain Cases.

Sec.
17-39 to 17-40. [Repealed.]

ARTICLE 2.

Application.

§ 17-3. Who may prosecute writ.

Cited in *State v. Hamrick*, 2 N.C. App. 227, 162 S.E.2d 567 (1968).

§ 17-4. When application denied.—Application to prosecute the writ shall be denied in the following cases:

- (3) Where any person has willfully neglected, for the space of two whole sessions after his imprisonment, to apply for the writ to the superior court of the county in which he may be imprisoned, such person shall not have a habeas corpus in vacation time for his enlargement.

(1971, c. 528, s. 1.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, substituted "sessions" for "terms" in subdivision (3).

Only the introductory paragraph of the section and the subdivision changed by the amendment are set out.

An indictment returned by a grand jury is sufficient ground to detain a defendant

for trial. *State v. Murphy*, 10 N.C. App. 11, 177 S.E.2d 917 (1970).

And the defendant is not entitled to his release in a habeas corpus proceeding. *State v. Murphy*, 10 N.C. App. 11, 177 S.E.2d 917 (1970).

Cited in *Dantzic v. State*, 279 N.C. 212, 182 S.E.2d 563 (1971).

§ 17-6. To judge of Appellate Division or superior court in writing.—Application for the writ shall be made in writing, signed by the applicant—

- (1) To any one of the justices or judges of the Appellate Division.
- (2) To any one of the superior court judges, either during a session or in vacation. (1868-9, c. 116, s. 4; Code, s. 1626; Rev., s. 1824; C. S., s. 2208; 1969, c. 44, s. 41; 1971, c. 528, s. 2.)

Editor's Note.—Prior to the 1969 amendment, subdivision (1) read "To any one of the justices of the Supreme Court."

The 1971 amendment, effective Oct. 1, 1971, substituted "during a session" for "at term time" in subdivision (2).

§ 17-7. Contents of application.

Noncompliance.—Where a defendant had not been tried when his writ of habeas corpus was filed, and he did not assert in the petition that the legality of his restraint had not been already adjudged upon a prior writ of habeas corpus, he did not

comply with the provisions of this section relating to the contents of a petition for the writ of habeas corpus. *State v. Murphy*, 10 N.C. App. 11, 177 S.E.2d 917 (1970).

Stated in *State v. Green*, 2 N.C. App. 391, 163 S.E.2d 14 (1968).

§ 17-8. Issuance of writ without application.—When the appellate division or superior court division, or any judge of either division, has evidence from any judicial proceeding before such court or judge that any person within this State is illegally imprisoned or restrained of his liberty, it is the duty of said court or judge to issue a writ of habeas corpus for his relief, although no application be

made for such writ. (1868-9, c. 116, s. 10; Code, s. 1632; Rev., s. 1826; C. S., s. 2210; 1969, c. 44, s. 42.)

Editor's Note.—The 1969 amendment substituted "When the appellate division or superior court division, or any judge of either division" for "When the Supreme or superior court, or any judge of either" at the beginning of the section.

ARTICLE 7.

Habeas Corpus for Custody of Children in Certain Cases.

§ 17-39: Repealed by Session Laws 1967, c. 1153, s. 1, effective October 1, 1967.

Cross References.—

As to action or proceeding for custody of minor child, see §§ 50-13.1 to 50-13.8.

§ 17-39.1: Repealed by Session Laws 1967, c. 1153, s. 1, effective October 1, 1967.

Cross Reference.—

As to action or proceeding for custody of minor child, see §§ 50-13.1 to 50-13.8.

§ 17-40: Repealed by Session Laws 1967, c. 1153, s. 1, effective October 1, 1967.

Cross Reference.—As to action or proceeding for custody of minor child, see §§ 50-13.1 to 50-13.8.

ARTICLE 8.

Habeas Corpus Ad Testificandum.

§ 17-41. **Authority to issue the writ.**—Every court of record has power, upon the application of any party to any suit or proceeding, civil or criminal, pending in such court, to issue a writ of habeas corpus, for the purpose of bringing before the said court any prisoner who may be detained in any jail or prison within the State, for any cause, except a prisoner under sentence for a capital felony, to be examined as a witness in such suit or proceeding in behalf of the party making the application.

Such writ of habeas corpus may be issued by any magistrate or clerk of the superior court, upon application as provided in this section, to bring any person confined in the jail or prison of the same county where such magistrate or clerk may reside, to be examined as a witness before such magistrate or clerk.

In cases where the testimony of any prisoner is needed in a proceeding before a magistrate, or a clerk, and such person is confined in a county in which such magistrate or clerk does not reside, application for habeas corpus to testify may be made to any justice or judge of the General Court of Justice. (1868-9, c. 116, ss. 37, 38; Code, ss. 1663, 1664; Rev., ss. 1855, 1856; C. S., s. 2243; 1969, c. 44, s. 43; 1971, c. 528, s. 3.)

Editor's Note.—The 1969 amendment substituted "justice or judge of the General Court of Justice" for "judge of the Supreme or superior court" at the end of the section.

The 1971 amendment, effective Oct. 1,

1971, substituted "magistrate" for "justice of the peace" near the beginning of the second and third paragraphs and for "justice" twice in the second paragraph and again in the third paragraph.

§ 17-44. Applicant to pay expenses and give bond to return.—The service of the writ shall not be complete, however, unless the applicant for the same tenders to the person in whose custody the prisoner may be, if such person is a sheriff, coroner, or marshal, the fees and expenses allowed by law for bringing such prisoner, nor unless he also gives bond, with sufficient security, to such sheriff, coroner, or marshal, as the case may be, conditioned that such applicant will pay the charges of carrying back such prisoner. (1868-9, c. 116, s. 41; Code, s. 1667; Rev., s. 1859; C. S., s. 2246; 1971, c. 528, s. 4.)

Editor's Note. — The 1971 amendment, following "coroner" in two places in the effective Oct. 1, 1971, deleted "constable" section.

Chapter 17A.

Law-Enforcement Officers.

Sec.		Sec.	
17A-1.	Findings and policy.	17A-5.	Chairman; vice-chairman; other officers; meetings; reports.
17A-2.	Definitions.	17A-6.	Powers.
17A-3.	North Carolina Criminal Justice Training and Standards Council established; members; terms; vacancies.	17A-7.	Required standards.
17A-4.	Compensation.	17A-8.	Grants under the supervision of Council and the State.
		17A-9.	Donations and appropriations.

§ 17A-1. **Findings and policy.**—The General Assembly finds that the administration of criminal justice is of statewide concern, and that proper administration is important to the health, safety and welfare of the people of the State and is of such nature as to require education and training of a professional nature. It is in the public interest that such education and training be made available to persons who seek to become criminal justice officers, persons who are serving as such officers in a temporary or probationary capacity, and persons already in regular service. (1971, c. 963, s. 1.)

Editor's Note. — Session Laws 1971, c. 963, s. 10 contains a severability clause.

This Chapter Is Applicable to Police Officers Appointed by Secretary of Department of Administration under § 143-

340.—See opinion of Attorney General to Mr. John Faircloth, Director, Criminal Justice Training and Standards Council, 43 N.C.A.G. 99 (1973).

§ 17A-2. **Definitions.**—Unless the context clearly otherwise requires, the following definition applies in this Chapter: "Criminal justice system" means the State and local law-enforcement agencies, the State and local police traffic service agencies, the State correctional agencies, the jails and other correctional agencies maintained by local governments, except constitutional officers. (1971, c. 963, s. 2.)

§ 17A-3. **North Carolina Criminal Justice Training and Standards Council established; members; terms; vacancies.**—(a) There is hereby established the North Carolina Criminal Justice Training and Standards Council, hereinafter called "the Council" in the Executive Office of the Governor (or the Department of Justice). The Council shall be composed of 21 members as follows:

- (1) **Sheriffs.**—Five sheriffs or other individuals serving in sheriffs' departments, one of whom shall be selected by the North State Law-Enforcement Officers Association and four selected by the North Carolina Sheriffs' Association.
- (2) **Police Officers.**—Five police chiefs or other individuals serving in police departments, one of whom shall be selected by the North State Law-Enforcement Officers Association and four selected by the North Carolina Association of Police Executives.
- (3) **Departments.**—A representative of the Department of Justice to be selected by the Attorney General; a representative of the Department of Motor Vehicles to be selected by the Commissioner of Motor Vehicles; a representative for the correctional system to be selected by the Governor; a representative for the court system to be selected by the Chief Justice.
- (4) **At-large Groups and Ex Officio Members.**—Three members at large to be selected by the Governor. The Director of the Institute of Government and the Director of Law-Enforcement Training in the Department of Community Colleges, the Director of Criminal Justice Programs at East Carolina University and the Director of Criminal Jus-

ti ce Programs of North Carolina University at Charlotte, who shall be permanent members of the Council.

(b) The members shall be appointed for staggered terms and the initial appointments shall be made prior to September 1, 1971, and the appointees shall hold office until July 1st of the year in which their respective terms expire and until their successors are appointed and qualified as provided hereafter:

For the terms of one year: One member from subdivision (1) of subsection (a), one member from subdivision (2) of subsection (a), one from subdivision (3) representing the Department of Motor Vehicles, one from subdivision (3) representing the court system, and one from subdivision (4) appointed by the Governor.

For the terms of two years: Two members from subdivision (1) of subsection (a), two members from subdivision (2) of subsection (a), one from subdivision (3) representing the Department of Justice, and one from subdivision (4) appointed by the Governor.

For the terms of three years: Two members from subdivision (1) of subsection (a), two members from subdivision (2) of subsection (a), one member from subdivision (3) representing the correctional system, and one from subdivision (4) appointed by the Governor.

Thereafter, as the term of each member expires, his successor shall be appointed for a term of three years. Notwithstanding the appointments for a term of years, each member shall serve at the will of the appointing authority.

The Director of the Institute of Government, the Director of Law-Enforcement Training of the Department of Community Colleges, the Directors of Criminal Justice Programs at East Carolina University and the University of North Carolina at Charlotte shall be continuing members of the Council during their tenure as Director.

Members of the Council who are public officers shall serve ex officio and shall perform their duties on the Council in addition to the duties of their office.

(c) Vacancies in the Council occurring for any reason shall be filled, for the unexpired term, by the authority making the original appointment of the person causing the vacancy. (1971, c. 963, s. 3.)

§ 17A-4. Compensation.—Members of the Council who are State officers or employees shall receive no compensation for serving on the Council, but shall be reimbursed for their expenses in accordance with G.S. 138-6. Members of the Council who are full-time salaried public officers or employees other than State officers or employees shall receive no compensation for serving on the Council, but shall be reimbursed for their expenses in accordance with G.S. 138-5(b). All other members of the Council shall receive compensation and reimbursement for expenses in accordance with G.S. 138-5. (1971, c. 963, s. 4.)

§ 17A-5. Chairman; vice-chairman; other officers; meetings; reports.—(a) The Governor shall designate one of the members of the Council as chairman upon its creation, and shall appoint or reappoint the chairman each July 1 thereafter.

(b) The Council shall select a vice-chairman and such other officers and committee chairmen from among its members, as it deems desirable, at the first regular meeting of the Council after its creation and at the first regular meeting after July 1 of each year thereafter. Nothing in this subsection, however, shall prevent the creation or abolition of committees or offices of the Council, other than the office of vice-chairman, as the need may arise at any time during the year.

(c) The Council shall hold at least four regular meetings per year upon the call of the chairman. Special meetings shall be held upon the call of the chairman or the vice-chairman, or upon the written request of five members of the Council.

(d) The activities and recommendations of the Council with respect to standards for criminal justice training shall be treated as appropriate in regular and special reports made by the Council. The Council, however, shall present special reports

and recommendations to the Governor or the General Assembly, or both, as the need may arise or as the Governor or General Assembly may request. (1971, c. 963, s. 5.)

§ 17A-6. Powers.—In addition to powers conferred upon the Council elsewhere in this Chapter, the Council shall have the power to:

- (1) Promulgate rules and regulations for the administration of this Chapter including the authority to require the submission of reports and information by criminal justice agencies and departments within this State relevant to employment, education and training.
- (2) Establish minimum educational and training standards for employment as a criminal justice officer: (i) In temporary or probationary status, and (ii) in permanent positions.
- (3) Certify persons as being qualified under the provisions of this Chapter to be criminal justice officers.
- (4) Consult and cooperate with counties, municipalities, agencies of this State, other governmental agencies, and with universities, colleges, junior colleges, and other institutions concerning the development of criminal justice training schools and programs or courses of instruction.
- (5) To establish minimum standards and levels of education or equivalent experience for all criminal justice instructors, teachers or professors.
- (6) Conduct and stimulate research by public and private agencies which shall be designed to improve education and training in the administration of criminal justice.
- (7) Make recommendations concerning any matters within its purview pursuant to this Chapter.
- (8) Employ a director and such other personnel as may be necessary in the performance of its functions.
- (9) Appoint such advisory committees as it may deem necessary.
- (10) Make such evaluations as may be necessary to determine if governmental units are complying with the provisions of this Chapter.
- (11) Adopt and amend bylaws, consistent with law, for its internal management and control.
- (12) Enter into contracts and do such things as may be necessary and incidental to the administration of its authority pursuant to this Chapter. (1971, c. 963, s. 6.)

§ 17A-7. Required standards.—(a) Criminal justice officers already serving under permanent appointment on July 1, 1971, shall not be required to meet any requirement of subsections (b) and (c) of this section as a condition of tenure or continued employment, nor shall failure of any such criminal justice officers to fulfill such requirements make him ineligible for any promotional examination for which he is otherwise eligible. The legislature finds, and it is hereby declared to be the policy of this Chapter, that such criminal justice officers have satisfied such requirements by their experience. It is the intent of this Chapter that all officers employed, after the Council has adopted the required standards, shall meet the requirements of this Chapter, provided that the Council shall not enforce its standards until after training facilities are available for personnel to comply with the standards.

(b) At the earliest practicable time, the Council shall provide, by regulation, that no person shall be appointed as a criminal justice officer, except on a temporary or probationary basis, unless such person has satisfactorily completed an initial preparatory program of training at a school approved by the Council. No criminal justice officer who lacks the education and training qualifications required by the Council may have his temporary or probationary employment extended beyond one year by renewal of appointment or otherwise.

(c) In addition to the requirements of subsection (b), of this section, the Council, by rules and regulations, shall fix other qualifications for the employment and

retention of criminal justice officers, including minimum age, education, physical and mental standards, citizenship, good moral character, experience, and such other matters as relate to the competence and reliability of persons to assume and discharge the responsibilities of criminal justice officers, and the Council shall prescribe the means for presenting evidence of fulfillment of these requirements.

Where minimum general educational standards are not met, yet the individual shows potential and a willingness to achieve the standards by extra study, they may be waived by the Council for the amount of time it will take to achieve the standards required.

(d) The Council may issue a certificate evidencing satisfaction of the requirements of subsection (b) and (c) of this section to any applicant who presents such evidence as may be required by its rules and regulations of satisfactory completion of a program or course of instruction in another jurisdiction equivalent in content and quality to that required by the Council for approved criminal justice education and training programs in this State. (1971, c. 963, s. 7.)

§ 17A-8. Grants under the supervision of Council and the State.—The Council may authorize the reimbursement to each political subdivision of the State not exceeding sixty percent (60%) of the salary and of the allowable tuition, living and travel expenses incurred by the officers in attendance at approved training programs, providing said political subdivisions do in fact adhere to the selection and training standards established by the Council. (1971, c. 963, s. 8.)

§ 17A-9. Donations and appropriations.—(a) The Council may accept for any of its purposes and functions under this Chapter any and all donations, both real and personal, and grants of money from any governmental unit or public agency, or from any institution, person, firm or corporation, and may receive, utilize and dispose of the same. Any arrangements pursuant to this section shall be detailed in the annual report of this Council. Such report shall include the identity of the donor, the nature of the transaction, and the conditions, if any. Any moneys received by the Council pursuant to this section shall be deposited in the State treasury to the account of the Council.

(b) The Council, by rules and regulations, shall provide for the administration of the grant program authorized by this section. In promulgating such rules, the Council shall promote the most efficient and economical program of criminal justice training, including the maximum utilization of existing facilities and programs for the purpose of avoiding duplication.

(c) The Council may provide grants as a reimbursement for actual expenses incurred by the State or political subdivision thereof for the provisions of training programs of officers from other jurisdictions within the State. (1971, c. 963, s. 9.)

Chapter 17B.

North Carolina Criminal Justice Education and Training System.

Sec.

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17B-2. System established.

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17B-4. North Carolina Criminal Justice
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17B-5. North Carolina Criminal Justice
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Council—duties.17B-6. Functions of Department of Jus-
tice.

§ 17B-1. **Definitions.**—As used in this Article, unless the context otherwise requires:

“Center” means the North Carolina Criminal Justice Education and Training Center.

“The Council” means the North Carolina Criminal Justice Education and Training Council.

“Criminal justice agencies” means the State and local law-enforcement agencies, the State and local police traffic service agencies, the State correctional agencies, the jails and other correctional agencies maintained by local governments, and the courts of the State.

“Department” means the Department of Justice. (1973, c. 749.)

§ 17B-2. **System established.**—The North Carolina Department of Justice shall establish a North Carolina Criminal Justice Education and Training System. The System shall consist of a cooperative arrangement between criminal justice agencies, both State and local, to provide education and training to the officers and employees of the criminal justice agencies of the State of North Carolina and its local governments. The System shall include the educational and training programs offered by the Criminal Justice Education and Training Center as well as those conducted by any other public agencies or institutions within the State which are engaged in criminal justice education and training and desire to be affiliated with the System for the purpose of achieving greater coordination of criminal justice education and training efforts in North Carolina. (1973, c. 749.)

§ 17B-3. **Center established.**—The North Carolina Department of Justice shall establish a North Carolina Criminal Justice Education and Training Center. The Center shall provide a comprehensive educational and training program for agents of the State Bureau of Investigation, for other employees of the Department of Justice and for the employees of any State criminal justice agency which desires to affiliate with the Center for purposes of education and training.

The Department of Justice, through the Center, also may provide educational and training programs for local criminal justice personnel upon request and is encouraged to develop programs which will enhance the skills of local criminal justice officials. In addition the Department of Justice is authorized to provide comprehensive programs designed to qualify persons as instructors of criminal justice education and training at the local level. (1973, c. 749.)

§ 17B-4. **North Carolina Criminal Justice Education and Training System Council — organization.** — (a) Membership. — The North Carolina Criminal Justice Education and Training System Council shall be composed of 38 members as follows:

- (1) Four representatives of sheriffs' departments, one of whom shall be selected by the North [Carolina] State Law Enforcement Officers' Association and three selected by the North Carolina Sheriffs' Association.

- (2) Four representatives of police departments, one of whom shall be selected by the North [Carolina] State Law Enforcement Officers' Association and three selected by the North Carolina Association of Police Executives.
- (3) Two county commissioners selected by the North Carolina Association of County Commissioners.
- (4) Two mayors selected by the North Carolina League of Municipalities.
- (5) One criminal justice educator selected by the North Carolina Association of Criminal Justice Education.
- (6) One law-enforcement training officer selected by the North Carolina Law-Enforcement Training Officers' Association.
- (7) Five civilian members at large to be selected by the Governor from the general private sector.
- (8) One superior court judge, one district court judge and one solicitor of the General Court of Justice, each of these individuals to be selected by the members of their respective groups in general meeting assembled.
- (9) The Attorney General, the Director of the Administrative Office of the Courts, the Commissioner of Correction, the Director of Jail and Detention Services, the Director of Probation, the Chairman of the Board of Paroles, the Commissioner of Youth Development, the Director of the State Bureau of Investigation, the Commissioner of Motor Vehicles, the Commander of the State Highway Patrol, the Executive Director of the Wildlife Resources Commission, the Commissioner of Commercial and Sports Fisheries, the Chairman of the State Board of Alcoholic Control, the Coordinator of the Governor's Highway Safety Program, the President of Community Colleges of the Department of Education, and the Director of the Institute of Government, all of whom shall serve ex officio.

(b) Terms.—Each of these members, other than those designated as ex officio, shall be appointed for one-year terms with the initial appointments being made prior to September 1, 1973, and each appointee serving upon said Council until September 1, 1974, or until such date as their respective successors are appointed and qualified.

(c) Vacancies.—Vacancies on the Council occurring for any reason shall be filled, for the unexpired term, by the appropriate designated authority making the appointment of the person causing the vacancy.

(d) Votes.—Each and every member of the Council, including those designated as ex officio members, shall be voting members.

(e) Chairman.—The chairman of the Council shall be elected from within the Council membership by a majority of the members voting thereon. The Council may elect such other officers from its membership as it deems necessary.

(f) Ex Officio Proxy.—Any of the ex officio members may, in writing, designate another individual on his staff to represent and vote for him on the Council.

(g) Compensation.—No member of the Council shall receive any compensation for serving on the Council. Members of the Council who are State officers or employees shall be reimbursed for their expenses in accordance with G.S. 138-6. All other members of the Council shall be reimbursed for their necessary expenses in accordance with G.S. 138-5(b). (1973, c. 749.)

§ 17B-5. North Carolina Criminal Justice Education and Training System Council—duties.—The North Carolina Criminal Justice Education and Training System Council shall have the following duties:

- (1) It shall formulate basic plans for and promote the development of a comprehensive system of education and training for the officers and employees of criminal justice agencies consistent with the regulations and standards of the North Carolina Criminal Justice Training and Stan-

dards Council and shall provide advice, counsel, and leadership in bringing together the various components of the System and in implementing and operating the System.

- (2) It may adopt and amend bylaws, consistent with law, for its internal management and control.
- (3) It may establish an executive committee and such other committees of the Council and such advisory bodies as it deems appropriate and may determine their respective powers and duties.
- (4) The Council may accept for any of its purposes and functions under this Article any and all donations, both real and personal, and grants of money from any governmental unit or public agency, or from any institution, person, firm or corporation. Any arrangements pursuant to this section shall be detailed in the annual report of the Council. Such reports shall include the identity of the donor, the nature of the transaction, and the conditions, if any. Any moneys received by the Council pursuant to this section shall be deposited in the State treasury to the account of the System. All moneys involved shall be subject to audit by the State Auditor. (1973, c. 749.)

§ 17B-6. Functions of Department of Justice.—The Department of Justice shall have the following powers and duties with respect to the Criminal Justice Education and Training System:

- (1) It may, after consultation with representatives of local criminal justice agencies, plan, organize, staff and conduct instructional and training programs to be offered through the System to local criminal justice agencies upon their request.
- (2) It shall provide any personnel deemed necessary for the development, implementation and maintenance of the System as a whole, provided appropriations are made for such positions by the General Assembly or funds are otherwise available.
- (3) It shall maintain liaison among local, State and federal agencies with respect to criminal justice education and training.
- (4) It shall have legal custody of all books, papers, documents, other records and property relating to the System as a whole.
- (5) It shall employ the staff of the Center and direct the operation of it in cooperation with other affiliated agencies.
- (6) It shall make an annual report to the North Carolina Criminal Justice Education and Training System Council.
- (7) It may enter into contracts and do such things as may be necessary and incidental to the administration of its authority pursuant to this Article. (1973, c. 749.)

Chapter 18.

Regulation of Intoxicating Liquors.

§§ 18-1 to 18-152: Repealed by Session Laws 1971, c. 872, s. 3, effective October 1, 1971.

Cross Reference.—For provisions covering the subject matter of the repealed Chapter, see Chapter 18A and §§ 105-113.68 to 105-113.104.

Chapter 18A.

Regulation of Intoxicating Liquors.

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18A-56. Violation a misdemeanor.

18A-57. Local acts and local option.

18A-58. Effective date of standards for intoxicating liquors; disposition of liquor on hand.

Editor's Note.—Session Laws 1971, c. 872, rewrote former Chapter 18 to appear as present Chapter 18A. Section 5 of c. 872 provides: "This act shall become effective October 1, 1971, except that G.S. 18A-30 and 18A-33, relative to hours of sale and consumption, shall be effective upon the ratification of this act. Any license or permit required by this act, which has not been heretofore required by law, must be acquired on or before May 1, 1972." The act was ratified July 16, 1971.

Revenue provisions of former Chapter 18 were rewritten and transferred to Chapter 105. See now §§ 105-113.68 to 105-113.104.

Historical citations to sections of former Chapter 18 have been added to corresponding sections in new Chapter 18A.

The cases cited under the provisions of this Chapter were decided under similar provisions of former Chapter 18.

ARTICLE 1.*General Provisions.*

§ 18A-1. Purpose of Chapter.—The purpose and intent of this Chapter is to establish a uniform system of control over the sale, purchase, transportation, manufacture, and possession of intoxicating liquors in North Carolina, and to provide administrative procedures to insure, as far as possible, the proper administration of this Chapter under a uniform system throughout the State. This Chapter shall be liberally construed to the end that the sale, purchase, transportation, manufacture, and possession of intoxicating liquors shall be prohibited except as authorized in this Chapter. (1937, c. 49, s. 1; 1971, c. 872, s. 1.)

Applied in *Food Fair, Inc. v. City of Henderson*, 17 N.C. App. 335, 194 S.E.2d 213 (1973).

Quoted in *Smith v. County of Mecklen-*

burg, 280 N.C. 497, 187 S.E.2d 67 (1972); *State v. Williams*, 283 N.C. 550, 196 S.E.2d 756 (1973).

§ 18A-2. Definitions.—When used in this Chapter:

- (1) The term "alcoholic beverage" means alcoholic beverages of any and all kinds that contain more than fourteen percent (14%) of alcohol by volume.
- (2) "Fortified wine" shall mean any wine that is made by fermentation from grapes, fruits, or berries, to which nothing but pure brandy has been added, which brandy is made from the same type of grape, fruit, or berry that is contained in the base wine to which it is added and having an alcoholic content of over fourteen percent (14%) and not more than twenty-one percent (21%) of absolute alcohol, reckoned by volume;

and is approved by the State Board of Alcoholic Control as to identity, quality, and purity as provided in this Chapter.

- (3) The word "license" shall mean a written or printed certificate which allows a person to engage in some phase of the liquor industry, and which may be issued by the Secretary of Revenue, by a municipality, or by a county, pursuant to the provisions of this Chapter or Article 2C of Chapter 105.
- (4) The word "liquor" or the phrase "intoxicating liquor" shall be construed to include alcohol, brandy, whiskey, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt or fermented beverages, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one half of one percent ($\frac{1}{2}$ of 1%) or more of alcohol by volume, which are fit for use for beverage purposes.
- (5) The term "malt beverages" shall mean beer, lager beer, malt liquor, ale, porter, and other brewed or fermented beverages containing one half of one percent ($\frac{1}{2}$ of 1%) of alcohol by volume but not more than five percent (5%) of alcohol by weight.
- (6) The term "mixed beverage," as used in this Chapter is defined to be and to mean a drink composed in whole or in part of alcoholic beverages having an alcoholic content of more than fourteen percent (14%) of alcohol by volume and served to an individual in a miniature bottle or in a quantity less than the quantity contained in a closed package, purchased for consumption on premises licensed for mixed beverages by the State Board of Alcoholic Control.
- (7) The term "native wines" shall mean wine made from grapes, fruit, or berries and having only such alcoholic content as natural fermentation may produce.
- (8) The term "nontaxpaid liquor" shall mean any intoxicating liquor upon which the taxes imposed by the United States and by the State or other territorial jurisdiction in which such liquor was purchased have not both been paid.
- (9) The word "permit" shall mean a written or printed authorization to engage in some phase of the liquor industry which may be issued by the State Board of Alcoholic Control under the provisions of this Chapter.
- (10) The term "person" shall mean any individual, firm, partnership, association, corporation, other organizations or groups, or combination of persons acting as a unit.
- (11) The term "sale" shall include any transfer, trade, exchange, or barter in any manner or by any means whatsoever, for a consideration.
- (12) The term "spirituous liquors" shall be deemed to include any alcoholic beverages containing an alcoholic content of more than twenty-one percent (21%) by volume.
- (13) The term "taxpaid liquor" shall mean any intoxicating liquor upon which the taxes imposed by the United States and by the State or other territorial jurisdiction in which such liquor was purchased have both been paid.
- (14) The term "unfortified wines" shall mean wine that has an alcoholic content produced only by natural fermentation or by the addition of pure cane, beet, or dextrose sugar, and having an alcoholic content of not less than five percent (5%) and not more than fourteen percent (14%) of absolute alcohol, the percent of alcohol to be reckoned by volume, and that has been approved as to identity, quality and purity by the State Board of Alcoholic Control as provided in this Chapter. (1923, c. 1, s. 1; C. S., s. 3411(a); 1937, c. 49, s. 24; c. 411; 1939, c. 158, s. 501;

1941, c. 339, ss. 1, 3, 4; 1945, c. 780; c. 903, ss. 1, 3, 10; 1971, c. 872, s. 1; 1973, c. 476, s. 193.)

Editor's Note.—The 1973 amendment, effective July 1, 1973, substituted "Secretary of Revenue" for "State Commissioner of Revenue" in subdivision (3).

Beverages Not Enumerated.—It may be shown in evidence as a fact that other beverages than those defined by this section as intoxicating and prohibited are intoxicating in fact and come within the intent and meaning of the statute. *State v. Fields*, 201 N.C. 110, 159 S.E. 11 (1931).

The General Assembly clearly intended to pre-empt the regulation of malt beverages in order to prevent local governments from enacting regulatory ordinances. *State v. Williams*, 283 N.C. 550, 196 S.E.2d 756 (1973).

Allowing local governments to regulate malt beverages contrary to State law would result in an intolerable situation whereby citizens lawfully possessing beer in one

county would be violating a criminal law in another. The legislature preempted the field in order to avoid such confusion. *State v. Williams*, 283 N.C. 550, 196 S.E.2d 756 (1973).

Beer is not an alcoholic beverage as defined by subdivision (1). *State v. Williams*, 283 N.C. 550, 196 S.E.2d 756 (1973).

But is a malt beverage as defined by subdivision (5). *State v. Williams*, 283 N.C. 550, 196 S.E.2d 756 (1973).

Those wines formerly called "sweet wines" are now called "fortified wines." *Clark v. North Carolina Bd. of Alcoholic Control*, 14 N.C. App. 464, 188 S.E.2d 705 (1972).

What Constitutes Sale of Beer. — See opinion of Attorney General to Mr. Lee P. Phillips, Director of Enforcement, State Board of Alcoholic Control, 40 N.C.A.G. 3 (1970).

§ 18A-3. Manufacture, sale, etc., forbidden except as expressly authorized.—(a) No person shall manufacture, sell, barter, transport, import, export, deliver, furnish, purchase, or possess any intoxicating liquor except as authorized in this Chapter.

(b) No person who does not have an appropriate permit and license (as defined in this Chapter) shall have any intoxicating liquor mailed or shipped to him from outside this State. (1923, c. 1, s. 2; C. S., s. 3411(b); 1971, c. 872, s. 1.)

State's Regulations in Relation to Interstate Commerce Clause.—Both by the Constitution of the United States (Amendment XXI) and this Chapter liquor has been placed in a category somewhat different from other articles of commerce, and the State's regulations thereof should not be held obnoxious to the interstate commerce clause, unless clearly in conflict with granted federal powers and congressional action thereunder. *State v. Hall*, 224 N.C. 314, 30 S.E.2d 158 (1944).

Guilty Knowledge.—This section relating to alcoholic liquors must be interpreted in the light of the common-law principle that guilty knowledge is an essential element of crime, and therefore a person cannot be held guilty of illegally transporting intoxicating liquors if he has no knowledge of the nature of the goods transported. *State v. Welch*, 232 N.C. 77, 59 S.E.2d 199 (1950).

Possession may be either actual or constructive. *State v. Meyers*, 190 N.C. 239, 129 S.E. 600 (1925). See also *State v. Norris*, 206 N.C. 191, 173 S.E. 14 (1934); *State v. Webb*, 233 N.C. 382, 64 S.E.2d 268 (1951); *State v. Harrelson*, 245 N.C. 604, 96 S.E.2d 867 (1957); *State v. Glenn*, 251 N.C. 156, 110 S.E.2d 791 (1959).

A prima facie case of the unlawful sale of intoxicating liquors may be established by circumstances sufficient to show that the defendant had in his constructive possession large quantities of whiskey not on his premises, in the possession of others who held it for him. *State v. Pierce*, 192 N.C. 766, 136 S.E.2d 121 (1926).

An accused has possession of intoxicating liquor within the meaning of this section when he has both the power and the intent to control its disposition or use. The requisite power to control may reside in the accused acting alone or in combination with others. *State v. Fuqua*, 234 N.C. 168, 66 S.E.2d 667 (1951).

If a man procures another to obtain liquor for him and puts it in a given place; and the other performs this agreement and places the liquor, then the possession is complete. A person may be in the possession of the article which he has not at the moment about his person. The constructive possession, as well as the actual possession, is in the contemplation of the statute. *State v. Meyers*, 190 N.C. 239, 129 S.E. 600 (1925); *State v. Pierce*, 192 N.C. 766, 136 S.E. 121 (1926).

Burden of Showing Right to Possess. — This section contemplates that no person

shall transport or have in his possession for the purpose of sale any intoxicating liquor. There are exceptions and, ordinarily, the burden is on him who asserts that he comes within the exception to show by way of defense that he is one of that class authorized by law to have intoxicants in his possession. *State v. Gordon*, 224 N.C. 304, 30 S.E.2d 43 (1944).

Possession of Taxpaid Liquor at Unauthorized Place Unlawful. — Possession of taxpaid whiskey is illegal under this section if it is not at an authorized place. *State v. Welborn*, 249 N.C. 268, 106 S.E.2d 204 (1958).

The possession of nontaxpaid liquor in any quantity anywhere in the State is, without exception, unlawful. *State v. Barnhardt*, 230 N.C. 223, 52 S.E.2d 904 (1949).

Purpose of Possession Immaterial. — Upon the trial for transporting intoxicating liquors in violation of this Article, the purpose of the possession of the intoxicants, or that they were for the purpose of profit, are immaterial, and the fact that the person accused is carrying them from one place to another is sufficient. *State v. Sigmon*, 190 N.C. 684, 130 S.E. 854 (1925).

Whether the transportation of nontaxpaid whiskey is unlawful does not depend upon whether it is being transported for the purpose of sale. *State v. Wells*, 259 N.C. 173, 130 S.E.2d 299 (1963).

The word "transport" means to carry or convey from one place to another, and therefore a person transports intoxicating liquor if he carries it on his person or conveys it in a vehicle under his control or in any other manner, regardless of whether the liquor belongs to him or is in his custody. *State v. Welch*, 232 N.C. 77, 59 S.E.2d 199 (1950).

A person is guilty of unlawfully transporting intoxicating liquor in violation of this section if he knowingly transports intoxicating liquor for any purpose other than those specified in this Chapter. *State v. Welch*, 232 N.C. 77, 59 S.E.2d 199 (1950).

Transportation as Including Possession. — Where the evidence is sufficient to convict the defendant of transporting whiskey under this section, the transportation of spirituous liquor includes the possession. *State v. Sigmon*, 190 N.C. 684, 130 S.E. 854 (1925).

Where an indictment for violating the prohibition law contains a count as to the unlawful possession and also unlawfully transporting spirituous liquor, an acquittal upon the first is not inconsistent with a conviction on the second issue. They are two distinct offenses under the statute.

State v. Sigmon, 190 N.C. 684, 130 S.E. 854 (1925).

Only a person in the actual or constructive possession of nontaxpaid whiskey, absent conspiracy or aiding and abetting, could be guilty of the unlawful transportation thereof. *State v. Wells*, 259 N.C. 173, 130 S.E.2d 299 (1963).

Purchase and Transportation for Use in Home.—See *State v. Winston*, 194 N.C. 243, 139 S.E. 240 (1927).

Sale of Liquor in Clubs or Restaurants Not Authorized. — There is no provision in this Chapter or in any other law in this State that authorizes the sale of liquor in private or public clubs or restaurants in this State. *Hill v. State Bd. of Alcoholic Control*, 17 N.C. App. 592, 195 S.E.2d 94 (1973).

Receiving Intoxicating Liquors. — There is no provision in this Article which in express terms prohibits one from receiving intoxicating liquors. Except as embraced and included by the acts which are prohibited in the statute, the mere receiving of intoxicating liquors is not forbidden. *State v. Hammond*, 188 N.C. 602, 125 S.E. 402 (1924).

It is bad pleading to make the mere receipt of liquor the subject of a separate and independent count; and the charge, that the mere receipt of same though only in the home of the recipient and kept there only for a lawful purpose is forbidden, is not warranted by any proper construction of the statute that has been suggested to this court. *State v. Hammond*, 188 N.C. 602, 125 S.E. 402 (1924).

Effect on Recovery under Compensation Act.—The mere fact that an applicant for compensation under the provisions of the Workmen's Compensation Act had in his possession whiskey contrary to this section does not alone prevent the recovery of compensation. *Jackson v. Dairymen's Creamery*, 202 N.C. 196, 162 S.E. 359 (1932).

Warrant or Indictment. — Under this section a warrant or indictment should charge the unlawful possession or sale of intoxicating liquors. *State v. May*, 248 N.C. 60, 102 S.E.2d 418 (1958).

Separate Offenses Charged in Same Warrant.—The offenses of delivering and of keeping for sale are separate offenses and although charged in the same warrant, they will be treated as separate counts. *State v. Jarrett*, 189 N.C. 516, 127 S.E. 590 (1925).

Sufficiency of Evidence. — See *State v. Meyers*, 190 N.C. 239, 129 S.E. 600 (1925);

State v. Sigmon, 190 N.C. 684, 130 S.E. 854 (1925); **State v. Pierce**, 192 N.C. 766, 136 S.E. 121 (1926); **State v. Hege**, 194 N.C. 526, 140 S.E. 80 (1927); **State v. Norris**, 206 N.C. 191, 173 S.E. 14 (1934); **State v. Epps**, 213 N.C. 709, 197 S.E. 580 (1938); **State v. Wilson**, 227 N.C. 43, 40 S.E.2d 449 (1946); **State v. Holbrook**, 228 N.C. 582, 46 S.E.2d 842 (1948); **State v. Vanhoy**, 230 N.C. 162, 52 S.E.2d 278 (1949); **State v. Webb**, 233 N.C. 382, 64 S.E.2d 268 (1951); **State v. Harrelson**, 245 N.C. 604, 96 S.E.2d 867 (1957); **State v. Mitchell**, 260 N.C. 235, 132 S.E.2d 481 (1963).

Testimony by officers searching without a warrant that they found a quantity of nontaxpaid liquor in defendant's car was held competent. **State v. Vanhoy**, 230 N.C. 162, 52 S.E.2d 278 (1949).

General Verdict Sufficient for Conviction.—A general verdict of guilty, under evidence tending to show that the defendant unlawfully had in his possession, when not in his private dwelling, intoxicating liquor, under an indictment therefor, as well as for the unlawful receiving and transportation, is sufficient to sustain a conviction upon the count of possession prohibited. **State v. McAllister**, 187 N.C. 400, 121 S.E. 739 (1924).

Erroneous Charge as to Separate Count Harmless. — Where a general verdict of guilty has been rendered against the defendant, upon competent evidence, tending to show that he unlawfully had spirituous liquor in his possession, an erroneous

charge as to receiving and transporting it, is harmless error. **State v. McAllister**, 187 N.C. 400, 121 S.E. 739 (1924).

Harmless Error. — When a defendant is charged in two counts in the bill of indictment with separate offenses of the same grade, and the jury returns a verdict of guilty as to both counts, error in the trial of one count is harmless and does not entitle defendant to a new trial when such error does not affect the verdict on the other count. **State v. Epps**, 213 N.C. 709, 197 S.E. 580 (1938).

Distinct Charges Supporting Separate Sentences.—A charge of unlawful possession of intoxicating liquors for the purpose of sale and a charge of unlawful sale of intoxicating liquors are distinct charges of separate offenses and support separate sentences by the court on a general plea of guilty. **State v. Moschoure**, 214 N.C. 321, 199 S.E. 92 (1938).

Sentence of Two Years Constitutional.—See **State v. Beavers**, 188 N.C. 595, 125 S.E. 258 (1924).

Separate Punishment for Different Counts.—Upon a general verdict of guilty to an indictment charging separately unlawful possession of intoxicating liquor and unlawful transportation of intoxicating liquor, the court is empowered to assign separate punishment for each count, notwithstanding that the possession was physically necessary to the act of transporting. **State v. Chavis**, 232 N.C. 83, 59 S.E.2d 348 (1950).

§ 18A-4. **Exemptions.**—(a) The provisions of this Chapter shall not apply to grain alcohol received by duly licensed physicians, druggists, dental surgeons, college, university, and State laboratories, and manufacturers of medicine, when intended to be used in compounding, mixing, or preserving medicines or medical preparations, or for surgical purposes, when obtained as hereinbefore provided.

(b) Nothing contained in this Chapter shall prohibit the importation into the State and the delivery and possession in the State for use in industry, manufacturers, and arts of any denatured alcohol or other denatured spirits that are compounded and made in accordance with the formulas prescribed by acts of Congress of the United States and regulations made under authority thereof by the Treasury Department of the United States and the Commissioner of Internal Revenue thereof and are not now subject to internal revenue tax levied by the government of the United States.

(c) This Chapter shall not apply to liquor required and used by bona fide hospitals or sanatoriums established and maintained for the treatment of patients addicted to the use of liquor, morphine, opium, cocaine, or other deleterious drugs when the liquor is administered to patients actually in such hospitals or sanatoriums for treatment, and when the liquor is administered as an essential part of the particular system or method of treatment and exclusively by or under the direction of a duly licensed and registered physician of good moral character and standing.

(d) This Chapter shall not prohibit the manufacture or sale of cider or vinegar.

(e) Nothing in this Chapter shall prevent the purchase or possession of un-

fortified wine for sacramental purposes by any organized church or ordained minister of the gospel.

(f) The provisions of this Chapter shall not apply to ethyl alcohol intended for use and/or used for the following purposes:

- (1) For scientific, chemical, mechanical, industrial, medicinal, and culinary purposes;
- (2) For use by those authorized to procure the same tax free, as provided by the acts of Congress and regulations promulgated thereunder;
- (3) In the manufacture of denatured alcohol produced and used as provided by the acts of Congress and regulations promulgated thereunder;
- (4) In the manufacture of patented, patent, proprietary, medicinal, pharmaceutical, antiseptic, toilet, scientific, chemical, mechanical, and industrial preparations or products unfit for beverage purposes;
- (5) In the manufacture of flavoring extracts and syrups unfit for beverage purposes.

(g) This Chapter shall not apply to wine (fortified or unfortified) and liquor used for the manufacture of pharmaceutical products, as authorized by the State Board of Alcoholic Control. (1923, c. 1, ss. 4, 19, 20; C. S., s. 3411(d), (s), (t); 1935, c. 114; 1971, c. 872, s. 1; c. 1233.)

Editor's Note. — Session Laws 1971, c. 1233, corrected an error in this section as enacted by Session Laws 1971, c. 872, by adding the introductory paragraph of subsection (f).

§ 18A-5. Manufacturing liquor, utensils, or stamps.—(a) It is unlawful for any person to distill, manufacture, or in any manner make, or for any person to aid, assist, or abet any such person in distilling, manufacturing, or in any manner making any intoxicating liquor, except as expressly authorized in this Chapter.

(b) It shall be unlawful for any person knowingly to permit or allow any distillery or other apparatus for the making or distilling of spirituous liquors to be set up for operation or to be operated on lands in his possession or control.

(c) It shall be unlawful to advertise, manufacture, sell, or possess for sale any utensil, contrivance, machine, preparation, compound, tablet, substance, formula, direction, or recipe advertised, designed, or intended for use in the unlawful manufacture of intoxicating liquor. It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this Chapter, or which has been so used, and no property rights shall exist in any such liquor or property.

(d) The willful manufacture or causing to be manufactured or the willful possession of any counterfeit or unauthorized federal revenue stamp or local A.B.C. board stamp shall be unlawful. (1905, c. 498, s. 2; Rev., s. 3533; 1923, c. 1, ss. 4, 6, 26; C. S., ss. 3407, 3411(d), (f), (z); 1937, c. 49, s. 13; 1945, c. 635; 1951, c. 850; 1955, c. 560; 1957, c. 984; c. 1235, s. 1; 1969, c. 789; 1971, c. 872, s. 1.)

Process of Manufacturing Need Not Be Complete.—See *State v. Horner*, 174 N.C. 788, 94 S.E. 291 (1917).

Accessories Equally Guilty. — The defendant, guilty of aiding and abetting the unlawful manufacture of liquor, is equally guilty with those who actually operated the still. *State v. Clark*, 183 N.C. 733, 110 S.E. 641 (1922).

The defendant, convicted on his trial of aiding or abetting in the manufacture of whiskey on one count of the indictment, may not complain because he was tried on

another count of the same bill for the unlawful manufacture of liquor and acquitted, there being sufficient evidence to sustain a conviction on each one. *State v. Smith*, 183 N.C. 725, 110 S.E. 654 (1922).

It was proper to reject evidence as to the quantity of cotton or corn defendant, tried for unlawful manufacture of liquor, etc., had raised on his farm that year. *State v. Smith*, 183 N.C. 725, 110 S.E. 654 (1922).

When Question for Jury.—Where there is evidence of defendant's guilty knowl-

edge in aiding in the distilling or manufacturing of intoxicating liquor by hauling it away, and also consistent with his innocence in merely hauling away the remnants after the illegal purpose had been accomplished or frustrated, without intention of taking part or aiding in its manufacture, the question of his guilt or innocence is one for the jury, under proper instructions. *State v. Horner*, 174 N.C. 788, 94 S.E. 291 (1917).

Possession, within the meaning of this section, may be either actual or constructive. *State v. McLamb*, 235 N.C. 251, 69 S.E.2d 537 (1952).

If the property designed for the manufacture of liquor was within the power of the defendant in such a sense that he could and did command its use, the possession was as complete within the meaning of this section as if his possession had been actual. *State v. Webb*, 233 N.C. 382, 64 S.E.2d 268 (1951); *State v. McLamb*, 235 N.C. 251, 69 S.E.2d 537 (1952).

Possession of Property Designed for Manufacture.—An indictment charging the defendant with a violation of this section, in that he had in his possession property designed for the manufacture of intoxicating liquor is not identical with a charge of an attempt to commit a crime. *State v. Jaynes*, 198 N.C. 728, 153 S.E. 410 (1930).

"Property Designed for the Manufacture of Liquor."—The word "designed" is de-

fined as "done by design or purposely," that is, "opposed to accidental or inadvertent." Hence, as used in this section, the phrase "property designed for the manufacture of liquor" means property "fashioned according to a plan" for that purpose. *State v. McLamb*, 235 N.C. 251, 69 S.E.2d 537 (1952).

Warrant.—A warrant adequately charges a defendant with the offense under this section if it charges possession of property designed for the manufacture of liquor intended for use in violation of this Chapter. *State v. Stokes*, 10 N.C. App. 176, 177 S.E.2d 758 (1970).

Insufficiency of Charge Not Such as to Warrant Sustaining Motion in Arrest of Judgment.—See *State v. McLamb*, 235 N.C. 251, 69 S.E.2d 537 (1952).

Evidence of the defendant's guilt of possessing parts of a still designed and intended for the purpose of manufacturing intoxicating liquor was sufficient to be submitted to the jury and to sustain their verdict of guilty, and the fact that the parts had not been assembled into a distillery is immaterial under the language of the statute. *State v. Jaynes*, 198 N.C. 728, 153 S.E. 410 (1930).

A plea of not guilty under this section puts in issue every element of the offense charged. *State v. McLamb*, 235 N.C. 251, 69 S.E.2d 537 (1952).

§ 18A-6. Nontaxpaid liquor.—It shall be unlawful for any person to have in his possession or transport any nontaxpaid liquor, except as authorized by law. In the event of a violation of this section, the liquor and any equipment or materials designed or intended for use in the manufacture, sale, or possession of nontaxpaid liquor shall be seized and disposed of as provided in G.S. 18A-24. Any vehicle or other conveyance used in the transportation of nontaxpaid liquor shall be seized and disposed of as provided in G.S. 18A-21. (1923, c. 1, s. 6; C. S., s. 3411(f); 1937, c. 49, ss. 13, 15; 1945, c. 635; 1951, c. 850; 1955, c. 560; 1957, c. 984; c. 1235, s. 1; 1969, c. 789; 1971, c. 872, s. 1.)

Possession Unlawful without Exception.—The possession of nontaxpaid liquor in any quantity anywhere in the State is, without exception, unlawful. *State v. Barnhardt*, 230 N.C. 223, 52 S.E.2d 904 (1949); *State v. Parker*, 234 N.C. 236, 66 S.E.2d 907 (1951); *State v. Avery*, 236 N.C. 276, 72 S.E.2d 670 (1952); *State v. Brown*, 238 N.C. 260, 77 S.E.2d 627 (1953); *State v. Guffey*, 252 N.C. 60, 112 S.E.2d 734 (1960); *State v. Leach*, 272 N.C. 733, 158 S.E.2d 782 (1968).

Possession May Be Actual or Constructive.—Possession, within the meaning of this section, may be either actual or constructive. *State v. Brown*, 238 N.C. 260, 77 S.E.2d 627 (1953); *State v. Guffey*, 252 N.C. 60, 112 S.E.2d 734 (1960); *State*

v. Leach, 272 N.C. 733, 158 S.E.2d 782 (1968).

There can be a constructive possession of nontaxpaid whiskey, as well as an actual possession. *State v. Carver*, 259 N.C. 229, 130 S.E.2d 285 (1963).

What Warrant or Indictment Should Charge.—Under this section a warrant or indictment should charge the unlawful possession of alcoholic beverages upon which the taxes imposed by the laws of the Congress of the United States or by the laws of this State had not been paid. *State v. May*, 248 N.C. 60, 102 S.E.2d 418 (1958).

Sufficiency of Warrant.—A warrant which, stripped of nonessential words,

charges defendant with unlawful possession of a quantity of nontaxpaid whiskey, is sufficient to survive a motion to quash. *State v. Camel*, 230 N.C. 426, 53 S.E.2d 313 (1949).

An allegation in a warrant or bill of indictment to the effect that the federal and State taxes had not been paid upon the liquor seized or that it was illicit liquor is merely descriptive, and does not limit the prosecution to any particular section of the liquor law or deprive the State of the benefit of the general provisions of the law as it now exists. Instead, it facilitates proof of the unlawfulness of the possession and renders it unnecessary to prove possession of any particular quantity. *State v. Avery*, 236 N.C. 276, 72 S.E.2d 670 (1952).

When Search Warrant Not Required.—No search warrant is required where the officer sees or has absolute personal knowledge that there is intoxicating liquor in an automobile. *State v. Leach*, 272 N.C. 733, 158 S.E.2d 782 (1968).

The court cannot take judicial notice that "bootleg whiskey" is "nontaxpaid liquor." *State v. Tillery*, 243 N.C. 706, 92 S.E.2d 64 (1956).

What State Must Prove.—See *State v. Pitt*, 248 N.C. 57, 102 S.E.2d 410 (1958).

Sufficiency of Evidence.—In a prosecution under this section on a warrant charging possession of nontaxpaid liquor, evidence by the State that six gallons of liquor and a jar of "white liquor" were found on defendant's premises, without evidence that the containers did not bear a revenue stamp of the federal government or a stamp of any of the county A.B.C. boards, is insufficient to sustain conviction. The court will not take judicial notice that

"white liquor" means nontaxpaid liquor. *State v. Wolf*, 230 N.C. 267, 52 S.E.2d 920 (1949).

Evidence of defendant's illegal possession of a considerable quantity of nontaxpaid whiskey was held sufficient to carry the case to the jury and his motion to nonsuit was properly denied. *State v. Camel*, 230 N.C. 426, 53 S.E.2d 313 (1949); *State v. Harrison*, 239 N.C. 659, 80 S.E.2d 481 (1954).

Evidence that whiskey belonging to defendant was found on defendant's premises, that the whiskey was not A.B.C. whiskey, together with stipulations that the containers bore no stamps, is sufficient to be submitted to the jury in a prosecution under this section. *State v. Pitt*, 248 N.C. 57, 102 S.E.2d 410 (1958).

Evidence Sufficient to Overrule Defendant's Motion to Nonsuit.—See *State v. Avery*, 236 N.C. 276, 72 S.E.2d 670 (1952); *State v. Bryant*, 245 N.C. 645, 97 S.E.2d 264 (1957); *State v. Mitchell*, 260 N.C. 235, 132 S.E.2d 481 (1963).

Evidence showing nontaxpaid liquor found within the curtilage of the defendant's home is sufficient to take the case to the jury under this section, and the court will properly overrule defendant's motion for judgment as of nonsuit. *State v. Gibbs*, 238 N.C. 258, 77 S.E.2d 779 (1953).

Confiscation of Car.—Defendant admitted ownership of the car in which two bottles of nontaxpaid whiskey were being transported at the time of his arrest, and he was found guilty of unlawful transportation of intoxicating liquor. This was held sufficient to sustain the court's order confiscating his car and ordering it sold in conformity with statute. *State v. Vanhoy*, 230 N.C. 162, 52 S.E.2d 278 (1949).

§ 18A-7. Keeping liquor for sale; evidence.—(a) It is unlawful for any person, firm, association or corporation, by whatever name called, to have or keep in possession for the purpose of sale, except as authorized by law, any intoxicating liquors; and proof of any one of the following facts shall constitute prima facie evidence of a violation of this section:

- (1) The possession of a license from the government of the United States to sell or manufacture spirituous liquors; or
- (2) The possession of more than one gallon of spirituous liquors at any one time, whether in one or more places; or
- (3) The possession of more than five gallons of wine (fortified or unfortified) at any time, whether in one or more places; or
- (4) The possession of more than 20 gallons of malt beverages at any one time, whether in one or more places, other than draft malt beverages in kegs; or
- (5) The possession of any quantity whatsoever of nontaxpaid liquor.

(b) The possession of liquor by any person not legally permitted under this Chapter to possess liquor shall be prima facie evidence that such liquor is kept

for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this Chapter. (1913, c. 44, s. 2; 1915, c. 97, s. 8; 1923, c. 1, s. 10; C. S., ss. 3379, 3411(j); 1949, c. 1251, s. 2; 1963, c. 932; 1967, c. 222, ss. 4, 6; 1971, c. 872, s. 1.)

Editor's Note.—For a discussion of the wisdom of permitting proof of possession to raise a presumption of unlawful handling for gain, see 5 N.C.L. Rev. 302.

Constitutionality.—The section is constitutional and valid. *State v. Randall*, 170 N.C. 757, 87 S.E. 227 (1915); *State v. Langley*, 209 N.C. 178, 183 S.E. 526 (1936).

It is not in contravention of the federal Constitution. *State v. Brown*, 170 N.C. 714, 86 S.E. 1042 (1915).

Liberal Construction. — Subsection (b) is to be liberally construed to prevent the use of liquor as a beverage, and the possession of such liquor is made prima facie evidence of the violation of the law. *State v. Hammond*, 188 N.C. 602, 125 S.E. 402 (1924).

"Prima Facie Evidence". — The words "prima facie evidence" are defined in Webster's International Dictionary as meaning "evidence sufficient, in law, to raise a presumption of fact or establish the fact in question, unless rebutted." It must presume that the legislature had such meaning in mind when such words were used in the statute. *State v. Russell*, 164 N.C. 482, 80 S.E. 66 (1913).

In a prosecution for the unlawful possession of intoxicating (now spirituous) liquor for the purpose of sale, evidence that defendant, who resided four miles from the still, came to the still and got one-half gallon of nontaxpaid whiskey and left with it, is sufficient to make out a prima facie case for the jury. *State v. Graham*, 224 N.C. 347, 30 S.E.2d 151 (1944).

Prima facie evidence neither conclusively determines the guilt or innocence of the party who is accused nor withdraws from the jury the right and duty of passing upon and deciding the issue to be tried. The burden of proof remains continually upon the State to establish the accusation which it makes, as prima facie evidence does not change or shift the burden. *State v. Russell*, 164 N.C. 482, 80 S.E. 66 (1913).

While the prima facie case, unexplained, is sufficient to sustain a verdict of guilty, yet the defendant is not required to show, by the greater weight of evidence, that the whiskey was in his possession for lawful purposes, for such, in effect, would require him to establish his own innocence, and relieve the State of the burden of the issue, which is placed upon it. *State v. Wilkerson*, 164 N.C. 431, 79 S.E. 888 (1913).

Where there is evidence that the defendant, indicted under this section had in his possession sufficient spirituous liquors to raise the prima facie presumption that it was for the purpose of sale, it is competent to show this intent, and in furtherance of the presumption, that soon thereafter, about two months, he was found working on a copper still on his premises, and had copper enough to make two of them; and that, upon his premises being searched, he had falsely denied the possession and had attempted to shoot the officer making the search. *State v. Simmons*, 178 N.C. 679, 100 S.E. 239 (1919).

Evidence that over a gallon of whiskey in pint bottles with unbroken seals was found on defendant's premises, that defendant admitted owning the whiskey, and that empty whiskey bottles were found around premises, is held sufficient to be submitted to the jury on a charge of illegal possession of intoxicating liquor for the purpose of sale. *State v. Libby*, 213 N.C. 662, 197 S.E. 154 (1938).

In a prosecution for unlawful possession of intoxicating (now spirituous) liquor for the purpose of sale, where the evidence is that a quantity of beer less than five gallons and less than one gallon of gin was found in the house of defendants, no presumption arises thereupon against defendants. *State v. Harrelson*, 245 N.C. 604, 96 S.E.2d 867 (1957).

The evidence was sufficient to carry the case to the jury on the charge of unlawful possession of whiskey and beer for the purpose of sale. *State v. Mills*, 246 N.C. 237, 98 S.E.2d 329 (1957).

The possession of more than one gallon of intoxicating (now spirituous) liquor is prima facie evidence of possession for the purpose of sale under this section, and is sufficient to take the case to the jury on the issue. *State v. Tate*, 210 N.C. 168, 185 S.E. 665 (1936).

For evidence sufficient to make out prima facie case against defendant, see *State v. Buchanan*, 233 N.C. 477, 64 S.E.2d 549 (1951).

Power of Legislature to Change Rule of Evidence.—See full discussion in *State v. Wilkerson*, 164 N.C. 431, 79 S.E. 888 (1913).

Possession may be either actual or constructive within the meaning of this section. *State v. Parker*, 234 N.C. 236, 66 S.E.2d

907 (1951); *State v. Rogers*, 252 N.C. 499, 114 S.E.2d 355 (1960).

This section, making the possession of certain specified quantities of spirituous, vinous, or malt liquors prima facie evidence of its violation, intends that the "possession" shall be construed as either actual or constructive; so that the possession of such quantities by the agent will be deemed the possession of the principal for the purpose of the act. *State v. Lee*, 164 N.C. 533, 80 S.E. 405 (1913); *State v. Buchanan*, 233 N.C. 477, 64 S.E.2d 549 (1951).

Evidence tending to show that 96 gallons of intoxicating liquor were found in the basement of the tenant house on defendant's farm and tending to show that he alone had key to the door to the basement is sufficient to support constructive possession. *State v. Parker*, 234 N.C. 236, 66 S.E.2d 907 (1951).

If the liquor was within the power of the defendant, in such a sense that he could and did command its use, the possession was as complete within the meaning of the statute as if his possession had been actual. *State v. Buchanan*, 233 N.C. 477, 64 S.E.2d 549 (1951).

If nontaxpaid whiskey is on a person's premises with his knowledge and consent, he has constructive possession thereof while it remains on premises under his exclusive control. *State v. Thompson*, 256 N.C. 593, 124 S.E.2d 728 (1962).

The possession of the agent for the one accused of violating the State prohibition law of more than one gallon of intoxicating liquor is sufficient to make out a prima facie case of guilt under the provisions of this section. *State v. Blauntia*, 170 N.C. 749, 87 S.E. 101 (1915).

Possession as Evidence of Sale. — See *State v. McAllister*, 187 N.C. 400, 121 S.E. 739 (1924); *State v. Knight*, 188 N.C. 630, 125 S.E. 406 (1924); *State v. Pierce*, 192 N.C. 766, 136 S.E. 121 (1926); *State v. Parker*, 234 N.C. 236, 66 S.E.2d 907 (1951).

Possession for Use of Owner. — The mere possession of spirituous liquor in the home for the use of the owner, his family and their guests on the premises in the absence of a count in the indictment charging that it was for prohibited purposes, is not made unlawful. *State v. Mull*, 193 N.C. 668, 137 S.E. 866 (1927).

The law permits an individual to possess in his home an unlimited quantity of tax-paid intoxicating (now spirituous) liquor for his own use and that of his bona fide guests, but the possession of more than one gallon is prima facie evidence that such

liquor is for the purpose of sale. *State v. Causby*, 269 N.C. 747, 153 S.E.2d 467 (1967).

Possession of Any Quantity of Nontaxpaid Liquor.—Nontaxpaid whiskey is outlawed by statute in this State. The possession of any quantity of nontaxpaid liquor is, without exception, unlawful, and this section raises the presumption, even though less than one gallon in quantity, that possession is for the purpose of sale. *State v. Guffey*, 252 N.C. 60, 112 S.E.2d 734 (1960).

Possession of nontaxpaid liquor is prima facie evidence that such liquor is kept for the purpose of being sold. *State v. Tessnear*, 265 N.C. 319, 144 S.E.2d 43 (1965).

From the mere possession of nontaxpaid whiskey, this section authorizes, but does not compel, the jury to infer that the possessor intended to sell the whiskey. *State v. Tessnear*, 265 N.C. 319, 144 S.E.2d 43 (1965).

Burden of Proof.—The possession of the specified quantity of spirituous liquors sufficient to make out prima facie evidence of an unlawful purpose is only sufficient to sustain a verdict of guilty, and does not shift the burden upon the defendant to show his innocence, and an instruction to that effect is reversible error. *State v. Helms*, 181 N.C. 566, 107 S.E. 228 (1921).

Where the possession of the specified quantities of intoxicating liquors under a statutory provision has made out prima facie evidence of guilt, and the defendant has not introduced evidence, an instruction to the jury placing the burden on the defendant to establish his innocence is reversible error, being equivalent to directing a verdict, which is not permissible in a criminal case. *State v. Helms*, 181 N.C. 566, 107 S.E. 228 (1921).

Evidence Sufficient to Warrant Finding That Possession Was for Purpose of Sale. — See *State v. Jenkins*, 234 N.C. 112, 66 S.E.2d 819 (1951).

Evidence Sufficient to Support Adverse Verdict.—See *State v. Gordon*, 224 N.C. 304, 30 S.E.2d 43 (1944).

Evidence Sufficient to Overrule Nonsuit. — Evidence tending to show that defendant was driving his automobile on a highway, that when officers attempted to stop him he attempted to elude them, threw a carton containing three gallons of nontaxpaid whiskey from the car, and drove in a reckless manner until struck from rear by the officers' car and run off the road, was held sufficient to overrule nonsuit upon each of the charges of illegal possession of whiskey for the purpose of sale and unlawful transportation of same.

State v. Merritt, 231 N.C. 59, 55 S.E.2d 804 (1949).

Insufficient Evidence to Direct Verdict.—Evidence establishing defendant's possession of more than a gallon of intoxicating (now spirituous) liquor, without other incriminating evidence, is insufficient to support a directed verdict of guilty of possession of intoxicating liquor for the purpose of sale under this section. *State v. Ellis*, 210 N.C. 166, 185 S.E. 663 (1936).

Instructions.—Where an instruction, that "the possession of more than one gallon of

liquor constitutes prima facie evidence of unlawful possession for the purpose of sale" is directed to a count charging unlawful possession for the purpose of sale, and defendant is convicted on that count and on two other counts of unlawful possession, and sentences imposed run concurrently, conceding the charge to be erroneous, it cannot avail defendant, who must show error affecting the whole case. *State v. Gordon*, 224 N.C. 304, 30 S.E.2d 43 (1944).

Applied in *State v. Moses*, 283 N.C. 390, 196 S.E.2d 211 (1973).

§ 18A-8. Sale to or purchase by minors.—(a) It shall be unlawful for :

- (1) Any person, firm, or corporation knowingly to sell or give any malt beverages or unfortified wine to any person under 18 years of age;
- (2) Any person under 18 years of age to purchase or possess, or for anyone to aid or abet such person in purchasing, any malt beverages or unfortified wine;
- (3) Any person, firm, or corporation knowingly to sell or give any alcoholic beverages to any person under 21 years of age; or
- (4) Any person under 21 years of age to purchase or possess, or for anyone to aid or abet such person in purchasing, any alcoholic beverages.

(b) Whenever a sale of malt beverages or unfortified wine is made to a person under the age of 18 years, it shall be prima facie evidence that the person making the sale had knowledge that the purchaser was under the age of 18 years. Such prima facie evidence may be rebutted by showing that the purchaser produced for inspection a driver's license, selective service card, or military identification card showing the age of the purchaser to be 18 years or more and the description of the physical appearance of the person on the identification card reasonably describes the purchaser. In the absence of such identification, the prima facie evidence of knowledge of age may be rebutted by the vendor by other evidence which reasonably indicated at the time of sale that the purchaser was 18 years of age or more. (1933, c. 216, s. 8; 1959, c. 745, s. 1; 1967, c. 222, s. 3; 1969, c. 998; 1971, c. 872, s. 1; 1973, c. 27.)

Editor's Note. — The 1973 amendment deleting "school identification card" following "selective service card" near the middle of subsection (b).

§ 18A-9. Federal license prohibited.—(a) It is unlawful for any person, firm, partnership, or corporation to procure, obtain, possess, purchase, permit to be issued, or have issued to any person a license, permit, stamp, or other authorization from the government of the United States to manufacture, sell, possess, transport, handle, or purchase intoxicating liquors in the State of North Carolina. Provided, this section shall not apply to the Department of Defense and agencies of the armed services operating thereunder, nor to any agency, department, official, or agent of the State of North Carolina or any other person or persons engaged in any activity or transactions authorized under this Chapter.

(b) The possession of a license or the issuance to any person of a license to manufacture, rectify, or sell, at wholesale or retail, spirituous liquors by the United States government or any officer thereof in any county, city, or town where the manufacture, sale, or rectification of spirituous liquors is forbidden by the laws of this State shall be prima facie evidence that the person having such license, or to whom the license was issued, is guilty of doing the act permitted by the license in violation of the laws of this State. On the trial of any person charged with the violation of any such laws, it shall be competent to prove that such a license is in the possession of or has been issued to such person by the testimony of any witness who has personally examined the records of the government office

where the official record of such licenses is kept. (1905, c. 339, s. 5; Rev., s. 2060; 1907, c. 931, C. S., s. 3408; 1951, c. 1025; 1971, c. 872, s. 1.)

§ 18A-10. Advertisements.—It shall be lawful to advertise anywhere or by any means or method, liquor or the manufacture, sale, keeping for sale, or furnishing of the means by which it may be obtained, or where, how, from whom, or at what price it may be obtained, provided such advertising complies with the rules and regulations of the State Board of Alcoholic Control. (1923, c. 1, s. 3; C. S., s. 3411(c); 1933, cc. 216, 229; 1945, c. 903, s. 1; 1947, c. 1098, ss. 2, 3; 1957, c. 1048; 1963, c. 426, s. 10; c. 460, s. 1; 1971, c. 872, s. 1.)

Authority of State Board of Alcoholic Control to Regulate Advertising. — See P. Phillips, State ABC Board 40 N.C.A.G. 1 (1970).
opinion of Attorney General to Mr. Lee

§ 18A-11. Place of sale and delivery; place of prosecution.—In case of a sale of liquor where the delivery thereof was made by a common or other carrier, the sale and delivery shall be deemed to be made in the county wherein the delivery was made by such carrier or the consignee, his agent or employee, or in the county wherein the sale was made, or from which the shipment was made, and prosecution for such sale or delivery may be had in either county. (1923, c. 1, s. 8; C. S., s. 3411(h); 1971, c. 872, s. 1.)

§ 18A-12. Indictment and summons.—In any affidavit, information, warrant, or indictment for the violation of this Chapter, separate offenses may be united in separate counts, and the defendant may be tried on all at one trial, and the penalty for all offenses may be imposed. (1971, c. 872, s. 1.)

§ 18A-13. Mixed beverages.—(a) When any person applies to a county or municipal alcoholic control board for a license or permit for the sale of mixed beverages on any premises in the State, pursuant to any public or local act, said person shall also file written application for a permit to be issued by the State Board.

(b) No permit shall be issued by the State Board unless the premises and licensee meet the requirements established in the comprehensive plan approved by the State Board, and the licensee meets the requirements contained in G.S. 18A-39.

(c) The permit shall be an on-premise permit and the provisions of G.S. 18A-43 through 18A-45 shall be applicable to any premises or licensee selling alcoholic beverages under any special or local act.

(d) No permit shall be issued until after the local board certifies that the licensee and the premises meet the requirements of all applicable local and State laws and regulations, and any permit shall remain the property of the State Board, and shall be surrendered upon notice from the State Board.

(e) The State Board shall suspend or revoke the permit for a violation of any provision of the local act or of Chapter 18 or Chapter 18A of the General Statutes.

(f) All permits shall be for a period of one year unless sooner suspended or revoked and shall expire on April 30 of each year.

(g) Application for permit or renewal of permit shall be accompanied by a fee of one hundred and fifty dollars (\$150.00), payable to the State Board of Alcoholic Control for deposit with the State Treasurer, and no fee is refundable in case a permit is refused, suspended, or revoked.

(h) The State Board shall adopt rules and regulations governing the transportation, possession, serving and use of mixed beverages, and it shall be unlawful and punishable as a misdemeanor for any person to violate the provisions of

this section or any rule or regulation duly adopted by the State Board. (1971, c. 872, s. 1.)

Editor's Note. — This section was repealed and a new Article 3A, governing the sale of mixed alcoholic beverages was enacted by Session Laws 1973, c. 316.

The 1973 act was made subject to a state-wide referendum, and was defeated at the general election held Nov. 6, 1973.

ARTICLE 2.

A.B.C. Boards and Enforcement.

Part 1. A.B.C. Boards.

§ 18A-14. State Board of Alcoholic Control.—(a) A State Board of Alcoholic Control is hereby created, and shall consist of a Chairman and two associate members. The Chairman and associate members of the Board shall be men well known for their character, ability, and business acumen. The Chairman of the Board shall devote his full time to his official duties. He shall receive a salary to be fixed by the Governor, subject to the approval of the Advisory Budget Commission, together with necessary traveling expenses allowed under the general law. The two associate members of the Board shall receive no compensation for their services except the per diem, subsistence, and travel allowances provided for members of similar State boards and commissions by Chapter 138 of the General Statutes.

(b) The Chairman and the associate members of the State Board of Alcoholic Control shall be appointed by the Governor and shall serve at the pleasure of the Governor. The Governor shall fill any vacancy arising on the State Board by appointment of a successor, to serve at the pleasure of the Governor. The Chairman of the Board shall have such powers and perform such duties as the Board shall prescribe, including the authority to appoint, promote, demote, and discharge all subordinate officers and employees of the State Board of Alcoholic Control. All such officers and employees shall perform such duties as the Chairman may assign. (1937, c. 49, ss. 2, 3; c. 411; 1939, c. 185, s. 5; 1941, c. 107, s. 5; 1963, c. 916, s. 1; 1965, c. 1102, ss. 1, 2; 1969, c. 294, ss. 1, 2; 1971, c. 872, s. 1.)

State Government Reorganization.—The State Board of Alcoholic Control was transferred to the Department of Com-

merce by G.S. 143A-173, enacted by Session Laws 1971, c. 864.

§ 18A-15. Powers and authority of State Board.—The State Board of Alcoholic Control shall have power and authority as follows:

- (1) To see that all the laws relating to the sale and control of intoxicating liquor are observed and performed;
- (2) To audit and examine the accounts, records, books, and papers relating to the operation of county and municipal stores or to have the same audited;
- (3) To fix the retail prices of all alcoholic beverages sold in the county and municipal A.B.C. stores at such levels as shall promote the temperate use of these beverages and as may facilitate policing, which price shall be uniform throughout the State; to compute the taxes levied by G.S. 105-113.93 and 105-113.94 on the retail prices so fixed; to determine the total prices of all such alcoholic beverages, which total price shall be the sum of the retail price plus the tax levied by G.S. 105-113.93 and 105-113.94; and to notify the stores periodically of such prices. The State Board of Alcoholic Control shall cause the several county and municipal alcoholic boards of control to add to the established retail prices of all alcoholic beverages sold in said county and municipal A.B.C. stores as provided above the sum of five cents (5¢) per bottle on every bottle of alcoholic beverages sold in said stores, which shall

be in addition to the retail prices of all alcoholic beverages as set by the State Board of Alcoholic Control. This five cents (5¢) per bottle increase in the retail prices of alcoholic beverages sold by county or municipal A.B.C. stores shall not be subject to the tax levied in G.S. 105-113.93 and 105-113.94, but the clear proceeds of the additional retail price of five cents (5¢) per bottle as provided above shall be remitted to the county commissioners of the county in which such five cents (5¢) per bottle was collected, accompanied by forms or reports to be prescribed and furnished by the State Board of Alcoholic Control, which remittances shall be spent in the discretion of the county commissioners only for projects for construction, maintenance and operation of facilities for education, research, treatment or rehabilitation of alcoholics. The funds may also be used for programs of education and research on problems of alcoholism and the treatment and rehabilitation of alcoholics. The county commissioners are hereby empowered to spend the funds for a project not located in the county but which benefits the citizens of the county. The State Department of Mental Health and the State Department of Public Instruction are hereby empowered to enact guidelines for the expenditure of such funds by county commissioners and the county commissioners may expend the funds pursuant to those guidelines. Said reports and remittances of the five cents (5¢) per bottle as herein provided shall be made monthly by the local boards on or before the fifteenth day of the succeeding month; that to every bottle of alcoholic beverages containing two ounces or less sold in said stores there shall be added to the price as established by the State Board of Alcoholic Control the sum of one cent (1¢) in lieu of the five cents (5¢) per bottle provided hereinabove and said sum shall be remitted and accounted for in the same manner as hereinabove provided on bottles containing more than two ounces.

- (4) To remove any member, or members, of county and municipal boards whenever in the opinion of the State Board, such member, or members, of the county or municipal board, or boards may be unfit to serve thereon;
- (5) To test any and all alcoholic beverages that may be sold, or proposed to be sold to the county or municipal stores, and to install and operate such apparatus, laboratories, or other means or instrumentalities and employ to operate the same such experts, technicians, employees and laborers as may be necessary to operate the same, in accordance with the opinion of the Board. In lieu of establishing and operating laboratories as above directed, the Board may, with the approval of the Governor and the Commissioner of Agriculture, arrange with the State Chemist to furnish such information and advice and to perform such analyses and other laboratory services as the Board may consider necessary, or they may, if they deem advisable, cause such tests to be made otherwise;
- (6) To supervise purchasing by the county and municipal boards when the State Board is of the opinion that it is advisable for it to exercise such power in order to carry into effect the purpose and intent of this Chapter, with full power to disapprove any such purchase. At all times it shall have the right to inspect all invoices, papers, books, and records in the county or municipal stores or boards relating to purchases;
- (7) To exercise the power to approve or disapprove in its discretion all regulations adopted by the several county and municipal stores for the operation of said stores and the enforcement of alcoholic beverage control laws which may be in violation of the terms or spirit of this Chapter;
- (8) To require that a sufficient amount be so allocated as to insure adequate

enforcement; the amount shall in no instance be less than five percent (5%) nor more than ten percent (10%) of the net profits arising from the sale of alcoholic beverages;

- (9) To remove, in case of violation of the terms or spirit of this Chapter, officers employed, elected, or appointed in the several counties and municipalities where stores may be operated;
- (10) To approve or disapprove, in its discretion, the opening and location of county and municipal stores; provided that in the location of control stores in any county in which a majority of the votes have been cast for liquor control stores, no store or stores shall be located in any community or town in which a majority of the votes cast were against control; provided further, however, that stores may be located in such communities and towns if and when as many as twenty percent (20%) of the qualified voters therein by petition, at any time after 18 months since the last election on such question, have requested the location of such a store or stores in such communities or towns and the State Board has found, upon due investigation after receipt of such petition, that a majority of the qualified electors in such community or town are at the time such investigation is made in favor of establishing such store or stores. Each county and municipality that may be entitled to operate stores for the sale of alcoholic beverages shall be entitled to operate at least one store for such purpose. No additional stores in each of said counties and municipalities shall be opened until and unless their opening and their place of location shall first be approved by the State Board, which at any time may withdraw its approval of the operation of any additional county or municipal store when the store is not operated efficiently and in accordance with the alcoholic beverage control laws and all valid regulations prescribed therefor, or whenever, in the opinion of the State Board, the operation of any county or municipal store shall be inimical to the morals or welfare of the community in which it is operated or for such other cause, or causes, as may appear to the State Board sufficient to warrant the closing of any county or municipal store;
- (11) To require the use of a uniform accounting system in the operation of all county and municipal stores hereunder and to provide in said system for the keeping therein and the record of all such information as may, in the opinion of the said State Board, be necessary or useful in its auditing of the affairs of the said county and municipal stores, as well as in the study of such problems and subjects as may be studied by said State Board in the performance of its duties;
- (12) To grant, to refuse to grant, or to revoke permits for any person, firm, or corporation to do business in North Carolina in selling alcoholic beverages to or for the use of any county or municipal store and to provide and to require that such information be furnished by such person, firm, or corporation as a condition precedent to the granting of such permit, or permits, and to require the furnishing of such data and information as it may desire during the life of such permit, or permits, and for the purpose of determining whether such permit, or permits, shall be continued, revoked, or regranted after expiration dates. No permit, however, shall be granted by the State Board to any person, firm, or corporation when the State Board has reason sufficient unto itself to believe that such person, firm, or corporation has furnished to it any false or inaccurate information or is not fully, frankly, and honestly cooperating with the State Board and the several county and municipal boards in observing and performing all liquor laws that may now or hereafter be in force in this State, or whenever the Board shall be of opinion that such permit ought not to

be granted or continued for any cause. Upon the granting of a permit in accordance with this Chapter, the State Board of Alcoholic Control shall notify the county sheriff and county tax collector, and if applicable, the city chief of police and city tax collector, as well as the county alcoholic beverage control officer, whenever an alcoholic beverage control permit of any type is issued within the respective county and/or city;

- (13) To permit both the establishment of warehouses for storing alcoholic beverages within the State and the storage of alcoholic beverages in warehouses already established and to prescribe rules and regulations for the storage of such beverages and the withdrawal of the same therefrom. Such warehousing or bailment of alcoholic beverages as may be made hereunder shall be for the convenience of delivering to alcoholic boards of control and others authorized to purchase the same and shall be under the strict supervision and subject to all of the rules and regulations of the State Board of Control relating thereto;
- (14) To adopt, amend, or repeal reasonable rules and regulations for the purpose of carrying out the provisions of this Chapter, but not inconsistent herewith, which rules and regulations shall become effective when filed as provided by law.
- (15) To appoint or commission A.B.C. officers, hearing officers, and other enforcement personnel authorized by Part 2 of this Article.

The State Board shall have all other powers which may be reasonably implied from the granting of express powers herein named, together with such other powers as may be incidental to, or convenient for, carrying out and performing the powers and duties herein given to the Board. (1937, c. 49, s. 4; cc. 237, 411; 1945, c. 954; 1949, c. 974, s. 9; 1961, c. 956; 1963, c. 426, s. 12; c. 916, s. 2; c. 1119, s. 1; 1965, c. 1063; c. 1102, s. 3; 1967, c. 222, s. 2; c. 1240, s. 1; 1971, c. 872, s. 1; 1973, c. 28; c. 473, s. 1; c. 606.)

Editor's Note.—The first 1973 amendment substituted "twenty percent (20%)" for "fifteen percent (15%)" in the second proviso to the first sentence of subdivision (10).

The second 1973 amendment, effective July 1, 1973, substituted "the county commissioners of the county in which such five cents (5¢) per bottle was collected" for "the State Treasurer" in the third sentence of subdivision (3), substituted, at the end of the same sentence, the language beginning "spent in the discretion of the county commissioner" for "placed in the general fund and shall be subject to appropriation by the General Assembly to the same degree as any other moneys deposited in such general fund," and added the fourth, fifth and sixth sentences of subdivision (3). The second 1973 amendatory act, Session Laws 1973, c. 473, s. 2, provides: "This act shall not apply to alcoholic beverages sold in bottles of less than one-half pint in quantity."

The third 1973 amendment, effective Jan. 1, 1974, added the last sentence of subdivision (12).

Before the second 1973 amendment, subdivision (3) read as follows:

"(3) To fix the retail prices of all alcoholic beverages sold in the county and municipal A.B.C. stores at such levels as shall promote the temperate use of these beverages and as may facilitate policing, which price shall be uniform throughout the State; to compute the taxes levied by G.S. 105-113.93 and 105-113.94 on the retail prices so fixed; to determine the total prices of all such alcoholic beverages, which total price shall be the sum of the retail price plus the tax levied by G.S. 105-113.93 and 105-113.94; and to notify the stores periodically of such prices. The State Board of Alcoholic Control shall cause the several county and municipal alcoholic boards of control to add to the established retail prices of all alcoholic beverages sold in said county and municipal A.B.C. stores as provided above the sum of five cents (5¢) per bottle on every bottle of alcoholic beverages sold in said stores, which

shall be in addition to the retail prices of all alcoholic beverages as set by the State Board of Alcoholic Control. This five cents (5¢) per bottle increase in the retail prices of alcoholic beverages sold by county or municipal A.B.C. stores shall not be subject to the tax levied in G.S. 105-113.93 and 105-113.94, but the clear proceeds of the additional retail price of five cents (5¢) per bottle as provided above shall be remitted to the State Treasurer, accompanied by forms or reports to be prescribed and furnished by the State Board of Alcoholic Control, which remittances shall be placed in the general fund and shall be subject to appropriation by the General Assembly to the same degree as any other moneys deposited in said general fund. Said reports and

remittances of the five cents (5¢) per bottle as herein provided shall be made monthly by the local boards on or before the fifteenth day of the succeeding month; that to every bottle of alcoholic beverages containing two ounces or less sold in said stores there shall be added to the price as established by the State Board of Alcoholic Control the sum of one cent (1¢) in lieu of the five cents (5¢) per bottle provided hereinabove and said sum shall be remitted and accounted for in the same manner as hereinabove provided on bottles containing more than two ounces."

As to making of necessary rules and regulations, see 15 N.C.L. Rev. 323. As to power of Board to grant, deny, or revoke permits, see 15 N.C.L. Rev. 328.

§ 18A-16. County boards of alcoholic control.—(a) In each county that may be permitted to engage in the sale of alcoholic beverages, there is hereby created a county board of alcoholic control, to consist of a chairman and two other members. The members of this board shall be well known for their character, ability, and business acumen. The members of the board shall be selected in each respective county in a joint meeting of the board of county commissioners, the county board of health, and the county board of education. Each person voting at this joint meeting shall have only one vote, notwithstanding the fact that there may be instances in which some persons are members of another board.

The terms of office of the members of the county boards of alcoholic control shall be as follows: The chairman, who shall be so designated by the appointing boards, shall serve for his first term a period of three years, and one member shall serve for his first term a period of two years and the other member shall serve for a period of one year, all terms beginning with the date of their appointment. After each term has expired, each successor in office shall serve for a period of three years and shall be appointed in the same manner as herein provided in this section.

Any member of any of the county boards hereinabove referred to in this section may be removed at any time by the composite board consisting of the board of county commissioners, the board of education, and the board of health whenever such composite board finds by a majority vote of its entire membership that a member or members are unfit to serve on the county alcoholic beverage control board, each member of the composite board having only one vote as above provided for the selection of members of the county alcoholic beverage control boards. If any member of the county board is removed hereunder, his successor shall be selected to serve out the time for which such member was originally selected.

Upon the death or resignation of the chairman or any other member of the county board of alcoholic control, whether selected under the provisions of this Article or under the provisions of Chapter 418 or Chapter 493, Public Laws of 1935, before the expiration of the term of office for which said chairman or member has been appointed, elected, or selected, his successor to fill out the unexpired term shall be selected at a joint meeting of the board of county commissioners, the county board of health, and the county board of education, which joint meet-

ing shall be held within 10 days after such resignation or death. This meeting shall be called by the chairman or some other member of the county board of alcoholic control by giving notice to each member of when and where it will be held.

(b) No person shall be appointed a member of either the State Board or any county board or employed thereby who is a stockholder in any brewery or the owner of any interest therein in any manner whatsoever, or interested therein directly or indirectly, or likewise interested in any distillery or other enterprise that produces, mixes, bottles, or sells alcoholic beverages, or related by blood to a degree of first cousin or closer to any person likewise interested or associated in business with any person likewise interested. Neither the State Board nor any county board shall employ any person who is interested in, directly or indirectly, or related by blood to a degree of first cousin or closer to any person interested in any firm, person, or corporation permitted to sell alcoholic beverages in this State. Notwithstanding the provisions of this section the State Board may, upon its own motion and its discretion, make determinative rulings as to the exception to the rules and determine possible conflict of interest.

(c) The salaries of the members of the said county board shall be fixed by the joint meeting of the several boards that appoint them. They shall be fixed with the view to securing the very best members available, with due regard to the fact that such salaries shall be adequate compensation but not large enough to make said positions unduly attractive or the objects of political aspirations.

(d) The several members of the county board shall give bond for the faithful performance of their duties, in the penal sum of five thousand dollars (\$5,000). This bond shall be payable to the State of North Carolina and to the county in which said board performs its duties with some corporate surety, which surety shall be satisfactory to and approved by the county attorney of said county and the Chairman of the State Board and shall be deposited with the Chairman of the State Board. The State Board for and on behalf of the State of North Carolina and the county named in said bond shall each be secured therein to the full amount of the penalty thereof, and the recovery or payment of any sums due thereunder to either shall not diminish or affect the right of the other obligee in said bond to recover the full amount of the said penalties thereof. The giving and the approval of such bond shall be a part of the qualification of said members, and no member shall be entitled to exercise any of the functions or powers incident to his appointment until and unless the said bond has been given and approved as herein provided. The three joint boards referred to above shall be authorized to relieve any member of the county boards who does not handle any money or funds from furnishing such bond, and shall be further authorized to require bond in excess of five thousand dollars (\$5,000) of any member of the board handling money or funds if the joint boards deem it advisable to increase such bond. (1937, c. 49, ss. 6-9; cc. 411, 431; 1939, c. 202; 1971, c. 872, s. 1.)

Conflict of Interest by Reason of Relationship.—See opinion of Attorney General to Morrison McKenzie, 41 N.C.A.G. 330 (1971).

§ 18A-17. Powers and duties of county boards.—The said county boards shall each have the following powers and duties:

- (1) Control and jurisdiction over the importation, sale and distribution of alcoholic beverages within its respective county;
- (2) Power to buy and to have in its possession and to sell alcoholic beverages within its county;
- (3) Power and authority to adopt rules and regulations governing the operation of stores within its county and relating to the carrying out of the provisions and purposes of this Chapter;
- (4) To prescribe and regulate and direct the duties and services of all employees of said county board;
- (5) To fix the hours for the opening and closing of stores operated by it.

No store, however, shall be permitted to remain open between the hours of 9:00 P.M. and 9:00 A.M.;

- (6) To require any county stores to close on such days as it may designate, but all stores shall remain closed on Sundays, New Year's Day, Fourth of July, Labor Day, Thanksgiving, Christmas Day and state-wide election days;
- (7) To import, transport, receive, purchase, sell, and deliver and have in its possession for sale for present and future delivery alcoholic beverages;
- (8) To purchase or lease property, furnish, and equip buildings, rooms, and accommodations as and when required for the storage and sale of alcoholic beverages and for distribution to all county stores within said county;
- (9) To sell at public auction, as provided by law, any real or personal property which the board, in its discretion, deems unnecessary for the proper operation of its stores;
- (10) To borrow money, guarantee the payment thereof and the interest thereon, in such manner as may be required or permitted by law, and to issue, sign, endorse, and accept checks, promissory notes, bills of exchange, and other negotiable instruments and to do all such other and necessary things as may be required or may be convenient in the conduct of the liquor stores in its county;
- (11) To investigate and aid in the prosecution of violations of this Chapter and other liquor laws, by whatever name called, and to seize alcoholic beverages in said county sold, kept, imported, or transported illegally and to apply for confiscation thereof and to cooperate in the prosecution of offenders in any court in said county;
- (12) To require A.B.C. stores to sell alcoholic beverages at the prices fixed by the State Board of Alcoholic Control and to prescribe to whom the same may be sold;
- (13) To locate stores in its county and to provide for the management thereof and to appoint and employ for each store conducted by it at least one person who shall be known as "manager" thereof. The duty of this manager shall be to conduct the store under directions of the county board and to carry out the law applying thereto. This manager shall give bond for the faithful performance of his duties in such sum as may be fixed by the county board, with sufficient corporate surety. Said surety, or sureties thereon, shall be approved by the county board as a part of the qualifications of the manager for his appointment, and the county board shall have the right to sue on said bond and to recover for all failures on the part of the manager faithfully to perform the duties as manager, to the extent of any loss occasioned by the manager on his part; but as against the surety, or sureties, thereon, such aggregate recovery, or recoveries, shall not exceed the penalty of said bond;
- (14) To expend for law enforcement a sum not less than five percent (5%) nor more than fifteen percent (15%) of the total profits to be determined by quarterly audits, and in the expenditure of said funds to employ one or more persons to be appointed by and directly responsible to the respective county boards; the persons so appointed shall be designated county A.B.C. officers. Local A.B.C. boards shall submit quarterly reports to the State A.B.C. Board, under regulations prescribed by said State Board, evidencing compliance with provisions of this section requiring expenditures for law enforcement.

In addition, any county or municipal board shall expend not less than seven percent (7%) of its total profits, to be determined by quarterly audits, for education on the excessive use of alcoholic beverages and for the rehabilitation of alcoholics. Expenditures for the purposes specified in this paragraph may be made, in the discretion

of the board, either for programs carried on by the board or as appropriations to nonprofit corporations or agencies sponsoring or engaging in such education, research, or rehabilitation.

- (15) To discontinue the operation of any store in its county whenever it appears to the board that the operation thereof is not sufficiently profitable to justify a continuance of its operation, or when, in the board's opinion, the operation of any store is inimical or hurtful to the morals or welfare of the community in which it is operated, or when said county board may be directed to close any store by the State Board.
- (16) To invest any funds temporarily held in the following: obligations of the United States or obligations fully guaranteed both as to principal and interest by the United States, shares of any building and loan association organized under the laws of this State, or of any federal savings and loan association having its principal office in this State, and certificates of deposit for time deposits or savings accounts in any bank or trust company authorized to do business in North Carolina, to the extent in each instance that such shares or deposits are insured by the State or federal government or agency thereof. If the board desires to deposit in bank, savings and loan, or trust company funds beyond the extent that such deposits are insured by the State or federal government or any agency thereof, the board shall require such depository to furnish a corporate surety bond or bonds of the United States government or of the State of North Carolina or of counties and municipalities of North Carolina whose bonds have been approved by the Local Government Commission. Nothing contained herein shall be deemed to authorize investments by local boards for periods of more than 90 days.

All the powers and duties herein conferred upon county boards, or required of them, shall be subject to the powers herein conferred upon the State Board, and whenever or wherever herein the State Board has been given power to approve or disapprove anything in respect to county stores or county boards, then no power on the part of the county boards and no act of any county board shall be exercisable or valid until and unless it has been approved by the State Board. (1937, c. 49, ss. 10, 12; cc. 411, 431; 1939, c. 98; 1957, cc. 1006, 1335; 1963, c. 1119, s. 2; 1967, c. 1178; 1969, cc. 118, 902; 1971, c. 872, s. 1; 1973, cc. 85, 185.)

Local Modification. — New Hanover, as to subdivision (14): 1973, c. 550.

Editor's Note. — The first 1973 amendment added subdivision (16).

The second 1973 amendment substituted "fifteen percent (15%)" for "ten percent (10%)" near the beginning of the first paragraph of subdivision (14).

Applicability of Subdivision (14) Requirements. — Subdivision (14) requirements as to expenditure of percentage of total profits for education and rehabilita-

tion are not applicable to a local board of alcoholic control where the local act contains different provisions regarding the percentages of profits so spent. Opinion of Attorney General to Mr. Terry R. Hutchins, 41 N.C.A.G. 610 (1971).

An alcoholic beverage control officer is a "public officer" within the meaning of § 14-223 and is entitled to the protection of that section. *State v. Taft*, 256 N.C. 441, 124 S.E.2d 169 (1962).

§ 18A-18. Salaries and expenses; net profits.—(a) All salaries and expenses incurred under the provisions of this Article, except those provided for in G.S. 18A-14, shall be paid out of the proceeds of the sales of the alcoholic beverages referred to in this Article. All salaries and expenses of the county boards and their employees shall be paid out of the receipts for their sales as operating expenses.

(b) After deducting the amount required to be expended for enforcement as herein provided and retaining sufficient and proper working capital, the amount to be determined by the board, and except as hereinbefore provided in Chapters 493 and 418 of the Public Laws of 1935, the entire net profits derived from any stores shall be paid quarterly to the general fund of each respective county wherein county stores are operated. (1937, c. 49, ss. 20, 21; c. 411; 1971, c. 872, s. 1.)

Part 2. Enforcement.

§ 18A-19. Director of Enforcement; hearing officers; State A.B.C. officers.—(a) The State Board of Alcoholic Control shall appoint a person to be known as "Director of the Enforcement Division," who shall be in charge of the administration of such Division. The Board may also appoint one or more assistants to the Director and one or more hearing officers, all of whom shall have full authority to make investigations, hold hearings, and make findings of fact. Upon the approval by the State Board of the findings and orders of suspension or revocation of the permit of any licensee, the findings of the assistant or the hearing officer shall be deemed to be the findings and the order of the Board.

(b) The State Board may commission as State A.B.C. officers such regular employees (including the Chairman) as the Board designates for the purpose of enforcing the provisions of this Chapter. Such employees shall receive no additional compensation for performing the duties of A.B.C. officer.

Any regular employee of the State A.B.C. Board commissioned as an A.B.C. officer shall have statewide jurisdiction. Such officers shall have the same powers and authorities as peace officers generally, and may arrest without a warrant as authorized in G.S. 15-41.

Each employee of the State Board commissioned as an A.B.C. officer under this Chapter shall give a bond with a good surety, payable to the State of North Carolina, in a sum not less than one thousand dollars (\$1,000), conditioned upon the faithful discharge of his duty as an A.B.C. officer. The bond shall be duly approved by and filed in the office of the Insurance Commissioner and received in evidence in all actions and proceedings in this State.

Before any employee of the State Board, commissioned as an A.B.C. officer, shall exercise any power of arrest under this Chapter, he shall take the oath required of public officers before an officer authorized to administer oaths.

(c) All State A.B.C. officers shall have authority to investigate the operation of the licensed premises of all persons licensed under this Chapter, to examine the books and records of such licensee, to procure evidence with respect to the violation of this Chapter or any rules and regulations adopted thereunder, and to perform such other duties as the Board may direct. A.B.C. officers shall have the right to enter any licensed premises in the State in the performance of their duty, at any hour of the day or night. Refusal by a permittee or by any employee of a permittee to permit such officers to enter the premises shall be cause for revocation or suspension of the permit of the permittee.

(d) Notices, orders, or demands issued by the State Board for the surrender of permits may be served and executed by the A.B.C. officers employed by the Board, and these officers, while serving and executing such notices, orders, or demands, shall have all the power and authority possessed by peace officers when serving and executing warrants charging violation of the criminal laws of the State. (1939, c. 158, s. 514; 1943, c. 400, s. 6; 1949, c. 974, ss. 11, 14; c. 1251, s. 4; 1951, c. 1056, s. 1; c. 1186, ss. 1, 2; 1953, c. 1207, ss. 2-4; 1957, c. 1440; 1961, c. 645; 1963, c. 426, ss. 1, 2, 4, 5, 12; 1967, c. 868; 1971, c. 872, s. 1.)

§ 18A-20. Powers of local officers.—(a) County A.B.C. officers shall, after taking the oath prescribed by law for peace officers, have the same powers and authorities within their respective counties as other peace officers. And any person so appointed, or any other peace officer while in hot pursuit of anyone found to be violating the liquor laws of this State, shall have the right to go into any other county of the State and arrest such offender therein so long as the hot pursuit of such person continues; and the common law of hot pursuit shall be applicable to said offenses and such officers. Any law-enforcement officer appointed by a county board and any other peace officer is hereby authorized, upon request of the sheriff or other lawful officer in any other county, to go into such other county and assist in suppressing a violation of the liquor law therein, and while so acting shall have such powers of a peace officer as are granted to him in his own county and be

entitled to all the protection provided for said officer while acting in his own county.

(b) Within their respective jurisdictions, all sheriffs, deputy sheriffs, municipal police, and local A.B.C. officers, as well as rural police and other local law-enforcement officers, shall have authority to investigate the operation of premises licensed under any provision of this Chapter and to procure evidence with respect to violations of this Chapter or any rule or regulation promulgated pursuant thereto. These law-enforcement officers shall have the right to enter the licensed premises in the performance of their duties at any hour of the day or night. (1949, c. 1251, s. 4; 1961, c. 645; 1963, c. 426, s. 2; 1967, c. 868; 1971, c. 872, s. 1; 1973, c. 29.)

Editor's Note.—The 1973 amendment in local law-enforcement officers" in subsection (b).

§ 18A-21. Seizure of liquor, equipment, materials, and conveyance; arrests; sale of property.—(a) When any officer of the law shall discover any person in the act of transporting, in violation of law, intoxicating liquor, or equipment or materials designed or intended for use in the manufacture of intoxicating liquor, in any vehicle, motor vehicle, water or aircraft, or other conveyance, it shall be his duty to seize any and all intoxicating liquor, and any and all equipment or materials designed or intended for use in the manufacture of intoxicating liquor, found therein being transported contrary to law. Whenever intoxicating liquor, or equipment or materials designed or intended for use in the manufacture of intoxicating liquor, transported or possessed illegally, is seized by an officer, he shall take possession of the vehicle, motor vehicle, water or aircraft, or any other conveyance, and shall arrest any person in charge thereof. (Provided, that the transportation of the legal amount of alcoholic beverages in the passenger area of a motor vehicle with the cap or seal on the container or containers open or broken shall not be ground for confiscation of the motor vehicle.) The officer shall at once proceed against the person arrested in any court having competent jurisdiction; but the vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. All liquor and all equipment and materials seized under this section shall be held by the officer seizing same and shall, upon the acquittal of the person so charged, be returned to the established owner, except that any nontaxpaid liquor shall be destroyed. In the event of conviction or default of appearance of the person charged, or in event no criminal proceedings are initiated, the liquor, equipment, and materials shall be disposed of as provided in G.S. 18A-24. Provided, that any taxpaid spirituous liquor so seized shall within 10 days be turned over to the board of county commissioners, which shall within 90 days from the receipt thereof either turn it over to hospitals for medicinal purposes or sell it to alcoholic beverage control stores within the State of North Carolina (the proceeds of such sale being placed in the school fund of the county in which such seizure was made) or destroy it. Any malt beverages or wine (fortified or unfortified), so seized for being transported or possessed illegally, shall be destroyed.

(b) Unless the claimant can show that the vehicle or other conveyance seized is his property and that it was used in transporting liquor, or equipment or materials designed or intended for use in the manufacture of intoxicating liquor, without his knowledge and consent, with the right on the part of the claimant to have a jury pass upon his claim, the court shall order a sale by public auction of the property seized. The officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the costs of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceedings brought for the purpose, as being bona fide and as having been created without the lienor's having any notice that the conveyance was being used for illegal transportation of liquor, equipment or materials designed or intended for use in the manufacture of intoxicating liquor, and shall pay the balance of the proceeds to the treasurer or the proper officer in the county who

receives fines and forfeitures, to be used for the school fund of the county. All liens against property sold under the provisions of this section shall be transferred from the property to be proceeds of the sale of the property.

(c) If, however, no one is found claiming the vehicle, water or aircraft, or other conveyance, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken, or, if there be no newspaper published in such city or county, in a newspaper having circulation in the county, once a week for two weeks and by handbills posted in three public places near the place of seizure. If no claimant appears within 10 days after the last publication of the advertisement, the property shall be sold, and the proceeds, after deducting the expenses and costs, shall be paid to the treasurer or proper officer in the county who receives fines and forfeitures, to be used for the school fund of the county: Provided, that nothing in this section shall be construed to authorize any officer to search any vehicle or other conveyance or baggage of any person without a search warrant duly issued, except where the officer sees or has absolute personal knowledge that there is intoxicating liquor, equipment or materials designed or intended for use in the manufacture of intoxicating liquor, in the vehicle or baggage.

(d) When any vehicle or other conveyance confiscated under the provisions of this section is found to be specially equipped or modified from its original manufactured condition so as to increase its speed, the court shall, prior to sale, order that the special equipment or modification be removed and destroyed and the vehicle restored to its original manufactured condition. However, if the court should find that such equipment and modifications are so extensive that it would be impractical to restore the vehicle to its original manufactured condition, then the court may order that the vehicle be turned over to such governmental agency or public official within the territorial jurisdiction of the court as the court shall see fit to be used in the performance of official duties only, and not for resale, transfer, or disposition other than as junk: Provided, that nothing herein contained shall affect the rights of lienholders and other claimants to said vehicles as set out in this section; and provided further that where such equipment and modifications are so extensive that it would be impractical to restore said vehicle to its original manufactured condition and no one is found claiming said vehicle, water or aircraft, or other conveyance, then in lieu of selling the same, after advertisement, and if no claimant appears after the last publication of the advertisement, then the court may order that the vehicle, water or aircraft, or other conveyance be turned over to a governmental agency or public official within the territorial jurisdiction of the court, as the court shall see fit, to be used in the performance of official duties only, and not for resale, transfer, or disposition other than as junk.

(e) It shall be unlawful for any State, county, township, or municipal officer to use or cause to be used for any purpose whatsoever any vehicle or other article of personal property seized by said officer for the reason that the owner of said property or one in possession thereof at time of seizure has violated the terms of the State or federal liquor laws, or any other laws, until the respective rights of the owner or person in possession at time of seizure, or mortgagee if one should intervene, are passed upon by the proper court, and final order is made as to proper disposition of said personal property so seized.

It shall be the duty of the officer seizing said vehicle or other personal property to store same in a safe and suitable place, until final disposition is ordered. Municipalities and counties shall provide storage facilities for vehicles and all other property seized pursuant to any provision of this Chapter; and the officer shall not be liable for the costs of storage. (1923, c. 1, s. 6; C. S., s. 3411(f); 1927, c. 18; 1945, c. 635; 1951, c. 850; 1955, c. 560; 1957, c. 1235, s. 1; 1969, c. 789; 1971, c. 872, s. 1.)

Editor's Note. — For article discussing limits to search and seizure, see 15 N.C.L. Rev. 229. See also 15 N.C.L. Rev. 101. For note on search of motor vehicles without

warrant, see 30 N.C.L. Rev. 421 (1952). For note as to requisites for forfeiture of vehicles transporting liquor in violation of law, see 35 N.C.L. Rev. 509 (1957).

Section Constitutional. — See *State v. Godette*, 188 N.C. 497, 125 S.E. 24 (1924).

Purpose of Subsection (b) of This Section.—Subsection (b) of this section is designed and intended to protect an owner of a vehicle used illegally within the meaning of the statute who is not the person arrested as “in charge thereof” at the time of the arrest for possession or concealment or illegal transportation. *State v. O’Hora*, 12 N.C. App. 250, 182 S.E.2d 823 (1971), decided under former similar provision.

Meaning of “Absolute Personal Knowledge.”—Under this section an officer “discovers any person in the act” and has “absolute personal knowledge” (1) when he sees the liquor; (2) when he has absolute personal knowledge . . . acquired through the senses of seeing, hearing, smelling, tasting or touching. 15 N.C.L. Rev. 131, citing *State v. Godette*, 188 N.C. 497, 125 S.E. 24 (1924). See also *State v. Giles*, 254 N.C. 499, 119 S.E.2d 394 (1961).

Arrest without Warrant. — An arrest may not be lawfully made by the properly authorized officers of the law for the violation of the State prohibition law, for the transportation of intoxicating liquors upon mere unfounded suspicion arising from information received that the supposed offenders would thus transgress the law on a future occasion, and an arrest so made, not upon an offense committed in the officers’ presence or to their personal knowledge as to the particular offense, and without a search warrant, is unlawful and entitles the plaintiff in his action therefor, to recover damages. *State v. DeHerradora*, 192 N.C. 749, 136 S.E. 6 (1926).

It follows that for an officer to fire upon a passing automobile with only an erroneous suspicion that the occupants thereof were thus unlawfully engaged, is without warrant of law, and the unintentional killing of one of those suspected as a result is manslaughter at least, and a verdict thereof under conflicting evidence will be sustained on appeal. *State v. Simmons*, 192 N.C. 692, 135 S.E. 866 (1926).

But, where there is evidence that acting upon information previously received that intoxicating liquors are being unlawfully transported, the proper officers of the law lie in wait for and follow automobile and can see containers and smell the liquor, they have a right to arrest without warrant and seize the vehicle. *State v. Godette*, 188 N.C. 497, 125 S.E. 24 (1924).

Where an arrest by an officer of the law without a warrant was valid under the provisions of this article, it may not successfully be maintained that evidence thereof

should have been excluded. *State v. Godette*, 188 N.C. 497, 125 S.E. 24 (1924).

No search warrant is required where the owner or person in charge consents to the search. *State v. Coffey*, 255 N.C. 293, 121 S.E.2d 736 (1961).

As to conduct amounting to voluntary consent to search, see *State v. Coffey*, 255 N.C. 293, 121 S.E.2d 736 (1961).

Or Where Officer Sees or Has Absolute Personal Knowledge of Presence of Liquor. — No search warrant is required where the officer sees or has absolute personal knowledge that there is intoxicating liquor in an automobile. *State v. Coffey*, 255 N.C. 293, 121 S.E.2d 736 (1961).

The constitutional and statutory guarantee against unreasonable search and seizure does not prohibit seizure of evidence and its introduction into evidence on a subsequent prosecution where no search is required. *State v. Simmons*, 278 N.C. 468, 180 S.E.2d 97 (1971).

When officers saw the liquid in containers generally used to contain and transport nontaxpaid liquor, under the circumstances then existing, they had sufficient reasonable cause to believe that the jars contained nontaxpaid liquor to justify the seizure of the contraband without a search warrant. *State v. Simmons*, 278 N.C. 468, 180 S.E.2d 97 (1971).

Seizure of contraband does not require a warrant when its presence is fully disclosed without necessity of search. *State v. Simmons*, 278 N.C. 468, 180 S.E.2d 97 (1971).

When an officer sees nontaxpaid liquor clearly visible in a defendant’s car, it becomes his duty under this section to take possession of the automobile and the liquor found therein and to arrest the defendant. It is his duty to act either with or without the aid of a search warrant. *State v. Harper*, 235 N.C. 67, 69 S.E.2d 164 (1952).

If an officer “saw and had absolute personal knowledge that there was intoxicating liquor in the automobile,” it necessarily follows that a defendant’s exception based on the court’s refusal to suppress the evidence should be overruled. *State v. Simmons*, 10 N.C. App. 259, 178 S.E.2d 90 (1970).

When the incriminating article, intoxicating liquor, is in plain view of the officers, no search warrant is necessary and the constitutional guaranty does not apply. *State v. Simmons*, 10 N.C. App. 259, 178 S.E.2d 90 (1970).

No search warrant was required for the seizure from defendant’s car of white plastic jugs containing nontaxpaid whiskey where the jugs were in plain view of the

officers from outside the car and no search was necessary for their discovery, and the trial court did not err in the admission of the whiskey and testimony relating to it. *State v. Simmons*, 10 N.C. App. 259, 178 S.E.2d 90 (1970).

The defendant, in operating his automobile in excess of 55 miles an hour in a 35 mile zone on the public streets in a city, committed a misdemeanor in the presence of the city police officers, and they had a right to pursue him and arrest him without a warrant. Consequently, after the defendant was taken into custody, it was the duty of the officers to return to defendant's car and to see that it was taken care of and not abandoned. If, upon approaching the automobile, the officers detected the smell of liquor or other intoxicating beverages therein, it was their duty to take possession of the car and seize the liquor without first obtaining a search warrant. *State v. Giles*, 254 N.C. 499, 119 S.E.2d 394 (1961).

Or Has Reasonable Grounds for Belief.

—A search warrant is not necessary to search a suitcase for intoxicating liquor when carried by the defendant after arrest, when, under the circumstances, the officer had reasonable grounds for belief that it contained intoxicating liquor, and these conditions do not fall within the intent of this section. *State v. Jenkins*, 195 N.C. 747, 143 S.E. 538 (1928).

Automobiles and other conveyances may be searched without a warrant under circumstances that would not justify the search of a house, and a police officer in the exercise of his duties may search an automobile or other conveyance without a search warrant when the existing facts and circumstances are sufficient to support a reasonable belief that the automobile or other conveyance carries contraband materials. *State v. Simmons*, 278 N.C. 468, 180 S.E.2d 97 (1971).

The word "baggage" at the end of subsection (c) refers to baggage accompanying or in the vehicle transporting the intoxicating liquor. *State v. Jenkins*, 195 N.C. 747, 143 S.E. 538 (1928).

By "baggage" is understood such articles of personal convenience or necessity as are usually carried by passengers for their personal use and not merchandise or other valuables, though carried in the trunk of a passenger car, which are not designed for such use, but for other purposes, such as sale and the like. *State v. Jenkins*, 195 N.C. 747, 143 S.E. 538 (1928).

A suitcase or traveling bag with four one-half gallon cans of contraband liquor in it is not baggage under the definition

in this section. *State v. Jenkins*, 195 N.C. 747, 143 S.E. 538 (1928).

"Other Vehicle".—A suitcase carried in one's hand along a public highway would not be an "other vehicle" within the meaning of this section. *State v. Jenkins*, 195 N.C. 747, 143 S.E. 538 (1928).

Search without Warrant.—Officers have no authority to search a car without a warrant, where they do not see or have "absolute personal knowledge" that there is intoxicating liquor in the car. *State v. Godette*, 188 N.C. 497, 125 S.E. 24 (1924); *State v. Simmons*, 192 N.C. 692, 135 S.E. 866 (1926); *State v. DeHerrodora*, 192 N.C. 749, 136 S.E. 6 (1926).

This section does not provide for seizure of all intoxicating liquor found in vehicle, but for seizure of any and all intoxicating liquor found therein being transported contrary to law. *State v. Gordon*, 225 N.C. 241, 34 S.E.2d 414 (1945).

Forfeiture of Property Used. — See article in 2 N.C.L. Rev. 126 for a review of the cases and statutes.

Confiscation and Forfeiture Are Mandatory.—Where one who was in possession of seized liquor at the time he was arrested for unlawful acts with respect thereto pleads guilty to charges of unlawful possession and unlawful transportation of this liquor and thereupon personal judgment is rendered against him, the provisions of this section are mandatory that the judgment also order the confiscation and forfeiture of the liquor so unlawfully possessed and transported. *State v. Hall*, 224 N.C. 314, 30 S.E.2d 158 (1944).

Jurisdiction to declare forfeiture of a vehicle used in the transportation of intoxicating liquor is in the court which has jurisdiction of the offense charged against the person operating the vehicle. *State v. Reavis*, 228 N.C. 18, 44 S.E.2d 354 (1947).

Order Confiscating Car. — Defendant admitted ownership of the car in which two bottles of nontaxpaid whiskey were being transported at the time of his arrest, and he was found guilty of unlawful transportation of intoxicating liquor. This was held sufficient to sustain the court's order confiscating his car and ordering it sold in conformity with the statute. *State v. Vanhoy*, 230 N.C. 162, 52 S.E.2d 278 (1949).

Order for Forfeiture Nunc Pro Tunc. —Where defendant has been convicted of illegal transportation of nontaxpaid liquor, the court may at a subsequent term enter an order nunc pro tunc for the forfeiture and sale of the vehicle used for such trans-

portation. *State v. Maynor*, 226 N.C. 645, 39 S.E.2d 833 (1946).

Use of Vehicle without Knowledge of Owner. — An instruction that if the jury should find by the greater weight of the evidence that petitioner, the owner of a car seized while being used in the unlawful transportation of intoxicating liquor, aided her husband in attempting flight to avoid arrest, to answer in the affirmative the issue of petitioner's knowledge that the car was being used for the transportation of liquor, is error when petitioner testifies that she did not know her husband was transporting liquor and that she thought the sheriff was pursuing them to serve a *capias* on her husband for a past offense, there being no evidence inconsistent with such belief on the part of petitioner, and the credibility of petitioner's testimony being for the jury. *State v. Ayers*, 220 N.C. 161, 16 S.E.2d 689 (1941).

Rights under Lien on Automobile Forfeited and Sold. — This section expressly transfers the lien upon an automobile seized and sold for the unlawful transportation of liquor to the proceeds of the sale, and does not deprive the lienor of his property in conflict with N.C. Const., Art. I, § 19, or with the due process clause of the federal Constitution, the statute prescribing notice by publication, and the mode of giving notice being peculiarly a legislative function. *C.I.T. Corp. v. Burgess*, 199 N.C. 23, 153 S.E. 634 (1930).

One claiming a lien under an unregistered mortgage on an automobile seized and sold under the provisions of this section, after notice by publication required by the statute, may not successfully maintain his action for possession of

the car against the purchaser at the sale had in conformity with law, though he may not have been aware of the proceedings and had no knowledge of the unlawful use of the automobile at the time of its seizure. *C.I.T. Corp. v. Burgess*, 199 N.C. 23, 153 S.E. 634 (1930).

Failure to Notify Lienor of Seizure. — For a case relating to tort liability of the possessor of an automobile for failure to notify the lienor of a seizure and sale under this section, see *Williams v. Aldridge Motors, Inc.*, 237 N.C. 352, 75 S.E.2d 237 (1953).

Liability of Sheriff for Destruction of vehicle. — In a case arising prior to this section it was held that, where the sheriff took an automobile in custody, under a corresponding statute, and while he was holding it in a storage garage according to law it was destroyed by fire through no fault of his, he was not liable on his forthcoming bond. There were two dissenting opinions filed. *Motor Co. v. Sands*, 186 N.C. 732, 120 S.E. 459 (1923).

Where a vehicle is seized by a municipal police officer for illegal transportation of intoxicating liquor, the vehicle is in the custody of the officer or of the law and not the municipality. *State v. Law*, 227 N.C. 103, 40 S.E.2d 699 (1946).

Evidence Required to Hold Passenger. — To hold a mere passenger, under this section, knowledge of the presence in the automobile of contraband whiskey is insufficient. The evidence must be sufficient to support an inference of some form of control, joint or otherwise, over the automobile or the liquor. *State v. Ferguson*, 238 N.C. 656, 78 S.E.2d 911 (1953); *State v. Coffey*, 255 N.C. 293, 121 S.E.2d 736 (1961).

§ 18A-22. Law-enforcement officers to search for and seize distilleries; confiscation; disposal of property.—(a) It is the duty of all sheriffs, deputy sheriffs, municipal police, rural police, State and local A.B.C. officers, and other law-enforcement officers to search for and seize all equipment and materials used for the illegal manufacture of intoxicating liquor; and, except as provided in subsection (b), to retain the equipment and materials at the office of the law-enforcement agency making the seizure until disposed of by court order.

(b) It is the duty of the sheriff and other officers mentioned in this section to seize and then and there destroy any liquor, nonsalable equipment or perishable materials which may be found at any distillery for the illegal manufacture of intoxicating liquor, such not being required for evidence, and to arrest and hold for trial all persons found on the premises engaged in distilling or aiding or abetting in the manufacture of intoxicating liquor. (1923, c. 1, ss. 21, 22; C.S., s. 3411(u), (v); 1971, c. 872, s. 1; 1973, c. 80.)

Editor's Note. — The 1973 amendment rewrote this section.

Arrest without Warrant.—An alcoholic beverage control officer who saw defendant at the still unlawfully engaged in the

manufacture of whiskey had a lawful right to arrest defendant there without a warrant. *State v. Taft*, 256 N.C. 441, 124 S.E.2d 169 (1962).

§ 18A-23. Search warrants.—Search warrants may be obtained as provided in Article 4 of Chapter 15 of the General Statutes. (1923, c. 1, s. 12; C. S., s. 3411(1); 1939, c. 12; 1941, c. 310; 1957, c. 1235, s. 3; 1971, c. 872, s. 1.)

Editor's Note. — For article discussing limits to search and seizure, see 15 N.C.L. Rev. 229. See also 15 N.C.L. Rev. 101. For note on requisites for a valid warrant to search for unlawfully possessed liquor, see 35 N.C.L. Rev. 424 (1957).

§ 18A-24. Disposal of seized property.—Any liquor, or equipment or materials designed or intended for use in the unlawful manufacture, sale, or possession of liquor, seized with or without a warrant shall be held by the officer seizing same, and upon acquittal of the defendant shall be returned to the established owner, except that any nontaxpaid liquor shall be destroyed. In the event of conviction or default of appearance of the person charged, or in event no criminal proceedings are initiated, the liquor, equipment, and materials shall be destroyed, sold or otherwise disposed of as ordered by the court. Provided, however, any taxpaid spirituous liquor so seized shall within 10 days be turned over to the county commissioners, who shall within 90 days from the receipt thereof turn it over to hospitals for medical purposes or sell it to alcoholic beverage control stores within North Carolina (the proceeds of the sale being placed in the school fund of the county in which the seizure was made) or destroy it. Any malt beverages or wine (fortified or unfortified), so seized for being transported or possessed illegally, shall be destroyed. (1923, c. 1, s. 12; C. S., s. 3411(1); 1939, c. 12; 1941, c. 310; 1957, c. 1235, s. 3; 1971, c. 872, s. 1.)

Legislative Intent. — The statutes seem to indicate the legislative intent to be that liquor itself, when the subject of unlawful traffic and capable of harmful effects, offends the law and should be regarded as a nuisance and contraband, to be summarily destroyed or otherwise disposed of. Only in case of failure to establish a violation

of the law is the restoration of the liquor permitted. However, the processes of the courts are available to anyone legally interested to present his claim for seized liquor, and his plea will be heard. *State v. Hall*, 224 N.C. 314, 30 S.E.2d 158 (1944).

ARTICLE 3.

Sale, Consumption, Possession and Transportation of Alcoholic Beverages.

§ 18A-25. Prohibited sales. — (a) No alcoholic beverage shall be sold knowingly by any county or municipal store or the manager thereof or any employee therein at any time other than within the opening and closing hours for the store, as fixed in the manner herein provided, and otherwise as prescribed by the said county board. The manager and employees of and in any county or municipal store may, in their discretion, refuse to sell alcoholic beverages to any individual applicant, and shall refuse to sell to any person a quantity in excess of what can be lawfully transported.

It shall be unlawful for any person knowingly to buy any alcoholic beverage for any person who has been refused the right to purchase under this section or who is prohibited from purchasing for himself under any other provision of law.

(b) The possession for sale, or sales, of any liquor purchased from any county or municipal store is hereby prohibited. (1937, c. 49, ss. 11, 15; c. 411; 1971, c. 872, s. 1.)

Possession for Purpose of Sale Is Essential Element. — Where the defendant was charged with the possession of taxpaid liquor for the purpose of sale, and the court removed from the warrant the charge that the possession was for the purpose of sale, he removed from the jury an essential element of the charge, and a con-

viction under the warrant could not be had for unlawful possession. *State v. Poe*, 245 N.C. 402, 96 S.E.2d 5 (1957).

Sale of Liquor in Clubs or Restaurants Not Authorized.—There is no provision in this Chapter or in any other law in this State that authorizes the sale of liquor in private or public clubs or restaurants in

this State. *Hill v. State Bd. of Alcoholic Control*, 17 N.C. App. 592, 195 S.E.2d 94 (1973).

When Search Warrant Unnecessary. — No search warrant is required where the officer sees or has absolute personal knowledge that there is intoxicating liquor in an automobile. *State v. Leach*, 272 N.C. 733, 158 S.E.2d 782 (1968).

What Warrant Should Charge.—Under this section a warrant or indictment should charge the unlawful possession for sale, or sale, of illicit liquors or the sale of any liquors purchased from the county stores. *State v. May*, 248 N.C. 60, 102 S.E.2d 418 (1958).

Where a warrant charged generally that defendant had in his possession "nontax-paid" whiskey for the purpose of sale it was held that upon the facts of the case the word "nontaxpaid" was merely used to describe the whiskey and to designate it as unlawful rather than to restrict the offense charged to a violation of this section, and therefore the prima facie presumption from the possession of three gallons of such whiskey, that the possession was for the purpose of sale, obtains. *State v. Merritt*, 231 N.C. 59, 55 S.E.2d 804 (1949).

§ 18A-26. Transportation of alcoholic beverages.—(a) A person may transport, not for sale or barter, not more than one gallon of alcoholic beverages, except as authorized by permit, to and from any place in the State; but if the cap or seal on the container or containers has been opened or broken, it shall be unlawful to transport the same in the passenger area of any motor vehicle.

It shall be unlawful for any person operating a for-hire passenger vehicle as defined in G.S. 20-38(20)(b) to transport alcoholic beverages except when the vehicle is actually transporting a bona fide paying passenger who is the actual owner of the alcoholic beverages being transported. Alcoholic beverages owned and possessed by each passenger shall be transported in the manner and amount authorized by this section, provided that the provisions of G.S. 20-16(a)(8) shall not apply to a person convicted under this section. The transportation of up to one gallon of alcoholic beverages shall not be ground for confiscation of the motor vehicle.

(b) A person may purchase legally outside of this State and bring into the State for his own personal use not more than one gallon of alcoholic beverage: Provided, that the container or containers of said alcoholic beverages are maintained within any vehicle as regulated and provided for in this Chapter. (1923, c. 1, s. 25; C. S., s. 3411(y); 1937, c. 49, ss. 14, 16; c. 411; 1967, c. 222, ss. 1, 7; c. 1256, s. 3; 1969, c. 598, ss. 2, 3; c. 1018; 1971, c. 872, s. 1.)

Section Has Statewide Application.—The legislature intended this section to have statewide application. *D & W, Inc. v. City of Charlotte*, 268 N.C. 577, 151 S.E.2d 241 (1966).

Section permits, with certain provisos, the transportation of taxpaid whiskey not in excess of one gallon. *State v. Bell*, 264 N.C. 350, 141 S.E.2d 493 (1965).

Guilty Knowledge. — This section must be interpreted in the light of the common-

What State Must Prove. — This section places upon the State only the burden of proving the defendant unlawfully had illicit liquors in his possession for sale. *State v. May*, 248 N.C. 60, 102 S.E.2d 418 (1958).

Evidence Sufficient for Jury.—See *State v. Mitchell*, 260 N.C. 235, 132 S.E.2d 481 (1963).

Evidence Insufficient to Carry Case to Jury. — See *State v. Peterson*, 226 N.C. 255, 37 S.E.2d 591 (1946).

Where the only evidence offered by the State was through its officers, including police officer's uncontradicted testimony that defendant said nontaxpaid liquor found in the room was for sick child, such evidence negated possession for the purpose of sale, and was insufficient to carry case to jury. *State v. McNeill*, 225 N.C. 560, 35 S.E.2d 629 (1945).

Evidence tending to show that some 18 gallons of nontaxpaid liquor was found in defendant's home was sufficient to be submitted to the jury on a charge of unlawful possession of illicit liquor for the purpose of sale, the credibility of the exculpatory evidence being for the jury. *State v. Turner*, 253 N.C. 37, 116 S.E.2d 194 (1960).

law principle that guilty knowledge is an essential element of crime, and therefore a person cannot be held guilty of illegally transporting intoxicating liquors if he has no knowledge of the nature of the goods transported. *State v. Welch*, 232 N.C. 77, 59 S.E.2d 199 (1950).

Where Transporter Accompanied by Others.—This section cannot be construed to permit the driver of an automobile to carry or convey more than one gallon of

alcoholic beverages in his automobile even though he is accompanied by others. *State v. Welch*, 232 N.C. 77, 59 S.E.2d 199 (1950).

Evidence held insufficient to fix defendant with ownership or possession of liquor

found in baggage compartment of bus. *State v. Love*, 236 N.C. 344, 72 S.E.2d 737 (1952).

Cited in *State v. Williams*, 283 N.C. 550, 196 S.E.2d 756 (1973).

§ 18A-27. Transportation of up to five gallons of fortified wine.—(a) Whenever any person desires to purchase or transport more than one gallon but not exceeding five gallons of fortified wine at one time (from an A.B.C. store or any retail permittee), he shall first obtain a “purchase-transportation permit” from the chairman of the local A.B.C. board, a member of the local board, or the general manager or supervisor of the local board of alcoholic control. No permit shall be issued by any authorized person to:

- (1) Persons not of good character ; or

(2) Persons not sufficiently identified, if unknown to the issuing person ; or

(3) Persons known or shown to be alcoholics or bootleggers.
- (b) The permit shall be signed by the person authorized to issue same and it shall authorize the purchaser named therein to purchase and transport the quantity of fortified wine therein indicated not to exceed five gallons. The permit shall be issued by means of a printed form with at least two carbon copies of the same, and on the face of the permit shall appear the following information:
- (1) Name and address of purchaser ;

(2) The name and location of the place where purchase is to be made ;

(3) Date issued and expiration date ;

(4) Destination ;

(5) Signature of person issuing the permit ;

(6) A statement that the permit is valid for only one purchase on the date shown and that the permit must accompany the merchandise during transit and both the merchandise and the permit must be exhibited by purchaser to any law-enforcement officer upon request.
- (c) The permit herein authorized shall be valid for only one purchase, and it shall expire at 6:00 P.M. of the date shown thereon. No purchase shall be made from any store except the store named on the permit. One copy of the permit shall be retained by the board issuing the same, one copy shall be delivered to the store from which the merchandise is purchased, and one copy shall be retained by the permittee. The permit shall authorize the permittee to transport fortified wine from the place of purchase to the destination indicated thereon. It must accompany the merchandise during transit, and both the merchandise and the permit must be exhibited to any law-enforcement officer upon request.
- (d) The chairman or any member of a local county or municipal board or the general manager or supervisor of a local alcoholic control board is authorized to issue purchase-transportation permits.
- (e) Permits to be used shall be in the form substantially as follows :

ALCOHOLIC BEVERAGE CONTROL BOARD

..... County

....., North Carolina

Date, 19.....

PURCHASE-TRANSPORTATION PERMIT

(not to exceed five gallons)

Name of Purchaser

Address

Name of Store Address of Store

Destination
 Route to Be Used
 Signed
 (Person authorized to issue)
 Board Member

Note: This permit is valid for only one purchase and it shall expire at 6:00 P.M. of the date shown above. Special Note: This permit must accompany the merchandise while in transit. Both the merchandise and the permit must be exhibited to any law-enforcement officer upon request. (1971, c. 872, s. 1.)

§ 18A-28. Transportation of up to five gallons of alcoholic beverage.

—(a) It shall be lawful to purchase, possess, and transport up to five gallons of alcoholic beverages in containers not smaller than one-fifth gallon from a county or municipal A.B.C. store to a named destination within the county; provided, the purchaser has in his possession a “purchase-transportation permit” and complies strictly with the provisions of this section, and provided further that said alcoholic beverages are not being transported for the purpose of sale and that the cap or seal on the container or containers of said alcoholic beverages has not been opened or broken.

(b) Whenever any person desires to purchase or transport more than one gallon of alcoholic beverages at one time, he shall first obtain a purchase-transportation permit from the chairman of the local board, a member of the local board, or the general manager or supervisor of the local board of alcoholic control. No permit shall be issued by any authorized person to:

- (1) Persons not of good character;
- (2) Persons not sufficiently identified, if unknown to the issuing person; or
- (3) Persons known or shown to be alcoholics or bootleggers.

(c) The permit shall be signed by the person authorized to issue it, and it shall authorize the purchaser named therein to purchase and transport the quantity of alcoholic beverages therein indicated not to exceed five gallons. The permit shall be issued by means of a printed form with at least two carbon copies. On the face of the permit shall appear the following information:

- (1) Name and address of purchaser;
- (2) The name and location of the place where purchase is to be made;
- (3) Date issued and expiration date;
- (4) Destination;
- (5) Signature of person issuing the permit;
- (6) A statement that the permit is valid for only one purchase on the date shown and that the permit must accompany the merchandise during transit and both the merchandise and the permit must be exhibited by purchaser to any law-enforcement officer upon request.

(d) The permit herein authorized shall be valid for only one purchase, and it shall expire at 6:00 P.M. of the date shown thereon. No purchase based on this permit shall be made from any A.B.C. store except the store named on the permit. One copy of the permit shall be retained by the permittee. The permit shall authorize the permittee to transport the alcoholic beverages from the place of purchase to the destination indicated thereon. The permit must accompany the merchandise during transit and both the merchandise and the permit must be exhibited to any law-enforcement officer upon request.

(e) The chairman or any member of a local county or municipal board or the general manager or supervisor of a local alcoholic control board is authorized to issue purchase-transportation permits.

(f) Permits to be used shall be in the form substantially as follows:

..... County
, North Carolina
 Date, 19.....

(not to exceed five gallons)

Name of Purchaser
 Address
 A.B.C. Store No. Address of the Store
 Destination
 Route to Be Used
 Signed

(Person authorized to issue)

Board Member

Note: This permit is valid for only one purchase and it shall expire at 6:00 P.M. of the date shown above. Special Note: This permit must accompany the merchandise while in transit. Both the merchandise and the permit must be exhibited to any law-enforcement officer upon request.

(g) Repealed by Session Laws 1973, c. 819, s. 1, effective July 1, 1973. (1969, c. 617, s. 1; 1971, c. 872, s. 1; 1973, c. 94; c. 819, s. 1.)

Editor's Note.—The first 1973 amendment amended subsection (g), which provided that this section should apply only to specified counties and municipalities, by inserting Lexington in the list of municipalities to which the section was made applicable.

The second 1973 amendment, effective July 1, 1973, repealed subsection (g), thus making the section applicable throughout the State.

§ 18A-29. Commercial transportation of alcoholic beverages. — (a) The willful transportation of alcoholic beverages within, into, or through the State of North Carolina in quantities in excess of one gallon (or five gallons with a permit) is prohibited except for delivery to federal reservations to which has been ceded exclusive jurisdiction by the State of North Carolina, for delivery to an A.B.C. store or board, or for transport through this State to another state. The State Board of Alcoholic Beverage Control may adopt further regulations governing the transportation of alcoholic beverages within, into, and through the State of North Carolina for delivery to a federal reservation, A.B.C. stores or boards, or in transit through this State to another state, as it may deem necessary to confine such transportation to legitimate purposes, and may issue transportation permits in accordance with such regulations.

(b) Before any person shall transport over the roads and highways of this State any alcoholic beverages in excess of one gallon (or five gallons with a permit) within, into, or through the State of North Carolina for delivery to a federal reservation exercising exclusive jurisdiction, or in transit through this State to another state, he shall post with the State Board of Alcoholic Beverage Control a bond with surety approved by the Board, payable to the State of North Carolina in the penal sum of one thousand dollars (\$1,000), running in the name of the State of North Carolina, conditioned that such person will not unlawfully transport or deliver any alcoholic beverages within, into, or through the State of North Carolina. In case of conviction, the forfeiture shall be paid to the school fund of the county in which the seizure is made, and any such county shall have the right to sue for the same. When such alcoholic beverages are desired to be transported within, into, or through the State of North Carolina, the transportation shall be engaged in only under the following conditions:

- (1) **Statement as to Bond and Bill of Lading Required.**—There shall accompany such alcoholic beverages a statement signed by the Chairman of the State Board of Alcoholic Beverage Control showing that the bond hereinbefore required has been furnished and approved. There shall accompany such alcoholic beverages at all times during transportation a bill of lading or other memorandum of shipment signed by the consignor showing an exact description of the alcoholic beverages being transported, the name and address of the consignee, and the route to be traveled by the vehicle while in the State of North Carolina; this route must be substantially the most direct route, from the consignor's place of business to the place of business of the consignee.
- (2) **Route Stated in Bill of Lading to Be Followed.**—Vehicles transporting alcoholic beverages shall not substantially vary from the route specified in the bill of lading or other memorandum of shipment.
- (3) **Names of True Consignor and Consignee Must Appear.**—The name of the consignor on any such bill of lading or other memorandum of shipment shall be the name of the true consignor of the alcoholic beverages being transported, and such consignor shall be only a person who has a legal right to make such shipment. The name of the consignee on any such bill of lading or memorandum of shipment shall be the name of the true consignee of the alcoholic beverages being transported and who had previously authorized in writing the shipment of the alcoholic beverages being transported and who has a legal right to receive such alcoholic beverages at the point of destination shown on the bill of lading or other memorandum of shipment.
- (4) **Officers May Require Driver to Exhibit Papers.**—The driver or any person in charge of any vehicle so transporting such alcoholic beverages shall, when required by any sheriff, deputy sheriff, or other peace officer having the power to make arrests, exhibit to such officer such papers or documents required by this law to accompany such shipment. (1945, c. 457, ss. 1, 2; 1965, c. 1102, s. 4; 1971, c. 872, s. 1.)

Possession Necessary Element of Transportation. — Only a person in the actual or constructive possession of nontaxpaid whiskey, absent conspiracy or aiding and abetting, could be guilty of the unlawful transportation thereof. *State v. Wells*, 259 N.C. 173, 130 S.E.2d 299 (1963).

Purpose of Transportation. — Whether the transportation of nontaxpaid whiskey is unlawful does not depend upon whether it is being transported for the purpose of sale. *State v. Wells*, 259 N.C. 173, 130 S.E.2d 299 (1963).

§ 18A-30. Possession and consumption of alcoholic beverages at designated places.—It shall be lawful in any county or municipality of this State for any person who is at least 21 years of age to possess, for lawful purposes, alcoholic beverages in quantities not in excess of one gallon, unless otherwise authorized, provided that these alcoholic beverages are obtained from an authorized alcoholic beverage control store within this State or from a lawful source outside this State, and provided that said alcoholic beverages are possessed for a purpose other than for sale or barter, and provided that said alcoholic beverages are purchased, possessed, and consumed in accordance with this and other applicable sections of this Chapter, including the following:

- (1) **Residence and Related Places.**—A person may possess and consume said alcoholic beverages in his private residence, or in any private residence of another where permission has been given, or in any hotel or motel room that said person has rented or to which he is invited, or at any place of secondary residence similarly used, where permitted by the owner. A person may also possess and consume said alcoholic beverages, but not in view of the general public, on any other private property not primarily engaged in commercial entertainment and not open to the general public at the time, when such person, association, or corporation

has obtained the express permission of the owner or person lawfully in possession of said property, and when said alcoholic beverages are consumed by said person, his family, his bona fide guest, or bona fide guests of the association or corporation; provided, however, that this sentence shall not be construed to permit or in any way or manner authorize the possession or consumption of alcoholic beverages on premises for which a permit is required pursuant to subdivisions (2), (3), or (4) of this section.

(2) Social Establishments. — Any person, association, or corporation may furnish facilities located on its premises, which facilities shall not be open to the general public, for the storage of alcoholic beverages for its bona fide members, in quantities not in excess of one gallon for each member, unless otherwise authorized, and for consumption by its members and their guests, but subject to the following conditions:

- a. The establishment is organized and operated solely for purposes of a social, recreational, patriotic, or fraternal nature; and
- b. It has a valid permit from the State Board of Alcoholic Control for this purpose; and
- c. The alcoholic beverages are stored in individual lockers and the name of the beverage owner shall be clearly displayed on both the locker and the bottle or bottles; and
- d. Any alcoholic beverage stored in any locker is for the exclusive use of the member and his guests and not to be sold or distributed to any other person.

(3) Special Occasions.—Alcoholic beverages in quantities in excess of one gallon may be possessed by a person on a special occasion, subject to the rules and regulations adopted by the State Board of Alcoholic Control, not for sale or barter, for the use and consumption of himself and his guests, when he meets one or more of the following requirements:

- a. He is using his personal residence or premises under his exclusive control, or
- b. He is using a facility, as a member, as defined in subdivision (2) of this section, and said facility has a valid permit from the State Board of Alcoholic Control for this purpose; or
- c. He is using a commercial establishment or any part thereof for a private meeting or party limited in attendance to members or guests of a particular person, group, association, or organization, and said commercial establishment has obtained a permit from the State Board of Alcoholic Control for this purpose.

(4) Restaurants and Related Places.—It shall be unlawful for any person to possess or consume any alcoholic beverages of any and all kinds, other than fortified wines (which contain more than fourteen percent (14%) of alcohol by volume) on the premises of any business establishment that is not permitted under subdivisions (1), (2), or (3) of this section unless said establishment meets the following requirements:

- a. The premises have an inside dining area with a seating capacity of at least 36 persons and a separate kitchen facility; and
- b. The business is engaged primarily and substantially in preparing and serving meals or furnishing lodging; and provided further, that the State Board of Alcoholic Control shall have broad power to examine the type and nature of the business and the combination and location of separate or affiliated businesses at the same location to determine if the establishment is a bona fide restaurant-type facility; and
- c. The business has a valid permit from the State Board of Alcoholic

Control for this purpose, including the requirement that the business post the type of notices required by said Board.

(5) Unlawful Possession or Use.—It shall be unlawful for:

- a. Any person to drink alcoholic beverages or to offer a drink to another person
 - i. On the premises of a county or municipal liquor control store, or
 - ii. Upon any premises used or occupied by a county or municipal alcoholic control board, or
 - iii. On any public road, street, or highway.
- b. Any person to make any public display of alcoholic beverages at any athletic contest.
- c. Any person to possess or consume any alcoholic beverages upon any of the premises designated under subdivisions (2), (3), or (4) of this section, unless there is conspicuously displayed a valid permit or notice on said premises from the State Board of Alcoholic Control.
- d. Any person, association, or corporation to permit any alcoholic beverages to be possessed or consumed upon any premises not authorized by this Chapter.
- e. Any person to possess or consume any alcoholic beverages upon any premises where such possession or consumption is not authorized by law, or where said person has been forbidden to possess or consume alcoholic beverages by the owner, operator, or person in charge of said premises.
- f. Any person, firm, or corporation to refuse to surrender any permit or notice upon request of the State Board of Alcoholic Control, or falsely to display any such notice, or to display any notice not permitted by the State Board of Alcoholic Control, or to obtain any facsimile permit or notice from any person.

(6) Hours for Consumption.—It shall be unlawful for any alcoholic beverages to be consumed on any premises having a permit issued under the provisions of this section between the hours of 1:30 A.M. and 7:00 A.M. Provided however, that during the period commencing on the last Sunday of April of each year and ending on the last Sunday of October of each year alcoholic beverages may be consumed on said premises until 2:30 A.M. Subsequently, on Sundays, consumption of these beverages may not resume until 1:00 P.M. (1905, c. 498, ss. 6-8; Rev., ss. 3526, 3534; C.S., s. 3371; 1937, c. 49, ss. 12, 16, 22; c. 411; 1955, c. 999; 1967, c. 222, ss. 1, 8; c. 1256, s. 3; 1969, c. 1018; 1971, c. 872, s. 1.)

Editor's Note. — Session Laws 1971, c. 872, s. 5, provides: "This act shall become effective October 1, 1971, except that G.S. 18A-30 and 18A-33, relative to hours of sale and consumption, shall be effective

upon the ratification of this act. Any license or permit required by this act, which has not been heretofore required by law, must be acquired on or before May 1, 1972." The act was ratified July 16, 1971.

§ 18A-31. Permits for social establishments, restaurants, etc.—(a) Permits.—Any person, association, or corporation making application for a permit under this Article shall file said application and appropriate fee with the State Board of Alcoholic Control, and said Board shall have the exclusive authority, not inconsistent herewith, in issuing any permit, or in renewing, suspending, or revoking any temporary or annual permit. The additional provisions relating to said permits are as follows:

- (1) Said Board may issue temporary permits where application in proper form has been received, with applicable fees, which shall be valid for

90 days, unless sooner suspended or revoked. No applicant or permittee shall be entitled to any hearing with reference to the issuance, suspension, or revocation of any temporary permit.

- (2) Any temporary or annual permit shall be suspended or revoked by said Board, upon the suspension or revocation of any other permit or license by the State Board of Alcoholic Control, pursuant to any other section of this Chapter.
- (3) All annual permits issued under this section shall be valid until May 1, 1968, unless sooner suspended or revoked, and thereafter all annual permits shall be valid for one year, renewable on May 1, 1968 and annually thereafter, unless sooner suspended or revoked.
- (4) Any person, association, or corporation shall promptly surrender any permit issued hereunder upon request of said Board.
- (5) Before exercising any privilege granted hereunder, and immediately upon the receipt of any temporary or annual permit, said person, association, or corporation receiving the same shall keep conspicuously displayed said permit and in addition shall post a notice or notices, approved by said Board, designating the type of permit that is applicable to the premises. The Board shall approve and designate the type of signs, notices, and exhibits that may be displayed or used on any premises.
- (6) All permits shall be the property of the State Board of Alcoholic Control, and no permit shall be transferable. Upon the termination of any business, or upon a change of ownership or control, all permits issued hereunder shall be immediately surrendered to said Board.
- (7) All permits shall be issued for a designated location, a separate permit being required for each separate location of any business.
- (8) Said Board shall not refuse the issuance of any permit to any person, firm, or corporation who shall comply with the provisions of this Chapter, and the issuance of a permit shall not be arbitrary in any case, but issuance of a permit shall be mandatory to any person, firm, or corporation complying with the provisions of this Chapter.

(b) Fees.—Applications for permits shall be accompanied by appropriate fees, payable to the State Board of Alcoholic Control, which shall not be refundable in case a permit is refused, suspended, or revoked. No additional fees or licenses shall be collected by any county or municipality under this section, and the fees received by the State Board of Alcoholic Control shall be deposited with the State Treasurer of North Carolina, as in the case of any other permit fees collected by said Board. No additional charge shall be imposed for any temporary permit. The schedule of fees for the original permit is as follows:

- (1) Two hundred dollars (\$200.00) for a social establishment as defined in G.S. 18A-30(2);
- (2) Two hundred dollars (\$200.00) for a commercial establishment as defined in G.S. 18A-30(3)c;
- (3) One hundred dollars (\$100.00) for a restaurant as defined in G.S. 18A-30(4) having a seating capacity of less than 50;
- (4) Two hundred dollars (\$200.00) for a restaurant as defined in G.S. 18A-30(4) having a seating capacity of 50 or more;
- (5) Three hundred dollars (\$300.00) for any establishment which obtains permits having two or more of the foregoing schedules for the same premises.
- (6) The annual renewal fees for such permits shall be twenty-five percent (25%) of the original permit as herein set forth.

(c) Exemptions.

- (1) Exemption from Fees.—No fee shall be charged by the State Board of Alcoholic Control for any permit issued under this section to the State

or any county or municipality for any premises operated by the State, county, or municipality.

- (2) **Exemption of Counties.**—Until at least one county or municipal alcoholic beverage control store has been lawfully established within any county, no permit shall be issued by the State Board of Alcoholic Control for the purposes defined in subdivision (4) of G.S. 18A-30 to any person, association, or corporation for premises located in said county.

(d) **Procedures.**—The provisions of Article 4 as to procedures to be followed in the issuance, suspension, and revocation of permits shall be applicable to permits issued under this Article. (1971, c. 872, s. 1.)

§ 18A-32. Transportation, possession, and sale at installations operated by or for armed forces.—Alcoholic beverages in quantities in excess of one gallon may be purchased by, transported to, possessed and sold by any open mess or officers' club at any installation located in any county in this State where alcoholic beverages may be legally sold or possessed, which installation is operated by or for any of the armed forces of the United States and where the possession, dispensing, and sale of such alcoholic beverages is under the control and supervision of the department of the armed forces concerned; provided, however, that all such alcoholic beverages transported, possessed, dispensed, or sold pursuant to this section on the premises of any such installation shall be purchased at the retail alcoholic beverage control store of the county in which such installation is located at the full retail price prevailing at the time of such purchase. Transportation permits may be issued by the State Board of Alcoholic Beverage Control under regulations adopted pursuant to G.S. 18A-29 for the transportation of alcoholic beverages in excess of one gallon from the alcoholic beverage control store of the county in which such installation is located for delivery to the responsible officer of such installation operated by or for any of the armed forces of the United States. The provisions of this section shall not be construed as to affect the source, or place of purchase, or the price paid for alcoholic beverages purchased, possessed, sold, and dispensed by or at any open mess or officers' club or other facility located at or maintained at or by any of the armed forces of the United States at any place where jurisdiction has been ceded to or taken by the United States government. (1955, c. 1211; 1971, c. 872, s. 1.)

Cited in *State v. Williams*, 283 N.C. 550,
196 S.E.2d 756 (1973).

ARTICLE 4.

Malt Beverages and Wine.

Part 1. Retail Sales and Personal Use.

§ 18A-33. Sale and consumption during certain hours prohibited; sales by off-premises permittees.—(a) No malt beverages or wine (fortified or unfortified) shall be sold between the hours of 1:00 A.M. and 7:00 A.M., nor shall any malt beverages or wine (fortified or unfortified) be consumed in any place where malt beverages or wine (fortified or unfortified) is sold between the hours of 1:30 A.M. and 7:00 A.M. Provided however, that during the period commencing on the last Sunday of April of each year and ending on the last Sunday of October of each year these beverages may be sold until 2:00 A.M. and may be consumed on the licensed premises until 2:30 A.M. Subsequently, on Sundays, sales of these beverages may not resume until 1:00 P.M.

(b) In addition to the restrictions on the sale of malt beverages and/or wines (fortified or unfortified) set out in this section, the governing bodies of all municipalities and counties in North Carolina shall have, and they are hereby vested with, full power and authority to regulate and prohibit the sale of malt beverages and/or wine (fortified or unfortified) from 1:00 P.M. on each Sunday until

7:00 A.M. on the following Monday. Provided, however, that municipalities and counties shall have no authority under this subsection to regulate or prohibit sales after 1:00 P.M. on Sundays by establishments having a permit issued under G.S. 18A-30(2) and (4).

The power herein vested in governing bodies of municipalities shall be exclusive within the corporate limits of their respective municipalities, and the powers herein vested in the county commissioners of the various counties in North Carolina shall be exclusive in all portions of their respective counties not embraced in the corporate limits of municipalities therein.

(c) It shall be unlawful to consume malt beverages on any premises having only an off-premises malt beverage permit; and it shall also be unlawful to consume wine (fortified or unfortified) on any premises having only an off-premises permit for the type of wine being so consumed. (1943, c. 339, ss. 1-3; 1949, c. 974, s. 12; 1951, c. 997, s. 1; 1953, c. 675, s. 4; 1963, c. 426, ss. 7-9, 12; 1969, c. 1131; 1971, c. 872, s. 1; 1973, cc. 56, 153.)

Editor's Note.—Session Laws 1971, c. 872, s. 5, provides: "This act shall become effective October 1, 1971, except that G.S. 18A-30 and 18A-33, relative to hours of sale and consumption, shall be effective upon the ratification of this act. Any license or permit required by this act, which has not been heretofore required by law, must be acquired on or before May 1, 1972." The act was ratified July 16, 1971.

The first 1973 amendment added subsection (c).

The second 1973 amendment substituted "G.S. 18A-30(2) and (4)" for "Article 3 of this Chapter" at the end of the proviso in the first paragraph of subsection (b).

Authority of Counties and Municipalities to Regulate Sale of Beer and Wine on Sundays. — See opinion of Attorney General to Mr. H.L. Riddle, Jr., 41 N.C.A.G. 484 (1971).

Applied in *Hill v. State Bd. of Alcoholic Control*, 17 N.C. App. 592, 195 S.E.2d 94 (1973).

§ 18A-34. Prohibited acts of licensees; wine and malt beverage purchases limited as to quantity.—(a) No holder of a license or permit authorizing the sale at retail of malt beverages or wine (fortified or unfortified) for consumption on or off the premises where sold, or any servant, agent, or employee of the licensee, shall do any of the following upon the licensed premises:

- (1) Knowingly permit the consumption of any kind of any intoxicating liquors not allowed to be consumed on said premises;
- (2) Knowingly sell such beverages to any person while such person is in an intoxicated condition;
- (3) Sell such beverages upon the licensed premises or permit such beverages to be consumed thereon, on any day or at any time when such sale or consumption is prohibited by law;
- (4) Permit on the licensed premises any disorderly conduct, breach of peace, or any lewd, immoral, or improper entertainment, conduct, or practices; or permit on the licensed premises any conduct or entertainment by nude performers or entertainers, or persons wearing transparent clothing or performances by any male or female performers simulating sexual acts or sexual activities with any person, object, device or other paraphernalia;
- (5) Sell, offer for sale, possess, or knowingly permit the consumption on the licensed premises of any kind of intoxicating liquors the sale or possession of which is not authorized by law.

(b) All retail license or permit holders shall keep their places of business clean, well lighted, and in an orderly manner.

(c) It shall be unlawful for any person selling at retail or wholesale any wines (fortified or unfortified) to sell wines the brands of which are not on the approved list of wines prepared by the State Board of Alcoholic Control unless specific authority for the sale of said wines has been obtained from the Board. It shall be the duty of all retailers to secure from the State Board of Alcoholic Control an

approved list of wines, and it shall be unlawful for retailers to purchase from wholesalers or distributors any wines not on said approved list, unless specific authority for such purchase is obtained from the State Board of Alcoholic Control.

(d) No retailer shall sell or deliver to any one person at any one time more than 20 gallons of malt beverages, other than draft malt beverages in kegs. Nor may more than one gallon of wine (fortified or unfortified) be sold at retail at any one time to any one person, except as authorized by permit. (1943, c. 400, s. 6; 1945, c. 708, s. 6; c. 903, s. 1; 1947, c. 1098, ss. 2, 3; 1949, c. 974, ss. 13, 15; c. 1251, s. 3; 1957, c. 1048; 1959, c. 745, s. 2; 1963, c. 426, ss. 6, 10, 12; c. 460, s. 1; 1971, c. 872, s. 1; 1973, c. 30.)

Editor's Note. — The 1973 amendment rewrote subdivision (a)(1), which formerly read: "Knowingly sell such beverages to any person not of lawful age."

The grantee of a privilege license need not surrender his constitutional protections in order to get the state-controlled license. *C'est Bon, Inc. v. North Carolina State Bd. of Alcoholic Control*, 325 F. Supp. 404 (W.D.N.C. 1971).

"Permit".—To permit as used in subsection (a)(4) means to acquiesce with knowledge, to knowingly consent. *Underwood v. State Bd. of Alcoholic Control*, 278 N.C. 623, 181 S.E.2d 1 (1971).

"Permit" has been construed to mean in effect "knowingly permit." To permit sale of alcoholic beverages to a minor connotes some opportunity for knowledge and prevention of the sale. *Underwood v. State Bd. of Alcoholic Control*, 278 N.C. 623, 181 S.E.2d 1 (1971).

The words **"permit"** and **"allow"** are synonymous. *Underwood v. State Bd. of Alcoholic Control*, 278 N.C. 623, 181 S.E.2d 1 (1971).

Knowledge Required. — To permit the unlawful sale of liquor in his building, an owner must have knowledge of the violation and consent to it. *Underwood v. State Bd. of Alcoholic Control*, 278 N.C. 623, 181 S.E.2d 1 (1971).

A finding that a licensee's employee sold wine to an intoxicated person, without a finding that the employee "knowingly" made the sale to an intoxicated person, is insufficient to sustain an order suspending retail beer and wine license. *Watkins v. State Bd. of Alcoholic Control*, 14 N.C. App. 19, 187 S.E.2d 500 (1972).

"Knowingly"—See *Campbell v. North Carolina State Bd. of Alcoholic Control*, 263 N.C. 224, 139 S.E.2d 197 (1964); *D & W, Inc. v. City of Charlotte*, 268 N.C. 577, 151 S.E.2d 241 (1966).

"Knowledge"—"Knowledge" means an impression of the mind, the state of being aware; and this may be acquired in numerous ways and from many sources. It is usually obtained from a variety of facts and circumstances. *Underwood v. State*

Bd. of Alcoholic Control, 278 N.C. 623, 181 S.E.2d 1 (1971).

Generally speaking, when it is said that a person has knowledge of a given condition, it is meant that his relation to it, his association with it, his control over it, and his direction of it are such as give him actual information concerning it. *Underwood v. State Bd. of Alcoholic Control*, 278 N.C. 623, 181 S.E.2d 1 (1971).

The mere fact that two boys violated the law on petitioner's premises on a single night within a period of 35 minutes does not constitute substantial evidence that petitioner knowingly permitted the consumption of alcoholic liquors on his premises. *Underwood v. State Bd. of Alcoholic Control*, 278 N.C. 623, 181 S.E.2d 1 (1971).

Knowledge may be implied from the circumstances. *Underwood v. State Bd. of Alcoholic Control*, 278 N.C. 623, 181 S.E.2d 1 (1971).

Sale of Beer to Minor Unknowingly on Single Occasion.—Under this section as it stood prior to the 1973 amendment, the sale of beer or wine to a person under 18 years of age by a licensee or an employee of a licensee was ground for the suspension or revocation of the license only if the sale was knowingly made to such minor; therefore, evidence that an employee of the licensee sold beer on a single occasion to a 17-year-old boy, without any evidence that the employee or the licensee knew the boy to be under 18 years of age, would not support order of the A.B.C. Board suspending the license. *National Food Stores v. North Carolina Bd. of Alcoholic Control*, 268 N.C. 624, 151 S.E.2d 582 (1966), overruling *Campbell v. North Carolina State Bd. of Alcoholic Control*, 263 N.C. 224, 139 S.E.2d 197 (1964), to the extent of any conflict.

Proprietor Responsible Even If One Carries His Own Beverage.—The proprietor is responsible if he knowingly permits another to drink on his premises, even if he carried his own beverage. *Campbell v. North Carolina State Bd. of Alcoholic Control*, 263 N.C. 224, 139 S.E.2d 197

(1964); *D & W, Inc. v. City of Charlotte*, 268 N.C. 577, 151 S.E.2d 241 (1966).

Enforcement of Subsection (a)(4).—All the evidence adduced at the hearing and considered by the Board tends to show that the licensee was making a reasonable effort in good faith to enforce the provisions of subsection (a)(4) where licensee's employees were ejecting troublemakers from his premises, thus indicating petitioner's disapproval of the disorderly conduct in which the participants were engaged. *Underwood v. State Bd. of Alcoholic Control*, 278 N.C. 623, 181 S.E.2d 1 (1971).

To permit gaming in one's house means to consent to it with knowledge. *Underwood v. State Bd. of Alcoholic Control*, 278 N.C. 623, 181 S.E.2d 1 (1971).

To permit livestock to run at large

means to allow it to be done with knowledge. *Underwood v. State Bd. of Alcoholic Control*, 278 N.C. 623, 181 S.E.2d 1 (1971).

The failure to observe all activities on a busy parking lot for a period of 35 minutes is not a failure, within the meaning of the law, to give the licensed premises proper supervision. *Underwood v. State Bd. of Alcoholic Control*, 278 N.C. 623, 181 S.E.2d 1 (1971).

Arranging Not to See Violations.—The holder of a license for the sale of wine and beer who is aware of violations on his premises but who arranges never to see them cannot be said to be ignorant of their existence. He must take steps to avoid violations or suffer the penalties prescribed. *Underwood v. State Bd. of Alcoholic Control*, 278 N.C. 623, 181 S.E.2d 1 (1971).

§ 18A-35. Transportation and possession of malt beverages and unfortified wine; out-of-state purchases.—(a) Except as otherwise provided in this Chapter, the purchase, transportation, and possession of malt beverages and unfortified wine by individuals 18 years of age or older for their own use are permitted without restriction or regulation.

(b) Whenever any person desires to purchase more than one gallon but not exceeding five gallons of unfortified wine at one time, he shall first obtain a purchase permit from the chairman of the local board, a member of the local board, or the general manager or supervisor of the local board of alcoholic control. No permit shall be issued by any authorized person to:

- (1) Persons not of good character; or
- (2) Persons not sufficiently identified, if unknown to the issuing person; or
- (3) Persons known or shown to be alcoholics or bootleggers.

(c) The permit shall be signed by the person authorized to issue same and it shall authorize the purchaser named therein to purchase the quantity of unfortified wine therein indicated not to exceed five gallons. The permit shall be issued by means of a printed form with at least two carbon copies of the same. On the face of the permit shall appear the following information:

- (1) Name and address of purchaser;
- (2) The name and location of the place where purchase is to be made;
- (3) Date issued and expiration date;
- (4) Destination;
- (5) Signature of person issuing the permit;
- (6) A statement that the permit is valid for only one purchase on the date shown and that the permit must accompany the merchandise while in transit and both the merchandise and the permit must be exhibited by purchaser to any law-enforcement officer upon request.

(d) The permit herein authorized shall be valid for only one purchase, and it shall expire at 6:00 P.M. of the date shown thereon. No purchase shall be made from any store except the store named on the permit. One copy of the permit shall be retained by the board issuing the same, one copy shall be delivered to the store from which the merchandise is purchased, and one copy shall be retained by the permittee. The permit shall authorize the permittee to transport unfortified wine from the place of purchase to the destination indicated thereon. It must accompany the merchandise during transit, and both the merchandise and the permit must be exhibited to any law-enforcement officer upon request.

(e) The chairman or any member of a local county or municipal board or the general manager or supervisor of any local alcoholic control board is authorized to issue purchase permits.

(f) Permits to be used shall be in the form substantially as follows:

ALCOHOLIC BEVERAGE CONTROL BOARD

..... County
, North Carolina
 Date, 19.....

PURCHASE PERMIT
 (not to exceed five gallons)

Name of Purchaser
 Address
 Name of Store Address of Store
 Destination
 Route to Be Used

Signed
 (Person authorized to issue)
 Board Member

Note: This permit is valid for only one purchase, and it shall expire at 6:00 P.M. of the date shown above. Special Note: This permit must accompany the merchandise during transit. Both the merchandise and the permit must be exhibited to any law-enforcement officer upon request.

(g) A person may purchase legally outside of this State and bring into this State for his own personal use the same quantity of malt beverages or unfortified wine as may be legally purchased by said person within this State. (1939, c. 158, s. 503; 1971, c. 872, s. 1.)

Municipal Ordinance Conflicting With Subsection (a) Was Invalid.—A municipal ordinance providing that “No person shall have open and in his possession, . . . beer, . . . on or in the public streets” conflicted with subsection (a); therefore, the municipal ordinance was invalid, and warrants drawn thereunder charging defendants with the possession of open beer were properly quashed. *State v. Williams*, 283 N.C. 550, 196 S.E.2d 756 (1973).

§ 18A-36. Native wines.—It shall be lawful for any person growing crops, either wild or cultivated, of grapes, fruits, or berries to make native wines therefrom and to possess and transport such wines without limitation or regulation for the use of his family and guests. No license or permit is required for wines manufactured pursuant to this section, nor shall any tax be imposed. (1971, c. 872, s. 1.)

Part 1A. Commercial Wineries.

§ 18A-36.1. Commercial wineries.—(a) In addition to the authority to make native wines conferred in G.S. 18A-36, it shall be lawful for any commercial winery after securing a permit from the State Board of Alcoholic Control to manufacture and distribute to wholesalers holding valid wine permits issued by the State Board of Alcoholic Control any wine, fortified or unfortified, after compliance with the provisions of this Chapter and other applicable law. The sale of wine, fortified and unfortified, to nonresident wholesalers is authorized when the purchase is not for resale in this State.

(b) “Commercial winery” means any business establishment which manufactures and sells wines for consumption by persons other than the families or guests of the person, firm or corporation owning or operating the winery.

(c) A commercial winery is authorized to grow crops, purchase crops and other materials, manufacture, possess and transport wine without limitation as to quantity except that any wine in transport shall be subject to the provisions of subdivisions (1) through (4) of G.S. 18A-29(b).

(d) Any applicable law with regard to tests for quality of the wine shall apply to wine possessed by commercial wineries in this State.

(e) The State Board of Alcoholic Control shall have all authority with regard to the issuance, denial, suspension and revocation of permits for commercial wineries which the Board has with regard to any permit issued by the Board.

(f) A resident manufacturer of fortified or unfortified wine may sell "short-filled" packages to its employees for the sole use of said employees, members of their families and bona fide guests in this State, provided that such manufacturer sell only such "short-filled" packages on which the appropriate North Carolina taxes have been paid or will be paid, based upon the size of the bottle or container short-filled. Any sale made to any employee of the manufacturer under this section shall not be construed as a retail or wholesale sale under Article 2C of Chapter 105, and Chapter 18A of the General Statutes, and such manufacturer shall not be required by reason of such sale to obtain a permit under Chapter 18A or license under Article 2C of Chapter 105. (1973, c. 511, ss. 1, 2.)

Part 2. Permits.

§ 18A-37. Permit and licenses required. — Malt beverages and wine (fortified or unfortified) may be manufactured, bottled, or sold in this State only after the person desiring to engage in such activity has acquired an appropriate permit from the State Board of Alcoholic Control as provided in this Article and has secured the license or licenses required by Article 2C of Chapter 105.

All permits shall be for a period of one year unless sooner suspended or revoked and shall expire on April 30 of each year.

Except as otherwise indicated, the provisions of this Article as to permits shall also be applicable to permits issued under Article 3 of this Chapter. (1971, c. 872, s. 1.)

§ 18A-38. Power of State Board of Alcoholic Control to issue permits.—(a) The State Board of Alcoholic Control shall be referred to herein as "the Board." The Board, in addition to all powers now conferred upon it by law, is hereby vested with additional powers to regulate the distribution and sale of wine (fortified and unfortified) and malt beverages as follows:

The Board shall have the sole power, in its discretion, to determine the fitness and qualifications of an applicant for a permit to sell, manufacture, or bottle malt beverages or wine (fortified and unfortified). The Board shall inquire into the character of the applicant and the location, general appearance, and type of place of business of the applicant.

(b) All manufacturers of malt beverages or wine (fortified or unfortified), wineries, brewers, bottlers of malt beverages or wine (fortified or unfortified), or any other persons selling or soliciting orders for, delivering, or distributing malt beverages or wine (fortified or unfortified) for the purpose of resale, whether on their own account or for or on behalf of other persons, whether any of such manufacturers, brewers, bottlers, or other persons are residents or nonresidents of this State, shall, as a condition precedent to the sale or the offering for sale or the delivery, distribution, or soliciting of orders for any malt beverages or wine (fortified or unfortified), apply for and obtain from the State Board of Alcoholic Control a permit for the sale, distribution, soliciting orders for, or delivery of malt beverages or wine (fortified or unfortified). The sale, distribution, soliciting orders for, or delivery of malt beverages or wine (fortified or unfortified) in this State without such a permit shall be unlawful.

The fact that any brewery or winery or any manufacturer or bottler of malt

beverages or wine (fortified or unfortified) has applied for or obtained a permit under the provisions of this Article shall not be construed as domesticating said brewery, manufacturer, or bottler, and shall not be evidence for any other purpose that such brewery, manufacturer, or bottler is doing business in North Carolina.

(c) The Board may issue temporary permits where application in proper form has been received, with applicable fees, which shall be valid for 90 days, unless sooner suspended or revoked. No applicant or permittee shall be entitled to any hearing with reference to the issuance, suspension, or revocation of any temporary permit.

(d) Permits issued for the retail sale of malt beverages shall be of two kinds:

- (1) "On-premises" permits, which shall be issued for bona fide restaurants, cafes, cafeterias, hotels, lunch stands, drugstores, filling stations, grocery stores, cold-drink stands, tearooms, or incorporated or chartered clubs. Such permit shall authorize the permittee to sell at retail malt beverages for consumption on the premises designated in the permit, and to sell malt beverages in original packages for consumption off the premises.
- (2) "Off-premises" permits, which shall authorize the permittee to sell at retail malt beverages for consumption only off the premises designated in the permit, and only in the immediate container in which the beverage was received by the permittee.

(e) Permits issued for the retail sale of unfortified wine shall be of two kinds:

- (1) "On-premises" permits shall be issued only to bona fide hotels, cafeterias, cafes, and restaurants which shall have a Grade A rating from the Commission for Health Services, and shall authorize the permittees to sell at retail for consumption on the premises designated in the permit and to sell unfortified wine in original containers for consumption off the premises. Provided, no such permit shall be issued except to such hotels, cafeterias, cafes, and restaurants where prepared food is customarily sold and only to such as are permitted under the provisions of G.S. 105-62(a).
- (2) "Off-premises" permits shall authorize the permittee to sell unfortified wine at retail for consumption off the premises designated in the permit, and all such sales shall be made in the immediate container in which the wine was purchased by the permittee.

(f) In any county or municipality in which the operation of alcoholic beverage control stores is authorized by law, it shall be legal to sell fortified wines for consumption on the premises in hotels and restaurants that have a Grade A rating from the Commission for Health Services, and it shall be legal to sell said wines in drugstores and grocery stores for off-premises consumption; such sales, however, shall be subject to the rules and regulations of the State Alcoholic Beverage Control Board. (1945, c. 903, s. 1; 1947, c. 1098, ss. 2, 3; 1949, c. 974, s. 1; 1957, cc. 1048, 1448; 1963, c. 426, ss. 10, 12; c. 460, s. 1; 1971, c. 872, s. 1; 1973, c. 476, s. 128.)

Editor's Note.—The 1973 amendment, effective July 1, 1973, substituted "Commission for Health Services" for "State Board of Health" in subsection (f). Although the 1973 amendatory act did not make any reference to the "State Department of Health," the codifiers have substituted "Commission for Health Services" for "State Department of Health" in subdivision (e)(1). See §§ 72-46 and 143B-142.

The superior court is without power to order the Board of Alcoholic Control to

issue a permit, but can order the Board to exercise its discretion in accordance with law. *Waggoner v. North Carolina Bd. of Alcoholic Control*, 7 N.C. App. 692, 168 S.E.2d 490 (1970).

Issuance of Certain Wine Permits Is Prohibited. — Section 18A-57(b) prohibits the issuance under subsection (f) of this section of permits for the sale of fortified wines in certain retail establishments in a territory having ABC stores where the electorate voted against the sale of beer

and wine in the territory in a local option election held pursuant to former § 18-124 et seq., notwithstanding at the time of the election fortified wines were sold only in ABC stores. *Clark v. North Carolina Bd. of Alcoholic Control*, 14 N.C. App. 464, 188 S.E.2d 705 (1972).

State Board of Alcoholic Control May Issue Permits for the Retail Sale of Fortified Wines in Those Counties and Cities Where ABC Stores Are Authorized.—See

opinion of Attorney General to Mr. N.H. Person, 41 N.C.A.G. 616 (1971).

In Locality Where Election for Off-Premises Sale of Unfortified Wine Only Has Been Held, Retail Sales of Wine Are Restricted to Those Conditions Despite Revision of General Statutes.—See opinion of Attorney General to Mr. Lee P. Phillips, State Board of Alcoholic Control, 41 N.C.A.G. 630 (1971).

§ 18A-39. Application for permit; contents and fees.—(a) All resident bottlers, wineries, or manufacturers of malt beverages or wine (fortified or unfortified) and all resident wholesalers and retailers of malt beverages or wine (fortified or unfortified) shall file a written application for a permit with the State Board of Alcoholic Control, and in the application shall state under oath therein:

- (1) The name and residence of the applicant and the length of his residence within the State of North Carolina;
- (2) The particular place for which the license is desired, designating the same by street and number if practicable; if not, by such other apt description as definitely locates it; and the distance to the nearest church or public or private school from said place;
- (3) The name of the owner of the premises upon which the business licensed is to be carried on, and, if the owner is not the applicant, that such applicant is the actual and bona fide lessee of the premises;
- (4) That the place or building in which it is proposed to do business conforms to all laws of health and fire regulations applicable thereto, and is a safe and proper place or building;
- (5) That the applicant intends to carry on the business authorized by the permit for himself or under his immediate supervision and direction;
- (6) That the applicant has been a bona fide resident of this State for a period of at least one year immediately preceding the date of filing his application and that he is not less than 21 years of age; provided, that no provision of this Chapter of [or] any rule or regulation adopted pursuant thereto, shall be construed to prohibit a person who is 18 years of age or older from being a manager, employee or other person in charge of any establishment which has a license and permit for on- or off-premises sales of malt beverages or wine (fortified or unfortified).
- (7) The place of birth of applicant and that he is a citizen of the United States, and, if a naturalized citizen, when and where naturalized;
- (8) That the applicant has not been convicted of, or entered a plea of guilty or nolo contendere to, a felony or other crime involving moral turpitude within the past three years; that the applicant's citizenship has been restored by the court if he has been so deprived of it; that he has not, within the two years next preceding the filing of the application, been adjudged guilty of violating the prohibition or liquor laws, either state or federal. It shall be within the discretion of the Board, after making investigation, to determine whether any person who has ever been convicted of, or entered a plea of guilty or nolo contendere to, a felony shall be deemed a suitable person to receive and hold a malt beverage or wine (fortified or unfortified) permit;
- (9) That the applicant has not during the three years next preceding the date of said application had any permit issuable hereunder or any license, issued to him pursuant to the laws of this State or any other state to sell intoxicating liquors of any kind, revoked;

- (10) That the applicant is not the holder of a federal special tax liquor stamp.
- (11) If the applicant is a firm, association, or partnership, the application shall state the matters required in subdivisions (6), (7), (8), and (9), with respect to each of the members thereof, and each of said members must meet all the requirements in said subdivisions provided;
- (12) If the applicant is a corporation, organized or authorized to do business in this State, the application shall state the matters required in subdivisions (7), (8) and (9), with respect to each of the officers and directors thereof, and any stockholder owning more than twenty-five percent (25%) of the stock of such corporation, and the person or persons who shall conduct and manage the licensed premises for the corporation. Each of said persons must meet all the requirements in said subdivisions provided; provided, however, that the requirement as to residence shall not apply to said officers, directors, and stockholders of such corporation; however, such requirement shall apply to any such officer, director or stockholder, agent, or employee who is also the manager and in charge of the premises for which permit is applied, but the Board may, in its discretion, waive such requirement.

(b) The application must be verified by the affidavit of the applicant before a notary public or other person duly authorized by law to administer oaths. The foregoing provisions and requirements are mandatory prerequisites for the issuance of a permit; if any applicant fails to qualify under the same, or if any false statement is knowingly made in any application, the permit shall be refused. If a permit is granted on any application containing a false statement knowingly made, it shall be revoked and the applicant upon conviction shall be guilty of a misdemeanor. In addition to the information furnished in any application, the Director of the Enforcement Division shall make such additional and independent investigation of each applicant and of the place to be occupied, as deemed necessary or advisable.

(c) Every person applying to the State Board of Alcoholic Control for a permit to sell malt beverages or wine (fortified or unfortified) under the provisions of this section shall pay an application fee at the time of application according to the following schedule:

- (1) For an application for a permit under the provisions of this section, a fee of twenty-five dollars (\$25.00); provided, that if applications for a malt beverage permit and a wine (fortified or unfortified) permit are filed at the same time for the same location, the total fee shall be twenty-five dollars (\$25.00);
- (2) For an application for a new permit under the provisions of this section by reason of the fact that a new manager has been assigned to an establishment for which a permit or permits are presently held, a fee of ten dollars (\$10.00); provided, this fee shall not be payable if the new manager has within 30 days of the time of filing of the application held a permit as the manager of another establishment of the same person.

All fees required by this section shall be paid by check or money order made payable to the State Board of Alcoholic Control, and they shall be deposited by the State Board of Alcoholic Control with the State Treasurer.

The application of any person who fails to comply with the provisions of this section shall be refused, and if the permit has been granted, it shall be canceled. (1949, c. 974, ss. 1, 2; 1963, s. 119; c. 426, s. 12; 1965, c. 326; 1971, c. 872, s. 1; 1973, c. 758, s. 2.)

Editor's Note.—The 1973 amendment added the proviso to subdivision (6) of subsection (a).

§ 18A-40. Permits prohibited.—(a) No permit shall be issued for the sale of malt beverages or wine (fortified or unfortified) upon the campus or property of any public school or college in this State.

(b) No permit shall be issued to a poolroom or billiard parlor or to any person operating same for the sale of wine (fortified or unfortified).

(c) No retail malt beverage or wine (fortified or unfortified) on premise permit shall be issued for any establishment within 50 feet of a church or a public school unless the State Board of Alcoholic Control determines upon proper investigation and a hearing, if requested, that the establishment is a suitable one and that the failure to issue a permit will result in undue hardship. (1971, c. 872, s. 1.)

§ 18A-41. Permits for commercial transportation of malt beverages and unfortified wine.—(a) Malt beverages and unfortified wine may be transported into, out of, or between points in this State by railroad companies, express companies, or steamboat companies engaged in public service as common carriers and having regularly established schedules of service upon condition that such companies shall keep accurate records of the character and volume of such shipments and the character and number of packages or containers and shall keep records open at all times for inspection by the State Board of Alcoholic Control and State A.B.C. officers, and upon condition that such common carrier shall make report of all shipments of such beverages into, out of, or between points in this State at such times and in such detail and form as may be required by the State Board of Alcoholic Control.

Malt beverages and unfortified wine may be transported into, out of, or between points in this State over the public highways of this State by motor vehicles upon condition that every person intending to make such use of the highways of this State shall as a prerequisite thereto register such intention with the State Board of Alcoholic Control in advance of such transportation, with notice of the kind and character of such products to be transported and the license and motor number of each motor vehicle intended to be used in such transportation. Upon the filing of such information, together with an agreement to comply with the provisions of this Chapter, the State Board of Alcoholic Control shall without charge therefor issue a numbered permit to each such owner or operator for each motor vehicle intended to be used for such transportation, which numbered permit shall be prominently displayed on the motor vehicle used in transporting malt beverages or unfortified wine. Every person transporting such products over any of the public highways of this State shall during the entire time he is so engaged have in his possession an invoice or bill of sale or other record evidence showing the true name and address of the person from whom he has received such beverages, the character and contents of containers, the number of bottles, cases, or gallons of such shipment, and the true name and address of every person to whom deliveries are to be made. The person transporting such beverages shall, at the request of any State A.B.C. officer, produce and offer for inspection said invoice or bill of sale or record evidence. If said person fails to produce an invoice or bill of sale or record evidence, or if when produced, the document fails to clearly and accurately disclose said information, the failure shall be prima facie evidence of the violation of this Article. Every person engaged in transporting such beverages over the public highways of this State shall keep accurate records of the character and volume of such shipments and the character and number of packages or containers, and shall keep records open at all times for inspection by the State Board of Alcoholic Control and State A.B.C. officers. Such person shall make report of all shipments of such beverages into, out of, or between points in this State at such times and in such detail and form as may be required by the State Board of Alcoholic Control.

The provisions of this section as to transportation of malt beverages and unfortified wine by motor vehicles over the public highways of this State shall in like manner apply to the owner or operator of any boat using the waters of the State for such transportation, and all of the provisions of this section with respect

to permits for such transportation and reports to the State Board of Alcoholic Control by the operators of motor vehicles on public highways shall in like manner apply to the owner or operator of any boat using the waters of this State.

(b) The State A.B.C. Board shall promulgate rules and regulations to prohibit the direct shipment of malt beverages from points outside this State to a United States military or naval reservation within the geographical confines of North Carolina for resale on such military or naval reservation.

(c) The permits required by this section shall be waived for any person already having a permit required under another section of this Article. (1923, c. 1, s. 15; C. S., s. 3411(o); 1939, c. 158, s. 503; 1971, c. 872, s. 1.)

§ 18A-42. Salesman's permit.—(a) Every salesman for a wholesale distributor of malt beverages or wine (fortified or unfortified) shall apply to the Board for a wholesale salesman's permit to sell such beverages, and shall renew the permit by May 1 of each succeeding year thereafter. This shall be deemed to include salesmen stationed at the wholesaler's warehouse as well as route salesmen who sell and deliver malt beverages or wine (fortified or unfortified) to retailers. All persons entering such employment after May 1, 1951, shall apply to the Board in like manner for a salesman's permit.

(b) Such salesman shall be 21 years of age and a citizen of the United States. No salesman's permit shall be issued to any person who has been convicted within two years preceding the filing of his application of violating the State or federal liquor laws, or who has been convicted of, or entered a plea of guilty or nolo contendere to, a felony or of any crime involving moral turpitude within the past three years and without restoration of his citizenship by the court. No salesman's permit shall be issued to any person whose permit or license issued to him pursuant to the laws of this State or any other state to sell intoxicating liquors of any kind has been revoked during the three years next preceding the date of application for a permit.

(c) Each route salesman shall be responsible under this Article for all sales and deliveries of malt beverages or wine (fortified or unfortified) by his helper.

(d) No wholesale distributor of malt beverages or wine (fortified or unfortified) shall employ as a salesman any person who does not have a salesman's permit.

(e) The permit of any salesman or wholesale distributor violating any provision of this Chapter or any regulation promulgated pursuant thereto, shall be subject to revocation or suspension by the Board. Permit holders cited for a violation by the Board shall have the right to a hearing as provided in this Article for other permittees. (1951, c. 378, ss. 1, 2, 5-8; 1963, c. 426, s. 13; 1971, c. 872, s. 1.)

§ 18A-43. Revocation or suspension of permit.—(a) If any permittee violates any of the provisions of this Chapter, or Chapter 105, or any rule or regulation promulgated under authority of either Chapter, or fails to superintend in person or through a manager the business for which the permit was issued, or allows the premises with respect to which the permit was issued to be used for any unlawful, disorderly, or immoral purposes, or knowingly employs in the sale or distribution of malt beverage or wine (fortified or unfortified) any person who has been convicted of, or entered a plea of guilty or nolo contendere to, a felony involving moral turpitude (federal or state) within the past three years, or adjudged guilty of violating the liquor or drug laws (federal or state) within two years, or leaves the licensed premises in charge of any person who has had a license or permit for the sale of malt beverages or wine (fortified or unfortified) revoked within the past two years, or otherwise fails to carry out in good faith the purposes of this Chapter, his permit may be revoked or suspended by the State Board of Alcoholic Control.

(b) The Board may refuse to issue a new permit or may suspend or revoke any permit issued by it if in the discretion of the Board it is of the opinion that the

applicant or permittee is not a suitable person to hold such permit or that the place occupied by the applicant or permittee is not a suitable place.

(c) Whenever any license or permit which has been issued by the Secretary of Revenue or by the State Board of Alcoholic Control has been revoked, the State Board may, at its discretion, refuse to issue a permit for said premises to any person for any period not to exceed six months after the revocation of such permit or license.

(d) The State A.B.C. Board may suspend or revoke any permit issued by it if the Board finds that the permittee has violated any provision of this Chapter or Chapter 105, or any rule or regulation of the State A.B.C. Board or the State Department of Revenue. (1939, c. 158, s. 514; 1943, c. 400, s. 6; 1945, c. 903, s. 1; 1947, c. 1098, ss. 2, 3; 1949, c. 974, ss. 7, 14; 1953, c. 1207, ss. 2-5; 1957, cc. 1048, 1440; 1963, c. 426, ss. 4, 5, 10, 12; c. 460, s. 1; 1971, c. 872, s. 1; 1973, c. 476, s. 193.)

Editor's Note. — The 1973 amendment, effective July 1, 1973, substituted "Secretary of Revenue" for "Commissioner of Revenue" in subsection (c).

Legislation for Revocation and Suspension of Permits Is Constitutional. — See *Boyd v. Allen*, 246 N.C. 150, 97 S.E.2d 864 (1957).

A violation of either a statute or a regulation is sufficient to support the suspension of a license. *C'est Bon, Inc. v. North Carolina Bd. of Alcoholic Control*, 279 N.C. 140, 181 S.E.2d 448 (1971).

Authority of Board.—Authority to conduct a hearing and determine whether a State retail (or wholesale) beer permit should be revoked is lodged in the State Board of Alcoholic Control by this section. *J. Lampros Wholesale, Inc. v. North Carolina Bd. of Alcoholic Control*, 265 N.C. 679, 144 S.E.2d 895 (1965).

Inquiry into Permittee's Suitability to Hold Permit at Several Locations. — See opinion of Attorney General to Mr. D.L. Pickard, Assistant Director-Hearing Officer, State Board of Alcoholic Control, 41 N.C.A.G. 50 (1970).

Authority of State Board of Alcoholic Control to Regulate Advertising of Alcoholic Beverages.—See opinion of Attorney General to Mr. Lee P. Phillips, State Board of Alcoholic Control, 40 N.C.A.G. 1 (1970).

Board Charged with Duty of Finding Facts. — The agency that hears the witnesses and observes their demeanor as they testify—the Board of Alcoholic Control—is charged with the duty of finding the facts. *J. Lampros Wholesale, Inc. v. North Carolina Bd. of Alcoholic Control*, 265 N.C. 679, 144 S.E.2d 895 (1965).

Duty of Court.—The duty of the court is to review the evidence and determine whether the Board had before it any material and substantial evidence sufficient to support its findings. *J. Lampros Wholesale, Inc. v. North Carolina Bd. of Alcoholic*

Control, 265 N.C. 679, 144 S.E.2d 895 (1965).

A permit is a privilege granted only to those who meet the standards which the Board has set up and may, and should be, revoked if the permittee fails to keep faith with the Board by observing its regulations and obeying the laws of the State. *J. Lampros Wholesale, Inc. v. North Carolina Bd. of Alcoholic Control*, 265 N.C. 679, 144 S.E.2d 895 (1965).

Who May Engage in Sale and Distribution of Beer.—Only those authorized by the Board and granted its permit may engage in the sale and distribution of beer. *J. Lampros Wholesale, Inc. v. North Carolina Bd. of Alcoholic Control*, 265 N.C. 679, 144 S.E.2d 895 (1965).

Revocation of Permit Requires Notice and Hearing.—Before a permit may be revoked the permittee is entitled to notice and a hearing before the Board. *J. Lampros Wholesale, Inc. v. North Carolina Bd. of Alcoholic Control*, 265 N.C. 679, 144 S.E.2d 895 (1965).

Nature of Proceedings to Suspend Beer Permit.—A proceeding by the State Board of Alcoholic Control to suspend a beer permit is an administrative proceeding, which does not involve any criminal liability of the holder of such permit. *Boyd v. Allen*, 246 N.C. 150, 97 S.E.2d 864 (1957).

The Board's findings are conclusive if supported by material and substantial evidence. *Freeman v. State Bd. of Alcoholic Control*, 264 N.C. 320, 141 S.E.2d 499 (1965); *J. Lampros Wholesale, Inc. v. North Carolina Bd. of Alcoholic Control*, 265 N.C. 679, 144 S.E.2d 895 (1965).

The findings of the Board, when made in good faith and supported by evidence, are final. *J. Lampros Wholesale, Inc. v. North Carolina Bd. of Alcoholic Control*, 265 N.C. 679, 144 S.E.2d 895 (1965).

And Its Decision Cannot Be Reversed by Jury Verdict.—The verdict of the jury

in a criminal prosecution does not have the effect of reversing the decision of the Board of Alcoholic Control. *Freeman v. State Bd. of Alcoholic Control*, 264 N.C. 320, 141 S.E.2d 499 (1965).

Findings Held to Support Judgment Suspending Permit. — Findings of fact, supported by evidence, that the holders of a beer permit sold whiskey on the premises, and sold beer consumed by the purchaser on the premises after closing hours and at a time when the sale of beer was prohibited by law, support judgment suspending the permit, notwithstanding the further finding that the holders had no knowledge of the unlawful conduct of the employees. *Boyd v. Allen*, 246 N.C. 150, 97 S.E.2d 864 (1957).

Findings Held Insufficient to Sustain Order Suspending License.—A finding that a licensee's employee sold wine to an intoxicated person, without a finding that the employee "knowingly" made the sale to an intoxicated person, is insufficient to sustain an order suspending retail beer and wine license. *Watkins v. State Bd. of Alcoholic Control*, 14 N.C. App. 19, 187 S.E.2d 500 (1972).

Evidence of Age of Person to Whom Licensee Sold Beer. — Testimony of officers that a person who had bought beer from a licensee declared he was under 18 is incompetent as hearsay, and a certified copy of a birth certificate without testimony of any person having knowl-

edge thereof that it was the record of the purchaser of the beer is incompetent to prove the age of the purchaser, and therefore such evidence is insufficient to sustain a finding of the State Board of Alcoholic Control that the licensee sold beer to a minor or failed to give his licensed premises proper supervision. *Thomas v. State Bd. of Alcoholic Control*, 258 N.C. 513, 128 S.E.2d 884 (1963).

The superior court erred in setting aside an order of the State Board of Alcoholic Control suspending a petitioner's retail beer permit where the evidence before the Board was sufficient to sustain its findings (1) that on a certain date an intoxicated person was permitted to loiter on the licensed premises of the petitioner in violation of the Board's regulations and (2) that the operator of the petitioner failed to give the premises proper supervision on the above occasion and where there was no evidence that the Board acted arbitrarily or in excess of lawful authority in suspending the license. *State Keg, Inc. v. State Bd. of Alcoholic Control*, 277 N.C. 450, 177 S.E.2d 861 (1970).

As to dismissal of certiorari to review revocation of license by town authorities for violation of this section, see *Harney v. Mayor & Bd. of Comm'rs*, 229 N.C. 71, 47 S.E.2d 535 (1948).

Applied in *Hill v. State Bd. of Alcoholic Control*, 17 N.C. App. 592, 195 S.E.2d 94 (1973).

§ 18A-44. Hearing before suspension or revocation of permit.—(a) Before the State A.B.C. Board may suspend or revoke any permit issued under the provisions of this Chapter, at least 10 days' notice of such proposed or contemplated action by the Board shall be given to the affected permittee. Such notice shall be in writing, shall contain a statement in detail of the grounds or reasons for such proposed or contemplated action of the Board, and shall be served on the permittee by sending the same to such permittee by registered or certified mail to his last known post office address or by personal service by an agent of the Board. The Board shall in such notice appoint a time and place when and at which the permittee shall be heard as to why the permit should not be suspended or revoked. The permittee shall at such time and place have the right to produce evidence in his behalf and to be represented by counsel.

(b) Whenever there is filed with the State Board of Alcoholic Control a certified copy of a judgment of a court convicting a licensee of a violation of the State or federal liquor or drug laws, or any of the provisions of this Chapter, or of any rule or regulation issued by the Board, the Board may suspend or revoke the permit of such licensee; and shall serve a written notice of such suspension or revocation upon the licensee either by requiring the delivery of such notice to the licensee in person by an agent of the Board or by sending same by registered mail to his last known post office address. Except as provided in the preceding sentence, before the State permit authorizing the sale of intoxicating liquors may be revoked or suspended, the Board shall give the affected permittee such notice and hearing as is required by subsection (a) of this section. Upon such hearing, the duly authorized agents of the Board may administer oaths and may issue subpoenas for

the attendance of witnesses and the production of books, papers, and documents belonging to the permittee.

(c) Any person who refuses to surrender any permit on demand under authority of the Board after such permit has been duly canceled, suspended, or revoked shall be guilty of a misdemeanor.

(d) Upon the appeal to the superior court of decisions of the Board suspending or revoking permits or disapproving applications for permits, and the appealing parties request a transcript of the entire record or a portion thereof, a transcript shall be furnished to the appealing parties upon payment to the Board of a fee of fifty cents (50¢) per page, but in no event shall the minimum fee be less than twenty-five dollars (\$25.00) per copy of the record. (1939, c. 158, s. 514; 1943, c. 400, §. 6; 1945, c. 903, s. 1; 1947, c. 1098, ss. 2, 3; 1949, c. 974, ss. 8, 14; 1953, c. 1207, ss. 2-4; 1957, cc. 1048, 1440; 1963, c. 426, ss. 4, 5, 10-12; c. 460, s. 1; 1971, c. 872, s. 1.)

Prerequisites to Suspension or Revocation of Permit.—Before a permit can be suspended or revoked, this section requires notice to the permittee of the time and place for a hearing with an opportunity for the permittee to offer evidence and to be represented by counsel. The charges against the permittee must be specific. The hearing may be before the director or a hearing officer. After the hearing, the hearing officer reviews all the evidence, records his findings of fact and conclusions of law, and makes his recommendations to the State Alcoholic Control Board. The Chairman of the Board causes the record, findings, conclusions, and recommendations of the hearing officer to be submitted to the Board for approval, modification, or rejection as the Board may find to be justified by the record. The Board makes the final decision. *C'est Bon, Inc. v. North Carolina Bd. of Alcoholic Control*, 279 N.C. 140, 181 S.E.2d 448 (1971).

Hearing Sufficient to Meet Requirements of Due Process. — A hearing by an examiner for the State Alcoholic Control Board, under provisions of statute and the rules promulgated pursuant thereto, of which hearing the permittee is given notice, is represented by counsel, introduces evidence, cross-examines the adverse witnesses, all witnesses being sworn, with right to object and except to any ruling and argue the matter, is held sufficient to meet the requirements of due process of law. *Sinodis v. State Bd. of Alcoholic Control*, 258 N.C. 282, 128 S.E.2d 587 (1962).

The failure to furnish a copy of the hearing examiner's proposed findings and recommendations without a request cannot be held violative of due process or the statutes providing for a hearing. *Sinodis v. State Bd. of Alcoholic Control*, 258 N.C. 282, 128 S.E.2d 587 (1962).

Failure to Request Hearing by Board.

—The holder of a permit to sell malt beverages is entitled, after a hearing by an examiner for the Board of charges of violations of law warranting a revocation of permit, to request a hearing by the Board, and when he does not request such hearing after notice of the date the Board would consider the matter, his application for jurisdiction review under § 143-307 must be dismissed for failure to exhaust available administrative remedies. *Sinodis v. State Bd. of Alcoholic Control*, 258 N.C. 282, 128 S.E.2d 587 (1962).

Whether a Hearing Is Required in All Cases Before Revocation of a Permit.—See opinion of Attorney General to Mr. Lee P. Phillips, State Board of Alcoholic Control, 40 N.C.A.G. 10 (1970).

Findings of Board Are Final.—The findings of the Board, when made in good faith and supported by evidence, are final. *C'est Bon, Inc. v. North Carolina Bd. of Alcoholic Control*, 279 N.C. 140, 181 S.E.2d 448 (1971).

After a hearing to determine whether the permittee has violated the law or regulations, the findings of the State Alcoholic Control Board are conclusive if supported by competent, material and substantial evidence. *C'est Bon, Inc. v. North Carolina Bd. of Alcoholic Control*, 279 N.C. 140, 181 S.E.2d 448 (1971).

Judicial Review.—On appeal to the court for judicial review of the State Alcoholic Control Board's decision, it is the duty of the court to review the evidence and determine whether the Board had before it any material and substantial evidence sufficient to support its findings. *C'est Bon, Inc. v. North Carolina Bd. of Alcoholic Control*, 279 N.C. 140, 181 S.E.2d 448 (1971).

§ 18A-45. Permit to be posted; effect of revocation.—(a) Each form of permit required by this Chapter shall be kept posted in a conspicuous place at each place where the business requiring the permit is carried on, and a separate permit shall be required for each place of business. Permits shall not be transferred to any other person or to any other location, except as provided in this Chapter.

(b) When a permit is canceled, revoked, or suspended by the Board, such cancellation, revocation, or suspension shall render void any State, county, or municipal license issued under this Chapter or Chapter 105, and in the event any State license is revoked, such revocation shall automatically revoke any other license or permit held by the licensee. (1939, c. 158, s. 514; 1943, c. 400, s. 6; 1949, c. 974, s. 14; 1953, c. 1207, ss. 2-4; 1957, c. 1440; 1963, c. 426, ss. 4, 5; 1971, c. 872, s. 1.)

§ 18A-46. Permit list to Department of Revenue.—The State Board of Alcoholic Control shall furnish to the Department of Revenue a list of all permits as issued. (1945, c. 903, s. 1; 1947, c. 1098, ss. 2, 3; 1957, c. 1048; 1963, c. 426, s. 10; c. 460, s. 1; 1971, c. 872, s. 1.)

Part 3. Miscellaneous Wine and Malt Beverage Provisions.

§ 18A-47. Wine regulations.—(a) The State Board of Alcoholic Control is authorized and empowered:

- (1) To adopt rules and regulations establishing standards of identity, quality, and purity for wines (fortified or unfortified). These standards shall be such as are deemed by said Board to best protect the public against wine containing deleterious, harmful, or impure substances or elements, or an improper balance of elements, and against spurious or imitation wines and wines unfit for beverage purposes.
- (2) To test wines (fortified or unfortified) possessed or offered for sale or sold in this State and to make chemical or laboratory analyses of said wines or to determine in any other manner whether said wines meet the standards established by said Board; to confiscate and destroy any wines (fortified or unfortified) not meeting said standards; to enter and inspect any premises upon which said wines (fortified or unfortified) are possessed or offered for sale; and to examine any and all books, records, accounts, invoices, or other papers or data which in any way relate to the possession or sale of said wines.

(b) Except as otherwise provided by law, no wines (fortified or unfortified) shall be transported or sold in this State unless there be firmly fastened or impressed on the barrel, bottle, or other container in which the wine may be a written statement showing the alcoholic content thereof reckoned by volume.

The possession, transportation, or sale of wines (fortified or unfortified) without such statement, or any misrepresentation made in any such statement, shall constitute a misdemeanor.

(c) Manufacturers, wineries, bottlers, and wholesalers, or any other persons selling wine (fortified or unfortified) for the purpose of resale, whether on their own account or for or on behalf of other persons, shall, upon request of the State A.B.C. Board, furnish a verified statement of a laboratory analysis of any wine sold or offered for sale by such persons.

(d) The "Standards of Identity for Wine" and the regulations relating to "Labeling and Advertising of Wine" promulgated by the federal alcohol administration of the United States Treasury Department and known respectively as Regulation Number Four, Article 2, and Regulation Number Four, Articles 3 and 6, are hereby adopted by North Carolina. The State A.B.C. Board may further restrict the standards of identity for wine and the regulations relative to the labeling and advertising of wine promulgated by the federal alcohol administration of the

U.S. Treasury Department, within the discretion of the Board. (1937, c. 335, s. 2; 1939, c. 158, s. 502; 1941, c. 339, s. 4; 1945, c. 903, s. 1; 1947, c. 1098, ss. 2, 3; 1957, c. 1048; 1963, c. 426, s. 10; c. 460, s. 1; 1971, c. 872, s. 1.)

§ 18A-48. Standards for malt beverages.—The State Board of Alcoholic Control shall have the authority to fix such standards for malt beverages as are determined by the Board to best protect the public against beverages containing deleterious, harmful, or impure substances or elements, or an improper balance of elements, and against spurious or imitation beverages unfit for human consumption; to test malt beverages possessed or offered for sale or sold in this State and to make chemical or laboratory analyses of such beverages or to determine in any other manner whether such beverages meet the standards established by said Board; to confiscate and destroy any such beverages not meeting such standards; to enter and inspect any premises on which such beverages are possessed or offered for sale; to examine any and all books, records, accounts, invoices, or other papers or data which in any way relate to the possession or sale of such beverages; and to take all proper steps for the prosecution of persons violating the provisions of this section and for carrying out the provisions and intent thereof; provided that the owner of said beverages confiscated shall be served with written notice to show cause within five days before the Board why the order should not be made permanent; and no beverages shall be destroyed until the order is final; provided further that the said owner shall have the right to appeal from the ruling of the said Board to the superior court of the county in which the said beverages were confiscated within 10 days from the final order of the said Board.

Manufacturers, bottlers, and wholesalers, or any other persons selling malt beverages for the purpose of resale, whether on their own account or for or on behalf of other persons, shall, upon the request of the State A.B.C. Board, furnish a verified statement of a laboratory analysis of any malt beverages sold or offered for sale by such persons. (1939, c. 158, s. 514; 1943, c. 400, s. 6; 1949, c. 974, s. 14; 1953, c. 1207, ss. 2-4; 1957, c. 1440; 1963, c. 426, ss. 4, 5; 1971, c. 872, s. 1.)

§ 18A-49. Prohibition against exclusive outlets.—It shall be unlawful for any manufacturer, bottler, or wholesaler of wine (fortified or unfortified) or malt beverages, whether licensed in this State or not, or any officer, director, or an affiliate of such manufacturer, bottler or wholesaler either directly or indirectly:

- (1) To require by agreement or otherwise that any retailer engaged in the sale of wine (fortified or unfortified) or malt beverages purchase any such products from such person, firm, or corporation to the exclusion in whole or in part of wine (fortified or unfortified) or malt beverages sold or offered for sale by other persons, firms, or corporations in North Carolina; or
- (2) To have any financial interest, direct or indirect, in the business for which any retailer's permit has been issued under this Article or in the premises where the business of any person to whom a retailer's permit has been issued hereunder is conducted; or
- (3) To lend or give to any person licensed hereunder as a retailer or his employee or to the owner of the premises on which the business of any such retailer is conducted any money, services, equipment, furniture, fixtures, or other things of value with which the business of such retailer is or may be conducted.

All of the above restrictions are subject to such exceptions as may be prescribed by the State Board of Alcoholic Control having due regard for public health, the quantity and value of articles involved, established trade customs not contrary to the public interest, and the purposes of this section. (1945, c. 708, s. 6; 1953, c. 1207, s. 1; 1971, c. 872, s. 1.)

§ 18A-50. Breweries forbidden to coerce or persuade wholesalers to violate Chapter or unjustly cancel contracts or franchises; prima facie evidence of franchise; injunctions; revocation or suspension of licenses and permits.—(a) It shall be unlawful, and punishable as provided in G.S. 18A-56, for any brewery or any officer, agent, or representative of any brewery:

- (1) To coerce or attempt to coerce or persuade any person licensed to sell malt beverages at wholesale to enter into any agreement to take any action which would violate or tend to violate any provision of Chapter 18A or Chapter 105 of the General Statutes or any rules or regulations promulgated by the State Board of Alcoholic Control or the Department of Revenue of the State of North Carolina in accordance therewith; or
- (2) To unfairly, without due regard to the equities of such wholesaler, or without just cause or provocation, to cancel or terminate any agreement or contract, written or oral, or the franchise of such wholesaler existing on January 1, 1965, or thereafter entered into, to sell malt beverages manufactured by the brewery; provided also, that, from and after June 17, 1965, this provision shall be a part of any franchise, contract, agreement, or understanding, whether written or oral, between any wholesale dealer in malt beverages licensed to do business in North Carolina, and any brewery doing business with such licensed wholesaler, just as though said provision had been specifically agreed upon between said wholesaler and said brewery.

(b) The doing or accomplishment of any of the following acts shall constitute prima facie evidence of a contractual franchise relationship within the contemplation of this section, as between a licensed malt beverage wholesaler and a brewery, to wit:

- (1) The shipment, preparation for shipment, or acceptance of any order by any brewery or its agent for any malt beverage to a licensed wholesale distributor within the State of North Carolina;
- (2) The payment by a licensed wholesale distributor in the State or the acceptance of payment by any brewery or its agent for the shipment of an order of malt beverage intended for sale within the State.

(c) The superior court of North Carolina is hereby vested with jurisdiction and power to enjoin the cancellation or termination of a franchise or agreement between a wholesaler of malt beverages and a brewery at the instance of such wholesaler who is or might be adversely affected by such cancellation or termination. In granting such an injunction, the superior court of North Carolina shall provide that no brewery shall supply the customers or territory of the wholesaler through servicing said territory or customers through other distributors or means while the injunction is in effect.

(d) The State Board of Alcoholic Control is empowered to investigate any violations of this section and to furnish to the prosecuting attorney of any court having jurisdiction of the offense information with respect to any violations of this section. The State Board shall have the power to enforce conformance with the provisions of any injunction granted by the superior court under the terms of this section, and, if the court finds that there has been a violation of the provisions of any injunction granted by it, the Board may revoke or suspend the permit of any wholesaler and the permit of any brewery to ship malt beverages into the State of North Carolina. (1965, c. 1191; 1971, c. 872, s. 1.)

ARTICLE 5.

Elections.

Part 1. A.B.C. Store Elections.

§ 18A-51. County elections as to alcoholic beverage control stores.—No county alcoholic beverage control store shall be established, maintained or operated in any county of this State until and unless there has been held in the county an election as provided herein, and the election shall be held under the same general laws, rules and regulations applicable to elections for county officers, insofar as practicable, provided that no absentee ballots or markers shall be permitted. At this election there shall be submitted to the qualified voters of the county the question of setting up and operating in the county an alcoholic beverage control store, or stores, as herein provided. Those favoring the setting up and operation of alcoholic beverage control stores in the county shall mark in the voting square to the left of the words "for county alcoholic beverage control stores" printed on the ballot, and those opposed to setting up and operating alcoholic beverage control stores in the county shall mark in the voting square to the left of the words "against county alcoholic beverage control stores," printed on the same ballot. If a majority of the votes cast in such election shall be for county alcoholic beverage control stores, then an alcoholic beverage control store, or alcoholic beverage control stores, may be set up and operated in the county as herein provided. If a majority of the votes cast at the election are against county alcoholic beverage control stores, then no alcoholic beverage control store shall be set up or operated in the county under the provisions of this Chapter.

The election shall be called in the county by the board of elections of the county only upon the written request of the board of county commissioners therein, or upon a petition to the board of elections signed by a number of voters of the county equal to at least twenty percent (20%) of the number of registered voters of the county according to the registration figures as certified by the board of elections on the date the petition is presented to the county board of elections. In calling the special election, the county board of elections shall give at least 30 days' public notice of the election before the closing of the registration books for said election, and the registration books shall close at the same time as for a regular election. A new registration of voters for such special alcoholic beverage control election is not required, and all qualified electors who are properly registered prior to the registration for the special election, as well as those electors who register for the special alcoholic beverage control election, shall be entitled to vote in the election.

Unless otherwise specified in this section, the procedural requirements relating to the petition shall be as provided in G.S. 18A-52(b), (c), (d), and (e), except the question shall be "FOR" and "AGAINST" county alcoholic beverage control stores.

If any county, while operating any alcoholic beverage control store under the provisions of Chapters 418 or 493 of the Public Laws of 1935, or under the terms of this Chapter hereafter under the provisions of this Article holds an election and if at this election a majority of the votes are cast "against county alcoholic beverage control stores," then the alcoholic beverage control board in such county shall, within three months from the canvassing of the vote and the declaration of the result thereof, close the stores and shall thereafter cease to operate them. During this period, the county control board shall dispose of all alcoholic beverages on hand, all fixtures, and all other property in the hands and under the control of the county control board and shall convert the same into money and shall, after making a true and faithful accounting, turn all money in its hands over to the general funds of the county.

No election under this section shall be held on the day of any biennial election for county officers, or within 45 days of such an election. The date of any elections

held under this section shall be fixed by the board of elections of the county wherein the election is held.

No other election shall be called and held in any of the counties in the State under the provisions of this section within three years from the holding of the last election under this section. In any county in which an election was held either under the provisions of Chapters 418 and 493 of the Public Laws of 1935, an election may be called under the provisions of this section, provided that no such election shall be called within three years of the holding of the last election.

Nothing herein contained shall be so construed as to require counties in which alcoholic beverage control stores have been established under Chapters 418 or 493 of the Public Laws of 1935 to have any further election in order to enable them to establish alcoholic beverage control stores. Counties in which alcoholic beverage control stores are now being operated under Chapters 418 or 493 of the Public Laws of 1935 shall from February 22, 1937, be operated under the terms of this Chapter. (1937, c. 49, ss. 25, 26; c. 431; 1971, c. 872, s. 1; 1973, c. 32.)

Editor's Note. — The 1973 amendment substituted "any county of this State" for "this State, in any county thereof" in the first sentence of the first paragraph and substituted, at the end of that sentence, the language beginning "as provided herein" for "under the same rules and regula-

tions that apply to elections for members of the General Assembly." The amendment also rewrote the second paragraph, added the third paragraph and substituted "45 days" for "60 days" in the first sentence of the fifth paragraph.

Part 2. Malt Beverage and Unfortified Wine Elections.

§ 18A-52. Malt beverage and unfortified wine elections in counties or municipalities.—(a) An election shall be called for the purpose of determining whether unfortified wine or malt beverages or both shall be sold in any municipality having a population of 500 or more, according to the last federal census of population, or within the county as a whole, only when the conditions of this Part are complied with.

(b) Such election shall be called in the county or municipality upon written request of the governing body or upon a petition to the appropriate board of elections conducting the election for the county or municipality. If the governing body requests the election, no petition shall be required, but the board of elections shall set a date for the election which shall not be later than 120 days after the written request is filed with the board. Notice of the election as hereinafter provided shall be given. The request shall specify the question or questions and the type of sale to be voted on in the election.

(c) The board of elections shall, upon written request, furnish petition forms to any person wishing to circulate a petition calling for an election on the sale of unfortified wine or malt beverages, or both, as hereinafter authorized. The board of elections shall date the petition, which must be returned to the board within 90 days from the date of delivery to the person; the date of return shall appear on the petition. Failure to return the petition as required shall render it void. Upon issuing the petition, the board of elections shall immediately give public notice that the petition is being circulated in some newspaper having general circulation in the county or municipality where the election is to be held and by posting the notice at three public places within the county or municipality. The notice shall be run at least twice in the newspaper. The person requesting the petition shall pay the cost of the notice.

(d) The board of elections shall call an election upon receipt of a petition which meets the following requirements:

- (1) The petition must contain the genuine signature, address, and precinct name or number of each signer.
- (2) The petition must be signed by a number of voters of the county or municipality equal to at least twenty percent (20%) of the number of

registered voters of the county or municipality according to the registration figures as certified by the board of elections on the date the petition is presented to the board of elections.

(3) The petition must request that an election be held in the county or the municipality to submit to the voters the question or questions of the legal sale of unfortified wine or malt beverages, or both. The petition must specify the particular question or questions to be voted on as specified in writing by the person requesting the petition, and whether the sale shall be "on-premises" or "off-premises" or both, or whether "on-premises" sales by Grade A hotels and restaurants only and "off-premises" sales by other licensees.

(4) The petition must show that it was returned to the board of elections within 90 days from the date it was delivered to the person requesting the petition.

(e) The board of elections shall determine the sufficiency of the petition within 30 days after its receipt. If the petition meets the requirements of this Part, the board of elections shall immediately set a date for the election, which shall be held not later than 120 days after the petition is returned to the board of elections. Public notice of the election shall be given by the board of elections 30 days prior to the closing of the registration books. The notice shall be given at least twice in some newspaper having general circulation in the county or municipality where the election is to be held. The person requesting the petition shall pay the cost of the notice before the board causes it to be published.

(f) The election shall be held under the same general laws, rules and regulations, insofar as practicable, as provided for the election of county or municipal officers wherein the election is being held, but no absentee ballots or markers shall be allowed. The opponents and proponents shall have the right to appoint two watchers to attend each voting place. The persons authorized to appoint watchers shall, three days before the election, submit in writing to the registrar of each precinct a signed list of the watchers appointed for that precinct. The persons appointed as watchers shall be registered voters of the precinct for which appointed. The registrar and judges for the precinct may for any good cause reject any appointee and require that another be appointed. Watchers shall do no electioneering at the voting place nor in any manner impede the voting process, interfere or communicate with or observe any voter in casting his ballot. Watchers shall be permitted in the voting place to make such observation and to take such notes as they may desire. No watcher shall enter the voting enclosure or render assistance to a voter. No new registration shall be required, and all qualified and registered voters shall be entitled to vote in the election.

(g) No election shall be held under this Part within 45 days of the date of any general, special, or primary election to be held in the county or the municipality in which an election under this Part is held. Provided, however, that an election under this Part may be held, in the discretion of the board of elections, on the same day of a general, special, or primary election held within the county or the municipality or an election to determine whether alcoholic beverage control stores shall be established therein.

If an election is to be held pursuant to a special act to determine whether alcoholic beverage control stores shall be operated within a county or municipality, and if there is not sufficient time before the election to comply with the petition or notice requirements of this Part for holding an election on the question or questions authorized by this Part, then the governing body of the county or municipality in which the election relating to the operation of alcoholic beverage control stores is to be held may, in its discretion, direct the board of elections to submit to the voters the question or questions relating to the sale and type of sale of unfortified wine or malt beverages, or both, as authorized by this Part and as specified by the governing body. The question or questions authorized by this

Part may be submitted on a separate ballot or placed on the same ballot relating to the operation of alcoholic beverage control stores. Provided, that the governing body shall not exercise the authority conferred by this paragraph within seven days of the day the election relating to alcoholic beverage control stores is to be held. Provided further, that if the governing body exercises the authority conferred by this paragraph, the board of elections shall immediately give public notice in some newspaper having general circulation in the county or municipality in which the election is to be held and by posting said notice in at least three public places within the county or municipality. The notice shall set forth the specific question or questions relating to the sale and type of sale of unfortified wine or malt beverages, or both, that will be submitted to the voters, and whether such question or questions will appear on the same ballot as the questions to determine whether alcoholic beverage control stores shall be established.

(h) Whenever an election has been held pursuant to this Part in any county or municipality, no other election hereunder shall be held in such county or municipality within three years of the preceding election within such county or municipality.

(i) No municipality shall hold an election under this Part unless there has been an election in the county where the municipality is located and the last vote in the county election was against the legal sale of the beverages authorized by this Part.

(j) The ballot shall give the voter the opportunity to vote "For" or "Against" the question or questions presented.

If the election is to determine whether unfortified wine is to be sold, the ballot shall contain one or more of the following:

- (1) FOR "on-premises" sales of unfortified wine by Grade A hotels and restaurants only and "off-premises" sales by other licensees.
AGAINST "on-premises" sales of unfortified wine by Grade A hotels and restaurants only and "off-premises" sales by other licensees.
- (2) FOR "off-premises" sales only of unfortified wine.
AGAINST "off-premises" sales only of unfortified wine.

If the election is to determine whether malt beverages are to be sold, the ballot shall contain one or more of the following:

- (1) FOR "on-premises" and "off-premises" sales of malt beverages,
AGAINST "on-premises" and "off-premises" sales of malt beverages,
or
- (2) FOR "on-premises" sales only of malt beverages,
AGAINST "on-premises" sales only of malt beverages, or
- (3) FOR "off-premises" sales only of malt beverages,
AGAINST "off-premises" sales only of malt beverages, or
- (4) FOR "on-premises" sales of malt beverages by Grade A hotels and restaurants only and "off-premises" sales by other licensees,
AGAINST "on-premises" sales of malt beverages by Grade A hotels and restaurants only and "off-premises" sales by other licensees.

Any one or more of the above questions shall, if requested in the petition, or by the governing body as authorized in subsections (b) and (g), be placed on the same ballot. (1947, c. 1084, ss. 1, 2, 4; 1951, c. 999, ss. 1, 2; 1957, c. 816; 1963, c. 265, ss. 1-3; 1965, c. 506; 1969, c. 647, s. 1; 1971, c. 872, s. 1; 1973, c. 33.)

Editor's Note. — The 1973 amendment deleted "(hereinafter referred to as board of elections)" at the end of the first sentence of subsection (b), substituted "twenty percent (20%)" for "twenty-five percent (25%)," deleted "most recent" preceding "registration" and added "on the date the petition is presented to the board of elec-

tions" in subdivision (d)(2), rewrote the first sentence of subsection (f), substituted "45 days" for "60 days" in the first sentence of subsection (g) and deleted the former first sentence of the first paragraph of subsection (j), which read: "The ballot shall be governed by the language of the petition."

Former Provisions Construed. — See *Tucker v. State Bd. of Alcoholic Control*, 240 N.C. 177, 81 S.E.2d 399 (1954); *Green v. Briggs*, 243 N.C. 745, 92 S.E.2d 149 (1956).
State v. Cochran, 230 N.C. 523, 53 S.E.2d 663 (1949); *Weaver v. Morgan*, 232 N.C. 642, 61 S.E.2d 916 (1950); *Ferguson v. Riddle*, 233 N.C. 54, 62 S.E.2d 525 (1950);

§ 18A-53. Effect of vote for or against questions.—(a) If a majority of the votes cast in such election shall be in favor of any question or questions on the ballot, then it shall be legal in accordance with the applicable law to sell only the beverage or beverages in the manner prescribed that received a favorable vote.

(b) If, at the time of the election, it is legal to sell the beverage or beverages presented on the ballot and the majority of the votes cast be against the sale of such beverage or beverages, then after the expiration of 60 days from the day of the election, it shall be unlawful to sell or possess for the purpose of sale the beverage or beverages receiving an unfavorable vote.

(c) The result of any county election held under this Part shall not affect the legal sale of unfortified wine or malt beverages, or both, or the type of sales in any municipality in the county in which the legal sale of such beverages has been authorized by an election or special act in the municipality prior to the time of the county election, and the result of a municipal election shall not in any manner affect the legal sale of such beverages, or the type of sale, which is legal in the county outside the municipality at the time of the municipal election.

(d) Nothing in this Part shall prevent bottlers, manufacturers or wholesalers of malt beverages or wine (fortified or unfortified) who have complied with this Chapter and Chapter 105 from bottling, manufacturing, possessing, transporting, or selling malt beverages or wine (fortified or unfortified) as a wholesaler to any person who has complied with the provisions of this Chapter and Chapter 105 and the rules and regulations of the State Board of Alcoholic Control, or selling to nonresident wholesalers when the purchase is not for resale in this State. (1947, c. 1084, s. 3; 1969, c. 647, s. 2; 1971, c. 872, s. 1.)

ARTICLE 6.

Miscellaneous Provisions.

§ 18A-54. Power of Governor to prohibit all sales during an emergency.—(a) When the Governor finds that a state of emergency, as defined in G.S. 14-288.1, exists anywhere within the State, he may order the closing of county and municipal alcoholic beverage control stores in all or any portion of the State for the period of the emergency. His order shall be directed to the Chairman of the State Board of Alcoholic Control. The express authority granted by this section is not intended to limit any other authority, express or implied, to order the closing of these stores.

(b) When the Governor finds that a state of emergency, as defined in G.S. 14-288.1, exists anywhere within the State, he may order the cessation of all sale or transfer, manufacture, or bottling of malt beverages or wine (fortified or unfortified) in all or any portion of the State for the period of the emergency. His order shall be directed to the Chairman of the State Board of Alcoholic Control. The express authority granted by this section is not intended to limit any other authority, express or implied, to order cessation of these activities. (1969, c. 869, ss. 4, 5; 1971, c. 872, s. 1.)

§ 18A-55. Books, records, reports.—All persons possessing or offering for sale or reselling any intoxicating liquors shall keep clear, complete, and accurate records which will reveal the sources from which said liquor was acquired, the date of acquisition, and any other information that may be required to be preserved by rules and regulations of the State A.B.C. Board. All such persons shall freely permit representatives of the Board to enter and inspect the premises

upon which liquor is possessed or offered for sale, to test and analyze any of such liquor, and to examine all books, records, accounts, invoices, or other papers or data relating to such liquor. (1971, c. 872, s. 1.)

§ 18A-56. Violation a misdemeanor.—(a) Except as otherwise expressly provided, anyone who violates any provision of this Chapter, or any rule or regulation promulgated pursuant thereto, shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine or by imprisonment, or by both fine and imprisonment, in the discretion of the court.

(b) The second or any subsequent conviction for violating G.S. 18A-5(a) is a felony, punishable by imprisonment for not less than four months and not exceeding five years in the discretion of the court.

(c) If any permittee or licensee is convicted of violating any provisions of this Chapter or any rule or regulation promulgated pursuant thereto, the court (in addition to the criminal penalty imposed) may declare his permit and license revoked, and shall notify the State Board of Alcoholic Control thereof; and no permit or license shall thereafter be granted to the person so convicted within a period of three years thereafter.

(d) The conviction of a member or employee of the State A.B.C. Board, or of a county or municipal A.B.C. board, shall constitute sufficient cause for removing him from the board or from his employment by the board; in addition to the powers of the State Board to remove any of its employees or any member of a county or municipal board and the power of a county or municipal board to remove any of its employees, the court in which the conviction is had shall have the power upon such conviction (and as a part of its judgment thereon) to remove such person from membership on, or employment by, said board. (1923, c. 1, ss. 26, 27; C. S., s. 3411(z), (aa); 1937, c. 49, ss. 16, 23; c. 411; 1941, c. 339, s. 5; 1943, c. 339, s. 4; 1945, c. 903, s. 1; 1949, c. 1251, s. 3; 1963, c. 426, s. 11; 1967, c. 222, s. 1; c. 1256, s. 3; 1969, c. 617, s. 2; c. 1018; 1971, c. 872, s. 1.)

§ 18A-57. Local acts and local option.—(a) Nothing in this Chapter shall operate to repeal any of the local acts of the General Assembly of North Carolina prohibiting the possession or consumption of intoxicating liquor within any county, municipality, or portion thereof, and all such local acts shall continue in full force and effect and in concurrence herewith, until repealed or modified.

(b) Nothing in this Chapter shall require a permit to be issued for any territory where the sale of malt beverages or wine (fortified or unfortified) is prohibited by special legislative act or for any area where the sale or possession for the purpose of sale of malt beverages or wine (fortified or unfortified) is unlawful as a result of a local option election; and this Chapter shall not repeal any special, public-local, or private act prohibiting or regulating the sale of these beverages in any county in this State, or any act authorizing the board of commissioners of any county of this State, or the governing body of any municipality, in its discretion, to prohibit the sale of malt beverages or wine (fortified or unfortified). (1923, c. 1, s. 28; C. S., s. 3411(bb); 1949, c. 974, s. 10; 1963, c. 426, s. 12; 1971, c. 872, s. 1.)

Issuance of Certain Wine Permits Prohibited by Subsection (b) of This Section.—Subsection (b) of this section prohibits the issuance under § 18A-38(f) of permits for the sale of fortified wines in certain retail establishments in a territory having ABC stores where the electorate voted against the sale of beer and wine in the territory in a local option election held pursuant to former § 18-124 et seq., not

withstanding at the time of the election fortified wines were sold only in ABC stores. *Clark v. North Carolina Bd. of Alcoholic Control*, 14 N.C. App. 464, 188 S.E.2d 705 (1972).

In Locality Where Election for Off-Premises Sale of Unfortified Wine Only Has Been Held, Retail Sales of Wine Are Restricted to Those Conditions Despite Revision of General Statutes.—See opin-

ion of Attorney General to Mr. Lee P. Phillips, State Board of Alcoholic Control, 41 N.C.A.G. 630 (1971).
Local Act Prohibiting the Sale of Sweet

Wine in City of Monroe Still Effective.— See opinion of Attorney General to Mr. Koy E. Dawkins, 42 N.C.A.G. 4 (1972).

§ 18A-58. Effective date of standards for intoxicating liquors; disposition of liquor on hand.—No standards adopted by the State Board of Alcoholic Control for any intoxicating liquor shall be effective until 30 days after the adoption of the regulation establishing said standards; and provided further, that any person affected by the adoption of any standard by the Board shall be granted 60 days after the effective date of the standard within which to dispose of any liquor on hand at the effective date of the standard which does not comply with the standard. (1945, c. 903, s. 1; 1971, c. 872, s. 1.)

Chapter 19.

Offenses Against Public Morals.

Article 1.

Abatement of Nuisances.

Sec.

19-1. What are nuisances under this Chapter.

Article 2.

Civil Remedy for Sales of Harmful Materials to Minors.

19-9. Title.

19-10. Purposes.

19-11. Public policy.

19-12. Definitions.

Sec.

19-13. Commencement of civil proceeding.

19-14. Filing and form of complaint.

19-15. Examination by the court; probable cause; service of summons.

19-16. Appearance and answer; default judgment.

19-17. Trial.

19-18. Judgment; limitation to district.

19-19. Injunctions.

19-20. Contempt; defenses; extradition.

19-21. [Repealed.]

ARTICLE 1.

Abatement of Nuisances.

§ 19-1. **What are nuisances under this Chapter.**—(a) The erection, establishment, continuance, maintenance, use, ownership or leasing of any building or place for the purpose of assignation, prostitution, gambling, illegal possession or sale of intoxicating liquors or illegal possession or sale of narcotic drugs as defined in the Uniform Narcotic Drug Act shall constitute a nuisance; and

(b) The erection, establishment, continuance, maintenance, use, ownership or leasing of any building or place wherein or whereon are carried on, conducted, or permitted repeated acts which create and constitute a breach of the peace shall constitute a nuisance.

(c) The building, or place, or the ground itself, in or upon which a nuisance as defined in subsections (a) or (b) above is carried on, and the furniture, fixtures, and contents, are also declared a nuisance, and shall be enjoined and abated as hereinafter provided. (Pub. Loc. 1913, c. 761, s. 25; 1919, c. 288; C. S., s. 3180; 1949, c. 1164; 1967, c. 142; 1971, c. 655.)

Editor's Note. — The 1971 amendment rewrote this section as previously amended in 1967.

For note on estuarine pollution, see 49 N.C.L. Rev. 921 (1971).

Admissibility of Evidence.—Where defendant was not charged with maintaining a nuisance, the admission of evidence

tending to show the general reputation of defendant's premises was error. *State v. Tessnear*, 265 N.C. 319, 144 S.E.2d 43 (1965).

Applied in *State ex rel. Bowman v. Fipps*, 266 N.C. 535, 146 S.E.2d 395 (1966).

Cited in *Wheeler v. Goodman*, 306 F. Supp. 58 (W.D.N.C. 1969).

§ 19-2. **Action for abatement; injunction.**—Whenever a nuisance is kept, maintained, or exists as defined in this Chapter, the solicitor, or any citizen of the county may maintain civil action in the name of the State of North Carolina upon the relation of such solicitor, or citizen, to perpetually enjoin said nuisance, the person or persons conducting or maintaining the same, and the owner or agent of the building or ground upon which said nuisance exists. In such action the court, or a judge in vacation, shall, upon the presentation of a petition therefor, alleging that the nuisance complained of exists, allow a temporary writ of injunction without bond, if it shall be made to appear to the satisfaction of the judge by evidence in the form of affidavits, depositions, oral testimony, or otherwise, as complainant may elect, unless the judge, by previous order, shall have directed the form and manner in which it shall be presented. When an injunction has been granted it shall be binding on the defendant throughout the county in which it was issued, and any violation of the provisions of injunction herein provided shall be

a contempt, as hereinafter provided. (Pub. Loc. 1913, c. 671, s. 26; 1919, c. 288; C. S., s. 3181; 1971, c. 528, s. 5.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, deleted "the city prosecuting attorney," preceding "the solicitor" and "city prosecuting attorney," preceding "such solicitor" in the first sentence.

For note on estuarine pollution, see 49 N.C.L. Rev. 921 (1971).

Applied in State ex rel. Simmons v. Johnson, 14 N.C. App. 168, 187 S.E.2d 370 (1972).

§ 19-3. When triable; evidence; dismissal of complaint. — The action when brought shall be triable at the first session of court after service of the summons has been made, and in such action evidence of the general reputation of the place shall be admissible for the purpose of proving the existence of said nuisance. If the complaint is filed by a citizen, it shall not be dismissed except upon a sworn statement made by the complainant and his attorney, setting forth the reason why the action should be dismissed, and the dismissal approved by the solicitor, in writing or in open court. If the court is of the opinion that the action ought not to be dismissed, he may direct the solicitor to prosecute said action to judgment; and if the action continued more than one session of court, any citizen of the county, or the county attorney, may be substituted for the complaining party and prosecute said action to judgment. If the action is brought by a citizen, and the court finds there was no reasonable ground or cause of said action, the costs may be taxed to such citizen. (Pub. Loc. 1913, c. 761, s. 27; 1919, c. 288; C. S., s. 3182; 1971, c. 528, s. 6.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, substituted "session" for "term" in the first and third sentences and deleted "city prosecuting attorney, or" preceding "solicitor" in the second sentence and "city prosecuting attorney, or the" preceding "solicitor" in the third sentence.

Evidence, etc.—

This section, which makes evidence of the general reputation of the place admissible for the purpose of proving a

nuisance, is not applicable where the defendant is not charged with maintaining a nuisance. State v. Tessnear, 265 N.C. 319, 144 S.E.2d 43 (1965).

Hence, evidence of the general reputation of defendant's premises is inadmissible in prosecutions for liquor law violations involving a charge of unlawful sale or possession of intoxicants at particular premises. State v. Tessnear, 265 N.C. 319, 144 S.E.2d 43 (1965).

§ 19-5. Order abating nuisance; what it shall contain.

Proceeding Is in Personam.—

A proceeding to abate a nuisance is not a proceeding in rem against the property itself, but is a proceeding in personam. State ex rel. Bowman v. Fipps, 266 N.C. 535, 146 S.E.2d 395 (1966).

And Lessor Must Have Knowledge before His Premises Can Be Padlocked.— Before the court can padlock a lessor-own-

er's premises and deprive him of the possession of his property on account of a nuisance maintained thereon by his tenant, it must be established by verdict, in a proceeding to which the owner is a party, that he knew, or could by due diligence have known, that the nuisance was being maintained. State ex rel. Bowman v. Fipps, 266 N.C. 535, 146 S.E.2d 395 (1966).

§ 19-6. Application of proceeds of sale.

Applied in State ex rel. Bowman v. Fipps, 266 N.C. 535, 146 S.E.2d 395 (1966).

§ 19-8. Attorney's fees may be taxed as costs.

Fee Discretionary.—The allowance of a fee is a matter in the discretion of the trial

judge. State ex rel. Bowman v. Fipps, 266 N.C. 535, 146 S.E.2d 395 (1966).

ARTICLE 2.

Civil Remedy for Sales of Harmful Materials to Minors.

§ 19-9. **Title.**—This article shall be known and cited as the North Carolina Law on the Protection of Minors from Harmful Materials. (1969, c. 1215, s. 1.)

Editor's Note. — Session Laws 1969, c. 1215, s. 5, makes the act effective July 1, 1969. niques for holding adversary hearing prior to seizure of obscene material, see 48 N.C.L. Rev. 830 (1970).

For comment on requirement and tech-

§ 19-10. **Purposes.**—The purposes of this Article are to provide solicitors with a speedy civil remedy for obtaining a judicial determination of the character and contents of publications, and with an effective power to enjoin promptly the sale of harmful materials to minors. (1969, c. 1215, s. 1; 1971, c. 528, s. 7.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, deleted "public prosecutors or" following "provide" near the beginning of the section.

§ 19-11. **Public policy.**—The public policy of this State requires that all proceedings prescribed in this article shall be examined, heard and disposed of with the maximum promptness and dispatch commensurate with constitutional requirements, including due process, freedom of the press and freedom of speech. (1969, c. 1215, s. 1.)

§ 19-12. **Definitions.**—As used within this article, the following definitions shall apply:

(1) "Harmful Material"—

- a. Any picture, photograph, drawing, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct or sadomasochistic abuse, and which is harmful to minors, or
- b. Any book, pamphlet, magazine, or printed matter however reproduced which contains any matter enumerated in subparagraph a of this subsection or which contains explicit or detailed verbal descriptions or accounts of sexual excitement, sexual conduct or sadomasochistic abuse, and which, taken as a whole, is harmful to minors.

(2) "Harmful to minors"—that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it:

- a. Predominantly appeals to the prurient, shameful or morbid interest of minors, and
- b. Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable materials for minors, and
- c. Is utterly without redeeming social importance for minors.

(3) "Knowledge of the Minor's Age"—

- a. Knowledge or information that the person is a minor, or
- b. Reason to know, or a belief or ground for belief which warrants further inspection or inquiry as to the age of the minor.

(4) "Knowledge of the Nature of the Material"—

- a. Knowledge of the character and content of any material described herein, or
- b. Knowledge or information that the material described herein has been adjudged to be harmful to minors in a proceeding instituted

pursuant to this article, or is the subject of a pending proceeding instituted pursuant to this article.

- (5) "Minor"—any person under the age of eighteen years.
- (6) "Nudity"—the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a full opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.
- (7) "Person"—any individual, partnership, firm, association, corporation or other legal entity.
- (8) "Sodomasochistic abuse"—flagellation or torture by or upon a person clad in undergarments, a mask or a bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.
- (9) "Sexual conduct"—acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person be a female, breast.
- (10) "Sexual excitement"—the condition of human male or female genitals when in a state of sexual stimulation or arousal. (1969, c. 1215, s. 1.)

§ 19-13. Commencement of civil proceeding.—(a) Whenever the solicitor for any judicial district has reasonable cause to believe that any person is engaged in selling, distributing or disseminating in any manner harmful material to minors or may become engaged in selling, distributing or disseminating in any manner harmful material to minors, the solicitor for the judicial district in which such material so offered for sale shall institute an action in the district court for that district for adjudication of the question of whether such material is harmful to minors.

(b) The provisions of the Rules of Civil Procedure and all existing and future amendments of said Rules shall apply to all proceedings herein, except as otherwise provided in this Article. (1969, c. 1215, s. 1; 1971, c. 528, s. 8.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, deleted "or prosecutor" following "solicitor" in two places in subsection (a).

For comment on requirement and techniques for holding adversary hearing prior to seizure of obscene material, see 48 N.C.L. Rev. 830 (1970).

The Rules of Civil Procedure are found in § 1A-1.

§ 19-14. Filing and form of complaint.—The action authorized by this article shall be commenced by the filing of a complaint to which shall be attached, as an exhibit, a true copy of the allegedly harmful material. The complaint shall:

- (1) Be directed against such material by name, description, volume, and issue, as appropriate;
- (2) Allege that such material is harmful to minors;
- (3) Designate as respondents, and list the names and all known addresses of any person in this State preparing, selling, offering, commercially distributing or disseminating in any manner such material to minors, or possessing such material with the apparent intent to offer to sell or commercially distribute or disseminate in any manner such material to minors;
- (4) Seek an adjudication that such material is harmful to minors; and
- (5) Seek a permanent injunction against any respondent prohibiting him from selling, commercially distributing, or disseminating in any manner such material to minors or from permitting minors to inspect such material. (1969, c. 1215, s. 1.)

§ 19-15. Examination by the court; probable cause; service of summons.—(a) Upon the filing of a complaint pursuant to this Article, the solicitor shall present the same together with attached exhibits, as soon as practicable to the court for its examination and reading.

(b) If, after such examination and reading, the court finds no probable cause to believe such material to be harmful to minors, the court shall cause an endorsement to that effect to be placed and dated upon the complaint and shall thereupon dismiss the action.

(c) If, after such examination and reading, the court finds probable cause to believe such material to be harmful to minors, the court shall enter an order to that effect whereupon it shall be the responsibility of the solicitor promptly to cause the clerk of the superior court to issue summonses together with copies of said order and said complaint as are needed for the service of the same upon respondents. Service of such summons, order and complaint shall be made upon each respondent thereto in any manner provided by law for the service of civil process. (1969, c. 1215, s. 1; 1971, c. 528, s. 8.)

Editor's Note. — The 1971 amendment, (a) and in the first sentence of subsection effective Oct. 1, 1971, deleted "or prosecutor" following "solicitor" in subsection (c).

§ 19-16. Appearance and answer; default judgment.—(a) On or before the return date specified in the summons issued pursuant to this article, or within fifteen days after the service of such summons, or within fifteen days after receiving actual notice of the issuance of such summons, the author, publisher or any person interested in sending or causing to be sent, bringing or causing to be brought, into this State for sale or distribution or disseminating in any manner, or any person in this State preparing, selling, offering, exhibiting or commercially distributing, or disseminating in any manner or possessing with intent to sell, offer or commercially distribute or exhibit or disseminate in any manner the material attached as an exhibit to the endorsed complaint, may appear and may intervene as a respondent and file an answer.

(b) If, after service of summons has been effected upon all respondents, no person appears and files an answer on or before the return date specified in the summons, the court may forthwith adjudge whether the material so exhibited to the endorsed complaint is harmful to minors and enter an appropriate final judgment. (1969, c. 1215, s. 1.)

§ 19-17. Trial.—(a) Upon the expiration of the time for filing answers by all respondents, but not later than the return date specified in the summons, the court shall, upon its own motion, or upon the application of any party who has appeared and filed an answer, set a date for the trial of the issues joined.

(b) Any respondent named in the complaint, or any person who becomes a respondent by virtue of intervention pursuant to this article, shall be entitled to a trial of the issues within one day after joinder of issue. A decision shall be rendered by the court or jury, as the case may be, within two days of the conclusion of the trial.

(c) Every person appearing and answering as a respondent shall be entitled, upon request, to a trial of any issue by a jury. If a jury is not requested by any such respondent, the issues shall be tried by the court without a jury. (1969, c. 1215, s. 1.)

§ 19-18. Judgment; limitation to district.—(a) In the event that the court or jury, as the case may be, fails to find the material attached as an exhibit to the complaint to be harmful to minors, the court shall enter judgment accordingly and shall dismiss the complaint.

(b) In the event that the court or jury, as the case may be, finds the material attached as an exhibit to the complaint to be harmful to minors, the court shall

enter judgment to such effect and may, in such judgment or in subsequent orders of enforcement thereof, enter a permanent injunction against any respondent prohibiting him from selling, commercially distributing, or giving away such material to minors or from permitting minors to inspect such material.

(c) No interlocutory order, judgment, or subsequent order of enforcement thereof, entered pursuant to the provisions of this article, shall be of any force and effect outside the judicial district in which entered; and no such order or judgment shall be res judicata in any proceeding in any other judicial district. (1969, c. 1215, s. 1.)

§ 19-19. Injunctions.—(a) If the court finds probable cause to believe the exhibited material to be harmful to minors, and so enters an order, the court may, upon the motion of the solicitor, issue a temporary restraining order against any respondent prohibiting him from offering, selling, commercially distributing or disseminating in any manner such material to minors or from permitting minors to inspect such material. No temporary restraining order shall be granted without notice to the respondents unless it clearly appears from specific facts shown by affidavit or by the verified complaint that one or more of the respondents are engaged in the sale, distribution or dissemination of harmful material to minors and that immediate and irreparable injury to the morals and general welfare of minors in this State will result before notice can be served and a hearing had thereon.

(b) Every temporary restraining order shall be endorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its own terms within such time after entry, not to exceed three days, as the court fixes unless within the time so fixed the respondent against whom the order is directed consents that it may be extended for a longer period.

(c) In the event that a temporary restraining order is granted without notice, a motion for a preliminary injunction shall be set down for hearing within two days after the granting of such order and shall take precedence over all matters except older matters of the same character; and when the motion comes on for hearing, the solicitor shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the restraining order.

(d) No preliminary injunction shall be issued without at least two days' notice to the respondents. (1969, c. 1215, s. 1; 1971, c. 528, s. 8.)

Editor's Note. — The 1971 amendment, sentence of subsection (a) and in subsection (c). effective Oct. 1, 1971, deleted "or prosecutor" following "solicitor" in the first

§ 19-20. Contempt; defenses; extradition.—(a) Any respondent, or any officer, agent, servant, employee or attorney of such respondent, or any person in active concert or participation by contract or arrangement with such respondent, who receives actual notice by personal service or otherwise of any restraining order or injunction entered pursuant to this article, and who shall disobey any of the provisions thereof, shall be guilty of contempt of court and upon conviction after notice and hearing shall be sentenced as provided by law.

(b) No person shall be guilty of contempt pursuant to this section:

(1) For any sale, distribution or dissemination to a minor where such person had reasonable cause to believe that the minor involved was eighteen years old or more, and such minor exhibited to such person a draft card, driver's license, birth certificate or other official or apparently official document purporting to establish that such minor was eighteen years old or more;

(2) For any sale, distribution or dissemination where a minor is accompanied by a parent or guardian, or accompanied by an adult and such person

has no reason to suspect that the adult accompanying the minor is not the minor's parent or guardian;

- (3) Where such person is a bona fide school, museum or public library or is acting in his capacity as an employee of such organization or as a retail outlet affiliated with and serving the educational purposes of such organization.

(c) In the event that any person found guilty of contempt pursuant to this section cannot be found within this State, the executive authority of this State shall, unless such person shall have appealed from the judgment of contempt and such appeal has not been finally determined, demand his extradition from the executive authority of the state in which such person may be found, pursuant to the law of this State. (1969, c. 1215, s. 1.)

§ 19-21: Repealed by Session Laws 1971, c. 528, s. 9, effective October 1, 1971.

Chapter 19A.

Protection of Animals.

Sec.

19A-1. Definitions.

19A-2. Purpose.

Sec.

19A-3. Preliminary injunction or restraining order.

19A-4. Permanent injunction.

§ 19A-1. **Definitions.**—For the purposes of this chapter the following definition of terms shall be applicable:

- (1) The terms “animals” and “dumb animals” shall be held to include every useful living creature.
- (2) The term “cruelty” shall be held to include every act, omission or neglect whereby unjustifiable physical pain, suffering or death is caused or permitted; but such term shall not be construed to prohibit lawful taking or attempting to take game animals or birds as allowed by law, provided further that such term shall not include activities sponsored by agencies or institutions conducting bio-medical research or training or for sport as provided by the laws of North Carolina.
- (3) The term “person” as used herein shall be held to include any persons, firm or corporation, including any nonprofit corporation, such as a society for the prevention of cruelty to animals. (1969, c. 831.)

§ 19A-2. **Purpose.**—It shall be the purpose of this chapter to provide a civil remedy for the protection and humane treatment of animals in addition to any criminal remedies that are available and it shall be proper in any action to combine causes of action against one or more defendants for the protection of one or more animals. A real party in interest as plaintiff shall be held to include any “person” as hereinbefore defined even though such person does not have a possessory or ownership right in an animal; a real party in interest as defendant shall include any person who owns or has possession of an animal. (1969, c. 831.)

§ 19A-3. **Preliminary injunction or restraining order.**—Upon the filing of a verified complaint in superior court in the county in which cruelty to an animal has allegedly occurred, and upon petition for a preliminary injunction or temporary restraining order, the resident judge or any judge holding a regular or special session of court may in the court's discretion issue such preliminary injunction or temporary restraining order, the duration of which shall be 20 days. Such injunction or restraining order may in the discretion of the court issue without prior notice to any person named as a defendant in the verified complaint, if service of process cannot be obtained, and such injunction may issue immediately and as soon as practicable be served upon every person named as a defendant. Every such preliminary injunction or restraining order, if the petition or complaint so requests, may in the discretion of the court give plaintiff the right to temporarily correct the condition giving rise to the cruel treatment of an animal; and if it shall appear upon the face of the complaint or verified petition, that the condition giving rise to the cruel treatment of an animal requires that plaintiff take custody of an animal, then it shall be proper for the court in its discretion in the order to allow plaintiff to take possession of the animal. (1969, c. 831; 1971, c. 528, s. 10.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, substituted “session” for “term” in the first sentence.

§ 19A-4. **Permanent injunction.**—On the date specified in a preliminary injunction or temporary restraining order, which date shall not be later than 20 days from the issuance thereof, a resident superior court judge or a superior court judge holding a regular or special session of superior court in the county in which

the action is brought shall determine the merits of the action by trial without jury, and upon hearing such evidence as may be presented, shall enter orders as he deems appropriate, including the issuance of a permanent injunction or final determination of the custody of the animal where appropriate. (1969, c. 831; 1971, c. 528, s. 10.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, substituted "session" for "term" near the middle of the section.

Chapter 20. Motor Vehicles.

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20-342. Unlawful devices.

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20-343. Unlawful change of mileage.

20-344. Operation of vehicle with intent to defraud.

20-345. Conspiracy.

20-346. Lawful service, repair, or replacement of odometer.

20-347. Disclosure requirements.

20-348. Private civil action.

20-349. Injunctive enforcement.

20-350. Criminal offense.

ARTICLE 1.*Department of Motor Vehicles.***§ 20-1. Department of Motor Vehicles created; powers and duties.**

—A department of the government of this State, to be known as the Department of Motor Vehicles, is hereby created. It is the intent and purpose of this Article, and it shall be liberally construed to accomplish that purpose, to transfer and consolidate under one administrative head in the Department of Motor Vehicles agencies now operated under the Department of Revenue and dealing with the subject of the regulation of motor vehicular traffic, whether such activities are at present handled directly by the Commissioner of Revenue or by the Motor Vehicle Bureau, the Auto Theft Bureau, the Division of Highway Safety, the major of the State Highway Patrol, the officials handling the Uniform Driver's License Act; and the Department of Motor Vehicles shall succeed to and is hereby vested with all the powers, duties and jurisdiction now vested by law in any of said agencies; provided, however, all powers, duties and functions relating to the collection of motor fuel taxes, and the collection of the gasoline and oil inspection taxes, shall continue to be vested in and exercised by the Secretary of Revenue and wherever it is now provided by law that reports shall be filed with the Secretary or Department of Revenue as a basis for collecting the motor fuel or gasoline and oil inspection taxes, or enforcing any of the laws regarding the motor fuel or gasoline and oil inspection taxes, such reports shall continue to be made to the Department of Revenue and the Commissioner of Motor Vehicles shall make available to the Secretary of Revenue all information from the files of the Department of Motor Vehicles which the Secretary of Revenue may request to enable him to better enforce the law with respect to the collection of such taxes: Provided, further, nothing in this Article shall deprive the Utilities Commissioner of any of the duties or powers now vested in him with regard to the regulation of motor vehicle carriers. (1941, c. 36, s. 1; 1949, c. 1167; 1973, c. 476, s. 193.)

Editor's Note.—

The 1973 amendment, effective July 1, 1973, substituted "Secretary of Revenue" for "Commissioner of Revenue" in three places and "Secretary or Department of Revenue" for "Commissioner or Department of Revenue" in one place.

State Government Reorganization.—

The Department of Motor Vehicles was transferred to the Department of Transportation and Highway Safety by § 143A-100, enacted by Session Laws 1971, c. 864.

§ 20-3.1. Purchase of additional airplanes.—The Department of Motor Vehicles shall not purchase additional airplanes without the express authorization of the General Assembly. (1963, c. 911, s. 1½; 1971, c. 198.)

Editor's Note. — The 1971 amendment deleted "or use" following "purchase."

ARTICLE 1A.

Reciprocity Agreements as to Registration and Licensing.

§ 20-4.4. Authority for reciprocity agreements; provisions; reciprocity standards.—(a) The Commissioner may enter into an agreement or arrangement for interstate or intrastate operations with the duly authorized representatives of another jurisdiction, granting to vehicles or to owners of vehicles which are properly registered or licensed in such jurisdiction and for which evidence of compliance is supplied, benefits, privileges and exemptions from the payment, wholly or partially, of any taxes, fees, or other charges imposed upon such vehicles or owners with respect to the operation or ownership of such vehicles under the laws of this State. Such an agreement or arrangement shall provide that vehicles properly registered or licensed in this State when operated upon highways of such other jurisdiction shall receive exemptions, benefits and privileges of a similar kind or to a similar degree as are extended to vehicles properly registered or licensed in such jurisdiction when operated in this State. Each such agreement or arrangement shall, in the judgment of the Commissioner, be in the best interest of this State and the citizens thereof and shall be fair and equitable to this State and the citizens thereof, and all of the same shall be determined on the basis and recognition of the benefits which accrue to the economy of this State from the uninterrupted flow of commerce.

(1971, c. 588.)

Editor's Note. — The 1971 amendment inserted "for interstate or intrastate operations" in the first sentence of subsection (a).

As subsection (b) was not changed by the amendment, it is not set out.

§ 20-4.6. Declarations of extent of reciprocity, when; deferral period for registration of vehicles owned by new residents. — In the absence of an agreement or arrangement with another jurisdiction, the Commissioner may examine the laws and requirements of such jurisdiction and declare the extent and nature of exemptions, benefits and privileges to be extended to vehicles properly registered or licensed in such other jurisdiction, or to the owners of such vehicles, which shall, in the judgment of the Commissioner, be in the best interest of this State and the citizens thereof and which shall be fair and equitable to this State and the citizens thereof, and all of the same shall be determined on the basis and recognition of the benefits which accrue to the economy of this State from the uninterrupted flow of commerce.

It is hereby provided that the owner of a private passenger vehicle who takes up residence in North Carolina on a permanent or temporary basis shall be exempt from the provisions of registration for a period of 30 days from the date that either permanent or temporary residence is established in North Carolina provided that his vehicle is properly licensed in the jurisdiction of which he is a resident or a former resident. (1961, c. 642, s. 1; 1967, c. 1166.)

Editor's Note. — The 1967 amendment added the second paragraph.

§§ 20-4.13 to 20-4.17: Reserved for future codification purposes.

ARTICLE 1B.

Reciprocal Provisions as to Arrest of Nonresidents.

§ 20-4.18. Definitions.—Unless the context otherwise requires, the following words and phrases, for the purpose of this Article, shall have the following meanings:

- (1) Citation.—Any citation, summons, ticket, or other document issued by a law-enforcement officer for the violation of a traffic law, ordinance, rule or regulation.

- (2) Collateral or Bond.—Any cash or other security deposited to secure an appearance following a citation by a law-enforcement officer.
- (3) License.—Any operator's or chauffeur's license or any other license, permit, or privilege to operate a motor vehicle.
- (4) Nonresident.—A person who is a resident of or holds a license issued by a reciprocating state.
- (5) Personal Recognizance. — A signed agreement by a nonresident that he will comply with the terms of the citation issued to him.
- (6) Reciprocating State.—Any state or other jurisdiction which extends by its laws to residents of North Carolina substantially the rights and privileges provided by this Article.
- (7) State.—The State of North Carolina. (1973, c. 736.)

§ 20-4.19. Issuance of citation to nonresident; officer to report non-compliance.—(a) Notwithstanding other provisions of this Chapter, a law-enforcement officer observing a violation of this Chapter or other traffic regulation by a nonresident shall issue a citation as appropriate and shall not, subject to the provisions of subsection (b) of this section, require such nonresident to post collateral or bond to secure appearance for trial, but shall accept such nonresident's personal recognizance; provided, however, that the nonresident shall have the right upon request to post collateral or bond in a manner provided by law and in such case the provisions of this Article shall not apply.

(b) No nonresident shall be entitled to be released on his personal recognizance if the offense is one which would result in the suspension or revocation of a person's license under the laws of this State.

(c) Upon the failure of the nonresident to comply with the citation, the law-enforcement officer shall obtain a warrant for his arrest and shall report the non-compliance to the Department. The report of noncompliance shall clearly identify the nonresident; describe the violation, specifying the section of the statute, code, or ordinance violated; indicate the location and date of offense; identify the vehicle involved; bear the signature of the law-enforcement officer; and contain a copy of the personal recognizance signed by the nonresident. (1973, c. 736.)

§ 20-4.20. Department to transmit report to reciprocating state; suspension of license for noncompliance with citation issued by reciprocating state.—(a) Upon receipt of a report of noncompliance, the Department shall transmit a certified copy of such report to the official in charge of the issuance of licenses in the reciprocating state in which the nonresident resides or by which he is licensed.

(b) When the licensing authority of a reciprocating state reports that a person holding a North Carolina license has failed to comply with a citation issued in such state, the Commissioner shall forthwith suspend such person's license. The order of suspension shall indicate the reason for the order, and shall notify the person that his license shall remain suspended until he has furnished evidence satisfactory to the Commissioner that he has complied with the terms of the citation which was the basis for the suspension order by appearing before the tribunal to which he was cited and complying with any order entered by said tribunal.

(c) A copy of any suspension order issued hereunder shall be furnished to the licensing authority of the reciprocating state.

(d) The Commissioner shall maintain a current listing of reciprocating states hereunder. Such lists shall from time to time be disseminated among the appropriate departments, divisions, bureaus, and agencies of this State; the principal law-enforcement officers of the several counties, cities, and towns of this State; and the licensing authorities in reciprocating states.

(e) The Commissioner shall have the authority to execute or make agreements, arrangements, or declarations to carry out the provisions of this Article. (1973, c. 736.)

ARTICLE 2.

Uniform Driver's License Act.

§ 20-6. Definitions.—Terms used in this Article shall be construed as follows, unless another meaning is clearly apparent from the language or context or unless such construction is inconsistent with the manifest intention of the legislature.

“Chauffeur” shall mean every person who is employed by another for the principal purpose of driving a motor vehicle and every person who drives any motor vehicle when in use for the transportation of persons or property for compensation and the driver, other than the owner of a private hauler, of any property-hauling vehicle or combination of vehicles licensed for more than 26,000 pounds gross weight and the driver of any passenger-carrying vehicle of over nine-passenger capacity except the driver of a church bus, farm bus, school bus or an activity bus for a nonprofit organization when such bus is being operated for a nonprofit purpose, who holds a valid operator's license. Those under 20 years of age must be certified and licensed to operate a North Carolina school bus. Nothing in this section shall be construed to eliminate the requirement of G.S. 20-218 that any person operating a school activity bus must hold either a school bus driver's certificate or a chauffeur's license.

“Department” shall mean the Department of Motor Vehicles.

“Highway” shall include any trunk line highway, State aid road or other public highway, road, street, avenue, alley, driveway, parkway, or place, under the control of the State or any political subdivision thereof, dedicated, appropriated or opened to public travel or other use.

“Motor vehicle” shall mean every vehicle which is self-propelled and every vehicle which is propelled by electric power obtained from trolley wires but not operated upon rails, and every vehicle designed to run upon the highways which is pulled by a self-propelled vehicle.

“Nonresident” shall mean any person whose legal residence is in some state other than North Carolina or in a foreign country.

“Operator” shall mean any person other than a “chauffeur” who shall operate a motor vehicle or who shall be in the driver's seat of a motor vehicle when the engine is running or who shall steer or direct the course of a motor vehicle which is being towed or pushed by another motor vehicle.

“Person” shall include any individual, corporation, association, copartnership, company, firm or other aggregation of individuals.

“Vehicle” shall include any device suitable for use on the highways for the conveyance, drawing or other transportation of persons or property, except those propelled or drawn by muscular power or those used exclusively upon tracks.

As applied to operators' and chauffeurs' licenses issued under this Article, the words:

“Cancelled” shall mean that a license which was issued through error or fraud has been declared void and terminated. A new license may be obtained only as permitted in this Article.

“Resident”.—Any individual who resides within this State for other than a temporary or transitory purpose for more than six months shall be presumed to be a resident of this State; but absence from the State for more than six months shall raise no presumption that the individual is not a resident of the State.

“Revocation” shall mean that the licensee's privilege to drive a vehicle is terminated for the period stated in the order of revocation.

“Suspension” shall mean the licensee's privilege to drive a vehicle is temporarily withdrawn. (1935, c. 52, s. 1; 1941, c. 36; 1943, c. 787, s. 1; 1951, c. 1202.

s. 1; 1953, cc. 683, 841; 1955, c. 1187, s. 1; 1957, c. 997; 1963, c. 160; 1969, c. 561, s. 1; c. 1000, s. 1; 1973, c. 125.)

Editor's Note.—

The first 1969 amendment inserted the definition of "resident."

The second 1969 amendment rewrote the exception clause to the next-to-last sentence and added the last sentence of the definition of "chauffeur."

The 1973 amendment, effective July 1, 1973, added the third sentence in the paragraph defining "chauffeur."

Opinions of Attorney General. — Mr. Blaine M. Madison, Commissioner, Board of Juvenile Correction, 40 N.C.A.G. 394 (1969). Major John Laws, N.C. State Highway Patrol, 40 N.C.A.G. 403 (1969).

Operator, as defined by this section, includes a person in the driver's seat of a motor vehicle when the engine is running. *State v. Carter*, 15 N.C. App. 391, 190 S.E.2d 241 (1972).

Period of Revocation.—The contention that a revocation remains in effect not only throughout the period stated in the order of revocation but also until the person whose license was revoked applies for a restoration of his license and pays the restoration fee required is contrary to the definition of "revocation" in this section. *Ennis v. Garrett*, 279 N.C. 612, 184 S.E.2d 246 (1971).

§ 20-7. Operators' and chauffeurs' licenses; expiration; examinations; fees.—(a) Except as otherwise provided in § 20-8, no person shall act as or operate a motor vehicle over any highway in this State as a chauffeur unless such person has first been licensed as a chauffeur by the Department under the provisions of this Article. Except as otherwise provided in § 20-8, no person shall operate a motor vehicle over any highway in this State unless such person has first been licensed as an operator or a chauffeur by the Department under the provisions of this Article. Any person who takes up residence in this State on a permanent basis shall be exempt from the provisions of this subsection for a period of 30 days from the date that residence is established, provided he is properly licensed in the jurisdiction of which he is a former resident.

(f) The operators' licenses issued under this section shall automatically expire on the birthday of the licensee in the fourth year following the year of issuance; and no new license shall be issued to any operator after the expiration of his license until such operator has again passed the examination specified in this section. Any operator may at any time within sixty days prior to the expiration of his license apply for a new license and if the applicant meets the requirements of this Article, the Department shall issue a new license to him. A new license issued within 60 days prior to the expiration of an applicant's old license or within 12 months thereafter shall automatically expire four years from the date of the expiration of the applicant's old license.

Any person serving in the armed forces of the United States on active duty and holding a valid operator's license properly issued under this section and stationed outside the State of North Carolina may renew his license by making application to the Department by mail. Any other person, except a nonresident as defined in this Article, who holds a valid operator's license issued under this section and who is temporarily residing outside North Carolina, may also renew by making application to the Department by mail. For purposes of this section "temporarily" shall mean not less than 30 days continuous absence from North Carolina. In either case, the Department may waive the examination and color photograph ordinarily required for the renewal of an operator's license, and may impose in lieu thereof such conditions as it may deem appropriate to each particular application; provided that such license shall expire 30 days after licensee returns to North Carolina, and such license shall be designated as temporary.

(i) The fee for issuance or reissuance of an operator's license shall be three dollars and twenty-five cents (\$3.25) and the fee for issuance or reissuance of a chauffeur's license shall be four dollars and seventy-five cents (\$4.75).

(il) Any person whose operator's or chauffeur's license or other privilege to operate a motor vehicle in this State has been suspended, canceled or revoked pursuant to the provisions of this Chapter shall pay a restoration fee of ten dollars

(\$10.00) to the Department prior to the issuance to such person of a new operator's or chauffeur's license or the restoration of such operator's or chauffeur's license or privilege, such restoration fee shall be paid to the Department in addition to any and all fees which may be provided by law.

(l) Any person who, except for lack of instruction in operating a motor vehicle would be qualified to obtain an operator's license under this Article, may apply for a temporary learner's permit, and the Department shall issue such permit, entitling the applicant, while having such permit in his immediate possession, to drive a motor vehicle upon the highways for a period of six months. Any such learner's permit may be renewed, or a new permit issued for an additional period of six months. Such person must, while operating a motor vehicle over the highways, be accompanied by a licensed operator or chauffeur who is actually occupying a seat beside the driver.

(m) The Department upon receiving proper application may in its discretion issue a restricted instruction permit effective for a school year or a lesser period to an applicant who is enrolled in a driver training program approved by the State Superintendent of Public Instruction even though the applicant has not yet reached the legal age to be eligible for an operator's license. Such instruction permit shall entitle the permittee when he has such permit in his immediate possession to operate a motor vehicle subject to the restrictions imposed by the Department. The restrictions which the Department may impose on such permits include but are not limited to restrictions to designated areas and highways and restrictions prohibiting operation except when an approved instructor is occupying a seat beside the permittee.

(n) Every operator's or chauffeur's license issued by the Department shall bear thereon the distinguishing number assigned to the licensee and color photograph of the licensee of a size approved by the Commissioner and shall contain the name, age, residence address and a brief description of the licensee, who, for the purpose of identification and as a condition precedent to the validity of the license, immediately upon receipt thereof, shall endorse his or her regular signature in ink upon the same in the space provided for that purpose unless a facsimile of his or her signature appears thereon; provided the requirement that a color photograph of the licensee appear on the license may be waived by the Commissioner upon satisfactory proof that the taking of such photograph violates the religious convictions of the licensee. Such license shall be carried by the licensee at all times while engaged in the operation of a motor vehicle. However, no person charged with failing to so carry such license shall be convicted, if he produces in court an operator's or chauffeur's license theretofore issued to him and valid at the time of his arrest.

(o) Any person convicted of violating any provision of this section shall be guilty of a misdemeanor and punished in the discretion of the court: Provided, that no person shall be convicted of operating a motor vehicle without an operator's or chauffeur's license if he produces in court at the time of his trial upon such charge an expired operator's or chauffeur's license and a renewal operator's or chauffeur's license issued to him within 30 days of the expiration date of the expired license and which would have been a defense to the charge had it been issued prior to the time of the alleged offense. (1935, c. 52, s. 2; 1943, c. 649, s. 1; c. 787, s. 1; 1947, c. 1067, s. 10; 1949, c. 583, ss. 9, 10; c. 826, ss. 1, 2; 1951, c. 542, ss. 1, 2; c. 1196, ss. 1-3; 1953, cc. 839, 1284, 1311; 1955, c. 1187, ss. 2-6; 1957, c. 1225; 1963, cc. 754, 1007, 1022; 1965, c. 410, s. 5; 1967, c. 509; 1969, c. 183; c. 783, s. 1; c. 865; 1971, c. 158; 1973, cc. 73, 705.)

Cross Reference.—As to jurisdiction of prosecution under this section, see notes to §§ 7A-271 and 7A-272.

Editor's Note.—

The 1967 amendment, effective Jan. 1, 1968, inserted "and color photograph" in the second paragraph of subsection (f), increased the fees in subsection (i) from \$2.50 to \$3.25 and \$4.00 to \$4.75, respec-

tively, and inserted "and color photograph of the licensee of a size approved by the Commissioner" in the first sentence of subsection (n).

The first 1969 amendment rewrote the second paragraph of subsection (f).

The second 1969 amendment, effective July 1, 1969, added subsection (il).

The third 1969 amendment, substituted

"approved by the State Superintendent of Public Instruction" for "as provided for in G.S. 20-88.1" in the first sentence of present subsection (m). Present subsection (m) was formerly subsection (l-1). Former subsections (m) and (n) have been designated (n) and (o).

The 1971 amendment, effective July 1, 1971, substituted "six months" for "thirty (30) days" in the first and second sentences of subsection (l).

Editor's Note.—

The first 1973 amendment, effective July 1, 1973, added the last sentence of subsection (a).

The second 1973 amendment added the proviso to the first sentence of subsection (n).

As the rest of the section was not changed by the amendments, only subsections (a), (f), (i), (il), (l), (m), (n) and (o) are set out.

This section and § 20-35, being in *pari materia*, must be construed together, and, if possible, they must be reconciled and harmonized. *State v. Tolley*, 271 N.C. 459, 156 S.E.2d 858 (1967).

Subsection (il) of this section does not expressly extend the period of a suspension, cancellation or revocation; it merely provides for the payment of a fee for an administrative act by the Department. *Ennis v. Garrett*, 279 N.C. 612, 184 S.E.2d 246 (1971).

The contention that a revocation remains in effect not only throughout the period

stated in the order of revocation but also until the person whose license was revoked applies for a restoration of his license and pays the restoration fee required by subsection (il) of this section is contrary to the definition of "revocation" in § 20-6. *Ennis v. Garrett*, 279 N.C. 612, 184 S.E.2d 246 (1971).

Penalty.—Any person convicted of operating a motor vehicle over any highway in this State without having first been licensed as such operator, in violation of subsection (a) of this section, is guilty of a misdemeanor; and, under subsection (n) and § 20-35 (b), is subject to punishment by imprisonment for a term of not more than six months. The superior court, even if it has jurisdiction in other respects, has no authority to pronounce judgment imposing a prison sentence of two years for this criminal offense. *State v. Wall*, 271 N.C. 675, 157 S.E.2d 363 (1967).

Driving without License, Lesser Included Offense of Driving While License Suspended or Revoked.—See opinion of Attorney General to Mr. Charles B. Winberry, Chief District Prosecutor, Seventh Judicial District, 40 N.C.A.G. 427 (1970).

Applied in *State v. Green*, 266 N.C. 785, 147 S.E.2d 377 (1966); *State v. White*, 18 N.C. App. 31, 195 S.E.2d 576 (1973).

Cited in *State v. White*, 3 N.C. App. 31, 164 S.E.2d 36 (1968); *State v. Newborn*, 11 N.C. App. 292, 181 S.E.2d 214 (1971); *State v. Baxley*, 15 N.C. App. 544, 190 S.E.2d 401 (1972).

§ 20-8. Persons exempt from license.

Exemption for One Driving Farm Tractor Applies Only to One Actually Engaged in Farming Operations. — See opin-

ion of Attorney General to LTC Charles B. Pierce, N.C. State Highway Patrol, 41 N.C.A.G. 832 (1972).

§ 20-9. What persons shall not be licensed.

(b) The Department shall not issue an operator's or chauffeur's license to any person whose license, either as operator or chauffeur, has been suspended or revoked during the period for which the license was suspended or revoked.

(d) No operator's or chauffeur's license shall be issued to any applicant who has been previously adjudged insane or an idiot, imbecile, or feeble-minded, and who has not at the time of such application been restored to competency by judicial decree or released from a hospital for the insane or feeble-minded upon a certificate of the superintendent that such person is competent, nor then unless the Department is satisfied that such person is competent to operate a motor vehicle with safety to persons and property.

(g) The Department may issue an operator's or chauffeur's license to any applicant covered by subsection (e) of this section under the following conditions:

- (1) The Department may issue a license to any person who is afflicted with or suffering from physical or mental disability set out in subsection (e) of this section who is otherwise qualified to obtain a license, provided such person submits to the Department a certificate in the form prescribed in subdivision (2). Unless sooner revoked, suspended or

cancelled, such license continues in force as long as the licensee presents to the Department one year from the date of issuance of such license and at yearly intervals thereafter a certificate in the form prescribed in subdivision (2), provided the Commissioner may require the submission of such certificate at six months intervals where in his opinion public safety demands. In no event shall a license issued pursuant to this section be valid beyond the birthday of the licensee in the fourth year following the year of issuance, at which time the license is subject to renewal.

- (2) The Department shall not issue a license pursuant to this section unless the applicant has submitted to a physical examination by a physician or surgeon duly licensed to practice medicine in this State and unless such examining physician or surgeon has completed and signed the certificate required by subdivision (1). Such certificate shall be devised by the Commissioner with the advice of qualified experts in the field of diagnosing and treating physical and mental disorders as he may select to assist him and shall be designed to elicit the maximum medical information necessary to aid in determining whether or not it would be a hazard to public safety to permit the applicant to operate a motor vehicle, including, if such is the fact, the examining physician's statement that the applicant is under medication and treatment and that such person's physical or mental disability is controlled. The certificate shall contain a waiver of privilege and the recommendation of the examining physician to the Commissioner as to whether a license should be issued to the applicant.
- (3) The Commissioner is not bound by the recommendation of the examining physician but shall give fair consideration to such recommendation in exercising his discretion in acting upon the application, the criterion being whether or not, upon all the evidence, it appears that it is safe to permit the applicant to operate a motor vehicle. The burden of proof of such fact is upon the applicant. In deciding whether to issue or deny a license, the Commissioner may be guided by opinion of experts in the field of diagnosing and treating the specific physical or mental disorder suffered by an applicant and such experts may be compensated for their services on an equitable basis. The Commissioner may also take into consideration any other factors which bear on the issue of public safety.
- (4) Whenever a license is denied by the Commissioner, such denial may be reviewed by a reviewing board upon written request of the applicant filed with the Department within 10 days after receipt of such denial. The reviewing board shall consist of the Commissioner or his authorized representative and four persons designated by the chairman of the Commission for Health Services. The persons designated by the chairman of the Commission for Health Services shall be either members of the Commission for Health Services or physicians duly licensed to practice medicine in this State. The members so designated by the chairman of the Commission for Health Services shall receive the same per diem and expenses as provided by law for members of the Commission for Health Services, which per diem and expenses shall be charged to the same appropriation as per diems and expenses for members of the Commission for Health Services. The Commissioner or his authorized representative, plus any two of the members designated by the chairman of the Commission for Health Services, constitute a quorum. The procedure for hearings authorized by this section shall be as follows:
 - a. Applicants shall be afforded an opportunity for hearing, after reasonable notice of not less than 10 days, before the review board

established by subdivision (4). The notice shall be in writing and shall be delivered to the applicant in person or sent by certified mail, with return receipt requested. The notice shall state the time, place, and subject of the hearing.

- b. The review board may compel the attendance of witnesses and the production of such books, records and papers as it desires at a hearing authorized by the section. Upon request of an applicant, a subpoena duces tecum to compel the production of any books, records, or papers shall be issued by the board. Subpoenas shall be directed to the sheriff of the county where the witness resides or is found and shall be served and returned in the same manner as a subpoena in a criminal case. Fees of the sheriff and witnesses shall be the same as that allowed in the district court in cases before that court and shall be paid in the same manner as other expenses of the Department of Motor Vehicles are paid. In any case of disobedience or neglect of any subpoena served on any person, or the refusal of any witness to testify to any matters regarding which he may be lawfully interrogated, the district court or superior court where such disobedience, neglect or refusal occurs, or any judge thereof, on application by the board, shall compel obedience or punish as for contempt.
- c. A hearing may be continued upon motion of the applicant for good cause shown with approval of the board or upon order of the board.
- d. The board shall pass upon the admissibility of evidence at a hearing but the applicant affected may at the time object to the board's ruling, and, if evidence offered by an applicant is rejected the party may proffer the evidence, and such proffer shall be made a part of the record. The board shall not be bound by common law or statutory rules of evidence which prevail in courts of law or equity and may admit and give probative value to evidence which possesses probative value commonly accepted by reasonably prudent men in the conduct of their affairs. They may exclude incompetent, immaterial, irrelevant and unduly repetitious evidence. Uncontested facts may be stipulated by agreement between an applicant and the board and evidence relating thereto may be excluded. All evidence, including records and documents in the possession of the Department of Motor Vehicles or the board, of which the board desires to avail itself shall be made a part of the record. Documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference. The board shall prepare an official record, which shall include testimony and exhibits. A record of the testimony and other evidence submitted shall be taken, but it shall not be necessary to transcribe shorthand notes or electronic recordings unless requested for purposes of court review.
- e. Every decision and order adverse to an applicant shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law. The findings of fact shall consist of a concise statement of the board's conclusions on each contested issue of fact. Counsel for applicant, or applicant, if he has no counsel, shall be notified of the board's decision in person or by registered mail with return receipt requested. A copy of the board's decision with accompanying findings and conclu-

- sions shall be delivered or mailed upon request to applicant's attorney of record or to applicant, if he has no attorney.
- f. Actions of the reviewing board are subject to judicial review as provided under Article 33 of Chapter 143 of the General Statutes.
 - g. An applicant or licensee who has been denied a license pursuant to a hearing before the board may not file a new application until the expiration of two years after the date of such denial by the board.
 - h. All records and evidence collected and compiled by the Department and the reviewing board shall not be considered public records within the meaning of Chapter [section] 132-1, and following, of the General Statutes of North Carolina and may be made available to the public only upon an order of a court of competent jurisdiction. All information furnished by or on behalf of an applicant under this section shall be without prejudice and shall be for the use of the Department, the reviewing board or the court in administering this section and shall not be used in any manner as evidence, or for any other purposes in any trial, civil or criminal.

(h) The Department shall not issue an operator's or chauffeur's license to an applicant who is the holder of any license to drive issued by another state, district or territory of the United States and currently in force, unless the applicant surrenders such license or licenses; provided, this section shall not apply to nonresident military personnel or members of their household. (1935, c. 52, s. 4; 1951, c. 542, s. 3; 1953, c. 773; 1955, c. 1187, s. 7; 1967, cc. 961, 966; 1971, c. 152; c. 528, s. 11; 1973, cc. 135, 441; c. 476, s. 128.)

Editor's Note.—The first 1967 amendment struck out "grand mal epileptic" following "imbecile" near the beginning of subsection (d).

The second 1967 amendment added subsection (g).

The first 1971 amendment, effective July 1, 1971, substituted "certified" for "registered" in the second sentence of subsection (g)(4)a.

The second 1971 amendment, effective Oct. 1, 1971, deleted "county recorder's court or" preceding "district court" in the fourth sentence of subsection (g)(4)b.

The first 1973 amendment, effective July 1, 1973, added subsection (h).

The second 1973 amendment, effective July 1, 1973, substituted "suspended or revoked during the period for which the license was suspended or revoked" for "revoked under the provisions of this Article, until the expiration of one year after such license was revoked" at the end of subsection (b).

The third 1973 amendment, effective July 1, 1973, substituted "Commission for Health Services" for "State Board of Health" throughout the introductory paragraph of subdivision (g)(4).

As the rest of the section was not changed by the amendments, it is not set out.

The word "section" in brackets in paragraph h of subdivision (4), subsection (g), is suggested as a correction of "chapter," which appears in the 1967 Session Laws.

For note on reporting patients for review of driver's license, see 48 N.C.L. Rev. 1003 (1970).

Epilepsy.—Prior to 1967, subsection (d) of this section prohibited the licensing of anyone who had been diagnosed as having grand mal epilepsy. In 1967 this section was amended to delete the words "grand mal epileptic." *Ormond v. Garrett*, 8 N.C. App. 662, 174 S.E.2d 371 (1970).

Where the Medical Review Board found as a fact that the petitioner had been suffering from epilepsy since 1951 but that his condition was controlled medically, and then proceeded to deny him driving privileges without making a finding that the petitioner is afflicted with or suffering from "such physical or mental disability or disease as will serve to prevent such person from exercising reasonable and ordinary control over a motor vehicle while operating the same upon the highways," the Board was without authority to deny the petitioner his driving privileges. *Ormond v. Garrett*, 8 N.C. App. 662, 174 S.E.2d 371 (1970).

Out-of-State Suspension as Basis for Revocation.—Under this section the De-

partment of Motor Vehicles must apply the period of revocation of the other state, since the person was a resident of the other state and was subject to and con-

trolled by the laws of that state at the time the offense was committed. *Parks v. Howland*, 4 N.C. App. 197, 166 S.E.2d 701 (1969).

§ 20-10. Age limits for drivers of public passenger-carrying vehicles.—It shall be unlawful for any person, whether licensed under this Article or not, who is under the age of 18 years to drive a motor vehicle while in use as a public passenger-carrying vehicle. For purposes of this section, an ambulance when operated for the purpose of transporting persons who are sick, injured, or otherwise incapacitated shall not be treated as a public passenger-carrying vehicle.

No person 14 years of age or under, whether licensed under this Article or not, shall operate any road machine, farm tractor or motor driven implement of husbandry on any highway within this State. Provided any person may operate a road machine, farm tractor, or motor driven implement of husbandry upon a highway adjacent to or running in front of the land upon which such person lives when said person is actually engaged in farming operations. (1935, c. 52, s. 5; 1951, c. 764; 1967, c. 343, s. 4; 1971, c. 1231, s. 1.)

Editor's Note. — The 1967 amendment added the second sentence of the first paragraph. The 1971 amendment substituted "18" for "twenty-one" in the first sentence.

§ 20-11. Application of minors.—(a) The Department shall not grant the application of any minor between the ages of sixteen (16) and eighteen (18) years for an operator's license or a learner's permit unless such application is signed both by the applicant and by the parent, guardian, husband, wife or employer of the applicant, or, if the applicant has no parent, guardian, husband, wife or employer residing in this State, by some other responsible adult person. It shall be unlawful for any person to sign the application of a minor under the provisions of this section when such application misstates the age of the minor and any person knowingly violating this provision shall be guilty of a misdemeanor.

The Department shall not grant the application of any minor between the ages of sixteen (16) and eighteen (18) years for an operator's license unless such minor presents evidence of having satisfactorily completed the driver training and safety education courses offered at the public high schools as provided in G.S. 20-88.1 or upon having satisfactorily completed a course of driving instruction offered at a licensed commercial driver training school or an approved nonpublic secondary school, provided instruction offered in such schools shall be approved by the State Commissioner of Motor Vehicles and the State Superintendent of Public Instruction and all expenses for such instruction shall be paid by the persons enrolling in such courses and/or by the schools offering them.

(b) The Department may grant an application for a limited learner's permit of any minor under the age of 16, who otherwise meets the requirements of licensing under this section, when such application is signed by both the applicant and his or her parent or guardian or some other responsible adult with whom the applicant resides and is approved by the Department of Motor Vehicles. Such limited learner's permit shall entitle the applicant, while having such permit in his immediate possession, to drive a motor vehicle upon the highways for a period of six months, while such minor is accompanied by a parent, guardian, or other person approved by the Department, who is licensed under this Chapter to operate a motor vehicle and who is actually occupying a seat beside the driver. Provided, however, a limited learner's permit as herein provided shall be issued only to those applicants who have reached the age of 15 years. In the event a minor who has been issued a limited learner's permit under this subsection operates a motor vehicle in violation of any provision herein, the permit shall be cancelled.

Provided a driver who holds a learner's permit only shall not be deemed a male operator under age 25 for the purpose of determining the insurance premium rate for persons insured under automobile property damage and bodily injury liability

insurance policies. (1935, c. 52, s. 6; 1953, c. 355; 1955, c. 1187, s. 8; 1963, c. 968, ss. 2, 2A; 1965, c. 410, s. 3; c. 1171; 1967, c. 694; 1969, c. 37; 1973, c. 191, ss. 1, 2; c. 664, ss. 1, 2.)

Editor's Note.—

The 1967 amendment, effective July 1, 1967, added to the second paragraph of subsection (a) the provisions following the reference to G.S. 20-88.1.

The 1969 amendment deleted "during daylight hours" following "highways" in the second sentence of subsection (b).

The first 1973 amendment, effective July 1, 1973, substituted "15 years" for "fifteen and one-half years" at the end of the third sentence of the first paragraph of subsection (b) and added to that paragraph a

sentence identical to the second paragraph of the section as set out above.

The second 1973 amendment rewrote the first paragraph of subsection (b), incorporating the change made in the third sentence by the first 1973 amendment, and added the second paragraph of subsection (b), which is identical to the sentence added to the first paragraph by the first amendment.

Subsection (b) is set out above as it appears in the second 1973 amendatory act.

§ 20-13. Mandatory revocation of license of provisional licensee.—

(a) The operator's license of any person shall be suspended by the Department without preliminary hearing upon notice to the Department of such person's conviction of a motor vehicle moving violation, as specified in subsection (b), committed while such person was still a provisional licensee. A provisional licensee is any licensee who has not attained his eighteenth birthday. A motor vehicle moving violation, as used herein, does not include any of those offenses for which no points under the point system may be assessed by specific reference in G.S. 20-16(c), nor does the term include those equipment violations specified in Part 9 of Article 3 of this Chapter.

(b) The basis for departmental action, and the period of suspension, shall be as follows:

- (1) For conviction of a second motor vehicle moving violation, in any 12-month period, 30 days;
- (2) For conviction of a third such violation, in any 12-month period, three months;
- (3) For conviction of a fourth such violation, in any 12-month period, one year.

After the expiration of six months of any suspension hereunder, the parent or someone standing in loco parentis of the provisional licensee may request a hearing for the purpose of obtaining a license upon a probationary status.

If such provisional licensee demonstrates to the Department that his conduct and attitude is such as to entitle him to favorable consideration, the Department may rescind the remainder of the suspension and allow such provisional licensee to operate motor vehicles under his provisional license in a probationary status. Such provisional licensee must agree in writing to accept such terms and conditions as the Department may see fit to impose during the term of probation.

(1967, c. 295, s. 1; 1971, c. 120, ss. 1, 2; 1973, c. 439.)

Editor's Note.—

The 1967 amendment deleted former subdivision (4) of subsection (b), relating to suspension for conviction of one violation in connection with an accident resulting in personal injury or property damage of one hundred dollars or more.

The 1971 amendment rewrote the last sentence of subsection (a) and added the second and third paragraphs of subdivision (3) of subsection (b).

The 1973 amendment, effective July 1,

1973, added, at the end of the last sentence of subsection (a), "nor does the term include those equipment violations specified in Part 9 of Article 3 of this Chapter."

As the rest of the section was not changed by the amendments, only subsections (a) and (b) are set out.

Revocation under this section is mandatory and not subject to court review. *Wing v. Godwin*, 271 N.C. 426, 156 S.E.2d 683 (1967).

Operation of Vehicle with Improper

Taillights Is a Moving Violation. — See M. Whitesides, Fourteenth Solicitorial opinion of Attorney General to Mr. Henry District, 41 N.C.A.G. 211 (1971).

§ 20-13.1. Revocation of license of provisional licensee upon conviction of moving violation in connection with accident resulting in personal injury or property damage.—The operator's license of a provisional licensee as defined in G.S. 20-13 may be suspended by the Department for a period of 60 days upon notice of such licensee's conviction of one motor vehicle moving violation in connection with a motor vehicle accident resulting in personal injury or property damage of more than three hundred dollars (\$300.00). Upon suspending any license as herein provided, the Department shall immediately notify the licensee, in writing, and, upon the request of the licensee's parent or guardian or someone standing in loco parentis to the child, afford him an opportunity for a hearing as early as practical within 20 days after receipt of the request in the county wherein the licensee resides or at some other place mutually agreed upon. Upon such hearing, the duly authorized agents of the Department may administer oaths and issue subpoenas for the attendance of witnesses and the production of relevant documents and may require reexamination. Upon such hearing, the Department may rescind, modify or affirm its order of suspension. (1967, c. 295, s. 2; 1971, c. 437.)

Editor's Note. — The 1971 amendment substituted "three hundred dollars (\$300.-" for "one hundred dollars (\$100.00)" in the first sentence.

§ 20-14. Duplicate licenses.—In the event that an operator's or chauffeur's license is lost or destroyed, or if it is necessary to change the name or address thereon, the person to whom the license is issued may, upon payment of a fee of one dollar (\$1.00) and upon furnishing proof satisfactory to the Department that the license has been lost or destroyed, or that the person's name or address has been changed, obtain a duplicate or substitute license. (1935, c. 52, s. 9; 1943, c. 649, s. 2; 1969, c. 783, s. 2.)

Editor's Note. — The 1969 amendment, effective July 1, 1969, rewrote this section. Quoted in *State v. Teasley*, 9 N.C. App. 477, 176 S.E.2d 838 (1970).

§ 20-15. Authority of Department to cancel license.

Quoted in *Parks v. Howland*, 4 N.C. App. 197, 166 S.E.2d 701 (1969).

§ 20-16. Authority of Department to suspend license.—(a) The Department shall have authority to suspend the license of any operator or chauffeur with or without preliminary hearing upon a showing by its records or other satisfactory evidence that the licensee:

- (1) Has committed an offense for which mandatory revocation of license is required upon conviction;
- (2) Has been involved as a driver in any accident resulting in the death or personal injury of another or serious property damage, which accident is obviously the result of the negligence of such driver, and where such property damage has not been compensated for;
- (3) Is an habitually reckless or negligent driver of a motor vehicle;
- (4) Is incompetent to drive a motor vehicle;
- (5) Has, under the provisions of subsection (c) of this section, within a three-year period, accumulated 12 or more points, or eight or more points in the three-year period immediately following the reinstatement of a license which has been suspended or revoked because of a conviction for one or more traffic offenses;
- (6) Has made or permitted an unlawful or fraudulent use of such license or a learner's permit, or has displayed or represented as his own, a license or learner's permit not issued to him;

- (7) Has committed an offense in another state, which if committed in this State would be grounds for suspension or revocation;
- (8) Has been convicted of illegal transportation of intoxicating liquors;
- (9) Has, within a period of 12 months, been convicted of two or more charges of speeding in excess of 55 and not more than 80 miles per hour, or of one or more charges of reckless driving and one or more charges of speeding in excess of 55 and not more than 80 miles per hour;
- (10) Has been convicted of operating a motor vehicle at a speed in excess of 75 miles per hour on a public road or highway where the maximum speed is less than 70 miles per hour;
- (10a) Has been convicted of operating a motor vehicle at a speed in excess of 80 miles per hour on a public highway where the maximum speed is 70 miles per hour; or
- (11) Has been sentenced by a court of record and all or a part of the sentence has been suspended and a condition of suspension of the sentence is that the operator or chauffeur not operate a motor vehicle for a period of time.

(b) Pending an appeal from a conviction of any violation of the motor vehicle laws of this State, no driver's or chauffeur's license shall be suspended by the Department of Motor Vehicles because of such conviction or because of evidence of the commission of the offense for which the conviction has been had.

(c) The Department shall maintain a record of convictions of every person licensed or required to be licensed under the provisions of this Article as an operator or chauffeur and shall enter therein records of all convictions of such persons for any violation of the motor vehicle laws of this State and shall assign to the record of such person, as of the date of commission for the offense, a number of points for every such conviction in accordance with the following schedule of convictions and points, except that points shall not be assessed for convictions resulting in suspensions or revocations under other provisions of laws: Further, any points heretofore charged for violation of the motor vehicle inspection laws shall not be considered by the Department of Motor Vehicles as a basis for suspension or revocation of operator's or chauffeur's license:

Schedule of Point Values

Passing stopped school bus	5
Reckless driving	4
Hit and run, property damage only	4
Following too close	4
Driving on wrong side of road	4
Illegal passing	4
Running through stop sign	3
Speeding in excess of 55 miles per hour	3
Failing to yield right-of-way	3
Running through red light	3
No operator's license or license expired more than one year	3
Failure to stop for siren	3
Driving through safety zone	3
No liability insurance	3
Failure to report accident where such report is required	3
All other moving violations	2
The [above] provisions of this subsection shall only apply to violations and convictions which take place within the State of North Carolina.	

No points shall be assessed for conviction of the following offenses:

- Overloads
- Over length

- Over width
- Over height
- Illegal parking
- Carrying concealed weapon
- Improper plates
- Improper registration
- Improper muffler
- Public drunk within a vehicle
- Possession of liquor
- Improper display of license plates or dealers' tags
- Unlawful display of emblems and insignia
- Failure to display current inspection certificate.

In case of the conviction of a licensee of two or more traffic offenses committed on a single occasion, such licensee shall be assessed points for one offense only and if the offenses involved have a different point value, such licensee shall be assessed for the offense having the greater point value.

Upon the restoration of the license or driving privilege of such person whose license or driving privilege has been suspended or revoked because of conviction for a traffic offense, any points that might previously have been accumulated in the driver's record shall be cancelled.

Whenever a licensee accumulates as many as four points hereunder, the Department shall mail a letter of warning to the licensee at his last known address, but failure to receive such warning letter shall not prevent a suspension under this subsection. Whenever any licensee accumulates as many as seven points or accumulates as many as four points during a three-year period immediately following reinstatement of his license after a period of suspension or revocation, the Department may request the licensee to attend a conference regarding such licensee's driving record. The Department may also afford any licensee who has accumulated as many as seven points or any licensee who has accumulated as many as four points within a three-year period immediately following reinstatement of his license after a period of suspension or revocation an opportunity to attend a driver improvement clinic operated by the Department and, upon the successful completion of the course taken at the clinic, three points shall be deducted from the licensee's conviction record; provided, that only one deduction of points shall be made on behalf of any licensee within any 10-year period.

When a license is suspended under the point system provided for herein, the first such suspension shall be for not more than 60 days; the second such suspension shall not exceed six months and any subsequent suspension shall not exceed one year.

Whenever the operator's or chauffeur's license of any person is subject to suspension under this subsection and at the same time also subject to suspension or revocation under other provisions of laws, such suspensions or revocations shall run concurrently.

In the discretion of the Department, a period of probation not to exceed one year may be substituted for suspension or for any unexpired period of suspension under subsections (a)(1) through (a)(10a) of this section. Any violation of probation during the probation period shall result in a suspension for the unexpired remainder of the suspension period. Any accumulation of three or more points under this subsection during a period of probation shall constitute a violation of the condition of probation.

(d) Upon suspending the license of any person as hereinbefore in this section authorized, the Department shall immediately notify the licensee in writing and upon his request shall afford him an opportunity for a hearing, unless a preliminary hearing was held before his license was suspended, as early as practical within not to exceed 20 days after receipt of such request in the county wherein the licensee resides unless the Department and the licensee agree that such hearing may be held in some other county, and such notice shall contain the provisions of this

section printed thereon. Upon such hearing the duly authorized agents of the Department may administer oaths and may issue subpoenas for the attendance of witnesses and the production of relevant books and papers and may require a reexamination of the licensee. Upon such hearing the Department shall either rescind its order of suspension, or good cause appearing therefor, may extend the suspension of such license. Provided further upon such hearing, preliminary or otherwise, involving subsections (a)(1) through (a)(10a) of this section, the Department may for good cause appearing in its discretion substitute a period of probation not to exceed one year for the suspension or for any unexpired period of suspension. Probation shall mean any written agreement between the suspended driver and a duly authorized representative of the Department and such period of probation shall not exceed one year, and any violation of the probation agreement during the probation period shall result in a suspension for the unexpired remainder of the suspension period. The authorized agents of the Department shall have the same powers in connection with a preliminary hearing prior to suspension as this subsection provided in connection with hearings held after suspension. (1935, c. 52, s. 11; 1947, c. 893, ss. 1, 2; c. 1067, s. 13; 1949, c. 373, ss. 1, 2; c. 1032, s. 2; 1953, c. 450; 1955, c. 1152, s. 15; c. 1187, ss. 9-12; 1957, c. 499, s. 1; 1959, c. 1242, ss. 1-2; 1961, c. 460, ss. 1, 2(a); 1963, c. 1115; 1965, c. 130; 1967, c. 16; 1971, c. 234, ss. 1, 2; c. 793, ss. 1, 2; c. 1198, ss. 1, 2; 1973, c. 16; c. 17, ss. 1, 2.)

Editor's Note.—

The 1967 amendment added, at the end of the first paragraph of subsection (c), the provision as to points "heretofore" charged for violation of the motor vehicle inspection laws and added to the list of offenses for which no points shall be assessed "Failure to display current inspection certificate." The amendatory act was ratified March 7, 1967 and became effective after its ratification.

The first 1971 amendment added the language following "75 miles per hour" in subdivision (10) of subsection (a) and added subdivision (10a) to subsection (a).

The second 1971 amendment, in the second sentence of the sixth paragraph of subsection (c), substituted "any licensee" for "a licensee" near the beginning of the sentence and inserted "or accumulates as many as four points during a three-year period immediately following reinstatement of his license after a period of suspension or revocation." In the last sentence of the sixth paragraph of subsection (c), the amendment substituted "any licensee" for "the licensee" near the beginning of the sentence, inserted "or any licensee who has accumulated as many as four points within a three-year period immediately following reinstatement of his license after a period of suspension or revocation" following "seven points," substituted "taken" for "taught," deleted "such" preceding "deduction," and added "within any 10-year period" at the end of the sentence.

The third 1971 amendment, effective July 1, 1971, in the first sentence of the

last paragraph of subsection (c), inserted "one-year," deleted "or" preceding "for any unexpired," and substituted "G.S. 20-16(a)(1) through G.S. 20-16(a)(10) inclusive" for "G.S. 20-16(a)(5) and this subsection." In the second sentence of the last paragraph of subsection (c), the amendment deleted "Such period of probation shall not exceed one year, and" preceding "Any violation," and substituted "unexpired remainder of the probation period" for "period originally provided for under this subsection or for the remainder of any unexpired suspension period." In the fourth sentence of subsection (d), the amendment substituted "G.S. 20-16(a)(1) through G.S. 20-16(a)(10) inclusive" for "subdivisions (9) and (10) of subsection (a) of G.S. 20-16" and inserted "one-year." In the fifth sentence of subsection (d), the amendment substituted "be for" for "not exceed," and substituted "unexpired remainder of the probation period" for "period originally provided for or for the remainder of any unexpired suspension period." The amendment also substituted "provided" for "provides" in the sixth sentence of subsection (d).

The first 1973 amendment, effective July 1, 1973, substituted "80" for "75" in two places in subdivision (a)(9).

The second 1973 amendment, effective July 1, 1973, substituted "a period of probation not to exceed one year" for "a one-year period of probation" in the first sentence of the last paragraph of subsection (c) and "subsections (a)(1) through (a)(10a) of this section" for "G.S. 20-

16(a)(1) through G.S. 20-16(a)(10) inclusive" in the first sentence of the last paragraph of subsection (c) and in the fourth sentence of subsection (d), and substituted "suspension period" for "probation period" at the end of the second sentence of the last paragraph of subsection (c) and at the end of the fifth sentence of subsection (d). The amendment also inserted "or" preceding "for suspension" near the beginning of the last paragraph of subsection (c), substituted "not exceed one year" for "be for one year" in the fifth sentence of subsection (d) and made minor changes in wording in subsection (d).

Subsection (a)(9) of This Section Did Not Repeal by Implication § 20-17(6).—Section 20-17(6) authorizing the mandatory revocation of a driver's license upon two convictions of reckless driving within a 12-month period was not repealed by implication by the subsequent enactment of subsection (a)(9) of this section authorizing the discretionary suspension of a driver's license upon one or more convictions of reckless driving and one or more convictions of speeding in excess of 44 mph and not more than 75 mph, within a 12-month period. *Person v. Garrett*, 280 N.C. 163, 184 S.E.2d 873 (1971).

Provisions Satisfy Requirements of Due Process.—The provisions of § 20-48, together with the provisions of subsection (d) of this section, relating to the right of review, and the provisions of § 20-25, relating to the right of appeal, satisfy the requirements of procedural due process. *State v. Teasley*, 9 N.C. App. 477, 176 S.E.2d 838 (1970).

Requirement of Notice Applies Also to Suspension under § 20-29.1.—A requirement for notice is made by subsection (d) of this section in all cases in which a license is suspended under the authority of this section. Even though a similar requirement for notice does not appear in § 20-29.1, a reading of this Chapter, in which both sections appear, makes it clear that the legislature intended that notice be given to the licensee when the Commissioner suspends a license under § 20-29.1 as well as when suspension is made under the authority of this section. *State v. Hughes*, 6 N.C. App. 287, 170 S.E.2d 78 (1969).

Department Not Required to Have Valid Warrant or Valid Judgment in Files.—This section authorizes the Department to suspend the license of any operator or chauffeur with or without preliminary hearing upon a showing by its records that the licensee has committed an enumerated of-

fense. It does not require the Department to have in its files a "valid warrant" nor a "valid judgment" before it is authorized to take action. *Tilley v. Garrett*, 8 N.C. App. 556, 174 S.E.2d 617 (1970).

Admissibility of Department Records.—The records of the Department of Motor Vehicles, properly authenticated, are competent for the purpose of establishing the status of a person's operator's license and driving privilege. *State v. Rhodes*, 10 N.C. App. 154, 177 S.E.2d 754 (1970).

A defendant is entitled to have the contents of the official record of the status of his driver's license limited, if he so requests, to the formal parts thereof, including the certification and seal, plus the fact that under official action of the Department of Motor Vehicles the defendant's license was in a state of revocation or suspension on the date he is charged with committing the offense under § 20-28. *State v. Rhodes*, 10 N.C. App. 154, 177 S.E.2d 754 (1970).

Burden of Proof.—In the administrative hearing under subsection (d) of this section the burden of proof is upon the Department to show "good cause" for extending the suspension of petitioner's license. *Joyner v. Garrett*, 279 N.C. 226, 182 S.E.2d 553 (1971).

Upon the hearing held under subsection (d) of this section the burden is upon the Department to show that petitioner has wilfully refused to take the test. *Joyner v. Garrett*, 279 N.C. 226, 182 S.E.2d 553 (1971).

Right of Licensee to Be Confronted by and Cross-Examine Adverse Witness.—At the administrative hearing, under subsection (d) of this section, the licensee has the right to be confronted by any witness whose testimony is used against him and to cross-examine the witness if he so desires. However, this is a right which the licensee waives if he does not assert it in apt time. *Joyner v. Garrett*, 279 N.C. 226, 182 S.E.2d 553 (1971).

Moving Violations.—The legislature considered the enumerated offenses in this section, including "no operator's license," to be moving violations. *Underwood v. Howland*, 274 N.C. 473, 164 S.E.2d 2 (1968).

Operation of Vehicle with Improper Taillights Carries Two Points as a Moving Violation.—See opinion of Attorney General to Mr. Henry M. Whitesides, Fourteenth Solicitorial District, 41 N.C.A.G. 211 (1971).

Cited in *Taylor v. Garrett*, 7 N.C. App. 473, 173 S.E.2d 31 (1970).

§ 20-16.1. Mandatory suspension of driver's license upon conviction of excessive speeding and reckless driving.

Cross Reference. — As to mandatory revocation of license for refusal to submit to chemical test to determine alcoholic content of blood, see § 20-16.2. **Cited in** Underwood v. Howland, 274 N.C. 473, 164 S.E.2d 2 (1968).

§ 20-16.2. Mandatory revocation of license in event of refusal to submit to chemical tests.—(a) Any person who drives or operates a motor vehicle upon any highway or any public vehicular area shall be deemed to have given consent, subject to the provisions of G.S. 20-139.1, to a chemical test or tests of his breath or blood for the purpose of determining the alcoholic content of his blood if arrested for any offense arising out of acts alleged to have been committed while the person was driving or operating a motor vehicle while under the influence of intoxicating liquor. The test or tests shall be administered at the request of a law-enforcement officer having reasonable grounds to believe the person to have been driving or operating a motor vehicle on a highway or public vehicular area while under the influence of intoxicating liquor. The law-enforcement officer shall designate which of the aforesaid tests shall be administered. The person arrested shall forthwith be taken before a person authorized to administer a chemical test and this person shall inform the person arrested both verbally and in writing and shall furnish the person a signed document setting out:

- (1) That he has a right to refuse to take the test;
- (2) That refusal to take the test will result in revocation of his driving privilege for six months.
- (3) That he may have a physician, qualified technician, chemist, registered nurse or other qualified person of his own choosing administer a chemical test or tests in addition to any administered at the direction of the law-enforcement officer; and
- (4) That he has the right to call an attorney and select a witness to view for him the testing procedures; but that the test shall not be delayed for this purpose for a period in excess of 30 minutes from the time he is notified of his rights.

(b) Any person who is unconscious or who is otherwise in a condition rendering him incapable of refusal shall be deemed not to have withdrawn the consent provided by subsection (a) of this section and the test or tests may be administered, subject to the provisions of G.S. 20-139.1.

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

(d) Upon receipt of the sworn report required by G.S. 20-16.2(c) the Department shall immediately notify the arrested person that his license to drive is revoked immediately unless said person requests in writing within three days of receipt of notice of revocation a hearing. If at least three days prior to hearing, the licensee shall so request of the hearing officer, the hearing officer shall subpoena the arresting officer and any other witnesses requested by the licensee to personally appear and give testimony at the hearing. If such person requests in writing a hearing, he shall retain his license until after the hearing. The hearing shall be conducted in the county where the arrest was made under the same conditions as hearings are conducted under the provisions of G.S. 20-16(d) except that the scope of such hearing for the purpose of this section shall cover the issues of whether

the law-enforcement officer had reasonable grounds to believe the person had been driving or operating a motor vehicle upon a highway or public vehicular area while under the influence of intoxicating liquor, whether the person was placed under arrest, and whether he willfully refused to submit to the test upon the request of the officer. Whether the person was informed of his rights under the provision of G.S. 20-16.2(a)(1), (2), (3), (4) shall be an issue. The Department shall order that the revocation either be rescinded or sustained. If the revocation is sustained, the person shall surrender his license immediately upon notification.

(e) If the revocation is sustained after such a hearing, the person whose driving privilege has been revoked, under the provisions of this section, shall have the right to file a petition in the superior court for a hearing *de novo* to review the action of the Department in the same manner and under the same conditions as is provided in G.S. 20-25.

(f) When it has been finally determined under the procedures of this section that a nonresident's privilege to operate a motor vehicle in this State has been revoked, the Department shall give information in writing of the action taken to the motor vehicle administrator of the state of the person's residence and of any state in which he has a license.

(g) Any revocation imposed under the provisions of this section shall run concurrently with any revocations issued under the provisions of G.S. 20-16.3.

(h) As used in this section, the term "public vehicular area" shall mean and include any drive, driveway, road, roadway, street, or alley upon the grounds and premises of any public or private hospital, college, university, school, orphanage, church, or any of the institutions maintained and supported by the State of North Carolina, or any of its subdivisions or upon the grounds and premises of any service station, drive-in theater, supermarket, store, restaurant or office building, or any other business or municipal establishment providing parking space for customers, patrons, or the public. (1963, c. 966, s. 1; 1965, c. 1165; 1969, c. 1074, s. 1; 1971, c. 619, ss. 3-6; 1973, c. 206, ss. 1, 2; c. 824.)

Editor's Note.—

The 1969 amendment, effective Sept. 1, 1969, rewrote this section.

The 1971 amendment, effective Oct. 1, 1971, inserted "drives" near the beginning and "or operating" near the end of the first sentence of subsection (a), substituted "any highway or any public vehicular area" for "public highways of this State or any area enumerated in G.S. 20-139" in the first sentence of subsection (a), and inserted "or operating" and substituted "on a highway or public vehicular area" for "upon the public highways of this State or any area enumerated in G.S. 20-139" in the second sentence of subsection (a). In subsection (c) the amendment inserted "or operating" and substituted "a highway or public vehicular area" for "the public highways of this State" in the first sentence. In subsection (d) the amendment added the second sentence, inserted "the law-enforcement officer had reasonable grounds to believe" and "or operating" and substituted "a highway or public vehicular area" for "the public highways of this State or any area enumerated in G.S. 20-139" and inserted "willfully" in the

third sentence. The amendment also added subsection (g).

The first 1973 amendment, effective June 1, 1973, rewrote the fourth sentence of subsection (a) and rewrote subsection (c). In subsection (d) the amendment inserted "in the county where the arrest was made" in the fourth sentence, substituted "of his rights under the provision of G.S. 20-16.2(a)(1), (2), (3), (4)" for "that his privilege to drive would be revoked if he refused to submit to the test" in the fifth sentence and deleted "unless said license shall have been returned to him under G.S. 20-16.2(c)" at the end of the last sentence. The first amendment also inserted "for a hearing *de novo*" in subsection (e), added present subsection (g) and redesignated former subsection (g) as (h).

The second 1973 amendment, effective June 1, 1973, corrected a technical error in the first 1973 amendatory act.

For article on tests for intoxication, see 45 N.C.L. Rev. 34 (1966).

Opinions of Attorney General. — Major John Laws, N.C. State Highway Patrol, 40 N.C.A.G. 403 (1969).

Person authorized to administer a chem-

ical test is a breathalyzer operator who holds a permit issued by the state board of health pursuant to § 20-139.1(b). Opinion of Attorney General to Dr. Arthur J. McBay, Office, Chief Medical Examiner, 42 N.C.A.G. 326 (1973).

Requirement That Person Must Be Arrested for Driving under the Influence before Chemical Test May Be Required.—See opinion of Attorney General to Colonel Edwin C. Guy, Commander, State Highway Patrol, 40 N.C.A.G. 430 (1970).

Administration of the breathalyzer test is not dependent upon the legality of the arrest but hinges solely upon the law-enforcement officer having reasonable grounds to believe the person to have been driving or operating a motor vehicle on a highway or public vehicular area while under the influence of intoxicating liquor. State v. Eubanks, 283 N.C. 556, 196 S.E.2d 706 (1973).

Consent Deemed Given.—Anyone who operates a motor vehicle upon the highways of the State is deemed to have given consent to a breathalyzer test. State v. Allen, 14 N.C. App. 485, 188 S.E.2d 568 (1972).

The word refuse as used in this section means the declination of a request or demand, or the omission to comply with some requirement of law, as the result of a positive intention to disobey. Joyner v. Garrett, 279 N.C. 226, 182 S.E.2d 553 (1971).

Officer's Sworn Report Is Not Prima Facie Evidence of Refusal to Submit to Breathalyzer Test.—This section does not make the law-enforcement officer's sworn report prima facie evidence that the arrested person willfully refused to submit to the breathalyzer test. Therefore, if he objects to its introduction, the report cannot be used as evidence against him. Joyner v. Garrett, 279 N.C. 226, 182 S.E.2d 553 (1971).

In the absence of a timely objection as to its introduction, the officer's sworn report was sufficient evidence to sustain the Department's suspension of petitioner's license. Joyner v. Garrett, 279 N.C. 226, 182 S.E.2d 553 (1971).

Failure by officers to advise defendant of his right to refuse to take a breathalyzer test does not render the result of the test inadmissible in evidence, defendant having impliedly consented to the test by virtue of driving an automobile on the public highways of the State, and the test having been administered after arrest and without the use of force or violence. State v. McCabe,

1 N.C. App. 237, 161 S.E.2d 42 (1968), decided prior to the 1969 amendment.

Under this section, failure to advise a defendant of his right to refuse the breathalyzer test does not render the results of the test inadmissible in court. State v. Allen, 14 N.C. App. 485, 188 S.E.2d 568 (1972).

Admission of Test Results Held Prejudicial Error.—Where the State offered no evidence upon the question of whether defendant had been notified of his right to call an attorney and to select a witness to view breathalyzer testing procedures in accordance with subsection (a), results of the test were inadmissible, and admission of the results over defendant's objection constituted prejudicial error. State v. Shad-ding, 17 N.C. App. 279, 194 S.E.2d 55 (1973).

Refusal May Not Be Used as Assumption of Guilt.—This section does not say that if a person refuses to submit to the test it will be used as an assumption of guilt in court. State v. Mobley, 273 N.C. 471, 160 S.E.2d 334 (1968), decided prior to the 1969 amendment.

Request Made by Officer to Technician.—That portion of this section which provides that "the test or tests shall be administered upon request of a law-enforcement officer having reasonable grounds to believe the person to have been driving a motor vehicle upon the public highways of this State . . . while under the influence of intoxicating liquor," refers to the request being made by the officer to the technician who will give the test, rather than being directed to the suspect. State v. Randolph, 273 N.C. 120, 159 S.E.2d 324 (1968), decided prior to the 1969 amendment.

Department of Motor Vehicles May Revoke Limited Driving Privilege Granted by a Court.—See opinion of Attorney General to Mr. Joe W. Garrett, Commissioner, N.C. Department of Motor Vehicles, 40 N.C.A.G. 414 (1970).

The Department of Motor Vehicles had authority to suspend for 60 days the limited driving privilege granted a defendant convicted of drunken driving for defendant's willful refusal to take a breathalyzer test at the time of his arrest for drunken driving. Vuncannon v. Garrett, 17 N.C. App. 440, 194 S.E.2d 364 (1973).

Revocation for Refusal to Submit to Test Is Contingent Upon First Having Been Arrested for Driving under Influence.—See opinion of Attorney General to Lt. M. S. Niven, 43 N.C.A.G. 81 (1973).

Suspensions of License Distinguished.—The suspension of a license for refusal to submit to a chemical test at the time of an arrest for drunken driving and a suspension which results from a plea of guilty or a conviction of that charge are separate and distinct revocations. *Joyner v. Garrett*, 279 N.C. 226, 182 S.E.2d 553 (1971); *Vuncannon v. Garrett*, 17 N.C. App. 440, 194 S.E.2d 364 (1973).

The suspension of a license which results from a plea of guilty or a conviction for drunken driving in no way exempts the licensee from the mandatory effects of the 60-day suspension of his license if he wilfully refused to take a chemical test. *Joyner v. Garrett*, 279 N.C. 226, 182 S.E.2d 553 (1971).

But Acquittal of Drunken Driving Charge Restores License.—Subsection (c) of this section constitutes an exception to the general rule (that a licensee's subsequent acquittal of a drunken driving charge has no bearing upon a proceeding to revoke his license because of his refusal to submit to the chemical test at the time of his arrest) by providing that any person arrested for drunken driving who refuses to submit to a chemical test to determine the alcoholic content of his blood and who

is thereafter acquitted of the charge shall have his driver's license restored immediately. *Joyner v. Garrett*, 279 N.C. 226, 182 S.E.2d 553 (1971).

Right to Full De Novo Review.—Any person whose driver's license has been suspended under subsection (d) of this section has the right to a full de novo review by a superior court judge. This means the court must hear the matter on its merits from beginning to end as if no trial or hearing had been held by the Department and without any presumption in favor of its decision. *Joyner v. Garrett*, 279 N.C. 226, 182 S.E.2d 553 (1971).

Advising Accused of Rights.—See opinion of Attorney General to Robert Powell, 41 N.C.A.G. 326 (1971).

Running of Thirty Minutes Prior to Testing Defendant.—See opinion of Attorney General to LTC Charles B. Pierce, N.C. State Highway Patrol, 41 N.C.A.G. 242 (1971).

Applied in *Joyner v. Garrett*, 18 N.C. App. 38, 195 S.E.2d 575 (1973).

Stated in *State v. Hill*, 9 N.C. App. 279, 176 S.E.2d 41 (1970).

Cited in *State v. Brown*, 13 N.C. App. 327, 185 S.E.2d 453 (1971).

§ 20-16.3. Preliminary breath test.—Any law-enforcement officer having reasonable grounds to believe that a person has been driving or operating a vehicle on a highway or public vehicular area while under the influence of intoxicating liquor may, without making an arrest, request that such person submit to a preliminary chemical breath test to be administered by the officer. The results of this test shall not be admissible in evidence and failure to submit to the test shall not constitute a violation of this Chapter. Nothing contained in this section shall be construed to prevent or require a subsequent chemical test pursuant to G.S. 20-16.2. The law-enforcement officer requesting the test shall advise orally and in writing the person to be tested that his failure to take the test or his taking of the test shall not be construed to prevent or require a subsequent chemical test pursuant to G.S. 20-16.2.

No device may be used to give a chemical test under the provisions of this section unless it has been approved as to type and make by the State Board of Health. (1973, c. 312, s. 1.)

Editor's Note. — Session Laws 1973, c. 312, s. 2, makes the act effective June 1, 1973.

§ 20-17. Mandatory revocation of license by Department.—The Department shall forthwith revoke the license of any operator or chauffeur upon receiving a record of such operator's or chauffeur's conviction for any of the following offenses when such conviction has become final:

- (1) Manslaughter (or negligent homicide) resulting from the operation of a motor vehicle.
- (2) Driving or operating a vehicle within this State while under the influence of intoxicating liquor or while under the influence of an impairing drug as defined in G.S. 20-19(h).
- (3) Any felony in the commission of which a motor vehicle is used.

- (4) Failure to stop and render aid as required under the laws of this State in the event of a motor vehicle accident.
- (5) Perjury or the making of a false affidavit or statement under oath to the Department under this Article or under any other law relating to the ownership of motor vehicles.
- (6) Conviction, or forfeiture of bail not vacated, upon two charges of reckless driving committed within a period of 12 months.
- (7) Conviction, or forfeiture of bail not vacated, upon one charge of reckless driving while engaged in the illegal transportation of intoxicants for the purpose of sale.
- (8) Conviction of using a false or fictitious name or giving a false or fictitious address in any application for an operator's or chauffeur's license, or learner's permit, or any renewal or duplicate thereof, or knowingly making a false statement or knowingly concealing a material fact or otherwise committing a fraud in any such application or procuring or knowingly permitting or allowing another to commit any of the foregoing acts. (1935, c. 52, s. 12; 1947, c. 1067, s. 14; 1967, c. 1098, s. 2; 1971, c. 619, s. 7; 1973, c. 18, s. 1.)

Editor's Note. — The 1967 amendment added subdivision (8).

The 1971 amendment, effective Oct. 1, 1971, rewrote subdivision (2).

The 1973 amendment, effective July 1, 1973, inserted "or learner's permit" near the beginning of subdivision (8).

In General.—

The revocation of a driver's license is mandatory whenever it is made to appear that the licensee has been found guilty of "driving a motor vehicle while under the influence of intoxicating liquor or a narcotic drug." *Parks v. Howland*, 4 N.C. App. 197, 166 S.E.2d 701 (1969); *In re Austin*, 5 N.C. App. 575, 169 S.E.2d 20 (1969).

Upon receiving a record of an operator's or chauffeur's conviction upon two charges of reckless driving committed within a period of 12 months, the Department of Motor Vehicles is required to forthwith revoke the license of such persons for the statutory period. *Simpson v. Garrett*, 15 N.C. App. 449, 190 S.E.2d 251 (1972).

"Forthwith" does not mean the absolute exclusion of any interval, etc.—

The word "forthwith" in this section does not require instantaneous action but only action within a reasonable length of time. *Simpson v. Garrett*, 15 N.C. App. 449, 190 S.E.2d 251 (1972).

The provisions of subdivision (6) of this section are mandatory.—

The provisions of subdivision (6) of this section and § 20-19(f) are mandatory and not discretionary. *Simpson v. Garrett*, 15 N.C. App. 449, 190 S.E.2d 251 (1972).

Section 20-16(a)(9) Did Not Repeal Subdivision (6) of This Section by Implication.—Subdivision (6) of this section authorizing the mandatory revocation of a driver's license upon two convictions of

reckless driving within a 12-month period was not repealed by implication by the subsequent enactment of § 20-16(a)(9) authorizing the discretionary suspension of a driver's license upon one or more convictions of reckless driving and one or more convictions of speeding in excess of 44 mph and not more than 75 mph, within a 12-month period. *Person v. Garrett*, 280 N.C. 163, 184 S.E.2d 873 (1971).

This section does not specifically require notice, and revocation under this statute is not reviewable in court. *State v. Teasley*, 9 N.C. App. 477, 176 S.E.2d 838 (1970).

The surrendering of his license and forwarding of it to the Department by the court, gives the licensee sufficient notice that his operator's license has been revoked. *State v. Teasley*, 9 N.C. App. 477, 176 S.E.2d 838 (1970).

Notice of Second Conviction Must Precede Revocation.—The Department of Motor Vehicles was not authorized under this section to revoke plaintiff's license before it received notice of his second conviction for reckless driving. *Simpson v. Garrett*, 15 N.C. App. 449, 190 S.E.2d 251 (1972).

Action by Department within Eleven Days of Notice Reasonably Complied with Section.—Where the Department of Motor Vehicles acted within 11 days after it received notice of plaintiff's second conviction for reckless driving, this was reasonable compliance with this section. *Simpson v. Garrett*, 15 N.C. App. 449, 190 S.E.2d 251 (1972).

Injunction Not Available to Plaintiff Who Could Have Prevented Delay in Start of Revocation Period.—Where the elapse of approximately 15 months between plaintiff's last conviction for reckless driving and the order of revocation was not caused by defendant or his de-

partment, but the delay apparently resulted from the failure of the clerk of the court where plaintiff was last convicted to act promptly in forwarding a record of the conviction to the Department of Motor Vehicles, and plaintiff could have prevented any delay in the start of the revocation period by surrendering his license to the clerk and obtaining a receipt therefor at the time of his second conviction plaintiff is not entitled to injunctive relief. *Simpson v. Garrett*, 15 N.C. App. 449, 190 S.E.2d 251 (1972).

Period of Revocation.—

In accord with original. See *In re Austin*, 5 N.C. App. 575, 169 S.E.2d 20 (1969).

Review of Revocation.—

There is no right of judicial review when the revocation is mandatory pursuant to the provisions of this section. *In re Austin*, 5 N.C. App. 575, 169 S.E.2d 20 (1969).

Quoted in *Ennis v. Garrett*, 279 N.C. 612, 184 S.E.2d 246 (1971).

Cited in *Underwood v. Howland*, 274 N.C. 473, 164 S.E.2d 2 (1968).

§ 20-17.1. Revocation of license of mental incompetents, alcoholics and habitual users of narcotic drugs.—(a) The commissioner, upon receipt of notice that any person has been legally adjudicated incompetent or has been involuntarily admitted to an institution for the treatment of alcoholism or drug addiction, shall forthwith make inquiry into the facts for the purpose of determining whether such person is competent to operate a motor vehicle. Unless the Commissioner is satisfied that such person is competent to operate a motor vehicle with safety to persons and property, he shall revoke such person's driving privilege. No driving privilege revoked hereunder shall be restored unless and until the Commissioner is satisfied that the person is competent to operate a motor vehicle with safety to persons and property.

(b) If any person shall be adjudicated as incompetent or is involuntarily admitted for the treatment of alcoholism or drug addiction, the clerk of the court in which any such adjudication is made shall forthwith send a certified copy of abstract thereof to the Commissioner.

(c) Repealed by Session Laws 1973, c. 475, s. 3½, effective September 1, 1973.

(d) It is the intent of this section that the provisions herein shall be carried out by the Commissioner of Motor Vehicles for the safety of the motoring public. The Commissioner shall have authority to make such agreements as are necessary with the persons in charge of every institution of any nature for the care and treatment of alcoholics or habitual users of narcotic drugs, to effectively carry out the duty hereby imposed and the person in charge of the institutions described above shall cooperate with and assist the Commissioner of Motor Vehicles.

(e) Notwithstanding the provisions of G.S. 8-53, G.S. 8-53.2, G.S. 122-8.1 and G.S. 122-8.2, the person or persons in charge of any institution as set out in subsection (a) hereinabove shall furnish such information as may be required for the effective enforcement of this section. Information furnished to the Department of Motor Vehicles as provided herein shall be confidential and the Commissioner of Motor Vehicles shall be subject to the same penalties and is granted the same protection as is the department, institution or individual furnishing such information. No criminal or civil action may be brought against any person or agency who shall provide or submit to the Commissioner of Motor Vehicles or his authorized agents the information as required herein.

(f) Revocations under this section may be reviewed as provided in G.S. 20-9(g)(4). (1947, c. 1006, s. 9; 1953, c. 1300, s. 36; 1955, c. 1187, s. 16; 1969, c. 186, s. 1; c. 1125; 1971, c. 208, ss. 1, 1½; c. 401, s. 1; c. 767; 1973, c. 475, s. 3½.)

Editor's Note.—

The first 1969 amendment deleted "and only then if he gives and maintains proof of financial responsibility" at the end of former subsection (b).

The second 1969 amendment rewrote this section.

Session Laws 1971, c. 208, inserted "involuntarily" in the first sentence of subsection (a), deleted "has entered" following "mentally ill or" in that sentence, and added the last sentence in subsection (c).

Session Laws 1971, c. 401, s. 1, and c. 767, corrected an erroneous statutory reference in s. 1½ of the first 1971 amendatory act.

The 1973 amendment, effective Sept. 1, 1973, substituted "adjudicated" for "ad-

judged" and deleted "as an inpatient" following "admitted" in the first sentence of subsection (a), substituted "adjudicated as incompetent or is involuntarily admitted for the treatment of alcoholism or drug addiction" for "adjudged as incompetent for any reason" near the beginning of subsection (b), deleted former subsection (c), requiring persons in charge of institutions

to report admissions to the Commissioner, deleted "of the mentally ill and" following "care and treatment" in the second sentence of subsection (d) and substituted "(a)" for "(c)" in the first sentence of subsection (e).

For note on reporting patients for review of driver's license, see 48 N.C.L. Rev. 1003 (1970).

§ 20-19. Period of suspension or revocation.

(d) When a license is revoked because of a second conviction for driving or operating a vehicle while under the influence of intoxicating liquor or while under the influence of an impairing drug, occurring within three years after a prior conviction, the period of revocation shall be four years; provided, that the Department may, after the expiration of two years, issue a new license upon satisfactory proof that the former licensee has been of good behavior for the past two years and that his conduct and attitude are such as to entitle him to favorable consideration and upon such terms and conditions which the Department may see fit to impose for the balance of said period of revocation; provided, that as to a license which has been revoked because of a second conviction for driving under the influence of intoxicating liquor or a narcotic drug prior to May 2, 1957, and which has not been restored, the Department may upon the application of the former licensee, and after the expiration of two years of such period of revocation, issue a new license upon satisfactory proof that the former licensee has been of good behavior for the past two years and that his conduct and attitude are such as to entitle him to favorable consideration and upon such terms and conditions which the Department may see fit to impose for the balance of a four-year revocation period, which period shall be computed from the date of the original revocation.

(e) When a license is revoked because of a third or subsequent conviction for driving or operating a vehicle while under the influence of intoxicating liquor or while under the influence of an impairing drug, occurring within five years after a prior conviction, the period of revocation shall be permanent; provided, that the Department may, after the expiration of three years, issue a new license upon satisfactory proof that the former licensee has been of good behavior for the past three years and that his conduct and attitude are such as to entitle him to favorable consideration; provided, that as to a license which has been revoked because of a third or subsequent conviction for driving under the influence of intoxicating liquor or a narcotic drug prior to May 2, 1957, and which license has not been restored, the Department may, upon application of the former licensee and after the expiration of three years of such period of revocation, issue a new license upon satisfactory proof that the former licensee has been of good behavior for the past three years and that his conduct and attitude are such as to entitle him to favorable consideration. When a new license is issued under the provisions of this subsection, it may be issued upon such terms and conditions as the Department may see fit to impose. The terms and conditions imposed by the Department may not exceed a period of three years.

(h) As used in this section, the term "under the influence of an impairing drug" shall mean under the influence of any narcotic drug or under the influence of any other drug to such degree that a person's physical or mental faculties are appreciably impaired. (1935, c. 52, s. 13; 1947, c. 1067, s. 15; 1951, c. 1202, ss. 2-4; 1953, c. 1138; 1955, c. 1187, ss. 13, 17, 18; 1957, c. 499, s. 2; c. 515, s. 1; 1959, c. 1264, s. 11A; 1969, c. 242; 1971, c. 619, ss. 8-10.)

Editor's Note. — The 1969 amendment added the last two sentences of subsection (e).

The 1971 amendment, effective Oct. 1,

1971, inserted "or operating" and substituted "while under the influence of an impairing drug" for "a narcotic drug" near the beginning of subsection (d), inserted

"or operating a vehicle while" and substituted "while under the influence of an impairing drug" for "a narcotic drug" near the beginning of subsection (e) and added subsection (h).

As the other subsections were not changed by the amendments, they are not set out.

The provisions of subsection (f) of this section are mandatory.—

The provisions of § 20-17(6) and subsection (f) of this section are mandatory and not discretionary. *Simpson v. Garrett*, 15 N.C. App. 449, 190 S.E.2d 251 (1972).

Out-of-State Conviction to Be Counted as Conviction for Purpose of Subsection (e).—An out-of-state conviction of operating a motor vehicle upon the public highway while under the influence of intoxicating liquor or an impairing drug is to be counted as a conviction for the purpose of the operation of the mandatory provision of subsection (e). In *re Oates*, 18 N.C. App. 320, 196 S.E.2d 596 (1973).

Where there is mandatory revocation, etc.—

In accord with original. See *In re Austin*, 5 N.C. App. 575, 169 S.E.2d 20 (1969).

Reinstatement, or the receipt of a new license during the revocation period is not a legal right of the defendant but an act of grace which the General Assembly permits, but does not require, the Department to apply. The authority to exercise or apply this act of grace is granted to the Department, not to the courts. In *re Austin*, 5 N.C. App. 575, 169 S.E.2d 20 (1969).

§ 20-20. Surrender of licenses.—Whenever any vehicle operator's or chauffeur's license issued by the Department is revoked or suspended under the terms of this chapter, the licensee shall surrender to the Department all vehicle operator's and chauffeur's licenses and duplicates thereof issued to him by the Department which are in his possession. (1935, c. 52, s. 14; 1943, c. 649, s. 4; 1967, c. 280; 1969, c. 182.)

Editor's Note. — The 1967 amendment rewrote this section.

The 1969 amendment included chauffeurs' licenses in this section and deleted

Department Required to Revoke License for Statutory Period.—Upon receiving a record of an operator's or chauffeur's conviction upon two charges of reckless driving committed within a period of 12 months, the Department of Motor Vehicles is required to forthwith revoke the license of such persons for the statutory period. *Simpson v. Garrett*, 15 N.C. App. 449, 190 S.E.2d 251 (1972).

Injunction Not Available to Plaintiff Who Could Have Prevented Delay in Start of Revocation Period.—Where the elapse of approximately 15 months between plaintiff's last conviction for reckless driving and the order of revocation was not caused by defendant or his department, but the delay apparently resulted from the failure of the clerk of the court where plaintiff was last convicted to act promptly in forwarding a record of the conviction to the Department of Motor Vehicles, and plaintiff could have prevented any delay in the start of the revocation period by surrendering his license to the clerk and obtaining a receipt therefor at the time of his second conviction plaintiff is not entitled to injunctive relief. *Simpson v. Garrett*, 15 N.C. App. 449, 190 S.E.2d 251 (1972).

Stated in State v. Letterlough, 6 N.C. App. 36, 169 S.E.2d 269 (1969); *Ennis v. Garrett*, 279 N.C. 612, 184 S.E.2d 246 (1971).

Cited in State v. Teasley, 9 N.C. App. 477, 176 S.E.2d 838 (1970).

"cancelled" preceding "revoked" near the beginning of the section.

Stated in State v. Hughes, 6 N.C. App. 287, 170 S.E.2d 78 (1969).

§ 20-22. Suspending privileges of nonresidents and reporting convictions.

Opinions of Attorney General.—Honorable John S. Gardner, District Court

Judge, Sixteenth Judicial District, 40 N.C.A.G. 420 (1969).

§ 20-23. Suspending resident's license upon conviction in another state.—The Department is authorized to suspend or revoke the license of any resident of this State upon receiving notice of the conviction as defined in G.S. 20-24(c) of such person in another state of the offenses hereinafter enumerated which, if committed in this State, would be grounds for the suspension or revocation of the license of an operator or chauffeur. The provisions of this section shall

apply only for the offenses as set forth in G.S. 20-26(a). (1935, c. 52, s. 17; 1971, c. 486, s. 2.)

Editor's Note. — The 1971 amendment inserted "as defined in G.S. 20-24(c)" in the first sentence, substituted "the offenses hereinafter enumerated" for "any offense therein" in that sentence, and added the last sentence.

For note on choice of law rules in North Carolina, see 48 N.C.L. Rev. 243 (1970).

Opinions of Attorney General.—Honorable John S. Gardner, District Court Judge, Sixteenth Judicial District, 40 N.C.A.G. 420 (1969).

§ 20-23.1. Suspending or revoking operating privilege of person not holding license.—In any case where the Department would be authorized to suspend or revoke the license of a person but such person does not hold a license, the Department is authorized to suspend or revoke the operating privilege of such a person in like manner as it could suspend or revoke his license if such person held an operator's or chauffeur's license, and the provisions of this chapter governing suspensions, revocations, issuance of a license, and driving after license suspended or revoked, shall apply in the discretion of the Department in the same manner as if the license had been suspended or revoked. (1955, c. 1187, s. 19; 1969, c. 186, s. 2.)

Editor's Note. — The 1969 amendment inserted "and" between "license" and "driving" and deleted "and filing of proof of financial responsibility" near the end of the section.

Driving during Period of Suspension Constitutes Violation of § 20-28. — Under the provisions of this section and § 20-28(a), when a person who does not hold a

Discretion of Department.—Under the provisions of this section, it is discretionary with the Department to suspend or revoke the operator's license upon receiving notice of a conviction of such person in another state of an offense therein which, if committed in this State, would be grounds for suspension or revocation. State v. Teasley, 9 N.C. App. 477, 176 S.E.2d 838 (1970).

driver's license has his operating privilege revoked or suspended in the manner and under the conditions prescribed by statute, and while such operating privilege is thus suspended or revoked he drives a motor vehicle upon the highways of this State, he violates G.S. 20-28(a). State v. Newborn, 11 N.C. App. 292, 181 S.E.2d 214 (1971).

§ 20-23.2. Suspension of license for conviction of traffic offense in federal court.—Upon receipt of notice of conviction in any court of the federal government sitting in North Carolina of the offense of driving or operating a vehicle while under the influence of intoxicating liquor or while under the influence of an impairing drug as defined in G.S. 20-19(h), the Department is authorized to revoke the driving privilege of the person convicted in the same manner as if such conviction had occurred in a court of this State. Provided that this section shall apply only to offenses committed on highways in federal parks in this State. (1969, c. 988; 1971, c. 619, s. 11.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, inserted "or operating a vehicle" and "or while under the in-

fluence of an impairing drug as defined in G.S. 20-19(h)" in the first sentence.

§ 20-24. When court to forward license to Department and report convictions.

(b) Every court having jurisdiction over offenses committed under this Article, or any other law of this State regulating the operation of motor vehicles on highways, shall forward to the Department a record of the conviction of any person in said court for a violation of any said laws, and may recommend the suspension of the operator's or chauffeur's license of the person so convicted. Every court shall also forward to the Department a record of every conviction in which sentence is suspended on condition that the defendant not operate a motor vehicle for a period of time, and such report shall state the period of time for which such

condition is imposed; provided that the punishment for the violation of this subsection shall be the same as provided in G.S. 20-7(o).

(1973, c. 19.)

Editor's Note.—

The 1973 amendment substituted "(o)" for "(n)" at the end of subsection (b).

As the rest of the section was not changed by the amendment, only subsection (b) is set out.

Opinions of Attorney General.—Honorable John S. Gardner, District Court Judge, Sixteenth Judicial District, 40 N.C.A.G. 420 (1969).

Trial Court Is Required to Forward Record of Conviction. — This section requires that the trial courts shall forward to the Department a record of the conviction of any person. *Tilley v. Garrett*, 8 N.C. App. 556, 174 S.E.2d 617 (1970).

But Court Is Not Required to Forward Warrant and Judgment.—This section does not require that the warrant and judgment, or certified copies thereof, shall be forwarded by the trial court. *Tilley v. Garrett*, 8 N.C. App. 556, 174 S.E.2d 617 (1970).

Forwarding of License as Notice of Revocation. — The surrendering of his license and forwarding of it to the Department by the court, gives the licensee sufficient notice that his operator's license has been revoked. *State v. Teasley*, 9 N.C. App. 477, 176 S.E.2d 838 (1970).

§ 20-25. Right of appeal to court.

Provisions Satisfy Requirements of Due Process.—The provisions of § 20-48, together with the provisions of § 20-16(d), relating to the right of review, and the provisions of this section, relating to the right of appeal, satisfy the requirements of procedural due process. *State v. Teasley*, 9 N.C. App. 477, 176 S.E.2d 838 (1970).

A license to operate a motor vehicle is a privilege in the nature of a right of which the licensee may not be deprived save in the manner and upon the conditions prescribed by statute. These, under express provisions of this section, include full de novo review by a superior court judge, at the election of the licensee, in all cases except where the suspension or revocation is mandatory. *Underwood v. Howland*, 274 N.C. 473, 164 S.E.2d 2 (1968).

But no discretionary power is conferred upon the court, etc.—

No discretionary power is conferred upon the court in matters pertaining to the revocation of licenses. If, under the facts found by the judge, the statute requires the suspension or revocation of petitioner's license the order of the Department entered in conformity with the facts

This section designates clerks of court and assistant and deputy clerks of court as agents of the Department of Motor Vehicles for receipt of driver's licenses in cases where revocation is required. *Simpson v. Garrett*, 15 N.C. App. 449, 190 S.E.2d 251 (1972).

Injunction Not Available to Plaintiff Who Could Have Prevented Delay in Start of Revocation Period. — Where the elapse of approximately 15 months between plaintiff's last conviction for reckless driving and the order of revocation was not caused by defendant or his department, but the delay apparently resulted from the failure of the clerk of the court where plaintiff was last convicted to act promptly in forwarding a record of the conviction to the Department of Motor Vehicles, and plaintiff could have prevented any delay in the start of the revocation period by surrendering his license to the clerk and obtaining a receipt therefor at the time of his second conviction plaintiff is not entitled to injunctive relief. *Simpson v. Garrett*, 15 N.C. App. 449, 190 S.E.2d 251 (1972).

found must be affirmed. *Joyner v. Garrett*, 279 N.C. 226, 182 S.E.2d 553 (1971).

Discretionary suspensions, etc.—

Discretionary revocations and suspensions may be reviewed by the court under this section, while mandatory revocations and suspensions may not. *Underwood v. Howland*, 274 N.C. 473, 164 S.E.2d 2 (1968); *Taylor v. Garrett*, 7 N.C. App. 473, 173 S.E.2d 31 (1970).

Discretionary revocation of a driver's license is reviewable under the provisions of this section but mandatory revocations are not. *In re Austin*, 5 N.C. App. 575, 169 S.E.2d 20 (1969).

By Trial De Novo.—

Upon the filing of a petition for review, it is the duty of the judge, after notice to the department, "to take testimony and examine into the facts of the case, and to determine whether the petitioner is entitled to a license or is subject to suspension, cancellation, or revocation of license under the provisions of this article." This is more than a review as upon a writ of certiorari. It is a rehearing de novo, and the judge is not bound by the findings of fact or the conclusions of law made by

the department. Else why "take testimony," "examine into the facts," and "determine" the question at issue? *Parks v. Howland*, 4 N.C. App. 197, 166 S.E.2d 701 (1969).

Any person whose driver's license has been suspended under § 20-16.2(d) has the right to a full de novo review by a superior court judge. This means the court must hear the matter on its merits from beginning to end as if no trial or hearing had been held by the Department and without any presumption in favor of its decision. *Joyner v. Garrett*, 279 N.C. 226, 182 S.E.2d 553 (1971).

But mandatory revocations, etc.—

There is no right of judicial review when the revocation is mandatory pursuant to the provisions of § 20-17. In re *Austin*, 5 N.C. App. 575, 169 S.E.2d 20 (1969).

Errors in Administrative Proceedings Are Rendered Harmless by Hearing De Novo. If any errors were committed in the administrative proceedings, they are rendered harmless by the hearing de novo on appeal. *Joyner v. Garrett*, 279 N.C. 226, 182 S.E.2d 553 (1971).

Denial of License on Petition for Reinstatement.—If a petitioner is unlawfully and illegally denied a license upon a hearing on a petition for reinstatement of his license, the judge of the superior court, upon proper allegations in a petition and proper notice to the respondent as provided in this section is authorized to take testimony, examine into the facts of the case, and determine whether the petitioner was illegally and unlawfully denied a license under the provisions of the Uniform Driver's License Act. In re *Austin*, 5 N.C. App. 575, 169 S.E.2d 20 (1969).

§ 20-26. Records; copies furnished.—(a) The Department shall keep a record of proceedings and orders pertaining to all operator's and chauffeur's licenses granted, refused, suspended or revoked. The Department shall keep records of convictions as defined in G.S. 20-24(c) occurring outside North Carolina only for the offenses of exceeding a stated speed limit of 55 miles per hour or more by more than 15 miles per hour, driving while license suspended or revoked, careless and reckless driving, engaging in prearranged speed competition, engaging willfully in speed competition, hit and run driving resulting in damage to property, unlawfully passing a stopped school bus, illegal transportation of intoxicating liquors, and the offenses included in G.S. 20-17.

(c) The Department shall furnish copies of license records required to be kept by subsection (a) of this section to other persons, firms and corporations for uses other than official upon prepayment of the fee therefor, according to the following schedule:

- | | |
|--|---------|
| (1) Limited extract copy of license record, for period up to three years | \$ 1.00 |
| (2) Complete extract copy of license record | 1.00 |
| (3) Certified true copy of complete license record | 3.00 |

Hearing Must Be Sufficiently Formal to Permit Appellate Review. — Although a hearing conducted pursuant to this section may be as informal as the particular judge permits, nevertheless there should be sufficient formality in compiling a record of the proceeding so as to permit an appellate review. *Tilley v. Garrett*, 8 N.C. App. 556, 174 S.E.2d 617 (1970).

Burden of Proof.—Since the hearing on appeal in the superior court is de novo, if the Department has the burden of proof at the first hearing held under § 20-16(d), obviously it also has the burden at the de novo hearing in the superior court. *Joyner v. Garrett*, 279 N.C. 226, 182 S.E.2d 553 (1971).

Plaintiff May Not Complain That Department Has No Valid Warrant and Valid Judgment in Records.—If the plaintiff had been improperly deprived of his license by the Department due to a mistake of law or fact, he is entitled to show that the suspension was erroneous; however, he has no ground to complain that the Department does not have as a part of its records a "valid warrant" and a "valid judgment." Plaintiff has available to him the records of the court in which he is alleged to have been convicted by which he may show whether the conviction was valid. *Tilley v. Garrett*, 8 N.C. App. 556, 174 S.E.2d 617 (1970).

Applied in *Underwood v. Howland*, 1 N.C. App. 560, 162 S.E.2d 124 (1968); *Ennis v. Garrett*, 279 N.C. 612, 184 S.E.2d 246 (1971); *Joyner v. Garrett*, 18 N.C. App. 38, 195 S.E.2d 575 (1973).

Stated in *State v. Hughes*, 6 N.C. App. 287, 170 S.E.2d 78 (1969).

All fees received by the Department under the provisions of this subsection shall be paid into and become a part of the "Operator's and Chauffeur's License Fund." (1935, c. 52, s. 20; 1961, c. 307; 1969, c. 783, s. 3; 1971, c. 486, s. 1.)

Editor's Note. — The 1969 amendment, effective July 1, 1969, increased the fee in subdivision (1) of subsection (c) from fifty cents to one dollar.

The 1971 amendment added the second sentence in subsection (a).

As subsection (b) was not affected by the amendments, it is not set out.

§ 20-28. Unlawful to drive while license suspended or revoked.—

(a) Any person whose operator's or chauffeur's license has been suspended or revoked other than permanently, as provided in this chapter, who shall drive any motor vehicle upon the highways of the State while such license is suspended or revoked shall be guilty of a misdemeanor and his license shall be suspended or revoked, as the case may be, for an additional period of one year for the first offense, two years for the second offense, and permanently for a third or subsequent offense; provided, any person whose license has been permanently suspended or revoked under this section may apply for a new license after three years from the commencement of the permanent suspension or revocation. Upon the filing of such application, the Department may, with or without a hearing, issue a new license upon satisfactory proof that the former licensee has been of good behavior for a minimum of three years from the last date of suspension or revocation and that his conduct and attitude are such as to entitle him to favorable consideration.

Notwithstanding any other provisions of this section, in those cases of conviction of the offense provided in this section in which the judge and solicitor of the court wherein a conviction for violation of this section was obtained recommend in writing to the Department that the Department examine into the facts of the case and exercise discretion in suspending or revoking the driver's license for the additional periods provided by this section, the Department shall conduct a hearing and may impose a lesser period of additional suspension or revocation than that provided in this section or may refrain from imposing any additional period. Any person convicted of violating this section before or after May 14, 1959, shall be entitled to the benefit of the foregoing relief provisions.

Upon conviction, a violator of this section shall be punished by a fine of not less than two hundred dollars (\$200.00) or imprisonment in the discretion of the court not to exceed two years, or both; provided, however, the restoree of a suspended or revoked operator's or chauffeur's license who operates a motor vehicle upon the streets or highways of the State without maintaining financial responsibility as provided by law shall be punished as for operating without an operator's license.

(b) Any person whose license has been permanently revoked or permanently suspended, as provided in this Article, who shall drive any motor vehicle upon the highways of this State while such license is permanently revoked or permanently suspended shall be guilty of a misdemeanor and shall be imprisoned for not less than one year. This subsection shall not apply to any license revocations under G.S. 20-17.1; penalty for violation of G.S. 20-17.1 shall be applied as prescribed under G.S. 20-28(a). (1935, c. 52, s. 22; 1945, c. 635; 1947, c. 1067, s. 16; 1955, c. 1020, s. 1; c. 1152, s. 18; c. 1187, s. 20; 1957, c. 1406; 1959, c. 515; 1967, c. 447; 1973, c. 71.)

Editor's Note.—The 1967 amendment inserted "not to exceed two years" near the middle of the third paragraph of subsection (a).

The 1973 amendment, effective July 1, 1973, inserted "or permanently suspended" in two places in the first sentence of subsection (b) and added the second sentence of subsection (b).

The right to operate a motor vehicle upon the public highways is not an unrestricted right but a privilege which can be exercised only in accordance with the legislative restrictions fixed thereon. *State v. Tharrington*, 1 N.C. App. 608, 162 S.E.2d 140 (1968).

Operation Must Have Occurred, etc.—One violates this section if he operates

a motor vehicle on a public highway while his operator's license is in a state of suspension. *State v. Blacknell*, 270 N.C. 103, 153 S.E.2d 789 (1967).

To constitute a violation of subsection (a) of this section there must be: (1) operation of a motor vehicle by a person; (2) on a public highway; (3) while his operator's license is suspended or revoked. *State v. Cook*, 272 N.C. 728, 158 S.E.2d 820 (1968); *State v. Hughes*, 6 N.C. App. 287, 170 S.E.2d 78 (1969).

In order to convict a person of a violation of subsection (a), such person must have: (1) operated a motor vehicle; (2) on a public highway; and (3) while his operator's license or operating privilege was lawfully suspended or revoked. *State v. Newborn*, 11 N.C. App. 292, 181 S.E.2d 214 (1971).

Offense Must Have Occurred upon Public Highway.—The trial judge's failure to require the jury to find beyond a reasonable doubt that the offense occurred upon a public highway was prejudicial error. *State v. Harris*, 10 N.C. App. 553, 180 S.E.2d 29 (1971).

Intent Immaterial. — A person has no right to drive his car upon the highways of North Carolina after his license has been revoked and it makes no difference what the person's intentions are in so doing. *State v. Tharrington*, 1 N.C. App. 608, 162 S.E.2d 140 (1968); *State v. Hurley*, 18 N.C. App. 285, 196 S.E.2d 542 (1973).

There is nothing in subsection (a) of this section which would imply that knowledge or intent is a part of the crime of operating a motor vehicle after one's license has been suspended. *State v. Teasley*, 9 N.C. App. 477, 176 S.E.2d 838 (1970); *State v. Hurley*, 18 N.C. App. 285, 196 S.E.2d 542 (1973).

Offense by Person Not Holding License.—Under the provisions of § 20-23.1 and subsection (a) of this section, when a person who does not hold a driver's license has his operating privilege revoked or suspended in the manner and under the conditions prescribed by statute, and while such operating privilege is thus suspended or revoked he drives a motor vehicle upon the highways of this State, he violates subsection (a). *State v. Newborn*, 11 N.C. App. 292, 181 S.E.2d 214 (1971).

Warrant Need Not Specifically Refer to Section.—A warrant charging that the named defendant did unlawfully and willfully operate a motor vehicle on public streets or highways while his license was suspended, sufficiently charges defendant's violation of this section without specific

reference to the statute. *State v. Blacknell*, 270 N.C. 103, 153 S.E.2d 789 (1967).

Warrant Need Not Allege That Defendant Was Driving on "Public" Highway.—A warrant for driving while driver's license was suspended is not fatally defective in failing to allege that defendant was driving upon a "public" street or highway, since this section uses the phrase "highways of the State." *State v. Martin*, 13 N.C. App. 613, 186 S.E.2d 647 (1972).

Admissibility of Department Records.—The records of the Department, properly authenticated, are competent for the purpose of establishing the status of a person's operator's license and driving privilege. *State v. Teasley*, 9 N.C. App. 477, 176 S.E.2d 838 (1970); *State v. Rhodes*, 10 N.C. App. 154, 177 S.E.2d 754 (1970).

In a prosecution of a defendant for driving while his license was suspended, a properly certified copy of the driver's license record of defendant on file with the Department of Motor Vehicles is admissible as evidence that the defendant's license was in a state of revocation for a period covering the date of the offense for which he was charged. *State v. Herald*, 10 N.C. App. 263, 178 S.E.2d 120 (1970).

Certification by an employee of the Department of Motor Vehicles that the original of an order of security requirement or suspension of driving privilege was mailed to defendant on a specified date at his address shown on the records of the Department of Motor Vehicles is sufficient to render admissible a copy of the document in a prosecution of a defendant for driving while his license was suspended. *State v. Herald*, 10 N.C. App. 263, 178 S.E.2d 120 (1970).

A defendant is entitled to have the contents of the official record of the status of his driver's license limited, if he so requests, to the formal parts thereof, including the certification and seal, plus the fact that under official action of the Department of Motor Vehicles the defendant's license was in a state of revocation or suspension on the date he is charged with committing the offense under this section. *State v. Rhodes*, 10 N.C. App. 154, 177 S.E.2d 754 (1970).

Where a defendant fails to request that the contents of his certified driving record be limited to the portions thereof relating to the status of his license on the day he was charged with driving while his license was revoked, he may not complain on appeal that the record indicates that he had been involved in a number of accidents. *State v. Herald*, 10 N.C. App. 263, 178 S.E.2d 120 (1970).

Applied in *State v. Letterlough*, 6 N.C. App. 36, 169 S.E.2d 269 (1969); *State v. Rowland*, 13 N.C. App. 253, 185 S.E.2d 296 (1971); *State v. Toler*, 18 N.C. App. 149, 196 S.E.2d 295 (1973); *State v. Guffey*, 283 N.C. 94, 194 S.E.2d 827 (1973).

§ 20-28.1. Conviction of moving offense committed while driving during period of suspension or revocation of license; departmental hearings upon recommendation of judge and solicitor.—(a) Upon receipt of notice of conviction of any person of a motor vehicle moving offense, such offense having been committed while such person's driving privilege was in a state of suspension or revocation, the Department shall revoke such person's driving privilege for an additional period of time as set forth in subsection (b) hereof.

(b) When a driving privilege is subject to revocation under this section, the additional period of revocation shall be as follows:

- (1) A first such revocation shall be for one year;
- (2) A second such revocation shall be for two years; and
- (3) A third or subsequent such revocation shall be permanent.

(c) Any person whose driving privilege has been permanently revoked under this section may apply for a new license after three years from the commencement of the permanent revocation. Upon the filing of such application, the Department may, with or without a hearing, issue a new license upon satisfactory proof that the former licensee has been of good behavior for a minimum of three years from the last date of revocation and that his conduct and attitude are such as to entitle him to favorable consideration.

(d) Notwithstanding any other provisions of this section, in those cases of conviction of the offense provided in this section in which the judge and solicitor of the court wherein a conviction for violation of this section was obtained recommend in writing to the Department that the Department examine into the facts of the case and exercise discretion in suspending or revoking the driver's license for the additional periods provided by this section, the Department shall conduct a hearing and may impose a lesser period of additional suspension or revocation than that provided in this section or may refrain from imposing any additional period. If the judge and solicitor hearing said case are not reasonably available to make or refuse such recommendation, then the judge and solicitor presiding and serving over the court of conviction may make the recommendation. (1965, c. 286; 1969, c. 348; 1971, c. 163.)

Editor's Note.—The 1969 amendment, effective July 1, 1969, rewrote this section.

The 1971 amendment added subsection (d).

Application of Section. — This section does not apply to a conviction of a "motor vehicle moving offense" during the interim between the termination of an original order of revocation and the payment of the fee required by § 20-7(i1). *Ennis v. Garrett*, 279 N.C. 612, 184 S.E.2d 246 (1971).

Effect of Termination of Revocation Period.—When the period of revocation stated in the original order of revocation terminates, the license is no longer "in a state of suspension or revocation" within the meaning of this section. *Ennis v. Garrett*, 279 N.C. 612, 184 S.E.2d 246 (1971).

When the period of revocation stated in the original order of revocation terminates the former holder of the license may not immediately resume driving. Before he may do so the fee required by § 20-

7(i1) must be paid. *Ennis v. Garrett*, 279 N.C. 612, 184 S.E.2d 246 (1971).

When the period of revocation stated in the original order of revocation terminates, the former holder of the license is simply a person without a valid operator's or chauffeur's license; if, before payment of the fee required by § 20-7(i1) he operates a motor vehicle upon a highway of this State, he is subject to the penalties provided for one who operates a motor vehicle without a valid operator's or chauffeur's license. *Ennis v. Garrett*, 279 N.C. 612, 184 S.E.2d 246 (1971).

Suspension Due, to Insurance Agent's Failure to Give Notice of Insurance.—Where, by error, a licensee's insurance agent fails to furnish the Commissioner notice of the existence of liability insurance on her car and she receives notification of suspension of her license for lack of liability insurance but she continues to drive, relying on her agent to correct his error,

subsequent moving violations during the period of the suspension make revocation for an additional period mandatory under this section even though the suspension would not have been entered if the Commissioner had been properly advised of the existence of liability insurance. *Carson v. Godwin*, 269 N.C. 744, 153 S.E.2d 473 (1967).

§ 20-29.1. Commissioner may require reexamination; issuance of limited or restricted licenses.—The Commissioner of Motor Vehicles, having good and sufficient cause to believe that a licensed operator or chauffeur is incompetent or otherwise not qualified to be licensed, may, upon written notice of at least five days to such licensee, require him to submit to a reexamination to determine his competency to operate a motor vehicle. Upon the conclusion of such examination, the Commissioner shall take such action as may be appropriate, and may suspend or revoke the license of such person or permit him to retain such license, or may issue a license subject to restrictions or upon failure of such reexamination may cancel the license of such person until he passes a reexamination. Refusal or neglect of the licensee to submit to such reexamination shall be grounds for the cancellation of the license of the person failing to be reexamined, and the license so cancelled shall remain cancelled until such person satisfactorily complies with the reexamination requirements of the Commissioner. The Commissioner may, in his discretion and upon the written application of any person qualified to receive an operator's or chauffeur's license, issue to such person an operator's or chauffeur's license restricting or limiting the licensee to the operation of a single prescribed motor vehicle or to the operation of a particular class or type of motor vehicle. Such a limitation or restriction shall be noted on the face of the license, and it shall be unlawful for the holder of such limited or restricted license to operate any motor vehicle or class of motor vehicle not specified by such restricted or limited license, and the operation by such licensee of motor vehicles not specified by such license shall be deemed the equivalent of operating a motor vehicle without any chauffeur's or operator's license. Any such restricted or limited licensee may at any time surrender such restricted or limited license and apply for and receive an unrestricted operator's or chauffeur's license upon meeting the requirements therefor. (1943, c. 787, s. 2; 1949, c. 1121; 1971, c. 546.)

Editor's Note. — The 1971 amendment, effective July 1, 1971, added "or upon failure of such reexamination may cancel the license of such person until he passes a reexamination" at the end of the second sentence and substituted for "suspension or revocation of his license" at the end of the third sentence the language beginning "cancellation of the license."

Notice of Suspension Required.—A requirement for notice is made by § 20-16(d) in all cases in which a license is suspended under the authority of that section. Even though a similar requirement for notice does not appear in this section, a reading of this Chapter, in which both sections appear, makes it clear that the legislature

Former Provisions Construed. — See *Underwood v. Howland*, 274 N.C. 473, 164 S.E.2d 2 (1968).

Applied in *Underwood v. Howland*, 1 N.C. App. 560, 162 S.E.2d 124 (1968); *Taylor v. Garrett*, 7 N.C. App. 473, 173 S.E.2d 31 (1970).

intended that notice be given to the licensee when the Commissioner suspends a license under this section as well as when suspension is made under the authority of § 20-16. *State v. Hughes*, 6 N.C. App. 287, 170 S.E.2d 78 (1969).

In any case in which a license is suspended under the authority of this section, the Commissioner of Motor Vehicles is required to notify the licensee of such suspension. That such notice is required is made more apparent when it is realized that even a failure to pass a reexamination conducted under this section does not necessarily result in suspension of the license. *State v. Hughes*, 6 N.C. App. 287, 170 S.E.2d 78 (1969).

§ 20-30. Violations of license or learner's permit provisions.—It shall be unlawful for any person to commit any of the following acts:

- (1) To display or cause to be displayed or to have in possession any oper-

- ator's or chauffeur's license or learner's permit, knowing the same to be fictitious or to have been cancelled, revoked, suspended or altered.
- (2) To counterfeit, sell, lend to, or knowingly permit the use of, by one not entitled thereto, any operator's or chauffeur's license or learner's permit.
 - (3) To display or to represent as one's own a license or learner's permit not issued to the person so displaying same.
 - (4) To fail or refuse to surrender to the Department upon demand any license or learner's permit or the badge of any chauffeur whose license or learner's permit has been suspended, cancelled or revoked as provided by law.
 - (5) To use a false or fictitious name or give a false or fictitious address in any application for an operator's or chauffeur's license or learner's permit, or any renewal or duplicate thereof, or knowingly to make a false statement or knowingly conceal a material fact or otherwise commit a fraud in any such application, or for any person to procure, or knowingly permit or allow another to commit any of the foregoing acts. Any license or learner's permit procured as aforesaid shall be void from the issuance thereof, and any moneys paid therefor shall be forfeited to the State.
 - (6) To photostat or otherwise reproduce an operator's or chauffeur's license or learner's permit or to possess an operator's or chauffeur's license or learner's permit which has been photostated or otherwise reproduced, unless such photostat or other reproduction was authorized by the Commissioner. (1935, c. 52, s. 24; 1951, c. 542, s. 4; 1967, c. 1098, s. 1; 1973, c. 18, s. 2.)

Editor's Note. — The 1967 amendment added "or for any person to procure, or knowingly permit or allow another to commit any of the foregoing acts" at the end of the first sentence in subdivision (5).

The 1973 amendment, effective July 1, 1973, inserted "or learner's permit" throughout the section.

§ 20-32. Unlawful to permit unlicensed minor to drive motor vehicle. —It shall be unlawful for any person to cause or knowingly permit any minor under the age of 18 years to drive a motor vehicle upon a highway as an operator, unless such minor shall have first obtained a license to so drive a motor vehicle under the provisions of this Article. (1935, c. 52, s. 26; 1973, c. 684.)

The 1973 amendment deleted "over sixteen and" following "any minor" near the beginning of the section.

§ 20-35. Penalties for misdemeanor.

Cross Reference.—As to jurisdiction of prosecution under this section, see notes to §§ 7A-271 and 7A-272.

This section and § 20-7, being in *pari materia*, must be construed together, and, if possible, they must be reconciled and harmonized. *State v. Tolley*, 271 N.C. 459, 156 S.E.2d 858 (1967).

Excessive Penalty. — Any person convicted of operating a motor vehicle over any highway in this State without having first been licensed as such operator, in

violation of § 20-7 (a), is guilty of a misdemeanor; and, under § 20-7 (n) and subsection (b) of this section, is subject to punishment by imprisonment for a term of not more than six months. The superior court, even if it has jurisdiction in other respects, has no authority to pronounce judgment imposing a prison sentence of two years for this criminal offense. *State v. Wall*, 271 N.C. 675, 157 S.E.2d 363 (1967).

§ 20-36. Ten-year-old convictions not considered.—No conviction of any violation of the motor vehicle laws shall be considered by the Department in determining whether any person's driving privilege shall be suspended or re-

voked or in determining the appropriate period of suspension or revocation after 10 years has elapsed from the date of such conviction. (1971, c. 15.)

Ten-Year Limitation Applicable to Department of Motor Vehicle Action Only.— See opinion of Attorney General to Honorable Robert A. Collier, Jr., 41 N.C.A.G. 322 (1971).

ARTICLE 2A.

Afflicted, Disabled or Handicapped Persons.

§ 20-37.2. Handicapped drivers—display of distinctive flags.—Handicapped or paraplegic drivers of motor vehicles are authorized when getting into and out of such vehicles, or when in distress, to display a white flag of approximately seven and one-half inches in width and thirteen inches in length, with the letter "H" thereon in red color with an irregular one-half inch red border. Said flag shall be of reflective material so as to be readily discernible under darkened conditions and shall be issued under § 20-37.3. (1967, c. 296, s. 2.)

§ 20-37.3. Handicapped drivers — issuance of flags and cards.—The Commissioner of Motor Vehicles may, upon application and payment of a fee of two dollars (\$2.00), issue to any handicapped person a distress flag as described in § 20-37.2, and a card which shall be applicant's authority to use such flag. This card shall set forth the applicant's name, address, date of birth, physical apparatus, if any, needed to operate a motor vehicle, and other pertinent facts which the Commissioner of Motor Vehicles deems desirable. The card and flag issued to an applicant shall bear corresponding numbers. In the event of loss or destruction of such flag a replacement may be issued upon the payment of the sum of one dollar (\$1.00) by the applicant. The Commissioner of Motor Vehicles shall maintain a list of those persons to whom distress flags and cards have been issued. (1967, c. 296, s. 3.)

§ 20-37.4. Handicapped drivers—unauthorized use of flag; violation of §§ 20-37.2 to 20-37.5.—Any person who is not a handicapped or paraplegic person who uses the above-mentioned flag or facsimile thereof as a distress signal or for any other purpose or any other person who violates any provision of §§ 20-37.2 to 20-37.5 shall be guilty of a misdemeanor. (1967, c. 296, s. 4.)

§ 20-37.5. Handicapped drivers—definition.—As used herein handicapped or paraplegic drivers shall mean:

- (1) Any person who has impairments that, regardless of cause or manifestation, for all practicable purposes, confines such person to a wheelchair.
- (2) Any person who has impairments that cause such person to walk with difficulty or insecurity and includes but is not limited to those persons using braces or crutches, amputees, arthritics, spastics and those with pulmonary or cardiac ills who may be semiambulatory. (1967, c. 296, s. 5.)

§ 20-37.6. Handicapped drivers—parking privileges.—Any person who has lost the use of one or both legs or is so severely disabled as to be unable to walk without the aid of a mechanical device shall be allowed to park for unlimited periods in parking zones restricted as to the length of time parking is permitted. This section shall have no application to those zones or during times in which the stopping, parking, or standing of all vehicles is prohibited or which are reserved for special types of vehicles. As a condition to this privilege the vehicle shall display a distinguishing license plate which shall be issued for a vehicle registered to the disabled person. Such license plate shall be issued for the normal fee applicable to standard license plates, except that a person who qualifies for

a license plate under this section and also qualifies as a disabled veteran under G.S. 20-81.4 shall be issued the license plate provided for herein free of charge. (1971, c. 374, s. 1; 1973, c. 126.)

Editor's Note.—Session Laws 1971, c. 374, s. 2, makes the act effective Jan. 1, 1972. The 1973 amendment, effective July 1, 1973, rewrote the third sentence and added the fourth sentence.

ARTICLE 2B.

Special Identification Cards for Nonoperators.

§ 20-37.7. Special identification card. — (a) The Department of Motor Vehicles shall upon satisfactory proof of identification issue a special identification card to any person 16 years or older who is a resident of the State of North Carolina and for any reason does not possess a valid driver's license issued by the Department of Motor Vehicles.

(b) Every application for a special identification card shall be made upon the approved form furnished by the Department.

(c) A special identification card issued under this section shall be similar in size, shape, and design to a driver's license and shall include a photograph, but the card shall be of a distinctive color and shall clearly state that it does not enable the person to whom it is issued to operate a motor vehicle.

(d) A special identification card shall not expire but may be reissued. The fee for the issuance or reissuance of a special identification card shall be one dollar (\$1.00) and shall be placed in the "operator's and chauffeur's license fund" for use as provided in G.S. 20-7(j).

(e) Any fraud or misrepresentation in the application for or use of a special identification card issued under this section is a misdemeanor, punishable by a fine of not more than five hundred dollars (\$500.00) or by imprisonment of 90 days, or both.

(f) The Department of Motor Vehicles shall maintain hard copies of applications and information pertaining to the recipients of a special identification card and such indices as deemed appropriate, but such information shall not be required to be computerized. The Department may promulgate any rules and regulations it deems necessary for the effective implementation of the provisions of this section.

(g) The fact of issuance of a special identification card pursuant to this section shall not place upon the State of North Carolina or any agency thereof any liability for the misuse thereof and the acceptance thereof as valid identification is a matter left entirely to the discretion of any person to whom such card is presented.

(h) The Department may utilize the various communications media throughout the State to inform North Carolina residents of the provisions of this section. (1973, c. 438, s. 1.)

Editor's Note. — Session Laws 1973, c. 438, s. 2, makes the act effective Oct. 1, 1973.

ARTICLE 3.

Motor Vehicle Act of 1937.

Part 1. General Provisions.

§ 20-38. Definitions of words and phrases.

(20) Passenger Vehicles.— a. Excursion passenger vehicles.

Passenger vehicles kept in use for the purpose of transporting persons on sight-seeing or travel tours.

b. For hire passenger vehicles.

Passenger motor vehicles transporting passengers for com-

pensation; but this classification shall not include motor vehicles of nine-passenger capacity or less operated as ambulances or operated by the owner where the cost of operation is shared by neighbor fellow workmen between their homes and the place of regular daily employment, when operated for not more than two trips each way per day, nor shall this classification include automobiles operated by the owner where the cost of operation is shared by the passengers on a "share the expense" plan, nor shall this classification include motor vehicles transporting students for the public school system when said motor vehicles are so transporting under contract with the State Board of Education, nor shall this classification include motor vehicles leased to the United States of America or any of its agencies when such lease agreement is on a nonprofit basis.

c. Common carriers of passengers.

Passenger motor vehicles operated under a franchise certificate issued by the Utilities Commission under §§ 62-121.5 through 62-121.79 [now §§ 62-259 through 62-279], for operation on the public highways of this State between fixed termini or over a regular route for the transportation of persons or property for compensation.

d. Motorcycle.

Every motor vehicle having a saddle for the use of the rider and designed to travel on not more than three wheels in contact with the ground, including motor scooters and motor-driven bicycles, but excluding tractors and utility vehicles equipped with an additional form of device designed to transport property, and three-wheeled vehicles while being used by law-enforcement agencies.

e. U-drive-it passenger vehicles.

Passenger motor vehicles used for the purpose of rent or lease to be operated by the lessee; provided, this shall not include passenger motor vehicles of nine-passenger capacity or less which are leased for a term of one year or more to the same person, firm, or corporation. Provided, further that passenger vehicles leased or rented to public school authorities for the purpose of driver-training instruction shall not be included in this designation.

f. Ambulance.

A motor vehicle equipped for transporting wounded, injured or sick persons.

g. Private passenger vehicles.

All other passenger vehicles not included in the above definitions.

(24) Property-Hauling Vehicles.—a. Exempt for hire vehicles.

All motor vehicles used for the transportation of property for hire but not licensed as common carriers or contract carriers of property under franchise certificates or permits issued by the Utilities Commission pursuant to G.S. 62-262 and other provisions of chapter 62 of the General Statutes, or by the Interstate Commerce Commission; provided, that the term "for hire" as used herein shall include every arrangement by which the owner of a motor vehicle uses, or permits such vehicle to be used, for the transportation of the property of another for compensation, subject to the following exemptions:

1. The transportation of farm crops or products, including logs, bark, pulp and tannic acid wood delivered from farms and forest to the first or primary market, and the transportation of wood chips from the place where wood has been converted into chips to their first or primary market.
 2. The transportation of perishable foods which are still owned by the grower while being delivered to the first or primary market by an operator who has not more than one truck, truck-tractor or trailer in a for hire operation.
 3. The transportation of merchandise hauled for neighborhood farmers incidentally and not as regular business in going to and from farms and primary markets.
 4. The transportation of T.V.A. or A.A.A. phosphate and/or agricultural limestone in bulk which is furnished as a grant of aid under the United States Agricultural Adjustment Administration.
 5. The transportation of fuel for the exclusive use of the public schools of the State.
 6. Motor vehicles whose sole operation in carrying the property of others is limited to the transportation of the United States mail pursuant to a contract made with the United States or the extension or renewal of such contract.
 7. Vehicles which are leased for a term of one year or more to the same person, firm or corporation when used exclusively by such person, firm or corporation in transporting its own property.
- b. Common carrier of property vehicles.
Every motor vehicle used for the transportation of property which is certified a common carrier by the Utilities Commission or the Interstate Commerce Commission.
- c. Private hauler vehicles.
All motor vehicles used for the transportation of property not falling within one of the above defined classifications; provided, self-propelled vehicles equipped with permanent living and sleeping facilities used exclusively for camping activities shall be classified as private passenger vehicles.
- d. Semitrailer.
Every vehicle without motive power designed for carrying property or persons and for being drawn by a motor vehicle, and so constructed that part of its weight and/or its load rests upon or is carried by the pulling vehicle.
- e. Trailers.
Every vehicle without motive power designed for carrying property or persons wholly on its own structure and to be drawn by a motor vehicle. This shall include so-called pole trailers or a pair of wheels used primarily to balance a load, rather than for purposes of transportation.
- f. Contract carrier of property vehicles.
Every motor vehicle used for the transportation of property under a franchise permit of a regulated contract carrier issued by the North Carolina Utilities Commission under G.S. 62-262 or the Interstate Commerce Commission.
- (26) Resident.—Any individual who resides within this State for other than a temporary or transitory purpose for more than six months shall be

presumed to be a resident of this State; but absence from the State for more than six months shall raise no presumption that the individual is not a resident of the State.

(1967, cc. 201, 399; c. 1095, ss. 3, 4; 1969, c. 561, s. 2.)

Editor's Note.—

The first 1967 amendment rewrote paragraph d of subdivision (20).

The second 1967 amendment inserted "operated as ambulances or" near the beginning of paragraph b of subdivision (20), inserted present paragraph f in subdivision (20) and redesignated former paragraph i of subdivision (20) as paragraph g.

The third 1967 amendment, effective Feb. 15, 1968, rewrote that portion of subdivision (24) preceding the words "provided, that the term 'for hire' as used herein" and added paragraph f thereto.

The 1969 amendment rewrote subdivision (26).

As only subdivisions (20), (24) and (26) were affected by the amendments, the rest of the section is not set out.

This section defines "owner" under the Motor Vehicles Act and § 20-279.1 defines "owner" essentially the same way. *Nation-wide Mut. Ins. Co. v. Hayes*, 276 N.C. 620, 174 S.E.2d 511 (1970).

Intersection.—

With reference to the right-of-way as between two vehicles approaching and entering an intersection, the law of this State makes no distinction between a "T" intersection and one at which the two highways cross each other completely. *Dawson v. Jennette*, 278 N.C. 438, 180 S.E.2d 121 (1971).

Part 2. Authority and Duties of Commissioner and Department.

§ 20-42. Authority to administer oaths and certify copies of records.

(b) The Commissioner and such officers of the Department as he may designate are hereby authorized to prepare under the seal of the Department and deliver upon request a certified copy of any record of the Department, charging a fee of one dollar (\$1.00) for each document so certified, and every such certified copy shall be admissible in any proceeding in any court in like manner as the original thereof, without further certification. Provided that any copy of any record of the Department furnished to State, county, municipal and court officials of this State for official use shall be furnished without charge. (1937, c. 407, s. 7; 1955, c. 480; 1961, c. 861, s. 1; 1967, c. 691, s. 41; c. 1172; 1971, c. 749.)

Editor's Note. — Session Laws 1967, c. 1172, added the proviso at the end of subsection (b).

Session Laws 1967, c. 691, s. 41, effective July 1, 1967, had added a last sentence to subsection (b) reading: "The Department shall furnish certified copies of any record required to be kept by the Department to State, county, municipal and court officials of the State for official use only, without charge."

Bicycle.—

The operation of a bicycle upon a public highway is governed by the rules governing motor vehicles insofar as the nature of the vehicle permits. *Webb v. Felton*, 266 N.C. 707, 147 S.E.2d 219 (1966).

A bicycle is a vehicle and its rider is a driver within the meaning of the Motor Vehicle Law. *Lowe v. Futrell*, 271 N.C. 550, 157 S.E.2d 92 (1967); *Sadler v. Purser*, 12 N.C. App. 206, 182 S.E.2d 850 (1971).

A mobile home is a motor vehicle under subdivision (17), and is subject to the mandatory provisions of the statutes relating to the registration of motor vehicles in this State. *King Homes, Inc. v. Bryson*, 273 N.C. 84, 159 S.E.2d 329 (1968).

Applied in *Mims v. Dixon*, 272 N.C. 256, 158 S.E.2d 91 (1967).

Quoted in *Galloway v. Hartman*, 271 N.C. 372, 156 S.E.2d 727 (1967).

Stated in *Wilson v. J.W. Dunn Co.*, 1 N.C. App. 65, 159 S.E.2d 373 (1968); *McCoy v. Dowdy*, 16 N.C. App. 242, 192 S.E.2d 81 (1972).

Cited in *Champion v. Waller*, 268 N.C. 426, 150 S.E.2d 783 (1966); *Anderson v. Carter*, 272 N.C. 426, 158 S.E.2d 607 (1968); *Hall v. Kimber*, 6 N.C. App. 669, 171 S.E.2d 99 (1969).

Session Laws 1971, c. 749, increased the fee in the first sentence of subsection (b) from fifty cents to one dollar for each document.

As subsection (a) was not affected by the amendments, it is not set out.

Admissibility of Department Records.— The records of the Department, properly authenticated, are competent for the purpose of establishing the status of a person's operator's license and driving privi-

lege. *State v. Teasley*, 9 N.C. App. 477, 176 S.E.2d 838 (1970); *State v. Rhodes*, 10 N.C. App. 154, 177 S.E.2d 754 (1970).

A defendant is entitled to have the contents of the official record of the status of his driver's license limited, if he so requests, to the formal parts thereof, including the certification and seal, plus the fact that under official action of the Department of Motor Vehicles the defendant's license was in a state of revocation or sus-

pension on the date he is charged with committing the offense under § 20-28. *State v. Rhodes*, 10 N.C. App. 154, 177 S.E.2d 754 (1970).

Applied in *State v. Blacknell*, 270 N.C. 103, 153 S.E.2d 789 (1967); *State v. Hughes*, 6 N.C. App. 287, 170 S.E.2d 78 (1969).

Cited in *State v. Letterlough*, 6 N.C. App. 36, 169 S.E.2d 269 (1969).

§ 20-43. Records of Department.—(a) All records of the Department, other than those declared by law to be confidential for the use of the Department, shall be open to public inspection during office hours.

(b) The Commissioner, upon receipt of notification from another state or foreign country that a certificate of title issued by the Department has been surrendered by the owner in conformity with the laws of such other state or foreign country, may cancel and destroy such record of certificate of title. (1937, c. 407, s. 8; 1947, c. 219, s. 1; 1971, c. 1070, s. 1.)

Editor's Note. — The 1971 amendment deleted former subsection (b) and redesignated former subsection (c) as present subsection (b).

Cited in *Hodgson v. Hyatt Realty & Inv. Co.*, 353 F. Supp. 1363 (M.D.N.C. 1973).

§ 20-47. Department may summon witnesses and take testimony.

Cross References.—

As to penalties for persons convicted

of misdemeanors for violations of this article, see § 20-176.

§ 20-48. Giving of notice.—Whenever the Department is authorized or required to give any notice under this Chapter or other law regulating the operation of vehicles, unless a different method of giving such notice is otherwise expressly prescribed, such notice shall be given either by personal delivery thereof to the person to be so notified or by deposit in the United States mail of such notice in an envelope with postage prepaid, addressed to such person at his address as shown by the records of the Department. The giving of notice by mail is complete upon the expiration of four days after such deposit of such notice. Proof of the giving of notice in either such manner may be made by the certificate of any officer or employee of the Department or affidavit of any person over 18 years of age, naming the person to whom such notice was given and specifying the time, place, and manner of the giving thereof. (1937, c. 407, s. 13; 1955, c. 1187, s. 21; 1971, c. 1231, s. 1.)

Editor's Note. — The 1971 amendment substituted "18" for "twenty-one" in the third sentence.

Provisions Satisfy Requirements of Due Process.—The provisions of this section, together with the provisions of § 20-16(d), relating to the right of review, and the provisions of § 20-25, relating to the right of appeal, satisfy the requirements of procedural due process. *State v. Teasley*, 9 N.C. App. 477, 176 S.E.2d 838 (1970).

Notice of Suspension or Revocation of License.—This section, which is the section providing for the manner in which notice is to be given, is reasonably calculated to assure that notice will reach the intended party and afford him the opportunity of resisting or avoiding the pro-

posed suspension, as well as to give him notification of the actual suspension of his operator's license and driving privilege. *State v. Teasley*, 9 N.C. App. 477, 176 S.E.2d 838 (1970).

When the Department complies with the procedure set forth in this section as to notice of suspension of the operator's license and driving privilege, such compliance constitutes constructive notice to the defendant that his license has been suspended. *State v. Teasley*, 9 N.C. App. 477, 176 S.E.2d 838 (1970).

Certification by an employee of the Department of Motor Vehicles that the original of an order of security requirement or suspension of driving privilege was mailed to defendant on a specified date at his

address shown on the records of the Department of Motor Vehicles is sufficient to render admissible a copy of the document in a prosecution of a defendant for driving while his license was suspended.

State v. Herald, 10 N.C. App. 263, 178 S.E.2d 120 (1970).

Applied in State v. Hughes, 6 N.C. App. 287, 170 S.E.2d 78 (1969).

§ 20-49. Police authority of Department.

Subdivisions (2) and (4) of this section are not irreconcilable with § 20-183. State v. Allen, 15 N.C. App. 670, 190 S.E.2d 714

(1972), rev'd on other grounds, 282 N.C. 503, 194 S.E.2d 9 (1973).

Part 3. Registration and Certificates of Titles of Motor Vehicles.

§ 20-50. Owner to secure registration and certificate of title.

Opinions of Attorney General.—Mr. Eric L. Gooch, Director, Sales and Use Tax Division, N.C. Department of Revenue, 40 N.C.A.G. 446 (1969).

A "certificate of number" required by § 75A-5 is not a "certificate of title" to be compared with that required by this section for vehicles intended to be operated on the highways. Lane v. Honeycutt, 14 N.C. App. 436, 188 S.E.2d 604 (1972).

A mobile home is a motor vehicle under § 20-38 (17), and is subject to the manda-

tory provisions of the statutes relating to the registration of motor vehicles in this State. King Homes, Inc. v. Bryson, 273 N.C. 84, 159 S.E.2d 329 (1968).

Stated in Nationwide Mut. Ins. Co. v. Hayes, 276 N.C. 620, 174 S.E.2d 511 (1970).

Cited in State v. White, 3 N.C. App. 31, 164 S.E.2d 36 (1968); United States v. Powers, 439 F.2d 373 (4th Cir. 1971); Ferguson v. Morgan, 282 N.C. 83, 191 S.E.2d 817 (1972).

§ 20-51. Exempt from registration.—The following shall be exempt from the requirement of registration and certificate of title:

(6) Any trailer or semitrailer attached to and drawn by a properly licensed motor vehicle when used by a farmer, his tenant, agent, or employee in transporting unginced cotton, peanuts, soybeans, corn, hay, tobacco, silage, cucumbers, or irrigation pipes and equipment owned by such farmer or tenant from place to place on the same farm, from one farm to another, from farm to gin, from farm to dryer, or from farm to market, and when not operated on a for-hire basis. The term "transporting" as used herein shall include the actual hauling of said products and all unloaded travel in connection therewith.

(8) Any vehicle which is driven or moved upon a highway only for the purpose of crossing or traveling upon such highway from one side to the other provided the owner or lessee of the vehicle owns the fee or a leasehold in all the land along both sides of the highway at the place of crossing. (1937, c. 407, s. 16; 1943, c. 500; 1949, c. 429; 1951, c. 705, s. 2; 1953, c. 826, ss. 2, 3; c. 1316, s. 1; 1961, cc. 334, 817; 1963, c. 145; 1965, c. 1146; 1971, c. 107; 1973, cc. 478, 757.)

Editor's Note.—

The 1971 amendment, in subdivision (6), inserted "soybeans, corn, hay, tobacco" in the first sentence and added the second sentence.

The first 1973 amendment inserted "cucumbers" in subdivision (6).

The second 1973 amendment added subdivision (8).

As the rest of the section was not changed by the amendments, only the opening paragraph and subdivisions (6) and (8) are set out.

§ 20-52. Application for registration and certificate of title.

A mobile home is a motor vehicle under § 20-38 (17), and is subject to the mandatory provisions of the statutes relating to the registration of motor vehicles in this

State. King Homes, Inc. v. Bryson, 273 N.C. 84, 159 S.E.2d 329 (1968).

Cited in Ferguson v. Morgan, 282 N.C. 83, 191 S.E.2d 817 (1972).

§ 20-52.1. Manufacturer's certificate of transfer of new motor vehicle.

(c) Upon sale of a new vehicle by a dealer to a consumer-purchaser, the dealer shall execute in the presence of a person authorized to administer oaths an assignment of the manufacturer's certificate of origin for the vehicle, including in such assignment the name and address of the transferee and no title to a new motor vehicle acquired by a dealer under the provisions of subsection (a) and (b) of this section shall pass or vest until such assignment is executed and the motor vehicle delivered to the transferee.

Any dealer transferring title to, or an interest in, a new vehicle shall deliver the manufacturer's certificate of origin duly assigned in accordance with the foregoing provision to the transferee at the time of delivering the vehicle, except that where a security interest is obtained in the motor vehicle from the transferee in payment of the purchase price or otherwise, the transferor shall deliver the manufacturer's certificate of origin to the lienholder and the lienholder shall forthwith forward the manufacturer's certificate of origin together with the transferee's application for certificate of title and necessary fees to the Department. Any person who delivers or accepts a manufacturer's certificate of origin assigned in blank shall be guilty of a misdemeanor. (1961 c. 835, s. 4; 1967 c. 863.)

Editor's Note. — The 1967 amendment rewrote subsection (c).

As subsections (a) and (b) were not changed by the amendment, they are not set out.

A mobile home is a motor vehicle under

§ 20-38 (17), and is subject to the mandatory provisions of the statutes relating to the registration of motor vehicles in this State. *King Homes, Inc. v. Bryson*, 273 N.C. 84, 159 S.E.2d 329 (1968).

§ 20-55. Examination of registration records and index of stolen and recovered vehicles.—The Department, upon receiving application for any transfer of registration or for original registration of a vehicle, other than a new vehicle sold by a North Carolina dealer, shall first check the engine and serial numbers shown in the application with its record of registered motor vehicles, and against the index of stolen and recovered motor vehicles required to be maintained by this Article. (1937, c. 407, s. 20; 1971, c. 1070, s. 2.)

Editor's Note. — The 1971 amendment substituted "with its record" for "against the indexes."

§ 20-56. Registration indexes.—The Department shall file each application received, and when satisfied as to the genuineness and regularity thereof, and that the applicant is entitled to register such vehicle and to the issuance of a certificate of title, shall register the vehicle therein described and keep a record thereof as follows:

- (1) Under a distinctive registration number assigned to the vehicle;
- (2) Alphabetically, under the name of the owner;
- (3) Under the motor number or any other identifying number of the vehicle; and
- (4) In the discretion of the Department, in any other manner it may deem advisable. (1937, c. 407, s. 20½; 1949, c. 583, s. 5; 1971, c. 1070, s. 3.)

Editor's Note. — The 1971 amendment cards" preceding "as follows" in the deleted "in suitable books or on index introductory language.

§ 20-57. The Department to issue certificate of title and registration card.

(b) The registration card shall be of a size not to exceed 2¾ inches by 3½ inches and shall be delivered to the owner and shall contain upon the face thereof the name and address of the owner, space for owner's signature, the registration number assigned to the vehicle, and such description of the vehicle as determined

by the Commissioner, provided that if there are more than two owners the Department may show only two owners on the registration card and indicate that additional owners exist by placing after the names listed "et al." Upon application to the Department, the registered owner may acquire additional copies of the registration card at a fee of fifty cents (50¢) each.

(d) The certificate of title shall contain upon the face thereof the identical information required upon the face of the registration card except the abbreviation "et al." if such appears and in addition thereto the name of all owners, the date of issuance and all liens or encumbrances disclosed in the application for title. All such liens or encumbrances shall be shown in the order of their priority, according to the information contained in such application.

(1973, c. 72; c. 764, ss. 1-3.)

Editor's Note.—

The first 1973 amendment, effective July 1, 1973, deleted, at the end of the first sentence of subsection (b), "and upon the reverse side a form for endorsement of notice to the Department upon transfer of the vehicle."

The second 1973 amendment, effective Jan. 1, 1975, inserted "of a size not to exceed 2¾ inches by 3½ inches and shall be" near the beginning of subsection (b) and added the proviso to the first sentence of

subsection (b). The amendment also inserted "except the abbreviation 'et al.' if such appears" and "the name of all owners" in subsection (d). The second amendatory act directed that "the name of all owners" be inserted "immediately after the word 'the'." In the section as set out above, the insertion has been made before, rather than after, "the."

As the rest of the section was not changed by the amendments, only subsections (b) and (d) are set out.

§ 20-58. Perfection by indication of security interest on certificate of title.—Except as provided in G.S. 20-58.8, a security interest in a vehicle of a type for which a certificate of title is required shall be perfected only as hereinafter provided.

- (1) If the vehicle is not registered in this State, the application for notation of a security interest shall be the application for certificate of title provided for in G.S. 20-52.
- (2) If the vehicle is registered in this State, the application for notation of a security interest shall be in the form prescribed by the Department, signed by the debtor, and containing the amount, date and nature of the security agreement, and the name and address of the secured party from whom information concerning the security interest may be obtained. The application must be accompanied by the existing certificate of title unless it is in the possession of a prior secured party. If there is an existing certificate of title issued by this or any other jurisdiction in the possession of a prior secured party, the application for notation of the security interest shall in addition, contain the name and address of such prior secured party.
- (3) If the application for notation of security interest is made in order to continue the perfection of a security interest perfected in another jurisdiction, it may be signed by the secured party instead of the debtor. Such application shall be accompanied by documentary evidence of a perfected security interest. No such application shall be valid unless an application for a certificate of title has been made in North Carolina. (1937, c. 407, s. 22; 1955, c. 554, s. 2; 1961, c. 835, s. 6; 1969, c. 838, s. 1.)

Editor's Note.—

Session Laws 1969, c. 838, effective Oct. 1, 1969, rewrote §§ 20-58 through 20-58.8, relating to notation of security interest on certificates of title, so as to make them conform to the Uniform Commercial Code.

Section 2 of the 1969 act provides: "This act shall not be construed so as to invalidate any security interest in a motor vehicle properly perfected in North Carolina prior to the effective date of this act."

For case law survey as to credit transactions, see 44 N.C.L. Rev. 956 (1966).

Opinions of Attorney General. — Mr. Eric L. Gooch, Director, Sales and Use Tax Division, N.C. Department of Revenue, 40 N.C.A.G. 446 (1969).

Purpose.—The manifest purpose of § 20-58 et seq. is to provide notice by recording the security interest on the certificate of title. *Ferguson v. Morgan*, 14 N.C. App. 520, 188 S.E.2d 672 (1972).

Provisions of the Uniform Commercial Code with reference to the place for filing financing statements have no application to vehicles subject to registration with the Department of Motor Vehicles. *Ferguson v. Morgan*, 282 N.C. 83, 191 S.E.2d 817 (1972).

Necessity for Recording Mortgage Or Other Lien.—It is no longer necessary to record the mortgage or other lien on vehicles required to be registered under the State motor vehicle laws in the county where the debtor resides. *Ferguson v. Morgan*, 282 N.C. 83, 191 S.E.2d 817 (1972).

Plaintiff Estopped from Asserting Lien on Vehicles Where It Did Nothing to Perfect Security Interest.—See *Wayne Fin. Corp. v. Shivar*, 8 N.C. App. 489, 174 S.E.2d 876 (1970).

Stated in Nationwide Mut. Ins. Co. v. Hayes, 276 N.C. 620, 174 S.E.2d 511 (1970).

§ 20-58.1. Duty of the Department upon receipt of application for notation of security interest.—(a) Upon receipt of an application for notation of security interest, the required fee and accompanying documents required by G.S. 20-58, the Department, if it finds the application and accompanying documents in order, shall either endorse upon the certificate of title or issue a new certificate of title containing, the name and address of each secured party, the amount of each security interest, and the date of perfection of each security interest as determined by the Department. The Department shall deliver or mail the certificate to the first secured party named in it and shall also notify the new secured party that his security interest has been noted upon the certificate of title.

(b) If the certificate of title is in the possession of some prior secured party, the Department, when satisfied that the application is in order, shall procure the certificate of title from the secured party in whose possession it is being held, for the sole purpose of noting the new security interest. Upon request of the Department, a secured party in possession of a certificate of title shall forthwith deliver or mail the certificate of title to the Department. Such delivery of the certificate does not affect the rights of any secured party under his security agreement. (1961, c. 835, s. 6; 1969, c. 838, s. 1.)

Cross Reference. — See Editor's note under § 20-58.

Notation Is Necessary for Perfection of Security Interest as of Date Provided in § 20-58.2.—A security interest would be perfected as of the date provided in § 20-58.2 only if the notation of the security interest is actually made on the certificate of

title by the Department as provided in this section. *Ferguson v. Morgan*, 14 N.C. App. 520, 188 S.E.2d 672 (1972).

Quoted in *Wayne Fin. Corp. v. Shivar*, 8 N.C. App. 489, 174 S.E.2d 876 (1970); *Ferguson v. Morgan*, 282 N.C. 83, 191 S.E.2d 817 (1972).

§ 20-58.2. Date of perfection.—If the application for notation of security interest with the required fee is delivered to the Department within ten days after the date of the security agreement, the security interest is perfected as of that date. Otherwise, the security interest is perfected as of the date of delivery of the application to the Department. (1961, c. 835, s. 6; 1969, c. 838, s. 1.)

Cross Reference. — See Editor's note under § 20-58.

Notation Is Necessary for Perfection of Security Interest as of Date Provided in Section.—A security interest would be perfected as of the date provided in this section only if the notation of the security interest is actually made on the certificate of title by the Department as provided in § 20-58.1. *Ferguson v. Morgan*, 14 N.C. App. 520, 188 S.E.2d 672 (1972).

Since security interest claimed by plaintiff was never actually recorded on the certificate of title, he never had a perfected security interest on the vehicle in question. *Ferguson v. Morgan*, 14 N.C. App. 520, 188 S.E.2d 672 (1972).

Applied in *Ferguson v. Morgan*, 282 N.C. 83, 191 S.E.2d 817 (1972).

§ 20-58.3. Notation of assignment of security interest on certificate of title.—An assignee of a security interest may have the certificate of title endorsed or issued with the assignee named as the secured party, upon delivering to the Department on a form prescribed by the Department, with the required fee, an assignment by the secured party named in the certificate together with the certificate of title. The assignment must contain the address of the assignee from which information concerning the security interest may be obtained. If the certificate of title is in the possession of some other secured party the procedure prescribed by G.S. 20-58.1 (b) shall be followed. (1961, c. 835, s. 6; 1969, c. 838, s. 1.)

Cross Reference. — See Editor's note under § 20-58.

§ 20-58.4. Release of security interest.—(a) Upon the satisfaction or other discharge of a security interest in a vehicle for which the certificate of title is in the possession of the secured party, the secured party shall within ten days after demand and, in any event, within thirty days, execute a release of his security interest, in the space provided therefor on the certificate or as the Department prescribes, and mail or deliver the certificate and release to the next secured party named therein, or if none, to the owner or other person authorized to receive the certificate for the owner.

(b) Upon the satisfaction or other discharge of a security interest in a vehicle for which the certificate of title is in the possession of a prior secured party, the secured party whose security interest is satisfied shall within ten days execute a release of his security interest in such form as the Department prescribes and mail or deliver the same to the owner or other person authorized to receive the same for the owner.

(c) An owner, upon securing the release of any security interest in a vehicle shown upon the certificate of title issued therefor, may exhibit the documents evidencing such release, signed by the person or persons making such release, and the certificate of title to the Department which shall, when satisfied as to the genuineness and regularity of the release, issue to the owner either a new certificate of title in proper form or an endorsement or rider attached thereto showing the release of the security interest.

(d) If an owner exhibits documents evidencing the release of a security interest as provided in subsection (c) of this section but is unable to furnish the certificate of title to the Department because it is in possession of a prior secured party, the Department, when satisfied as to the genuineness and regularity of the release, shall procure the certificate of title from the person in possession thereof for the sole purpose of noting thereon the release of the subsequent security interest, following which the Department shall return the certificate of title to the person from whom it was obtained and notify the owner that the release has been noted on the certificate of title.

(e) If it is impossible for the owner to secure from the secured party the release contemplated by this section, the owner may exhibit to the Department such evidence as may be available showing satisfaction or other discharge of the debt secured, together with a sworn affidavit by the owner that the debt has been satisfied, which the Department may treat as a proper release for purposes of this section when satisfied as to the genuineness, truth and sufficiency thereof. Prior to cancellation of a security interest under the provisions of this subsection, at least fifteen days' notice of the pendency thereof shall be given to the secured party at his last known address by the Department by registered letter. (1961, c. 835, s. 6; 1969, c. 838, s. 1.)

Cross Reference. — See Editor's note under § 20-58.

§ 20-58.5. Duration of security interests in favor of firms which cease to do business. — Any security interest recorded in favor of a firm or corporation which, since the recording of such security interest, has dissolved,

ceased to do business, or gone out of business for any reason, and which remains of record as a security interest of such firm or corporation for a period of more than three years from the date of the recording thereof, shall become null and void and of no further force and effect. (1961, c. 835, s. 6; 1969, c. 838, s. 1.)

Cross Reference. — See Editor's note under § 20-58.

§ 20-58.6. Duty of secured party to disclose information. — A secured party named in a certificate of title shall, upon written request of the Department, the owner or another secured party named on the certificate, disclose information as to his security agreement and the indebtedness secured by it. (1961, c. 835, s. 6; 1969, c. 838, s. 1.)

Cross Reference. — See Editor's note under § 20-58.

§ 20-58.7. Cancellation of certificate.—The cancellation of a certificate of title shall not, in and of itself, affect the validity of a security interest noted on it. (1961, c. 835, s. 6; 1969, c. 838, s. 1.)

Cross Reference. — See Editor's note under § 20-58.

§ 20-58.8. Applicability of §§ 20-58 through 20-58.8; use of term "lien".—(a) The provisions of G.S. 20-58 through 20-58.8 apply to the perfection of security interests pursuant to G.S. 25-9-302.

(b) The provisions of G.S. 20-58 through 20-58.8 inclusive shall not apply to or affect:

- (1) A lien given by statute or rule of law for storage of a motor vehicle or to a supplier of services or materials for a vehicle;
- (2) A lien arising by virtue of a statute in favor of the United States, this State or any political subdivision of this State; or
- (3) A security interest in a vehicle created by a manufacturer or by a dealer in new or used vehicles who holds the vehicle in his inventory. Such security interests shall be perfected by filing a financing statement under article 9 of the Uniform Commercial Code.

(c) When the term "lien" is used in other sections of this chapter, or has been used prior to October 1, 1969, with reference to transactions governed by G.S. 20-58 through 20-58.8, to describe contractual agreements creating security interests in personal property, the term "lien" shall be construed to refer to a "security interest" as the term is used in G.S. 20-58 through 20-58.8 and the Uniform Commercial Code. (1961, c. 835, s. 6; 1969, c. 838, s. 1.)

Cross Reference. — See Editor's note under § 20-58.

§ 20-58.9: Repealed by Session Laws 1969, c. 838, s. 3, effective October 1, 1969.

Cross Reference. — See Editor's note under § 20-58.

§ 20-58.10. Effective date of §§ 20-58 to 20-58.9.

Applied in *Ferguson v. Morgan*, 282 N.C. 83, 191 S.E.2d 817 (1972).

§ 20-63. Registration plates to be furnished by the Department; requirements; surrender and reissuance; displaying; preservation and cleaning; alteration or concealment of numbers; commission contracts for issuance.

(h) Commission Contracts for Issuance of Plates and Certificates.—All registration plates, registration certificates and certificates of title issued by the De-

partment, outside of those issued from the Raleigh offices of the said Department and those issued and handled through the United States mail, shall be issued insofar as practicable and possible through commission contracts entered into by the Department for the issuance of such plates and certificates in localities throughout North Carolina with persons, firms, corporations or governmental subdivisions of the State of North Carolina and the Department shall make a reasonable effort in every locality, except as hereinbefore noted, to enter into a commission contract for the issuance of such plates and certificates and a record of these efforts shall be maintained in the Department. In the event the Department is unsuccessful in making commission contracts as hereinbefore set out it shall then issue said plates and certificates through the regular employees of the Department. Whenever registration plates, registration certificates and certificates of title are issued by the Department through commission contract arrangements, the Department shall provide proper supervision of such distribution. Commission contracts entered into hereunder shall provide for the payment of compensation at a rate per registration plate as may be set by the General Assembly. Nothing contained in this subsection will allow or permit the operation of fewer outlets in any county in this State than are now being operated. (1937, c. 407, s. 27; 1943, c. 726; 1951, c. 102, ss. 1-3; 1955, c. 119, s. 1; 1961, c. 360, s. 4; c. 861, s. 2; 1963, c. 552, s. 6; c. 1071; 1965, c. 1088; 1969, c. 1140; 1971, c. 945; 1973, c. 629.)

Editor's Note.—

The 1969 amendment, effective July 1, 1969, substituted "twenty-seven cents (27¢)" for "twenty-two cents (22¢)" near the end of subsection (h).

The 1971 amendment, effective July 1, 1971, substituted "thirty [cents] (30¢)" for "twenty-seven cents (27¢)" in the fourth sentence of subsection (h).

The 1973 amendment substituted "a rate per registration plate as may be set by the General Assembly" for "the rate of thirty [cents] (30¢) per registration plate" at the end of the fourth sentence of subsection (h).

As the rest of the section was not changed by the amendments, only subsection (h) is set out.

License plates are a receipt for the privilege of using North Carolina highways; thus any aid they give to commerce relates only to intrastate movements. *Hodgson v. Hyatt Realty & Inv. Co.*, 353 F. Supp. 1363 (M.D.N.C. 1973).

A North Carolina license plate remains the property of the State and can be summarily seized under certain conditions under subsection (a). *Hodgson v. Hyatt Realty & Inv. Co.*, 353 F. Supp. 1363 (M.D.N.C. 1973).

Subsection (h) was intended to further the public convenience by setting up local license plate distribution points throughout the State. *Hodgson v. Hyatt Realty & Inv. Co.*, 353 F. Supp. 1363 (M.D.N.C. 1973).

As well as to eliminate the necessity of employing temporary Department personnel for a 45 day period between January 1 and February 15 of each year when the vast bulk of the license plates are issued. *Hodgson v. Hyatt Realty & Inv. Co.*, 353 F. Supp. 1363 (M.D.N.C. 1973).

The Legislature did not intend to aid or facilitate the functioning of an interstate facility, in this case the state highways. *Hodgson v. Hyatt Realty & Inv. Co.*, 353 F. Supp. 1363 (M.D.N.C. 1973).

Those commissioned to sell license plates are not dealing in interstate commerce, but perform a general tax collecting effort, since this section and § 20-97 do not earmark the funds for any specific project or road, and not all of the tax even goes to the Department of Highways. *Hodgson v. Hyatt Realty & Inv. Co.*, 353 F. Supp. 1363 (M.D.N.C. 1973).

The tax collection from license sales under subsection (h) is essentially a local activity which Congress did not intend to include under the Fair Labor Standards Act. *Hodgson v. Hyatt Realty & Inv. Co.*, 353 F. Supp. 1363 (M.D.N.C. 1973).

The maximum punishment for a violation of this section or § 20-111 would be that prescribed by § 20-176 (b), namely, a fine of not more than one hundred dollars or imprisonment in the county or municipal jail for not more than 60 days, or both such fine and imprisonment. *State v. Tolley*, 271 N.C. 459, 156 S.E.2d 858 (1967).

§ 20-63.1. Department may cause plates to be reflectorized. — The Department of Motor Vehicles is hereby authorized to cause vehicle license plates for 1968 and future years to be completely treated with reflectorized materials designed to increase visibility and legibility of license plates at night. (1967, c. 8.)

§ 20-64. Transfer of registration plates to another vehicle.

(f) Whenever the owner of a registered vehicle transfers or assigns his interest to another, such transferor may, by surrendering the registration plate to the Department, secure a refund of the unexpired portion of such plate on a monthly basis, beginning the first day of the month following surrender of the plate to the Department, provided, that the annual license fee for such surrendered plate is sixty dollars (\$60.00) or more.

(1967, c. 995.)

Editor's Note.—

The 1967 amendment rewrote subsection (f).

As the other subsections were not affected by the amendment, they are not set out.

Stated in *Nationwide Mut. Ins. Co. v. Hayes*, 276 N.C. 620, 174 S.E.2d 511 (1970).

§ 20-67. Notice of change of address or name.

Stated in *State v. Teasley*, 9 N.C. App. 477, 176 S.E.2d 838 (1970).

§ 20-71. Altering or forging certificate of title, registration card or application, a felony; reproducing or possessing blank certificate of title.—(a) Any person who, with fraudulent intent, shall alter any certificate of title, registration card issued by the Department, or any application for a certificate of title or registration card, or forge or counterfeit any certificate of title or registration card purported to have been issued by the Department under the provisions of this Article, or who, with fraudulent intent, shall alter, falsify or forge any assignment thereof, or who shall hold or use any such certificate, registration card, or application, or assignment, knowing the same to have been altered, forged or falsified, shall be guilty of a felony and upon conviction thereof shall be punished in the discretion of the court.

(b) It shall be unlawful to reproduce by any means or possess a blank North Carolina motor vehicle certificate of title or facsimile thereof. The provisions of this subsection shall not apply to agents or employees of the Department while acting in the course and scope of their employment or any printing company or its employees while employed by the Department to print or reproduce such certificates of title while said company or its employees are acting within the scope of such employment. Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor punishable by a fine of not less than one hundred dollars (\$100.00) and not more than five hundred dollars (\$500.00), imprisonment for not more than six months or both such fine and imprisonment. (1937, c. 407, s. 35; 1959, c. 1264, s. 2; 1971, c. 99.)

Cross Reference.—

As to penalty for a violation of this article declared to constitute a felony, see § 20-177.

Editor's Note. — The 1971 amendment

designated the former section as subsection (a) and added subsection (b).

§ 20-71.1. Registration evidence of ownership; ownership evidence of defendant's responsibility for conduct of operation.**Purpose, etc.—**

The purpose of this section is to establish a ready means of proving agency in any case where it is charged that the negligence of a nonowner operator causes damage to the property or injury to the person of another. It does not and was not intended to have any other force or effect. *Phillips v. Utica Mut. Ins. Co.*, 4 N.C. App. 655, 167 S.E.2d 542 (1969).

When Section Applies.—This section

applies when plaintiff, upon sufficient allegations, seeks to hold the owner liable for the negligence of a nonowner operator under the doctrine of respondeat superior. *Phillips v. Utica Mut. Ins. Co.*, 4 N.C. App. 655, 167 S.E.2d 542 (1969); *Allen v. Schiller*, 6 N.C. App. 392, 169 S.E.2d 924 (1969); *Dupree v. Batts*, 276 N.C. 68, 170 S.E.2d 918 (1969).

The section was plainly meant to apply in a civil case. *State v. Cotten*, 2 N.C. App. 305, 163 S.E.2d 100 (1968).

But It Does Not Apply to Action Seeking Declaration of Insurers' Rights and Obligations. — An action which is not an action to recover damages for injury to the person or to the property or for the death of a person arising out of an accident or collision involving a motor vehicle, but is an action brought by an insurer against another insurer to have the court declare the rights and obligations of the insurers under their policies of insurance, is not the type of case to which this section was intended to apply. *Aetna Cas. & Sur. Co. v. Lumbermen's Mut. Cas. Co.*, 11 N.C. App. 490, 181 S.E.2d 727 (1971).

This section creates a presumption of ownership only in those specific instances enumerated. *State v. Cotten*, 2 N.C. App. 305, 163 S.E.2d 100 (1968).

Defendant's testimony that he was the registered owner of a truck made a prima facie case of agency sufficient to support, but not compel, a verdict against him under the doctrine of respondeat superior for damages proximately caused by the negligence of the operator thereof. *Brown v. Nesbitt*, 271 N.C. 532, 157 S.E.2d 85 (1967).

Where Defendant Admitted Ownership of Automobile.—Plaintiff was entitled to have his case submitted to the jury where defendant admitted ownership of the automobile and conceded that it was registered in his name. *White v. Vananda*, 13 N.C. App. 19, 185 S.E.2d 247 (1971).

The two subsections, etc.—

In accord with 1st paragraph in original. See *State v. Cotten*, 2 N.C. App. 305, 163 S.E.2d 100 (1968).

Proof of Ownership Alone Takes Case, etc.—

Admission of ownership of the vehicle involved in the collision requires the submission to the jury of the question of liability under the doctrine of respondeat superior. *Wilcox v. Glover Motors, Inc.*, 269 N.C. 473, 153 S.E.2d 76 (1967).

Proof of ownership is prima facie proof of agency. *Branch v. Dempsey*, 265 N.C. 733, 145 S.E.2d 395 (1965).

Upon a showing of ownership, the artificial force of the prima facie rule under this section seems to permit a finding of agency. *Torres v. Smith*, 269 N.C. 546, 153 S.E.2d 129 (1967).

By reason of this section, the agency issue is for determination by the jury. *Allen v. Schiller*, 6 N.C. App. 392, 169 S.E.2d 924 (1969).

Evidence of ownership and registration of the motor vehicle involved in the collision must, by force of this statute, be regarded as prima facie evidence that at the time and place of the injury caused by it the motor vehicle was being operated with the authority, consent and knowledge, and under the control of a person for whose conduct the defendant was legally responsible. *Allen v. Schiller*, 6 N.C. App. 392, 169 S.E.2d 924 (1969).

Proof of registration of a vehicle in the name of a father is prima facie evidence of ownership by him and agency in the driver under this section. Such prima facie evidence of ownership in the father is sufficient to carry the case to the jury against him, notwithstanding that further evidence is sufficient, if true, to rebut the prima facie evidence that the father owned the motorcycle and that the minor was driving it as the owner's agent. *Bowen v. Gardner*, 275 N.C. 363, 168 S.E.2d 47 (1969).

But Defendant May Be Entitled to Instruction.—

Where plaintiff relied solely on this section to take the issue of agency to the jury and defendant's evidence tended to show that the driver was on a purely personal mission at the time of the accident, defendant, without request therefor, was entitled to a peremptory instruction, related directly to the particular facts shown by defendant's positive evidence, to answer the issue of agency in the negative. A general instruction to so answer the issue if the jury believed the facts to be as defendant's evidence tended to show, without relating the instruction directly to defendant's evidence in the particular case, was insufficient. *Belmany v. Overton*, 270 N.C. 400, 154 S.E.2d 538 (1967).

It Merely Creates, etc.—

This section merely creates a rule of evidence. *Duckworth v. Metcalf*, 268 N.C. 340, 150 S.E.2d 485 (1966).

This section was designed and intended to, and does, establish a rule of evidence which facilitates proof of ownership and agency in automobile collision cases where one of the vehicles is operated by a person other than the owner. It was not enacted and designed to render proof unnecessary, nor does proof of registration or ownership make out a prima facie case for the jury on the issue of negligence. Neither is it sufficient to send the case to the jury, or support a finding favorable to plaintiff under the negligence issue, or to support a finding against a defendant on the issue of negligence. *Branch v.*

Dempsey, 265 N.C. 733, 145 S.E.2d 395 (1965).

This section was designed and intended to apply, and does apply, only in those cases where the plaintiff seeks to hold an owner liable for the negligence of a non-owner operator under the doctrine of respondeat superior. Its purpose is to establish a ready means of proving agency in any case where it is charged that the negligence of a nonowner operator causes damage to the property or injury to the person of another or for the death of a person, arising out of an accident or collision involving a motor vehicle. It does not have, and was not intended to have, any other force or effect. *State v. Cotten*, 2 N.C. App. 305, 163 S.E.2d 100 (1968).

And Does Not Change, etc.—

This section does not abrogate the well-settled rule of law that mere ownership of an automobile does not impose liability upon the owner for injury to another by the negligent operation of the vehicle on the part of a driver, who was not, at the time of the injury, the employee or agent of the owner or who was not, at such time, acting in the course of his employment or agency. *Duckworth v. Metcalf*, 268 N.C. 340, 150 S.E.2d 485 (1966).

Nor Compel a Verdict against Owner.—

Proof of ownership of the automobile by one not the driver makes out a prima facie case of agency of the driver for the owner at the time of the driver's negligent act or omission, but it does not compel a verdict against the owner upon the principle of respondeat superior. *Duckworth v. Metcalf*, 268 N.C. 340, 150 S.E.2d 485 (1966).

Effect of Establishing Facts with Respect to Agency. — Whenever the facts with respect to agency are established, without contradiction, it is the duty of the court to disregard this section, even to the point of setting aside a verdict which this section permits. *Manning v. State Farm Mut. Auto. Ins. Co.*, 243 F. Supp. 619 (W.D.N.C. 1965).

Beginning and Termination of Presumption as to Agency.—This section creates no presumption and gives rise to no inference as to the existence of any agency relation before the operation of the vehicle begins or after it stops. *Branch v. Dempsey*, 265 N.C. 733, 145 S.E.2d 395 (1965).

In the absence of evidence of agency, apart from the mere act of driving a motor vehicle registered in the name of another, the agency must be deemed to have terminated when the driver has brought the vehicle to a final stop and has

left it. *Branch v. Dempsey*, 265 N.C. 733, 145 S.E.2d 395 (1965).

Presumption Is Not One, etc.—

The burden of proof continues to rest upon the plaintiff to prove an agency relationship between the driver and the owner at the time of the driver's negligence which caused the injury. *Duckworth v. Metcalf*, 268 N.C. 340, 150 S.E.2d 485 (1966).

This section is simply a rule of evidence to shift the burden of going forward with the proof to those persons better able to establish the true facts than are plaintiffs. *Manning v. State Farm Mut. Auto. Ins. Co.*, 243 F. Supp. 619 (W.D.N.C. 1965).

Both Negligence and Agency Must Be, etc.—

In accord with 5th paragraph in original. See *Belmany v. Overton*, 270 N.C. 400, 154 S.E.2d 538 (1967).

Non constat the statute, it is still necessary for the party aggrieved to allege both negligence and agency in his pleading and to prove both at the trial. *Branch v. Dempsey*, 265 N.C. 733, 145 S.E.2d 395 (1965); *Belmany v. Overton*, 270 N.C. 400, 154 S.E.2d 538 (1967).

Proof of registration is prima facie evidence of ownership and that the agent was acting for the owner's benefit and in the scope of his employment, but there must be allegation of agency to make evidence of agency admissible against the principal. *Dupree v. Batts*, 276 N.C. 68, 170 S.E.2d 918 (1969).

Proof of ownership or proof of registration under this section shall be prima facie evidence of ownership. However, evidence, direct, circumstantial, or prima facie, does not take away the necessity of alleging agency if the principal is to be held liable. *Dupree v. Batts*, 276 N.C. 68, 170 S.E.2d 918 (1969).

Defendant's admission and stipulation that the automobile involved in the accident was registered in her name is sufficient evidence to support, but not compel, a finding for the plaintiffs that defendant was legally responsible for the acts and omissions of the codefendant in the operation and parking of the automobile; but before the plaintiffs can recover they must prove by evidence competent against the owner defendant that the codefendant was negligent and that her negligence was the proximate cause of plaintiffs' damages. *Tuttle v. Beck*, 7 N.C. App. 337, 172 S.E.2d 90 (1970).

No Authority for Vicarious Admissions of Negligence.—Sections 20-166 and 20-166.1 do not give blanket authority to

whomsoever may drive a vehicle registered in the name of another to make statements as to the manner of his driving so as to cause such statements to be competent in evidence against the registered owner as vicarious admissions of negligence for which owner is legally liable. *Branch v. Dempsey*, 265 N.C. 733, 145 S.E.2d 395 (1965).

This section makes no reference to any authority of the driver to affect the owner's liability to other persons otherwise than by the driver's conduct in the operation and control of the vehicle. *Branch v. Dempsey*, 265 N.C. 733, 145 S.E.2d 395 (1965).

Admission by defendant truck owner that his truck was being operated by codefendant is sufficient, as against such owner, to permit a finding that codefendant was driving the truck and, therefore, to bring into operation this section making such fact prima facie proof that codefendant was the agent of the truck owner and was driving the truck in the course of his employment as such agent. *Branch v. Dempsey*, 265 N.C. 733, 145 S.E.2d 395 (1965).

Departure from Course of Employment.

—It is elementary that a principal or employer is not liable for injury due to a negligent act or omission of his agent or employee when such agent or employee

has departed from the course of his employment and embarked upon a mission or frolic of his own. *Duckworth v. Metcalf*, 268 N.C. 340, 150 S.E.2d 485 (1966).

The test is whether the employee or agent was, at the time of the negligent act or omission, about his master's business. *Duckworth v. Metcalf*, 268 N.C. 340, 150 S.E.2d 485 (1966).

If there has been a total departure from the course of the master's business, the employer or principal is not liable for the negligent act or omission of the employee during such departure from the employment relation. *Duckworth v. Metcalf*, 268 N.C. 340, 150 S.E.2d 485 (1966).

But it is not sufficient to take the servant out of the course of his employment, and and thus to relieve the employer from responsibility for the negligent act or omission of the servant, that the servant at the time of such act or omission was violating an instruction or rule of the employer or principal. *Duckworth v. Metcalf*, 268 N.C. 340, 150 S.E.2d 485 (1966).

Applied in *Passmore v. Smith*, 266 N.C. 717, 147 S.E.2d 238 (1966); *Jackson v. Baldwin*, 268 N.C. 149, 150 S.E.2d 37 (1966); *Morris v. Bigham*, 6 N.C. App. 490, 170 S.E.2d 534 (1969).

Quoted in *Perkins v. Cook*, 272 N.C. 477, 158 S.E.2d 584 (1968).

Part 4. Transfer of Title or Interest.

§ 20-72. Transfer by owner.—(a) Whenever the owner of a registered vehicle transfers or assigns his title or interests thereto, he shall remove the license plates. The registration card and plates shall be forwarded to the Department unless the plates are to be transferred to another vehicle as provided in G.S. 20-64. If they are to be transferred to and used with another vehicle, then the endorsed registration card and the plates shall be retained and preserved by the owner. If such registration plates are to be transferred to and used with another vehicle, then the owner shall make application to the Department for assignment of the registration plates to such other vehicle under the provisions of G.S. 20-64. Such application shall be made within 20 days after the date on which such plates are last used on the vehicle to which theretofore assigned.

(b) In order to assign or transfer title or interest in any motor vehicle registered under the provisions of this Article, the owner shall execute in the presence of a person authorized to administer oaths an assignment and warranty of title on the reverse of the certificate of title in form approved by the Department, including in such assignment the name and address of the transferee; and no title to any motor vehicle shall pass or vest until such assignment is executed and the motor vehicle delivered to the transferee. The provisions of this section shall not apply to any foreclosure or repossession under a chattel mortgage or conditional sales contract or any judicial sale.

Any person transferring title or interest in a motor vehicle shall deliver the certificate of title duly assigned in accordance with the foregoing provision to the transferee at the time of delivering the vehicle, except that where a security interest is obtained in the motor vehicle from the transferee in payment of the pur-

chase price or otherwise, the transferor shall deliver the certificate of title to the lienholder and the lienholder shall forward the certificate of title together with the transferee's application for new title and necessary fees to the Department within 20 days. Any person who delivers or accepts a certificate of title assigned in blank shall be guilty of a misdemeanor.

(c) When the Department finds that any person other than the registered owner of a vehicle has in his possession a certificate of title to the vehicle on which there appears an endorsement of an assignment of title but there does not appear in the assignment any designation to show the name and address of the assignee or transferee, the Department shall be authorized and empowered to seize and hold said certificate of title until the assignor whose name appears in the assignment appears before the Department to complete the execution of the assignment or until evidence satisfactory to the Department is presented to the Department to show the name and address of the transferee. (1937, c. 407, s. 36; 1947, c. 219, ss. 4, 5; 1955, c. 554, ss. 5, 6; 1961, c. 360, s. 8; c. 835, s. 8; 1963, c. 552, ss. 3, 4; 1971, c. 678.)

Editor's Note.—

The 1971 amendment deleted, at the end of the first sentence of subsection (a), "and endorse upon the reverse side of the registration card issued for such vehicles the name and address of the transferee and the date of such transfer." The amendment also substituted "The" for "Such" at the beginning of the second sentence of subsection (a).

Requirements Mandatory. — By explicit terms of this section and by interpretation of the Supreme Court, there are definite and mandatory requirements governing transfer of legal title and ownership to a motor vehicle. *Nationwide Mut. Ins. Co. v. Hayes*, 276 N.C. 620, 174 S.E.2d 511 (1970).

Section Not Repealed by Uniform Commercial Code.—The provisions of the Uniform Commercial Code do not override the earlier motor vehicle statutes relating to the transfer of ownership of motor vehicle for the purpose of tort law and liability insurance coverage. *Nationwide Mut. Ins. Co. v. Hayes*, 276 N.C. 620, 174 S.E.2d 511 (1970).

The legislature did not intend to repeal the Motor Vehicles Act in the general repealer section of the Uniform Commercial Code. *Nationwide Mut. Ins. Co. v. Hayes*, 276 N.C. 620, 174 S.E.2d 511 (1970).

The provisions of subsection (b) of this section contain specific, definite and comprehensive terms concerning the transfer of ownership of a motor vehicle. Conversely, the Uniform Commercial Code does not refer to transfer of ownership of motor vehicles, but only refers to the passing of title to property generally described as "goods." Although the word "automobile" comes within the general term of "goods," automobiles are a special class of goods which have long been heavily regulated by public regulatory acts. Subsection (b) is a special statute and the

Uniform Commercial Code is a general statute. Thus, the special statute, even though earlier in point of time, must prevail. *Nationwide Mut. Ins. Co. v. Hayes*, 276 N.C. 620, 174 S.E.2d 511 (1970).

"Title" as Used in Subsection (b) Is Synonymous with "Ownership". — The words "title" and "ownership" are words that may be used interchangeably, and the legislature in enacting the 1963 amendment to subsection (b) of this section used the word "title" as a synonym for the word "ownership." *Nationwide Mut. Ins. Co. v. Hayes*, 276 N.C. 620, 174 S.E.2d 511 (1970).

In enacting the 1963 amendment to subsection (b) of this section (which provides that title to a motor vehicle cannot be transferred from one owner to another until the certificate of title has been duly executed and the vehicle delivered to the transferee), the legislature used the word "title" as a synonym for the word "ownership." *Nationwide Mut. Ins. Co. v. Fireman's Fund Ins. Co.*, 279 N.C. 240, 182 S.E.2d 571 (1971).

The definition of "owner" in § 20-279.1 as the holder of the legal title is compatible with subsection (b) of this section, requiring the vendor to execute an assignment and warranty of title on the reverse of the certificate of title in order to assign or transfer any interest in the motor vehicle. *Nationwide Mut. Ins. Co. v. Hayes*, 276 N.C. 620, 174 S.E.2d 511 (1970).

No material conflict will arise between the Financial Responsibility Act and subsection (b) of this section, as amended by the legislature of 1963, by holding subsection (b) of this section to be controlling as to ownership of a motor vehicle for purposes of tort liability and insurance coverage. Rather, such an interpretation would strengthen and complement the purposes of the Financial Responsibility Act of 1953.

Nationwide Mut. Ins. Co. v. Hayes, 276 N.C. 620, 174 S.E.2d 511 (1970).

Vesting of Title.—

No title passes to the purchaser of a motor vehicle until (1) the certificate of title has been assigned by the vendor, (2) delivered to the vendee or his agent, and (3) application made for a new certificate of title. **International Serv. Ins. Co. v. Iowa Nat'l Mut. Ins. Co.**, 276 N.C. 243, 172 S.E.2d 55 (1970).

After 1 July 1961, the effective date of the amendments, no title passes to the purchaser of a motor vehicle until (1) the certificate of title has been assigned by the vendor, (2) delivered to the vendee or his agent, and (3) application made for a new certificate of title. **Younts v. State Farm Mut. Auto. Ins. Co.**, 281 N.C. 582, 189 S.E.2d 137 (1972).

Same—For Purposes of Tort Law and Insurance Coverage. — After 1 July 1963 (the effective date of the 1963 amendment to this section) for purposes of tort law and liability insurance coverage, no ownership passes to the purchaser of a motor vehicle which requires registration under the Motor Vehicle Act of 1937 until (1) the owner executes, in the presence of a person authorized to administer oaths, an assignment and warranty of title on the reverse of the certificate of title, including the name and address of the transferee,

(2) there is an actual or constructive delivery of the motor vehicle, and (3) the duly assigned certificate of title is delivered to the transferee. In the event a security interest is obtained in the motor vehicle from the transferee, the requirement of delivery of the duly assigned certificate of title is met by delivering it to the lien holder. **Nationwide Mut. Ins. Co. v. Hayes**, 276 N.C. 620, 174 S.E.2d 511 (1970).

Same—Former Law. — Prior to 1961, a purchaser of a motor vehicle acquired title notwithstanding the vendor's failure to deliver a certificate of title or the purchaser's failure to make application for a new certificate to the Department of Motor Vehicles. **International Serv. Ins. Co. v. Iowa Nat'l Mut. Ins. Co.**, 276 N.C. 243, 172 S.E.2d 55 (1970); **Nationwide Mut. Ins. Co. v. Hayes**, 276 N.C. 620, 174 S.E.2d 511 (1970).

The 1961 amendments to subsection (b) of this section and § 20-75 were intended to and did change the law with respect to transfer of ownership of motor vehicles. **International Serv. Ins. Co. v. Iowa Nat'l Mut. Ins. Co.**, 276 N.C. 243, 172 S.E.2d 55 (1970).

Cited in Manning v. State Farm Mut. Auto. Ins. Co., 243 F. Supp. 619 (W.D.-N.C. 1965); **Younts v. State Farm Mut. Auto. Ins. Co.**, 13 N.C. App. 426, 185 S.E.2d 730 (1972).

§ 20-73. New owner to secure new certificate of title.

And Vendor Should Not Be Penalized, etc.—

There is nothing in the statute which suggests dealer, a vendor, should be penalized and held liable because of the failure of a purchaser to perform his statutory

duty. **International Serv. Ins. Co. v. Iowa Nat'l Mut. Ins. Co.**, 5 N.C. App. 236, 168 S.E.2d 66 (1969).

Cited in International Serv. Ins. Co. v. Iowa Nat'l Mut. Ins. Co., 276 N.C. 243, 172 S.E.2d 55 (1970).

§ 20-74. Penalty for failure to make application for transfer within the time specified by law.

Cited in International Serv. Ins. Co. v. Iowa Nat'l Mut. Ins. Co., 276 N.C. 243, 172 S.E.2d 55 (1970); **Nationwide Mut. Ins.**

Co. v. Hayes, 7 N.C. App. 294, 172 S.E.2d 269 (1970).

§ 20-75. When transferee is dealer or insurance company.—When the transferee of any vehicle registered under the foregoing provision of this article is a licensed dealer who holds the same for resale and operates the same only for purpose of demonstration under a dealer's number plate, or a duly licensed insurance company taking such vehicle for sale or disposal for salvage purposes where such title is taken as a part of a bona fide claim settlement transaction and only for the purpose of resale, such transferee shall not be required to register such vehicle nor forward the certificate of title to the Department as provided in § 20-73. To assign or transfer title or interest in such vehicle, the dealer or insurance company shall execute in the presence of a person authorized to administer oaths a reassignment and warranty of title on the reverse of the certificate of title in form approved by the Department, including in such reassignment the name and address of the transferee, and title to such vehicle shall not pass or vest until such reassignment is executed and the motor vehicle delivered to the transferee.

The dealer transferring title or interest in a motor vehicle shall deliver the certificate of title duly assigned in accordance with the foregoing provision to the transferee at the time of delivering the vehicle, except that where a security interest in the motor vehicle is obtained from the transferee in payment of the purchase price or otherwise, the dealer shall deliver the certificate of title to the lienholder and the lienholder shall forward the certificate of title together with the transferee's application for new certificate of title and necessary fees to the Department within twenty (20) days. Any person who delivers or accepts a certificate of title assigned in blank shall be guilty of a misdemeanor. (1937, c. 407, s. 39; 1961, c. 835, s. 9; 1963, c. 552, s. 5; 1967, c. 760.)

Editor's Note.—

The 1967 amendment inserted in the first paragraph the provisions relating to insurance companies.

The 1961 amendments to this section and § 20-72(b) were intended to and did change

the law with respect to transfer of ownership of motor vehicles. *International Serv. Ins. Co. v. Iowa Nat'l Mut. Ins. Co.*, 276 N.C. 243, 172 S.E.2d 55 (1970).

Cited in *Nationwide Mut. Ins. Co. v. Hayes*, 276 N.C. 620, 174 S.E.2d 511 (1970).

§ 20-77. Transfer by operation of law; sale under mechanic's or storage lien; unclaimed vehicles.

(b) In the event of transfer as upon inheritance, devise or bequest, the Department shall, upon receipt of a certified copy of a will, letters of administration and/or a certificate from the clerk of the superior court showing that the motor vehicle registered in the name of the decedent owner has been assigned to his widow as part of her year's support, transfer both title and license as otherwise provided for transfers. If a decedent dies intestate and no administrator has qualified or the clerk of superior court has not issued a certificate of assignment as part of the widow's years allowance, or if a decedent dies testate with a small estate and leaving a purported will, which, in the opinion of the clerk of superior court, does not justify the expense of probate and administration and probate and administration is not demanded by any interested party entitled by law to demand same, and provided that the purported will is filed in the public records of the office of the clerk of the superior court, the Department may upon affidavit executed by all heirs effect such transfer. The affidavit shall state the name of the decedent, date of death, that the decedent died intestate or testate and no administration is pending or expected, that all debts have been paid or that the proceeds from the transfer will be used for that purpose, the names, age and relationship of all heirs and devisees (if there be a purported will), and the name and address of the transferee of the title. A surviving spouse may execute the affidavit and transfer the interest of the decedent's minor or incompetent children where such minor or incompetent does not have a guardian. A transfer under this subparagraph shall not affect the validity nor be in prejudice of any creditor's lien.

(d) An operator of a place of business for garaging, repairing, parking or storing vehicles for the public, in which a vehicle remains unclaimed for 30 days, shall within five days after the expiration of that period, report the vehicle as unclaimed to the Department. Failure to make such report shall constitute a misdemeanor punishable by fine not to exceed fifty dollars (\$50.00) or imprisonment not to exceed 30 days, or both, in the discretion of the court.

Any vehicle which remains unclaimed after report is made to the Department may be sold by such operator in accordance with the following procedure:

- (1) The garage owner or storage keeper shall give written notice to the person who made the storage, to the registered owner, if known, and to any other persons known to claim any lien on or other interest in the motor vehicle. Such notice shall be given by delivery to the person, or by registered letter addressed to the last known place of business or abode of the person to be notified.
- (2) The notice shall contain a description of the motor vehicle and a demand that the vehicle be claimed on or before a day specified, not less than

10 days from the delivery of the notice if it is personally delivered or from the time when the notice should reach its destination according to the due course of post if the notice is sent by mail; and a statement that unless the vehicle is claimed on or before the day specified, it will be advertised for sale and sold at auction at a specified time and place.

- (3) If the vehicle is not claimed by the day specified in the notice, a sale of the motor vehicle may be had. The sale shall be held at the place where the vehicle was stored, or if such place is manifestly unsuitable for the purpose, at the courthouse in the county where vehicle was stored. The advertisement of such sale shall contain the name and address of the registered owner of the vehicle, if known or ascertainable; the name and address of the person who made the storage; a description of the motor vehicle, including the make, year of make, model, motor number, serial number and license number, if any; and the place, date and hour of sale. The advertisement shall be published once a week for two consecutive weeks in a newspaper published in the place where such sale is to be held. The sale shall not be held less than 15 days from the time of the first publication. If there is no newspaper published in such place, the advertisement shall be posted at least 10 days before such sale in not less than three conspicuous public places in such place. A notice of sale on a form approved by the Department shall be sent to the Commissioner of Motor Vehicles at least 20 days prior to the sale. From the proceeds of the sale the garage owner or storage keeper shall satisfy the reasonable charges of notice, advertisement and sale. The balance, if any, shall be held by the garage owner or storage keeper and delivered on demand to the person to whom he would have been bound to deliver or justified in delivering the motor vehicle. If no claim is made for said balance within 10 days, the garage owner or storage keeper shall immediately pay such balance into the office of the clerk of the superior court of the county wherein the sale was held, and the clerk shall hold said money for 12 months for delivery on demand to person entitled thereto, and if no claim is made within said period, said balance shall escheat as provided in Article IX, § 10, of the North Carolina Constitution.
- (4) At any time before the motor vehicle is so sold any person claiming a right of property or possession therein may pay the garage owner or storage keeper the amount necessary to pay the reasonable expenses and liabilities incurred in serving notices and advertising and preparing for the sale up to the time of such payment, and upon receiving such payment, the garage owner or storage keeper shall deliver the motor vehicle to the person making such payment if he is a person entitled to the possession thereof.
- (5) Any person selling a vehicle under the provisions of this subsection shall remove any unexpired registration plates attached thereto and return them to the Department.

(1967, c. 562, s. 8; 1971, cc. 230, 512, 876.)

Editor's Note. - The 1967 amendment, effective at midnight June 30, 1967, rewrote subsection (d), eliminating therefrom provisions as to storage charges and the storage lien and its enforcement. See Editor's note to § 25-1-201.

The first 1971 amendment rewrote the second sentence and added the third, fourth and fifth sentences in subsection (b).

The second 1971 amendment rewrote

subsection (d), adding the provisions as to sale of unclaimed vehicles and making other changes.

The third 1971 amendment deleted from the second paragraph of subsection (d) "for a period of 90 days" following "unclaimed."

Only the subsections affected by the amendments are set out.

For article concerning liens on personal property not governed by the Uniform

Commercial Code, see 44 N.C.L. Rev. 322 (1966). Auto. Ins. Co., 281 N.C. 582, 189 S.E.2d 137 (1972).

Cited in *Younts v. State Farm Mut.*

§ 20-78. When Department to transfer registration and issue new certificate; recordation.—(a) The Department, upon receipt of a properly endorsed certificate of title, application for transfer thereof and payment of all proper fees, shall issue a new certificate of title as upon an original registration. The Department, upon receipt of an application for transfer of registration plates, together with payment of all proper fees, shall issue a new registration card transferring and assigning the registration plates and numbers thereon as upon an original assignment of registration plates.

(b) The Department shall maintain a record of certificates of title issued, maintaining at all times the records of the last two owners.

The Commissioner is hereby authorized and empowered to provide for the photographic or photostatic recording of certificate of title records in such manner as he may deem expedient. The photographic or photostatic copies herein authorized shall be sufficient as evidence in tracing of titles of the motor vehicles designated therein, and shall also be admitted in evidence in all actions and proceedings to the same extent that the originals would have been admitted. (1937, c. 407, s. 42; 1943, c. 726; 1947, c. 219, s. 8; 1961, c. 360, s. 14; 1971, c. 1070, s. 4.)

Editor's Note. — The 1971 amendment and "maintaining" in the first sentence of deleted the language between "issued" subsection (b).

Part 5. Issuance of Special Plates.

§ 20-79. Registration by manufacturers and dealers.

Applied in *Brinkley v. Nationwide Mut.*

Ins. Co., 271 N.C. 301, 156 S.E.2d 225 (1967).

§ 20-79.2. Transporter registration.—(a) A person engaged in a business requiring the limited operation of motor vehicles to facilitate the foreclosure or repossession of such motor vehicles may apply to the Commissioner for special registration to be issued to and used by such person upon the following conditions:

- (1) Application for Registration.—Only one application shall be required from each person, and such application for registration under this section shall be filed with the Commissioner of Motor Vehicles in such form and detail as the Commissioner shall prescribe, setting forth:
 - a. The name and residence address of applicant; if an individual, the name under which he intends to conduct business; if a partnership, the name and residence address of each member thereof, and the name under which the business is to be conducted; if a corporation, the name of the corporation and the name and residence address of each of its officers.
 - b. The complete address or addresses of the place or places where the business is to be conducted.
 - c. Such further information as the Commissioner may require.
- (2) Applications for registration under this section shall be verified by the applicant, and the Commissioner may require the applicant for registration to appear at such time and place as may be designated by the Commissioner for examination to enable him to determine the accuracy of the facts set forth in the written application, either for initial registration or renewal thereof.

- (3) Fees.—The annual fee for such registration under this section or renewal thereof shall be nineteen dollars (\$19.00), plus an annual fee of six dollars (\$6.00) for each set of plates. The application for registration and number plates shall be accompanied by the required annual fee. There shall be no refund of registration fee or fees for number plates in the event of suspension, revocation or voluntary cancellation of registration. There shall be no quarterly reduction in fees under this section.
- (4) Issuance of Certificate.—If the Commissioner approves the application, he shall issue a registration certificate in such form as he may prescribe. A registrant shall notify the Commissioner of any change of address of his principal place of business within thirty (30) days after such change is made, and the Commissioner shall be authorized to cancel the registration upon failure to give such notice.
- (5) Use.—Transporter number plates issued under this section may be transferred from vehicle to vehicle, but shall be used only for the limited operation of vehicles in connection with foreclosure or repossession of vehicles owned or controlled by the registrant.
- (6) Suspension, Revocation or Refusal to Issue or to Renew a Registration.—The Commissioner may deny the application of any person for registration under this section and may suspend or revoke a registration or refuse to issue a renewal thereof if he determines that such applicant or registrant has:
- a. Made a material false statement in his application;
 - b. Used or permitted the use of number plates contrary to law;
 - c. Been guilty of fraud or fraudulent practices; or
 - d. Failed to comply with any of the rules and regulations of the Commissioner for the enforcement of this section or with any provisions of this chapter applicable thereto.
- (1969, c. 600, s. 1.)

Editor's Note.—The 1969 amendment, effective Jan. 1, 1970, substituted "nineteen dollars (\$19.00)" for "fifteen dollars (\$15.00)" and "six dollars (\$6.00)" for "five dollars (\$5.00)" in the first sentence of subdivision (3) of subsection (a).

Session Laws 1969, c. 600, s. 23 provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

As subsection (b) was not changed by the amendment, it is not set out.

§ 20-80. National guard plates.—The Commissioner shall cause to be made each year a sufficient number of automobile license plates to furnish each member of the North Carolina national guard with one thereof, said license plates to be in the same form and character as other license plates now or hereafter authorized by law to be used upon private passenger vehicles registered in this State, except that such license plates shall bear on the face thereof the following words: "National Guard." The said license plates shall be issued only to members of the North Carolina national guard, and for which license plates the Commissioner shall collect fees in an amount equal to the fees collected for the licensing and registering of private vehicles. The Adjutant General of North Carolina shall furnish the Commissioner annually with an estimate of the number of such distinctive plates required. In addition, the Adjutant General of North Carolina shall furnish to the Commissioner each year, prior to the date that licenses are issued, a list of the officers of the North Carolina national guard, which said list shall contain the rank of each officer listed in the order of his seniority in the North Carolina national guard, and the said license plates to be set aside for officer personnel shall be numbered beginning with the number two hundred and one and in numerical sequence thereafter up to and including the number sixteen hundred, according to seniority, the senior officer being issued the license bearing the numerals two hundred and one. Enlisted personnel applying for such distinctive plates shall present

to the Department of Motor Vehicles proof of membership in the North Carolina national guard by means of certificate signed by the commanding officer of applicant on forms as may be agreed upon by the Adjutant General of North Carolina and the Department of Motor Vehicles. If a holder of such distinctive license plate shall be discharged from the North Carolina national guard under other than honorable conditions, he shall within thirty days exchange such distinctive plate for a standard plate. (1937, c. 407, s. 44; 1941, c. 36; 1949, c. 1130, s. 7; 1955, c. 490; 1961, c. 360, s. 16; 1967, c. 700.)

Editor's Note.—The 1967 amendment, effective Jan 1, 1968, rewrote this section so as to provide for the issuance of special license plates to all members of the North

Carolina national guard, rather than to officers only, and so as to provide for the issuance of one plate, rather than "a set" of plates.

§ 20-81.1. Special plates for amateur radio and Class D citizens radio station operators.—(a) Every owner of a motor vehicle which is primarily used for pleasure or communication purposes who holds an unrevoked and unexpired amateur radio or Class D citizens radio station license of a renewable nature, issued by the Federal Communications Commission, shall, upon payment of registration and licensing fees for such vehicle as required by law and an additional fee of five dollars (\$5.00), be issued plates of similar size and design as the regular registration plates provided for by G.S. 20-63 or other provisions of law, upon which shall be inscribed, in lieu of the usual registration number, the official amateur radio or Class D citizens radio station call letters of such persons as assigned by the Federal Communications Commission; provided, however, that in addition to the payment of registration and licensing fees, a fee of five dollars (\$5.00) shall be required to purchase a Class D citizens radio station license.

(b) Application for special registration plates shall be made on forms which shall be provided by the Department of Motor Vehicles and shall contain proof satisfactory to the Department that the applicant holds an unrevoked and unexpired official amateur radio or Class D citizens radio station license and shall state the call letters which have been assigned to the applicant. Applications must be filed prior to 60 days before the day when regular registration plates for the year are made available to motor vehicle owners.

(c) Special registration plates issued pursuant to this section shall be replaced annually to the same extent as regular registration plates are replaced. These plates shall be valid during the year for which issued. If the amateur radio or Class D citizens radio station license of a person holding a special plate issued pursuant to this section shall be cancelled or rescinded by the Federal Communications Commission, such person shall immediately return the special plates to the Department of Motor Vehicles.

(d) The provisions of this section shall apply to calendar years beginning after December 31, 1955. The Department of Motor Vehicles is authorized to, and shall, make such provisions prior to January 1, 1956, as are necessary for the issuance for the year 1956 of the special plates provided for in this section.

(e) The revenue derived from the additional fee for the amateur radio plates and Class D citizens radio plates shall be placed in a separate fund designated the "Amateur Radio Registration Plate Fund" and the "Class D Citizens Radio Registration Plate Fund" as appropriate. After deducting the cost of the plates, plus budgetary requirements for handling and issuance to be determined by the Commissioner of Motor Vehicles, any remaining moneys derived from the additional fee for such plates shall be periodically transferred to the Board of Transportation as provided in G.S. 20-81.3(c) (2). (1951, c. 1099; 1955, c. 291; 1961, c. 360, s. 18; 1971, c. 589, ss. 1, 2; c. 829, ss. 1, 2, 4; 1973, c. 507, s. 5.)

Editor's Note.—The first 1971 amendment inserted "or Class D citizens radio station" in two places in subsection (a) and in subsections (b) and (c), added the pro-

viso at the end of subsection (a) and added subsection (e).

The second 1971 amendment substituted "five dollars (\$5.00)" for "one dollar

(\$1.00)" near the middle of subsection (a), inserted "the amateur radio plates and," "the 'Amateur Radio Registration Plate Fund' and" and "as appropriate" in the first sentence of subsection (e) and corrected the statutory reference at the end of subsection (e).

The 1973 amendment, effective July 1, 1973, substituted "Board of Transportation" for "State Highway Commission" in subsection (e).

§ 20-81.2. Special plates for historic vehicles.—Notwithstanding any other provisions of this chapter, special license plates shall be issued upon application with respect to any motor vehicle of the age of thirty-five years or more from the date of manufacture. Such license plates shall be of the same colors as the regular license plates and shall be issued in a separate numerical series. On the plate there shall be printed the words "Horseless Carriage," the license plate serial number, the words "North Carolina" or the letters "N.C.," and the appropriate calendar year. In lieu of other registration fees, the annual license registration fee for such vehicle shall be six dollars (\$6.00). All other provisions of this chapter not inconsistent herewith shall be applicable to such motor vehicles.

The Commissioner of Motor Vehicles is hereby authorized to make such rules as, in his discretion, may seem necessary with respect to applications for special plates, time for making applications and other matters necessary for the efficient administration of this section. (1955, c. 1339; 1969, c. 600, s. 2.)

Editor's Note.—The 1969 amendment, effective Jan. 1, 1970, increased the annual license registration fee from \$5.00 to \$6.00. "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

Session Laws 1969, c. 600, s. 23 provides:

§ 20-81.3. Special personalized registration plates. — (a) The Commissioner may issue under such regulation as he shall deem appropriate a special personalized registration plate to the owner of a private passenger motor vehicle or private trucks not to exceed one ton manufacturer's rated capacity in lieu of another number plate. Such personalized registration plate shall be of such design and shall bear such letter or letters and numerals as the Commissioner shall prescribe, but there shall be no duplication of a registration plate. The Commissioner shall in his discretion refuse the issue of such letter combinations which might carry connotations offensive to good taste and decency.

(b) An owner who desires personalized registration plates shall make application for such plates on forms which shall be provided by the Department of Motor Vehicles and pay the sum of ten dollars (\$10.00) annually, which shall be in addition to the regular motor vehicle registration fee. Once an owner has obtained personalized plates, he, where possible, will have first priority on those plates for the following years provided he makes timely and appropriate application; provided, however, that the Commissioner shall not issue a personalized license plate pursuant to this section except upon written application therefor on a form furnished by the Commissioner in which the applicant certifies that his operator's or chauffeur's license has not been revoked or suspended under Article 2 of Chapter 20 of the General Statutes within two years prior to the date of the application; and provided, further, that any personalized license plate issued pursuant to this section shall be cancelled and recalled by the Commissioner and the application fee forfeited in the event that the Commissioner determines that a false application has been submitted.

(c) The revenue derived from the additional fee for such plates shall be placed in a separate fund designated the "Personalized Registration Plate Fund." After deducting the cost of the plates, plus budgetary requirements for handling and issuance to be determined by the Commissioner of Motor Vehicles, any remaining moneys derived from the additional fee for such plates shall be periodically transferred as follows:

- (1) One half to the account of the Department of Conservation and Development to aid in financing out-of-state advertising under the North Carolina program for the promotion of travel and industrial development in North Carolina.
- (2) One half to the Board of Transportation to be used solely for the purpose of beautification of highways other than those designated as interstate. Such funds shall be administered by the Board of Transportation for beautification purposes not inconsistent with good landscaping and engineering principles.

(d) The Governor's Advisory Committee on Beautification shall act in an advisory capacity to the Board of Transportation and shall, from time to time, make such recommendations to the Board of Transportation concerning beautification of highways as it shall deem appropriate.

(e) Special personalized registration plate shall mean any registration plate bearing any combination of letters or numerals, or both, other than that which the Department determines would normally be issued sequentially to an applicant for original or renewal vehicle registration.

(f) In the event a personalized registration plate is lost, stolen or mutilated, the owner may not obtain another such plate bearing the same letter, letters or numerals until the next registration year. He may, upon proper application and payment of a fee of one dollar (\$1.00), obtain a plate of the regular series. Provided, further, that a special personalized registration plate revoked for violation of the motor vehicle laws shall not be reissued, but in lieu thereof a plate of the regular series will be issued upon payment of the appropriate fee for the new registration plate. (1967, c. 413; 1971, c. 42; 1973, c. 507, s. 5.)

Editor's Note.—The 1971 amendment inserted "or private trucks not to exceed one ton manufacturer's rated capacity" in the first sentence of subsection (a).

The 1973 amendment, effective July 1, 1973, substituted "Board of Transporta-

tion" for "State Highway Commission" in subsections (c) and (d).

Cited in *Hodgson v. Hyatt Realty & Inv. Co.*, 353 F. Supp. 1363 (M.D.N.C. 1973).

§ 20-81.4. Free registration plates to disabled veterans.—(a) From and after January 1, 1970, the North Carolina Department of Motor Vehicles shall provide and issue free of charge to each disabled veteran in this State registration and registration plates for either one (1) automobile or one (1) pickup truck, where a pickup truck is the disabled veteran's only mode of transportation and is not used for hire, a disabled veteran being, for the purpose of this section, a veteran of World War I, World War II or Korean service or Vietnam service, having served in the military, naval, marines or air services of the United States, who is a resident of North Carolina and who is entitled to compensation under the laws administered by the Veterans Administration and who is rated as 100% service-connected disabled or has suffered one or more of the following due to disability incurred in or aggravated by active military, naval, marine or air service of the United States during one or more conflicts:

- (1) Loss or permanent loss of use of one (1) or both feet;
- (2) Loss or permanent loss of use of one (1) or both hands;
- (3) Permanent impairment of vision of both eyes of the following status: Central visual acuity of 20/200 or less in the better eye, with corrective glasses, or central visual acuity of more than 20/200 if there is a field defect in which the peripheral field has contracted to such an extent that the widest diameter of visual field subtends an angular distance no greater than twenty (20) degrees in the better eye.

(b) The registration plates provided for by this section shall be in colors as prescribed by the Department of Motor Vehicles.

(c) The registration plate provided for by this section shall be issued to dis-

abled veterans only upon proof of disabled status, proof of financial responsibility as required by the motor vehicle laws of North Carolina and if the vehicle is to be operated by such disabled veteran that the vehicle is properly equipped to compensate for his disability in the operation thereof and that he has submitted to and passed the driver's license examination required by the motor vehicle laws of North Carolina.

(d) The registration plate provided for by this section once issued shall be subject to all laws and policies that govern and control registration plates in North Carolina and such plate shall be cancelled for violation of same. (1969, c. 461.)

Editor's Note. — Session Laws 1969, c. 461, adding this section, is effective Jan. 1, 1970.

Veterans Entitled to Free Registration

Plates.—See opinion of Attorney General to Mr. Charles A. Beddingfield, Assistant Director, N.C. Department of Veterans Affairs, 40 N.C.A.G. 439 (1970).

§ 20-81.5. Civil Air Patrol plates.—(a) The Commissioner shall cause to be made each year sufficient number of automobile license plates to furnish each member of the North Carolina Wing of the Civil Air Patrol with not more than two thereof, said license plates to be in the same form and character as other license plates now or hereinafter authorized by law to be used upon private passenger vehicles registered in this State, except that such license plates shall bear on the face thereof the following: the words "North Carolina," the year designation, and the words "Civil Air Patrol." The said license plates shall be issued only to members of the North Carolina Wing of the Civil Air Patrol and for each license plate the Commissioner shall collect a fee of five dollars (\$5.00) in addition to the fees in an amount equal to the fees collected for the licensing and registering of private vehicles. The Commander of the North Carolina Wing of the Civil Air Patrol shall furnish the Commissioner annually with a list of the number of such distinctive plates required accompanied by the five dollar (\$5.00) fee referred to hereinabove and such list shall contain the rank of each officer listed in order of his seniority in the North Carolina Civil Air Patrol. The said license plates to be set aside for officer personnel shall be numbered beginning with the number 201 and running in numerical sequence thereafter up to and including the number 500, according to seniority; the senior officer being issued the plate bearing the number 201. Enlisted personnel, senior members and cadet members applying for such distinctive plates shall, upon application and payment of the required fee, receive such plates in numerical sequence beginning with the number 501. Applications for such distinctive license plates shall be on forms as may be agreed upon by the Wing Commander of the North Carolina Civil Air Patrol and the Department of Motor Vehicles. If a holder of such a distinctive license plate shall be discharged from the North Carolina Civil Air Patrol under other than honorable conditions, he shall within 30 days exchange such distinctive plate for a standard plate.

(b) The revenue derived from the additional fee for such plates shall be placed in a separate fund designated the "Civil Air Patrol Registration Plate Fund." After deducting the cost of the plates, plus budgetary requirements for handling and issuance to be determined by the Commissioner of Motor Vehicles, any remaining moneys derived from the additional fee for such plates shall be periodically transferred to the Board of Transportation as provided in G.S. 20-81.3(c)(2). (1971, c. 601; c. 829, s. 3; 1973, c. 52; c. 507, s. 5.)

Editor's Note.—The 1971 amendment corrected the statutory reference at the end of subsection (b).

The first 1973 amendment substituted "not more than two" for "one" near the beginning of the first sentence of subsection (a).

The second 1973 amendment, effective July 1, 1973, substituted "Board of Transportation" for "State Highway Commission" in subsection (b).

Part 6. Vehicles of Nonresidents of State, etc.

§ 20-83. Registration by nonresidents.

(b) Motor vehicles duly registered in a state or territory which are not allowed exemptions by the Commissioner, as provided for in the preceding paragraph, desiring to make occasional trips into or through the State of North Carolina, or operate in this State for a period not exceeding thirty days, may be permitted the same use and privileges of the highways of this State as provided for similar vehicles regularly licensed in this State, by procuring from the Commissioner trip licenses upon forms and under rules and regulations to be adopted by the Commissioner, good for use for a period of thirty days upon the payment of a fee in compensation for said privilege equivalent to one tenth of the annual fee which would be chargeable against said vehicle if regularly licensed in this State: Provided that only one such permit allowed by this section shall be issued for the use of the same vehicle within the same registration year. Provided, however, that nothing in this provision shall prevent the extension of the privileges of the use of the roads of this State to vehicles of other states under the reciprocity provisions provided by law: Provided further, that nothing herein contained shall prevent the owners of vehicles from other states from licensing such vehicles in the State of North Carolina under the same terms and the same fees as like vehicles are licensed by owners resident in this State.

(1967, c. 1090.)

Editor's Note.—

The 1967 amendment inserted the first proviso in subsection (b).

As subsections (a) and (c) were not affected by the amendment, they are not set out.

§ 20-84. Vehicles owned by State, municipalities or orphanages, etc.; certain vehicles operated by local chapters of American National Red Cross.—The Department upon proper proof being filed with it that any motor vehicle for which registration is herein required is owned by the State or any department thereof, or by any county, township, city or town, or by any board of education, or by any orphanage or civil air patrol, or incorporated emergency rescue squad, shall collect one dollar (\$1.00) for the registration of such motor vehicles, but shall not collect any fee for application for certificate of title in the name of the State or any department thereof, or by any county, township, city or town, or by any board of education or orphanage: Provided, that the term "owned" shall be construed to mean that such motor vehicle is the actual property of the State or some department thereof or of the county, township, city or town, or of the board of education, and no motor vehicle which is the property of any officer or employee of any department named herein shall be construed as being "owned" by such department. Provided, that the above exemptions from registration fees shall also apply to any church-owned bus used exclusively for transporting children and parents to Sunday School and church services and for no other purpose.

In lieu of the annual one dollar (\$1.00) registration provided for in this section, the Department may for the license year 1950 and thereafter provide for a permanent registration of the vehicles described in this section and issue permanent registration plates for such vehicles. The permanent registration plates issued pursuant to this paragraph shall be of a distinctive color and shall bear thereon the word "permanent." Such plates shall not be subject to renewal and shall be valid only on the vehicle for which issued. For the permanent registration and issuance of permanent registration plates provided for in this paragraph, the Department shall collect a fee of one dollar (\$1.00) for each vehicle so registered and licensed.

The provisions of this section are hereby made applicable to vehicles owned by a rural fire department, agency or association.

The Department of Motor Vehicles shall issue to the North Carolina Tuberculosis Association, Incorporated, or any local chapter or association of said corporation, for a fee of one dollar (\$1.00) for each plate a permanent registration

plate which need not be thereafter renewed for each motor vehicle in the form of a mobile X-ray unit which is owned by said North Carolina Tuberculosis Association, Incorporated, or any local chapter or local association thereof and operated exclusively in this State for the purpose of diagnosis, treatment and discovery of tuberculosis. The initial one dollar (\$1.00) fee required by this section and for this purpose shall be in full payment of the permanent registration plates issued for such vehicle operated as a mobile X-ray unit, and such plates need not thereafter be renewed, and such plates should be valid only on the vehicle for which issued and then only so long as the vehicle shall be operated for the purposes above described and for which the plates were originally issued.

The Department of Motor Vehicles shall issue to the American National Red Cross, upon application of any local chapter thereof and payment of a fee of one dollar (\$1.00) for each plate, a permanent registration plate, which need not be thereafter renewed, for all disaster vans, bloodmobiles, handivans, and such sedans and station wagons as are used for emergency or disaster work, and operated by a local chapter in this State in the business of, the American National Red Cross. Such registration plate shall be valid only for the vehicle for which issued and then only so long as the vehicle shall be operated as above described. In the event of transfer of ownership to any other person, firm or corporation, or transfer or reassignment of any vehicle bearing such registration plate to any chapter or association of the American National Red Cross in any other state, territory or country, the registration plate assigned to such vehicle shall be surrendered to the Department of Motor Vehicles.

In lieu of all other registration requirements, the Commissioner shall each year assign to the State Highway Patrol, upon payment of one dollar (\$1.00) per registration plate, a sufficient number of regular registration plates of the same letter prefix and in numerical sequence beginning with number 100 to meet the requirements of the State Highway Patrol for use on Department vehicles assigned to the State Highway Patrol. The commander of the Patrol shall, when such plates are assigned, issue to each member of the State Highway Patrol a registration plate for use upon the Department vehicle assigned to him pursuant to G.S. 20-190 and assign a registration plate to each Department service vehicle operated by the Patrol. An index of such assignments of registration plates shall be kept at each State Highway Patrol radio station and a copy thereof shall be furnished to the registration division of the Department. Information as to the individual assignments of such registration plates shall be made available to the public upon request to the same extent and in the same manner as regular registration information. The commander, when necessary, may reassign registration plates provided that such reassignment shall be made to appear upon the index required herein within 20 days after such reassignment.

On and after January 1, 1972, permanent registration plates used on all vehicles owned by the State of North Carolina or a department thereof shall be of a distinctive color and design which shall be readily distinguishable from all other permanent registration plates issued pursuant to this section or G.S. 20-84.1. For the purpose of carrying out the intent of this paragraph, all vehicles owned by the State of North Carolina or a department thereof in operation as of October 1, 1971, and bearing a permanent registration shall be reregistered during the months of October, November and December, 1971, and upon reregistration, registration plates issued for such vehicles shall be of a distinctive color and design as provided for hereinabove. (1937, c. 407, s. 48; 1939, c. 275; 1949, c. 583, s. 1; 1951, c. 388; 1953, c. 1264; 1955, cc. 368, 382; 1967, c. 284; 1969, c. 800; 1971, c. 460, s. 1.)

Editor's Note. — The 1967 amendment, effective Dec. 31, 1967, added the fifth paragraph.

The 1969 amendment, effective Jan. 1, 1970, added the sixth paragraph.

The 1971 amendment added the last paragraph.

Section 1.1, c. 460, Session Laws 1971, provided that the addition of the last paragraph "shall not be construed as abrogat-

ing or modifying the provisions of G.S. 14-250."

James H. Stamey, Department of Motor Vehicles, 41 N.C.A.G. 798 (1972).

Permanent Registration of Motor Vehicle Leased to Municipality Improper.—
See opinion of Attorney General to Mr.

Part 6.1. Rental Vehicles.

§ 20-84.2. Definition; reciprocity; Commissioner's powers.—(a) The term rental vehicle when used herein shall mean and include any motor vehicle which is rented or leased to another by its owner for a period of not more than 30 days solely for the transportation of the lessee or the private hauling of the lessee's personal property.

(b) Rental vehicles owned or operated by any nonresident person engaged in the business of leasing such vehicles for use in intrastate or interstate commerce shall be extended full reciprocity and exempted from registration fees only in instances where:

- (1) Such person has validly licensed all rental vehicles owned by him in the state wherein the owner actually resides; provided, that such state affords equal recognition, either in fact or in law to such vehicles licensed in the State of North Carolina and operating similarly within the owner's state of residence; and further provided, that such person is not engaged in this State in the business of leasing rental vehicles; or where
- (2) Such person operates vehicles which are a part of a common fleet of vehicles which are easily identifiable as a part of such fleet and such person has validly licensed in the State of North Carolina a percentage of the total number of vehicles in each weight classification in such fleet which represents the percentage of total miles travelled in North Carolina by all vehicles in each weight classification of such fleet to total miles travelled in all jurisdictions in which such fleet is operated by all vehicles in each weight classification of such fleet.

(c) The Commissioner of Motor Vehicles requires such person to submit under oath such information as is deemed necessary for fairly administering this section. The Commissioner's determination, after hearing, as to the number of vehicles in each weight classification to be licensed in North Carolina shall be final.

Any person who licenses vehicles under subsection (b)(2) above shall keep and preserve for three years the mileage records on which the percentage of the total fleet is determined. Upon request these records shall be submitted or made available to the Commissioner of Motor Vehicles for audit or review, or the owner or operator shall pay reasonable costs of an audit by the duly appointed representative of the Commissioner at the place where the records are kept.

If the Commissioner determines that the person licensing vehicles under subsection (b)(2) above should have licensed more vehicles in North Carolina or that such person's records are insufficient for proper determination the Commissioner may deny that person the right or any further benefits under this subsection until the correct number of vehicles have been licensed, and all taxes determined by the Commissioner to be due have been paid.

(d) Upon payment by the owner of the prescribed fee, the Department shall issue registration certificates and plates for the percentage of vehicles determined by the Commissioner. Thereafter, all rental vehicles properly identified and licensed in any state, territory, province, county or the District of Columbia, and belonging to such owner, shall be permitted to operate in this State on an interstate or intrastate basis. (1959, c. 1066; 1971, c. 808.)

Editor's Note. — The 1971 amendment, tion that a detailed comparison is not here effective Dec. 31, 1971, so changed this section practical.

Part 7. Title and Registration Fees.

§ 20-85. Schedule of fees.

Editor's Note.—For article “Transfer- How the Present System Functions,” see
ring North Carolina Real Estate Part I: 49 N.C.L. Rev. 413 (1971).

§ 20-87. Passenger vehicle registration fees.—There shall be paid to the Department annually, as of the first day of January, for the registration and licensing of passenger vehicles, fees according to the following classifications and schedules:

(1) **Common Carriers of Passengers.**—Common carriers of passengers shall pay an annual license tax of fifty-six cents (56¢) per hundred pounds weight of each vehicle unit, and in addition thereto one and nine-tenths percent (1 9/10%) of the gross revenue derived from such operation: Provided, said additional one and nine-tenths percent (1 9/10%) shall not be collectible unless and until and only to the extent that such amount exceeds the license tax of fifty-six cents (56¢) per hundred pounds: Provided further, that common carriers of passengers operating from a point or points in this State to another point or other points in this State shall be liable for a tax of one and nine-tenths percent (1 9/10%) on the gross revenue earned in such intrastate hauls. Common carriers of passengers operating between a point or points within this State and a point or points without this State shall be liable for a one and nine-tenths percent (1 9/10%) tax only on that proportion of the gross revenue earned between terminals in this State and terminals outside this State that the mileage in North Carolina bears to the total mileage between the respective terminals. Common carriers of passengers operating through this State from a point or points outside this State to a point or points outside this State shall be liable for a one and nine-tenths percent (1 9/10%) tax on that proportion of the gross revenue earned between such terminals as the mileage in North Carolina bears to the total mileage between the respective terminals. In no event shall the tax paid by such common carriers of passengers be less than fifty-six cents (56¢) per hundred pounds weight for each vehicle. The tax prescribed in this subdivision is levied as compensation for the use of the highways of this State and for the special privileges extended such common carriers of passengers by this State.

(2) **U-Drive-It Passenger Vehicles.**—U-drive-it passenger vehicles shall pay the following tax:

Motorcycles:	1-passenger capacity	\$15.00
	2-passenger capacity	19.00
	3-passenger capacity	23.00

Automobiles: Thirty-eight dollars (\$38.00) per year for each vehicle of nine-passenger capacity or less, and vehicles of over nine-passenger capacity shall be classified as busses and shall pay two dollars and forty cents (\$2.40) per hundred pounds empty weight of each vehicle.

(3) **Contract Carrier and Exempt for Hire Passenger Carrier Vehicles.**—For hire passenger vehicles shall be taxed at the rate of \$75.00 per year for each vehicle of nine-passenger capacity or less and vehicles of over nine-passenger capacity shall be classified as busses and shall be taxed at a rate of two dollars and forty cents (\$2.40) per hundred pounds of empty weight per year for each vehicle; provided, however, no license shall issue for the operation of any taxicab until the governing body of the city or town in which such taxicab is principally operated, if the principal operation is in a city or town, has issued a certificate showing

- a. That the operator of such taxicab has provided liability insurance or other form of indemnity for injury to persons or damage to property resulting from the operation of such taxicab, in such amount as required by the city or town, and
- b. That the convenience and necessity of the public requires the operation of such taxicab.

All persons operating taxicabs on January first, one thousand nine hundred and forty-five shall be entitled to a certificate of necessity and convenience for the number of taxicabs operated by them on such date, unless since said date the license of such person or persons to operate a taxicab or taxicabs has been revoked or their right to operate has been withdrawn or revoked; provided that all persons operating taxicabs in Edgecombe, Lee, Nash and Union counties on January first, one thousand nine hundred and forty-five shall be entitled to certificates of necessity and convenience only with the approval of the governing authority of the town or city involved.

A taxicab shall be defined as any motor vehicle, seating nine or fewer passengers, operated upon any street or highway on call or demand, accepting or soliciting passengers indiscriminately for hire between such points along streets or highways as may be directed by the passenger or passengers so being transported, and shall not include motor vehicles or motor vehicle carriers as defined in G.S. 62-121.5 through 62-121.79. Such taxicab shall not be construed to be a common carrier nor its operator a public service corporation.

- (4) Limousine Vehicles.—For-hire passenger vehicles on call or demand which do not solicit passengers indiscriminately for hire between points along streets or highways, shall be taxed at the same rate as for-hire passenger vehicles under G.S. 20-87(3) but shall be issued appropriate registration plates to distinguish such vehicles from taxicabs.
- (5) Private Passenger Vehicles.—There shall be paid to the Department annually, as of the first day of January, for the registration and licensing of private passenger vehicles, fees according to the following classifications and schedules:

Private passenger vehicles of not more than nine passengers	\$13.00
Private passenger vehicles over nine passengers	\$16.00

provided, that a fee of only one dollar (\$1.00) shall be charged for any vehicle given by the federal government to any veteran on account of any disability suffered during war so long as such vehicle is owned by the original donee or other veteran entitled to receive such gift under Title 38, section 252, United States Code Annotated.

- (6) Private Motorcycles.—The tax on private passenger motorcycles shall be six dollars (\$6.00); except that when a motorcycle is equipped with an additional form of device designed to transport persons or property, the tax shall be thirteen dollars (\$13.00).
- (7) Manufacturers and Motor Vehicle Dealers.—Manufacturers and dealers in motor vehicles, trailers and semitrailers for license and for one set of dealer's plates for each place of business licensed under Article 12 of Chapter 20 of the General Statutes shall pay the sum of thirty-five dollars (\$35.00), and for each additional set of dealer's plates the sum of one dollar (\$1.00).
- (8) Driveaway Companies.—Any person, firm or corporation engaged in the business of driving new motor vehicles from the place of manufacture to the place of sale in this State for compensation shall pay as a registration fee and for one set of plates one hundred twenty-five dollars (\$125.00) and for each additional set of plates six dollars (\$6.00).
- (9) House Trailers.—In lieu of other registration and license fees levied on

house trailers under this section or G.S. 20-88, the registration and license fee on house trailers shall be four dollars (\$4.00) for the license year or any portion thereof.

- (10) **Special Mobile Equipment.**—The tax for special mobile equipment shall be four dollars (\$4.00) for the license year or any portion thereof; provided, that vehicles on which are permanently mounted feed mixers, grinders and mills and on which are also transported molasses or other similar type feed additives for use in connection with the feed mixing, grinding or milling process shall be taxed an additional sum of thirty dollars (\$30.00) for the license year or any portion thereof, in addition to the basic four dollars (\$4.00) tax provided for herein. (1937, c. 407, s. 51; 1939, c. 275; 1943, c. 648; 1945, c. 564, s. 1; c. 576, s. 2; 1947, c. 220, s. 3; c. 1019, ss. 1-3; 1949, c. 127; 1951, c. 819, ss. 1, 2; 1953, c. 478; c. 826, s. 4; 1955, c. 1313, s. 2; 1957, c. 1340, s. 3; 1961, c. 1172, s. 1a; 1965, c. 927; 1967, c. 1136; 1969, c. 600, ss. 3-11; 1971, c. 952; 1973, c. 107.)

Editor's Note.—

The 1967 amendment changed the catch-line or caption for subdivision (3) from "For Hire Passenger Vehicles" to "Contract Carrier and Exempt for Hire Passenger Carrier Vehicles" and repealed former subdivision (4).

The 1969 amendment, effective Jan. 1, 1970, rewrote subdivisions (1) and (5) and increased the fees in subdivisions (2), (3), (6), (7), (8), (9) and (10).

Session Laws 1969, c. 600, s. 23 provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

The 1971 amendment, effective Dec. 31, 1971, added subdivision (4), the former provisions of which had previously been repealed by Session Laws 1967, c. 1136.

The 1973 amendment, effective July 1, 1973, inserted "for each place of business licensed under Article 12 of Chapter 20 of the General Statutes" in subdivision (7).

The subject matter of former §§ 62-121.5 through 62-121.79, referred to in subdivision (3) of this section, is now covered by §§ 62-259 through 62-279.

§ 20-87.1. Reciprocity; passenger buses operated by common carrier of passengers.—(a) Passenger buses operated by any common carrier of passengers for use in intrastate or interstate commerce shall be extended full reciprocity and exempted from registration fees only in such instances where such common carriers of passengers have validly licensed in the State of North Carolina the average number of buses required to operate the total miles operated by it in and through the State during the preceding year. The average number of buses required will be determined by applying the average miles traveled of each bus owned by it into the total miles operated in North Carolina by such carrier during the preceding year. The Department may, in its discretion, verify the average number of buses required by the common carrier of passengers during the licensing year in and through the State. Upon payment by the common carrier of passengers of the prescribed fees or taxes, the Department shall issue registration certificates and license plates for the average number of buses required by such common carrier of passengers. Thereafter, all buses properly identified and licensed in any state, territory, province, county or the District of Columbia, and used by such common carrier of passengers shall be permitted to operate on an interstate or intrastate basis.

(b) When a resident common carrier of passengers of this State interchanges a properly licensed bus with another common carrier of passengers who is a resident of another state, and adequate records are on file in its office to verify such interchanges, the North Carolina licensed common carrier of passengers may use the bus licensed in such other state the same as if it is its own during the time the nonresident carrier is using the North Carolina licensed bus. (1971, c. 871, s. 1.)

Editor's Note. — Session Laws 1971, c. 871, s. 2, makes the act effective Jan. 1, 1972.

§ 20-88. Property-hauling vehicles.

(b) There shall be paid to the Department annually, as of the first day of January, for the registration and licensing of self-propelled property-carrying vehicles, fees according to the following classification and schedule and upon the following conditions:

SCHEDULE OF WEIGHTS AND RATES

Rates Per Hundred Pound Gross Weight	
	<i>Farmer</i>
Not over 4,500 pounds	\$0.20
4,501 to 8,500 pounds inclusive .....	.25
8,501 to 12,500 pounds inclusive .....	.32
12,501 to 16,500 pounds inclusive .....	.44
Over 16,500 pounds .....	.50
	<i>Private Hauler</i>
	<i>Contract Carriers, Flat</i>
	<i>Rate Common Carriers and</i>
	<i>Exempt for-Hire Carriers</i>
Not over 4,500 pounds	\$0.40
4,501 to 8,500 pounds inclusive .....	.50
8,501 to 12,500 pounds inclusive .....	.63
12,501 to 16,500 pounds inclusive .....	.88
Over 16,500 pounds	1.00
	<i>Common Carrier of</i>
	<i>Property</i>
	<i>(Deposit)</i>
Not over 4,500	\$0.75
4,501 to 8,750 pounds inclusive .....	.75
8,501 to 12,500 pounds inclusive .....	.75
12,501 to 16,500 pounds inclusive .....	.75
Over 16,500 pounds .....	.75

- (1) The minimum fee for a vehicle licensed under this subsection shall be twelve dollars and fifty cents (\$12.50) at the farmer rate and sixteen dollars (\$16.00) at the private hauler, contract carrier and common carrier rates.
- (2) The term "farmer" as used in this subsection means any person engaged in the raising and growing of farm products on a farm in North Carolina not less than 10 acres in area, and who does not engage in the business of buying products for resale.
- (3) License plates issued at the farmer rate shall be placed upon trucks and truck-tractors that are operated exclusively in the carrying or transportation of applicant's farm products, raised or produced on his farm, and farm supplies and not operated in hauling for hire.
- (4) Farm products means any food crop, cattle, hogs, poultry, dairy products, flower bulbs, or other nursery products and other agricultural products designed to be used for food purposes, including in the term farm products also cotton, tobacco, logs, bark, pulpwood, tannic acid wood and other forest products, grown, produced, or processed by the farmer.
- (5) The Department shall issue necessary rules and regulations providing for the recall, transfer, exchange or cancellation of "farmer" plates, when vehicle bearing such plates shall be sold or transferred.

(6) There shall be paid to the Department annually as of the first of January, the following fees for "wreckers" as defined under G.S. 20-38(39): A wrecker fully equipped weighing 7,000 pounds or less, sixty-two dollars and fifty cents (\$62.50); wreckers weighing in excess of 7,000 pounds shall pay one hundred twenty-five dollars (\$125.00). Fees to be prorated quarterly. Provided, further, that nothing herein shall prohibit a licensed dealer from using a dealer's license plate to tow a vehicle for a customer.

(c) There shall be paid to the Department annually, as of the first day of January, for the registration and licensing of trailers or semitrailers, four dollars (\$4.00) for any part of the license year for which said license is issued.

(e) Common Carriers of Property.—Common carriers of property shall pay an annual license tax as per the above schedule of rates for each vehicle unit, and in addition thereto seven and one-half percent of the gross revenue derived from such operations: Provided, said additional seven and one-half percent shall not be collectible unless and until and only to the extent that such amount exceeds the license tax or deposit per the above schedule: Provided, further, common carriers of property operating from a point or points in this State to another point or points in this State shall be liable for a tax of seven and one-half percent on the gross revenue earned in such intrastate hauls. Common carriers of property operating between a point or points within this State and a point or points without this State shall be liable for a seven and one-half percent tax only on that proportion of the gross revenue earned between terminals in this State and terminals outside this State that the mileage in North Carolina bears to the total mileage between the respective terminals. Common carriers of property operating through this State from a point or points outside this State to a point or points outside this State shall be liable for a seven and one-half percent tax on that proportion of the gross revenue earned between such terminals as the mileage in North Carolina bears to the total mileage between the respective terminals. In no event shall the tax paid by such common carriers of property be less than the license tax or deposit shown on the above schedule, except where a franchise is hereafter issued by the Utilities Commission for service over a route within the State which is not now served by any common carrier of property the seven and one-half percent gross revenue tax may be reduced to five percent for the first two years only. The tax prescribed in this subsection is levied as compensation for the use of the highways of this State and for the special privileges extended such common carriers of property by this State. Common carriers of property operating from a point in this State to a point in another state over two or more routes, shall compute their mileage from the point of origin to the point of destination on the basis of the average mileage of all routes used by them from the point in this State to the point outside of this State and this figure shall be used as the mileage between said points in determining the percentage of miles operated in North Carolina between said points.

In lieu of the seven and one-half percent gross revenue tax levied by this subsection and the deposit required by subsection (b) of this section, common carriers of property may elect to pay a flat rate according to the highest rate provided by subsection (b) of this section for vehicles and loads of the same gross weight operated by contract carriers. The election to so pay must be made at the time license plates are applied for and may not thereafter be changed during the license year except that for the license year 1949 such election, if one is made, must be made on or before July 1, 1949. Vehicles registered and licensed during the license year and after the election herein provided for has been made, must be registered and licensed and the operator shall pay taxes on the operation thereof according to the election made. A failure by a common carrier of property to make an election under this paragraph shall render such common carrier of property liable for the deposit required by subsection (b) of this section and the seven and one-half percent gross revenue tax levied by this subsection.

(g) Repealed by Session Laws 1969, c. 600, s. 17, effective January 1, 1970.

(1967, c. 1095, ss. 1, 2; 1969, c. 600, ss. 12-17; c. 1056, s. 1; 1973, c. 154, ss. 1, 2; c. 291.)

Editor's Note.—

The 1967 amendment, effective Feb. 15, 1968, substituted "Contract Carriers, Flat Rate Common Carriers and Exempt for Hire Carriers" for "Contract Carrier" in subsection (b) and rewrote a portion of former subsection (g).

The first 1969 amendment, effective Jan. 1, 1970, rewrote the schedule of weights and rates in subsection (b), increased the fees in subdivisions (1) and (6) of subsection (b) and in subsection (c), substituted "seven and one-half percent" for "six percent" throughout subsection (e) and "five percent" for "four percent" in the fourth sentence of subsection (e) and repealed subsection (g).

The second 1969 amendment inserted the heading "Rates Per Hundred Pound Gross Weight" at the beginning of the rate schedule and substituted "Contract Carriers" for "Common Carriers" in the rate schedule in subsection (b).

Session Laws 1969, c. 600, s. 23 provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

The first 1973 amendment substituted "or other nursery products" for "(but does not mean nursery products)" in subsection (b)(4) and added the language following "forest products" at the end of subsection (b)(4).

The second 1973 amendment, effective

Jan. 1, 1974, eliminated, in the rate schedule in subsection (b), a separate classification, "Contract Carriers, Flat Rate Common Carriers and Exempt for-Hire Carriers," and placed such carriers in the same classification as "Private Hauler." The amendment also substituted "8,750" for "8,500" in the second line of the schedule for "Common Carrier of Property," but left the figure "8,501" in the next line unchanged.

As the other subsections were not changed by the amendments, they are not set out.

Large Lumber and Paper Companies Engaged in Tree Farming as Farmer License Holder. — See opinion of Attorney General to Gonzalie Rivers, Department of Motor Vehicles, 41 N.C.A.G. 273 (1971).

Method of Reporting in Certain Circumstances May Be Changed at Other Than Beginning of Tax Year.—See opinion of Attorney General to Mr. Victor J. Hines, Director, Common Carrier Tax Division, N.C. Department of Motor Vehicles, 43 N.C.A.G. 106 (1973).

Common Carrier Filing Hereunder May Not Report Only Loaded Miles for Purpose of Determining Gross Receipts for Tax Due.—See opinion of Attorney General to Mr. Victor J. Hines, Director, Common Carrier Tax Division, N.C. Department of Motor Vehicles, 43 N.C.A.G. 106 (1973).

§ 20-89. Method of computing gross revenue of common carriers of passengers and property.—In computing the gross revenue of common carriers of passengers and common carriers of property, revenue derived from the transportation of United States mail or other United States government services shall not be included. All revenue earned both within and without this State from the transportation of persons or property, except as herein provided, by common carriers of passengers and common carriers of property, whether on fixed schedule routes or by special trips or by auxiliary vehicles not licensed as common carriers of property, whether owned by the common carrier of property or hired from another for the transportation of persons or property within the limits of the designated franchise route shall be included in the gross revenue upon which said tax is based. Provided, however, that whenever any person licensed as a common carrier of property transports his own property, other than for his own use, he shall be liable for a tax on such transportation, computed at seven and one-half percent ($7\frac{1}{2}\%$) of the gross charges authorized by the Utilities Commission or Interstate Commerce Commission on such operation if it had been for hire; and common carriers of property shall maintain accurate records of all operations involving transportation of their own property, in order that said tax may be correctly computed, paid and audited.

When vehicles are leased from other operators who are licensed in this State as contract carriers, for hire passenger or common carriers of property any amounts paid to such operators under said lease may be deducted by the lessees from gross revenue on which tax is based in the event a copy of the lease and

adequate records and receipts are maintained so as to clearly reflect such payments. Any revenue earned by a common carrier of property under a lease or rental shall be included in the gross revenue upon which said tax is based but revenue earned by a common carrier of passengers from coach rentals shall not be included in gross revenue on which tax is based. (1937, c. 407, s. 53; 1943, c. 726; 1945, c. 414, s. 2; c. 575, s. 2; 1951, c. 819, ss. 1, 2½; 1969, c. 600, s. 18.)

Editor's Note.—The 1969 amendment, effective Jan. 1, 1970, substituted “seven and one-half percent (7½%)” for “six percent (6%)” in the third sentence of the first paragraph.

Session Laws 1969, c. 600, s. 23 provides: “This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof.”

§ 20-90. Due date of franchise tax.—The additional tax on common carriers of passengers and common carriers of property shall become due and payable on or before the thirtieth day of the month following the month in which it accrues.

Whenever a contract carrier or a flat rate common carrier of property becomes a regular common carrier of property subject to the seven and one-half percent (7½%) gross revenue tax under this chapter during the license renewal period, January 1 to February 15, said carrier's gross revenue for the seven and one-half percent (7½%) tax purpose shall be all the revenue earned from operations on and after the January 1 preceding the carrier's change to a regular common carrier during the renewal period January 1 to February 15.

Whenever a regular common carrier of property subject to the seven and one-half percent (7½%) gross revenue tax under this chapter becomes a flat rate common carrier of property or a contract carrier during the license renewal period, January 1 to February 15, said carrier's gross revenue for the seven and one-half percent (7½%) tax purposes shall be all the revenue earned from operations up to and including operations on the December 31 preceding the carrier's change to a flat rate common carrier of property or a contract carrier if such change is made during the renewal period January 1 to February 15. (1937, c. 407, s. 54; 1951, c. 729; c. 819, s. 1; 1955, c. 1313, s. 2; 1967, c. 1079, s. 1; 1969, c. 600, s. 19.)

Editor's Note. — The 1967 amendment rewrote the second and third paragraphs.

The 1969 amendment substituted “seven and one-half percent (7½%)” for “six percent (6%)” throughout the section.

Session Laws 1969, c. 600, s. 23 provides: “This act shall not affect the liability of any

taxpayer arising prior to the effective date of the applicable section hereof.”

Session Laws 1969, c. 1056, s. 2, amended Session Laws 1969, c. 600, s. 25, so as to change the effective date of the 1969 amendment to this section from July 1, 1969 to Jan. 1, 1970.

§ 20-91. Records and reports required of franchise carriers.

(b) All common carriers of passengers and common carriers of property shall, on or before the thirtieth day of each month, make a report to the Department of gross revenue earned and gross mileage operated during the month previous, in such manner as the Department may require and on such forms as the Department shall furnish. If reports are not filed by the thirtieth day of the month following the month for which the report is made, a penalty of five percent (5%) of gross receipts tax reported will be due. This five percent (5%) penalty must be paid in addition to the gross receipts tax and may not be claimed as a credit against the tag deposit. Provided that the Commissioner may, in his discretion, waive the five percent (5%) penalty upon proof by the carrier that late filing of report was due to extenuating circumstances beyond the control of the carrier.

(1967, c. 1079, s. 2.)

Editor's Note. — The 1967 amendment added the second, third and fourth sentences in subsection (b).

As the other subsections were not affected by the amendment, they are not set out.

§ 20-94. Partial payments.—In the purchase of licenses, where the gross amount of the license to any one owner amounts to more than four hundred dollars (\$400.00), half of such payment may, if the Commissioner is satisfied of the financial responsibility of such owner, be deferred until June first in any calendar year upon the execution to the Commissioner of a draft upon any bank or trust company upon forms to be provided by the Commissioner in an amount equivalent to one half of such tax, plus a carrying charge of one half of one percent ($\frac{1}{2}$ of 1%): Provided, that any person using any tag so purchased after the first day of June in any such year without having first provided for the payment of such draft, shall be guilty of a misdemeanor. No further license plates shall be issued to any person executing such a draft after the due date of any such draft so long as such draft or any portion thereof remains unpaid. Any such draft being dishonored and not paid shall be subject to the penalties prescribed in § 20-178 and shall be immediately turned over by the Commissioner to his duly authorized agents and/or the State Highway Patrol, to the end that this provision may be enforced. When the owner of the vehicles for which a draft has been given sells or transfers ownership to all vehicles covered by the draft, such draft shall become payable immediately, and such vehicles shall not be transferred by the Department until the draft has been paid. Any one owner whose gross license amounts to more than two hundred dollars (\$200.00) but not more than four hundred dollars (\$400.00) may also be permitted to sign a draft in accordance with the foregoing provisions of this section provided such owner makes application for the draft on or before February 1st during the license renewal period. (1937, c. 407, s. 58; 1943, c. 726; 1945, c. 49, ss. 1, 2; 1947, c. 219, s. 10; 1953, c. 192; 1967, c. 712.)

Editor's Note.—The 1967 amendment added the last sentence.

§ 20-96. Overloading.—It is the intent of this section that every owner of a motor vehicle shall procure license in advance to cover the empty weight and maximum load which may be carried. Any owner failing to do so, and whose vehicle shall be found in operation on the highway over the weight for which such vehicle is licensed, shall pay the penalties prescribed in G.S. 20-118. Nonresidents operating under the provisions of G.S. 20-83 shall be subject to the additional tax provided in this section when their vehicles are operated in excess of the licensed weight or, regardless of the licensed weight, in excess of the maximum weight provided for in G.S. 20-118. Any resident or nonresident owner of a vehicle that is found in operation on a highway designated by the Board of Transportation as a light traffic highway, and along which signs are posted showing the maximum legal weight on said highway with a load in excess of the weight posted for said highway, shall be subject to the penalties provided in G.S. 20-118. Any person who shall wilfully violate the provisions of this section shall be guilty of a misdemeanor in addition to being liable for the additional tax herein prescribed.

Any peace officer who discovers a property hauling vehicle being operated on the highways with an overload as described in this section or which is equipped with improper registration plates, or the owner of which is liable for any overload penalties or assessments applicable to the vehicle and due and unpaid for more than 30 days, is hereby authorized to seize said property hauling vehicle and hold the same until the overload has been removed or proper registration plates therefor have been secured and attached thereto and the overloading penalty provided in this section and G.S. 20-118 has been paid. Any peace officer seizing a property hauling vehicle under this provision, may, when necessary, store said vehicle and the owner thereof shall be responsible for all reasonable storage charges thereon. When any property hauling vehicle is seized, held, unloaded or partially unloaded under this provision, the load or any part thereof shall be cared for by the owner or operator of the vehicle without any liability on the part of the officer or of the State or any municipality because of damage to or loss of such load or any

part thereof. (1937, c. 407, s. 60; 1943, c. 726; 1949, c. 583, s. 8; c. 1207, s. 4½; c. 1253; 1951, c. 1013, ss. 1-3; 1953, c. 694, ss. 2, 3; 1955, c. 554, s. 9; 1957, c. 65, s. 11; 1959, c. 1264, s. 5; 1973, c. 507, s. 5.)

Editor's Note.—The 1973 amendment, effective July 1, 1973, substituted "Board of Transportation" for "State Highway Commission" in the fourth sentence of the first paragraph.

§ 20-97. Taxes compensatory; no additional tax.

Those commissioned to sell license plates are not dealing in interstate commerce, but perform a general tax collecting effort, since this section and § 20-63 do not earmark the funds for any specific project or

road, and not all of the tax even goes to the Department of Highways. *Hodgson v. Hyatt Realty & Inv. Co.*, 353 F. Supp. 1363 (M.D.N.C. 1973).

§ 20-99. Remedies for the collection of taxes.

(c) In addition to the remedy herein provided, the Commissioner of Motor Vehicles is authorized and empowered to make a certificate setting forth the essential particulars relating to the said tax, including the amount thereof, the date when the same was due and payable, the person, firm, or corporation chargeable therewith, and the nature of the tax, and under his hand and seal transmit the same to the clerk of the superior court of any county in which the delinquent taxpayer resides or has property; whereupon, it shall be the duty of the clerk of the superior court of the county [to] record the certificate in the same manner as a judgment, and execution may issue thereon with the same force and effect as an execution upon any other judgment of the superior court; said tax shall become a lien on realty only from the date of the docketing of such certificate in the office of the clerk of the superior court and on personalty only from the date of the levy on such personalty and upon execution thereon no homestead or personal property exemption shall be allowed.

(1971, c. 528, s. 12.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, substituted "record the certificate in the same manner as a judgment" for "to docket the said certificate and index the same on the cross index

of judgments" near the middle of subsection (c).

As the rest of the section was not changed by the amendment, only subsection (c) is set out.

§ 20-101. For hire vehicles to be marked.—All motor vehicles licensed as common carriers or contract carriers of passengers or property and all exempt for hire motor carriers shall have printed on each side of the vehicle in letters not less than three inches in height the name and home address of the owner, the certificate number, permit number, or exemption number under which said vehicle is operated, and such other identification as may be required and approved by the Utilities Commission. (1937, c. 407, s. 65; 1951, c. 819, s. 1; 1967, c. 1132.)

Editor's Note. — The 1967 amendment, effective Nov. 15, 1967, rewrote the section.

Not Applicable to Taxicab Which Seats Nine or Fewer Passengers and Is Not Op-

erated on a Regular Route or between Termini. — See Opinion of Attorney General to Mr. W. Vance McCown, 41 N.C.A.G. 547 (1971).

Part 8. Anti-Theft and Enforcement Provisions.

§ 20-105. Unlawful taking of a vehicle.

Inference Arising from Unlawful Possession of Vehicle.—It is more accurate to refer to the unlawful and unexplained possession of an automobile, recently and unlawfully taken from the actual or constructive possession of the owner thereof, as giving rise to an inference, an evidential circumstance, that the person having such possession thereof had unlawfully taken it

into his possession with intent to deprive the owner of the (temporary) use thereof. *State v. Frazier*, 268 N.C. 249, 150 S.E.2d 431 (1966).

The presumption arising from the recent possession of stolen property is to be considered by the jury merely as an evidential fact, along with the other evidence in the case, in determining whether the State has

carried the burden of satisfying the jury beyond a reasonable doubt of the defendant's guilt. *State v. Hayes*, 273 N.C. 712, 161 S.E.2d 185 (1968).

Offense Not an Included Less Degree of Larceny.—The statutory criminal offense defined in this section, sometimes referred to as "temporary larceny," is not an included less degree of the crime of larceny; and a defendant may not be convicted of a violation of this section when tried upon a bill of indictment charging the crime of larceny. *State v. Wall*, 271 N.C. 675, 157 S.E.2d 363 (1967); *State v. Campbell*, 14 N.C. App. 633, 188 S.E.2d 754 (1972).

Possession of One Participant Is the Possession of All.—Possession may be personal and exclusive, although it is the joint possession of two or more persons, if they are shown to have acted in concert, or to have been particeps criminis, the possession of one participant being the possession of

all. *State v. Frazier*, 268 N.C. 249, 150 S.E.2d 431 (1966).

Immediate flight of both defendants, without explanation, at mere approach of officers may be considered more than slight corroborative evidence of relation between their then unlawful possession and the unlawful removal of automobile from parking lot. *State v. Frazier*, 268 N.C. 249, 150 S.E.2d 431 (1966).

Jurisdiction of Superior Court of Guilford County.—See *State v. Covington*, 267 N.C. 292, 148 S.E.2d 138 (1966).

Punishment Prior to 1965 Amendment.—For punishment under this section prior to 1965 amendment, see *State v. Massey*, 265 N.C. 579, 144 S.E.2d 649 (1965).

Cited in *State v. Evans*, 10 N.C. App. 265, 178 S.E.2d 83 (1970); *State v. Baxley*, 15 N.C. App. 544, 190 S.E.2d 401 (1972); *State v. Franklin*, 16 N.C. App. 537, 192 S.E.2d 626 (1972).

§ 20-106. Receiving or transferring stolen vehicles.

Cross Reference.—

As to penalty for a violation of this

article declared to constitute a felony, see § 20-177.

§ 20-109. Altering or changing engine or other numbers.—No person shall wilfully deface, destroy, or alter the manufacturer's serial or engine number or other distinguishing number or identification mark of a motor vehicle and neither shall any owner permit the defacing, destroying or alteration of such numbers or marks. No person shall place or stamp any serial, engine or other number or marking upon a vehicle, except one assigned thereto by the Department, and neither shall any owner permit the placing or stamping of any number or mark upon a motor vehicle except one assigned thereto by the Department. It shall be unlawful and constitute a misdemeanor for any person to violate any of the provisions of this section, and upon conviction said person shall be punished by a fine or imprisonment not to exceed two years, or both, in the discretion of the court. (1937, 407, s. 73; 1943, c. 726; 1953, c. 216; 1965, c. 621, s. 3; 1967, c. 449.)

Editor's Note.—

The 1967 amendment inserted "not to

exceed two years" near the end of the last sentence.

§ 20-111. Violation of registration provisions.

The maximum punishment for a violation of this section or § 20-63 would be that prescribed by § 20-176 (b), namely, a fine of not more than one hundred dollars or imprisonment in the county or municipal jail for not more than sixty days, or both

such fine and imprisonment. *State v. Tolley*, 271 N.C. 459, 156 S.E.2d 858 (1967).

Applied in *State v. Green*, 266 N.C. 785, 147 S.E.2d 377 (1966).

Cited in *State v. White*, 3 N.C. App. 31, 164 S.E.2d 36 (1968).

§ 20-114. Duty of officer; manner of enforcement.—(a) For the purpose of enforcing the provisions of this Article, it is hereby made the duty of every police officer of any incorporated city or village, and every sheriff, deputy sheriff, and all other lawful officers of any county to arrest within the limits of their jurisdiction any person known personally to any such officer, or upon the sworn information of a creditable witness, to have violated any of the provisions of this Article, and to immediately bring such offender before any magistrate or officer having jurisdiction, and any such person so arrested shall have the right of immediate trial, and all other rights given to any person arrested for having committed a misdemeanor. Every officer herein named who shall neglect or re-

fuse to carry out the duties imposed by this Chapter shall be liable on his official bond for such neglect or refusal as provided by law in like cases.

(c) It shall also be the duty of every sheriff of every county of the State and of every police or peace officer of the State to make immediate report to the Commissioner of all motor vehicles reported to him as abandoned or that are seized by him for being used for illegal transportation of intoxicating liquors or other unlawful purposes, and no motor vehicle shall be sold by any sheriff, police or peace officer, or by any person, firm or corporation claiming a mechanic's or storage lien, or under judicial proceedings, until notice on a form approved by the Commissioner shall have been given the Commissioner at least 20 days before the date of such sale. (1937, c. 407, s. 78; 1943, c. 726; 1967, c. 862; 1971, c. 528, s. 13.)

Editor's Note. — The 1967 amendment, effective July 1, 1967, inserted "on a form approved by the Commissioner" near the end of subsection (c).

The 1971 amendment, effective Oct. 1, 1971, deleted "every marshal, deputy marshal, or watchman" following "police

officer" and "and every constable of any township" following "lawful officers of any county" and substituted "magistrate" for "justice of the peace" in the first sentence of subsection (a).

As subsection (b) was not changed by the amendments, it is not set out.

§ 20-114.1. Willful failure to obey traffic officer; firemen as traffic officers.—(a) No person shall willfully fail or refuse to comply with any lawful order or direction of any law-enforcement officer invested by law with authority to direct, control or regulate traffic, which order or direction related to the control of traffic.

(b) In addition to other law-enforcement officers, uniformed regular and volunteer firemen may direct traffic and enforce traffic laws and ordinances at the scene of fires in connection with their duties as firemen, and uniformed regular and volunteer members of a rescue squad may direct and enforce traffic laws and ordinances at the scene of accidents in connection with their duties. Except as herein provided, firemen and members of rescue squads shall not be considered law-enforcement officers. (1961, c. 879; 1969, c. 59.)

Editor's Note.—The 1969 amendment rewrote this section, which formerly related only to firemen.

Quoted in *Bland v. City of Wilmington*, 278 N.C. 657, 180 S.E.2d 813 (1971).

Part 9. The Size, Weight, Construction and Equipment of Vehicles.

§ 20-115. Scope and effect of regulations in this title.—It shall be unlawful and constitute a misdemeanor for any person to drive or move or for the owner to cause or knowingly permit to be driven or moved on any highway any vehicle or vehicles of a size or weight exceeding the limitations stated in this title, or any vehicle or vehicles which are not so constructed or equipped as required in this title, or the rules and regulations of the Board of Transportation adopted pursuant thereto and the maximum size and weight of vehicles herein specified shall be lawful throughout this State, and local authorities shall have no power or authority to alter said limitations except as express authority may be granted in this Article. (1937, c. 407, s. 79; 1973, c. 507, s. 5.)

Editor's Note.—The 1973 amendment, effective July 1, 1973, substituted "Board of Transportation" for "Commission."

§ 20-116. Size of vehicles and loads.

(d) A vehicle having two axles shall not exceed 35 feet in length of extreme over-all dimensions inclusive of front and rear bumpers. A vehicle having three axles shall not exceed 40 feet in length over-all dimensions inclusive of front and rear bumpers. A truck-tractor and semitrailer shall be regarded as two vehicles for the purpose of determining lawful length and license taxes.

(e) No combination of vehicles coupled together shall consist of more than two units and no such combination of vehicles shall exceed a total length of 55 feet inclusive of front and rear bumpers, subject to the following exceptions: Said length limitation shall not apply to vehicles operated in the daytime when transporting poles, pipe, machinery or other objects of a structural nature which cannot readily be dismembered, nor to such vehicles transporting such objects operated at nighttime by a public utility when required for emergency repair of public service facilities or properties, but in respect to such night transportation every such vehicle and the load thereon shall be equipped with a sufficient number of clearance lamps on both sides and marker lamps upon the extreme ends of said projecting load to clearly mark the dimensions of such load: Provided, that wreckers in an emergency may tow a combination tractor and trailer to the nearest feasible point for repair and/or storage: Provided, that the Board of Transportation shall have authority to designate any highways upon the State system as light-traffic roads when, in the opinion of the Board of Transportation, such roads are inadequate to carry and will be injuriously affected by the maximum load, size, and/or width of trucks or buses using such roads as herein provided for, and all such roads so designated shall be conspicuously posted as light-traffic roads and the maximum load, size and/or width authorized shall be displayed on proper signs erected thereon. Provided, however, that a combination of a house trailer used as a mobile home, together with its towing vehicle, shall not exceed a total length of 55 feet exclusive of front and rear bumpers. The operation of any vehicle whose gross load, size and/or width exceed the maximum shown on such signs over the roads thus posted shall constitute a misdemeanor: Provided further, that no standard concrete highway, or other highway built of material of equivalent durability, and not less than 18 feet in width, shall be designated as a light-traffic road: Provided further, that the limitations placed on any road shall not be less than eighty percent (80%) of the standard weight, unless there shall be available an alternate improved route of not more than twenty percent (20%) increase in the distance; provided, however, that such restriction of limitations shall not apply to any county road, farm-to-market road, or any other road of the secondary system: Provided further, that the said limitation that no combination of vehicles coupled together shall consist of more than two units shall not apply to trailers not exceeding three in number drawn by a motor vehicle used by municipalities for the removal of domestic and commercial refuse and street rubbish, but such combination of vehicles shall not exceed a total length of 50 feet inclusive of front and rear bumpers. Provided further, that the said limitation that no combination of vehicles coupled together shall consist of more than two units shall not apply to a combination of vehicles coupled together by a saddle mount device used to transport motor vehicles in a driveway service when no more than two saddle mounts are used and provided further that equipment used in said combination is approved by the safety regulations of the Interstate Commerce Commission and the safety regulations of the North Carolina Department of Motor Vehicles and the Board of Transportation.

(g) No vehicle shall be driven or moved on any highway unless such vehicle is so constructed or loaded as to prevent any of its load from dropping, sifting, leaking, or otherwise escaping therefrom, except that sand may be dropped for the purpose of securing traction, or water or other substance may be sprinkled on a roadway in cleaning or maintaining such roadway.

Trucks, trailers or other vehicles when loaded with rock, gravel, stone or other similar substances which could blow, leak, sift or drop shall not be driven or moved on any highway unless the height of the load against all four walls does not extend above a horizontal line six inches below their tops when loaded at the loading point, or if not so loaded, unless the load shall be securely covered by tarpaulin or some other suitable covering, or unless it is otherwise constructed so as to prevent any of its load from dropping, sifting, leaking, blowing, or otherwise escaping therefrom.

Provided this section shall not be applicable to or in any manner restrict the transportation of poultry or livestock or silage or other feed grain used in the feeding of poultry or livestock.

(h) Wherever there exist two highways of the primary State highway system of approximately the same distance between two or more points, the Board of Transportation shall have authority when in the opinion of the Board of Transportation, based upon engineering and traffic investigation, safety will be promoted or the public interest will be served thereby, to designate one of said highways the "truck route" between said points, and to prohibit the use of the other highway by heavy trucks or other vehicles of a gross vehicle weight or axle load limit in excess of a designated maximum. In such instances the highways so selected for heavy vehicle traffic shall be so designated as "truck routes" by signs conspicuously posted thereon, and the highways upon which heavy vehicle traffic is prohibited shall likewise be so designated by signs conspicuously posted thereon showing the maximum gross vehicle weight or axle load limits authorized for said highways. The operation of any vehicle whose gross vehicle weight or axle load exceed the maximum limits shown on such signs over the highway thus posted shall constitute a misdemeanor: Provided, that nothing herein shall prohibit a truck or other motor vehicle whose gross vehicle weight or axle load exceeds that prescribed for such highways from using such highway when the destination of such vehicle is located solely upon said highway, road or street: Provided, further, that nothing herein shall prohibit passenger vehicles or other light vehicles from using any highways so designated for heavy truck traffic.

(j) Self-propelled grain combines or other farm equipment self-propelled or otherwise, not exceeding 18 feet in width may be operated on any highway, except a highway or section of highway that is a part of the National System of Interstate and Defense Highways, and provided, that such combines or equipment may be operated on numbered federal or State highways exclusive of the Interstate System, only by special permit as provided in G.S. 20-119; permits issued in compliance with G.S. 20-119 for equipment covered under this section may be on an annual basis and shall expire on January 1 of the year next following the year of issuance: Provided, further, that all such combines or equipment which exceed 10 feet in width may be so operated only under the following conditions:

- (1) Said equipment may only be so operated during daylight hours; and
- (2) Said equipment must display a red flag on front and rear, said flags shall not be smaller than three feet wide and four feet long and be attached to a stick, pole, staff, etc., not less than four feet long and shall be so attached to said equipment as to be visible from both directions at all times while being operated on the public highway for not less than 300 feet; and said equipment shall travel only on routes designated by the special permit required under this section and for distances not to exceed 10 miles; and
- (3) Equipment covered by this section requiring special permit to be operated on permissible or designated highways, which by necessity must travel more than 10 miles or where by nature of the terrain or obstacles the flags referred to in subdivision (2) are not visible from both directions for 300 feet at any point along the proposed route, must be preceded at a distance of 300 feet and followed at a distance of 300 feet by a flagman either on foot or in a vehicle. Each flagman must carry and display, by hand or mounted on his vehicle, a red flag, not smaller than three feet wide and four feet long. Said flag shall be attached to a stick, pole, staff, etc., not less than three feet long and every such piece of equipment so operated shall carry and display at least one red flag not less than three feet wide and four feet long. Equipment to be operated for a distance in excess of 10 miles may not be so operated on Sundays, or holidays; and

(4) Every such piece of equipment so operated shall operate to the right of the center line when meeting traffic coming from the opposite direction and at all other times when possible and practical.

(5) Violation of this section shall not constitute negligence per se.

(k) Nothing in this section shall be construed to prevent the operation of passenger buses having an overall width of 102 inches, exclusive of safety equipment, upon the highways of this State which are 20 feet or wider and that are designated as the State primary system, or as municipal streets, when, and not until, the federal law and regulations thereunder permit the operation of passenger buses having a width of 102 inches or wider on the National System of Interstate and Defense Highways. (1937, c. 246; c. 407, s. 80; 1943, c. 213, s. 1; 1945, c. 242, s. 1; 1947, c. 844; 1951, c. 495, s. 1; c. 733; 1953, cc. 682, 1107; 1955, c. 296, s. 2; c. 729; 1957, c. 65, s. 11; cc. 493, 1183, 1190; 1959, c. 559; 1963, c. 356, s. 1; c. 610, ss. 1, 2; c. 702, s. 4; c. 1027, s. 1; 1965, c. 471; 1967, c. 24, s. 4; c. 710; 1969, cc. 128, 880; 1971, cc. 128, 680, 688, 1079; 1973, c. 507, s. 5; c. 546.)

Editor's Note.—

Chapter 24, Session Laws 1967, originally effective Oct. 1, 1967, substituted "preceded" for "proceeded" in the first sentence of subdivision (3) of subsection (j). Session Laws 1967, c. 1078, amends c. 24 so as to make it effective July 1, 1967.

Chapter 710, Session Laws 1967, effective Jan. 1, 1968, substituted, in the opening paragraph of subsection (j), "an annual basis and shall expire on January 1 of the year next following the year of issuance" for "a seasonal basis," substituted "ten" for "four" near the end of subdivision (2) and in the first and last sentences of subdivision (3) of subsection (j), and deleted "Saturdays" preceding "Sundays" near the end of subdivision (3) of subsection (j).

The first 1969 amendment rewrote subsection (d).

The second 1969 amendment, effective Sept. 1, 1969, added subsection (k).

The first 1971 amendment substituted "18" for "fifteen and one-half" near the beginning of the opening paragraph of subsection (j), inserted "from both directions at all times while being operated on the public highway" in subdivision (2), inserted the language beginning "or where" and ending "the proposed route" in the first sentence of subdivision (3) and "when meeting traffic coming from the opposite direction and at all other times" in subdivision (4) and added subdivision (5) of subsection (j).

The second and fourth 1971 amendments

§ 20-117. Flag or light at end of load.

Purpose of Section.—The obvious purpose of this section is to promote the safety of one following a loaded vehicle upon the highway. *Ratliff v. Duke Power Co.*, 268 N.C. 605, 151 S.E.2d 641 (1966).

And Meaning.—The clear meaning of this section is that during daylight hours

added the proviso at the end of subsection (g).

The third 1971 amendment, effective Jan. 1, 1972, added the second paragraph of subsection (g).

The first 1973 amendment, effective July 1, 1973, substituted "Board of Transportation" for "State Highway Commission," for "Commission" and for "North Carolina State Highway Commission" in subsections (e) and (h).

The second 1973 amendment added "or silage or other feed grain used in the feeding of poultry or livestock" at the end of subsection (g).

As subsections (a), (b), (c), (f) and (i) were not affected by the amendments, they are not set out.

Transporting Pole in Daytime without Special Permit Is Not Negligence Per Se.

—Vehicles transporting poles in the daytime are exempt from the requirements of subsection (e) of this section, and therefore during the daytime it is not negligence per se to transport without a special permit a 40-foot pole on a trailer. *Ratliff v. Duke Power Co.*, 268 N.C. 605, 151 S.E.2d 641 (1966).

Subsection (g) Does Not Require the Peak of a Load on a Truck, Trailer or Other Vehicle to Be Six Inches Below a Horizontal Line Six Inches Below the Top of All Four Side Walls.—See opinion of Attorney General to Colonel Edwin C. Guy, North Carolina State Highway Patrol, 41 N.C.A.G. 708 (1972).

a red flag shall be displayed from the end of the projecting load so that there shall be visible to a user of the highway following the vehicle at least twelve inches of the flag's length and twelve inches of the flag's width. *Ratliff v. Duke Power Co.*, 268 N.C. 605, 151 S.E.2d 641 (1966).

Draping Flag Over Load.—The requirement of this section is not met by draping over the top of the load a red flag of the required dimensions so that only a fringe of it is visible to one following the vehicle upon the highway. *Ratliff v. Duke Power Co.*, 268 N.C. 605, 151 S.E.2d 641 (1966).

Violation of Section, etc.—

Violation of this section by failure to

display at night a light, such as is required thereby, is negligence. *Ratliff v. Duke Power Co.*, 268 N.C. 605, 151 S.E.2d 641 (1966).

The violation of this section during the daylight hours, by failure to comply with its requirements applicable to such time, is negligence. *Ratliff v. Duke Power Co.*, 268 N.C. 605, 151 S.E.2d 641 (1966).

§ 20-118. Weight of vehicles and load.—No vehicle or combination of vehicles shall be moved or operated on any highway or bridge when the gross weight thereof exceeds the limit specified below:

- (5) For each violation of subdivisions (3) or (4), or for each violation of the maximum axle weight limits established by the Board of Transportation in connection with light-traffic roads, the owner of the vehicle shall pay to the Department a penalty for each pound of weight of [on] such axle in excess of the said maximum weight in accordance with the following schedule: for the first 1,000 pounds or any part thereof, two cents (2¢) per pound; for the next 1,000 pounds or any part thereof, three cents (3¢) per pound; and for each additional pound, five cents (5¢) per pound. Provided, however, the penalty shall not apply if the excess weight on any one axle does not exceed 1,000 pounds. Said 1,000 pounds shall constitute a tolerance and no additional tolerance on axle weight shall be granted administratively or otherwise. In all cases of violation of the axle weight limitation, the penalty shall be computed and assessed on each pound of weight in excess of the maximum permitted in subdivisions (3) and (4) including the 1,000 pound tolerance. The penalties herein provided shall constitute sole punishment for violation of this subdivision and violators thereof shall not be subject to criminal action. Provided, that when it is discovered that a vehicle is in violation of subdivisions (3) or (4), or is in violation of the maximum axle weight limits established by the Board of Transportation in connection with light-traffic roads, the owner of the vehicle shall be permitted to shift without penalty the weight from one axle to another to comply with the axle limits set forth in this section in the following instances, provided, that the gross weight of the vehicle is within the legal limit:

- a. In cases where the single axle load exceeds the statutory limits, but does not exceed 21,000 pounds.
- b. In cases where the vehicle has tandem axles and the weight exceeds the statutory limits, but does not exceed 40,000 pounds, for any two axle combination or 60,000 pounds for any three axle combination.
- c. In cases where the axle weight does not exceed 15,500 pounds and the limit placed on the road or highway by the Board of Transportation is 13,000 pounds per axle.

- (6) **Axle Weights.**—For the purposes of this section, the following definitions shall apply:

- a. **Single axle weight.**—The total load on all wheels whose centers are included within two parallel transverse planes less than forty-eight inches apart.
- b. **Tandem axle weight.** — The total load on all wheels whose centers are at least forty-eight inches apart but not more than one-hundred-four inches apart and are equipped with a connecting mechanism designed to equalize the load on all axles ex-

cept that as to any vehicle equipped with tandem axles prior to July 1, 1969, the portion of this definition concerning a connecting mechanism designed to equalize the load on all axles shall not apply.

(1969, c. 537; 1973, c. 507, s. 5.)

Editor's Note.—

The 1969 amendment, effective July 1, 1969, substituted in paragraph b of subdivision (5) "for any two axle combination or 60,000 pounds for any three axle combination" for "provided, that for the purpose of this section tandem axles shall be defined as any two axles more than 48 inches apart but less than 96 inches apart." The amendment also rewrote subdivision (6).

The 1973 amendment, effective July 1, 1973, substituted "Board of Transportation" for "State Highway Commission" in three places in subdivision (5).

As the rest of the section was not changed by the amendments, only the introductory paragraph and subdivisions (5) and (6) are set out.

§ 20-118.2. Authority to fix higher weight limitations at reduced speeds for certain vehicles. — The Board of Transportation is hereby authorized and empowered to fix higher weight limitations at reduced speeds for vehicles used in transporting property when the point of origin or destination of the motor vehicles is located upon any light traffic highway, county road, farm-to-market road, or any other roads of the secondary system only and/or to the extent only that the motor vehicle is necessarily using said highway in transporting the property from the bona fide point of origin of the property being transported or to the bona fide point of destination of said property and such weights may be different from the weight of those vehicles otherwise using such roads. (1951, c. 1013, s. 7A; 1957, c. 65, s. 11; 1973, c. 507, s. 5.)

Editor's Note.—

The 1973 amendment, effective July 1, 1973, substituted "Board of Transporta-

tion" for "State Highway Commission" near the beginning of the section.

§ 20-119. Special permits for vehicles of excessive size or weight. —The Board of Transportation may, in their discretion, upon application in writing and good cause being shown therefor, issue a special permit in writing authorizing the applicant to operate or move a vehicle of a size or weight exceeding a maximum specified in this Article upon any highway under the jurisdiction and for the maintenance of which the body granting the permit is responsible. Every such permit shall be carried in the vehicle to which it refers and shall be open to inspection by any peace officer; and it shall be a misdemeanor for any person to violate any of the terms or conditions of such special permit: Provided, the authorities in any incorporated city or town may grant permits in writing and for good cause shown, authorizing the applicant to move a vehicle over the streets of such city or town, the size or width exceeding the maximum expressed in this Article. (1937, c. 407, s. 83; 1957, c. 65, s. 11; 1959, c. 1129; 1973, c. 507, s. 5.)

Editor's Note.—The 1973 amendment, effective July 1, 1973, substituted "Board of Transportation" for "State Highway Commission" near the beginning of the section.

Violation as Negligence Per Se.—The failure to obtain a permit to operate oversize or overweight vehicles in violation of this section is negligence per se. *Byers v. Standard Concrete Prods. Co.*, 268 N.C. 518, 151 S.E.2d 38 (1966).

Transporting Pole in Daytime without Special Permit Is Not Negligence Per Se.

—Vehicles transporting poles in the daytime are exempt from the requirements of § 20-116 (e), and therefore during the daytime it is not negligence per se to transport without a special permit a 40-foot pole on a trailer. *Ratliff v. Duke Power Co.*, 268 N.C. 605, 151 S.E.2d 641 (1966).

§ 20-121. When authorities may restrict right to use highways. — The Board of Transportation or local authorities may prohibit the operation of vehicles upon or impose restrictions as to the weight thereof, for a total period

not to exceed 90 days in any one calendar year, when operated upon any highway under the jurisdiction of and for the maintenance of which the body adopting the ordinance is responsible, whenever any said highway by reason of deterioration, rain, snow or other climatic conditions will be damaged unless the use of vehicles thereon is prohibited or the permissible weights thereof reduced. The local authority enacting any such ordinance shall erect, or cause to be erected and maintained, signs designating the provisions of the ordinance at each end of that portion of any highway to which the ordinance is applicable, and the ordinance shall not be effective until or unless such signs are erected and maintained. (1937, c. 407, s. 84; 1957, c. 65, s. 11; 1973, c. 507, s. 5.)

Editor's Note.—The 1973 amendment, "Transportation" for "State Highway Commission" near the beginning of the section, effective July 1, 1973, substituted "Board of

mission" near the beginning of the section.

§ 20-122. Restrictions as to tire equipment.

(c) The Board of Transportation or local authorities in their respective jurisdictions may, in their discretion, issue special permits authorizing the operation upon a highway of traction engines or tractors having movable tracks with transverse corrugation upon the periphery of such movable tracks or farm tractors of other farm machinery.

(1973, c. 507, s. 5.)

Editor's Note.—

The 1973 amendment, effective July 1, 1973, substituted "Board of Transportation" for "State Highway Commission" in subsection (c).

As the rest of the section was not changed by the amendment, only subsection (c) is set out.

§ 20-122.1. Motor vehicles to be equipped with safe tires.—(a) Every motor vehicle subject to safety equipment inspection in this State and operated on the streets and highways of this State shall be equipped with tires which are safe for the operation of the motor vehicle and which do not expose the public to needless hazard. Tires shall be considered unsafe if cut so as to expose tire cord, cracked so as to expose tire cord, or worn so as to expose tire cord or there is a visible tread separation or chunking or the tire has less than two thirty-seconds inch tread depth: Provided, the two thirty-seconds ($2/32$) tread depth requirements of this section shall not apply to dual wheel trailers. Provided further that as to trucks owned by farmers and operated exclusively in the carrying and transportation of the owner's farm products which are approved for daylight use only and which are equipped with dual wheels, the tread depth requirements of this section shall not apply to more than one wheel in each set of dual wheels. For the purpose of this section, the following definitions shall apply:

- (1) "Chunking"—separation of the tread from the carcass in particles which may range from very small size to several square inches in area.
- (2) "Cord"—strands forming a ply in a tire.
- (3) "Tread"—portion of tire which comes in contact with road.
- (4) "Tread depth"—the distance, measured near the center line of the tire, from the base of the tread design to the top of the tread.

(b) The driver of any vehicle who is charged with a violation of this section shall be allowed 15 calendar days within which to bring the tires of such vehicle in conformance with the requirements of this section. It shall be a defense to any such charge that the person arrested produce in court, or submit to the prosecuting attorney prior to trial, a certificate from an official safety inspection equipment station showing that within 15 calendar days after such arrest, the tires on such vehicle had been made to conform with the requirements of this section or that such vehicle had been sold, destroyed, or permanently removed from the highways.

Violation of this section shall not constitute negligence per se. (1969, c. 378, s. 1; c. 1256.)

Editor's Note. — The 1969 amendment and inserted the third sentence of subsection (a) to the proviso to the second sentence

§ 20-123. Trailers and towed vehicles.—(a) No motor vehicle shall be driven upon any highway drawing or having attached thereto more than one trailer or semitrailer: Provided that this provision shall not apply to trailers not exceeding three in number drawn by a motor vehicle used by municipalities for the removal of domestic and commercial refuse and street rubbish, but such combination of vehicles shall not exceed a total length of 50 feet inclusive of front and rear bumpers: Provided that, this provision shall not apply to a combination of vehicles coupled together by a saddle mount device used to transport motor vehicles in a driveway service when no more than two saddle mounts are used and provided further that equipment used in said combination is approved by the safety regulations of the Interstate Commerce Commission and the safety regulations of the North Carolina Department of Motor Vehicles and the Board of Transportation. Nothing herein shall prohibit the towing of farm trailers and equipment in single tandem during the period from one-half hour before sunrise and one-half hour after sunset, but such combination of vehicles shall not exceed a total length of 40 feet and provided there is displayed on the rear of the last vehicle being towed, in such position as to be clearly visible at all times, a red flag not less than 12 inches both in length and width. The towing of farm trailers and equipment as herein permitted shall not be applicable to interstate or federal numbered highways.

(b) No trailer or semitrailer or other towed vehicle shall be operated over the highways of the State unless such trailer or semitrailer or other towed vehicle be firmly attached to the rear of the motor vehicle drawing same, and unless so equipped that it will not snake, but will travel in the path of the vehicle drawing such trailer or semitrailer or other towed vehicle, which equipment shall at all times be kept in good condition. (1937, c. 407, s. 86; 1955, c. 296, s. 3; 1963, c. 356, s. 2; c. 1027, s. 2; 1965, c. 966; 1971, c. 639; 1973, c. 507, s. 5.)

Editor's Note.—

The 1971 amendment inserted "or other towed vehicle" in three places in subsection (b) and deleted "the wheels of" following "in the path of" in subsection (b).

The 1973 amendment, effective July 1, 1973, substituted "Board of Transportation" for "North Carolina State Highway Commission" in the second proviso in subsection (a).

One using a vehicle trailer on the public highways is required to exercise reasonable care, both as to the equipment of the trailer and as to the operation of the vehicle to which it is attached. *Miller v. Lucas*, 267 N.C. 1, 147 S.E.2d 537 (1966).

In the case of a trailer not controlled in its movements by any person thereon, the operator of the vehicle to which the trailer is attached must exercise reasonable care to see that it is properly attached and that the progress of the two vehicles does not cause danger or injury. *Miller v. Lucas*, 267 N.C. 1, 147 S.E.2d 537 (1966).

And Violation of Section Is Negligence

§ 20-124. Brakes.

(c) Every motor vehicle when operated on a highway shall be equipped with brakes adequate to control the movement of and to stop and hold such vehicle, and

Per Se.—A violation of this section intended and designed to prevent injury to persons or property on the highways is negligence per se. *Miller v. Lucas*, 267 N.C. 1, 147 S.E.2d 537 (1966).

Liability for Defect in Trailer Hitch.—The owner of a motor vehicle to which a trailer is attached is generally held liable for loss or injury proximately by reason of a defect in the trailer fastening or hitch, resulting in the trailer breaking loose and becoming detached from the motor vehicle. *Miller v. Lucas*, 267 N.C. 1, 147 S.E.2d 537 (1966).

The owner of a motor vehicle with a trailer attached is generally held not liable for loss or injury inflicted by reason of a defect in the trailer fastening or hitch resulting in the trailer breaking loose, where he did not have knowledge of such defect, and would not have discovered it by reasonable inspection. *Miller v. Lucas*, 267 N.C. 1, 147 S.E.2d 537 (1966).

shall have all originally equipped brakes in good working order, including two separate means of applying the brakes. If these two separate means of applying the brakes are connected in any way, they shall be so constructed that failure of any one part of the operating mechanism shall not leave the motor vehicle without brakes.

(f) Every semitrailer, or trailer, or separate vehicle, attached by a draw-bar or coupling to a towing vehicle, and having a gross weight of two tons, and all house trailers of one thousand pounds gross weight or more, shall be equipped with brakes controlled or operated by the driver of the towing vehicle, which shall conform to the specifications set forth in subsection (e) of this section and shall be of a type approved by the Commissioner.

(h) From and after July 1, 1955, no person shall sell or offer for sale for use in motor vehicle brake systems in this State any hydraulic brake fluid of a type and brand other than those approved by the Commissioner of Motor Vehicles. From and after January 1, 1970 no person shall sell or offer for sale in motor vehicle brake systems any brake lining of a type or brand other than those approved by the Commissioner of Motor Vehicles. Violation of the provisions of this subsection shall constitute a misdemeanor. (1937, c. 407, s. 87; 1953, c. 1316, s. 2; 1955, c. 1275; 1959, c. 990; 1965, c. 1031; 1967, c. 1188; 1969, cc. 787, 866.)

Editor's Note.—

The 1967 amendment rewrote the first sentence in subsection (c) and eliminated "on at least two wheels" at the end of the second sentence therein.

The first 1969 amendment, effective Jan. 1, 1970, inserted the second sentence in subsection (h).

The second 1969 amendment substituted "subsection (e)" for "subsection (d)" near the end of subsection (f).

As the other subsections were not affected by the amendments, they are not set out.

Legislative Purpose.—

The purpose of this section is to protect from injury all persons using the highway, both occupants of the vehicle in question and others. *Wilcox v. Glover Motors, Inc.*, 269 N.C. 473, 153 S.E.2d 76 (1967).

But Section Must Be Given, etc.—

In accord with original. See *Wilcox v. Glover Motors, Inc.*, 269 N.C. 473, 153 S.E.2d 76 (1967); *Stone v. Mitchell*, 5 N.C. App. 373, 168 S.E.2d 668 (1969).

The duty imposed by this section rests both upon the owner and upon the driver of the vehicle, though knowledge of a defect, or negligence in failing to discover it, on the part of the one would not necessarily be imputed to the other. *Wilcox v. Glover Motors, Inc.*, 269 N.C. 473, 153 S.E.2d 76 (1967).

The legislature did not intend, etc.—

In accord with original. See *Wilcox v. Glover Motors, Inc.*, 269 N.C. 473, 153 S.E.2d 76 (1967); *Stone v. Mitchell*, 5 N.C. App. 373, 168 S.E.2d 668 (1969).

Violation Negligence Per Se.—

In accord with 1st paragraph in original.

See *Tate v. Bryant*, 16 N.C. App. 132, 191 S.E.2d 433 (1972).

The violation of this section and other safety statutes is negligence per se, unless the statute expressly provides otherwise. *McCall v. Dixie Cartage & Warehousing, Inc.*, 272 N.C. 190, 158 S.E.2d 72 (1967).

Where the plaintiff has shown the defendant's brakes to be defective, this is negligence per se. *Anderson v. Robinson*, 8 N.C. App. 224, 174 S.E.2d 45 (1970).

To park an automobile on an incline without securing its position by use of the brake and transmission constitutes negligence, and, if such negligence is the proximate cause of plaintiffs' damages, it is actionable negligence. *Tuttle v. Beck*, 7 N.C. App. 337, 172 S.E.2d 90 (1970).

Liability of Bailor.—When a prospective purchaser of an automobile is permitted by the dealer to take the car and drive it for the purpose of trying it out to determine whether he wishes to buy it, no representative of the dealer accompanying him, the relationship between the dealer and the prospective purchaser is that of bailor and bailee. The bailment is one for the mutual benefit of the parties. *Wilcox v. Glover Motors, Inc.*, 269 N.C. 473, 153 S.E.2d 76 (1967).

The bailor, even though a dealer in secondhand automobiles and engaged in the repair of automobiles, is not an insurer of the brakes upon a vehicle held by him for sale and delivered by him to a prospective customer for a trial drive upon the highway. *Wilcox v. Glover Motors, Inc.*, 269 N.C. 473, 153 S.E.2d 76 (1967).

A bailor who knows, or by a reasonable inspection of his vehicle should know, that its brakes are defective and unsafe, is neg-

ligent in permitting that vehicle to be taken from his premises and driven upon the highway by a bailee and may be held liable in damages to a third person injured by the operation of such vehicle, if such defect in its brakes is the proximate cause of such injury. *Wilcox v. Glover Motors, Inc.*, 269 N.C. 473, 153 S.E.2d 76 (1967).

The burden is upon the plaintiff to prove that the bailor, at the time he allowed the vehicle to leave his possession for such purpose, knew, or in the exercise of reasonable care in the inspection of the vehicle should have known, that the brakes were defective. *Wilcox v. Glover Motors, Inc.*, 269 N.C. 473, 153 S.E.2d 76 (1967).

The doctrine of *res ipsa loquitur* does not apply to a brake failure several hours and many miles after delivery of the car to the bailee. *Wilcox v. Glover Motors, Inc.*, 269 N.C. 473, 153 S.E.2d 76 (1967).

Reasonable Excuse for Failure to Comply with Section. — In recognition of the principle that this statute must be reason-

ably construed and applied, defendant could offer proof of legal excuse in avoidance of his failure to have observed the duty created by this section, i.e., proof that an occurrence wholly without his fault made compliance with the section impossible at the moment complained of and which proper care on his part would not have avoided. Upon adducing the substantial evidence tending to so prove, it is then a jury question as to whether the defendant was negligent for failure to have provided a foot brake in good working order. *Anderson v. Robinson*, 8 N.C. App. 224, 174 S.E.2d 45 (1970).

The defendant may excuse violation of this section by showing a sudden and unexpected brake failure not the result of his failure to reasonably inspect the vehicle. *Tate v. Bryant*, 16 N.C. App. 132, 191 S.E.2d 433 (1972).

Cited in *Vann v. Hayes*, 266 N.C. 713, 147 S.E.2d 186 (1966).

§ 20-125. Horns and warning devices.

Blue Light for Law-Enforcement Vehicles May Be Used.—See opinion of Attorney General to Chief W.W. Pleasants, Durham Chief of Police, 40 N.C.A.G. 391 (1970).

Applied in *State v. Speights*, 12 N.C. App. 32, 182 S.E.2d 204 (1971).

Cited in *State v. Speights*, 280 N.C. 137, 185 S.E.2d 152 (1971).

§ 20-125.1. Directional signals.—(a) It shall be unlawful for the owner of any motor vehicle of a changed model or series designation indicating that it was manufactured or assembled after July 1, 1953, to register such vehicle or cause it to be registered in this State, or to obtain, or cause to be obtained in this State registration plates therefor, unless such vehicle is equipped with a mechanical or electrical signal device by which the operator of the vehicle may indicate to the operator of another vehicle, approaching from either the front or rear and within a distance of 200 feet, his intention to turn from a direct line. Such signal device must be of a type approved by the Commissioner of Motor Vehicles.

(b) It shall be unlawful for any dealer to sell or deliver in this State any motor vehicle of a changed model or series designation indicating that it was manufactured or assembled after July 1, 1953, if he knows or has reasonable cause to believe that the purchaser of such vehicle intends to register it or cause it to be registered in this State or to resell it to any other person for registration in and use upon the highways of this State, unless such motor vehicle is equipped with a mechanical or electrical signal device by which the operator of the vehicle may indicate to the operator of another vehicle, approaching from either of the front or rear or within a distance of 200 feet, his intention to turn from a direct line. Such signal device must be of a type approved by the Commissioner of Motor Vehicles: Provided that in the case of any motor vehicle manufactured or assembled after July 1, 1953 the signal device with which such motor vehicle is equipped shall be presumed *prima facie* to have been approved by the Commissioner of Motor Vehicles. Irrespective of the date of manufacture of any motor vehicle a certificate from the Commissioner of Motor Vehicles to the effect that a particular type of signal device has been approved by his Department shall be admissible in evidence in all the courts of this State.

(c) Trailers satisfying the following conditions are not required to be equipped with a directional signal device:

- (1) The trailer and load does not obscure the directional signals of the towing vehicle from the view of a driver approaching from the rear and within a distance of two hundred (200) feet;
- (2) The gross weight of the trailer and load does not exceed four thousand (4,000) pounds.

(d) Nothing in this section shall apply to motorcycles. (1953, c. 481; 1957, c. 488, s. 1; 1963, c. 524; 1969, c. 622.)

Editor's Note.—

The 1969 amendment substituted "four thousand (4,000)" for "three thousand

(3,000)" in subdivision (2) of subsection (c).

§ 20-126. Mirrors.—(a) No person shall drive a motor vehicle on the streets or highways of this State unless equipped with an inside rear view mirror of a type approved by the Commissioner, which provides the driver with a clear, undistorted, and reasonably unobstructed view of the highway to the rear of such vehicle; provided, a vehicle so constructed or loaded as to make such inside rear view mirror ineffective, may be operated if equipped with a mirror of a type to be approved by the Commissioner located so as to reflect to the driver a view of the highway to the rear of such vehicle. A violation of this subsection shall not constitute negligence per se in civil actions. Farm tractors, self-propelled implements of husbandry and construction equipment and all self-propelled vehicles not subject to registration under this chapter are exempt from the provisions of this section. Provided that pickup trucks equipped with an outside rear view mirror approved by the Commissioner shall be exempt from the inside rear view mirror provision of this section.

(c) No person shall operate a motorcycle upon the streets or highways of this State unless such motorcycle is equipped with a rear view mirror so mounted as to provide the operator with a clear, undistorted and unobstructed view of at least 200 feet to the rear of the motorcycle. No motorcycle shall be registered in this State after January 1, 1968 unless such motorcycle is equipped with a rear view mirror as described in this section. Violation of the provisions of this subsection shall not be considered negligence per se or contributory negligence per se in any civil action. (1937, c. 407, s. 89; 1965, c. 368; 1967, c. 282, s. 1; c. 674, s. 2; c. 1139.)

Editor's Note.—

The first 1967 amendment, effective Jan. 1, 1968, rewrote subsection (a).

The second 1967 amendment, effective Jan. 1, 1968, added subsection (c).

The third 1967 amendment added the last sentence in subsection (a).

As subsection (b) was not changed by the amendments, it is not set out.

The violation of this section and other

safety statutes is negligence per se, unless the statute expressly provides otherwise. *McCall v. Dixie Cartage & Warehousing, Inc.*, 272 N.C. 190, 158 S.E.2d 72 (1967).

Inside Mirror Installed by Manufacturer. — Section 1.2, c. 282, Session Laws 1967, provides that any inside mirror installed in any motor vehicle by its manufacturer shall be deemed to comply with subsection (a) of this section.

§ 20-127. Windshields must be unobstructed.

(b) No motor vehicle which is equipped with a permanent windshield shall be operated upon the highways unless said windshield is equipped with a device for cleaning snow, rain, moisture, or other matters from the windshield directly in front of the operator, which device shall be in good working order and so constructed as to be controlled or operated by the operator of the vehicle. Provided, on any vehicle equipped by its manufacturer with such devices on both the right and left sides of windshield, both such devices shall be in working order. The

device required by this subsection shall be of a type approved by the Commissioner. (1967, c. 1077.)

Editor's Note. — The 1967 amendment changed by the amendment, they are not added the proviso in subsection (b). set out.

As subsections (a) and (c) were not

§ 20-128. Prevention of noise, smoke, etc.; muffler cut-outs regulated.

(c) No motor vehicle registered in this State which was manufactured after model year 1967 shall be operated in this State unless it is equipped with such emission control devices to reduce air pollution as were installed at the time of manufacture, provided the foregoing requirement shall not apply where such devices have been removed for the purpose of converting the motor vehicle to operate on natural or liquified petroleum gas or other modifications have been made in order to reduce air pollution, further provided that such modifications shall have first been approved by the Department of Water and Air Resources. (1937, c. 407, s. 91; 1971, c. 455, s. 1.)

Editor's Note. — The 1971 amendment, Only the subsection added by the effective Jan. 1, 1972, added subsection amendment is set out. (c).

§ 20-128.1. Control of visible emissions.—(a) It shall be a violation of this Article:

- (1) For any gasoline powered motor vehicle registered and operated in this State to emit visible air contaminants under any mode of operation for longer than five consecutive seconds.
- (2) For any diesel powered motor vehicle registered and operated in this State to emit for longer than five consecutive seconds under any mode of operation visible air contaminants which are equal to or darker than the shade or density designated as No. 1 on the Ringelmann Chart or are equal to or darker than a shade or density of twenty percent (20%) opacity.

(b) Any person charged with a violation of this section shall be allowed 30 days within which to make the necessary repairs or modification to bring the motor vehicle into conformity with the standards of this section and to have the motor vehicle inspected and approved by the agency issuing the notice of violation. Any person who, within 30 days of receipt of a notice of violation, and prior to inspection and approval by the agency issuing the notice, receives additional notice or notices of violation, may exhibit a certificate of inspection and approval from the agency issuing the first notice in-lieu of inspection and approval by the agencies issuing the subsequent notices.

(c) The provisions of this section shall be enforceable by all persons designated in G.S. 20-49; by all law-enforcement officers of this State within their respective jurisdictions; by the personnel of local air pollution control agencies within their respective jurisdictions; and by personnel of State air pollution control agencies throughout the State.

(d) Any person who fails to comply with the provisions of this section shall be subject to the penalties provided in G.S. 20-176. (1971, c. 1167, s. 10.)

Editor's Note. — Session Laws 1971, c. 1167, s. 12 makes the act effective July 1, 1971.

§ 20-129. Required lighting equipment of vehicles.—(a) When Vehicles Must Be Equipped.—Every vehicle upon a highway within this State during the period from a half hour after sunset to a half hour before sunrise, and at any other time when there is not sufficient light to render clearly discernible any person on the highway at a distance of two hundred feet ahead, shall be equipped

with lighted head lamps and rear lamps as in this section respectively required for different classes of vehicles, and subject to exemption with reference to lights on parked vehicles as declared in § 20-134.

(c) **Headlamps on Motorcycles.**—Every motorcycle shall be equipped with at least one and not more than two headlamps which shall comply with the requirements and limitations set forth in G.S. 20-131 or 20-132. The headlamps on a motorcycle shall be lighted at all times while the motorcycle is in operation on highways or public vehicular areas.

(d) **Rear Lamps.**—Every motor vehicle, and every trailer or semitrailer attached to a motor vehicle and every vehicle which is being drawn at the end of a combination of vehicles, shall have all originally equipped rear lamps or the equivalent in good working order, which lamps shall exhibit a red light plainly visible under normal atmospheric conditions from a distance of 500 feet to the rear of such vehicle. One rear lamp or a separate lamp shall be so constructed and placed that the number plate carried on the rear of such vehicle shall under like conditions be illuminated by a white light as to be read from a distance of 50 feet to the rear of such vehicle. Every trailer or semitrailer shall carry at the rear, in addition to the originally equipped lamps, a red reflector of the type which has been approved by the Commissioner and which is so located as to height and is so maintained as to be visible for at least 500 feet when opposed by a motor vehicle displaying lawful undimmed lights at night on an unlighted highway.

Notwithstanding the provisions of the first paragraph of this subsection, it shall not be necessary for a trailer, weighing less than 4000 pounds, to carry or be equipped with a rear lamp, provided such vehicle is equipped with and carries at the rear two red reflectors of a diameter of not less than four inches, such reflectors to be approved by the Commissioner, and which are so designed and located as to height and are maintained so that each reflector is visible for at least 500 feet when approached by a motor vehicle displaying lawful undimmed headlights at night on an unlighted highway.

The rear lamps of a motorcycle shall be lighted at all times while the motorcycle is in operation on highways or public vehicular areas.

(1967, cc. 1076, 1213; 1969, c. 389; 1973, c. 531, ss. 1, 2.)

Editor's Note.—The first 1967 amendment rewrote subsection (d).

The second 1967 amendment substituted "head lamps" for "front" in subsection (a).

The 1969 amendment substituted "weighing less than 4000" for "licensed for not more than 2500" near the beginning of the second paragraph of subsection (d).

The 1973 amendment added the second sentence of subsection (c) and the third paragraph of subsection (d).

As the other subsections were not changed by the amendments, they are not set out.

Purpose of Section.—

In accord with 3rd paragraph in original. See *White v. Mote*, 270 N.C. 544, 155 S.E.2d 75 (1967).

This is a safety statute enacted for the protection of persons and property. *Brown v. Boren Clay Prods. Co.*, 5 N.C. App. 418, 168 S.E.2d 452 (1969).

Section Applies to State Highway System Only.—The provisions of this section are not applicable to defendants' truck

parked or stopped on a street in the city when plaintiff has neither allegation nor proof to show that the street forms a part of the State highway system. *Coleman v. Burris*, 265 N.C. 404, 144 S.E.2d 241 (1965).

Violation as Negligence Per Se.—

In accord with 2nd paragraph in original. See *Faison v. T & S Trucking Co.*, 266 N.C. 383, 146 S.E.2d 450 (1966); *Brown v. Boren Clay Prods. Co.*, 5 N.C. App. 418, 168 S.E.2d 452 (1969).

In accord with 3rd paragraph in original. See *White v. Mote*, 270 N.C. 544, 155 S.E.2d 75 (1967).

The violation of this section constitutes negligence per se. *McNulty v. Chaney*, 1 N.C. App. 610, 162 S.E.2d 90 (1968).

The function of a front light or headlight, defined by this section and § 20-131, is to produce a driving light sufficient, under normal atmospheric conditions, to enable the operator to see a person 200 feet ahead. *O'Berry v. Perry*, 266 N.C. 77, 145 S.E.2d 321 (1965); *Miller v. Wright*, 272 N.C. 666, 158 S.E.2d 824 (1968).

The adequacy of headlights upon a motor vehicle, in normal atmospheric conditions, is determined by this section and § 20-131. *Miller v. Wright*, 272 N.C. 666, 158 S.E.2d 824 (1968).

Bicycle Riding On Highway Without Lights Was Negligence. — In a wrongful death case if deceased was riding his bicycle, without lights, at night upon a public highway, he was guilty of negligence.

§ 20-129.1. Additional lighting equipment required on certain vehicles.

- (4) On every trailer or semitrailer having a gross weight of 4,000 pounds or more:

On the front, two clearance lamps, one at each side.

On each side, two side marker lamps, one at or near the front and one at or near the rear.

On each side, two reflectors, one at or near the front and one at or near the rear.

On the rear, two clearance lamps, one at each side, also two reflectors, one at each side, and one stop light.

- (5) On every pole trailer having a gross weight of 4,000 pounds or more:

On each side, one side marker lamp and one clearance lamp which may be in combination, to show to the front, side and rear

On the rear of the pole trailer or load, two reflectors, one at each side.

- (6) On every trailer, semitrailer or pole trailer having a gross weight of less than 4,000 pounds:

On the rear, two reflectors, one on each side. If any trailer or semitrailer is so loaded or is of such dimensions as to obscure the stoplight on the towing vehicle, then such vehicle shall also be equipped with one stoplight.

(1969, c. 387.)

Editor's Note. — The 1969 amendment substituted "of 4,000 pounds or more" for "in excess of 3,000 pounds" near the beginning of subdivision (4), substituted "having a gross weight of 4,000 pounds or more" for "in excess of 3,000 pounds gross weight" near the beginning of subdivision (5) and substituted "having a gross weight of less than 4,000 pounds" for "weighing 3,000 pounds gross or less" near the beginning of subdivision (6).

As the rest of the section was not

Miller v. Enzor, 17 N.C. App. 510, 195 S.E.2d 86 (1973).

Evidence Showing Violation of Section.—

See *White v. Mote*, 270 N.C. 544, 155 S.E.2d 75 (1967).

Applied in *Griffin v. Watkins*, 269 N.C. 650, 153 S.E.2d 356 (1967); *Williamson v. McNeill*, 8 N.C. App. 625, 174 S.E.2d 294 (1970).

changed by the amendment, only subdivisions (4), (5) and (6) are set out.

This section was enacted in the interest, etc.—

In accord with original. See *White v. Mote*, 270 N.C. 544, 155 S.E.2d 75 (1967).

Its violation constitutes negligence, etc.—

In accord with original. See *White v. Mote*, 270 N.C. 544, 155 S.E.2d 75 (1967).

Cited in *Atkins v. Moye*, 277 N.C. 179, 176 S.E.2d 729 (1970).

§ 20-130.1. Use of red lights on front of vehicles prohibited; exceptions.—It shall be unlawful for any person to drive upon the highways of this State any vehicle displaying red lights visible from the front of said vehicle. The provisions of this section shall not apply to police cars, highway patrol cars, vehicles owned by the Wildlife Resources Commission and operated exclusively for law-enforcement purposes, ambulances, fire-fighting vehicles, school buses, a vehicle operated in the performance of his duties or services by any member of a municipal or rural fire department, paid or voluntary, or vehicles of a voluntary life-saving organization that have been officially approved by the local police authorities and manned or operated by members of such organization while on official call or vehicles operated by medical doctors and anesthetists in emergencies or to such lights as may be prescribed by the Interstate Commerce Commission. The

provisions of this section shall not apply to motor vehicles used in law enforcement by the sheriff or any salaried deputy sheriff or salaried rural policeman of any county, regardless of whether or not the vehicle is owned by the county. (1943, c. 726; 1947, c. 1032; 1953, c. 354; 1955, c. 528; 1957, c. 65, s. 11; 1959, c. 166, s. 2; c. 1170, s. 2; 1967, c. 651, s. 1; 1971, c. 1214.)

Editor's Note.—The 1967 amendment, effective Jan. 1, 1968, deleted "wreckers" and "maintenance or construction vehicles or equipment of the State Highway Commission engaged in performing maintenance or construction work on the roads"

from the list of exempted vehicles in the second sentence.

The 1971 amendment inserted "or vehicles operated by medical doctors and anesthetists in emergencies" in the second sentence.

§ 20-130.2. Use of amber lights on certain vehicles.—All wreckers operated on the highways of the State shall be equipped with an amber colored flashing light which shall be so mounted and located as to be clearly visible in all directions from a distance of 500 feet. It shall be lawful to equip any other vehicle with a similar warning light including, but not by way of limitation, maintenance or construction vehicles or equipment of the Board of Transportation engaged in performing maintenance or construction work on the roads, maintenance or construction vehicles of any person, firm or corporation, and any other vehicles required to contain a warning light. (1967, c. 651, s. 2; 1973, c. 507, s. 5.)

Editor's Note.—Section 3, c. 651, Session Laws 1967, provides that the act shall become effective Jan. 1, 1968.

1973, substituted "Board of Transportation" for "State Highway Commission" in the second sentence.

The 1973 amendment, effective July 1,

§ 20-131. Requirements as to head lamps and auxiliary driving lamps.

The function of a front light or headlight, defined by § 20-129 and this section, is to produce a driving light sufficient, under normal atmospheric conditions, to enable the operator to see a person 200 feet ahead. *O'Berry v. Perry*, 266 N.C. 77, 145 S.E.2d 321 (1965); *Miller v. Wright*, 272 N.C. 666, 158 S.E.2d 824 (1968).

The adequacy of headlights upon a motor vehicle, in normal atmospheric conditions, is determined by this section and

§ 20-129. *Miller v. Wright*, 272 N.C. 666, 158 S.E.2d 824 (1968).

The function of a parking light is to enable a vehicle parked or stopped upon the highway to be seen under similar conditions from a distance of 500 feet to the front of such vehicle. *O'Berry v. Perry*, 266 N.C. 77, 145 S.E.2d 321 (1965).

Applied in *Williamson v. McNeill*, 8 N.C. App. 625, 174 S.E.2d 294 (1970).

Quoted in *Meeks v. Atkeson*, 7 N.C. App. 631, 173 S.E.2d 509 (1970).

§ 20-134. Lights on parked vehicles.

The function of a parking light is to enable a vehicle parked or stopped upon the highway to be seen under similar conditions from a distance of 500 feet to the front of such vehicle. *O'Berry v. Perry*, 266 N.C. 77, 145 S.E.2d 321 (1965).

This section is inapplicable, etc.—

The provisions of this section are not applicable to defendants' truck parked or stopped on a street in the city when plaintiff has neither allegation nor proof to show that the street forms a part of the State highway system. *Coleman v. Burris*, 265 N.C. 404, 144 S.E.2d 241 (1965).

Violation Is Negligence Per Se.—

In accord with 4th paragraph in original. See *Faison v. T & S Trucking Co.*, 266 N.C. 383, 146 S.E.2d 450 (1966).

A violation of this provision is negligence per se. *Edwards v. Mayes*, 385 F.2d 369 (4th Cir. 1967).

Jury Question.—

It is for the jury to decide whether, upon the evidence, a violation of this statute was a proximate cause of decedent's injuries. *Edwards v. Mayes*, 385 F.2d 369 (4th Cir. 1967).

Stated in *Puryear v. Cooper*, 2 N.C. App. 517, 163 S.E.2d 299 (1968).

Cited in *Vann v. Hayes*, 266 N.C. 713, 147 S.E.2d 186 (1966); *Brown v. Boren Clay Prods. Co.*, 5 N.C. App. 418, 168 S.E.2d 452 (1969); *Atkins v. Moye*, 277 N.C. 179, 176 S.E.2d 789 (1970); *McNair v. Boyette*, 282 N.C. 230, 192 S.E.2d 457 (1972).

§ 20-135.2. Safety belts and anchorages.

Seat belt enactments are not absolute safety measures and no statutory duty to use the belts can be implied from them. *Miller v. Miller*, 273 N.C. 228, 160 S.E.2d 65 (1968).

The failure of a guest passenger to use an available seat belt does not constitute contributory negligence barring recovery by the passenger for personal injuries received in an automobile accident caused by defendant driver's negligence. *Miller v. Miller*, 273 N.C. 228, 160 S.E.2d 65 (1968).

Nor Does It Invoke Doctrine of Avoidable Consequences.—The doctrine of avoidable consequences is not invoked by the failure of plaintiff guest passenger to use an available seat belt, since the failure to fasten the seat belt occurs before defendant's negligence. *Miller v. Miller*, 273 N.C. 228, 160 S.E.2d 65 (1968).

Applied in *Calloway v. Ford Motor Co.*, 281 N.C. 496, 189 S.E.2d 484 (1972).

§ 20-135.3. Seat belt anchorages for rear seats of motor vehicles.

Cross Reference.—See note to § 20-135.2.

§ 20-135.4. Certain automobile safety standards.—(a) Definitions.—For the purposes of this section, the term "private passenger automobile" shall mean a four-wheeled motor vehicle designed principally for carrying passengers, for use on public roads and highways, except a multipurpose passenger vehicle which is constructed either on a truck chassis or with special features for occasional off-road operation.

(b) **Warranty on Original Sale and Manufacture of Automobile; Energy Absorption System.**—Every private passenger automobile manufactured on and after August 1, 1973, upon its original sale in the State of North Carolina, shall be sold subject to the manufacturer's warranty that it is equipped with an appropriate energy absorption system and that, without compromising existing standards of passenger safety, it can be driven directly into a standard Society of Automotive Engineers (SAE J-850) test barrier at a forward speed of five miles per hour and a reverse speed of two and one-half miles per hour without sustaining any damage to the automobile, exclusive of damage to the bumper itself.

(c) **Exceptions.**—The manufacturer's warranty provisions of this section shall not be applicable with respect to any private passenger automobile as to which the manufacturer files a written certification under oath with the State Department of Motor Vehicles, on a form to be prescribed by that Department, that the particular make and model described therein complies with the applicable standards of this section. (1971, c. 485; 1973, c. 58.)

Editor's Note. — The 1973 amendment substituted, at the end of subsection (a), the language beginning "except a multipurpose passenger vehicle" for "and not designed for use principally as a dwelling or for camping."

Section Is Applicable to Specific Vehicle; Statute Not Preempted by Federal Legislation.—See opinion of Attorney General to Mr. Joe W. Garrett, Commissioner of Motor Vehicles, 41 N.C.A.G. 677 (1971).

§§ 20-137.1 to 20-137.5: Reserved for future codification purposes.

Part 9A. Abandoned and Derelict Motor Vehicles.

§ 20-137.6. Declaration of purpose.—Abandoned and derelict motor vehicles constitute a hazard to the health and welfare of the people of the State in that such vehicles can harbor noxious diseases, furnish shelter and breeding places for vermin, and present physical dangers to the safety and well-being of children and other citizens. It is therefore in the public interest that the present accumulation of abandoned and derelict motor vehicles be eliminated and that the future abandonment of such vehicles be prevented. (1973, c. 720, s. 1.)

Editor's Note. — Session Laws 1973, c. 720, s. 2, provides: "This act shall not repeal or modify G.S. 20-162.3 and shall become effective on Sept. 3, 1973."

§ 20-137.7. Definitions of words and phrases. — The following words and phrases when used in this Part shall for the purpose of this Part have the meaning respectively prescribed to them in this Part, except in those instances where the context clearly indicates a different meaning :

- (1) "Abandoned vehicle" means a motor vehicle that has remained illegally on private or public property for a period of more than 10 days without the consent of the owner or person in control of the property.
- (2) "Demolisher" means any person, firm or corporation whose business is to convert a motor vehicle into processed scrap or scrap metal or otherwise to wreck, or dismantle, such a vehicle.
- (3) "Department" means the North Carolina Department of Transportation.
- (4) "Derelict vehicle" means a motor vehicle :
 - a. Whose certificate of registration has expired and the registered and legal owner no longer resides at the address listed on the last certificate of registration on record with the North Carolina Department of Transportation ; or
 - b. Whose major parts have been removed so as to render the vehicle inoperable and incapable of passing inspection as required under existing standards ; or
 - c. [Whose] manufacturer's serial plates, vehicle identification numbers, license number plates and any other means of identification have been removed so as to nullify efforts to locate or identify the registered and legal owner ; or
 - d. Whose registered and legal owner of record disclaims ownership or releases his rights thereto ; or
 - e. Which is more than 12 years old and does not bear a current license as required by the Department.
- (5) "Officer" means any law-enforcement officer of the State, of any county or of any municipality including county sanitation officers.
- (6) "Salvage yard" means a business or a person who possesses five or more derelict vehicles, regularly engages in buying and selling used vehicle parts.
- (7) "Secretary" means the Secretary of the North Carolina Department of Transportation.
- (8) "Tag" means any type of notice affixed to an abandoned or derelict motor vehicle advising the owner or the person in possession that the same has been declared an abandoned or derelict vehicle and will be treated as such, which tag shall be of sufficient size as to be easily discernible and contain such information as the Secretary deems necessary to enforce this Part.
- (9) "Vehicle" means every device in, upon, or by which any person or property is or may be transported or drawn upon a highway by mechanical means.
- (10) "Vehicle recycling" means the process whereby discarded vehicles (abandoned, derelict or wrecked) are collected and then processed by shredding, bailing or shearing to produce processed scrap iron and steel which is then remelted by steel mills and foundries to make raw materials which are subsequently used to manufacture new metal-based products for the consumer. (1973, c. 720, s. 1.)

§ 20-137.8. Secretary may adopt rules and regulations.—The Secretary is hereby vested with the power and is charged with the duties of administering the provisions of this Part and is authorized to adopt such rules and regulations as may be necessary to carry out the provisions thereof. (1973, c. 720, s. 1.)

§ 20-137.9. **Removal from private property.**—Any abandoned or any derelict vehicle in this State shall be subject to be removed from public or private property provided not objected to by the owner of the private property after notice as hereinafter provided and disposed of in accordance with the provisions of this Part, provided, that all abandoned motor vehicles left on any right-of-way of any road or highway in this State may be removed in accordance with G.S. 20-161. (1973, c. 720, s. 1.)

§ 20-137.10. **Abandoned and derelict vehicles to be tagged; determination of value.**—(a) When any vehicle is derelict or abandoned in this State, the Secretary shall cause a tag to be placed on the vehicle which shall be notice to the owner, the person in possession of the vehicle, or any lienholder that the same is considered to have been derelict or abandoned and is subject to forfeiture to the State.

(b) If the vehicle is determined to be valued at less than one hundred dollars (\$100.00), the tag shall so state and shall serve as the only legal notice that unless the vehicle is removed within five days from the date reflected on the tag, that it will thereafter become property of the State, removed and be sold for recycling purposes and that all proceeds derived from the sale thereof shall be deposited into a highway fund established for the purpose of administering the provisions of this Part.

(c) If the value of the vehicle is determined to be more than one hundred dollars (\$100.00) the tag shall so state and shall serve as the only legal notice that if the vehicle is not removed within five days from the date reflected on the tag, that it will be removed to a designated place to be sold. After the vehicle is removed, the Secretary shall give notice in writing to the person in whose name the vehicle was last registered at the last address reflected in the Department's records and to any lienholder of record that the vehicle is being held, designating the place where the vehicle is being held and that if it is not redeemed within 10 days from the date of the notice by paying all costs of removal and storage the same shall be sold for recycling purposes. The proceeds of the sale shall be deposited in the highway fund established for the purpose of administering the provisions of this Part.

(d) If the value of the vehicle is determined to be more than one hundred dollars (\$100.00), and if the identity of the last registered owner cannot be determined or if the registration contains no address for the owner, or if it is impossible to determine with reasonable certainty the identification and addresses of any lienholders, notice by one publication in a newspaper of general circulation in the area where the vehicle was located shall be sufficient to meet all requirements of notice pursuant to this Part. The notice of publication may contain multiple listings of vehicles. Five days after date of publication the advertised vehicles may be sold. The proceeds of such sale shall be deposited in the highway fund established for the purpose of administering the provisions of this Part.

(e) All officers, as defined in this Part, are given the authority to appraise or determine the value of derelict or abandoned vehicles as defined in this Part. (1973, c. 720, s. 1.)

§ 20-137.11. **Title to vest in State.**—Title to all vehicles sold or disposed of in accordance with this Part shall vest in the State. All manufacturers' serial number plates and any other identification numbers for all vehicles sold to any person other than a demolisher shall at the time of the sale be turned in to the Department for destruction. Any demolisher purchasing or acquiring any vehicle hereunder shall, under oath, state to the Department that the vehicles purchased or acquired by it have been shredded or recycled.

The Secretary shall remove and destroy all departmental records relating to such vehicles in such method and manner as he may prescribe. (1973, c. 720, s. 1.)

§ 20-137.12. Secretary may contract for disposal.—The Secretary is hereby authorized to contract with any federal, other state, county or municipal authority or private enterprise for tagging, collection, storage, transportation or any other services necessary to prepare derelict or abandoned vehicles for recycling or other methods of disposal. Publicly owned properties, when available, shall be provided as temporary collecting areas for the vehicles defined herein. The Secretary shall have full authority to sell such derelict or abandoned vehicles. If the Secretary deems it more advisable and practical, in addition, he is authorized to contract with private enterprise for the purchase of such vehicles for recycling. (1973, c. 720, s. 1.)

§ 20-137.13. No liability for removal.—No agent or employee of any federal, State, county or municipal government, no person or occupant of the premises from which any derelict or abandoned vehicle shall be removed, nor any person or firm contracting for the removal of or disposition of any such vehicle shall be held criminally or civilly liable in any way arising out of or caused by carrying out or enforcing any provisions of this Part. (1973, c. 720, s. 1.)

§ 20-137.14. Enclosed, antique, registered and certain other vehicles exempt.—The provisions of this Part shall not apply to vehicles located on used car lots, in private garages, enclosed parking lots, or on any other parking area on private property which is not visible from any public street or highway, nor to motor vehicles classified as antiques and registered under the laws of the State of North Carolina, those not required by law to be registered, or those in possession of a salvage yard as defined in G.S. 20-137.7, unless that vehicle presents some safety or health hazard or constitutes a nuisance. (1973, c. 720, s. 1.)

Part 10. Operation of Vehicles and Rules of the Road.

§ 20-138. Persons under the influence of intoxicating liquor.—It is unlawful and punishable as provided in G.S. 20-179 for any person who is under the influence of intoxicating liquor to drive or operate any vehicle upon any highway or any public vehicular area within this State. (1937, c. 407, s. 101; 1971, c. 619, s. 1.)

Cross Reference. — For definitions of "public vehicular area," see §§ 20-16.2(g), 136-91(b)(2).

Editor's Note.—

The 1971 amendment, effective Oct. 1, 1971, rewrote this section, eliminating provisions as to driving by an habitual user of narcotic drugs or by a person under the influence of narcotic drugs, making the section applicable to "any public vehicular area" as well as to the highways, and making other changes. For present provisions as to driving by an habitual user of narcotic drugs or by a person under the influence of a narcotic drug, see § 20-139.

This section creates and defines three separate criminal offenses.—

In accord with original. See *State v. Burris*, 17 N.C. App. 710, 195 S.E.2d 345 (1973).

Elements of Offense.—

The three elements of the offense under this section are (1) driving a vehicle, (2) upon a highway within the State, (3) while under the influence of intoxicating liquor.

State v. Kellum, 273 N.C. 348, 160 S.E.2d 76 (1968).

This section, as written before amendment, required the State to prove that defendant (1) drove a vehicle, (2) upon a highway of this State, (3) while under the influence of intoxicating liquor. *State v. Carter*, 15 N.C. App. 391, 190 S.E.2d 241 (1972).

Duplicity.—As to the duplicity of charging two of the criminal offenses created and defined in this section, see *State v. Thompson*, 257 N.C. 452, 126 S.E.2d 58 (1962). *State v. Strouth*, 266 N.C. 340, 145 S.E.2d 852 (1966).

And Waiver Thereof.—In a prosecution under this section, by going to trial without making a motion to quash, defendant waives any duplicity which might exist in the bill. *State v. Strouth*, 266 N.C. 340, 145 S.E.2d 852 (1966).

In a prosecution under this section, by going to trial without making a motion to quash, defendant waives any duplicity in the warrant. *State v. Strouth*, 266 N.C. 340, 145 S.E.2d 852 (1966).

"Under the Influence" Defined.—

In accord with 1st paragraph in original. See *State v. Combs*, 13 N.C. App. 195, 185 S.E.2d 8 (1971).

One is under the influence of an intoxicant when he has consumed some quantity of an intoxicating beverage, whether it be a small amount or a large amount, one drink or several drinks, or one bottle of beer or one can of beer, or more than one, so as to cause him to lose the normal control of his bodily faculties or his mental faculties, or both of those faculties, to such an extent that there is an appreciable impairment of either one of those faculties, that is, bodily or mental faculties. *State v. Felts*, 5 N.C. App. 499, 168 S.E.2d 483 (1969).

A person is under the influence of intoxicating liquor within the meaning of the statute when he has drunk a sufficient quantity of intoxicating beverage to cause him to lose the normal control of his bodily or mental faculties, or both, to such an extent that there is an appreciable impairment of either or both of these faculties. *Atkins v. Moye*, 277 N.C. 179, 176 S.E.2d 789 (1970).

A person is under the influence of intoxicating liquor or narcotic drugs, within the meaning and intent of the statute, when he has drunk a sufficient quantity of intoxicating beverage or taken a sufficient amount of narcotic drugs to cause him to lose the normal control of his bodily or mental faculties, or both, to such an extent that there is an appreciable impairment of either or both of these faculties. This definition is preferred and any substantial deviation therefrom is not approved, but certain minor variations from the approved language have been held not sufficiently prejudicial to require a new trial. *State v. Bledsoe*, 6 N.C. App. 195, 169 S.E.2d 520 (1969).

A person would not be guilty of a violation of this section if he had partaken of an intoxicant to an appreciable extent, but would be if he had partaken to such an extent that there is an appreciable impairment of either bodily or mental faculties. *State v. Felts*, 5 N.C. App. 499, 168 S.E.2d 483 (1969).

A person is under the influence of an intoxicant within the meaning of this section whenever he has consumed sufficient alcohol to appreciably impair his mental or bodily faculties or both. *State v. Bunn*, 283 N.C. 444, 196 S.E.2d 777 (1973).

"Driving" Construed.—The word "driving," when used in statutes prohibiting the operation of a motor vehicle while under the influence of intoxicating liquor, is almost universally construed as requiring

that the vehicle be in motion. *State v. Carter*, 15 N.C. App. 391, 190 S.E.2d 241 (1972).

"Operate" Construed.—The Supreme Court has held that the term "operate," when used in connection with an automobile, clearly imports motion and that holding an automobile motionless by putting one's foot on a brake pedal is not operating the automobile. *State v. Carter*, 15 N.C. App. 391, 190 S.E.2d 241 (1972).

The phrase "however slightly" does not properly express the intent of this section which makes it an offense to operate a motor vehicle on the public highway while under the influence of intoxicating liquor. *State v. Combs*, 13 N.C. App. 195, 185 S.E.2d 8 (1971).

This section requires an appreciable impairment of one's normal control of his bodily or mental faculties, or both. *State v. Combs*, 13 N.C. App. 195, 185 S.E.2d 8 (1971).

Circumstantial Evidence May Suffice.—

Where the State relied upon circumstantial evidence, from which there could be little doubt that the defendant's car collided with another; although the defendant said he had been hit from the rear, he admitted a collision; his radiator was leaking; the officer had followed a trail of water from the scene of collision to the point where he found the defendant and his car, and the car was hot, stopped, and wouldn't run, and with a bluish paint on it that resembled the bluish paint of the other car, the jury was fully justified in finding that the defendant, when seen by the officer, and later tested by the breathalyzer, was, if anything, less intoxicated than at the time of the collision. *State v. Cummings*, 267 N.C. 300, 148 S.E.2d 97 (1966).

Testimony as to Results, etc.—

A qualified expert may testify as to the effect of certain percentages of alcohol in the bloodstream of human beings, provided the blood sample analyzed was timely taken, properly traced, and identified. *State v. Webb*, 265 N.C. 546, 144 S.E.2d 619 (1965).

Result of Breathalyzer Test Is Competent Evidence.—The result of a breathalyzer test, when the qualifications of the person making the test and the manner of making it meet the requirements of § 20-139.1, is competent evidence in a criminal prosecution under this section. *State v. Cooke*, 270 N.C. 644, 155 S.E.2d 165 (1967).

Policeman May Arrest without War-rant.—

A highway patrolman apprehending a

person driving a motor vehicle on the public highway while under the influence of intoxicating liquor is authorized, by virtue of the provisions of § 20-188 and subdivision (1) of § 15-41, to arrest such person without a warrant, and such arrest is legal. *State v. Broome*, 269 N.C. 661, 153 S.E.2d 384 (1967).

But offense must have occurred in presence of arresting officer.—An arrest of a defendant without a warrant for the offense of operating a motor vehicle on a public highway while under the influence of an intoxicant is illegal where the defendant has not operated the vehicle in the arresting officer's presence. *State v. Hill*, 277 N.C. 547, 178 S.E.2d 462 (1971).

Right of Accused to Communicate with Counsel.—The denial of a request for permission to contact counsel as soon as a person is charged with a crime involving the element of intoxication is a denial of a constitutional right, resulting in irreparable prejudice to his defense. *State v. Hill*, 277 N.C. 547, 178 S.E.2d 462 (1971).

When one is taken into police custody for an offense of which intoxication is an essential element, time is of the essence. Intoxication does not last. Ordinarily a drunken man will "sleep it off" in a few hours. Thus, if one accused of driving while intoxicated is to have witnesses for his defense, he must have access to his counsel, friends, relatives, or some disinterested person within a relatively short time after his arrest. Section 15-47 says he is entitled to communicate with them immediately, and this is true whether he is arrested at 2:00 in the morning or 2:00 in the afternoon. *State v. Hill*, 277 N.C. 547, 178 S.E.2d 462 (1971).

A defendant's guilt or innocence under this section depends upon whether he is intoxicated at the time of his arrest. His condition then is the crucial and decisive fact to be proven. Permission to communicate with counsel and friends is of no avail if those who come to the jail in response to a prisoner's call are not permitted to see for themselves whether he is intoxicated. In this situation, the right of a defendant to communicate with counsel and friends implies, at the very least, the right to have them see, observe and examine him, with reference to his alleged intoxication. *State v. Hill*, 277 N.C. 547, 178 S.E.2d 462 (1971).

One who is detained by police officers under a charge of driving while under the influence of an intoxicant has the same constitutional and statutory rights, including the rights given under N.C. Const., Art. I, § 23 and § 15-47, as any

other accused. *State v. Hill*, 277 N.C. 547, 178 S.E.2d 462 (1971).

First Offender Not Entitled to Appointment of Counsel.—A defendant charged with his first offense of drunken driving is not entitled to the appointment of counsel; therefore, the trial court is not required to go into the question of defendant's indigency. *State v. Hickman*, 9 N.C. App. 592, 176 S.E.2d 910 (1970).

One Need Not Be Drunk to Violate Section.—This statute provides that one may not operate a motor vehicle while under the influence of some intoxicant. It is not necessary for one to be drunk and operate a motor vehicle on a public highway to violate this statute, although one would be guilty if he were drunk and operated a motor vehicle on a public highway, but a person need only be under the influence. *State v. Felts*, 5 N.C. App. 499, 168 S.E.2d 483 (1969).

Facts Should Show Intoxication Rather Than Mere Consumption of Alcoholic Beverages.—Intoxicating beverages affect different persons in different ways and some persons would be intoxicated by the consumption of the same quantity of intoxicating beverages that the plaintiff consumed, but the consumption of a similar amount by other persons would have no effect. Thus, no court has ever turned to an arithmetic solution to this problem. Rather, the courts have uniformly required the proof of facts which would tend to show intoxication, rather than the mere consumption of alcoholic beverages. *Atkins v. Moye*, 8 N.C. App. 126, 174 S.E.2d 34 (1970).

Odor of Alcohol Is Insufficient to Show That Driver Is under Influence of Intoxicant.—An odor of alcohol on the breath of the driver of an automobile is evidence that he has been drinking. However, an odor, standing alone, is no evidence that he is under the influence of an intoxicant, and the mere fact that one has had a drink will not support such a finding. *Atkins v. Moye*, 277 N.C. 179, 176 S.E.2d 789 (1970); *State v. Cartwright*, 12 N.C. App. 4, 182 S.E.2d 203 (1971).

Prima Facie Showing of Violation.—The fact that a motorist has been drinking, when considered in connection with faulty driving or other conduct indicating an impairment of physical or mental faculties, is sufficient, prima facie, to show a violation of this section. *Atkins v. Moye*, 277 N.C. 179, 176 S.E.2d 789 (1970); *State v. Cartwright*, 12 N.C. App. 4, 182 S.E.2d 203 (1971).

In a prosecution for drunken driving, etc.—

In a prosecution under this section, two highway patrolmen who investigated the accident in which defendant was involved just before his arrest were properly allowed to testify that in their opinion defendant was under the influence of intoxicating liquor. *State v. Mills*, 268 N.C. 142, 150 S.E.2d 13 (1966).

Violation of Section Is Negligence, etc.

In accord with 2nd paragraph in original. See *Wardrick v. Davis*, 15 N.C. App. 261, 189 S.E.2d 746 (1972).

Violation of this section is negligence per se. *Edwards v. Mayes*, 385 F.2d 369 (4th Cir. 1967); *Arant v. Ransom*, 4 N.C. App. 89, 165 S.E.2d 671 (1969).

It is unlawful for any person who is under the influence of intoxicating liquor to drive any vehicle upon the highways within this State and a violation of this statute is negligence. *Atkins v. Moye*, 277 N.C. 179, 176 S.E.2d 789 (1970).

But Causal Relation Must Be Shown to Sustain Action for Negligence.—Unquestionably a motorist is guilty of negligence if he operates a motor vehicle on the highway while under the influence of intoxicating liquor. Such conduct, however, will not constitute either actionable negligence or contributory negligence unless, like any other negligence, it is causally related to the accident. *Atkins v. Moye*, 277 N.C. 179, 176 S.E.2d 789 (1970).

Mere proof that a motorist involved in a collision was under the influence of an intoxicant at the time does not establish a causal relation between his condition and the collision. His condition must have caused him to violate a rule of the road and to operate his vehicle in a manner which was a proximate cause of the collision. *Atkins v. Moye*, 277 N.C. 179, 176 S.E.2d 789 (1970).

Evidence Not Directly Showing that Defendant Drove While Intoxicated.—Where the State's evidence impressively shows that the defendant operated a motor vehicle upon the streets of a city and that he was intoxicated, but the defendant complains that it doesn't directly show that he drove while he was intoxicated, his position is well taken unless the evidence will reasonably and logically sustain such a finding. *State v. Cummings*, 267 N.C. 300, 148 S.E.2d 97 (1966).

Evidence Sufficient for Jury.—

The State's evidence was amply sufficient to carry the case to the jury on the charge of driving while intoxicated. *State v. Mills*, 268 N.C. 142, 150 S.E.2d 13 (1966).

The State's evidence was sufficient to be submitted to the jury on the issue of defendants' guilt of drunken driving where

it tended to show that defendant was driving on the wrong side of the road, and that he had a strong odor of alcohol about him, was unsteady on his feet and had half a fifth of whiskey in his truck. *State v. Cartwright*, 12 N.C. App. 4, 182 S.E.2d 203 (1971).

Verdict Insufficient to Support Judgment.

—The jury's verdict of "guilty of driving automobile under the influence" was insufficient to support the judgment against defendant in a prosecution for driving under the influence of intoxicating liquor, second offense, because the verdict neither alluded to the warrant nor used language to show a conviction of the offense charged therein. *State v. Medlin*, 15 N.C. App. 434, 190 S.E.2d 425 (1972).

Jury Questions.—Whether decedent in an action for wrongful death was intoxicated was a question for the jury. *Edwards v. Mayes*, 385 F.2d 369 (4th Cir. 1967).

The jury would have to find that decedent's drunkenness, and not defendants' negligence, was a proximate cause of the accident, before finding that decedent was contributorily negligent. *Edwards v. Mayes*, 385 F.2d 369 (4th Cir. 1967).

Instruction on Intoxication Held Proper.

—An instruction that under the influence of intoxicating liquor means that the defendant at the time and place in question had by reason of having drunk some intoxicating beverage lost the normal control of the powers or functions of his body or mind, or both, so that such loss could be estimated or recognized properly expresses the intent of this section. *State v. Combs*, 13 N.C. App. 195, 185 S.E.2d 8 (1971).

An instruction that a person is under the influence of some intoxicating beverage within the meaning of this statute when he has drunk a sufficient quantity of some intoxicating beverage to cause him to lose the normal control of his mental or bodily faculties, his mental or bodily capabilities, to such an extent that there is appreciable or noticeable impairment of either one or both of those faculties was held without error. *State v. Robinette*, 13 N.C. App. 224, 185 S.E.2d 9 (1971).

Instruction on Intoxication Held Erroneous.—

The trial judge's instruction that "a person would be under the influence of intoxicants if he had drunk a sufficient amount to make him think or act differently than he would otherwise have done, regardless of the amount, and he would be under the influence if his mind and muscles did not normally coordinate, or if he was abnormal in any degree from intoxicants,"

was held erroneous. *State v. Harris*, 10 N.C. App. 553, 180 S.E.2d 29 (1971).

Instruction Held Reversible Error.—In a drunken driving prosecution, a trial court's instruction that a person is under the influence of intoxicants if he has consumed a sufficient amount to make him think or act differently than he otherwise would have done, regardless of the amount that he consumed, and that one is under the influence if his mind and muscles do not normally coordinate or if he is abnormal in any degree is reversible error. *State v. Edwards*, 9 N.C. App. 602, 176 S.E.2d 874 (1970).

The inadvertent use by the trial judge of the word "qualities" in place of the word "faculties" at one point in the charge could not have in any way misled the jury to defendant's prejudice. *State v. Bledsoe*, 6 N.C. App. 195, 169 S.E.2d 520 (1969).

Issue of Intoxication Improperly Submitted to Jury.—See *Atkins v. Moye*, 8 N.C. App. 126, 174 S.E.2d 34 (1970).

Punishment, etc.—

The offense condemned by this section is a general misdemeanor for which an offender, for the first offense, may be imprisoned for two years in the discretion of the court. *State v. Morris*, 275 N.C. 50, 165 S.E.2d 245 (1969).

Section 20-179 fixes no maximum period of imprisonment as punishment for the first offense of a violation of this section, and it is well-settled law in this jurisdiction that when no maximum time is fixed by the statute an imprisonment for two years will not be held cruel or unusual punishment, as prohibited by N.C. Const., Art. I, § 27. *State v. Morris*, 275 N.C. 50, 165 S.E.2d 245 (1969).

§ 20-139. Persons under the influence of drugs.—(a) It is unlawful and punishable as provided in G.S. 20-179 for any person who is an habitual user of any narcotic drug to drive or operate any vehicle upon any highway or public vehicular area within this State.

(b) It is unlawful and punishable as provided in G.S. 20-179 for any person, who is under the influence of any narcotic drug or who is under the influence of any other drug to such degree that his physical or mental faculties are appreciably impaired, to drive or operate a motor vehicle upon any highway or public vehicular area within this State.

(c) The term "narcotic drug" as used in this Chapter shall have the meaning assigned to the term in Chapter 90 of the General Statutes. (1939, c. 292; 1951, c. 1042, s. 1; 1959, c. 1264, s. 1; 1971, c. 619, s. 2.)

Cross Reference. — For definitions of "public vehicular area," see §§ 20-16.2(g), 136-91(b)(2).

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, rewrote this section, which formerly applied to operation on driveways of public or private institutions by an habitual user of narcotic drugs or

Applied in *State v. Mohrmann*, 265 N.C. 594, 144 S.E.2d 645 (1965); *State v. Stauffer*, 266 N.C. 358, 145 S.E.2d 917 (1966); *State v. Ferebee*, 266 N.C. 606, 146 S.E.2d 666 (1966); *State v. Green*, 266 N.C. 785, 147 S.E.2d 377 (1966); *State v. Hall*, 267 N.C. 90, 147 S.E.2d 548 (1966); *State v. Choplin*, 268 N.C. 461, 150 S.E.2d 851 (1966); *State v. Owens*, 272 N.C. 100, 157 S.E.2d 658 (1967); *State v. Randolph*, 273 N.C. 120, 159 S.E.2d 324 (1968); *State v. Cline*, 4 N.C. App. 112, 165 S.E.2d 691 (1969); *State v. Sims*, 5 N.C. App. 288, 168 S.E.2d 238 (1969); *State v. Newsome*, 7 N.C. App. 525, 172 S.E.2d 909 (1970); *State v. Caviness*, 7 N.C. App. 541, 173 S.E.2d 12 (1970); *State v. Michaels*, 11 N.C. App. 110, 180 S.E.2d 442 (1971); *State v. Wright*, 13 N.C. App. 489, 186 S.E.2d 196 (1972); *State v. Coffey*, 14 N.C. App. 642, 188 S.E.2d 550 (1972); *State v. Rigsbee*, 15 N.C. App. 218, 189 S.E.2d 583 (1972); *State v. Warf*, 16 N.C. App. 431, 192 S.E.2d 37 (1972); *State v. Guffey*, 283 N.C. 94, 194 S.E.2d 827 (1973); *Vuncannon v. Garrett*, 17 N.C. App. 440, 194 S.E.2d 364 (1973); *State v. Coley*, 17 N.C. App. 443, 194 S.E.2d 372 (1973).

Cited in *Cline v. Atwood*, 267 N.C. 182, 147 S.E.2d 885 (1966); *State v. Gallamore*, 6 N.C. App. 608, 170 S.E.2d 573 (1969); *Wood v. Ross*, 434 F.2d 297 (4th Cir. 1970); *State v. Marshall*, 11 N.C. App. 200, 180 S.E.2d 464 (1971); *Joyner v. Garrett*, 279 N.C. 226, 182 S.E.2d 553 (1971); *McNair v. Boyette*, 282 N.C. 230, 192 S.E.2d 457 (1972); *State v. Campbell*, 18 N.C. App. 288, 196 S.E.2d 558 (1973).

by a person under the influence of intoxicating liquors or narcotic drugs.

Driveways of an apartment complex are "public vehicular areas" within the meaning of this section. Opinion of Attorney General to Mr. C.C. Tarleton, 42 N.C.A.G. 107 (1972).

§ 20-139.1. Result of a chemical analysis admissible in evidence; presumption.—(a) In any criminal action arising out of acts alleged to have been committed by any person while driving or operating a vehicle while under the influence of intoxicating liquor, the amount of alcohol in the person's blood at the time alleged as shown by chemical analysis of the person's breath or blood shall be admissible in evidence and shall give rise to the following presumptions:

- (1) If there was at that time 0.10 percent or more by weight of alcohol in the person's blood, it shall be presumed that the person was under the influence of intoxicating liquor.
- (2) Percent by weight of alcohol in the blood shall be based upon milligrams of alcohol per 100 cubic centimeters of blood.
- (3) The provisions of this section shall not be construed as limiting the introduction of any other competent evidence, including other types of chemical analyses, bearing upon the question whether the person was under the influence of intoxicating liquor.

(b) Chemical analyses of the person's breath or blood, to be considered valid under the provisions of this section, shall have been performed according to methods approved by the Commission for Health Services and by an individual possessing a valid permit issued by the Commission for Health Services for this purpose. The Department of Human Resources is authorized to approve satisfactory techniques or methods, to ascertain the qualifications and competence of individuals to conduct such analyses, and the Department of Human Resources may issue permits which shall be subject to termination or revocation at the discretion of the Commission for Health Services; provided, that in no case shall the arresting officer or officers administer said test.

(c) When a person shall submit to a blood test at the request of a law-enforcement officer under the provisions of G.S. 20-16.2 only a physician or a registered nurse (or other qualified person) may withdraw blood for the purpose of determining the alcoholic content therein. No such person shall be held to answer in any criminal or civil action for assault or battery by reason of withdrawing blood from another under this section; provided, however, that no person shall be relieved of liability for negligent acts or omissions in withdrawing blood from another under the provisions of this section.

(d) The person tested may have a physician, or a qualified technician, chemist, registered nurse, or other qualified person of his own choosing administer a chemical test or tests in addition to any administered at the direction of a law-enforcement officer. The failure or inability of the person tested to obtain an additional test shall not preclude the admission of evidence relating to the test or tests taken at the direction of a law-enforcement officer. Any law-enforcement officer having in his charge any person who has submitted to the chemical test under the provisions of G.S. 20-16.2 shall assist such person in contacting a qualified person as set forth above for the purpose of administering such additional test.

(e) The individual making such chemical analysis of a person's breath shall record in writing the time of arrest and the time and results of such analysis, a copy of which record shall be furnished to the person submitting to said test or to his attorney prior to any trial or proceeding where the results of the test may be used.

(f) If a person under arrest refuses to submit to a chemical test or tests under the provisions of G.S. 20-16.2, evidence of refusal shall be admissible in any criminal action arising out of acts alleged to have been committed while the person was driving or operating a vehicle while under the influence of intoxicating liquor.

(g) The Department of Human Resources is empowered to make regulations

concerning the ingestion of controlled amounts of beverages containing ethyl alcohol by individuals submitting to chemical analyses as a part of scientific, experimental, educational, or demonstration programs. Such regulations shall prescribe procedures consistent with controlling federal law governing the acquisition, transportation, possession, storage, administration, and disposition of ethyl alcohol or of beverages containing ethyl alcohol intended for use in such programs. Any person acquiring ethyl alcohol or beverages containing ethyl alcohol under such regulations shall keep records accounting for the disposition of all ethyl alcohol and beverages containing ethyl alcohol so acquired, and such records shall at all reasonable times be available for inspection upon the request of any federal or State law-enforcement officer with jurisdiction over the laws relating to alcohol or intoxicating liquor. All acts done pursuant to such regulations reasonably in furtherance of bona fide objectives of the chemical testing program within this State shall be lawful notwithstanding the provisions of any other general, special, or local statute or any ordinance or regulation of the State or of any agency or subdivision of the State. Regulations of the Department of Human Resources adopted pursuant to this section shall be filed and published in accordance with the provisions of G.S. 143-195 to G.S. 143-198.1. (1963, c. 966, s. 2; 1967, c. 123; 1969, c. 1074, s. 2; 1971, c. 619, ss. 12, 13; 1973, c. 476, s. 128.)

Editor's Note. — The 1969 amendment, effective Sept. 1, 1969, rewrote this section as previously amended in 1967.

The 1971 amendment, effective Oct. 1, 1971, inserted "or operating" in the opening paragraph of subsection (a), inserted "or tests" near the beginning of subsection (f) and substituted "driving or operating a vehicle" for "driving a motor vehicle upon the public highways of this State" near the end of subsection (f).

The 1973 amendment, effective July 1, 1973, substituted "Commission for Health Services" for "State Board of Health" in three places and "Department of Human Resources" for "State Board of Health" in one place in subsection (b), substituted "and the Department of Human Resources may issue permits" for "and to issue permits" in the second sentence of subsection (b) and substituted "Department of Human Resources" for "State Board of Health" in two places in subsection (g).

Most of the cases cited in the note below were decided prior to the 1969 amendment.

For article on tests for intoxication, see 45 N.C.L. Rev. 34 (1966).

Opinions of Attorney General. — Mr. Howard D. Cole, Assistant Prosecutor, Eighteenth Judicial District, 40 N.C.A.G. 401 (1969).

This section relates only to criminal actions arising out of the operation of a motor vehicle and has no application to the effect of voluntary intoxication upon criminal responsibility for assault and homicide. *State v. Bunn*, 283 N.C. 444, 196 S.E.2d 777 (1973).

The breathalyzer test is a chemical test for the testing of a person's breath for the purpose of determining the alcoholic con-

tent of his blood. *State v. Hill*, 9 N.C. App. 279, 176 S.E.2d 41 (1970).

This section requires two things before a chemical analysis of a person's breath can be considered valid. First, it requires that such analysis shall have been performed according to methods approved by the State Board of Health. Second, it requires that such analysis shall have been made by an individual possessing a valid permit issued by the State Board of Health for this purpose. It is left open for the State to prove compliance with these two requirements in any proper and acceptable manner. *State v. Powell*, 10 N.C. App. 726, 179 S.E.2d 785 (1971); *State v. Eubanks*, 283 N.C. 556, 196 S.E.2d 706 (1973).

This section requires two things before a chemical analysis of a person's breath or blood can be considered valid under the section. First, that such analysis shall be performed according to methods approved by the State Board of Health, and second, that such analysis be made by a person possessing a valid permit issued by the State Board of Health for this purpose. *State v. Powell*, 279 N.C. 608, 184 S.E.2d 243 (1971); *State v. Chavis*, 15 N.C. App. 566, 190 S.E.2d 374 (1972).

The two requirements must be met, but it is left open for the State to prove compliance in any proper and acceptable manner. *State v. Chavis*, 15 N.C. App. 566, 190 S.E.2d 374 (1972); *State v. Warf*, 16 N.C. App. 431, 192 S.E.2d 37 (1972).

Meaning of "Presumption." — In this section, the General Assembly used the word "presumption" in the sense of a permissive inference or "prima facie" evidence. *State v. Cooke*, 270 N.C. 644, 155 S.E.2d 165 (1967); *State v. Jent*, 270 N.C. 652, 155

S.E.2d 171 (1967); *State v. Raynor*, 17 N.C. App. 707, 195 S.E.2d 309 (1973).

And the trial judge should so instruct the jury. *State v. Jent*, 270 N.C. 652, 155 S.E.2d 171 (1967).

The words "it shall be presumed" are equivalent to "prima facie" proof. *State v. Cooke*, 270 N.C. 644, 155 S.E.2d 165 (1967).

In this section, the word "presumption" is used in the sense of a permissive inference or prima facie evidence, and not as a presumption with the burden on the defendant to rebut it. *State v. Beasley*, 10 N.C. App. 663, 179 S.E.2d 820 (1971).

In this section, the General Assembly did not intend to create a so-called conclusive presumption since it specifically provided that "any other competent evidence, including other types of chemical analyses," bearing upon the issue of defendant's intoxication may be introduced. *State v. Cooke*, 270 N.C. 644, 155 S.E.2d 165 (1967).

Nor to Shift the Burden of Proof.—The legislature did not intend to shift the burden of proof to a defendant whose breathalyzer tests show a blood alcohol level of 0.10 percent or more to prove that he was not under the influence of intoxicating liquor at the time charged. *State v. Cooke*, 270 N.C. 644, 155 S.E.2d 165 (1967); *State v. Raynor*, 17 N.C. App. 707, 195 S.E.2d 309 (1973).

Failure of State to Offer Proof Has Not Been Sanctioned by Courts.—The manner of proof is left open for the State, but the failure to offer any proof has never been sanctioned by the courts, and such failure resulted in clear and manifest error prejudicial to defendant. *State v. Chavis*, 15 N.C. App. 566, 190 S.E.2d 374 (1972); *State v. Warf*, 16 N.C. App. 431, 192 S.E.2d 37 (1972).

Breathalyzer test results are not admissible in a breaking and entering case. *State v. Wade*, 14 N.C. App. 414, 188 S.E.2d 714 (1972).

Result of Breathalyzer Test Is Competent Evidence. — The result of a breathalyzer test, when the qualifications of the person making the test and the manner of making it meet the requirements of this section, is competent evidence in a criminal prosecution under § 20-138. *State v. Cooke*, 270 N.C. 644, 155 S.E.2d 165 (1967); *State v. Coley*, 17 N.C. App. 443, 194 S.E.2d 372 (1973).

Defendant's objections to the results of a breathalyzer test are not sustained where, before being permitted to testify, the officer who had administered the test was questioned preliminarily and his answers tended to show that the tests were

made in compliance with this section and the regulations of the State Board of Health as set forth in this section. *State v. Cummings*, 267 N.C. 300, 148 S.E.2d 97 (1966).

And May Carry State's Case to Jury.—A breathalyzer test (otherwise relevant and competent) which shows 0.10 percent or more by weight of alcohol in a defendant's blood will carry the State's case to the jury for its determination of whether defendant was under the influence of intoxicating liquor at the time charged. *State v. Cooke*, 270 N.C. 644, 155 S.E.2d 165 (1967).

But Jury Is Still at Liberty to Acquit.—Despite the results of the breathalyzer test, the jury is still at liberty to acquit defendant if they find that his guilt is not proven beyond a reasonable doubt, and the court should explain this to the jury. *State v. Cooke*, 270 N.C. 644, 155 S.E.2d 165 (1967).

Despite the presumption arising from the results of the breathalyzer test, the jury is at liberty to acquit the defendant if it should find that his guilt was not proven beyond a reasonable doubt. *State v. Royali*, 14 N.C. App. 214, 188 S.E.2d 50 (1972).

Test Must Have Been Timely Made.—For the test to cast any light on a defendant's condition at the time of the alleged crime, the test must have been timely made. *State v. Cooke*, 270 N.C. 644, 155 S.E.2d 165 (1967).

The breathalyzer can measure only the amount of alcohol which is in a person's blood at the time the test is given. Therefore, the presumption or inference which this section raises when the test shows 0.10 percent or more of blood alcohol relates only to the time of the test. Since it is the degree of intoxication at the time of the occurrence in question which is relevant, it is undoubtedly true that the sooner after the event the test is made, the more accurate will be the estimate of blood alcohol concentration at the time of the act in issue. *State v. Cooke*, 270 N.C. 644, 155 S.E.2d 165 (1967).

The purpose of the limitation in subsection (b) of this section is to assure that the test will be fairly and impartially made. *State v. Stauffer*, 266 N.C. 358, 145 S.E.2d 917 (1966).

Qualifications to Administer Breathalyzer Test.—A person holding a valid permit issued by the State Board of Health is qualified to administer a breathalyzer test. When such permit is introduced in evidence, the permittee is competent to testify as to the results of the test. *State v. King*, 6 N.C. App. 702, 171 S.E.2d 33 (1969);

State v. Powell, 10 N.C. App. 726, 179 S.E.2d 785 (1971).

Although permissible, it is not required that either the "permit" or a certified copy of the "methods approved by the State Board of Health" be introduced into evidence by the State before testimony of the results of the breathalyzer test can be given. *State v. Powell*, 10 N.C. App. 726, 179 S.E.2d 785 (1971).

It is not incumbent upon the State to introduce into evidence a certified copy of the methods approved by the State Board of Health in administering the breathalyzer test and a witness may testify that he administered the test in accordance with the rules and regulations established by the North Carolina State Board of Health, without introducing a copy of such rules and regulations in evidence. *State v. Powell*, 10 N.C. App. 726, 179 S.E.2d 785 (1971).

The testimony of a witness that he had been to school, studied and graduated from the "school for breathalyzer operators put on by the Community College in Raleigh" is not sufficient to satisfy the requirements of the statute that he possess a valid permit issued by the State Board of Health. *State v. Caviness*, 7 N.C. App. 541, 173 S.E.2d 12 (1970).

Testimony that a witness has "a license to administer the breathalyzer" is not sufficient to satisfy the requirement of this section, that to be considered valid, the analysis must be performed by an individual possessing a valid permit issued by the State Board of Health for this purpose. *State v. Caviness*, 7 N.C. App. 541, 173 S.E.2d 12 (1970).

Persons Qualified to Give Blood Test.—See opinion of Attorney General to Dr. Jacob Koomen, State Health Director, 40 N.C.A.G. 429 (1970).

Compliance with Requirements of Section Held Sufficient.—Where an officer had a valid permit issued by the Board to conduct such analysis and testified that he made the analysis in this case according to methods approved by that Board, the Supreme Court held this sufficient to meet the requirements of this section. *State v. Powell*, 279 N.C. 608, 184 S.E.2d 243 (1971).

Officer's Testimony as to Test Results Held Competent.—Failure to introduce in evidence a certified copy of the rules and regulations of the State Board of Health containing the approved methods of administering a breathalyzer test does not make an officer's testimony as to the results of a test incompetent. *State v. Powell*, 279 N.C. 608, 184 S.E.2d 243 (1971).

Admitting Results of Breathalyzer Test into Evidence Without Showing Test Properly Administered Was Error.—Defendant is entitled to a new trial in a prosecution under § 20-138 where the trial court allowed into evidence the results of a breathalyzer test without a showing by the State that the test was administered according to methods approved by the State Board of Health and that the test was administered by a person possessing a valid permit issued by the State Board of Health. *State v. Warf*, 16 N.C. App. 431, 192 S.E.2d 37 (1972).

Arresting Officer May Not Collect Breath Sample for Subsequent Analysis by a Qualified Operation of a Testing Device.—See opinion of Attorney General to Mr. Jacob Koomen, M.D., M.P.H., State Health Director, 41 N.C.A.G. 792 (1972).

"Arresting Officer."—An officer, who is present at the scene of the arrest for the purpose of assisting in it, if necessary, is an "arresting officer" within the meaning of this section, even though a different officer actually places his hand upon the defendant and informs him that he is under arrest. *State v. Stauffer*, 266 N.C. 358, 145 S.E.2d 917 (1966).

Charge on Force and Effect of Presumption.—On the force and effect of the "presumption" created by this section, the judge should charge the jury in accordance with the opinion in *State v. Bryant*, 245 N.C. 645, 97 S.E.2d 264 (1957), wherein are collected and analyzed the cases dealing with "prima facie or presumptive evidence" created by statute. *State v. Cooke*, 270 N.C. 644, 155 S.E.2d 165 (1967).

An instruction was proper where the trial court instructed the jury that the presumption of intoxication raised under this section by a breathalyzer test is merely a permissive inference of prima facie evidence of intoxication and that, despite the results of the test, the jury is at liberty to acquit defendant if they find defendant's guilt not proven beyond a reasonable doubt. *State v. Robinette*, 13 N.C. App. 224, 185 S.E.2d 9 (1971).

Instruction Held Erroneous.—The court's instruction that "the percentage was .014% rather than .10%, some 40% higher than the presumption required," was error, because this portion of the charge could have been construed by the jury as placing a greater burden on the defendant than arises from the statute. *State v. Beasley*, 10 N.C. App. 663, 179 S.E.2d 820 (1971).

Blood Alcohol Level of Less Than .10 Not Conclusive on Drunken Driving Charge.—See opinion of Attorney General

to Honorable George H. Martin, Magistrate, Clay County, 40 N.C.A.G. 430 (1970).

Drivers' Licenses; Drunken Driving; Highway Patrol and Other Officers; Chemical Tests for Alcohol.—See opinion of Attorney General to Mr. Howard D. Cole, Assistant Prosecutor, Eighteenth

Judicial District, 40 N.C.A.G. 401 (1969).

Applied in *State v. Randolph*, 273 N.C. 120, 159 S.E.2d 324 (1968); *State v. Mobley*, 273 N.C. 471, 160 S.E.2d 334 (1968); *State v. Sherrill*, 15 N.C. App. 590, 190 S.E.2d 405 (1972).

Quoted in *State v. Brown*, 13 N.C. App. 327, 185 S.E.2d 453 (1971).

§ 20-140. Reckless driving.

Editor's Note.—

For article on proof of negligence in North Carolina, see 48 N.C.L. Rev. 731 (1970).

This section is a safety, etc.—

This section is a safety statute, designed for the protection of life, limb and property. *State v. Weston*, 273 N.C. 275, 159 S.E.2d 883 (1968).

Every operator of a motor vehicle is required, etc.—

This section requires every operator of a motor vehicle to exercise reasonable care to avoid injury to persons or property of another and a failure to so operate proximately causing injury to another gives rise to a cause of action. *Miller v. Lucas*, 267 N.C. 1, 147 S.E.2d 537 (1966).

Duty of Motorist.—A motorist must operate his vehicle at a reasonable rate of speed, keep a lookout for persons on or near the highway, decrease his speed when any special hazard exists with respect to pedestrians, and, if circumstances warrant, he must give warning of his approach by sounding his horn. *Morris v. Minix*, 4 N.C. App. 634, 167 S.E.2d 494 (1969).

A motorist must at all times operate his vehicle with due caution and circumspection, with due regard for the rights and safety of others, and at such speed and in such manner as will not endanger or be likely to endanger the lives or property of others. *Morris v. Minix*, 4 N.C. App. 634, 167 S.E.2d 494 (1969).

It is the duty of one proceeding along a public highway to maintain a proper lookout and to exercise due care to avoid colliding with vehicles entering the highway from private premises. *Davis v. Imes*, 13 N.C. App. 521, 186 S.E.2d 641 (1972).

Allegations of reckless driving in the words of this section, without more, do not justify a charge on reckless driving. *Roberts v. Pilot Freight Carriers*, 273 N.C. 600, 160 S.E.2d 712 (1968); *Nance v. Williams*, 2 N.C. App. 345, 163 S.E.2d 47 (1968).

Allegations as to reckless driving in the words of this section, without specifying wherein the party was reckless, amount to no more than an allegation that the party charged was negligent. They are but con-

clusions of law which are not admitted by demurrer. They do not justify a charge on reckless driving. *Ingle v. Roy Stone Transf. Corp.*, 271 N.C. 276, 156 S.E.2d 265 (1967).

Pleading Reckless Driving Effectively.—To plead reckless driving effectively, a party must allege facts which show that the other was violating specific rules of the road in a criminally negligent manner. *Roberts v. Pilot Freight Carriers*, 273 N.C. 600, 160 S.E.2d 712 (1968); *Nance v. Williams*, 2 N.C. App. 345, 163 S.E.2d 47 (1968).

To plead reckless driving effectively, the pleader must particularize with reference to the specific rules of the road which the motorist was violating and his manner of doing so. *Ingle v. Roy Stone Transf. Corp.*, 271 N.C. 276, 156 S.E.2d 265 (1967).

Reckless driving is made up of continuing acts, or a series of acts, which, in themselves, constitute negligence. *Ingle v. Roy Stone Transf. Corp.*, 271 N.C. 276, 156 S.E.2d 265 (1967).

When Person Guilty, etc.—

Neither the intentional nor the unintentional violation of a traffic law without more constitutes reckless driving. *Ingle v. Roy Stone Transf. Corp.*, 271 N.C. 276, 156 S.E.2d 265 (1967); *Haynes v. Busby*, 15 N.C. App. 106, 189 S.E.2d 653 (1972).

Under this section a person is guilty of reckless driving if he drives an automobile on a public highway in this State without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property. *State v. Floyd*, 15 N.C. App. 438, 190 S.E.2d 353 (1972).

A violation of this section, etc.—

A violation of this section gives rise to both civil and criminal liability. *Ingle v. Roy Stone Transf. Corp.*, 271 N.C. 276, 156 S.E.2d 265 (1967).

Person may violate section by either one of the two courses of conduct defined, etc.—

In accord with original. See *Haynes v. Busby*, 15 N.C. App. 106, 189 S.E.2d 653 (1972).

The language of this section, etc.—

The language in each subsection of the reckless driving statute defines culpable

negligence. *Ingle v. Roy Stone Transf. Corp.*, 271 N.C. 276, 156 S.E.2d 265 (1967); *Ford v. Jones*, 6 N.C. App. 722, 171 S.E.2d 103 (1969); *Haynes v. Busby*, 15 N.C. App. 106, 189 S.E.2d 653 (1972).

Culpable Negligence, etc.—

Culpable negligence is such recklessness or carelessness, proximately resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others. The intentional, wilful or wanton violation of a safety statute or ordinance which proximately results in injury is culpable negligence; an unintentional violation, unaccompanied by recklessness or probable consequences of a dangerous nature, when tested by the rule of reasonable prevision, is not. *Ingle v. Roy Stone Transf. Corp.*, 271 N.C. 276, 156 S.E.2d 265 (1967); *Ford v. Jones*, 6 N.C. App. 722, 171 S.E.2d 103 (1969); *Haynes v. Busby*, 15 N.C. App. 106, 189 S.E.2d 653 (1972).

The violation of a safety statute which results in injury or death will constitute culpable negligence if the violation is wilful, wanton, or intentional. But, where there is an unintentional or inadvertent violation of the statute, such violation standing alone does not constitute culpable negligence. The inadvertent or unintentional violation of the statute must be accompanied by recklessness of probable consequences of a dangerous nature, when tested by the rule of reasonable prevision, amounting altogether to a thoughtless disregard of consequences or of a heedless indifference to the safety of others. *State v. Weston*, 273 N.C. 275, 159 S.E.2d 883 (1968).

If plaintiff's evidence does not establish civil negligence, a fortiori, it will not prove reckless driving, which is criminal negligence. *Ford v. Jones*, 6 N.C. App. 722, 171 S.E.2d 103 (1969).

A motorist is under duty at all times, etc.—

In accord with original. See *Price v. Miller*, 271 N.C. 690, 157 S.E.2d 347 (1967).

Violation of Traffic Ordinance.—

In accord with original. See *State v. Floyd*, 15 N.C. App. 438, 190 S.E.2d 353 (1972).

Mere failure, etc.—

In accord with original. See *Ingle v. Roy Stone Transf. Corp.*, 271 N.C. 276, 156 S.E.2d 265 (1967); *Haynes v. Busby*, 15 N.C. App. 106, 189 S.E.2d 653 (1972).

Violation of Section, etc.—

A violation of this section is negligence per se. *Ingle v. Roy Stone Transf. Corp.*, 271 N.C. 276, 156 S.E.2d 265 (1967).

Rear-End Collision.—While the fact of

a rear-end collision offers some evidence of negligence, it is not sufficient to present the question of defendant's violation of this section, when the fact of accident is combined only with the failure to keep a proper lookout, and not with excessive speed or following too closely. *Nance v. Williams*, 2 N.C. App. 345, 163 S.E.2d 47 (1968).

It is not sufficient for the judge to read this section and then leave it to the jury to apply the law to the facts and to decide for themselves what plaintiff did, if anything, which constituted reckless driving. *Ingle v. Roy Stone Transf. Corp.*, 271 N.C. 276, 156 S.E.2d 265 (1967); *Roberts v. Pilot Freight Carriers*, 273 N.C. 600, 160 S.E.2d 712 (1968); *Nance v. Williams*, 2 N.C. App. 345, 163 S.E.2d 47 (1968); *Ford v. Jones*, 6 N.C. App. 722, 171 S.E.2d 103 (1969).

Entering Intersection Closely in Front of Plainly Visible Automobile.—The act of a driver in entering an intersection so closely in front of an automobile plainly visible to him approaching along an intersecting four-lane highway, that the driver of the car does not have sufficient time in the exercise of reasonable care to avoid a collision, constitutes a violation of subsections (a) and (b) of this section, and is negligence per se. *Snell v. Caudle Sand & Rock Co.*, 267 N.C. 613, 148 S.E.2d 608 (1966).

Evidence Not Disclosing Careless and Reckless Driving.—Evidence, while sufficient to present the question of negligence, did not disclose careless and reckless driving within the purview of this section. *Williams v. Boulterice*, 269 N.C. 499, 153 S.E.2d 95 (1967).

The charge, etc.—

If a party has properly pleaded reckless driving and the judge undertakes to charge upon it, § 1-180 requires him to tell the jury what facts they might find from the evidence would constitute reckless driving. *Roberts v. Pilot Freight Carriers*, 273 N.C. 600, 160 S.E.2d 712 (1968); *Nance v. Williams*, 2 N.C. App. 345, 163 S.E.2d 47 (1968); *Ford v. Jones*, 6 N.C. App. 722, 171 S.E.2d 103 (1969).

When the judge has correctly instructed the jury upon the law applicable to the various acts of negligence upon which the pleadings and evidence require a charge, there is no need to reassemble the parts and present them to the jury in a packaged proposition labeled reckless driving, for the whole is equal to the sum of its parts. If, however, he undertakes to do so, § 1-180 requires him to tell the jury what facts, which they might find from the evidence, would constitute reckless driving.

Ingle v. Roy Stone Transf. Corp., 271 N.C. 276, 156 S.E.2d 265 (1967).

Instruction Erroneous When Not Supported by Evidence.—Where there is no evidence that the person charged with negligence drove his vehicle in such a manner as to constitute reckless driving, it is error for the court to charge that reckless driving is an element of negligence to be considered by the jury. *Ford v. Jones*, 6 N.C. App. 722, 171 S.E.2d 103 (1969).

Findings Supporting Conclusion of Violation of Section.—Findings by the jury that certain acts import a thoughtless disregard for the consequences or a heedless indifference to the safety and rights of others would support a conclusion that the minor plaintiff operated her car in violation of this section. That would constitute negligence per se and, if a proximate cause of the collision, would constitute actionable negligence. *Ford v. Jones*, 6 N.C. App. 722, 171 S.E.2d 103 (1969).

An acquittal, etc.

An acquittal of reckless driving in a court having jurisdiction to try the defendant for that offense would not bar the prosecution of the defendant in the superior court for involuntary manslaughter arising out of the same occurrence. Reckless driving and speed competition are not lesser included offenses of the charge of involuntary manslaughter. *State v. Sawyer*, 11 N.C. App. 81, 180 S.E.2d 387 (1971).

§ 20-140.1. Reckless driving upon driveways of public or private institutions, establishments providing parking space, etc.

Quoted in *McCall v. Dixie Cartage & Warehousing, Inc.*, 272 N.C. 190, 158 S.E.2d 72 (1967).

§ 20-140.2. Overloaded or overcrowded vehicle; persons riding on motorcycles to wear safety helmets.

(b) No motorcycle shall be operated upon the streets and highways of this State unless the operator and all passengers thereon wear safety helmets of a type approved by the Commissioner of Motor Vehicles. No person shall operate a motorcycle upon the streets and highways of this State when the number of persons upon such motorcycle, including the operator, shall exceed the number of persons for which it was designed to carry. Violation of any provision of this subsection shall not be considered negligence per se or contributory negligence per se in any civil action.

(1967, c. 674, s. 1.)

Editor's Note.—The 1967 amendment, effective Jan. 1, 1968, rewrote subsection (b).

As subsections (a) and (c) were not changed by the amendment, they are not set out.

For note on statutory requirement of safety helmets for motorcyclists, see 6 Wake Forest Intra. L. Rev. 349 (1970).

Applied in *State v. Abernathy*, 265 N.C. 724, 145 S.E.2d 2 (1965); *Drumwright v. Wood*, 266 N.C. 198, 146 S.E.2d 1 (1966); *Wells v. Bissette*, 266 N.C. 774, 147 S.E.2d 210 (1966); *Atwood v. Holland*, 267 N.C. 722, 148 S.E.2d 851 (1966); *State v. Moses*, 272 N.C. 509, 158 S.E.2d 617 (1968); *Morris v. Bigham*, 6 N.C. App. 490, 170 S.E.2d 534 (1969); *State v. Grissom*, 17 N.C. App. 374, 194 S.E.2d 227 (1973).

Quoted in *Baden v. Sutton*, 7 N.C. App. 6, 171 S.E.2d 77 (1969).

Cited in *Webb v. Felton*, 266 N.C. 707, 147 S.E.2d 219 (1966); *Hout v. Harvell*, 270 N.C. 274, 154 S.E.2d 41 (1967); *Mabe v. Green*, 270 N.C. 276, 154 S.E.2d 91 (1967); *Reeves v. Hill*, 272 N.C. 352, 158 S.E.2d 529 (1968); *Toler v. Brink's, Inc.*, 1 N.C. App. 315, 161 S.E.2d 208 (1968); *Rogers v. Rogers*, 2 N.C. App. 668, 163 S.E.2d 645 (1968); *State v. White*, 3 N.C. App. 31, 164 S.E.2d 36 (1968); *Wilder v. Edwards*, 7 N.C. App. 513, 173 S.E.2d 72 (1970); *Broadnax v. DeLoatch*, 8 N.C. App. 620, 174 S.E.2d 314 (1970); *Huggins v. Kye*, 10 N.C. App. 221, 178 S.E.2d 127 (1970); *Brewer v. Harris*, 279 N.C. 288, 182 S.E.2d 345 (1971); *Southwire Co. v. Long Mfg. Co.*, 12 N.C. App. 335, 183 S.E.2d 253 (1971); *McNair v. Boyette*, 282 N.C. 230, 192 S.E.2d 457 (1972).

Constitutionality.—Subsection (b) of this section does not contravene any provision of either State or federal Constitutions. *State v. Anderson*, 3 N.C. App. 124, 164 S.E.2d 48 (1968).

The requirement of subsection (b) that the operator of a motorcycle on a public highway wear a protective helmet is constitutional as a valid exercise of the police

power since the statute bears a real and substantial relationship to public safety. *State v. Anderson*, 275 N.C. 168, 166 S.E.2d 49 (1969).

Applied in *Snellings v. Roberts*, 12 N.C. App. 476, 183 S.E.2d 872 (1971).

§ 20-141. Speed restrictions.—(a) No person shall drive a vehicle on a highway or on any parking lot, drive, driveway, road, roadway, street or alley upon the grounds and premises of any public or private hospital, college, university, benevolent institution, school, orphanage, church, or any of the institutions maintained and supported by the State of North Carolina or any of its subdivisions, or upon the grounds and premises of any service station, drive-in theater, supermarket, store, restaurant or office building, or any other business or municipal establishment, providing parking space for customers, patrons or the public at a speed greater than is reasonable and prudent under the conditions then existing.

(b) Except as otherwise provided in this Chapter, it shall be unlawful to operate a vehicle in excess of the following speeds:

- (1) Twenty miles per hour in any business district;
- (2) Thirty-five miles per hour in any residential district;
- (3) Forty-five miles per hour in places other than those named in subdivisions (1) and (2) of this subsection for:
 - a. All vehicles other than passenger cars, regular passenger vehicles, pickup trucks of less than one-ton capacity, and school busses loaded with children; and
 - b. All vehicles, of whatever kind, which are engaged in towing, drawing, or pushing another vehicle: Provided, this subdivision shall not apply to vehicles engaged in towing, drawing, or pushing trailers with a gross weight of not more than 3,000 pounds;
- (4) Fifty-five miles per hour in places other than those named in subdivisions (1) and (2) of this subsection for passenger cars, regular passenger carrying vehicles, and pickup trucks of less than one-ton capacity.
- (5) Whenever the Board of Transportation shall determine upon the basis of an engineering and traffic investigation that a higher maximum speed than those set forth in subdivisions (1), (2), (3) and (4) of this subsection is reasonable and safe under the conditions found to exist upon any part of a highway outside the corporate limits of a municipality, or upon any part of a highway designated as a part of the interstate highway system or other controlled-access-facility highway either inside or outside the corporate limits of a municipality, with respect to the vehicles described in said subdivisions (3) and (4), said Board of Transportation shall determine and declare a reasonable and safe speed limit, not to exceed a maximum of 70 miles per hour, with respect to said part of any such highway, which maximum speed limit with respect to subdivisions (1), (2), (3) and (4) of this subsection shall be effective when appropriate signs giving notice thereof are erected upon the parts of the highway affected.

(b1) Except as otherwise provided in this Chapter, and except while towing another vehicle, and except when an advisory safe speed sign indicates a slower speed, it shall be unlawful to operate a passenger vehicle or pickup truck, rated for a capacity of not more than three-fourths ton, upon the interstate and primary highway system at less than the following speeds:

- (1) Forty miles per hour in a 55 mile-per-hour zone;

(2) Forty-five miles per hour in any speed zone of 60 miles per hour or greater.

(3) Repealed by Session Laws 1971, c. 79, s. 2.

It shall be a specific duty of the State Highway Patrol and such Patrol is hereby directed to enforce the minimum speeds established hereby, when appropriate signs are posted indicating the minimum speed, provided that this mandate shall not be construed to divest other local, authorized law-enforcement officers of authority to enforce the minimum speeds established hereby.

In all civil actions, violations of this subsection relating to minimum speeds shall not constitute negligence per se.

(c) The fact that the speed of a vehicle is lower than the foregoing limits shall not relieve the driver from the duty to decrease speed when approaching and crossing an intersection, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway, or when special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions, and speed shall be decreased as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the highway, and to avoid causing injury to any person or property either on or off the highway, in compliance with legal requirements and the duty of all persons to use due care.

(d) Whenever the Board of Transportation shall determine upon the basis of an engineering and traffic investigation that any speed hereinbefore set forth is greater than is reasonable or safe under the conditions found to exist upon any part of a highway outside the corporate limits of a municipality or upon any part of a highway designated as a part of the interstate highway system or other controlled-access-facility highway either inside or outside the corporate limits of a municipality, said Board of Transportation shall determine and declare a reasonable and safe speed limit thereat, which shall be effective when appropriate signs giving notice thereof are erected at such place or part of the highway.

(e) The foregoing provisions of this section shall not be construed to relieve the plaintiff in any civil action from the burden of proving negligence upon the part of the defendant as the proximate cause of an accident: Provided, that the failure or inability of a motor vehicle operator who is operating such vehicle within the maximum speed limits prescribed by G.S. 20-141(b) to stop such vehicle within the radius of the lights thereof or within the range of his vision shall not be considered negligence per se or contributory negligence per se in any civil action, but the facts relating thereto may be considered with other facts in such action in determining the negligence or contributory negligence of such operator.

(f) Repealed by Session Laws 1963, c. 949.

(f1) Local authorities in their respective jurisdictions may in their discretion fix by ordinance such speed limits as they may deem safe and proper on those streets which are not a part of the State highway system and which are not maintained by the Board of Transportation, but no speed limit so fixed for such streets shall be less than 25 miles per hour, and no such ordinance shall become or remain effective unless signs have been conspicuously placed giving notice of the speed limit for such streets. A violation of any ordinance adopted pursuant to the provisions of this subsection shall constitute a misdemeanor punishable by a fine not to exceed fifty dollars (\$50.00) or a prison sentence of not more than 30 days.

(g) Local authorities in their respective jurisdictions may, in their discretion, authorize by ordinance higher speeds than those stated in subsection (b) hereof upon streets which are not a part of the State highway system and which are not maintained by the Board of Transportation or portions thereof where there are no intersections or between widely spaced intersections: Provided, that signs are erected giving notice of the authorized speed.

Local authorities shall not have authority to modify or alter the basic rules set forth in subsection (a) herein, nor in any event to authorize by ordinance a speed in excess of 50 miles per hour.

(g1) Whenever local authorities within their respective jurisdictions determine upon the basis of an engineering and traffic investigation that a higher maximum speed than those set forth in subdivisions (1), (2), and (3) of subsection (b) hereof is reasonable and safe under the conditions found to exist upon any part of a street or highway within the corporate limits of a municipality and which street or highway is a part of the State highway system, except those highways designated as a part of the interstate highway system or other controlled-access-facility highways, said local authorities shall determine and declare a safe and reasonable speed limit, not to exceed a maximum of 50 miles per hour; provided, that the same shall not become effective until the Board of Transportation has passed a concurring ordinance adopting the speed limit so fixed by the local ordinance and, signs are erected giving notice of the authorized speed limit.

(g2) Whenever local authorities within their respective jurisdictions determine upon the basis of an engineering and traffic investigation that any speed hereinbefore set forth is greater than is reasonable or safe under the conditions found to exist upon any part of a street or highway within the corporate limits of a municipality and which street or highway is a part of the State highway system, except those highways designated as a part of the interstate highway system or other controlled-access-facility highways, said local authority shall determine and declare a safe and reasonable speed limit; provided, that the same shall not become effective until the Board of Transportation has passed a concurring ordinance adopting the speed limit so fixed by the local ordinance and, signs are erected giving notice of the authorized speed limits; provided, further, however, that nothing in this subsection shall prohibit local authorities from setting lower speed limits in school zones under the authority of subsection (g3) hereof.

(g3) Whenever a municipal governing body determines upon the basis of an engineering and traffic investigation that any speed hereinbefore set forth is greater than reasonable or safe under the conditions found to exist upon any street or highway within its corporate limits which is a part of a State highway system, except those highways designated as a part of the interstate highway system or other controlled-access-facility highways, and is located in the vicinity of any public or private elementary or secondary school, it shall have authority to reduce by ordinance the speed limit upon such streets and highways abutting school property and for a distance not to exceed 500 feet on either side of such school property lines to a maximum speed of not less than 25 miles per hour, such speed limit to be effective only for 30 minutes prior to and 30 minutes following the times when such school begins and ends its daily schedule; provided, that in the event of a school having different beginning and ending schedules for different groups of pupils, such speed limit may be effective for 30 minutes prior to and 30 minutes following the time of each beginning schedule and each ending schedule; and provided, further, that no speed limit fixed under authority of this subsection shall be effective unless appropriate signs are erected giving notice of the authorized speed limit.

(h) No person shall operate a motor vehicle on the highway at such a slow speed as to impede the normal and reasonable movement of traffic except when reduced speed is necessary for safe operation because of mechanical failure or in compliance with law; provided, this provision shall not apply to farm tractors and other motor vehicles operating at reasonable speeds for the type and nature of such vehicles.

(h1) Whenever the Board of Transportation or local authorities within their respective jurisdictions determine on the basis of an engineering and traffic investigation that slow speeds on any part of a highway considerably impede the normal and reasonable movement of traffic, the Board of Transportation or such local authority may determine and declare a minimum speed below which no person shall

operate a motor vehicle except when necessary for safe operation because of mechanical failure or in compliance with law. Such minimum speed limit shall be effective when appropriate signs giving notice thereof are erected on said part of the highway. Provided, such minimum speed limit shall be effective as to those highways and streets within the corporate limits of a municipality which are on the State highway system only when ordinances adopting the minimum speed limit are passed and concurred in by both the Board of Transportation and the local authorities. The provisions of this subsection shall not apply to farm tractors and other motor vehicles operating at reasonable speeds for the type and nature of such vehicles.

(h2) Struck out by Session Laws 1961, c. 1147.

(i) The Board of Transportation shall have authority to designate and appropriately mark certain highways of the State as truck routes.

(j) Any person violating any of the provisions of this section shall be guilty of a misdemeanor and shall be punished as provided in G.S. 20-180. (1937, c. 297, s. 2; c. 407, s. 103; 1939, c. 275; 1941, c. 347; 1947, c. 1067, s. 17; 1949, c. 947, s. 1; 1953, c. 1145; 1955, c. 398; c. 555, ss. 1, 2; c. 1042; 1957, c. 65, s. 11; c. 214; 1959, c. 640; c. 1264, s. 10; 1961, cc. 99, 1147; 1963, cc. 134, 456, 949; 1967, c. 106; 1971, c. 79, ss. 1-3; 1973, c. 507, s. 5.)

Editor's Note.—

The 1967 amendment inserted the language beginning "or on any parking lot" and ending "patrons or the public" in subsection (a).

The 1970 amendment substituted "70" for "65" in subsection (b)(5), repealed subsection (b1)(3), which related to the minimum speed in a 65-mile-per-hour zone, and substituted "any speed zone of sixty (60) miles per hour or greater" for "a sixty (60) mile-per-hour zone; and" in subsection (b1)(2).

The 1973 amendment, effective July 1, 1973, substituted "Board of Transportation" for "State Highway Commission" and for "Commission" throughout the section.

For article on proof of negligence in North Carolina, see 48 N.C.L. Rev. 731 (1970).

This section is constitutional, since a difference in speed based upon weight and size of motor vehicles bears a real and substantial relationship to the public health, safety, morals or some other phase of the public welfare. *State v. Bennor*, 6 N.C. App. 188, 169 S.E.2d 393 (1969).

And it has been scrutinized and studied by the legislature at every session of that body and has been amended, changed and altered constantly in keeping with changes in highway construction and public safety. This statute was enacted for the protection of persons and property and in the interest of public safety and the preservation of human life. *State v. Bennor*, 6 N.C. App. 188, 169 S.E.2d 393 (1969).

Rights of Motorist Are Relative. — A motorist operates his vehicle on the public highways where others are apt to be. His rights are relative. *Wagoner v. Butcher*, 6 N.C. App. 221, 170 S.E.2d 151 (1969).

A driver must operate his vehicle at a reasonable rate of speed and keep a proper lookout for persons on or near the highway. *Basden v. Sutton*, 7 N.C. App. 6, 171 S.E.2d 77 (1969).

Reasonableness of Speed Is Question for Jury.—It is ultimately for the jury, not for a witness, to determine what speed under subsection (a) of this section would have been "reasonable and prudent under the conditions" which existed at the time and place of a collision. *Peterson v. Taylor*, 10 N.C. App. 297, 178 S.E.2d 227 (1971).

Violation as Constituting Negligence.—

In accord with 9th paragraph in original. See *Stegall v. Sledge*, 247 N.C. 718, 102 S.E.2d 115 (1958); *Price v. Miller*, 271 N.C. 690, 157 S.E.2d 347 (1967); *Basden v. Sutton*, 7 N.C. App. 6, 171 S.E.2d 77 (1969).

In accord with 14th paragraph in original. See *Edwards v. Mayes*, 385 F.2d 369 (4th Cir. 1967).

It is well settled by an unbroken line of North Carolina Supreme Court decisions that the operation of a motor vehicle in excess of the applicable limits set forth in subsection (b) of this section is negligence per se. *Edwards v. Mayes*, 385 F.2d 369 (4th Cir. 1967).

A violation of subsection (b) (3) of this section is negligence per se. *Smart v. Fox*, 268 N.C. 284, 150 S.E.2d 403 (1966).

Where defendant was driving in excess of the maximum speed which would have been reasonable and prudent under the conditions then prevailing, and failed to reduce his speed in approaching and entering the intersection, he was driving in violation of this section, and was guilty of negligence. *Raper v. Byrum*, 265 N.C. 269, 144 S.E.2d 38 (1965).

A violation of this section constitutes negligence although such negligence is not actionable unless it is the proximate cause of the injuries complained of. *Davis v. Imes*, 13 N.C. App. 521, 186 S.E.2d 641 (1972).

Violation Must Proximately Cause Injury.—

The violation of subsection (c) constitutes negligence per se. However, in order for there to be actionable negligence such violation must be a proximate cause of the injury in suit, including the essential element of foreseeability. *Day v. Davis*, 268 N.C. 643, 151 S.E.2d 556 (1966).

This section prescribes a standard, etc.—

The duty of a driver to decrease his speed is governed by the duty of all persons to use "due care," and is tested by the usual legal requirements and standards such as proximate cause. *Day v. Davis*, 268 N.C. 643, 151 S.E.2d 556 (1966).

This section establishes the maximum speed at which motor vehicles are permitted to travel lawfully on the highways of the State, in a business district, in a residential district, and in other places. *Clark v. Jackson*, 4 N.C. App. 277, 166 S.E.2d 501 (1969).

Duty of Motorist.—A motorist must operate his vehicle at a reasonable rate of speed, keep a lookout for persons on or near the highway, decrease his speed when any special hazard exists with respect to pedestrians, and, if circumstances warrant, he must give warning of his approach by sounding his horn. *Morris v. Minix*, 4 N.C. App. 634, 167 S.E.2d 494 (1969).

Colliding with Vehicle Ahead. — The mere fact of a collision with a vehicle ahead furnishes some evidence that the following motorist was negligent as to speed or was following too closely. *Huggins v. Kye*, 10 N.C. App. 221, 178 S.E.2d 127 (1970).

Colliding with Vehicle Parked on Highway, etc.—

In accord with 5th paragraph in original. See *Sharpe v. Hanline*, 265 N.C. 502, 144 S.E.2d 574 (1965).

A motorist is not required to anticipate that an automobile will be stopped on the highway ahead of him at night, without lights or warning signals required by statute, but this does not relieve him of the duty of exercising reasonable care for his own safety, of keeping a proper lookout, and proceeding as a reasonably prudent person would under the circumstances to avoid a collision with the rear of a vehicle stopped or standing on the road. *Bass v. McLamb*, 268 N.C. 395, 150 S.E.2d 856 (1966).

The operator of a standing or parked vehicle which constitutes a source of danger to other users of the highway is generally bound to exercise ordinary or reasonable care to give adequate warning or notice to approaching traffic of the presence of the standing vehicle, and such duty exists irrespective of the reason for stopping the vehicle on the highway. So the driver of the stopped vehicle must take such precautions as would reasonably be calculated to prevent injury, whether by the use of lights, flags, guards, or other practical means, and failing to give such warning may constitute negligence. *Bass v. McLamb*, 268 N.C. 395, 150 S.E.2d 856 (1966).

Motorist Must Decrease Speed, etc.—

See *Price v. Miller*, 271 N.C. 690, 157 S.E.2d 347 (1967).

Reduction of Speed at Intersection Not Required in All Circumstances.—

This section does not require the driver of a vehicle to reduce the speed of his vehicle in all circumstances when approaching and crossing an intersection. *Rogers v. Rogers*, 2 N.C. App. 668, 163 S.E.2d 645 (1968); *Murrell v. Jennings*, 15 N.C. App. 658, 190 S.E.2d 686 (1972).

Ordinary Care Required of Motorists at Intersections. — The duties of motorists, both those on dominant and those on servient highways, when approaching, entering or traversing intersections require that each driver exercise ordinary care under the particular circumstances in which he finds himself and that the failure to do so can constitute actionable negligence where injury results. *Murrell v. Jennings*, 15 N.C. App. 658, 190 S.E.2d 686 (1972).

The fact that the speed of a vehicle is lower than the maximum speed limit at that particular place does not relieve the driver thereof from the duty to decrease speed when approaching and crossing an intersection, when, in the exercise of due care, he should decrease his speed in order to avoid causing injury to any person or property, and a failure to do so is negligence per se, and if the proximate cause of an injury would create liability. *Rogers v. Rogers*, 2 N.C. App. 668, 163 S.E.2d 645 (1968); *Murrell v. Jennings*, 15 N.C. App. 658, 190 S.E.2d 686 (1972).

Speed in excess of that which is reasonable and prudent under the existing conditions is unlawful notwithstanding that the speed may be less than the limits prescribed by statute. *State v. Grissom*, 17 N.C. App. 374, 194 S.E.2d 227 (1973).

Municipal Ordinance Limiting Speed on Nonsystem Streets Ineffective without

Signs.—See opinion of Attorney General to Mr. James B. Garland, Assistant Gastonia City Attorney, 41 N.C.A.G. 167 (1970).

Inability to Stop within Radius, etc.—

In accord with 2nd paragraph in original. See *Coleman v. Burris*, 265 N.C. 404, 144 S.E.2d 241 (1965); *Bass v. McLamb*, 268 N.C. 395, 150 S.E.2d 856 (1966); *Duke v. Tankard*, 3 N.C. App. 563, 165 S.E.2d 524 (1969).

Prior to April 29, 1953, the effective date of subsection (e) of this section, the failure of a nocturnal motorist to drive in such a manner and at such a speed that he could stop his vehicle within the radius of his headlights or range of his vision was negligence, or contributory negligence, per se. Subsection (e), which modified this rule, by its terms does not apply, however, when a motorist is operating his vehicle in excess of the maximum speed limits fixed by subsection (b). *Griffin v. Watkins*, 269 N.C. 650, 153 S.E.2d 356 (1967).

The proviso in subsection (e) does not apply if it is admitted, or if all the evidence discloses, that the motor vehicle was being operated in excess of the maximum speed limit under the existing circumstances as prescribed under subsection (b). *Bass v. McLamb*, 268 N.C. 395, 150 S.E.2d 856 (1966).

Driving on Snow or Ice. — One is not negligent per se in driving an automobile on a highway covered with snow or ice. *Bass v. McLamb*, 268 N.C. 395, 150 S.E.2d 856 (1966).

Skidding.—The skidding of an automobile is not in itself, and without more, evidence of negligence. *Bass v. McLamb*, 268 N.C. 395, 150 S.E.2d 856 (1966); *Clark v. Jackson*, 4 N.C. App. 277, 166 S.E.2d 501 (1969).

The mere skidding of a motor vehicle is not evidence of, and does not imply, negligence. *Clark v. Jackson*, 4 N.C. App. 277, 166 S.E.2d 501 (1969).

But the skidding of an automobile may be evidence of negligence, if it appears that it was caused by a failure to exercise reasonable precaution to avoid it, when the conditions at the time made such a result probable in the absence of such precaution. *Clark v. Jackson*, 4 N.C. App. 277, 166 S.E.2d 501 (1969).

When the condition of a road is such that skidding may be reasonably anticipated, the driver of a vehicle must exercise care commensurate with the danger, to keep the vehicle under control so as to avoid injury to occupants of the vehicle and others on or off the highway. *Clark v.*

Jackson, 4 N.C. App. 277, 166 S.E.2d 501 (1969).

Speed in excess, etc.—

Where there is evidence from which the jury could draw a reasonable inference that the defendant was driving at a speed in excess of the statutory limit, the court must instruct the jury, without special request therefor, that if it finds from the evidence that defendant was operating its motor vehicle in excess of the speed limit such conduct would constitute negligence per se. A failure to so instruct the jury is prejudicial error which requires reversal and a new trial. *Edwards v. Mayes*, 385 F.2d 369 (4th Cir. 1967).

The jury should have been instructed on the effect of violations of subsections (a) and (c) of this section, where, under proper instruction, it would have been possible for the jury to conclude that defendant, in the exercise of due and reasonable care, could or should have seen the decedent's vehicle stopped on the highway. *Edwards v. Mayes*, 385 F.2d 369 (4th Cir. 1967).

Jury Question Presented as to Slow Speed.—Where the evidence tends to show that the plaintiff or defendant was traveling at a slow speed, a jury question was presented whether under the circumstances the speed was so slow as to impede reasonable movement of traffic, and whether there was justification for the slow speed. *Fonville v. Dixon*, 16 N.C. App. 664, 193 S.E.2d 406 (1972).

Instruction Held Sufficient.—Instruction charging duty of motorist operating a vehicle with worn, slick tires on a wet and slippery highway held sufficient. *First Union Nat'l Bank v. Hackney*, 270 N.C. 437, 154 S.E.2d 512 (1967).

Penalty. — Every person convicted of speeding in violation of this section, where the speed is not in excess of eighty miles per hour, shall be punished by a fine of not more than one hundred dollars (\$100.00) or by imprisonment in the county or municipal jail for not more than sixty days, or by both such fine and imprisonment. *State v. Tolley*, 271 N.C. 459, 156 S.E.2d 858 (1967).

Applied in *Drumwright v. Wood*, 266 N.C. 198, 146 S.E.2d 1 (1966); *Wells v. Bissette*, 266 N.C. 774, 147 S.E.2d 210 (1966); *Atwood v. Holland*, 267 N.C. 722, 148 S.E.2d 851 (1966); *White v. Mote*, 270 N.C. 544, 155 S.E.2d 75 (1967); *State v. Massey*, 271 N.C. 555, 157 S.E.2d 150 (1967); *State v. Moses*, 272 N.C. 509, 158 S.E.2d 617 (1968); *Pelkey v. Bynum*, 2 N.C. App. 183, 162 S.E.2d 586 (1968); *Kinney v. Goley*, 6 N.C. App. 182, 169 S.E.2d 525 (1969); *Racine v. Boege*, 6 N.C. App.

341, 169 S.E.2d 913 (1969); *State v. Zimmerman*, 7 N.C. App. 522, 173 S.E.2d 35 (1970); *Meeks v. Atkeson*, 7 N.C. App. 631, 173 S.E.2d 509 (1970); *Doggett v. Welborn*, 18 N.C. App. 105, 196 S.E.2d 36 (1973).

Quoted in *Kanoy v. Hinshaw*, 273 N.C. 418, 160 S.E.2d 296 (1968).

Cited in *Wilkins v. Turlington*, 266 N.C. 328, 145 S.E.2d 892 (1966); *Webb v. Felton*, 266 N.C. 707, 147 S.E.2d 219 (1966);

Barefoot v. Joyner, 270 N.C. 388, 154 S.E.2d 543 (1967); *Reeves v. Hill*, 272 N.C. 352, 158 S.E.2d 529 (1968); *Anderson v. Carter*, 272 N.C. 426, 158 S.E.2d 607 (1968); *Swain v. Williamson*, 4 N.C. App. 622, 167 S.E.2d 491 (1969); *Brewer v. Harris*, 279 N.C. 288, 182 S.E.2d 345 (1971); *Southwire Co. v. Long Mfg. Co.*, 12 N.C. App. 335, 183 S.E.2d 253 (1971); *McNair v. Boyette*, 282 N.C. 230, 192 S.E.2d 457 (1972).

§ 20-141.1. Restrictions in speed zones near rural public schools.—

Whenever the Board of Transportation shall determine that the proximity of a public school to a public highway, coupled with the number of pupils in ordinary regular attendance at such school, results in a situation that renders the applicable speed set out in G.S. 20-41 greater than is reasonable or safe, under the conditions found to exist with respect to any public highway near such school, said Board of Transportation shall establish a speed zone on such portion of said public highway near such school as it deems necessary, and determine and declare a reasonable and safe speed limit for such speed zone, which shall be effective when appropriate signs giving notice thereof are erected at each end of said zone so as to give notice to anyone entering the zone. This section does not apply with respect to any portion of any street or highway within the corporate limits of any incorporated city or town. Operation of a motor vehicle in any such zone at a rate of speed in excess of that fixed pursuant to the powers granted in this section is a misdemeanor punishable by fine or imprisonment not to exceed two years, or both, in the discretion of the court. (1951, c. 782; 1957, c. 65, s. 11; 1967, c. 448; 1973, c. 507, s. 5.)

Editor's Note.—The 1967 amendment inserted "not to exceed two years" near the end of the last sentence.

The 1973 amendment, effective July 1,

1973, substituted "Board of Transportation" for "State Highway Commission" and for "Commission" in the first sentence.

§ 20-141.3. Unlawful racing on streets and highways.

(c) It shall be unlawful for any person to authorize or knowingly permit a motor vehicle owned by him or under his control to be operated on a public street, highway, or thoroughfare in prearranged speed competition with another motor vehicle, or to place or receive any bet, wager, or other thing of value from the outcome of any prearranged speed competition on any public street, highway, or thoroughfare. Any person violating the provisions of this subsection shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine or imprisonment not to exceed two years, or both, in the discretion of the court.

(f) All suspensions and revocations made pursuant to the provisions of this section shall be in the same form and manner and shall be subject to all procedures as now provided for suspensions and revocations made under the provisions of article 2 of chapter 20 of the General Statutes.

(1967, c. 446; 1969, c. 186, s. 3.)

Editor's Note.—

The 1967 amendment inserted "not to exceed two years" in the second sentence of subsection (c).

The 1969 amendment deleted the last sentence of subsection (f).

As only subsections (c) and (f) were affected by the amendments, the rest of the section is not set out.

The word "race," when used in conjunction with the operation of a motor vehicle

on the highway, describes "speed competition with another motor vehicle" and is sufficient to charge a violation of this section. *State v. Turner*, 13 N.C. App. 603, 186 S.E.2d 681 (1972).

Prosecution for Involuntary Manslaughter.—In a prosecution for involuntary manslaughter arising out of a violation of this section, the instruction is erroneous where it would permit the jury to find the defendant guilty of involuntary manslaughter

without first finding beyond a reasonable doubt that the speed competition was a proximate cause of the collision. *State v. Sawyer*, 11 N.C. App. 81, 180 S.E.2d 387 (1971).

An acquittal of reckless driving in a court having jurisdiction to try the defendant for that offense would not bar the

prosecution of the defendant in the superior court for involuntary manslaughter arising out of the same occurrence. Reckless driving and speed competition are not lesser included offenses of the charge of involuntary manslaughter. *State v. Sawyer*, 11 N.C. App. 81, 180 S.E.2d 387 (1971).

§ 20-143. Vehicles must stop at certain railway grade crossings.—The road governing body (whether State or county) is hereby authorized to designate grade crossings of steam or interurban railways by State and county highways, at which vehicles are required to stop, respectively, and such railways are required to erect signs thereat notifying drivers of vehicles upon any such highway to come to a complete stop before crossing such railway tracks, and whenever any such crossing is so designated and sign-posted it shall be unlawful for the driver of any vehicle to fail to stop within fifty feet, but not closer than ten feet, from such railway tracks before traversing such crossing. No failure so to stop, however, shall be considered contributory negligence per se in any action against the railroad or interurban company for injury to person or property; but the facts relating to such failure to stop may be considered with the other facts in the case in determining whether the plaintiff was guilty of contributory negligence. (1937, c. 407, s. 105; 1969, c. 1231, s. 1.)

Editor's Note.—

The 1969 amendment, effective Sept. 1, 1969, deleted, at the end of the section, a proviso reading: "Provided, that all school trucks and passenger busses be required to come to a complete stop at all railroad crossings." For present provisions as to busses stopping at railroad crossings, see § 20-143.1.

Test.—The test is whether a reasonably prudent man, knowing the custom of the crossing signals by bell and whistle and also the automatic signals, would approach the track in the reasonable belief that no train was approaching. *Earnhardt v. Southern Ry.*, 281 F. Supp. 585 (M.D.N.C. 1968).

Extenuating Circumstances May Relax Diligence Required of Traveller. — While ordinarily a driver would be guilty of contributory negligence as a matter of law because he did not stop when he was 25 feet

from the track where he could have seen the train if he had looked, extenuating circumstances may relax the diligence required of the traveller. In the instant case the jury could reasonably conclude the driver was listening for crossing signals, but they were not given, and looking for the automatic signals which normally would warn him if a train was approaching, and at the time he got within 25 feet of the track, he was misled by the failure of the automatic signals and the failure of the defendant to give any warning of any kind of the train which approached at 60 miles per hour or 88 feet per second. *Earnhardt v. Southern Ry.*, 281 F. Supp. 585 (M.D.N.C. 1968).

Quoted in *Price v. Seaboard Air Line R.R.*, 274 N.C. 32, 161 S.E.2d 590 (1968); *Hunter v. Seaboard Coast Line R.R.*, 443 F.2d 1319 (4th Cir. 1971).

§ 20-143.1. Certain vehicles must stop at all railroad grade crossings.—(a) The driver of every school bus, every motor vehicle carrying passengers for compensation and every property-hauling motor vehicle licensed in excess of 10,000 pounds which is carrying explosives or any dangerous article as a cargo or part of a cargo, before crossing at grade any track or tracks of a railroad, shall stop such vehicle within 50 feet but not less than 10 feet from the nearest rail of such railroad and while so stopped shall listen and look in both directions along such track for any approaching train and for any signals indicating the approach of a train, except as hereinafter provided, and shall not proceed until he can do so safely. Upon proceeding, the driver of such vehicle shall cross only in such gear of the vehicle that there shall be no necessity for changing gears and the driver shall not change gears while crossing the track or tracks.

(b) The provisions of this section shall not require the driver of a vehicle to stop:

- (1) At railroad tracks used exclusively for industrial switching purposes within a business district as defined in G.S. 20-38 (1).
- (2) At a railroad grade crossing which a police officer or crossing flagman directs traffic to proceed.
- (3) At a railroad grade crossing protected by a gate or flashing signal designed to stop traffic upon the approach of a train, when such gate or flashing signal does not indicate the approach of a train.
- (4) At an abandoned railroad grade crossing which is marked with a sign indicating that the rail line is abandoned.
- (5) At an industrial or spur line railroad grade crossing marked with a sign reading "Exempt Crossing," which sign has been erected by or with the consent of the appropriate State or local authority.

(c) "Dangerous article" shall mean any flammable liquids, flammable solids, oxidizing materials, corrosive liquids, compressed gases, poisonous substances or radioactive materials as hereinafter defined.

- (1) "Flammable liquids" shall mean any liquid which gives off flammable vapors, (as determined by flash point from Tagliabue's open cup tester as used for test of burning oil) at or below a temperature of 80 degrees F.
- (2) "Flammable solids" shall mean any solid substance which is liable, under conditions incident to transportation, to cause fires through friction, through absorption of moisture, through spontaneous chemical changes, or as a result of retained heat from its manufacturing or processing.
- (3) "Oxidizing materials" shall mean any substance such as chlorate, permanganate, peroxide, or a nitrate, that yields oxygen readily to stimulate the combustion of organic matter.
- (4) "Corrosive liquids" shall mean those acids, alkaline caustic liquids and other corrosive liquids which, when in contact with living tissue, will cause severe damage of such tissue by chemical action, or in case of leakage, will materially damage or destroy other freight by chemical action, or are liable to cause fire when in contact with organic matter or with certain chemicals.
- (5) "Compressed gas" shall mean any material or mixture having in the container either an absolute pressure exceeding forty pounds per square inch at seventy degrees F., or an absolute pressure exceeding one hundred four pounds per square inch at one hundred thirty degrees F., or both, or any liquid flammable material having a Reid vapor pressure exceeding forty pounds per square inch absolute at one hundred degrees F.
- (6) "Poisonous substances" shall mean liquids and gases of such nature that a very small amount of the gas or vapor of the liquid mixed with air is dangerous to life, or such liquid or solid substance as, upon contact with fire or when exposed to air, gives off dangerous or intensely irritating fumes or substances, which are chiefly dangerous by external contact with the body or by being taken internally.
- (7) "Radioactive materials" shall mean any material or combination of materials that spontaneously emits ionizing radiation.

(d) It shall be unlawful to transport by motor vehicle upon the highways of this State any dangerous article without conspicuously marking or placarding such motor vehicle on each side and on the rear thereof with the word "DANGEROUS" or the common or generic name of the article transported or its principal hazard.

Additionally, the rear of every such vehicle shall be conspicuously marked with the words "THIS VEHICLE STOPS AT ALL RAILROAD CROSSINGS."

(e) The provisions of this section shall not apply to taxicabs nor to vehicles subject to the rules and regulations adopted by the North Carolina Utilities Commission and the United States Department of Transportation. (1969, c. 1231, s. 2.)

Editor's Note. — Session Laws 1969, c. 1231, s. 4, makes the act effective Sept. 1, 1969.

Marking of Vehicles Required to Stop at

Railroad Crossings.—See opinion of Attorney General to Mr. Joe W. Garrett, Commissioner, N.C. Department of Motor Vehicles, 40 N.C.A.G. 432 (1970).

§ 20-144. Special speed limitation on bridges.—It shall be unlawful to drive any vehicle upon any public bridge, causeway or viaduct at a speed which is greater than the maximum speed which can with safety to such structure be maintained thereon, when such structure is signposted as provided in this section.

The Board of Transportation, upon request from any local authorities, shall, or upon its own initiative may, conduct an investigation of any public bridge, causeway or viaduct, and if it shall thereupon find that such structure cannot with safety to itself withstand vehicles traveling at the speed otherwise permissible under this Article, the Department shall determine and declare the maximum speed of vehicles which such structure can withstand, and shall cause or permit suitable signs stating such maximum speed to be erected and maintained at a distance of 100 feet beyond each end of such structure. The findings and determination of the Board of Transportation shall be conclusive evidence of the maximum speed which can with safety to any such structure be maintained thereon. (1937, c. 407, s. 106; 1957, c. 65, s. 11; 1973, c. 507, ss. 5, 21.)

Editor's Note. — The 1973 amendment, effective July 1, 1973, substituted "Board of Transportation" for "State Highway Commission" in the first sentence, and for "Commission" in the second sentence, of the second paragraph, and substituted "Department" for "Commissioner" in the first sentence of the second paragraph.

Prosecution for Involuntary Manslaughter.—In a prosecution for involuntary man-

slaughter arising out of a violation of this section, the instruction is erroneous where it fails to require the jury to find beyond a reasonable doubt that the deliberate and intentional violation of the speed statute upon the part of the defendant was a proximate cause of the collision which inflicted the injuries resulting in death. *State v. Sawyer*, 11 N.C. App. 81, 180 S.E.2d 387 (1971).

§ 20-145. When speed limit not applicable.—The speed limitations set forth in this Article shall not apply to vehicles when operated with due regard for safety under the direction of the police in the chase or apprehension of violators of the law or of persons charged with or suspected of any such violation, nor to fire department or fire patrol vehicles when traveling in response to a fire alarm, nor to public or private ambulances and rescue squad emergency service vehicles when traveling in emergencies, nor to vehicles operated by the duly authorized officers, agents and employees of the North Carolina Utilities Commission when traveling in performance of their duties in regulating and checking the traffic and speed of buses, trucks, motor vehicles and motor vehicle carriers subject to the regulations and jurisdiction of the North Carolina Utilities Commission. This exemption shall not, however, protect the driver of any such vehicle from the consequence of a reckless disregard of the safety of others. (1937, c. 407, s. 107; 1947, c. 987; 1971, c. 5.)

Editor's Note.—

The 1971 amendment inserted "and rescue squad emergency service vehicles" near the middle of the section.

Section Does Not Preclude Other Exemptions for Police Vehicles.—The legislature, by including the express exemption for police vehicles when operated with due regard for safety in this section, did not

thereby evidence an intent that there be no exemption under any circumstances from other sections of the Motor Vehicle Act for police vehicles while being similarly operated. *Collins v. Christenberry*, 6 N.C. App. 504, 170 S.E.2d 515 (1969).

Applied in *Campbell v. O'Sullivan*, 4 N.C. App. 581, 167 S.E.2d 450 (1969).

§ 20-146. Drive on right side of roadway; exceptions.

Right to Assume That Approaching Vehicle Will Remain on Its Own Side of Road.—A motorist, who is proceeding on his right side of the highway, is not required to anticipate that an automobile, which is coming from the opposite direction on its own side of the road, will suddenly leave its side of the road and turn into his path. He has the right to assume under such circumstances that the approaching automobile will remain on its own side of the road until the vehicles meet and pass in safety. *Johnson v. Douglas*, 6 N.C. App. 109, 169 S.E.2d 505 (1969).

Proximate Cause.—

A violation of this section, when the proximate cause of injury, constitutes actionable negligence. *Anderson v. Webb*, 267 N.C. 745, 148 S.E.2d 846 (1966).

Negligence Per Se.—

In accord with 3rd paragraph in original. See *Anderson v. Webb*, 267 N.C. 745, 148 S.E.2d 846 (1966).

A violation of this section is negligence per se, and when proximate cause of injury or damage is shown, such violation constitutes actionable negligence. *Reeves v. Hill*, 272 N.C. 352, 158 S.E.2d 529 (1968); *Lassiter v. Williams*, 272 N.C. 473, 158 S.E.2d 593 (1968).

Violation of this section is negligence per se which, when it is the proximate cause of injury, constitutes actionable negligence. *Smith v. Kilburn*, 13 N.C. App. 449, 186 S.E.2d 214 (1972).

A violation of this section constitutes negligence although such negligence is not actionable unless it is the proximate cause of the injuries complained of. *Davis v. Imes*, 13 N.C. App. 521, 186 S.E.2d 641 (1972).

Driving Left of Center of Highway.—

Where plaintiff sues for injuries or damages caused by an automobile collision and offers evidence showing that defendant was driving left of the center of the highway when the collision occurred, such evidence makes out a prima facie case of actionable negligence. *Reeves v. Hill*, 272 N.C. 352, 158 S.E.2d 529 (1968); *Lassiter*

v. Williams, 272 N.C. 473, 158 S.E.2d 593 (1968).

Where evidence that defendant was driving to his left of the center of the highway when a collision occurred is circumstantial, i.e., based on testimony as to the physical facts at the scene, such evidence may be sufficiently strong to infer negligence and take the cause to the jury. *Lassiter v. Williams*, 272 N.C. 473, 158 S.E.2d 593 (1968).

Evidence Sufficient, etc.—

When a plaintiff suing to recover damages for injuries sustained in a collision offers evidence tending to show that the collision occurred when the defendant was driving to his left of the center of the highway, such evidence makes out a prima facie case of actionable negligence. The defendant, of course, may rebut the inference arising from such evidence by showing that he was on the wrong side of the road from a cause other than his own negligence. *Anderson v. Webb*, 267 N.C. 745, 148 S.E.2d 846 (1966); *Smith v. Kilburn*, 13 N.C. App. 449, 186 S.E.2d 214 (1972).

Plaintiff in a wrongful death action offered sufficient evidence—including physical evidence of tire marks at the scene and the defendant's statements to the investigating officer—to support a jury finding that the defendant was driving on the left-hand side of the street when he struck the plaintiff's intestate. *Smith v. Kilburn*, 13 N.C. App. 449, 186 S.E.2d 214 (1972).

Applied in *Stewart v. Gallimore*, 265 N.C. 696, 144 S.E.2d 862 (1965); *Atwood v. Holland*, 267 N.C. 722, 148 S.E.2d 851 (1966); *State v. Massey*, 271 N.C. 555, 157 S.E.2d 150 (1967); *State v. Moses*, 272 N.C. 509, 158 S.E.2d 617 (1968); *Broadnax v. Deloatch*, 8 N.C. App. 620, 174 S.E.2d 314 (1970).

Cited in *Hunt v. Carolina Truck Supplies, Inc.*, 266 N.C. 314, 146 S.E.2d 84 (1966); *Champion v. Waller*, 268 N.C. 426, 150 S.E.2d 783 (1966); *Brewer v. Harris*, 279 N.C. 288, 182 S.E.2d 345 (1971); *State v. Boone*, 16 N.C. App. 368, 192 S.E.2d 13 (1972).

§ 20-147. Keep to the right in crossing intersections or railroads.

Motorists Required to Exercise Ordinary Care at Intersections.—The duties of motorists, both those on dominant and those on servient highways, when approaching, entering or traversing intersections require that each driver exercise ordinary care under the particular circumstances in which he finds himself and that

the failure to do so can constitute actionable negligence where injury results. *Murrell v. Jennings*, 15 N.C. App. 658, 190 S.E.2d 686 (1972).

Applied in *Stutts v. Burcham*, 271 N.C. 176, 155 S.E.2d 742 (1967).

Cited in *Hardy v. Tesh*, 5 N.C. App. 107, 167 S.E.2d 848 (1969).

§ 20-148. Meeting of vehicles.**Violation as Negligence.—**

In accord with 1st paragraph in original. See *Anderson v. Webb*, 267 N.C. 745, 148 S.E.2d 846 (1966).

A violation of this section is negligence per se, and, when proximate cause of injury or damage is shown, such violation constitutes actionable negligence. *Reeves v. Hill*, 272 N.C. 352, 158 S.E.2d 529 (1968); *Lassiter v. Williams*, 272 N.C. 473, 158 S.E.2d 593 (1968).

A violation of this section constitutes negligence although such negligence is not actionable unless it is the proximate cause of the injuries complained of. *Davis v. Imes*, 13 N.C. App. 521, 186 S.E.2d 641 (1972).

Violation Must Be Proximate Cause, etc.—

A violation of this section, when the proximate cause of injury, constitutes actionable negligence. *Anderson v. Webb*, 267 N.C. 745, 148 S.E.2d 846 (1966).

Driving Left of Center of Highway.—Where plaintiff sues for injuries or damages caused by an automobile collision and offers evidence showing that defendant was driving left of the center of the highway when the collision occurred, such evidence makes out a prima facie case of actionable

negligence. *Reeves v. Hill*, 272 N.C. 352, 158 S.E.2d 529 (1968); *Lassiter v. Williams*, 272 N.C. 473, 158 S.E.2d 593 (1968).

Where evidence that defendant was driving to his left of the center of the highway when a collision occurred is circumstantial, i.e., based on testimony as to the physical facts at the scene, such evidence may be sufficiently strong to infer negligence and take the case to the jury. *Lassiter v. Williams*, 272 N.C. 473, 158 S.E.2d 593 (1968).

Evidence held sufficient, etc.—

When a plaintiff suing to recover damages for injuries sustained in a collision offers evidence tending to show that the collision occurred when the defendant was driving to his left of the center of the highway, such evidence makes out a prima facie case of actionable negligence. The defendant, of course, may rebut the inference arising from such evidence by showing that he was on the wrong side of the road from a cause other than his own negligence. *Anderson v. Webb*, 267 N.C. 745, 148 S.E.2d 846 (1966).

Cited in *Brewer v. Harris*, 279 N.C. 288, 182 S.E.2d 345 (1971); *State v. Boone*, 16 N.C. App. 368, 192 S.E.2d 13 (1972).

§ 20-149. Overtaking a vehicle.**And a violation of subsection (b), etc.—**

Where, as in subsection (b) of this section, a violation is declared not to be negligence per se, the common-law rule of ordinary care applies, and a violation is only evidence to be considered with other facts and circumstances in determining whether the violator used due care. *Kinney v. Goley*, 4 N.C. App. 325, 167 S.E.2d 97 (1969).

But Motorist Not Relieved of All Duty, etc.—

In accord with original. See *Lowe v. Futrell*, 271 N.C. 550, 157 S.E.2d 92 (1967).

Where Driver of Forward Vehicle Has Signaled, etc.—

Notwithstanding the provisions of this statute, a motorist may, in the exercise of ordinary care, pass another vehicle, going in the same direction, on the right of the overtaken vehicle when the driver of that vehicle has given a clear signal of his intention to make a left turn and has left sufficient space to the right to permit the overtaking vehicle to pass in safety. This rule, however, does not mean that the act of passing on the right of a left turning vehicle at an intersection may not be accomplished in such a manner as to consti-

tute negligence. *Ford v. Smith*, 6 N.C. App. 539, 170 S.E.2d 548 (1969).

Generally, the overtaking driver is justified in proceeding along the right side of the highway in attempting to pass the forward vehicle where the driver of the latter gives a left-turn signal or pulls over to the left as though intending to make a left turn. *Ford v. Smith*, 6 N.C. App. 539, 170 S.E.2d 548 (1969).

No Duty to Sound Horn, etc.—

The provision of this section with reference to a vehicle within a business or residence district was not intended to forbid the overtaking motorist to sound his horn, or to absolve him of the duty to do so, where the circumstances are such that a reasonable man in the position of the overtaking motorist could foresee risk of injury to the person or property of the occupant of the forward vehicle if he undertakes to pass the forward vehicle without such warning. *Lowe v. Futrell*, 271 N.C. 550, 157 S.E.2d 92 (1967).

Failure to Blow Horn Held Evidence of Negligence.—The failure of a bus driver to blow his horn in apt time before attempting to pass a boy on a bicycle, who was obviously unaware of the overtaking

vehicle, is evidence of negligence. *Webb v. Felton*, 266 N.C. 707, 147 S.E.2d 219 (1966).

The fact that the engine of the overtaking vehicle is noisy, or even that it is carrying a rattling load, will not relieve a driver of his duty to give in apt time the warning required by statute. *Webb v. Felton*, 266 N.C. 707, 147 S.E.2d 219 (1966).

The two-foot clearance requirement is a minimum requirement by the express terms of the statute. *Murchison v. Powell*, 269 N.C. 656, 153 S.E.2d 352 (1967).

It Applies to Overtaking and Passing Another Vehicle.—The two-foot clearance

required by this section applies to the overtaking and passing of another vehicle, not a horse subject to fright by a sudden noise. *Murchison v. Powell*, 269 N.C. 656, 153 S.E.2d 352 (1967).

Applied in *Simpson v. Lyerly*, 265 N.C. 700, 144 S.E.2d 870 (1965); *Welch v. Jenkins*, 271 N.C. 138, 155 S.E.2d 763 (1967); *Almond v. Bolton*, 272 N.C. 78, 157 S.E.2d 709 (1967).

Stated in *Inman v. Harper*, 2 N.C. App. 103, 162 S.E.2d 629 (1968).

Cited in *Bateman v. Elizabeth City State College*, 5 N.C. App. 168, 167 S.E.2d 838 (1969).

§ 20-150. Limitations on privilege of overtaking and passing.

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

(d) The driver of a vehicle shall not drive to the left side of the centerline of a highway upon the crest of a grade or upon a curve in the highway where such centerline has been placed upon such highway by the Board of Transportation, and is visible.

(e) The driver of a vehicle shall not overtake and pass another on any portion of the highway which is marked by signs or markers placed by the Board of Transportation stating or clearly indicating that passing should not be attempted. (1937, c. 407, s. 112; 1955, c. 862; c. 913, s. 2; 1957, c. 65, s. 11; 1969, c. 13; 1973, c. 507, s. 5.)

Editor's Note.—

The 1969 amendment deleted "steam or electric" preceding "railway grade crossing" in the first sentence of subsection (c).

The 1973 amendment, effective July 1, 1973, substituted "Board of Transportation" for "State Highway Commission" in subsections (c), (d) and (e).

As subsections (a) and (b) were not changed by the amendments, they are not set out.

Purpose.—The manifest purpose of this section is to promote safety in the operation of automobiles on the highways and not to obstruct vehicular traffic. *Lawson v. Benton*, 272 N.C. 627, 158 S.E.2d 805 (1968).

Application.—This section applies only to vehicles overtaking and passing another

vehicle traveling in the same direction. *State v. Boone*, 16 N.C. App. 368, 192 S.E.2d 13 (1972).

As to violation of subsection (c), etc.—

Violation of subsection (c) has been held to constitute negligence per se if injury proximately results therefrom. *Teachey v. Woolard*, 16 N.C. App. 249, 191 S.E.2d 903 (1972).

Interpretation.—This safety statute must be given a reasonable and realistic interpretation to effect the legislative purpose. *Lawson v. Benton*, 272 N.C. 627, 158 S.E.2d 805 (1968).

Applied in *Duckworth v. Metcalf*, 268 N.C. 340, 150 S.E.2d 485 (1966); *Wands v. Cauble*, 270 N.C. 311, 154 S.E.2d 425 (1967); *Stutts v. Burcham*, 271 N.C. 176, 155 S.E.2d 742 (1967).

proximate cause of a collision. *Teachey v. Woolard*, 16 N.C. App. 249, 191 S.E.2d 903 (1972).

§ 20-150.1. When passing on the right is permitted.

When Passing on Right Constitutes Negligence Per Se.—Passing on the right when not sanctioned by this section constitutes negligence per se if found to be the

hicle about to be overtaken to yield the right-of-way does not apply to a highway patrolman who sets up a "running road-

§ 20-151. Driver to give way to overtaking vehicle.

Exemption of Police Vehicles in Case of "Running Roadblock".—The provision of this section requiring the driver of a ve-

block" in an attempt to stop a stolen car being pursued by another patrolman, since an exemption for police vehicles from this section in case of a running roadblock may

be reasonably implied. *Collins v. Christenberry*, 6 N.C. App. 504, 170 S.E.2d 515 (1969).

§ 20-152. Following too closely.

Editor's Note.—For article on proof of negligence in North Carolina, see 48 N.C.L. Rev. 731 (1970).

This section fixes no specific distance at which one automobile may lawfully follow another. *Beanblossom v. Thomas*, 266 N.C. 181, 146 S.E.2d 36 (1966).

Determining Proper Space to Be Maintained between Vehicles.—In determining the proper space to be maintained between his vehicle and the one preceding him, a motorist must take into consideration such variables as the locality, road and weather conditions, other traffic on the highway, the characteristics of the vehicle he is driving, as well as that of the one ahead, the relative speeds of the two, and his ability to control and stop his vehicle should an emergency require it. Thus, the space is determined according to the standard of reasonable care and should be sufficient to enable the operator of the car behind to avoid danger in case of a sudden stop or decrease in speed by the vehicle ahead under circumstances which should reasonably be anticipated by the following driver. *Beanblossom v. Thomas*, 266 N.C. 181, 146 S.E.2d 36 (1966).

Negligence Per Se.—

In accord with 1st paragraph in original. See *Beanblossom v. Thomas*, 266 N.C. 181, 146 S.E.2d 36 (1966).

In accord with 2nd paragraph in original. See *Ratliff v. Duke Power Co.*, 268 N.C. 605, 151 S.E.2d 641 (1966).

Inferences from Fact of Collision.—

Unless the driver of the leading vehicle is himself guilty of negligence, or unless an emergency is created by some third person or other highway hazard, the mere fact of a collision with the vehicle ahead furnishes some evidence that the motorist in the rear was not keeping a proper lookout or that he was following too closely. *Beanblossom v. Thomas*, 266 N.C. 181, 146 S.E.2d 36 (1966).

The mere fact of a collision with a ve-

hicle ahead furnishes some evidence that the following motorist was negligent as to speed or was following too closely. *Griffin v. Ward*, 267 N.C. 296, 148 S.E.2d 133 (1966); *Huggins v. Kye*, 10 N.C. App. 221, 178 S.E.2d 127 (1970).

Though the mere fact of a collision with a vehicle furnishes some evidence of a violation of this section, or of failure to keep a proper lookout, the mere proof of a collision with a preceding vehicle does not compel either of these conclusions. It merely raises a question for the jury to determine. *Ratliff v. Duke Power Co.*, 268 N.C. 605, 151 S.E.2d 641 (1966).

Drivers Charged with Notice That Operation of Each Car in Line Is Affected by Car in Front of It.—Where the plaintiff and defendant had been driving their cars behind a line of cars for a substantial distance, the drivers, in the exercise of reasonable care, were charged with notice that the operation of each car was affected by the one in front of it. They had to maintain such distance, keep such a lookout, and operate at such speed, under these conditions, that they could control their cars under ordinarily foreseeable developments. The defendant did so and was able to stop when it became necessary because the car leading the procession stopped to make a left turn. No less responsibility was cast upon the plaintiff, and therefore a motion to nonsuit the plaintiff's cause of action should have been allowed. *Griffin v. Ward*, 267 N.C. 296, 148 S.E.2d 133 (1966).

The following driver is not an insurer against rear-end collisions, for, even when he follows at a distance reasonable under the existing conditions, the space may be too short to permit a stop under any and all eventualities. *White v. Mote*, 270 N.C. 544, 155 S.E.2d 75 (1967).

Cited in *Southwire Co. v. Long Mfg. Co.*, 12 N.C. App. 335, 183 S.E.2d 253 (1971).

§ 20-153. Turning at intersection.

Charge to Jury.—

The reference to "subdivision (5) of § 20-38" in the paragraph under this catchline in the replacement volume should be to "subdivision (12) of § 20-38."

Evidence Insufficient to Show Violation.

—The evidence, as distinguished from defendant's allegations, was insufficient to constitute a basis for the contention that

plaintiff violated this section. *Kidd v. Burton*, 269 N.C. 267, 152 S.E.2d 162 (1967).

Applied in *Stewart v. Gallimore*, 265 N.C. 696, 144 S.E.2d 862 (1965); *Wands v. Cauble*, 270 N.C. 311, 154 S.E.2d 425 (1967).

Cited in *Almond v. Bolton*, 272 N.C. 78, 157 S.E.2d 709 (1967); *Hardy v. Tesh*, 5 N.C. App. 107, 167 S.E.2d 848 (1969).

§ 20-154. Signals on starting, stopping or turning.

Editor's Note.—

For article on proof of negligence in North Carolina, see 48 N.C.L. Rev. 731 (1970).

In General.—

Every driver who intends to turn, or partly turn, from a direct line shall first see that such movement can be made in safety. *Wagoner v. Butcher*, 6 N.C. App. 221, 170 S.E.2d 151 (1969).

This section imposes, etc.—

This safety statute requires a motorist intending to turn from a direct line (1) to see that the movement can be made in safety, and (2) to give the required signal when the operation of any other vehicle may be affected. The first requirement does not mean that a motorist may not make a left turn unless the circumstances are absolutely free from danger. It means that a motorist must exercise reasonable care under existing conditions to ascertain that such movement can be made with safety. Infallibility is not required. *Clarke v. Holman*, 274 N.C. 425, 163 S.E.2d 783 (1968); *Johnson v. Douglas*, 6 N.C. App. 109, 169 S.E.2d 505 (1969).

The duties imposed upon the driver intending to turn from a direct line are two-fold: (1) he must first ascertain whether the move can be made in safety and (2) upon ascertaining that another vehicle might be affected, must give a signal, plainly visible, of his intention so to move. *Sharpe v. Grindstaff*, 329 F. Supp. 405 (M.D.N.C. 1970).

The requirement that a motorist, etc.—

In accord with 3rd paragraph in original. See *Hales v. Flowers*, 7 N.C. App. 46, 171 S.E.2d 113 (1969); *Hudgens v. Goins*, 15 N.C. App. 203, 189 S.E.2d 633 (1972).

In accord with 4th paragraph in original. See *Almond v. Bolton*, 272 N.C. 78, 157 S.E.2d 709 (1967).

While it is true that subsection (a) of this section does not mean that a motorist may not make a left turn on a highway unless the circumstances be absolutely free from danger, he is required to exercise reasonable care in determining that his intended movement can be made in safety. *Petree v. Johnson*, 2 N.C. App. 336, 163 S.E.2d 87 (1968).

The statutory provisions that "the driver of any vehicle upon a highway before . . . turning from a direct line shall first see that such movement can be made in safety" does not mean that a motorist may not make a left turn on a highway unless the circumstances render such turning absolutely free from danger. It is simply de-

signed to impose upon the driver of a motor vehicle, who is about to make a left turn upon a highway, the legal duty to exercise reasonable care under the circumstances in ascertaining that such movement can be made with safety to himself and others before he actually undertakes it. *Hales v. Flowers*, 7 N.C. App. 46, 171 S.E.2d 113 (1969).

The duty to give a signal does not arise unless the operation of some other vehicle may be affected by such movement. When the surrounding circumstances afford him reasonable grounds to conclude that the left turn might affect the operation of another vehicle, then the duty to give the statutory signal is imposed upon him. *Clarke v. Holman*, 274 N.C. 425, 163 S.E.2d 783 (1968).

Whenever the operation of another vehicle will not be affected by starting, stopping, or turning, no signal is required by subsection (a) of this section. *Clarke v. Holman*, 1 N.C. App. 176, 160 S.E.2d 552 (1968).

Person Observing No Vehicles, etc.—

One is not required to give a signal to a motorist who has not yet appeared on the horizon. *Clarke v. Holman*, 274 N.C. 425, 163 S.E.2d 783 (1968).

Right to Assume That Driver, etc.—

A person has the right to assume, and to act on that assumption, that the driver of a vehicle approaching from the opposite direction will comply with subsection (a) of this section before making a left turn across his path. *Petree v. Johnson*, 2 N.C. App. 336, 163 S.E.2d 87 (1968).

And That Approaching Motorist, etc.—

In accord with original. See *Johnson v. Douglas*, 6 N.C. App. 109, 169 S.E.2d 505 (1969).

Driver Must Keep Outlook in Direction of Travel.—It is the duty of the driver of a motor vehicle not merely to look, but to keep an outlook in the direction of travel. *Clarke v. Holman*, 274 N.C. 425, 163 S.E.2d 783 (1968).

A driver is held to the duty of seeing what he ought to have seen. *Clarke v. Holman*, 274 N.C. 425, 163 S.E.2d 783 (1968).

A driver making a left turn must always use the care which a reasonable man would use under like circumstances. *Ratliff v. Duke Power Co.*, 268 N.C. 605, 151 S.E.2d 641 (1966).

The care which is reasonable in making a left turn at an intersection depends, in part, upon the nature and dimensions of the vehicle, or combination of vehicles, to

be turned and of the load, if any, projecting from the rear thereof. *Ratliff v. Duke Power Co.*, 268 N.C. 605, 151 S.E.2d 641 (1966).

It Is Not Necessarily Enough to Look and Give Signal.—In making a left turn, it is not necessarily enough to absolve a driver from negligence that he looked and gave the statutory signal. *Ratliff v. Duke Power Co.*, 268 N.C. 605, 151 S.E.2d 641 (1966).

Hence, when the turning vehicle is drawing behind it a 40-foot pole, it is obvious that a left turn at a right angle will involve some swinging of the end of the pole in an arc through part of the intersection. Evidence of such a turn with such a load is sufficient to permit, though not to require, the jury to find that reasonable care for the safety of other users of the highway demands the stationing of some person at the intersection to stop traffic which may otherwise be imperiled by the turn. *Ratliff v. Duke Power Co.*, 268 N.C. 605, 151 S.E.2d 641 (1966).

Effect of Traffic Signals, etc.—

Where the intersection of streets in a municipality has authorized electric traffic signals, requirements in regard to stopping are controlled by the traffic lights and not by subsection (b) of this section. *Jones v. Holt*, 268 N.C. 381, 150 S.E.2d 759 (1966).

When a motorist approaches an electrically controlled signal at an intersection of streets or highways, he is under the legal duty to maintain a proper lookout and to keep his motor vehicle under reasonable control in order that he may stop before entering the intersection if the green light changes to yellow or red before he actually enters the intersection. Likewise, another motorist, following immediately behind the first motorist, is not relieved of the legal duty to keep his motor vehicle under reasonable control in order that he might not collide with the motor vehicle in front of him in the event the driver of the first car is required to stop before entering the intersection by reason of the signal light changing from green to yellow or red. *Jones v. Holt*, 238 N.C. 381, 150 S.E.2d 759 (1966).

In subsection (a) of this section there is no hint of a legislative intent to create a clear dichotomy between those intersections with and those without traffic lights. A pedestrian following the lights and continuing his straight course has the right to rely on the presumption that the driver will obey the law as set forth in this statute. *Wagoner v. Butcher*, 6 N.C. App. 221, 170 S.E.2d 151 (1969).

Violation of Section as Negligence Per Se.—

Under this section as it stood before the 1965 amendment, a violation of subsection (a) was negligence per se. *Lowe v. Futrell*, 271 N.C. 550, 157 S.E.2d 92 (1967), in which the court said that it was unnecessary to determine whether the proviso added by the 1965 amendment in subsection (b) was intended to apply to subsection (a).

Since a violation of this section is no longer to be considered negligence per se, the jury, if they find as a fact this section was violated, must consider the violation along with all other facts and circumstances and decide whether, when so considered, the violator has breached his common-law duty of exercising ordinary care. If a violation of the statute is to be considered negligence per se, the jury would not need to perform this function, since the statute, rather than the common-law duty of ordinary care, would provide the applicable standard. *Kinney v. Goley*, 4 N.C. App. 325, 167 S.E.2d 97 (1969).

Since a violation of this safety statute is not negligence per se, triers of the facts must consider all relevant facts and attendant circumstances in deciding whether the violator has breached his common-law duty to exercise due care. *Sharpe v. Grindstaff*, 329 F. Supp. 405 (M.D.N.C. 1970).

Since a violation of this section is no longer to be considered negligence per se, the jury if they find as a fact that the statute was violated, must consider the violation along with all other facts and circumstances and decide whether, when so considered, the violator has breached his common-law duty of exercising ordinary care. *Harris v. Freeman*, 18 N.C. App. 85, 196 S.E.2d 48 (1973).

Section Not Applicable Where Driver Has No Choice.—This section, which provides that the driver of a motor vehicle shall not stop without first seeing that he can do so in safety and that he must give a signal of his intention where the operation of other cars might be affected, is not applicable where the driver has no choice, such as where the driver is confronted with a situation which demands that he stop because the line of cars in front of him has done so, he cannot turn left because of oncoming traffic, and it has been raining and the windows of his car are up so he can give no hand signal. *Griffin v. Ward*, 267 N.C. 296, 148 S.E.2d 133 (1966).

Where plaintiff failed to give any signal indicating that he was going to stop, but defendant's own evidence established that plaintiff had no time in which to give a signal, plaintiff is not guilty of contributory negligence when defendant strikes him

from rear, because he was under no statutory duty to give a signal where he has no choice but to stop because of the situation. *Harris v. Freeman*, 18 N.C. App. 85, 196 S.E.2d 48 (1973).

Bicyclist. — Under ordinary circumstances, it is the duty of a bicyclist, before turning from a direct line of travel, to ascertain that the movement can be made in safety, and to signal his intention to make the movement if the operation of any other vehicle will be thereby affected. *Webb v. Felton*, 266 N.C. 707, 147 S.E.2d 219 (1966).

Allegations of complaint held to show that sole proximate cause of collision was negligent left turn made by first defendant across path of second defendant despite allegations that second defendant was concurrently negligent. *Hout v. Harvell*, 270 N.C. 274, 154 S.E.2d 41 (1967); *Mabe v. Green*, 270 N.C. 276, 154 S.E.2d 91 (1967).

Question for Jury.—

It was for the jury to determine whether plaintiff should have reasonably anticipated that the operation of any other vehicle might be affected by his making a right-hand turn. *Kidd v. Burton*, 269 N.C. 267, 152 S.E.2d 162 (1967).

Evidence Sufficient to Show Negligence under Subsection (a).—Evidence to the effect that defendant, traveling in the opposite direction, turned left to enter a private driveway and stopped with her vehicle partially blocking plaintiff's lane of travel, causing plaintiff to swerve off the hard surface to avoid a collision, was sufficient to show negligence by defendant under subsection (a) of this section. *Black v. Wilkinson*, 269 N.C. 689, 153 S.E.2d 333 (1967).

§ 20-155. Right-of-way.

(b) The driver of a vehicle approaching but not having entered an intersection and/or junction, shall yield the right-of-way to a vehicle already within such intersection and/or junction whether the vehicle in the junction is proceeding straight ahead or turning in either direction: Provided, that this subsection shall not be interpreted as giving the right-of-way to a vehicle already in an intersection and/or junction when said vehicle is turning either to the right or left unless the driver of said vehicle has given a plainly visible signal of intention to turn as required in § 20-154. Notwithstanding the provisions of this section and § 20-154, a vehicle making a left turn in front of an approaching vehicle does not have the right-of-way unless such movement can be completed with safety prior to the arrival of the approaching vehicle, and when the movement cannot be completed with safety, the driver of the vehicle making the left turn shall yield the right-of-way.

(1967, c. 1053.)

Editor's Note.—

The 1967 amendment added the last sentence in subsection (b).

Stopping on Traveled Portion of Highway Does Not Necessarily Constitute Negligence.—The mere fact that a driver stops his vehicle on the traveled portion of a highway for the purpose of receiving or discharging a passenger, nothing else appearing, does not constitute negligence. *Strickland v. Powell*, 10 N.C. App. 225, 178 S.E.2d 136 (1970).

Applied in *Stewart v. Gallimore*, 265 N.C. 696, 144 S.E.2d 862 (1965); *Simpson v. Lyerly*, 265 N.C. 700, 144 S.E.2d 870 (1965); *Webb v. Felton*, 266 N.C. 707, 147 S.E.2d 219 (1966); *Stutts v. Burcham*, 271 N.C. 176, 155 S.E.2d 742 (1967); *Roberts v. Pilot Freight Carriers*, 273 N.C. 600, 160 S.E.2d 712 (1968); *Key v. Merritt-Holland Welding Supplies*, 273 N.C. 609, 160 S.E.2d 687 (1968); *Smith v. Perdue*, 7 N.C. App. 314, 172 S.E.2d 246 (1970).

Quoted in *Kanoy v. Hinshaw*, 273 N.C. 418, 160 S.E.2d 296 (1968); *Strickland v. Powell*, 279 N.C. 183, 181 S.E.2d 464 (1971).

Stated in *Hall v. Kimber*, 6 N.C. App. 669, 171 S.E.2d 99 (1969).

Cited in *Vann v. Hayes*, 266 N.C. 713, 147 S.E.2d 186 (1966); *Underwood v. Gay*, 268 N.C. 715, 151 S.E.2d 596 (1966); *Bateman v. Elizabeth City State College*, 5 N.C. App. 168, 167 S.E.2d 838 (1969); *Brown v. Boren Clay Prods. Co.*, 5 N.C. App. 418, 168 S.E.2d 452 (1969); *Kinney v. Goley*, 6 N.C. App. 182, 169 S.E.2d 525 (1969); *Odell v. Lipscomb*, 12 N.C. App. 318, 183 S.E.2d 299 (1971); *Southwire Co. v. Long Mfg. Co.*, 12 N.C. App. 335, 183 S.E.2d 253 (1971); *Teachey v. Woolard*, 16 N.C. App. 249, 191 S.E.2d 903 (1972).

As the other subsections were not affected by the amendment, they are not set out.

No Distinction Between "T" Intersection and One at Which Highways Cross.

—With reference to the right-of-way as between two vehicles approaching and entering an intersection, the law of this State makes no distinction between a "T" intersection and one at which the two highways cross each other completely. *Dawson v. Jennette*, 278 N.C. 438, 180 S.E.2d 121 (1971).

Entering Intersection, etc.

In accord with 2nd paragraph in original. See *Moore v. Butler*, 10 N.C. App. 120, 178 S.E.2d 35 (1970); *Dawson v. Jennette*, 278 N.C. 438, 180 S.E.2d 121 (1971).

The test of the applicability of subsection (a) is whether both vehicles approach or reach the intersection at "approximately the same time," and the right-of-way is not determined by a fraction of a second. *Hathcock v. Lowder*, 16 N.C. App. 255, 192 S.E.2d 124 (1972).

Duty of Driver Approaching, etc.—

Where two drivers approach an uncontrolled intersection at the same time, it is the duty of the driver on the left to yield the right-of-way to the vehicle on his right. *Wilder v. Harris*, 266 N.C. 82, 145 S.E.2d 393 (1965).

Right to Assume That Driver, etc.—

In accord with 1st paragraph in original. See *Neal v. Stevens*, 266 N.C. 96, 145 S.E.2d 325 (1965).

When two drivers approach an uncontrolled intersection at the same time, the driver on the right has the right to assume and act on the assumption until given notice to the contrary that the operator of any vehicle approaching the intersection to the left would obey the law and yield the right-of-way. *Wilder v. Harris*, 266 N.C. 82, 145 S.E.2d 393 (1965).

Nothing else appearing, the driver of a vehicle having the right-of-way at an intersection is entitled to assume and to act, until the last moment, on the assumption that the driver of another vehicle, approaching the intersection, will recognize his right-of-way and will stop or reduce his speed sufficiently to permit him to pass through the intersection in safety. *Dawson v. Jennette*, 278 N.C. 438, 180 S.E.2d 121 (1971).

Right-of-Way Is Not Absolute.

Even though a driver has the right-of-way at an intersection, it is incumbent upon him, in approaching and traversing the intersection, to drive at a speed no greater than is reasonable under the conditions then existing, to keep his vehicle under control, to keep a reasonably careful lookout and to take such action as a reasonably prudent person would take to

avoid collision when the danger of one is discovered or should have been discovered. *Dawson v. Jennette*, 278 N.C. 438, 180 S.E.2d 121 (1971).

Right of Pedestrian to Proceed Is Superior to That of Turning Motorist.—

Under subsection (c) of this section, where a pedestrian and a turning motorist are both proceeding at an intersection under favorable signal lights, the right of the pedestrian to proceed is superior to that of the turning motorist. *Duke v. Meisky*, 12 N.C. App. 329, 183 S.E.2d 292 (1971).

Failure to Maintain Proper Lookout.—

Where a plaintiff's testimony indicates that he did not slow down and yield the right-of-way to a defendant for the reason that plaintiff was not maintaining a proper lookout and did not see the defendant's vehicle, and where plaintiff's testimony further reveals that, while he looked before entering the intersection, he did so at a point where he could not see vehicles approaching the intersection from his right, he was faced with the duty of looking and seeing what he ought to have seen; his admitted conduct prohibits any recovery. *Moore v. Butler*, 10 N.C. App. 120, 178 S.E.2d 35 (1970).

A motorist who does not keep a lookout is nevertheless charged with having seen what he could have seen had he looked, and his liability to one injured in a collision with his vehicle is determined as it would have been had he looked, observed the prevailing conditions and continued to drive as he did. *Dawson v. Jennette*, 278 N.C. 438, 180 S.E.2d 121 (1971).

Effect of Disappearance or Removal of Stop Sign.—

Where the driver of the vehicle on the highway, which a stop sign had designated as the dominant highway, knew that the stop sign had been so erected but did not know of its disappearance or removal, and the driver of the vehicle on the other highway, which the stop sign had designated as the servient highway, did not know there had ever been such a stop sign erected at the intersection, and he approached the intersection from the right of the other driver, the removal of the stop sign would not take away the right of the driver of the vehicle on the highway, designated by the sign as the dominant highway, to treat it as such and to proceed into the intersection on the assumption that the other vehicle approaching from the right would yield the right-of-way to him. The responsibility of the driver of the vehicle on the highway, designated by the sign as the servient highway, but who did not know it had ever

been so designated, must be judged in the light of conditions confronting him, namely, an unmarked intersection, at which the other vehicle was approaching from his left. *Dawson v. Jennette*, 278 N.C. 438, 180 S.E.2d 121 (1971).

Effect of Prior Knowledge of Malfunctioning Traffic Signal. — Where a traffic signal was malfunctioning, and each party knew how the traffic signal malfunctioned on his street, the rights and duties of the drivers were determined on the basis of their prior knowledge and not on the objective condition of the intersection, and the defendant was not entitled to a peremptory instruction that the vehicle approaching from the right had the right-of-way under this section. *Bledsoe v. Gaddy*, 10 N.C. App. 470, 179 S.E.2d 167 (1971).

Effect of Traffic-Control Signals on Right-of-Way of Pedestrians. — The right-of-way given a pedestrian by subsection (c) of this section at an intersection where there is no traffic-control signal is limited at an intersection where there is a traffic-control signal by § 20-173(a) to the pedestrian having the right-of-way only when he is moving with the green light. *Wagoner v. Butcher*, 6 N.C. App. 221, 170 S.E.2d 151 (1969).

It is not the intention of the legislature to change the rule of right-of-way between vehicles and pedestrians in subsection (c) of this section, but rather to subject the latter to the regulation of traffic signal devices at street intersections. *Wagoner v. Butcher*, 6 N.C. App. 221, 170 S.E.2d 151 (1969).

The pedestrian crossing with a favor-

able light is also assisted by the principle that the right to proceed is superior to the right to turn. *Wagoner v. Butcher*, 6 N.C. App. 221, 170 S.E.2d 151 (1969).

Provisions of subsection (c) of this section requiring motorists to yield the right-of-way to pedestrians within a marked or unmarked crosswalk "except at intersections where the movement of traffic is being regulated by traffic officers or traffic direction devices" do not subordinate the right-of-way of a pedestrian to that of a turning vehicle at an intersection controlled by traffic signals which are favorable to both. *Wagoner v. Butcher*, 6 N.C. App. 221, 170 S.E.2d 151 (1969).

Subsection (a), etc.—

In accord with 1st paragraph in original. See *Rathburn v. Sorrells*, 5 N.C. App. 212, 167 S.E.2d 800 (1969).

Applicability of Subsection (b) of This Section. — Where, at the time they were struck, defendants had fully complied with § 20-158(a), subsection (b) of this section was then applicable. *Todd v. Shipman*, 12 N.C. App. 650, 184 S.E.2d 403 (1971).

Applied in *Mims v. Dixon*, 272 N.C. 256, 158 S.E.2d 91 (1967); *White v. Hester*, 1 N.C. App. 410, 161 S.E.2d 611 (1968); *Douglas v. Booth*, 6 N.C. App. 156, 169 S.E.2d 492 (1969).

Quoted in *Hathcock v. Lowder*, 16 N.C. App. 255, 192 S.E.2d 124 (1972).

Stated in *Hall v. Kimber*, 6 N.C. App. 669, 171 S.E.2d 99 (1969).

Cited in *Farrow v. Baugham*, 266 N.C. 739, 147 S.E.2d 167 (1966); *Anderson v. Carter*, 272 N.C. 426, 158 S.E.2d 607 (1968).

§ 20-156. Exceptions to the right-of-way rule.

(b) The driver of a vehicle upon a highway shall yield the right-of-way to police and fire department vehicles and public and private ambulances and rescue squad emergency service vehicles when the latter are operated upon official business and the drivers thereof giving warning signal by appropriate light and by bell, siren or exhaust whistle audible under normal conditions from a distance not less than one thousand feet. This provision shall not operate to relieve the driver of a police or fire department vehicle or public or private ambulance or rescue squad emergency service vehicle from the duty to drive with due regard for the safety of all persons using the highway, nor shall it protect the driver of any such vehicle from the consequence of any arbitrary exercise of such right-of-way. (1937, c. 407, s. 118; 1971, cc. 78, 106.)

Editor's Note.—

The first 1971 amendment, in subsection (b), inserted "and rescue squad emergency service vehicles" in the first sentence, substituted "giving warning signal by appropriate light and by exhaust whistle audible under normal conditions from a distance not less than one thousand feet" for "sound audible signal by bell, siren or ex-

haust whistle" in that sentence, and inserted "or rescue squad emergency service vehicle" in the second sentence.

The second 1971 amendment inserted "bell, siren or" in the first sentence of subsection (b).

As subsection (a) was not affected by the amendments, it is not set out.

Duty of Driver Entering Highway, etc.—

In accord with 2nd paragraph in original. See *Davis v. Imes*, 13 N.C. App. 521, 186 S.E.2d 641 (1972).

Stopping Before Emerging from Private Driveway Does Not Relieve Driver from Further Responsibility.—The fact that the driver of a plaintiff's automobile emerging from a private driveway stops before entering the highway, does not relieve her from further responsibility with respect to the exercise of due care. *Blackwell v. Butts*, 10 N.C. App. 347, 178 S.E.2d 644 (1971).

And Right-of-Way Is Not Obtained Merely by Getting into Highway Lane.—The mere fact that a driver gets into a lane from a private drive a split second or two before being struck by a vehicle in that lane does not give her the right-of-way. *Blackwell v. Butts*, 10 N.C. App. 347, 178 S.E.2d 644 (1971).

Motorist Facing Stop Sign Must Yield.

—Stop signs erected by the State Highway Commission and local authorities on an intersecting highway or street pursuant to subsection (a) of this section are a method of giving the public notice that traffic on one is favored over the other, and a motorist facing a stop sign must yield. *Kelly v. Ashburn*, 256 N.C. 338, 123 S.E.2d 775

(1962); *Galloway v. Hartman*, 271 N.C. 372, 156 S.E.2d 727 (1967).

Failure of a motorist to yield the right-of-way to traffic on a public highway does not compel a finding of contributory negligence as a matter of law when there is evidence that traffic on the highway was faced with a red traffic light and there is no evidence of anything to give notice that a motorist on the highway would not obey the traffic control signal. *Galloway v. Hartman*, 271 N.C. 372, 156 S.E.2d 727 (1967).

Subsection (a) Applies to Person Riding Animal.—The requirement that a person entering a public highway from a private road or drive must yield the right-of-way to vehicles on the public highway applies to a person riding an animal as well as to a person driving a motor vehicle. *Watson v. Stallings*, 270 N.C. 187, 154 S.E.2d 308 (1967).

Applied in *O'Berry v. Perry*, 266 N.C. 77, 145 S.E.2d 321 (1965).

Quoted in *Payne v. Lowe*, 2 N.C. App. 369, 163 S.E.2d 74 (1968).

Cited in *Campbell v. O'Sullivan*, 4 N.C. App. 581, 167 S.E.2d 450 (1969); *White v. Reilly*, 15 N.C. App. 331, 190 S.E.2d 303 (1972); *Hathcock v. Lowder*, 16 N.C. App. 255, 192 S.E.2d 124 (1972).

§ 20-157. Approach of police, fire department or rescue squad vehicles or ambulances; driving over fire hose or blocking fire-fighting equipment; parking, etc., near police, fire department, or rescue squad vehicle or ambulance.—(a) Upon the approach of any police or fire department vehicle or public or private ambulance or rescue squad emergency service vehicle giving warning signal by appropriate light and by audible bell, siren or exhaust whistle, audible under normal conditions from a distance not less than 1000 feet, the driver of every other vehicle shall immediately drive the same to a position as near as possible and parallel to the right-hand edge or curb, clear of any intersection of streets or highways, and shall stop and remain in such position unless otherwise directed by a police or traffic officer until police or fire department vehicle or public or private ambulance or rescue squad emergency service vehicle shall have passed. Provided however, this subsection shall not apply to vehicles traveling in the opposite direction of the vehicles herein enumerated when traveling on a four-lane limited access highway with a median divider dividing the highway for vehicles traveling in opposite directions, and provided further that the violation of this subsection shall not be negligence per se.

(b) It shall be unlawful for the driver of any vehicle other than one on official business to follow any fire apparatus traveling in response to a fire alarm closer than one block or to drive into or park such vehicle within one block where fire apparatus has stopped in answer to a fire alarm.

(c) Outside of the corporate limits of any city or town it shall be unlawful for the driver of any vehicle other than one on official business to follow any fire apparatus traveling in response to a fire alarm closer than 400 feet or to drive into or park such vehicle within a space of 400 feet from where fire apparatus has stopped in answer to a fire alarm.

(d) It shall be unlawful to drive a motor vehicle over a fire hose or any other equipment that is being used at a fire at any time, or to block a fire-fighting ap-

paratus or any other equipment from its source of supply regardless of its distance from the fire.

(e) It shall be unlawful for the driver of a vehicle, other than one on official business, to park and leave standing such vehicle within 100 feet of police or fire department vehicles, public or private ambulances, or rescue squad emergency vehicles which are engaged in the investigation of an accident or engaged in rendering assistance to victims of such accident. (1937, c. 407, s. 119; 1955, cc. 173, 744; 1971, c. 366, ss. 1, 2.)

Editor's Note.—The 1971 amendment inserted "or public or private ambulance or rescue squad emergency service vehicle" near the beginning and again near the end of the first sentence of subsection (a) and substituted "warning signal by appropriate light and by audible bell, siren or exhaust whistle, audible under normal conditions

from a distance not less than 1000 feet" for "audible signal by bell, siren or exhaust whistle" in that sentence, added the second sentence of subsection (a) and added subsection (e).

Applied in *State v. Moses*, 272 N.C. 509, 158 S.E.2d 617 (1968).

§ 20-158. Vehicles must stop and yield right-of-way at certain through highways.—(a) The Board of Transportation, with reference to State highways, and local authorities, with reference to highways under their jurisdiction, are hereby authorized to designate main traveled or through highways by erecting at the entrance thereto from intersecting highways signs notifying drivers of vehicles to come to full stop before entering or crossing such designated highway, and whenever any such signs have been so erected it shall be unlawful for the driver of any vehicle to fail to stop in obedience thereto and yield the right-of-way to vehicles operating on the designated main traveled or through highway and approaching said intersection. No failure so to stop, however, shall be considered contributory negligence per se in any action at law for injury to person or property; but the facts relating to such failure to stop may be considered with the other facts in the case in determining whether the plaintiff in such action was guilty of contributory negligence.

Editor's Note.—

The 1973 amendment, effective July 1, 1973, substituted "Board of Transportation" for "State Highway Commission" near the beginning of subsection (a).

As the rest of the section was not changed by the amendment, only subsection (a) is set out.

This section applies to a "T" intersection. *Dawson v. Jennette*, 278 N.C. 438, 180 S.E.2d 121 (1971).

With reference to the right-of-way as between two vehicles approaching and entering an intersection, the law of this State makes no distinction between a "T" intersection and one at which the two highways cross each other completely. *Dawson v. Jennette*, 278 N.C. 438, 180 S.E.2d 121 (1971).

The erection of stop signs, etc.—

In accord with original. See *Payne v. Lowe*, 2 N.C. App. 369, 163 S.E.2d 74 (1968).

Where Stop Sign Has Been Removed, etc.

Where the driver of the vehicle on the highway, which a stop sign had designated as the dominant highway, knew that the stop sign had been so erected but did not know of its disappearance or removal, and

the driver of the vehicle on the other highway, which the stop sign had designated as the servient highway, did not know there had ever been such a stop sign erected at the intersection, and he approached the intersection from the right of the other driver, the removal of the stop sign would not take away the right of the driver of the vehicle on the highway, designated by the sign as the dominant highway, to treat it as such and to proceed into the intersection on the assumption that the other vehicle approaching from the right would yield the right-of-way to him. The responsibility of the driver of the vehicle on the highway, designated by the sign as the servient highway, but who did not know it had ever been so designated, must be judged in the light of conditions confronting him, namely, an unmarked intersection at which the other vehicle was approaching from his left. *Dawson v. Jennette*, 278 N.C. 438, 180 S.E.2d 121 (1971).

Failure to Stop at Intersection Not, etc.—

A violation of this section is not negligence per se. *State v. Williams*, 3 N.C. App. 463, 165 S.E.2d 52 (1969).

Duty of Motorist before Starting, etc.—

This section requires the driver to re-

main in a private road until he ascertains, by proper lookout, that he can enter the main highway in safety to himself and to others on the highway. *Warren v. Lewis*, 273 N.C. 457, 160 S.E.2d 305 (1968).

The driver along the servient highway is not required to anticipate that a driver on the dominant highway will travel at excessive speed or fail to observe the rules of the road applicable to him. *Farmer v. Reynolds*, 4 N.C. App. 554, 167 S.E.2d 480 (1969).

This section not only requires the driver on a servient highway to stop, but such driver is further required to exercise due care to see that he may enter or cross the dominant highway or street in safety before entering thereon. This interpretation incorporates the requirements obtained in § 20-154, that the motorist must see that such movement can be made in safety. *Kanoy v. Hinshaw*, 273 N.C. 418, 160 S.E.2d 296 (1968).

A driver along a servient street is required, in compliance with this section, to bring his vehicle to a stop in obedience to a stop sign lawfully erected, and not to proceed into an intersection with the dominant highway until, in the exercise of due care, he can determine that he can do so with reasonable assurance of safety. *Todd v. Shipman*, 12 N.C. App. 650, 184 S.E.2d 403 (1971).

Right-of-Way.—

Where the driver on the servient street is already in the intersection before the vehicle approaching on the dominant street is near enough to the intersection to constitute an immediate hazard, the driver on the servient street has the right-of-way. *Farmer v. Reynolds*, 4 N.C. App. 554, 167 S.E.2d 480 (1969); *Todd v. Shipman*, 12 N.C. App. 650, 184 S.E.2d 403 (1971).

The fact a motorist on a servient road reaches the intersection a hairsbreadth ahead of one on the dominant highway does not give him the right to proceed. It is his duty to stop and yield the right-of-way unless the motorist on the dominant highway is a sufficient distance from the intersection to warrant the assumption that he can cross in safety before the other vehicle, operated at a reasonable speed, reaches the crossing. *Farmer v. Reynolds*, 4 N.C. App. 554, 167 S.E.2d 480 (1969).

The right of one starting from, etc.—

In accord with original. See *Raper v. Byrum*, 265 N.C. 269, 144 S.E.2d 38 (1965).

Duty of Driver, etc.—

In accord with 1st paragraph in original. See *Raper v. Byrum*, 265 N.C. 269, 144 S.E.2d 38 (1965); *Murrell v. Jennings*, 15 N.C. App. 658, 190 S.E.2d 686 (1972).

Even though a driver has the right-of-way at an intersection, it is incumbent upon him, in approaching and traversing the intersection, to drive at a speed no greater than is reasonable under the conditions then existing, to keep his vehicle under control, to keep a reasonably careful lookout and to take such action as a reasonably prudent person would take to avoid collision when the danger of one is discovered or should have been discovered. *Dawson v. Jennette*, 278 N.C. 438, 180 S.E.2d 121 (1971).

Proximate Cause, etc.—

It is not enough for the plaintiff to show that defendant was negligent in driving at an excessive speed, in failing to reduce his speed as he approached and entered the intersection, or in failing to maintain a reasonable and proper lookout. The burden is also upon the plaintiff to prove that such negligence by the defendant was one of the proximate causes of the collision and of his intestate's death. *Raper v. Byrum*, 265 N.C. 269, 144 S.E.2d 38 (1965).

Right to Assume That Automobile, etc.—

In accord with 1st paragraph in original. See *Raper v. Byrum*, 265 N.C. 269, 144 S.E.2d 38 (1965); *Moore v. Hales*, 266 N.C. 482, 146 S.E.2d 385 (1966).

It is reasonable for the operator of an automobile, traveling upon a designated main traveled or through highway and approaching an intersecting highway, to assume until the last moment that a motorist on the servient highway who has actually stopped in obedience to the stop sign will yield the right-of-way to him and will not enter the intersection until he has passed through it. *Raper v. Byrum*, 265 N.C. 269, 144 S.E.2d 38 (1965).

Nothing else appearing, the driver of a vehicle having the right-of-way at an intersection is entitled to assume and to act, until the last moment, on the assumption that the driver of another vehicle, approaching the intersection, will recognize his right-of-way and will stop or reduce his speed sufficiently to permit him to pass through the intersection in safety. *Dawson v. Jennette*, 278 N.C. 438, 180 S.E.2d 121 (1971).

Ordinary Care Required of Motorists at Intersections.—The duties of motorists, both those on dominant and those on servient highways, when approaching, entering or traversing intersections require that each driver exercise ordinary care under the particular circumstances in which he finds himself and that the failure to do so can constitute actionable negli-

gence where injury results. *Murrell v. Jennings*, 15 N.C. App. 658, 190 S.E.2d 686 (1972).

Evidence of Negligence and Proximate Cause.—Where plaintiff's intestate brought his automobile to a stop at a point where he had an unobstructed view of the defendants' automobile approaching on the dominant highway, and he resumed his progress into the intersection at a very slow rate of speed when the defendants' automobile was so near to the intersection and moving at such a speed that in the exercise of reasonable prudence he should have seen that he could not cross in safety, his entry into the intersection in this manner and under these conditions was negligence

and was one of the proximate causes of the collision and of his death, if not the sole proximate cause thereof. *Raper v. Byrum*, 265 N.C. 269, 144 S.E.2d 38 (1965).

Section 20-155 Applicable Where There Is Compliance with Subsection (a) of This Section.—Where at the time they were struck, defendants had fully complied with subsection (a) of this section, § 20-155(b) was then applicable. *Todd v. Shipman*, 12 N.C. App. 650, 184 S.E.2d 403 (1971).

Applied in *Douglas v. Booth*, 6 N.C. App. 156, 169 S.E.2d 492 (1969); *Gregor v. Willis*, 8 N.C. App. 538, 174 S.E.2d 702 (1970).

§ 20-158.1. Erection of "yield right-of-way" signs.—The Board of Transportation, with reference to State highways, and cities and towns with reference to highways and streets under their jurisdiction, are authorized to designate main traveled or through highways and streets by erecting at the entrance thereto from intersecting highways or streets, signs notifying drivers of vehicles to yield the right-of-way to drivers of vehicles approaching the intersection on the main traveled or through highway. Notwithstanding any other provisions of this Chapter, except G.S. 20-156, whenever any such yield right-of-way signs have been so erected, it shall be unlawful for the driver of any vehicle to enter or cross such main traveled or through highway or street unless he shall first slow down and yield the right-of-way to any vehicle in movement on the main traveled or through highway or street which is approaching so as to arrive at the intersection at approximately the same time as the vehicle entering the main traveled or through highway or street. No failure to so yield the right-of-way shall be considered negligence or contributory negligence per se in any action at law for injury to person or property, but the facts relating to such failure to yield the right-of-way may be considered with the other facts in the case in determining whether either party in such action was guilty of negligence or contributory negligence. Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not more than ten dollars (\$10.00) or imprisoned for not more than 10 days. (1955, c. 295; 1957, c. 65, s. 11; 1973, c. 507, s. 5.)

Editor's Note.—The 1973 amendment, effective July 1, 1973, substituted "Board of Transportation" for "State Highway Commission" in the first sentence.

Duty of Driver along Servient Highway.—The driver along the servient highway is not required to anticipate that a driver on the dominant highway will travel at excessive speed or fail to observe the rules of the road applicable to him. *Farmer v. Reynolds*, 4 N.C. App. 554, 167 S.E.2d 480 (1969).

The fact a motorist on a servient road reaches the intersection a hairsbreadth ahead of one on the dominant highway does not give him the right to proceed. It is his duty to stop and yield the right-of-

way unless the motorist on the dominant highway is a sufficient distance from the intersection to warrant the assumption that he can cross in safety before the other vehicle, operated at a reasonable speed, reaches the crossing. *Farmer v. Reynolds*, 4 N.C. App. 554, 167 S.E.2d 480 (1969).

Where the driver on the servient street is already in the intersection before the vehicle approaching on the dominant street is near enough the intersection to constitute an immediate hazard, the driver on the servient street has the right-of-way. *Farmer v. Reynolds*, 4 N.C. App. 554, 167 S.E.2d 480 (1969).

Cited in *Hathcock v. Lowder*, 16 N.C. App. 255, 192 S.E.2d 124 (1972).

§ 20-161. Stopping on highway prohibited; warning signals; removal of vehicles from public highway.—(a) No person shall park or leave

standing any vehicle, whether attended or unattended, upon the paved or main traveled portion of any highway or highway bridge unless the vehicle is disabled to such an extent that it is impossible to avoid stopping and temporarily leaving the vehicle upon the paved or main traveled portion of the highway or highway bridge.

(b) No person shall park or leave standing any vehicle upon the shoulder of a public highway unless the vehicle can be clearly seen by approaching drivers from a distance of 200 feet in both directions and does not obstruct the normal movement of traffic.

(c) The operator of any truck, trailer or semitrailer which is disabled upon any portion of the highway shall display warning signals not less than 200 feet in the front and rear of the vehicle. During daylight hours, such warning signals shall consist of red flags. During hours of darkness, such warning signals shall consist of red flares or reflectors of a type approved by the Commissioner of Motor Vehicles. Such warning signals shall be displayed as long as the vehicle is disabled.

(d) The owner of any vehicle parked or left standing wholly or partially upon the paved or main traveled portion of a public highway or highway bridge shall be deemed to have appointed any investigating law-enforcement officer his agent for the purpose of removing the vehicle to the shoulder of the highway when the removal is, in the judgment of the officer, practicable and consistent with subsection (b) above.

(e) When any vehicle is parked or left standing upon the right-of-way of a public highway for a period of 48 hours or more, the owner shall be deemed to have appointed any investigating law-enforcement officer his agent for the purpose of arranging for the transportation and safe storage of such vehicle and such investigating law-enforcement officer shall be deemed a legal possessor of the motor vehicle within the meaning of that term as it appears in G.S. 44A-2(d). (1937, c. 407, s. 123; 1951, c. 1165, s. 1; 1971, c. 294, s. 1.)

Editor's Note.—The 1971 amendment rewrote this section.

This section has no reference, etc.—

A mere temporary or momentary stoppage on the highway when there is no intent to break the continuity of the travel is not "parking" or "leave standing" as used in this section. *Wilson v. Lee*, 1 N.C. App. 119, 160 S.E.2d 107 (1968).

This section does not apply to the driver of a disabled passenger vehicle. *Exum v. Boyles*, 272 N.C. 567, 158 S.E.2d 845 (1968).

This section is inapplicable to a motor vehicle, etc.—

In accord with original. See *Pardon v. Williams*, 265 N.C. 539, 144 S.E.2d 607 (1965).

Exemption for Police Vehicles.—Erection of some type of roadblock, whether stationary or running, may be the only practical method of stopping a determined and reckless lawbreaker. Under such circumstances exemption for police vehicles from this section (in case of a stationary roadblock) or from § 20-151 (in case of a running roadblock), may be reasonably implied. *Collins v. Christenberry*, 6 N.C. App. 504, 170 S.E.2d 515 (1969).

The word "park," etc.—

"Park" and "leave standing," as used in

subsection (a), are synonymous, and neither term includes a mere temporary or momentary stoppage on the highway for a necessary purpose when there is no intent to break the continuity of the travel. *Faison v. T & S Trucking Co.*, 266 N.C. 383, 146 S.E.2d 450 (1966).

This section requires that no part of a parked vehicle be left protruding into the traveled portion of the highway when there is ample room and it is practicable to park the entire vehicle off the traveled portion of the highway. *Sharpe v. Hanline*, 265 N.C. 502, 144 S.E.2d 574 (1965).

One stopping an automobile on the highway should use ordinary care to prevent a collision with other vehicles operating thereon. *Saunders v. Warren*, 267 N.C. 735, 149 S.E.2d 19 (1966).

The operator of a standing or parked vehicle which constitutes a source of danger to other users of the highway is generally bound to exercise ordinary or reasonable care to give adequate warning or notice to approaching traffic of the presence of the standing vehicle, and such duty exists irrespective of the reason for stopping the vehicle on the highway. So the driver of the stopped vehicle must take such precautions as would reasonably be

calculated to prevent injury, whether by the use of lights, flags, guards, or other practical means, and failing to give such warning may constitute negligence. *Saunders v. Warren*, 267 N.C. 735, 149 S.E.2d 19 (1966).

A motorist stopping on a pronounced curve should anticipate that a following motorist will have an obstructed view of the highway ahead. *Saunders v. Warren*, 267 N.C. 735, 149 S.E.2d 19 (1966).

But Obligation to Light Vehicle, etc.—

Whether defendants violated this section has no bearing upon their obligations in respect of lighting equipment and lights imposed by §§ 20-129 and 20-134. *Faison v. T & S Trucking Co.*, 266 N.C. 383, 146 S.E.2d 450 (1966).

The parking of a car on the hard surface, etc.—

In accord with original. See *Sharpe v. Hanline*, 265 N.C. 502, 144 S.E.2d 574 (1965).

Stopping to Receive or Discharge Passenger Does Not Necessarily Constitute Negligence.—The mere fact that a driver stops his vehicle on the traveled portion of a highway for the purpose of receiving or discharging a passenger, nothing else appearing, does not constitute negligence.

§ 20-161.1. Regulation of night parking on highways.

Hazard against Which Section Directed.

—This section is directed against the hazard of bright lights on standing vehicles facing oncoming traffic at night. *Lienthall v. Glass*, 2 N.C. App. 65, 162 S.E.2d 596 (1968).

§ 20-162.2. Removal of unauthorized vehicles from private lots.—

(a) It shall be unlawful for any person other than the owner or lessee of a privately owned or leased parking space to park a motor or other vehicle in such private parking space without the express permission of the owner or lessee of such space; provided, that such private parking lot be clearly designated as such by a sign no smaller than 24 inches by 24 inches prominently displayed at the entrance thereto and the parking spaces within the lot be clearly marked by signs setting forth the name of each individual lessee or owner; a vehicle parked in a privately owned parking space in violation of this section may be removed from such space upon the written request of the parking space owner or lessee to a place of storage and the registered owner of such motor vehicle shall become liable for removal and storage charges. No person shall be held to answer in any civil or criminal action to any owner, lienholder or other person legally entitled to the possession of any motor vehicle removed from such lot pursuant to this section except where such motor vehicle is willfully, maliciously or negligently damaged in the removal from aforesaid space to place of storage.

(b) Any person violating any of the provisions of this section shall be guilty of a misdemeanor and upon conviction shall be fined not more than ten dollars (\$10.00) in the discretion of the court.

(c) This section shall apply only to the Counties of Craven, Gaston, Guilford,

Strickland v. Powell, 10 N.C. App. 225, 178 S.E.2d 136 (1970).

Evidence Making Out Prima Facie Case of Actionable Negligence.—Evidence that defendants left a wrecker standing on the highway in such manner that the wrecker, and the cable attached, blocked the entire highway, that the existing circumstances affected visibility of the cable, that no meaningful warning was given that the highway was completely obstructed, and that traffic, to avoid collision, would have to come to a complete stop, makes out a prima facie case of actionable negligence on the part of defendants. *Montford v. Gilbhaar*, 265 N.C. 389, 144 S.E.2d 31 (1965).

Applied in *Coleman v. Burris*, 265 N.C. 404, 144 S.E.2d 241 (1965); *Williams v. Hall*, 1 N.C. App. 508, 162 S.E.2d 84 (1968); *Staples v. Carter*, 5 N.C. App. 264, 168 S.E.2d 240 (1969); *Grimes v. Gibert*, 6 N.C. App. 304, 170 S.E.2d 65 (1969).

Quoted in *Lienthall v. Glass*, 2 N.C. App. 65, 162 S.E.2d 596 (1968).

Stated in *Puryear v. Cooper*, 2 N.C. App. 517, 163 S.E.2d 299 (1968).

Cited in *Choate Motor Co. v. Gray*, 5 N.C. App. 643, 169 S.E.2d 77 (1969); *Atkins v. Moye*, 277 N.C. 179, 176 S.E.2d 789 (1970).

Applied in *Staples v. Carter*, 5 N.C. App. 264, 168 S.E.2d 240 (1969); *Tharpe v. Brewer*, 7 N.C. App. 432, 172 S.E.2d 919 (1970).

New Hanover, Orange, Robeson, Wake, Wilson. (1969, cc. 173, 288; 1971, c. 986; 1973, c. 183.)

Editor's Note.—Session Laws 1969, c. 288, added Wilson to the list of counties in subsection (c).
The 1971 amendment added "Guilford" to the list of counties in subsection (c).
The 1973 amendment added Gaston to the list of counties in subsection (c).

§ 20-162.3. Removal of unauthorized vehicles from gasoline service station premises.—(a) No motor vehicle shall be left for more than 48 hours upon the premises of any gasoline service station without the consent of the owner or operator of the service station.

(b) The registered owner of any motor vehicle left unattended upon the premises of a service station in violation of subsection (a) shall be given notice by the owner or operator of said station of said violation. The notice given shall be by certified mail return receipt requested addressed to the registered owner of the motor vehicle.

(c) Upon the expiration of 10 days from the return of the receipt showing that the notice was received by the addressee, such vehicle left on the premises of a service station in violation of this section may be removed from the station premises to a place of storage and the registered owner of such vehicle shall become liable for the reasonable removal and storage charges and the vehicle subject to the storage lien created by G.S. 44A-1 et seq. No person shall be held to answer in any civil or criminal action to any owner, lienholder or other person legally entitled to the possession of any vehicle removed from such station premises pursuant to this section except where such vehicle is willfully or maliciously damaged in the removal from such station premises to place of storage.

(d) In the alternative, the station owner or operator may charge for storage, assert a lien, and dispose of the vehicle under the terms of G.S. 44A-4(b) through (g). The proceeds from the sale of the vehicle shall be disbursed as provided in G.S. 44A-5. (1971, c. 1220.)

§ 20-163. Motor vehicle left unattended; brakes to be set and engine stopped.

Violation of this section, etc.—the statute expressly provides otherwise.
The violation of this section and other safety statutes is negligence per se, unless *McCall v. Dixie Cartage & Warehousing, Inc.*, 272 N.C. 190, 158 S.E.2d 72 (1967).

§ 20-165.1. One-way traffic. — In all cases where the Board of Transportation has heretofore, or may hereafter lawfully designate any highway or other separate roadway, under its jurisdiction for one-way traffic and shall erect appropriate signs giving notice thereof, it shall be unlawful for any person to willfully drive or operate any vehicle on said highway or roadway except in the direction so indicated by said signs. Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction shall be fined not more than fifty dollars (\$50.00) or imprisoned for not more than 30 days. (1957, c. 1177; 1973, c. 507, s. 5.)

Editor's Note.—for "State Highway Commission" in the first sentence.
The 1973 amendment, effective July 1, 1973, substituted "Board of Transportation"

§ 20-166. Duty to stop in event of accident or collision; furnishing information or assistance to injured person, etc.; persons assisting exempt from civil liability.

(b) The driver of any vehicle involved in an accident or collision resulting in damage to property and in which there is not involved injury or death of any person shall immediately stop his vehicle at the scene of the accident or collision and shall give his name, address, operator's or chauffeur's license number and the registration number of his vehicle to the driver or occupants of any other vehicle involved in the accident or collision or to any person whose property is damaged

in the accident or collision; provided that if the damaged property is a parked and unattended vehicle and the name and location of the owner is not known to or readily ascertainable by the driver of the responsible vehicle, the said driver shall furnish the information required by this subsection to the nearest available peace officer, or, in the alternative, and provided he thereafter within 48 hours fully complies with G.S. 20-166.1(c), shall immediately place a paper-writing containing said information in a conspicuous place upon or in the damaged vehicle and, provided that if the damaged property is a guard rail, utility pole, or other fixed object owned by the Board of Transportation, a public utility, or other public service corporation to which report cannot readily be made at the scene, it shall be sufficient if the responsible driver shall furnish the information required to the nearest peace officer or make written report thereof containing said information by U.S. certified mail, return receipt requested, to the N.C. Department of Motor Vehicles within five days following said collision. Any person violating the provisions of this subsection shall be guilty of a misdemeanor and fined or imprisoned for a period of not more than two years, or both, in the discretion of the court.

(1967, c. 445; 1971, c. 958, s. 1; 1973, c. 507, s. 5.)

Editor's Note.—

The 1967 amendment inserted "for a period of not more than two years" in the last sentence of subsection (b).

The 1971 amendment, effective July 1, 1971, rewrote the proviso in the first sentence of subsection (b).

The 1973 amendment, effective July 1, 1973, substituted "Board of Transportation" for "State Highway Commission" in the first sentence of subsection (b).

As the rest of the section was not changed by the amendments, only subsection (b) is set out.

For note on North Carolina's "Good Samaritan" statute, see 44 N.C.L. Rev. 508 (1966).

For note on duty of tort-feasor and of innocent participant to render aid to accident victim, see 6 Wake Forest Intra. L. Rev. 537 (1970).

The misdemeanor described in subsection (b) is not a lesser included offense of the crime described in subsection (c) of this section; therefore, in a prosecution for a violation of subsection (c), a trial court does not err in failing to instruct the jury on the offense defined in subsection (b). *State v. Chavis*, 9 N.C. App. 430, 176 S.E.2d 388 (1970).

Driver Must Stop at Scene, etc.—

This section requires the driver of a vehicle, involved in an accident or collision resulting in injury or death to any person, to stop, render reasonable assistance and give certain specified information to the occupant or driver of the vehicle collided with. *Branch v. Dempsey*, 265 N.C. 733, 145 S.E.2d 395 (1965).

Failure of Warrant to Set Out Description or Name of Owner of Property Damaged.—In a prosecution under this section,

charging defendant with failing to stop his automobile after an accident resulting in property damage, the fact that the warrant failed to set out any description of the property damaged other than the word "automobile" and failed to state the name of the owner is not fatal. *State v. Crutchfield*, 5 N.C. App. 586, 169 S.E.2d 43 (1969).

What State Must Prove, etc.

The burden is on the State to satisfy beyond a reasonable doubt that a defendant violated every element of a crime charged under subsection (c) of this section. *State v. Chavis*, 9 N.C. App. 430, 176 S.E.2d 388 (1970).

Knowledge of Accident, etc.—

Knowledge by a motorist that he had struck a pedestrian is an essential element of the offense of failing to stop and give such pedestrian aid. *State v. Glover*, 270 N.C. 319, 154 S.E.2d 305 (1967).

Personal injury or death is a necessary element of the offense envisioned by this section. *State v. Crutchfield*, 5 N.C. App. 586, 169 S.E.2d 43 (1969).

Whether Injury Sustained Is Matter for Jury.—Whether a person received personal injuries in an accident within the meaning of this section is a matter for determination by the jury. *State v. Chavis*, 9 N.C. App. 430, 176 S.E.2d 388 (1970).

Section does not require statement by driver as to how he was driving or what caused the collision. *Branch v. Dempsey*, 265 N.C. 733, 145 S.E.2d 395 (1965).

Evidence held sufficient to support charge of failing to stop an automobile after an accident resulting in death of a person. *State v. Massey*, 271 N.C. 555, 157 S.E.2d 150 (1967).

Applied in *State v. Harrelson*, 265 N.C. 589, 144 S.E.2d 650 (1965); *State v. Mohr-*

mann, 265 N.C. 594, 144 S.E.2d 645 (1965); 391, 168 S.E.2d 49 (1969); State v. Alston, State v. Moses, 272 N.C. 509, 158 S.E.2d 6 N.C. App. 200, 169 S.E.2d 520 (1969). 617 (1968); State v. Markham, 5 N.C. App.

§ 20-166.1. Reports and investigations required in event of collision.—(a) The driver of a vehicle involved in a collision resulting in injury to or death of any person or total property damage to an apparent extent of two hundred dollars (\$200.00) or more shall immediately, by the quickest means of communication, give notice of the collision to the local police department if the collision occurs within a municipality, or to the office of the sheriff or other qualified rural police of the county wherein the collision occurred.

(b) The driver of any vehicle involved in a collision resulting in injury to or death of any person or total property damage to an apparent extent of two hundred dollars (\$200.00) or more, shall, within five days after the collision, forward a written report of the collision to the Department.

(c) Notwithstanding any other provisions of this section, the driver of any motor vehicle which collides with another motor vehicle left parked or unattended on any street or highway of this State shall within 48 hours report the collision to the owner of such parked or unattended motor vehicle. Such report shall include the time, date and place of the collision, the driver's name, address, operator's or chauffeur's license number and the registration number of the vehicle being operated by the driver at the time of the collision, and such report may be oral or in writing. Such written report must be transmitted to the current address of the owner of the parked or unattended vehicle by United States certified mail, return receipt requested and a copy of such report shall be transmitted to the North Carolina Department of Motor Vehicles.

No report, oral or written, made pursuant to this Article shall be competent in any civil action except to establish identity of the person operating the moving vehicle at the time of the collision referred to therein.

Any person who violates this subsection is guilty of a misdemeanor and shall be punishable by fine or imprisonment, or both, in the discretion of the court.

(1971, c. 55; c. 763, s. 1; c. 958, ss. 2, 3.)

Editor's Note.—

The first 1971 amendment, effective July 1, 1971, substituted "five days" for "twenty-four hours" in subsection (b).

The second 1971 amendment, effective July 1, 1971, substituted "two hundred dollars (\$200.00)" for "one hundred dollars (\$100.00)" in subsections (a) and (b) and deleted, following "within a municipality," in subsection (a), "or if the collision occurs outside of the municipality to the nearest station of the State Highway Patrol."

The third 1971 amendment, effective July 1, 1971, in subsection (c), substituted "within 48 hours" for "immediately" in the first sentence of the first paragraph, added the last sentence of that paragraph, and rewrote the second paragraph.

As the rest of the section was not changed by the amendments, only subsections (a), (b) and (c) are set out.

Section Imposes Duties on Driver, Not Owner.—The duties imposed by this section are duties which the law imposes up-

on the driver, not upon the owner. Branch v. Dempsey, 265 N.C. 733, 145 S.E.2d 395 (1965).

Requirements of Section.—This section requires the driver of any vehicle involved in a collision, resulting in injury or death of any person, to give notice of the collision to police officers and within twenty-four hours to make a written report to the Department of Motor Vehicles upon a form supplied by it. Branch v. Dempsey, 265 N.C. 733, 145 S.E.2d 395 (1965).

No Statement Required.—This section contains no provision requiring a driver involved in a collision which must be reported to make any statement to the officer. Branch v. Dempsey, 265 N.C. 733, 145 S.E.2d 395 (1965).

Duty Imposed by Subsection (e).—Subsection (e) of this section makes it the duty of the State Highway Patrol to investigate all collisions required to be reported to it by this section, and requires the investigating officer to make his report in writing to the Motor Vehicle Depart-

ment, which report is open to inspection by the public. *Branch v. Dempsey*, 265 N.C. 733, 145 S.E.2d 395 (1965).

Applied in *Marks v. Thompson*, 282 N.C. 174, 192 S.E.2d 311 (1972).

Stated in *Forrester v. Garrett*, 280 N.C. 117, 184 S.E.2d 858 (1971).

§ 20-169. Powers of local authorities. — Local authorities, except as expressly authorized by G.S. 20-141 and G.S. 20-158, shall have no power or authority to alter any speed limitations declared in this Article or to enact or enforce any rules or regulations contrary to the provisions of this Article, except that local authorities shall have power to provide by ordinances for the regulation of traffic by means of traffic or semaphores or other signaling devices on any portion of the highway where traffic is heavy or continuous and may prohibit other than one-way traffic upon certain highways, and may regulate the use of the highways by processions or assemblages and except that local authorities shall have the power to regulate the speed of vehicles on highways in public parks, but signs shall be erected giving notices of such special limits and regulations. Signaling devices of a stop light nature erected pursuant to this section and which emit alternate red and green lights shall be so arranged and placed that the red light shall appear at the top and the green light shall appear at the bottom of the signaling unit. Provided, that all traffic signs, signals, markings, islands, and all other traffic control devices installed or erected on streets or highways on the State highway system within the corporate limits of a municipality shall be subject to the approval of the Board of Transportation and be installed or erected in substantial conformance with the specifications set forth in the Manual on Uniform Traffic Control Devices for Streets and Highways, or any subsequent revisions of the same, published by the United States Department of Commerce, Bureau of Public Roads and dated June, 1961. Provided further that the Board of Transportation is authorized and directed to assume the cost of installing and erecting such traffic control devices provided the same are installed and erected with the approval of the Board of Transportation and in conformity with this section, and the Board of Transportation is authorized and directed to assume the costs of altering existing traffic control devices on the State highway system to conform to the said specifications set out above. (1937, c. 407, s. 131; 1949, c. 947, s. 2; 1955, c. 384, s. 2; 1963, c. 559; 1973, c. 507, s. 5.)

Editor's Note.—

The 1973 amendment, effective July 1, 1973, substituted "Board of Transportation" for "State Highway Commission" in four places.

Cited in *Rogers v. Rogers*, 2 N.C. App. 668, 163 S.E.2d 645 (1968).

§ 20-171. Traffic laws apply to persons riding animals or driving animal-drawn vehicles.

The requirement that a person entering a public highway from a private road or drive must yield the right-of-way to vehicles on the public highway applies to a

person riding an animal as well as to a person driving a motor vehicle. *Watson v. Stallings*, 270 N.C. 187, 154 S.E.2d 308 (1967).

Part 11. Pedestrians' Rights and Duties.

§ 20-172. Pedestrians subject to traffic control signals.

A pedestrian at a crosswalk acquires no additional rights against a red traffic light. *Wagoner v. Butcher*, 6 N.C. App. 221, 170 S.E.2d 151 (1969).

Rights of Pedestrians Proceeding in Accord with Lights Not Impaired.—The legislature did not intend that the provisions subjecting pedestrians to traffic lights

would impair their rights as pedestrians proceeding in accord with such lights. *Wagoner v. Butcher*, 6 N.C. App. 221, 170 S.E.2d 151 (1969).

Party Having Green Light Has Superior Right. — Although one party may be a motorist and the other a pedestrian who ever has the green light has the superior

right to traverse the intersection and to assume that the other will recognize it and conduct himself accordingly. *Wagoner v.*

Butcher, 6 N.C. App. 221, 170 S.E.2d 151 (1969).

§ 20-173. Pedestrians' right-of-way at crosswalks.

The term "unmarked crosswalk at an intersection," as used in subsection (a) of this section and § 20-174 (a) means that area within an intersection which also lies within the lateral boundaries of a sidewalk projected across the intersection. *Anderson v. Carter*, 272 N.C. 426, 158 S.E.2d 607 (1968); *Bowen v. Gardner*, 3 N.C. App. 529, 165 S.E.2d 545 (1969); *Wagoner v. Butcher*, 6 N.C. App. 221, 170 S.E.2d 151 (1969); *Downs v. Watson*, 8 N.C. App. 13, 173 S.E.2d 556 (1970).

This section extends right-of-way to a pedestrian within "an unmarked crosswalk at an intersection." The focus is not on the lines but on the proximity to an intersection which is a place a motorist should expect pedestrians will have to cross and should yield to them. *Wagoner v. Butcher*, 6 N.C. App. 221, 170 S.E.2d 151 (1969).

A right-of-way is not absolute and even a pedestrian with the right-of-way must exercise ordinary care for her own safety. *Wagoner v. Butcher*, 6 N.C. App. 221, 170 S.E.2d 151 (1969).

But where the pedestrian has the right-of-way, he is not required to anticipate negligence on the part of others. *Wagoner v. Butcher*, 6 N.C. App. 221, 170 S.E.2d 151 (1969).

To a pedestrian the right-of-way means that he has the right to continue in his direction of travel without anticipating negligence on the part of motorists. Unless the circumstances are sufficient to give him notice to the contrary, he may act upon the assumption, even to the last moment, that motorists will recognize such a preferential right. *Wagoner v. Butcher*, 6 N.C. App. 221, 170 S.E.2d 151 (1969).

A pedestrian who has the right-of-way at a crosswalk may not be held to be contributorily negligent as a matter of law for failure to see an approaching vehicle or for failure to use ordinary care for his or her own safety. The pedestrian is not required to anticipate negligence on the part of others. *McCoy v. Dowdy*, 16 N.C. App. 242, 192 S.E.2d 81 (1972).

And May Assume That Motorist Will Yield Right-of-Way.—A pedestrian is entitled to assume and to act upon the assumption, even to the last moment, that an approaching motorist would yield the right-of-way in the absence of anything which gives or should have given notice to the contrary. *Wagoner v. Butcher*, 6 N.C. App. 221, 170 S.E.2d 151 (1969).

If a person is crossing in an unmarked crosswalk at an intersection, he is not required to anticipate negligence on the part of others. In the absence of anything which gave or should have given notice to the contrary, he is entitled to assume and to act upon the assumption, even to the last moment, that others will observe and obey the statute which required them to yield the right-of-way. *Bowen v. Gardner*, 275 N.C. 363, 168 S.E.2d 47 (1969).

Effect of Traffic-Control Signal.—Subsection (a) of this section does not indicate a legislative intent to establish two mutually exclusive sets of rules to be applied according to the mere presence or absence of a traffic light. *Wagoner v. Butcher*, 6 N.C. App. 221, 170 S.E.2d 151 (1969).

The right-of-way given a pedestrian by § 20-155(c) at an intersection where there is no traffic-control signal is limited at an intersection where there is a traffic-control signal by subsection (a) of this section to the pedestrian having the right-of-way only when he is moving with the green light. *Wagoner v. Butcher*, 6 N.C. App. 221, 170 S.E.2d 151 (1969).

The injustice of holding that the legislature intended in all events to impair the pedestrian's right-of-way where the intersection may be in some ways a controlled one is clear. If he had no right-of-way, the pedestrian faced with heavy turning traffic would not even be able to cross the street even though he had the green light. He would be "invited into a place of danger" every time he obeyed the green light only to find himself dodging or being hit by turning traffic. *Wagoner v. Butcher*, 6 N.C. App. 221, 170 S.E.2d 151 (1969).

Duty of Motorist to Yield Right-of-Way.—It is the duty of a motorist to yield the right-of-way to a pedestrian in an unmarked crosswalk at an intersection. *Bowen v. Gardner*, 3 N.C. App. 529, 165 S.E.2d 545 (1969).

Duty of Pedestrian to Yield Right-of-Way.—If the pedestrian elects to cross a street or a highway at a place which is not a marked crosswalk and not an unmarked crosswalk at an intersection, subsection (a) of this section and § 20-174 (a) require that he yield the right-of-way to vehicles. *Anderson v. Carter*, 272 N.C. 426, 158 S.E.2d 607 (1968).

Failure of Pedestrian to See Approaching Motorist.—Where the pedestrian had

the right-of-way afforded her by an intersection crosswalk it was erroneous to find contributory negligence as a matter of law simply because she failed to see the defendant motorist approaching the intersection. *Wagoner v. Butcher*, 6 N.C. App. 221, 170 S.E.2d 151 (1969).

Whether a pedestrian simply by failing to see the vehicle, failed to exercise due care is a jury question. The jury must determine whether the vehicle's speed, proximity, or manner of operation would have put the pedestrian, had she seen it, on notice that the motorist did not intend to yield the right-of-way. *Wagoner v. Butcher*, 6 N.C. App. 221, 170 S.E.2d 151 (1969).

§ 20-174. Crossing at other than crosswalks.

Editor's Note.—For article on proof of negligence in North Carolina, see 48 N.C.L. Rev. 731 (1970).

The pedestrian's right-of-way is limited by this section. *Wagoner v. Butcher*, 6 N.C. App. 221, 170 S.E.2d 151 (1969).

The term "unmarked crosswalk at an intersection," as used in § 20-173 (a) and subsection (a) of this section means that area within an intersection which also lies within the lateral boundaries of a sidewalk projected across the intersection. *Anderson v. Carter*, 272 N.C. 426, 158 S.E.2d 607 (1968); *Bowen v. Gardner*, 3 N.C. App. 529, 165 S.E.2d 545 (1969); *Wagoner v. Butcher*, 6 N.C. App. 221, 170 S.E.2d 151 (1969); *Downs v. Watson*, 8 N.C. App. 13, 173 S.E.2d 556 (1970).

Subsection (a) and § 20-173 (a) do not prohibit pedestrians from crossing streets or highways at places other than marked crosswalks or unmarked crosswalks at intersections. *Anderson v. Carter*, 272 N.C. 426, 158 S.E.2d 607 (1968).

Duty of Motorist.—A motorist must operate his vehicle at a reasonable rate of speed, keep a lookout for persons on or near the highway, decrease his speed when any special hazard exists with respect to pedestrians, and, if circumstances warrant, he must give warning of his approach by sounding his horn. *Morris v. Minix*, 4 N.C. App. 634, 167 S.E.2d 494 (1969).

A driver must make certain that pedestrians in front of him are aware of his approach. *Wanner v. Alsup*, 265 N.C. 308, 144 S.E.2d 18 (1965).

Duty of Pedestrian, etc.—

In accord with 1st paragraph in original. See *Grisanti v. United States*, 284 F. Supp. 308 (E.D.N.C. 1968).

Where intestate was crossing the street diagonally within the block, at a point which was neither at an intersection nor

Subsection (a) and § 20-174 (a) do not prohibit pedestrians from crossing streets or highways at places other than marked crosswalks or unmarked crosswalks at intersections. *Anderson v. Carter*, 272 N.C. 426, 158 S.E.2d 607 (1968).

Where gutter repair work and barricades prevented exit from the street within the crosswalk lines, it would be unreasonable and unjust for the Court of Appeals to say plaintiff forfeited her intersection crossing right-of-way by stepping a few feet outside the painted lines to skirt a barricade. *Wagoner v. Butcher*, 6 N.C. App. 221, 170 S.E.2d 151 (1969).

Applied in *Carter v. Murray*, 7 N.C. App. 171, 171 S.E.2d 810 (1970).

within a marked crosswalk, and the evidence disclosed no traffic control signals at the adjacent intersections, under the provisions of subsection (a) it was intestate's duty to "yield the right-of-way to all vehicles upon the roadway." *Wanner v. Alsup*, 265 N.C. 308, 144 S.E.2d 18 (1965).

If the pedestrian elects to cross a street or a highway at a place which is not a marked crosswalk and not an unmarked crosswalk at an intersection, § 20-173 (a) and subsection (a) of this section require that he yield the right-of-way to vehicles. *Anderson v. Carter*, 272 N.C. 426, 158 S.E.2d 607 (1968).

Crossing a street without a right-of-way is not negligence per se. *Wagoner v. Butcher*, 6 N.C. App. 221, 170 S.E.2d 151 (1969).

The failure of a pedestrian, etc.—

In accord with 3rd paragraph in original. See *Price v. Miller*, 271 N.C. 690, 157 S.E.2d 347 (1967).

In accord with 4th paragraph in original. See *Price v. Miller*, 271 N.C. 690, 157 S.E.2d 347 (1967).

The mere fact that a pedestrian attempts to cross a street at a point other than a crosswalk is not sufficient, standing alone, to support a finding of contributory negligence as a matter of law. *Wanner v. Alsup*, 265 N.C. 308, 144 S.E.2d 18 (1965).

Evidence tending to show that intestate failed to yield the right-of-way as required by subsection (a) may not be treated as amounting to contributory negligence as a matter of law, particularly so in view of testimony to the effect that intestate at the time he was struck had reached a point about ten feet from the west curb of the street. Failure so to yield the right-of-way is not contributory negligence per se, but rather it is evidence of negligence to be

considered with other evidence in the case in determining whether the actor is chargeable with negligence which proximately caused or contributed to his injury. *Wanner v. Alsop*, 265 N.C. 308, 144 S.E.2d 18 (1965).

A failure to yield the right-of-way required under this section is not contributory negligence per se, but rather it is evidence of negligence to be considered with other evidence in the case in determining whether the actor is chargeable with negligence which proximately caused or contributed to his injury. *Wagoner v. Butcher*, 6 N.C. App. 221, 170 S.E.2d 151 (1969).

The evidence tending to show that intestate failed to yield the right-of-way as required by subsection (a) of this section may not be treated as amounting to contributory negligence as a matter of law. *Wagoner v. Butcher*, 6 N.C. App. 221, 170 S.E.2d 151 (1969).

A pedestrian's failure to yield the right-of-way is not contributory negligence per se, but rather it is evidence of negligence to be considered with other evidence in the case in determining whether the pedestrian is chargeable with negligence which proximately caused, or contributed to, his injury. *Pompey v. Hyder*, 9 N.C. App. 30, 175 S.E.2d 319 (1970).

Duty to Avoid Striking Pedestrian, etc.—

In accord with 2nd paragraph in original. See *Wanner v. Alsop*, 265 N.C. 308, 144 S.E.2d 18 (1965).

Warning Should Be Given Pedestrians.—

While a driver of a motor vehicle is not required to anticipate that a pedestrian seen in a place of safety will leave it and get in the danger zone until some demonstration or movement on his part reasonably indicates that fact, he must give warning to one on the highway or in close proximity to it, and not on a sidewalk, who is apparently oblivious of the approach of the car or one whom the driver in the exercise of ordinary care may reasonably anticipate will come into his way. *Wanner v. Alsop*, 265 N.C. 308, 144 S.E.2d 18 (1965).

It is a driver's duty to sound his horn in order that a pedestrian unaware of his

approach may have timely warning. *Wanner v. Alsop*, 265 N.C. 308, 144 S.E.2d 18 (1965).

If it appears that the pedestrian is oblivious for the moment of the nearness of the car and of the speed at which it is approaching, ordinary care requires the driver to blow his horn, slow down, and, if necessary, stop to avoid inflicting injury. *Wanner v. Alsop*, 265 N.C. 308, 144 S.E.2d 18 (1965).

The doctrine of last clear chance is the humane rule of law that imposes upon a person the duty to exercise ordinary or due care to avoid injury to another who has negligently placed himself in a situation of danger, and who he can reasonably apprehend is unconscious thereof or is unable to avoid the danger. *Wanner v. Alsop*, 265 N.C. 308, 144 S.E.2d 18 (1965).

If liability is to be imposed, the defendant must have the last clear chance to avoid the injury. Without the showing of an opportunity, the doctrine of last clear chance cannot be invoked in North Carolina; the doctrine cannot be applied if the contributory negligence of the plaintiff continued up to the moment of the accident which caused the injury. *Grisanti v. United States*, 284 F. Supp. 308 (E.D.N.C. 1968).

Contributory negligence of plaintiff does not preclude recovery where it is made to appear that the defendant, by exercising reasonable care and prudence, might have avoided the injurious consequences to the plaintiff, notwithstanding plaintiff's negligence. *Wanner v. Alsop*, 265 N.C. 308, 144 S.E.2d 18 (1965).

Examples of Negligence of Pedestrians.—See *Wagoner v. Butcher*, 6 N.C. App. 221, 170 S.E.2d 151 (1969).

Applied in *Jones v. Smith*, 3 N.C. App. 396, 165 S.E.2d 56 (1969); *Swain v. Williamson*, 4 N.C. App. 622, 167 S.E.2d 491 (1969); *Anderson v. Mann*, 9 N.C. App. 397, 176 S.E.2d 365 (1970).

Cited in *Webb v. Felton*, 266 N.C. 707, 147 S.E.2d 219 (1966); *Bowen v. Gardner*, 275 N.C. 363, 168 S.E.2d 47 (1969); *Duke v. Meisky*, 12 N.C. App. 329, 183 S.E.2d 292 (1971).

§ 20-174.1. Sitting or lying upon highways or streets prohibited.

(b) Any person convicted of violating this section shall be punished by a fine not exceeding five hundred dollars (\$500.00) or by imprisonment not exceeding six months, or both, in the discretion of the court. (1965, c. 137; 1969, c. 1012.)

Editor's Note.—The 1969 amendment rewrote subsection (b).

As subsection (a) was not changed by the amendment, it is not set out.

For article dealing with the legal problems in southern desegregation, see 43 N.C.L. Rev. 689 (1965).

The legislative intent is to prohibit and punish those who willfully place themselves upon the streets and highways of the State in such manner as to impede the regular flow of traffic. *State v. Spencer*, 276 N.C. 535, 173 S.E.2d 765 (1970).

The legislature intended to make it unlawful for any person to impede the regular flow of traffic upon the streets and highways of the State by willfully placing his body thereon in either a standing, lying or sitting position. *State v. Spencer*, 276 N.C. 535, 173 S.E.2d 765 (1970).

Conduct Constituting Violation of Section. — A person may stand and walk, stand and strut, stand and run, or stand still. All these acts are condemned by this section when done willfully in such manner as to impede the regular flow of traffic upon a public street or highway. *State v. Spencer*, 276 N.C. 535, 173 S.E.2d 765 (1970).

Conduct of the defendants in walking slowly back and forth across a public highway in such a manner as to cause traffic to be blocked in both directions is

within the purview of this section, making it unlawful for any person to willfully stand upon a highway and impede the regular flow of traffic; and the trial court correctly charged that "if the defendants were on the highway and standing, whether they were standing still or walking is of no consequence," since standing is an integral and necessary part of the act of walking. *State v. Spencer*, 7 N.C. App. 282, 172 S.E.2d 280, aff'd, 276 N.C. 535, 173 S.E.2d 765 (1970).

The punishment ceiling imposed by § 20-176(b) does not apply to this section. *State v. Spencer*, 276 N.C. 535, 173 S.E.2d 765 (1970).

Applied in *In re Burrus*, 4 N.C. App. 523, 167 S.E.2d 454 (1969); *In re Burrus*, 275 N.C. 517, 169 S.E.2d 879 (1969); *In re Shelton*, 5 N.C. App. 487, 168 S.E.2d 695 (1969).

Cited in *State v. Gibbs*, 8 N.C. App. 339, 174 S.E.2d 119 (1970); *State v. Evans*, 8 N.C. App. 469, 174 S.E.2d 680 (1970); *McKeiver v. Pennsylvania*, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971); *State v. Godwin*, 13 N.C. App. 700, 187 S.E.2d 400 (1972); *State v. Murrell*, 18 N.C. App. 327, 196 S.E.2d 606 (1973).

§ 20-175. Pedestrians soliciting rides, employment, business or funds upon highways or streets.

(b) No person shall stand or loiter in the main traveled portion, including the shoulders and median, of any State highway or street, excluding sidewalks, or stop any motor vehicle for the purpose of soliciting employment, business or contributions from the driver or occupant of any motor vehicle that impedes the normal movement of traffic on the public highways or streets: Provided that the provisions of this subsection shall not apply to licensees, employees or contractors of the Board of Transportation or of any municipality engaged in construction or maintenance or in making traffic or engineering surveys.

(1973, c. 507, s. 5.)

Editor's Note.—

The 1973 amendment, effective July 1, 1973, substituted "Board of Transportation" for "State Highway Commission" in subsection (b).

As subsections (a) and (c) were not changed by the amendment, they are not set out.

Acts Not Constituting Violation of Sec-

tion. — Standing or loitering on the main traveled portion of the highway, soliciting employment, business or contributions from driver or occupant of motor vehicle does not constitute a violation of this section if the acts do not result in impeding the normal movement of traffic. Opinion of Attorney General to Mr. Carl V. Venters, 41 N.C.A.G. 528 (1971).

Part 12. Sentencing; Penalties.

§ 20-176. Penalty for misdemeanor.

(b) Unless another penalty is in this article or by the laws of this State provided, every person convicted of a misdemeanor for the violation of any provision of this article shall be punished by a fine of not more than one hundred dollars (\$100.00) or by imprisonment in the county or municipal jail for not more than sixty days, or by both such fine and imprisonment: Provided, that upon conviction for the following offenses—operating motor vehicles without

displaying registration number plates issued therefor; permitting or making any unlawful use of registration number plates, or permitting the use of registration by a person not entitled thereto, and violation of §§ 20-116, 20-117, 20-122, 20-122.1, 20-123, 20-124, 20-125, 20-126, 20-127, 20-128, 20-129, 20-130, 20-131, 20-132, 20-133, 20-134, 20-140.2, 20-142, 20-143, 20-144, 20-146, 20-147, 20-148, 20-150, 20-151, 20-152, 20-153, 20-154, 20-155, 20-156, 20-157, 20-159, 20-160, 20-161, 20-162, 20-163, 20-165—the punishment therefor shall be a fine not to exceed fifty dollars (\$50.00), or imprisonment not to exceed thirty days for each offense. (1937, c. 407, s. 137; 1951, c. 1013, s. 7; 1957, c. 1255; 1967, c. 674, s. 3; 1969, c. 378, s. 3.)

Editor's Note.—

The 1967 amendment, effective, Jan. 1, 1968, inserted the reference to § 20-140.2 in the proviso to subsection (b).

The 1969 amendment inserted the reference to § 20-122.1 in subsection (b).

As subsection (a) was not changed by the amendments, it is not set out.

This section does not apply to the various sections where punishment is specified as fine or imprisonment or both in the discretion of the court with no maximum limitation being specified. *State v. Spencer*, 7 N.C. App. 282, 172 S.E.2d 280, aff'd, 276 N.C. 535, 173 S.E.2d 765 (1970).

The maximum punishment for a violation of § 20-63 or 20-111 would be that prescribed by subsection (b) of this section, namely, a fine of not more than one hundred dollars or imprisonment in the county or municipal jail for not more than sixty days, or both such fine and imprisonment.

State v. Tolley, 271 N.C. 459, 156 S.E.2d 858 (1967).

Every person convicted of speeding in violation of § 20-141, where the speed is not in excess of eighty miles per hour, shall be punished by a fine of not more than one hundred dollars (\$100.00) or by imprisonment in the county or municipal jail for not more than sixty days, or by both such fine and imprisonment. *State v. Tolley*, 271 N.C. 459, 156 S.E.2d 858 (1967).

The punishment ceiling imposed by subsection (b) does not apply to § 20-174.1. *State v. Spencer*, 276 N.C. 535, 173 S.E.2d 765 (1970).

Applied in *State v. Massey*, 265 N.C. 579, 144 S.E.2d 649 (1965).

Quoted in *State v. Zimmerman*, 7 N.C. App. 522, 173 S.E.2d 35 (1970).

Cited in *State v. Speights*, 280 N.C. 137, 185 S.E.2d 152 (1971); *State v. Murrell*, 18 N.C. App. 327, 196 S.E.2d 606 (1973).

§ 20-179. Penalty for driving or operating vehicle while under the influence of intoxicating liquor, narcotic drugs, or other impairing drugs; limited driving permits for first offenders.—(a) Every person who is convicted of violating G.S. 20-138, G.S. 20-139(a), or G.S. 20-139(b) shall be punished as follows:

- (1) For the first offense, a fine of not less than one hundred dollars (\$100.00) nor more than five hundred dollars (\$500.00), by imprisonment for not less than 30 days nor more than six months, or by both such fine and imprisonment, in the discretion of the court.
 - (2) For a second conviction of any offense under G.S. 20-138, G.S. 20-139(a), or G.S. 20-139(b), by a fine of not less than two hundred dollars (\$200.00) nor more than five hundred dollars (\$500.00), by imprisonment for not less than two months nor more than six months, or by both such fine and imprisonment, in the discretion of the court.
 - (3) For a third or subsequent conviction of any offense under G.S. 20-138, G.S. 20-139(a), or G.S. 20-139(b), by a fine of not less than five hundred dollars (\$500.00), by imprisonment for not more than two years, or by both such fine and imprisonment, in the discretion of the court.
- (b) (1) Upon a first conviction only, the trial judge may when feasible allow a limited driving privilege or license to the person convicted for proper purposes reasonably connected with the health, education and welfare of the person convicted and his family. For purposes of determining whether conviction is a first conviction, no prior offense occurring more than 10 years before the date of the current offense shall be

considered. The judge may impose upon such limited driving privilege any restrictions as in his discretion are deemed advisable including, but not limited to, conditions of days, hours, types of vehicles, routes, geographical boundaries and specific purposes for which limited driving privilege is allowed. Any such limited driving privilege allowed and restrictions imposed thereon shall be specifically recorded in a written judgment which shall be as near as practical to that hereinafter set forth and shall be signed by the trial judge and shall be affixed with the seal of the court and shall be made a part of the records of the said court. A copy of said judgment shall be transmitted to the Department of Motor Vehicles along with any operator's or chauffeur's license in the possession of the person convicted and a notice of the conviction. Such permit issued hereunder shall be valid for such length of time as shall be set forth in the judgment of the trial judge. Such permit shall constitute a valid license to operate motor vehicles upon the streets and highways of this or any other state in accordance with the restrictions noted thereon and shall be subject to all provisions of law relating to operator's or chauffeur's license, not by their nature, rendered inapplicable.

(2) The judgment issued by the trial judge as herein permitted shall as near as practical be in form and contents as follows:

STATE OF NORTH CAROLINA
COUNTY OF

}

IN THE GENERAL COURT
OF JUSTICE
RESTRICTED DRIVING
PRIVILEGES

This cause coming on to be heard and being heard before the Honorable, Judge presiding, and it appearing to the Court that the defendant,, has been convicted of the offense of (describe offense under G.S. 20-138, G.S. 20-139(a) or G.S. 20-139(b) or as appropriate), and it further appearing to the court that the defendant should be issued a restrictive driving license and is entitled to the issuance of a restrictive driving privilege under and by the authority of G.S. 20-179(b) ;

Now, therefore, it is ordered, adjudged and decreed that the defendant be allowed to operate a motor vehicle under the following conditions and under no other circumstances.

Name:
Race: Sex:
Height: Weight:
Color of Hair: Color of Eyes:
Birth Date:
Driver's License Number:
Signature of Licensee:
Conditions of Restriction:
Type of Vehicle:
Geographic Restrictions:
Hours of Restriction:
Other Restrictions:

This limited license shall be effective from to subject to further orders as the court in its discretion may deem necessary and proper.

This the day of, 19.....
.....
(Judge Presiding)

- (3) Upon conviction of such offense outside the jurisdiction of this State the person so convicted may apply to the resident judge of the superior court of the district in which he resides for limited driving privileges hereinbefore defined. Upon such application the judge shall have the authority to issue such limited driving privileges in the same manner as if he were the trial judge.
- (4) Any violation of the restrictive driving privileges as set forth in the judgment of the trial judge allowing such privileges shall constitute the offense of driving while license has been revoked as set forth in G.S. 20-28. Whenever a person is charged with operating a motor vehicle in violation of the restrictions, the limited driving privilege shall be suspended pending the final disposition of the charge.
- (5) This section is supplemental and in addition to existing law and shall not be construed so as to repeal any existing provision contained in the General Statutes of North Carolina. (1937, c. 407, s. 140; 1947, c. 1067, s. 18; 1967, c. 510; 1969, c. 50; c. 1283, ss. 1-5; 1971, c. 619, s. 16; c. 1133, s. 1.)

Editor's Note.—The 1967 amendment provided a maximum imprisonment for a third or subsequent offense of "not to exceed two years" at the end of subsection (a).

The first 1969 amendment added "nor more than five hundred dollars (\$500.00)" and "nor more than six months" in the first sentence, added "nor more than five hundred dollars (\$500.00)" in the second sentence, substituted "two" for "six" preceding "months" in that sentence and added therein "nor more than six months."

The second 1969 amendment designated the former provisions of this section as subsection (a) and added subsection (b).

The first 1971 amendment, effective Oct. 1, 1971, rewrote subsection (a) and substituted "(describe offense under G.S. 20-138, G.S. 20-139(a), or G.S. 20-139(b) or as appropriate)" for "operating a motor vehicle while under the influence of intoxicating beverages" in the first paragraph of the text of the judgment set out in subdivision (2) of subsection (b).

The second 1971 amendment, in subsection (b)(1), deleted "as a condition of a suspended sentence" following "feasible" in the first sentence, added the second sentence, substituted "to" for "as" in the fourth sentence, and inserted "not" in the seventh sentence. In the judgment form, the amendment deleted "(Indicate if none)" following "Conditions of Restriction," and substituted "19.." for "1969" near the end of the form. In subsection (b)(4), the amendment also substituted "has been revoked" for "have been suspended and revoked" in the first sentence.

Session Laws 1971, c. 1133, s. 2, provides: "This act shall be given retroactive effect and shall be considered to have become effective upon February 19, 1971. Any

judge of the district or superior court is hereby authorized and empowered to modify to grant limited driving privileges any judgment issued between February 19, 1971 and the date of ratification of this act [July 21, 1971] in any criminal action for driving while under the influence of intoxicating liquor wherein the defendant was prohibited solely by reason of having a prior conviction more than 10 years from the date of his conviction."

Opinions of Attorney General.—Representative G. Hunter Warlick, Hickory, 40 N.C.A.G. 412 (1969); Commissioner Joe W. Garrett, Department of Motor Vehicles, 40 N.C.A.G. 415 (1969); Mr. John B. Whitley, District Prosecutor, Twenty-sixth Judicial District, 40 N.C.A.G. 409 (1969); Mr. Robert C. Powell, Attorney at Law, 40 N.C.A.G. 401 (1969); Honorable Walter W. Cohoon, Resident Judge, First Judicial District, 40 N.C.A.G. 410 (1969); Mr. W. E. Crosswhite, Solicitor, Statesville Recorder's Court, 40 N.C.A.G. 422 (1969); Honorable John S. Gardner, District Court Judge, Sixteenth Judicial District, 40 N.C.A.G. 420 (1969).

Subsection (b)(4) speaks of "any violation," not just knowing or wilful violations of the conditions of a restrictive driving privilege; therefore, if a defendant was not "at work" when he drove the automobile on May 15, 1971, while his restrictive driving privilege was effective, then he is guilty of violation of § 20-28 regardless of his intent, or whether he thought he was "at work." *State v. Hurley*, 18 N.C. App. 285, 196 S.E.2d 542 (1973).

First Offender Not Entitled to Appointment of Counsel.—A defendant charged with his first offense of drunken driving is not entitled to the appointment of counsel; therefore, the trial court is not required to

go into the question of defendant's indigency. *State v. Hickman*, 9 N.C. App. 592, 176 S.E.2d 910 (1970).

Amendment of Warrant. — The trial court has discretionary power to permit the amendment of a warrant charging defendant with operating a motor vehicle upon a public highway while under the influence of intoxicating liquor, so as to charge that the offense was a third offense, since the amendment does not change the nature of the offense but relates solely to punishment. *State v. Broome*, 269 N.C. 661, 153 S.E.2d 384 (1967).

Allegation of Prior Conviction.—

For a defendant to be subjected under this section to the infliction of the heavier punishment for a second offense of driving while under the influence of intoxicating liquor, it is necessary that a prior conviction, and the time and place thereof, be alleged in the warrant and proved by the State. *State v. Owenby*, 10 N.C. App. 170, 177 S.E.2d 749 (1970).

Question of Former Conviction, etc. —

Whether there was in fact a prior conviction under this section is a question for the jury and not the court. *State v. Owenby*, 10 N.C. App. 170, 177 S.E.2d 749 (1970).

Admissibility of Evidence of Prior Conviction. — Evidence that a defendant has been previously convicted of drunken driving is admissible in a prosecution charging defendant with a second offense of drunken driving, even though the defendant neither testified as a witness nor offered evidence of good character. *State v. Owenby*, 10 N.C. App. 170, 177 S.E.2d 749 (1970).

A plea of nolo contendere, etc.—

In accord with 1st paragraph in original. See *State v. Michaels*, 11 N.C. App. 110, 180 S.E.2d 442 (1971).

Verdict Insufficient to Support Judgment.

—The jury's verdict of "guilty of driving automobile under the influence" was insufficient to support the judgment against defendant in a prosecution for driving under the influence of intoxicating liquor, second offense, because the verdict neither alluded to the warrant nor used language to show a conviction of the offense charged therein. *State v. Medlin*, 15 N.C. App. 434, 190 S.E.2d 425 (1972).

Two Years' Imprisonment, etc.—

In accord with original. See *State v. Morris*, 275 N.C. 50, 165 S.E.2d 245 (1969).

The offense condemned by § 20-138 is a general misdemeanor for which an offender, for the first offense, may be imprisoned for two years in the discretion of the court. *State v. Morris*, 275 N.C. 50, 165 S.E.2d 245 (1969).

Sentence Not Excessive.—

Under this section a maximum sentence of two years may be imposed, and therefore a sentence of six months in prison is not excessive. *State v. Grant*, 3 N.C. App. 586, 165 S.E.2d 505 (1969).

License Suspensions Held Separate and Distinct Revocations.—The suspension of a license for refusal to submit to a chemical test at the time of an arrest for drunken driving and a suspension which results from a plea of guilty or a conviction of that charge are separate and distinct revocations. *Vuncannon v. Garrett*, 17 N.C. App. 440, 194 S.E.2d 364 (1973).

District Court Judge May Now Grant Limited Driving Privilege without Suspended Sentence.—See opinion of Attorney General to Mr. J.E. Holshouser, Sr., 41 N.C.A.G. 659 (1971).

Authority to Modify Limited Driving Privileges Judgment.—See opinion of Attorney General to Honorable Charles M. Johnson, Clerk of Superior Court, Montgomery County, 40 N.C.A.G. 418 (1970).

Except for Period from February 19, 1971, to July 21, 1971, Trial Judge Has No Authority to Modify Judgment to Allow Limited Driving Privileges When Such Judgment Was Entered at Past Session of District Court.—See opinion of Attorney General to Honorable J. Ray Braswell, 41 N.C.A.G. 706 (1971).

Department of Motor Vehicles May Revoke Limited Driving Privilege Granted by a Court.—See opinion of Attorney General to Mr. Joe W. Garrett, Commissioner, N.C. Department of Motor Vehicles, 40 N.C.A.G. 414 (1970).

Limited Driving Privilege; Status of Defendant Violates Provisions; Judgment of As Driver's License.—See opinion of Attorney General to Honorable Wm. Pope Barfield, Magistrate, Harnett County, 40 N.C.A.G. 407 (1970).

Ten-Year Limitation in § 20-36 Applicable to Department of Motor Vehicle Action Only. — See opinion of Attorney General to Honorable Robert A. Collier, Jr., 41 N.C.A.G. 322 (1971).

Ten-Year Limitation Enacted by the 1971 General Assembly Applies Only to Consideration by Trial Judge of the Feasibility of Allowing a Limited Driving Privilege.—See opinion of Attorney General to Solicitor F. Ogden Parker, 41 N.C.A.G. 535 (1971).

Driver Accompanying Operator Holding Learning Permit May Hold Restricted Driving Permit if Holder Is within Restrictions Noted and if Person with Learner's Permit Is Member of His

Family.—See opinion of Attorney General to Lt. O.H. Page, 41 N.C.A.G. 596 (1971).

Applied in State v. Gallamore, 6 N.C. App. 608, 170 S.E.2d 573 (1969); State v. Spencer, 276 N.C. 535, 173 S.E.2d 765 (1970); State v. Tuggle, 17 N.C. App. 329, 194 S.E.2d 50 (1973).

Cited in Joyner v. Garrett, 279 N.C. 226, 182 S.E.2d 553 (1971); State v. Brown, 13 N.C. App. 327, 185 S.E.2d 453 (1971); State v. Burris, 17 N.C. App. 710, 195 S.E.2d 345 (1973).

§ 20-179.1. Presentence investigation of persons convicted of driving while under the influence of intoxicating liquor.—(a) In the case of a first or subsequent conviction of driving a motor vehicle upon a highway while under the influence of intoxicating liquor, the trial judge may request a presentence investigation to determine whether a person convicted of such offense would benefit from treatment for persons who are habitual users of alcohol. Provided however, if the person convicted objects, the sentence of the court shall be entered.

(b) In any case, the trial court may order suitable treatment for the person, as a condition for suspension of a sentence, in addition to imposing any penalties required by this Article. (1973, c. 612.)

§ 20-180. Penalty for speeding.

Every person convicted of speeding in violation of § 20-141, where the speed is not in excess of eighty miles per hour, shall be punished by a fine of not more than one hundred dollars (\$100.00) or by imprisonment in the county or municipal jail for not more than sixty days, or by

both such fine and imprisonment. State v. Tolley, 271 N.C. 459, 156 S.E.2d 858 (1967).

Stated in State v. Zimmerman, 7 N.C. App. 522, 173 S.E.2d 35 (1970).

Cited in State v. Teasley, 9 N.C. App. 477, 176 S.E.2d 838 (1970).

§ 20-182. Penalty for failure to stop in event of accident involving injury or death to a person.

Cited in State v. Massey, 271 N.C. 555, 157 S.E.2d 150 (1967); State v. Markham, 5 N.C. App. 391, 168 S.E.2d 449 (1969).

§ 20-183. Duties and powers of law-enforcement officers; warning by local officers before stopping another vehicle on highway; warning tickets.

Constitutionality.—The provisions of subsection (a) of this section, when balanced with the State's obligation to preserve order and enforce safety on its streets and highways, do not constitute such an encroachment on the individual's constitutional rights as to render the statute invalid. State v. Allen, 282 N.C. 503, 194 S.E.2d 9 (1973).

Persons stopped pursuant to this section may not be indiscriminately searched or arrested without probable cause in contravention of recognized constitutional principles. State v. Allen, 282 N.C. 503, 194 S.E.2d 9 (1973).

Authority Granted Law-Enforcement Officers under Section.—This section authorizes State law-enforcement officers to stop any motor vehicle upon the highway of the State for the purpose of determining whether the same is being operated in violation of any of the provisions of the Motor Vehicles Code, including the provisions requiring registration of the vehicle, operation by a properly licensed driver,

etc. United States v. Kelley, 462 F.2d 372 (4th Cir. 1972).

Because of their authority under this section, the police were acting properly when they turned on their siren and light and requested a truck to stop even though they had no probable cause to believe that a crime had been committed. United States v. Kelley, 462 F.2d 372 (4th Cir. 1972).

Seizure of marijuana from defendants' car and their arrest for its possession did not amount to an unconstitutional invasion of defendants' rights where officers discovered the marijuana in plain view after lawfully stopping defendants' vehicle to check driver's license and vehicle registration. State v. Garcia, 16 N.C. App. 344, 192 S.E.2d 2 (1972).

Subdivisions (2) and (4) of § 20-49 are not irreconcilable with this section. State v. Allen, 15 N.C. App. 670, 190 S.E.2d 714 (1972), rev'd on other grounds, 282 N.C. 503, 194 S.E.2d 9 (1973).

Verdict of Not Guilty Not Tantamount to a Finding of No Reasonable Grounds for

Arrest.—Verdict of not guilty of the misdemeanor for which defendant was arrested—drunken driving—was not tantamount to a finding that the arresting officer did not have reasonable grounds to believe that defendant had committed such offense in

his presence and that defendant therefore could lawfully resist the arrest. *State v. Jefferies*, 17 N.C. App. 195, 193 S.E.2d 388 (1972).

Applied in *State v. White*, 18 N.C. App. 31, 195 S.E.2d 576 (1973).

ARTICLE 3A.

Motor Vehicle Law of 1947.

Part 2. Equipment Inspection of Motor Vehicles.

§ 20-183.2. Equipment inspection required; inspection certificate; one-way permit to move vehicle to inspection station.—(a) Every motor vehicle, trailer, semitrailer, and pole trailer not including trailers of a gross weight of less than 4000 pounds and house trailers, registered or required to be registered in North Carolina when operated on the streets and highways of this State must display a current approved inspection certificate at such place on the vehicle as may be designated by the Commissioner, indicating that it has been inspected in accordance with this part. Such motor vehicle shall thereafter be inspected and display a current inspection certificate as is required by subsection (b) hereof.

(b) Every inspection certificate issued under this part shall be valid for not less than 12 months and shall expire at midnight on the last day of the month designated on said inspection certificate. It shall be unlawful to operate any motor vehicle on the highway until there is displayed thereon a current inspection certificate as provided by this part, indicating that the vehicle has been inspected within the previous 12 months and has been found to comply with the standard for safety equipment prescribed by this chapter subject to the following provisions:

- (1) Vehicles of a type required to be inspected under subsection (a), which are owned by a resident of this State, that have been outside of North Carolina continuously for a period of 30 days, or more, immediately preceding the expiration of the then current inspection certificate shall within 10 days of reentry to the State be inspected and have an approved certificate attached thereto if vehicle is to continue operation on the streets and highways.
- (2) Any vehicle owned or possessed by a dealer, manufacturer or transporter within this State and operated over the public streets and highways displaying thereon a dealer demonstration, manufacturer or transporter plate must have affixed to the windshield thereof a valid certificate of inspection and approval, except a dealer, manufacturer or transporter or his agent may operate a motor vehicle displaying dealer demonstration, manufacturer or transporter plates from source of purchase to his place of business or to an inspection station, provided it is within 10 days of purchase, foreclosure or repossession.
- (3) Vehicles acquired by residents of this State from dealers or owners located outside of the State must, upon entry to this State, be inspected and approved, certificate attached, within 10 days after the vehicle becomes subject to registration.
- (4) Vehicles acquired by residents within this State, not displaying current North Carolina inspection certificates, must be inspected and have approved inspection certificate attached within 10 days from date registration plate issued or if registration plate is to be transferred, within 10 days of the date of purchase.
- (5) Owners of motor vehicles moving their residence to North Carolina from other states must within 10 days from the date the vehicles are

subject to registration have same inspected and have an approved certificate attached thereto.

- (6) The Commissioner of Motor Vehicles or his duly authorized agent is empowered to grant special written one-way permits to operate motor vehicles without current inspection certificates solely for the purpose of moving such vehicles to an authorized inspection station to obtain the inspection required under this part.

(c) On and after February 16, 1966 all motor vehicle dealers in North Carolina shall, prior to retail sale of any new or used motor vehicle, have such motor vehicle inspected by an approved inspection station as required by this part. Provided, however, a purchaser of a motor vehicle, who is licensed as a self-inspector, may conduct the required inspection, after entering into a written agreement with the dealer to follow such a procedure. A copy of such dealer-purchaser agreement must be filed with the Department of Motor Vehicles. Provided further, that any new and unregistered vehicle sold to a nonresident (as defined in G.S. 20-6) shall be exempt from the requirements of this section if such vehicle is not required to be registered in this State.

(d) When a motor vehicle required to be inspected under this part shall, upon inspection, fail to meet the safety requirements of this part, the safety equipment inspection station making such inspection, shall issue an authorized receipt for such vehicle indicating that it has been inspected and shall enumerate the defects found. The owner or operator may have such defects corrected at such place as he or she chooses. The vehicle may be reinspected at the safety equipment inspection station, first making the inspection, without additional charge, or the owner or operator may have same inspected at another safety equipment station upon payment of a new inspection fee.

(e) On and after January 1, 1974, each motor vehicle safety inspection certificate shall contain, on the portion readable from the vehicle interior, the following information:

- (1) The date of the current inspection;
- (2) The odometer reading at the time of the current inspection;
- (3) The signature, initials or other identification of the person making the inspection and affixing the certificate to the windshield. (1965, c. 734, s. 1; 1967, c. 692, s. 1; 1969, c. 179, s. 2; cc. 219, 386; 1973, c. 679, s. 2.)

Editor's Note.—

The 1967 amendment rewrote this section.

The first 1969 amendment added subdivision (6) at the end of subsection (b).

The second 1969 amendment added the last three sentences of subsection (c).

The third 1969 amendment, effective July 1, 1969, substituted "less than 4000 pounds" for "2500 pounds or less" near the beginning of subsection (a).

The 1973 amendment, effective Sept. 1, 1973, added subsection (e).

Sale of Uninspected Vehicle by Dealer Is Negligence Per Se.—The retail sale of an automobile by a dealer, without first having the official inspection required by this statute, is negligence per se. This is the general rule as to statutes enacted for the safety and protection of the public. In such cases, the only remaining question is whether such negligence was a proximate cause of the injury for which recovery is sought. *Anderson v. Robinson*, 8 N.C. App. 224, 174 S.E.2d 45 (1970).

Cited in *State v. White*, 3 N.C. App. 31, 164 S.E.2d 36 (1968).

§ 20-183.3. Inspection requirements. — Before an approval certificate may be issued for a motor vehicle, the vehicle must be inspected by a safety equipment inspection station, and if required by Chapter 20 of the General Statutes of North Carolina, must be found to possess in safe operating condition the following articles and equipment:

- (1) Brakes,
- (2) Lights,

- (3) Horn,
- (4) Steering mechanism,
- (5) Windshield wiper,
- (6) Directional signals,
- (7) Tires,
- (8) Rear view mirror or mirrors.

No inspection certificate shall be issued by a safety equipment inspection station for a motor vehicle manufactured after model year 1967 unless the vehicle is equipped with such emission control devices to reduce air pollution as were installed at the time of manufacture which are readily visible, provided the foregoing requirement shall not apply where such devices have been removed for the purpose of converting the motor vehicle to operate on natural or liquified petroleum gas or other modifications have been made in order to reduce air pollution, further provided that such modifications shall have first been approved by the Department of Water and Air Resources.

In addition to the items listed above, safety inspection equipment stations shall inspect the exhaust systems of all vehicles inspected and report the condition of each exhaust system to the owners or to the persons offering the vehicles for inspection.

The inspection requirements herein provided for shall not exceed the standards provided in the current General Statutes for such equipment. (1965, c. 734, s. 1; 1969, c. 378, s. 2; 1971, c. 455, s. 2; c. 478, ss. 1, 2.)

Editor's Note. — The 1969 amendment added "(7) Tires."

The first 1971 amendment, effective Jan. 1, 1972, substituted "safety equipment inspection station" for "safety inspection equipment station" in the first paragraph and added the second from the last paragraph.

The second 1971 amendment, effective

Jan. 1, 1972, added "(8) Rear view mirror or mirrors" and added the next-to-last paragraph of the section.

Neither amendment gave effect to the other, but both have been given effect in the section as set out above.

Stated in *Anderson v. Robinson*, 8 N.C. App. 224, 174 S.E.2d 45 (1970).

§ 20-183.4. Licensing of safety equipment inspection stations. — Every person, firm or agency with employees meeting the following qualifications shall, upon application, be issued a license designating the person, firm or agency as a safety equipment inspection station:

- (1) Be of good character and have a good reputation for honesty.
- (2) Have adequate knowledge of the equipment requirements of the Motor Vehicle Laws of North Carolina.
- (3) Be able to satisfactorily conduct the mechanical inspection required by this part.
- (4) Have adequate facilities as to space and equipment in order to check each of the items of safety equipment listed herein.
- (5) Have a general knowledge of motor vehicles sufficient to recognize a mechanical condition which is not safe.

Any person, firm or agency meeting the above requirements and desiring to be licensed as a motor vehicle inspection station may apply to the Commissioner of Motor Vehicles on forms provided by the Commissioner. The Commissioner shall cause an investigation to be made as to the applicant's qualifications, and if, in the opinion of the Commissioner, the applicant fulfills such qualifications, he shall issue a certificate of appointment to such person, firm or agency as a safety equipment inspection station. Such appointment shall be issued without charge and shall be effective until cancelled by request of licensee or until revoked or suspended by the Commissioner. Any licensee whose license has been revoked or suspended or any applicant whose application has been refused, may, within 10 days from the notice of such revocation, suspension or refusal, request a hearing before the Commissioner and, in such cases, the hearing shall be conducted within 10 days

of receipt of request for such hearing. The Commissioner, following such hearing, may rescind the order of suspension, revocation or the refusal to issue license, or he may affirm the previous order of revocation, suspension or refusal. Any applicant or licensee aggrieved by the decision of the Commissioner may, following such decision, file a petition in the Superior Court of Wake County or in the county wherein applicant or licensee resides. Such petition shall recite the fact that the administrative remedy, as provided above, has been exhausted. Provided, that no restraining order shall issue against the Department of Motor Vehicles under this section until and unless the Department shall have had at least five days' notice of the petitioner's intention to seek such restraining order.

The Commissioner may designate the State or any political subdivision thereof or any person, firm or corporation as self inspectors for the sole purpose of inspecting vehicles owned or operated by such agencies, persons, firms, or corporations so designated. (1965, c. 734, s. 1; 1967, c. 692, s. 2.)

Editor's Note.—The 1967 amendment rewrote the portion of the second paragraph that follows the second sentence.

§ 20-183.7. Fees to be charged by safety equipment inspection station.—Every inspection station, except self inspectors as designated herein, shall charge a fee of two dollars (\$2.00) for inspecting a motor vehicle to determine compliance with this article and shall give the operator a receipt indicating the articles and equipment approved and disapproved; provided, that inspection stations approved by the Commissioner, and operated under rules, regulations and supervision of any governmental agency, when inspecting vehicles required to be inspected by such agencies' rules and regulations and by the provisions of this part, may, upon approval by such inspection station and the payment of a fee of twenty-five cents (25¢), attach to the vehicle inspected a North Carolina inspection certificate as required by this part. When the receipt is presented to the inspection station which issued it, at any time within ninety days, that inspection station shall reinspect the motor vehicle free of additional charge until approved. When said vehicle is approved, and upon payment to the inspection station of the fee, the inspection station shall affix a valid inspection certificate to said motor vehicle, and said inspection station shall maintain a record of the motor vehicles inspected which shall be available for eighteen months. The Department of Motor Vehicles shall receive twenty-five cents (25¢) for each inspection certificate and these proceeds shall be placed in a fund designated the "Motor Vehicle Safety Equipment Inspection Fund," to be used under the direction and supervision of the Director of the Budget for the administration of this article. (1965, c. 734, s. 1; 1969, c. 1242.)

Editor's Note.—The 1969 amendment, effective July 15, 1969, increased the inspection fee in the first sentence from one dollar and fifty cents to two dollars.

§ 20-183.8. Commissioner of Motor Vehicles to issue regulations subject to approval of Governor; penalties for violation; fictitious or unlawful safety inspection certificate; thirty-day grace period for expired inspection certificates.

(b) The Commissioner of Motor Vehicles is authorized to enter into agreements or arrangements with the duly authorized representatives of other jurisdictions whereby the safety equipment inspection required under this article may be waived with respect to vehicles which have undergone substantially similar safety equipment inspections in such other jurisdictions and for which valid inspection certificates have been issued by such other jurisdictions. Such agreements or arrangements shall provide that vehicles inspected in this State and for which valid inspection certificates have been issued shall be accorded a similar privilege when subject to the laws of such other jurisdictions. Each such agreement or arrangement shall, in the judgment of the Commissioner, be in the best interest

of this State and the citizens thereof and shall be fair and equitable to this State and citizens thereof; and all of the same shall be determined upon the basis and recognition of the benefits which accrue to the citizens of this State by reason of the agreement or arrangement.

(c) Violation of any provision of this article shall, upon conviction, be punishable by a fine not to exceed fifty dollars (\$50.00) or imprisonment not to exceed thirty days, except that the unauthorized reproduction of an inspection certificate shall be punishable as a forgery under G.S. 14-119.

(d) No person shall display or cause to be displayed or permit to be displayed upon any motor vehicle any safety inspection certificate, knowing the same to be fictitious or to be issued for another motor vehicle or to be issued without inspection and approval having been made. The Department is hereby authorized to take immediate possession of any safety inspection certificate which is fictitious or which has been otherwise unlawfully or erroneously issued or which has been unlawfully used. Any person violating the provisions of this subsection shall be guilty of a misdemeanor punishable by fine not to exceed fifty dollars (\$50.00) or imprisonment not to exceed 30 days.

(e) No person shall be convicted of failing to display current inspection certificate as provided under this article if he produces in court at the time of his trial a receipt from a licensed motor vehicle inspection station showing that a valid inspection certificate was issued for the vehicle involved within thirty (30) days after expiration of the previous inspection certificate issued for the vehicle. (1965, c. 734, s. 1; 1967, c. 692, s. 3; 1969, c. 179, s. 1; c. 620.)

Editor's Note.—The 1967 amendment added subsection (d).

The first 1969 amendment added subsection (e).

The second 1969 amendment inserted

present subsection (b) and designated former subsections (b) and (c) as (c) and (d).

As subsection (a) was not changed by the amendments, it is not set out.

ARTICLE 3B.

Permanent Weighing Stations and Portable Scales.

§ 20-183.9. Establishment and maintenance of permanent weighing stations.—The Board of Transportation is hereby authorized, empowered and directed to establish during the biennium ending June 30, 1953, not less than six nor more than 12 permanent weighing stations equipped to weigh vehicles using the streets and highways of this State to determine whether such vehicles are being operated in accordance with legislative enactments relating to weights of vehicles and their loads. The permanent weighing stations shall be established at such locations on the streets and highways in this State as will enable them to be used most advantageously in determining the weight of vehicles and their loads. Said permanent weighing stations shall be equipped by the Board of Transportation and shall be maintained by said Board of Transportation.

There is hereby appropriated to the Board of Transportation out of the State Highway and Public Works Fund the sum of three hundred thousand dollars (\$300,000). The funds appropriated by this paragraph shall be used exclusively for the purpose of carrying out the provisions of this section and may be expended at any time during the biennium ending June 30, 1953. (1951, c. 988, s. 1; 1957, c. 65, s. 11; 1973, c. 507, s. 5.)

Editor's Note.—The 1973 amendment, effective July 1, 1973, substituted "Board of Transportation" for "State Highway

Commission" in three places and for "Commission" in one place.

ARTICLE 3C.

*Vehicle Equipment Safety Compact.***§ 20-183.16. Compact Commissioner.**

State Government Reorganization.—The department of Transportation and Highway administration of the Vehicle Equipment Safety by § 143A-108, enacted by Session Safety Compact was transferred to the De- Laws 1971, c. 864.

ARTICLE 4.

*State Highway Patrol.***§ 20-185. Personnel; appointment; salaries.**

(f) The benefits provided for members of the State Highway Patrol under the provisions of subsections (b), (c), (d), and (e) of this section shall be granted to the Director and assistant director of the License and Theft Enforcement Division of the Department and to members of the License and Theft Enforcement Division designated by the Commissioner as "inspectors," in the same manner and under the same circumstances and subject to the same limitations as if the Director and assistant director and the inspectors were members of the State Highway Patrol. The benefits provided for members of the State Highway Patrol under the provisions of subsections (b), (c), (d), and (e) of this section shall be granted to incapacitated driver license examiners, if such total or partial incapacity is the result of an injury by accident arising out of and in the course of giving a road test.

(1973, c. 59.)

Editor's Note. — The 1973 amendment, effective July 1, 1973, added the second sentence of subsection (f).

As the rest of the section was not changed by the amendment, only subsection (f) is set out.

§ 20-187.1. Awards.—(a) The patrol commander shall appoint an awards committee consisting of one troop commander, one troop executive officer, one district sergeant, one corporal, two troopers and one member of patrol headquarters staff. All committee members shall serve for a term of one year. The member from patrol headquarters staff shall serve as secretary to the committee and shall vote only in case of ties. The committee shall meet at such times and places designated by the patrol commander.

(b) The award to be granted under the provisions of this section shall be the North Carolina State Highway Patrol award of honor. The North Carolina State Highway Patrol award of honor is awarded in the name of the people of North Carolina and by the Governor to a person who, while a member of the North Carolina State Highway Patrol, distinguishes himself conspicuously by gallantry and intrepidity at the risk of personal safety and beyond the call of duty while engaged in the preservation of life and property. The deed performed must have been one of personal bravery and self-sacrifice so conspicuous as to clearly distinguish the individual above his colleagues and must have involved risk of life. Proof of the performance of the service will be required and each recommendation for the award of this decoration will be considered on the standard of extraordinary merit.

(c) Recipients of the awards hereinabove provided for will be entitled to receive a framed certificate of the award and an insignia designed to be worn as a part of the State Highway Patrol uniform.

(d) The awards committee shall review and investigate all reports of outstanding service and shall make recommendations to the patrol commander with respect thereto. The committee shall consider members of the Patrol for the awards created by this section when properly recommended by any individual having personal knowledge of an act, achievement or service believed to warrant the award of a decoration. No recommendation shall be made except by majority

vote of all members of the committee. All recommendations of the committee shall be in writing and shall be forwarded to the patrol commander.

(e) Upon receipt of a recommendation of the committee, the patrol commander shall inquire into the facts of the matter and shall reduce his recommendation to writing. The patrol commander shall forward his recommendation, together with the recommendation of the committee, to the Commissioner of Motor Vehicles. The Commissioner shall have final authority to approve or disapprove recommendations affecting the issuance of all awards except the award of honor. All recommendations for the award of honor shall be forwarded to the Governor for final approval or disapproval.

(f) The patrol commander shall, with the approval of the Commissioner, establish all necessary rules and regulations to fully implement the provisions of this section and such rules and regulations shall include, but shall not be limited to, the following:

- (1) Announcement of awards
- (2) Presentation of awards
- (3) Recording of awards
- (4) Replacement of awards
- (5) Authority to wear award insignias. (1967, c. 1179; 1971, c. 848.)

Editor's Note.—The 1971 amendment rewrote subsection (b) so as to eliminate provisions as to the North Carolina State Highway Patrol award for valor, the North Carolina State Highway Patrol award of

merit and the North Carolina State Highway Patrol award for distinguished service. The amendment also deleted "Incontestable" at the beginning of the present last sentence of the subsection.

§ 20-187.2. Badges and service revolver of deceased or retiring members of State law-enforcement agencies; revolvers of active members.—(a) Widows, or in the event such members die unsurvived by a widow, surviving children of members of North Carolina State law-enforcement agencies killed in the line of duty or who are members of such agencies at the time of their deaths, and retiring members of such agencies, shall receive, upon request and at no cost to them, the badge and service revolver worn or carried by such deceased or retiring member, upon securing a permit as required by G.S. 14-402 et seq. or G.S. 14-409.1 et seq., or without such permit provided the revolver shall have been rendered incapable of being fired.

(b) Active members of North Carolina State law-enforcement agencies, upon change of type of revolvers from .38 caliber or .41 caliber to .357 magnum, may purchase the revolver worn or carried by such member at a price which shall be the average yield to the State from the sale of similar revolvers during the preceding year. (1971, c. 669.)

§ 20-188. Duties of Highway Patrol.—The State Highway Patrol shall be subject to such orders, rules and regulations as may be adopted by the Commissioner of Motor Vehicles, with the approval of the Governor, and shall regularly patrol the highways of the State and enforce all laws and regulations respecting travel and the use of vehicles upon the highways of the State and all laws for the protection of the highways of the State. To this end, the members of the Patrol are given the power and authority of peace officers for the service of any warrant or other process issuing from any of the courts of the State having criminal jurisdiction, and are likewise authorized to arrest without warrant any persons who, in the presence of said officers, is engaged in the violation of any of the laws of the State regulating travel and the use of vehicles upon the highways, or of laws with respect to the protection of the highways, and they shall have jurisdiction anywhere within the State, irrespective of county lines.

The State Highway Patrol shall have full power and authority to perform such additional duties as peace officers as may from time to time be directed by the Governor, and such officers may at any time and without special authority,

either upon their own motion or at the request of any sheriff or local police authority, arrest persons accused of highway robbery, bank robbery, murder, or other crimes of violence.

The State Highway Patrol shall be required to perform such other and additional duties as may be required of it by the Commissioner of Motor Vehicles in connection with the work of the Department of Motor Vehicles, and such other and additional duties as may be required of it from time to time by the Governor.

Members of the State Highway Patrol, in addition to the duties, power and authority hereinbefore given, shall have the authority throughout the State of North Carolina of any police officer in respect to making arrests for any crimes committed in their presence and shall have authority to make arrests for any crime committed on any highway.

Regardless of territorial jurisdiction, any member of the State Highway Patrol who initiates an investigation of an accident or collision may not relinquish responsibility for completing the investigation, or for filing criminal charges as appropriate, without clear assurance that another law-enforcement officer or agency has fully undertaken responsibility, and in such cases he shall render reasonable assistance to the succeeding officer or agency if requested. (1929, c. 218, s. 4; 1933, c. 214, ss. 1, 2; 1935, c. 324, s. 3; 1939, c. 387, s. 2; 1941, c. 36; 1945, c. 1048; 1947, c. 1067, s. 20; 1973, c. 689.)

Editor's Note. — The 1973 amendment, effective July 1, 1973, added the last paragraph.

When acting as such, a State highway patrolman is a public officer within the purview of § 14-223. *State v. Powell*, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

Right to Employ Reasonable Means in Fulfilling Duties.—By this section the Patrol is directed to "enforce all laws and regulations respecting travel and use of vehicles upon the highways of the State." Imposition of this duty implies the right to employ reasonable means in a reasonable manner in fulfilling it. *Collins v. Christenberry*, 6 N.C. App. 504, 170 S.E.2d 515 (1969).

Arrest without Warrant. — A highway patrolman apprehending a person driving a motor vehicle on the public highway while under the influence of intoxicating liquor is authorized, by virtue of the provi-

sions of this section and subdivision (1) of § 15-41, to arrest such person without a warrant, and such arrest is legal. *State v. Broome*, 269 N.C. 661, 153 S.E.2d 384 (1967).

Care Required of Officer in Pursuit of Lawbreaker.—It is not held that an officer, when in pursuit of a lawbreaker, is under no obligation to exercise a reasonable degree of care to avoid injury to others who may be on the public roads and streets. It is held that, when so engaged, he is not to be deemed negligent merely because he fails to observe the requirements of the Motor Vehicle Act. His conduct is to be examined and tested by another standard. He is required to observe the care which a reasonably prudent man would exercise in the discharge of official duties of a like nature under like circumstances. *Collins v. Christenberry*, 6 N.C. App. 504, 170 S.E.2d 515 (1969).

§ 20-190.2. Signs showing highways patrolled by unmarked vehicles.—The Board of Transportation shall erect or cause to be erected signs at all points where paved highways enter this State from adjacent states stating that the highways are patrolled by unmarked police vehicles. (1957, c. 673, s. 2; 1973, c. 507, s. 5.)

Editor's Note.—

The 1973 amendment, effective July 1, 1973, substituted "Board of Transportation"

for "North Carolina State Highway Commission."

§ 20-194. Expense of administration.—All expenses incurred in carrying out the provisions of this Article shall be paid out of the maintenance funds of the Board of Transportation. (1929, c. 218, s. 9; 1941, c. 36; 1957, c. 65, s. 11; 1973, c. 507, s. 5.)

Editor's Note.—The 1973 amendment, effective July 1, 1973, substituted "Board

of Transportation" for "State Highway Commission."

§ 20-196. Statewide radio system authorized; use of telephone lines in emergencies. — The Commissioner of Motor Vehicles, through the Division of Highway Safety and Patrol is hereby authorized and directed to set up and maintain a statewide radio system, with adequate broadcasting stations so situate as to make the service available to all parts of the State for the purpose of maintaining radio contact with the members of the State Highway Patrol and other officers of the State, to the end that the traffic laws upon the highways may be more adequately enforced and that the criminal use of the highways may be prevented.

If the Director of the Budget shall find that the appropriation provided for the Department is not adequate to take care of the entire cost of the radio service herein provided for, after providing for the administration of other provisions of this law, the Board of Transportation, upon the order of the Director of the Budget approved by the Advisory Budget Commission, shall make available such additional sum as the said Budget Commission may find to be necessary to make the installation and operation of such radio service possible; and the sum so provided by the Board of Transportation shall constitute a valid charge against the appropriation item of betterments for State and county roads.

The Commissioner of Motor Vehicles is likewise authorized and empowered to arrange with the various telephone companies of the State for the use of their lines for emergency calls by the members of the State Highway Patrol, if it shall be found practicable to arrange apparatus for temporary contact with said telephone circuits along the highways of the State.

In order to make this service more generally useful, the various boards of county commissioners and the governing boards of the various cities and towns are hereby authorized and empowered to provide radio receiving sets in the offices and vehicles of their various officers, and such expenditures are declared to be a legal expenditure of any funds that may be available for police protection. (1935, c. 324, s. 6; 1941, c. 36; 1957, c. 65, s. 11; 1973, c. 507, s. 5.)

Editor's Note. — The 1973 amendment, effective July 1, 1973, substituted "Board of Transportation" for "State Highway Commission" in two places in the second paragraph.

§ 20-196.2. Use of airplanes to discover violations of §§ 20-138 to 20-171; testimony of pilots and observers; declaration of policy. — The State Highway Patrol is hereby permitted the use of airplanes to discover violations of part 10 of article 3 of chapter 20 of the General Statutes relating to operation of motor vehicles and rules of the road; provided, however, neither the observer nor the pilot shall be competent to testify in any court of law in a criminal action charging violations of G.S. 20-141, 20-141.1, and 20-144. It is hereby declared the public policy of North Carolina that the airplanes should be used primarily for accident prevention and should also be used incident to the issuance of warning citations in accordance with the provisions of G.S. 20-183. (1967, c. 513.)

ARTICLE 6.

Giving Publicity to Highway Traffic Laws through the Public Schools.

§ 20-212. Board of Transportation to prepare digest. — The Board of Transportation shall cause to be prepared a digest of the traffic laws of the State suitable for use in the public schools of the State and have published in pamphlet form and delivered on or before the first day of August, 1927, to the State Superintendent of Public Instruction, a sufficient number of said pamphlets to supply at least one copy each to all of the public high school teachers of the State. (1927, c. 242, s. 1; 1933, c. 172, s. 17; 1957, c. 65, s. 11; 1973, c. 507, s. 5.)

Editor's Note. — The 1973 amendment, effective July 1, 1973, substituted "Board of Transportation" for "State Highway Commission."

§ 20-215. Practice to be continued; Board of Transportation to supply additional copies yearly.—This practice shall be continued during each school year and the Board of Transportation is directed annually on or before the first Monday of August, to supply, as hereinbefore provided, such additional copies of the said pamphlet, having the same revised from time to time to meet any amendments of the traffic laws of the State, as the State Superintendent of Public Instruction may ascertain and report to the Board of Transportation to be necessary. (1927, c. 242, s. 4; 1957, c. 65, s. 11; 1973, c. 507, s. 5.)

Editor's Note.—The 1973 amendment, of Transportation" for "State Highway effective July 1, 1973, substituted "Board Commission" in two places.

ARTICLE 7.

Miscellaneous Provisions Relating to Motor Vehicles.

§ 20-216. Passing horses or other draft animals.—Any person operating a motor vehicle shall use reasonable care when approaching or passing a horse or other draft animal whether ridden or otherwise under control. (1917, c. 140, s. 15; C. S., s. 2616; 1969, c. 401.)

Editor's Note.—The 1969 amendment rewrote this section.

§ 20-217. Motor vehicles to stop for school, temple, church and Sunday school buses in certain instances.—Every person using, operating, or driving a motor vehicle upon the roads and highways of this State or upon any street of any town or city in this State, upon approaching from any direction on the same road, highway or street any school bus or any privately owned bus transporting children while such bus is stopped and engaged in receiving or discharging passengers therefrom and displaying its mechanical stop signal upon the roads or highways of the State or upon any of the streets of cities and towns of the State, or at any time while such bus is stopped and is displaying its mechanical stop signal, shall bring his motor vehicle to a full stop before passing or attempting to pass such bus and shall remain stopped until the mechanical stop signal of the bus has been withdrawn or until such bus has moved on; except, that the driver of a vehicle upon any road, highway or street which has been divided into two roadways, so constructed as to separate vehicular traffic between the two roadways by an intervening space or by a physical barrier, need not stop upon meeting or passing any such bus which has stopped in the roadway across such dividing space or physical barrier. No operator of such bus shall use the mechanical stop signal installed on such bus except for the purpose of indicating that such bus has stopped or is about to stop for the purpose of receiving or discharging passengers.

The provisions of this section are applicable only in the event the school, church, privately owned bus or Sunday school bus bears upon the front and rear thereof a plainly visible sign containing the words "school bus" or the words "church bus" or "temple bus" or "Sunday school bus" in letters not less than five inches in height.

Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not to exceed two hundred dollars (\$200.00) or imprisoned not to exceed 90 days. (1925, c. 265; 1943, c. 767; 1947, c. 527; 1955, c. 1365; 1959, c. 909; 1965, c. 370; 1969, c. 952; 1971, c. 245, s. 1.)

Editor's Note.—

The 1969 amendment rewrote the first sentence.

The 1971 amendment, effective July 1, 1971, deleted "to and from any school, church, or Sunday school" following "pri-

vately owned bus transporting children" in the first sentence, inserted "and displaying its mechanical stop signal" in that sentence, inserted "is stopped and" therein, substituted "operator of such bus" for "operator of a school, church, or Sunday

school bus" in the second sentence, inserted "or 'temple bus'" in the second paragraph, substituted "two hundred dollars (\$200.00)" for "fifty dollars (\$50.00)" in the last paragraph, and substituted "90 days" for "thirty days" in that paragraph.

This section is a safety statute, designed for the protection of life, limb and property. *State v. Weston*, 273 N.C. 275, 159 S.E.2d 883 (1968).

This section is designed for the protection of life, limb and property. *Slade v. New Hanover County Bd. of Educ.*, 10 N.C. App. 287, 178 S.E.2d 316 (1971).

Culpable Negligence.—The violation of a safety statute which results in injury or

death will constitute culpable negligence if the violation is wilful, wanton, or intentional. But where there is an unintentional or inadvertent violation of the statute, such violation standing alone does not constitute culpable negligence. The inadvertent or unintentional violation of the statute must be accompanied by recklessness of probable consequences of a dangerous nature, when tested by the rule of reasonable prevision, amounting altogether to a thoughtless disregard of consequences or of a heedless indifference to the safety of others. *State v. Weston*, 273 N.C. 275, 159 S.E.2d 883 (1968).

§ 20-218. Standard qualifications for school bus drivers; speed limit.—No person shall drive or operate a school bus over the public roads of North Carolina while the same is occupied by children unless said person shall be fully trained in the operation of motor vehicles, and shall furnish to the superintendent of the schools of the county in which said bus shall be operated a certificate from the Highway Patrol of North Carolina, or from any representative duly designated by the Commissioner of Motor Vehicles, and the chief mechanic in charge of school busses in said county showing that he has been examined by a member of the said Highway Patrol, or a representative duly designated by the Commissioner of Motor Vehicles, and said chief mechanic in charge of school busses in said county and that he is a fit and competent person to operate or drive a school bus over the public roads of the State. Notwithstanding the above, school activity busses may be operated by a person who holds a school bus driver's certificate or a chauffeur's license.

It shall be unlawful for any person to operate or drive a school bus loaded with children over the public roads of North Carolina at a greater rate of speed than 35 miles per hour. Provided, however, that as to school activity busses which are painted a different color from regular school busses and which are being used for transportation of students or others to or from places for participation in events other than regular classroom work, it shall be unlawful to operate such a school activity bus at a greater rate of speed than 45 miles per hour.

Any person violating this section shall, upon conviction, be fined not more than fifty dollars (\$50.00) or imprisoned not more than 30 days. (1937, c. 397, ss. 1-3; 1941, c. 21; 1943, c. 440; 1945, c. 216; 1957, cc. 139, 595; 1971, c. 293.)

Editor's Note.—The 1971 amendment, effective July 1, 1971, deleted "paragraph two of" preceding "this section" in the last paragraph.

§ 20-218.1. Private and parochial school buses.—The term "school bus" as used in this chapter shall include public, private, and parochial school buses, and the term "school activity bus" as used in this chapter shall include public, private, and parochial school activity buses. (1969, c. 264.)

Editor's Note. — Session Laws 1969, c. 264, adding this section, is effective Jan. 1, 1970.

§ 20-218.2. Speed limit for activity busses for nonprofit purpose.—It shall be unlawful for any person to operate an activity bus for a nonprofit organization for a nonprofit purpose which is being used for transportation of persons in connection with nonprofit activities in excess of 45 miles per hour.

Any person violating this section shall, upon conviction, be fined not more than fifty dollars (\$50.00) or imprisoned for not more than thirty days. (1969, c. 1000, s. 2.)

§ 20-219.1: Repealed by Session Laws 1971, c. 294, s. 2.

Cross Reference.—For present provision as to removal of vehicles parked or left standing on highways, see § 20-161.

ARTICLE 8.

Habitual Offenders.

§ 20-220. **Declaration of policy.**—It is hereby declared to be the policy of North Carolina:

- (1) To provide maximum safety for all persons who travel or otherwise use the public highways of this State; and
- (2) To deny the privilege of operating motor vehicles on such highways to persons who by their conduct and record have demonstrated their indifference to the safety and welfare of others and their disrespect for the laws of this State, the orders of its courts, and the statutorily required acts of its administrative agencies; and
- (3) To discourage repetition of criminal acts by individuals against the peace and dignity of this State and her political subdivisions and to impose increased and added deprivation of the privilege to operate motor vehicles upon habitual offenders who have been convicted repeatedly of violations of the traffic laws. (1969, c. 867.)

Editor's Note.—Former article 8, relating to sale of used motor vehicles brought into the State and containing §§ 20-220 to 20-223, was repealed by Session Laws 1945, c. 635. Former §§ 20-224 to 20-231,

which were contained in former article 9, the Motor Vehicle Safety and Financial Responsibility Act, were repealed by Session Laws 1953, c. 1300, s. 35.

§ 20-221. **Habitual offender defined.**—An habitual offender shall be any person, resident or nonresident, whose record, as maintained in the office of the Department of Motor Vehicles, shows that such person has accumulated the convictions for separate and distinct offenses described in subdivisions (1), (2), or (3), of this section, committed after June 19, 1969 and within a seven-year period, provided, that where multiple convictions result from a series of offenses committed within a six-hour period, only one conviction shall be recorded for the purposes of this article, as follows:

- (1) Three or more convictions arising from separate acts of any one or more of the following offenses, either singularly or in combination:
 - a. Voluntary and involuntary manslaughter resulting from the operation of a motor vehicle;
 - b. Driving a motor vehicle while under the influence of intoxicating liquor or a narcotic drug;
 - c. Driving a motor vehicle while operator's or chauffeur's license is suspended or revoked;
 - d. Any offense punishable as a felony under the motor vehicle laws of North Carolina or any felony in the commission of which a motor vehicle is used;
 - e. Failure to stop and render aid as required under the laws of this State in the event of a motor vehicle accident;
 - f. Failure of the driver of a motor vehicle involved in an accident resulting only in damage to an attended or unattended vehicle or other property in excess of one hundred dollars (\$100.00) to stop close to the scene of such accident and report his identity or otherwise report such accident in violation of law.
 - g. Any motor vehicle moving violation committed during a period of suspension or revocation.

- (2) Twelve or more convictions of any separate and distinct offenses in the operation of a motor vehicle which are required to be reported to the Department of Motor Vehicles and the conviction whereof authorizes or requires the Department of Motor Vehicles to suspend or revoke the privilege to operate motor vehicles on the highways of this State for a period of thirty days or more and such convictions shall include those offenses enumerated in subdivision (1) above when taken with and added to those offenses described herein.
- (3) The offenses included in subdivisions (1) and (2) hereof shall be deemed to include offenses under any valid town, city or county ordinance paralleling and substantially conforming to the State's statutory provisions concerning such offenses and all changes in or amendments thereto and any federal law, any law of another state or any valid town, city or county ordinance of another state substantially conforming to the aforesaid State's statutory provisions.
- (4) For the purpose of this article, the term "conviction" shall mean a final conviction. Also for the purposes of this article a forfeiture of bail or collateral deposited to secure a defendant's appearance in court in North Carolina, which forfeiture has not been vacated, shall be equivalent to a conviction. (1969, c. 867.)

§ 20-222. Commissioner to certify record to superior court.—The Commissioner of Motor Vehicles shall certify, substantially in the manner provided for in G.S. 20-42 (b) three abstracts of the conviction record as maintained in his office of any person whose record appears to bring him within the definition of an habitual offender, as defined in G.S. 20-221, to the superior court solicitor of the judicial district in which such person resides according to the records of the Department of Motor Vehicles or to the superior court solicitor for the county of Wake if such person is not a resident of this State. Such abstract may be admitted as evidence as provided in G.S. 20-42 (b). Such abstract shall be competent evidence that the person named therein was duly convicted by the court wherein such conviction or holding was made of each offense shown by such abstract. (1969, c. 867.)

§ 20-223. Solicitor to initiate court proceeding, petition.—The solicitor, upon receiving the aforesaid abstract from the Commissioner, shall forthwith file a petition against the person named therein in the superior court division of the county wherein such person resides or, in the case of a nonresident, in the Superior Court Division of Wake County. The petition shall request the court to determine whether or not the person named therein is an habitual offender. (1969, c. 867.)

§ 20-224. Service of petition, order to show cause.—Upon the filing of the petition, any superior court judge having jurisdiction over criminal cases within the county shall enter an order incorporating by attachment the aforesaid abstract and directed to the person named therein to appear at the next criminal session of the court and show cause why he should not be barred from operating a motor vehicle on the highways of this State. A copy of the petition, the show cause order and the abstract shall be served upon the person named therein in the manner prescribed by law for the service of process. Service thereof on any non-resident of this State may be made in the same manner as in any action or proceeding arising out of a collision on the highways in this State in the manner provided in G.S. 1-105 which is hereby made applicable to these proceedings except that any fee for such service shall be taxed against the person named in the petition as a part of the cost of such proceeding. (1969, c. 867.)

§ 20-225. Hearing, procedure.—The matter shall be heard at the criminal session of the court by the judge without a jury. If such person denies that he

was convicted of any offense shown in the abstract and necessary for a holding that he is an habitual offender, and if the court cannot, on the evidence available to it, determine the issue, the court may require of the Department of Motor Vehicles certified copies of such records respecting the matter as it may have in its possession. If, upon an examination of such records, the court is still unable to make such determination, it shall certify the decision of such issue to the court in which such conviction was reportedly made. The court to which such certification is made shall forthwith conduct a hearing to determine such issue and send a certified copy of its final order determining such issue to the court in which the petition was filed. (1969, c. 867.)

§ 20-226. Court's findings, judgment.—If the court finds that such person is not the same person named in the aforesaid abstract, or that he is not an habitual offender under this article, the proceeding shall be dismissed, but if the court finds that such person is the same person named in the abstract and that such person is an habitual offender, the court shall so find and by appropriate judgment shall direct that such person not operate a motor vehicle on the highways of the State of North Carolina and to surrender to the court all licenses or permits to operate a motor vehicle upon the highways of this State. The clerk of the court shall forthwith transmit a copy of such judgment together with any licenses or permits surrendered to the Department of Motor Vehicles. (1969, c. 867.)

§ 20-227. No new license issued for five years.—No license to operate a motor vehicle in North Carolina shall be issued to an habitual offender,

- (1) For a period of five years from the date of the judgment of the court finding such person to be an habitual offender and
- (2) Until the privilege of such person to operate a motor vehicle in this State has been restored by judgment of the superior court division. (1969, c. 867.)

§ 20-228. Driving after judgment prohibited.—It shall be unlawful for any person to operate any motor vehicle in this State while the judgment of the court prohibiting the operation remains in effect. Any person found to be an habitual offender under the provisions of this article who is thereafter convicted of operating a motor vehicle in this State while the judgment of the court prohibiting such operation is in effect, shall be guilty of a misdemeanor and imprisoned for not less than one year nor more than five years or by fine or imprisonment in the discretion of the court.

For the purpose of enforcing this section, in any case in which the accused is charged with driving a motor vehicle while his license, permit or privilege to drive is suspended or revoked or is charged with driving without a license, the court before hearing such charge shall require the solicitor to determine whether such person has been adjudged an habitual offender and by reason of such judgment is barred from operating a motor vehicle on the highways of this State. If the solicitor determines that the accused has been so held, he shall cause the appropriate criminal charges to be lodged against the accused. (1969, c. 867.)

§ 20-229. Restoration of driving privilege.—At the expiration of five years from the date of any final judgment of the court entered under the provisions of this article finding a person to be an habitual offender and directing him not to operate a motor vehicle in this State, such person may petition the court in which he was found to be an habitual offender, or the superior court division of any county in this State having criminal jurisdiction over the place in which such person then resides, for restoration of his privilege to operate a motor vehicle in this State. Upon such petition, the court shall restore to such person the privilege to operate a motor vehicle in this State. (1969, c. 867.)

§ 20-230. **Appeals.**—An appeal may be taken from any final action or judgment entered under the provisions of this article in the same manner and form as appeals in civil actions. (1969, c. 867.)

§ 20-231. **No existing law modified.**—Nothing in this article shall be construed as amending, modifying or repealing any existing law of North Carolina or any existing ordinance of any political subdivision relating to the operation of motor vehicles, the licensing of persons to operate motor vehicles or providing penalties for the violation thereof; or shall be construed so as to preclude the exercise of the regulatory powers of any division, agency, department or political subdivision of this State having the statutory authority to regulate such operation and licensing. (1969, c. 867.)

ARTICLE 9A.

Motor Vehicle Safety and Financial Responsibility Act of 1953.

§ 20-279.1. **Definitions.**—The following words and phrases, when used in this Article, shall, for the purposes of this Article, have the meanings respectively ascribed to them in this section, except in those instances where the context clearly indicates a different meaning:

- (11) "Proof of financial responsibility": Proof of ability to respond in damages for liability, on account of accidents occurring subsequent to the effective date of said proof, arising out of the ownership, maintenance or use of a motor vehicle, in the amount of fifteen thousand dollars (\$15,000) because of bodily injury to or death of one person in any one accident, and, subject to said limit for one person, in the amount of thirty thousand dollars (\$30,000) because of bodily injury to or death of two or more persons in any one accident, and in the amount of five thousand dollars (\$5,000) because of injury to or destruction of property of others in any one accident. Nothing contained herein shall prevent an insurer and an insured from entering into a contract, not affecting third parties, providing for a deductible as to property damage at a rate approved by the Commissioner of Insurance.

(1967, c. 277, s. 1; 1971, c. 1205, s. 1; 1973, c. 745, s. 1.)

Editor's Note.—

The 1967 amendment substituted "The 1967 amendment substituted for \"\$5,000\" and \"\$20,000\" for \"\$10,000\" in subdivision (11)."

Section 10, c. 277, Session Laws 1967, provides: "This act shall become effective Jan. 1, 1968, and where the manner of giving proof of financial responsibility is by automobile liability policy, the same shall apply only to policies written or renewed on or after said effective date."

The 1971 amendment, effective Jan. 1, 1972, added the second sentence in subdivision (11).

The 1973 amendment substituted "fifteen thousand dollars (\$15,000)" for "ten thousand dollars (\$10,000)" and "thirty thousand dollars (\$30,000)" for "twenty thousand dollars (\$20,000)" in subdivision (11).

Session Laws 1973, c. 745, s. 8, provides: "This act shall become effective Jan. 1, 1974, and where the manner of giving proof of financial responsibility is by automobile liability policy, the same shall apply only to

policies written or renewed on or after the effective date of this act."

As the rest of the section was not changed by the amendments, only the introductory paragraph and subdivision (11) are set out.

For case law survey as to automobile liability insurance, see 44 N.C.L. Rev. 1023 (1966).

For case law survey as to insurance, see 45 N.C.L. Rev. 955 (1967).

Allstate Ins. Co. v. Shelby Mut. Ins. Co., 269 N.C. 341, 152 S.E.2d 436 (1967), cited in the note below, was commented on in 46 N.C.L. Rev. 433 (1968).

The object, etc.—

In accord with 2nd paragraph in original. See *Fidelity & Cas. Co. v. North Carolina Farm Bureau Mut. Ins. Co.*, 16 N.C. App. 194, 192 S.E.2d 113 (1972).

The purpose of the Financial Responsibility Law is to protect victims of automobile accidents. *Allstate Ins. Co. v. Shelby*

Mut. Ins. Co., 269 N.C. 341, 152 S.E.2d 436 (1967).

The purpose of the Financial Responsibility Act is to provide protection from damages or injuries resulting from the negligent operation of automobiles. *Nationwide Mut. Ins. Co. v. Hayes*, 276 N.C. 620, 174 S.E.2d 511 (1970).

The purpose of the Financial Responsibility Act is to provide protection to the public from damages resulting from the negligent operation of automobiles by irresponsible persons. *Nationwide Mut. Ins. Co. v. Fireman's Fund Ins. Co.*, 279 N.C. 240, 182 S.E.2d 571 (1971).

This Article and Article 13, etc.—

This article and article 13 of this chapter are to be construed together so as to harmonize their provisions and to effectuate the purpose of the legislature. *Harrelson v. State Farm Mut. Auto. Ins. Co.*, 272 N.C. 603, 158 S.E.2d 812 (1968).

Article 13 Requires Proof of Financial Responsibility to Be Given in Manner Prescribed by This Article.—The Vehicle Financial Responsibility Act of 1957, article 13 of this chapter, requires every owner of a motor vehicle, as a prerequisite to the registration thereof, to show "proof of financial responsibility" in the manner prescribed by this article. *Jones v. State Farm Mut. Auto. Ins. Co.*, 270 N.C. 454, 155 S.E.2d 118 (1967).

Construction of Article. — Ambiguous provisions of the Financial Responsibility Law must be construed to accomplish the purpose of such law. *Allstate Ins. Co. v. Shelby Mut. Ins. Co.*, 269 N.C. 341, 152 S.E.2d 436 (1967).

Contravening Policy Provision Is Void.—A provision in a policy of liability insurance which contravenes the Financial Responsibility Law is void. *Allstate Ins. Co. v. Shelby Mut. Ins. Co.* 269 N.C. 341, 152 S.E.2d 436 (1967).

"Owner".—

In order to protect the public and close all avenues of escape from its provisions, the legislature broadly defines "owner" in the Financial Responsibility Act. *Nationwide Mut. Ins. Co. v. Hayes*, 276 N.C. 620, 174 S.E.2d 511 (1970).

The Financial Responsibility Act fixes the requirement that financial responsibility be maintained by the owner, which includes the holder of title and a mortgagor, conditional vendee or lessee having right of purchase and right of possession. *Nationwide Mut. Ins. Co. v. Hayes*, 276 N.C. 620, 174 S.E.2d 511 (1970).

Section 20-38 defines "owner" under the Motor Vehicle Act and this section defines "owner" in essentially the same way.

Nationwide Mut. Ins. Co. v. Hayes, 276 N.C. 620, 174 S.E.2d 511 (1970).

The definition of "owner" in this section as the holder of the legal title is compatible with § 20-72(b), requiring the vendor to execute an assignment and warranty of title on the reverse of the certificate of title in order to assign or transfer any interest in the motor vehicle. *Nationwide Mut. Ins. Co. v. Hayes*, 276 N.C. 620, 174 S.E.2d 511 (1970).

No material conflict will arise between the Financial Responsibility Act and § 20-72(b), as amended by the legislature of 1963, by holding § 20-72(b) to be controlling as to ownership of a motor vehicle for purposes of tort liability and insurance coverage. Rather, such an interpretation would strengthen and complement the purposes of the Financial Responsibility Act. *Nationwide Mut. Ins. Co. v. Hayes*, 276 N.C. 620, 174 S.E.2d 511 (1970).

Under this definition the word "owner" embraces the holder of title and a mortgagor, conditional vendee or lessee having the right of purchase and the right of possession. *Younts v. State Farm Mut. Auto. Ins. Co.*, 281 N.C. 582, 189 S.E.2d 137 (1972).

Under the definition in subdivision (9) of this section the word owner embraces "the holder of title and a mortgagor, conditional vendee or lessee having right of purchase and the right of possession." *Nationwide Mut. Ins. Co. v. Fireman's Fund Ins. Co.*, 279 N.C. 240, 182 S.E.2d 571 (1971).

By its definition of an "owner," the legislature attempted to close all avenues of escape from the provisions of the Financial Responsibility Act. *Nationwide Mut. Ins. Co. v. Fireman's Fund Ins. Co.*, 279 N.C. 240, 182 S.E.2d 571 (1971).

A father is the owner of an automobile operated exclusively by his minor son where the father registers the title in his own name and also executes the note and conditional sales contract for the balance of the purchase price. It is immaterial that the son may have an equitable interest in the article to the extent of payments he has made on the purchase price. *Nationwide Mut. Ins. Co. v. Fireman's Fund Ins. Co.*, 279 N.C. 240, 182 S.E.2d 571 (1971).

Applied in *Manning v. State Farm Mut. Auto. Ins. Co.*, 243 F. Supp. 619 (W.D.-N.C. 1965); *Forrester v. Garrett*, 280 N.C. 117, 184 S.E.2d 858 (1971).

Quoted in *Marks v. Thompson*, 282 N.C. 174, 192 S.E.2d 311 (1972).

Cited in *State v. Anderson*, 3 N.C. App. 124, 164 S.E.2d 48 (1968).

§ 20-279.2. Commissioner to administer article; appeal to court.**Hearing and Judicial Review Provisions Comply with Due Process Requirements.**

— See opinion of Attorney General to Senator Clyde Norton, 41 N.C.A.G. 420 (1971).

Hearing and Judicial Review Provisions Comply with Due Process Requirements.—

Ample review is provided before a driver's license suspension becomes effective. *State v. Martin*, 13 N.C. App. 613, 186 S.E.2d 647 (1972).

The provisions for suspension of an automobile driver's license fully comply with constitutional requirements. *State v. Martin*, 13 N.C. App. 613, 186 S.E.2d 647 (1972).

Commissioner and Court Held without Authority to Grant Relief.— Where peti-

tioner did not allege that he was probably not guilty of negligence or that the negligence of the other party was probably the sole proximate cause of the collision, nor did he allege that the amount of the security required was excessive or that such security was not required by the terms of the statute and there were no allegations which if proved would entitle the petitioner to any relief, and the only relief requested by the petitioner was that the court postpone the posting of the security required by the Commissioner under § 20-279.5, neither the Commissioner nor the court had the authority to grant this relief and a motion to dismiss was properly granted. *Forrester v. Garrett*, 280 N.C. 117, 184 S.E.2d 858 (1971).

§ 20-279.4. Information required in accident report.—In case of an accident in which any person is killed or injured or in which damage to the property of any one person in excess of two hundred dollars (\$200.00) is sustained, the report required by G.S. 20-166 or G.S. 20-166.1 shall contain information to enable the Commissioner to determine whether the requirements for the deposit of security under G.S. 20-279.5 are inapplicable by reason of the existence of insurance or other exceptions specified in this Article. The Commissioner may rely upon the accuracy of the information unless and until he has reason to believe that the information is erroneous. The operator or the owner shall furnish such additional relevant information as the Commissioner shall require. (1953, c. 1300, s. 4; 1971, c. 763, s. 2.)

Editor's Note. — The 1971 amendment, effective July 1, 1971, substituted "two hundred dollars (\$200.00)" for "\$100.00" in the first sentence.

Stated in *Forrester v. Garrett*, 280 N.C. 117, 184 S.E.2d 858 (1971).

§ 20-279.5. Security required unless evidence of insurance; when security determined; suspension; exceptions.—(a) If at the expiration of 20 days after the receipt of a report of a motor vehicle accident within this State which has resulted in bodily injury or death or damage to the property of any one person in excess of two hundred dollars (\$200.00), the Commissioner does not have on file evidence satisfactory to him that the person who would otherwise be required to file security under subsection (b) of this section has been released from liability, or has been finally adjudicated not to be liable or has executed a duly acknowledged written agreement providing for the payment of an agreed amount, in installments or otherwise, or is for any other reason not required to file security under this Article with respect to all claims for injuries or damages resulting from the accident, the Commissioner shall determine the amount of security which shall be sufficient in his judgment to satisfy any judgment or judgments for damages resulting from such accident as may be recovered against each operator or owner.

(c) This section shall not apply under the conditions stated in G.S. 20-279.6 nor:

- (1) To such operator or owner if such owner had in effect at the time of such accident an automobile liability policy with respect to the motor vehicle involved in such accident;
- (2) To such operator, if not the owner of such motor vehicle, if there was in effect at the time of such accident a motor vehicle liability policy or bond with respect to his operation of motor vehicles not owned by him;

- (3) To such operator or owner if the liability of such operator or owner for damages resulting from such accident is, in the judgment of the Commissioner, covered by any other form of liability insurance policy or bond or sinking fund or group assumption of liability;
- (4) To any person qualifying as a self-insurer, nor to any operator for a self-insurer if, in the opinion of the Commissioner from the information furnished him, the operator at the time of the accident was probably operating the vehicle in the course of the operator's employment as an employee or officer of the self-insurer; nor
- (5) To any employee of the United States government while operating a vehicle in its service and while acting within the scope of his employment, such operations being fully protected by the Federal Tort Claims Act of 1946, which affords ample security to all persons sustaining personal injuries or property damage through the negligence of such federal employee.

No such policy or bond shall be effective under this section unless issued by an insurance company or surety company authorized to do business in this State, except that if such motor vehicle was not registered in this State, or was a motor vehicle which was registered elsewhere than in this State at the effective date of the policy or bond, or the most recent renewal thereof, or if such operator not an owner was a nonresident of this State, such policy or bond shall not be effective under this section unless the insurance company or surety company if not authorized to do business in this State shall execute a power of attorney authorizing the Commissioner to accept service on its behalf of notice or process in any action upon such policy, or bond arising out of such accident, and unless said insurance company or surety company, if not authorized to do business in this State, is authorized to do business in the state or other jurisdiction where the motor vehicle is registered or, if such policy or bond is filed on behalf of an operator not an owner who was a nonresident of this State, unless said insurance company or surety company, if not authorized to do business in this State, is authorized to do business in the state or other jurisdiction of residence of such operator; provided, however, every such policy or bond is subject, if the accident has resulted in bodily injury or death, to a limit, exclusive of interest and cost, of not less than fifteen thousand dollars (\$15,000) because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, to a limit of not less than thirty thousand dollars (\$30,000) because of bodily injury to or death of two or more persons in any one accident, and, if the accident has resulted in injury to or destruction of property, to a limit of not less than five thousand dollars (\$5,000) because of injury to or destruction of property of others in any one accident. (1953, c. 1300, s. 5; 1955, cc. 138, 854; c. 855, s. 1; c. 1152, ss. 4-8; c. 1355; 1967, c. 277, s. 2; 1971, c. 763, s. 3; 1973, c. 745, s. 2.)

Editor's Note. — The 1967 amendment substituted "ten thousand dollars (\$10,000.00)" for "five thousand dollars (\$5,000.00)" and "twenty thousand dollars (\$20,000.00)" for "ten thousand dollars (\$10,000.00)" near the end of subsection (c).

Section 10, c. 277, Session Laws 1967, provides: "This act shall become effective Jan. 1, 1968, and where the manner of giving proof of financial responsibility is by automobile liability policy, the same shall apply only to policies written or renewed on or after said effective date."

The 1971 amendment, effective July 1, 1971, substituted "two hundred dollars

(\$200.00)" for "\$100.00" near the beginning of subsection (a).

The 1973 amendment substituted "fifteen thousand dollars (\$15,000)" for "ten thousand dollars (\$10,000.00)" and "thirty thousand dollars (\$30,000)" for "twenty thousand dollars (\$20,000.00)" near the end of subsection (c).

Session Laws 1973, c. 745, s. 8, provides: "This act shall become effective Jan. 1, 1974, and where the manner of giving proof of financial responsibility is by automobile liability policy, the same shall apply only to policies written or renewed on or after the effective date of this act."

As subsection (b) was not affected by the amendments, it is not set out.

Allegations Insufficient to Authorize Postponement of Posting.—Where petitioner did not allege that he was probably not guilty of negligence or that the negligence of the other party was probably the sole proximate cause of the collision, nor did he allege that the amount of the security required was excessive or that such security was not required by the terms of the statute and there were no allegations which if proved would entitle the petitioner to any relief, and the only relief requested by the petitioner was that the court postpone the posting of the

security required by the Commissioner under this section, neither the Commissioner nor the court had the authority to grant this relief and a motion to dismiss was properly granted. *Forrester v. Garrett*, 280 N.C. 117, 184 S.E.2d 858 (1971).

Applied in *Carson v. Godwin*, 269 N.C. 744, 153 S.E.2d 473 (1967); *Moore v. Hartford Fire Ins. Co.*, 270 N.C. 532, 155 S.E.2d 128 (1967).

Cited in *Lichtenberger v. American Motorists Ins. Co.*, 7 N.C. App. 269, 172 S.E.2d 284 (1970); *State v. Herald*, 10 N.C. App. 263, 178 S.E.2d 120 (1970); *Dildy v. Southeastern Fire Ins. Co.*, 13 N.C. App. 66, 185 S.E.2d 272 (1971).

§ 20-279.7. Duration of suspension.

Applied in *Forrester v. Garrett*, 280 N.C. 117, 184 S.E.2d 858 (1971).

§ 20-279.10. Custody, disposition and return of security; escheat.

—(a) Security deposited in compliance with the requirements of this article shall be placed by the Commissioner in the custody of the State Treasurer and shall be applicable only to the payment of a judgment or judgments rendered against the person or persons on whose behalf the deposit was made, for damages arising out of the accident in question in an action at law, begun not later than one year after the date of such accident, or within one year after the date of deposit of any security under subdivision (3) of § 20-279.7, or to the payment in settlement, agreed to by the depositor, of a claim or claims arising out of such accident. Such deposit or any balance thereof shall be returned to the depositor or his personal representative when evidence satisfactory to the Commissioner has been filed with him that there has been a release from liability, or a final adjudication of non-liability, or a duly acknowledged agreement, in accordance with subdivision (4) of § 20-279.6, or a settlement accepted by the Commissioner as provided in subdivision (5) of § 20-279.6, or a conviction accepted by the Commissioner as provided in subdivision (6) of § 20-279.6, or whenever, after the expiration of one (1) year from the date of the accident, or from the date of deposit of any security under subdivision (3) of § 20-279.7, whichever is later, the Commissioner shall be given reasonable evidence that there is no such action pending and no judgment rendered in such action left unpaid.

(b) One year from the deposit of any security under the terms of this article, the Commissioner shall notify the depositor thereof by registered mail addressed to his last known address that the depositor is entitled to a refund of the security upon giving reasonable evidence that no action at law for damages arising out of the accident in question is pending or that no judgment rendered in any such action remains unpaid. If, at the end of three years from the date of deposit, no claim therefor has been received, the Department shall notify the depositor thereof by registered mail and shall cause a notice to be posted at the courthouse door of the county in which is located the last known address of the depositor for a period of 60 days. Such notice shall contain the name of the depositor, his last known address, the date, amount and nature of the deposit, and shall state the conditions under which the deposit will be refunded. If, at the end of two years from the date of posting of such notice, no claim for the deposit has been received, the Commissioner shall certify such fact together with the facts of notice to the State Treasurer and the Treasurer shall turn such deposit over to the

University of North Carolina as an escheat. (1953, c. 1300, s. 10; 1955, c. 1152, s. 13; 1967, c. 1227.)

Editor's Note. — The 1967 amendment section as subsection (a) and added sub-designated the former provisions of the section (b).

§ 20-279.13. Suspension for nonpayment of judgment; exceptions.

(c) If the judgment creditor consents in writing, in such form as the Commissioner may prescribe, that the judgment debtor be allowed license or non-resident's operating privilege, the same may be allowed by the Commissioner, in his discretion, for six (6) months from the date of such consent and thereafter until such consent is revoked in writing notwithstanding default in the payment of such judgment, or of any installments thereof prescribed in § 20-279.16. (1953, c. 1300, s. 13; 1965, c. 926, s. 1; 1969, c. 186, s. 4.)

Editor's Note.—

The 1969 amendment deleted, at the end of subsection (c), "provided the judgment debtor furnishes proof of financial responsibility."

As only subsection (c) was changed by the amendment, the rest of the section is not set out.

Satisfaction of Judgment by Joint Tort-Feasor May Not Satisfy Judgment for Other Tort-Feasor for Driver License Sus-

pension Purposes. — See opinion of Attorney General to Mr. Donald N. Freeman, Supervisor, Department of Motor Vehicles, 41 N.C.A.G. 99 (1970).

Second Judgment upon Expiration of Ten Years after First Judgment Not Grounds for Continued Suspension of License. — See opinion of Attorney General to Mr. Donald N. Freeman, Supervisor, Department of Motor Vehicles, 40 N.C.A.G. 99 (1970).

§ 20-279.14. Suspension to continue until judgments satisfied. — Such license and nonresident's operating privilege shall remain so suspended and shall not be renewed, nor shall any such license be thereafter issued in the name of such person, including any such person not previously licensed, unless and until every such judgment is stayed, satisfied in full or to the extent hereinafter provided subject to the exemptions stated in §§ 20-279.13 and 20-279.16 of this article.

A discharge in bankruptcy following the rendering of any such judgment shall not relieve the judgment debtor from any of the requirements of this article. (1953, c. 1300, s. 14; 1969, c. 186, s. 5.)

Editor's Note. — The 1969 amendment deleted "and until the said person gives proof of financial responsibility" near the end of the first paragraph.

Satisfaction of Judgment by Joint Tort-Feasor May Not Satisfy Judgment for

Other Tort-Feasor for Driver License Suspension Purposes. — See opinion of Attorney General to Mr. Freeman, Department of Motor Vehicles, 40 N.C.A.G. 99 (1970).

§ 20-279.15. Payment sufficient to satisfy requirements.—In addition to other methods of satisfaction provided by law, judgments herein referred to shall, for the purpose of this Article, be deemed satisfied:

- (1) When fifteen thousand dollars (\$15,000) has been credited upon any judgment or judgments rendered in excess of that amount because of bodily injury to or death of one person as the result of any one accident; or
- (2) When, subject to such limit of ten thousand dollars (\$10,000) because of bodily injury to or death of one person, the sum of thirty thousand dollars (\$30,000) has been credited upon any judgment or judgments rendered in excess of that amount because of bodily injury to or death of two or more persons as the result of any one accident; or
- (3) When five thousand dollars (\$5,000) has been credited upon any judgment or judgments rendered in excess of that amount because of injury to or destruction of property of others as a result of any one accident;

Provided, however, payments made in settlement of any claims because of bodily injury, death or property damage arising from a motor vehicle accident

shall be credited in reduction of the amounts provided for in this section. (1953, c. 1300, s. 15; 1963, c. 1238; 1967, c. 277, s. 3; 1973, c. 745, s. 3.)

Editor's Note.—

The 1967 amendment substituted "ten thousand dollars (\$10,000.00)" for "five thousand dollars (\$5,000.00)" in subdivisions (1) and (2) and "twenty thousand dollars (\$20,000.00)" for "ten thousand dollars (\$10,000.00)" in subdivision (2).

Section 10, c. 277, Session Laws 1967 provides: "This act shall become effective Jan. 1, 1968, and where the manner of giving proof of financial responsibility is by automobile liability policy, the same shall apply only to policies written or renewed on or after said effective date."

The 1973 amendment substituted "fifteen thousand dollars (\$15,000)" for "ten thousand dollars (\$10,000.00)" in subdivision (1) and "thirty thousand dollars (\$30,000)" for "twenty thousand dollars (\$20,000.00)" in subdivision (2).

Session Laws 1973, c. 745, s. 8, provides: "This act shall become effective Jan. 1, 1974, and where the manner of giving proof of financial responsibility is by automobile liability policy, the same shall apply only to policies written or renewed on or after the effective date of this act."

§ 20-279.16. Installment payment of judgments; default.

(b) The Commissioner shall not suspend a license or a nonresident's operating privilege, and shall restore any license or nonresident's operating privilege suspended following nonpayment of a judgment, when the judgment debtor obtains such an order permitting the payment of such judgment in installments, and while the payment of any said installment is not in default.

(1969, c. 186, s. 6.)

Editor's Note. — The 1969 amendment deleted "gives proof of financial responsibility and" near the middle of subsection (b).

As only subsection (b) was changed by the amendment, the rest of the section is not set out.

§ 20-279.17: Repealed by Session Laws 1967, c. 866.

§ 20-279.18. Alternate methods of giving proof.

Cited in *Marks v. Thompson*, 282 N.C.

174, 192 S.E.2d 311 (1972).

§ 20-279.19. Certificate of insurance as proof.

Cited in *Harrelson v. State Farm Mut. Auto. Ins. Co.*, 272 N.C. 603, 158 S.E.2d 812 (1968); *Nationwide Mut. Ins. Co. v.*

Aetna Life & Cas. Co., 283 N.C. 87, 194 S.E.2d 834 (1973).

§ 20-279.21. "Motor vehicle liability policy" defined.

(b) Such owner's policy of liability insurance:

- (1) Shall designate by explicit description or by appropriate reference all motor vehicles with respect to which coverage is thereby to be granted;
- (2) Shall insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured, or any other persons in lawful possession, against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicle or motor vehicles within the United States of America or the Dominion of Canada, subject to limits exclusive of interest and costs, with respect to each such motor vehicle, as follows: fifteen thousand dollars (\$15,000) because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, thirty thousand dollars (\$30,000) because of bodily injury to or death of two or more persons in any one accident, and five thousand dollars (\$5,000) because of injury to or destruction of property of others in any one accident; and
- (3) No policy of bodily injury liability insurance, covering liability arising out of the ownership, maintenance, or use of any motor vehicle, shall

be delivered or issued for delivery in this State with respect to any motor vehicle registered or principally garaged in this State unless coverage is provided therein or supplemental thereto, in limits for bodily injury or death set forth in subsection (c) of G.S. 20-279.5, under provisions filed with and approved by the Commissioner of Insurance, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom; and provided that an insured shall be entitled to secure increased limits coverage of fifteen thousand dollars (\$15,000) because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, thirty thousand dollars (\$30,000) because of bodily injury to or death of two or more persons in any one accident if the policy of such insured carries liability limits of equal or greater amounts for the protection of third persons. Such provisions shall include coverage for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of injury to or destruction of the property of such insured, with a limit in the aggregate for all insureds in any one accident of five thousand dollars (\$5,000) and subject, for each insured, to an exclusion of the first one hundred dollars (\$100.00) of such damages. Such provision shall further provide that a written statement by the liability insurer, whose name appears on the certification of financial responsibility made by the owner of any vehicle involved in an accident with the insured, that such other motor vehicle was not covered by insurance at the time of the accident with the insured shall operate as a prima facie presumption that the operator of such other motor vehicle was uninsured at the time of the accident with the insured, for the purposes of recovery under this provision of the insured's liability insurance policy. The coverage required under this section shall not be applicable where any insured named in the policy shall reject the coverage.

In addition to the above requirements relating to uninsured motorist insurance, every policy of bodily injury liability insurance covering liability arising out of the ownership, maintenance or use of any motor vehicle, which policy is delivered or issued for delivery in this State, shall be subject to the following provisions which need not be contained therein.

- a. A provision that the insurer shall be bound by a final judgment taken by the insured against an uninsured motorist if the insurer has been served with copy of summons, complaint or other process in the action against the uninsured motorist in any manner provided by law; provided however, that the determination of whether a motorist is uninsured may be decided only by an action against the insurer alone. The insurer upon being served as herein provided, shall be a party to the action between the insured and the uninsured motorist though not named in the caption of the pleadings and may defend the suit in the name of the uninsured motorist or in its own name. The insurer upon being served with copy of summons, complaint or other pleading, shall have the time allowed by statute in which to answer, demur or otherwise plead (whether such pleading is verified or not) to the summons, complaint or other process served upon it. The consent of the insurer shall not be required for the initiation of suit by the insured against the uninsured motorist: Provided, however, no action shall be initiated by the

insured until 60 days following the posting of notice to the insurer at the address shown on the policy or after personal delivery of such notice to the insurer or its agent setting forth the belief of the insured that the prospective defendant or defendants are uninsured motorists. No default judgment shall be entered when the insurer has timely filed an answer or other pleading as required by law.

- b. Where the insured, under the uninsured motorist coverage, claims that he has sustained bodily injury as the result of collision between motor vehicles and asserts that the identity of the operator or owner of a vehicle (other than a vehicle in which the insured is a passenger) cannot be ascertained, the insured may institute an action directly against the insurer: Provided, in such event, the insured or someone in his behalf, shall report the accident within 24 hours or as soon thereafter as may be practicable, to a police officer, peace officer, other judicial officer, or to the Commissioner of Motor Vehicles. The insured shall also within a reasonable time give notice to the insurer of his injury, the extent thereof, and shall set forth in such notice the time, date and place of such injury. Thereafter, on forms to be mailed by the insurer within 15 days following receipt of the notice of the accident to the insurer, the insured shall furnish to insurer such further reasonable information concerning the accident and the injury as the insurer shall request. If such forms are not so furnished within 15 days, the insured shall be deemed to have complied with the requirements for furnishing information to the insurer. Suit may not be instituted against the insurer in less than 60 days from the posting of the first notice of such injury or accident to the insurer at the address shown on the policy or after personal delivery of such notice to the insurer or its agent.

Provided under this section the term "uninsured motor vehicle" shall include, but not be limited to, an insured motor vehicle where the liability insurer thereof is unable to make payment with respect to the legal liability within the limits specified therein because of insolvency.

An insurer's insolvency protection shall be applicable only to accidents occurring during a policy period in which its insured's uninsured motorist coverage is in effect where the liability insurer of the tortfeasor becomes insolvent within three years after such an accident. Nothing herein shall be construed to prevent any insurer from affording insolvency protection under terms and conditions more favorable to the insured than is provided herein.

In the event of payment to any person under the coverage required by this section and subject to the terms and conditions of such coverage, the insurer making such payment shall, to the extent thereof, be entitled to the proceeds of any settlement for judgment resulting from the exercise of any limits of recovery of such person against any person or organization legally responsible for the bodily injury for which such payment is made, including the proceeds recoverable from the assets of the insolvent insurer.

For the purpose of this section, an "uninsured motor vehicle" shall be a motor vehicle as to which there is no bodily injury liability insurance and property damage liability insurance in at least the amounts specified in subsection (c) of G.S. 20-279.5, or there is such insurance but the insurance company writing the same denies coverage thereunder, or has become bankrupt, or there is no bond or deposit of money or securities as provided in G.S. 20-279.24 or G.S. 20-279.25 in lieu

of such bodily injury and property damage liability insurance, or the owner of such motor vehicle has not qualified as a self-insurer under the provisions of G.S. 20-279.33, or a vehicle that is not subject to the provisions of the Motor Vehicle Safety and Financial Responsibility Act; but the term "uninsured motor vehicle" shall not include:

- a. A motor vehicle owned by the named insured;
- b. A motor vehicle which is owned or operated by a self-insurer within the meaning of any motor vehicle financial responsibility law, motor carrier law or any similar law;
- c. A motor vehicle which is owned by the United States of America, Canada, a state, or any agency of any of the foregoing (excluding, however, political subdivisions thereof);
- d. A land motor vehicle or trailer, if operated on rails or crawler-treads or while located for use as a residence or premises and not as a vehicle; or
- e. A farm-type tractor or equipment designed for use principally off public roads, except while actually upon public roads.

(e) Such motor vehicle liability policy need not insure against loss from any liability for which benefits are in whole or in part either payable or required to be provided under any workmen's compensation law nor any liability for damage to property owned by, rented to, in charge of or transported by the insured.

(f) Every motor vehicle liability policy shall be subject to the following provisions which need not be contained therein:

- (1) Except as hereinafter provided, and with respect to policies of motor vehicle liability insurance written under the North Carolina assigned risk plan, the liability of the insurance carrier with respect to the insurance required by this article shall become absolute whenever injury or damage covered by said motor vehicle liability policy occurs; said policy may not be cancelled or annulled as to such liability by any agreement between the insurance carrier and the insured after the occurrence of the injury or damage; no statement made by the insured or on his behalf and no violation of said policy shall defeat or void said policy. As to policies issued to insureds in this State under the assigned risk plan, a default judgment taken against an assigned risk insured shall not be used as a basis for obtaining judgment against the insurer unless counsel for the plaintiff has forwarded to the insurer, or to one of its agents, by registered mail with return receipt requested, a copy of summons, complaint, or other pleading, filed in the action. The return receipt shall, upon its return to plaintiff's counsel, be filed with the clerk of court wherein the action is pending against the insured and shall be admissible in evidence as proof of notice to the insurer. The refusal of insurer or its agent to accept delivery of the registered mail, as provided in this section, shall not affect the validity of such notice and any insurer or agent of an insurer refusing to accept such registered mail shall be charged with the knowledge of the contents of such notice. When notice has been sent to an agent of the insurer such notice shall be notice to the insurer. The word "agent" as used in this subsection shall include, but shall not be limited to, any person designated by the insurer as its agent for the service of process, any person duly licensed by the insurer in the State as insurance agent, any general agent of the company in the State of North Carolina, and any employee of the company in a managerial or other responsible position, or the North Carolina Commissioner of Insurance; provided, where the return receipt is signed by an employee of the insurer or an employee of an

agent for the insurer, shall be deemed for the purposes of this subsection to have been received. The term "agent" as used in this subsection shall not include a producer of record or broker, who forwards an application for insurance to the assigned risk bureau. The Commissioner of Motor Vehicles and the North Carolina assigned risk bureau, shall, upon request made, furnish to the plaintiff or his counsel the identity and address of the insurance carrier as shown upon the records of the Department or the bureau, and whether the policy is an assigned risk policy. Neither the Department of Motor Vehicles nor the assigned risk bureau shall be subject to suit by reason of a mistake made as to the identity of the carrier and its address in response to a request made for such information.

The insurer upon receipt of summons, complaint or other process, shall be entitled, upon its motion, to intervene in the suit against its insured as a party defendant and to defend the same in the name of its insured. In the event of such intervention by an insurer it shall become a named party defendant. The insurer shall have 30 days from the signing of the return receipt acknowledging receipt of the summons, complaint or other pleading, in which to file a motion to intervene, along with any responsive pleading, whether verified or not, which it may deem necessary to protect its interest: Provided, the court having jurisdiction over the matter may, upon motion duly made, extend the time for the filing of responsive pleading or continue the trial of the matter for the purpose of affording the insurer a reasonable time in which to file responsive pleading or defend the action. If, after receiving copy of the summons, complaint or other pleading, the insurer elects not to defend the action, if coverage is in fact provided by the policy, the insurer shall be bound to the extent of its policy limits to the judgment taken by default against the insured, and noncooperation of the insured shall not be a defense.

If the plaintiff initiating an action against the insured has complied with the provisions of this subsection, then, in such event, the insurer may not cancel or annul the policy as to such liability and the defense of noncooperation shall not be available to the insurer: Provided, however, nothing in this section shall be construed as depriving an insurer of its defenses that the policy was not in force at the time in question, that the operator was not an "insured" under policy provisions, or that the policy had been lawfully cancelled at the time of the accident giving rise to the cause of action.

Provided further that the provisions of this subdivision shall not apply when the assigned risk insured has delivered a copy of the summons, complaint or other pleadings served on him to his insurance carrier within the time provided by law for filing answer, demurrer or other pleadings.

- (2) The satisfaction by the insured of a judgment for such injury or damage shall not be a condition precedent to the right or duty of the insurance carrier to make payment on account of such injury or damage;
- (3) The insurance carrier shall have the right to settle any claim covered by the policy, and if such settlement is made in good faith, the amount thereof shall be deductible from the limits of liability specified in subdivision (2) of subsection (b) of this section;
- (4) The policy, the written application therefor, if any, and any rider or endorsement which does not conflict with the provisions of the article shall constitute the entire contract between the parties.

(1967, c. 277, s. 4; c. 854; c. 1159, s. 1; c. 1162, s. 1; c. 1186, s. 1; c. 1246, s. 1; 1971, c. 1205, s. 2; 1973, c. 745, s. 4.)

Editor's Note.—

Chapter 277, Session Laws 1967, substituted "Ten thousand dollars (\$10,000.00)" for "Five thousand dollars (\$5,000.00)" and "twenty thousand dollars (\$20,000.00)" for "ten thousand dollars (\$10,000.00)" in subdivision (2) of subsection (b) and deleted, at the end of the first sentence of subdivision (3) of subsection (b) a proviso relating to increased limits coverage. Section 10, c. 277, provides: "This act shall become effective Jan. 1, 1968, and where the manner of giving proof of financial responsibility is by automobile liability policy, the same shall apply only to policies written or renewed on or after said effective date."

Chapter 854, Session Laws 1967, effective Jan. 1, 1968, rewrote subsection (e)

Chapter 1159, Session Laws 1967, rewrote the proviso that had been deleted by c. 277. Section 3 of c. 1159 provides: "This act shall apply only to new and renewal automobile liability insurance policies issued on and after January 1, 1968." The proviso as rewritten by c. 1159 appears in subdivision (3) of subsection (b) as set out above.

Chapter 1162, Session Laws 1967 inserted "or any other persons in lawful possession" in subdivision (2) of subsection (b). Section 2, c. 1162, provides: "It shall be a defense to any action that the operator of a motor vehicle was not in lawful possession on the occasion complained of." Section 4, c. 1162, provides: "This act shall be in full force and effect from and after its ratification, but shall not affect any claims or causes of action arising before ratification." The act was ratified July 6, 1967.

Chapter 1186, Session Laws 1967, added the second, third, fourth, fifth and sixth paragraphs (including paragraphs a and b) in subdivision (3) of subsection (b). Section 3, c. 1186, provides that the act shall become effective from and after ratification, shall not apply to existing policies of insurance, but shall apply to renewals and to new policies issued after its effective date. The act was ratified July 6, 1967.

Chapter 1246, Session Laws 1967, effective July 1, 1967, rewrote subdivision (1) of subsection (f). Section 3, c. 1246, provides that the act shall become effective on and after July 1, 1967, and shall apply to any action or actions initiated thereafter.

The 1971 amendment, effective Jan. 1, 1972, in subsection (b)(3), deleted two

former paragraphs, concerning the non-renewal or cancellation of an automobile liability insurance policy after a claim has been made, following subparagraph b.

The 1973 amendment substituted "fifteen thousand dollars (\$15,000)" for "Ten thousand dollars (\$10,000.00)" and "thirty thousand dollars (\$30,000)" for "twenty thousand dollars (\$20,000.00)" in subdivision (2) of subsection (b).

Session Laws 1973, c. 745, s. 8, provides: "This act shall become effective Jan. 1, 1974, and where the manner of giving proof of financial responsibility is by automobile liability policy, the same shall apply only to policies written or renewed on or after the effective date of this act."

As the rest of the section was not changed by the amendments, only subsections (b), (e) and (f) are set out.

By virtue of Session Laws 1943, c. 170, "Commissioner of Insurance" has been substituted for "Insurance Commissioner" in subsection (b) (3).

For a note on the statutory definition of an "uninsured motor vehicle" when the liability insurer is insolvent or denies coverage, see 45 N.C.L. Rev. 551 (1967).

For note entitled "Liability of Insurers under the Omnibus Clause to Protect Emergency Drivers—The North Carolina Situation," see 48 N.C.L. Rev. 984 (1970).

For note on liability of insurer beyond policy limits, see 47 N.C.L. Rev. 453 (1969).

The manifest purpose of this article, etc.—

In accord with 1st paragraph in original. See *Jones v. State Farm Mut. Auto. Ins. Co.*, 270 N.C. 454, 155 S.E.2d 118 (1967).

In accord with 2nd paragraph in original. See *Jones v. State Farm Mut. Auto. Ins. Co.*, 270 N.C. 454, 155 S.E.2d 118 (1967); *Strickland v. Hughes*, 273 N.C. 481, 160 S.E.2d 313 (1968).

The primary purpose of this Article is to compensate the innocent victims of financially irresponsible motorists. *Nationwide Mut. Ins. Co. v. Aetna Life & Cas. Co.*, 283 N.C. 87, 194 S.E.2d 834 (1973).

Obligations Imposed by Article.—

The Motor Vehicle Financial Responsibility Act obliges a motorist either to post security or to carry liability insurance, not accident insurance to indemnify all persons who might be injured by the insured's car. When the Legislature passed the act it was not in the legislative contemplation that each driver in a two-car collision

would recover from the other's insurance carrier. *Moore v. Young*, 263 N.C. 483, 485, 139 S.E.2d 704, 706 (1965). *McKinney v. Morrow*, 18 N.C. App. 282, 196 S.E.2d 585 (1973).

Victim's Right to Recover Is Statutory.—Under the Motor Vehicle and Financial Responsibility Act the victim's right to recover against the insurer is not derived through the insured, as in cases of voluntary insurance; his right to recover is statutory. *Nationwide Mut. Ins. Co. v. Aetna Life & Cas. Co.*, 283 N.C. 87, 194 S.E.2d 834 (1973).

And becomes absolute upon occurrence of an injury covered by the policy. *Nationwide Mut. Ins. Co. v. Aetna Life & Cas. Co.*, 283 N.C. 87, 194 S.E.2d 834 (1973).

A compulsory motor vehicle insurance act is a remedial statute and will be liberally construed so that the beneficial purpose intended by its enactment by the General Assembly may be accomplished. *Moore v. Hartford Fire Ins. Co.*, 270 N.C. 532, 155 S.E.2d 128 (1967).

This section was enacted as remedial legislation and is to be liberally construed to effectuate its purpose, that being to provide, within fixed limits, some financial recompense to innocent persons who receive bodily injury or property damage, and to the dependents of those who lose their lives through the wrongful conduct of an uninsured motorist who cannot be made to respond in damages. *Hendricks v. United States Fidelity & Guar. Co.*, 5 N.C. App. 181, 167 S.E.2d 876 (1969).

This statute was enacted as remedial legislation and is to be liberally construed to effectuate its purpose. *Lichtenberger v. American Motorists Ins. Co.*, 7 N.C. App. 269, 172 S.E.2d 284 (1970).

The provisions of this section are written into every policy as a matter of law. In case a provision of the policy conflicts with a provision of the statute favorable to the insured, the provision of the statute controls. As a consequence, an insurance company cannot avoid liability on a policy of insurance issued pursuant to a statute by omitting from the policy provisions favorable to the insured, which are required by the statute. *Lichtenberger v. American Motorists Ins. Co.*, 7 N.C. App. 269, 172 S.E.2d 284 (1970).

The provisions of a statute applicable to insurance policies are a part of the policy to the same extent as if therein written, and when the terms of the policy conflict with statutory provisions favorable to the insured, the provisions of the statute will prevail. *Nationwide Mut. Ins. Co. v. Aetna*

Life & Cas. Co., 283 N.C. 87, 194 S.E.2d 834 (1973).

Policy to Include Certain Provisions.—A close reading of subsections (b) (3) a and (b) (3) b indicates that they provide for the inclusion of certain provisions in the policy, namely, that the insurer shall be bound by a final judgment against the uninsured motorist, under certain conditions, and that suit may be against the insurer directly in case of injury from collision with an unidentifiable motorist. *Hendricks v. United States Fid. & Guar. Co.*, 5 N.C. App. 181, 167 S.E.2d 876 (1969).

Distinction between Owner's Policy and Operator's Policy.—The distinction between an owner's policy of liability insurance and an operator's policy of liability insurance, the required provisions of each being set forth in this section, is pointed out in *Howell v. Travelers Indem. Co.*, 237 N.C. 227, 74 S.E.2d 610 (1953), and *Lofquist v. Allstate Ins. Co.*, 263 N.C. 615, 140 S.E.2d 12 (1965). *Clemmons v. Nationwide Mut. Ins. Co.*, 267 N.C. 495, 148 S.E.2d 640 (1966).

Policies Are Mandatory.—

In North Carolina today all insurance policies covering loss from liability arising out of the ownership, maintenance, or use of a motor vehicle are, to the extent required by this section, mandatory. *Moore v. Hartford Fire Ins. Co.*, 270 N.C. 532, 155 S.E.2d 128 (1967).

Except as to Excess, etc.—

Coverage furnished an insured which is in addition to the mandatory statutory requirements, and is therefore voluntary, is not subject to the requirements of this section. *Nationwide Mut. Ins. Co. v. Aetna Life & Cas. Co.*, 283 N.C. 87, 194 S.E.2d 834 (1973).

As Is Coverage of Owner's, etc.—

In accord with 1st paragraph in original. See *Clemmons v. Nationwide Mut. Ins. Co.*, 267 N.C. 495, 148 S.E.2d 640 (1966).

There is no insurance separate and distinct from the ownership of the car because an owner's motor vehicle liability policy is a contract between the insurance company and the owner. *Younts v. State Farm Mut. Auto. Ins. Co.*, 281 N.C. 582, 189 S.E.2d 137 (1972).

In Absence of Statutory Provision, etc.—

In accord with original. See *Younts v. State Farm Mut. Auto. Ins. Co.*, 281 N.C. 582, 189 S.E.2d 137 (1972).

Liability Must Accrue under Provisions in Insurance Contract.—Defendant is liable to the plaintiff only if its liability accrues under the provisions set out in the contract of insurance between defendant and its in-

sured. *Younts v. State Farm Mut. Auto. Ins. Co.*, 281 N.C. 582, 189 S.E.2d 137 (1972).

Insurable Interest Is Essential to Validity of Contract.—It is a fixed rule of insurance law that an insurable interest on the part of the person taking out the policy is essential to the validity and enforceability of the insurance contract. *Rea v. Hardware Mut. Cas. Co.*, 15 N.C. App. 620, 190 S.E.2d 708 (1972).

Who Has Insurable Interest.—A person has an insurable interest in the subject matter insured where he has such a relation or connection with, or concern in, such subject matter that he will derive pecuniary benefit or advantage from its preservation, or will suffer pecuniary loss or damage from its destruction, termination, or injury by the happening of the event insured against. *Rea v. Hardware Mut. Cas. Co.*, 15 N.C. App. 620, 190 S.E.2d 708 (1972).

Company Held to Have Insurable Interest in Automobile.—Where the general superintendent of the company used an automobile in the business of the insured as its employee and the decedent, an officer, director and owner of 98% of the stock of the insured, used the automobile in the business of the insured, applying the general principles of law to the facts, the company had an insurable interest in the automobile. *Rea v. Hardware Mut. Cas. Co.*, 15 N.C. App. 620, 190 S.E.2d 708 (1972).

Policy Violations.—

In accord with 2nd paragraph in original. See *Jones v. State Farm Mut. Auto. Ins. Co.*, 270 N.C. 454, 155 S.E.2d 118 (1967).

Subsection (f) provides that except with respect to liability insurance written under the assigned risk plan, the liability of the insurance carrier shall to the extent of coverage required by the article become absolute when the injury or damage covered by motor vehicle liability occurs, and no violation of said policy shall defeat or void said policy. *Beasley v. Hartford Accident & Indem. Co.*, 11 N.C. App. 34, 180 S.E.2d 381 (1971).

Liability under Assigned Risk Policy Becomes Absolute When Injury or Damage Occurs.—As provided in subsection (f) (1) of this section liability becomes absolute when a plaintiff's injury and damage occurs notwithstanding subsequent violations by the insured under an assigned risk policy of his obligations to the insurance company under the policy provisions. *Jones v. State Farm Mut. Auto. Ins. Co.*, 270 N.C. 454, 155 S.E.2d 118 (1967), de-

cided under this section as it stood before the 1967 amendments thereto.

And Insurer Is Deprived of Defenses Otherwise Available under Standard Policy Provisions.—Subsection (f) (1) of this section, as interpreted and applied by the Supreme Court, deprives the insurer under an assigned risk policy of the defenses otherwise available under its standard policy provisions. *Jones v. State Farm Mut. Auto. Ins. Co.*, 270 N.C. 454, 155 S.E.2d 118 (1967), decided under this section as it stood before the 1967 amendments thereto.

And This Provision Does Not Violate State or Federal Constitution.—Subsection (f) (1) of this section, when applied to an assigned risk policy issued in compliance with the plan set forth in § 20-279.34 and regulations pursuant thereto, does not deprive an insurance company of its property without due process of law and otherwise than by the law of the land in contravention of the Fourteenth Amendment to the Constitution of the United States and N.C. Const., Art. I, §§ 1 and 19. *Jones v. State Farm Mut. Auto. Ins. Co.*, 270 N.C. 454, 155 S.E.2d 118 (1967), decided under this section as it stood before the 1967 amendments thereto.

Assigned Risk Policy Does Not Cover Replacement Vehicle Owned by Person Other Than Named Insured.—Nothing in the statute requires any carrier to extend the coverage of an assigned risk policy to a replacement vehicle owned by and registered to a person other than the original named insured owner of the vehicle originally described and insured. *Beasley v. Hartford Accident & Indem. Co.*, 11 N.C. App. 34, 180 S.E.2d 381 (1971).

Plaintiff is not required to give the insurer the registered notice required by subsection (f)(1) because the insured was not an "assigned risk insured" under the statute. To hold otherwise would require every plaintiff to send copy of summons and complaint by registered mail to the carrier of the liability insurance of the owner of the vehicle involved in every accident resulting in litigation to avoid the pitfall of the possibility of the vehicle involved being a replacement vehicle registered in a different name than the applicant for assignment of risk. This was obviously not intended by the General Assembly. *Beasley v. Hartford Accident & Indem. Co.*, 11 N.C. App. 34, 180 S.E.2d 381 (1971).

Exclusionary Provisions.—

A provision in a liability policy excluding

coverage if the accident in question is covered by other insurance does not contravene the North Carolina Financial Responsibility Law. *Allstate Ins. Co. v. Shelby Mut. Ins. Co.*, 269 N.C. 341, 152 S.E.2d 436 (1967), commented on in 46 N.C.L. Rev. 433 (1968); *Government Employees Ins. Co. v. Lumbermens Mut. Cas. Co.*, 269 N.C. 354, 152 S.E.2d 445 (1967).

The public policy embodied by the Financial Responsibility Act controls over an exclusionary provision in a policy issued pursuant to the Act. *Allstate Ins. Co. v. Webb*, 10 N.C. App. 672, 179 S.E.2d 803 (1971); *Nationwide Mut. Ins. Co. v. Aetna Life & Cas. Co.*, 283 N.C. 87, 194 S.E.2d 834 (1973).

Provision of an owner's automobile liability policy excluding from coverage an owned automobile while used "in the automobile business" by any person other than the named insured and certain other persons is repugnant to the mandatory requirements of the Motor Vehicle and Financial Responsibility Act and is, therefore, invalid. *Nationwide Mut. Ins. Co. v. Aetna Life & Cas. Co.*, 283 N.C. 87, 194 S.E.2d 834 (1973).

Compliance with Voluntary Policy Provisions Is a Condition Precedent to Recovery.—Where coverage in a policy is in addition to the coverage required by the Motor Vehicle Safety and Financial Responsibility Act, provisions requiring that an insured give notice of an accident, and requiring the insured's cooperation in defense of any action against him are binding and enforceable. Moreover, compliance with such policy provisions is a condition precedent to recovery, with the burden of proof on the insured to show compliance, where the policy provides, "No action shall lie against the Company unless, as a condition precedent thereto, the Insured shall have fully complied with all the terms of this policy," or words of like import. *Clemmons v. Nationwide Mut. Ins. Co.*, 267 N.C. 495, 148 S.E.2d 640 (1966).

Hence, Failure to Forward Suit Papers Relieves Insurer of Liability. — While no decision of the Supreme Court involving a policy provision, "If claim is made or suit is brought against the Insured, he shall immediately forward to the Company every demand, notice, summons or other process received by him or his representative," has come to the court's attention, decisions in other jurisdictions hold this is an unambiguous, reasonable and valid stipulation, and that, unless the insured or his judgment creditor can show compliance by the insured with this policy requirement,

the insurer is relieved of liability. *Clemmons v. Nationwide Mut. Ins. Co.*, 267 N.C. 495, 148 S.E.2d 640 (1966).

Unless Insurer Loses Right to Defeat Recovery by Waiver or Estoppel.—An automobile liability insurer may, by waiver or estoppel, lose its right to defeat a recovery under a liability policy because of the insured's failure to comply with the policy provision as to the forwarding of suit papers. *Clemmons v. Nationwide Mut. Ins. Co.*, 267 N.C. 495, 148 S.E.2d 640 (1966).

The essential elements of a waiver are: (1) The existence, at the time of the alleged waiver, of a right, advantage or benefit; (2) the knowledge, actual or constructive, of the existence thereof; and (3) an intention to relinquish such right, advantage or benefit. *Clemmons v. Nationwide Mut. Ins. Co.*, 267 N.C. 495, 148 S.E.2d 640 (1966).

Rights of Injured Party in Action Based on Voluntary Policy.—With reference to an owner's policy of insurance, unless the action be based on policy provisions required by this section, an injured party who obtains a judgment against the insured has no greater rights against the insurer than those of the insured. *Clemmons v. Nationwide Mut. Ins. Co.*, 267 N.C. 495, 148 S.E.2d 640 (1966).

Construction of Provision Requiring "Omnibus Clause".—

The omnibus clause has been interpreted by the Supreme Court of North Carolina according to the "moderate" rule rather than the "hell and high water" rule, as recommended in 41 N.C.L. Rev. 232 (1963) et seq. *Bailey v. General Ins. Co. of America, Inc.*, 265 N.C. 675, 144 S.E.2d 898 (1965).

An omnibus clause should be construed liberally in favor of the insured and in accordance with the policy of the clause to protect the public. *Fidelity & Cas. Co. v. North Carolina Farm Bureau Mut. Ins. Co.*, 16 N.C. App. 194, 192 S.E.2d 113 (1972).

Ambiguity in a policy which requires interpretation as to whether the policy provisions impose liability requires construction in favor of coverage and against the company. *Fidelity & Cas. Co. v. North Carolina Farm Bureau Mut. Ins. Co.*, 16 N.C. App. 194, 192 S.E.2d 113 (1972).

In construing an omnibus clause, an injury cannot be said to arise out of the use of an automobile if it was directly caused by some independent act or intervening cause wholly disassociated from, independent of, and remote from the use of the automobile. *Fidelity & Cas. Co. v. North*

Carolina Farm Bureau Mut. Ins. Co., 16 N.C. App. 194, 192 S.E.2d 113 (1972).

Loading and Unloading Vehicle.—When a policy is silent on the point, loading and unloading is using an insured motor vehicle within the terms of the omnibus insurance clause which insures against loss arising out of the ownership, maintenance and use of a motor vehicle. *Fidelity & Cas. Co. v. North Carolina Farm Bureau Mut. Ins. Co.*, 16 N.C. App. 194, 192 S.E.2d 113 (1972).

Liberal Construction in Interpreting Scope of Permission.—The 1967 amendment, adding the words “any other person in lawful possession” signifies that the legislature favors adoption of a liberal rule of construction in applying and interpreting the scope of permission under the omnibus clause. *Jernigan v. State Farm Mut. Auto Ins. Co.*, 16 N.C. App. 46, 190 S.E.2d 866 (1972).

“Permission” Connotes Power to Grant or Withhold It.—Permission to drive a car, within the meaning of the omnibus coverage clause, connotes the power to grant or withhold it. *Rea v. Hardware Mut. Cas. Co.*, 15 N.C. App. 620, 190 S.E.2d 708 (1972).

In order for one’s use and operation of an automobile to be within the meaning of the omnibus coverage clause requiring the permission of the named insured, the latter must, as a general rule, own the insured vehicle or have such an interest in it that he is entitled to the possession and control of the vehicle and in a position to give permission. *Rea v. Hardware Mut. Cas. Co.*, 15 N.C. App. 620, 190 S.E.2d 708 (1972).

Permission is an essential element of “lawful possession” as used in subsection (b)(2). *Jernigan v. State Farm Mut. Auto. Ins. Co.*, 16 N.C. App. 46, 190 S.E.2d 866 (1972).

And Is Essential to Extend Coverage to Second Permittee.—Regardless of the liberality of the rule of construction applied, permission of the named insured or of the original permittee is essential to extend coverage to a second permittee. *Jernigan v. State Farm Mut. Auto. Ins. Co.*, 16 N.C. App. 46, 190 S.E.2d 866 (1972).

Permission May Be Expressed or Inferred.—The owner’s permission for the use of the insured vehicle may be expressed or, under certain circumstances, it may be inferred. *Bailey v. General Ins. Co. of America, Inc.*, 265 N.C. 675, 144 S.E.2d 898 (1965).

Permission may be either express or implied. *Nationwide Mut. Ins. Co. v. Fire-*

man’s Fund Ins. Co., 279 N.C. 240, 182 S.E.2d 571 (1971).

Express Permission.—

In accord with original. See *Bailey v. General Ins. Co. of America, Inc.*, 265 N.C. 675, 144 S.E.2d 898 (1965).

Implied permission, etc.—

In accord with original. See *Bailey v. General Ins. Co. of America, Inc.*, 265 N.C. 675, 144 S.E.2d 898 (1965).

The relationship between the owner and the user, such as kinship, social ties, and the purpose of the use, all have bearing on the critical question of the owner’s implied permission for the actual use. *Bailey v. General Ins. Co. of America, Inc.*, 265 N.C. 675, 144 S.E.2d 898 (1965).

A permission to use an automobile may be implied, and strong social relationships and ties between the owner and the bailee are relevant upon the question of the extent of such implied permission. *Wilson v. Hartford Accident & Indem. Co.*, 272 N.C. 183, 158 S.E.2d 1 (1967).

Implied permission may be a product of the present or past conduct of the insured. It is not confined alone to affirmative action, and is usually shown by usage and practice of the parties over a sufficient period of time prior to the day on which the insured car was being used. *Nationwide Mut. Ins. Co. v. Fireman’s Fund Ins. Co.*, 279 N.C. 240, 182 S.E.2d 571 (1971).

Implied permission may be established by a showing of a course of conduct or relationship between the parties, including lack of objection to the use by the permittee which signifies acquiescence or consent of the injured. *Nationwide Mut. Ins. Co. v. Fireman’s Fund Ins. Co.*, 279 N.C. 240, 182 S.E.2d 571 (1971).

Who May Grant Permission.—

Ordinarily, one permittee within the coverage of a liability policy does not have authority to select another permittee without specific authority from the named insured. *Bailey v. General Ins. Co. of America, Inc.*, 265 N.C. 675, 144 S.E.2d 898 (1965).

Bailee’s Use Must Be within Scope of Permission.—Under the omnibus clause, the coverage of a policy extends to the liability of a bailee of the automobile for an accident only where the bailee’s use of the vehicle at the time of the accident is within the scope of the permission granted to him, the burden being upon the plaintiff to show that such use was within the scope of the permission. *Wilson v. Hartford Accident & Indem. Co.*, 272 N.C. 183, 158 S.E.2d 1 (1967).

When the bailee deviates in a material

respect from the grant of permission, his use of the vehicle, while such deviation continues, is not a permitted use within the meaning of the omnibus clause of a policy. *Wilson v. Hartford Accident & Indem. Co.*, 272 N.C. 183, 158 S.E.2d 1 (1967).

Express Limitations Not Overcome by Proof of Friendly Relations. — Proof of friendly relations, which might otherwise imply permission, cannot overcome the effect of a limitation as to time, purpose or locality expressly imposed by the owner upon the bailee at the time of the delivery of the automobile to the bailee by the owner on the occasion in question. *Wilson v. Hartford Accident & Indem. Co.*, 272 N.C. 183, 158 S.E.2d 1 (1967).

Burden on Plaintiff to Prove Defendant Was Insured.—In order for the plaintiff to recover on this policy, the burden is on plaintiff to allege and prove that the defendant was insured under this policy on the date of the accident in which plaintiff was injured. *Younts v. State Farm Mut. Auto. Ins. Co.*, 281 N.C. 582, 189 S.E.2d 137 (1972).

Provision Requiring Joinder as Party Defendant of Person Allegedly Responsible for Damage to Insured Held Void.—The provision of an automobile liability policy which required the insured, in an action against the insurer, to join as a party defendant the person or organization allegedly responsible for the damage to the insured, was held void as a violation of § 58-31 where the party defendant was a nonresident uninsured motorist and not amenable to the jurisdiction of this State. *Dildy v. Southeastern Fire Ins. Co.*, 13 N.C. App. 66, 185 S.E.2d 272 (1971).

Purpose of Uninsured Motorist Provisions.—Subdivision (3) of subsection (b) of this section was enacted so as to include protection against uninsured motorists. *Moore v. Hartford Fire Ins. Co.*, 270 N.C. 532, 155 S.E.2d 128 (1967); *Wright v. Fidelity & Cas. Co.*, 270 N.C. 577, 155 S.E.2d 100 (1967).

The purpose of the uninsured motorist statute was to provide, within fixed limits, some financial recompense to innocent persons who receive bodily injury or property damage, and to the dependents of those who lose their lives through the wrongful conduct of an uninsured motorist who cannot be made to respond in damages. *Moore v. Hartford Fire Ins. Co.*, 270 N.C. 532, 155 S.E.2d 128 (1967); *Lichtenberger v. American Motorists Ins. Co.*, 7 N.C. App. 269, 172 S.E.2d 284 (1970).

Uninsured motorist's coverage is in-

tended, within fixed limits, to provide financial recompense to innocent persons who receive injuries and the dependents of those who are killed, through the wrongful conduct of motorists who, because they are uninsured and not financially responsible, cannot be made to respond in damages. *Wright v. Fidelity & Cas. Co.*, 270 N.C. 577, 155 S.E.2d 100 (1967).

Uninsured motorists coverage is designed to close the gaps inherent in motor vehicle financial responsibility and compulsory insurance legislation. *Wright v. Fidelity & Cas. Co.*, 270 N.C. 577, 155 S.E.2d 100 (1967).

The uninsured motorist statute was enacted by the General Assembly as a result of public concern over the increasingly important problem arising from property damage, personal injury, and death inflicted by motorists who are uninsured and financially irresponsible. *Moore v. Hartford Fire Ins. Co.*, 270 N.C. 532, 155 S.E.2d 128 (1967); *Lichtenberger v. American Motorists Ins. Co.*, 7 N.C. App. 269, 172 S.E.2d 284 (1970).

Subdivision (3) of subsection (b) of this section provides for a limited type of compulsory automobile liability coverage against uninsured motorists. *Moore v. Hartford Fire Ins. Co.*, 270 N.C. 532, 155 S.E.2d 128 (1967).

Construction of Uninsured Motorists Coverage. — In determining whether the injury arose out of the "ownership, maintenance, or use" of the motor vehicle, the same rules of construction apply in construing uninsured motorists coverage as apply in construing a standard liability insurance policy. *Williams v. Nationwide Mut. Ins. Co.*, 269 N.C. 235, 152 S.E.2d 102 (1967).

The term "uninsured vehicle," when used in an uninsured motorists endorsement, must be interpreted in the light of the fact that such endorsement is designed to protect the insured, and any operator of the insured's car with the insured's consent, against injury caused by the negligence of uninsured or unknown motorists. *Buck v. United States Fid. & Guar. Co.*, 265 N.C. 285, 144 S.E.2d 34 (1965).

Subsection (b)(3) of this section is to be considered in conjunction with the principle that the provisions of this section enter into and form a part of the policy. *Lichtenberger v. American Motorists Ins. Co.*, 7 N.C. App. 269, 172 S.E.2d 284 (1970).

In the absence of rejection, this section writes uninsured motorists coverage into every policy of automobile liability insur-

ance although the policy may not indicate the coverage on its face. *Lichtenberger v. American Motorists Ins. Co.*, 7 N.C. App. 269, 172 S.E.2d 284 (1970).

And Coverage Is Provided Although Not Requested by Insured. — A policy issued under subsection (b)(3) of this section is substantially different from a "voluntary" policy. Where the provisions of the statute enter into and form a part of the policy, the coverage is provided although the insured has never requested that coverage. *Lichtenberger v. American Motorists Ins. Co.*, 7 N.C. App. 269, 172 S.E.2d 284 (1970).

But Coverage Does Not Apply If Named Insured Rejects It. — Compulsory uninsured motorist coverage as required by subsection (b)(3) of this section does not apply where the insured named in the policy rejects the coverage. *Lichtenberger v. American Motorists Ins. Co.*, 7 N.C. App. 269, 172 S.E.2d 284 (1970).

Burden of Proving Rejection of Coverage.—The delivery or issuance of a motor vehicle liability policy carries with it as a matter of law the requisite uninsured motorist liability, unless it is shown that the statutory coverage is rendered inapplicable by a rejection. As is true with cancellation or termination, the burden of proving the defense of rejection shifts to the defendant. *Lichtenberger v. American Motorists Ins. Co.*, 7 N.C. App. 269, 172 S.E.2d 284 (1970).

Acceptance of Policy without Uninsured Motorist Provisions Does Not Operate as Rejection. — If the insurer cannot avoid liability on a policy of insurance issued pursuant to this statute by omitting from the policy provisions favorable to the insured, then neither can the insured's acceptance of the policy alone operate as a rejection of the coverage written into it by statute. *Lichtenberger v. American Motorists Ins. Co.*, 7 N.C. App. 269, 172 S.E.2d 284 (1970).

The terms "ownership, maintenance and use" should not be treated as mere surplusage. They were placed in the policy in order to cover situations distinct and separate from any other term. *Williams v. Nationwide Mut. Ins. Co.*, 269 N.C. 235, 152 S.E.2d 102 (1967); *Fidelity & Cas. Co. v. North Carolina Farm Bureau Mut. Ins. Co.*, 16 N.C. App. 194, 192 S.E.2d 113 (1972).

Hence, in an action on the uninsured motorists clause of an automobile insurance policy, where the allegations were to the effect that plaintiff, while underneath the uninsured vehicle, raised on blocks,

making repairs, was injured when the owner removed a front wheel and the car fell or rolled upon plaintiff, it was held that repairs are a necessary incident to maintenance, and the allegations brought plaintiff within the coverage of the policy. *Williams v. Nationwide Mut. Ins. Co.*, 269 N.C. 235, 152 S.E.2d 102 (1967).

"Arising Out of"—Where a policy provision speaks of liability "arising out of the ownership, maintenance or use" of a motor vehicle, the words "arising out of" are not words of narrow and specific limitation but are broad, general, and comprehensive terms affecting broad coverage. They are intended to, and do, afford protection to the insured against liability imposed upon him for all damages caused by acts done in connection with or arising out of such use. *Fidelity & Cas. Co. v. North Carolina Farm Bureau Mut. Ins. Co.*, 16 N.C. App. 194, 192 S.E.2d 113 (1972).

The words "arising out of" are words of much broader significance than "caused by." They are ordinarily understood to mean "originating from," "having its origin in," "growing out of," or "flowing from," or in short, "incident to," or "having connection with" the use of the automobile. *Fidelity & Cas. Co. v. North Carolina Farm Bureau Mut. Ins. Co.*, 16 N.C. App. 194, 192 S.E.2d 113 (1972).

The "use" of a vehicle includes its loading and unloading, and all persons actively engaged in the loading and unloading with the permission of the named insured are additional insureds under policy omnibus clauses. *Fidelity & Cas. Co. v. North Carolina Farm Bureau Mut. Ins. Co.*, 16 N.C. App. 194, 192 S.E.2d 113 (1972).

Vehicle "Uninsured" Unless Policy Covers Liability of Person Using It.—An automobile on which an automobile liability insurance policy has been issued is uninsured within the meaning of an uninsured motorists endorsement, unless such policy covers the liability of the person using it and inflicting injury on the occasion of the collision or mishap. *Buck v. United States Fid. & Guar. Co.*, 265 N.C. 285, 144 S.E.2d 34 (1965).

Vehicle Insured in Another State.—In an action on the uninsured motorist clause in a collision policy, evidence that the vehicle causing the loss was insured in another state, where it was registered and licensed, by a company authorized to do business in that state but not in North Carolina, was insufficient to carry the burden of proving the allegation that the vehicle was an uninsured automobile. *Rice*

v. Aetna Cas. & Sur. Co., 267 N.C. 421, 148 S.E.2d 223 (1966).

Insolvency of Insurer of Vehicle Causing Loss.—In an action on the uninsured vehicle clause in a collision policy, evidence that the vehicle causing the loss was insured in another state, where it was registered and licensed, and that subsequent to the collision the insurer was placed in receivership because of its insolvency, and that a claim was filed with the insurer's receiver was insufficient to carry the burden of proving that the vehicle causing the injury was an uninsured motor vehicle. *Rice v. Aetna Cas. & Sur. Co.*, 267 N.C. 421, 148 S.E.2d 223 (1966), decided under this section as it stood before the 1965 and 1967 amendments thereto.

What Must Be Shown under Uninsured Motorists Endorsement.—The insured, in order to be entitled to the benefits of the uninsured motorists endorsement, must show (1) he is legally entitled to recover damages, (2) from the owner or operator of an uninsured automobile, (3) because of bodily injury, (4) caused by accident, and (5) arising out of the ownership, maintenance, or use of the uninsured automobile. *Williams v. Nationwide Mut. Ins. Co.*, 269 N.C. 235, 152 S.E.2d 102 (1967).

Subdivision (3) of subsection (b) of this section is designed to protect the insured as to his actual loss within the statutory limit of \$5,000 for one person but it was not intended by the General Assembly that an insured shall receive more from such coverage than his actual loss, although he is the beneficiary under multiple policies issued pursuant to the statute. *Moore v. Hartford Fire Ins. Co.*, 270 N.C. 532, 155 S.E.2d 128 (1967).

It appears from subdivision (3) of subsection (b) of this section that the General Assembly clearly intended that automobile liability insurance policies delivered or issued for delivery in this State and covering motor vehicles registered or principally garaged in this State will provide protection, within certain limits, to insureds who are legally entitled to recover damages for bodily injury from owners or operators of uninsured motor vehicles. The section does not restrict the coverage to injury or damage occurring in this State. *Dildy v. Southeastern Fire Ins. Co.*, 13 N.C. App. 66, 185 S.E.2d 272 (1971).

"Other Insurance" Clauses Contrary to Statutory Amount of Coverage Not Permitted.—Subdivision (3) of subsection (b) of this section does not permit "other insurance" clauses in the policy which are contrary to the statutory limited amount of

coverage. *Moore v. Hartford Fire Ins. Co.*, 270 N.C. 532, 155 S.E.2d 128 (1967).

Provision That Uninsured Motorist Clause Shall Constitute Only Excess Coverage Violates Statute.—A policy provision that its uninsured motorist clause should constitute only excess insurance over any other similar insurance available to the injured person, is contrary to the statutory provisions of subdivision (3) of subsection (b) of this section. *Moore v. Hartford Fire Ins. Co.*, 270 N.C. 532, 155 S.E.2d 128 (1967).

Insured Is Not Limited to One \$5000 Recovery Where He Is Beneficiary of More Than One Policy.—This section does not limit an insured only to one \$5000 recovery under uninsured motorist coverage where his loss for bodily injury or death is greater than \$5000 and he is the beneficiary of more than one policy issued under subdivision (3) of subsection (b). *Moore v. Hartford Fire Ins. Co.*, 270 N.C. 532, 155 S.E.2d 128 (1967).

Settlement of Claims, etc.—

The duty of the insurer in the exercise of its contract right to settle a pending liability claim or suit is to act diligently and in good faith in effecting settlements within policy limits and, if necessary to accomplish that purpose, to pay the full amount of the policy. *Coca-Cola Bottling Co. v. Maryland Cas. Co.*, 325 F. Supp. 204 (W.D.N.C. 1971).

Every claim has some settlement value, but the existence of issues for the jury rather than the certainty of nonsuit does not demonstrate bad faith or even lack of due care if the insurer fails to settle. *Coca-Cola Bottling Co. v. Maryland Cas. Co.*, 325 F. Supp. 204 (W.D.N.C. 1971).

Although the insurer may be unreasonable in not settling as seen in retrospect, it is liable for recovery beyond its policy limits only if it acts with wrongful or fraudulent purpose or with lack of good faith; an honest mistake of judgment is not actionable. *Coca-Cola Bottling Co. v. Maryland Cas. Co.*, 325 F. Supp. 204 (W.D.N.C. 1971).

Insurance counsel do not have to be omniscient, and their opinions whether they support or cast doubt on the action of the insurer in not settling do not determine the issue of liability above policy limits. *Coca-Cola Bottling Co. v. Maryland Cas. Co.*, 325 F. Supp. 204 (W.D.N.C. 1971).

Provision for Compulsory Arbitration Conflicts with Statute.—A provision in an insurance policy, in effect, ousting the jurisdiction of the court to judicially deter-

mine liability and damages and providing for compulsory arbitration between the insured and the company, if they do not agree, conflicts with the beneficent purposes of our uninsured motorist statute favorable to the insured, and the provision of the statute controls. *Wright v. Fidelity & Cas. Co.*, 270 N.C. 577, 155 S.E.2d 100 (1967).

Injuries Intentionally Inflicted, etc.—

The provisions of this section extend coverage to include liability for injuries intentionally inflicted by the use of an automobile. *Allstate Ins. Co. v. Webb*, 10 N.C. App. 672, 179 S.E.2d 803 (1971).

Where, but for the provisions of this section, the insurer would not have been liable under its policy for injury intentionally inflicted by the use of an automobile, it could recover from the insured the amount paid to a claimant for such injury, and also the amount of its expenses. *Allstate Ins. Co. v. Webb*, 10 N.C. App. 672, 179 S.E.2d 803 (1971).

Negligently Self-Inflicted Injury Not Compensable. — This section was not intended to compensate an insured for injury and damage negligently inflicted upon himself. *Strickland v. Hughes*, 273 N.C. 481, 160 S.E.2d 313 (1968).

Institution of Action against Hit-and-Run Driver May Not Be Made Condition Precedent to Recovery under Policy.—In many cases it is impossible to determine the identity of a hit-and-run driver. To

hold that the institution of an action by the insured against a hit-and-run driver, and to recover damages from him for his tort, is a condition precedent to the insurer's liability under uninsured motorist coverage, would in most such cases defeat insurer's liability against uninsured motorist coverage. *Wright v. Fidelity & Cas. Co.*, 270 N.C. 577, 155 S.E.2d 100 (1967).

No Conflict between Statute and Policy Requirement. — There is no conflict between the term "hit-and-run motor vehicle," as used in the statute relating to uninsured or hit-and-run motor vehicle coverage, and a policy requirement of "physical contact of such automobile" with the insured or with an automobile occupied by the insured. *Hendricks v. United States Fidelity & Guar. Co.*, 5 N.C. App. 181, 167 S.E.2d 876 (1969).

Applied in *Manning v. State Farm Mut. Auto. Ins. Co.*, 243 F. Supp. 619 (W.D.-N.C. 1965); *Abernethy v. Utica Mut. Ins. Co.*, 373 F.2d 565 (4th Cir. 1967); *Beasley v. Hartford Accident & Indem. Co.*, 280 N.C. 177, 184 S.E.2d 841 (1971); *McKinney v. Morrow*, 18 N.C. App. 282, 196 S.E.2d 585 (1973).

Quoted in *Marks v. Thompson*, 282 N.C. 174, 192 S.E.2d 311 (1972).

Cited in *Aldridge v. State*, 4 N.C. App. 297, 166 S.E.2d 485 (1969); *In re Filing by Auto. Rate Office*, 278 N.C. 302, 180 S.E.2d 155 (1971).

§ 20-279.22. Notice of cancellation or termination of certified policy.

This section applies only to certified assigned risk policies issued under the *Motor Vehicle Safety and Responsibility Act of 1953*. *Nationwide Mut. Ins. Co. v. Davis*, 7 N.C. App. 152, 171 S.E.2d 601 (1970).

This section has, etc.—

In accord with original. See *Harrelson v. State Farm Mut. Auto. Ins. Co.*, 272 N.C. 603, 158 S.E.2d 812 (1968).

Statutes Control Policy Provisions as to Cancellation.—The provisions of this article and article 13 of this chapter, liberally construed to effectuate the legislative policy, control any provision written into a policy which otherwise would give an insurance company a greater right to cancel than is provided by the statute. *Harrelson v. State Farm Mut. Auto. Ins. Co.*, 272 N.C. 603, 158 S.E.2d 812 (1968).

Right of carrier to cancel policy issued under assigned risk plan is subject to the provisions of article 13 of this chapter as so implemented by the provisions of this article incorporated by reference therein. *Harrelson v. State Farm Mut. Auto. Ins. Co.*, 272 N.C. 603, 158 S.E.2d 812 (1968).

Notice Is Required Whether Coverage Is Terminated by Insured or by Insurer.—Under the provisions of the *Motor Vehicle Safety and Responsibility Act of 1953* it is incumbent upon the insurer to give the statutory notice of cancellation irrespective of whether the insurance coverage is terminated through acts of the insured or the insurer. *Nationwide Mut. Ins. Co. v. Davis*, 7 N.C. App. 152, 171 S.E.2d 601 (1970).

§ 20-279.25. Money or securities as proof. — (a) Proof of financial responsibility may be evidenced by the certificate of the State Treasurer that the person named therein has deposited with him forty-five thousand dollars (\$45,000) in cash, or securities such as may legally be purchased by savings banks or for trust funds of a market value of forty-five thousand dollars (\$45,000).

The State Treasurer shall not accept any such deposit and issue a certificate therefor and the Commissioner shall not accept such certificate unless accompanied by evidence that there are no unsatisfied judgments of any character against the depositor in the county where the depositor resides.

(1967, c. 277, s. 5; 1973, c. 745, s. 5.)

Editor's Note.—

The 1967 amendment substituted "twenty-five thousand dollars (\$25,000.00)" for "fifteen thousand dollars (\$15,000.00)" in two places in subsection (a).

Section 10, c. 277, Session Laws 1967 provides: "This act shall become effective Jan. 1, 1968, and where the manner of giving proof of financial responsibility is by automobile liability policy, the same shall apply only to policies written or renewed on or after said effective date."

The 1973 amendment substituted "forty-

five thousand dollars (\$45,000)" for "twenty-five thousand dollars (\$25,000.00)" in two places in subsection (a).

Session Laws 1973, c. 745, s. 8, provides: "This act shall become effective Jan. 1, 1974, and where the manner of giving proof of financial responsibility is by automobile liability policy, the same shall apply only to policies written or renewed on or after the effective date of this act."

As subsection (b) was not changed by the amendments, it is not set out.

§ 20-279.34. North Carolina Automobile Insurance Plan.—The Commissioner of Insurance shall develop a revised assigned risk plan to be denominated "The North Carolina Automobile Insurance Plan" as follows:

- (1) The Commissioner of Insurance, after consultation with representatives of the insurance carriers licensed to write motor vehicle liability insurance in this State, shall consider such reasonable plans and procedures for providing the coverage and coverage limits as specified in subdivision (4) of this section as such insurance carriers may submit to him for the equitable apportionment among such insurance carriers of those applicants for motor vehicle liability insurance on motor vehicles registered or principally garaged in this State who are unable to secure such insurance through ordinary means. Such plans and procedures shall further provide for a reasonable method of allowing each insurance carrier a credit due to writing coverage limits in excess of those required to meet the minimum requirements for a motor vehicle liability policy as defined by G.S. 20-279.21.
- (2) Upon approval by the Commissioner of Insurance of any such plans and procedures thus submitted, all insurance carriers licensed to write motor vehicle liability insurance in this State, as a prerequisite to further engaging in writing such insurance in this State, shall formally subscribe to, and participate in, such plans and procedures so submitted.
- (3) In the event the Commissioner of Insurance, in the exercise of his discretion, does not approve any plan so submitted, or should no such plan be submitted, then the Commissioner of Insurance shall formulate and put into effect reasonable plans and procedures providing coverage and coverage limits as specified in subdivision (4) of this section for the apportionment among such insurance carriers of all such applications for motor vehicle liability insurance on motor vehicles registered or principally garaged in this State submitted to him in accordance with the provisions of this section by persons desiring coverage pursuant to the provisions of this section. Such plans and procedures shall further provide for a reasonable method of allowing each insurance carrier a credit due to writing coverage limits in excess of those required to meet the minimum requirements for a motor vehicle liability policy as defined by G.S. 20-279.21.
- (4) Should no such plan be submitted by the insurance carriers and approved by the Commissioner of Insurance, then as a prerequisite to further engaging in the selling of motor vehicle liability insurance in this State, every insurance carrier licensed to write motor vehicle liability insur-

ance in this State shall formally subscribe to and participate in the plans and procedures formulated by the Commissioner of Insurance as provided by subdivision (3) of this section, and every such insurance carrier shall accept any and all risks on motor vehicles registered or principally garaged in this State assigned to it by the Commissioner of Insurance under such plan and shall upon payment of a proper premium issue a policy covering the same, such policy to meet the minimum requirements for a motor vehicle liability policy as defined by G.S. 20-279.21, and at the option of the applicant, coverage and coverage limits may be obtained through the assigned risk plan of up to but not more than twenty-five thousand dollars (\$25,000) because of bodily injury to or death of one person in any one accident, and subject to said limit for one person, to limits of up to but not more than fifty thousand dollars (\$50,000) because of bodily injury to or death of two or more persons in any one accident and up to but not more than a limit of ten thousand dollars (\$10,000), without any deductible therefrom, because of injury to or destruction of property of others in any one accident. In addition, at the option of the applicant, at a coverage limit not to exceed five hundred dollars (\$500.00) insurance coverage for the payment of medical expenses shall be available under the plan to the same extent and manner and subject to the same conditions and exclusions as such insurance coverage is being currently written voluntarily outside the plan as a part of insurance policies affording the coverages required by G.S. 20-279.21.

- In addition, at the option of the applicant, uninsured motorist coverage as defined in G.S. 20-279.21 [shall be available under the plan.]
- (5) Any such assigned risk plan adopted or approved by the Commissioner shall provide that every person who has been unable to obtain a motor vehicle liability insurance policy through ordinary methods or every person who desires to obtain coverage under the provisions of this section on motor vehicles registered or principally garaged in this State shall have the right to apply to the Commissioner of Insurance or the person designated under the plan to have his risk assigned to an insurance carrier licensed to write, and writing motor vehicle liability insurance in this State, and the insurance carrier shall issue a motor vehicle liability policy which will meet the minimum requirements for a motor vehicle liability policy defined by G.S. 20-279.21 and at the option of the applicant provides additional coverage and coverage limits as specified in this section. In such instance where application is made to the Commissioner of Insurance or the person designated under the plan, to have a risk assigned to an insurance carrier, it shall be deemed that the applicant desires coverage under this section, and the Commissioner of Insurance or the person designated under the plan shall upon receipt of such application immediately assign the risk to an insurance carrier, which carrier shall be required, as a prerequisite to the further engaging in selling motor vehicle liability insurance in this State, to issue a motor vehicle liability policy which will meet at least the minimum requirements for a motor vehicle liability policy as defined by G.S. 20-279.21, and at the option of the applicant provides additional coverage and coverage limits as specified in this section.

Any such assigned risk plan adopted or approved by the Commission shall establish reasonable plans and procedures for decreasing the number of persons obtaining insurance through the North Carolina Automobile Insurance Plan by an equitable method of allowing credit as business written through the Plan for business composed of persons insured through the Plan, which such carriers will write voluntarily outside the Plan.

- (6) The Commissioner of Insurance shall establish, or cause to be established, such rate classifications, rating schedules, rates, rules and regulations to be used by insurance carriers issuing assigned risk motor vehicle liability policies in accordance with this Article as appear to him to be proper; provided the Commissioner of Insurance is authorized but not required to establish rates for assigned risk liability policies which are higher than approved manual rates; and in the case of assigned risk policies issued in excess of the minimum limits the Commissioner may establish higher rates or a surcharge adequate to cover the costs of underwriting such excess limits.

In the establishment of rate classification, rating schedules, rates, rules and regulations, the Commissioner of Insurance shall be guided by such principles and practices as have been established under his statutory authority to regulate motor vehicle liability insurance rates, and he may act in conformity with his statutory discretionary authority in such matters, and may in his discretion assign to the North Carolina automobile rate administrative office, or other State bureau or agency any of the administrative duties imposed upon him by this Article.

- (7) The Commissioner of Insurance or the person designated in the plan adopted or approved by the Commissioner is empowered, after reviewing all information pertaining to the applicant or policyholder available from the records of the Department of Motor Vehicles and after determining that the applicant's license to operate a motor vehicle has been suspended and continues to be suspended or has been revoked and the revocation remains in effect:

- a. To refuse to assign an application;
- b. To approve the rejection of an application by an insurance carrier;
- c. To approve the cancellation of any motor vehicle liability insurance policy written through the plan by an insurance carrier; or
- d. To refuse to approve the renewal or the reassignment of an expiring policy.

Otherwise, nonrenewal or cancellation of insurance under the provisions of this section shall be exercised only in the event of nonpayment of premiums.

- (8) The Commissioner of Insurance shall not be held liable for any act, or omission, in connection with the administration of the duties imposed upon him by the provisions of this Article, except upon proof of actual malfeasance.
- (9) The provisions of this section relevant to assignment of risks shall be available to nonresidents who desire to obtain motor vehicle liability insurance with respect only to motor vehicles registered and principally garaged in this State.
- (10) The provisions of this section shall apply to vehicles operated by a county or municipality as an ambulance service or as a rescue squad, and the assigned risk plan shall provide for the assignment of policies on such vehicles. (1953, c. 1300, s. 34; 1963, c. 1208, ss. 1, 2; 1967, c. 277, s. 6; c. 1155; 1969, c. 744, s. 2; 1971, c. 1205, s. 3.)

Cross Reference.—See § 20-279.21 and the note thereto.

Editor's Note. — The 1971 amendment rewrote this section as previously amended in 1967 and 1969.

Session Laws 1971, c. 1205, s. 6, provides: "Section 3 of this act shall become effective on January 1, 1972, but shall apply only to insurance policies written or renewed after said date. The present provisions of

G.S. 20-279.34 and the plan adopted pursuant thereto shall apply to all insurance policies written or renewed under the North Carolina Automobile Assigned Risk Plan prior to January 1, 1972."

Liberal Construction.—Interpreting this section liberally, in order to accomplish the legislative purpose of maintenance of financial responsibility throughout the period of registration of the vehicle, it is

construed to mean that, notwithstanding provisions in the policy, an insurance carrier may cancel an assigned risk policy, issued to fulfil the requirements of either this article or article 13 of this chapter, only when it is shown both that (1) there has been a nonpayment of premium or a suspension of the driver's license of the insured, and (2) the Commissioner of Insurance has approved the cancellation, which he may apparently do by the issuance of general rules and regulations with reference thereto. *Harrelson v. State Farm Mut. Auto. Ins. Co.*, 272 N.C. 603, 158 S.E.2d 812 (1968).

Insurance Carriers Required to Subscribe to and Participate in Assigned Risk Plan.—All insurance carriers, as a prerequisite to engaging and writing motor vehicle insurance in this State, must subscribe to, and participate in, the plans and procedures constituting the assigned risk plan. *Jones v. State Farm Mut. Auto. Ins. Co.*, 270 N.C. 454, 155 S.E.2d 118 (1967).

And This Requirement Does Not Constitute Denial of Due Process.—The fact that an insurance company is required to issue assigned risk motor vehicle liability policies as a condition of transacting liability insurance business in North Carolina does not constitute a denial of due process in violation of State and federal constitutional provisions. *Jones v. State Farm Mut. Auto. Ins. Co.*, 270 N.C. 454, 155 S.E.2d 118 (1967); *Beasley v. Hartford Accident & Indem. Co.*, 11 N.C. App. 34, 180 S.E.2d 381 (1971).

Purpose of Assigned Risk Plan. — The assigned risk plan authorized by this section is for the equitable apportionment among insurance carriers licensed to write motor vehicle insurance in this State of those applicants for motor vehicle liability policies who are required to file proof of financial responsibility under this article but who are unable to secure such insurance through ordinary methods. *Jones v. State Farm Mut. Auto. Ins. Co.*, 270 N.C. 454, 155 S.E.2d 118 (1967).

This section is incorporated by reference into the **Financial Responsibility Act** of 1957 by § 20-314. *Harrelson v. State Farm Mut. Auto. Ins. Co.*, 272 N.C. 603, 158 S.E.2d 812 (1968).

Act Must Be Read into Policy and Construed Liberally.—A policy having been issued pursuant to the assigned risk plan (§ 20-279.34) and for the purpose of fulfilling

the requirement of the **Financial Responsibility Act** of 1957 (§ 20-309 et seq.), the provisions of that act, relative to the cancellation of such policies, must be read into this policy and construed liberally so as to effectuate the purpose of the act. *Harrelson v. State Farm Mut. Auto. Ins. Co.*, 272 N.C. 603, 158 S.E.2d 812 (1968); *Grant v. State Farm Mut. Auto. Ins. Co.*, 1 N.C. App. 76, 159 S.E.2d 368 (1968).

Assigned risk insurance is compulsory both as to the insurer and the insured, made so by law. *Grant v. State Farm Mut. Auto. Ins. Co.*, 1 N.C. App. 76, 159 S.E.2d 368 (1968).

Insurance supplied by a policy issued under the assigned risk plan is compulsory both as to the insured owner and as to the insurance carrier. *Harrelson v. State Farm Mut. Auto. Ins. Co.*, 272 N.C. 603, 158 S.E.2d 812 (1968).

To avoid liability to a third party beneficiary of an assigned risk automobile insurance policy, the insurer must allege and prove cancellation and termination of the policy in accordance with the applicable statutes. *Grant v. State Farm Mut. Auto. Ins. Co.*, 1 N.C. App. 76, 159 S.E.2d 368 (1968).

Coverage Not Extended to Replacement Vehicle Owned by Person Other Than Named Insured. — Nothing in the statute requires any carrier to extend the coverage of an assigned risk policy to a replacement vehicle owned by and registered to a person other than the original named insured owner of the vehicle originally described and insured. *Beasley v. Hartford Accident & Indem. Co.*, 11 N.C. App. 34, 180 S.E.2d 381 (1971).

Nonpayment of Fee for Filing Form SR-22.—The failure of an insured under the assigned risk plan to pay his insurer a fee for filing a certificate of financial responsibility (Form SR-22) with the Department of Motor Vehicles is not a nonpayment of premium within the purview of this section for which the insurer may cancel a policy of automobile liability insurance. *Harrelson v. State Farm Mut. Auto. Ins. Co.*, 272 N.C. 603, 158 S.E.2d 812 (1968).

Applied in *Beasley v. Hartford Accident & Indem. Co.*, 280 N.C. 177, 184 S.E.2d 841 (1971).

Cited in *Strickland v. Hughes*, 273 N.C. 481, 160 S.E.2d 313 (1968); *Perkins v. American Mut. Fire Ins. Co.*, 274 N.C. 134, 161 S.E.2d 536 (1968).

ARTICLE 10.

*Financial Responsibility of Taxicab Operators.***§ 20-280. Filing proof of financial responsibility with governing board of municipality or county.**

(b) As used in this section "proof of financial responsibility" shall mean a certificate of any insurance carrier duly authorized to do business in the State of North Carolina certifying that there is in effect a policy of liability insurance insuring the owner and operator of the taxicab business, his agents and employees while in the performance of their duties against loss from any liability imposed by law for damages including damages for care and loss of services because of bodily injury to or death of any person and injury to or destruction of property caused by accident and arising out of the ownership, use or operation of such taxicab or taxicabs, subject to limits (exclusive of interests and costs) with respect to each such motor vehicle as follows: fifteen thousand dollars (\$15,000) because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, thirty thousand dollars (\$30,000) because of bodily injury to or death of two or more persons in any one accident, and five thousand dollars (\$5,000) because of injury to or destruction of property of others in any one accident.

(1967, c. 277, s. 7; 1973, c. 745, s. 6.)

Editor's Note.—

The 1967 amendment substituted "Ten thousand dollars (\$10,000.00)" for "Five thousand dollars (\$5,000.00)" and "twenty thousand dollars (\$20,000.00)" for "ten thousand dollars (\$10,000.00)" in subsection (b).

Section 10, c. 277, Session Laws 1967, provides: "This act shall become effective Jan. 1, 1968, and where the manner of giving proof of financial responsibility is by automobile liability policy, the same shall apply only to policies written or renewed on or after said effective date."

The 1973 amendment substituted "fifteen

thousand dollars (\$15,000)" for "Ten thousand dollars (\$10,000.00)" and "thirty thousand dollars (\$30,000)" for "twenty thousand dollars (\$20,000.00)" near the end of subsection (b).

Session Laws 1973, c. 745, s. 8, provides: "This act shall become effective Jan. 1, 1974, and where the manner of giving proof of financial responsibility is by automobile liability policy, the same shall apply only to policies written or renewed on or after the effective date of this act."

As subsections (a) and (c) were not changed by the amendments, they are not set out.

ARTICLE 11.

Liability Insurance Required of Persons Engaged in Renting Motor Vehicles.

§ 20-281. Liability insurance prerequisite to engaging in business; coverage of policy.—From and after July 1, 1953, it shall be unlawful for any person, firm or corporation to engage in the business of renting or leasing motor vehicles to the public for operation by the rentee or lessee unless such person, firm or corporation has secured insurance for his own liability and that of his rentee or lessee, in such an amount as is hereinafter provided, from an insurance company duly licensed to sell motor vehicle liability insurance in this State. Each such motor vehicle leased or rented must be covered by a policy of liability insurance insuring the owner and rentee or lessee and their agents and employees while in the performance of their duties against loss from any liability imposed by law for damages including damages for care and loss of services because of bodily injury to or death of any person and injury to or destruction of property caused by accident arising out of the operation of such motor vehicle, subject to the following minimum limits: fifteen thousand dollars (\$15,000) because of bodily injury to or death of one person in any one accident,

and thirty thousand dollars (\$30,000) because of bodily injury to or death of two or more persons in any one accident, and five thousand dollars (\$5,000) because of injury to or destruction of property of others in any one accident. Provided, however, that nothing in this Article shall prevent such operators from qualifying as self-insurers under terms and conditions to be prepared and prescribed by the Commissioner of Motor Vehicles or by giving bond with personal or corporate surety, as now provided by G.S. 20-279.24, in lieu of securing the insurance policy hereinbefore provided for. (1953, c. 1017, s. 1; 1955, c. 1296; 1965, c. 349, s. 1; 1967, c. 277, s. 8; 1973, c. 745, s. 7.)

Editor's Note.—

The 1967 amendment substituted "Ten thousand dollars (\$10,000.00)" for "Five thousand dollars (\$5,000.00)" and "twenty thousand dollars (\$20,000.00)" for "ten thousand dollars (\$10,000.00)."

Section 10, c. 277, Session Laws 1967, provides: "This act shall become effective Jan. 1, 1968, and where the manner of giving proof of financial responsibility is by automobile liability policy, the same shall apply only to policies written or renewed on or after said effective date."

The 1973 amendment substituted "fifteen thousand dollars (\$15,000)" for "Ten thousand dollars (\$10,000.00)" and "thirty thousand dollars (\$30,000)" for "twenty thou-

sand dollars (\$20,000.00)" following the colon in the second sentence.

Session Laws 1973, c. 745, s. 8, provides: "This act shall become effective Jan. 1, 1974, and where the manner of giving proof of financial responsibility is by automobile liability policy, the same shall apply only to policies written or renewed on or after the effective date of this act."

This section did not extend insurance coverage to the driver of a rented vehicle where there was neither evidence nor a finding that the driver at any time was a rentee or a lessee or an agent or employee of the owner of the vehicle. *Iowa Nat'l Mut. Ins. Co. v. Broughton*, 283 N.C. 309, 196 S.E.2d 243 (1973).

ARTICLE 12.

Motor Vehicle Dealers and Manufacturers Licensing Law.

§ 20-286. Definitions.

- (6) "Established place of business" means a salesroom containing at least 64 square feet of floor space in a permanent enclosed building or structure, said salesroom shall have displayed thereon or immediately adjacent thereto a sign clearly and distinctly designating the trade name of the business at which a permanent business of bartering, trading and selling of motor vehicles will be carried on as such in good faith and at which place of business shall be kept and maintained the books, records and files necessary to conduct the business at such place, and shall not mean tents, temporary stands, or other temporary quarters, nor permanent quarters occupied pursuant to any temporary arrangement, devoted principally to the business of a motor vehicle dealer, as herein defined.
- (11) "Motor vehicle dealer" and "dealer" mean any person, firm, association, or corporation engaged in the business of selling, soliciting, or advertising the sale of motor vehicles.

The term "motor vehicle dealer" or "dealer" does not include:

- a. Receivers, trustees, administrators, executors, guardians, or other persons appointed by or acting under the judgment or order of any court; or
- b. Public officers while performing their official duties; or
- c. Persons disposing of motor vehicles acquired for their own use and actually so used, when the same shall have been so acquired and used in good faith and not for the purpose of avoiding the provisions of this article; or
- d. Persons, firms or corporations who shall sell motor vehicles as an

incident to their principal business but who are not engaged primarily in the selling of motor vehicles. This category includes finance companies who shall sell repossessed motor vehicles and insurance companies who sell motor vehicles to which they have taken title as an incident of payments made under policies of insurance and who do not maintain a used car lot or building with one or more employed motor vehicle salesmen.

- e. Persons, firms or corporations manufacturing, distributing or selling trailers and semitrailers weighing not more than 750 pounds and carrying not more than 1500 pound load.

(1967, c. 1126, s. 1; c. 1173.)

Editor's Note. — The first 1967 amendment inserted "containing at least 64 square feet of floor space" near the beginning of subdivision (6) and inserted "said salesroom shall have displayed thereon or immediately adjacent thereto a sign clearly and distinctly designating the trade name of the business" in that subdivision.

The second 1967 amendment added paragraph e at the end of subdivision (11).

As only subdivisions (6) and (11) were changed by the amendments, the rest of the section is not set out.

§ 20-289. License fees.—(a) The license fee for each fiscal year, or part thereof, shall be as follows:

- (1) For motor vehicle dealers, distributors, and wholesalers, twenty-one dollars (\$21.00) for each principal place of business, plus five dollars (\$5.00) for a supplementary license for each car lot not immediately adjacent thereto.
- (2) For manufacturers, fifty dollars (\$50.00), and for each factory branch in this State, thirty dollars (\$30.00).
- (3) For motor vehicle salesmen, three dollars and fifty cents (\$3.50).
- (4) For factory representatives, or distributor branch representatives, four dollars (\$4.00).
- (5) Manufacturers, wholesalers, and distributors may operate as a motor vehicle dealer, without any additional fee or license.

(1969, c. 593.)

Editor's Note.—The 1969 amendment, effective July 1, 1969, increased the fee for each principal place of business in subdivision (1), for each factory branch in subdivision (2), for each salesman in subdivision

(3) and for factory representatives or distributor branch representatives in subdivision (4) of subsection (a).

As subsection (b) was not changed by the amendment, it is not set out.

§ 20-294. Grounds for denying, suspending or revoking licenses.

- (2) Willful and intentional failure to comply with any provision of this article or the willful and intentional violation of G.S. 20-52.1, G.S. 20-75, G.S. 20-82, G.S. 20-108, G.S. 20-109 or recision and cancellation of dealer's license and dealer's plates under G.S. 20-110 (e) or G.S. 20-110 (f) or any lawful rule or regulation promulgated by the Department under this article.

(1967, c. 1126, s. 2.)

Editor's Note.—

The 1967 amendment inserted "or the willful and intentional violation of G.S. 20-52.1, G.S. 20-75, G.S. 20-82, G.S. 20-108, G.S. 20-109 or recision and cancellation of dealer's license and dealer's plates under G.S. 20-110 (e) or G.S. 20-110 (f)" in subdivision (2).

As only subdivision (2) was changed by the amendment, the rest of the section is not set out.

Price Prohibited by Subdivision (6).—

Subdivision (6) prohibits a licensed motor vehicle dealer from advertising, publishing, or representing a price which does not include all charges which constitute the total price to the retail customer, except the North Carolina sales tax. Opinion of Attorney General to Mr. Gonzalie Rivers, License and Theft Division, Department of Motor Vehicles, 43 N.C.A.G. 135 (1973).

§ 20-299. Acts of officers, directors, partners, salesmen and other representatives. — (a) If a licensee is a copartnership or a corporation, it shall be sufficient cause for the denial, suspension or revocation of a license that any officer, director or partner of the copartnership or corporation has committed any act or omitted any duty which would be cause for refusing, suspending or revoking a license to such party as an individual. Each licensee shall be responsible for the acts of any or all of his salesmen while acting as his agent. (1973, c. 559.)

Editor's Note. — The 1973 amendment deleted, at the end of the second sentence of subsection (a), a provision requiring approval or knowledge and ratification of

the acts of the agent by the licensee in order to render the licensee responsible.

As subsection (b) was not changed by the amendment, it is not set out.

§ 20-305. Coercing dealer to accept commodities not ordered; threatening to cancel franchise; preventing transfer of ownership; granting additional franchises; terminating franchises without good cause; preventing family succession.—It shall be unlawful for any manufacturer, factory branch, distributor, or distributor branch, or any field representative, officer, agent, or any representative whatsoever of any of them:

- (1) To coerce, or attempt to coerce any dealer to accept delivery of any motor vehicle or vehicles, parts or accessories therefor, or any other commodities, which shall not have been ordered by such dealer,
- (2) To coerce, or attempt to coerce any dealer to enter into any agreement with such manufacturer, factory branch, distributor, or distributor branch, or representative thereof, or do any other act unfair to such dealer, by threatening to cancel any franchise existing between such manufacturer, factory branch, distributor, distributor branch, or representative thereof, and such dealer.
- (3) Unfairly without due regard to the equities of the dealer, and without just provocation, to cancel the franchise of such dealer.

Cross Reference.—For provisions relative to repeal of subdivision (3), see Editor's note at end of section.

- (4) Notwithstanding the terms of any franchise agreement, to prevent or refuse to approve the sale or transfer of the ownership of a dealership by the sale of the business, stock transfer, or otherwise, or the transfer, sale or assignment of a dealer franchise, or a change in the executive management or principal operator of the dealership, if the Commissioner has determined, if requested in writing by the dealer within 30 days after receipt of an objection to the proposed sale, transfer or change, and after a hearing on the matter, that the failure to permit or honor such sale, transfer, assignment, or change is unreasonable under the circumstances; provided, however, that no franchise may be sold or assigned or transferred unless (i) the franchisor has been given at least 30 days' prior written notice as to the identity, financial ability and qualifications of the proposed transferee, and (ii) the sale or transfer of the franchise and business will not involve, without the franchisor's consent, a relocation of the business;
- (5) To grant an additional franchise for a particular line-make of motor vehicle in a trade area already served by a dealer or dealers in that line-make unless the franchisor first advised in writing such other dealers in the line-make in the trade area; provided that no such additional franchise may be established in the trade area if the Commissioner has determined, if requested by any party within 30 days after receipt of the franchisor's notice of intention to establish the additional franchise, and after a hearing on the matter, that there is reasonable evidence that after the grant of the new franchise, the market will not support all of the dealerships in that line-make in the trade area; trade areas are those areas specified in the franchise agreement or determined by the Motor Vehicle Dealers' Advisory Board.

- (6) Notwithstanding the terms of any franchise agreement to terminate, cancel, or refuse to renew the franchise of any dealer, without good cause, and unless (i) the dealer and the Commissioner have received written notice of the franchisor's intentions at least 60 days prior to the effective date of such termination, cancellation, or the expiration date of the franchise, setting forth the specific grounds for such action, and (ii) the Commissioner has determined, if requested in writing by the dealer within such 60-day period, and after a hearing on the matter, that there is good cause for the termination, cancellation, or nonrenewal of the franchise, except in the event of fraud, insolvency, closed doors, or failure to function in the ordinary course of business, 15 days' notice shall suffice; provided that in any case where a petition is made to the Commissioner for a determination as to good cause for the termination, cancellation, or nonrenewal of a franchise, the franchise in question shall continue in effect pending the Commissioner's decision; or
- (7) Notwithstanding the terms of any franchise agreement, to prevent or refuse to honor the succession to a dealership by a member of the family of a deceased or incapacitated dealer if the Commissioner determines, if requested in writing by such member of the family within 30 days after the death or incapacity of the dealer, and after a hearing on the matter, that the failure to permit or honor such succession is unreasonable under the circumstances; provided, however, that no member of the family may succeed to a franchise unless (i) the franchisor has been given written notice as to the identity, financial ability and qualifications of the member of the family in question, and (ii) the succession to the franchise will not involve, without the franchisor's consent, a relocation of the business. (1955, c. 1243, s. 21; 1973, c. 88, ss. 1, 2.)

Editor's Note. — The 1973 amendment repealed subdivision (3) and added subdivisions (4) through (7).

Session Laws 1973, c. 88, s. 4, provides: "The provisions of this act shall not apply to manufacturers of, or dealers in, mobile

or manufactured type housing or recreational trailers."

In view of the above-quoted provision, subdivision (3) of this section, though repealed by the 1973 act, has not been deleted in the section as set out above.

§ 20-305.1. Automobile dealer warranty obligations.—(a) Each motor vehicle manufacturer, factory branch, distributor or distributor branch, shall specify in writing to each of its motor vehicle dealers licensed in this State the dealer's obligations for preparation, delivery and warranty service on its products, the schedule of compensation to be paid such dealers for parts, work, and service in connection with warranty service, and the time allowances for the performance of such work and service. In no event shall such schedule of compensation fail to include reasonable compensation for diagnostic work as well as repair service and labor. Time allowances for the performance of warranty work and service shall be reasonable and adequate for the work to be performed. In the determination of what constitutes reasonable compensation under this section, the factors to be given consideration shall include, among others, the compensation being paid by other manufacturers to their dealers, the prevailing wage rates being paid by dealers, and the prevailing labor rate being charged by dealers, in the community in which the dealer is doing business.

(b) It is unlawful for any motor vehicle manufacturer, factory branch, distributor, or distributor branch to fail to perform any of its warranty obligations with respect to a motor vehicle, to fail to assume all responsibility for any liability resulting from structural or production defects, or to fail to compensate its motor vehicle dealers licensed in this State for warranty parts, work, and service in accordance with the schedule of compensation provided the dealer pursuant to

subsection (a) above, or for legal costs and expenses incurred by such dealers in connection with warranty obligations for which the manufacturer, factory branch, distributor or distributor branch is legally responsible.

(c) In the event there is a dispute between the manufacturer, factory branch, distributor, or distributor branch, and the dealer with respect to any matter referred to in subsections (a) and (b) above, either party may petition the Commissioner in writing, within 30 days after either party has given written notice of the dispute to the other, for a hearing on the subject and the decision of the Commissioner shall be binding on the parties, subject to rights of judicial review and appeal as provided in Article 33 of Chapter 143 of the General Statutes; provided, however, that nothing contained herein shall give the Commissioner any authority as to the content of any manufacturer's or distributor's warranty. (1973, c. 88, s. 3.)

§ 20-305.2. Unfair methods of competition—It is unlawful for any motor vehicle manufacturer, factory branch, distributor, distributor branch, or subsidiary thereof, to own, operate, or control any motor vehicle dealership in a trade area of this State already served by a motor vehicle dealer under a franchise for the same line-make from such manufacturer, factory branch, distributor, or distributor branch, or subsidiary, provided that this section shall not be construed to prohibit (i) the operation by a manufacturer, factory branch, distributor, distributor branch, or subsidiary thereof, of a dealership for a temporary period (not to exceed one year) during the transition from one owner or operator to another, or (ii) the ownership or control of a dealership by a manufacturer, factory branch, distributor, distributor branch, or subsidiary thereof, during a period while such dealership is being sold under a bona fide contract or purchase option to the operator of the dealership, or (iii) the ownership, operation or control of a dealership by a manufacturer, factory branch, distributor, distributor branch, or subsidiary thereof, if such manufacturer, factory branch, distributor, distributor branch, or subsidiary has been engaged in the retail sale of motor vehicles through such dealership for a continuous period of three years prior to March 16, 1973, and if the Commissioner determines, after a hearing on the matter at the request of any party, that there is no independent dealer available in the trade area to own and operate the franchise in a manner consistent with the public interest, or, (iv) the ownership, operation, or control of a dealership by a manufacturer, factory branch, distributor, distributor branch, or subsidiary thereof, if the Commissioner determines after a hearing on the matter at the request of any party, that there is no independent dealer available in the trade area to own and operate the franchise in a manner consistent with the public interest.

Trade area is that area specified in the franchise agreement or determined by the Motor Vehicle Dealers' Advisory Board. Provided, this section shall not apply to manufacturers or distributors of trailers or semitrailers. (1973, c. 88, s. 3.)

§ 20-305.3. Hearing notice.—In every case of a hearing before the Commissioner authorized under this Article, the Commissioner shall give reasonable notice of each such hearing to all interested parties, and the Commissioner's decision shall be binding on the parties, subject to the rights of judicial review and appeal as provided in Article 33 of Chapter 143 of the General Statutes. The costs of such hearings shall be assessed by the Commissioner. (1973, c. 88, s. 3.)

§ 20-305.4. Motor Vehicle Dealers' Advisory Board.—(a) The Motor Vehicle Dealers' Advisory Board shall consist of six members; three of which shall be appointed by the Speaker of the House of Representatives, and three of which shall be appointed by the Lieutenant Governor to consult with and advise the Commissioner with respect to matters brought before the Commissioner under the provisions of G.S. 20-304 through G.S. 20-305.4.

(b) Each member of the Motor Vehicle Dealers' Advisory Board shall be a resident of North Carolina. Three members of the Board shall be franchised dealers in new automobiles or trucks, duly licensed and engaged in business as such in North Carolina, provided that no two of such dealers may be franchised to sell automobiles or trucks manufactured or distributed by the same person or a subsidiary or affiliate of the same person. Three members of the Board shall not be motor vehicle dealers or employees of a motor vehicle dealer.

(c) The Speaker shall appoint two of the dealer members and one of the public members and shall fill any vacancy in said positions and the Lieutenant Governor shall appoint one of the dealer members and two of the public members and shall fill any vacancy in said positions. In making the initial appointments the Speaker shall designate that the two dealer members shall serve for one and three years respectively and the public member shall serve for two years, and in making the initial appointments the Lieutenant Governor shall designate that the dealer member shall serve for two years and the two public members shall serve for one and three years respectively.

(d) Two members of the first Board appointed shall serve for a period of three years, two members of the first Board shall serve for a period of two years, and two members of the first Board shall serve for a period of one year. Subsequent appointments shall be for terms of three years, except appointments to fill vacancies which shall be for the unexpired terms. Members of the Board shall meet at the call of the Commissioner and shall receive as compensation for their services seven dollars (\$7.00) for each day actually engaged in the exercise of the duties of the Board and such travel expenses and subsistence allowances as are generally allowed other State commissions and boards. (1973, c. 88, s. 3.)

§ 20-305.5. Sections 20-305, subdivisions (4) through (7), and 20-305.1 to 20-305.4 not applicable to certain manufacturers and dealers.—The provisions of G.S. 20-305(4), (5), (6) and (7) and 20-305.1 to 20-305.4 shall not apply to manufacturers of, or dealers in, mobile or manufactured type housing or recreational trailers. (1973, c. 88, s. 4.)

Cross Reference.—See the Editor's note under § 20-305.

ARTICLE 13.

The Vehicle Financial Responsibility Act of 1957.

§ 20-309. Financial responsibility prerequisite to registration; must be maintained throughout registration period.

(c) When it is certified that financial responsibility is a liability insurance policy, the Commissioner of Motor Vehicles may require that the owner produce records to prove the fact of such insurance, and failure to produce such records shall be prima facie evidence that no financial responsibility exists with regard to the vehicle concerned and the Department of Motor Vehicles shall revoke the owner's registration plate for 60 days. In no case shall any vehicle, the registration of which has been revoked for failure to have financial responsibility, be reregistered in the name of the registered owner, spouse, or any child of the spouse or any child of such owner, within less than 60 days after the date of receipt of the registration plate by the Department, except that a spouse living separate and apart from the registered owner may reregister such vehicle immediately in such spouse's name. As a condition precedent to the registration of the vehicle, the separated spouse shall furnish the Department his or her affidavit and the affidavit of two other individuals stating that he or she is separated. As a condition precedent to the reregistration of the vehicle, the owner shall pay the appropriate fee for a new registration plate. It shall be the duty of insurance companies, upon request of the Department, to verify the accuracy of any owner's certification. Failure by an

insurance company to deny coverage within 20 days may be considered by the Commissioner as acknowledgment that the information as submitted is correct.

(e) No insurance policy provided in subsection (d) may be terminated by cancellation or otherwise by the insurer without having given the North Carolina Motor Vehicles Department notice of such cancellation 15 days prior to effective date of cancellation. Where the insurance policy is terminated by the insured the insurer shall immediately notify the Department of Motor Vehicles that such insurance policy has been terminated. The Department of Motor Vehicles upon receiving notice of cancellation or termination of an owner's financial responsibility as required by this Article, shall notify such owner of such cancellation or termination, and such owner shall, to retain the registration plate for the vehicle registered or required to be registered, within 15 days from date of notice given by the Department, certify to the Department that he has financial responsibility effective on or prior to the date of such cancellation or termination. Failure by the owner to certify that he has financial responsibility as herein required shall be prima facie evidence that no financial responsibility exists with regard to the vehicle concerned and, unless the owner's registration plate has been surrendered to the Department of Motor Vehicles by surrender to an agent or representative of the Department of Motor Vehicles and so designated by the Commissioner of Motor Vehicles or depositing the same in the United States mail, addressed to the Department of Motor Vehicles, Raleigh, North Carolina, the Department of Motor Vehicles shall revoke the owner's registration plate for 60 days. In no case shall any vehicle, the registration of which has been revoked for failure to have financial responsibility, be reregistered in the name of the registered owner, spouse, or any child of the spouse or any child of such owner, within less than 60 days after the date of receipt of the registration plate by the Department, except that a spouse living separate and apart from the registered owner may reregister such vehicle immediately in such spouse's name. As a condition precedent to the reregistration of the vehicle, the owner shall pay the appropriate fee for a new registration plate. (1957, c. 1393, s. 1; 1959, c. 1277, s. 1; 1963, c. 964, s. 1; 1965, c. 272; c. 1136, ss. 1, 2; 1967, c. 822, ss. 1, 2; c. 857, ss. 1, 2; 1971, c. 477, ss. 1, 2; c. 924.)

Editor's Note.—

The second 1967 amendment deleted, in subsection (c), provisions as to suspension of an operator's license and increased the period of revocation of registration from thirty to sixty days. The amendment also rewrote the fourth sentence of subsection (e) and substituted "60" for "30" and deleted "and operator's license" in the next to the last sentence of that subsection.

The first 1967 amendment had substituted "surrendered to an employee or agent of the Department of Motor Vehicles who has been designated by the Commissioner for this purpose, or it has been deposited in the United States mail addressed to the Department of Motor Vehicles, Raleigh, North Carolina" for "forwarded to the Department of Motor Vehicles" in the fourth sentence in subsection (e) and had inserted "issued for the vehicle at the time liability insurance was terminated or the current registration plate for the vehicle if the year registration has changed" in that sentence. The sentence is set out above as last amended by c. 857.

The first 1971 amendment deleted "his" between "registered owner" and "spouse"

and inserted "and operator's license" in the second sentence of subsection (c), added at the end of that sentence the language beginning "except that a spouse living separate and apart" and added the third sentence of subsection (c). The amendment also deleted "his" between "registered owner" and "spouse" in the fifth sentence of subsection (e) and added at the end of that sentence the language beginning "except that a spouse living separate and apart."

The second 1971 amendment deleted "and operator's license" following "registration plate" in the second sentence of subsection (c).

As the other subsections were not affected by the amendments, only subsections (c) and (e) are set out.

This article is a remedial statute and will be liberally construed to carry out its beneficent purpose of providing compensation to those who have been injured by automobiles. *Jones v. State Farm Mut. Auto. Ins. Co.*, 270 N.C. 454, 155 S.E.2d 118 (1967).

The manifest purpose of this article, etc.—

The manifest purpose of this article was to provide protection, within the required limits, to persons injured or damaged by the negligent operation of a motor vehicle. *Perkins v. American Mut. Fire Ins. Co.*, 274 N.C. 134, 161 S.E.2d 536 (1968).

The purpose of this article is to assure the protection of liability insurance, or other type of established financial responsibility, up to the minimum amount specified in this article, to persons injured by the negligent operation of a motor vehicle upon the highways of this State. To that end, the act makes it mandatory that the owner of a registered motor vehicle maintain proof of financial responsibility throughout such registration of the vehicle. This may be done by the owner's obtaining, and maintaining in effect, a policy of automobile liability insurance (§§ 20-279.19, 20-314). To enable an owner so to comply with this requirement of the act, even though he is unable to procure such insurance in the usual way, the act provides that the provisions of the Financial Responsibility Act of 1953, with reference to the assigned risk plan, "shall apply to filing and maintaining proof of financial responsibility required by" the Act of 1957 (§ 20-314). *Harrelson v. State Farm Mut. Auto. Ins. Co.*, 272 N.C. 603, 158 S.E.2d 812 (1968).

The manifest purpose of this article was to provide protection, within the required limits, to persons injured or damaged by the negligent operation of a motor vehicle; and, in respect of a "motor vehicle liability policy," to provide such protection notwithstanding violations of policy provisions by the owner subsequent to accidents on which such injured parties base their claims. *Jones v. State Farm Mut. Auto. Ins. Co.*, 270 N.C. 454, 155 S.E.2d 118 (1967).

The primary purpose of the law requiring compulsory insurance is to furnish at least partial compensation to innocent victims who have suffered injury and damage as a result of the negligent operation of a motor vehicle upon the public highway. *Allstate Ins. Co. v. Hale*, 270 N.C. 195, 154 S.E.2d 79 (1967).

It is manifest that the purpose of this Article is to provide protection, within the required limits, to persons injured or damaged by the negligent operation of a motor vehicle. *Nationwide Mut. Ins. Co. v. Cotten*, 12 N.C. App. 212, 182 S.E.2d 801 (1971).

Legislature Did Not Contemplate Recovery by Each Driver in Two-Car Collision.—This Article obliges a motorist either to post security or to carry liability insurance, not accident insurance to indemnify

all persons who might be injured by the insured's car. When the Legislature passed the act it was not in the legislative contemplation that each driver in a two-car collision would recover from the other's insurance carrier. *Moore v. Young*, 263 N.C. 483, 485, 139 S.E.2d 704, 706 (1965). *McKinney v. Morrow*, 18 N.C. App. 282, 196 S.E.2d 585 (1973).

This Article and Article 9A, etc.—

In accord with 2nd paragraph in original. See *First Union Nat'l Bank v. Hackney*, 266 N.C. 17, 145 S.E.2d 352 (1965); *Jones v. State Farm Mut. Auto. Ins. Co.*, 270 N.C. 454, 155 S.E.2d 118 (1967).

This article and article 9A are to be construed together so as to harmonize their provisions and to effectuate the purpose of the legislature. *Harrelson v. State Farm Mut. Auto. Ins. Co.*, 272 N.C. 603, 158 S.E.2d 812 (1968).

The requirements of this section with respect to cancellation must be observed or the attempt at cancellation fails. *Allstate Ins. Co. v. Hale*, 270 N.C. 195, 154 S.E.2d 79 (1967).

Subsection (e) of this section and § 20-310 (a) prescribe the procedure pursuant to which a policy issued for the purpose of complying with the requirements of this article may be cancelled by the insurance carrier having the right to cancel. In order to cancel such policy, the carrier must comply with these procedural requirements of the statute or the attempt at cancellation fails. *Harrelson v. State Farm Mut. Auto. Ins. Co.*, 272 N.C. 603, 158 S.E.2d 812 (1968).

An insurer may not cancel for nonpayment of premiums without following the provisions of subsection (e) of this section and § 20-310. *Nationwide Mut. Ins. Co. v. Davis*, 7 N.C. App. 152, 171 S.E.2d 601 (1970).

Purpose of Notice Requirement.—The purpose of the notice to the Department is to enable it to recall the registration and license plate issued for the vehicle unless the owner makes other provision for compliance with the Vehicle Financial Responsibility Act. *Nationwide Mut. Ins. Co. v. Cotten*, 280 N.C. 20, 185 S.E.2d 182 (1971).

The purpose of the requirement of notice to the Department of Motor Vehicles is not to provide free insurance to the policyholder who has, by his disregard of the premium notice, demonstrated that he does not intend to pay the renewal premium. *Nationwide Mut. Ins. Co. v. Cotten*, 280 N.C. 20, 185 S.E.2d 182 (1971).

The purpose sought to be accomplished by the legislature in requiring notice to be

given to the Department of Motor Vehicles is fully accomplished if the life of the policy be deemed extended 15 days after the giving to it by the company of the delayed notice. *Nationwide Mut. Ins. Co. v. Cotten*, 280 N.C. 20, 185 S.E.2d 182 (1971).

Notice by Insurer to Insured Is Not Required Where Insured Has Terminated Policy.—Where a policy is terminated or cancelled by an insured, the insurer is not required to give notice of cancellation to the insured. *Nationwide Mut. Ins. Co. v. Davis*, 7 N.C. App. 152, 171 S.E.2d 601 (1970).

And Failure to Give Notice to Department of Termination by Insured Does Not Affect Validity of Cancellation.—Where the insured terminates a policy issued pursuant to the Vehicle Responsibility Act of 1957, the insurer is required immediately to notify the Department of Motor Vehicles, but failure to give such notice does not affect the validity or binding effect of the cancellation. *Nationwide Mut. Ins. Co. v. Davis*, 7 N.C. App. 152, 171 S.E.2d 601 (1970).

Notice Prior to Cancellation Date Required Only Where Termination by Insurer.—Only where the policy has been terminated by the insurer does subsection (e) of this section require notice to the Department of Motor Vehicles prior to the effective date of cancellation. *Nationwide Mut. Ins. Co. v. Cotten*, 280 N.C. 20, 185 S.E.2d 182 (1971).

Subsection (e) of this section requires the insurer to give to the Department of Motor Vehicles notice of a termination "by the insurer" prior to the effective date thereof; this has no bearing on the question of what constitutes a termination "by the insured." *Nationwide Mut. Ins. Co. v. Cotten*, 280 N.C. 20, 185 S.E.2d 182 (1971).

Notice After Termination Required Where Termination Is by Insured.—Where a policy was terminated "by the insured" by his complete ignoring of the offer by the insurer to renew the policy contained in the notice of premium sent by it to the insured and received by him, subsection (e) of this section requires the company to notify the Department of Motor Vehicles of the termination of the policy "immediately" and contemplates such notice to the Department after the termination. *Nationwide Mut. Ins. Co. v. Cotten*, 280 N.C. 20, 185 S.E.2d 182 (1971).

Policy Terminated by Insurer and Policy Terminated by Insured Distinguished.—Subsection (e) of this section expressly distinguishes between a policy terminated by the insurer and a policy terminated by

the insured, with reference to when the insurer is required to notify the Department of Motor Vehicles that the policy has been terminated. *Nationwide Mut. Ins. Co. v. Cotten*, 280 N.C. 20, 185 S.E.2d 182 (1971).

When Policy Is Terminated by Insured.—A policy issued by an insurer to an insured is terminated "by the insured," within the meaning of subsection (e) of this section, by his complete ignoring of the offer by the company to renew the policy contained in the notice of premium sent by it to the insured and received by him. *Nationwide Mut. Ins. Co. v. Cotten*, 280 N.C. 20, 185 S.E.2d 182 (1971).

When a policy terminates in consequence of the policyholder's rejection of the company's offer to renew the policy, contained in a premium notice such termination is deemed a termination "by the insured" and not a termination "by the insurer." *Nationwide Mut. Ins. Co. v. Cotten*, 280 N.C. 20, 185 S.E.2d 182 (1971).

But Termination Is Not Contingent on Insurer's Giving Notice to Department.—Where a policy was terminated "by the insured" by his complete ignoring of the offer by the insurer to renew the policy contained in the notice of premium sent by it to the insured and received by him, termination of the policy is not contingent upon the company's giving notice thereof to the Department of Motor Vehicles 15 days prior to the effective date of the termination. *Nationwide Mut. Ins. Co. v. Cotten*, 280 N.C. 20, 185 S.E.2d 182 (1971).

Thus, Defective Notice or Lack of Notice Does Not Affect Validity of Termination.—Where termination is "by the insured," since the notice to the Department of Motor Vehicles is to be given "immediately" after the effective date of the termination, neither a defective notice nor a failure to give notice to the Department would affect the validity or binding effect of the termination of the policy. *Nationwide Mut. Ins. Co. v. Cotten*, 280 N.C. 20, 185 S.E.2d 182 (1971).

Nor Does Delayed Notice.—Delayed notice by an insurer of a termination "by the insured" is sufficient to effect a termination of the policy 15 days after it is given to the Department of Motor Vehicles. *Nationwide Mut. Ins. Co. v. Cotten*, 280 N.C. 20, 185 S.E.2d 182 (1971).

Time Gaps in Coverage Permitted.—The Vehicle Financial Responsibility Act of 1957 permits the possibility of time gaps in insurance coverage; that is, short periods in which vehicles are uninsured.

Fincher v. Rhyne, 266 N.C. 64, 145 S.E.2d 316 (1965).

Stated in *Hayes v. Hartford Accident & Indem. Co.*, 274 N.C. 73, 161 S.E.2d 552 (1968); *Nationwide Mut. Ins. Co. v. Hayes*, 276 N.C. 620, 174 S.E.2d 511 (1970).

Cited in *Grant v. State Farm Mut. Auto. Ins. Co.*, 1 N.C. App. 76, 159 S.E.2d 368 (1968); In re Filing by N.C. Auto Rate Administrative Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

§ 20-309.1. Purchase of automobile insurance by minors.—Any minor 18 years of age or over shall be competent to contract for automobile insurance of any kind, to enter into an agreement to finance such insurance, to execute a power of attorney in connection with such financing, and also to execute a power of attorney in connection with an application for insurance with the assigned risk plan, to the same extent and with the same effect as though he had attained the age of 21 years. (1967, c. 934.)

Quoted in *Gastonia Personnel Corp. v. Rogers*, 276 N.C. 279, 172 S.E.2d 19 (1970).

§ 20-310. Grounds and procedure for cancellation or nonrenewal of a motor vehicle liability insurance policy; review by Commissioner of Insurance.—(a) As used in this section the following definitions shall apply:

- (1) "Policy of automobile insurance" or "policy" means a policy or contract for bodily injury or property damage liability insurance delivered or issued for delivery in this State covering liability arising from the ownership, maintenance or use of any motor vehicle, insuring as the named insured one individual or husband and wife residents of the same household, and under which the insured vehicle therein designated is of the following type only:

- a. A four-wheeled automobile or station wagon that is not used as a public or livery conveyance (which terms shall not be construed to include car pools) nor rented to others;
- b. Any other four-wheeled motor vehicle with a load capacity of 1500 pounds or less which is not used in the occupation, profession or business of the insured, nor is used as a public or livery conveyance nor rented to others;

"Policy of automobile insurance" or "policy" shall not apply to any policy issued under the North Carolina Automobile Insurance Plan or to any policy insuring more than four motor vehicles, or to any policy covering the operation of a garage, sales agency, repair shop, service station, or public parking place or to any policy providing insurance only on an excess basis, or to any other contract providing insurance to such named insured even though such contract may incidentally provide insurance with respect to such motor vehicles.

- (2) "Renewal" or "to renew" means the issuance and delivery by an insurer of a policy superseding at the end of the policy period a policy previously issued and delivered by the same insurer through the agent who originally placed the policy or his successors or assigns, such renewal policy to provide types and limits of coverage at least equal to those contained in the policy being superseded, or the maximum limits of coverage provided for under G.S. 20-279.34(4), whichever is less, or the issuance and delivery of a certificate or notice extending the term of a policy beyond its policy period or term with types and limits of coverage at least equal to those contained in the policy being extended or the maximum limits of coverage provided for under G.S. 20-279.34(4), whichever is less; provided, however, that any policy with a policy period or term of less than 12 months or any period with

no fixed expiration date shall for the purpose of this section be considered as if written for successive policy periods or terms of six months.

- (3) "Insurer" means any insurance company, association or exchange authorized to transact the business of automobile insurance in the State of North Carolina.

(b) This section shall apply only to that portion of a policy of automobile insurance providing bodily injury and property damage liability, and uninsured motorists coverage.

(c) No insurer shall cancel or refuse to renew a policy of automobile insurance solely or primarily because of the age, sex, residence, race, color, creed, national origin, ancestry, marital status or lawful occupation (including the military service) of anyone who is insured or solely because another insurer cancelled a policy of automobile insurance or refused to write or renew such policy or solely because of any combination of the hereinabove mentioned factors.

(d) No insurer shall cancel a policy of automobile insurance except for the following reasons:

- (1) The named insured fails to discharge when due any of his obligations in connection with the payment of premium for the policy or any installment thereof, whether payable to the company or its agent either directly or indirectly under any premium finance plan or extension of credit.
- (2) The named insured or any other operator who resides in the same household and customarily operates an automobile insured under such policy has had his driver's license suspended or revoked for more than 31 days after the effective date of the policy if said policy had been in effect less than one year or after the last anniversary of the effective date if the policy had been in effect longer than one year.
- (3) The named insured or any other operator who resides in the same household and customarily operates an automobile insured under such policy during such policy period is finally convicted of operating a motor vehicle while under the influence of intoxicating liquor or of any impairing drug.

(e) No insurer shall refuse to renew a policy of automobile insurance except for one or more of the following reasons:

- (1) The insured has violated any of the material terms or conditions of the policy.
- (2) The named insured or any other operator who resides in the same household and customarily operates an automobile insured under such policy has had his driver's license suspended or revoked for more than 31 days after the effective date of the policy if said policy had been in effect less than one year or after the last anniversary of the effective date if the policy had been in effect longer than one year; or is or becomes subject to any physical or mental condition which impairs his ability to operate a motor vehicle.
- (3) The named insured or any other operator who resides in the same household and customarily operates an automobile insured under such policy is finally convicted of, pleads nolo contendere or forfeits bail during the policy period for any of the following:
 - a. Any felony involving the use of a motor vehicle.
 - b. Homicide, arising out of the operation of a motor vehicle.
 - c. Operating a motor vehicle while under the influence of intoxicating liquor or of any impairing drug.
 - d. Leaving the scene of a motor vehicle accident in which the insured

is involved without identifying himself and furnishing his address as required by law.

- e. Theft of a motor vehicle or the unlawful taking of a motor vehicle.
- f. A second moving traffic violation by any one person who customarily operates the insured vehicle or an aggregate of four moving traffic violations by all persons customarily operating the insured vehicle within a 12-month period any part of which falls within the policy period, whether or not the violations were repetitions of the same offense or were different offenses.

- (4) The named insured fails to discharge when due any of his obligations in connection with the payment of premium for the policy or any installment thereof, whether payable to the company or its agent either directly or indirectly under any premium finance plan or extension of credit.
- (5) The named insured, or any other operator who resides in his household and who customarily operates an automobile insured under said policy within a 24-month period any part of which falls within the policy period, have been involved as an operator of an automobile in four or more automobile accidents where there is evidence to indicate fault on the part of such operator.

(f) No cancellation or refusal to renew by an insurer of a policy of automobile insurance shall be effective unless the insurer shall have given the policyholder notice at his last known post office address by certificate of mailing a written notice of the cancellation or refusal to renew. Such notice shall:

- (1) Be approved as to form by the Commissioner of Insurance prior to use;
 - (2) State the date, not less than 60 days after mailing to the insured of notice of cancellation or notice of intention not to renew, on which such cancellation or refusal to renew shall become effective, except that such effective date may be 15 days from the date of mailing or delivery when it is being cancelled or not renewed for the reasons set forth in subdivision (1) of subsection (d) and in subdivision (4) of subsection (e) of this section;
 - (3) State the specific reason or reasons of the insurer for cancellation or refusal to renew;
 - (4) Advise the insured of his right to request in writing, within 10 days of the receipt of the notice, that the Commissioner of Insurance review the action of the insurer; and the insured's right to request in writing, within 10 days of receipt of the notice, a hearing before the Commissioner of Insurance;
 - (5) Either in the notice or in an accompanying statement advise the insured of his possible eligibility for insurance through the North Carolina Automobile Insurance Plan; and that operation of a motor vehicle without complying with the provisions of this Article is a misdemeanor and specifying the penalties for such violation.
- (g) Nothing in this section shall apply:
- (1) If the insurer has manifested its willingness to renew by issuing or offering to issue a renewal policy, certificate or other evidence of renewal, or has manifested such intention by any other means;
 - (2) If the named insured has notified in writing the insurer or its agent that he wishes the policy to be cancelled or that he does not wish the policy to be renewed;
 - (3) To any policy of automobile insurance which has been in effect less than 60 days, unless it is a renewal policy, or to any policy which has been written or written and renewed for a consecutive period of 48 months or longer.

(h) There shall be no liability on the part of and no cause of action of any nature shall arise against any insurer, its authorized representative, its agents, its employees, or any firm, person or corporation furnishing to the insurer information as to reasons for cancellation or refusal to renew for any statement made by any of them in complying with this section or for the providing of information pertaining thereto except as provided by this section and any applicable federal law.

(i) Notwithstanding any provision herein contained, any insured may within 10 days of the receipt of the notice of cancellation or notice of intention not to renew, or the receipt of the reason or reasons for cancellation or refusal to renew if they were not stated in the notice, be entitled to request in writing that the Commissioner of Insurance review the action of an insurer in cancelling or refusing to renew the policy of such insured. Within said 10-day period the insured may also request in writing a hearing in regard to such review; otherwise, the right of the insured for a hearing shall be deemed waived. On receiving a request in writing for a review of the action of such insurer, the Commissioner of Insurance shall immediately notify the insurer involved of the insured's request and the charges involved, if known, and on receipt of said notification and within 10 days thereafter the insurer may make a request in writing for a hearing in regard to such review; otherwise, the right of the insurer to such a hearing shall be deemed waived. If neither the insurer or the insured by request in writing or the Commissioner of Insurance of his own motion requires a hearing, then in such event the Commissioner of Insurance shall make such investigation as he deems appropriate to determine if the insurer has violated the provisions of this section, and shall after appropriate findings of fact either approve the cancellation or nonrenewal of such policy or order the insurer to renew, reissue, or reinstate such policy on such terms as may be just. At the written request of the insured or insurer or on his own motion, the Commissioner of Insurance shall after notice conduct a hearing to determine if the insurer has violated the provisions of this section, and after appropriate findings of fact, shall within 40 days after receipt in writing of a request for review by the insured, either approve the cancellation or nonrenewal of such policy or order the insurer to renew, reissue, or reinstate such policy on such terms as may be just. In addition, if the Commissioner of Insurance finds after notice and hearing and after appropriate findings of fact, that the insurer has willfully violated the provisions of this section or has acted without reasonable investigation into the grounds for action of cancellation or nonrenewal, he may order the insurer involved to pay the reasonable expenses and costs of the investigation and hearing conducted by the Commissioner not to exceed the sum of three hundred dollars (\$300.00) and such costs as are ordered paid by the Commissioner pursuant to the provisions of this section shall be paid as a condition of such insurer continuing to write automobile insurance business in this State. Any insured or insurer aggrieved by any order or decision of the Commissioner of Insurance may appeal said order and decision to the Superior Court of Wake County pursuant to and subject to the provisions of G.S. 58-9.3. All examinations, investigations, and hearings provided by this subsection may be conducted by the Commissioner personally or by one or more of his deputies, actuaries, examiners or employees designated by him for the purpose. All hearings shall be held at such time and place as shall be designated in a notice which shall be given by the Commissioner in writing to the person cited to appear at least 10 days before the date designated thereon. The notice shall state the subject of the inquiry and the specific charges, if any. It shall be sufficient to give such notice either by delivering it or by depositing the same in the United States mail, postage prepaid and addressed to the last known address of such insured or insurer. The policy shall remain in full force and effect during the pendency of review by the Commissioner of Insurance or the court except where the Commissioner of Insurance has sustained the action of the insurer and except where the cancellation or failure to renew was for nonpayment under subdivision (1) of subsection (d) and subdivi-

sion (4) of subsection (e) of this section, in which case the policy shall terminate as of the date provided in the notice under subsection (f) of this section.

(j) If any provision of this section or application thereof to any person or situation is held invalid, such invalidity shall not affect other provisions or applications of the section which can be given effect without the invalid provision or application, and to this end the provisions of this section are declared to be severable.

(k) Each insurer shall maintain for a period of three years records of refusals to renew and cancellations and shall, on request, forward to the Commissioner of Insurance copies of every notice or statement referred to in subsection (e) of this section which it shall at any time send to any of its insureds.

(l) The provisions of this section shall not apply to any insurer who shall limit the issuance of policies of automobile liability insurance to one class or group of persons engaged in any one particular profession, trade, occupation or business nor shall any insurer be required to renew should the insured become a nonresident of North Carolina. (1957, c. 1393, s. 2; 1963, c. 842, ss. 1-3; c. 964, s. 2; 1965, c. 1135; 1967, c. 857, s. 3; 1971, c. 1205, s. 4.)

Editor's Note.—The 1971 amendment rewrote this section as previously amended in 1967.

Session Laws 1971, c. 1205, s. 6, provides: "Section 4 of this act shall become effective on January 1, 1972, but shall apply only to insurance policies written or renewed after said date. The present provisions of G.S. 20-310 shall apply to all insurance policies written or renewed prior to January 1, 1972."

By virtue of Session Laws 1943, c. 170, "Commissioner of Insurance" has been substituted for "Insurance Commissioner" throughout this section.

Opinions of Attorney General. — Honorable Edwin S. Lanier, Commissioner of Insurance, 40 N.C.A.G. 326 (1969).

It was the intent, etc.—

The primary intent of the General Assembly was that every motorist maintain continuously proof of financial responsibility. *Perkins v. American Mut. Fire Ins. Co.*, 274 N.C. 134, 161 S.E.2d 536 (1968).

Purpose of Certification of Financial Responsibility.—Certification by an insured to the Department of Motor Vehicles that he had financial responsibility as required by the Vehicle Financial Responsibility Act and his giving the name of his insurer in that certification is for the purpose of getting a license plate for his automobile and does not show his intent to renew the policy so as to extend its coverage. *Nationwide Mut. Ins. Co. v. Cotten*, 280 N.C. 20, 185 S.E.2d 182 (1971).

Article Must Be Read into Policy and Construed Liberally. — A policy having been issued pursuant to the assigned risk plan (§ 20-279.34) and for the purpose of fulfilling the requirement of the Financial Responsibility Act of 1957 (§ 20-309 et seq.), the provisions of that act, relative to

the cancellation of such policies, must be read into this policy and construed liberally so as to effectuate the purpose of the act. *Harrelson v. State Farm Mut. Auto. Ins. Co.*, 272 N.C. 603, 158 S.E.2d 812 (1968).

Statutes Control Policy Provisions as to Cancellation.—The provisions of this article and article 9A, liberally construed to effectuate the legislative policy, control any provision written into a policy which otherwise would give an insurance company a greater right to cancel than is provided by the statute. *Harrelson v. State Farm Mut. Auto. Ins. Co.*, 272 N.C. 603, 158 S.E.2d 812 (1968).

An insurer may not cancel for nonpayment of premiums without following the provisions of this section and § 20-309(e). *Nationwide Mut. Ins. Co. v. Davis*, 7 N.C. App. 152, 171 S.E.2d 601 (1970).

This section applies both to termination by cancellation and to termination by failure to renew. *Robinson v. Nationwide Ins. Co.*, 273 N.C. 391, 159 S.E.2d 896 (1968).

Subsection (f) relates to the notice and warning that must be given the policyholder in the event his policy is terminated by the insurer, whether the termination is by cancellation or by failure to renew. *Perkins v. American Mut. Fire Ins. Co.*, 274 N.C. 134, 161 S.E.2d 536 (1968); *Nationwide Mut. Ins. Co. v. Davis*, 7 N.C. App. 152, 171 S.E.2d 601 (1970).

Insurer Required to Give Notice Where It Cancels Policy. — Where circumstances known to the insurer indicate a definite desire on the part of the insured to renew a policy, a termination of the policy is "by the insurer," necessitating the giving to the insured by the insurer of the notice of termination required by this section. *Nationwide Mut. Ins. Co. v. Cotten*, 280 N.C. 20, 185 S.E.2d 182 (1971).

Insurer Is Not Required to Notify Insured Where Insured Himself Terminates Policy.—This section does not, as does § 20-279.22 with respect to certified assigned risk policies, require the insurer to notify the insured where the insured himself terminates the policy. *Nationwide Mut. Ins. Co. v. Davis*, 7 N.C. App. 152, 171 S.E.2d 601 (1970).

If the notice fails, etc.—

Where the insurer failed to give the insured the required notice and warning prior to terminating a policy of automobile liability insurance, the policy continued in force and effect notwithstanding the insured's failure to pay in full the required premium. *Perkins v. American Mut. Fire Ins. Co.*, 274 N.C. 134, 161 S.E.2d 536 (1968).

§ 20-310.2. Motor vehicle liability insurance; companies may not fail to renew solely by reason of age; penalties provided.—No insurance company licensed in this State to do a business of insurance, which is engaged in the writing of motor vehicle liability insurance, as the same is defined in G.S. 20-279.21, shall fail to renew any such existing policy of insurance solely because the insured has attained the age of 65 years or older.

Whenever the Commissioner of Insurance shall have reason to believe that any insurance company which is licensed to do a business of insurance in this State and is engaged in writing motor vehicle liability insurance has refused to renew policies of motor vehicle liability insurance solely because the applicant has reached the age of 65 years or older, he shall notify such company that it may be in violation of this section, and, in his discretion he may require a hearing to determine whether or not such company has actually been engaged in the practice as aforesaid. Any hearing held under this section shall in all respects comply with the hearing procedure provided in G.S. 58-54.6.

It after such hearing the Commissioner shall determine that the company has engaged in the practice of systematically failing to renew policies of motor vehicle liability insurance because of the advanced age of the insureds, he shall reduce his findings to writing and shall issue and cause to be served upon the company charged with the violation an order requiring the company to cease and desist from engaging in such practices. After the issuance of such cease and desist order, if the Commissioner finds that the company has continued to engage in such practices, he shall impose upon such company a fine not to exceed the amount of one thousand dollars (\$1,000.00) for each separate violation.

Any company aggrieved by any order or decision of the North Carolina Commissioner of Insurance may appeal such order and decision to the Superior Court of Wake County in the same manner and under the same rules and provisions set forth in G.S. 58-9.3. (1967, c. 1072.)

Editor's Note.—The act adding this section became effective July 1, 1967.

By virtue of Session Laws 1943, c. 170,

Notice to Commissioner of Motor Vehicles—Former Law.—

See *Allstate Ins. Co. v. Hale*, 270 N.C. 195, 154 S.E.2d 79 (1967).

No Period of Continuous Automobile Liability Insurance Coverage Prior to January 1, 1972, Written Either Voluntarily or under Automobile Assigned Risk Plan, Would Count Toward Completion of Period of 48 Consecutive Months of Coverage Necessary to Exclude a Policy from Provisions of Section.—See opinion of Attorney General to Honorable Edwin S. Lanier, Commissioner of Insurance, 42 N.C.A.G. 22 (1972).

Applied in *Hayes v. Hartford Accident & Indem. Co.*, 274 N.C. 73, 161 S.E.2d 552 (1968).

§ 20-311. Revocation of registration when financial responsibility not in effect.—The Department of Motor Vehicles, upon receipt of evidence that financial responsibility for the operation of any motor vehicle registered or required to be registered in this State is not or was not in effect at the time of operation or certification that insurance was in effect, shall revoke the owner's registration plate issued for the vehicle at the time of operation or certification that insurance was in effect or the current registration plate for the vehicle if the year registration has

changed for 60 days. In no case shall any vehicle, the registration of which has been revoked for failure to have financial responsibility, be reregistered in the name of such owner, spouse or any child of the spouse or any child of such owner within less than 60 days after the registration plates have been surrendered to the Department except that a spouse living separate and apart from the registered owner may reregister such vehicle immediately in such spouse's name. As a condition precedent to the reregistration of the vehicle the owner shall pay the appropriate fee for a new registration plate. (1957, c. 1393, s. 3; 1959, c. 1277, s. 2; 1963, c. 964, s. 4; 1965, c. 205; c. 1136, s. 3; 1967, c. 822, s. 3; c. 857, s. 4; 1971, c. 477, s. 3.)

Editor's Note.—

The first 1967 amendment substituted "the owner's registration plate issued for the vehicle at the time of operation or certification that insurance was in effect or the current registration plate for the vehicle if the year registration has changed" for "the registration of such vehicle" in the first sentence.

The second 1967 amendment deleted provisions as to suspension and reinstatement of an operator's or chauffeur's license and increased the period of revocation of registration from thirty to sixty days.

The 1971 amendment deleted "his" between "owner" and "spouse" and substituted "any child of the spouse or any child of such owner" for "any child or spouse of any child of the owner" in the second sentence, and added at the end of that sentence the language beginning "except that a spouse living separate and apart."

The 1971 amendment deleted "his" between "owner" and "spouse" and substituted "any child of the spouse or any child of such owner" for "any child or spouse of any child of the owner" in the second sentence, and added at the end of that sentence the language beginning "except that a spouse living separate and apart."

§ 20-313. Operation of motor vehicle without financial responsibility as misdemeanor.

Applied in *State v. Green*, 266 N.C. 785, 147 S.E.2d 377 (1966).

§ 20-314. Applicability of article 9A; its provisions continued.

Owner Must Show Proof of Financial Responsibility as Prerequisite to Registration. — This article requires every owner of a motor vehicle, as a prerequisite to the registration thereof, to show "proof of financial responsibility" in the manner prescribed by the Motor Vehicle Safety and Financial Responsibility Act of 1953, chapter 20, article 9A. *Jones v. State Farm Mut. Auto. Ins. Co.*, 270 N.C. 454, 155 S.E.2d 118 (1967).

Section 20-279.34 is incorporated by reference into the Financial Responsibility Act of 1957 by this section. *Harrelson v. State Farm Mut. Auto. Ins. Co.*, 272 N.C. 603, 158 S.E.2d 812 (1968).

Section 20-279.34 is incorporated by reference into the Financial Responsibility Act of 1957 by this section. *Harrelson v. State Farm Mut. Auto. Ins. Co.*, 272 N.C. 603, 158 S.E.2d 812 (1968).

§ 20-315. Commissioner to administer article; rules and regulations.

Cited in *Government Employees Ins. Co. v. Lumbermens Mut. Cas. Co.*, 269 N.C. 354, 152 S.E.2d 445 (1967).

§ 20-316. Departmental hearings upon lapse of liability insurance coverage.—Any person whose registration plate has been revoked under G.S. 20-309(e) or G.S. 20-311 may within 10 days from the date of receipt of the notice of revocation request a hearing. Upon receipt of such request, the Department shall, as early as practical, afford him an opportunity for hearing. Upon such hearing the duly authorized agents of the Department may administer oaths and issue subpoenas for the attendance of witnesses and the production of relevant books and documents. If, at the conclusion of the hearing, it appears to the agent of the Department that continuous financial responsibility has existed with regard to the vehicle involved or if continuous financial responsibility has not existed, that the lapse in financial responsibility is not due to any fault on the part of the person whose registration plate has been revoked, the Department may withdraw its order of revocation and such person may retain his registration plate. Otherwise, the order of revocation shall be affirmed and the registration plate surrendered. (1971, c. 1218, s. 1.)

Editor's Note. — Session Laws 1971, c. 1218, s. 2, makes the act effective Sept. 1, 1971.

§ 20-319. Effective date.

Cited in *Grant v. State Farm Mut. Auto. Ins. Co.*, 1 N.C. App. 76, 159 S.E.2d 368 (1968).

ARTICLE 13A.*Certification of Automobile Insurance Coverage by Insurance Companies.*

§ 20-319.1. Company to forward certification within seven days after receipt of request.—Upon the receipt by an insurance company at its home office of a registered letter from an insured requesting that it certify to the North Carolina Department of Motor Vehicles whether or not a previously issued policy of automobile liability insurance was in full force and effect on a designated day, it shall be the duty of such insurance company to forward such certification within seven days. (1967, c. 908, s. 1.)

Editor's Note.—Section 4, c. 908, Session Laws 1967, provides that the act shall become effective July 1, 1967.

§ 20-319.2. Penalty for failure to forward certification.—If any insurance company shall without good cause fail to forward said certification within seven days after its receipt of such registered letter, the North Carolina Commissioner of Insurance shall be authorized in his discretion to impose a civil penalty upon said company in the amount of two hundred dollars (\$200.00) for such violation. (1967, c. 908, s. 2.)

ARTICLE 14.*Driver Training School Licensing Law.*

§ 20-328. Administration of Article.—This Article shall be administered by the Department of Motor Vehicles with no additional appropriations. (1965, c. 873; 1973, c. 440.)

Editor's Note. — The 1973 amendment, effective July 1, 1973, deleted "Driver Education and Accident Records Division" of the" preceding "Department" and substituted "appropriations" for "appropriation."

§§ 20-329 to 20-339: Reserved for future codification purposes.

ARTICLE 15.*Vehicle Mileage Act.*

§ 20-340. Purpose.—This Article shall provide State remedies for persons injured by motor vehicle odometer alteration, and to provide purchasers of motor vehicles with information to assist them in determining the condition and value of such vehicles. Such remedies shall be in addition to remedies provided by the federal odometer law (Motor Vehicle Information and Cost Savings Act, Public Law 92-513, 86 Stat. 947, enacted October 20, 1972). (1973, c. 679, s. 1.)

Editor's Note. — Session Laws 1973, c. 679, s. 3, makes the act effective Sept. 1, 1973.

§ 20-341. Definitions.—As used in this Article:

- (1) The term "odometer" means an instrument for measuring and recording the actual distance a motor vehicle travels while in operation; but shall not include any auxiliary odometer designed to be reset by the operator of the motor vehicle for the purpose of recording mileage on trips.

- (2) The term "repair and replacement" means to restore to a sound working condition by replacing the odometer or any part thereof or by correcting what is inoperative.
- (3) The term "transfer" means to change ownership by purchase, gift, or any other means.
- (4) The term "transferee" means any person to whom the ownership in a motor vehicle is transferred by purchase, gift, or any means other than by creation of a security interest.
- (5) The term "transferor" means any person who transfers his ownership in a motor vehicle by sale, gift or any means other than by creation of a security interest. (1973, c. 679, s. 1.)

§ 20-342. **Unlawful devices.**—It is unlawful for any person knowingly to advertise for sale, to sell, to use, or to install or to have installed, any device which causes an odometer to register any mileage other than the true mileage driven. For the purposes of this section, the true mileage driven is that mileage driven by the vehicle as registered by the odometer within the manufacturer's designed tolerance. (1973, c. 679, s. 1.)

§ 20-343. **Unlawful change of mileage.**—It is unlawful for any person or his agent to disconnect, reset, or alter the odometer of any motor vehicle with the intent to change the number of miles indicated thereon. (1973, c. 679, s. 1.)

§ 20-344. **Operation of vehicle with intent to defraud.**—It is unlawful for any person with the intent to defraud to operate a motor vehicle on any street or highway knowing that the odometer of such vehicle is disconnected or non-functional. (1973, c. 679, s. 1.)

§ 20-345. **Conspiracy.**—No person shall conspire with any other person to violate G.S. 20-342, 20-343, 20-344, 20-346, or 20-347. (1973, c. 679, s. 1.)

§ 20-346. **Lawful service, repair, or replacement of odometer.** — Nothing in this Article shall prevent the service, repair, or replacement of an odometer, provided the mileage indicated thereon remains the same as before the service, repair, or replacement. Where the odometer is incapable of registering the same mileage as before such service, repair, or replacement, the odometer shall be adjusted to read zero and a notice in writing shall be attached to the left door frame of the vehicle by the owner or his agent specifying the mileage prior to repair or replacement of the odometer and the date on which it was repaired or replaced. Any removal or alteration of such notice so affixed shall be unlawful. (1973, c. 679, s. 1.)

§ 20-347. **Disclosure requirements.**—(a) In connection with the transfer of a motor vehicle, the transferor shall deliver to the transferee, prior to execution of any transfer of ownership document, a single written statement which contains the following:

- (1) The odometer reading at the time of the transfer;
- (2) The date of the transfer;
- (3) The transferor's name and current address;
- (4) The identity of the vehicle, including its make, model, body type, its vehicle identification number, and the license plate number most recently used on the vehicle;
- (5) A statement that the mileage is unknown if the transferor knows the odometer reading differs from the number of miles the vehicle has actually traveled, and that the difference is greater than that caused by odometer calibration error;
- (6) A statement describing each known alteration of the odometer reading, including date, person making the alteration, and approximate number of miles removed by the alteration; and

(7) Disclosure of excess mileage when vehicle is known to have exceeded 100,000 miles and the odometer records only five whole-mile digits.

(b) A copy of each written disclosure must be forwarded to the Department of Motor Vehicles, as a condition precedent to the reregistration of the vehicle. The odometer reading at the time of transfer, as stated on the written disclosure, shall be recorded on the new certificate of title by the Department.

(c) It shall be unlawful for any transferor to violate any rules under this section or to knowingly give a false statement to a transferee in making any disclosure required by such rules.

(d) The provisions of this disclosure statement section shall not apply to the following transfers:

- (1) A vehicle having a gross vehicle weight rating of more than 16,000 pounds;
- (2) A vehicle that is not self-propelled;
- (3) A vehicle that is 25 years old or older; or
- (4) A new vehicle prior to its first transfer for purposes other than resale. (1973, c. 679, s. 1.)

§ 20-348. Private civil action.—(a) Any person who, with intent to defraud, violates any requirement imposed under this Article shall be liable in an amount equal to the sum of:

- (1) Three times the amount of actual damages sustained or one thousand five hundred dollars (\$1,500), whichever is the greater; and
- (2) In the case of any successful action to enforce the foregoing liability, the costs of the action together with reasonable attorney fees as determined by the court.

(b) An action to enforce any liability created under subsection (a) of this section, may be brought in any court of the trial division of the General Court of Justice of the State of North Carolina within two years from the date on which the liability arises. (1973, c. 679, s. 1.)

§ 20-349. Injunctive enforcement. — Upon petition by the Attorney General of North Carolina, a violation of this Article may be enjoined as an unfair and deceptive trade practice, as prohibited by G.S. 75-1.1. (1973, c. 679, s. 1.)

§ 20-350. Criminal offense. — Any person, firm or corporation violating any provision of this Article shall be guilty of a misdemeanor. (1973, c. 679, s. 1.)

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

November 1, 1973

I, Robert Morgan, Attorney General of North Carolina, do hereby certify that the foregoing 1973 Cumulative Supplement to the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Division of Legislative Drafting and Codification of Statutes of the Department of Justice of the State of North Carolina.

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Attorney General of North Carolina

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