THE GENERAL STATUTES OF NORTH CAROLINA

1971 CUMULATIVE SUPPLEMENT

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

UNDER THE DIRECTION OF

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Volume 1B

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Preface

This Cumulative Supplement to Replacement Volume 1B contains the general laws of a permanent nature enacted at the 1971 Session 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.

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.

Preface

This Cumulative Supplement to [illegible] Volumes [illegible] contains the general laws of a permanent nature enacted at the 19[illegible] Session of the General Assembly, which are within the scope of such volumes, and [illegible] to date the annotations included therein.

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Scope of Volume

Statutes:

Permanent portions of the general laws enacted at the 1971 Session of the General Assembly affecting Chapters 2 through 14 of the General Statutes.

Annotations:

Sources of the annotations:

North Carolina Reports volumes 275 (p. 342)-279 (p. 191).
North Carolina Court of Appeals Reports volumes 5 (p. 228)-11 (p. 596).
Federal Reporter 2nd Series volumes 410 (p. 449)-443 (p. 1216).
Federal Supplement volumes 298 (p. 1201)-328 (p. 224).
United States Reports volumes 394 (p. 576)-403 (p. 442).
Supreme Court Reporter volumes 89 (p. 2152)-91 (p. 1976).
North Carolina Law Review volumes 47 (p. 732)-49 (p. 591.)
Wake Forest Intramural Law Review volume 6 (p. 568).
Opinions of the Attorney General.

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The General Statutes of North Carolina 1971 Cumulative Supplement

VOLUME 1B

Chapter 2.

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2-7 to 2-9. [Repealed.]

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ARTICLE 1.

The Office.

§ **2-1**: Repealed by Session Laws 1971, c. 363, s. 11, effective October 1, 1971.

§ **2-2**: Transferred to § 7A-100 by Session Laws 1971, c. 363, s. 1, effective October 1, 1971.

§§ **2-3, 2-4**: Repealed by Session Laws 1971, c. 363, s. 11, effective October 1, 1971.

§§ **2-5, 2-6**: Transferred to § 7A-100 by Session Laws 1971, c. 363, s. 1, effective October 1, 1971.

§§ **2-7 to 2-9**: Repealed by Session Laws 1971, c. 363, s. 11, effective October 1, 1971.

ARTICLE 2.

Assistant Clerks.

§ **2-10**: Transferred to § 7A-102 by Session Laws 1971, c. 363, s. 2, effective October 1, 1971.

§ **2-11**: Repealed by Session Laws 1971, c. 363, s. 11, effective October 1, 1971.

§ **2-12**: Transferred to § 7A-102 by Session Laws 1971, c. 363, s. 2, effective October 1, 1971.

Article 3.
Deputies.

§ **2-13**: Transferred to § 7A-102 by Session Laws 1971, c. 363, s. 2, effective October 1, 1971.

§ **2-14**: Repealed by Session Laws 1971, c. 363, s. 11, effective October 1, 1971.

§ **2-15**: Transferred to § 7A-102 by Session Laws 1971, c. 363, s. 2, effective October 1, 1971.

Article 4.
Powers and Duties.

§ **2-16**: Transferred to § 7A-103 by Session Laws 1971, c. 363, s. 3, effective October 1, 1971.

§§ **2-16.1, 2-16.2**: Repealed by Session Laws 1971, c. 363, s. 11, effective October 1, 1971.

Editor's Note. — Session Laws 1971, c. 363, s. 11, as amended by Session Laws 1971, c. 518, s. 1, provides: "Repeal of any curative or validating laws by this section shall not be construed to invalidate any acts validated by the curative or validating laws."

§ **2-17**: Transferred to § 7A-104 by Session Laws 1971, c. 363, s. 4, effective October 1, 1971.

§ **2-18**: Repealed by Session Laws 1971, c. 363, s. 11, effective October 1, 1971.

Editor's Note. — Session Laws 1971, c. 363, s. 11, as amended by Session Laws 1971, c. 518, s. 1, provides: "Repeal of any curative or validating laws by this section shall not be construed to invalidate any acts validated by the curative or validating laws."

§§ **2-19 to 2-21**: Transferred to § 7A-104 by Session Laws 1971, c. 363, s. 4, effective October 1, 1971.

§ **2-22**: Transferred to § 7A-106 by Session Laws 1971, c. 363, s. 5, effective October 1, 1971.

§ **2-23**: Repealed by Session Laws 1971, c. 363, s. 11, effective October 1, 1971.

§§ **2-24, 2-25**: Transferred to § 7A-100 by Session Laws 1971, c. 363, s. 1, effective October 1, 1971.

§§ **2-26, 2-27**: Repealed by Session Laws 1971, c. 363, s. 11, effective October 1, 1971.

§§ **2-29 to 2-41**: Repealed by Session Laws 1971, c. 363, s. 11, effective October 1, 1971.

§ **2-42**: Transferred to § 7A-109 by Session Laws 1971, c. 363, s. 6, effective October 1, 1971.

§ **2-43**: Repealed by Session Laws 1971, c. 363, s. 11, effective October 1, 1971.

ARTICLE 5.

Reports.

§ **2-44**: Repealed by Session Laws 1971, c. 363, s. 11, effective October 1, 1971.

§ **2-45**: Transferred to § 7A-110 by Session Laws 1971, c. 363, s. 7, effective October 1, 1971.

ARTICLE 6.

Money in Hand; Investments.

§§ **2-46 to 2-51**: Repealed by Session Laws 1971, c. 363, s. 11, effective October 1, 1971.

§§ **2-52, 2-53**: Transferred to § 7A-111 by Session Laws 1971, c. 363, s. 8, effective October 1, 1971.

§§ **2-54 to 2-56**: Transferred to § 7A-112 by Session Laws 1971, c. 363, s. 9, effective October 1, 1971.

§§ **2-57 to 2-59**: Repealed by Session Laws 1971, c. 363, s. 11, effective October 1, 1971.

§ **2-60**: Transferred to § 7A-112 by Session Laws 1971, c. 363, s. 9, effective October 1, 1971.

Chapter 3.

Commissioners of Affidavits and Deeds.

§§ **3-1 to 3-8**: Repealed by Session Laws 1971, c. 202.

Chapter 4.

Common Law.

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

Extent of Common Law.—

In accord with 3rd paragraph in original. See Mullen v. Sawyer, 8 N.C. App. 458, 174 S.E.2d 646 (1970).

Statutes Construed According to Common-Law Definition. — When a statute punishes an act giving it a name known to the common law, without otherwise defining it, the statute is construed according to the common-law definition. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

The common-law writ of error coram nobis, etc.

The availability of a writ of error coram nobis in this State stems from this section which adopts the common law as the law of this State, and authority for the writ stems from N.C. Const., Art. IV, § 12, which gives the Supreme Court authority to exercise supervision over the inferior courts of the State. State v. Green, 277 N.C. 188, 176 S.E.2d 756 (1970).

The requirement that, in every instance, the approval of the Supreme Court must first be obtained before application can be made to the trial court for issuance of a writ of error coram nobis appears to be novel to North Carolina and here, of recent vintage. Prior to In re Taylor, 229 N.C. 297, 49 S.E.2d 749 (1948), it does not appear that authority for the issuance of the writ, long recognized as an available common-law writ, was derived from the supervisory powers granted in the Constitution but rather from this section which, with certain exceptions, adopted the common law as the law of this State. Dantzic v. State, 10 N.C. App. 369, 178 S.E.2d 790 (1971).

False imprisonment is the illegal restraint of the person of any one against his will, but there must be a detention, and the detention must be unlawful. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

False imprisonment is, at common law, the unlawful restraint or detention of another. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

Since this section adopts the common law as the law of this State (with exceptions not pertinent here), the common law with respect to kidnapping and false imprisonment is the law of this State. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

Any unlawful restraint of one's liberty, whether in a common prison, in a private house, on the public streets, in a ship, or elsewhere, is, in law, a false imprisonment, and the offense is a misdemeanor at common law. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

The unlawful detention of a human being against his will is false imprisonment, not kidnapping. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

At common law forcible detention was false imprisonment, not kidnapping. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

North Carolina does not have a criminal statute making false imprisonment a crime. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

False imprisonment was indictable as a specific crime at common law, and this doctrine still applies in states where the common law has been adopted. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

Kidnapping.—Since § 14-39 does not define kidnapping, the General Assembly changed nothing from the common-law definition of that crime. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

The failure of § 14-39 to define kidnapping does not render the statute vague or uncertain, and the common-law definition of the offense is incorporated into the statute by construction. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

Since this section adopts the common law as the law of this State (with exceptions not pertinent here), the common law with respect to kidnapping and false imprisonment is the law of this State. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

Obligation of Father to Support Child.— At common law it is the duty of a father to support his minor children. The common-law obligation of a father to support his child is not a debt in the legal sense, but an obligation imposed by law. It is not a property right of the child but is a personal duty of the father which is terminated by his death. These common-law principles have not been abrogated or modified by statute and are in full force and effect in this jurisdiction. Mullen v. Sawyer, 277 N.C. 623, 178 S.E.2d 425 (1971).

Chapter 5.

Contempt.

§ 5-1. Contempts enumerated; common law repealed.

I. GENERAL CONSIDERATION.

Editor's Note.—

For note on right to jury trial in criminal contempt proceedings, see 6 Wake Forest Intra. L. Rev. 356 (1970). For note on the right of an individual to freedom of speech, and the right of the State to carry out normal functions of the judiciary, a balancing of interests, see 6 Wake Forest Intra. L. Rev. 491 (1970). 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).

Nature and Purpose of Proceedings.—

In accord with 4th paragraph in original. See Blue Jeans Corp. of America v. Amalgamated Clothing Workers, 275 N.C. 503, 169 S.E.2d 867 (1969).

The fact that contemptuous conduct arises in a civil action does not alter the fact that contempt proceedings are criminal in nature. Blue Jeans Corp. of America v. Amalgamated Clothing Workers, 275 N.C. 503, 169 S.E.2d 867 (1969).

Although contempt of court, in its essential character, is divided into various kinds, such as direct or constructive, and civil or criminal, nevertheless in every species of contempt there is said to be necessarily inherent an element of offense against the majesty of the law savoring more or less of criminality. Therefore it is said that the process by which the party charged is reached and tried is essentially criminal or quasi-criminal. Blue Jeans Corp. of America v. Amalgamated Clothing Workers, 275 N.C. 503, 169 S.E.2d 867 (1969).

A person guilty of any of the acts or omissions enumerated in the eight subdivisions of this section may be punished for contempt because such acts or omissions have a direct tendency to interrupt the proceedings of the court or to impair the respect due to its authority. Blue Jeans Corp. of America v. Amalgamated Clothing Workers, 275 N.C. 503, 169 S.E.2d 867 (1969).

The distinction between a proceeding under this section, etc.—

In accord with original. See Blue Jeans Corp. of America v. Amalgamated Clothing Workers, 275 N.C. 503, 169 S.E.2d 867 (1969).

Nature of Offense.—

Criminal contempt or punishment for contempt is applied where the judgment is in punishment of an act already accomplished, tending to interfere with the administration of justice. Blue Jeans Corp. of America v. Amalgamated Clothing Workers, 275 N.C. 503, 169 S.E.2d 867 (1969).

Same—Jury Trial.—

The United States Supreme Court has held that serious contempts are so nearly like other serious crimes that they are subject to the jury trial provisions of U.S. Const., Art. III, § 2 and of the Sixth Amendment thereto, which is binding upon the states by virtue of the due process clause of the Fourteenth Amendment. Blue Jeans Corp. of America v. Amalgamated Clothing Workers, 275 N.C. 503, 169 S.E.2d 867 (1969).

The maximum punishment authorized for criminal contempt under this section and § 5-4 is a fine of $250 or imprisonment for 30 days, or both. This makes it a petty offense with no constitutional right to a jury trial. Blue Jeans Corp. of America v. Amalgamated Clothing Workers, 275 N.C. 503, 169 S.E.2d 867 (1969).

The possibilities that striking workers adjudged guilty of criminal contempt under this section might be denied the right to return to work or might be disqualified from drawing unemployment benefits for as long as 12 weeks are held irrelevant on the issue of whether the strikers are entitled to trial by jury in the contempt proceedings, since the possibilities are no part of the punishment which the court may impose for criminal contempt. Blue Jeans Corp. of America v. Amalgamated Clothing Workers, 275 N.C. 503, 169 S.E.2d 867 (1969).

II. SUBDIVISION (1).

Editor's Note.—For comment on dealing with unruly persons in the courtroom, see 48 N.C.L. Rev. 878 (1970).

In General.—The power to punish for a contempt committed in the presence of the court, or near enough to impede its business, is essential to the existence of every court. In re Hennis, 6 N.C. App. 683, 171 S.E.2d 211 (1969).

Behavior committed during the sitting of any court of justice, in immediate view and presence of the court, and directly tending to interrupt its proceedings or to impair the respect due to its authority may

be punished for contempt. In re Hennis, 6 N.C. App. 683, 171 S.E.2d 211 (1969).

Rights of Freedom of Expression, Assembly and Petition for Redress of Grievances.—The right of a person or a group of persons to freedom of expression and peaceably to assemble and petition the government for a redress of grievances may not be exercised in such a way as to interrupt the sitting of a court of justice. In re Hennis, 6 N.C. App. 683, 171 S.E.2d 211 (1969).

Picketing and Demonstrating. — Interference with the operations of the court cannot be tolerated. Picketing the courthouse and the judge would tend to intimidate jurors, witnesses and parties having business with the court, where demonstration or picketing is so close to the scene of a trial that it constitutes a clear and present danger to the orderly administration of justice in that it actually interrupts the proceedings of the court. It is not what a defendant expresses but the place where he expresses it and the results he obtains that authorize the judge to punish him summarily for direct contempt of court. In re Hennis, 6 N.C. App. 683, 171 S.E.2d 211 (1969).

IV. SUBDIVISION (4).

Willful disobedience of an order lawfully issued by the court is contemptuous conduct. Blue Jeans Corp. of America v. Amalgamated Clothing Workers, 275 N.C. 503, 169 S.E.2d 867 (1969).

Contempt Proceeding as Part of Original Injunction Suit.—While some jurisdictions hold that a criminal contempt proceeding is independent and not a part of the case out of which the alleged contempt arose, there is authority that a contempt proceeding based on the violation of an injunction, regardless of whether the proceeding is civil or criminal in nature, is a part of the original injunction suit and properly triable as such. Blue Jeans Corp. of America v. Amalgamated Clothing Workers, 275 N.C. 503, 169 S.E.2d 867 (1969).

§ 5-2. Appeal from judgment of guilty.

Editor's Note.—

For note on right to jury trial in criminal contempt proceedings, see 6 Wake Forest Intra. L. Rev. 356 (1970).

Applied in Blue Jeans Corp. of America v. Amalgamated Clothing Workers, 275 N.C. 503, 169 S.E.2d 867 (1969).

§ 5-4. Punishment.

Editor's Note.—

For note on right to jury trial in criminal contempt proceedings, see 6 Wake Forest Intra. L. Rev. 356 (1970). 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).

Punishment Immediate.—

Punishment for contempt is the exercise of a power incident to all courts of record, and essential to the administration of the laws. The punishment, in such cases, must be immediate, or it would be ineffectual, as it is designed to suppress an outrage which impedes the business of the court. Blue Jeans Corp. of America v. Amalgamated Clothing Workers, 275 N.C. 503, 169 S.E.2d 867 (1969).

Punishment of 20 days in jail for direct contempt of court is not excessive. In re Hennis, 6 N.C. App. 683, 171 S.E.2d 211 (1969).

§ 5-5. Summary punishment for direct contempt.

Constitutionality.—

In accord with original. See In re Hennis, 6 N.C. App. 683, 171 S.E.2d 211 (1969).

A contention that a defendant was denied due process when the court summarily sentenced him for direct contempt committed in the presence of the court, in that he did not have sufficient opportunity to prepare his defense or obtain a lawyer, he was not offered a lawyer, he was not informed of the right to have witnesses and compel their attendance, he was not proven guilty beyond a reasonable doubt, he had no opportunity to confront and cross-examine witnesses, and he was not informed of his right against self-incrimination, is without merit, since summary punishment for direct contempt committed in the presence of the court does not contemplate such a trial. In re Hennis, 6 N.C. App. 683, 171 S.E.2d 211 (1969).

And the offended court, etc.—

Direct contempt of court is punishable summarily, and the offended court is only required to "cause the particulars of the offense to be specified on the record." In re Hennis, 6 N.C. App. 683, 171 S.E.2d 211 (1969).

The proceeding by attachment for violating an order of the court made in furtherance of a pending action is necessarily summary and prompt, and to be effectual

it must be so. The judge determines the facts and adjudges the contempt, and while he may avail himself of a jury and have their verdict upon a disputed and doubtful matter of fact, it is in his discretion to do so or not. Blue Jeans Corp. of America v. Amalgamated Clothing Workers, 275 N.C. 503, 169 S.E.2d 867 (1969).

What Is Direct Contempt.—

In accord with original. See In re Hennis, 6 N.C. App. 683, 171 S.E.2d 211 (1969).

Remedy by Habeas Corpus.—

The fact found by the court in summarily punishing a person for direct contempt are binding upon the judge at a habeas corpus hearing, the duty of the judge at the habeas corpus hearing being only to review the record and determine whether the court which imposed the sentence for direct contempt had jurisdiction and whether the facts found and specified on the record were sufficient to support the imposition of sentence. In re Hennis, 6 N.C. App. 683, 171 S.E.2d 211 (1969).

The Court of Appeals is bound by the factual findings spread upon the record by the presiding judge in summarily punishing a person for direct contempt of court. In re Hennis, 6 N.C. App. 683, 171 S.E.2d 211 (1969).

Applied in State v. Dickerson, 9 N.C. App. 387, 176 S.E.2d 376 (1970).

§ **5-6. Courts and officers empowered to punish.**—Every referee, commissioner, magistrate, or judge, justice, or clerk of the General Court of Justice, or member of the board of commissioners of each county, or member of the Utilities Commission or Industrial Commission, has the power to punish for contempt while sitting for the trial of causes or while engaged in official duties. (Code, ss. 651, 652; Rev., s. 942; C. S., s. 983; 1933, c. 134, s. 8; 1941, c. 97; 1945, c. 533; 1969, c. 44, s. 16; 1971, c. 381, s. 1.)

Editor's Note.—

The 1971 amendment, effective Oct. 1, 1971, deleted "justice of the peace" preceding "referee" and deleted "judge of a court inferior to the superior court" preceding "magistrate."

Contempt Powers of Deputy Commissioners of the Industrial Commission.—See opinion of Attorney General to Mr. Wm. H. Stephenson, North Carolina Industrial Commission, 41 N.C.A.G. 403 (1971).

§ **5-7. Indirect contempt; order to show cause.**

Editor's Note. — For note on right to jury trial in criminal contempt proceedings, see 6 Wake Forest Intra. L. Rev. 356 (1970).

Applied in Blue Jeans Corp. of America v. Amalgamated Clothing Workers, 275 N.C. 503, 169 S.E.2d 867 (1969).

§ **5-8. Acts punishable as for contempt.**—Every court of record has power to punish as for contempt when the act complained of was such as tended to defeat, impair, impede, or prejudice the rights or remedies of a party to an action then pending in court—

(1) Any clerk, sheriff, register, solicitor, attorney, counselor, coroner, referee, or any other person in any manner selected or appointed to perform any ministerial or judicial service, for any neglect or violation of duty or any misconduct by which the rights or remedies of any party in a cause or matter pending in such court may be defeated, impaired, delayed, or prejudiced, for disobedience of any lawful order of any court or judge, or any deceit or abuse of any process or order of any such court or judge.

(6) All magistrates, officers and tribunals for disobedience of any lawful order of the court, or for proceeding in any matter or cause contrary to law, after the same shall have been removed from their jurisdiction.

(1971, c. 381, s. 2.)

Editor's Note.—

The 1971 amendment, effective Oct. 1, 1971, deleted "constable" preceding "referee" in subdivision (1) and deleted "inferior" preceding "magistrates" in subdivision (6).

Only the opening paragraph of the section and the subdivisions changed by the amendment are set out.

For note on right to jury trial in criminal contempt proceedings, see 6 Wake Forest Intra. L. Rev. 356 (1970).

In General.—A person guilty of any of the acts or neglects catalogued in the seven

subdivisions of this section is punishable as for contempt because such acts or neglects tend to defeat, impair, impede, or prejudice the rights or remedies of a party to an action pending in court. Blue Jeans Corp. of America v. Amalgamated Clothing Workers, 275 N.C. 503, 169 S.E.2d 867 (1969).

Criminal and Civil Contempt Distinguished.—

The line of demarcation between civil and criminal contempts is hazy at best. A major factor in determining whether a contempt is civil or criminal is the purpose for which the power is exercised. Where the primary purpose is to preserve the court's authority and to punish for disobedience of its orders, the contempt is criminal. Where the primary purpose is to provide a remedy for an injured suitor and to coerce compliance with an order, the contempt is civil. Blue Jeans Corp. of America v. Amalgamated Clothing Workers, 275 N.C. 503, 169 S.E.2d 867 (1969).

Civil contempt or punishment as for contempt is applied to a continuing act, and the proceeding is used to compel obedience to orders and decrees made for the benefit of private parties and to preserve and enforce private rights. Blue Jeans Corp. of America v. Amalgamated Clothing Workers, 275 N.C. 503, 169 S.E.2d 867 (1969).

Civil contempt proceedings look only to the future. Blue Jeans Corp. of America v. Amalgamated Clothing Workers, 275 N.C. 503, 169 S.E.2d 867 (1969).

Proceedings under This Section and under § 5-1 Distinguished.—It is essential to the due administration of justice in this field of the law that the fundamental distinction between a proceeding for contempt under § 5-1 and a proceeding as for contempt under this section be recognized and enforced. The importance of the distinction lies in differences in the procedure, the punishment, and the right of review established by law for the two proceedings. Blue Jeans Corp. of America v. Amalgamated Clothing Workers, 275 N.C. 503, 169 S.E.2d 867 (1969).

District Court May Enforce Judgment Entered in Superior Court. — A district court judge may hold a party to a proceeding before him in civil contempt for failure to comply with court orders issued pursuant to a confession of judgment regarding payment of alimony which was entered in the superior court prior to the establishment of a district court for the district in which the order was entered. Peoples v. Peoples, 8 N.C. App. 136, 174 S.E.2d 2 (1970).

The court is vested with broad power when it is authorized to punish "as for contempt." This power includes the authority for a district court judge to require one whom he has found in wilful contempt of court for failure to comply with a child support order entered pursuant to § 50-13.1 et seq., to pay reasonable counsel fees to opposing counsel as a condition to being purged of contempt. Blair v. Blair, 8 N.C. App. 61, 173 S.E.2d 513 (1970).

A failure to obey an order of a court cannot be punished by contempt proceedings unless the disobedience is wilful, which imports knowledge and a stubborn resistance. Manifestly, one does not act wilfully in failing to comply with a judgment if it has not been within his power to do so since the judgment was rendered. Cox v. Cox, 10 N.C. App. 476, 179 S.E.2d 194 (1971).

Defendant Must Possess Means to Comply with Order.—In order to punish by contempt proceedings, the trial court must find as a fact that the defendant possessed the means to comply with orders of the court during the period when he was in default. Cox v. Cox, 10 N.C. App. 476, 179 S.E.2d 194 (1971).

For a defendant to be held in contempt for failure to comply with a court order, the trial judge must make particular findings that defendant possessed the means to comply with them. Peoples v. Peoples, 8 N.C. App. 136, 174 S.E.2d 2 (1970).

Where the court enters judgment as for civil contempt, the court must find not only failure to comply with the order but that the defendant presently possesses the means to comply. Cox v. Cox, 10 N.C. App. 476, 179 S.E.2d 194 (1971).

Threats designed to intimidate plaintiffs and their witnesses and to dissuade them from testifying in the case or otherwise pursuing the enforcement of the restrictive covenants is punishable as for contempt. Anderson v. Williard, 11 N.C. App. 70, 180 S.E.2d 410 (1971).

A judgment ordering the payment of alimony may be enforced by the contempt power as provided for in this section and § 5-9. Peoples v. Peoples, 8 N.C. App. 136, 174 S.E.2d 2 (1970).

Error to Imprison for Failure to Pay Whole Amount of Alimony. — Where the trial judge found that the party was a healthy and able-bodied man for his age, and further found that he could pay at least a portion of the alimony, it was error to imprison him until he should pay the

whole amount. Cox v. Cox, 10 N.C. App. 476, 179 S.E.2d 194 (1971).

The findings of fact by the judge in contempt proceedings are conclusive on appeal when supported by any competent evidence, and are reviewable only for the purpose of passing on their sufficiency to warrant the judgment. Peoples v. Peoples, 8 N.C. App. 136, 174 S.E.2d 2 (1970).

In proceedings for contempt, the facts found by the judge are not reviewable except for the purpose of passing upon their sufficiency to warrant the judgment. Cox v. Cox, 10 N.C. App. 476, 179 S.E.2d 194 (1971).

§ 5-9. Trial of proceedings in contempt.

Editor's Note. — For note on right to jury trial in criminal contempt proceedings, see 6 Wake Forest Intra. L. Rev. 356 (1970).

Applied in Peoples v. Peoples, 8 N.C. App. 136, 174 S.E.2d 2 (1970).

Chapter 6.

Liability for Court Costs.

Article 1.

Generally.

Sec.
6-2. [Repealed.]
6-4. Execution for unpaid costs; bill of costs to be attached.
6-5, 6-6. [Repealed.]
6-7. Clerk to enter costs in case file.
6-8 to 6-12. [Repealed.]

Article 2.

When State Liable for Costs.

6-16. [Repealed.]

Article 3.

Civil Actions and Proceedings.

6-18. When costs allowed as of course to plaintiff.
6-27. [Repealed.]

Article 4.

Costs on Appeal.

6-34, 6-35. [Repealed.]

Article 5.

Liability of Counties in Criminal Actions.

6-36 to 6-39. [Repealed.]
6-40. Liability of counties, where trial removed from one county to another.
6-41 to 6-44. [Repealed.]

Article 6.

Liability of Defendant in Criminal Actions.

Sec.
6-45, 6-46. [Repealed.[

Article 7.

Liability of Prosecuting Witness for Costs.

6-49. Prosecuting witness liable for costs in certain cases; court determines prosecuting witness.
6-50. Imprisonment of prosecuting witness for willful nonpayment of costs if prosecution frivolous.

Article 8.

Fees of Witnesses.

6-52. [Repealed.]
6-54 to 6-56. [Repealed.]
6-58, 6-59. [Repealed.]
6-60. No more than two witnesses may be subpoenaed to prove single material fact; liability for fees of such witnesses; one fee for day's attendance.
6-61. [Repealed.]
6-63. [Repealed.]

Article 9.

Criminal Costs before Justices, Mayors, County or Recorders' Courts.

6-64, 6-65. [Repealed.]

Article 1.

Generally.

§ **6-1. Items allowed as costs.**—To the party for whom judgment is given, costs shall be allowed as provided in Chapter 7A and this Chapter. (Code, s. 528; Rev., s. 1249; C. S., s. 1225; 1955, c. 922; 1971, c. 269, s. 1.)

Editor's Note.—
The 1971 amendment, effective Oct. 1, 1971, rewrote this section.

§ **6-2:** Repealed by Session Laws 1971, c. 269, s. 15, effective October 1, 1971.

§ **6-4. Execution for unpaid costs; bill of costs to be attached.**—When costs are not paid by the party from whom they are due, the clerk of superior court shall issue an execution for the costs, and attach a bill of costs to each execution. The sheriff shall levy the execution as in other cases. (R. C., c. 102, s. 24; Code, s. 3762; Rev., s. 1252; C. S., s. 1228; 1969, c. 44, s. 17; 1971, c. 269, s. 2.)

Editor's Note.—
The 1971 amendment, effective Oct. 1, 1971, rewr -: this section.

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§§ **6-5, 6-6**: Repealed by Session Laws 1971, c. 269, s. 15, effective October 1, 1971.

§ **6-7. Clerk to enter costs in case file.**—The clerk of superior court shall enter in the case file, after judgment, the costs allowed by law. (Code, s. 532; Rev., s. 1255; C. S., s. 1231; 1971, c. 269, s. 3.)

Editor's Note.—The 1971 amendment, effective Oct. 1, 1971, rewrote this section.

§§ **6-8 to 6-12**: Repealed by Session Laws 1971, c. 269, s. 15, effective October 1, 1971.

Article 2.

When State Liable for Costs.

§ **6-14. Civil action by and against State officers.**—In all civil actions depending, or which may be instituted, by any of the officers of the State, or which have been or shall be instituted against them, when any such action is brought or defended pursuant to the advice of the Attorney General, and the same is decided against such officers, the cost thereof shall be paid by the State Treasurer upon properly drawn warrants. (1874-5, c. 154; Code, s. 3373; Rev., s. 1260; C. S., s. 1237; 1971, c. 269, s. 4.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, substituted "upon properly drawn warrants" for "upon the warrant of the Auditor for the amount thereof as taxed."

§ **6-16**: Repealed by Session Laws 1971, c. 269, s. 15, effective October 1, 1971.

§ **6-17. Costs of State on appeals to federal courts.**—In all cases, whether civil or criminal, to which the State of North Carolina is a party, and which are carried from the courts of this State, or from the district court of the United States, by appeal or writ of error, to the United States circuit court of appeals, or to the Supreme Court of the United States, and the State is adjudged to pay the costs, it is the duty of the Attorney General to certify the amount of such costs to the Treasurer, who shall pay them upon properly drawn warrants. (1871-2, c. 26; Code, s. 538; Rev., s. 1263; C. S., s. 1240; 1971, c. 269, s. 5.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, substituted "to certify the amount of such costs to the Treasurer, who shall pay them upon properly drawn warrants" for "to certify the amount of such costs to the Auditor, who shall thereupon issue a warrant for the same, directed to the Treasurer, who shall pay the same out of any monies in the treasury not otherwise appropriated."

Article 3.

Civil Actions and Proceedings.

§ **6-18. When costs allowed as of course to plaintiff.**—Costs shall be allowed of course to the plaintiff, upon a recovery, in the following cases:

(1) In an action for the recovery of real property, or when a claim of title to real property arises on the pleadings, or is certified by the court to have come in question at the trial.

(2) In an action to recover the possession of personal property.

(3) In an action for assault, battery, false imprisonment, libel, slander, malicious prosecution, criminal conversation or seduction, if the plaintiff recovers less than fifty dollars ($50.00) damages, he shall recover no more costs than damages.

(4) When several actions are brought on one bond, recognizance, promissory note, bill of exchange or instrument in writing, or in any other case, for the same cause of action against several parties who might

have been joined as defendants in the same action, no costs other than disbursements shall be allowed to the plaintiff in more than one of such actions, which shall be at his election, provided the party or parties proceeded against in such other action or actions were within the State and not secreted at the commencement of the previous action or actions. (R. C., c. 31, s. 78; 1874-5, c. 119; Code, s. 525; Rev., s. 1264; C. S., s. 1241; 1971, c. 269, s. 6.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, deleted former subdivision (3), which read "In actions of which a court of a justice of the peace has no jurisdiction, unless otherwise provided by law," and designated former subdivisions (4) and (5) as present subdivisions (3) and (4).

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

Discretion Not Reviewable.—

Taxation of costs against the plaintiff is within the court's discretion and is not reviewable on appeal, the action being equitable in nature. Bumgarner & Bowman Bldrs. v. Hollar, 7 N.C. App. 14, 171 S.E.2d 60 (1969).

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

Attorneys' Fees.—

The language of subdivision (2) of this section is sufficient to vest in the trial court the discretionary authority to tax reasonable attorneys' fees as a part of the costs to be paid by the executor. McWhirter v. Downs, 8 N.C. App. 50, 173 S.E.2d 587 (1970).

Applied in Dillon v. North Carolina Nat'l Bank, 6 N.C. App. 584, 170 S.E.2d 571 (1969).

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

Ordinarily, attorneys' fees are not recoverable as an item of damages or part of the costs in litigation. U.S. Piping, Inc. v. Travelers Indem. Co., 9 N.C. App. 561, 176 S.E.2d 835 (1970).

But the legislature has enacted an exception to this general rule and allows the trial judge to award attorneys' fees in certain situations under this section. U.S. Piping, Inc. v. Travelers Indem. Co., 9 N.C. App. 561, 176 S.E.2d 835 (1970).

Allowance of Counsel Fees Discretionary.—The allowance of counsel fees under the authority of this section is, by express language of the section, in the discretion of the presiding judge, and without a showing of any abuse of the trial judge's discretion, an assignment of error to a denial of a motion for such allowance is overruled. Callicutt v. Hawkins, 11 N.C. App. 546, 181 S.E.2d 725 (1971).

A trial court improperly awarded attorneys' fees to a judgment holder in the latter's action against an automobile liability insurer, where it made no finding that there was an unwarranted refusal by the insurer to pay the claim constituting the basis of the judgment holder's suit against the insured. U.S. Piping, Inc. v. Travelers Indem. Co., 9 N.C. App. 561, 176 S.E.2d 835 (1970).

Notice Need Not Be Given Prior to Institution of Action. — The only requirement in this section as to when notice is to be given is that it be given "after maturity of the obligation by default or otherwise." This does not mean that the notice must be given prior to the institution of an action. Binning's, Inc. v. Roberts Constr. Co., 9 N.C. App. 569, 177 S.E.2d 1 (1970).

Former § 25-8 Became Part of Contracts.—Provisions in notes executed prior to the repeal in 1965 of former § 25-8 that required the debtors to pay reasonable attorneys' fees for collection of the notes were rendered unenforceable by that section, notwithstanding the enactment in 1967 of this section permitting such provisions, since the former section became a part of the contracts between the parties and this section could not vary the terms of those contracts. Register v. Griffin, 10 N.C. App. 191, 178 S.E.2d 95 (1970).

Specific Percentage Not Specified in Unsecured Promissory Note.—Where an unsecured promissory note provided for the payment of reasonable attorneys' fees upon default by the debtor, without specifying any specific percentage, the trial court properly allowed the plaintiff to recover as reasonable attorneys' fees 15% of the balance due on the note, as provided by this section. Binning's Inc. v. Roberts Constr. Co., 9 N.C. App. 569, 177 S.E.2d 1 (1970).

§ **6-27**: Repealed by Session Laws 1971, c. 269, s. 15, effective October 1, 1971.

Construed with §§ 6-19 and 6-20. — The meaning of this subdivision of the section when considered in connection with § 6-20, is not clear, nor has it ever been fully and satisfactorily interpreted; but in many well considered decisions of the court it has been held to be the correct construction of these sections that, in actions which under the old system were peculiarly cognizable in courts of equity and unless coming in the class of actions specified in §§ 6-18 and 6-19, in which the plaintiff and defendant who succeed in the controversies were to recover costs as of course, that the costs could be awarded in the discretion of the court under the provisions of § 6-20. Yates v. Yates, 170 N.C. 533, 87 S.E. 317 (1915).

Application. — A justice has no cognizance of an action brought for the purpose of subjecting land to the payment of intestate's debts, Williams v. Hughes, 139 N.C. 17, 51 S.E. 790 (1905), consequently, such an action is controlled by this subdivision of the section; and a stakeholder who demurs to the complaint, has guardians ad litem appointed, etc., is liable for the costs. Van Dyke v. Aetna Life Ins. Co., 174 N.C. 78, 93 S.E. 444 (1917).

ARTICLE 4.

Costs on Appeal.

§ **6-33. Costs on appeal generally.**—On appeal from a magistrate or any court of the General Court of Justice, if the appellant recovers judgment, he shall recover the costs of the appeal and also those costs he ought to have recovered below had the judgment of that court been correct. If in any court of appeal there is judgment for a new trial, or for a new jury, or if the judgment appealed from is not wholly reversed, but partly affirmed and partly disaffirmed, the costs shall be in the discretion of the appellate court. (Code, s. 540; Rev., s. 1279; C. S., s. 1256; 1969, c. 44, s. 19; 1971, c. 269, s. 7.)

Editor's Note.—
The 1971 amendment, effective Oct. 1, 1971, rewrote the first sentence.

§§ **6-34, 6-35**: Repealed by Session Laws 1971, c. 269, s. 15, effective October 1, 1971.

ARTICLE 5.

Liability of Counties in Criminal Actions.

§§ **6-36 to 6-39**: Repealed by Session Laws 1971, c. 269, s. 15, effective October 1, 1971.

§ **6-40. Liability of counties, where trial removed from one county to another.**—When a prisoner is sent from one county to another to be held for trial, or for any other cause or purpose, the county from which he is sent shall pay his jail expenses, unless they are collected from the prisoner. (1889, c. 354; 1901, c. 718; Rev., s. 1285; C. S., s. 1263; 1971, c. 269, s. 8.)

Cross Reference. — As to requirement that prisoner pay charges and fees, see § 153-181.

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, rewrote this section.

§§ **6-41 to 6-44**: Repealed by Session Laws 1971, c. 269, s. 15, effective October 1, 1971.

ARTICLE 6.

Liability of Defendant in Criminal Actions.

§§ **6-45, 6-46**: Repealed by Session Laws 1971, c. 269, s. 15, effective October 1, 1971.

§ **6-47. Judgment confessed; bond given to secure fine and costs.**—In cases where a court permits a defendant convicted of any criminal offense to give bond or confess judgment, with sureties to secure the fine and costs which may be imposed, the acceptance of such security shall be upon the condition that it shall not operate as a discharge of the original judgment against the defendant nor as a discharge of his person from the custody of the law until the fine and costs are paid. (1879, c. 264; Code, s. 749; 1885, c. 364; Rev., s. 1293; C. S., s. 1269; 1971, c. 269, s. 9.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, deleted "mayor, or a justice of the peace" following "court" near the beginning of this section.

§ **6-48. Arrest for nonpayment of fine and costs.**—In default of payment of such fine and costs, it is the duty of the court at any subsequent term thereof, on motion of the solicitor of the State, to order a capias to issue to the end that such defendant may be again arrested and held for the fine and costs until discharged according to law. (1879, c. 264; Code, s. 750; 1885, c. 364; Rev., s. 1294; C. S., s. 1270; 1971, c. 269, s. 10.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, deleted "and a justice of the peace or mayor may at any subsequent time arrest the defendant and hold him for the fine and costs until discharged according to law" following "until discharged according to law."

Article 7.

Liability of Prosecuting Witness for Costs.

§ **6-49. Prosecuting witness liable for costs in certain cases; court determines prosecuting witness.**—In all criminal actions in any court, if the defendant is acquitted, nolle prosequi entered, or judgment against him is arrested, or if the defendant is discharged from arrest for want of probable cause, the costs, including the fees of all witnesses whom the judge before whom the trial took place shall certify to have been proper for the defense and prosecution, shall be paid by the prosecuting witness, whether marked on the bill or warrant or not, whenever the judge is of the opinion that there was not reasonable ground for the prosecution, or that it was not required by the public interest. If a greater number of witnesses have been summoned than were, in the opinion of the court, necessary to support the charge, the court may, even though it is of the opinion that there was reasonable ground for the prosecution, order the prosecuting witness to pay the attendance fees of such witnesses, if it appear that they were summoned at the prosecuting witness's special request.

Every judge is authorized to determine who the prosecuting witness is at any stage of a criminal proceeding, whether before or after the bill of indictment has been found, or the defendant acquitted: Provided, that no person shall be made a prosecuting witness after the finding of the bill, unless he shall have been notified to show cause why he should not be made the prosecuting witness of record. (1799, c. 4, s. 19, P. R.; 1880, c. 558, P. R.; R. C., c. 35, s. 37; 1868-9, c. 277; 1874-5, c. 151; 1879, c. 49; Code, s. 737; 1889, c. 34; Rev., s. 1295; C. S., s. 1271; 1947, c. 781; 1953, c. 675, s. 1; 1971, c. 269, s. 11.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, deleted "court or justice of the peace" following "whom the judge" in the first sentence, substituted "prosecuting witness" for "prosecutor" in that sentence, deleted "court or justice" following "whenever the judge" therein, substituted "prosecuting witness" for "prosecutor" in the second sentence, substituted "prosecuting witness's" for "prosecutor's" in that sentence, deleted "or justice" following "judge" near the beginning of the second paragraph, and substituted "prosecuting witness" for "prosecutor" three times in that paragraph.

§ **6-50. Imprisonment of prosecuting witness for willful nonpayment of costs if prosecution frivolous.**—Every such prosecuting witness may be

adjudged not only to pay the costs, but he shall also be imprisoned for the willful nonpayment thereof, when the judge before whom the case was tried shall adjudge that the prosecution was frivolous or malicious. (1800, c. 558; R. C., c. 35, s. 37; 1879, c. 49; 1881, c. 176; Code, s. 738; Rev., s. 1297; C. S., s. 1272; 1971, c. 269, s. 11.1.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, substituted "prosecuting witness" for "prosecutor," inserted "willful," and deleted "court, or justice of the peace" following "judge."

ARTICLE 8.

Fees of Witnesses.

§ **6-52**: Repealed by Session Laws 1971, c. 269, s. 15, effective October 1, 1971.

§ **6-53. Witness to prove attendance; action for fees.**—Every person summoned, who shall attend as a witness in any suit, shall, before the clerk of the court, or before the referee or officer taking the testimony, ascertain by his own oath or affirmation the sum due for traveling to and from court, attendance and ferriage, which shall be certified by the clerk; and on failure of the party, at whose instance such witness was summoned (witnesses for the State and municipal corporations excepted), to pay the same previous to the departure of the witness from court, such witness may at any time sue for and recover the same from the party summoning him; and the certificate of the clerk shall be sufficient evidence of the debt. (1777, c. 115, s. 46, P. R.; 1796, c. 458, P. R.; R. C., c. 31, s. 73; 1868-9, c. 279, subch. 11, ss. 2, 4; Code, s. 1369; Rev., s. 1299; C. S., s. 1274; 1971, c. 269, s. 12.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, deleted the last sentence.

§§ **6-54 to 6-56**: Repealed by Session Laws 1971, c. 269, s. 15, effective October 1, 1971.

§§ **6-58, 6-59**: Repealed by Session Laws 1971, c. 269, s. 15, effective October 1, 1971.

§ **6-60. No more than two witnesses may be subpoenaed to prove single material fact; liability for fees of such witnesses; one fee for day's attendance.**—No solicitor shall direct that more than two witnesses be subpoenaed for the State to prove a single material fact, nor shall the State or defendant in any such prosecution be liable for the fees of more than two witnesses to prove a single material fact, unless the court, upon satisfactory reasons appearing, otherwise directs. And no witness subpoenaed in a criminal action shall be paid by the State for attendance in more than one case for any one day. (1871-2, c. 186; 1879, c. 264; Code, s. 744; Rev., s. 1303; C. S., s. 1284; 1971, c. 269, s. 13.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, rewrote this section.

§ **6-61**: Repealed by Session Laws 1971, c. 269, s. 15, effective October 1, 1971.

§ **6-62. Solicitor to announce discharge of State's witnesses.**—It is the duty of all solicitors prosecuting in the several courts, as each criminal prosecution is disposed of by trial, removal, continuance or otherwise, to call, in open court, and announce the discharge of witnesses for the State, either finally or otherwise as the disposition of the case may require. (1879, c. 264; 1881, c. 312; Code, s. 746; Rev., s. 1305; C. S., s. 1286; 1935, c. 26; 1971, c. 269, s. 14.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, deleted the language following "disposition of the case may require."

§ **6-63**: Repealed by Session Laws 1971, c. 269, s. 15, effective October 1, 1971.

ARTICLE 9.

Criminal Costs before Justices, Mayors, County or Recorders' Courts.

§ **6-64, 6-65**: Repealed by Session Laws 1971, c. 269, s. 15, effective October 1, 1971.

Chapter 7.

Courts.

SUBCHAPTER II. SUPERIOR COURTS.

Article 7.

Organization.

Sec.
7-44, 7-45. [Repealed.]

Article 9.

Judicial and Solicitorial Districts and Terms of Court.

7-68. [Repealed.]

Article 11.

Special Regulations.

7-89. [Repealed.]

SUBCHAPTER IV. DOMESTIC RELATIONS COURTS.

Article 13.

Domestic Relations Courts.

7-101 to 7-111. [Repealed.]

SUBCHAPTER V. JUSTICES OF THE PEACE.

Article 14.

Election and Qualification.

7-112 to 7-120. [Repealed.]

Article 15.

Jurisdiction.

7-121 to 7-129. [Repealed.]

Article 16.

Dockets.

7-130 to 7-133. [Repealed.]

Article 17.

Fees.

7-134. [Repealed.]

Article 17A.

Warrants and Receipts.

7-134.1 to 7-134.6. [Repealed.]

Article 18.

Process.

7-135 to 7-146. [Repealed.]

Article 19.

Pleading and Practice.

7-147 to 7-149. [Repealed.]

Article 20.

Jury Trial.

Sec.
7-150 to 7-165. [Repealed.]

Article 21.

Judgment and Execution.

7-166 to 7-176. [Repealed.]

Article 22.

Appeal.

7-177 to 7-183. [Repealed.]

Article 23.

Forms.

7-184. [Repealed.]

SUBCHAPTER VI. RECORDERS' COURTS.

Article 24.

Municipal Recorders' Courts.

7-185 to 7-217. [Repealed.]

Article 25.

County Recorders' Courts.

7-218 to 7-239. [Repealed.]

Article 27.

Provisions Applicable to All Recorders' Courts.

7-243 to 7-245. [Repealed.]

Article 28.

Civil Jurisdiction of Recorders' Courts.

7-246 to 7-255. [Repealed.]

Article 29.

Elections to Establish Recorders' Courts.

7-256 to 7-264. [Repealed.]

Article 29A.

Alternate Method of Establishing Municipal Recorders' Courts; Establishment without Election.

7-264.1. [Repealed.]

SUBCHAPTER VII. GENERAL COUNTY COURTS.

Article 30.

Establishment, Organization and Jurisdiction.

Sec.
7-265 to 7-285. [Repealed.]

Article 31.

Practice and Procedure.

7-286 to 7-296. [Repealed.]

SUBCHAPTER IX. COUNTY CRIMINAL COURTS.

Article 36.

County Criminal Courts.

7-384 to 7-404. [Repealed.]

SUBCHAPTER X. SPECIAL COUNTY COURTS.

Article 37.

Special County Courts.

Sec.
7-405 to 7-447. [Repealed.]

SUBCHAPTER XI. JUDICIAL COUNCIL.

Article 38.

Judicial Council.

7-448 to 7-456. [Transferred.]

SUBCHAPTER II. SUPERIOR COURTS.

ARTICLE 7.

Organization.

§§ **7-44, 7-45**: Repealed by Session Laws 1971, c. 377, s. 32, effective October 1, 1971.

Editor's Note.—
These sections had been previously repealed by Session Laws 1967, c. 1049, s. 6, effective Jan. 1, 1971.

ARTICLE 9.

Judicial and Solicitorial Districts and Terms of Court.

§ **7-68**: Repealed by Session Laws 1971, c. 377, s. 32, effective October 1, 1971.

Editor's Note.—
This section had been previously repealed by Session Laws 1967, c. 1049, s. 6, effective Jan. 1, 1971.

ARTICLE 11.

Special Regulations.

§ **7-89**: Repealed by Session Laws 1971, c. 377, s. 32, effective October 1, 1971.

Editor's Note.—
The seventh paragraph of § 7-89 was transferred to § 8-85 by Session Laws 1971, c. 377, s. 1, effective Oct. 1, 1971.

SUBCHAPTER IV. DOMESTIC RELATIONS COURTS.

ARTICLE 13.

Domestic Relations Courts.

§§ **7-101 to 7-111**: Repealed by Session Laws 1971, c. 377, s. 32, effective October 1, 1971.

SUBCHAPTER V. JUSTICES OF THE PEACE.

ARTICLE 14.

Election and Qualification.

§§ **7-112 to 7-120**: Repealed by Session Laws 1971, c. 377, s. 32, effective October 1, 1971.

ARTICLE 15.

Jurisdiction.

§§ **7-121 to 7-129**: Repealed by Session Laws 1971, c. 377, s. 32, effective October 1, 1971.

ARTICLE 16.

Dockets.

§§ **7-130 to 7-133**: Repealed by Session Laws 1971, c. 377, s. 32, effective October 1, 1971.

ARTICLE 17.

Fees.

§ **7-134**: Repealed by Session Laws 1971, c. 377, s. 32, effective October 1, 1971.

ARTICLE 17A.

Warrants and Receipts.

§§ **7-134.1 to 7-134.6**: Repealed by Session Laws 1971, c. 377, s. 32, effective October 1, 1971.

ARTICLE 18.

Process.

§§ **7-135 to 7-146**: Repealed by Session Laws 1971, c. 377, s. 32, effective October 1, 1971.

ARTICLE 19.

Pleading and Practice.

§§ **7-147 to 7-149**: Repealed by Session Laws 1971, c. 377, s. 32, effective October 1, 1971.

ARTICLE 20.

Jury Trial.

§§ **7-150 to 7-165**: Repealed by Session Laws 1971, c. 377, s. 32, effective October 1, 1971.

ARTICLE 21.

Judgment and Execution.

§§ **7-166 to 7-176**: Repealed by Session Laws 1971, c. 377, s. 32, effective October 1, 1971.

ARTICLE 22.

Appeal.

§§ **7-177 to 7-183**: Repealed by Session Laws 1971, c. 377, s. 32, effective October 1, 1971.

Article 23.

Forms.

§ **7-184**: Repealed by Session Laws 1971, c. 377, s. 32, effective October 1, 1971.

SUBCHAPTER VI. RECORDERS' COURTS.

Article 24.

Municipal Recorders' Courts.

§§ **7-185 to 7-217**: Repealed by Session Laws 1971, c. 377, s. 32, effective October 1, 1971.

Article 25.

County Recorders' Courts.

§§ **7-218 to 7-239**: Repealed by Session Laws 1971, c. 377, s. 32, effective October 1, 1971.

Article 27.

Provisions Applicable to All Recorders' Courts.

§§ **7-243 to 7-245**: Repealed by Session Laws 1971, c. 377, s. 32, effective October 1, 1971.

Article 28.

Civil Jurisdiction of Recorders' Courts.

§§ **7-246 to 7-255**: Repealed by Session Laws 1971, c. 377, s. 32, effective October 1, 1971.

Article 29.

Elections to Establish Recorders' Courts.

§§ **7-256 to 7-264**: Repealed by Session Laws 1971, c. 377, s. 32, effective October 1, 1971.

Article 29A.

Alternate Method of Establishing Municipal Recorders' Courts; Establishment without Election.

§ **7-264.1**: Repealed by Session Laws 1971, c. 377, s. 32, effective October 1, 1971.

SUBCHAPTER VII. GENERAL COUNTY COURTS.

Article 30.

Establishment, Organization and Jurisdiction.

§§ **7-265 to 7-285**: Repealed by Session Laws 1971, c. 377, s. 32, effective October 1, 1971.

Article 31.

Practice and Procedure.

§§ **7-286 to 7-296**: Repealed by Session Laws 1971, c. 377, s. 32, effective October 1, 1971.

SUBCHAPTER IX. COUNTY CRIMINAL COURTS.

Article 36.

County Criminal Courts.

§§ **7-384 to 7-404**: Repealed by Session Laws 1971, c. 377, s. 32, effective October 1, 1971.

SUBCHAPTER X. SPECIAL COUNTY COURTS.

Article 37.

Special County Courts.

§§ **7-405 to 7-447**: Repealed by Session Laws 1971, c. 377, s. 32, effective October 1, 1971.

SUBCHAPTER XI. JUDICIAL COUNCIL.

Article 38.

Judicial Council.

§ **7-448**: Transferred to § 7A-400 by Session Laws 1971, c. 377, s. 1.1, effective October 1, 1971.

§ **7-449**: Transferred to § 7A-401 by Session Laws 1971, c. 377, s. 1.1, effective October 1, 1971.

§ **7-450**: Transferred to § 7A-402 by Session Laws 1971, c. 377, s. 1.1, effective October 1, 1971.

§ **7-451**: Transferred to § 7A-403 by Session Laws 1971, c. 377, s. 1.1, effective October 1, 1971.

§ **7-452**: Transferred to § 7A-404 by Session Laws 1971, c. 377, s. 1.1, effective October 1, 1971.

§ **7-453**: Transferred to § 7A-405 by Session Laws 1971, c. 377, s. 1.1, effective October 1, 1971.

§ **7-454**: Transferred to § 7A-406 by Session Laws 1971, c. 377, s. 1.1, effective October 1, 1971.

§ **7-455**: Transferred to § 7A-407 by Session Laws 1971, c. 377, s. 1.1, effective October 1, 1971.

§ **7-456**: Transferred to § 7A-408 by Session Laws 1971, c. 377, s. 1.1, effective October 1, 1971.

Chapter 7A.

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SUBCHAPTER I. GENERAL COURT OF JUSTICE.

Article 1A.

[Reserved.]

Article 1B.

Age Limits for Service as Justice or Judge.

Sec.

7A-4.20. Age limit for service as justice or judge; exception.

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7A-35. [Repealed.]

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7A-43.1 to 7A-43.3. [Repealed.]

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7A-67. [Repealed.]

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

Article 13.

Creation and Organization of the District Court Division.

7A-132. Judges, solicitors, full-time assistant solicitors and magistrates for district court districts.

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

Article 14.

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7A-145. [Repealed.]

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Article 20.

Original Civil Jurisdiction of the Trial Divisions.

7A-252. [Repealed.]

Article 21.

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

Sec.
7A-261. [Repealed.]

Article 22.

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7A-275. [Repealed.]

SUBCHAPTER VI. REVENUES AND EXPENSES OF THE JUDICIAL DEPARTMENT.

Article 28.

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7A-305.1. Discovery, fee on filing verified petition.
7A-319. [Repealed.]

SUBCHAPTER VII. ADMINISTRATIVE MATTERS.

Article 29.

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7A-347 to 7A-374. [Reserved.]

Article 30.

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Sec.
7A-375. Judicial Standards Commission.
7A-376. Grounds for censure or removal.
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7A-400. Establishment and membership.
7A-401. Terms of office.
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7A-407. Compensation of members.
7A-408. Executive secretary; stenographer or clerical assistant.

SUBCHAPTER VIII.

Articles 32 to 35.

7A-409 to 7A-449. [Reserved.]

§ 7A-1. Short title.

Chapter 50 of the General Statutes was extensively rewritten during the 1967 session of the General Assembly and is not a part of the Judicial Department Act of 1965; although in some respects they must be construed with reference to each other. Boston v. Freeman, 6 N.C. App. 736, 171 S.E.2d 206 (1969).

SUBCHAPTER I. GENERAL COURT OF JUSTICE.

ARTICLE 1.

Judicial Power and Organization.

§ 7A-4. Composition and organization.

Quoted in Peoples v. Peoples, 8 N.C. App. 136, 174 S.E.2d 2 (1970).

ARTICLE 1A.

[Reserved.]

ARTICLE 1B.

Age Limits for Service as Justice or Judge.

§ 7A-4.20. Age limit for service as justice or judge; exception.—(a) No justice or judge of the Appellate Division of the General Court of Justice may continue in office beyond the last day of the month in which he attains his seventy-second birthday, and no judge of the Superior Court or District Court Divisions of the General Court of Justice may continue in office beyond the last day of the month in which he attains his seventieth birthday, except that any justice

or judge in office on the effective date of this section who has attained the age prescribed in this section for mandatory retirement may continue to serve for the remainder of the term for which he was selected. Any superior court judge in office on the effective date of this section, who continues in office until the last day of the month in which he reaches age 70, and who at that time has not served as a judge a sufficient number of years to be eligible for retirement compensation under G.S. 7A-51, may, notwithstanding this subsection, serve the additional number of calendar months necessary to make him eligible for retirement compensation under G.S. 7A-51.

(b) Subsection (a) of this section is inapplicable to emergency justices or judges, who may continue to serve as provided in G.S. 7A-39.3 and G.S. 7A-52. (1971, c. 508, s. 1; c. 1194.)

Editor's Note. — Session Laws 1971, c. 508, s. 5, provides that the act shall become effective Jan. 1, 1973, if the amendment to N.C. Const., Art. IV, § 8, proposed by Session Laws 1971, c. 451, is approved by the voters. Session Laws 1971, c. 508, s. 4, contains a severability clause.

Session laws 1971, c. 1194, added the second sentence in subsection (a).

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

ARTICLE 2.

Appellate Division Organization.

§ 7A-5. Organization.

Stated in Fetherbay v. Sharpe Motor Lines, 8 N.C. App. 58, 173 S.E.2d 589 (1970).

§ 7A-6. Appellate Division reporters; reports.

(c) The Administrative Officer of the Courts shall furnish, without charge, one copy of the advance sheets of the Appellate Division to each justice and judge of the General Court of Justice, to each public defender, and to each superior court clerk. He shall furnish two copies to each superior court solicitor, and as many copies as may be reasonably necessary to the Supreme Court library. (1967, c. 108, s. 1; c. 691, s. 57; 1969, c. 1190, s. 1; 1971, c. 377, s. 2.)

Editor's Note.—

The 1971 amendment, effective Oct. 1, 1971, substituted "public defender, and" for "superior court solicitor" in the first sentence of subsection (c), and deleted, at the end of that sentence, "each district court prosecutor, and, in such numbers as may be reasonably necessary, to the Supreme Court library." The amendment also added the second sentence of subsection (c).

As the rest of the section was not changed by the amendment, only subsection (c) is set out.

ARTICLE 5.

Jurisdiction.

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

(e) From any other order or judgment of the superior court from which an appeal is authorized by statute, appeal lies of right directly to the Court of Appeals. (1967, c. 108, s. 1; 1971, c. 377, s. 3.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, added subsection (e).

As the rest of the section was not changed by the amendment, only subsection (e) is set out.

For all practical purposes there is an unlimited right of appeal in North Carolina

to the Appellate Division of the General Court of Justice from any final judgment of the superior court or the district court in civil and criminal cases. State v. Black, 7 N.C. App. 324, 172 S.E.2d 217 (1970).

The right to appeal must be exercised in accordance with the established rules of practice and procedure. State v. Black, 7 N.C. App. 324, 172 S.E.2d 217 (1970).

No Appeal as Matter of Right from Interlocutory Orders, etc.—

In a criminal case there is no provision in the statute for an appeal to the Court of Appeals as a matter of right from an interlocutory order entered therein. State v. Black, 7 N.C. App. 324, 172 S.E.2d 217 (1970).

Denial of Application for Certiorari Is Not Final Judgment.—A "judgment" of the superior court denying defendant's application to that court for a writ of certiorari to review the proceedings of the district court in a criminal case was not a final judgment within the meaning of subsection (b) of this section, and defendant was not authorized to appeal therefrom to the Court of Appeals as a matter of right; defendant's only remedy was by petition for certiorari to the Court of Appeals. State v. Flynt, 8 N.C. App. 323, 174 S.E.2d 120 (1970).

An order requiring payment of alimony pendente lite and attorneys' fees affect a substantial right from which an appeal lies as a matter of right. Peeler v. Peeler, 7 N.C. App. 456, 172 S.E.2d 915 (1970).

Applied in State v. Moore, 276 N.C. 142, 171 S.E.2d 453 (1970); State v. Tomblin, 276 N.C. 273, 171 S.E.2d 901 (1970); State v. Henderson, 276 N.C. 430, 173 S.E.2d 291 (1970); Cline v. Cline, 6 N.C. App. 523, 170 S.E.2d 645 (1969).

Cited in State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970); State v. Hamby, 276 N.C. 674, 174 S.E.2d 385 (1970); State v. Blackwell, 276 N.C. 714, 174 S.E.2d 534 (1970).

§ 7A-28. Decisions of Court of Appeals in post-conviction proceedings final.

Judgments under the Post Conviction Act may be reviewed by the Court of Appeals under § 15-222. Dantzic v. State, 10 N.C. App. 369, 178 S.E.2d 790 (1971).

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).

Cited in Parker v. North Carolina, 397 U.S. 790, 90 S. Ct. 1458, 1474, 25 L. Ed. 2d 785 (1970).

§ 7A-29. Appeals of right from certain administrative agencies.— From any final order or decision of the North Carolina Utilities Commission, the North Carolina Industrial Commission or an appeal from the Commissioner of Insurance pursuant to G.S. 58-9.4 appeal lies of right directly to the Court of Appeals. (1967, c. 108, s. 1; 1971, c. 703, s. 5.)

Editor's Note.—The 1971 amendment, effective Jan. 1, 1972, made this section applicable to appeals from the Commissioner of Insurance pursuant to § 58-9.4.

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

Legislative Intent.—The General Assembly of North Carolina intended to insure a review by the Supreme Court of questions on which there was a division in the intermediate appellate court; no such review was intended for claims joined or consolidated in the lower appellate court and on which that court rendered unanimous decision. Hendrix v. Alsop, 278 N.C. 549, 180 S.E.2d 802 (1971).

Requirements of Constitutional Question.—

In accord with original. See Bundy v. Ayscue, 276 N.C. 81, 171 S.E.2d 1 (1969).

Question Should Be Raised and Passed on in Trial Court.—Appellate courts will not ordinarily pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the trial court. State v. Mitchell, 276 N.C. 404, 172 S.E.2d 527 (1970).

And Preserved by Appropriate Objection, etc., Assignment of Error and Argument in Brief. — The Supreme Court will not pass upon the merits of a litigant's contention that his constitutional right has been violated by a ruling or order of a lower court, unless, at the time the alleged violation of such right occurred or was threatened by a proposed procedure, ruling or offer of evidence, or at the earliest opportunity thereafter, the litigant made an appropriate objection, exception or motion and thereafter preserved the constitutional question at each level of appellate review by an appropriate assignment of error and by argument in his brief. State v. Mitchell, 276 N.C. 404, 172 S.E.2d 527 (1770).

Scope of Review.—

In accord with 2nd paragraph in original. See Bundy v. Ayscue, 276 N.C. 81, 171 S.E.2d 1 (1969).

Dismissal, etc.—

In accord with original. See Bundy v. Ayscue, 276 N.C. 81, 171 S.E.2d 1 (1969).

Mouthing of Constitutional Phrases, etc.—

In accord with original. See Bundy v. Ayscue, 276 N.C. 81, 171 S.E.2d 1 (1969).

Applied in Southern Ry. v. City of Winston-Salem, 275 N.C. 465, 168 S.E.2d 396 (1969); State v. Horton, 275 N.C. 651, 170 S.E.2d 466 (1969); State v. Bumper, 275 N.C. 670, 170 S.E.2d 457 (1969); State v. Strickland, 276 N.C. 253, 173 S.E.2d 129 (1970); State v. Barrow, 276 N.C. 381, 172 S.E.2d 512 (1970); State v. McCloud, 276 N.C. 518, 173 S.E.2d 753 (1970); North Carolina State Highway Comm'n v. Asheville School, Inc., 276 N.C. 556, 173 S.E.2d 909 (1970); Atkins v. Moye, 277 N.C. 179, 176 S.E.2d 789 (1970); State v. Green, 277 N.C. 188, 176 S.E.2d 756 (1970); Goldman v. Parkland of Dallas, Inc., 277 N.C. 223, 176 S.E.2d 784 (1970); State v. Gaiten, 277 N.C. 236, 176 S.E.2d 778 (1970); State v. Lee, 277 N.C. 242, 176 S.E.2d 772 (1970); Marrone v. Long, 277 N.C. 246, 176 S.E.2d 762 (1970); State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970); State v. Jordan, 277 N.C. 341, 177 S.E.2d 289 (1970); State v. Hatcher, 277 N.C. 380, 177 S.E.2d 892 (1970); Williamson v. McNeill, 277 N.C. 447, 177 S.E.2d 859 (1970); Allred v. City of Raleigh, 277 N.C. 530, 178 S.E.2d 432 (1971); In re Johnson, 277 N.C. 688, 178 S.E.2d 470 (1971); Southern Ry. v. City of Raleigh, 277 N.C. 709, 178 S.E.2d 490 (1971); Keiger v. Winston-Salem Bd. of Adjustment, 278 N.C. 17, 178 S.E.2d 616 (1971); Blackwell v. Butts, 278 N.C. 615, 180 S.E.2d 835 (1971); State v. Lynch, 279 N.C. 1, 181 S.E.2d 561 (1971); Watkins v. Central Motor Lines, 279 N.C. 132, 181 S.E.2d 588 (1971).

Cited in Hicks v. Hicks, 275 N.C. 370, 167 S.E.2d 761 (1969); City of Raleigh v. Norfolk S. Ry., 275 N.C. 454, 168 S.E.2d 396 (1969); State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970); Surratt v. State, 276 N.C. 725, 174 S.E.2d 524 (1970); State v. Simmons, 278 N.C. 468, 180 S.E.2d 97 (1971).

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

Applied in State v. Horton, 275 N.C. 651, 170 S.E.2d 466 (1969); State v. McBane, 276 N.C. 60, 170 S.E.2d 913 (1969); State v. Jennings, 276 N.C. 157, 171 S.E.2d 447 (1970); Whitley v. Redden, 276 N.C. 263, 171 S.E.2d 894 (1970); Hoyle v. City of Charlotte, 276 N.C. 292, 172 S.E.2d 1 (1970); King v. Baldwin, 276 N.C. 316, 172 S.E.2d 12 (1970); Smith v. Mercer, 276 N.C. 329, 172 S.E.2d 489 (1970); State v. Riera, 276 N.C. 361, 172 S.E.2d 535 (1970); Morse v. Curtis, 276 N.C. 371, 172 S.E.2d 495 (1970); State Educ. Assistance Authority v. Bank of Statesville, 276 N.C. 576, 174 S.E.2d 551 (1970); Martin v. North Carolina Housing Corp., 277 N.C. 29, 175 S.E.2d 665 (1970); Home Sec. Life Ins. Co. v. McDonald, 277 N.C. 275, 177 S.E.2d 291 (1970); Whitney Stores, Inc. v. Clark, 277 N.C. 322, 177 S.E.2d 418 (1970); Mansour v. Rabil, 277 N.C. 364, 177 S.E.2d 849 (1970); State v. McVay, 277 N.C. 410, 177 S.E.2d 874 (1970); In re Ellis, 277 N.C. 419, 178 S.E.2d 77 (1970); State v. Harris, 277 N.C. 435, 177 S.E.2d 865 (1970); State Keg, Inc. v. State Bd. of Alcoholic Control, 277 N.C. 450, 177 S.E.2d 861 (1970); Styers v. Phillips, 277 N.C. 460, 178 S.E.2d 583 (1971); State v. Crump, 277 N.C. 573, 178 S.E.2d 366 (1971); Stegall v. Housing Authority, 278 N.C. 95, 178 S.E.2d 824 (1971); State v. Brooks, 279 N.C. 45, 181 S.E.2d 553 (1971); Strickland v. Powell, 279 N.C. 183, 181 S.E.2d 464 (1971).

Cited in Nationwide Mut. Ins. Co. v. Hayes, 276 N.C. 620, 174 S.E.2d 511 (1970); Kale v. Forrest, 278 N.C. 1, 178 S.E.2d 622 (1971); State v. Winford, 278 N.C. 67, 178 S.E.2d 777 (1971); Kelly v. International Harvester Co., 278 N.C. 153, 179 S.E.2d 396 (1971); State v. Woods, 278 N.C. 210, 179 S.E.2d 358 (1971); Ervin v. Clayton, 278 N.C. 219, 179 S.E.2d 353 (1971); In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971); City of Statesville v. Bowles, 278 N.C. 497, 180 S.E.2d 111 (1971); Hendrix v. Alsop, 278 N.C. 549, 180 S.E.2d 802 (1971); In re Annexation Ordinance, 278 N.C. 641, 180 S.E.2d 851 (1971); State v. Parker, 279 N.C. 168, 181 S.E.2d 432 (1971).

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

Appeal by Trustees of Charitable Trust.—Although an appeal by the trustees of a charitable trust was subject to dismissal on the ground that there were no parties aggrieved by the order of the superior court modifying the trust, the Court of Appeals nonetheless can consider the appeal, in the exercise of its supervisory

power, where the order will affect the interests of a substantial number of public and private hospitals in the State, as well as thousands of persons who will be hospitalized as charity patients. Wachovia Bank & Trust Co. v. Morgan, 9 N.C. App. 460, 176 S.E.2d 860 (1970).

Quoted in State v. Flynt, 8 N.C. App. 323, 174 S.E.2d 120 (1970).

Cited in Dantzic v. State, 10 N.C. App. 369, 178 S.E.2d 790 (1971).

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

Cited in Lee v. Rowland, 11 N.C. App. 27, 180 S.E.2d 445 (1971); Terrell v. H. & N. Chevrolet Co., 11 N.C. App. 310, 181 S.E.2d 124 (1971).

§ **7A-35**: Repealed by Session Laws 1971, c. 377, s. 32, effective October 1, 1971.

ARTICLE 6.

Retirement of Justices and Judges of the Appellate Division; Retirement Compensation; Recall to Emergency Service; Disability Retirement.

§ **7A-39.2. Age and service requirements for retirement of justices of the Supreme Court and judges of the Court of Appeals.**—(a) Any justice of the Supreme Court or judge of the Court of Appeals who has attained the age of 65 years, and who has served for a total of 15 years, whether consecutive or not, on the Supreme Court, the Court of Appeals, or the superior court, or as Administrative Officer of the Courts, or in any combination of these offices, may retire from his present office and receive for life compensation equal to two thirds of the annual salary from time to time received by the occupant or occupants of the office from which he retired.

(b) Any justice of the Supreme Court or judge of the Court of Appeals who has attained the age of 65 years, and who has served as justice or judge, or both, in the Appellate Division for 12 consecutive years may retire and receive for life compensation equal to two thirds of the annual salary from time to time received by the occupant or occupants of the office from which he retired.

(c) Any justice or judge of the Appellate Division, who has served for a total of 24 years, whether continuously or not, as justice of the Supreme Court, judge of the Court of Appeals, judge of the superior court, or Administrative Officer of the Courts, or in any combination of these offices, may retire, regardless of age, and receive for life compensation equal to two thirds of the annual salary from time to time received by the occupant or occupants of the office from which he retired. In determining eligibility for retirement under this subsection, time served as a district solicitor of the superior court prior to January 1, 1971, may be included, provided the person has served at least eight years as a justice, judge, or Administrative Officer of the Courts, or in any combination of these offices. (1967, c. 108, s. 1; 1971, c. 508, s. 2.)

Editor's Note. — The 1971 amendment repealed former subsection (c), relating to retirement at age 75 after eight years' service, and relettered former subsection (d) as (c).

Session Laws 1971, c. 508, s. 5, provides that the act shall become effective Jan. 1, 1973, if the amendment to N.C. Const., Art. IV, § 8, proposed by Session Laws 1971, c. 451, is approved by the voters. Session Laws 1971, c. 508, s. 4 contains a severability clause.

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

ARTICLE 7.

Organization.

§ **7A-40. Composition; judicial powers of clerk.**—The Superior Court Division of the General Court of Justice consists of the several superior courts of

the State. The clerk of superior court in the exercise of the judicial power conferred upon him as ex officio judge of probate, and in the exercise of other judicial powers conferred upon him by law in respect of special proceedings and the administration of guardianships and trusts, is a judicial officer of the Superior Court Division, and not a separate court. (1965, c. 310, s. 1; 1967, c. 691, s. 1; 1969, c. 1190, s. 4; 1971, c. 377, s. 4.)

Editor's Note.—
The 1971 amendment, effective Oct. 1, 1971, deleted the former last sentence, relating to the application of certain provisions of Chapter 7.

§ **7A-41. Superior court divisions and districts; judges; assistant solicitors.**—The counties of the State are organized into four judicial divisions and 30 judicial districts, and each district has the counties, the number of regular resident superior court judges, and the number of full-time assistant solicitors set forth in the following table:

Judicial Division	Judicial District	Counties	No. of Resident Judges	No. of Full-time Asst. Solicitors
First	1	Camden, Chowan, Currituck, Dare, Gates, Pasquotank, Perquimans	1	2
	2	Beaufort, Hyde, Martin, Tyrrell, Washington	1	2
	3	Carteret, Craven, Pamlico, Pitt	1	3
	4	Duplin, Jones, Onslow, Sampson	1	3
	5	New Hanover, Pender	1	3
	6	Bertie, Halifax, Hertford, Northampton	1	2
	7	Edgecombe, Nash, Wilson	1	3
	8	Greene, Lenoir, Wayne	1	3
Second	9	Franklin, Granville, Person, Vance, Warren	1	2
	10	Wake	2	6
	11	Harnett, Johnston, Lee	1	3
	12	Cumberland, Hoke	2	5
	13	Bladen, Brunswick, Columbus	1	1
	14	Durham	1	3
	15	Alamance, Chatham, Orange	1	4
	16	Robeson, Scotland	1	2
Third	17	Caswell, Rockingham, Stokes, Surry	1	3
	18	Guilford	3	7
	19	Cabarrus, Montgomery, Randolph, Rowan	2	4
	20	Anson, Moore, Richmond, Stanly, Union	1	3
	21	Forsyth	2	5
	22	Alexander, Davidson, Davie, Iredell	1	3
	23	Alleghany, Ashe, Wilkes, Yadkin	1	1

Judicial Division	Judicial District	Counties	No. of Resident Judges	No. of Full-time Asst. Solicitors
Fourth	24	Avery, Madison, Mitchell, Watauga, Yancey	1	1
	25	Burke, Caldwell, Catawba	1	4
	26	Mecklenburg	3	8
	27	Cleveland, Gaston, Lincoln	2	6
	28	Buncombe	2	4
	29	Henderson, McDowell, Polk, Rutherford, Transylvania	1	3
	30	Cherokee, Clay, Graham, Haywood, Jackson, Macon, Swain	1	2

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

Senior regular resident judges and regular resident judges possess equal judicial jurisdiction, power, authority and status, but all duties placed by the Constitution or statutes on the resident judge of a judicial district, including the appointment to and removal from office, which are not related to a case, controversy, or judicial proceeding and which do not involve the exercise of judicial power, shall be discharged by the senior regular resident judge. A senior regular resident superior court judge in a multi-judge district, by notice in writing to the Administrative Officer of the Courts, may decline to exercise the authority vested in him by this section, in which event such authority shall be exercised by the regular resident judge next senior in point of service or age, respectively. (1969, c. 1190, s. 4; 1971, c. 377, s. 5; c. 997.)

Editor's Note.—
The first 1971 amendment, effective Oct. 1, 1971, deleted the former last sentence, which read: "Full-time assistant solicitors are not authorized under this section until January 1, 1971."

The second 1971 amendment, effective July 1, 1971, increased the number of full-time assistant solicitors in the last column of the table.

Cited in Kelly v. Davenport, 7 N.C. App. 670, 173 S.E.2d 600 (1970).

§§ **7A-43.1 to 7A-43.3**: Repealed by Session Laws 1967, c. 1049, s. 6, effective January 1, 1971.

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

Solicitor's Responsibility for Calendaring Criminal Cases.—See opinion of Attorney General to Mr. Archie Taylor, Solicitor, Fourth Solicitorial District, 9/14/70.

ARTICLE 8.

Retirement of Judges of the Superior Court; Retirement Compensation; Recall to Emergency Service; Disability Retirement.

§ 7A-51. Age and service requirements for retirement of judges of the superior court and of the Administrative Officer of the Courts.

(d) Repealed by Session Laws 1971, c. 508, s. 3. (1967, c. 108, s. 2; 1971, c. 508, s. 3.)

Editor's Note. — The 1971 amendment, repealed subsection (d), relating to compulsory retirement at the age of 70.

Session Laws 1971, c. 508, s. 5, provides that the act shall become effective Jan. 1, 1973, if the amendment to N.C. Const.,

Art. IV, § 8, proposed by Session Laws 1971, c. 451, is approved by the voters. Session Laws 1971, c. 508, s. 4, contains a severability clause.

As the other subsections were not changed by the amendment they are not set out.

Article 9.

Solicitors and Solicitorial Districts.

§ **7A-61. Duties of solicitor.**—The solicitor shall prepare the trial dockets, prosecute in the name of the State all criminal actions requiring prosecution in the superior and district courts of his district, advise the officers of justice in his district, and perform such duties related to appeals to the Appellate Division from his district as the Attorney General may require. Effective January 1, 1971, the solicitor shall also represent the State in juvenile cases in which the juvenile is represented by an attorney. Each solicitor shall devote his full time to the duties of his office and shall not engage in the private practice of law. (1967, c. 1049, s. 1; 1969, c. 1190, s. 5; 1971, c. 377, s. 5.1.)

Editor's Note.—

The 1971 amendment, effective Oct. 1, 1971, inserted "prepare the trial dockets," near the beginning of the section.

§ **7A-63. Assistant solicitors.**—Each solicitor shall be entitled to the number of full-time assistant solicitors set out in this Subchapter, to be appointed by the solicitor, to serve at his pleasure. A vacancy in the office of assistant solicitor shall be filled in the same manner as the initial appointment. An assistant solicitor shall take the same oath of office as the solicitor, and shall perform such duties as may be assigned by the solicitor. He shall devote his full time to the duties of his office and shall not engage in the private practice of law during his term. (1967, c. 1049, s. 1; 1969, c. 1190, s. 6; 1971, c. 377, s. 6.)

Editor's Note.—

The 1971 amendment, effective Oct. 1, 1971, substituted "to serve at his pleasure" for "for the same term of office as the solicitor" at the end of the first sentence and deleted "for the remainder of the unexpired term" at the end of the second sentence.

§ **7A-64. Temporary assistance when dockets overcrowded.**

Temporary Solicitor Is Full-Time Public Office as of January 1, 1971.—See opinion of Attorney General to Mr. John C.W. Gardner, 41 N.C.A.G. 192 (1970).

§ **7A-67**: Repealed by Session Laws 1971, c. 377, s. 32, effective October 1, 1971.

Article 11.

Special Regulations.

§ **7A-95. Reporting of trials.**

(f) Repealed by Session Laws 1971, c. 377, s. 32. (1965, c. 310, s. 1; 1969, c. 1190, s. 7; 1971, c. 377, s. 32.)

Editor's Note.—

The 1971 amendment, effective Oct. 1, 1971, repealed subsection (f).

As the other subsections were not changed by the amendment, they are not set out.

Applied in State v. Rogers, 275 N.C. 411, 168 S.E.2d 345 (1969).

§§ **7A-97 to 7A-99**: Reserved for future codification purposes.

Article 12.

Clerk of Superior Court.

§ **7A-100. Election; term of office; oath; vacancy; office and office hours.**—(a) A clerk of the superior court for each county shall be elected by the qualified voters thereof, to hold office for a term of four years, in the manner pre-

scribed by Chapter 163 of the General Statutes. The clerk, before entering on the duties of his office, shall take the oath of office prescribed by law. If the office of clerk of superior court becomes vacant otherwise than by the expiration of the term, or if the people fail to elect a clerk, the senior regular resident superior court judge for the county shall fill the vacancy by appointment until an election can be regularly held.

(b) The county commissioners shall provide an office for the clerk in the courthouse or other suitable place in the county seat. The clerk shall observe such office hours and holidays as may be directed by the Administrative Officer of the Courts. (Const., art. 4, ss. 16, 17, 29; C. C. P., ss. 139-141; 1871-72, c. 136; Code, ss. 74, 76, 78, 80, 114, 115; 1903, c. 467; Rev., ss. 890-893, 895, 909, 910; C. S., ss. 926, 930, 931, 945, 946; 1935, c. 348; 1939, c. 82; 1941, c. 329; 1949, c. 122, ss. 1, 2; 1971, c. 363, s. 1.)

Editor's Note. — This section combines former §§ 2-2, 2-5, 2-6, 2-24, and 2-25. The former sections were revised, combined and transferred to their present position by Session Laws 1971, c. 363, s. 1, effective Oct. 1, 1971.

§ **7A-101. Compensation.**—(a) The clerk of superior court is a full-time employee of the State and shall receive an annual salary, payable in equal monthly installments, based on the population of the county, as determined by the 1970 federal decennial census, according to the following schedule:

Population	*Salary*
Less than 10,000	$ 7,704.00
10,000 to 19,999	8,424.00
20,000 to 49,999	11,220.00
50,000 to 99,999	12,660.00
100,000 to 149,999	14,520.00
150,000 to 199,999	17,052.00
200,000 to 274,999	18,504.00
275,000 to 349,999	19,800.00
350,000 and above	21,000.00

When a county changes from one population group to another as a result of any future federal decennial census, the salary of the clerk shall be changed to the salary appropriate for the new population group on July 1 of the first full biennium subsequent to the taking of the census (July 1, 1971; July 1, 1981; etc.), except that the salary of an incumbent clerk shall not be decreased by any change in population group during his term.

The salary set forth in this section shall constitute the clerk's sole compensation, and he shall receive no fees, commissions, or other compensation by virtue of his office, except as provided in subsection (b) of this section.

(b) At the beginning of each fiscal year the Administrative Officer of the Courts may, in his discretion, authorize an increase in the annual salary of any clerk of superior court, but the salary of any clerk, so increased, shall not exceed the salary set forth in subsection (a) for clerks in the next higher population group. A salary increase for any clerk in the 350,000 and above population group shall not exceed ten percent (10%) of the salary set out in subsection (a) for that group.

An increase in the salary of the clerk shall be based on a finding by the Administrative Officer of the Courts of one or more of the following:

(1) The records and reports of the clerk meet high standards of completeness, accuracy, and timeliness, and the operations of the clerk's office are discharged with exceptional efficiency and economy; or

(2) The responsibilities of the clerk, due to rapid population growth or rapid increase in judicial business, have increased above the average for clerks in his salary grouping.

The decision of the Administrative Officer of the Courts under this subsection

shall be final. This subsection shall not apply to a clerk who has served less than one year in office. (1965, c. 310, s. 1; 1967, c. 691, s. 5; 1969, c. 1186, s. 3; 1971, c. 877, ss. 1, 2.)

Editor's Note.—

The 1971 amendment, effective July 1, 1971, substituted "1970" for "1960" in the introductory paragraph and rewrote the salary schedule in subsection (a) and rewrote the first paragraph of subsection (b).

§ 7A-102. Assistant and deputy clerks; appointment; number; salaries; duties.—(a) The numbers and salaries of assistant clerks, deputy clerks, and other employees in the office of each clerk of superior court shall be determined by the Administrative Officer of the Courts after consultation with the clerk concerned. All personnel in the clerk's office are employees of the State. The clerk appoints the assistants, deputies, and other employees in his office to serve at his pleasure. Assistant and deputy clerks shall take the oath of office prescribed for clerks of superior court, conformed to the office of assistant or deputy clerk, as the case may be.

(b) An assistant clerk is authorized to perform all the duties and functions of the office of clerk of superior court, and any act of an assistant clerk is entitled to the same faith and credit as that of the clerk. A deputy clerk is authorized to certify the existence and correctness of any record in the clerk's office and to perform any other ministerial act which the clerk may be authorized and empowered to do, in his own name and without reciting the name of his principal. The clerk is responsible for the acts of his assistants and deputies. (1777, c. 115, s. 86; P. R.; R. C., c. 19, s. 15; Code, s. 75; 1899, c. 235, ss. 2, 3; Rev., ss. 898-900; 1921, c. 32, ss. 1-3; C. S., ss. 934(a)-934(c), 935-937; 1951, c. 159, ss. 1, 2; 1959, c. 1297; 1963, c. 1187; 1965, c. 264; c. 310, s. 1; 1971, c. 363, s. 2.)

Editor's Note.—This section combines former §§ 2-10, 2-12, 2-13, 2-15 and 7A-102. Sections 2-10, 2-12, 2-13 and 2-15 were revised, transferred and combined with § 7A-102, which was also revised, by Session Laws 1971, c. 363, s. 2, effective Oct. 1, 1971.

§ 7A-103. Authority of clerk of superior court.—The clerk of superior court is authorized to:

(1) Issue subpoenas to compel the attendance of any witness residing or being in the State, or to compel the production of any document or paper, material to any inquiry in his court.

(2) Administer oaths, and to take acknowledgment and proof of the execution of all instruments or writings.

(3) Issue commissions to take the testimony of any witness within or without the State.

(4) Issue citations and orders to show cause to parties in all matters cognizable in his court, and to compel the appearance of such parties.

(5) Enforce all lawful orders and decrees, by execution or otherwise, against those who fail to comply therewith or to execute lawful process. Process may be issued by the clerk, to be executed in any county of the State, and to be returned before him.

(6) Certify and exemplify, under seal of his court, all documents, papers or records therein, which shall be received in evidence in all the courts of the State.

(7) Preserve order in his court and to punish contempts.

(8) Adjourn any proceeding pending before him from time to time.

(9) Open, vacate, modify, set aside, or enter as of a former time, decrees or orders of his court.

(10) Enter default or judgment in any action or proceeding pending in his court as authorized by law.

(11) Award costs and disbursements as prescribed by law, to be paid personally, or out of the estate or fund, in any proceeding before him.

(12) Compel an accounting by magistrates and compel the return to the clerk of superior court by the person having possession thereof, of all money, records, papers, dockets and books held by such magistrate by virtue or color of his office.
(13) Grant and revoke letters testamentary, letters of administration, and letters of trusteeship.
(14) Appoint and remove guardians and trustees, as provided by law.
(15) Audit the accounts of fiduciaries, as required by law.
(16) Exercise jurisdiction conferred on him in every other case prescribed by law. (C. C. P., ss. 417, 418, 442; Code, ss. 103, 108; 1901, c. 614, s. 2; Rev., s. 901; 1919, c. 140; C. S., s. 938; 1949, c. 57, s. 1; 1951, c. 28, s. 1; 1961, c. 341, s. 2; 1971, c. 363, s. 3.)

Editor's Note. — This section was formerly § 2-16. It was revised and transferred to its present position by Session Laws 1971, c. 363, s. 3, effective Oct. 1, 1971. Former § 7A-103, relating to accounting for fees and other receipts, and annual audit, was renumbered § 7A-108 by s. 10 of the same 1971 act.

§ **7A-104. Disqualification; waiver; removal; when judge acts.**—(a) The clerk shall not exercise any judicial powers in relation to any estate, proceeding, or civil action:

(1) If he has, or claims to have, an interest by distribution, by will, or as creditor or otherwise;
(2) If he is so related to any person having or claiming such an interest that he would, by reason of such relationship, be disqualified as a juror, but the disqualification on this ground ceases unless the objection is made at the first hearing of the matter before him;
(3) If he or his wife is a party or a subscribing witness to any deed of conveyance, testamentary paper or nuncupative will, but this disqualification ceases when such deed, testamentary paper, or will has been finally admitted to probate by another clerk, or before the judge of the superior court;
(4) If he or his wife is named as executor or trustee in any testamentary or other paper, but this disqualification ceases when the will or other paper is finally admitted to probate by another clerk, or before the judge of the superior court. The clerk may renounce the executorship and endorse the renunciation on the will or on some paper attached thereto, before it is propounded for probate, in which case the renunciation must be recorded with the will if it is admitted to probate.

The parties may waive the disqualification specified in subdivisions (1), (2), and (3) of this subsection, and upon the filing of such written waiver, the clerk shall act as in other cases.

(b) When any of the disqualifications specified in this section exist, and there is no waiver thereof, or when there is no renunciation under subdivision (a) (4), of this section, any party in interest may apply to the resident or presiding superior court judge for an order to remove the proceedings to the clerk of superior court of an adjoining county in the same district; or he may apply to the judge to make either in vacation or during a session of court all necessary orders and judgments in any proceeding in which the clerk is disqualified, and the judge in such cases is hereby authorized to make any and all necessary orders and judgments as if he had the same original jurisdiction as the clerk over such proceedings.

(c) In any case in which the clerk of the superior court is executor, administrator, collector, or guardian of an estate at the time of his election or appointment to office, in order to enable him to settle such estate, the resident or presiding judge of the superior court is empowered to make such orders as may be necessary in the settlement of the estate; and he may audit the accounts or appoint a commissioner to audit the accounts of such executor or administrator, and report to him for his approval, and when the accounts are so approved, the judge shall order the

proper records to be made by the clerk. (C. C. P., ss. 419-421; 1871-72, cc. 196, 197; Code, ss. 104-107; Rev., ss. 902-905; 1913, c. 70, s. 1; C. S., ss. 939-942; 1935, c. 110, s. 1; 1971, c. 363, s. 4.)

Editor's Note. — This section combines former §§ 2-17, 2-19, 2-20 and 2-21. The former sections were revised, combined and transferred to their present position by Session Laws 1971, c. 363, s. 4, effective Oct. 1, 1971. Former § 7A-104 was renumbered § 7A-105 by s. 10 of the same 1971 act.

§ **7A-105. Suspension, removal, and reinstatement of clerk.**—A clerk of superior court may be suspended or removed from office, and reinstated, for the same causes and under the same procedures as are applicable to a district court judge, except that the procedure shall be initiated by the filing of a sworn affidavit with the chief district judge of the district in which the clerk resides. If suspension is ordered, the senior regular resident superior court judge shall appoint some qualified person to act as clerk during the period of the suspension. (1967, c. 691, s. 6; 1971, c. 363, s. 10.)

Editor's Note.—The above section was formerly numbered § 7A-104. It was renumbered § 7A-105 by Session Laws 1971, c. 363, s. 10, effective Oct. 1, 1971. Former § 7A-105 was renumbered § 7A-107 by the same 1971 act.

§ **7A-106. Custody of records and property of office.**—(a) It is the duty of the clerk of superior court, upon going out of office for any reason, to deliver to his successor, or such person as the senior regular resident superior court judge may designate, all records, books, papers, moneys, and property belonging to his office, and obtain receipts therefor.

(b) Any clerk going out of office or such other person having custody of the records, books, papers, moneys, and property of the office who fails to transfer and deliver them as directed shall forfeit and pay the State one thousand dollars ($1,000), which shall be sued for by the solicitor. (R. C., c. 19, s. 14; C. C. P., s. 142; Code, ss. 81, 124; Rev., ss. 906, 907; C. S., s. 943; 1971, c. 363, s. 5.)

Editor's Note. — This section was formerly § 2-22. It was revised and transferred to its present position by Session Laws 1971, c. 363, s. 5, effective Oct. 1, 1971. Former § 7A-106, which was codified from Session Laws 1965, c. 310, s. 1, was repealed, effective Oct. 1, 1971, by Session Laws 1971, c. 363, s. 12.

§ **7A-107. Bonds of clerks, assistant and deputy clerks, and employees of office.**—The Administrative Officer of the Courts shall require, or purchase, in such amounts as he deems proper, individual or blanket bonds for any and all clerks of superior court, assistant clerks, deputy clerks, and other persons employed in the offices of the various clerks of superior court, or one blanket bond covering all such clerks and other persons, such bond or bonds to be conditioned upon faithful performance of duty, and made payable to the State. The premiums shall be paid by the State. (1965, c. 310, s. 1; 1967, c. 691, s. 7; 1971, c. 363, ss. 10, 11.1; c. 518, s. 2.)

Editor's Note.—The above section was formerly numbered § 7A-105. It was renumbered § 7A-107 by Session Laws 1971, c. 363, s. 10, effective Oct. 1, 1971.

Section 11.1, c. 363, Session Laws 1971, effective Oct. 1, 1971, amended this section by substituting "shall" for "may" near the beginning of the section. Session Laws 1971, c. 518, s. 2, effective Oct. 1, 1971, corrected a technical error in the first 1971 act.

§ **7A-108. Accounting for fees and other receipts; annual audit.**—The Administrative Office of the Courts, subject to the approval of the State Auditor, shall establish procedures for the receipt, deposit, protection, investment, and disbursement of all funds coming into the hands of the clerk of superior court. The fees to be remitted to counties and municipalities shall be paid to them monthly by the clerk of superior court.

The State Auditor shall conduct an annual post audit of the receipts, disbursements, and fiscal transactions of each clerk of superior court, and furnish a copy to the Administrative Office of the Courts. (1965, c. 310, s. 1; 1969, c. 1190, s. 9; 1971, c. 363, s. 10.)

Editor's Note.—The above section was formerly numbered § 7A-103. It was renumbered § 7A-108 by Session Laws 1971, c. 363, s. 10, effective Oct. 1, 1971.

§ **7A-109. Record-keeping procedures.**—(a) Each clerk shall maintain such records, files, dockets and indexes as are prescribed by rules of the Director of the Administrative Office of the Courts. Except as prohibited by law, these records shall be open to the inspection of the public during regular office hours, and shall include civil actions, special proceedings, estates, criminal actions, juvenile actions, minutes of the court, judgments, liens, lis pendens, and all other records required by law to be maintained. The rules prescribed by the Director shall be designed to accomplish the following purposes:

(1) To provide an accurate record of every determinative legal action, proceeding, or event which may affect the person or property of any individual, firm, corporation, or association;

(2) To provide a record during the pendency of a case that allows for the efficient handling of the matter by the court from its initiation to conclusion and also affords information as to the progress of the case;

(3) To provide security against the loss or destruction of original documents during their useful life and a permanent record for historical uses;

(4) To provide a system of indexing that will afford adequate access to all records maintained by the clerk;

(5) To provide, to the extent possible, for the maintenance of records affecting the same action or proceeding in one rather than several units; and

(6) To provide a reservoir of information useful to those interested in measuring the effectiveness of the laws and the efficiency of the courts in administering them.

(b) The rules shall provide for indexing according to the minimum criteria set out below:

(1) Civil actions—the names of all parties;

(2) Special proceedings—the names of all parties;

(3) Administration of estates—the name of the estate and in the case of testacy the name of each devisee;

(4) Criminal actions—the names of all defendants;

(5) Juvenile actions—the names of all juveniles;

(6) Judgments, liens, lis pendens, etc. — The names of all parties against whom a lien has been created by the docketing of a judgment, notice of lien, transcript, certificate, or similar document and the names of all parties in those cases in which a notice of lis pendens has been filed with the clerk and abstracted on the judgment docket.

(c) The rules shall require that all documents received for docketing shall be immediately indexed either on a permanent or temporary index. The rules may prescribe any technological process deemed appropriate for the economical and efficient indexing, storage and retrieval of information. (Code, ss. 83, 95, 96, 97, 112, 1789; 1887, c. 178, s. 2; 1889, c. 181, s. 4; 1893, c. 52; 1899, c. 1, s. 17; cc. 82, 110; 1901, c. 2, s. 9; c. 89, s. 13; c. 550, s. 3; 1903, c. 51; c. 359, s. 6; 1905, c. 360, s. 2; Rev., s. 915; 1919, c. 78, s. 7; c. 152; c. 197, s. 4; c. 314; C. S., s. 952; 1937, c. 93; 1953, c. 259; c. 973, s. 3; 1959, c. 1073, s. 3; c. 1163, s. 3; 1961, c. 341, ss. 3, 4; c. 960; 1965, c. 489; 1967, c. 691, s. 39; c. 823, s. 2; 1971, c. 192; c. 363, s. 6.)

Editor's Note. — This section was formerly § 2-42. It was revised and transferred to its present position by Session Laws 1971, c. 363, s. 6, effective Oct. 1, 1971.

§ 7A-110. List of attorneys furnished to Commissioner of Revenue.—On or before the first of May each year the clerk of superior court shall certify to the Commissioner of Revenue the names and addresses of all attorneys at law located within the clerk's county who are engaged in the practice of law. (1931, c. 290; 1971, c. 363, s. 7.)

Editor's Note. — This section was formerly § 2-45. It was revised and transferred to its present position by Session Laws 1971, c. 363, s. 7, effective Oct. 1, 1971.

§ 7A-111. Receipt and disbursement of insurance and other moneys for minors and incapacitated adults.—(a) When a minor under 18 years of age, or an adult who is mentally incapable on account of sickness, old age, disease or other infirmity to manage his property and affairs, is named beneficiary in a policy or policies of insurance, and the insured dies prior to the majority of such minor or during the incapacity of such adult, and the proceeds of each individual policy do not exceed two thousand dollars ($2,000) such proceeds may be paid to and, if paid, shall be received by the public guardian or clerk of the superior court of the county wherein the beneficiary is domiciled. A certificate of mental incapacity, signed by a physician or reputable person who has had an opportunity to observe the mental condition of an adult beneficiary, filed with the clerk, is prima facie evidence of the mental incapacity of such adult, and authorizes the clerk to receive and administer funds under this section. The receipt of the public guardian or clerk shall be a full and complete discharge of the insurer issuing the policy or policies to the extent of the amount paid to such public guardian or clerk.

(b) Any person, firm, corporation or association having in its possession two thousand dollars ($2,000) or less for any minor child or incapacitated adult, as described in (a), for whom there is no guardian, may pay such moneys into the office of the public guardian, if any, or the office of the clerk of superior court of the county of the recipient's domicile. The clerk of the superior court is hereby authorized to receive and administer funds under this section. The clerk's receipt shall constitute a valid release of the payor's obligation to the extent of the sum delivered to the clerk.

(c) The moneys paid into the office of clerk of superior court pursuant to this section shall be disbursed only upon the order of the clerk or assistant clerk, and in the following manner:

(1) Minors.—The clerk is authorized to disburse the moneys held in such sum or sums and at such time or times as in his judgment is in the best interest of the child, except that the clerk must first determine that the parents or other persons responsible for the child's support and maintenance are financially unable to provide the necessities for such child, and also that the child is in need of maintenance and support or other necessities, including, when appropriate, education.

(2) Incapacitated Adults.—The clerk, upon finding of fact that it is in the best interest of the incapacitated adult, is authorized to disburse funds directly to a creditor or to some discreet and solvent neighbor or friend of a person mentally incapable of handling his property and affairs.

The clerk may require receipts or paid vouchers showing that the moneys disbursed under this section were used for the exclusive use and benefit of the child or incapacitated adult.

(d) The determination of incapacity authorized in subsection (a) of this section is separate and distinct from the procedure for the determination of incompetency provided in G.S. Chapter 35. (1899, c. 82; Rev., s. 924; 1911, c. 29, s. 1; 1919, c. 91; C. S., s. 962; Ex. Sess., 1924, c. 1, s. 1; 1927, c. 76; 1929, c. 15; 1933, c. 363; 1937, c. 201; 1945, c. 160, ss. 1, 2; 1949, c. 188; 1953, c. 101; 1959, c. 794, ss. 1, 2; 1961, c. 377; 1971, c. 363, s. 8; c. 1231, s. 1.)

Editor's Note.—This section combines former §§ 2-52 and 2-53. The former sections were revised, combined and transferred to their present position by Session Laws 1971, c. 363, s. 8, effective Oct. 1, 1971.

Session Laws 1971, c. 1231, s. 1, substituted "18" for "21" in the first sentence of subsection (a).

§ **7A-112. Investment of funds in clerk's hands.**—(a) The clerk of the superior court may in his discretion invest moneys secured by virtue or color of his office or as receiver in any of the following securities:

(1) Obligations of the United States or obligations fully guaranteed both as to principal and interest by the United States;
(2) Obligations of the State of North Carolina;
(3) Obligations of North Carolina cities or counties approved by the Local Government Commission; and
(4) 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 any agency thereof. If the clerk desires to deposit in a bank, saving and loan, or trust company funds entrusted to him by virtue or color of his office, beyond the extent that such deposits are insured by the State or federal government or an agency thereof, the clerk 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.

(b) When money in a single account in excess of two thousand dollars ($2,000) is received by the clerk by virtue or color of his office and it can reasonably be expected that the money will remain on deposit with the clerk in excess of six months from date of receipt, the money exceeding two thousand dollars ($2,000) shall be invested by the clerk within 60 days of receipt in investments authorized by this section. The first two thousand dollars ($2,000) of these accounts and money in a single account totalling less than two thousand [dollars] ($2,000), received by the clerk by virtue or color of his office, shall be invested, or administered, or invested and administered, by the clerk in accordance with regulations promulgated by the Administrative Officer of the Courts. This subsection shall not apply to cash bonds or to money received by the clerk to be disbursed to governmental units.

(c) The State Auditor is hereby authorized and empowered to inspect the records of the clerk to insure compliance with this section, and he shall report noncompliance with the provisions of this section to the Administrative Officer of the Courts.

(d) It shall be unlawful for the clerk of the superior court of any county receiving any money by virtue or color of his office to apply or invest any of it except as authorized under this section. Any clerk violating the provisions of this section shall be guilty of a misdemeanor. (1931, c. 281, ss. 1-3, 5; 1937, c. 188; 1939, cc. 86, 110; 1943, c. 543; 1971, c. 363, s. 9; c. 956, s. 1.)

Editor's Note. — This section combines former §§ 2-54, 2-55, 2-56 and 2-60. The provisions of the former sections were rewritten, combined and transferred to their present position by Session Laws 1971, c. 363, s. 9, effective Oct. 1, 1971.

Session Laws 1971, c. 956, s. 1, effective Oct. 1, 1971, redesignated subsections (b) and (c) as subsections (c) and (d), respectively, and added present subsection (b).

§§ **7A-113 to 7A-129**: Reserved for future codification purposes.

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

Article 13.

Creation and Organization of the District Court Division.

§ 7A-130. Creation of district court division and district court districts; seats of court.

Stated in In re Burrus, 275 N.C. 517, 169 S.E.2d 879 (1969).

§ 7A-131. Establishment of district courts.

Editor's Note.—For article "Some Aspects of the Criminal Court Process in North Carolina," see 49 N.C.L. Rev. 469 (1971).

Stated in In re Burrus, 275 N.C. 517, 169 S.E.2d 879 (1969); Cline v. Cline, 6 N.C. App. 523, 170 S.E.2d 645 (1969); Peoples v. Peoples, 8 N.C. App. 136, 174 S.E.2d 2 (1970).

Cited in State v. Caudle, 7 N.C. App. 276, 172 S.E.2d 231 (1970); Kelly v. Davenport, 7 N.C. App. 670, 173 S.E.2d 600 (1970); State v. Barker, 8 N.C. App. 311, 173 S.E.2d 88 (1970); Bryant v. Kelly, 279 N.C. 123, 181 S.E.2d 938 (1971); Ford Motor Credit Co. v. Hayes, 10 N.C. App. 527, 179 S.E.2d 181 (1971); State v. Stafford, 11 N.C. App. 520, 181 S.E.2d 741 (1971).

§ 7A-132. Judges, solicitors, full-time assistant solicitors and magistrates for district court districts. — Each district court district shall have one or more judges and one solicitor. Each county within each district shall have at least one magistrate.

For each district the General Assembly shall prescribe the numbers of district judges, and the numbers of full-time assistant solicitors. For each county within each district the General Assembly shall prescribe a minimum and a maximum number of magistrates. (1965, c. 310, s. 1; 1967, c. 1049, s. 5.)

Editor's Note. — The 1967 amendment, effective Jan. 1, 1971, substituted "solicitor" for "prosecutor" at the end of the first sentence, and substituted "solicitors" for "prosecutors" at the end of the third sentence.

§ 7A-133. Numbers of judges by districts; numbers of magistrates and additional seats of court, by counties.—Each district court district shall have the numbers of judges and each county within the district shall have the numbers of magistrates and additional seats of court, as set forth in the following table:

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

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

District	Judges	County	Magistrates Min.	Magistrates Max.	Additional Seats of Court
16	3	Robeson	8	12	Fairmont
					Maxton
					Red Springs
					Rowland
					St. Pauls
		Scotland	2	3	
17	4	Caswell	2	4	
		Rockingham	4	8	Reidsville
					Eden
					Madison
		Stokes	2	3	
		Surry	4	6	Mt. Airy
18	7	Guilford	17	22	High Point
19	5	Cabarrus	4	7	Kannapolis
		Montgomery	2	3	
		Randolph	4	6	Liberty
		Rowan	4	8	
20	4	Stanly	5	6	
		Union	4	6	
		Anson	4	5	
		Richmond	5	6	Hamlet
		Moore	5	6	Southern Pines
21	5	Forsyth	10	15	Kernersville
22	4	Alexander	2	3	
		Davidson	5	7	Thomasville
		Davie	2	3	
		Iredell	4	6	Mooresville
23	2	Alleghany	1	2	
		Ashe	2	3	
		Wilkes	4	6	
		Yadkin	2	3	
24	2	Avery	2	3	
		Madison	3	4	
		Mitchell	3	4	
		Watauga	3	4	
		Yancey	2	3	
25	4	Burke	4	6	
		Caldwell	4	6	
		Catawba	6	9	Hickory
26	7	Mecklenburg	15	25	
27	5	Cleveland	5	8	
		Gaston	10	18	
		Lincoln	3	5	
28	4	Buncombe	6	10	
29	3	Henderson	4	6	
		McDowell	3	4	
		Polk	2	3	
		Rutherford	6	8	
		Transylvania	2	3	

District	Judges	County	Magistrates Min.	Magistrates Max.	Additional Seats of Court
30	2	Cherokee	2	3	
		Clay	1	2	
		Graham	2	3	
		Haywood	4	6	Canton
		Jackson	2	3	
		Macon	2	3	
		Swain	2	3	

(1965, c. 310, s. 1; 1967, c. 691, s. 8; 1969, c. 1190, s. 10; c. 1254; 1971, c. 377, s. 7; cc. 727, 840, 841, 842, 843, 865, 866, 898.)

Editor's Note.—

Session Laws 1969, c. 1190, s. 10, subsection (a), effective Jan. 1, 1971, deleted the words "and full-time assistant prosecutors" in the first sentence of this section and deleted the heading "Full-Time Assistant Prosecutors" and all numbers under that heading in the table. Session Laws 1969, c. 1190, s. 10, subsection (f), repealed Session Laws 1967, c. 1049, s. 5, subsection (2), which would also have amended this section effective Jan. 1, 1971.

Session Laws 1971, c. 377, s. 7, effective Oct. 1, 1971, transferred "Hickory," which formerly appeared in the column headed "Additional Seats of Court" opposite Burke in the twenty-fifth judicial district, and placed it opposite Catawba.

Session Laws 1971, c. 727, effective July 1, 1971, designated Scotland Neck as an additional seat of court for Halifax County.

Session Laws 1971, c. 840, effective July 1, 1971, increased the maximum number of magistrates in Carteret County from five to six.

Session Laws 1971, c. 841, increased the maximum number of magistrates in Franklin County from four to five.

Session Laws 1971, c. 842, increased the maximum number of magistrates in Martin County from four to five.

Session Laws 1971, c. 843, increased the maximum number of magistrates in Nash County from nine to ten.

Session Laws 1971, c. 865, increased the maximum number of magistrates in Halifax County from nine to eleven.

Session Laws 1971, c. 866, increased the maximum number of magistrates for Caswell County from three to four.

Session Laws 1971, c. 898, designated Liberty as an additional seat of court for Randolph County.

§ 7A-134. Family court services.—In any district court district having a county with a population of 84,000 or more, according to the latest federal decennial census, the chief district judge and the Administrative Officer of the Courts may determine that special counselor services should be made available in the district to the district judge or judges hearing domestic relations and juvenile cases. In this event, the chief district judge may appoint a chief counselor and such assistant counselors as the Administrative Officer may authorize, to provide investigative, supervisory, and other related services. The salaries of the chief counselor and the assistant counselors shall be determined by the Administrative Officer of the Courts, with due regard to the salary levels and the economic situation in the district, and all counselors shall be employees of the State. The chief counselor and his assistants shall serve at the pleasure of the chief district judge. Counselors shall have the same powers and authority as is conferred upon juvenile court probation officers by G.S. 110-33. (1965, c. 310, s. 1; 1967, c. 691, s. 9; c. 1164; 1971, c. 830.)

Editor's Note.—

The 1971 amendment, effective July 1, 1971, substituted "84,000" for "85,000" in the first sentence.

§ 7A-135. Transfer of pending cases when present inferior courts replaced by district courts.

Applied in State v. Caudle, 276 N.C. 550, 173 S.E.2d 778 (1970).

Cited in In re Bowen, 7 N.C. App. 236, 172 S.E.2d 62 (1970); State v. Caudle, 7 N.C. App. 276, 172 S.E.2d 231 (1970); Ford Motor Credit Co. v. Hayes, 10 N.C. App. 527, 179 S.E.2d 181 (1971).

ARTICLE 14.

District Judges.

§ **7A-145**: Repealed by Session Laws 1971, c. 377, s. 32, effective October 1, 1971.

§ **7A-146. Administrative authority and duties of chief district judge.**—The chief district judge, subject to the general supervision of the Chief Justice of the Supreme Court, has administrative supervision and authority over the operation of the district courts and magistrates in his district. These powers and duties include, but are not limited to, the following:

(1) Arranging schedules and assigning district judges for sessions of district courts;

(2) Arranging or supervising the calendaring of noncriminal matters for trial or hearing;

(3) Supervising the clerk of superior court in the discharge of the clerical functions of the district court;

(4) Assigning matters to magistrates, and prescribing times and places at which magistrates shall be available for the performance of their duties;

(5) Making arrangements with proper authorities for the drawing of civil court jury panels and determining which sessions of district court shall be jury sessions;

(6) Arranging for the reporting of civil cases by court reporters or other authorized means;

(7) Arranging sessions, to the extent practicable for the trial of specialized cases, including traffic, domestic relations, and other types of cases, and assigning district judges to preside over these sessions so as to permit maximum practicable specialization by individual judges;

(8) Promulgating a schedule of traffic offenses for which magistrates and clerks of court may accept written appearances, waivers of trial, and pleas of guilty, and establishing a schedule of fines therefor;

(9) Assigning magistrates, in an emergency, to temporary duty outside the county of their residence, but within the district; and

(10) Designating another district judge of his district as acting chief district judge, to act during the absence or disability of the chief district judge. (1965, c. 310, s. 1; 1971, c. 377, s. 8.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, inserted "noncriminal" in subdivision (2).

Purpose of Section.—Legislative anticipation of the procedural quagmires and "judge shopping" that could result from multi-judge districts was a factor prompting the enactment of this section. Johnson v. Johnson, 7 N.C. App. 310, 172 S.E.2d 264 (1970)

ARTICLE 15.

District Prosecutors.

§§ **7A-160 to 7A-165**: Repealed by Session Laws 1967, c. 1049, s. 6, effective January 1, 1971.

ARTICLE 16.

Magistrates.

§ **7A-171. Numbers; fixing of salaries; appointment and terms; vacancies.**

(b) Not later than the first Monday in September of each even-numbered year, the Administrative Officer of the Courts, after consultation with the chief district judge (or the senior regular resident superior court judge, if there is no chief

district judge) shall prescribe and notify the clerk of superior court of the salaries to be paid to the various magistrates to be appointed to fill the minimum quota established for the county. A salary shall be prescribed for each office within the minimum quota upon consideration of the time which the particular magistrate will be required by the chief district judge to devote to the performance of the duties of his office. Not later than the second Monday in December of each even-numbered year, the clerk of superior court shall submit to the senior regular resident superior court judge of his district the names of two (or more, if requested by the judge) nominees for each magisterial office in the minimum quota established for the county, specifying as to each nominee the salary level for which nominated. Not later than the fourth Monday in December, the senior regular superior court judge shall, from the nominations submitted by the clerk of superior court, appoint magistrates to fill the minimum quota established for each county of his district, such appointments to be at the various salary levels prescribed by the Administrative Officer of the Courts. The term of a magistrate so appointed shall be two years, commencing on the first day in January of the calendar year next ensuing the calendar year of appointment.

(1971, c. 84, s. 1.)

Editor's Note.—

The 1971 amendment, effective July 1, 1971, in subsection (b), substituted "second Monday in December" for "first Monday in October" in the third sentence, substituted "fourth Monday in December" for "first Monday in November" in the fourth sentence, and substituted "first day in January of the calendar year next ensuing the calendar year of appointment" for "first Monday in December of each even-numbered year" in the fifth sentence.

Session Laws 1971, c. 84, s. 2, effective July 1, 1971, provides: "The term of office of any magistrate in office on the day before the first Monday in December, 1972, is extended to December 31, 1972."

As the rest of the section was not affected by the amendment, it is not set out.

Judge Has Duty to Appoint Magistrates Which May Be Enforced by a Writ of Mandamus.—See opinion of Attorney General to Honorable Ralph A. Allison, Clerk of Superior Court, 6/24/70.

§ 7A-172. Minimum and maximum salaries.—Magistrates shall receive not less than one thousand two hundred dollars ($1,200.00) and not more than seven thousand, nine hundred and forty-four dollars ($7,944.00) per year. (1965, c. 310, s. 1; 1969, c. 1186, s. 6; 1971, c. 877, s. 3.)

Editor's Note.—

The 1971 amendment, effective July 1, 1971, substituted "seven thousand, nine hundred and forty-four dollars ($7,944.00)" for "seventy-two hundred dollars ($7,200.-00)."

ARTICLE 18.

District Court Practice and Procedure Generally.

§ 7A-190. District courts always open.

Quoted in Boston v. Freeman, 6 N.C. App. 736, 171 S.E.2d 206 (1969).

§ 7A-191. Trials; hearings and orders in chambers.

Cross Reference.—See note to § 7A-192.

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

Temporary Restraining Order Is Interlocutory Order.—A temporary restraining order, made permanent pending trial of the cause on its merits, is an interlocutory order. Boston v. Freeman, 6 N.C. App. 736, 171 S.E.2d 206 (1969).

Restraining Order in Action Pending in Another County in District.—A chief judge of the district court has jurisdiction to enter, in chambers in one county, a temporary restraining order in an action pending in the district court of another county in the judicial district, to return the order for hearing before him, and to enter an order continuing the restraining order in effect in the district court of the other county until the trial of the case on its merits. Boston v. Freeman, 6 N.C. App. 736, 171 S.E.2d 206 (1969).

§ **7A-193. Civil procedure generally.**

Decision upon Trial of Issue of Fact by Court.—The rule that upon trial of an issue of fact by the court, its decision shall be in writing and shall contain a statement of the facts found and the conclusions of law separately, applies in the district court division of the General Court of Justice as well as in the superior court. Public Serv. Co. v. Beal, 5 N.C. App. 659, 169 S.E.2d 41 (1969).

Applied in Boston v. Freeman, 6 N.C. App. 736, 171 S.E.2d 206 (1969).

§ **7A-196. Jury trials.**

The right to trial by jury in civil cases in the district court is preserved by this section. Ford Motor Credit Co. v. Hayes, 10 N.C. App. 527, 179 S.E.2d 181 (1971).

Provided timely demand is made in one of the ways authorized by statute. — See Ford Motor Credit Co. v. Hayes, 10 N.C. App. 527, 179 S.E.2d 181 (1971).

When Demand Timely.—The demand for trial by jury in a civil case is timely if made in writing not later than 10 days after the filing of the last pleading directed to the issues. Ford Motor Credit Co. v. Hayes, 10 N.C. App. 527, 179 S.E.2d 181 (1971).

One authorized method of making the demand is by endorsement on the pleading of the party. Ford Motor Credit Co. v. Hayes, 10 N.C. App. 527, 179 S.E.2d 181 (1971).

Waiver.—A jury determination of any issue triable of right by a jury may be requested within 10 days of the filing of the last pleading "directed to the issue." The failure of a party to make such a demand is a waiver of the right to a jury trial. Holcomb v. Holcomb, 7 N.C. App. 329, 172 S.E.2d 212 (1970).

Transfer of Case without Notice Denied Defendant's Right to Jury Trial.—Defendant was denied its constitutional right to a jury trial where the action was transferred from the superior court division to the district court division without notice to defendant, so that defendant made no demand for jury trial in the district court within the 10-day time period formerly allowed by this section (see now § 1A-1, Rule 38), and the district court subsequently denied defendant's demand for a jury trial. Thermo-Industries v. Talton Constr. Co., 9 N.C. App. 55, 175 S.E.2d 370 (1970).

Error to Deny Jury Trial Timely Demanded.—Defendants having made timely demand in a manner authorized by statute, it was error for the district judge to deny them a jury trial. Ford Motor Credit Co. v. Hayes, 10 N.C. App. 527, 179 S.E.2d 181 (1971).

Applied in Kelly v. Davenport, 7 N.C. App. 670, 173 S.E.2d 600 (1970); Wendell Tractor & Implement Co. v. Lee, 9 N.C. App. 524, 176 S.E.2d 854 (1970).

Quoted in Boring v. Mitchell, 5 N.C. App. 550, 169 S.E.2d 79 (1969).

Stated in In re Burrus, 275 N.C. 517, 169 S.E.2d 879 (1969).

Article 19.

Small Claim Actions in District Court.

§ **7A-213. Procedure for commencement of action; request for and notice of assignment.**—The plaintiff files his complaint in a small claim action in the office of the clerk of superior court of the county wherein the defendant, or one of the defendants resides. The designation "Small Claim" on the face of the complaint is a request for assignment. If, pursuant to order or rule, the action is assigned to a magistrate, the clerk issues a magistrate summons substantially in the form prescribed in this Article as soon as practicable after the assignment is made. The issuance of a magistrate summons commences the action. After service of the magistrate summons on the defendant, the clerk gives written notice of the assignment to the plaintiff. The notice of assignment identifies the action, designates the magistrate to whom assignment is made, and specifies the time, date and place of trial. By any convenient means the clerk notifies the magistrate of the assignment and the setting. (1965, c. 310, s. 1; 1969, c. 1190, s. 19; 1971, c. 377, s. 9.)

Editor's Note.—

The 1971 amendment, effective Oct. 1, 1971, substituted "the defendant, or one of the defendants, resides" for "he desires to commence the action" at the end of the first sentence.

§ **7A-216. Form of complaint.**—The complaint in a small claim action shall be in writing, signed by the party or his attorney, except the complaint in an action for summary ejectment may be signed by an agent for the plaintiff. It need be in no particular form, but is sufficient if in a form which enables a person of common understanding to know what is meant. In any event, the forms prescribed in this Article are sufficient under this requirement, and are intended to indicate the simplicity and brevity of statement contemplated. Demurrers and motions to challenge the legal and formal sufficiency of a complaint in an assigned small claim action shall not be used. But at any time after its filing, the clerk, the chief district judge, or the magistrate to whom such an action is assigned may, on oral or written ex parte motion of the defendant, or on his own motion, order the plaintiff to perfect the statement of his claim before proceeding to its determination, and shall grant extensions of time to plead and continuances of trial pending any perfecting of statement ordered. (1965, c. 310, s. 1; 1971, c. 377, s. 10.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, substituted "except the complaint in an action for summary ejectment may be signed by an agent for the plaintiff" for "and verified" at the end of the first sentence.

§ **7A-222. General trial practice and procedure.**—Trial of a small claim action before a magistrate is without a jury. The rules of evidence applicable in the trial of civil actions generally are observed. At the conclusion of plaintiff's evidence the magistrate may render judgment of dismissal if plaintiff has failed to establish a prima facie case. If a judgment of dismissal is not rendered the defendant may introduce evidence. At the conclusion of all the evidence the magistrate may render judgment or may in his discretion reserve judgment for a period not in excess of 10 days. (1965, c. 310, s. 1; 1971, c. 377, s. 11.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, substituted "dismissal" for "nonsuit" in the third and fourth sentences.

§ **7A-223. Practice and procedure in small claim actions for summary ejectment.**—In any small claim action demanding summary ejectment or past due rent, or both, the complaint may be signed by an agent acting for the plaintiff who has actual knowledge of the facts alleged in the complaint. If a small claim action demanding summary ejectment is assigned to a magistrate, the practice and procedure prescribed for commencement, form and service of process, assignment, pleadings, and trial in small claim actions generally are observed, except that if the defendant by written answer denies the title of the plaintiff, the action is placed on the civil issue docket of the district court division for trial before a district judge. In such event, the clerk withdraws assignment of the action from the magistrate and immediately gives written notice of withdrawal, by any convenient means, to the plaintiff and the magistrate to whom the action has been assigned. The plaintiff, within five days after receipt of the notice, and the defendant, in his answer, may request trial by jury. Failure to request jury trial within the time limited is a waiver of the right to trial by jury. (1965, c. 310, s. 1; 1967, c. 691, s. 21; 1971, c. 377, s. 12.)

Editor's Note.—
The 1971 amendment, effective Oct. 1, 1971, added the first sentence.

§ **7A-232. Forms.**—The following forms are sufficient for the purposes indicated under this Article. Substantial conformity is sufficient.

FORM 4.

COMPLAINT ON A PROMISSORY NOTE

NORTH CAROLINA General Court of Justice
District Court Division
.... COUNTY SMALL CLAIM

A. B., Plaintiff
v. } COMPLAINT
C. D., Defendant

1. Plaintiff is a resident of .... County; defendant is a resident of .... County.

2. Defendant on or about January 1, 1964, executed and delivered to plaintiff a promissory note (in the following words and figures: (here set out the note verbatim)); (a copy of which is annexed as Exhibit ......); (whereby defendant promised to pay to plaintiff or order on June 1, 1964, the sum of two hundred and fifty dollars ($250.00) with interest thereon at the rate of six percent (6%) per annum).

3. Defendant owes the plaintiff the amount of said note and interest.

Wherefore plaintiff demands judgment against defendant for the sum of two hundred and fifty dollars ($250.00), interest and costs.

This .... day of ...., 19.....

(signed) A. B., Plaintiff
(or E. F., Attorney for Plaintiff)

Service by mail is, is not, requested.

....
(signed) A. B., Plaintiff
(or E. F., Attorney for Plaintiff)

(1971, c. 1181, s. 2.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, deleted "(Verification)" near the end of Form 4.

As the rest of the section was not changed by the amendment, only the opening paragraph and Form 4 are set out.

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

ARTICLE 20.

Original Civil Jurisdiction of the Trial Divisions.

§ 7A-240. Original civil jurisdiction generally.

The superior court is a court of general jurisdiction and has jurisdiction in all actions for personal injuries caused by negligence, except where its jurisdiction is divested by statute. Morse v. Curtis, 276 N.C. 371, 172 S.E.2d 495 (1970).

And Has Concurrent Jurisdiction to Hear Application for Restraining Order Pending Trial on the Merits.—An application for a restraining order pending trial on the merits is a justiciable matter of a civil nature which is cognizable in the General Court of Justice, and the original general jurisdiction to hear the application and issue such order is vested concurrently in the superior court division and the district court division. Boston v. Freeman, 6 N.C. App. 736, 171 S.E.2d 206 (1969).

Disposition of Case in Superior Court After Transfer to District Court.—After a judge entered his order transferring a case from the superior court division of the General Court of Justice to the district court division, and the latter was the proper division in which to try the case, nothing else appearing, disposition of the case thereafter in the superior court is irregular and contrary to the course and practice in the General Court of Justice. Brady v. Town of Chapel Hill, 277 N.C. 720, 178 S.E.2d 446 (1971).

Quoted in Peoples v. Peoples, 8 N.C. App. 136, 174 S.E.2d 2 (1970).

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

Opinions of Attorney General.—Honorable Hubert E. May, Special Judge, Superior Court, 11/10/69.

Jurisdiction over Misdemeanors. — The superior court may try a misdemeanor when the conviction is appealed from the district court to the superior court for trial de novo. State v. Taylor, 8 N.C. App. 544, 174 S.E.2d 872 (1970).

A superior court has no jurisdiction to try a defendant upon warrants charging misdemeanors where defendant has not first been tried upon the warrants in the district court and appealed to the superior court. State v. Taylor, 8 N.C. App. 544, 174 S.E.2d 872 (1970).

An administratrix' petition for allowance of commissions and attorneys' fees is initially properly brought before the clerk of superior court. In re Green, 9 N.C. App. 326, 176 S.E.2d 19 (1970).

Stated in Boston v. Freeman, 6 N.C. App. 736, 171 S.E.2d 206 (1969).

Cited in In re Will of Spinks, 7 N.C. App. 417, 173 S.E.2d 1 (1970).

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

The superior court division or the district court division, or both, are designated as "proper" divisions in which to bring a given civil action. Peoples v. Peoples, 8 N.C. App. 136, 174 S.E.2d 2 (1970).

No order of the district court may be overturned merely because it was not the proper division to enter the order. Peoples v. Peoples, 8 N.C. App. 136, 174 S.E.2d 2 (1970).

The superior court is a court of general jurisdiction and has jurisdiction in all actions for personal injuries caused by negligence, except where its jurisdiction is divested by statute. Morse v. Curtis, 276 N.C. 371, 172 S.E.2d 495 (1970).

Enforcement of Judgment for Alimony Entered in Superior Court before Establishment of District Court. — A district court judge may hold a party to a proceeding before him in civil contempt for failure to comply with court orders issued pursuant to a confession of judgment regarding payment of alimony which was entered in the superior court prior to the establishment of a district court for the district in which the order was entered. Peoples v. Peoples, 8 N.C. App. 136, 174 S.E.2d 2 (1970).

Quoted in Boston v. Freeman, 6 N.C. App. 736, 171 S.E.2d 206 (1969).

Cited in Boring v. Mitchell, 5 N.C. App. 550, 169 S.E.2d 79 (1969).

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

Disposition of Case in Superior Court After Transfer to District Court.—After a judge entered his order transferring a case from the superior court division of the General Court of Justice to the district court division, and the latter was the proper division in which to try the case, nothing else appearing, disposition of the case thereafter in the superior court is irregular and contrary to the course and practice in the General Court of Justice. Brady v. Town of Chapel Hill, 277 N.C. 720, 178 S.E.2d 446 (1971).

Stated in Bryant v. Kelly, 279 N.C. 123, 181 S.E.2d 438 (1971).

§ 7A-244. Domestic relations.

The district court has jurisdiction over alimony proceedings and, indeed, the legislature has decreed that it is the only "proper" division for such a proceeding. Peoples v. Peoples, 8 N.C. App. 136, 174 S.E.2d 2 (1970).

And May Enforce Alimony Judgments and Orders Pursuant Thereto.—It is manifest that the court which has been given the duty to supervise domestic relations matters—including alimony judgments and orders pursuant thereto—must have the authority to enforce those judgments and orders. This is true whether the judgment was entered in the superior court or the district court. It would be anomalous to assume that when the legislature changed the statutory framework to make the district court division the proper agency in which to bring actions for alimony or actions to enforce alimony judgments, it meant to leave supervision of prior alimony judgments to the superior court. Peoples v. Peoples, 8 N.C. App. 136, 174 S.E.2d 2 (1970).

An order for the payment of alimony is not a final judgment, since it may be modified upon application of either party; thus,

an action for alimony would continue to be "pending" in the court of proper jurisdiction, which is now the district court. Peoples v. Peoples, 8 N.C. App. 136, 174 S.E.2d 2 (1970).

Judgment Entered in Superior Court before Establishment of District Court.—The district court has the power to enforce by a civil contempt proceeding a confession of judgment entered in the superior court before the establishment of the district court allowing alimony to an appellee. Peoples v. Peoples, 8 N.C. App. 136, 174 S.E.2d 2 (1970).

Transfer of Action for Absolute Divorce Which Has Ended in Mistrial.—The superior court has authority under § 7A-259 to transfer to the district court an action for absolute divorce which has twice ended in mistrial in the superior court and this section gives the district court jurisdiction to try the action. Pence v. Pence, 8 N.C. App. 484, 174 S.E.2d 860 (1970).

Applied in Bonavia v. Torreso, 7 N.C. App. 21, 171 S.E.2d 108 (1969).

§ **7A-245. Injunctive and declaratory relief to enforce or invalidate statutes; constitutional rights.**

Jurisdiction of injunctive relief generally is vested concurrently in the superior court division and the district court division, because even the four types of injunctive relief which the legislature suggested should be heard in the superior court division are not confined jurisdictionally to that division; the statute merely specifies that the superior court division is the proper division for the trial of such actions. Boston v. Freeman, 6 N.C. App. 736, 171 S.E.2d 206 (1969).

Under subsection (b) of this section a prayer for injunctive relief of any of the types enumerated in subsection (a) is not even grounds for transfer to the superior court division unless such injunctive relief is prayed for by a party plaintiff. So it is abundantly clear that the district court division has jurisdiction to grant injunctive relief in cases docketed in that division. Boston v. Freeman, 6 N.C. App 736, 171 S.E.2d 206 (1969).

§ **7A-247. Quo warranto.**—The Superior Court Division is the proper division, without regard to the amount in controversy, for the trial of all civil actions seeking as principal relief the remedy of quo warranto, according to the practice and procedure provided for obtaining that remedy. (1965, c. 310, s. 1; 1971, c. 377, s. 13.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, substituted "remedy of" for "remedies of mandamus and" and "that remedy" for "each remedy."

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

Stated in Boston v. Freeman, 6 N.C. App. 736, 171 S.E.2d 206 (1969).

§ **7A-251. Appeal from clerk to judge.**

Stated in Boston v. Freeman, 6 N.C. App. 736, 171 S.E.2d 206 (1969).

Cited in In re Will of Spinks, 7 N.C. App. 417, 173 S.E.2d 1 (1970).

§ **7A-252**: Repealed by Session Laws 1971, c. 377, s. 32, effective October 1, 1971.

Article 21.

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

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

An appellant's attack on the authority of the district court to enter an order holding him in contempt for failure to comply with an alimony consent order entered in the superior court must fail where there is no showing in the record that he entered a timely objection to the jurisdiction or venue of the district court. Peoples v. Peoples, 8 N.C. App. 136, 174 S.E.2d 2 (1970).

Cited in Boston v. Freeman, 6 N.C. App. 736, 171 S.E.2d 206 (1969).

§ **7A-258. Motion to transfer.**—(a) Any party, including the plaintiff, may move on notice to all parties to transfer the civil action or special proceeding

to the proper division when the division in which the case is pending is improper under the rules stated in this Subchapter. A motion to transfer to another division may also be made if all parties to the action or proceeding consent thereto, and if the judge deems the transfer will facilitate the efficient administration of justice.

(1971, c. 377, s. 14.)

Editor's Note.—

The 1971 amendment, effective Oct. 1, 1971, substituted "Subchapter" for "article" at the end of the first sentence.

As the rest of the section was not changed by the amendment, only subsection (a) is set out.

Action Instituted in Superior Court Prior to Establishment of District Court. — Where an action was instituted in the superior court prior to the establishment of the district court in the county and where no order was ever entered transferring the action from the superior court to the district court, a district court judge is without jurisdiction to enter an order in the action. Hodge v. Hodge, 9 N.C. App. 601, 176 S.E.2d 795 (1970).

The district court has no authority to modify a child-custody order entered in the superior court where the cause was pending in the superior court when district courts were established in the county, and no order has been entered in the superior court transferring the cause to the district court pursuant to § 7A-259, nor has a motion to transfer been made pursuant to this section. In re Hopper, 9 N.C. App. 730, 177 S.E.2d 326 (1970).

§ 7A-259. Transfer on judge's own motion.

Cross Reference.—See note to § 7A-258.

This section includes giving prompt notice to the parties when the transfer is effected. Wendell Tractor & Implement Co. v. Lee, 9 N.C. App. 524, 176 S.E.2d 854 (1970).

Compliance with Subsection (a) Assumed.—Absent objection and exception to an order of transfer, it is assumed that the provisions of subsection (a) of this section were complied with. Wendell Tractor & Implement Co. v. Lee, 9 N.C. App. 524, 176 S.E.2d 854 (1970).

Transfer of Action for Absolute Divorce Which Has Ended in Mistrial.—The superior court has authority under this section to transfer to the district court an action for absolute divorce which has twice ended in mistrial in the superior court and § 7A-244 gives the district court jurisdiction to try the action. Pence v. Pence, 8 N.C. App. 484, 174 S.E.2d 860 (1970).

Quoted in Bryant v. Kelly, 279 N.C. 123, 181 S.E.2d 438 (1971).

Stated in Kelly v. Davenport, 7 N.C. App. 670, 173 S.E.2d 600 (1970).

Cited in Boston v. Freeman, 6 N.C. App. 736, 171 S.E.2d 206 (1969); Radford v. Radford, 7 N.C. App. 569, 172 S.E.2d 897 (1970).

§ 7A-260. Review of transfer matters.

Applied in Bryant v. Kelly, 279 N.C. 123, 181 S.E.2d 438 (1971).

§ 7A-261: Repealed by Session Laws 1971, c. 377, s. 32, effective October 1, 1971.

ARTICLE 22.

Jurisdiction of the Trial Divisions in Criminal Actions.

§ 7A-271. Jurisdiction of superior court.

(b) Appeals by the State or the defendant from the district court are to the superior court. The jurisdiction of the superior court over misdemeanors appealed from the district court to the superior court for trial de novo is the same as the district court had in the first instance.

(1971, c. 377, s. 15.)

Editor's Note.—

The 1971 amendment, effective Oct. 1, 1971, added the first sentence of subsection (b).

As the rest of the section was not changed by the amendment, only subsection (b) is set out.

Stated in State v. Barbour, 278 N.C. 449, 180 S.E.2d 115 (1971).

§ 7A-272. Jurisdiction of district court.

The district court has exclusive original jurisdiction of misdemeanors, including actions to determine liability of persons for the support of dependents in any criminal proceeding. Cline v. Cline, 6 N.C. App. 523, 170 S.E.2d 645 (1969).

The superior court may try a misdemeanor when the conviction is appealed from the district court to the superior court for trial de novo. State v. Taylor, 8 N.C. App. 544, 174 S.E.2d 872 (1970).

Proceeding Pursuant to Uniform Reciprocal Enforcement of Support Act. — The district court had exclusive original jurisdiction to entertain a proceeding pursuant to the Uniform Reciprocal Enforcement of Support Act. Cline v. Cline, 6 N.C. App. 523, 170 S.E.2d 645 (1969).

Cited in State v. Flynt, 8 N.C. App. 323, 174 S.E.2d 120 (1970).

§ 7A-275: Repealed by Session Laws 1971, c. 377, s. 32, effective October 1, 1971.

ARTICLE 23.

Jurisdiction and Procedure Applicable to Children.

§ 7A-277. Purpose.

The purpose of this statute is to give to delinquent children the control and environment which may lead to their reformation and enable them to become law abiding and useful citizens—a support and not a hindrance to the State. In re Whichard, 8 N.C. App. 154, 174 S.E.2d 281 (1970).

District Courts Have Original, Exclusive Jurisdiction of a Person under the Age of Fourteen Charged with a Crime. —See opinion of Attorney General to Mr. Charles B. Winberry, Chief District Prosecutor, Seventh Judicial District, 9/2/70.

Applied in In re Burrus, 275 N.C. 517, 169 S.E.2d 879 (1969); In re Martin, 9 N.C. App. 576, 176 S.E.2d 849 (1970).

Cited in In re Roberts, 8 N.C. App. 513, 174 S.E.2d 667 (1970); McKeiver v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971).

§ 7A-278. Definitions.

Editor's Note. — For note on juries in the juvenile justice system, see 48 N.C.L. Rev. 666 (1970).

District Courts Have Original, Exclusive Jurisdiction of a Person under the Age of Fourteen Charged with a Crime. —See opinion of Attorney General to Mr. Charles B. Winberry, Chief District Prosecutor, Seventh Judicial District, 9/2/70.

"Undisciplined Child".—A finding in a juvenile commitment proceeding that a 15-year-old girl was beyond the disciplinary control of her parents or custodian and was therefore a delinquent child in need of the supervision, protection, and custody of the State, is sufficient to bring the girl within the statutory definition of an "undisciplined child." In re Martin, 9 N.C. App. 576, 176 S.E.2d 849 (1970).

No Finding of Delinquency Where Evidence Insufficient to Convict Juvenile of Crime.—Where the evidence in a juvenile hearing was insufficient to convict the juvenile of the crime alleged in the petition, subornation of perjury, there could be no finding that the juvenile was a delinquent. In re Roberts, 8 N.C. App. 513, 174 S.E.2d 667 (1970).

Cited in McKeiver v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971).

§ 7A-279. Juvenile jurisdiction.

Venue of District Courts in Juvenile Cases.—See opinion of Attorney General to Mrs. Helen S. Cunningham, Chief Counselor, Twenty-Seventh Judicial District, 1/7/70.

§ 7A-280. Felony cases.

Venue of District Courts in Juvenile Cases.—See opinion of Attorney General, to Mrs. Helen S. Cunningham, Chief Counselor, Twenty-Seventh Judicial District, 1/7/70.

§ 7A-281. Petition.

Cited in In re Martin, 9 N.C. App. 576, 176 S.E.2d 849 (1970).

§ 7A-285. Juvenile hearing.

Editor's Note.—For note on juries in the juvenile justice system, see 48 N.C.L. Rev. 666 (1970).

Juvenile proceedings are not criminal prosecutions. Nor is a finding of delinquency in a juvenile proceeding synonymous with conviction of a crime. In re Burrus, 275 N.C. 517, 169 S.E.2d 879 (1969); In re Jones, 11 N.C. App. 437, 181 S.E.2d 163 (1971).

Nevertheless, Juvenile Entitled to Constitutional Safeguards. — A juvenile cited under a petition to appear for an inquiry into his alleged delinquency is entitled to the constitutional safeguards of due process and fairness. In re Jones, 11 N.C. App. 437, 181 S.E.2d 163 (1971).

These safeguards include notice of the charge or charges upon which the petition is based. In re Jones, 11 N.C. App. 437, 181 S.E.2d 163 (1971).

But trial by jury in the juvenile court's adjudicative stage is not a constitutional requirement. McKeiver v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971).

Requirements of Due Process.—So long as proceedings in the juvenile court meet the requirements of due process, they are constitutionally sound and must be upheld. This means that: (1) The basic requirements of due process and fairness must be satisfied in a juvenile court adjudication of delinquency. (2) The Fourteenth Amendment applies to prohibit the use of a coerced confession of a juvenile. (3) Notice must be given in juvenile proceedings which would be deemed constitutionally adequate in a civil or criminal proceeding; that is, notice must be given the juvenile and his parents sufficiently in advance of scheduled court proceedings to afford them reasonable opportunity to prepare, and the notice must set forth the alleged misconduct with particularity. (4) In juvenile proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to counsel and, if unable to afford counsel, to the appointment of same. (5) Juvenile proceedings to determine delinquency, as a result of which the juvenile may be committed to a State institution, must be regarded as "criminal" for Fifth Amendment purposes of the privilege against self-incrimination. The privilege applies in juvenile proceedings the same as in adult criminal cases. In re Burrus, 275 N.C. 517, 169 S.E.2d 879 (1969).

The due process clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child. In re Garcia, 9 N.C. App. 691, 177 S.E.2d 461 (1970).

Duty of District Court.—It is the constant duty of the district court to give each child subject to its jurisdiction such oversight and control as will conduce to the welfare of the child and to the best interest of the State, and to ensure that the juvenile be carefully afforded all constitutional safeguards at every stage of the hearings. In re Eldridge, 9 N.C. App. 723, 177 S.E.2d 313 (1970).

Allowing Amendment Discretionary. — Where the petition sufficiently alleged the offense of larceny, and the amendment in no way changed the nature of the offense but simply identified more specifically the owner of the property allegedly stolen, allowing the amendment under these circumstances was within the sound discretion of the court. In re Jones, 11 N.C. App. 437, 181 S.E.2d 163 (1971).

Waiver of Right to Counsel.—In a juvenile delinquency hearing, it is not sufficient that a court inform the juvenile's mother that she could have an attorney to represent her son if she so desired; there must also be a showing (1) that the mother was advised of the right to have appointed counsel in case she was indigent and (2) that the mother knowingly waived such right. In re Garcia, 9 N.C. App. 691, 177 S.E.2d 461 (1970).

The fact that a mother testified that she knew that she could have appeared with counsel at a juvenile hearing, is not a waiver of the right to counsel which she and her juvenile son had. They had a right expressly to be advised that they might retain counsel and to be confronted with the need for specific consideration of whether they did or did not choose to waive the right. If they were unable to afford to employ counsel, they were entitled in view of the seriousness of the charge and the potential commitment, to appointed counsel, unless they chose waiver. The knowledge that she could employ counsel was not an intentional relinquishment or abandonment of a fully-

known right. In re Garcia, 9 N.C. App. 691, 177 S.E.2d 461 (1970).

A juvenile is not entitled to a jury trial in a juvenile court proceeding on the issue of his delinquency. In re Burrus, 275 N.C. 517, 169 S.E.2d 879 (1969).

Absent a statute providing for a jury trial, it is almost universally held that in juvenile court delinquency proceedings the alleged delinquent has no right under the pertinent State or federal Constitution to demand that the issue of his delinquency be determined by a jury. In re Burrus, 275 N.C. 517, 169 S.E.2d 879 (1969).

Exclusion of Public.—It has never been the practice in juvenile proceedings wholly to exclude parents, relatives or friends, or to refuse juveniles the benefit of counsel. Even so, such proceedings are usually conducted without admitting the public generally. In re Burrus, 275 N.C. 517, 169 S.E.2d 879 (1969).

§ 7A-286. Disposition.—The judge shall select the disposition which provides for the protection, treatment, rehabilitation or correction of the child after considering the factual evidence, the needs of the child, and the available resources, as may be appropriate in each case. In cases where the court finds a factual basis for an adjudication that a child is delinquent, undisciplined, dependent or neglected, the court may find it is in the best interest of the child to postpone adjudication or disposition of the case for a specified time or subject to certain conditions.

In any case where the court adjudicates the child to be delinquent, undisciplined, dependent or neglected, the jurisdiction of the court to modify any order of disposition made in the case shall continue during the minority of the child or until terminated by order of the court, except as otherwise provided herein, provided that any child subject to the juvenile jurisdiction of the court shall be subject to prosecution in any court for any offense committed after his sixteenth birthday.

Any adjudication or disposition of a juvenile hearing shall not have the effect of forfeiting any of the child's citizenship rights.

The court shall have a duty to give each child subject to juvenile jurisdiction such attention and supervision as will achieve the purposes of this Article. Upon motion in the cause or petition, and after notice as provided in this Article, the court may conduct a review hearing to determine whether the order of the court is in the best interest of the child, and the court may modify or vacate the order in light of changes in circumstances or the needs of the child.

The following alternatives for disposition shall be available to any judge exercising juvenile jurisdiction, and the judge may combine any two of the applicable alternatives when he finds such disposition to be in the best interest of the child:

(1) The judge may dismiss the case, or continue the case in order to allow the child, parents or others to take appropriate action.

(2) In the case of any child who needs more adequate care or supervision, or who needs placement, the court may:

a. Require that the child be supervised in his own home by the county department of social services, juvenile probation officer, family counselor or such other personnel as may be available to the court, subject to such conditions applicable to the parents or the child as the court may specify; or

b. Place the child in the custody of a parent, relative, private agency offering placement services, or some other suitable person; or

c. Place the child in the custody of the county department of social services in the county of his residence, or in the case of a child who has legal residence outside the State, in the temporary custody of the county department of social services in the county where the child is found so that said agency may return the child to the responsible authorities. Any county department of social services in whose custody or temporary custody a child is placed shall have the authority to arrange for and provide medical care as needed for such child.

In any case where the court removes custody from a parent or other person standing in loco parentis, the court order shall include provision for such support of the child by the parents or other responsible parties as may be reasonable under the circumstances, and the court may order any parent who appears in court with such child to pay such support, or after notice to the parent as provided by this Article, the court may hold a hearing and order the parent to pay such support. If the court places a child in the custody of a county department of social services and if the court finds that the parents or other responsible parties are unable to pay the cost of the support, maintenance, medical or dental care required by the child, such cost shall be paid by the county department of social services in whose custody the child is placed, provided the child is not receiving care in an institution owned or operated by the State or federal government or any subdivision thereof.

(3) In the case of any child who is alleged to be delinquent or undisciplined and where the court finds it necessary that such child be detained in secure custody for the protection of the community or in the best interest of the child before or after a hearing on the merits of the case, the court may order that such child be detained in a juvenile detention home as provided in G.S. 110-24, or if no juvenile detention home is available, in a separate section of a local jail which meets the requirements of G.S. 110-24, provided the court shall notify the parent, guardian or custodian of the child of such detention. No child shall be held in any juvenile detention home or jail for more than five days without a hearing under the special procedures established by this Article. If the judge orders that the child continue in the detention home or jail after such hearing, the court order shall be in writing with appropriate findings of fact.

(4) In the case of any child who is delinquent or undisciplined, the court may:

a. Place the child on probation for whatever period of time the court may specify, and subject to such conditions of probation as the court finds are related to the needs of the child and which the court shall specify, under the supervision of the juvenile probation officer or family counselor; or

b. Continue the case in order to allow the family an opportunity to meet the needs of the child through more adequate supervision, or placement in a private or specialized school, or placement with a relative, or through some other plan approved by the court.

(5) In the case of any child who is delinquent, the court may commit the child to the care of the North Carolina Board of Juvenile Correction to be assigned to whatever facility operated by such Board as the Board or its administrative personnel may find to be in the best interest of the child. Said commitment shall be for an indefinite term, not to extend beyond the eighteenth birthday of the child, as the Board or its administrative personnel may find to be in the best interest of the child, provided that if a child is engaged in a vocational training program when he becomes 18 years of age, the Board may extend the indefinite term of such child beyond the eighteenth birthday until the vocational training program is completed. The Board or its administrative personnel shall have final authority to determine when any child who has been admitted to any facility operated by the Board has sufficiently benefitted from the program as to be ready for release. At the end of any term, the Board shall notify the court that the child is ready for release and shall plan for the return of the child to the community in cooperation with the juvenile probation officer or the family counselor or such other appropriate personnel as may be avail-

able. If the Board finds that any child committed to its care is not suitable for the program of any facility operated by the Board, or that further court action is needed to protect the best interest of a child at the end of his term, the Board shall make a motion in the cause so that the court may enter an appropriate order.

(6) In any case, the court may order that the child be examined by a physician, psychiatrist, psychologist or other professional person as may be needed for the court to determine the needs of the child. If the court finds the child to be in need of medical, surgical, psychiatric, psychological or other treatment, the court may allow the parents or other responsible persons to arrange for such care. If the parents decline or are unable to make such arrangements, the court may order the needed treatment, surgery or other needed care, and the court may order the parents or other responsible parties to pay the cost of such care, or if the court finds the parents are unable to pay the cost of such care, such cost shall be a charge upon the county when approved by the court. If the court finds the child to be in need of evaluation for mental disorder, mental retardation, or other mental impairment, the court may order the area mental health director or local mental health director to arrange an interdisciplinary evaluation of the child and make recommendations to the court. If such evaluation shows the child to be in need of residential care and treatment for mental impairment, the court may cause the mental health director to arrange admission or commit the child to the appropriate state or local facility.

(7) In any case where there is no parent to appear in a hearing with the child or where the court finds it would be in the best interest of the child, the court may appoint a guardian of the person for the child, who shall operate under the supervision of the court with or without bond, and who shall file only such reports as the court shall require. Such guardian of the person shall have the care, custody and control of the child or may arrange a suitable placement for the child, and may represent the child in legal actions before any court. Such guardian of the person shall also have authority to consent to certain actions on the part of the child in place of the parents, including but not limited to marriage, enlisting in the armed forces, major surgery, or such other actions as the court shall designate where parental consent is required. The authority of the guardian of the person shall continue for whatever period of time the court shall designate during the minority of the child. (1919, c. 97, s. 9; C. S., s. 5047; 1929, c. 84; 1957, c. 100, s. 1; 1963, c. 631; 1969, c. 911, s. 2; 1971, c. 432, ss. 1, 2; c. 967; c. 1180, ss. 1-4.)

Editor's Note. — The first 1971 amendment added the last sentence in subdivision (2)c of the fifth paragraph and rewrote the sixth paragraph.

The second 1971 amendment added the third paragraph.

The third 1971 amendment, effective Sept. 1, 1971, in the fifth paragraph, added the language following "juvenile jurisdiction" in the introductory clause, deleted "or if the child is delinquent, the court may" at the end of subdivision (4)b, and redesignated former subdivisions (4)c, (5) and (6) as present subdivisions (5), (6) and (7), respectively. The amendment also added "In the case of any child who is delinquent, the court may" at the beginning of the first sentence in present subdivision (5), and rewrote the fourth and fifth sentences in present subdivision (6).

Constitutional Rights of Child. — The question as to the extent to which a child's constitutional rights are impaired by a restraint upon its freedom has arisen many times with reference to statutes authorizing the commitment of dependent, incorrigible, or delinquent children to the custody of some institution, and the decisions appear to warrant the statement, as a general rule, that, where the investigation is into the status and needs of the child, and the institution to which he or she is committed is not of a penal character, such investigation is not one to which the con-

stitutional guaranty of a right to trial by jury extends, nor does the restraint put upon the child amount to a deprivation of liberty within the meaning of the Declaration of Rights, nor is it a punishment for crime. In re Whichard, 8 N.C. App. 154, 174 S.E.2d 281 (1970).

Jurisdiction Ends When Minority Ends.—The subject matter of the statute is delinquent children, over whom the juvenile courts are given control and jurisdiction during their minority. This clearly ends when their minority ends and their status as a child no longer obtains. In re Whichard, 8 N.C. App. 154, 174 S.E.2d 281 (1970).

Duty of District Court.—It is the constant duty of the district court to give each child subject to its jurisdiction such oversight and control as will conduce to the welfare of the child and to the best interest of the State, and to ensure that the juvenile be carefully afforded all constitutional safeguards at every stage of the hearings. In re Eldridge, 9 N.C. App. 723, 177 S.E.2d 313 (1970).

Training schools are established for the training and moral and industrial development of the delinquent children of the State. In re Whichard, 8 N.C. App. 154, 174 S.E.2d 281 (1970).

Duration of Child Custody by County Social Services Department.—See opinion of Attorney General to Mrs. Margaret H. Coman, 4/9/70.

Applied in In re Martin, 9 N.C. App. 576, 176 S.E.2d 849 (1970).

§ 7A-288. Termination of parental rights.

Cited in Crockett v. Lowry, 8 N.C. App. 71, 173 S.E.2d 566 (1970).

§ 7A-289. Appeals.

Constitutionality.—This section, permitting the district court to enter a temporary custody order affecting a juvenile who is appealing a commitment order of the court, is not unconstitutional on the ground that the statute deprives the juvenile of the right to bail. In re Martin, 9 N.C. App. 576, 176 S.E.2d 849 (1970).

Article 25.

Jurisdiction and Procedure in Criminal Appeals from District Courts.

§ 7A-290. Appeals from district court in criminal cases; notice; appeal bond.—Any defendant convicted in district court before the magistrate may appeal to the district court for trial de novo before the district court judge. Any defendant convicted in district court before the judge may appeal to the superior court for trial de novo. Notice of appeal may be given orally in open court, or to the clerk in writing within 10 days of entry of judgment. Upon expiration of the 10 day period in which an appeal may be entered, if an appeal has been entered and not withdrawn, the clerk shall transfer the case to the district or superior court docket. The original bail shall stand pending appeal, unless the judge orders bail denied, increased, or reduced. (1965, c. 310, s. 1; 1967, c. 601, s. 1; 1969, c. 876, s. 3; c. 911, s. 5; c. 1190, s. 26; 1971, c. 377, s. 16.)

Editor's Note.—

The 1971 amendment, effective Oct. 1, 1971, rewrote the fourth and fifth sentences, which formerly provided for transfer of a case to the district or superior court criminal docket upon the clerk's receiving notice of appeal and for an appeal bond to be set by the judge in his discretion.

Opinions of Attorney General. — Mr. Carroll R. Holmes, Attorney at Law, 11/17/69; Mr. W.H.S. Burgwyn, Jr., Solicitor, Sixth Judicial District, 9/16/69.

Duty of Clerk in Event of Appeal in a Criminal Case.—See opinion of Attorney General to Mrs. Lena M. Leary, Clerk, Chowan County Superior Court, 5/14/70.

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).

An appeal from a conviction in an inferior court entitles the defendant to a trial de novo in the superior court as a matter of right; and this is true even when an accused pleads guilty in the inferior court. State v. Bryant, 11 App. 423, 181 S.E.2d 211 (1971).

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).

As If Case Had Been Brought There Originally.—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. Bryant, 11 N.C. App. 423, 181 S.E.2d 211 (1971).

Sentence in Superior Court May Be Lighter or Heavier than That Imposed by District Court.—Inasmuch as the trial in the superior court is without regard to the proceedings in the district court, the judge of the superior court is necessarily required to enter his own independent judgment. His sentence may be lighter or heavier than that imposed by the inferior court, provided, of course, it does not exceed the maximum punishment which the inferior court could have imposed. State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970).

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 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. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970); State v. Spencer, 276 N.C. 535, 173 S.E.2d 765 (1970).

To hold that upon appeal the superior court judge may decrease the sentence imposed below but is precluded from increasing it would necessarily destroy the district court system of this State. With all to gain and nothing to lose, defendants would swamp the superior court with appeals in every case and render trials in the district court a vain and worthless exercise. On the other hand, it could tempt district judges to impose maximum sentences which likewise would prompt every defendant to give automatic notice of appeal. State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970).

To hold that upon appeal the superior court judge may decrease the sentence imposed below but is precluded from increasing it, would encourage appeal to the superior court in every case. Trial in the district court would be futile and the court itself an impediment to the administration of justice. State v. Spencer, 276 N.C. 535, 173 S.E.2d 765 (1970).

And Heavier Sentence Is No Violation of 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).

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 Imposing 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).

Validity of Trial without Jury in Inferior Court. — 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).

Failure to Appear in Court or Consent to Dismissal. — Where the defendant neither appears in court when his case is called nor consents to dismissal of his appeal, the trial judge is without authority to dismiss the appeal and remand the case to the district court for compliance with the judgment of that court. The defendant is entitled to a trial as if the case originated in the superior court. State v. Bryant, 11 N.C. App. 423, 181 S.E.2d 211 (1971).

Remand for Clarification of Judgment or Other Proceedings.—Where the appeal has been docketed in the superior court, the judge presiding, at term, has the authority,

upon satisfactory cause shown and with the consent of the defendant, to remand the case to the inferior court for clarifying judgment or other proceedings. This would reinstate the case and revest the inferior court with jurisdiction. State v. Bryant, 11 N.C. App. 423, 181 S.E.2d 211 (1971).

ARTICLE 26.

Additional Powers of District Court Judges and Magistrates.

§ **7A-292. Additional powers of magistrates.**—In addition to the jurisdiction and powers assigned in this Chapter to the magistrate in civil and criminal actions, each magistrate has the following additional powers:

(1) To administer oaths;
(2) To punish for contempt;
(3) When authorized by the chief district judge, to take depositions and examinations before trial;
(4) To issue subpoenas and capiases valid throughout the county;
(5) To take affidavits for the verification of pleadings;
(6) To issue writs of habeas corpus ad testificandum, as provided in G.S. 17-41;
(7) To assign a year's allowance to the surviving spouse and a child's allowance to the children as provided in Chapter 30, Article 4, of the General Statutes;
(8) To take acknowledgments of instruments, as provided in G.S. 47-1;
(9) To perform the marriage ceremony, as provided in G.S. 51-1;
(10) To take acknowledgment of a written contract or separation agreement between husband and wife, and to make a private examination of the wife, as provided in G.S. 52-6;
(11) To conduct proceedings for the valuation of a division fence, as provided in G.S. 68-10;
(12) To assess contribution for damages or for work done on a dam, canal, or ditch, as provided in G.S. 156-15; and
(13) To perform any civil, quasi-judicial or ministerial function assigned by general law to the office of justice of the peace. (1965, c. 310, s. 1; 1967, c. 691, s. 25; 1971, c. 377, s. 17.)

Editor's Note.—

The 1971 amendment, effective Oct. 1, 1971, deleted former subdivision (6), relating to appointment of assessors to allot property for homestead and personal property exemptions, and redesignated former subdivisions (7) to (14) as (6) to (13).

SUBCHAPTER VI. REVENUES AND EXPENSES OF THE JUDICIAL DEPARTMENT.

ARTICLE 27.

Expenses of the Judicial Department.

§ **7A-300. Expenses paid from State funds.**—(a) The operating expenses of the Judicial Department shall be paid from State funds, out of appropriations for this purpose made by the General Assembly. The Administrative Office of the Courts shall prepare budget estimates to cover these expenses, including therein the following items and such other items as are deemed necessary for the proper functioning of the Judicial Department:

(1) Salaries, departmental expense, printing and other costs of the appellate division;
(2) Salaries and expenses of superior court judges, solicitors, assistant solicitors, public defenders, and assistant public defenders, and fees and

expenses of counsel assigned to represent indigents under the provisions of Subchapter IX of this Chapter;

(3) Salaries, travel expenses, departmental expense, printing and other costs of the Administrative Office of the Courts;

(4) Salaries and travel expenses of district judges, magistrates, and family court counselors;

(5) Salaries and travel expenses of clerks of superior court, their assistants, deputies, and other employees, and the expenses of their offices, including supplies and materials, postage, telephone and telegraph, bonds and insurance, equipment, and other necessary items;

(6) Fees and travel expenses of jurors, and of witnesses required to be paid by the State;

(7) Compensation and allowances of court reporters;

(8) Briefs for counsel and transcripts and other records for adequate appellate review when an appeal is taken by an indigent person;

(9) Transcripts of preliminary hearings in indigency cases;

(10) Transcript of the evidence and trial court charge furnished the solicitor when a criminal action is appealed to the appellate division; and

(11) All other expenses arising out of the operations of the Judicial Department which by law are made the responsibility of the State.

(b) Repealed by Session Laws 1971, c. 377, s. 32. (1965, c. 310, s. 1; 1967, c. 108, s. 9; c. 1049, s. 5; 1969, c. 1013, s. 2; 1971, c. 377, ss. 18, 32.)

Editor's Note.—

Session Laws 1967, c. 1049, s. 5, effective Jan. 1, 1971, deleted "prosecutors, assistant prosecutors, acting prosecutors" preceding "magistrates" in subsection (a) (4).

The 1971 amendment, effective Oct. 1, 1971, deleted "(including holdover judges)" following "district judges" in subdivision (4), added present subdivisions (9) and (10) and redesignated former subdivision (9) as (11), all in subsection (a), and repealed subsection (b).

ARTICLE 28.

Uniform Costs and Fees in the Trial Divisions.

§ **7A-304. Costs in criminal actions.**—(a) In every criminal case in the superior or district court, wherein the defendant is convicted, or enters a plea of guilty or nolo contendere, or when costs are assessed against the prosecuting witness, the following costs shall be assessed and collected, except that when the judgment imposes an active prison sentence, costs shall be assessed and collected only when the judgment specifically so provides:

(1) For each arrest or personal service of criminal process, including citations and subpoenas, the sum of two dollars ($2.00), to be remitted to the county wherein the arrest was made or process was served, except that in those cases in which the arrest was made or process served by a law-enforcement officer employed by a municipality, the fee shall be paid to the municipality employing the officer.

(2) For the use of the courtroom and related judicial facilities, the sum of two dollars ($2.00) in the district court, including cases before a magistrate, and the sum of fifteen dollars ($15.00) in superior court, to be remitted to the county in which the judgment is rendered. In all cases where the judgment is rendered in facilities provided by a municipality, the facilities fee shall be paid to the municipality. Funds derived from the facilities fees shall be used exclusively by the county or municipality for providing, maintaining, and constructing adequate courtroom and related judicial facilities, including: Adequate space and furniture for judges, solicitors, public defenders, magistrates, juries, and other court related personnel; office space, furniture and vaults for the clerk; jail and juvenile detention facilities; and a law library

(including books) if one has heretofore been established or if the governing body hereafter decides to establish one. In the event the funds derived from the facilities fees exceed what is needed for these purposes, the county or municipality may, with the approval of the Administrative Officer of the Courts as to the amount, use any or all of the excess to retire outstanding indebtedness incurred in the construction of the facilities, or to reimburse the county or municipality for funds expended in constructing or renovating the facilities (without incurring any indebtedness) within a period of two years before or after the date a district court is established in such county, or to supplement the operations of the General Court of Justice in the county.

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

(4) For support of the General Court of Justice, the sum of nine dollars ($9.00) in the district court, including cases before a magistrate, and the sum of twenty dollars ($20.00) in the superior court, to be remitted to the State Treasurer.

(b) On appeal, costs are cumulative, and costs assessed before a magistrate shall be added to costs assessed in the district court, and costs assessed in the district court shall be added to costs assessed in the superior court, except that the fee for the Law-Enforcement Officers' Benefit and Retirement Fund shall be assessed only once in each case. No superior court costs shall be assessed against a defendant who gives notice of appeal from the district court but withdraws it prior to the expiration of the 10-day period for entering notice of appeal. When a case is reversed on appeal, the defendant shall not be liable for costs, and the State shall be liable for the cost of printing records and briefs in the Appellate Division.

(c) The costs set forth in this section are complete and exclusive, and in lieu of any and all other costs and fees, except that witness fees, jail fees and cost of necessary trial transcripts shall be assessed as provided by law in addition thereto. Nothing in this section shall limit the power or discretion of the judge in imposing fines or forfeitures or ordering restitution.

(1967, c. 1049, s. 5; 1971, c. 377, ss. 19-21; c. 1129.)

Editor's Note.—

Session Laws 1967, c. 1049, s. 5, effective Jan. 1, 1971, deleted "prosecutors" following "solicitors" near the middle of the third sentence in subsection (a)(2).

The first 1971 amendment, effective Oct. 1, 1971, inserted "and collected" in two places in the opening paragraph of subsection (a), added the second and third sentences of subsection (b) and substituted "jail fees and cost of necessary trial transcripts" for "and jail fees" in subsection (c).

The second 1971 amendment, effective Aug. 1, 1971, substituted "nine dollars ($9.00)" for "eight dollars ($8.00)" in subdivision (4) of subsection (a).

As the rest of the section was not changed by the amendments, only subsections (a), (b) and (c) are set out.

§ 7A-305. Costs in civil actions.

(c) The clerk of superior court, at the time of the filing of the papers initiating the action or the appeal, shall collect as advance court costs, the facilities fee and General Court of Justice fee, except in suits in forma pauperis. He shall also collect the fee for discovery procedures under Rule 27(a) and (b) at the time of the filing of the verified petition.

(d) The uniform costs set forth in this section are complete and exclusive, and in lieu of any and all other costs and fees, except that the following expenses, when incurred, are also assessable or recoverable, as the case may be:

(1) Witness fees, as provided by law.

(2) Jail fees, as provided by law.

(3) Counsel fees, as provided by law.

(4) Expense of service of process by certified mail.
(5) Costs on appeal to the superior court, or to the appellate division, as the case may be, of the original transcript of testimony, if any, insofar as essential to the appeal.
(6) Fees for personal service of civil process and other sheriff's fees, as provided by law.
(7) Fees of guardians ad litem, referees, receivers, commissioners, surveyors, arbitrators, appraisers, and other similar court appointees, as provided by law. The fee of such appointees shall include reasonable reimbursement for stenographic assistance, when necessary.
(8) Fees of interpreters, when authorized and approved by the court.
(9) Premiums for surety bonds for prosecution, as authorized by G.S. 1-109.
(1971, c. 377, ss. 23, 24; c. 1181, s. 1.)

Editor's Note.—
The first 1971 amendment, effective Oct. 1, 1971, added the second sentence of subsection (c) and added subdivision (9) of subsection (d).
The second 1971 amendment, effective Oct. 1, 1971, deleted "next friends" preceding "referees" in subsection (d)(7).
As the rest of the section was not changed by the amendments, only subsections (c) and (d) are set out.

§ **7A-305.1. Discovery, fee on filing verified petition.**—When discovery procedures under Rule 27 of the Rules of Civil Procedure are utilized, the sum of twenty dollars ($20.00) shall be assessed and collected by the clerk at the time of the filing of the verified petition. If a civil action is subsequently initiated, the twenty dollars ($20.00) shall be credited against costs in the civil action. (1971, c. 377, s. 22.)

Editor's Note. — Session Laws 1971, c. 377, adding this section, is effective Oct. 1, 1971.

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

(c) The uniform costs set forth in this section are complete and exclusive, and in lieu of any and all other costs, fees, and commissions, except that the following additional expenses, when incurred, are assessable or recoverable, as the case may be:
(1) Witness fees, as provided by law.
(2) Counsel fees, as provided by law.
(3) Costs on appeal, of the original transcript of testimony, if any, insofar as essential to the appeal.
(4) Fees for personal service of civil process, and other sheriff's fees, as provided by law.
(5) Fees of guardians ad litem, referees, receivers, commissioners, surveyors, arbitrators, appraisers, and other similar court appointees, as provided by law. The fees of such appointees shall include reasonable reimbursement for stenographic assistance, when necessary.
(6) Fees for a special jury, if any, at two dollars ($2.00) per special juror for each proceeding. If a special proceeding lasts more than one-half day, the same daily compensation as regular jurors.
(1971, c. 377, s. 25; c. 1181, s. 1.)

Editor's Note.—
The first 1971 amendment, effective Oct. 1, 1971, added the second sentence of subdivision (6) of subsection (c).
The second 1971 amendment, effective Oct. 1, 1971, deleted "next friends" preceding "referees" in subsection (c)(5).
As the rest of the section was not changed by the amendments, only subsection (c) is set out.

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

(c) The uniform costs set forth in this section are complete and exclusive, and in lieu of any and all other costs, fees and commissions, except that the following

additional expenses, when incurred, are also assessable or recoverable, as the case may be:

(1) Witness fees, as provided by law.
(2) Counsel fees, as provided by law.
(3) Costs on appeal, of the original transcript of testimony, if any, insofar as essential to the appeal.
(4) Fees for personal service of civil process, and other sheriff's fees, as provided by law.
(5) Fees of guardians ad litem, referees, receivers, commissioners, surveyors, arbitrators, appraisers, and other similar court appointees, as provided by law.

(1971, c. 1181, s. 1.)

Editor's Note.—
The 1971 amendment, effective Oct. 1, 1971, deleted "next friends" preceding "referees" in subsection (c)(5).

As the rest of the section was not changed by the amendment, only subsection (c) is set out.

§ **7A-308. Miscellaneous fees and commissions.**—(a) The following miscellaneous fees and commissions shall be collected by the clerk of superior court and remitted to the State for the support of the General Court of Justice:

(1)	Foreclosure under power of sale in deed of trust or mortgage	$10.00
(2)	Inventory of safe deposits of a decedent	5.00
(3)	Proceeding supplemental to execution	5.00
(4)	Confession of judgment	4.00
(5)	Taking a deposition	3.00
(6)	Execution	2.00
(7)	Notice of resumption of maiden name	2.00
(8)	Taking an acknowledgment or administering an oath, or both, with or without seal, each certificate (except that oaths of office shall be administered to public officials without charge)	1.00
(9)	Bond, taking justification or approving	1.00
(10)	Certificate, under seal	1.00
(11)	Recording or docketing (including indexing) any document, per page or fraction thereof, excluding welfare liens	1.00
(12)	Preparation of copies, including transcripts, per page or fraction thereof	0.50
(13)	Substitution of trustee in deed of trust	1.00
(14)	Probate of any instrument	0.50

(15) On all funds placed with the clerk by virtue or color of his office, to be administered, invested, or administered in part and invested in part, a commission not to exceed fifteen dollars ($15.00) if one thousand dollars ($1,000) or less and a commission not to exceed twenty-five dollars ($25.00) if more than one thousand dollars ($1,000) when investment of the funds was the sole activity for the account.

(1971, c. 956, s. 2.)

Editor's Note.—
The 1971 amendment, effective Oct. 1, 1971, rewrote subdivision (15) of subsection (a).
Only the subsection affected by the amendment is set out.

Commission by Clerk of Superior Court on Interest Earned by Posted Cash Bond Deductible; Form of Order Setting Bond Precludes Deduction of Commission from Principal.—See opinion of Attorney General to Honorable Frank W. Snepp, 41 N.C.A.G. 470 (1971).

§ **7A-312. Uniform fees for jurors; meals.** — A juror in the General Court of Justice, including a coroner's juror, but excluding a juror in a special proceeding, shall receive eight dollars ($8.00) per day. A juror required to remain overnight at the site of the trial shall be furnished adequate accommodations and subsistence. If required by the presiding judge to remain in a body during the trial

of a case, meals shall be furnished the jurors during the period of sequestration. A juror in a special proceeding shall receive two dollars ($2.00) for each proceeding, except that if a special proceeding lasts more than one half day, the special jurors shall receive the same daily compensation as regular jurors. (1965, c. 310, s. 1; 1967, c. 1169; 1969, c. 1190, s. 32; 1971, c. 377, s. 26.)

Editor's Note.—

The 1971 amendment, effective Oct. 1, 1971, added to the last sentence the exception clause as to a special proceeding lasting more than half a day.

§ 7A-314. Uniform fees for witnesses; experts; limit on number.—(a) A witness under subpoena, bound over, or recognized, other than a salaried State, county, or municipal law-enforcement officer, or an out-of-state witness in a criminal case, whether to testify before the court, jury of view, magistrate, clerk, referee, commissioner, appraiser, or arbitrator shall be entitled to receive five dollars ($5.00) per day, or fraction thereof, during his attendance, which must be certified to the clerk of superior court.

(b) A witness entitled to the fee set forth in subsection (a) of this section, and a law-enforcement officer who qualifies as a witness, shall be entitled to receive reimbursement for travel expenses as follows:

(1) A witness whose residence is outside the county of appearance but within 75 miles of the place of appearance shall be entitled to receive mileage reimbursement at the rate currently authorized for State employees, for each mile necessarily traveled from his place of residence to the place of appearance and return, each day.

(2) A witness whose residence is outside the county of appearance and more than 75 miles from the place of appearance shall be entitled to receive mileage reimbursement at the rate currently authorized State employees for one round-trip from his place of residence to the place of appearance. A witness required to appear more than one day shall be entitled to receive reimbursement for actual expenses incurred for lodging and meals not to exceed the maximum currently authorized for State employees, in lieu of daily mileage.

(c) A witness who resides in a state other than North Carolina and who appears for the purpose of testifying in a criminal action and proves his attendance may be compensated at the rate of ten cents (10¢) a mile for one round-trip from his place of residence to the place of appearance, and five dollars ($5.00) for each day that he is required to travel and attend as a witness, upon order of the court based upon a finding that the person was a necessary witness. If such a witness is required to appear more than one day, he is also entitled to reimbursement for actual expenses incurred for lodging and meals, not to exceed the maximum currently authorized for State employees.

(d) An expert witness, other than a salaried State, county, or municipal law-enforcement officer, shall receive such compensation and allowances as the court, in its discretion, may authorize. A law-enforcement officer who appears as an expert witness shall receive reimbursement for travel expenses only, as provided in subsection (b) of this section.

(e) If more than two witnesses are subpoenaed, bound over, or recognized, to prove a single material fact, the expense of the additional witnesses shall be borne by the party issuing or requesting the subpoena. (1965, c. 310, s. 1; 1969, c. 1190, s. 34; 1971, c. 377, s. 27.)

Editor's Note.—

The 1971 amendment, effective Oct. 1, 1971, rewrote this section.

§ 7A-316. Payment of witness fees in criminal actions.—A witness in a criminal action who is entitled to a witness fee and who proves his attendance prior to assessment of the bill of costs shall be paid by the clerk from State funds

and the amount disbursed shall be assessed in the bill of costs. When the State is liable for the fee, a witness who proves his attendance not later than the last day of court in the week in which the trial was completed shall be paid by the clerk from State funds. If more than two witnesses shall be subpoenaed, bound over, or recognized, to prove a single material fact, disbursements to such additional witnesses shall be charged against the party issuing or requesting the subpoena. (1965, c. 310, s. 1; 1971, c. 377, s. 28.)

Editor's Note.—The 1971 amendment, effective Oct. 1, 1971, rewrote the former provisions of this section as the present first and third sentences of the section, inserting "prior to assessment of the bill of costs" in the present first sentence, and deleting "unless the State is liable for the fee, except that" following "bill of costs," and inserted the present second sentence.

§ 7A-317. Counties and municipalities not required to advance certain fees.

County Hospital within Exemption of County from Advance Costs.—See opinion of Attorney General to Mr. William L. Mills, Jr., Attorney for Cabarrus Memorial Hospital, 41 N.C.A.G. 232 (1971).

§ **7A-319**: Repealed by Session Laws 1971, c. 377, s. 32, effective October 1, 1971.

SUBCHAPTER VII. ADMINISTRATIVE MATTERS.

ARTICLE 29.

Administrative Office of the Courts.

§ **7A-343. Duties of Director.**—The Director is the Administrative Officer of the Courts, and his duties include the following:

(2) Determine the state of the dockets and evaluate the practices and procedures of the courts, and make recommendations concerning the number of judges, solicitors, and magistrates required for the efficient administration of justice;

(1967, c. 1049, s. 5.)

Editor's Note.—The 1967 amendment, effective Jan. 1, 1971, deleted "prosecutors" following "solicitors" in subdivision (2). As the rest of the section was not changed by the amendment, only the opening paragraph and subdivision (2) are set out.

§ **7A-346. Information to be furnished to Administrative Officer.**—All judges, solicitors, public defenders, magistrates, clerks of superior court and other officers or employees of the courts and of offices directly related to and serving the courts shall on request furnish to the Administrative Officer information and statistical data relative to the work of the courts and of such offices and relative to the receipt and expenditure of public moneys for the operation thereof. (1965, c. 310, s. 1; 1967, c. 1049, s. 5; 1969, c. 1013, ss. 4, 5.)

Editor's Note.—

Session Laws 1967, c. 1049, s. 5, effective Jan. 1, 1971, deleted "prosecutors" following "solicitors" near the beginning of this section.

§§ **7A-347 to 7A-374.** Reserved for future codification purposes.

ARTICLE 30.

Judicial Standards Commission.

§ **7A-375. Judicial Standards Commission.**—(a) The Judicial Standards Commission shall consist of: one Court of Appeals judge, one superior court judge, and one district court judge, each appointed by the Chief Justice of the

Supreme Court; two members of the State Bar who have actively practiced in the courts of the State for at least 10 years, elected by the State Bar Council; and two citizens who are not judges, active or retired, nor members of the State Bar, appointed by the Governor. The Court of Appeals judge shall act as chairman of the Commission.

(b) Terms of Commission members shall be for six years, except that, to achieve overlapping of terms, one of the judges, one of the practicing members of the State Bar, and one of the citizens shall be appointed initially for a term of only three years. No member who has served a full six-year term is eligible for reappointment. If a member ceases to have the qualifications required for his appointment, he ceases to be a member. Vacancies are filled in the same manner as the original appointment, for the remainder of the term. Members who are not judges are entitled to per diem and reimbursement for travel and subsistence expenses at the rate applicable to members of state boards and commissions generally, for each day engaged in official business. (1971, c. 590, s. 1.)

Editor's Note. — Former Article 30, Transitional Matters, comprising §§ 7A-400 and 7A-401, was enacted by Session Laws 1965, c. 310, s. 1, and repealed by Session Laws 1971, c. 377, s. 32, effective Oct. 1, 1971. Sections numbered 7A-400 and 7A-401 were enacted as part of new Article 31 by Session Laws 1971, ch. 377, § 1.1.

Section 3 of Session Laws 1971, c. 590, enacting this Article, provides: "This act is effective January 1, 1973, provided Article IV, Sec. 17 of the Constitution of North Carolina is amended by the amendment proposed in H.B. 86 [Session Laws 1971, c. 560] ratified June 14, 1971, the same being entitled An Act to Amend Article IV of the Constitution of North Carolina As Amended Effective July 1, 1971, to Authorize the General Assembly to Prescribe Procedures for the Censure and Removal of Justices or Judges of the General Court of Justice. If the amendment proposed by H.B. 86 is not approved by the voters, this act shall be of no effect."

Session Laws 1971, c. 590, s. 2, contains a severability clause.

§ **7A-376. Grounds for censure or removal.**—Upon recommendation of the Commission, the Supreme Court may censure or remove any justice or judge for wilful misconduct in office, wilful and persistent failure to perform his duties, habitual intemperance, conviction of a crime involving moral turpitude, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute. Upon recommendation of the Commission, the Supreme Court may remove any justice or judge for mental or physical incapacity interfering with the performance of his duties, which is, or is likely to become, permanent. A judge removed for mental or physical incapacity is entitled to retirement compensation if he has accumulated the years of creditable service required for incapacity or disability retirement under any provision of State law, but he shall not sit as an emergency justice or judge. A judge removed for other than mental or physical incapacity receives no retirement compensation, and is disqualified from holding further judicial office. (1971, c. 590, s. 1.)

§ **7A-377. Procedures.**—(a) Any citizen of the State may file a written complaint with the Commission concerning the qualifications or conduct of any justice or judge of the General Court of Justice, and thereupon the Commission shall make such investigation as it deems necessary. The Commission may also make an investigation on its own motion. The Commission is authorized to issue process to compel the attendance of witnesses and the production of evidence, to administer oaths, to punish for contempt, and to prescribe its own rules of procedure. No justice or judge shall be recommended for censure or removal unless he has been given a hearing affording due process of law. All papers filed with and proceedings before the Commission are confidential, unless the judge involved shall otherwise request. The recommendations of the Commission to the Supreme Court, and the record filed in support of the recommendations are not confidential. Testimony and other evidence presented to the Commission is privileged in any

action for defamation. No other publication of such testimony or evidence is privileged, except that the record filed with the Supreme Court continues to be privileged. At least five members of the Commission must concur in any recommendation to censure or remove any justice or judge. A respondent who is recommended for censure or removal is entitled to a copy of the proposed record to be filed with the Supreme Court, and if he has objections to it, to have the record settled by the Commission. He is also entitled to present a brief and to argue his case, in person and through counsel, to the Supreme Court. A majority of the members of the Supreme Court voting must concur in any order of censure or removal. The Supreme Court may approve the recommendation, remand for further proceedings, or reject the recommendation. A justice of the Supreme Court or a member of the Commission who is a judge is disqualified from acting in any case in which he is a respondent.

(b) The Commission is authorized to employ an executive secretary to assist it in carrying out its duties. For specific cases, the Commission may also employ special counsel or call upon the Attorney General to furnish counsel. (1971, c. 590, s. 1.)

§§ **7A-378 to 7A-399.** Reserved for future codification purposes.

ARTICLE 31.

Judicial Council.

§ **7A-400. Establishment and membership.**—A Judicial Council is hereby created which shall consist of the Chief Justice of the Supreme Court or some other member of that Court designated by him, the Chief Judge of the Court of Appeals or some other member of that Court designated by him, two judges of the superior court and one judge of the district court designated by the Chief Justice, the Attorney General or some member of his staff designated by him, two solicitors of the superior court designated by the Chief Justice, and 10 additional members, two of whom shall be appointed by the Governor, two by the President of the Senate from among the members of the Senate, two by the Speaker of the House of Representatives from among the members of the House and four by the Council of the North Carolina State Bar. All appointive members of the Judicial Council shall be selected on the basis of their interest in and competency for the study of law reform. The four members to be appointed by the Council of the North Carolina State Bar shall be active practitioners in the trial and appellate courts. (1949, c. 1052, s. 1; 1953, c. 74, s. 1; 1969, c. 1015, s. 1; 1971, c. 377, s. 1.1.)

Editor's Note.—Sections 7A-400 to 7A-408 were formerly §§ 7-448 through 7-456. They were transferred to their present position by Session Laws 1971, c. 377, s. 1.1, effective Oct. 1, 1971. Former §§ 7A-400 and 7A-401, which were added by Session Laws 1965, c. 310, s. 1, and constituted Article 30 of this Chapter, Transitional Matters, were repealed by Session Laws 1971, c. 377, s. 32.

§ **7A-401. Terms of office.**—Members of the Council shall hold office for the following terms:

(1) If he designates no other member of the Supreme Court, the Chief Justice during his term of office.

(2) If he designates no other member of the Court of Appeals, the Chief Judge during his term of office.

(3) If he designates no member of his staff, the Attorney General during his term of office.

(4) All other members shall hold office from the time of their designation or appointment until June 30th of the next odd-numbered year. Those authorized to designate or appoint members to the Council shall make such designation or appointment to take effect on July 1st of each odd-

numbered year or as soon thereafter as practicable. Any member is eligible for redesignation or reappointment provided he continues to have the qualifications prescribed in G.S. 7A-400. (1949, c. 1052, s. 2; 1953, c. 74, ss. 2, 3; 1969, c. 1015, ss. 2-4; 1971, c. 377, s. 1.1.)

§ **7A-402. Vacancy appointments.** — Vacancies shall be filled for the remainder of any term in the same manner as the original appointment. (1949, c. 1052, s. 3; 1971, c. 377, s. 1.1.)

§ **7A-403. Chairman of Council.**—The member from the Supreme Court shall serve as chairman of the Council. (1949, c. 1052, s. 4; 1971, c. 377, s. 1.1.)

§ **7A-404. Meetings.**—The Council shall meet at least once each quarter of the calendar year, or more often at the call of the chairman. (1949, c. 1052, s. 5; 1971, c. 377, s. 1.1.)

§ **7A-405. Duties of Council.**—It is the duty of the Judicial Council:

(1) To make a continuing study of the administration of justice in this State, and the methods of administration of each and all of the courts of the State, whether of record or not of record.

(2) To receive reports of criticisms and suggestions pertaining to the administration of justice in the State.

(3) To recommend to the legislature, or the courts, such changes in the law or in the organization, operation or methods of conducting the business of the courts, or with respect to any other matter pertaining to the administration of justice, as it may deem desirable. (1949, c. 1052, s. 6; 1971, c. 377, s. 1.1.)

§ **7A-406. Annual report; submission of recommendations.** — The Council shall annually file a report with the Governor. The Council shall submit any recommendations it may have for the improvement of the administration of justice to the Governor, who shall transmit the same to the General Assembly. (1949, c. 1052, s. 7; 1971, c. 377, s. 1.1.)

§ **7A-407. Compensation of members.** — The members of the Council shall be paid the sum of seven dollars ($7.00) per day and such necessary travel expenses and subsistence as may be incurred. (1949, c. 1052, s. 8; 1971, c. 377, s. 1.1.)

§ **7A-408. Executive secretary; stenographer or clerical assistant.**—The Council and the Chief Justice of the Supreme Court, by and with the advice, consent and approval of the Governor and Council of State, may employ an executive secretary who shall be a licensed attorney and fix his salary and also may employ a stenographer or clerical assistant and fix his or her salary. Said salaries shall be paid out of the Contingency and Emergency Fund. The executive secretary shall perform such duties as the Council may assign to him. When not actively engaged in the discharge of duties assigned to him by said Council, he shall perform such duties as the Chief Justice may assign to him. (1949, c. 1052, s. 9; 1953, c. 1111, ss. 1, 2; 1957, c. 1417; 1971, c. 377, s. 1.1.)

SUBCHAPTER VIII.

ARTICLES 32 TO 35.

§§ **7A-409 to 7A-449**: Reserved for future codification purposes.

SUBCHAPTER IX. REPRESENTATION OF INDIGENT PERSONS.

ARTICLE 36.

Entitlement of Indigent Persons Generally.

§ 7A-450. Indigency; definition; entitlement; determination.

Quoted in State v. Lynch, 279 N.C. 1, 181 S.E.2d 561 (1971).

§ 7A-451. Scope of entitlement.

Determining Whether Offense Is Petty or Serious.—Whether an offense is petty or serious is measured, in both State and federal courts, by the punishment authorized by law for the particular offense in question. State v. Green, 277 N.C. 188, 176 S.E.2d 756 (1970).

Any crime, the maximum authorized punishment for which does not exceed six months in prison, is a petty offense for which the offender may be tried without a jury and without the assistance of counsel. State v. Green, 277 N.C. 188, 176 S.E.2d 756 (1970).

A defendant charged with his first offense of drunken driving is not entitled to the appointment of counsel. State v. Hickman, 9 N.C. App. 592, 176 S.E.2d 910 (1970).

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).

The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment. State v. Lynch, 279 N.C. 1, 181 S.E.2d 561 (1971).

Defendant Indigent on Day of Interrogation Has Right to Counsel.—If defendant is indigent on the day of the interrogation, he is entitled to the services of counsel at the interrogation. State v. Lynch, 279 N.C. 1, 181 S.E.2d 561 (1971).

And, under § 7A-457, he can waive that right only in writing. State v. Lynch, 279 N.C. 1, 181 S.E.2d 561 (1971).

When Article Renders Statements Made on Interrogation Inadmissible.—If, at the time of his custody interrogation, defendant was indigent and had not signed a written waiver of counsel, this Article renders the statements made on interrogation inadmissible; and this is true whether the evidence offered to prove them be the testimony of a witness who was present or a sound recording of the interrogation itself. State v. Lynch, 279 N.C. 1, 181 S.E.2d 561 (1971).

Counsel Not Required Where Narrative Confession Is Not Result of In-Custody Interrogation. — Where defendant's narrative confession was not the result of an in-custody interrogation, even though his indigency be assumed, the presence of counsel was not required at that time. State v. Lynch, 279 N.C. 1, 181 S.E.2d 561 (1971).

A confession is not inadmissible merely because the person making it is a minor. State v. Lynch, 279 N.C. 1, 181 S.E.2d 561 (1971).

"Totality of Circumstances" Rule Applicable to Confessions of Minors.—In determining whether a minor's in-custody confession was voluntarily and understandingly made, the judge will consider not only his age, but his intelligence, education, experience, the fact that he was in custody, and any other factor bearing upon the question. In other words, the "totality of circumstances" rule for the admission of out-of-court confessions applies to the confessions of minors as well as adults. State v. Lynch, 279 N.C. 1, 181 S.E.2d 561 (1971).

Minor May Waive Counsel.—A minor who has arrived at the age accountability for crime may waive counsel in the manner provided by law and make a voluntary confession without the presence of either counsel or an adult member of his family, provided he fully understands his constitutional rights and the meaning and consequences of his statement. State v. Lynch, 279 N.C. 1, 181 S.E.2d 561 (1971).

Admitting Confession without Making Specific Findings.—When no conflicting testimony is offered on voir dire, it is not error for the judge to admit the confession without making specific findings. Clearly, however, it is always the better practice for the court to find the facts upon which it concludes any confession is admissible. State v. Lynch, 279 N.C. 1, 181 S.E.2d 561 (1971).

Conflicting Testimony Bearing on Admissibility of Confession.—If, on voir dire, there is conflicting testimony bearing on the admissibility of confession, it is error for the judge to admit it upon a mere statement of his conclusion that the confession was freely and voluntarily made. In such a situation the judge must make specific findings so that the appellate court can determine whether the facts found will support his conclusions. State v. Lynch, 279 N.C. 1, 181 S.E.2d 561 (1971).

Preliminary Hearing.—Prior to the enactment of this section a defendant did not have a right to an attorney at a preliminary hearing. Dawson v. State, 8 N.C. App. 566, 174 S.E.2d 610 (1970).

Cited in State v. Butcher, 10 N.C. App. 93, 177 S.E.2d 924 (1970).

§ 7A-452. Source of counsel; fees; appellate records.

(c) Repealed by Session Laws 1971, c. 377, s. 32. (1969, c. 1013, s. 1; 1971, c. 377, s. 32.)

Editor's Note.—The 1971 amendment, effective Oct. 1, 1971, repealed subsection (c).

As the other subsections were not changed by the amendment, they are not set out.

§ 7A-453. Duty of custodian of a possibly indigent person; determination of indigency.

Stated in State v. Lynch, 279 N.C. 1, 181 S.E.2d 561 (1971).

§ 7A-454. Supporting services.

Stated in State v. Lewis, 7 N.C. App. 178, 171 S.E.2d 793 (1970).

§ 7A-457. Waiver of counsel; pleas of guilty.—(a) An indigent person except one charged with a capital crime who has been informed of his right to be represented by counsel at any in-court proceeding, may, in writing, waive the right to in-court representation by counsel, if the court finds of record that at the time of waiver the indigent person acted with full awareness of his rights and of the consequences of the waiver. In making such a finding, the court shall consider, among other things, such matters as the person's age, education, familiarity with the English language, mental condition, and the complexity of the crime charged.

(b) If an indigent person waives counsel as provided in subsection (a), and pleads guilty to any offense, the court shall inform him of the nature of the offense and the possible consequences of his plea, and as a condition of accepting the plea of guilty the court shall examine the person and shall ascertain that the plea was freely, understandably and voluntarily made, without undue influence, compulsion or duress, and without promise of leniency.

(c) An indigent person who has been informed of his right to be represented by counsel at any out-of-court proceeding, may, either orally or in writing, waive the right to out-of-court representation by counsel. (1969, c. 1013, s. 1; 1971, c. 1243.)

Cross Reference.—See note to § 7A-451.

Editor's Note. — The 1971 amendment rewrote the first sentence of subsection (a), deleted the third sentence of that subsection, deleted the second sentence of subsection (b), and added subsection (c).

The rule is that one may waive counsel if he does so freely and voluntarily and with full understanding that he has the right to be represented by an attorney. State v. Lynch, 279 N.C. 1, 181 S.E.2d 561 (1971) (decided prior to the 1971 amendment).

Stringency of Requiring Waiver in Writing.—In imposing the requirement that an indigent's waiver of counsel must be in writing, the North Carolina General Assembly imposed a more stringent requirement than the federal courts have done. State v. Lynch, 279 N.C. 1, 181 S.E.2d 561 (1971) (decided prior to the 1971 amendment).

Prior to the enactment of § 7A-450 et seq., effective July 1, 1969, there was no difference in the requirements for a waiver of counsel by indigents and nonindigents. Each could waive the right either orally or in writing. State v. Lynch, 279 N.C. 1, 181 S.E.2d 561 (1971) (decided prior to the 1971 amendment).

Applied in State v. Griffin, 10 N.C. App. 134, 177 S.E.2d 760 (1970).

Article 37.

The Public Defender.

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

Entitlement of Public Defender to Solicitor's Travel Allowance and Full-Time Duties.—See opinion of Attorney General to Mr. Wallace C. Harrelson, Public Defender, Eighteenth Judicial District, 12/30/69.

SUBCHAPTER X. NORTH CAROLINA COURTS COMMISSION.

Article 40.

North Carolina Courts Commission.

§ 7A-500. Creation; members; terms; qualifications; vacancies.— The North Carolina Courts Commission is hereby created. It shall consist of 15 regular members, seven of whom shall be appointed by the President of the Senate, seven by the Speaker of the House, and one by the President of the Senate and the Speaker of the House jointly. At least eight of the appointees shall be members or former members of the North Carolina General Assembly. Two of the appointees shall be laymen. Four of the appointees of the President of the Senate shall serve for two years, and three for four years. Four of the appointees of the Speaker of the House shall serve for two years, and three for four years. The joint appointee shall serve for four years. All initial terms shall begin July 1, 1969. Subsequent terms shall begin July 1 of odd-numbered years, and shall be for four years. A vacancy in Commission membership shall be filled by the remaining members of the Commission to serve for the remainder of the term vacated. A member whose term expires may be reappointed. (1969, c. 910, s. 1; 1971, c. 556.)

Editor's Note. — The 1971 amendment added "and shall be for four years" to the ninth sentence.

Chapter 8.

Evidence.

Article 7.

Competency of Witnesses.

Sec.
8-53.1. Physician-patient privilege waived in child abuse.
8-53.4. School counselor privilege.
8-57.1. Husband-wife privilege waived in child abuse.

Article 10.

Depositions.

Sec.
8-75. [Repealed.]

Article 11.

Perpetuation of Testimony.

8-85. Court reporter's certified transcription.

ARTICLE 1.

Statutes.

§ 8-4. Judicial notice of laws of United States, other states and foreign countries.

Editor's Note. — For note on choice of law rules in North Carolina, see 48 N.C.L. Rev. 243 (1970).

Applied in American Inst. of Marketing Sys., Inc. v. Willard Realty Co., 277 N.C. 230, 176 S.E.2d 784 (1970).

§ 8-5. Town ordinances certified.—In a trial in which the offense charged is the violation of a town ordinance, a copy of the ordinance alleged to have been violated, certified by the mayor, shall be prima facie evidence of the existence of such ordinance. (1899, c. 277, s. 2; Rev., s. 1595; C. S., s. 1750; 1971, c. 381, s. 3.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, substituted "In a trial in which" for "In the trial of appeals from mayors' courts, when."

ARTICLE 3.

Public Records.

§ 8-35. Authenticated copies of public records.

A record of the Department of Motor Vehicles, etc.—

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).

Department of Motor Vehicles Employee's Certification of Original Renders Copy Admissible.—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).

Certified Copy of Driver's License Record Admissible to Show Revocation.—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).

Cited in Taylor v. Garrett, 7 N.C. App. 473, 173 S.E.2d 31 (1970).

ARTICLE 4.

Other Writings in Evidence.

§ 8-39. Parol evidence to identify land described.

The purpose of parol evidence, etc.— Parol evidence is admissible to fit the description to the land. Such evidence cannot, however, be used to enlarge the scope of the descriptive words. The deed itself must point to the source from which evidence aliunde to make the description complete is to be sought. State v. Brooks, 279 N.C. 45, 181 S.E.2d 553 (1971).

Applied in Taylor v. Tri-County Elec. Membership Corp., 10 N.C. App. 277, 178 S.E.2d 130 (1970).

§ 8-40. Proof of handwriting by comparison.

Comparison by Jury.— The enactment of this section in 1913 changed the rule existing theretofore, and comparison of writings by the jury has been approved. If the genuineness of a signature or writing is established to the satisfaction of the judge, a witness may compare the established writing with the disputed writing; and then the testimony of the witness and the writings themselves may be submitted to the jury. State v. Simmons, 8 N.C. App. 561, 174 S.E.2d 627 (1970).

Neither this section nor North Carolina rules of evidence permit the jury, unaided by competent opinion testimony, to compare writings to determine genuineness. State v. Simmons, 8 N.C. App. 561, 174 S.E.2d 627 (1970).

ARTICLE 4A.

Photographic Copies of Business and Public Records.

§ 8-45.1. Photographic reproductions admissible; destruction of originals.

Reproductions Are Primary Evidence.— Photostatic copies of deposit slips and checks made by an employee of a bank in the usual course of business and identified by such employee are competent as primary evidence without proof of the loss or destruction of the originals. Jones v. Metropolitan Life Ins. Co., 5 N.C. App. 570, 169 S.E.2d 6 (1969).

Failure to Show That Copy Was Made in Regular Course of Business or by Whom It Was Made.—A photostatic copy of a purported written designation of plaintiff by deceased as the beneficiary of deceased's governmental life insurance benefits should not be admitted as evidence where plaintiff failed to show that the copy was made in the regular course of business or activity of any federal agency or by whom it was made. Jones v. Metropolitan Life Ins. Co., 5 N.C. App. 570, 169 S.E.2d 6 (1969).

ARTICLE 5.

Life Tables.

§ 8-46. Mortuary tables as evidence.—Whenever it is necessary to establish the expectancy of continued life of any person from any period of such person's life, whether he be living at the time or not, the table hereto appended shall be received in all courts and by all persons having power to determine litigation, as evidence, with other evidence as to the health, constitution and habits of such person, of such expectancy represented by the figures in the columns headed by the words "completed age" and "expectation" respectively:

Completed Age	*Expectation*
0	68.40
1	69.64
2	68.78
3	67.86
4	66.92
5	65.98
6	65.02

Completed Age	*Expectation*
7	64.06
8	63.09
9	62.12
10	61.15
11	60.18
12	59.20
13	58.22
14	57.25
15	56.29
16	55.34
17	54.39
18	53.45
19	52.52
20	51.58
21	50.65
22	49.72
23	48.80
24	47.87
25	46.94
26	46.02
27	45.09
28	44.17
29	43.25
30	42.33
31	41.41
32	40.49
33	39.58
34	38.67
35	37.76
36	36.85
37	35.95
38	35.06
39	34.17
40	33.29
41	32.42
42	31.57
43	30.72
44	29.87
45	29.04
46	28.21
47	27.38
48	26.56
49	25.76
50	24.96
51	24.18
52	23.40
53	22.64
54	21.89
55	21.15
56	20.42
57	19.70
58	18.99
59	18.29
60	17.61
61	16.94
62	16.29

Completed Age	*Expectation*
63	15.65
64	15.02
65	14.40
66	13.79
67	13.20
68	12.61
69	12.04
70	11.48
71	10.93
72	10.39
73	9.86
74	9.35
75	8.84
76	8.35
77	7.87
78	7.40
79	6.96
80	6.53
81	6.12
82	5.75
83	5.39
84	5.05
85	4.70
86	4.38
87	4.08
88	3.79
89	3.54
90	3.30
91	3.08
92	2.89
93	2.72
94	2.56
95	2.43
96	2.32
97	2.21
98	2.10
99	2.01
100	1.91
101	1.83
102	1.75
103	1.67
104	1.60
105	1.53
106	1.46
107	1.40
108	1.35
109	1.29

(1883, c. 225; Code, s. 1352; Rev., s. 1626; C. S. s. 1790; 1955, c. 870; 1971, c. 968.)

Editor's Note.—The 1971 amendment revised the mortuary table.

Stated in Petition of United States, 303 F. Supp. 1282 (E.D.N.C. 1969).

ARTICLE 7.

Competency of Witnesses.

§ 8-50.1. Competency of evidence of blood tests.

Legislature Intended Consideration of Test Results with Other Evidence.—Since § 49-7 and this section do not make the blood test which establishes nonpaternity conclusive of that issue but merely provide that the results of such test when offered by a duly qualified person shall be admitted in evidence, it seems clear that the legislative intent was that the jury should consider the test results, whatever they might show, along with all the other evidence in determining the issue of paternity. State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970).

Statutes Silent as to Weight Given Tests.—Both § 49-7 and this section are silent as to the weight to be given to blood tests to determine parentage. State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970).

Tests Cannot Prove Paternity. — The value of serological blood tests, when made and interpreted by specifically qualified technicians, using approved testing procedures and reagents of standard strength, is now generally recognized. Such tests, however, can never prove the paternity of any individual, and they cannot always exclude the possibility. Nevertheless, in a significant number of cases, they can disprove it. State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970).

Tests Conclusive Only in Excluding Putative Father.—The blood-grouping test results are conclusive only in excluding the putative father. The results might show him to have a blood type which the father of the child must have had; but this only indicates that of all the people of that blood type or group, he, as well as anyone else with that blood type or group, could have been the father of the child. State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970).

Chance of Proving Nonpaternity.—The result of a blood test to determine parentage will be either "exclusion of paternity demonstrated" or "exclusion of paternity not possible." It has been estimated that by tests, based upon each of three blood-type classifications, A-B-O, M-N, and Rh-hr, a man falsely accused has a 50-55% chance of proving his nonpaternity. State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970).

Defendant Has Right to Blood Test. — There can be no doubt that a defendant's right to a blood test to determine parentage is a substantial right and that, upon defendant's motion, the court must order the test when it is possible to do so. State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970).

The only areas in which the results of blood grouping tests should be open to attack are in the method of testing or in the qualifications of the persons performing the tests. State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970).

Tests May Not Be Accurate until Infant Six Months Old. — In a few cases it has been found that an infant's blood group cannot be established immediately after birth. However, by the age of six months, an accurate determination can always be had. State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970).

When the death of the child makes a blood test impossible the situation is analogous to that which occurs when an eyewitness to events constituting the basis for an indictment dies before the accused has interviewed him or taken his deposition. It would hardly be suggested that to try the defendant after the death of that witness would deprive him of due process and that therefore the prosecution must be dismissed. State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970).

Child Born in Wedlock Presumed Legitimate.—When a child is born in wedlock, the law presumes it to be legitimate, and this presumption can be rebutted only by facts and circumstances which show that the husband could not have been the father, as that he was impotent or could not have had access to his wife. To render the child of a married woman illegitimate, unless impotency be established, proof of the nonaccess of her husband is required, and neither the wife nor the husband is a competent witness to prove such nonaccess. The evidence of nonaccess, if there be such, must come from third persons. If there was access, there is a conclusive presumption that the child was lawfully begotten in wedlock. Wright v. Wright, 11 N.C. App. 190, 180 S.E.2d 369 (1971).

The results of a blood-grouping test cannot be used to establish nonpaternity if there was access; and if nonaccess is established the results of the blood-grouping test would be superfluous. Therefore, since the results of the blood-grouping test are incompetent or immaterial evidence, an order requiring the test is error. Wright v. Wright, 11 N.C. App. 190, 180 S.E.2d 369 (1971).

Applied in Johnson v. Johnson, 7 N.C. App. 310, 172 S.E.2d 264 (1970).

§ 8-51. A party to a transaction excluded, when the other party is dead.

I. GENERAL CONSIDERATION.

Purpose of Section.—

In accord with 3rd paragraph in original. See Whitley v. Redden, 5 N.C. App. 705, 169 S.E.2d 260 (1969).

When Testimony Is Incompetent, etc.—

This section does not render the testimony of a witness incompetent in any case unless these four questions require an affirmative answer: 1. Is the witness (a) a party to the action, or (b) a person interested in the event of the action, or (c) a person from, through or under whom such a party or interested person derives his interest or title? 2. Is the witness testifying (a) in his own behalf or interest, or (b) in behalf of the party succeeding to his title or interest? 3. Is the witness testifying against (a) the personal representative of a deceased person, or (b) the committee of a lunatic, or (c) a person deriving his title or interest from, through or under a deceased person or lunatic? 4. Does the testimony of the witness concern a personal transaction or communication between the witness and the deceased person or lunatic? Ballard v. Lance, 6 N.C. App. 24, 169 S.E.2d 199 (1969).

The rule that evidence offered is admissible if it is competent for any purpose ought not to be used as a sword with which to attack a decedent's estate by destroying the express provisions of this section. Whitley v. Redden, 5 N.C. App. 705, 169 S.E.2d 260 (1969).

Applied in Bryant v. Kelly, 279 N.C. 123, 181 S.E.2d 438 (1971).

III. WHEN THE DISQUALIFICATION EXISTS.

Contest over Will. — As between the propounder or an interested executor and a person who is interested in the result of the trial, this section, rendering an interested survivor incompetent as a witness to a personal transaction with a deceased person, applies in a contest over a will, notwithstanding the proceeding is in rem. There is an exception when the evidence is directed solely towards the question or issue of mental condition or testamentary capacity. In that case, it is competent for the interested witness to give testimony of such transaction or conversation, solely, however, as a basis for the opinion formed as to the mental condition or capacity of the deceased. Whitley v. Redden, 276 N.C. 263, 171 S.E.2d 894 (1970).

IV. SUBJECT MATTER OF THE TRANSACTION.

Test, etc.—

In accord with 1st paragraph in original. See Whitley v. Redden, 5 N.C. App. 705, 169 S.E.2d 260 (1969).

In accord with 2nd paragraph in original. See Ballard v. Lance, 6 N.C. App. 24, 169 S.E.2d 199 (1969).

Testimony Relating Solely to Issue of Mental Capacity.—

A person (who would otherwise be precluded from testifying by this section), after testifying as to the mental capacity of a deceased person may testify to transactions and communications with deceased in order to show the jury that the opinion was well founded. Whitley v. Redden, 276 N.C. 263, 171 S.E.2d 894 (1970).

This is one of those states which has a "dead man's" statute and allows an interested witness, where there is an issue of mental capacity, to relate personal transactions and communications between the witness and a decedent or lunatic as a basis for his opinion as to the mental capacity of the decedent or lunatic; however, such evidence will be rejected when it is offered for the purpose of proving and does tend to prove vital and material facts which will fix liability against the representative of a deceased person, or committee of a lunatic, or anyone deriving his title or interest through them. Whitley v. Redden, 276 N.C. 263, 171 S.E.2d 894 (1970).

Where this section is in conflict with the rule that testimony of personal transactions and communications is competent on the question of the mental capacity of a deceased person where the opinion of the interested witness as to the mental competency has been formed from conversations and communications with such deceased person, and when these two principles of law conflict with each other because the testimony of an interested witness concerning personal transactions and communications with a deceased person tends directly to establish the material facts in issue, in addition to mental capacity, then this section should control. Whitley v. Redden, 5 N.C. App. 705, 169 S.E.2d 260 (1969).

V. EXCEPTIONS.

This section contains only two exceptions, one of which relates to the identity of the driver of a motor vehicle, and the

other relates to cases in which the representative of the lunatic or deceased person has "opened the door" by testifying or offering the testimony of the deceased or insane person. Whitley v. Redden, 5 N.C. App. 705, 169 S.E.2d 260 (1969).

Evidence Relating to Mental Capacity. — The Supreme Court has stated what seems to be another exception to this section which provides that after a witness has stated his opinion as to the mental capacity of such deceased person, and where this opinion has been formed from conversations and communications with such person, it is competent to offer such in evidence as constituting the basis of such opinion. While it is conceded that a sane declaration by a person may be some evidence of sanity, the statute as written by the legislature does not contain this exception. Whitley v. Redden, 5 N.C. App. 705, 169 S.E.2d 260 (1969). See ante, this note, analysis line IV.

§ 8-52. Communications between attorney and client.

Quoted in Battle v. State, 8 N.C. App. 192, 174 S.E.2d 299 (1970).

§ 8-53. Communications between physician and patient.

Editor's Note.—

For note on reporting patients for review of driver's license, see 48 N.C.L. Rev. 1003 (1970).

Applied in Wilder v. Edwards, 7 N.C. App. 513, 173 S.E.2d 72 (1970); Gibson v. Montford, 9 N.C. App. 251, 175 S.E.2d 776 (1970).

§ 8-53.1. Physician-patient privilege waived in child abuse.—Notwithstanding the provisions of G.S. 8-53, the physician-patient privilege shall not be ground for excluding evidence regarding the abuse or neglect of a child under the age of 16 years or regarding an illness of or injuries to such child or the cause thereof in any judicial proceeding related to a report pursuant to the Child Abuse Reporting Law, Article 8 of Chapter 110 of the General Statutes of North Carolina. (1965, c. 472, s. 2; 1971, c. 710, s. 2.)

Editor's Note. — The 1971 amendment, effective July 1, 1971, substituted "related to a report pursuant to the Child Abuse Reporting Law, Article 8 of Chapter 110 of the General Statutes of North Carolina" for "resulting from a report pursuant to §§ 14-318.2 and 14-318.3" at the end of the section.

§ 8-53.4. School counselor privilege.—No person certified by the State Department of Public Instruction as a school counselor and duly appointed or designated as such by the governing body of a public school system within this State or by the head of any private school within this State shall be competent to testify in any action, suit, or proceeding concerning any information acquired in rendering counseling services to any student enrolled in such public school system or private school, and which information was necessary to enable him to render counseling services; provided, however, that this section shall not apply where the student in open court waives the privilege conferred; provided further that the presiding judge may compel such disclosure, if in his opinion the same is necessary to a proper administration of justice. (1971, c. 943.)

§ 8-54. Defendant in criminal action competent but not compellable to testify.

Historical Background.—

Prior to the adoption of this section defendants in criminal actions were not competent to testify in their own behalf. The prevailing theory prior to the adoption of the statute was that the frailty of human nature and the overpowering desire for freedom would ordinarily induce a person charged with crime, if permitted to testify, to swear falsely. State v. Williams, 6 N.C. App. 611, 170 S.E.2d 640 (1969).

Proper Instruction.—

There is no hard and fast form of expression or consecrated formula required, but the jury may be instructed that as to the defendant the jury should scrutinize his testimony in the light of his interest in the outcome of the prosecution but that if after such scrutiny the jury believes that the witness has told the truth, it should give his testimony the same weight it would give the testimony of any other credible witness. It is not mandatory that the judge charge the jury in this respect, but the charge is permissible and it appears to be the uniform practice. State v.

Williams, 6 N.C. App. 611, 170 S.E.2d 640 (1969).

Giving unrequested proper instructions relating to the failure of the defendant to exercise his right to testify or refrain from testifying under the provisions of this section is not reversible error. State v. Powell, 11 N.C. App. 465, 181 S.E.2d 754 (1971).

Instruction Discretionary Absent Request.—Ordinarily, it would seem better to give no instruction concerning a defendant's failure to testify unless such an instruction is requested by the defendant. State v. Powell, 11 N.C. App. 465, 181 S.E.2d 754 (1971).

Instructions concerning the failure of a defendant to testify relate to a subordinate feature of the case. Absent a request, it is discretionary with the trial judge as to whether he does or does not instruct the jury on a subordinate feature of a case. State v. Powell, 11 N.C. App. 465, 181 S.E.2d 754 (1971).

Court's Duty in Undertaking to Charge.—While the court is not required to charge on a subordinate feature of the case, nevertheless when it undertakes to do so, it becomes the duty of the court to charge thereon fully and accurately. State v. Powell, 11 N.C. App. 465, 181 S.E.2d 754 (1971).

Language of Statute Should Be Used.—The better practice is for the trial judge to use the language employed in this section without additions if there is a request for such instructions. State v. Powell, 11 N.C. app. 465, 181 S.E.2d 754 (1971).

§ 8-55. Testimony enforced in certain criminal investigations; immunity.—If any justice, judge or magistrate of the General Court of Justice shall have good reason to believe that any person within his jurisdiction has knowledge of the existence and establishment of any faro bank, faro table or other gaming table prohibited by law, or of any place where intoxicating liquors are sold contrary to law, in any town or county within his jurisdiction, such person not being minded to make voluntary information thereof on oath, then it shall be lawful for such justice, magistrate, or judge to issue to the sheriff of the county in which such faro bank, faro table, gaming table, or place where intoxicating liquors are sold contrary to law is supposed to be, a subpoena, capias ad testificandum, or other summons in writing, commanding such person to appear immediately before such justice, magistrate, or judge and give evidence on oath as to what he may know touching the existence, establishment and whereabouts of such faro bank, faro table or other gaming table, or place where intoxicating liquors are sold contrary to law, and the name and personal description of the keeper thereof. Such evidence, when obtained, shall be considered and held in law as an information on oath, and the justice, magistrate or judge may thereupon proceed to seize and arrest such keeper and destroy such table, or issue process therefor as provided by law. No person shall be excused, on any prosecution, from testifying touching any unlawful gaming done by himself or others; but no discovery made by the witness upon such examination shall be used against him in any penal or criminal prosecution, and he shall be altogether pardoned of the offenses so done or participated in by him. (R. C., c. 35, s. 50; 1858-9, c. 34, s. 1; Code, ss. 1050, 1215; 1889, c. 355; Rev., ss. 1637, 3721; 1913, c. 141; C. S., s. 1800; 1969, c. 44, s. 22; 1971, c. 381, s. 4.)

Editor's Note.—

The 1971 amendment, effective Oct. 1, 1971, in the first sentence, deleted "or justice of the peace, or mayor of a town" following "General Court of Justice," deleted "of the peace" following "justice" in two places, deleted "mayor" following "magistrate" in two places, and deleted "or to any constable of the town or township" following "sheriff of the county." In the second sentence, the amendment deleted "mayor" following "magistrate."

§ 8-56. Husband and wife as witnesses in civil action.

Editor's Note.—

For note on testimony by one spouse against the other of adultery under North Carolina law, see 48 N.C.L. Rev. 131 (1969).

Common Law.—

At common law husband and wife could not testify in an action to which either was a party. Hicks v. Hicks, 275 N.C. 370, 167 S.E.2d 761 (1969).

Public policy demands that the wife be protected against the absolute defense of adultery which the husband seeks to prove by his own testimony. Hicks v. Hicks, 275 N.C. 370, 167 S.E.2d 761 (1969).

§ **8-57. Husband and wife as witnesses in criminal actions.** — The husband or wife of the defendant, in all criminal actions or proceedings, shall be a competent witness for the defendant, but the failure of such witness to be examined shall not be used to the prejudice of the defense. Every such person examined as a witness shall be subject to be cross-examined as are other witnesses. No husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage. Nothing herein shall render any spouse competent or compellable to give evidence against the other spouse in any criminal action or proceeding, except to prove the fact of marriage and facts tending to show the absence of divorce or annulment in cases of bigamy and in cases of criminal cohabitation in violation of the provisions of G.S. 14-183, and except that in all criminal prosecutions of a spouse for an assault upon the other spouse, or in any criminal prosecution of a spouse for trespass in or upon the separate residence of the other spouse when living separate and apart from each other by mutual consent or by court order, or for any criminal offense against a legitimate or illegitimate or adopted or foster minor child of either spouse, or for abandonment, or for neglecting to provide for the spouse's support, or the support of the children of such spouse, it shall be lawful to examine a spouse in behalf of the State against the other spouse: Provided that this section shall not affect pending litigation relating to a criminal offense against a minor child. (1856-7, c. 23; 1866, c. 43; 1868-9, c. 209; 1881, c. 110; Code, ss. 588, 1353, 1354; Rev., ss. 1634, 1635, 1636; C. S., s. 1802; 1933, c. 13, s. 1; c. 361; 1951, c. 296; 1957, c. 1036; 1967, c. 116; 1971, c. 800.)

Editor's Note.—The 1971 amendment inserted in the last sentence "or in any criminal prosecution of a spouse for trespass in or upon the separate residence of the other spouse when living separate and apart from each other by mutual consent or by court order."

§ **8-57.1. Husband-wife privilege waived in child abuse.**—Notwithstanding the provisions of G.S. 8-56 and G.S. 8-57, the husband-wife privilege shall not be ground for excluding evidence regarding the abuse or neglect of a child under the age of 16 years or regarding an illness of or injuries to such child or the cause thereof in any judicial proceeding related to a report pursuant to the Child Abuse Reporting Law, Article 8 of Chapter 110 of the General Statutes of North Carolina. (1971, c. 710, s. 3.)

Editor's Note.—Session Laws 1971, c. 710, s. 8, makes the act effective July 1, 1971.

ARTICLE 8.

Attendance of Witness.

§ **8-59. Issue and service of subpoena.**—In obtaining the testimony of witnesses in causes pending in the trial divisions of the General Court of Justice, subpoenas shall be issued and served in the manner provided in Rule 45 of the Rules of Civil Procedure for civil actions. (1777, c. 115, s. 36, P. R.; R. C., c. 31, s. 59; Code, s. 1355; Rev., s. 1639; C. S., s. 1803; 1959, c. 522, s. 2; 1967, c. 954, s. 3; 1971, c. 381, s. 5.)

Editor's Note.—
The 1971 amendment, effective Oct. 1, 1971, substituted "pending in the trial divisions of the General Court of Justice" for "depending in the superior, criminal and inferior courts."

§ **8-63. Witnesses attend until discharged; effect of nonattendance.**—Every witness, being summoned to appear in any of the said courts, in manner before directed, shall appear accordingly, and, subject to the provisions of G.S. 6-51, continue to attend from session to session until discharged, when summoned in a civil action or special proceeding, by the court or the party at whose instance such witness shall be summoned, or, when summoned in a criminal prosecution,

until discharged by the court, the prosecuting officer, or the party at whose instance he was summoned; and in default thereof shall forfeit and pay, in civil actions or special proceedings, to the party at whose instance the subpoena issued, the sum of forty dollars ($40.00), to be recovered by motion in the cause, and shall be further liable to his action for the full damages which may be sustained for the want of such witness's testimony; or if summoned in a criminal prosecution shall forfeit and pay eighty dollars ($80.00) for the use of the State, or the party summoning him. If the civil action or special proceeding shall, in the vacation, be compromised and settled between the parties, and the party at whose instance such witness was summoned should omit to discharge him from further attendance, and for want of such discharge he shall attend the next session, in that case the witness, upon oath made of the facts, shall be entitled to a ticket from the clerk in the same manner as other witnesses, and shall recover from the party at whose instance he was summoned the allowance which is given to witnesses for their attendance, with costs.

No execution shall issue against any defaulting witness for the forfeiture aforesaid but after notice made known to him to show cause against the issuing thereof; and if sufficient cause be shown of his incapacity to attend, execution shall not issue, and the witness shall be discharged of the forfeiture without costs; but otherwise the court shall, on motion, award execution for the forfeiture against the defaulting witness. (1777, c. 115, ss. 37, 38, 43, P. R.; 1799, c. 528, P. R.; 1801, c. 591, P. R.; R. C., c. 31, ss. 60, 61, 62; Code, s. 1356; Rev., s. 1643; C. S., s. 1807; 1965, c. 284; 1971, c. 381, s 12.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, substituted "session to session" for "term to term" in the first sentence and "session" for "term" in the second sentence.

Article 9.

Attendance of Witnesses from without State.

§ 8-67. Witness from another state summoned to testify in this State.

Court Cannot Compel State or County to Appropriate Funds for Fees.—The court has no authority to compel the State or county to appropriate funds for the purpose of paying the mileage and witness fees specified in this section. It may be that a case might arise in which due process would require that the public bear such an expense. State v. Preston, 9 N.C. App. 71, 175 S.E.2d 705 (1970).

Article 10.

Depositions.

§ 8-74. Depositions for defendant in criminal actions.—In all criminal actions, hearings and investigations it shall be lawful for the defendant in any such action to make affidavit before the clerk of the superior court of the county in which said action is pending, that it is important for the defense that he have the testimony of any person, whose name must be given, and that such person is so infirm, or otherwise physically incapacitated, or nonresident of this State, that he cannot procure his attendance at the trial or hearing of said cause. Upon the filing of such affidavit, it shall be the duty of the clerk to appoint some responsible person to take the deposition of such witness, which deposition may be read in the trial of such criminal action under the same rules as now apply by law to depositions in civil actions: Provided, that the solicitor or prosecuting attorney of the district, county or town in which such action is pending have 10 days' notice of the taking of such deposition, who may appear in person or by representative to

conduct the cross-examination of such witness. (Code, s. 1357; 1891, c. 522; 1893, c. 80; Rev., s. 1652; 1915, c. 251; C. S., s. 1812; 1971, c. 381, s. 6.)

Editor's Note.—The 1971 amendment, effective Oct. 1, 1971, deleted the last sentence.

§ **8-75**: Repealed by Session Laws 1971, c. 381, s. 13, effective October 1, 1971.

§ **8-81. Objection to deposition before trial.**

When Trial Begins.—

In accord with 1st and 2nd paragraphs in original. See State v. Swann, 5 N.C. App. 385, 168 S.E.2d 429, rev'd on other grounds, 275 N.C. 644, 170 S.E.2d 611 (1969).

When a trial commences is a difficult question, and the answer may vary according to the statute being construed and according to the circumstances in a particular case. State v. Swann, 5 N.C. App. 385, 168 S.E.2d 429, rev'd on other grounds, 275 N.C. 644, 170 S.E.2d 611 (1969).

The trial begins when the jury are called into the box for examination as to their qualifications—when the work of impaneling the jury begins—and the calling of a jury is a part of the trial. State v. Swann, 5 N.C. App. 385, 168 S.E.2d 429, rev'd on other grounds, 275 N.C. 644, 170 S.E.2d 611 (1969).

§ **8-83. When deposition may be read on the trial.**—Every deposition taken and returned in the manner provided by law may be read on the trial of the action or proceeding, or before any referee, in the following cases, and not otherwise:

(10) If the action is pending in a magistrate's court the deposition may be read on the trial of the action, provided the witness is more than 75 miles by the usual public mode of travel from the place where the court is sitting.

(1971, c. 381, s. 7.)

Editor's Note.—

The 1971 amendment, effective Oct. 1, 1971, substituted "magistrate's" for "justice's" in subdivision (10).

Only the opening paragraph of the section and the subdivision changed by the amendment are set out.

ARTICLE 11.

Perpetuation of Testimony.

§ **8-85. Court reporter's certified transcription.**—Testimony taken and transcribed by a court reporter and certified by the reporter or by the judge who presided at the trial at which the testimony was given, may be offered in evidence in any court as the deposition of the witness whose testimony is so taken and transcribed, in the manner, and under the rules governing the introduction of depositions in civil actions. (1971, c. 377, s. 1.)

Editor's Note.—The above section is the seventh paragraph of former § 7-89. It was revised and transferred to its present position by Session Laws 1971, c. 377, s. 1, effective Oct. 1, 1971. Former § 8-85 was repealed by Session Laws 1967, c. 954, s. 4, effective Jan. 1, 1970.

Chapter 8A.

Interpreters for Deaf Persons.

§ **8A-1. Appointment of interpreters for deaf parties or witnesses; costs.**—Whenever any deaf person is a party to any legal proceeding of any nature, or a witness therein, the court upon request of any party shall appoint a qualified interpreter of the deaf sign language to interpret the proceedings to and the testimony of such deaf person. In proceedings involving possible commitment of a deaf person to a mental institution, the court shall appoint such interpreter upon its own initiative. In criminal cases and commitment proceedings, the court shall determine a reasonable fee for all such interpreter services which shall be paid by the State, and in civil cases, the said fee shall be taxed as part of the court costs. (1965, c. 868; 1971, c. 381, s. 8.)

Editor's Note.—The 1971 amendment, effective Oct. 1, 1971, substituted "by the State" for "out of the general county funds" in the last sentence.

Chapter 9.

Jurors.

Article 1.
Jury Commissions, Preparation of Jury Lists, and Drawing of Panels.
Sec.
9-8. [Repealed.]

ARTICLE 1.

Jury Commissions, Preparation of Jury Lists, and Drawing of Panels.

§ 9-2. Preparation of jury list; sources of names.

Power of State to Prescribe Qualifications of Jurors.—Absent discrimination by race or other identifiable group or class, a state is at liberty to prescribe such qualifications for jurors as it deems proper without offending the Fourteenth Amendment. State v. Rogers, 275 N.C. 411, 168 S.E.2d 345 (1969).

Use of a jury box containing only the names of property owners is not per se discriminatory as to race and does not unfairly narrow the choice of jurors so as to impinge defendant's statutory or constitutional rights. State v. Rogers, 275 N.C. 411, 168 S.E.2d 345 (1969).

Failure to Use List of Names Not Appearing on Tax Lists. — The fact that the county commissioners did not also use a list of names of persons who do not appear on the tax lists does not show racial discrimination in the selection of prospective jurors. State v. Rogers, 275 N.C. 411, 168 S.E.2d 345 (1969).

Cited in Garner v. State, 8 N.C. App. 109, 174 S.E.2d 92 (1970).

§ 9-3. Qualifications of prospective jurors.—All persons are qualified to serve as jurors and to be included on the jury list who are citizens of the State and residents of the county, who have not served as jurors during the preceding two years, who are 18 years of age or over, who are physically and mentally competent, who have not been convicted of a felony or pleaded nolo contendere to an indictment charging a felony, and who have not been adjudged non compos mentis. Persons not qualified under this section are subject to challenge for cause. (1806, c. 694, P. R.; Code, ss. 1722, 1723; 1889, c. 559; 1897, cc. 117, 539; 1899, c. 729; Rev., s. 1957; C. S., s. 2312; 1947, c. 1007, s. 1; 1967, c. 218, s. 1; 1971, c. 1231, s. 1.)

Editor's Note. — The 1971 amendment substituted "18" for "twenty-one" in the first sentence.

Stated in Glover v. North Carolina, 301 F. Supp. 364 (E.D.N.C. 1969).

§ 9-6. Jury service a public duty; excuses to be allowed in exceptional cases; procedure.

(b) Pursuant to the foregoing policy, the chief district judge of each district shall promulgate procedures whereby he or any district judge designated by him, prior to the date that a jury session (or sessions) of superior or district court convenes, shall receive, hear, and pass on applications for excuses from jury duty. The procedure shall provide for the time and place, publicly announced, at which applications for excuses will be heard, and prospective jurors who have been summoned for service shall be so informed.

(1971, c. 377, s. 30.)

Editor's Note.—

The 1971 amendment, effective Oct. 1, 1971, deleted the former second sentence of subsection (b), relating to procedures to be followed before the establishment of a district court in a county.

As the rest of the section was not changed by the amendment, only subsection (b) is set out.

Cited in State v. White, 6 N.C. App. 425, 169 S.E.2d 895 (1969).

§ 9-8: Repealed by Session Laws 1967, c. 218, s. 1, effective January 1, 1971.

ARTICLE 2.

Petit Jurors.

§ 9-11. Supplemental jurors; special venire.

There is no statutory or case authority prescribing the methods by which tales jurors must be selected. State v. White, 6 N.C. App. 425, 169 S.E.2d 895 (1969).

Nowhere in the statute is there a provision delineating discretionary restrictions to be placed on an officer in fulfilling the court's order. The statutory recognition that tales jurors may be needed and the statutory language used contemplate a system easily and expeditiously administered. To place procedural restrictions unnecessarily on their selection would defeat the purpose of the system, which is to facilitate the dispatch of the business of the court. State v. White, 6 N.C. App. 425, 169 S.E.2d 895 (1969).

Discretion of Selecting Officer.—Where an officer is empowered to select and summon talesmen he is vested with some discretion. It is his right and duty to use his best judgment in securing men of intelligence, courage, and good moral character, but he must act with entire impartiality. State v. White, 6 N.C. App. 425, 169 S.E.2d 895 (1969).

Tales jurors are selected infrequently and only to provide a source from which to fill the unexpected needs of the court. They must still possess the statutory qualifications and are still subject to the same challenges as regular jurors and may be examined by both parties on voir dire. In order to retain the flexibility needed in the administration of such a system, the summoning official must be permitted some discretion, whether he be located in a relatively small community or a more heavily populated area, and to restrict the discretion placed in the summoning official, without proven cause, is to presume he is not worthy of the office which he holds. State v. White, 6 N.C. App. 425, 169 S.E.2d 895 (1969).

Mere Possibility of Discrimination Does Not Make Panel Objectionable.—Obviously it would be possible for a sheriff, sent out to execute an order of the court under this section to discriminate in the selection of persons to be summoned. This mere possibility does not make the panel actually summoned by him objectionable where the record shows that he did not so discriminate. State v. White, 6 N.C. App. 425, 169 S.E.2d 895 (1969).

§ 9-12. Supplemental jurors from other counties.

(c) Repealed by Session Laws 1971, c. 377, s. 32. (1913, c. 4, ss. 1, 2; C. S., s. 473; 1931, c. 308; 1933, c. 248; 1961, c. 110; 1967, c. 218, s. 1; 1971, c. 377, s. 32.)

Editor's Note.—The 1971 amendment, effective Oct. 1, 1971, repealed subsection (c).

As subsections (a) and (b) were not changed by the amendment, they are not set out.

Discretion of Court.—

A defendant's motion for a change of venue and his alternative motion for a special venire from another county are addressed to the sound legal discretion of the trial court. State v. Penley, 6 N.C. App. 455, 170 S.E.2d 632 (1969).

Review.—

A defendant's motions for a change of venue or for a special venire from another county on the ground that he could not get a fair and impartial trial in the county because of extensive publicity and public discussion of the cases, was addressed to the sound legal discretion of the trial court, whose ruling in denying these motions was not disturbed on appeal because (1) the newspaper articles filed in support of the motions were not unduly inflammatory in nature, (2) the articles were published three months prior to the trial and there was no evidence of repeated or excessive publication, and (3) those of the prospective jurors who had read the newspaper accounts stated that they could return an impartial verdict. State v. Penley, 6 N.C. App. 455, 170 S.E.2d 632 (1969).

Applied in State v. Roseboro, 276 N.C. 185, 171 S.E.2d 886 (1970).

§ 9-14. Jury sworn; judge decides competency.

Challenges for Cause.—

A juror, who is related to the defendant by blood or marriage within the ninth degree of kinship, is properly rejected when challenged by the State for cause on that ground. State v. Allred, 275 N.C. 554, 169 S.E.2d 833 (1969).

A relationship within the ninth degree between a juror and a State's witness, standing alone, is not legal ground for chal-

lenge for cause. Where such relationship exists and is known and recognized by the juror, a defendant's challenge for cause should be rejected only if it should appear clearly that, under the circumstances of the particular case, the challenged juror would have no reason or disposition to favor his kinsman by giving added weight to his testimony or otherwise. State v. Allred, 275 N.C. 554, 169 S.E.2d 833 (1969).

Review.—

The presiding judge's rulings as to the competency of jurors are final and not subject to review on appeal unless accompanied by some imputed error of law. State v. Gibbs, 5 N.C. App. 457, 168 S.E.2d 507 (1969).

The right of challenge is not one to accept, but to reject. It is not given for the purpose of enabling the defendant, or the State, to pick a jury, but to secure an impartial one. State v. Allred, 275 N.C. 554, 169 S.E.2d 833 (1969).

Excluding Jurors for Opposition to Capital Punishment. — Under the decision of Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968), a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. State v. Ruth, 276 N.C. 36, 170 S.E.2d 897 (1969).

Judgment of the superior court sentencing defendant to death for first-degree murder must be vacated under the decision of Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968), where the trial court allowed the State's challenges for cause to seven prospective jurors who stated simply a general objection to or conscientious scruples against capital punishment, notwithstanding the trial occurred prior to the Witherspoon decision, since that decision is fully retroactive. State v. Ruth, 276 N.C. 36, 170 S.E.2d 897 (1969).

§ 9-15. Questioning jurors without challenge; challenges for cause.

Purpose of Voir Dire. — The voir dire examination of jurors is a right secured to the defendant by the statutes and has a definite double purpose: first, to ascertain whether there exist grounds for challenge for cause; and, second, to enable counsel to exercise intelligently the peremptory challenges allowed by law. State v. Allred, 275 N.C. 554, 169 S.E.2d 833 (1969).

§ 9-18. Alternate jurors.

Quoted in State v. Fox, 277 N.C. 1, 175 S.E.2d 561 (1970).

ARTICLE 3.

Peremptory Challenges.

§ 9-21. Peremptory challenges in criminal cases.

(b) In all capital cases the State may challenge peremptorily without cause nine jurors for each defendant and no more. In all other criminal cases the State may challenge peremptorily without cause four jurors for each defendant and no more. The State's challenge, peremptory or for cause, must be made before the juror is tendered to the defendant. The State does not have the right to stand any jurors at the foot of the panel. (22 Hen. VIII, c. 14, s. 6; 33 Edw. I, c. 4; 1777, c. 115, s. 85, P. R., 1801, c. 592, s. 1, P. R.; 1812, c. 833, P. R.; 1826, c. 9; 1827, c. 10; R. S., c. 35, ss. 19, 21; R. C., c. 35, ss. 32, 33; 1871-2, c. 39; Code, ss. 1199, 1200; 1887, c. 53; Rev., ss. 3263, 3264; 1907, c. 415; 1913, c. 31, ss. 3, 4; C. S., ss. 4633, 4634; 1935, c. 475, ss. 2, 3; 1967, c. 218, s. 1; 1969, c. 205, s. 7; 1971, c. 75.)

Editor's Note.—

The 1971 amendment substituted "nine" for "six" in the first sentence of subsection (b).

As subsection (a) was not changed by the amendment, it is not set out.

Waiver of Objection, etc.—

A defendant has not been prejudiced by the acceptance of a juror who is challenged for cause and the cause is disallowed unless he exhausts his peremptory challenges before the panel is completed. State v. Allred, 275 N.C. 554, 169 S.E.2d 833 (1969).

Challenge May Be Peremptory or for Cause.—A challenge to the poll (to each prospective juror) may be peremptory

within the limits allowed by law, or for cause without limit if cause is shown. State v. Allred, 275 N.C. 554, 169 S.E.2d 833 (1969).

Peremptory Challenge Defined. — Peremptory challenges are challenges which may be made or omittted according to the judgment, will, or caprice of the party entitled thereto, without assigning any reason therefor, or without being required to assign a reason therefor. State v. Allred, 275 N.C. 554, 169 S.E.2d 833 (1969).

A party's reason for challenging a juror peremptorily cannot be inquired into. The law gives the litigant the right to object to a number of jurors without assigning cause. State v. Allred, 275 N.C. 554, 169 S.E.2d 833 (1969).

Manner of Preserving Exception to Acceptance of Juror Challenged for Cause. — Where the court has refused to stand aside a juror challenged for cause, and the party has then peremptorily challenged him, in order to get the benefit of his exception he must exhaust his remaining peremptory challenges, and then challenge another juror peremptorily to show his dissatisfaction with the jury, and except to the refusal of the court to allow it. State v. Allred, 275 N.C. 554, 169 S.E.2d 833 (1969).

Where the trial court in a capital case erroneously disallowed defendant's challenge for cause of a prospective juror, and defendant exercised all of his peremptory challenges, including one for the juror for whom the challenge for cause was erroneously disallowed, the trial court's refusal to allow defendant to challenge peremptorily an additional juror on the ground that defendant had exhausted his peremptory challenges is a denial of defendant's right under this section to challenge fourteen jurors peremptorily without cause. State v. Allred, 275 N.C. 554, 169 S.E.2d 833 (1969).

Applied in State v. Sanders, 276 N.C. 598, 174 S.E.2d 487 (1970).

Cited in State v. McNeil, 277 N.C. 162, 176 S.E.2d 732 (1970); State v. Perry, 277 N.C. 174, 176 S.E.2d 729 (1970).

ARTICLE 4.

Grand Jurors.

§ 9-22. How grand jury drawn.

Noncompliance with Directory Does Not Void Indictment. — Noncompliance with a procedure merely directory for the preparation of the jury list does not void a bill of indictment returned by a grand jury drawn from a jury box so composed. State v. Rogers, 275 N.C. 411, 168 S.E.2d 345 (1969).

§ 9-23. Exceptions to qualifications of grand jurors.

Waiver.—

Under North Carolina law, a guilty plea does not waive objections to racial exclusion in the selection of the grand jury if, before the plea of guilty, the defendant raises his objection in a motion to quash the indictment. Parker v. North Carolina, 397 U.S. 790, 90 S. Ct. 1458, 1474, 25 L. Ed. 2d 785 (1970).

Chapter 10.

Notaries.

§ 10-1. Appointment and commission; term of office; revocation of commission.

State Government Reorganization.—The commissioning of notaries public was transferred to the Department of the Secretary of State by § 143A-23, enacted by Session Laws 1971, c. 864.

§ 10-4. Powers of notaries public.

Quoted in Boone v. Brown, 11 N.C. App. 355, 181 S.E.2d 157 (1971).

§ 10-7. Expiration of commission to be stated after signature.

It Is Essential That Notary Specify Expiration Date of His Commission.—See opinion of Attorney General to Mr. Alex T. Wood, Register of Deeds, Franklin County, 41 N.C.A.G. 225 (1971).

§ 10-9. Official acts of notaries public; signatures; appearance of names; notarial stamps or seals.

Notarial Stamp Need Not Contain the Word "Stamp".—See opinion of Attorney General to Mr. Mark Stewart, Guilford County Register of Deeds, 4/6/70.

§ 10-12. Acts of notaries public in certain instances validated.—The acts of any person heretofore performed after appointment as a notary public and prior to qualification as a notary public or upon reappointment and prior to qualification:

(1) In taking any acknowledgment, or
(2) In notarizing any instrument,

are all hereby declared to be valid and of the same legal effect as if such person had qualified as a notary public prior to performing any such acts. (1947, c. 313; 1949, c. 1; 1965, c. 37; 1969, c. 716, s. 1; 1971, c. 229, s. 1.)

Editor's Note.—

The 1971 amendment so changed this section as to make a detailed comparison impracticable.

Session Laws 1971, c. 229, s. 2, provides: "This act shall not apply to pending litigation."

Chapter 11.

Oaths.

ARTICLE 1.

General Provisions.

§ 11-2. Administration of oath upon the Gospels. — Judges and other persons who may be empowered to administer oaths, shall (except in the cases in this Chapter excepted) require the party sworn to lay his hand upon the Holy Evangelists of Almighty God, in token of his engagement to speak the truth, as he hopes to be saved in the way and method of salvation pointed out in that blessed volume; and in further token that, if he should swerve from the truth, he may be justly deprived of all the blessings of the Gospel, and made liable to that vengeance which he has imprecated on his own head. (1777, c. 108, s. 2, P. R.; R. C., c. 76, s. 1; Code, s. 3309; Rev., s. 2354; C. S., s. 3189; 1941, c. 11; 1971, c. 381, s. 9.)

Editor's Note.—The 1971 amendment, effective Oct. 1, 1971, deleted "and justices of the peace" following "Judges" near the beginning of this section.

§ 11-7.1. Who may administer oaths of office.—(a) Except as otherwise specifically required by statute, an oath of office may be administered by:

(1) A justice, judge, magistrate, clerk, assistant clerk, or deputy clerk of the General Court of Justice;

(2) The Secretary of State;

(3) A notary public;

(4) A register of deeds;

(5) A mayor of any city, town, or incorporated village.

(b) The administration of an oath by any judge of the Court of Appeals prior to March 7, 1969, is hereby validated. (1953, c. 23; 1969, c. 44, s. 25; c. 499; c. 713, s. 1; 1971, c. 381, s. 10.)

Editor's Note.—
The 1971 amendment, effective Oct. 1, 1971, deleted subdivision (3) and renumbered subdivisions (4), (5), and (6) to be subdivisions (3), (4), and (5), respectively.

ARTICLE 2.

Forms of Official and Other Oaths.

§ 11-11. Oaths of sundry persons; forms.—The oaths of office to be taken by the several persons hereafter named shall be in the words following the names of said persons respectively:

Administrator

You swear (or affirm) that you believe A. B. died without leaving any last will and testament; that you will well and truly administer all and singular the goods and chattels, rights and credits of the said A. B., and a true and perfect inventory thereof return according to law; and that all other duties appertaining to the charge reposed in you, you will well and truly perform, according to law, and with your best skill and ability; so help you, God.

Attorney at Law

I, A. B., do swear (or affirm) that I will truly and honestly demean myself in the practice of an attorney, according to the best of my knowledge and ability; so help me, God.

Attorney General, State Solicitors and County Attorneys

I, A. B., do solemnly swear (or affirm) that I will well and truly serve the State

of North Carolina in the office of Attorney General (solicitor for the State or attorney for the State in the county of ....); I will, in the execution of my office, endeavor to have the criminal laws fairly and impartially administered, so far as in me lies, according to the best of my knowledge and ability; so help me, God.

Auditor

I, A. B., do solemnly swear (or affirm) that I will well and truly execute the trust reposed in me as auditor, without favor or partiality, according to law, to the best of my knowledge and ability; so help me, God.

Book Debt Oath

You swear (or affirm) that the matter in dispute is a book account; that you have no means to prove the delivery of such articles, as you propose to prove by your own oath, or any of them, but by yourself; and you further swear that the account rendered by you is just and true; and that you have given all just credits; so help you, God.

Book Debt Oath for Administrator

You, as executor or administrator of A. B., swear (or affirm) that you verily believe this account to be just and true, and that there are no witnesses, to your knowledge, capable of proving the delivery of the articles therein charged; and that you found the book or account so stated, and do not know of any other or further credit to be given than what is therein given; so help you, God.

Clerk of the Supreme Court

I, ..., do solemnly swear that I will discharge the duties of the office of clerk of the Supreme Court without prejudice, affection, favor, or partiality, according to law and to the best of my skill and ability, so help me, God.

Clerk of the Superior Court

I, A. B., do swear (or affirm) that, by myself or any other person, I neither have given, nor will I give, to any person whatsoever, any gratuity, fee, gift or reward, in consideration of my election or appointment to the office of clerk of the superior court for the county of ....; nor have I sold, or offered to sell, nor will I sell or offer to sell, my interest in the said office; I also solemnly swear that I do not, directly or indirectly, hold any other lucrative office in the State; and I do further swear that I will execute the office of clerk of the superior court for the county of .... without prejudice, favor, affection or partiality, to the best of my skill and ability; so help me, God.

Commissioners Allotting a Year's Provisions

You and each of you swear (or affirm) that you will lay off and allot to the petitioner a year's provisions for herself and family, according to law, and with your best skill and ability; so help you, God.

Commissioners Dividing and Allotting Real Estate

You and each of you swear (or affirm) that, in the partition of the real estate now about to be made by you, you will do equal and impartial justice among the several claimants, according to their several rights, and agreeably to law; so help you, God.

Commissioner of Wrecks

I, A. B., do solemnly swear (or affirm) that I will truly and faithfully discharge the duties of a commissioner of wrecks, for the district of ...., in the county of ...., according to law; so help me, God.

Cotton Weigher for Public

I, ..., public weigher for the city of .... (or as the case may be), do solemnly swear that I will justly, impartially and without any deduction, except as may be allowed by law, weigh all cotton that may be

brought to me for that purpose, and tender a true account thereof to the parties concerned, if required so to do; so help me, God.

Entry-Taker

I, A. B., do solemnly swear (or affirm) that I will well and impartially discharge the several duties of the office of entry-taker for the county of .... according to law; so help me, God.

Executor

You swear (or affirm) that you believe this writing to be and contain the last will and testament of A. B., deceased; and that you will well and truly execute the same by first paying his debts and then his legacies, as far as the said estate shall extend or the law shall charge you; and that you will well and faithfully execute the office of an executor, agreeably to the trust and confidence reposed in you, and according to law; so help you, God.

Grand Jury—Foreman of

You, as foreman of this grand inquest for the body of this county, shall diligently inquire and true presentment make of all such matters and things as shall be given you in charge; the State's counsel, your fellows' and your own you shall keep secret; you shall present no one for envy, hatred or malice; neither shall you leave anyone unpresented for fear, favor or affection, reward or the hope of reward; but you shall present all things truly, as they come to your knowledge, according to the best of your understanding; so help you, God.

Grand Jurors

The same oath which your foreman hath taken on his part, you and each of you shall well and truly observe and keep on your part; so help you, God.

Grand Jury—Officer of

You swear (or affirm) that you will faithfully carry all papers sent from the court to the grand jury, or from the grand jury to the court, without alteration or erasement, and without disclosing the contents thereof; so help you, God.

Jury—Officer of

You swear (or affirm) that you will keep every person sworn on this jury in some private and convenient place when in your charge. You shall not suffer any person to speak to them, neither shall you speak to them yourself, unless it be to ask them whether they are agreed in their verdict, but with leave of the court; so help you, God.

Oath for Petit Juror

You do solemnly swear (affirm) that you will truthfully and without prejudice or partiality try all issues in civil or criminal actions that come before you and give true verdicts according to the evidence, so help you, God.

Justice, Judge, or Magistrate of the General Court of Justice

I, ..., do solemnly swear (affirm) that I will administer justice without favoritism to anyone or to the State; that I will not knowingly take, directly or indirectly, any fee, gift, gratuity or reward whatsoever, for any matter or thing done by me or to be done by me by virtue of my office, except the salary and allowances by law provided; and that I will faithfully and impartially discharge all the duties of .... of the .... Division of the General Court of Justice to the best of my ability and understanding, and consistent with the Constitution and laws of the State; so help me, God.

Register of Deeds

I, A. B., do solemnly swear (or affirm) that I will faithfully and truly, according to the best of my skill and ability, execute the duties of the office of register of deeds for the county of ...., in all things according to law; so help me, God.

Secretary of State

I, A. B., do swear (or affirm) that I will, in all respects, faithfully and honestly execute the office of Secretary of State of the State of North Carolina, during my continuance in office, according to law; so help me, God.

Sheriff

I, A. B., do solemnly swear (or affirm) that I will execute the office of sheriff of .... county to the best of my knowledge and ability, agreeably to law; and that I will not take, accept or receive, directly or indirectly, any fee, gift, bribe, gratuity or reward whatsoever, for returning any man to serve as a juror or for making any false return on any process to me directed; so help me, God.

Standard Keeper

I, A. B., do swear (or affirm) that I will not stamp, seal or give any certificate for any steelyards, weights or measures, but such as shall, as near as possible, agree with the standard in my keeping; and that I will, in all respects, truly and faithfully discharge and execute the power and trust by law reposed in me, to the best of my ability and capacity; so help me, God.

State Treasurer

I, A. B., do swear (or affirm) that, according to the best of my abilities and judgment, I will execute impartially the office of State Treasurer, in all things according to law, and account for the public taxes; and I will not, directly or indirectly, apply the public money to any other use than by law directed; so help me, God.

Stray Valuers

You swear (or affirm) that you will well and truly view and appraise the stray, now to be valued by you, without favor or partiality, according to your skill and ability; so help you, God.

Surveyor for a County

I, A. B., do solemnly swear (or affirm) that I will well and impartially discharge the several duties of the office of surveyor for the county of ...., according to law; so help me, God.

Treasurer for a County

I, A. B., do solemnly swear (or affirm) that, according to the best of my skill and ability, I will execute impartially the office of treasurer for the county of ...., in all things according to law; that I will duly and faithfully account for all public moneys that may come into my hands, and will not, directly or indirectly, apply the same, or any part thereof, to any other use than by law directed; so help me, God.

Witness to Depose before the Grand Jury

You swear (or affirm) that the evidence you shall give to the grand jury, upon this bill of indictment against A. B., shall be the truth, the whole truth, and nothing but the truth; so help you, God.

Witness in a Capital Trial

You swear (or affirm) that the evidence you shall give to the court and jury in this trial, between the State and the prisoner at the bar, shall be the truth, the whole truth, and nothing but the truth; so help you, God.

Witness in a Criminal Action

You swear (or affirm) that the evidence you shall give to the court and jury in this action between the State and A. B. shall be the truth, the whole truth, and nothing but the truth; so help you, God.

Witness in Civil Cases

You swear (or affirm) that the evidence you shall give to the court and jury

in this cause now on trial, wherein A. B. is plaintiff and C. D. defendant, shall be the truth, the whole truth, and nothing but the truth; so help you, God.

Witness to Prove a Will

You swear (or affirm) that you saw C. D. execute (or heard him acknowledge the execution of) this writing as his last will and testament; that you attested it in his presence and at his request; and that at the time of its execution (or at the time the execution was acknowledged) he was, in your opinion, of sound mind and disposing memory; so help you, God.

General Oath

Any officer of the State or of any county or township, the term of whose oath is not given above, shall take an oath in the following form:

I, A. B., do swear (or affirm) that I will well and truly execute the duties of the office of .... according to the best of my skill and ability, according to law; so help me, God. (R. C., c. 76, § 6; 1874-5, c. 58, s. 2; Code, ss. 3057, 3315; 1903, c. 604; Rev., s. 2360; C. S., s. 3199; 1947, c. 71; 1959, c. 879, s. 5; 1967, c. 218, s. 2; 1969, c. 1190, ss. 50, 51; 1971, c. 381, s. 11.)

Editor's Note.— The 1971 amendment, effective Oct. 1, 1971, deleted the oath for "Constable" and the oath for "Justice of the Peace."

Chapter 12.

Statutory Construction.

§ 12-3. Rules for construction of statutes.

V. CONSTRUCTION IN ACCORD WITH CONSTITUTION.

A. Construction.

Presumption in Favor, etc.—

When the constitutionality of a statute is challenged, "every presumption is to be indulged in favor of its validity." Martin v. North Carolina Housing Corp., 277 N.C. 29, 175 S.E.2d 665 (1970).

Existence of Facts Preserving Constitutionality Presumed.—If the constitutionality of a statute depends on the existence of certain facts and circumstances, the existence of such facts and circumstances will generally be presumed for the purpose of giving validity to the statute, if such a state of facts can reasonably be presumed to exist, and if any such facts may be reasonably conceived in the mind of the court. This rule does not apply if the evidence is to the contrary, or if facts judicially known or proved, compel otherwise. Martin v. North Carolina Housing Corp., 277 N.C. 29, 175 S.E.2d 665 (1970).

Court Determines Constitutionality Only Where Statute Attacked.—Ordinarily, the Supreme Court will not undertake to determine whether a statute is unconstitutional except with reference to a ground on which it is attacked and definitely drawn into focus by the attacker's pleadings. Martin v. North Carolina Housing Corp., 277 N.C. 29, 175 S.E.2d 665 (1970).

§ 12-4. Construction of amended statute.—Where a part of a statute is amended it is not to be considered as having been repealed and reenacted in the amended form; but the portions which are not altered are to be considered as having been the law since their enactment, and the new provisions as having been enacted at the time of the amendment.

Whenever the General Assembly (i) enacts a bill which purports to amend an existing general statute by deleting, adding, or substituting specific words or figures, and (ii) such bill also purports to set out the wording of the amended statute, or a portion thereof, as it will read after the amendment is accomplished, and (iii) there is a variance between the latter and the former, then, in such case, the latter shall control and be presumed to express the amendatory intent of the General Assembly. (1868-9, c. 270, s. 22; 1870-1, c. 111; Code, s. 3766; Rev., s. 2832; C. S., s. 3950; 1971, c. 115.)

Editor's Note.—

The 1971 amendment added the second paragraph.

Chapter 13.

Citizenship Restored.

Sec.
13-1. Restoration of citizenship.
13-2. Procedure for restoration.
13-3. Assistance by appropriate government personnel.
13-4 to 13-10. [Repealed.]

Revision of Chapter. — Session Laws 1971, c. 902, revised and rewrote this chapter, substituting present §§ 13-1 to 13-3 for former §§ 13-1 to 13-10.

§ **13-1. Restoration of citizenship.**—Any person convicted of a crime, whereby the rights of citizenship are forfeited, shall have such rights restored upon compliance with one of the following conditions:

(1) The Department of Correction at the time of release recommends restoration of citizenship;

(2) Two years have elapsed since release by the Department of Correction, including probation or parole, during which time the individual has not been convicted of a criminal offense of any state or of the federal government;

(3) Or upon receiving an unconditional pardon. (1971, c. 902.)

§ **13-2. Procedure for restoration.**—The restoration procedure shall consist of the taking of an oath by such person before any judge of the General Court of Justice in Wake County or in the county where he resides or in which he was last convicted, to the effect that said person has complied with the provisions of G.S. 13-1, and that he will support and abide by the Constitution and laws of the United States, and the Constitution and laws of North Carolina not inconsistent therewith. (1971, c. 902.)

§ **13-3. Assistance by appropriate government personnel.**—The Department of Correction, the Department of Juvenile Correction, the Probation Commission, the Board of Paroles and other appropriate State and county officials shall cooperate with and assist such person in securing any information required by any judge prior to administering the oath required by this section. (1971, c. 902.)

§§ **13-4 to 13-10:** Repealed by Session Laws 1971, c. 902.

Revision of Chapter.—See the note following the analysis to this Chapter.

Chapter 14.

Criminal Law.

SUBCHAPTER III. OFFENSES AGAINST THE PERSON.

Article 8.

Assaults.

Sec.
14-32. Felonious assault with a firearm or other deadly weapon with intent to kill or inflicting serious injury; punishments.

SUBCHAPTER IV. OFFENSES AGAINST THE HABITATION AND OTHER BUILDINGS.

Article 15.

Arson and Other Burnings.

14-59. Burning of certain public buildings.
14-61. Burning of certain bridges and buildings.
14-62. Burning of churches and certain other buildings.
14-63. Burning of boats and barges.
14-64. Burning of ginhouses and tobacco houses.
14-66. Burning of personal property.
14-67.1. Burning or attempting to burn other buildings.

SUBCHAPTER V. OFFENSES AGAINST PROPERTY.

Article 19.

False Pretenses and Cheats.

14-111.3. Making false ambulance request in Buncombe, Duplin, Haywood and Madison Counties.

Article 19A.

Obtaining Property or Services by False or Fraudulent Use of Credit Device or Other Means.

14-113.5. Making, possessing or transferring device for theft of telecommunication service; publication of information regarding schemes, devices, means, or methods for such theft; concealment of existence, origin or destination of any telecommunication.
14-113.6A. Venue of offenses.

Article 20.

Frauds.

14-117.2. Gasoline price advertisements.

SUBCHAPTER VI. CRIMINAL TRESPASS.

Article 22.

Trespasses to Land and Fixtures.

Sec.
14-134.1. Depositing trash, garbage, etc., on lands of another or in waters of the State.

SUBCHAPTER VII. OFFENSES AGAINST PUBLIC MORALITY AND DECENCY.

Article 26.

Offenses against Public Morality and Decency.

14-189 to 14-190. [Repealed.]
14-190.1. Obscene literature and exhibitions.
14-190.2. Adversary hearing prior to seizure.
14-190.3. Exhibition of obscene pictures; posting of advertisements.
14-190.4. Coercing acceptance of obscene articles or publications.
14-190.5. Preparation of obscene photographs, slides and motion pictures.
14-190.6. Employing or permitting minor to assist in offense under Article.
14-190.7. Dissemination to minors under the age of 16 years.
14-190.8. Dissemination to minors 12 years of age or younger.
14-190.9. Indecent exposure.
14-191 to 14-194. [Repealed.]

SUBCHAPTER VIII. OFFENSES AGAINST PUBLIC JUSTICE.

Article 33.

Prison Breach and Prisoners.

14-258.1. Furnishing poison, narcotics, deadly weapons, cartridges or ammunition to inmates of charitable or penal institutions.

SUBCHAPTER IX. OFFENSES AGAINST THE PUBLIC PEACE.

Article 35.

Offenses against the Public Peace.

14-269.2. Weapons on campus or other educational property.
14-276. [Repealed.]

SUBCHAPTER XI. GENERAL POLICE REGULATIONS.

Article 37.

Lotteries and Gaming.

Sec.
14-291.2. Pyramid and chain schemes prohibited.

Article 39.

Protection of Minors.

14-314. [Repealed.]
14-316.1. Contributing to delinquency and neglect by parents and others.
14-318.2. Child abuse a general misdemeanor.
14-318.3. [Repealed.]

Article 41.

Intoxicating Liquors.

14-327, 14-328. [Repealed.]
14-330 to 14-332. [Repealed.]

Article 42.

Public Drunkenness.

14-333. [Repealed.]

Article 43.

Vagrants and Tramps.

14-340, 14-341. [Repealed.]

Article 45.

Regulation of Employer and Employee.

Sec.
14-347 to 14-352. [Repealed.]

Article 49.

Protection of Livestock Running at Large.

14-365. [Repealed.]

Article 52.

Miscellaneous Police Regulations.

14-381. Desecration of State and United States flag.
14-401.11. Distribution of certain food at Halloween and all other times prohibited.

Article 53A.

Other Firearms.

14-409.12. "Historic edged weapons" defined.

Article 54A.

The Felony Firearms Act.

14-415.1. Possession of firearms, etc., by felon prohibited.
14-415.2. Exemption where citizenship restored.

SUBCHAPTER I. GENERAL PROVISIONS.

ARTICLE 1.

Felonies and Misdemeanors.

§ 14-1. Felonies and misdemeanors defined.

Applied in State v. Roberts, 276 N.C. 98, 171 S.E.2d 440 (1970).

§ 14-2. Punishment of felonies.

Breaking and Entering. — Sentence of imprisonment for not less than six nor more than ten years for felonious breaking and entering was punishment within the limits authorized by statute and is not cruel and unusual punishment within the constitutional prohibition. State v. Strickland, 10 N.C. App. 540, 179 S.E.2d 162 (1971).

A sentence of ten years is not in excess of that permitted by the statute upon a conviction of the felony of breaking and entering in violation of § 14-54(a). State v. Cleary, 9 N.C. App. 189, 175 S.E.2d 749 (1970).

Where Felony and Misdemeanor Counts Consolidated for Judgment.—Where defendant was tried and convicted upon an indictment charging felonious breaking and entering and misdemeanor larceny, and both counts were consolidated for judgment, the fact that the one sentence imposed is in excess of that permissible upon conviction of the misdemeanor is immaterial and is not prejudicial where it does not exceed that permitted upon conviction of the felony. State v. Cleary, 9 N.C. App. 189, 175 S.E.2d 749 (1970).

The fact that others tried on similar charges are given shorter sentences is not ground for legal objection, the punishment imposed in a particular case, if within statutory limits, being within the sound discretion of the trial judge. State v. Best, 11 N.C. App. 286, 181 S.E.2d 138 (1971).

Credit for Time Spent in Custody Prior to Commitment.—A prisoner should be given credit for time spent in custody prior

to commitment where he has been given a maximum sentence. Culp v. Bounds, 325 F. Supp. 416 (W.D.N.C. 1971).

Fundamental notions of fair play as well as the double jeopardy clause require that a prisoner receive credit for pre-commitment incarceration. Culp v. Bounds, 325 F. Supp. 416 (W.D.N.C. 1971).

Constitution Requires Credit for Punishment Already Exacted.—The constitutional guarantee against multiple punishments for the same offense absolutely requires that punishment already exacted must be fully "credited" in imposing sentence upon a new conviction for the same offense. Culp v. Bounds, 325 F. Supp. 416 (W.D.N.C. 1971).

Pretrial Custody Added to Sentence Cannot Exceed Statutory Maximum Punishment.—The time a prisoner spends in custody prior to trial when added to the sentence to be served upon commitment cannot total more than the statutory maximum punishment for the crime involved. Culp v. Bounds, 325 F. Supp. 416 (W.D.N.C. 1971).

The court assumed, without deciding, that where the time spent in custody before commitment when added to the sentence given after trial is less than the statutory maximum, no constitutional issue is presented. In that situation, the court would be reluctantly inclined to indulge the fiction that the trial judge who imposes sentence has given the defendant credit for time served before commitment. Culp v. Bounds, 325 F. Supp. 416 (W.D.N.C. 1971).

Pretrial detention is nothing less than punishment. An unconvicted accused who is not allowed or cannot raise bail is deprived of his liberty. His incarceration is indistinguishable in effect from that of one who is retried after obtaining post-conviction relief. Culp v. Bounds, 325 F. Supp. 416 (W.D.N.C. 1971).

Failure to Give Credit Violates Constitution.—North Carolina's failure to give a prisoner credit for time served before trial where he has received a maximum sentence violates the Constitution in two ways. First, it constitutes multiple punishment for a single offense, thereby offending the double jeopardy clause of the Fifth Amendment which is applicable to the states through the Fourteenth Amendment. Second, the fact that only those accused who are unable to raise bail are subjected to extra pretrial incarceration when their prison time exceeds the statutory maximum is an invidious discrimination against the poor in violation of the equal protection clause of the Fourteenth Amendment. Culp v. Bounds, 325 F. Supp. 416 (W.D.N.C. 1971).

The state's refusal to give a prisoner credit for pretrial detention is an unconstitutional discrimination on the basis of wealth prohibited by the Fourteenth Amendment. Wealthy defendants (except where no bail is allowed) are able to remain out of prison until conviction and sentencing; the poor stay behind bars. Culp v. Bounds, 325 F. Supp. 416 (W.D.N.C. 1971).

Applied in State v. Price, 8 N.C. App. 94, 173 S.E.2d 644 (1970); State v. Batts, 8 N.C. App. 551, 174 S.E.2d 704 (1970); State v. Lynch, 9 N.C. App. 71, 175 S.E.2d 327 (1970).

Cited in State v. Melton, 7 N.C. App. 721, 173 S.E.2d 610 (1970); State v. Perry, 8 N.C. App. 83, 173 S.E.2d 521 (1970); State v. Richardson, 8 N.C. App. 298, 174 S.E.2d 77 (1970); Wood v. Ross, 434 F.2d 297 (4th Cir. 1970); State v. Washington, 11 N.C. App. 441, 181 S.E.2d 261 (1971).

§ 14-3. Punishment of misdemeanors, infamous offenses, offenses committed in secrecy and malice or with deceit and intent to defraud.

Constitutionality.—The punishment provisions of subsection (a) of this section are not unconstitutional. State v. Hullender, 8 N.C. App. 41, 173 S.E.2d 581 (1970).

An attempt to commit robbery is an infamous crime. State v. Best, 11 N.C. App. 286, 181 S.E.2d 138 (1971).

Larceny.—The punishment upon conviction of the misdemeanor of larceny may not exceed two years. State v. Cleary, 9 N.C. App. 189, 175 S.E.2d 749 (1970).

Where Felony and Misdemeanor Counts Consolidated for Judgment.—Where defendant was tried and convicted upon an indictment charging felonious breaking and entering and misdemeanor larceny, and both counts were consolidated for judgment, the fact that the one sentence imposed is in excess of that permissible upon conviction of the misdemeanor is immaterial and is not prejudicial where it does not exceed that permitted upon conviction of the felony. State v. Cleary, 9 N.C. App. 189, 175 S.E.2d 749 (1970).

The fact that others tried on similar charges are given shorter sentences is not ground for legal objection, the punishment imposed in a particular case, if within statutory limits, being within the sound discretion of the trial judge. State v. Best, 11 N.C. App. 286, 181 S.E.2d 138 (1971).

Applied in State v. Batiste, 5 N.C. App.

511, 168 S.E.2d 510 (1969); State v. Crabb, 9 N.C. App. 333, 176 S.E.2d 39 (1970).

Cited in State v. Spencer, 276 N.C. 535, 173 S.E.2d 765 (1970); State v. Melton, 7 N.C. App. 721, 173 S.E.2d 610 (1970); State v. Perry, 8 N.C. App. 83, 173 S.E.2d 521 (1970); State v. Benfield, 278 N.C. 199, 179 S.E.2d 388 (1971).

§ 14-4. Violation of local ordinances misdemeanor.

Cited in Walker v. City of Charlotte, 276 N.C. 166, 171 S.E.2d 431 (1970); Clarke v. Kerchner, 11 N.C. App. 454, 181 S.E.2d 787 (1971).

Article 2.

Principals and Accessories.

§ 14-5. Accessories before the fact; trial and punishment.

Elements of Crime.—

In accord with 1st paragraph in original. See State v. Benton, 275 N.C. 378, 167 S.E.2d 775 (1969).

Who Are Principals.—

A principal in the first degree is the person who actually perpetrates the deed either by his own hand or through an innocent agent. Any other who is actually or constructively present at the place of the crime either aiding, abetting, assisting, or advising in its commission, or is present for that purpose, is a principal in the second degree. The distinction between principals in the first and second degrees is a distinction without a difference. Both are principals and equally guilty. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

One Charged with Murder, etc.—

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).

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).

Who Is Accessory before the Fact.—An accessory before the fact is one who was absent from the scene when the crime was committed but who procured, counseled, commanded or encouraged the principal to commit it. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

Guilt of Principal Must Be Established beyond Reasonable Doubt. — In order to warrant the conviction of an accessory, the guilt of the principal must be established to the same degree of certainty as if he himself were on trial, that is, beyond a reasonable doubt. State v. Benton, 275 NC. 378, 167 S.E.2d 775 (1969).

In a separate trial of a defendant as a principal in the second degree to armed robbery, it is incumbent upon the State to establish beyond a reasonable doubt by evidence in that separate trial the guilt of those referred to as principals in the first degree. State v. Benton, 275 N.C. 378, 167 S.E.2d 775 (1969).

The only distinction between a principal and an accessory before the fact is that the latter was not present when the crime was actually committed. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

And Actual Presence Is Immaterial When Crime Was Committed by Innocent Agent. — Actual presence, in distinguishing between a principal and an accessory before the fact, becomes immaterial when a person causes a crime to be committed by an innocent agent, that is, one who is not himself legally responsible for the act. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

If a person causes a crime to be committed through the instrumentality of an innocent agent, he is the principal in the crime, and punishable accordingly, although he was not present at the time and place of the offense. Under such circumstances, an exception to the rules applicable to principals and accessories, in the trial of criminal cases arises ex necessitate legis. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

But This Rule Applies Only When Agent Is Innocent. — When one acts through an agent, he can himself be guilty as a principal in the first degree only when the agent is innocent. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

Where one incites or employs a mental defective to kill another the question whether the employer is guilty as a principal depends upon whether the defective was criminally responsible for his act under the McNaughten rule. If the agent is legally responsible for his own acts, the instigator is only an accessory before the fact, if he is absent when the crime is committed. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

Parties involved in the commission of a murder are either principals or accessories. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

And There May Be Accessories before the Fact to Murder in Both Degrees. — Since malice, express or implied, is a constituent element of murder in any degree, there may be accessories before the fact to the crime of murder in both degrees. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

Admittedly the concept of accessory before the fact presupposes some arrangement between the accessory and the principal with respect to the commission of the crime. It does not follow, however, that there can be no accessory before the fact to second-degree murder, which imports a specific intent to do an unlawful act. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

There may, of course, be accessories before the fact in all kinds of murder with deliberation, or premeditation, or malice aforethought, including murder in the second degree, which involves malice. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

§ 14-6. Punishment of accessories before the fact.

Life Sentence for Accessory to Murder Valid.—The punishment for an accessory before the fact to a murder in any degree remains imprisonment for life. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

It cannot be assumed that the legislature's division of murder into degrees and reduction of the punishment for murder in the second degree implied the reduction in the sentence for an accessory before the fact in second-degree murder. Had the legislature intended this revision it would undoubtedly have made it ipsissimis verbis. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

Though Principal Received Lesser Sentence.—Imposition of a sentence of life imprisonment upon a defendant's conviction of accessory before the fact to the murder of her husband—the actual murderer having received a sentence of 20 to 30 years' imprisonment upon acceptance of his guilty plea to second-degree murder—is not cruel and unusual punishment nor does it deny a defendant the equal protection of the laws in violation of the Fourteenth Amendment. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

The contention that the sentence of an accessory may not exceed that of the principal in murder in the second degree is clearly refuted. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

Quoted in State v. Benton, 275 N.C. 378, 167 S.E.2d 775 (1969).

ARTICLE 2A.

Habitual Felons.

§ 14-7.1. Persons defined as habitual felons.—Any person who has been convicted of or pled guilty to three felony offenses in any federal court or state court in the United States or combination thereof is declared to be an habitual felon. For the purpose of this Article, a felony offense is defined as an offense which is a felony under the laws of the State or other sovereign wherein a plea of guilty was entered or a conviction was returned regardless of the sentence actually imposed. Provided, however, that federal offenses relating to the manufacture, possession, sale and kindred offenses involving intoxicating liquors shall not be considered felonies for the purposes of this Article. For the purposes of this Article, felonies committed before a person attains the age of 18 years shall not constitute more than one felony. The commission of a second felony shall not fall within the purview of this Article unless it is committed after the conviction of or plea of guilty to the first felony. The commission of a third felony shall not fall within the purview of this Article unless it is committed after the conviction of or plea of guilty to the second felony. Pleas of guilty to or convictions of felony offenses prior to July 6, 1967, shall not be felony offenses within the meaning of this Article. Any felony offense to which a pardon has been extended shall not for the purpose of this Article constitute a felony. The burden of proving such

pardon shall rest with the defendant and the State shall not be required to disprove a pardon. (1967, c. 1241, s. 1; 1971, c. 1231, s. 1.)

Editor's Note. — The 1971 amendment substituted "18" for "21" in the fourth sentence.

SUBCHAPTER III. OFFENSES AGAINST THE PERSON.

ARTICLE 4A.

Prohibited Secret Societies and Activities.

§ 14-12.12. Placing burning or flaming cross on property of another or on public street or highway.

Cited in State v. Frazier, 278 N.C. 458, 180 S.E.2d 128 (1971).

SUBCHAPTER III. OFFENSES AGAINST THE PERSON.

ARTICLE 6.

Homicide.

§ 14-17. Murder in the first and second degree defined; punishment.

I. IN GENERAL.

Editor's Note.—

For article entitled "Capital Punishment and Life Imprisonment in North Carolina, 1946 to 1968: Implications for Abolition of the Death Penalty," see 6 Wake Forest Intra. L. Rev. 417 (1970).

History.—

Prior to 1893 there were no degrees of murder in North Carolina. Any unlawful killing of a human being with malice aforethought, express or implied, was murder and punishable by death. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

This section is capable of standing alone. State v. Roseboro, 276 N.C. 185, 171 S.E.2d 886 (1970); Garner v. State, 8 N.C. App. 109, 174 S.E.2d 92 (1970).

Section 15-162.1 did not alter this section. State v. Roseboro, 276 N.C. 185, 171 S.E.2d 886 (1970); Garner v. State, 8 N.C. App. 109, 174 S.E.2d 92 (1970).

The repeal of § 15-162.1, etc.—

The repeal in 1969 of § 15-162.1 neither added to, nor took from this section. State v. Roseboro, 276 N.C. 185, 171 S.E.2d 886 (1970); Garner v. State, 8 N.C. App. 109, 174 S.E.2d 92 (1970).

The repeal of § 15-162.1 did not modify, change, add to, or take from this section. State v. Hill, 276 N.C. 1, 170 S.E.2d 885 (1969).

If former § 15-162.1 (repealed 1969) should be held invalid upon the grounds suggested in United States v. Jackson, 390 U.S. 570, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968), or otherwise, such decision will not and cannot affect the validity of this section, a wholly separate, independent, previously existing and surviving statute. State v. Sanders, 276 N.C. 598, 174 S.E.2d 487 (1970).

Definitions.—

Manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation. State v. Duboise, 279 N.C. 73, 181 S.E.2d 393 (1971).

Constitutionality of Single-Verdict Procedure. — The Supreme Court of North Carolina has consistently upheld the single-verdict procedure established by this statute, and federal courts hold that this procedure does not violate due process or infringe upon defendant's constitutionally guaranteed right of silence. State v. Sanders, 276 N.C. 598, 174 S.E.2d 487 (1970).

In capital cases, under this section, the single-verdict procedure is valid and does not violate a defendant's constitutional rights. Such procedure does not violate due process nor infringe upon defendant's constitutional right to remain silent. State v. Lee, 277 N.C. 205, 176 S.E.2d 765 (1970).

The decision in United States v. Jackson, 390 U.S. 570, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968), did not at the time of the judgment in this case, and does not, forbid the courts of this State to impose the sentence of death pursuant to a verdict of the jury in accordance with this section. State v. Sanders, 276 N.C. 598, 174 S.E.2d 487 (1970).

Nothing in the Constitution of the United States forbids a state to adopt a procedure whereby the jury shall return

simultaneously its verdict upon the issue of guilt and its determination of the sentence to be imposed. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971).

No provision of the Constitution of this State supports the defendant's contention that the General Assembly may not provide, as it has done in this section, that the jury shall make its determination as to punishment at the same time it renders its verdict upon the question of guilt. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971).

After guilt in a capital case has been established by the jury, its recommendation as to punishment does not violate the defendant's constitutional rights. State v. Roseboro, 276 N.C. 185, 171 S.E.2d 886 (1970).

The procedure which permits the trial jury in a capital case to decide guilt and at the same time and as a part of the verdict fix the punishment at life imprisonment has been repeatedly upheld. State v. Smith, 278 N.C. 36, 178 S.E.2d 597 (1971).

The 1949 amendment to this section providing that the jury, as a part of its guilty verdict, might by recommendation fix the punishment at life imprisonment rather than death, is not an unlawful division of powers between the court and the jury. State v. Miller, 276 N.C. 681, 174 S.E.2d 481 (1970).

The provision of this section which permits the jury to recommend life imprisonment for first degree murder is not unconstitutional in failing to prescribe any standard or rule to govern the jury in determining whether to make a recommendation. State v. Roseboro, 276 N.C. 185, 171 S.E.2d 886 (1970).

See also post, this note, analysis line III.

Self-Defense.—

In order that the right of self-defense may be restored to a person who has provoked or commenced a combat, he must attempt in good faith to withdraw from the combat. He must also in some manner make known his intention to his adversary; and if the circumstances are such that he cannot notify his adversary, as where the injuries inflicted by him are such as to deprive his adversary of his capacity to receive impressions concerning his assailant's design and endeavor to cease further combat, it is the assailant's fault and he must bear the consequences. As long as a person keeps his gun in his hand prepared to shoot, the person opposing him is not expected or required to accept any act or statement as indicative of an intent to discontinue the assault. State v. Winford, 279 N.C. 58, 181 S.E.2d 423 (1971).

The term "quitting the combat," within the meaning of these decisions, does not always and necessarily require that a defendant should physically withdraw therefrom. If the counterattack is of such a character that he cannot do this consistently with safety of life or limb, such a course is not required; but before the right of perfect self-defense can be restored to one who has wrongfully brought on a difficulty, and particularly where he has done so by committing a battery, he is required to abandon the combat in good faith and signify this in some way to his adversary. There is every reason for saying that the conduct of the accused relied upon to sustain such a defense must have been so marked in the matter of time, place, and circumstance as not only to clearly evince the withdrawal of the accused in good faith from the combat, but also as fairly to advise his adversary that his danger has passed and to make his conduct thereafter the pursuit of vengeance rather than measures taken to repel the original assault. And when, as heretofore shown, the counterassault is so fierce that the original assailant cannot comply with this requirement, then, in the language of Lord Hale, "He that first assaulted hath done the first wrong and brought upon himself this necessity, and shall not have the advantage of his own wrong to gain the favorable interpretation of the law, that that necessity which he brought on himself should, by way of interpretation, be accounted a flight to save himself from murder or manslaughter." State v. Winford, 279 N.C. 58, 181 S.E.2d 423 (1971).

It is incumbent upon defendant to satisfy the jury (1) that he did act in self-defense, and (2) that, in the exercise of his right to self-defense, he used no more force than was or reasonably appeared necessary under the circumstances to protect himself from death or great bodily harm. State v. Boyd, 278 N.C. 682, 180 S.E.2d 794 (1971).

The burden is on defendant to prove his plea of self-defense to the satisfaction of the jury and to prove that he used no more force than was or reasonably appeared necessary under the circumstances to protect himself from death or great bodily harm. State v. Boyd, 278 N.C. 682, 180 S.E.2d 794 (1971).

Where a prisoner makes an assault upon A. and is reassaulted so fiercely that the prisoner cannot retreat without danger of his life, and the prisoner kills A.: Held, that the killing cannot be justified upon the ground of self-defense. The first assailant does the first wrong and brings upon him-

self the necessity of slaying, and is therefore not entitled to a favorable interpretation of the law. State v. Winford, 279 N.C. 58, 181 S.E.2d 423 (1971).

Quoted in State v. Benton, 275 N.C. 378, 167 S.E.2d 775 (1969).

II. MURDER IN GENERAL.

Malice—Definition.—

In accord with 2nd paragraph in original. See State v. Drake, 8 N.C. App. 214, 174 S.E.2d 132 (1970).

Same — Implied from Use of Deadly Weapon.—

Malice is implied in law from the intentional killing with a deadly weapon. State v. McCain, 6 N.C. App. 558, 170 S.E.2d 531 (1969).

The intentional use of a deadly weapon, as a weapon, when death proximately results from such use, gives rise to two presumptions: (1) that the killing was unlawful, and (2) that it was done with malice. The presumptions do not rise from the mere use of a deadly weapon—the use must be intentional. State v. Drake, 8 N.C. App. 214, 174 S.E.2d 132 (1970).

Malice may be presumed from evidence which satisfies the jury beyond a reasonable doubt that the death of the victim proximately resulted from pistol shots intentionally fired at him by the defendant. State v. Sanders, 276 N.C. 598, 174 S.E.2d 487 (1970).

Malice, as one of the essential elements of murder in the second degree, is not presumed merely by the pointing of a gun or pistol at another person in fun in violation of § 14-34. In order for this presumption of malice to arise from an assault with a deadly weapon, there must be an intent to inflict a wound with such weapon which produces death. State v. Currie, 7 N.C. App. 439, 173 S.E.2d 49 (1970).

It is error for the trial court to instruct the jury that once a killing is proven to have been done with a deadly weapon the law presumes malice, since in order for a presumption of malice to arise, it has to be established or admitted that the defendant intentionally used a deadly weapon, as a weapon, and inflicted wounds proximately resulting in death. State v. Drake, 8 N.C. App. 214, 174 S.E.2d 132 (1970).

Same—Evidence.—

Any unseemly conduct toward the corpse of the person slain or any indignity offered it by the slayer should go to the jury on the question of malice. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971).

"Malice aforethought" was a term used in defining murder prior to the time of the adoption of this section dividing murder into degrees. As then used it did not mean an actual, express or preconceived disposition; but imported an intent, at the moment, to do without lawful authority, and without the pressure of necessity, that which the law forbade. As used in this section, the term premeditation and deliberation is more comprehensive and embraces all that is meant by aforethought, and more. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

There May Be Accessories to Murder in Both Degrees. — Since malice, express or implied, is a constituent element of murder in any degree, there may be accessories before the fact to the crime of murder in both degrees. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

There may, of course, be accessories before the fact in all kinds of murder with deliberation, or premeditation, or malice aforethought, including murder in the second degree, which involves malice. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

The punishment for an accessory before the fact to a murder in any degree remains imprisonment for life. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

Where one incites or employs a mental defective to kill another the question whether the employer is guilty as a principal depends upon whether the defective was criminally responsible for his act under the McNaughten rule. If the agent is legally responsible for his own acts, the instigator is only an accessory before the fact if he is absent when the crime is committed. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

III. MURDER IN THE FIRST DEGREE.

Definition.—

In accord with 1st paragraph in original. See State v. Robbins, 275 N.C. 537, 169 S.E.2d 858 (1969); State v. Reams, 277 N.C. 391, 178 S.E.2d 65 (1970); State v. Duboise, 279 N.C. 73, 181 S.E.2d 393 (1971).

Murder in the first degree is sometimes defined briefly as murder in the second degree plus premeditation. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

A specific intent to kill, etc.—

In accord with original. See State v. Robbins, 275 N.C. 537, 169 S.E.2d 858 (1969).

Deliberation and Premeditation.—

In accord with original. See State v. Walters, 275 N.C. 615, 170 S.E.2d 484 (1969).

The following are indicia of premeditation and deliberation: want of provocation on the part of the deceased; the conduct of defendant before and after the killing; threats and declarations of defendant before and during the course of the occurrence giving rise to the death of the deceased; the dealing of lethal blows after deceased has been felled and rendered helpless. State v. Hamby, 276 N.C. 674, 174 S.E.2d 385 (1970).

The additional ingredient of premeditation and deliberation necessary in first degree murder may be inferred from the vicious and brutal circumstances of the homicide, e.g., lack of provocation, threats before and during the occurrence, infliction of lethal blows after the victim had been felled and rendered helpless, and conduct of the defendant before and after the killing. State v. Duboise, 279 N.C. 73, 181 S.E.2d 393 (1971).

Want of provocation, absence of excuse, lack of justification, and defendant's statement that he shot a person "to prove a point"—all permit, if not compel, a legitimate inference of premeditation and deliberation. State v. Rich, 277 N.C. 333, 177 S.E.2d 422 (1970).

Evidence of threats against the victim are admissible in evidence to show premeditation and deliberation. State v. Reams, 277 N.C. 391, 178 S.E.2d 65 (1970).

Premeditation and deliberation may be inferred from a vicious and brutal slaying of a human being. State v. Reams, 277 N.C. 391, 178 S.E.2d 65 (1970).

Any unseemly conduct toward the corpse of the person slain, or any indignity offered it by the slayer, and also concealment of the body, are evidence of express malice, and of premeditation and deliberation in the slaying, depending, of course, upon the particular circumstances of the case. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971).

When a homicide is perpetrated by means of torture, premeditation and deliberation are presumed and defendant is guilty of murder in the first degree. State v. Duboise, 279 N.C. 73, 181 S.E.2d 393 (1971).

No presumption as to premeditation and deliberation arises from a killing proximately caused by the intentional use of a deadly weapon. State v. Reams, 277 N.C. 391, 178 S.E.2d 65 (1970).

Same—Premeditation.—

Premeditation means "thought beforehand" for some length of time, however short. State v. Sanders, 276 N.C. 598, 174 S.E.2d 487 (1970); State v. Reams, 277 N.C. 391, 178 S.E.2d 65 (1970).

Premeditation means thought over beforehand for some length of time, however short, but no particular time is required for the mental process of premeditation. State v. Robbins, 275 N.C. 537, 169 S.E.2d 858 (1969).

Same—Deliberation.—

In accord with original. See State v. Reams, 277 N.C. 391, 178 S.E.2d 65 (1970).

Deliberation means an intention to kill, executed by the defendant in a cool state of blood, in furtherance of a fixed design or to accomplish some unlawful purpose, and not under the influence of a violent passion, suddenly aroused by some lawful or just cause or legal provocation. State v. Sanders, 276 N.C. 598, 174 S.E.2d 487 (1970).

Deliberation means revolving over in the mind. A deliberate act is one done in a cool state of the blood in furtherance of some fixed design. State v. Robbins, 275 N.C. 537, 169 S.E.2d 858 (1969).

Same—Length of Time Immaterial.—

No fixed length of time is required for the mental processes of premeditation and deliberation constituting an element of the offense of murder in the first degree, and it is sufficient if these processes occur prior to, and not simultaneously with, the killing. State v. Walters, 275 N.C. 615, 170 S.E.2d 484 (1969); State v. Perry, 276 N.C. 339, 172 S.E.2d 541 (1970).

Same—Sufficiency of Evidence. — Evidence held sufficient to permit the jury to make a legitimate inference of premeditation and deliberation. State v. Sanders, 276 N.C. 598, 174 S.E.2d 487 (1970).

Killing in Perpetration of Robbery.—

When a murder is committed in the perpetration or attempt to perpetrate the felony of robbery, it is murder in the first degree, irrespective of premeditation, deliberation or malice aforethought. State v. Haynes, 276 N.C. 150, 171 S.E.2d 435 (1970).

In a case of murder in the first degree committed in the perpetration of, or attempt to perpetrate, a robbery, instruction that the jury should return a verdict of guilty as charged, guilty as charged with a recommendation for life imprisonment, or not guilty is a proper instruction. When the indictment and evidence disclose a killing in the perpetration of a robbery, only one of such verdicts may be returned. State v. Hill, 276 N.C. 1, 170 S.E.2d 885 (1969).

When a murder is committed in the perpetration or attempt to perpetrate any robbery, burglary or other felony, this section declares it murder in the first degree. In those instances the law presumes premeditation and deliberation, and the State is

not put to further proof of either. State v. Fox, 277 N.C. 1, 175 S.E.2d 561 (1970).

Where the evidence permits a legitimate inference that a murder was committed in perpetration of a robbery, and murder so committed is "deemed to be murder in the first degree." Hence it is not then prejudicial error to defendant for the court to give the State's contentions and to charge the jury that a murder committed in the perpetration of a robbery will be deemed murder in the first degree. State v. Rich, 277 N.C. 333, 177 S.E.2d 422 (1970).

All Conspirators Are Guilty, etc.—

When a conspiracy is formed to commit a robbery or burglary, and a murder is committed by any one of the conspirators in the attempted perpetration of the crime, each and all of the conspirators are guilty of murder in the first degree. State v. Fox, 277 N.C. 1, 175 S.E.2d 561 (1970).

Right of Jury to Recommend Life Imprisonment.—

Under this section the statute imposes the death penalty, and the jury can give life imprisonment in lieu of death. Garner v. State, 8 N.C. App. 109, 174 S.E.2d 92 (1970).

Under this section, the punishment imposed by law, not the jury, for first-degree murder is death. The jury does not impose the sentence of death. However, the legislature has given the jury the right to extend mercy to one guilty of first-degree murder. Garner v. State, 8 N.C. App. 109, 174 S.E.2d 92 (1970).

Except in one class of cases, the presiding judge fixes the punishment for a convicted defendant within the limits provided by the applicable statute. The exception is capital cases in which the jury may reduce the penalty from death to life imprisonment. State v. Rhodes, 275 N.C. 584, 169 S.E.2d 846 (1969).

Instructions as to Right to Recommend Life Imprisonment.—

Failure of the trial court in a rape prosecution to instruct the jury that a guilty verdict with recommendation of life imprisonment requires the court to pronounce a judgment of life imprisonment is erroneous. State v. Vance, 277 N.C. 345, 177 S.E.2d 389 (1970).

Absent Such Recommendation Death Sentence Is Required and May Lawfully Be Imposed.—Upon a verdict by a jury, properly selected and constituted, that the defendant was guilty of murder in the first degree, which verdict contained no recommendation that his punishment be life imprisonment and which verdict was rendered in a trial free from error, the death sentence may lawfully be imposed and is required by the law of this State. State v. Ruth, 276 N.C. 36, 170 S.E.2d 897 (1969).

The repeal of § 15-162.1 did not modify, change, add to, or take from this section. The verdict of a jury returned without a recommendation that the punishment be imprisonment for life, requires the court to impose the death sentence. State v. Sanders, 276 N.C. 598, 174 S.E.2d 487 (1970).

The jury, after finding guilt of a capital felony, may return as a part of its verdict, a recommendation that the punishment shall be imprisonment for life in the State's prison. The court must impose the life sentence, and no other. Absent a recommendation, the court must impose the death sentence. State v. Roseboro, 276 N.C. 185, 171 S.E.2d 886 (1970).

Where a jury returns a verdict of guilty of murder in the first degree without a recommendation that the punishment be imprisonment for life, the trial court is required to impose the death sentence. State v. Hill, 276 N.C. 1, 170 S.E.2d 885 (1969).

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).

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).

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).

And Court Has No Power to Impose Sentence Different from That Fixed by Jury.—This section clearly confers no dis-

cretionary power upon the superior court, or upon the Supreme Court of North Carolina, to impose a sentence different from that fixed by the jury. State v. Ruth, 276 N.C. 36, 170 S.E.2d 897 (1969).

Under this section the court has no more authority to sentence a defendant to imprisonment where the verdict requires the death sentence than it has to sentence him to death where the jury "recommends" life imprisonment. The statute, itself, prescribes the penalty. It does so in the alternative, but the condition which calls into operation the one or the other alternative is the verdict of the jury, not the determination of the judge. State v. Ruth, 276 N.C. 36, 170 S.E.2d 897 (1969).

Constitutionality of Death Penalty.—See ante, this note, analysis line I.

It is the policy of this State, as declared in its Constitution, Art. XI, § 1, and by the General Assembly in this section, 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 imposition of the death penalty for murder in the first degree is not, per se, a violation of the Fourteenth Amendment to the Constitution of the United States or of any provision of the Constitution of North Carolina. It is not cruel and unusual punishment in the constitutional sense, being expressly authorized by Art. XI, § 2, of the Constitution of North Carolina. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971).

Whatever the arguments may be against capital punishment it cannot be said to violate the constitutional concept of cruelty. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971).

This section is not unconstitutional in requiring the trial court to submit to the jury the question of defendant's guilt or innocence of first degree murder and, at the same time, the question of punishment—whether he should live or die. State v. Lee, 277 N.C. 205, 176 S.E.2d 765 (1970).

No constitutional right of the defendant is violated by the provision of this section authorizing the jury, upon finding the defendant guilty of murder in the first degree, to determine whether the punishment shall be death or imprisonment for life, notwithstanding the absence from the statute any standards to guide the jury in making that determination. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971).

Nothing in the Constitution of the United States forbids a state to commit to the untrammeled discretion of the jury the power to determine whether a defendant found guilty of murder in the first degree shall be put to death or imprisoned for life. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971).

Plea of Guilty to Capital Charge Not Permitted.—Though under present North Carolina law it is not possible for a defendant to plead guilty to a capital charge, it seemingly remains possible for a person charged with a capital offense to plead guilty to a lesser charge. North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

Possibility of Death Sentence Does Not Render Plea of Guilty Void.—The punishment for murder in the first degree as contained in this section does not constitute coercion in fact so as to render void a defendant's plea of guilty to murder in the first degree, pursuant to the provisions of § 15-162.1 as it existed prior to its repeal in 1969. Garner v. State, 8 N.C. App. 109, 174 S.E.2d 92 (1970).

Defendant Is Not Entitled to Have Second Jury Fix Punishment. — In this State a defendant in a first-degree murder prosecution is not entitled to a bifurcated jury trial with one jury determining the guilt or innocence and the other fixing the punishment. State v. Sanders, 276 N.C. 598, 174 S.E.2d 487 (1970).

Permissible Argument against Recommending Life Imprisonment.—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).

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).

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).

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).

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).

If the prosecuting attorney passed over the boundary of this 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).

Evidence Required to Sustain Verdict.—To sustain a verdict of murder in the first degree, the evidence must be sufficient to support a finding beyond a reasonable doubt that the defendant with malice, after premeditation and deliberation, intentionally shot and killed the victim. State v. Sanders, 276 N.C. 598, 174 S.E.2d 487 (1970).

In order to convict a defendant of first-degree murder the State is required to produce evidence which satisfies the jury beyond a reasonable doubt that he unlawfully killed a person with malice and in the execution of an actual specific intent to kill, formed after premeditation and deliberation. State v. Hamby, 276 N.C. 674, 174 S.E.2d 385 (1970).

A murder committed in the perpetration or attempt to perpetrate a felonious escape is murder in the first degree. State v. Lee, 277 N.C. 205, 176 S.E.2d 765 (1970).

Voluntary Intoxication May Render Defendant Incapable of Forming Required Intent.—The general rule that voluntary drunkenness is no legal excuse for crime does not obtain with respect to crimes where, in addition to the overt act, it is required that a definite, specific intent be established as an essential feature. Murder in the first degree is a specific intent crime in that a specific intent to kill is a necessary ingredient of premeditation and deliberation. Intoxication which renders an offender utterly unable to form the required intent may be shown as a defense. State v. Baldwin, 276 N.C. 690, 174 S.E.2d 526 (1970).

If at the time of a killing, a defendant was so drunk as to be utterly incapable of forming a deliberate and premeditated intent to kill a person, he could not be guilty of murder in the first degree, for an essential element of that crime would be lacking. State v. Hamby, 276 N.C. 674, 174 S.E.2d 385 (1970).

What Evidence Must Show to Establish Defense of Voluntary Intoxication. — To make the defense of intoxication available the evidence must show that at the time of the killing the prisoner's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming a deliberate and premeditated purpose to kill. And where the evidence shows that the purpose to kill was deliberately and premeditatedly formed when sober, the imbibing of intoxicants to whatever extent in order to carry out the design will not avail as a defense. State v. Baldwin, 276 N.C. 690, 174 S.E.2d 526 (1970).

Whether intoxication and premeditation can coexist depends upon the degree of inebriety and its effect upon the mind and passions. No inference of the absence of deliberation and premeditation arises from intoxication, as a matter of law. State v. Hamby, 276 N.C. 674, 174 S.E.2d 385 (1970).

A person may be excited, intoxicated and emotionally upset, and still have the capability to formulate the necessary plan, design, or intention to commit murder in the first degree. State v. Hamby, 276 N.C. 674, 174 S.E.2d 385 (1970).

Intent to Kill Formed When Sober and Executed When Drunk.—Where the facts show that the intent to kill was deliberately formed when sober and executed when drunk, intoxication is no defense to the capital charge of murder in the first degree. State v. Baldwin, 276 N.C. 690, 174 S.E.2d 526 (1970).

The fact that, after his intent to kill was deliberately and premeditatedly formed when sober, defendant voluntarily drank enough intoxicants to produce pathological intoxication and then executed his murderous intent, is held not to constitute a valid defense to murder in the first degree in this State. State v. Baldwin, 276 N.C. 690, 174 S.E.2d 526 (1970).

Effect of Intoxication as Question for Jury.—When a defendant has committed an overt lethal act, the decision has been that whether his intoxication was so gross as to preclude a capacity intentionally to kill is normally a fact issue for the jury to resolve. State v. Hamby, 276 N.C. 674, 174 S.E.2d 385 (1970).

It is for the jury to determine whether

the mental condition of accused was so far affected by intoxication that he was unable to form a guilty intent to commit murder, unless the evidence is not sufficient to warrant the submission of the question to the jury. State v. Hamby, 276 N.C. 674, 174 S.E.2d 385 (1970).

IV. MURDER IN THE SECOND DEGREE.

Definition.—

In accord with 1st paragraph in original. See State v. McCain, 6 N.C. App. 558, 170 S.E.2d 531 (1969); State v. Jennings, 276 N.C. 157, 171 S.E.2d 447 (1970); State v. Duboise, 279 N.C. 73, 181 S.E.2d 393 (1971).

In accord with 3rd paragraph in original. See State v. Winford, 279 N.C. 58, 181 S.E.2d 423 (1971).

Under statutes of this description, murder in the second degree is common-law murder but the killing is not accompanied by the distinguishing features of murder in the first degree. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

Included in Murder in First Degree.—If a person is guilty of murder in the first degree, a fortiori, his guilt encompasses murder in the second degree. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

The essential elements of the offense of murder in the second degree are that the killing was unlawful and with malice. For these elements to be presumed present, the burden is upon the State to satisfy the jury from the evidence beyond a reasonable doubt that the defendant intentionally used a deadly weapon, as a weapon, and inflicted wounds proximately resulting in death. State v. Drake, 8 N.C. App. 214, 174 S.E.2d 132 (1970).

Burden of Proof.—

When the presumptions from the intentional use of a deadly weapon obtain, the burden is upon the defendant to show to the satisfaction of the jury the legal provocation that will rob the crime of malice and thus reduce it to manslaughter or that will excuse it altogether upon the ground of self-defense. State v. Boyd, 278 N.C. 682, 180 S.E.2d 794 (1971).

Where the charge complained of clearly places the burden on defendant to show beyond a reasonable doubt facts which would reduce the charge from second-degree murder to manslaughter, this is error and is not cured by the fact that the trial judge did thereafter correctly and fully charge as to the burden which defendant must assume in order to reduce the charge from second-degree murder to manslaughter. State v. Winford, 279 N.C. 58, 181 S.E.2d 423 (1971).

When the presumptions of malice and an unlawful killing arise, nothing else appearing, defendant would be guilty of murder in the second degree. However, it is incumbent upon the trial judge to instruct the jury that the law casts upon the defendant the burden of showing to the satisfaction of the jury, not beyond a reasonable doubt, but simply to satisfy the jury as to legal provocation that would deprive the crime of malice and thus reduce it to manslaughter, or that will excuse it on some ground recognized in law as a complete defense. State v. Winford, 279 N.C. 58, 181 S.E.2d 423 (1971).

Presumption.—

Where there is plenary evidence that deceased died from a wound intentionally inflicted by defendant with a rifle, the presumptions that the killing was unlawful and that it was done with malice are created. State v. Jennings, 276 N.C. 157, 171 S.E.2d 447 (1970).

If the State satisfies the jury beyond a reasonable doubt that a defendant intentionally used a deadly weapon and thereby caused the death, then two presumptions arise: (1) that the killing was unlawful, and (2) that it was done with malice; and nothing else appearing, the defendant would be guilty of murder in the second degree. State v. Winford, 279 N.C. 58, 181 S.E.2d 423 (1971).

When the killing with a deadly weapon is admitted or established, two presumptions arise: (1) that the killing was unlawful; (2) that it was done with malice; and an unlawful killing with malice is murder in the second degree but the expression, intentional killing, is not used in the sense that a specific intent to kill must be admitted or established. The sense of the expression is that the presumptions arise when the defendant intentionally assaults another with a deadly weapon and thereby proximately causes the death of the person assaulted. A specific intent to kill, while a necessary constituent of the elements of premeditation and deliberation in first-degree murder, is not an element of second-degree murder or manslaughter. The intentional use of a deadly weapon as a weapon, when death proximately results from such use, gives rise to the presumptions. The presumptions do not arise if an instrument, which is per se or may be a deadly weapon, is not intentionally used as a weapon, e.g., from an accidental discharge of a shotgun. State v. Winford, 279 N.C. 58, 181 S.E.2d 423 (1971).

When the killing with a deadly weapon

is admitted or established, two presumptions arise: (1) that the killing was unlawful; (2) that it was done with malice; and an unlawful killing with malice is murder in the second degree. Where the defense was that an accidental discharge of the shotgun caused the death of the deceased, it was stated that the presumptions arise only when there is an intentional killing with a deadly weapon; these presumptions arise only when there is an intentional killing with a deadly weapon. But the expression, intentional killing, is not used in the sense that a specific intent to kill must be admitted or established. The sense of the expression is that the presumptions arise when the defendant intentionally assaults another with a deadly weapon and thereby proximately causes the death of the person assaulted. A specific intent to kill, while a necessary constituent of the elements of premeditation and deliberation in first-degree murder, is not an element of second-degree murder or manslaughter. The intentional use of a deadly weapon as a weapon, when death proximately results from such use, gives rise to the presumptions. State v. Duboise, 279 N.C. 73, 181 S.E.2d 393 (1971).

The intentional use of a deadly weapon as a weapon, when death proximately results from such use, gives rise to the presumptions that (1) the killing was unlawful and (2) done with malice, and an unlawful killing with malice is murder in the second degree, where all the evidence tends to show that defendant stubbornly continued over a period of hours to curse the deceased and to assault his helpless victim time after time with various deadly weapons while a witness was begging him to cease and desist. By these persistent assaults without the slightest provocation he inflicted mortal wounds proximately causing the death of his victim. This evidence affords no basis upon which defendant could be found guilty of manslaughter. Upon this evidence the presumptions arose, and it was then incumbent upon defendant, in keeping with legal principles too well settled to require repetition, to satisfy the jury of the truth of facts which would mitigate the killing to manslaughter or excuse it altogether. State v. Duboise, 279 N.C. 73, 181 S.E.2d 393 (1971).

If the State satisfied the jury from the evidence beyond a reasonable doubt that defendant stabbed the victim intentionally with a knife which constituted a deadly weapon and the stab wound so inflicted proximately caused her death, these facts would give rise to the presumptions that the killing was unlawful and with malice, the essentials of murder in the second degree. State v. Parker, 279 N.C. 168, 181 S.E.2d 432 (1971).

When a jury finds from the State's evidence beyond a reasonable doubt that a defendant intentionally shot the deceased and that the wound so inflicted proximately caused his death, the presumptions arise that the killing was unlawful and that it was done with malice; nothing else appearing, the defendant is guilty of murder in the second degree. State v. Crump, 277 N.C. 573, 178 S.E.2d 366 (1971); State v. Boyd, 278 N.C. 682, 180 S.E.2d 794 (1971).

When the defendant admits or the State satisfies the jury beyond a reasonable doubt that the defendant intentionally used a deadly weapon and thereby proximately caused the death of a human being, the law raises presumptions that the killing was unlawful and that it was done with malice. Such unlawful killing of a human being with malice is murder in the second degree. State v. Reams, 277 N.C. 391, 178 S.E.2d 65 (1970).

Evidence Sufficient for Jury.—

As to evidence of second-degree murder sufficient for jury, see State v. McCain, 6 N.C. App. 558, 170 S.E.2d 531 (1969).

Accessory before the Fact.—There can be an accessory before the fact to murder in the second degree. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

Admittedly the concept of accessory before the fact presupposes some arrangement between the accessory and the principal with respect to the commission of the crime. It does not follow, however, that there can be no accessory before the fact to second-degree murder, which imports a specific intent to do an unlawful act. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

It cannot be assumed that the legislature's division of murder into degrees and reduction of the punishment for murder in the second degree implied the reduction in the sentence for an accessory before the fact in second-degree murder. Had the legislature intended this revision it would undoubtedly have made it ipsissimis verbis. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

The fact that the law imposed the threat of the gas chamber does not render petitioner's plea of guilty to second-degree murder involuntary. Petitioner entered his plea to a lesser offense of murder and was not exposed to the defect which prompted the holding in United States v. Jackson, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d

138 (1968). Pickett v. Henry, 315 F. Supp. 1138 (E.D.N.C. 1970).

V. PLEADING AND PRACTICE.

Form of Indictment.—

A felony murder may be proven by the State although the bill of indictment charges murder in the statutory language of § 15-144. State v. Lee, 277 N.C. 205, 176 S.E.2d 765 (1970).

Evidence of Premeditation, etc.—

Premeditation and deliberation are not usually susceptible of direct proof, and are therefore susceptible of proof by circumstances. State v. Perry, 276 N.C. 339, 172 S.E.2d 541 (1970).

The elements of premeditation and deliberation are not usually susceptible to direct proof, but must be established from the circumstances surrounding the homicide. State v. Sanders, 276 N.C. 598, 174 S.E.2d 487 (1970).

Beyond Reasonable Doubt.—

It makes no difference whether the State is relying on circumstantial or direct evidence, or both, the evidence must produce in the mind of the jurors a moral certainty of the defendant's guilt, otherwise the State has not proven his guilt beyond a reasonable doubt. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971).

Photographs, etc.—

In accord with 4th paragraph in original. See State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971).

There was no error in the admission of the two photographs of the body of a murder victim, the court instructing the jury that they were to be considered solely for the purpose of illustrating the testimony of the witness. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971).

Photographs of the victim's body and articles of clothing found upon it were competent notwithstanding the admission by the defendant, through his counsel, in open court, that the body was that of the victim that it was discovered in a wooded area, partially hidden under boards and an old quilt and in a state of decomposition, and that the cause of death was five gunshot wounds in the abdomen. Notwithstanding these admissions, the circumstances with reference to the shooting of the deceased and the disposition of her body were material upon the question of the degree of the homicide and the decision as to the punishment to be inflicted, if the jury should find the defendant guilty of murder in the first degree. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971).

Instructions.—

No set formula is required to convey to the jury the fixed principle relating to the degree of proof required for conviction. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971).

Here the erroneous definition, standing alone, did not constitute prejudicial error since the definition complained of placed upon the State the added burden of proving a specific intent to kill. This is patently favorable to defendant, and defendant cannot ordinarily complain of instructions favorable to him. The only possible vice in this instruction is that the giving of almost contemporaneous instructions—one correct and one incorrect—may have caused confusion in the minds of the jurors. State v. Winford, 279 N.C. 58, 181 S.E.2d 423 (1971).

When Jury May Be Instructed as to Lesser Degree, etc.—

In a prosecution charging a defendant with the slaying of a person, the issue of defendant's guilt of second-degree murder or of manslaughter is properly submitted to the jury. State v. Crump, 277 N.C. 573, 178 S.E.2d 366 (1971).

The judge is required to declare and explain the law arising on the evidence. It is not an expression of opinion, but rather the duty of the trial judge, where the evidence so warrants, to inform the jury that manslaughter does not arise on the evidence in the case. It is the duty of the judge to determine, in the first instance, if there is any evidence or any inference fairly deducible therefrom tending to prove one of the lower grades of murder. Having done so, and having concluded that there is no basis for submission of manslaughter to the jury, it was the duty of the judge to instruct it accordingly. State v. Duboise, 279 N.C. 73, 181 S.E.2d 393 (1971).

Sufficiency of Evidence, etc.—

Evidence bearing upon the atrocity of the offense and the callous disregard exhibited by the defendant toward the victim is especially relevant and material when the punishment to be imposed is to be fixed by the jury in its discretion. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971).

Evidence as to the general moral character of the deceased is not admissible in a prosecution for homicide. State v. Vestal, 278 N.C. 561, 180 S.E.2d 755 (1971).

A charge of murder in the first degree includes murder in the second degree and manslaughter. Garner v. State, 8 N.C. App. 109, 174 S.E.2d 92 (1970).

Circumstantial Evidence to Establish Cause of Death and Criminal Agency. — Circumstantial evidence may be used in homicide cases to establish the cause of

death and the criminal agency. State v. Lawson, 6 N.C. App. 1, 169 S.E.2d 265 (1969).

A defendant cannot deprive the State of the right to place before the jury all the circumstances of a homicide by admitting the bare facts as to identity, the location where the body was found, its general condition and the cause of death. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971).

Circumstantial evidence must exclude every reasonable hypothesis of innocence. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971).

While circumstantial evidence is sufficient to justify a conviction when, and only when, the circumstances proved are consistent with the hypothesis of guilt and inconsistent with every other reasonable hypothesis, no set form of words is required to be used in conveying to the jury this rule relating to the degree of proof required for conviction upon circumstantial evidence. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971).

The convincing effect of circumstantial evidence on the mind of the jury is measured by the same standard of intensity required of any other evidence—the jury must be convinced beyond a reasonable doubt as to every element of the crime before they find the defendant guilty of it, whether the evidence is wholly circumstantial, only partly so, or entirely direct. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971).

No set of words is required by the law in regard to the force of circumstantial evidence. All that the law requires is that the jury shall be clearly instructed, that unless after due consideration of the evidence they are "fully satisfied" or "entirely convinced" or "satisfied beyond a reasonable doubt" of the guilt of the defendant, it is their duty to acquit, and every attempt on the part of the courts to lay down a "formula" for the instruction of the jury, by which to "gauge" the degrees of conviction, has resulted in no good. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971).

In the absence of a request to do so, the failure of the court to instruct the jury regarding circumstantial evidence, or as to what such evidence should show, will not be held for reversible error, if the charge is correct in all other respects as to the burden and measure of proof. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971).

Evidence of Abnormal Mental Condition Not Amounting to Legal Insanity.—A defendant may offer evidence of an abnormal mental condition, although not sufficient to establish legal insanity, for the purpose of showing that he did not have the capacity to deliberate or premeditate at the time the homicide was committed—elements necessary for a conviction of murder in the first degree. State v. Baldwin, 276 N.C. 690, 174 S.E.2d 526 (1970).

Premeditation and deliberation are not usually susceptible of direct proof, and are therefore susceptible of proof by circumstances from which the facts sought to be proved may be inferred. State v. Walters, 275 N.C. 615, 170 S.E.2d 484 (1969).

Uncommunicated Threats. — Generally speaking, uncommunicated threats are not admissible in homicide cases. But there are exceptions to the rule which must be considered in the light of the facts of the particular case. Such exceptions occur where the evidence has an explanatory bearing on the plea of self-defense. State v. Hurdle, 5 N.C. App. 610, 169 S.E.2d 17 (1969).

It is now generally recognized that in trials for homicide uncommunicated threats are admissible where they tend to throw light on the occurrence and aid the jury to a correct interpretation of the same, and there is testimony ultra sufficient to carry the case to the jury tending to show that the killing may have been done from a principle of self-preservation. State v. Hurdle, 5 N.C. App. 610, 169 S.E.2d 17 (1969).

Burden on Defendant to Prove Self-Defense or Mitigation.—Upon the jury finding that deceased died from a wound intentionally inflicted by defendant with a rifle, it is incumbent upon the defendant to satisfy the jury that the homicide was committed without malice so as to mitigate it to manslaughter or that the homicide was justified on the ground of self-defense. State v. Jennings, 276 N.C. 157, 171 S.E.2d 447 (1970).

Same—Instruction.—Where there is evidence sufficient to establish an affirmative defense or to rebut the presumptions which arise against a defendant when a killing results from his intentional use of a deadly weapon, the court should instruct the jury that defendant has the burden of proving his defense or mitigation to the satisfaction of the jury—not by the greater weight of the evidence or beyond a reasonable doubt —but simply to the satisfaction of the jury. State v. Freeman, 275 N.C. 662, 170 S.E.2d 461 (1969).

Refusing to Instruct or Error in Instruction as to Manslaughter.—In a prosecution for homicide, where the court correctly instructed as to murder in the first and sec-

ond degrees and the jury found the defendant guilty of murder in the first degree, any error in refusing to instruct as to manslaughter is harmless. State v. Freeman, 275 N.C. 662, 170 S.E.2d 461 (1969).

Where a jury was properly instructed as to both degrees of murder and yet found defendant guilty of murder in the first degree rather than the second degree, it is clear that error in the charge on manslaughter is harmless. State v. Freeman, 275 N.C. 662, 170 S.E.2d 461 (1969).

When the jury is instructed that it may find defendant guilty of murder in the first degree, murder in the second degree, manslaughter, or not guilty, and the verdict is guilty of murder in the second degree, an error in the charge on manslaughter will require a new trial. State v. Freeman, 275 N.C. 662, 170 S.E.2d 461 (1969).

Although the trial judge in other parts of the charge had clearly stated that the only verdicts to be considered by the jury were second-degree murder, manslaughter, or not guilty, the misuse of "murder" in lieu of "manslaughter" might well have created some degree of confusion in the minds of the jurors. State v. Winford, 279 N.C. 58, 181 S.E.2d 423 (1971).

In applying the law to the facts the court charged the jury that the defendant must show beyond a reasonable doubt facts and circumstances sufficient to reduce the crime to manslaughter, and in so charging the court committed prejudicial error. State v. Winford, 279 N.C. 58, 181 S.E.2d 423 (1971).

Even if the court before and after in its charge state the general principle of law correctly that the defendant must show to the satisfaction of the jury facts and circumstances sufficient to reduce the crime to manslaughter, yet that did not cure the error in the vital part of its charge when it applied the law to the facts, by requiring the defendant to show those facts beyond a reasonable doubt. State v. Winford, 279 N.C. 58, 181 S.E.2d 423 (1971).

There being no evidence in the record to sustain a verdict of manslaughter, it was not error for the court to omit manslaughter from the possible verdicts which the jury might return. State v. Vestal, 278 N.C. 561, 180 S.E.2d 755 (1971).

Verdict of Second-Degree Murder in Prosecution for First-Degree Murder.—In a case of first-degree murder, committed after premeditation and deliberation, a verdict of second-degree murder is permissible if the jury should fail to find premeditation and deliberation. State v. Hill, 276 N.C. 1, 170 S.E.2d 885 (1969).

Instruction Permitting Verdict of Guilty as Accessory to Second-Degree Murder.—In a prosecution of a defendant as an accessory before the fact to the murder of her husband, defendant was not prejudiced by an instruction which would permit the jury to return a verdict of guilty as an accessory to murder in the second degree. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

A general motion to nonsuit is properly refused where the evidence is sufficient to support conviction of any one of the degrees of homicide. State v. Lawson, 6 N.C. App. 1, 169 S.E.2d 265 (1969).

Preliminary Question to Be Determined by Court.—In a first-degree murder prosecution, the trial court must determine the preliminary question whether the evidence, in its light most favorable to the State, is sufficient to permit the jury to make a legitimate inference and finding that the defendant, after premeditation and deliberation, formed a fixed purpose to kill and thereafter accomplished the purpose. State v. Walters, 275 N.C. 615, 170 S.E.2d 484 (1969).

Real Evidence Must Be Properly Identified.—Any evidence which is relevant to the trial of a criminal action is admissible but when real evidence (i.e., the object itself) is offered into evidence, it must be properly identified and offered. State v. Winford, 279 N.C. 58, 181 S.E.2d 423 (1971).

Victim's Clothing Is Admissible.—The admission in evidence of the articles of clothing found upon a murder victim's body was not error, where the location of the bullet holes in her dress and the presence thereon of stains, identified by an expert witness as powder burns, were material and tended to show that when the shots were fired the pistol was held close to the victim's body. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971).

§ 14-18. Punishment for manslaughter.

Definitions.—

Manslaughter is defined as the unlawful killing of a human being without malice, express or implied, without premeditation and deliberation, and without the intention to kill or to inflict serious bodily injury. State v. Roseboro, 276 N.C. 185, 171 S.E.2d 886 (1970).

Involuntary manslaughter is the unlawful killing of a human being, unintentionally and without malice, proximately resulting from the commission of an unlawful

act not amounting to a felony, or resulting from some act done in an unlawful or culpably negligent manner, when fatal consequences were not improbable under all the facts existent at the time, or resulting from the culpably negligent omission to perform a legal duty. State v. Lawson, 6 N.C. App. 1, 169 S.E.2d 265 (1969).

ARTICLE 7.

Rape and Kindred Offenses.

§ 14-21. Punishment for rape.

Editor's Note.—

For article entitled "Capital Punishment and Life Imprisonment in North Carolina, 1946 to 1968: Implications for Abolition of the Death Penalty," see 6 Wake Forest Intra. L. Rev. 417 (1970).

Removal from Jury, etc.—

A sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. State v. Atkinson, 278 N.C. 168, 179 S.E.2d 410 (1971).

Where a venireman is irrevocably committed before the trial begins to vote against the death penalty regardless of the facts and circumstances which might be revealed by the evidence, such irrevocable commitment is valid cause for challenge. State v. Atkinson, 278 N.C. 168, 179 S.E.2d 410 (1971).

The most that can be demanded of a venireman with regard to the death penalty is that he be willing to consider all of the penalties provided by State law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. If the voir dire testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out. State v. Atkinson, 278 N.C. 168, 179 S.E.2d 410 (1971).

Age of Consent.—

In accord with 5th paragraph in original. See State v. Murry, 277 N.C. 197, 176 S.E.2d 738 (1970).

Penetration without Emission, etc. —

The terms "carnal knowledge" and "sexual intercourse" are synonymous. There is "carnal knowledge" or "sexual intercourse" in a legal sense if there is the slightest penetration of the sexual organ of the female by the sexual organ of the male. It is not necessary that the vagina be entered or that the hymen be ruptured; the entering of the vulva or labia is sufficient. State v. Murry, 277 N.C. 197, 176 S.E.2d 738 (1970).

Death Penalty for Rape Is Not Unconstitutional Per Se.—The death penalty, or its alternative when the jury so recommends, is not prohibited as cruel and unusual in the constitutional sense, and its imposition upon conviction of the crime of rape is not unconstitutional per se. State v. Rogers, 275 N.C. 411, 168 S.E.2d 345 (1969).

The death penalty is not prohibited as cruel and unusual in the constitutional sense, and its imposition upon conviction of the crime of rape is not unconstitutional per se. State v. Atkinson, 278 N.C. 168, 179 S.E.2d 410 (1971).

The death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty. State v. Barber, 278 N.C. 268, 179 S.E.2d 404 (1971).

When punishment does not exceed the limits fixed by statute, it cannot be classified as cruel and unusual in a constitutional sense. State v. Barber, 278 N.C. 268, 179 S.E.2d 404 (1971).

Power of Jury to Reduce Punishment from Death to Life Imprisonment.—Except in one class of cases, the presiding judge fixes the punishment for a convicted defendant within the limits provided by the applicable statute. The exception is capital cases in which the jury may reduce the penalty from death to life imprisonment. State v. Rhodes, 275 N.C. 584, 169 S.E.2d 846 (1969).

Allowing Same Jury to Determine Guilt and Recommend Life Imprisonment Does Not Deny Due Process.—It is not a denial of due process that this section allows the same jury in a capital case to determine a defendant's guilt or innocence and to recommend life imprisonment upon a verdict of guilty. State v. Blackwell, 276 N.C. 714, 174 S.E.2d 534 (1970).

The procedure in this State which permits the trial jury in a rape prosecution to decide, within its absolute and uncontrolled discretion, the guilt of the defendant and at the same time and as a part of the verdict to fix his punishment at life imprisonment is constitutional. State v.

Dozier, 277 N.C. 615, 178 S.E.2d 412 (1971).

Infants of fourteen and over are not entitled to any presumption of incapacity to commit rape. State v. Rogers, 275 N.C. 411, 168 S.E.2d 345 (1969).

Admissibility of Evidence. — Objects which have a relevant connection with the case are admissible in evidence in both civil and criminal trials. State v. Atkinson, 278 N.C. 168, 179 S.E.2d 410 (1971).

Where officers testified that defendant drew a map and that they followed it to the scene where defendant had buried the victim's body, the map was admissible to illustrate their testimony. State v. Atkinson, 278 N.C. 168, 179 S.E.2d 410 (1971).

When relevant, articles of clothing identified as worn by the victim at the time the crime was committed are always competent evidence. State v. Atkinson, 278 N.C. 168, 179 S.E.2d 410 (1971).

Garments worn by the victim of a rape and murder showing the location of a wound upon the person of the deceased, or which otherwise corrobate the State's theory of the case, are competent. State v. Atkinson, 278 N.C. 168, 179 S.E.2d 410 (1971).

Photographs are admissible in this State to illustrate the testimony of a witness. State v. Atkinson, 278 N.C. 168, 179 S.E.2d 410 (1971).

The fact that photographs are in color does not affect their admissibility. State v. Atkinson, 278 N.C. 168, 179 S.E.2d 410 (1971).

That a photograph might inflame the passions of the jurors does not render it inadmissible. State v. Atkinson, 278 N.C. 168, 179 S.E.2d 410 (1971).

Color photographs depicting the condition of the rape victim's body when examined by the doctor were competent for the purpose of illustrating the doctor's testimony. State v. Atkinson, 278 N.C. 168, 179 S.E.2d 410 (1971).

The fact that a photograph depicts a horrible, gruesome and revolting scene, indicating a vicious, calculated act of cruelty, malice or lust, does not render the photograph incompetent in evidence, when properly authenticated as a correct portrayal of conditions observed by and related by the witness who uses the photograph to illustrate his testimony. State v. Atkinson, 278 N.C. 168, 179 S.E.2d 410 (1971).

Where the jury was properly instructed to consider photographs of a rape victim's body in the morgue as illustrative of the testimony only, their admission was not error. State v. Atkinson, 278 N.C. 168, 179 S.E.2d 410 (1971).

Applied in State v. Jacobs, 278 N.C. 693, 180 S.E.2d 832 (1971).

§ 14-22. Punishment for assault with intent to commit rape.

Felonies under This Section, etc.—

In accord with 1st paragraph in original. See State v. Harris, 277 N.C. 435, 177 S.E.2d 865 (1970).

Applied in State v. Rhodes, 275 N.C. 584, 169 S.E.2d 846 (1969).

§ 14-26. Obtaining carnal knowledge of virtuous girls between twelve and sixteen years old.

Punishment.—

Imprisonment for ten years is the maximum permissible punishment for a violation of this section. State v. Harris, 277 N.C. 435, 177 S.E.2d 865 (1970).

The felony set forth in § 14-22 is not a less degree of the felony set forth in this section. State v. Harris, 277 N.C. 435, 177 S.E.2d 865 (1970).

ARTICLE 8.

Assaults.

§ 14-30.1. Malicious throwing of corrosive acid or alkali.

Unnecessary for Jury, to Find Defendant's Motive Was Intent to Murder.—In a prosecution for maliciously throwing a corrosive acid or alkali, it is not necessary for the jury to find that the intent to murder, maim, or disfigure was the sole or even the dominant motivation for defendant's actions. State v. Wingard, 10 N.C. App. 101, 177 S.E.2d 765 (1970).

Defendant May Not Complain if Jury Finds Intent to Murder.—One who, without provocation, deliberately throws corrosive acid or alkali into the face and eyes of another, thereby causing serious injuries,

is in no position to complain if a jury finds that he intended his act to produce the very result which it did produce, to murder, maim, or disfigure. State v. Wingard, 10 N.C. App. 101, 177 S.E.2d 765 (1970).

Error in Charging on Lessor Included Offense Not Prejudicial.—In a prosecution for the malicious throwing of corrosive acid or alkali with the intent to murder, maim, or disfigure, any error by the trial court in charging on the lessor included offense of assault could not have been prejudicial to the defendant. State v. Wingard, 10 N.C. App. 101, 177 S.E.2d 765 (1970).

§ 14-32. Felonious assault with a firearm or other deadly weapon with intent to kill or inflicting serious injury; punishments.—(a) Any person who assaults another person with a deadly weapon with intent to kill and inflicts serious injury is guilty of a felony punishable by a fine, imprisonment for not more than 10 years, or both such fine and imprisonment.

(b) Any person who assaults another person with a deadly weapon and inflicts serious injury is guilty of a felony punishable by a fine, imprisonment for not more than five years, or both such fine and imprisonment.

(c) Any person who assaults another person with a firearm with intent to kill is guilty of a felony punishable by a fine, imprisonment for not more than five years, or both such fine and imprisonment. (1919, c. 101; C. S., s. 4214; 1931, c. 145, s. 30; 1969, c. 602, s. 2; 1971, c. 765, s. 1; c. 1093, s. 12.)

Editor's Note.—

The first 1971 amendment, effective Oct. 1, 1971, in subsection (a), deleted "firearm or other" preceding "deadly weapon," deleted "of any kind" following "deadly weapon," deleted "under G.S. 14-2" following "punishable," and added "by a fine, imprisonment for not more than 10 years, or both such fine and imprisonment." In subsection (b) the amendment deleted "firearm or other" preceding "deadly weapon," deleted "per se" following "deadly weapon," and substituted a comma for "or" following "fine." In subsection (c) the amendment also substituted a comma for "or" following "fine."

The second 1971 amendment made a technical correction in the section as it stood before the first 1971 amendment.

Elements of Offense.—

A serious injury and an intent to kill are both essential elements of the crime of felonious assault. State v. Marshall, 5 N.C. App. 476, 168 S.E.2d 487 (1969).

The term "inflicts serious injury," etc. —

In accord with original. See State v. Marshall, 5 N.C. App. 476, 168 S.E.2d 487 (1969); State v. Parker, 7 N.C. App. 191, 171 S.E.2d 665 (1970).

Facts of Particular Case, etc.—

In accord with original. See State v. Marshall, 5 N.C. App. 476, 168 S.E.2d 487 (1969); State v. Parker, 7 N.C. App. 191, 171 S.E.2d 665 (1970).

The rule that whether serious injury has been inflicted must be determined according to the particular facts of each case applies to a prosecution under subsection (b) of this section for assault with a deadly weapon inflicting serious injury. State v. Parker, 7 N.C. App. 191, 171 S.E.2d 665 (1970).

Injury Must Fall Short, etc.—

In accord with original. See State v. Marshall, 5 N.C. App. 476, 168 S.E.2d 487 (1969); State v. Parker, 7 N.C. App. 191, 171 S.E.2d 665 (1970).

Intent to Kill May Be Inferred, etc.—

The requisite intent to kill can be inferred from the nature of the assault on the victim, the manner in which it was made, and the conduct of the parties under the circumstances. State v. Marshall, 5 N.C. App. 476, 168 S.E.2d 487 (1969).

The intent to kill may be inferred or presumed from the act itself. State v. Marshall, 5 N.C. App. 476, 168 S.E.2d 487 (1969).

Included Offense.—

Subsection (b) of this section creates a new lesser offense of subsection (a). State v. Parker, 7 N.C. App. 191, 171 S.E.2d 665 (1970).

The offense defined in subsection (b) is a lesser included offense of the offense defined in subsection (a). State v. Cox, 11 N.C. App. 377, 181 S.E.2d 205 (1971).

Subsection (c) of this section creates another new lesser offense of subsection (a), that of assault with a firearm with intent to kill. State v. Parker, 7 N.C. App. 191, 131 S.E.2d 665 (1970).

Law of Self-Defense, etc.—

In accord with original. See State v. Barnette, 8 N.C. App. 198, 174 S.E.2d 82 (1970).

A defendant could assault a person with intent to kill only if such force was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm. Likewise, a defendant could be absolved from criminal liability for the assault with intent to kill only if he acted in

self-defense when he was in actual or apparent danger of suffering death or great bodily harm. State v. Barnette, 8 N.C. App. 198, 174 S.E.2d 82 (1970).

What Is a Deadly Weapon.—Any instrument which is likely to produce death or great bodily harm, under the circumstances of its use, is properly denominated a deadly weapon. State v. Parker, 7 N.C. App. 191, 171 S.E.2d 665 (1970).

May Depend upon Manner of Use.—The deadly character of a weapon depends sometimes more upon the manner of its use, and the condition of the person assaulted, than upon the intrinsic character of the weapon itself. State v. Parker, 7 N.C. App. 191, 171 S.E.2d 665 (1970).

And May Be Question of Law or Fact.—Where the alleged deadly weapon and the manner of its use are of such character as to admit of but one conclusion, the question as to whether or not it is deadly is one of law, and the court must take the responsibility of so declaring. But where it may or may not be likely to produce fatal results, according to the manner of its use, or the part of the body at which the blow is aimed, its alleged deadly character is one of fact to be determined by the jury. State v. Parker, 7 N.C. App. 191, 171 S.E.2d 665 (1970).

A pistol or a gun is a deadly weapon. State v. Parker, 7 N.C. App. 191, 171 S.E.2d 665 (1970).

Knife.—Under the case law of this State, a knife with a three-inch blade constitutes a deadly weapon per se when used as a weapon in an assault. State v. Cox, 11 N.C. App. 377, 181 S.E.2d 205 (1971).

A baseball bat should be denominated a deadly weapon if viciously used. State v. Parker, 7 N.C. App. 191, 171 S.E.2d 665 (1970).

Erroneous Instruction Cured by Conviction of Lesser Included Offense.—Any error in instructing the jury as to defendant's guilt or innocence of felonious assault under subsection (a) of this section was cured by the jury's verdict which found defendant guilty of the lesser included offense described in subsection (b). State v. Hearns, 9 N.C. App. 42, 175 S.E.2d 376 (1970).

Instruction on self-defense is erroneous which tells the jury that defendant could use no more force than necessary in defending himself. The law is that the defendant could use such force as was reasonably necessary or apparently necessary. One may fight in self-defense and may use more force than is actually necessary to prevent death or great bodily harm, if he believes it to be necessary and has a reasonable ground for the belief. State v. Hearns, 9 N.C. App. 42, 175 S.E.2d 376 (1970).

Evidence of Infliction of Serious Injury.—

A pistol wound in the neck, close to the spinal cord, resulting in unconsciousness, with the bullet lodging in the neck, is sufficient evidence of serious injury, within the meaning of the statute, to submit the question of serious injury to the jury. State v. Marshall, 5 N.C. App. 476, 168 S.E.2d 487 (1969).

Where there is evidence from which the jury could find that the offense defined in subsection (b) had been committed, it is not only proper but is necessary for the trial court to submit the issue. State v. Cox, 11 N.C. App. 377, 181 S.E.2d 205 (1971).

Whether serious injury has been inflicted must be determined according to the particular facts of each case and is a question the jury must answer under proper instruction. State v. Marshall, 5 N.C. App. 476, 168 S.E.2d 487 (1969).

Cited in Aetna Cas. & Sur. Co. v. Lumbermen's Mut. Cas. Co., 11 N.C. App. 490, 181 S.E.2d 727 (1971).

§ 14-33. Misdemeanor assaults, batteries, and affrays; simple and aggravated; punishments.—(a) Any person who commits a simple assault or a simple assault and battery or participates in a simple affray is guilty of a misdemeanor punishable by a fine not to exceed fifty dollars ($50.00) or imprisonment for not more than 30 days.

(b) Unless his conduct is covered under some other provision of law providing greater punishment, any person who commits any assault, assault and battery, or affray is guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both such fine and imprisonment if in the course of such assault, assault and battery, or affray he:

(1) Attempts to inflict serious injury upon another person; or
(2) Assaults a female, he being a male person; or
(3) Assaults a child under the age of 12 years.

(c) Unless his conduct is covered under some other provision of law providing greater punishment, any person who commits any assault, assault and battery, or affray is punishable by a fine, imprisonment for not more than two years, or both

such fine and imprisonment if in the course of such assault, assault and battery, or affray he:

(1) Inflicts serious injury upon another person; or

(2) Uses a deadly weapon; or

(3) Intends to kill another person; or

(4) Assaults a public officer while such officer is discharging or attempting to discharge a duty of his office. (1870-1, c. 43, s. 2; 1873-4, c. 176, s. 6; 1879, c. 92, ss. 2, 6; Code, s. 987; Rev., s. 3620; 1911, c. 193; C. S., s. 4215; 1933, c. 189; 1949, c. 298; 1969, c. 618, s. 1; 1971, c. 765, s. 2.)

Editor's Note.—

The 1971 amendment, effective Oct. 1, 1971, rewrote subsections (b) and (c).

There is no statutory definition, etc.—

In North Carolina, there is no statutory definition of assault and the crime remains one governed by the rules of the common law. State v. Hill, 6 N.C. App. 365, 170 S.E.2d 99 (1969).

Lesser Offense Included in Indictment for Assault with Intent to Rape.—

Assault on a female by a male person is a lesser included offense in a proper bill of indictment charging an assault with intent to commit rape. State v. Mitchell, 6 N.C. App. 534, 170 S.E.2d 355 (1969).

Sentence under Verdict of "Guilty of Simple Assault on a Female".—

In a prosecution for an assault with intent to commit rape a verdict of "guilty of simple assault on a female" supports a sentence for an assault on a female by a male person over the age of 18 years when the defendant's own evidence discloses that he was over 18 years of age at the time of the commission of the assault, and no question of defendant's age is raised during the trial. State v. Mitchell, 6 N.C. App. 534, 170 S.E.2d 355 (1969), decided under this section as it stood before the 1969 amendment.

Failure to Submit Question of Guilt of Simple Assault.—Where in a prosecution for assault with a deadly weapon the evidence tends to show assault on a female at least, it is not error to fail to submit the question of guilt of simple assault. State v. Hill, 6 N.C. App. 365, 170 S.E.2d 99 (1969).

Applied in State v. Haith, 7 N.C. App. 552, 172 S.E.2d 912 (1970).

Stated in State v. Walker, 7 N.C. App. 548, 172 S.E.2d 881 (1970).

Cited in State v. Rhodes, 275 N.C. 584, 169 S.E.2d 846 (1969); State v. Virgil, 276 N.C. 217, 172 S.E.2d 28 (1970); State v. Walker, 277 N.C. 403, 177 S.E.2d 868 (1970); State v. Leak, 11 N.C. App. 344, 181 S.E.2d 224 (1971).

§ 14-34. Assaulting by pointing gun.

Assault with a Deadly Weapon.—It is axiomatic that if the gun or pistol used is in fact a deadly weapon, then the pointing thereof is an assault with a deadly weapon. State v. Currie, 7 N.C. App. 439, 173 S.E.2d 49 (1970).

Accidental Discharge of Gun — Manslaughter.—

If a person intentionally pointed the gun at the deceased and it was then discharged, inflicting the wound of which he died, or if the person was at the time guilty of culpable negligence in the way he handled and dealt with the gun, and by reason of such negligence the gun was discharged, causing the death of deceased, in either event the person would be guilty of manslaughter, and this whether the discharge of the gun was intentional or accidental. State v. Currie, 7 N.C. App. 439, 173 S.E.2d 49 (1970).

If a person points a pistol at another in sport, as a joke, or to cause fright merely, believing and, perhaps, having some reason to think that it is not loaded, and subsequently pulls the trigger, causing the pistol to be discharged, and resulting in the killing of the person pointed at, he is guilty of manslaughter. State v. Currie, 7 N.C. App. 439, 173 S.E.2d 49 (1970).

Gun Need Not Be Loaded.—

Pointing a gun at another under such circumstances as would not excuse its intentional discharge constitutes, in this and many other states, a statutory misdemeanor, and an accidental killing occasioned by it is manslaughter. In this State it is immaterial whether the gun is loaded or not. State v. Currie, 7 N.C. App. 439, 173 S.E.2d 49 (1970).

§ 14-34.1. Discharging firearm into occupied property.

Applied in State v. Tripp, 9 N.C. App. 518, 176 S.E.2d 892 (1970).

ARTICLE 10.

Kidnapping and Abduction.

§ 14-39. Kidnapping.

Definition.—

In this State there is no statutory definition of the crime of kidnapping. State v. Reid, 5 N.C. App. 424, 168 S.E.2d 511 (1969).

Since this section does not define kidnapping, the General Assembly changed nothing from the common-law definition of that crime. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

Kidnapping is the taking and carrying away of a human being by physical force or by constructive force unlawfully and without lawful authority. State v. Perry, 275 N.C. 565, 169 S.E.2d 839 (1969).

The word "kidnap," in its application to the evidence in the case at bar, and as used in this section, means the unlawful taking and carrying away of a person by force and against his will. State v. Reid, 5 N.C. App. 424, 168 S.E.2d 511 (1969).

The common-law definition of kidnapping is "the unlawful taking and carrying away of a person by force and against his will." State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

The word "kidnap" means the unlawful taking and carrying away of a person by force and against his will. State v. Penley, 277 N.C. 704, 178 S.E.2d 490 (1971).

At common law and as used in this section, the word "kidnap" means the unlawful taking and carrying away of a human being by force and against his will. State v. Barbour, 278 N.C. 449, 180 S.E.2d 115 (1971).

The unlawful taking and carrying away of a human being fraudulently is kidnapping within the meaning of this section. State v. Barbour, 278 N.C. 449, 180 S.E.2d 115 (1971).

Where a defendant by force and threat of violence took a person and carried him where he did not consent to go, this constitutes kidnapping under this section. State v. Penley, 277 N.C. 704, 178 S.E.2d 490 (1971).

In order to constitute kidnapping there must be not only an unlawful detention by force or fraud but also a carrying away of the victim. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

Common-law kidnapping contemplates, in addition to unlawful restraint, a carrying away of the person detained. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

The unlawful taking and carrying away of a person fraudulently is kidnapping, and this is true even though this section omits the words "forcibly or fraudulently." State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

Construction.—

The failure of this section to define kidnapping does not render the statute vague or uncertain and the common-law definition of the offense is incorporated in the statute by construction. State v. Penley, 277 N.C. 704, 178 S.E.2d 490 (1971); State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

To construe the word "kidnap" as used in this section as applying only to a forcible taking is too narrow a construction, and in many instances would make the section practically useless. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

When a statute punishes an act giving it a name known to the common law, without otherwise defining it, the statute is construed according to the common-law definition. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

When Person Is Guilty, etc.—

Where a motorist who invited a hitchhiker to ride with him is compelled by the force and intimidation exerted upon him by the hitchhiker to abandon his own desired course of travel and to drive his car as commanded by the hitchhiker, there is a kidnapping. State v. Barbour, 278 N.C. 449, 180 S.E.2d 115 (1971).

Taking and Carrying Away.—

This State, by judicial definition of the crime, follows the concept that some carrying away or transporting of the person of the victim is an essential element of the crime of kidnapping. State v. Reid, 5 N.C. App. 424, 168 S.E.2d 511 (1969).

Standing alone, the fact that the taking and carrying away of the victim was accomplished by means of a truck owned and operated by the victim is of no avail as a defense to the alleged kidnapping. State v. Barbour, 278 N.C. 449, 180 S.E.2d 115 (1971).

Physical Force, etc.—

The use of actual physical force or violence is not always essential to the commission of the offense of kidnapping. State v. Barbour, 278 N.C. 449, 180 S.E.2d 115 (1971).

The crime of kidnapping, etc.—

In accord with original. See State v. Barbour, 278 N.C. 449, 180 S.E.2d 115 (1971).

Threats and intimidation are equivalent

to the use of actual force or violence. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

The use of actual physical force or violence is not always essential to the commission of the offense of kidnapping. The crime of kidnapping is frequently committed by threats and intimidation and appeals to the fears of the victim which are sufficient to put an ordinarily prudent person in fear for his life or personal safety, and to overcome the will of the victim and secure control of his person without his consent and against his will, and are equivalent to the use of actual force or violence. State v. Penley, 277 N.C. 704, 178 S.E.2d 490 (1971).

Distance Immaterial.—

In accord with original. See State v. Reid, 5 N.C. App. 424, 168 S.E.2d 511 (1969).

The asportation requirement has been relaxed so that any carrying away is sufficient, and the distance the victim is carried is immaterial. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

Where the gravamen of the crime is the carrying away of the person, the place from or to which the person is transported is not material, and an actual asportation of the victim is sufficient to constitute the offense without regard to the extent or degree of such movement; it is the fact, not the distance, of forcible removal which constitutes kidnapping. State v. Barbour, 278 N.C. 449, 180 S.E.2d 115 (1971).

Crime May Be Committed by Means of Fraud.—The use of fraud instead of force to effect a kidnapping is likewise a violation of the kidnapping statute. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

Where false and fraudulent representations or fraud amounting substantially to a coercion of the will of the kidnapped person are used as a substitute for force in effecting kidnapping, there is, in truth and in law, no consent at all on the part of the victim; and under those circumstances the law has long considered fraud and violence as the same in the kidnapping of a person. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

If it be conceded arguendo that the evidence in this case was suffiicent to require a charge on kidnapping by fraud as well as kidnapping by force, it is not perceived how a failure to charge on the fraudulent aspect of the matter was prejudicial to defendant, since kidnapping effected by fraud is still kidnapping, and failure to so charge would have been advantageous to defendant. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

Punishment Discretionary.—

This section leaves the term of imprisonment in the discretion of the court, imprisonment for life being the maximum punishment. State v. Barbour, 278 N.C. 449, 180 S.E.2d 115 (1971).

False Imprisonment. — At common law forcible detention was false imprisonment, not kidnapping. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

The unlawful detention of a human being against his will is false imprisonment, not kidnapping. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

North Carolina does not have a criminal statute making false imprisonment a crime. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

False imprisonment was indictable as a specific crime at common law, and this doctrine still applies in states where the common law has been adopted. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

Unlawful detention with the intent to carry away, without the asportation in fact being accomplished, does not constitute kidnapping. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

Common Law Applies. — Since § 4-1 adopts the common law as the law of this State (with exceptions not pertinent here), the common law with respect to kidnapping and false imprisonment is the law of this State. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

It is not necessary for the unlawfulness to exist from the beginning of the transaction. State v. Barbour, 278 N.C. 449, 180 S.E.2d 115 (1971).

Sufficiency of Indictment. — A bill of indictment charging that defendant "unlawfully, willfully, feloniously and forcibly did kidnap" a named person is sufficient to withstand a motion to quash, since the word "kidnap" has a definite legal meaning. State v. Penley, 277 N.C. 704, 178 S.E.2d 490 (1971).

Where the bill of indictment is drafted in the language of this section, charging a defendant with kidnapping without defining the word, this is sufficient. If an indictment charges the offense in a plain, intelligible, and explicit manner and contains averments sufficient to enable the court to proceed to judgment, and to bar a subsequent prosecution for the same offense, it is sufficient. State v. Penley, 277 N.C. 704, 178 S.E.2d 490 (1971).

Consolidation of Kidnapping and Assault Charges.—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 § 15-152. State v. Barbour, 278 N.C. 449, 180 S.E.2d 115 (1971).

§ 14-41. Abduction of children.

Removal of Child from State by Parent in Absence of Custody Order.—See opinion of Attorney General to Honorable Roy R. Holdford, Jr., Solicitor, Second Solicitorial District, 1/14/70.

Applicability to Arrest by Special Police.—See opinion of Attorney General to Mr. G. R. Ranklin, Vanguard Security Service, 2/5/70.

ARTICLE 11.

Abortion and Kindred Offenses.

§ 14-44. Using drugs or instruments to destroy unborn child.

Constitutional Power of State. — The State of North Carolina can constitutionally assign to the human organism in its early prenatal development as embryo and fetus the right to be born (with certain exceptions as set out in the statute). Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971).

Whether possessing a soul from the moment of conception or mere protoplasm, the fertilized egg is "unique as a physical entity," with the potential to become a person. The State's power to protect children is a well-established constitutional maxim. That this power should be used to protect a fertilized egg or embryo or fetus during the period of gestation embodies no logical infirmity, but would seemingly fall within the plenary power of government. Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971).

Section relates to destruction, etc.—

This statute makes it a felony to willfully administer to any woman who is pregnant or quick with child any substance whatever with intent to destroy such child. Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971).

This section and § 14-45, etc.—

The thrust of this section is to protect the unborn child and the thrust of § 14-45 to protect the pregnant woman. Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971).

Mother's Interests Are Superior to Unquickened Embryo. — The mother's interests (before quickening) are superior to that of an unquickened embryo. Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971).

§ 14-45. Using drugs or instruments to produce miscarriage or injure pregnant woman.

Constitutional Power of State. — The State of North Carolina can constitutionally assign to the human organism in its early prenatal development as embryo and fetus the right to be born (with certain exceptions as set out in the statute). Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971).

Whether possessing a soul from the moment of conception or mere protoplasm, the fertilized egg is "unique as a physical entity," with the potential to become a person. The State's power to protect children is a well established constitutional maxim. That this power should be used to protect a fertilized egg or embryo or fetus during the period of gestation embodies no logical infirmity, but would seemingly fall within the plenary power of government. Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971).

Section Is Designed, etc.—

The evil intent proscribed is to procure a miscarriage or injure or destroy the woman. Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971).

The thrust of § 14-44 is to protect the unborn child.—Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971).

And the thrust of this section to protect the pregnant woman. Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971).

Mother's Interests Are Superior to Unquickened Embryo.—The mother's interests (before quickening) are superior to that of an unquickened embryo. Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971).

§ 14-45.1. When abortion not unlawful.—Notwithstanding any of the provisions of G.S. 14-44 and 14-45, it shall not be unlawful to advise, procure, or cause the miscarriage of a pregnant woman or an abortion when the same is per-

formed by a doctor of medicine licensed to practice medicine in North Carolina, if he can reasonably establish that:

There is substantial risk that continuance of the pregnancy would threaten the life or gravely impair the health of the said woman, or

There is substantial risk that the child would be born with grave physical or mental defect, or

The pregnancy resulted from rape or incest and the said alleged rape was reported to a law-enforcement agency or court official within seven days after the alleged rape, and

Only after the said woman has given her written consent for said abortion to be performed, and if the said woman shall be a minor or incompetent as adjudicated by any court of competent jurisdiction then only after permission is given in writing by the parents, or if married, her husband, guardian or person or persons standing in loco parentis to said minor or incompetent, and

Only when the said woman shall have resided in the State of North Carolina for a period of at least 30 days immediately preceding the operation being performed except in the case of emergency where the life of the said woman is in danger, and

Only if the abortion is performed in a hospital licensed by the North Carolina Medical Care Commission, and

Only after two doctors of medicine shall have examined said woman and certified in writing the circumstances which they believe to justify the abortion, and

Only when such certificate shall have been submitted before the abortion to the hospital where it is to be performed; provided, however, that where an emergency exists, and the certificate so states, such certificate may be submitted within 24 hours after the abortion.

All abortions performed under the provisions of this section shall be reported to the State Board of Health within five days of the date of operation. The report shall be for statistical purposes only and the confidentiality of the patient relationship shall be protected. The report shall be submitted on a form provided by the State Board of Health. The administrator of the hospital in which an abortion is performed shall be responsible for insuring that a report is submitted in accordance with this paragraph. The requirements of G.S. 130-43 are waived for abortions as provided in this section. (1967, c. 367, s. 2; 1971, c. 383, ss. 1, 1½.)

Editor's Note.—

The 1971 amendment substituted "30 days" for "four months" in the sixth paragraph, rewrote the eighth paragraph, and added the last paragraph.

For comment on a constitutional right to abortion, see 49 N.C.L. Rev. 487 (1971).

Constitutional Power of State. — The State of North Carolina can constitutionally assign to the human organism in its early prenatal development as embryo and fetus the right to be born (with certain exceptions as set out in the statute). Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971).

Whether possessing a soul from the moment of conception or mere protoplasm, the fertilized egg is "unique as a physical entity," with the potential to become a person. The State's power to protect children is a well-established constitutional maxim. That this power should be used to protect a fertilized egg or embryo or fetus during the period of gestation embodies no logical infirmity, but would seemingly fall within the plenary power of government. Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971).

Burden of Proof.—The legislature did not intend to reverse the presumption of innocence, and the burden of proof in a prosecution is on the State to show that an abortion did not come within the exemptions of this section. Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971).

The burden of proof must be upon the State to show that the conditions for performing therapeutic abortions, a substantial risk to the life or the health of the mother, or a substantial risk that the child would be born with grave physical or mental defect, or rape or incest, were not present. Due process forbids that the accused be required to establish to the court and jury that the abortion performed came within the exemptions of the statute. Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971).

The words in this statute authorizing abortion by a medical doctor ". . . if he can

reasonably establish that . . ." simply means that the doctor must establish to his own satisfaction that one of the three statutory reasons for abortion exists before he may lawfully proceed. Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971).

Mother's Interests Superior to Unquickened Embryo.—The mother's interests (before quickening) are superior to that of an unquickened embryo. Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971).

"Minor" for Whom Consent of Another Is Required Is Person under 18. — See opinion of Attorney General to Lena S. Davis, 41 N.C.A.G. 489 (1971).

ARTICLE 13.

Malicious Injury or Damage by Use of Explosive or Incendiary Device or Material.

§ 14-49. Malicious use of explosive or incendiary; attempt; punishment.

The offense created by this section is malicious injury or damage to property, real or personal, by the use of high explosives. State v. Conrad, 275 N.C. 342, 168 S.E.2d 39 (1969).

The word "malicious" as used in this section connotes a feeling of animosity, hatred or ill will toward the owner, the possessor, or the occupant. State v. Conrad, 275 N.C. 342, 168 S.E.2d 39 (1969).

Indictment Should Contain Identifying Description of Property.—Since no distinction whatever is made between real and personal property in this section an indictment under this section should contain an identifying description of the property which the defendant damaged or attempted to damage by the use of the explosive. State v. Conrad, 275 N.C. 342, 168 S.E.2d 39 (1969).

Verdict in Consolidated Trial of Separate Indictments.—See same catchline in note under § 14-49.1.

§ 14-49.1. Malicious damage of occupied property by use of explosive or incendiary; attempt; punishment.

Indictment Should Include Description of Any Other Property Injured.—An indictment drawn under this section should include not only the description of the occupied property and the name of the occupant but any other property injured or attempted to be injured by the explosion so that if proof of occupancy fails, the jury could consider whether the defendant is guilty under § 14-49 of the lesser included offense of malicious injury to unoccupied property. State v. Conrad, 275 N.C. 342, 168 S.E.2d 39 (1969).

Verdict in Consolidated Trial of Separate Indictments. — In consolidated trial of separate indictments charging the same defendant with malicious damage to an occupied dwelling and malicious damage to an automobile, where the evidence discloses but one explosion and the jury returns a verdict finding defendant guilty of malicious damage to the occupied dwelling, a further jury verdict finding defendant guilty of malicious damage to the automobile should be treated as surplusage, since the verdict of dynamiting the occupied dwelling contains the maximum charge under § 14-49 as amended by this section. State v. Conrad, 275 N.C. 342, 168 S.E.2d 39 (1969).

SUBCHAPTER IV. OFFENSES AGAINST THE HABITATION AND OTHER BUILDINGS.

ARTICLE 14.

Burglary and Other Housebreakings.

§ 14-51. First and second degree burglary.

First and Second Degree, etc.—

The bill of indictment returned by the grand jury charged all of the elements of burglary in the first degree. Consequently, it necessarily charged all of the elements of burglary in the second degree plus the additional allegation that the dwelling house in question was actually occupied at the time of the alleged breaking and entry by the defendant. This further element of actual occupancy at the time of the breaking and entering is the only distinction be-

tween the two degrees of burglary. State v. Allen, 279 N.C. 115, 181 S.E.2d 453 (1971).

Elements of Burglary in First Degree.— In accord with original. See State v. Accor, 277 N.C. 65, 175 S.E.2d 583 (1970).

Sufficient Evidence to Submit Question of Second Degree Burglary.—

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).

Jury Must Determine Whether Criminal Intent Existed. — Where the evidence is sufficient for submission to the jury upon the allegations contained in the indictment, it is for the jury to determine, under all the circumstances, whether the defendant had the ulterior criminal intent at the time of breaking and entering to commit the felony charged in the indictment. State v. Accor, 277 N.C. 65, 175 S.E.2d 583 (1970).

The indictment having identified the intent necessary, the State is held to the proof of that intent. Of course, intent or absence of it may be inferred from the circumstances surrounding the occurrence, but the inference must be drawn by the jury. State v. Accor, 277 N.C. 65, 175 S.E.2d 583 (1970).

The fact of the entry alone, in the nighttime, accompanied by flight when discovered, is some evidence of guilt, and in the absence of any other proof, or evidence of other intent, and with no explanatory facts or circumstances, may warrant a reasonable inference of guilty intent. State v. Accor, 277 N.C. 65, 175 S.E.2d 583 (1970).

People do not usually enter the dwellings of others in the nighttime, when the inmates are asleep, with innocent intent. The most usual intent is to steal, and when there is no explanation or evidence of a different intent, the ordinary mind will infer this also. State v. Accor, 277 N.C. 65, 175 S.E.2d 583 (1970).

Occupancy of Dwelling Is No Defense to Charge of Second Degree Burglary. — 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).

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).

Quoted in Parker v. North Carolina, 397 U.S. 790, 90 S. Ct. 1458, 1474, 25 L. Ed. 2d 785 (1970).

Cited in State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969); State v. Richardson, 8 N.C. App. 298, 174 S.E.2d 77 (1970).

§ 14-52. Punishment for burglary.

Editor's Note. — For article entitled "Capital Punishment and Life Imprisonment in North Carolina, 1946 to 1968: Implications for Abolition of the Death Penalty," see 6 Wake Forest Intra. L. Rev. 417 (1970).

Punishment Not Exceeding Statutory Limits Cannot Be Classified Cruel and Unusual.—When punishment does not exceed the limits fixed by statute, it cannot be classified as cruel and unusual in a constitutional sense. State v. Barber, 278 N.C. 268, 179 S.E.2d 404 (1971).

Death Penalty Does Not Violate Constitutional Concept of Cruelty.—The death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty. State v. Barber, 278 N.C. 268, 179 S.E.2d 404 (1971).

Jury May Reduce Penalty from Death to Life Imprisonment.—Except in one class of cases, the presiding judge fixes the punishment for a convicted defendant within the limits provided by the applicable statute. The exception is capital cases in which the jury may reduce the penalty from death to life imprisonment. State v. Rhodes, 275 N.C. 584, 169 S.E.2d 846 (1969).

Motion to Quash Indictment Overruled where Question Concerning Death Penalty Not Presented.—A motion to quash the indictment, supported by the contention that the death penalty provisions of this section relating to burglary in the first

degree, in force on March 4, 1969, were invalid, was properly overruled, where the question whether burglary in the first degree is punishable by death if the jury, when rendering its verdict, fails to recommend imprisonment for life was not presented by the motion. State v. Accor, 277 N.C. 65, 175 S.E.2d 583 (1970).

Applied in Parker v. North Carolina, 397 U.S. 790, 90 S. Ct. 1458, 1474, 25 L. Ed. 2d 785 (1970).

§ 14-53. Breaking out of dwelling house burglary.

Cited in State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969); State v. Richardson, 8 N.C. App. 298, 174 S.E.2d 77 (1970).

§ 14-54. Breaking or entering buildings generally.

Intent Must Be Shown.—

Either a breaking or an entering with the requisite intent is sufficient to constitute a violation of this section. State v. Bronson, 10 N.C. App. 638, 179 S.E.2d 823 (1971).

Ownership of Property Is Immaterial.—

It is no defense to a larceny charge that title to the property taken is in one other than the person from whom it was taken. The same rule applies to breaking and entering with larcenous intent. State v. Richardson, 8 N.C. App. 298, 174 S.E.2d 77 (1970).

Value of Stolen Property Immaterial.—

Where larceny is committed pursuant to breaking and entering, it constitutes a felony without regard to the value of the property in question. State v. Richardson, 8 N.C. App. 298, 174 S.E.2d 77 (1970).

Description of Building.—

Particular identification in the indictment of the building alleged to have been broken into and entered is desirable. State v. Melton, 7 N.C. App. 721, 173 S.E.2d 610 (1970).

In light of the growth in population and in the number of structures (domestic, business and governmental), the prosecuting officers of this State would be well advised to identify the subject premises in a bill of indictment under this section by street address, highway address, rural road address or some clear description and designation to set the subject premises apart from like and other structures described in Article 14 of this Chapter. State v. Carroll, 10 N.C. App. 143, 178 S.E.2d 10 (1970).

Under this section, the breaking or entering of any building with intent to commit a felony or larceny therein constitutes a felony. Thus the necessity for describing the building in the bill of indictment for the purpose of showing that it is within the statute no longer exists. It remains necessary, however, to identify the building with reasonable particularity so as to enable the defendant to prepare his defense and plead his conviction or acquittal as a bar to further prosecution for the same offense. State v. Carroll, 10 N.C. App. 143, 178 S.E.2d 10 (1970).

Unlocking Door, etc.—

The State is not required to offer evidence of damage to a door or window. A breaking or entering condemned by the statute may be shown to be a mere pushing or pulling open of an unlocked door or the raising or lowering of an unlocked window, or the opening of a locked door with a key. State v. Bronson, 10 N.C. App. 638, 179 S.E.2d 823 (1971).

Evidence held sufficient, etc.—

Evidence that around midnight the defendant and a companion broke the glass door of a hardware store and took away guns and ammunition was held sufficient to show a present intent on the part of defendant to take property belonging to another and convert it to his own use. State v. Thompson, 8 N.C. App. 313, 174 S.E.2d 130 (1970).

Punishment.—

Sentence of imprisonment for not less than six nor more than ten years for felonious breaking and entering was punishment within the limits authorized by statute and is not cruel and unusual punishment within the constitutional prohibition. State v. Strickland, 10 N.C. App. 540, 179 S.E.2d 162 (1971).

A sentence of ten years is not in excess of that permitted by the statute upon a conviction of the felony of breaking and entering in violation of subsection (a) of this section. State v. Cleary, 9 N.C. App. 189, 175 S.E.2d 749 (1970).

Where defendant was tried and convicted upon an indictment charging felonious breaking and entering and misdemeanor larceny, and both counts were consolidated for judgment, the fact that the one sentence imposed is in excess of that permissible upon conviction of the misdemeanor is immaterial and is not prejudicial where it does not exceed that permitted upon conviction of the felony. State v. Cleary, 9 N.C. App. 189, 175 S.E.2d 749 (1970).

Effect and Application of 1969 Amendment.—The title of the 1969 amendatory act, Session Laws 1969, c. 543, s. 7, expresses the legislative intent to clarify, not to repeal, "the laws relating to burglary and related offenses." It is, therefore, clear that the 1969 act amended, rather than repealed, this section. State v. Melton, 7 N.C. App. 721, 173 S.E.2d 610 (1970).

A defendant may be prosecuted, and if lawfully convicted may be punished, after the effective date of the 1969 amendment for a violation of this section as it existed prior to the effective date of that amendment where the offense was committed prior to the effective date. State v. Melton, 7 N.C. App. 721, 173 S.E.2d 610 (1970).

A defendant is entitled to have the jury instructed as to what facts they were required to find in order to find him guilty under the statute as it existed on the date the offense was alleged to have been committed, without reference to the less stringent requirements of the amended statute. State v. Melton, 7 N.C. App. 721, 173 S.E.2d 610 (1970).

When Entry is Lawful. — An entry is found to be a lawful one where the owner of the premises gives the defendant permission to enter, and where the entry is with the consent and at the instance of the owner. State v. Thompson, 8 N.C. App. 313, 174 S.E.2d 130 (1970).

Bill of Indictment Must Sufficiently Describe Crime Alleged.—The bill of indictment under this section must describe the crime alleged in such detail as would enable the defendant to plead his conviction or acquittal thereof as a bar to another prosecution for the same offense. State v. Carroll, 10 N.C. App. 143, 178 S.E.2d 10 (1970).

The indictment charged store-breaking, larceny and receiving in the language of the statute under which it was drawn, § 14-72 and this section, and contained the elements of the offense intended to be charged, and sufficiently informed the petitioner of the crime with which he was charged so that he could adequately prepare his defense and could plead the judgment as a bar to any subsequent prosecution for the same offense. Nothing more was required. Harris v. North Carolina, 320 F. Supp. 770 (M.D.N.C. 1970).

"Intent".—Intent is a mental attitude which must ordinarily be proved by circumstances from which it can be inferred. State v. Bronson, 10 N.C. App. 638, 179 S.E.2d 823 (1971).

Determining Intent.—The intent with which defendant broke and entered, or entered, may be found by the jury from what he did within the building. State v. Bronson, 10 N.C. App. 638, 179 S.E.2d 823 (1971).

In determining the presence or absence of the element of intent the jury may consider the acts and conduct of defendant and the general circumstances existing at the time of the alleged commission of the offense. State v. Bronson, 10 N.C. App. 638, 179 S.E.2d 823 (1971).

Only Intent to Commit Larceny Need Be Shown. — For felonious breaking and entering there need be only an intent to commit larceny, and the value of the property involved is immaterial. State v. Richardson, 8 N.C. App. 298, 174 S.E.2d 77 (1970).

Intoxication as Defense.—Intoxication which renders an offender utterly unable to form the required specific intent may be shown as a defense. State v. Bronson, 10 N.C. App. 638, 179 S.E.2d 823 (1971).

Evidence that defendant was in an intoxicated condition at the time he was apprehended fell short of a showing that defendant was in such an intoxicated condition that he was utterly unable to form the intent required. State v. Bronson, 10 N.C. App. 638, 179 S.E.2d 823 (1971).

Tracing Stolen Articles to Defendant.—It is always competent in a prosecution for breaking and entering and larceny to show all of the goods lost from a store and to trace some or all of the articles to a defendant. State v. Richardson, 8 N.C. App. 298, 174 S.E.2d 77 (1970).

Double Jeopardy. — Where a defendant has been tried for breaking and entering, and then the State tries him for a felony in which breaking and entering is an indispensable element, he has suffered double jeopardy. This is because the charge against him was increased after he had been tried for an offense consisting of an essential element of the greater offense. Wood v. Ross, 434 F.2d 297 (4th Cir. 1970).

Applied in State v. Wilson, 6 N.C. App. 618, 170 S.E.2d 557 (1969); State v. McDonald, 6 N.C. App. 627, 170 S.E.2d 551 (1969); State v. Perry, 8 N.C. App. 83, 173 S.E.2d 521 (1970); State v. Crabb, 9 N.C. App. 333, 176 S.E.2d 39 (1970).

Stated in State v. Johnson, 7 N.C. App. 53, 171 S.E.2d 106 (1969).

Cited in State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969); State v. Dickerson, 6 N.C. App. 131, 169 S.E.2d 510 (1969); State v. Smith, 11 N.C. App. 552, 181 S.E.2d 778 (1971); Culp v. Bounds, 325 F. Supp. 416 (W.D.N.C. 1971).

§ 14-55. Preparation to commit burglary or other housebreakings.

Separate Offenses.—

In accord with 2nd paragraph in original. See State v. Shore, 10 N.C. App. 75, 178 S.E.2d 22 (1970).

The second defined offense under this section is the possession of an implement of housebreaking without lawful excuse. State v. Shore, 10 N.C. App. 75, 178 S.E.2d 22 (1970).

State's Burden of Proof.—

In accord with 2nd paragraph in original. See State v. McCloud, 276 N.C. 518, 173 S.E.2d 753 (1970); State v. McCloud, 7 N.C. App. 132, 171 S.E.2d 470 (1970).

In a prosecution for unlawful possession of implements of housebreaking, the burden is on the State to show (1) that the person charged was found having in his possession an implement of housebreaking and (2) that such possession was without lawful excuse. State v. Shore, 10 N.C. App. 75, 178 S.E.2d 22 (1970).

Statute Condemns Possession of Implement with Intent to Burglarize.—The possession of an implement with intent to burglarize and not the character of the object (be it a house or vending machine) of the burglary brings the act within the condemnation of the statute. State v. Shore, 10 N.C. App. 75, 178 S.E.2d 22 (1970).

"Implements of Housebreaking".—Items which are "implements of housebreaking" are not specifically named in this section, so if their possession without lawful excuse is proscribed at all it is under the general language of the statute. State v. Shore, 10 N.C. App. 75, 178 S.E.2d 22 (1970).

Jury Must Decide Conflicting Evidence.—The evidence as to whether the possession of an implement was lawful, being in conflict, is for the jury to decide and a nonsuit would be improper. State v. Shore, 10 N.C. App. 75, 178 S.E.2d 22 (1970).

Possession of Bolt-Cutter Raises Inference of Unlawful Purpose.—The conduct of defendants and the circumstances under which they were in possession of a bolt-cutter may raise the inference that its possession is for an unlawful purpose. State v. Shore, 10 N.C. App. 75, 178 S.E.2d 22 (1970).

It is reasonable to perceive that a burglar with a bolt-cutter, on the prowl to steal that which belongs to others, would clip a padlock and enter and steal from a service station building as readily as he would clip a metal band securing a vending machine and steal its contents. State v. Shore, 10 N.C. App. 75, 178 S.E.2d 22 (1970).

Cited in State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969).

§ 14-56. Breaking or entering into railroad cars, motor vehicles, or trailers; breaking out.

Cited in State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969).

§ 14-57. Burglary with explosives.

Cited in State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969); State v. Richardson, 8 N.C. App. 298, 174 S.E.2d 77 (1970).

ARTICLE 15.

Arson and Other Burnings.

§ 14-58. Punishment for arson.

Editor's Note.—

For article entitled "Capital Punishment and Life Imprisonment in North Carolina, 1946 to 1968: Implications for Abolition of the Death Penalty," see 6 Wake Forest Intra. L. Rev. 417 (1970).

Jury May Reduce Penalty from Death to Life Imprisonment.—Except in one class of cases, the presiding judge fixes the punishment for a convicted defendant within the limits provided by the applicable statute. The exception is capital cases in which the jury may reduce the penalty from death to life imprisonment. State v. Rhodes, 275 N.C. 584, 169 S.E.2d 846 (1969).

§ 14-59. Burning of certain public buildings.—If any person shall wantonly and willfully set fire to or burn or cause to be burned or aid, counsel or procure the burning of, the State Capitol, the Legislative Building, the Justice Building or any building owned or occupied by the State or any of its agencies, institutions or subdivisions or by any county, incorporated city or town or other govern-

mental or quasi-governmental entity, he shall be guilty of a felony and shall, on conviction, be imprisoned in the State's prison for not less than two nor more than 30 years, and may also be fined in the discretion of the court. (1830, c. 41, s. 1; R. C., c. 34, s. 7; 1868-9, c. 167, s. 5; Code, s. 985, subsec. 3; Rev., s. 3344; C. S., s. 4239; 1965, c. 14; 1971, c. 816, s. 1.)

Editor's Note.—The 1971 amendment rewrote this section.

§ **14-60. Burning of schoolhouses or buildings of educational institutions.**—If any person shall wantonly and willfully set fire to or burn or cause to be burned or aid, counsel or procure the burning of, any schoolhouse or building owned, leased or used by any public or private school, college or educational institution, he shall be guilty of a felony, and shall, on conviction, be imprisoned in the State's prison for not less than two nor more than 30 years, and may also be fined in the discretion of the court. (1901, c. 4, s. 28; Rev., s. 3345; 1919, c. 70; C. S., s. 4240; 1965, c. 870; 1971, c. 816, s. 2.)

Editor's Note.—The 1971 amendment rewrote this section.

§ **14-61. Burning of certain bridges and buildings.**—If any person shall wantonly and willfully set fire to or burn or cause to be burned, or aid, counsel or procure the burning of, any public bridge, or private toll bridge, or the bridge of any incorporated company, or any fire-engine house or rescue-squad building, or any house belonging to an incorporated company or unincorporated association and used in the business of such company or association, he shall be guilty of a felony, and shall, on conviction, be imprisoned in the State's prison for not less than two nor more than 30 years, and may also be fined in the discretion of the court. (1825, c. 1278, P. R.; R. C., c. 34, s. 30; Code, s. 985, subsec. 4; Rev., s. 3337; C. S., s. 4241; 1971, c. 816, s. 3.)

Editor's Note.—The 1971 amendment rewrote this section.

§ **14-62. Burning of churches and certain other buildings.**—If any person shall wantonly and willfully set fire to or burn or cause to be burned, or aid, counsel or procure the burning of, any uninhabited house, any church, chapel or meetinghouse, or any stable, coach house, outhouse, warehouse, office, shop, mill, barn or granary, or any building, structure or erection used or intended to be used in carrying on any trade or manufacture, or any branch thereof, whether the same or any of them respectively shall then be in the possession of the offender, or in the possession of any other person, he shall be guilty of a felony, and shall, on conviction, be imprisoned in the State's prison for not less than two nor more than 30 years, and may also be fined in the discretion of the court. (1874-5, c. 228; Code, s. 985, subsec. 6; 1885, c. 66; 1903, c. 665, s. 2; Rev., s. 3338; C. S., s. 4242; 1927, c. 11, s. 1; 1953, c. 815; 1959, c. 1298, s. 1; 1971, c. 816, s. 4.)

I. IN GENERAL.

Editor's Note.—

The 1971 amendment deleted "to" preceding "any building," inserted "on conviction" and substituted "30 years, and may also be fined in the discretion of the court" for "forty years."

Cited in State v. Lynch, 279 N.C. 1, 181 S.E.2d 561 (1971).

§ **14-62.1. Burning of building or structure in process of construction.**—If any person shall wantonly and willfully set fire to or burn or cause to be burned, or aid, counsel or procure the burning of, any building or structure in the process of construction for use or intended to be used as a dwelling house or in carrying on any trade or manufacture, or otherwise, whether the same or any of them respectively shall then be in the possession of the offender, or in the possession of any other person, he shall be guilty of a felony, and shall, on conviction, be imprisoned in the State's prison for not less than two nor more than 30 years,

and may also be fined in the discretion of the court. (1957, c. 792; 1971, c. 816, s. 5.)

Editor's Note. — The 1971 amendment substituted "If any person shall wantonly and willfully set fire to or burn or cause to be burned, or aid, counsel or procure the burning" for "The wilful and intentional burning," at the beginning of the section and substituted "he shall be guilty of a felony, and shall, on conviction be imprisoned in the State's prison for not less than two nor more than 30 years, and may also be fined" for "shall be a felony and punished by imprisonment in the county jail or State prison, or by fine or by both such fine and imprisonment" at the end of the section.

§ 14-63. Burning of boats and barges.—If any person shall wantonly and willfully set fire to or burn or cause to be burned or aid, counsel or procure the burning of, any boat, barge, ferry or float, without the consent of the owner thereof, he shall be guilty of a felony and shall, on conviction, be punished by imprisonment in the State's prison for not less than four months nor more than 10 years, and may also be fined in the discretion of the court. In the event the consent of the owner is given for an unlawful or fraudulent purpose, however, the penalty provisions of this section shall remain in full force and effect. (1909, c. 854; C. S., s. 4243; 1971, c. 816, s. 6.)

Editor's Note.—The 1971 amendment rewrote the first sentence and added the last sentence.

§ 14-64. Burning of ginhouses and tobacco houses.—If any person shall wantonly and willfully set fire to or burn or cause to be burned, or aid, counsel or procure the burning of, any ginhouse or tobacco house, or any part thereof, he shall, on conviction, be imprisoned in the State's prison for not less than four months nor more than 10 years, and may also be fined in the discretion of the court. (1863, c. 17; 1868-9, c. 167, s. 5; Code, s. 985, subsec. 2; 1903, c. 665, s. 1; Rev., s. 3341; C. S., s. 4244; 1971, c. 816, s. 7.)

Editor's Note.—The 1971 amendment rewrote this section.

§ 14-65. Fraudulently setting fire to dwelling houses.—If any person, being the occupant of any building used as a dwelling house, whether such person be the owner thereof or not, or, being the owner of any building designed or intended as a dwelling house, shall wantonly and willfully or for a fraudulent purpose set fire to or burn or cause to be burned, or aid, counsel or procure the burning of such building, he shall be guilty of a felony, and shall, on conviction, be punished by imprisonment in the State's prison for not less than four months nor more than 10 years, and may also be fined in the discretion of the court. (Code, s. 985; 1903, c. 665, s. 3; Rev., s. 3340; 1909, c. 862; C. S., s. 4245; 1927, c. 11, s. 2; 1971, c. 816, s. 8.)

Editor's Note. — The 1971 amendment substituted "wantonly and willfully" for "willfully and wantonly," inserted "on conviction," and substituted "for not less than four months nor more than 10 years" for "or county jail."

§ 14-66. Burning of personal property.—If any person shall wantonly and willfully set fire to or burn, or cause to be burned, or aid, counsel or procure the burning of, any goods, wares, merchandise or other chattels or personal property of any kind, whether or not the same shall at the time be insured by any person or corporation against loss or damage by fire, with intent to injure or prejudice the insurer, the creditor or the person owning the property, or any other person, whether the property is that of such person or another, he shall be guilty of a felony and shall, on conviction, be imprisoned in the State's prison for not less than four months nor more than 10 years, and may also be fined in the discretion of the court. (1921, c. 119; C. S., s. 4245 (a); 1971, c. 816, s. 9.)

Editor's Note. — The 1971 amendment rewrote this section.

§ 14-67. Attempting to burn dwelling houses and certain other buildings.—If any person shall wantonly and willfully attempt to set fire to or burn or cause to be burned any dwelling house, uninhabited house, the State Capitol, the Legislative Building, the Justice Building or any building owned or occupied by the State or any of its agencies, institutions or subdivisions or by any county, incorporated city or town or other governmental or quasi-governmental entity, any schoolhouse or building owned, leased or used by any public or private school, college or educational institution, or any public bridge, private toll bridge or the bridge of any incorporated company, or any fire-engine house or rescue-squad building, or any house belonging to an incorporated company or unincorporated association and used in the business of such company or association, any church, chapel or meetinghouse, or any stable, coach house, outhouse, warehouse, office, shop, mill, barn or granary, or any building, structure or erection used or intended to be used in carrying on any trade or manufacture, or otherwise, any boat, barge, ferry, or float, any ginhouse or tobacco house, or any part thereof, whether such buildings or structures or any of them shall then be in the possession of the offender or in the possession of any other person, he shall be guilty of a felony, and shall, on conviction, be imprisoned in the State's prison for not less than four months nor more than 10 years, and may also be fined in the discretion of the court. (1876-7, c. 13; Code, s. 985, subsec. 7; Rev., s. 3336; C. S., s. 4246; 1957, c. 250, s. 1; 1959, c. 1298, s. 2; 1971, c. 816, s. 10.)

Editor's Note. — The 1971 amendment rewrote this section.

Applied in State v. Lynch, 9 N.C. App. 71, 175 S.E.2d 327 (1970).

Cited in State v. Williams, 10 N.C. App. 183, 178 S.E.2d 41 (1970); State v. Lynch, 279 N.C. 1, 181 S.E.2d 561 (1971).

§ 14-67.1. Burning or attempting to burn other buildings.—If any person shall wantonly and willfully set fire to or burn or cause to be burned or aid, counsel or procure the burning of, or attempt to burn, any building or other structure of any type not otherwise covered by the provisions of this Article, he shall be guilty of a felony, and shall, on conviction, be imprisoned in the State's prison for not less than four months nor more than 10 years, and may also be fined in the discretion of the court. (1971, c. 816, s. 11.)

SUBCHAPTER V. OFFENSES AGAINST PROPERTY.

ARTICLE 16.

Larceny.

§ 14-70. Distinctions between grand and petit larceny abolished; punishment; accessories to larceny.

Verdict of Guilty of "Grand Larceny".—While there is no longer a crime in this State designated as "grand larceny" the verdict of the jury must be considered as tantamount to a verdict finding the defendant guilty as charged in the bill of indictment. State v. Walker, 6 N.C. App. 740, 171 S.E.2d 91 (1969).

It is not necessary for an indictment to allege that a larceny was from the person for it to be shown. State v. Benfield, 9 N.C. App. 657, 177 S.E.2d 306 (1970).

Mitigation of Charge.—An indictment for larceny charges a felony, and it is a matter of defense to mitigate the charge to a misdemeanor by showing that the property taken was a value of less than the amount prescribed by statute, and that it was neither taken from the person nor from a dwelling house. State v. Benfield, 9 N.C. App. 657, 177 S.E.2d 306 (1970).

Stated in State v. Johnson, 7 N.C. App. 53, 171 S.E.2d 106 (1969).

Cited in State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969); State v. Dickerson, 6 N.C. App. 131, 169 S.E.2d 510 (1969); Culp v. Bounds, 325 F. Supp. 416 (W.D.N.C. 1971).

§ 14-72. Larceny of property; receiving stolen goods not exceeding two hundred dollars in value.

Editor's Note.—

Decisions subsequent to the Act of 1913 and at variance with the legal propositions stated herein, for example, State v. Flynn,

230 N.C. 293, 52 S.E.2d 791 (1949), and State v. Stevens, 252 N.C. 331, 113 S.E.2d 577 (1960), to the extent of such variance, are overruled. State v. Benfield, 278 N.C. 199, 179 S.E.2d 388 (1971).

Decisions based on the Act of 1895, including State v. Bynum, 117 N.C. 749, 23 S.E. 218 (1895), and State v. Harris, 119 N.C. 811, 26 S.E. 148 (1896), and other decisions based thereon, are no longer authoritative. State v. Benfield, 278 N.C. 199, 179 S.E.2d 388 (1971).

It Is Inapplicable, etc.—

Larceny from the person is a felony, without regard to the value of the property. State v. Benfield, 278 N.C. 199, 179 S.E.2d 388 (1971).

Thus, larceny of property of a value in excess of $200, etc.—

In accord with original. See State v. Benfield, 278 N.C. 199, 179 S.E.2d 388 (1971).

And Larceny by Breaking and Entering.—

Where larceny is committed pursuant to breaking and entering, it constitutes a felony without regard to the value of the property in question. State v. Richardson, 8 N.C. App. 298, 174 S.E.2d 77 (1970).

But Larceny of Property of a Value of Not More than $200, etc.—

Larceny of property of the value of $200 or less is a misdemeanor unless it is (1) from the person, or (2) from a building in violation of § 14-51, 14-53, 14-54 or 14-57, or (3) the property is an explosive or incendiary device or substance. State v. Benfield, 278 N.C. 199, 179 S.E.2d 388 (1971).

Indictment.—

Where neither larceny from the person nor by breaking and entering is involved, an indictment for the felony of larceny must charge, as an essential element of the crime, that the value of the stolen goods was more than $200. State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969).

Where an indictment charges larceny of property of the value of $200 or less, but contains no allegation the larceny was from a building by breaking and entering, the crime charged is a misdemeanor for which the maximum prison sentence is two years, notwithstanding all the evidence tends to show the larceny was accomplished by means of a felonious breaking and entering. State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969).

To convict of felony-larceny, the indictment must allege and the State must prove beyond a reasonable doubt, as an essential element of the crime, that the value of the property exceeded $200, or that the larceny was from the person, or that the larceny was from a building in violation of § 14-51, 14-53, 14-54 or 14-57, or that the property involved was an explosive or incendiary device or substance. State v. Benfield, 278 N.C. 199, 179 S.E.2d 388 (1971).

In order to properly charge the felony of larceny of property, without regard to the value of the property, the bill of indictment must contain one or more of the elements set out in subsection (b) of this section. State v. Cleary, 9 N.C. App. 189, 175 S.E.2d 749 (1970).

The indictment charged store-breaking, larceny and receiving in the language of the statute under which it was drawn, § 14-54 and this section, and contained the elements of the offense intended to be charged, and sufficiently informed the petitioner of the crime with which he was charged so that he could adequately prepare his defense and could plead the judgment as a bar to any subsequent prosecution for the same offense. Nothing more was required. Harris v. North Carolina, 320 F. Supp. 770 (M.D.N.C. 1970).

Indictment for Larceny from the Person.—

A person may not be convicted and punished for the felony of larceny from the person when the indictment on which he is tried fails to allege that the larceny was from the person. State v. Benfield, 278 N.C. 199, 179 S.E.2d 388 (1971).

When State Must Prove, etc.—

In accord with 1st paragraph in original. See State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969).

Except in those cases where this section is inapplicable, the State must prove beyond a reasonable doubt that the value of the stolen property was more than $200 in order to convict of felony-larceny, and the trial judge must so instruct the jury even though no request is made for such instruction. The reason for this requirement is that the defendant's plea of not guilty places in issue every essential element of the offense, including the element of value of the property stolen, and the credibility of the testimony must be passed upon by the jury. State v. Walker, 6 N.C. App. 740, 171 S.E.2d 91 (1969).

The principle of law, etc.—

It is always competent in a prosecution for breaking and entering and larceny to show all of the goods lost from a store and to trace some or all of the articles to a defendant. State v. Richardson, 8 N.C. App. 298, 174 S.E.2d 77 (1970).

Evidence.—

Evidence held sufficient to show a present intent on the part of defendant to take

property belonging to another and convert it to his own use. State v. Thompson, 8 N.C. App. 313, 174 S.E.2d 130 (1970).

Instructions.—

When there is evidence tending to show the value of the stolen goods was more than $200 and other evidence tending to show the value thereof was $200 or less, the jury should be instructed that if they find from the evidence beyond a reasonable doubt that the defendant is guilty of larceny and that the value of the stolen property was more than $200, it would be their duty to return a verdict of guilty of felony-larceny; however, if they find from the evidence beyond a reasonable doubt that the defendant is guilty of larceny but fail to find from the evidence beyond a reasonable doubt that the value of the stolen goods was more than $200, it would be their duty to return a verdict of guilty of misdemeanor-larceny. State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969).

The court should submit to the jury the issue of defendant's guilt of misdemeanor-larceny, where the evidence of the State does not show the value of the property that was taken. State v. Walker, 6 N.C. App. 740, 171 S.E.2d 91 (1969).

Although an indictment charges, and all the evidence tends to show, that the value of the stolen property was more than $200, the jury, under appropriate instructions, must find from the evidence beyond a reasonable doubt that this is the fact. In such case, there is no basis, and it is inappropriate, for the court to instruct the jury with reference to a verdict of guilty of misdemeanor-larceny. State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969).

Trial judges should bear in mind that instructions requiring proof beyond a reasonable doubt and jury findings as to all essential elements thereof are prerequisite to a conviction of felony-larceny. State v. Benfield, 278 N.C. 199, 179 S.E.2d 388 (1971).

Jury Need Not Fix Precise Value of Stolen Property.—

This section does not require that the jury fix the precise value of the stolen property. The only issue of legal significance is whether the value thereof exceeds $200. State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969).

Sentence.—

The punishment upon conviction of the misdemeanor of larceny may not exceed two years. State v. Cleary, 9 N.C. App. 189, 175 S.E.2d 749 (1970).

Where defendant was tried and convicted upon an indictment charging felonious breaking and entering and misdemeanor-larceny, and both counts were consolidated for judgment, the fact that the one sentence imposed is in excess of that permissible upon conviction of the misdemeanor is immaterial and is not prejudicial where it does not exceed that permitted upon conviction of the felony. State v. Cleary, 9 N.C. App. 189, 175 S.E.2d 749 (1970).

Larceny of any explosive or incendiary device or substance is a felony. State v. Benfield, 278 N.C. 199, 179 S.E.2d 388 (1971).

Larceny from Building.—Larceny from a building in violation of § 14-51, 14-53, 14-54 or 14-57 is a felony, without regard to the value of the property. State v. Benfield, 278 N.C. 199, 179 S.E.2d 388 (1971).

Taking and Carrying Away. — While there must be a taking and carrying away of the personal property of another to complete the crime of larceny, it is not necessary that the property be completely removed from the premises of the owner. The least removal of an article, from the actual or constructive possession of the owner, so as to be under the control of the felon, will be a sufficient asportation. State v. Walker, 6 N.C. App. 740, 171 S.E.2d 91 (1969).

The fact that the property may have been in defendant's possession and under his control for only an instant is immaterial if his removal of the property from its original status was such as would constitute a complete severance from the possession of the owner. State v. Walker, 6 N.C. App. 740, 171 S.E.2d 91 (1969).

Title to Property Taken.—It is no defense to a larceny charge that title to the property taken is in one other than the person from whom it was taken. State v. Richardson, 8 N.C. App. 298, 174 S.E.2d 77 (1970).

Effect of Plea of Not Guilty.—A plea of not guilty to an indictment charging the felony of larceny puts in issue every essential element of the crime and constitutes a denial of the charge that the value of the stolen property was more than $200. State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969).

Verdict Where Court Failed to Instruct as to Duty to Find Value of Property.—A verdict finding the defendant guilty as charged in the bill of indictment must be considered as a verdict of guilty of larceny of personal property having a value of $200 or less, a misdemeanor, where the trial court failed to instruct the jury as to their duty to fix the value of the property.

State v. Walker, 6 N.C. App. 740, 171 S.E.2d 91 (1969).

Applied in State v. Crabb, 9 N.C. App. 333, 176 S.E.2d 39 (1970).

Stated in State v. Hullender, 8 N.C. App. 41, 173 S.E.2d 581 (1970).

§ 14-72.1. Concealment of merchandise in mercantile establishments.—(a) Whoever, without authority, willfully conceals the goods or merchandise of any store, not theretofore purchased by such person, while still upon the premises of such store, shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than one hundred dollars ($100.00), or by imprisonment for not more than six months, or by both such fine and imprisonment. Such goods or merchandise found concealed upon or about the person and which have not theretofore been purchased by such person shall be prima facie evidence of a willful concealment.

(b) Any person found guilty of a second or subsequent offense of willful concealment of goods as defined in the first paragraph of this section shall be guilty of a misdemeanor and shall be punished in the discretion of the court.

(c) A merchant, or his agent or employee, or a peace officer who detains or causes the arrest of any person shall not be held civilly liable for detention, malicious prosecution, false imprisonment, or false arrest of the person detained or arrested, where such detention is in a reasonable manner for a reasonable length of time, if in detaining or in causing the arrest of such person, the merchant, or his agent or employee, or the peace officer had at the time of the detention or arrest probable cause to believe that the person committed the offense created by this section. If the person being detained by the merchant, or his agent or employee, is a minor 16 years of age or younger, the merchant or his agent or employee, shall call or notify, or make a reasonable effort to call or notify the parent or guardian of the minor, during the period of detention. (1957, c. 301; 1971, c. 238.)

Editor's Note.—

The 1971 amendment, effective July 31, 1971, designated the first paragraph as subsection (a), designated the second paragraph as subsection (b) and added subsection (c).

§ 14-80. Larceny of wood and other property from land.

In General.—

This section was enacted in 1866, immediately after the Civil War, to suppress aimless wanderers, from entering land and doing great damage. State v. Andrews, 11 N.C. App. 341, 181 S.E.2d 142 (1971).

Prior to the enactment of this section, landowners had little or no protection against the willful and unlawful taking from their land property which was not, either by common law or previous statute, the subject of larceny. State v. Andrews, 11 N.C. App. 341, 181 S.E.2d 142 (1971).

No latitude of construction is permitted in the interpretation of a penal statute. This section is highly penal in character, and the court is not at liberty to extend its import by implication or equitable construction to include an offense not clearly described. State v. Andrews, 11 N.C. App. 341, 181 S.E.2d 142 (1971).

Indictment Must Allege That Property Taken Was Property of Landowner.—The particularly peculiar wording of this section clearly requires that the indictment allege that the property taken was the property of the owner of the land. State v. Andrews, 11 N.C. App. 341, 181 S.E.2d 142 (1971).

ARTICLE 17.

Robbery.

§ 14-87. Robbery with firearms or other dangerous weapons.

This section creates no new offense.—

In accord with 1st paragraph in original. See State v. Bailey, 278 N.C. 80, 178 S.E.2d 809 (1971).

In accord with 5th paragraph in original. See State v. Council, 6 N.C. App. 397, 169 S.E.2d 921 (1969).

This section superadds, etc.—

The critical and essential difference between armed robbery and common-law robbery is that in order for the jury to convict for armed robbery the victim must be endangered or threatened by the use or threatened use of a "firearm or other

dangerous weapon, implement or means." State v. Bailey, 278 N.C. 80, 178 S.E.2d 809 (1971).

Common-Law Robbery Defined.—

In accord with 4th paragraph in original. See State v. Council, 6 N.C. App. 397, 169 S.E.2d 921 (1969); State v. Hullender, 8 N.C. App. 41, 173 S.E.2d 581 (1970).

In accord with 5th paragraph in original. See State v. Council, 6 N.C. App. 397, 169 S.E.2d 921 (1969); State v. Bailey, 278 N.C. 80, 178 S.E.2d 809 (1971).

Punishment for Common-Law Robbery.—

A sentence of five years' imprisonment imposed upon a verdict of guilty of common-law robbery is to be within the statutory maximum. State v. Jackson, 8 N.C. App. 346, 174 S.E.2d 53 (1970).

"Endangered or Threatened" Construed Conjunctively.—Although this section sets forth disjunctively, "endangered or threatened," several means or ways by which this offense may be committed, a warrant thereunder correctly charges them conjunctively, as "endangered and threatened." State v. Swaney, 277 N.C. 602, 178 S.E.2d 399 (1971).

The gist of the offense, etc.—

In an indictment for robbery with firearms or other dangerous weapons, the gist of the offense is not the taking of personal property, but a taking or attempted taking by force or putting in fear by the use of firearms or other dangerous weapons. State v. Harris, 8 N.C. App. 653, 174 S.E.2d 334 (1970).

The gist of the offense of armed robbery is not the taking but the taking by force or putting in fear. Testimony by the victim of the armed robbery that he was scared is sufficient to meet the requirements of the statute. State v. Swaney, 277 N.C. 602, 178 S.E.2d 399 (1971).

The offense requires the taking, etc.—

In order to commit robbery, property must be taken, which is larceny; thus the taking or attempted taking of property is an essential element of robbery. State v. Council, 6 N.C. App. 397, 169 S.E.2d 921 (1969).

It is not incumbent upon the State to prove that defendants actually took money. In a prosecution for the offense of armed robbery the offense is complete if there is an attempt to take personal property by use of firearms. State v. Jenkins, 8 N.C. App. 532, 174 S.E.2d 690 (1970).

Profit Immaterial.—

In accord with original. See State v. Jenkins, 8 N.C. App. 532, 174 S.E.2d 690 (1970).

It is not necessary to describe accurately, etc.—

In robbery it is not necessary or material to describe accurately or prove the particular identity or value of the property, further than to show that it was the property of the person assaulted or in his care, and had a value. State v. Council, 6 N.C. App. 397, 169 S.E.2d 921 (1969).

In an indictment for robbery, unlike an indictment for larceny, the kind and value of the property taken is not material—the gist of the offense is not the taking but a taking by force or putting in fear. State v. Council, 6 N.C. App. 397, 169 S.E.2d 921 (1969).

Where the gist of the offense as described in the indictment is the attempt to commit robbery by the use or threatened use of firearms, the force or intimidation occasioned by the use or threatened use of firearms is the main element of the offense. In such a case, it is not necessary or material to describe accurately or prove the particular identity or value of the property, provided the indictment shows that the property was that of the person assaulted or under his care, and that such property is the subject of robbery and that it had some value. State v. Owens, 277 N.C. 697, 178 S.E.2d 442 (1971).

An indictment for robbery with firearms will support a conviction, etc.—

In accord with 5th paragraph in original. See State v. Conrad, 275 N.C. 342, 168 S.E.2d 39 (1969).

An indictment for armed robbery under this section will support a verdict of guilty of common-law robbery. State v. Jackson, 6 N.C. App. 406, 170 S.E.2d 137 (1969).

An indictment for robbery with firearms will support a conviction of the lesser offenses of common-law robbery, assault, larceny from the person, or simple larceny. State v. Swaney, 277 N.C. 602, 178 S.E.2d 399 (1971).

Common-law robbery is a lesser included offense of armed robbery, and an indictment for armed robbery will support a conviction for common-law robbery. State v. Bailey, 278 N.C. 80, 178 S.E.2d 809 (1971).

An indictment for robbery must contain a description, etc.—

An indictment is defective under this section where it does not describe any property sufficiently to show that it was the subject of robbery, and although the indictment states a value, what property has the value does not appear. State v. Owens, 277 N.C. 697, 178 S.E.2d 442 (1971).

Proof of Intent.—

In accord with 1st paragraph in original. See State v. Reaves, 9 N.C. App. 315, 176 S.E.2d 13 (1970).

It is not necessary that ownership, etc.—

In accord with original. See State v. McGilvery, 9 N.C. App. 15, 175 S.E.2d 328 (1970).

Evidence.—

Testimony by armed robbery victim, including identification of defendant, was sufficient for submission of case to the jury. State v. Canady, 8 N.C. App. 320, 174 S.E.2d 140 (1970).

Where defendants entered pleas of not guilty to charges of armed robbery and there is nothing in the record to show that they made any judicial admission that the offense had actually occurred, a trial court's instruction to the jury that defendants "do not deny that somebody did this, but they say they are not the men, and some other men did it, not themselves," is an unauthorized expression of opinion on the evidence in violation of this section. State v. Brinkley, 10 N.C. App. 160, 177 S.E.2d 727 (1970).

Attempt.—

There can be no attempt to commit robbery in the absence of an overt act in part execution of the intent to commit the crime. State v. Powell, 6 N.C. App. 8, 169 S.E.2d 210 (1969).

In determining whether a person has been guilty of the offense of attempting to commit robbery, the courts are guided by the peculiar facts of each case, in order to decide whether the acts of the defendant have advanced beyond the stage of mere preparation, to the point where it can be said that an attempt to commit the crime has been made. The question is one of degree, and cannot be controlled by exact definition. State v. Powell, 6 N.C. App. 8, 169 S.E.2d 210 (1969).

The attempt to take property by the forbidden means, all other elements being present, completes the offense of armed robbery. State v. Jenkins, 8 N.C. App. 532, 174 S.E.2d 690 (1970).

Failure to Instruct on Common-Law Robbery.—

When there is evidence of defendant's guilt of common-law robbery, it is error for the court to fail to submit the lesser offense to the jury. State v. Bailey, 278 N.C. 80, 178 S.E.2d 809 (1971).

Where conflicting testimony raised an issue for the jury as to whether defendant had in his possession and used or threatened to use a firearm or other dangerous weapon to perpetrate the robbery, the trial judge, even without request for special instructions, should have submitted the lesser offense of common-law robbery to the jury under proper instructions. State v. Bailey, 278 N.C. 80, 178 S.E.2d 809 (1971).

Maximum Punishment.—

Punishment under this section which does not exceed the limit fixed by this section cannot be considered cruel and unusual in a constitutional sense. State v. Frietch, 8 N.C. App. 331, 174 S.E.2d 149 (1970).

Property alleged to have been taken should be described by the name usually applied to it when in the condition it was in when taken, and where possible to state the number or quantity, kind, quality, distinguishing features, etc., thereof. State v. Council, 6 N.C. App. 397, 169 S.E.2d 921 (1969).

It Must Appear That Article Taken Had Some Value.—Although value need not be averred by a specific allegation, it must appear from the indictment that the article taken had some value. State v. Council, 6 N.C. App. 397, 169 S.E.2d 921 (1969).

The allegation in a bill of indictment that the property taken was "personal property of the value of . . ." is insufficient to charge the offense of robbery. State v. Council, 6 N.C. App. 397, 169 S.E.2d 921 (1969).

In an indictment or information for robbery by taking money, the term "money" itself imports some value, of which fact the court will take judicial notice. State v. Owens, 277 N.C. 697, 178 S.E.2d 442 (1971).

Where the property involved is described in an indictment under this section as "U.S. currency," it is the subject of robbery and some value can be inferred from the description of the property itself. State v. Owens, 277 N.C. 697, 178 S.E.2d 442 (1971).

And That It May Be Subject of Larceny.—An indictment for robbery must contain a description of the property sufficient, at least, to show that such property is the subject of robbery. To constitute the offense of robbery the property must be such as is the subject of larceny. State v. Council, 6 N.C. App. 397, 169 S.E.2d 921 (1969).

Money is recognized by law as property which may be the subject of larceny, and hence of robbery. State v. Owens, 277 N.C. 697, 178 S.E.2d 442 (1971).

Bill Need Not Allege That Defendant Intended Conversion of Property.—A bill of indictment for armed robbery need not allege that defendants intended to convert the personal property stolen to their own

use. State v. Frietch, 8 N.C. App. 331, 174 S.E.2d 149 (1970).

Bill of indictment for armed robbery sufficiently charged felonious intent where it alleged that defendants, by the use and threatened use of firearms whereby the life of a motel night clerk was endangered, unlawfully, willfully and feloniously took money from the motel. State v. Frietch, 8 N.C. App. 331, 174 S.E.2d 149 (1970).

Failing to Submit Issues of Assault with a Deadly Weapon and Simple Assault.—Where there is no evidence in an armed robbery prosecution that any offense other than armed robbery or common-law robbery had been committed, the trial court does not err in failing to submit the issues of assault with a deadly weapon and simple assault. State v. Gurkin, 8 N.C. App. 304, 174 S.E.2d 20 (1970).

No Fatal Variance between Indictment and Evidence.—There was no fatal variance between an indictment which charged that property was taken from the "residence" or "place of business" of a named person and evidence that the armed robbery occurred at a finance company where the person named was employed, the property having been in the lawful custody of such person. State v. McGilvery, 9 N.C. App. 15, 175 S.E.2d 328 (1970).

Exception to signing of judgment entered upon defendant's conviction of armed robbery is without merit where the indictment properly charged defendant with armed robbery, the evidence supports the judgment and the sentence is within the statutory limits. State v. Hughes, 8 N.C. App. 334, 174 S.E.2d 1 (1970).

Verbal Demand to Surrender Money Not Required.—The fact that neither defendant nor a companion made any verbal demand on the prosecuting witness to surrender money did not entitle defendant to a nonsuit in an armed robbery prosecution, where evidence showed that the witness immediately pitched the money onto the floor when a gun was pointed in his face. State v. Jenkins, 8 N.C. App. 532, 174 S.E.2d 690 (1970).

Robbery Includes Assault.—The crime of robbery ex vi termini includes an assault on the person. State v. Powell, 6 N.C. App. 8, 169 S.E.2d 210 (1969).

The fact that the allegations in an armed robbery indictment include a charge of assault does not render the indictment invalid. State v. Swaney, 277 N.C. 602, 178 S.E.2d 399 (1971).

Necessity for Instruction as to Lesser Included Offense Arises Only Where Evidence Warrants. — In an armed robbery prosecution, there is no necessity for the trial judge to instruct the jury as to an included crime of lesser degree where the State's evidence tends to show a completed robbery and there is no conflicting evidence relating to the elements of the crime charged. State v. Reaves, 9 N.C. App. 315, 176 S.E.2d 13 (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, and 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. Bailey, 278 N.C. 80, 178 S.E.2d 809 (1971).

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. However, the trial court is not required to submit to the jury the question of a lesser offense, included in that charged in the indictment, where there is no evidence to support such a verdict. State v. Owens, 277 N.C. 697, 178 S.E.2d 442 (1971).

Where under the State's evidence, a defendant would be guilty of attempted armed robbery, and under the defendant's evidence, he would not be guilty of attempted armed robbery or attempted common-law robbery, the judge is not required to instruct the jury that it might return a verdict of guilty of attempted common-law robbery. State v. Owens, 277 N.C. 697, 178 S.E.2d 442 (1971).

Where the evidence for the State clearly shows an armed robbery and there is no evidence of a lesser offense, the trial court is not required to submit to the jury the lesser included offenses of common-law robbery and assault. State v. Swaney, 277 N.C. 602, 178 S.E.2d 399 (1971).

Instruction Not Misleading.—In its instructions, the trial court's use of the words "some weapon" rather than "firearms or other dangerous weapon," although not approved, was not such as to mislead or misinform the jury, where the court specified a pistol as the weapon allegedly

used elsewhere in the charge. State v. Bailey, 278 N.C. 80, 178 S.E.2d 809 (1971).

Applied in State v. Reid, 5 N.C. App. 424, 168 S.E.2d 511 (1969); State v. Gwyn, 7 N.C. App. 397, 172 S.E.2d 105 (1970); State v. Basden, 8 N.C. App. 401, 174 S.E.2d 613 (1970); State v. Elliott, 9 N.C. App. 1, 175 S.E.2d 312 (1970); State v. Summerlin, 9 N.C. App. 457, 176 S.E.2d 356 (1970).

Cited in State v. Bumper, 5 N.C. App. 528, 169 S.E.2d 65 (1969); State v. Smith, 278 N.C. 476, 180 S.E.2d 7 (1971).

§ 14-89.1. Safecracking and safe robbery.

Evidence sufficient to sustain conviction for safecracking. State v. Walker, 6 N.C. App. 447, 170 S.E.2d 627 (1969).

Stated in State v. Johnson, 7 N.C. App. 53, 171 S.E.2d 106 (1969).

ARTICLE 18.

Embezzlement.

§ 14-90. Embezzlement of property received by virtue of office or employment.

The offense of embezzlement is exclusively statutory, etc.—

In accord with 2nd paragraph in original. See State v. Hutson, 10 N.C. App. 653, 179 S.E.2d 858 (1971).

Elements of Offense.—

To convict a defendant of embezzlement in violation of this statute the Supreme Court has declared that "four distinct propositions of fact must be established, (1) that the defendant was the agent of the prosecutor, and (2) by the terms of his employment had received property of his principal; (3) that he received it in the course of his employment; and (4) knowing it was not his own, converted it to his own use." State v. Buzzelli, 11 N.C. App. 52, 180 S.E.2d 472 (1971).

Evidence Sufficient, etc.—

The mere making of false entries in books of account is not sufficient evidence of an act of conversion constituent to the crime of embezzlement regardless of the defendant's fraudulent intent at the time of making such a false entry. But depositing funds of another in one's own account, together with the making of incorrect entries in books of account, and failing to turn the other's funds over to him at a time when obligated to do so, is sufficient evidence of conversion. State v. Buzzelli, 11 N.C. App. 52, 180 S.E.2d 472 (1971).

Evidence that during a period in which a defendant had allegedly been guilty of embezzling money from his employer the defendant spent money considerably in excess of his known income or made large bank deposits has been held admissible. State v. Buzzelli, 11 N.C. App. 52, 180 S.E.2d 472 (1971).

"Embezzlement". — Embezzlement is simply a fraudulent breach of trust by misapplying the property entrusted to the defendant to the use either of himself or another, when done with a fraudulent intent. State v. Hutson, 10 N.C. App. 653, 179 S.E.2d 858 (1971).

Embezzlement and fraudulent conversion are not necessarily and strictly synonymous. State v. Hutson, 10 N.C. App. 653, 179 S.E.2d 858 (1971).

Indictment under This Section Rather Than § 14-168.1.—It was proper for the State to elect to indict the defendant for felonious embezzlement under this section, the broader statute, rather than to indict him under § 14-168.1, the narrower statute. State v. Hutson, 10 N.C. App. 653, 179 S.E.2d 858 (1971).

Section 14-168.1 is more limited in its scope with regard to bailees than this section; it appears to embrace a bailee "who fraudulently converts the same" to his own use, while this section covers the bailee who "shall embezzle or fraudulently or knowingly and willfully misapply or convert to his own use." State v. Hutson, 10 N.C. App. 653, 179 S.E.2d 858 (1971).

Section 14-168.1 does not remove bailees from this section or make embezzlement by a bailee a misdemeanor. State v. Hutson, 10 N.C. App. 653, 179 S.E.2d 858 (1971).

There is no irreconcilable conflict between this section and § 14-168.1 as they relate to bailees. State v. Hutson, 10 N.C. App. 653, 179 S.E.2d 858 (1971).

Article 19.

False Pretenses and Cheats.

§ **14-107. Worthless checks.**—It shall be unlawful for any person, firm or corporation, to draw, make, utter or issue and deliver to another, any check or draft on any bank or depository, for the payment of money or its equivalent, knowing at the time of the making, drawing, uttering, issuing and delivering such check or draft as aforesaid, that the maker or drawer thereof has not sufficient funds on deposit in or credit with such bank or depository with which to pay the same upon presentation.

It shall be unlawful for any person, firm or corporation to solicit or to aid and abet any other person, firm or corporation to draw, make, utter or issue and deliver to any person, firm or corporation, any check or draft on any bank or depository for the payment of money or its equivalent, being informed, knowing or having reasonable grounds for believing at the time of the soliciting or the aiding and abetting that the maker or the drawer of the check or draft has not sufficient funds on deposit in, or credit with, such bank or depository with which to pay the same upon presentation.

The word "credit" as used herein shall be construed to mean an arrangement or understanding with the bank or depository for the payment of any such check or draft.

Any person, firm or corporation violating any provision of this section shall be guilty of a misdemeanor and upon conviction shall be punished as follows:

(1) If the amount of such check or draft is not over fifty dollars ($50.00), the punishment shall be by a fine not to exceed fifty dollars ($50.00) or imprisonment for not more than 30 days. Provided, however, if such person has been convicted three times of violating G.S. 14-107, he shall on the fourth and all subsequent convictions be punished in the discretion of the district or superior court as for a general misdemeanor.

(2) If the amount of such check or draft is over fifty dollars ($50.00), the punishment shall be by a fine not to exceed five hundred dollars ($500.00) or imprisonment for not more than six months, or both. Provided, however, if such person has been convicted three times of violating G.S. 14-107, he shall on the fourth and all subsequent convictions be punished in the discretion of the district or superior court as for a general misdemeanor. (1925, c. 14; 1927, c. 62; 1929, c. 273, ss. 1, 2; 1931, cc. 63, 138; 1933, cc. 43, 64, 93, 170, 265, 362, 458; 1939, c. 346; 1949, cc. 183, 332; 1951, c. 356; 1961, c. 89; 1963, cc. 73, 547, 870; 1967, c. 49, s. 1; c. 661, s. 1; 1969, c. 157; c. 876, s. 1; cc. 909, 1014; c. 1224, s. 10; 1971, c. 243, s. 1.)

Editor's Note.—

The 1971 amendment transferred a former last sentence in this section to appear as the third paragraph, and substituted the language beginning "and upon conviction" for "punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both" in the first sentence of the last paragraph.

Section 2, c. 243, Session Laws 1971, provides: "This act shall become effective on and apply to all violations occurring after the date of ratification." The act was ratified on April 27, 1971.

Applied in State v. McClam, 7 N.C. App. 477, 173 S.E.2d 53 (1970).

§ **14-111.2. Obtaining ambulance services without intending to pay therefor—Alamance and other named counties.** — Any person who with intent to defraud shall obtain ambulance services without intending at the time of obtaining such services to pay, if financially able, any reasonable charges therefor shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. A determination by the court that the recipient of such services has willfully failed to pay

for the services rendered for a period of 90 days after request for payment, and that the recipient is financially able to do so, shall raise a presumption that the recipient at the time of obtaining the services intended to defraud the provider of the services and did not intend to pay for the services.

This section shall apply to Alamance, Anson, Caswell, Catawba, Chatham, Cumberland, Davie, Duplin, Forsyth, Gaston, Guilford, Iredell, Montgomery, Orange, Person, Randolph, Rockingham, Stanly, Surry, Vance and Wilkes Counties only. (1967, c. 964; 1969, cc. 292, 753; c. 1224, s. 4; 1971, cc. 125, 203, 300, 496.)

Editor's Note.—

The first 1971 amendment made this section applicable to Person County.

The second 1971 amendment made this section applicable to Iredell.

The third 1971 amendment made this section applicable to Montgomery and Vance Counties.

The fourth 1971 amendment made this section applicable to Duplin County.

§ **14-111.3. Making false ambulance request in Buncombe, Duplin, Haywood and Madison Counties.**—It shall be unlawful for any person or persons to willfully obtain or attempt to obtain ambulance service that is not needed, or to make a false request or report that an ambulance is needed. Every person convicted of violating this section shall upon conviction be punished by a fine of fifty dollars ($50.00) or imprisonment not to exceed 30 days or both such fine and imprisonment.

This section shall apply only to the Counties of Buncombe, Duplin, Haywood and Madison. (1965, c. 976, s. 2; 1971, c. 496.)

Editor's Note. — The 1971 amendment made this section applicable to Duplin County.

ARTICLE 19A.

Obtaining Property or Services by False or Fraudulent Use of Credit Device or Other Means.

§ **14-113.1. Use of false or counterfeit credit device; unauthorized use of another's credit device; use after notice of revocation.**—It shall be unlawful for any person knowingly to obtain or attempt to obtain credit, or to purchase or attempt to purchase any goods, property or service, by the use of any false, fictitious, or counterfeit telephone number, credit number or other credit device, or by the use of any telephone number, credit number or other credit device of another without the authority of the person to whom such number or device was issued, or by the use of any telephone number, credit number or other credit device in any case where such number or device has been revoked and notice of revocation has been given to the person to whom issued or he has knowledge or reason to believe that such revocation has occurred. (1961, c. 223, s. 1; 1965, c. 1147; 1967, c. 1244, s. 1; 1971, c. 1213, s. 1.)

Editor's Note.—

The 1971 amendment added "or he has knowledge or reason to believe that such revocation has occurred."

§ **14-113.5. Making, possessing or transferring device for theft of telecommunication service; publication of information regarding schemes, devices, means, or methods for such theft; concealment of existence, origin or destination of any telecommunication.**—It shall be unlawful for any person knowingly to:

(1) Make or possess any instrument, apparatus, equipment, or device designed, adapted, or which is used

a. For commission of a theft of telecommunication service in violation of this Article, or

b. To conceal, or assist another to conceal, from any supplier of telecommunication service or from any lawful authority the exis-

tence or place of origin or of destination of any telecommunication, or

(2) Sell, give, transport, or otherwise transfer to another or offer or advertise for sale, any instrument, apparatus, equipment, or device described in (1) above, or plans or instructions for making or assembling the same; under circumstances evincing an intent to use or employ such apparatus, equipment, or device, or to allow the same to be used or employed, for a purpose described in (1)a or (1)b above, or knowing or having reason to believe that the same is intended to be so used, or that the aforesaid plans or instructions are intended to be used for making or assembling such apparatus, equipment or device.

(3) Publish plans or instructions for making or assembling or using any apparatus, equipment or device described in (1) above, or

(4) Publish the number or code of an existing, cancelled, revoked or nonexistent telephone number, credit number or other credit device, or method of numbering or coding which is employed in the issuance of telephone numbers, credit numbers or other credit devices with knowledge or reason to believe that it may be used to avoid the payment of any lawful telephone or telegraph toll charge under circumstances evincing an intent to have such telephone number, credit number, credit device or method of numbering or coding so used. As used in this section, "publish" means the communication or dissemination of information to any one or more persons, either orally, in person or by telephone, radio or television, or in a writing of any kind, including without limitation a letter or memorandum, circular or handbill, newspaper or magazine article, or book.

(5) Any instrument, apparatus, device, plans or instructions or publications described in this section may be seized under warrant or incident to a lawful arrest for a violation of this section, and, upon the conviction of a person for a violation of this section, such instrument, apparatus, device, plans, instructions or publication may be destroyed as contraband by the sheriff of the county in which such person was convicted or turned over to the person providing telephone or telegraph service in the territory in which the same was seized. (1965, c. 1147; 1971, c. 1213, s. 2.)

Editor's Note. — The 1971 amendment, in subdivision (1), inserted "instrument" in the introductory language, and deleted "to" preceding "assist" in subparagraph b. The amendment also inserted "instrument" near the beginning of subdivision (2), and added subdivisions (3), (4), and (5).

§ **14-113.6A. Venue of offenses.**—(a) Any of the offenses described in Article 19A which involve the placement of telephone calls may be deemed to have been committed at either the place at which the telephone call or calls were made or at the place where the telephone call or calls were received.

(b) An offense under G.S. 14-113.5(3) or (4) may be deemed to have been committed at either the place at which the publication was initiated or at which the publication was received or at which the information so published was utilized to avoid or attempt to avoid the payment of any lawful telephone or telegraph toll charge. (1971, c. 1213, s. 3.)

ARTICLE 19B.

Credit Card Crime Act.

§ **14-113.8. Definitions.**—The following words and phrases as used in this Chapter, unless a different meaning is plainly required by the context, shall have the following meanings:

(2) Credit Card.—"Credit card" means any instrument or device, whether known as a credit card, credit plate, or by any other name, issued with or without fee by an issuer for the use of the cardholder in obtaining money, goods, services or anything else of value on credit, but shall not include a telephone number, credit number or other credit device which is covered by the provisions of Article 19A of this Chapter. (1971, c. 1213, s. 4.)

Editor's Note. — The 1971 amendment, in subdivision (2), added "but shall not include a telephone number, credit number or other credit device which is covered by the provisions of Article 19A of this Chapter."

As the rest of the section was not changed by the amendment, only the opening paragraph and subdivision (2) are set out.

Cited in State v. Trollinger, 11 N.C. App. 400, 181 S.E.2d 212 (1971).

§ 14-113.13. Credit card fraud.

Applied in State v. Caudle, 276 N.C. 550, 173 S.E.2d 778 (1970); State v. Caudle, 7 N.C. App. 276, 172 S.E.2d 231 (1970).

§ 14-113.17. Punishment and penalties.

Applied in State v. Caudle, 276 N.C. 550, 173 S.E.2d 778 (1970); State v. Caudle, 7 N.C. App. 276, 172 S.E.2d 231 (1970).

ARTICLE 20.

Frauds.

§ 14-115. Secreting property to hinder enforcement of lien or security interest.

Punishment.—Since this section does not prescribe specific punishment for its violation, by virtue of § 14-3 a person convicted of violating this section would be subject to a fine, to imprisonment for a term not exceeding two years, or both, in the discretion of the court. State v. Batiste, 5 N.C. App. 511, 168 S.E.2d 510 (1969).

§ 14-117.2. Gasoline price advertisements. — (a) Advertisements by any person or firm of the price of any grade of motor fuel must clearly so indicate if such price is dependent upon purchaser himself drawing or pumping the fuel.

(b) Any person or firm violating the provisions of this section shall be guilty of a separate misdemeanor, punishable by a fine of not more than fifty dollars ($50.00) or imprisonment of not more than 30 days or both such fine and imprisonment, for each day that such violation continues. (1971, c. 324, ss. 1, 2.)

Editor's Note.—Session Laws 1971, c. 324, s. 3, makes the act effective July 1, 1971.

ARTICLE 21.

Forgery.

§ 14-119. Forgery of bank notes, checks and other securities.

Punishment.—

A sentence of five years' imprisonment imposed upon defendant's plea of guilty to the charge of forging a check in the amount of $45.00 is within the maximum authorized by this section. State v. Bolder, 8 N.C. App. 343, 174 S.E.2d 139 (1970).

Cited in State v. Moffitt, 9 N.C. App. 694, 177 S.E.2d 324 (1970).

§ 14-120. Uttering forged paper or instrument containing a forged endorsement.

Applied in State v. Hall, 8 N.C. App. 101, 173 S.E.2d 627 (1970).

Cited in State v. Moffitt, 9 N.C. App. 694, 177 S.E.2d 324 (1970).

SUBCHAPTER VI. CRIMINAL TRESPASS.

Article 22.

Trespasses to Land and Fixtures.

§ **14-129. Taking, etc., of certain wild plants from land of another.**—No person, firm or corporation shall dig up, pull up or take from the land of another or from any public domain, the whole or any part of any venus fly trap (Dionaea muscipula), trailing arbutus, Aaron's Rod (Thermopsis caroliniana), Bird-foot Violet (Viola pedata), Bloodroot (Sanguinaria canadensis), Blue Dogbane (Amsonia tabernaemontana), Cardinal-flower (Lobelia cardinalis), Columbine (Aquilegia canadenis), Dutchman's Breeches (Dicentra cucullaria), Maidenhair Fern (Adiantum pedatum), Walking Fern (Camptosorus rhizophyllus), Gentians (Gentiana), Ginseng (Panax quinquefolium), Ground Cedar, Running Cedar, Hepatica (Hepatica americana and acutiloba), Jack-in-the-Pulpit (Arisaema triphyllum), Lily (Lilium), Lupine (Lupinus), Monkshood (Aconitum uncinatum and reclinatum), May Apple (Podophyllum peltatum), Orchids (all species), Pitcher Plant (Sarracenia), Sea Oats (Uniola paniculata), Shooting Star (Dodecatheon meadia), Oconee Bells (Shortia galacifolia), Solomon's Seal (Polygonatum), Trailing Christmas (Greens-Lycopodium), Trillium (Trillium), Virginia Bluebells (Mertensia virginica), and Fringe Tree (Chionanthus virginicus), American holly, white pine, red cedar, hemlock or other coniferous trees, or any flowering dogwood, any mountain laurel, any rhododendron, or any ground pine, or any Christmas greens, or any Judas tree, or any leucothea, or any azalea, without having in his possession a permit to dig up, pull up or take such plants, signed by the owner of such land, or by his duly authorized agent. Any person convicted of violating the provisions of this section shall be fined not less than ten dollars ($10.00) nor more than fifty dollars ($50.00) for each offense. The provisions of this section shall not apply to the counties of Cabarrus, Carteret, Catawba, Cherokee, Chowan, Cumberland, Currituck, Dare, Duplin, Edgecombe, Franklin, Gaston, Granville, Hertford, McDowell, Pamlico, Pender, Person, Richmond, Rockingham, Rowan and Swain. (1941, c. 253; 1951, c. 367, s. 1; 1955, cc. 251, 962; 1961, c. 1021; 1967, c. 355; 1971, c. 951.)

Editor's Note.—

The 1971 amendment inserted the language beginning "Aaron's Rod" and ending "Fringe Tree (Chionanthus virginicus)" in the first sentence.

§ **14-132. Disorderly conduct in and injuries to public buildings and facilities.**

Applied in In re Burrus, 275 N.C. 517, 169 S.E.2d 879 (1969).

Cited in State v. Midgett, 8 N.C. App. 230, 174 S.E.2d 124 (1970); McKeiver v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971).

§ **14-133. Erecting artificial islands and lumps in public waters.**

Applied in State v. Murry, 277 N.C. 197, 176 S.E.2d 738 (1970).

§ **14-134.1. Depositing trash, garbage, etc., on lands of another or in waters of the State.**—It shall be unlawful for any person, firm, organization, corporation, or for the governing body, agents or employees of any municipal corporation or county to willfully place, deposit, leave or cause to be placed, deposited or left, either temporarily or permanently, any trash, refuse, garbage, debris, litter, plastic materials, scrap vehicle or equipment, or waste materials of any kind upon the lands of another without first obtaining written consent of the owner thereof; or unless specifically authorized by law or lawful authority, to place, deposit, leave or cause to be placed, deposited or left, either temporarily or permanently, any such materials in any waters within this State or over which this State has juris-

diction. Provided, it shall not be unlawful to deposit such materials upon a public dump maintained by a municipality or county.

A violation of this section shall constitute a misdemeanor and is punishable by a fine of not more than five hundred dollars ($500.00) or by imprisonment of not more than six months, or both, in the discretion of the court. (1965, c. 300, ss. 2, 3; 1969, c. 22, s. 2; 1971, c. 769.)

Editor's Note.—

The 1971 amendment, effective July 1, 1971, inserted "willfully" near the beginning of the first sentence, and substituted the words beginning "or unless specifically authorized by law or lawful authority, to place, deposit" and ending "over which this State has jurisdiction" for "or to deposit any of such materials in any river or stream" at the end of the first sentence.

ARTICLE 23.

Trespasses to Personal Property.

§ 14-160. Wilful and wanton injury to personal property; punishments.

Applied in State v. Locklear, 7 N.C. App. 375, 172 S.E.2d 267 (1970); In re Ingram, 8 N.C. App. 266, 174 S.E.2d 89 (1970).

ARTICLE 24.

Vehicles and Draft Animals—Protection of Bailor against Acts of Bailee.

§ 14-168.1. Conversion by bailee, lessee, tenant or attorney in fact.

Embezzlement and fraudulent conversion are not necessarily and strictly synonymous. State v. Hutson, 10 N.C. App. 653, 179 S.E.2d 858 (1971).

Compared with § 14-90.—This section is more limited in its scope with regard to bailees than § 14-90; it appears to embrace a bailee "who fraudulently converts the same" to his own use, while § 14-90 covers the bailee who "shall embezzle or fraudulently or knowingly and willfully misapply or convert to his own use." State v. Hutson, 10 N.C. App. 653, 179 S.E.2d 858 (1971).

It was proper for the State to elect to indict the defendant for felonious embezzlement under § 14-90, the broader statute, rather than to indict him under this section, the narrower statute. State v. Hutson, 10 N.C. App. 653, 179 S.E.2d 858 (1971).

This section does not remove bailees from § 14-90 or make embezzlement by a bailee a misdemeanor. State v. Hutson, 10 N.C. App. 653, 179 S.E.2d 858 (1971).

There is no irreconcilable conflict between § 14-90 and this section as they relate to bailees. State v. Hutson, 10 N.C. App. 653, 179 S.E.2d 858 (1971).

SUBCHAPTER VII. OFFENSES AGAINST PUBLIC MORALITY AND DECENCY.

ARTICLE 26.

Offenses against Public Morality and Decency.

§ 14-177. Crime against nature.

This section condemns crimes against nature whether committed against adults or children. State v. Copeland, 11 N.C. App. 516, 181 S.E.2d 722 (1971).

Definition.—

The crime against nature is sexual intercourse contrary to the order of nature. State v. Copeland, 11 N.C. App. 516, 181 S.E.2d 722 (1971).

This section and § 14-202.1, etc.—

Because the two offenses are separate and distinct and the constituent elements are not identical, a violation of § 14-202.1 is not a lesser included offense of the crime against nature described in this section. State v. Copeland, 11 N.C. App. 516, 181 S.E.2d 722 (1971).

Section 14-202.1 condemns those offenses of an unnatural sexual nature against children under 16 years of age by persons over 16 years of age which cannot be reached and punished under the provisions of this

section. State v. Copeland, 11 N.C. App. 516, 181 S.E.2d 722 (1971).

Section 14-202.1 condemns other acts against children than unnatural sexual acts. State v. Copeland, 11 N.C. App. 516, 181 S.E.2d 722 (1971).

This section and § 14-202.1 can be reconciled and both declared to be operative without repugnance. State v. Copeland, 11 N.C. App. 516, 181 S.E.2d 722 (1971).

Proof of penetration, etc.—

In accord with original. See State v. Copeland, 11 N.C. App. 516, 181 S.E.2d 722 (1971).

Applied in State v. Caudle, 7 N.C. App. 276, 172 S.E.2d 231 (1970).

§ 14-178. Incest between certain near relatives.

Intercourse with Illegitimate Daughter.—

A father violates this section and by reason thereof is guilty of the statutory felony of incest if he has sexual intercourse, either habitual or in a single instance, with a woman or girl whom he knows to be his daughter. State v. Vincent, 278 N.C. 63, 178 S.E.2d 608 (1971).

Corroboration of Prosecutrix' Testimony, etc.—

A conviction for incest may be had against a father upon the uncorroborated testimony of the daughter if such testimony suffices to establish all the elements of the offense beyond a reasonable doubt. State v. Vincent, 278 N.C. 63, 178 S.E.2d 608 (1971).

§ 14-181. Miscegenation.

Quoted in Swann v. Charlotte-Mecklenburg Bd. of Educ., 318 F. Supp. 786 (W.D.N.C. 1970).

§ 14-182. Issuing license for marriage between white person and negro; performing marriage ceremony.

Quoted in Swann v. Charlotte-Mecklenburg Bd. of Educ., 218 F. Supp. 786 (W.D.N.C. 1970).

§ 14-184. Fornication and adultery.

"Lewdly and lasciviously cohabit," etc.—

A single act of illicit sexual intercourse is not fornication and adultery as defined by this section. "Lewdly and lasciviously cohabit" plainly implies habitual intercourse, in the manner of husband and wife, and together with the fact of not being married to each other, constitutes the offense, and in plain words draws the distinction between single or nonhabitual intercourse and the offense the statute means to denounce. State v. Robinson, 9 N.C. App. 433, 176 S.E.2d 253 (1970).

Circumstantial Evidence.—It is never essential to conviction of fornication and adultery that even a single act of illicit sexual intercourse be proven by direct testimony. While necessary to a conviction that such acts must have occurred, it is, nevertheless, competent to infer them from the circumstances presented in the evidence. State v. Robinson, 9 N.C. App. 433, 176 S.E.2d 253 (1970).

§ 14-185. Inducing female persons to enter hotels or boardinghouses for immoral purposes.

Cited in Wheeler v. Goodman, 306 F. Supp. 58 (W.D.N.C. 1969).

§ 14-187. Permitting unmarried female under eighteen in house of prostitution.

Cited in Wheeler v. Goodman, 306 F. Supp. 58 (W.D.N.C. 1969).

§ 14-188. Certain evidence relative to keeping disorderly houses admissible; keepers of such houses defined; punishment.

Cited in Wheeler v. Goodman, 306 F. Supp. 58 (W.D.N.C. 1969).

§§ 14-189, 14-189.1: Repealed by Sessions Laws 1971, c. 405, s. 4, effective July 1, 1971.

§§ **14-189.2, 14-190:** Repealed by Session Laws 1971, c. 591, s. 4.

§ **14-190.1. Obscene literature and exhibitions.**—(a) It shall be unlawful for any person, firm or corporation to intentionally disseminate obscenity in any public place. A person, firm or corporation disseminates obscenity within the meaning of this Article if he or it:

(1) Sells, delivers or provides or offers or agrees to sell, deliver or provide any obscene writing, picture, record or other representation or embodiment of the obscene; or
(2) Presents or directs an obscene play, dance or other performance or participates directly in that portion thereof which makes it obscene; or
(3) Publishes, exhibits or otherwise makes available anything obscene; or
(4) Exhibits, broadcasts, televises, presents, rents, sells, delivers, or provides; or offers or agrees to exhibit, broadcast, televise, present, rent or to provide; any obscene still or motion picture, film, filmstrip, or projection slide, or sound recording, sound tape, or sound track, or any matter or material of whatever form which is a representation, embodiment, performance, or publication of the obscene.

(b) For purposes of this Article any material is obscene if:

(1) The dominant theme of the material taken as a whole appeals to the prurient interest in sex; and,
(2) The material is patently offensive because it affronts contemporary national community standards relating to the description or representation of sexual matters; and,
(3) The material is utterly without redeeming social value; and,
(4) The material as used is not protected or privileged under the Constitution of the United States or the Constitution of North Carolina.

(c) Obscenity shall be judged with reference to ordinary adults except that it shall be judged with reference to children or other especially susceptible audiences if it appears from the character of the material or the circumstances of its dissemination to be especially designed for or directed to such children or audiences. In any prosecution for an offense involving dissemination of obscenity under this Article, evidence shall be admissible to show:

(1) The character of the audience for which the material was designed or to which it was directed;
(2) Whether the material is published in such a manner that an unwilling adult could not escape it;
(3) Whether the material is exploited so as to amount to pandering;
(4) What the predominant appeal of the material would be for ordinary adults or a special audience, and what effect, if any, it would probably have on the behavior of such people;
(5) Artistic, literary, scientific, educational or other social value, if any, of the material;
(6) The degree of public acceptance of the material throughout the United States;
(7) Appeal to prurient interest, or absence thereof, in advertising or in the promotion of the material.

Expert testimony and testimony of the author, creator or publisher relating to factors entering into the determination of the issue of obscenity shall also be admissible.

(d) It shall be unlawful for any person, firm or corporation to knowingly and intentionally create, buy, procure or possess obscene material with the purpose and intent of disseminating it unlawfully.

(e) It shall be unlawful for a person, firm or corporation to advertise or otherwise promote the sale of material represented or held out by said person, firm or corporation as obscene.

(f) Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor and, unless a greater penalty is expressly provided for in this Article, shall be fined or imprisoned in the discretion of the court. (1971, c. 405, s. 1.)

Editor's Note.—Section 5, c. 405, Session Laws 1971, makes the act effective July 1, 1971.

Interpretation of §§ 14-190.1 to 14-190.8.—Section 2, c. 405, Session Laws 1971, effective July 1, 1971, provides: "Every word, clause, sentence, paragraph, section, or other part of this act shall be interpreted in such manner as to be as expansive as the Constitution of the United States and the Constitution of North Carolina permit."

Section 3, c. 405, Session Laws 1971, effective July 1, 1971, provides: "If any word, clause, sentence, paragraph, section, or other part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof."

§ **14-190.2. Adversary hearing prior to seizure.**—(a) The purpose of this section is to provide an adversary determination of the question of whether books, magazines, motion pictures or other materials are obscene prior to their seizure.

(b) The public policy of this State requires that all proceedings prescribed in this section shall be examined, heard and disposed of with the maximum promptness and dispatch commensurate with the Constitution of the United States and the Constitution of North Carolina.

(c) Whenever any law-enforcement officer has reasonable cause to believe that any person, firm or corporation is engaged in the sale, display, distribution or dissemination in a public place of any books, magazines, motion pictures or other materials which are obscene within the meaning of G.S. 14-190.1, he shall, without seizing such material, notify the solicitor for the judicial district in which such material is so believed to be offered. Upon receiving such notification the solicitor for said judicial district shall submit a written complaint to any resident judge of the Superior Court Division of the General Court of Justice or any judge of the District Court Division of the General Court of Justice, to which shall be attached, if available without purchase or seizure, a true copy of the allegedly obscene material. The complaint shall:

(1) Be directed against the person, firm or corporation believed to be engaged in the sale, display, distribution or dissemination in a public place of the material alleged to be obscene and against such material by name, description, volume and issue as appropriate;

(2) Allege that such material is obscene within the meaning of G.S. 14-190.1;

(3) Designate as respondent the person, firm or corporation believed to be engaged in the sale, display, distribution or dissemination in a public place of the material alleged to be obscene within the said judicial district;

(4) Seek an adjudication that said material is obscene;

(5) Seek a temporary restraining order prohibiting the respondent from removing, causing, or permitting to be removed the material alleged to be obscene within the meaning of G.S. 14-190.1; and,

(6) Seek a warrant to search for and seize said material as obscene within the meaning of G.S. 14-190.1.

(d) Upon receipt of such complaint from the solicitor, the judge shall:

(1) Issue a summons to be served upon the respondent which shall be in the same form prescribed for warrants in G.S. 15-20, except that it shall summon the respondent to appear before the said judge at a stated time not less than two days, including the day of service, and not more than four days, including the day of service, after service of the summons, and to show cause why the said material should not be declared obscene and a warrant issued authorizing a search for and seizure of said material;

(2) Issue a subpoena as provided for under G.S. 1A-1, Rule 45 of the Rules

of Civil Procedure commanding the respondent to produce copies of all items of said material not attached to the complaint in order that a complete adversary hearing may be held on the question of whether said material should be declared obscene and a warrant issued authorizing a search for and seizure of said material;

(3) Issue a temporary restraining order prohibiting the respondent from removing, causing, or permitting to be removed the material which is alleged to be obscene within the meaning of G.S. 14-190.1; provided, however, that such temporary restraining order shall not be construed as prohibiting the respondent from conducting sales in the normal course of business only, so long as at least one copy of each item alleged in the complaint to be obscene is retained for evidentiary purposes at the said hearing;

(4) Insure that any and all hearings held pursuant to this section are designed to focus searchingly upon the issue of whether the said material is obscene within the meaning of G.S. 14-190.1, and that the rights of the respondent to counsel, to confrontation and cross-examination of witnesses for the State, to present witnesses including expert witnesses in his own behalf, and all other rights granted the respondent by the Constitution of the United States or the Constitution of North Carolina are protected, and;

(5) Render a decision on the issue of whether said material is obscene within the meaning of G.S. 14-190.1 within two days, excluding the final day of said hearing, after the conclusion of any hearing held under the authority of this section.

(e) In the event that the judge fails to find the material involved is obscene within the meaning of G.S. 14-190.1, he shall enter judgment accordingly and dismiss the complaint. Should the respondent fail to appear or the judge find that said material is obscene within the meaning of G.S. 14-190.1, the judge involved shall enter judgment accordingly and issue a warrant to search for and seize said material. The warrant shall describe with reasonable certainty the person, premises or other place to be searched and the material for which the search is to be made and which is to be seized. The warrant must be signed by the issuing judge and bear the date and hour of its issuance above his signature.

(f) No judgment or subsequent order of enforcement thereof, entered pursuant to the provisions of this section, 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. Further, evidence of any hearing held pursuant to this section shall not be competent or admissible in any criminal action for the violation of any other section of this Article; provided, however, that where a violation involving the dissemination of obscenity under other sections of this Article is charged as having occurred subsequent to such hearing, having involved the same materials declared obscene under the provisions of this section, and the same party who was respondent in such hearing, then evidence of such hearing shall be competent and admissible as bearing on the issue of scienter only.

(g) Any respondent described in this section who shall violate any provision of this section or any order issued under any provision of this section shall be guilty of a misdemeanor and upon conviction shall be fined or imprisoned in the discretion of the court.

(h) Nothing in this section shall be construed as preventing any law-enforcement officer from arresting any person when that person is charged under a proper warrant or indictment with a criminal violation of this Article, or when that person has committed a crime in the presence of the officer, or when the officer has reasonable grounds to believe that that person has committed a crime in his presence. Neither shall anything in this section be construed as prohibiting any law-enforcement officer from seizing for evidentiary purposes single copies of any books, magazines, or other printed material, which he reasonably believes to be obscene

within the meaning of G.S. 14-190.1, when such seizure is made pursuant to a lawful arrest. (1971, c. 405, s. 1.)

Cross Reference.—See note to § 14-190.1.

Editor's Note.—Section 5, c. 405, Session Laws 1971, makes the act effective July 1, 1971.

§ 14-190.3. Exhibition of obscene pictures; posting of advertisements.—If any person, firm or corporation shall intentionally disseminate in any public place any motion picture which he or it knows or reasonably should know to be obscene within the meaning of G.S. 14-190.1; or, if any person, firm or corporation shall intentionally post any placard, writings, pictures, or drawings, which he or it knows or reasonably should know to be obscene within the meaning of G.S. 14-190.1, on walls, fences, billboards, or other public places; or, if any person, firm or corporation shall intentionally permit any exhibition or show, which he or it knows or reasonably should know to be obscene within the meaning of G.S. 14-190.1, to be conducted in any public place owned or controlled by said person, firm or corporation; the person, firm or corporation performing either one or all of the said acts shall be guilty of a misdemeanor and unless a greater penalty is expressly provided for in this Article, shall be punishable in the discretion of the court. (1971, c. 405, s. 1.)

Cross Reference.—See note to § 14-190.1.

Editor's Note.—Section 5, c. 405, Session Laws 1971, makes the act effective July 1, 1971.

§ 14-190.4. Coercing acceptance of obscene articles or publications.—No person, firm or corporation shall, as a condition to any sale, allocation, consignment or delivery for resale of any paper, magazine, book, periodical or publication require that the purchaser or consignee receive for resale any other article, book, or publication which is obscene within the meaning of G.S. 14-190.1; nor shall any person, firm or corporation deny or threaten to deny any franchise or impose or threaten to impose any penalty, financial or otherwise, by reason of the failure or refusal of any person to accept such articles, books, or publications, or by reason of the return thereof. Any violation of this section shall be a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1971, c. 405, s. 1.)

Cross Reference.—See note to § 14-190.1.

Editor's Note.—Section 5, c. 405, Session Laws 1971, makes the act effective July 1, 1971.

§ 14-190.5. Preparation of obscene photographs, slides and motion pictures.—Every person who knowingly:

(1) Photographs himself or any other person, for purposes of preparing an obscene film, photograph, negative, slide or motion picture for the purpose of dissemination in a public place; or

(2) Models, poses, acts, or otherwise assists in the preparation of any obscene film, photograph, negative, slide or motion picture for the purpose of dissemination in a public place, shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1971, c. 405, s. 1.)

Cross Reference.—See note to § 14-190.1.

Editor's Note.—Section 5, c. 405, Session Laws 1971, makes the act effective July 1, 1971.

§ 14-190.6. Employing or permitting minor to assist in offense under Article.—Every person 18 years of age or older who intentionally, in any manner, hires, employs, uses or permits any minor under the age of 16 years to do or assist in doing any act or thing constituting an offense under this Article and involving any material, act or thing he knows or reasonably should know to be obscene within the meaning of G.S. 14-190.1, shall be guilty of a misdemeanor, and unless a greater penalty is expressly provided for in this Article, shall be punishable in the discretion of the court. (1971, c. 405, s. 1.)

Cross Reference.—See note to § 14-190.1.

Editor's Note.—Section 5, c. 405, Session Laws 1971, makes the act effective July 1, 1971.

§ 14-190.7. Dissemination to minors under the age of 16 years.—Every person 18 years of age or older who knowingly disseminates to any minor under the age of 16 years any material which he knows or reasonably should know to be obscene within the meaning of G.S. 14-190.1 shall be guilty of a misdemeanor and unless a greater penalty is expressly provided for in this Article, shall be punishable in the discretion of the court. (1971, c. 405, s. 1.)

Cross Reference.—See note to § 14-190.1.

Editor's Note.—Section 5, c. 405, Session Laws 1971, makes the act effective July 1, 1971.

§ 14-190.8. Dissemination to minors 12 years of age or younger.—Every person 18 years of age or older who knowingly disseminates to any minor 12 years of age or younger any material which he knows or reasonably should know to be obscene within the meaning of G.S. 14-190.1 shall be guilty of a felony and upon conviction shall be imprisoned in the State's prison for not more than five years and shall be fined at the discretion of the court. (1971, c. 405, s. 1.)

Cross Reference.—See note to § 14-190.1.

Editor's Note.—Section 5, c. 405, Session Laws 1971, makes the act effective July 1, 1971.

§ 14-190.9. Indecent exposure.—Any person who shall willfully expose the private parts of his or her person in any public place and in the presence of any other person or persons, of the opposite sex, or aids or abets in any such act, or who procures another to perform such act; or any person, who as owner, manager, lessee, director, promoter or agent, or in any other capacity knowingly hires, leases or permits the land, building, or premises of which he is owner, lessee or tenant, or over which he has control, to be used for purposes of any such act, shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1971, c. 591, s. 1.)

Interpretation of Section. — Section 2, c. 591, Session Laws 1971, provides: "Every word, clause, sentence, paragraph, section, or other part of this act shall be interpreted in such manner as to be as expansive as the Constitution of the United States and the Constitution of North Carolina permit."

Section 3, c. 591, Session Laws 1971, provides: "If any word, clause, sentence, paragraph, section, or other part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof."

§ 14-191: Repealed by Session Laws 1971, c. 591, s. 4.

§§ 14-192, 14-193: Repealed by Session Laws 1971, c. 405, s. 4, effective July 1, 1971.

§ 14-194: Repealed by Session Laws 1971, c. 591, s. 4.

§ 14-196. Using profane, indecent or threatening language to any person over telephone; annoying or harassing by repeated telephoning or making false statements over telephone.

Right to Counsel.—A warrant charging a violation of this section charges a serious offense, entitling defendant to the assistance of legal counsel. State v. Best, 5 N.C. App. 379, 168 S.E.2d 433 (1969).

§ 14-197. Using profane or indecent language on public highways, counties exempt.—If any person shall, on any public road or highway and in the hearing of two or more persons, in a loud and boisterous manner, use indecent or profane language, he shall be guilty of a misdemeanor and upon conviction shall be fined not exceeding fifty dollars ($50.00) or imprisoned not exceeding 30 days. The following counties shall be exempt from the provisions of this section: Craven, Pitt, Stanly and Swain. (1913, c. 40; C.S., s. 4352; Pub. Loc. Ex. Sess., 1924, c. 65; 1933, c. 309; 1937, c. 9; 1939, c. 73; 1945, c. 398; 1947, cc. 144, 959;

1949, c. 845; 1957, c. 348; 1959, c. 733; 1963, cc. 39, 123; 1969, c. 300; 1971, c. 718.)

Editor's Note. — The 1971 amendment deleted Brunswick, Camden, Macon and Tyrrell from the list of exempt counties.

§ **14-198. Lewd women within three miles of colleges and boarding schools.**—If any loose woman or woman of ill fame shall commit any act of lewdness with or in the presence of any student, who is under 18 years old, of any boarding school or college, within three miles of such school or college, she shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars ($50.00) or imprisoned not exceeding 30 days. Upon the trial of any such case students may be competent but not compellable to give evidence. No prosecution shall be had under this section after the lapse of six months. (1889, c. 523; Rev., s. 3353; C. S., s. 4353; 1971, c. 1231, s. 1.)

Editor's Note. — The 1971 amendment substituted "18" for "twenty-one" in the first sentence.

Cited in Wheeler v. Goodman, 306 F. Supp. 58 (W.D.N.C. 1969).

§ **14-202.1. Taking indecent liberties with children.**

This section and § 14-177, etc.— Sections 14-177 and this section can be reconciled and both declared to be operative without repugnance. State v. Copeland, 11 N.C. App. 516, 181 S.E.2d 722 (1971).

Section 14-177 condemns crimes against nature whether committed against adults or children. State v. Copeland, 11 N.C. App. 516, 181 S.E.2d 722 (1971).

This section condemns other acts against children than unnatural sexual acts. State v. Copeland, 11 N.C. App. 516, 181 S.E.2d 722 (1971).

This section condemns those offenses of an unnatural sexual nature against children under 16 years of age by persons over 16 years of age which cannot be reached and punished under the provisions of § 14-177. State v. Copeland, 11 N.C. App. 516, 181 S.E.2d 722 (1971).

Because the two offenses are separate and distinct and the constituent elements are not identical, a violation of this section is not a lesser included offense of the crime against nature described in § 14-177. State v. Copeland, 11 N.C. App. 516, 181 S.E.2d 722 (1971).

Article 27.

Prostitution.

§ **14-203. Definition of terms.**

Applied in State v. Bethea, 9 N.C. App. 544, 176 S.E.2d 904 (1970).

Cited in Wheeler v. Goodman, 306 F. Supp. 58 (W.D.N.C. 1969); State v. Blalock, 9 N.C. App. 94, 175 S.E.2d 716 (1970).

§ **14-204. Prostitution and various acts abetting prostitution unlawful.**

Applied in State v. Bethea, 9 N.C. App. 544, 176 S.E.2d 904 (1970).

Cited in State v. Blalock, 9 N.C. App. 94, 175 S.E.2d 716 (1970).

§ **14-208. Punishment; probation; parole.**

Cited in Wheeler v. Goodman, 306 F. Supp. 58 (W.D.N.C. 1969).

SUBCHAPTER VIII. OFFENSES AGAINST PUBLIC JUSTICE.

Article 30.

Obstructing Justice.

§ **14-223. Resisting officers.**

Purpose.—The purpose of this section is to enforce orderly conduct in the important mission of preserving the peace, carrying out the judgments and orders of the court,

and upholding the dignity of the law. State v. Leigh, 278 N.C. 243, 179 S.E.2d 708 (1971).

The provisions of this section provide for safeguards that are essential to the welfare of the public. State v. Leigh, 278 N.C. 243, 179 S.E.2d 708 (1971).

Constitution Does Not Preclude Prosecution for Violation of Criminal Statute. — The First and Fourteenth Amendments to the United States Constitution do not preclude prosecution and conviction of a defendant for violation of the provisions of a criminal statute enacted in the public interest. State v. Leigh, 278 N.C. 243, 179 S.E.2d 708 (1971).

The words "delay" and "obstruct" appear to be synonymous as used in this section. State v. Leigh, 278 N.C. 243, 179 S.E.2d 708 (1971).

And perhaps the word "resist" would infer more direct and forceful action. State v. Leigh, 278 N.C. 243, 179 S.E.2d 708 (1971).

This section will apply to cases falling within any one of the descriptive words, since the words describing the act are joined by the disjunctive (or). State v. Leigh, 278 N.C. 243, 179 S.E.2d 708 (1971).

There does not have to be an assault on or actual physical interference with the officer in order to constitute a crime under this section. Neither does the conduct of a defendant have to be so effective that it permanently prevents the officer from making his investigation. State v. Leigh, 10 N.C. App. 202, 178 S.E.2d 85 (1970).

Right to Resist Illegal Conduct of Officer. — Decisions of the Supreme Court recognize the right to resist illegal conduct of an officer. State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970).

Applicability to Arrest by Special Police.—See opinion of Attorney General to Mr. G.R. Rankin, Vanguard Security Service, 2/5/70.

Conduct Not Constituting Obstruction of Officer.—Merely remonstrating with an officer in behalf of another, or criticizing or questioning an officer while he is performing his duty, when done in an orderly manner, does not amount to obstructing or delaying an officer in the performance of his duties. State v. Leigh, 278 N.C. 243, 179 S.E.2d 708 (1971).

Citizen may advise another of his constitutional rights in an orderly and peaceable manner while the officer is performing his duty without necessarily obstructing or delaying the officer in the performance of his duty. State v. Leigh, 278 N.C. 243, 179 S.E.2d 708 (1971).

Illegal Entry by Officer into Home. — Officers have no duty to make an illegal entry into a person's home. Hence, one who resists an illegal entry is not resisting an officer in the discharge of the duties of his office. These views are in accordance with the ancient rules of the common law and are predicated on the constitutional principle that a person's home is his castle. State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970).

A State highway patrolman, when acting as such, is a public officer within the purview of this section. State v. Powell, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

A deputy sheriff is discharging or attempting to discharge a duty of his office when he begins an investigation of a crime reported to him by eyewitnesses, under circumstances which appear to threaten a further breach of the peace. State v. Leigh, 278 N.C. 243, 179 S.E.2d 708 (1971).

"Arrest".—The term "arrest" has a technical meaning, applicable in legal proceedings. It implies that a person is thereby restrained of his liberty by some officer or agent of the law, armed with lawful process, authorizing and requiring the arrest to be made. It is intended to serve and does serve, the end of bringing the person arrested personally within the custody and control of the law, for the purpose specified in, or comtemplated by the process. State v. Leak, 11 N.C. App. 344, 181 S.E.2d 224 (1971).

In criminal procedure an arrest consists in the taking into custody of another person under real or assumed authority for the purpose of holding or detaining him to answer a criminal charge or of preventing the commission of a criminal offense. State v. Leak, 11 N.C. App. 344, 181 S.E.2d 224 (1971).

An "arrest" does not necessarily terminate the instant a person is taken into custody; arrest also includes "bringing the person personally within the custody and control of the law." State v. Leak, 11 N.C. App. 344, 181 S.E.2d 224 (1971).

The arrest of defendant in the instant case did not terminate until he was delivered to the jailer and properly confined. State v. Leak, 11 N.C. App. 344, 181 S.E.2d 224 (1971).

Sufficiency of Warrant, etc.—

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 prerequisities 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).

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).

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).

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 153 (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).

What State May Show to Convict.—In order to convict a person of a violation of this section, the State does not have to show that a defendant resisted, delayed and obstructed an officer. It is sufficient if a defendant unlawfully and willfully resists, or delays, or obstructs an officer. State v. Leigh, 10 N.C. App. 202, 178 S.E.2d 85 (1970).

Sufficiency of Evidence.—Where the evidence is sufficient for the jury to find that a defendant unlawfully and willfully, by loud and abusive language directed at an officer, delayed him in making his investigation, this requires the submission of the case to the jury. State v. Leigh, 10 N.C. App. 202, 178 S.E.2d 85 (1970).

Conceding that no actual violence or force was used by defendant, there was plenary evidence to support a jury finding that defendant did by his actions and language delay and obstruct the officer in the performance of his duties. State v. Leigh, 278 N.C. 243, 179 S.E.2d 708 (1971).

Rejection of Argument That Acts Not in Connection with Arrest.—The defendant's contention that at the time he was in the magistrate's office his arrest had been consummated, and that the acts alleged to have occurred between the magistrate's office and the jail were not in connection with his arrest, and that, therefore, he was not guilty of resisting arrest, was rejected. State v. Leak, 11 N.C. App. 344, 181 S.E.2d 224 (1971).

Instructions on Right of Self-Defense.—While a defendant was not charged with assaulting an officer, where the actions which he contends he took in self-defense are those which the warrants charge constitute the unlawful interference and the resistance to arrest, the jury should have been properly charged on the principle of self-defense under this factual situation and if they were satisfied defendant was legitimately exercising a right of self-defense it would be their duty to acquit him, not simply to take it into consideration in arriving at their verdict as the court charged. State v. May, 8 N.C. App. 423, 174 S.E.2d 633 (1970).

Where, in a prosecution charging defendant with resisting arrest and with obstructing an officer in the performance of his duties, the defendant offered evidence that the officer had struck the first blow and that defendant was forced in self-defense to take the actions which resulted in the charges against him, the trial court should have instructed the jury to acquit defendant if they found that he was legitimately exercising a right of self-defense; the court's instruction merely that the jury "will take into consideration in arriving at your verdict" the defendant's lawful exercise of self-defense, is insufficient and is reversible error. State v. May, 8 N.C. App. 423, 174 S.E.2d 633 (1970).

Article 31.

Misconduct in Public Office.

§ 14-234. Director of public trust contracting for his own benefit.

Opinions of Attorney General.—

Mr. Bobby F. Jones, Elm City Town Attorney, 10/24/69.

Inapplicable When Company in which Local School Board Member Contracts with State Board of Education.—See opin-

ion of Attorney General to Mr. Bobby R. Stott, 4/6/70.

Officers and Employees of City Selling Property Not Prohibited from Buying at Sale.—See opinion of Attorney General to Mr. E. Murray Tate, Jr., 41 N.C.A.G. 276 (1971).

§ 14-236. Acting as agent for those furnishing supplies for schools and other State institutions.

Inapplicable When Company in which Local School Board Member Contracts with State Board of Education.—See opinion of Attorney General to Mr. Bobby R. Stott, 4/6/70.

§ 14-247. Private use of publicly owned vehicle.

Local Modification.—Mecklenburg: 1971, c. 302; city of Charlotte: 1971, c. 220.

§ 14-249. Limitation of amount expended for vehicle. — It shall be unlawful for any officer, agent, employee or department of the State of North Carolina, or of any county, or of any institution or agency of the State to expend from the public treasury an amount in excess of three thousand five hundred dollars ($3,500) for any motor vehicle other than motor trucks; except upon the approval of the Governor and Council of State: Provided, that nothing in G.S. 14-247 through G.S. 14-251 shall be construed to authorize the purchase or maintenance of an automobile at the expense of the State by any State officer unless he is now authorized by statute to do so: Provided further, that the limitation prescribed by this section shall not be applicable to the purchase of any motor vehicle by any county, city or town in this State, where such motor vehicle is purchased in accordance with the provisions of Article 8 of Chapter 143 of the General Statutes of North Carolina. (1925, c. 239, s. 3; 1957, c. 862, s. 6; c. 1345; 1959, c. 172; 1971, c. 337.)

Editor's Note. — The 1971 amendment substituted "three thousand five hundred dollars ($3,500)" for "two thousand five hundred dollars ($2,500.00)" near the beginning of the section.

§ 14-250. Publicly owned vehicle to be marked.—It shall be the duty of the executive head of every department of the State government, and of any county, or of any institution or agency of the State, to have painted on every motor vehicle owned by the State, or by any county, or by any institution or agency of the State, a statement that such car belongs to the State or to some county, or institution or agency of the State. Provided, however, that no automobile used by any officer or official in any county in the State for the purpose of transporting, apprehending or arresting persons charged with violations of the laws of the State of North Carolina, shall be required to be lettered. Provided, further, that in lieu of the above method of marking motor vehicles owned by any agency or department of the State government, it shall be deemed a compliance with the law if such vehicles have imprinted on the license tags thereof, above the license number, the words "State Owned" and that such vehicles have affixed to the front thereof a plate with the statement "State Owned." Provided, further, the Council of State shall have authority to authorize exemptions from the provisions of this section with respect to any state-owned vehicle when they find that it is in the public interest to do so because of the use to be made of the vehicle. Such exemptions shall be perfected and effective upon the filing with the Secretary of State of a notice of exemption identifying the vehicle, stating the use to be made of it, the individual or department to which assigned, and the period of the exemption, which may not exceed 12 months. Provided, further, that in lieu of the above method of marking vehicles owned by any county, it shall be deemed a compliance with the law if such vehicles have painted or affixed on the side thereof a circle not less than eight inches in diameter showing a replica of the seal

of such county. (1925, c. 239, s. 4; 1929, c. 303, s. 1; 1945, c. 866; 1957, c. 1249; 1961, c. 1195; 1965, c. 1186; 1971, c. 3.)

Editor's Note. — The 1971 amendment added the fourth and fifth sentences.

§ 14-252. Five preceding sections applicable to cities and towns.

Local Modification.—City of Charlotte: 1971, c. 220.

ARTICLE 33.

Prison Breach and Prisoners.

§ 14-255. Escape of hired prisoners from custody.

Two Classes of Escape.—There are two classes of escape from the State prison system. One is a felonious escape and the other is a misdemeanor. A defendant who has committed an escape is entitled to have his case submitted to the jury on the question of whether he was imprisoned while serving a sentence imposed for a felony or for a misdemeanor. State v. Ledford, 9 N.C. App. 245, 175 S.E.2d 605 (1970).

No Evidence that Defendant Was Hired out under this Section. — A defendant's contention that he should have been tried for escape under this section rather than under § 148-45 was without merit where the evidence showed that, when he escaped, defendant was in the custody of the State Department of Correction and was under the supervision of a foreman for the State Highway Department, and there was no evidence that defendant was being hired out by a county, city or town under the provisions of this section. State v. Ledford, 9 N.C. App. 245, 175 S.E.2d 605 (1970).

§ 14-258.1. Furnishing poison, narcotics, deadly weapons, cartridges or ammunition to inmates of charitable or penal institutions.—If any person shall give or sell to any inmate of any charitable or penal institution, or if any person shall combine, confederate, conspire, aid, abet, solicit, urge, investigate, counsel, advise, encourage, attempt to procure, or procure another or others to give or sell to any inmate of any charitable or penal institution, any deadly weapon, or any cartridge or ammunition for firearms of any kind, or any narcotic, poison or poisonous substance, except upon the prescription of a physician, he shall be guilty of a felony and upon conviction thereof shall be fined or imprisoned in the State's prison for not more than 10 years in the discretion of the court; and if he be an officer or employee of any institution of the State, he shall be dismissed from his position or office. (1961, c. 394, s. 2; 1969, c. 970, s. 6; 1971, c. 929.)

Editor's Note.—Prior to the enactment of Session Laws 1971, c. 929, provisions identical to the above section appeared in § 90-113.13.

SUBCHAPTER IX. OFFENSES AGAINST THE PUBLIC PEACE.

ARTICLE 35.

Offenses against the Public Peace.

§ 14-269. Carrying concealed weapons.

Possession of an Unconcealed Pistol in an Automobile Not Violation of Statute.—See opinion of Attorney General to Honorable Albert Jackson, Sheriff of Henderson County, 41 N.C.A.G. 207 (1971).

§ 14-269.2. Weapons on campus or other educational property.—It shall be unlawful for any person to possess, or carry, whether openly or concealed, any gun, rifle, pistol, dynamite cartridge, bomb, grenade, mine, powerful explosive as defined in G.S. 14-284.1, bowie knife, dirk, dagger, slungshot, leaded cane, switch-blade knife, blackjack, metallic knuckles or any other weapon of like kind, not used solely for instructional or school sanctioned ceremonial purposes, in any public or private school building or bus, on any public or private

school campus, grounds, recreation area, athletic field, or other property owned, used or operated by any board of education, school, college, or university board of trustees or directors for the administration of any public or private educational institution. For the purpose of this section a self-opening or switch-blade knife is defined as a knife containing a blade or blades which open automatically by the release of a spring or a similar contrivance, and the above phrase "weapon of like kind" includes razors and razor blades (except solely for personal shaving) and any sharp pointed or edged instrument except unaltered nail files and clips and tools used solely for preparation of food, instruction and maintenance. This section shall not apply to the following persons: Officers and enlisted personnel of the armed forces of the United States when in discharge of their official duties as such and acting under orders requiring them to carry arms or weapons, civil officers of the United States while in the discharge of their official duties, officers and soldiers of the militia and the national guard when called into actual service, officers of the State, or of any county, city, or town, charged with the execution of the laws of the State, when acting in the discharge of their official duties, any pupils who are members of the Reserve Officer Training Corps and who are required to carry arms or weapons in the discharge of their official class duties, and any private police employed by the administration or board of trustees of any public or private institution of higher education when acting in the discharge of their duties.

Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction shall be punished in the discretion of the court by fine or imprisonment or by both such fine and imprisonment, not to exceed five hundred dollars ($500.00) fine or six months imprisonment. (1971, c. 241, ss. 1, 2; c. 1224.)

Editor's Note. — The 1971 amendment added the language beginning "and any private police" at the end of the last sentence in the first paragraph.

Faculty Member May Have Gun in Own Home Located on Campus.—See opinion of Attorney General to Mr. Pritchard C. Smith, 41 N.C.A.G. 466 (1971).

§ 14-273. Disturbing schools and scientific and temperance meetings; injuring property of schools and temperance societies.

Elements, etc.—

In accord with original. See State v. Midgett, 8 N.C. App. 230, 174 S.E.2d 124 (1970).

Evidence Sufficient for Jury.—In a prosecution charging that defendants unlawfully and willfully interrupted a public school in violation of this section, the issue of defendants' guilt was properly submitted to the jury, where the State's evidence tended to show that (1) the defendants entered the office of the secretary to the principal and told her that they were going to interrupt the school that day; (2) the defendants locked the secretary out of hei office, moved furniture about, scattered papers, and dumped books on the floor; (3) the secretary and several teachers were kept away from their jobs or classes by these actions; (4) the defendants also occupied the principal's office and operated the bells that normally signalled the change of classes; and (5) the principal, as a result of the commotion, was forced to dismiss school prior to the regular closing hour. State v. Midgett, 8 N.C. App. 230, 174 S.E.2d 124 (1970).

Reduction of Sentence.—In a school disturbance prosecution the Court of Appeals, in the exercise of its supervisory powers, reduced the defendants' sentences of imprisonment from 12 months to six months, where the amendment to this section mitigating the punishment for the offense had become effective on the day defendants were sentenced. State v. Evans, 8 N.C. App. 469, 174 S.E.2d 680 (1970).

Applied in In re Burrus, 275 N.C. 517, 169 S.E.2d 879 (1969).

Cited in McKeiver v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971).

§ 14-276: Repealed by Session Laws 1971, c. 357.

SUBCHAPTER X. OFFENSES AGAINST THE PUBLIC SAFETY.

ARTICLE 36.

Offenses against the Public Safety.

§ **14-284.1. Regulation of sale of explosives; reports; storage.**

Applicability of Section to United States.—See Duvall v. United States, 312 F. Supp. 625 (E.D.N.C. 1970).

Violation as Negligence.—A violation of a statute enacted for safety and protection of the general public, such as this section, is negligence per se. Duvall v. United States, 312 F. Supp. 625 (E.D.N.C. 1970).

A person in North Carolina who has explosives under his control or in his possession must take adequate precautions to insure that no person, and especially children, are able to gain possession of these dangerous devices. If the person fails to take such precautions, under North Carolina law he is negligent. Duvall v. United States, 312 F. Supp. 625 (E.D.N.C. 1970).

ARTICLE 36A.

Riots and Civil Disorders.

§ **14-288.1. Definitions.**

Constitutionality.—The statutory scheme of this Article is not unconstitutional in contravention of the First, Fourth, Ninth and Fourteenth Amendments to the U.S. Constitution and N.C. Const., Art. I, § 19. State v. Dobbins, 9 N.C. App. 452, 176 S.E.2d 353 (1970).

Quoted in State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971); United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971).

§ **14-288.4. Disorderly conduct.**—(a) Disorderly conduct is a public disturbance intentionally caused by any person who:

(1) Engages in fighting or other violent conduct or in conduct creating the threat of imminent fighting or other violence; or

(2) Makes or uses any utterance, gesture, display or abusive language which is intended and plainly likely to provoke violent retaliation and thereby cause a breach of the peace; or

(3) Takes possession of, exercises control over, or seizes any building or facility of any public or private educational institution without the specific authority of the chief administrative officer of the institution, or his authorized representative; or

(4) Refuses to vacate any building or facility of any public or private educational institution in obedience to:

a. An order of the chief administrative officer of the institution, or his authorized representative; or

b. An order given by any fireman or public health officer acting within the scope of his authority; or

c. If a state of emergency is occurring or is imminent within the institution, an order given by any law-enforcement officer acting within the scope of his authority; or

(5) Shall, after being forbidden to do so by the chief administrative officer, or his authorized representative, of any public or private educational institution:

a. Engage in any sitting, kneeling, lying down, or inclining so as to obstruct the ingress or egress of any person entitled to the use of any building or facility of the institution in its normal and intended use; or

b. Congregate, assemble, form groups or formations (whether organized or not), block, or in any manner otherwise interfere with the operation or functioning of any building or facility of the institution so as to interfere with the customary or normal

use of the building or facility. As used in this section the term "building or facility" includes the surrounding grounds and premises of any building or facility used in connection with the operation or functioning of such building or facility.

(b) Any person who willfully engages in disorderly conduct is guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00) or imprisonment for not more than six months. (1969, c. 869, s. 1; 1971, c. 668, s. 1.)

Editor's Note. — The 1971 amendment rewrote subdivisions (1) and (2), deleted former subdivision (3), which read "Wilfully or wantonly creates a hazardous or physically offensive condition; or," renumbered former subdivisions (4), (5) and (6) as (3), (4) and (5) and substituted "or seizes" for "seizes, or occupies" near the beginning of present subdivision (3).

Section 2, c. 668, Session Laws 1971, provides: "Every word, clause, sentence, paragraph, section, or other part of this act shall be interpreted in such manner as to be as expansive as the Constitution of the United States and the Constitution of North Carolina permit."

Section 3, c. 668, Session Laws 1971, contains a severability clause.

Applicable to Nonriot Situation. — See opinion of Attorney General to Mr. G. Patrick Hunter, Jr., Charlotte Police Attorney, 4/9/70.

§ 14-288.7. Transporting dangerous weapon or substance during emergency; possessing off premises; exceptions.

Penalty Not Limited to that Prescribed by Ordinance. — Since this section itself makes the possession of a disassembled shotgun and the shotgun shells in the area in question a criminal offense and specifies the penalty therefor, and since the warrant relating to this offense was founded upon the statute, not the ordinance, the sentence imposable in this case was not limited to the penalty prescribed for such conduct by the ordinance. State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971).

Applied in State v. Dobbins, 9 N.C. App. 452, 176 S.E.2d 353 (1970).

§ 14-288.11. Warrants to inspect vehicles in riot areas or approaching municipalities during emergencies.

Search of Automobile without Warrant Is Reasonable. — Because of its mobility, a search of an automobile without a warrant is reasonable if it is based on probable cause. United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971).

Search May Be Conducted After Automobile Transported to Police Station.—If there is probable cause to search the automobile at the place where it was stopped, it matters not that the search is conducted sometime later after the automobile has been transported to the police station. United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971).

§ 14-288.12. Powers of municipalities to enact ordinances to deal with states of emergency.

Constitutionality. — The contention that this statute is unconstitutionally vague in that it fails to provide a standard for the exercise of the discretion conferred is clearly without merit. State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971).

Control of Civil Disorders Is Within Police Power.—Control of civil disorders that may threaten the very existence of the State is certainly within the police power of government. United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971).

Section Delegates Portion of Police Power to Municipalities.—By this section, the State has delegated a portion of its police power to its municipalities. This statute authorizes the city to enact an ordinance prohibiting the movement of people in public places "during a state of emergency" as defined in § 14-288.1(10). State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971).

The "state of emergency" is the condition precedent to the exercise of this power by the city. State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971).

Only when local law-enforcement is no longer able to maintain order and protect lives and property may the emergency powers be invoked. United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971).

Maintenance of Public Order Is Duty of Executive. — The responsibility for maintaining public peace on a day-to-day basis is lodged with the executive branch of government. United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971).

Public peace in our cities may be sud-

denly breached by massive civil disorder. Dealing with such an emergency situation requires an immediacy of action that is not possible for judges. It would be highly inappropriate for the court, removed from the primary responsibility for maintaining order and with the benefit of time for reflection not available to the mayor, to substitute its judgment of necessity for his. United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971).

Precise Definition Would Destroy Executive's Broad Discretion. — Attempting to precisely define under what specific conditions each of the authorized restrictions might be imposed would destroy the "broad discretion" necessary for the executive to deal with an emergency situation. United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971).

Mayor's Power Subject to Definite Standard.—The mayor's power to impose the restraints enumerated in this section and Asheville City Ordinance No. 613 is subject to a narrow, objective, and definite standard. United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971).

Standard Is that which Applies to Executive's Use of Military. — The standard is essentially the same as that which applies to the executive's inherent power to restore order through the use of the military. United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971).

Mayor's Actions Subject to Judicial Review. — The executive's decision that civil control has broken down to the point where emergency measures are necessary is not conclusive or free from judicial review, but the scope of review must be limited to a determination of whether the mayor's actions were taken in good faith and whether there is some factual basis for his decision that the restrictions he imposed were necessary to maintain order. United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971).

Where actual violence, good faith, and a relation between means and ends are shown, an executive's finding of necessity will be upheld in court. United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971).

Declaration of State of Emergency Must Be Necessary to Preserve Order. — The declaration of a state of emergency and the restrictions imposed pursuant to it must appear to have been reasonably necessary for the preservation of order. United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971).

Freedom of Travel May Be Limited. — The liberty of every American citizen freely to come and to go must frequently, in the face of sudden danger, be temporarily limited or suspended. United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971).

Freedom of travel like freedom of speech may be subject to reasonable limitations as to time and place. United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971).

Incidental Restriction on Freedom of Speech May Be No Greater than Essential to Government Interest. — The standard that has developed where regulation of conduct has an incidental effect on speech is that the incidental restriction of First Amendment freedoms can be no greater than is essential to the furtherance of the government interest which is being protected. United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971).

Imposition of Curfew is Proper Exercise of Police Power. — Whatever the cause, given the fact of widespread riotous conditions and criminal activities, the restoration of "domestic tranquility" becomes, not alone a constitutional right, but a constitutional obligation. The temporary imposition of a curfew, limited in time and reasonably made necessary by conditions prevailing, is a legitimate and proper exercise of the police power of public authority. State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971).

Arrest without Warrant Lawful. — 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.—The search of the defendant's person was incidental to such 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).

Burden of Proof.—The defendant's contention that the burden was on the State to prove that his presence on the streets was for a purpose other than those excepted by the ordinance and by the curfew proclamation is without merit. State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971).

A defendant, charged with the crime, who seeks protection by reason of the exception has the burden of proving that he comes within the same. State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971).

SUBCHAPTER XI. GENERAL POLICE REGULATIONS.

ARTICLE 37.

Lotteries and Gaming.

§ 14-289. Advertising lotteries.

Local Modification.—(As to Article 37) Carteret: 1971, c. 221; Cleveland, Polk and Rutherford: 1971, c. 627.

§ 14-291.2. Pyramid and chain schemes prohibited.—(a) Any person who shall establish, promote, operate or participate in any pyramid distribution plan, program, device or scheme whereby a participant pays a valuable consideration for the opportunity or chance to receive a fee or compensation upon the introduction of other participants into the program, whether or not such opportunity or chance is received in conjunction with the purchase of merchandise, shall be deemed to have participated in a lottery and shall be punished as provided for in G.S. 14-290.

(b) "Pyramid distribution plan" means any program utilizing a pyramid or chain process by which a participant gives a valuable consideration for the opportunity to receive compensation or things of value in return for inducing other persons to become participants in the program;

"Compensation" does not mean payment based on sales of goods or services to persons who are not participants in the scheme, and who are not purchasing in order to participate in the scheme; and

"Promotes" shall mean inducing one or more other persons to become a participant.

(c) Any judge of the superior court shall have jurisdiction, upon petition by the Attorney General of North Carolina or solicitor of the superior court, to enjoin, as an unfair or deceptive trade practice, the continuation of the scheme described in subsection (a); in such proceeding the court may assess a civil penalty against any defendant found to have engaged in the willful promotion of such a scheme with knowledge that such conduct violated this section, in an amount not to exceed two thousand dollars ($2,000) which shall be for the benefit of the general fund of the State of North Carolina as reimbursement for expenses incurred in the institution and prosecution of the action; and the court may appoint a receiver to secure and distribute assets obtained by any defendant through participation in any such scheme.

(d) Any contract hereafter created for which a part of the consideration consisted of the opportunity or chance to participate in a program described in subsection (a) is hereby declared to be contrary to public policy and therefore void and unenforceable. (1971, c. 875, s. 1.)

Editor's Note. — Session Laws 1971, c. 875, s. 2, makes the act effective Oct. 1, 1971.

ARTICLE 39.

Protection of Minors.

§ 14-314: Repealed by Session Laws 1971, c. 31.

§ 14-316. Permitting young children to use dangerous firearms.

(b) Air rifles, air pistols, and BB guns shall not be deemed "dangerous firearms" within the meaning of subsection (a) of this section except in the following counties: Anson, Caldwell, Caswell, Chowan, Cleveland, Cumberland, Durham,

Forsyth, Gaston, Harnett, Haywood, Mecklenburg, Stanly, Stokes, Surry, Union, Vance. (1913, c. 32; C. S., s. 4441; 1965, c. 813; 1971, c. 309.)

Editor's Note. — The 1971 amendment added Cumberland to the list of counties in subsection (b).

As the rest of the section was not changed by the amendment, only subsection (b) is set out.

§ **14-316.1. Contributing to delinquency and neglect by parents and others.**—(a) Any parent, guardian, or other person acting in loco parentis to a child under 16 years of age who fails to exercise reasonable diligence in the care, protection, or control of such child, or who knowingly or willfully permits such child to associate with immoral persons, or to beg, or to solicit funds, or to be unlawfully absent from school, or to engage in sexual intercourse, or to enter any place which may be injurious to the morals, health, or general welfare of such child shall be guilty of a misdemeanor.

(b) Any person who knowingly or willfully causes, encourages, or aids any child under 16 years of age to be in a place or condition, or to commit an act whereby such child could be adjudicated delinquent, undisciplined or neglected as defined by G.S. 7A-278 or who engages in sexual intercourse with such child shall be guilty of a misdemeanor.

(c) It shall not be necessary for a district court exercising juvenile jurisdiction to make an adjudication that any child is delinquent, undisciplined or neglected in order to prosecute a parent or any other person under this section. An adjudication that a child is delinquent, undisciplined or neglected shall not preclude a subsequent prosecution of a parent or any other person who contributes to the delinquent, undisciplined or neglected condition of any child. (1919, c. 97, s. 19; C. S., s. 5057; 1959, c. 1284; 1969, c. 911, s. 4; 1971, c. 1180, s. 5.)

Editor's Note.—

The 1971 amendment, effective Sept. 1, 1971, rewrote this section.

This section is not unconstitutional for vagueness. State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970).

The words used in this section are ordinary words in common usage, and adequate warning is provided those inclined to violate them. Simply stated, any person who knowingly does any act to produce, promote or contribute to any condition of delinquency of a child is in violation of the section. State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970).

Conviction of Minor Not Required. — It is not necessary that a minor be convicted of the charges contained in a juvenile petition before a person may be prosecuted under this section for contributing to the delinquency of the minor. State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970).

§ **14-318.2. Child abuse a general misdemeanor.**—(a) Any parent of a child less than 16 years of age, or any other person providing care to or supervision of such child, who inflicts physical injury, or who allows physical injury to be inflicted, or who creates or allows to be created a substantial risk of physical injury, upon or to such child by other than accidental means is guilty of the misdemeanor of child abuse.

(b) The misdemeanor of child abuse is an offense additional to other civil and criminal provisions and is not intended to repeal or preclude any other sanctions or remedies, and is punishable as provided in G.S. 14-3(a). (1965, c. 472, s. 1; 1971, c. 710, s. 6.)

Editor's Note.—

The 1971 amendment, effective July 1, 1971, rewrote this section, which formerly related to immunity of physicians and others reporting abuse or neglect of children. For present provisions as to reporting and investigating abuse and neglect of children, see § 110-115 et seq.

§ **14-318.3**: Repealed by Session Laws 1971, c. 710, s. 7, effective July 1, 1971.

ARTICLE 40.

Protection of the Family.

§ 14-322. Abandonment by husband or parent.

The district court has exclusive original jurisdiction of misdemeanors, including action to determine liability of persons for the support of dependents in any criminal proceeding. Cline v. Cline, 6 N.C. App. 523, 170 S.E.2d 645 (1969).

Elements of Offense.—

In accord with 2nd paragraph in original. See Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971).

Abandonment, etc.—

There is a distinction between criminal abandonment and the matrimonial offense of desertion. Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971).

This section in express terms, etc.—

A parent's willful failure or refusal to provide adequate support for his children is a continuing offense, and is not barred by any statute of limitations until the youngest child shall have reached the age of 18 years. State v. McMillan, 10 N.C. App. 734, 180 S.E.2d 35 (1971).

Abandonment Must Be Willful.—

In a prosecution under this section the failure by a defendant to provide adequate support for his child must be willful, that is, he intentionally and without just cause or excuse does not provide adequate support for his child according to his means and station in life, and this essential element of the offense must be alleged and proved. State v. McMillan, 10 N.C. App. 734, 180 S.E.2d 35 (1971).

Where there was no evidence in the record that the defendant was employed, or that he owned any property, or had any income or any ability whatsoever to contribute to the support of his children; nor any evidence that the defendant had failed to apply himself to some honest calling for the support of himself and family, or that he was a frequenter of drinking houses, or a known common drunkard, so as to bring the case within the presumption raised by § 14-323, the record was devoid of evidence from which the jury might infer that the defendant willfully or intentionally failed to discharge his obligation to support his children, and the defendant's motion for judgment as of nonsuit should have been allowed. State v. McMillan, 10 N.C. App. 734, 180 S.E.2d 35 (1971).

Cited in State v. Stevens, 11 N.C. App. 402, 181 S.E.2d 159 (1971).

§ 14-322.2. Failure to support handicapped dependent. — If any father or mother shall wilfully fail and refuse to provide support for a physically handicapped child or a mentally retarded child who becomes 18 years of age and who is unable to be self-supporting, then the parent shall be guilty of a misdemeanor; failure to provide such support shall be a continuing offense after the eighteenth birthday and after the child reaches his majority until such time as the physically handicapped or mentally retarded dependent is able to become self-supporting or until such time as such dependent attains age 21 and is a patient in a facility owned or operated by the State Department of Mental Health. (1969, c. 889, s. 1; 1971, c. 218, s. 2.)

Editor's Note.—

The 1971 amendment added the language beginning "or until such time."

Session Laws 1971, c. 218, s. 4, as amended by Session Laws 1971, c. 1142, provides: "This act is intended to relieve and shall be construed to relieve, any parent of any liability for charges accrued prior to the ratification of this act for treatment, care and maintenance of a natural or adoptive child at facilities owned or operated by the State Department of Mental Health. It is the intent of this act to limit the existing liability of all parents, in the manner set out in the previous sections of this act, in regard to charges made prior to the date of the ratification of this act, or to be made subsequent to such date, for treatment, care and maintenance of a natural or adopted child at facilities owned or operated by the State Department of Mental Health."

§ 14-325. Failure of husband to provide adequate support for family.

The district court has exclusive original jurisdiction of misdemeanors, including actions to determine liability of persons for the support of dependents in any criminal proceeding. Cline v. Cline, 6 N.C. App. 523, 170 S.E.2d 645 (1969).

Article 41.

Intoxicating Liquors.

§§ **14-327, 14-328**: Repealed by Session Laws 1971, c. 872, s. 3, effective October 1, 1971.

§§ **14-330 to 14-332**: Repealed by Session Laws 1971, c. 872, s. 3, effective October 1, 1971.

Editor's Note.—Section 14-330 was also repealed by Session Laws 1971, c. 168.

Article 42.

Public Drunkenness.

§ **14-333**: Repealed by Session Laws 1971, c. 872, § 3, effective October 1, 1971.

Article 43.

Vagrants and Tramps.

§ **14-336. Persons classed as vagrants.**

Editor's Note.—

For note, "Federal Court Intervention as Protection against Illegal Police Harassment," see 48 N.C.L. Rev. 138 (1969).

For comment entitled "Vagrancy — A Crime of Status," see 6 Wake Forest Intra. L. Rev. 307 (1970).

This section is unconstitutional and its enforcement is permanently enjoined. Wheeler v. Goodman, 306 F. Supp. 58 (W.D.N.C. 1969).

This section is void for vagueness and overbreadth. The section's terms do not give fair notice of what acts are criminally prohibited and are so broad as to embrace, on its face, obviously innocent activities. Wheeler v. Goodman, 306 F. Supp. 58 (W.D.N.C. 1969).

This section is unconstitutional because it is vague and overbroad; because it punishes mere status; and because it invidiously discriminates against those without property, all in violation of the Fourteenth Amendment. Wheeler v. Goodman, 306 F. Supp. 58 (W.D.N.C. 1969).

This vagrancy statute is properly attacked on its face as being vague and overbroad; it suppresses free expression and free association; no single criminal state court prosecution could conceivably explore and clarify and limit its myriad possible constructions. Wheeler v. Goodman, 298 F. Supp. 935 (W.D.N.C. 1969).

§ **14-337. Police officers to furnish list of disorderly houses; inmates competent and compellable to testify.**

Cited in Wheeler v. Goodman, 306 F. Supp. 58 (W.D.N.C. 1969).

§ **14-340**: Repealed by Session Laws 1971, c. 700.

§ **14-341**: Repealed by Session Laws 1971, c. 699.

Article 45.

Regulation of Employer and Employee.

§ **14-347**: Repealed by Session Laws 1971, c. 350.

§ **14-348**: Repealed by Session Laws 1971, c. 701.

§ **14-349**: Repealed by Session Laws 1971, c. 351.

§ **14-350**: Repealed by Session Laws 1971, c. 352.

§ **14-351**: Repealed by Session Laws 1971, c. 353.

§ **14-352**: Repealed by Session Laws 1971, c. 354.

Article 49.

Protection of Livestock Running at Large.

§ **14-365**: Repealed by Session Laws 1971, c. 110.

Article 52.

Miscellaneous Police Regulations.

§ **14-381. Desecration of State and United States flag.** — It shall be unlawful for any person wilfully and knowingly to cast contempt upon any flag of the United States or upon any flag of North Carolina by public acts of physical contact including, but not limited to, mutilation, defiling, defacing or trampling. Any person violating this section shall be deemed guilty of a misdemeanor and shall be punished by a fine not exceeding five hundred dollars ($500.00) or imprisonment for not more than six months or both, in the discretion of the court.

The flag of the United States, as used in this section, shall be the same as defined in 4 U.S.C.A. 1 and 4 U.S.C.A. 2. The flag of North Carolina, as used in this section, shall be the same as defined in G.S. 144-1. (1917, c. 271; C. S., s. 4500; 1971, c. 295.)

Editor's Note.—The 1971 amendment rewrote this section.

Former Provisions Held Unconstitutional.—See Parker v. Morgan, 322 F. Supp. 585 (W.D.N.C. 1971).

§ **14-391. Usurious loans on household and kitchen furniture or assignment of wages.**

Editor's Note.—

For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

§ **14-399. Placing of trash, refuse, etc., on the right-of-way of any public road.**—It is unlawful for any person, firm, organization or private corporation, or for the governing body, agents or employees of any municipal corporation, to place or leave or cause to be placed or left temporarily or permanently, any trash, refuse, garbage, scrapped automobile, scrapped truck or part thereof on the right-of-way of any State highway or public road where said highway or public road is outside of an incorporated town, unless such refuse, garbage, scrapped automobile, scrapped truck or part thereof is placed in a designated location or container for removal by a specific garbage or trash service collector.

The placing or leaving of the articles or matter forbidden by this section shall, for each day or portion thereof that said articles or matter are placed or left, constitute a separate offense.

A violation of this section is a misdemeanor punishable by a fine of not less than ten dollars ($10.00) or more than two hundred dollars ($200.00), imprisonment for not more than 30 days, or both. (1935, c. 457; 1937, c. 446; 1943, c. 543; 1951, c. 975, s. 1; 1953, cc. 387, 1011; 1955, c. 437; 1957, cc. 73, 175; 1959, c. 1173; 1971, c. 165.)

Editor's Note. — The 1971 amendment, effective Sept. 1, 1971, added the language following "incorporated town" in the first paragraph and substituted "or more than two hundred dollars ($200.00), imprisonment for not more than 30 days, or both" for "and not more than fifty dollars ($50.00) for each offense" in the third paragraph.

§ **14-400. Tattooing prohibited.**—It shall be unlawful for any person or persons to tattoo the arm, limb, or any part of the body of any other person under 18 years of age. Anyone violating the provisions of this section shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00),

imprisonment for not more than six months, or both. (1937, c. 112, ss. 1, 2; 1969, c. 1224, s. 8; 1971, c. 1231, s. 1.)

Editor's Note.—

The 1971 amendment substituted "18" for "twenty-one" in the first sentence.

§ 14-401.11. Distribution of certain food at Halloween and all other times prohibited.—(a) It shall be unlawful for any person to knowingly distribute, sell, give away or otherwise cause to be placed in a position of human accessibility, any food or eatable substance which that person knows to contain:

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

(2) Any barbiturate, stimulant, narcotic or hallucinogenic drug as defined in Chapter 90, Articles 5 and 5A, of the North Carolina General Statutes, or

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

(b) Penalties.

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

a. Where the actual or possible effect on a person eating the food or substance was or would be limited to mild physical discomfort without any lasting effect, shall be guilty of a misdemeanor punishable in the discretion of the court.

b. Where the actual or possible effect on a person eating the food or substance was or would be greater than mild physical discomfort without any lasting effect, shall be guilty of a felony punishable in the discretion of the court.

(2) Any person violating the provisions of G.S. 14-401.11(a)(2) shall be guilty of a felony punishable by imprisonment in the Department of Correction for not less than two nor more than 10 years.

(3) Any person violating the provisions of G.S. 14-401.11(a)(3) shall be guilty of a felony punishable by imprisonment in the Department of Correction for not less than five nor more than 40 years. (1971, c. 564.)

Article 52A.

Sale of Weapons in Certain Counties.

§ 14-402. Sale of certain weapons without permit forbidden. — It shall be unlawful for any person, firm, or corporation in this State to sell, give away, or dispose of, or to purchase or receive, at any place within the State from any other place within or without the State, unless a license or permit therefor shall have first been obtained by such purchaser or receiver from the sheriff of the county in which such purchase, sale, or transfer is intended to be made, any pistol, so-called pump gun, bowie knife, dirk, dagger, slungshot, blackjack or metallic knucks.

It shall be unlawful for any person or persons to receive from any postmaster, postal clerk, employee in the parcel post department, rural mail carrier, express agent or employee, railroad agent or employee, within the State of North Carolina any pistol, so-called pump gun, bowie knife, dirk, dagger or metallic knucks without having in his or their possession and without exhibiting at the time of the delivery of the same and to the person delivering the same, the permit from

the sheriff as provided in G.S. 14-403. Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than fifty dollars ($50.00) nor more than two hundred dollars ($200.00), or imprisoned not less than 30 days nor more than six months, or both, in the discretion of the court.

"Antique firearm" as defined by G.S. 14-409.11, and "historic edged weapon" as defined by G.S. 14-409.12, are hereby excepted from the provisions of this section. (1919, c. 197, s. 1; C. S., s. 5106; 1923, c. 106; 1947, c. 781; 1959, c. 1073, s. 2; 1971, c. 133, s. 2.)

Editor's Note.—

The 1971 amendment added the last paragraph.

Session Laws 1959, c. 1073, s. 4, was amended by Session Laws 1971, c. 192, by deleting Washington from the list of counties.

Iredell was deleted from the list of counties by Session Laws 1971, c. 410, amending Session Laws 1959, c. 1073, s. 4.

§ 14-404. Applicant must be of good moral character; weapon for defense of home; sheriff's fee.

Local Modification.—Forsyth and Mecklenburg: 1971, c. 411.

Issuance of Pistol Permits to 18, 19 and 20 Year Olds. — See opinion of Attorney General to Mr. Isaac T. Avery, Jr., 41 N.C.A.G. 465 (1971).

More Than One Permit Allowed. — See opinion of Attorney General to Mr. Leroy Reavis, 41 N.C.A.G. 415 (1971).

§ 14-409. Machine guns and other like weapons.

Definitions. — The usual and customary definitions of the words used in this section are as follows: A machine gun is defined as an automatic gun using small-arms ammunition for rapid continuous firing; a submachine gun as a lightweight automatic or semiautomatic portable firearm fired from the shoulder or hip; a carbine as a light automatic or semiautomatic military rifle; and an automatic rifle as a rifle capable commonly of either semiautomatic or full automatic fire and designed to be fired without a mount. State v. Lee, 277 N.C. 242, 176 S.E.2d 772 (1970).

"Automatic".—The word "automatic" as used in connection with a firearm is one using either gas pressure or force of recoil and mechanical spring action for repeatedly ejecting the empty cartridge shell, introducing a new cartridge and firing it. State v. Lee, 277 N.C. 242, 176 S.E.2d 772 (1970).

In ordinary usage the word "automatic" is used to describe both automatic and semiautomatic weapons. State v. Lee, 277 N.C. 242, 176 S.E.2d 772 (1970).

A machine gun is automatic. State v. Lee, 277 N.C. 242, 176 S.E.2d 772 (1970).

A submachine gun can be automatic or semiautomatic. State v. Lee, 277 N.C. 242, 176 S.E.2d 772 (1970).

Section Excludes Weapons Which Shoot Less Than 31 Times. — The General Assembly intended to include within the prohibition of this section all weapons either automatic or semiautomatic which shoot 31 times or more and to exclude such weapons which shoot less than 31 times. State v. Lee, 277 N.C. 242, 176 S.E.2d 772 (1970).

This section has a proviso which excludes automatic shotguns and pistols or other automatic weapons that shoot less than 31 shots. Giving the usual and customary meaning to the word "automatic," the proviso would exclude automatic weapons or semiautomatic weapons which shoot less than 31 shots. State v. Lee, 277 N.C. 242, 176 S.E.2d 772 (1970).

Weapon Not Machine Gun, etc., within Meaning of Section.—A weapon described as a Universal Caliber 30 M1 Carbine, capable of firing 31 shots by the successive pulling of the trigger is not a "machine gun, submachine gun or other like weapon" within the meaning of this section. State v. Lee, 8 N.C. App. 601, 174 S.E.2d 658 (1970).

ARTICLE 53.

Sale of Weapons in Certain Other Counties.

§ 14-409.1. Sale of certain weapons without permit forbidden.—It shall be unlawful for any person, firm, or corporation in this State to sell, give away, or dispose of, or to purchase or receive, at any place within the State

from any other place within or without the State, unless a license or permit therefor shall have first been obtained by such purchaser or receiver from the clerk of the superior court of the county in which such purchase, sale or transfer is intended to be made, any pistol, so-called pump gun, bowie knife, dirk, dagger, slungshot, blackjack or metallic knucks.

It shall be unlawful for any person or persons to receive from any postmaster, postal clerk, employee in the parcel post department, rural mail carrier, express agent or employee, railroad agent or employee, within the State of North Carolina any pistol, so-called pump gun, bowie knife, dirk, dagger or metallic knucks without having in his or their possession and without exhibiting at the time of the delivery of the same and to the person delivering the same, the permit from the clerk of the superior court as provided in G.S. 14-409.2. Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than fifty dollars ($50.00) nor more than two hundred dollars ($200.00), or imprisoned not less than 30 days nor more than six months, or both, in the discretion of the court.

"Antique firearm" as defined by G.S. 14-409.11, and "historic edged weapon" as defined by G.S. 14-409.12, are hereby excepted from the provisions of this section. (1919, c. 197, s. 1; C. S., s. 5106; 1923, c. 106; 1947, c. 781; 1971, c. 133, s. 2.)

Editor's Note.—

The 1971 amendment added the last paragraph.

Iredell was deleted from the list of counties by Session Laws 1971, c. 410, amending Session Laws 1959, c. 1073, s. 4.

§ 14-409.3. Applicant must be of good moral character; weapon for defense of home; clerk's fee.

Issuance of Pistol Permits to 18, 19 and 20 Year Olds. — See opinion of Attorney General to Mr. Isaac T. Avery, Jr., 41 N.C.A.G. 465 (1971).

ARTICLE 53A.

Other Firearms.

§ 14-409.12. "Historic edged weapons" defined.—The term "historic edged weapon" means any bayonet, trench knife, sword or dagger manufactured during or prior to World War II but in no event later than January 1, 1946. (1971, c. 133, s. 1.)

ARTICLE 54.

Sale, etc., of Pyrotechnics.

§ 14-414. Pyrotechnics defined; exceptions.

What Prohibited within Definition of Pyrotechnics. — See opinion of Attorney General to Mr. W.I. Adams, Sheriff, Wayne County, 1/29/70.

ARTICLE 54A.

The Felony Firearms Act.

§ 14-415.1. Possession of firearms, etc., by felon prohibited.—(a) It shall be unlawful for any person who has been convicted in any court in this State, in any other state of the United States or in any federal court of the United States of a crime, punishable by imprisonment for a term exceeding two years, to purchase, own, possess or have in his custody, care or control, any hand gun or pistol.

Every person violating the provisions of this section shall be guilty of a felony and shall be imprisoned for not more than 10 years in the State prison or shall be fined an amount not exceeding five thousand dollars ($5,000).

(b) In all cases where the person is charged under the provisions of this sec-

tion, the record or records of prior convictions of any offense whether in courts in this State, or in courts of any other state or in any court of the United States shall be admissible in evidence, but only for the purpose of proving that said person has been convicted of a previous offense the punishment for which may be more than two years. The term "conviction" is defined as a final judgment in any case of any offense having a maximum permissible penalty of more than two years without regard to the plea entered or to the sentence imposed. A judgment of a conviction or a plea of guilty to such an offense certified to a superior court of this State from the custodian of records of any state or federal court under the same name as that by which the defendant is charged shall be prima facie evidence that the identity of such person is the same as the defendant so charged and shall be prima facie evidence of the facts so certified.

(c) The indictment charging the defendant under the terms of this section shall be separate from any indictment charging him with other offenses related to or giving rise to a charge under this section. An indictment which charges the person with violation of this section must set forth the date that the prior offense was committed, the type offense and the penalty therefor, and the date that the defendant was convicted or plead guilty to such offense, the identity of the court in which the conviction or plea of guilty took place and the verdict and judgment rendered therein. (1971, c. 954, s. 1.)

Editor's Note. — Session Laws 1971, c. 954, s. 3, makes the act effective on Oct. 1, 1971.

§ 14-415.2. Exemption where citizenship restored.—Any person whose citizenship is restored under the provisions of Chapter 13 of the General Statutes, any comparable State or federal statute, shall thereafter be exempted from the provisions of G.S. 14-415.1. (1971, c. 954, s. 2.)

Editor's Note. — Session Laws 1971, c. 954, s. 3, makes the act effective on Oct. 1, 1971.

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

November 1, 1971

I, Robert Morgan, Attorney General of North Carolina, do hereby certify that the foregoing 1971 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.

ROBERT MORGAN
Attorney General of North Carolina

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