THE GENERAL STATUTES OF NORTH CAROLINA

1981 CUMULATIVE SUPPLEMENT

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

Under the Direction of
D. P. HARRIMAN, S. C. WILLARD, SYLVIA FAULKNER AND D. E. SELBY, JR.

Volume 1C

1978 Replacement

Annotated through 302 N.C. 222 and 50 N.C. App. 567. For complete scope of annotations, see scope of volume page.

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

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Preface

This Cumulative Supplement to Replacement Volume 1C contains the general laws of a permanent nature enacted by the General Assembly at the Second 1977 Session, the First and Second 1979 Sessions and the 1981 Session through October 10, 1981 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 chapters effected by the amendatory acts.

Chapter analyses show all sections except catchlines carried for the purpose of notes only. An index to all statutes codified herein will appear in Replacement Volumes 4B and 4C.

A majority of the Session Laws are made effective upon ratification, but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after 30 days after the adjournment of the session" in which passed. All legislation appearing herein became effective upon ratification, unless noted to the contrary in an editor's note or an effective date note.

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

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

Scope of Volume

Statutes:

Permanent portions of the general laws enacted by the General Assembly at the Second 1977 Session, the First and Second 1979 Sessions and the 1981 Session through October 10, 1981, affecting Chapters 15 through 20 of the General Statutes.

Annotations:

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

North Carolina Reports through volume 302, p. 222.
North Carolina Court of Appeals Reports through volume 50, p. 567.
Federal Reporter 2nd Series through volume 650, p. 292.
Federal Supplement through volume 515, p. 55.
Federal Rules Decision through volume 89, p. 719.
Bankruptcy Reporter through volume 11, p. 138.
United States Reports through volume 449, p. 410.
Supreme Court Reporter through volume 101, p. 2881.
North Carolina Law Review.
Wake Forest Law Review.
Campbell Law Review.
Duke Law Journal.
North Carolina Central Law Journal.
Opinions of the Attorney General.

The General Statutes of North Carolina
1981 Cumulative Supplement

VOLUME 1C

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ARTICLE 1.

General Provisions.

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CASE NOTES

Compliance with Section Required. — A defendant cannot claim the benefits afforded by this section without complying with its terms. State v. McKoy, 294 N.C. 134, 240 S.E.2d 383 (1978).

Oral requests for trial made by defendant's counsel to the district attorney were not sufficient to entitle defendant to a dismissal under the provisions of subsection (a) of this section. State v. McKoy, 33 N.C. App. 304, 235 S.E.2d 98, reversed on other grounds, 294 N.C. 134, 240 S.E.2d 383 (1978).

Applied in State v. Dammons, 293 N.C. 263, 237 S.E.2d 834 (1977).

Cited in State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

ARTICLE 2.

Record and Disposition of Seized, etc., Articles.

§ 15-11.1. Seizure, custody and disposition of articles; exceptions.

(a) If a law-enforcement officer seizes property pursuant to lawful authority, he shall safely keep the property under the direction of the court or magistrate as long as necessary to assure that the property will be produced at and may be used as evidence in any trial. Upon application by the lawful owner or a person, firm or corporation entitled to possession or upon his own determination, the district attorney may release any property seized pursuant to his lawful authority if he determines that such property is no longer useful or necessary as evidence in a criminal trial and he is presented with satisfactory evidence of ownership. If the district attorney refuses to release such property, the lawful owner or a person, firm or corporation entitled to possession may make application to the court for return of the property. The court, after notice to all parties, including the defendant, and after hearing, may in its discretion order any or all of the property returned to the lawful owner or a person, firm or corporation entitled to possession. The court may enter such order as may be necessary to assure that the evidence will be available for use as evidence at the time of trial, and will otherwise protect the rights of all parties. Notwithstanding any other provision of law, photographs or other identification or analyses made of the property may be introduced at the time of the trial provided that the court determines that the introduction of such substitute evidence is not likely to substantially prejudice the rights of the defendant in the criminal trial.

(1979, c. 593.)

Effect of Amendments. — The 1979 amendment, effective October 1, 1979, substituted the present second, third and fourth sentences of subsection (a) for the former second sentence, which read: "Upon application to the court by the lawful owner or a person, firm, or corporation entitled to possession, after notice to all parties, including the defendant, and after

hearing, the court may in its discretion order any or all of the property returned to the lawful owner or person, firm, or corporation entitled to possession."

Only Part of Section Set Out. — As subsections (b) and (c) were not changed by the amendment, they are not set out.

Legal Periodicals. — For survey of 1979 law on evidence, see 58 N.C.L. Rev. 1456 (1980).

ARTICLE 4A.

Administrative Search and Inspection Warrants.

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

(e) Any warrant issued under this section for a search or inspection shall be valid for only 24 hours after its issuance, must be personally served upon the owner or possessor of the property between the hours of 8:00 A.M. and 8:00 P.M. and must be returned within 48 hours. If the owner or possessor of the property is not present on the property at the time of the search or inspection and reasonable efforts to locate the owner or possessor have been made and have failed, the warrant or a copy thereof may be affixed to the property and shall have the same effect as if served personally upon the owner or possessor. (1979, c. 729.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, added the second sentence of subsection (e).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (e) is set out.

Legal Periodicals. — For survey of 1979 constitutional law, see 58 N.C.L. Rev. 1326 (1980).

CASE NOTES

Constitutionality. — Subdivision (c)(1) of this section is not unconstitutionally void for vagueness. Brooks v. Taylor Tobacco Enterprises, Inc., 39 N.C. App. 529, 251 S.E.2d 656, rev'd on other grounds, 298 N.C. 759, 260 S.E.2d 419 (1979).

Warrant Protects Employer's Fourth Amendment Rights. — A warrant showing that a specific business has been chosen for an Occupational Safety and Health Act search on the basis of a general administrative plan for the enforcement of the act derived from neutral sources such as, for example, dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area, would protect an employer's Fourth Amendment rights. Brooks v. Taylor Tobacco Enterprises, Inc., 39 N.C. App. 529, 251 S.E.2d 656, rev'd on other grounds, 298 N.C. 759, 260 S.E.2d 419 (1979).

The statutory scheme for obtaining a warrant to conduct an administrative inspection, when complied with, provides ample protections against the constitutional proscription of general warrants. Brooks v. Taylor Tobacco Enterprises, Inc., 39 N.C. App. 529, 251 S.E.2d 656, rev'd on other grounds, 298 N.C. 759, 260 S.E.2d 419 (1979).

Neutral Application of Inspection Program. — It is necessary for the agency to make a showing to the magistrate, or clerk, that the general administrative plan for enforcement is being applied on a neutral basis as to the particular establishment to be inspected. Gooden v. Brooks, 39 N.C. App. 519, 251 S.E.2d 698, cert. denied, 298 N.C. 806, 261 S.E.2d 919 (1979).

Alternative Criteria for Basis of Warrant. — Subdivision (c)(1) of this section creates two alternative criteria for determining whether to issue a warrant. The first, the "program of inspection test," is that the property is to be inspected as part of a legally authorized program of inspection which naturally includes that property. The second is a probable cause test. If an inspection meets either of these tests a warrant is properly issued under the statute. Gooden v. Brooks, 39 N.C. App. 519, 251 S.E.2d 698, cert. denied, 298 N.C. 806, 261 S.E.2d 919 (1979).

The requirement of subdivision (c)(1) of this section that the property is to be inspected "as

part of a legally authorized program of inspection which naturally includes that property" comports with the criterion that a specific business has been chosen for an Occupational Safety and Health Act search on the basis of a general administrative plan for the enforcement of the act derived from neutral sources. In light of the United States Supreme Court decisions, the statute must be interpreted as also requiring a showing to the magistrate that the general administrative plan for enforcement is based upon "reasonable legislative or administrative standards." Interpreted in this way, subdivision (c)(1) of this section requires a sufficient showing of probable cause and is constitutional. Gooden v. Brooks, 39 N.C. App. 519, 251 S.E.2d 698, cert. denied, 298 N.C. 806, 261 S.E.2d 919 (1979).

A warrant to conduct an inspection that is not part of a program of inspection may issue upon a showing of probable cause, the standard for which is the same as in the case of a search warrant in a criminal proceeding. State v. Sheetz, 46 N.C. App. 641, 265 S.E.2d 914 (1980).

Sufficiency of Affidavit. — The "program of inspection" test under subdivision (c)(1) of this section requires the agent seeking the warrant to provide facts in an affidavit showing that a particular business has been selected for inspection pursuant to an administrative plan containing specific neutral criteria. The affidavit to support issuance of a warrant under this standard must contain an adequate description of the general administrative plan, the specific neutral criteria used to determine which businesses will be inspected under the plan, and facts showing why the particular business sought to be inspected comes within the plan. Brooks v. Taylor Tobacco Enterprises, Inc., 39 N.C. App. 529, 251 S.E.2d 656, rev'd on other grounds, 298 N.C. 759, 260 S.E.2d 419 (1979).

Where no facts from which the issuing officer could determine whether probable cause existed were included in the affidavit on which the administrative warrant was obtained, the affidavit was insufficient to support the issuance of an administrative search warrant. Gooden v. Brooks, 39 N.C. App. 519, 251 S.E.2d 698, cert. denied, 298 N.C. 806, 261 S.E.2d 919 (1979).

The inclusion of the underlying facts in the affidavit is necessary to make the warrant procedure meaningful. Gooden v. Brooks, 39 N.C. App. 519, 251 S.E.2d 698, cert. denied, 298 N.C. 806, 261 S.E.2d 919 (1979).

Conclusory allegations by the affiant, which are nothing more than a perfunctory restatement of the statutory language contained in subdivision (c)(1) of this section, are insufficient to meet the statutory requirements. Brooks v. Taylor Tobacco Enterprises, Inc., 39 N.C. App. 529, 251 S.E.2d 656, rev'd on other grounds, 298 N.C. 759, 260 S.E.2d 419 (1979).

The rule that the sufficiency of a search warrant should properly be determined with reference to the supporting affidavits is applicable in the context of administrative inspection warrants. Brooks v. Taylor Tobacco Enterprises, Inc., 39 N.C. App. 529, 251 S.E.2d 656, rev'd on other grounds, 298 N.C. 759, 260 S.E.2d 419 (1979).

Probable Cause Standards. — While subdivision (c)(1) of this section sets forth standards for issuance of an administrative search warrant which are less stringent than the probable cause standards required in the criminal law sense under § 15A-246, these standards are certainly sufficient to guarantee that a decision to search private property is justified by a reasonable governmental interest. Brooks v. Taylor Tobacco Enterprises, Inc., 39 N.C. App. 529, 251 S.E.2d 656, rev'd on other grounds, 298 N.C. 759, 260 S.E.2d 419 (1979).

For purposes of an administrative search, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that reasonable legislative or administrative standards for conducting an inspection are satisfied with respect to a particular establishment. Brooks v. Taylor Tobacco Enterprises, Inc., 39 N.C. App. 529, 251 S.E.2d 656, rev'd on other grounds, 298 N.C. 759, 260 S.E.2d 419 (1979).

An Occupational Safety and Health Act agent's entitlement to inspect will not depend on his demonstrating probable cause to believe that conditions in violation of OSHA exist on the premises. Probable cause in the criminal law sense is not required. Brooks v. Taylor Tobacco Enterprises, Inc., 39 N.C. App. 529, 251 S.E.2d 656, rev'd on other grounds, 298 N.C. 759, 260 S.E.2d 419 (1979).

The "probable cause" standard permits an Occupational Safety and Health Act agent to obtain a warrant where he has specific evidence in an affidavit showing that conditions in violation of OSHA exist on the premises. Brooks v. Taylor Tobacco Enterprises, Inc., 39 N.C. App. 529, 251 S.E.2d 656, rev'd on other grounds, 298 N.C. 759, 260 S.E.2d 419 (1979).

The attempt to show through statistics that an inspection of the business would be likely to reveal Occupational Safety and Health Act violations is not sufficient to meet the "probable cause" test under the statute. Brooks v. Taylor Tobacco Enterprises, Inc., 39 N.C. App. 529, 251 S.E.2d 656, rev'd on other grounds, 298 N.C. 759, 260 S.E.2d 419 (1979).

Warrant Improperly Granted. — Where there was no showing from which a magistrate could have independently determined (1) that there existed a legally authorized program of inspection which naturally included the property, (2) that the general administrative plan

for enforcement was based upon reasonable legislative or administrative standards, and (3) that the administrative standards were being applied to plaintiff on a neutral basis, the warrant was improperly granted. Gooden v. Brooks, 39 N.C. App. 519, 251 S.E.2d 698, cert. denied, 298 N.C. 806, 261 S.E.2d 919 (1979).

The allegation that agents have conducted an investigation which has disclosed evidence of irregularities which, if supported by evidence and found to be true, would constitute serious violations of the law on the part of the defendant, without the disclosure of facts from which the magistrate could ascertain the existence of irregularities that would constitute serious violations of the law, does not meet the constitutional standard for issuance of a search warrant. State v. Sheetz, 46 N.C. App. 641, 265 S.E.2d 914 (1980).

The requirements for warrant procedures set out in State v. Campbell, 282 N.C. 125, 191 S.E.2d 752 (1972), a criminal case, apply equally to the issuance of administrative inspection warrants, since the purpose of a warrant in either case is to provide for a determination of probable cause by a neutral officer. Gooden v. Brooks, 39 N.C. App. 519, 251 S.E.2d 698, cert. denied, 298 N.C. 806, 261 S.E.2d 919 (1979).

Scope and Objects of Search Must Be Included in Warrant. — Unless an administrative inspection warrant advises the owner or possessor of the property proposed to be searched of the scope and objects of the search, beyond which limits the inspector may not go, it does not meet the requirements of subsections (d)(3) of this section. In short, a valid search warrant serves not only to authorize a search of premises but also to afford reasonable notice to the possessor of property of the nature and extent of any search that is to be conducted. Brooks v. Taylor Tobacco Enterprises, Inc., 298 N.C. 759, 260 S.E.2d 419 (1979).

When Affidavit May Be Notice of Extent of Search. — If the warrant and the affidavit are to be construed together to provide sufficient proof of authority and notice of the extent of the proposed search, there must be an express reference to the affidavit in the warrant which is sufficient to put a reasonable person on notice of its incorporation. It is not enough that a warrant and its supporting affidavit be served together as a unit for the affidavit to serve to uphold the validity of the warrant. Brooks v. Taylor Tobacco Enterprises, Inc., 298 N.C. 759, 260 S.E.2d 419 (1979).

Article 7.

Fugitives from Justice.

§ 15-48. Outlawry for felony.

Legal Periodicals. — For survey of 1976 case law on constitutional law, see 55 N.C.L. Rev. 965 (1977).

Article 11.

Forfeiture of Bail.

§§ 15-110 to 15-124: Repealed by Sessions Law 1977, c. 711, s. 33, effective July 1, 1978.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

ARTICLE 15.

Indictment.

§ 15-144. Essentials of bill for homicide.

CASE NOTES

Accused's County of Residence Is Not Element of Murder. — This section states it is not necessary to allege matter not required to be proved on the trial. Defendant's county of residence is not an element of murder and not required to be proved at trial. State v. Carswell, 40 N.C. App. 752, 253 S.E.2d 635, cert. denied, 297 N.C. 613, 257 S.E.2d 220 (1979).

Nature of Malice Aforethought. — The term "malice aforethought," which is used in an indictment conforming to this section cannot be held to import into the definition [of first degree murder] the element of premeditation or deliberation. Indeed, it is rather definitely indicated that it relates rather to the prior existence of the malice which motivates the murder than to a previously entertained purpose. State v. Lowe, 295 N.C. 596, 247 S.E.2d 878 (1978).

Killing with Malice, etc. —

An indictment drawn in accordance with this section is sufficient to sustain a verdict of guilty of murder in the first degree based upon a finding that defendant killed with malice, premeditation and deliberation, or that defendant killed in the perpetration or attempted perpetration of any arson, rape, robbery, burglary or other felony. State v. May, 292 N.C. 644, 235 S.E.2d 178, cert. denied, 434 U.S. 928, 98 S. Ct. 414, 54 L. Ed. 2d 288 (1977).

Allegation of Premeditation and Deliberation Is Not Required. — By virtue of this section premeditation and deliberation do not have to be alleged in an indictment for first degree murder. State v. Lowe, 295 N.C. 596, 247 S.E.2d 878 (1978).

Bill of Particulars. —

In accord with original. See State v. May, 292 N.C. 644, 235 S.E.2d 178, cert. denied, 434 U.S. 928, 98 S. Ct. 414, 54 L. Ed. 2d 288 (1977).

Cited in State v. Foster, 293 N.C. 674, 239 S.E.2d 449 (1977); State v. Smith, 294 N.C. 365, 241 S.E.2d 674 (1978); State v. Freeman, 295 N.C. 210, 244 S.E.2d 680 (1978); State v. Connley, 295 N.C. 327, 245 S.E.2d 663 (1978); State v. Ford, 297 N.C. 144, 254 S.E.2d 14 (1979); State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979); State v. Allison, 298 N.C. 135, 257 S.E.2d 417 (1979).

§ 15-144.1. Essentials of bill for rape.

(a) In indictments for rape it is not necessary to allege every matter required to be proved on the trial; but in the body of the indictment, after naming the person accused, the date of the offense, the county in which the offense of rape was allegedly committed, and the averment "with force and arms," as is now usual, it is sufficient in describing rape to allege that the accused person unlawfully, willfully, and feloniously did ravish and carnally know the victim, naming her, by force and against her will and concluding as is now required by law. Any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for rape in the first degree and will support a verdict of guilty of rape in the first degree, rape in the second degree, attempted rape or assault on a female.

(b) If the victim is a female child under the age of 12 years it is sufficient to allege that the accused unlawfully, willfully, and feloniously did carnally know and abuse a child under 12, naming her, and concluding as aforesaid. Any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for the rape of a female child under the age of 12 years and all lesser included offenses.

(c) If the victim is a person who is mentally defective, mentally incapacitated, or physically helpless it is sufficient to allege that the defendant unlawfully, willfully, and feloniously did carnally know and abuse a person who was mentally defective, mentally incapacitated or physically helpless, naming such victim, and concluding as aforesaid. Any bill of indictment con-

taining the averments and allegations herein named shall be good and sufficient in law for the rape of a mentally defective, mentally incapacitated or physically helpless person and all lesser included offenses. (1977, c. 861, s. 1; 1979, c. 682, s. 10.)

Effect of Amendments. — The 1979 amendment, effective January 1, 1980, deleted "assault with intent to commit rape" following "rape in the second degree" near the end of subsection (a), deleted "virtuous" preceding "female child" and preceding "child under 12" in the first sentence of subsection (b) and preceding "female child" in the second sentence of subsection (b) and added subsection (c).

Session Laws 1979, c. 682, ss. 13 and 14, provide:

"Sec. 13. All laws and clauses of laws in conflict with this act are hereby repealed, provided however, nothing in this act shall be construed to repeal any portion of Article 26 of Chapter 14 which relates to offenses against public morality and decency.

"Sec. 14. This act shall become effective January 1, 1980, and shall apply to offenses occurring on and after that date. Nothing herein shall be construed to render lawful acts committed prior to the effective date of this act [January 1, 1979] and unlawful at the time the said acts occurred; and nothing contained herein shall be construed to affect any prosecution instituted under any section repealed by this act pending on the effective date hereof."

Session Laws 1979, c. 682, s. 12, contains a severability clause.

Legal Periodicals. — For a survey of 1977 criminal law, see 56 N.C.L. Rev. 965 (1978).

For survey of 1978 constitutional law, see 57 N.C.L. Rev. 958 (1979).

CASE NOTES

Allegations of Every Element of Offense Are Not Required. — Prior to the enactment of this section it was necessary that an indictment for rape contain allegations of every element of the offense. This section, in which the legislature explicitly states that "[i]n indictments for rape it is not necessary to allege every matter required to be proved on the trial," eliminates that requirement. State v. Lowe, 295 N.C. 596, 247 S.E.2d 878 (1978).

This section complies with the constitutional requirement that the defendant be informed of the accusation against him even though it eliminates the requirement that the indictment contain allegations of every element of the offense. State v. Lowe, 295 N.C. 596, 247 S.E.2d 878 (1978).

This section, enacted after the 1973 revision of former § 14-21 which divided rape into degrees, authorizes an indictment for first degree rape which omits averments (1) that the offense was perpetrated with a deadly weapon or by inflicting serious bodily injury or (2) that the defendant's age is greater than sixteen, two elements the proof of which were essential to a conviction for first degree rape. State v. Lowe, 295 N.C. 596, 247 S.E.2d 878 (1978).

In enacting this section the legislature prescribed a new form of indictment for rape. State v. Lowe, 295 N.C. 596, 247 S.E.2d 878 (1978).

The short-form indictment for homicide in § 15-144 is the model upon which this section was drafted. State v. Lowe, 295 N.C. 596, 247 S.E.2d 878 (1978).

Applied in State v. Hunter, 299 N.C. 29, 261 S.E.2d 189 (1980).

Cited in State v. Perry, 298 N.C. 502, 259 S.E.2d 496 (1979).

§ 15-144.2. Essentials of bill for sex offense.

(a) In indictments for sex offense it is not necessary to allege every matter required to be proved on the trial; but in the body of the indictment, after naming the person accused, the date of the offense, the county in which the sex offense was allegedly committed, and the averment "with force and arms," as is now usual, it is sufficient in describing a sex offense to allege that the accused person unlawfully, willfully, and feloniously did engage in a sex offense with the victim, naming the victim, by force and against the will of such victim and concluding as is now required by law. Any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for a first degree sex offense and will support a verdict of guilty of a sex offense in the first degree, a sex offense in the second degree, an attempt to commit a sex offense or an assault.

(b) If the victim is a person of the age of 12 years or less, it is sufficient to allege that the defendant unlawfully, willfully, and feloniously did engage in a sex offense with a child of 12 years or less, naming the child, and concluding as aforesaid. Any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for a sex offense against a child of the age of 12 years or less and all lesser included offenses.

(c) If the victim is a person who is mentally defective, mentally incapacitated, or physically helpless it is sufficient to allege that the defendant unlawfully, willfully, and feloniously did engage in a sex offense with a person who was mentally defective, mentally incapacitated or physically helpless, naming such victim, and concluding as aforesaid. Any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law for a sex offense against a mentally defective, mentally incapacitated or physically helpless person and all lesser included offenses. (1979, c. 682, s. 11.)

Editor's Note. — Session Laws 1979, c. 682, ss. 13 and 14, provide:

"Sec. 13. All laws and clauses of laws in conflict with this act are hereby repealed, provided however, nothing in this act shall be construed to repeal any portion of Article 26 of Chapter 14 which relates to offenses against public morality and decency.

"Sec. 14. This act shall become effective January 1, 1980, and shall apply to offenses occurring on and after that date. Nothing herein shall be construed to render lawful acts committed prior to the effective date of this act [January 1, 1979] and unlawful at the time the said acts occurred; and nothing contained herein shall be construed to affect any prosecution instituted under any section repealed by this act pending on the effective date hereof."

Session Laws 1979, c. 682, s. 12, contains a severability clause.

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

CASE NOTES

II. GENERAL EFFECT.

Plain, Intelligible, etc. —

In accord with 10th paragraph in original. See State v. Palmer, 293 N.C. 633, 239 S.E.2d 406 (1977).

Indictment and warrants need only allege the ultimate facts constituting each element of the criminal offense. Evidentiary matters need not be alleged. State v. Palmer, 293 N.C. 633, 239 S.E.2d 406 (1977).

Following Words, etc. —

An indictment couched in the language of the statute is generally sufficient to charge the statutory offense. State v. Palmer, 293 N.C. 633, 239 S.E.2d 406 (1977).

Charging Use of Deadly Weapon. — It is sufficient for indictments or warrants seeking to charge a crime in which one of the elements is the use of a deadly weapon (1) to name the weapon and (2) either to state expressly that the weapon used was a "deadly weapon" or to allege such facts as would necessarily demonstrate the deadly character of the weapon. State v. Palmer, 293 N.C. 633, 239 S.E.2d 406 (1977).

§ 15-155. Defects which do not vitiate.

CASE NOTES

Variance in Description of Locality. — Where an indictment alleges the particular place where an act took place, and such allegation is not descriptive of the offense, and is not required to be proved as laid in order to show the court's jurisdiction, a variance which does not mislead accused or expose him to double jeopardy is not material. State v. Currie, 47 N.C. App. 446, 267 S.E.2d 390 (1980).

When Time, etc. —

In accord with 2nd paragraph in original. See State v. Locklear, 33 N.C. App. 647, 236 S.E.2d

376, cert. denied, 293 N.C. 363, 237 S.E.2d 851 (1977); State v. Currie, 47 N.C. App. 446, 267 S.E.2d 390 (1980).

Variance. —

There was no fatal variance between an indictment charging that the date of a felonious assault was April 17, 1979, and evidence that the assault occurred on February 17, 1979, where the variance was caused by a clerical mistake in the indictment; the statute of limitations was not involved; all of the evidence at trial concerned an incident on February 17; defense counsel's questioning of the witnesses clearly indicates that he was aware of the clerical error before trial; and defendant was not prejudiced in his preparation of an adequate defense by the variance. State v. Bailey, 49 N.C. App. 377, 271 S.E.2d 752 (1980).

Applied in State v. Tesenair, 35 N.C. App. 531, 241 S.E.2d 877 (1978).

Cited in State v. Guffey, 39 N.C. App. 359, 250 S.E.2d 96 (1979).

ARTICLE 16.

Trial before Justice.

§ 15-159: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

ARTICLE 17.

Trial in Superior Court.

§ 15-166. Exclusion of bystanders in trial for rape and sex offenses.

In the trial of cases for rape or sex offense or attempt to commit rape or attempt to commit a sex offense, the trial judge may, during the taking of the testimony of the prosecutrix, exclude from the courtroom all persons except the officers of the court, the defendant and those engaged in the trial of the case. (1907, c. 21; C. S., s. 4636; 1973, c. 1141, s. 14; 1979, c. 682, s. 3; 1981, c. 682, s. 5.)

Effect of Amendments. — The 1979 amendment, effective January 1, 1980, substituted "or a sex offense or attempt to commit rape or attempt to commit a sex offense" for "assault with the intent to commit rape" near the beginning of the section. The language of the section as set out above follows literally the direction of the 1979 amendatory act.

Session Laws 1979, c. 682, ss. 13 and 14, provide:

"Sec. 13. All laws and clauses of laws in conflict with this act are hereby repealed, provided however, nothing in this act shall be construed to repeal any portion of Article 26 of Chapter 14 which relates to offenses against public morality and decency.

"Sec. 14. This act shall become effective January 1, 1980, and shall apply to offenses occurring on and after that date. Nothing herein shall be construed to render lawful acts committed prior to the effective date of this act [January 1, 1980] and unlawful at the time the said acts occurred; and nothing contained herein shall be construed to affect any prosecution instituted under any section repealed by this act pending on the effective date hereof."

Session Laws 1979, c. 682, s. 12, contains a severability clause.

The 1981 amendment, effective July 1, 1981, substituted "rape or sex offense" for "rape and of or a sex offense" near the beginning of the section.

§ 15-169. Conviction of assault, when included in charge.

On the trial of any person for any felony whatsoever, when the crime charged includes an assault against the person, it is lawful for the jury to acquit of the felony and to find a verdict of guilty of assault against the person indicted, if the evidence warrants such finding; and when such verdict is found the court shall have power to imprison the person so found guilty of an assault, for any term now allowed by law in cases of conviction when the indictment was originally for the assault of a like character. (1885, c. 68; Rev., s. 3268; C. S., s. 4639; 1979, c. 682, s. 4.)

Effect of Amendments. — The 1979 amendment, effective January 1, 1980, deleted "rape, or" preceding "any felony" near the beginning of the section.

Session Laws 1979, c. 682, ss. 13 and 14, provide:

"Sec. 13. All laws and clauses of laws in conflict with this act are hereby repealed, provided however, nothing in this act shall be construed to repeal any portion of Article 26 of Chapter 14 which relates to offenses against public morality and decency.

"Sec. 14. This act shall become effective January 1, 1980, and shall apply to offenses occurring on and after that date. Nothing herein shall be construed to render lawful acts committed prior to the effective date of this act [January 1, 1980] and unlawful at the time the said acts occurred; and nothing contained herein shall be construed to affect any prosecution instituted under any section repealed by this act pending on the effective date hereof."

Session Laws 1979, c. 682, s. 12, contains a severability clause.

CASE NOTES

The necessity for instructing the jury, etc. —

The trial court should instruct the jury on a lesser included offense when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The presence of such evidence is the determinative factor. State v. Mayberry, 38 N.C. App. 509, 248 S.E.2d 402 (1978).

The trial court in a prosecution for common-law robbery did not err in refusing to instruct on the lesser included offense of misdemeanor assault where the state's evidence tended to show that defendant took the victim's money by violent means, and defendant admitted taking the victim's money but denied assaulting him. State v. Thompson, 49 N.C. App. 684, 272 S.E.2d 160 (1980).

There is a duty to charge on any lesser included offense raised by the evidence even in the absence of a request for the instruction. State v. Moore, 300 N.C. 694, 268 S.E.2d 196 (1980).

Where all the evidence points to a graver crime, etc. —

In accord with original. See State v. Wade, 49 N.C. App. 257, 271 S.E.2d 77 (1980).

Stated in State v. Craig, 35 N.C. App. 547, 241 S.E.2d 704 (1978).

§ 15-170. Conviction for a less degree or an attempt.

CASE NOTES

Application of Section. —

In accord with 4th paragraph in original. See State v. Davis, 48 N.C. App. 386, 269 S.E.2d 242 (1980).

And Conviction of Offense Charged, etc. —

In accord with 2nd paragraph in original. See State v. Haith, 48 N.C. App. 319, 269 S.E.2d 205, cert. denied, 301 N.C. 403, 273 S.E.2d 449 (1980).

Charge of Manslaughter Absent Evidence. — If there is evidence of self-defense and no evidence of involuntary manslaughter, it is prejudicial error to submit a charge of involuntary manslaughter in a trial for second degree murder. State v. Brooks, 46 N.C. App. 833, 266 S.E.2d 3 (1980).

In Prosecution for Robbery. —

In a prosecution for armed robbery, defendant was not prejudiced by error, if any, in the trial court's submission to the jury of the lesser

included offense of common-law robbery. State v. Mitchell, 48 N.C. App. 680, 270 S.E.2d 117 (1980).

Necessity for instructing jury, etc. —

In accord with 1st paragraph in original. See State v. Brown, 300 N.C. 731, 268 S.E.2d 201 (1980).

In accord with 2nd paragraph in original. See State v. Moore, 300 N.C. 694, 268 S.E.2d 196 (1980).

The trial court should instruct the jury on a lesser included offense when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The presence of such evidence is the determinative factor. State v. Mayberry, 38 N.C. App. 509, 248 S.E.2d 402 (1978).

The greater crime includes the lesser, so that where an offense is alleged in an indictment, and the jury acquits as to that one, it may convict of the lesser offense when the charge is inclusive of both offenses. State v. Craig, 35 N.C. App. 547, 241 S.E.2d 704 (1978).

§ 15-173. Demurrer to the evidence.

CASE NOTES

Section 15A-1227 compared. — Both this section and § 15A-1227 allow motions to dismiss to be made at the close of the State's evidence. However, they are not identical. This section provides that "If the defendant introduces evidence, he thereby waives any motion for dismissal or judgment as in case of nonsuit which he may have made prior to the introduction of his evidence and cannot urge such prior motion as ground for appeal." Although no such provision is contained in § 15A-1227, its enactment did not create a new type of motion to challenge the sufficiency of the evidence. State v. Mendez, 42 N.C. App. 141, 256 S.E.2d 405 (1979).

A challenge to the sufficiency of the evidence to sustain a conviction is still properly made by either a motion for dismissal or a motion for judgment as in the case of nonsuit. Both motions were known to the law for many years prior to the enactment of § 15A-1227. The motion for dismissal referred to in § 15A-1227 is the same motion for dismissal referred to in this section. Therefore, there is but one motion for dismissal for insufficiency of the evidence to sustain a conviction, and that motion is governed by the provisions of both this section and § 15A-1227. State v. Mendez, 42 N.C. App. 141, 256 S.E.2d 405 (1979).

No Difference in Motion to Dismiss, etc. —

In accord with 1st paragraph in original. See State v. Lindsay, 45 N.C. App. 514, 263 S.E.2d 364 (1980).

On motion to nonsuit, the court is required, etc. —

In accord with 9th paragraph in original. See State v. Joyner, 301 N.C. 18, 269 S.E.2d 125 (1980).

In accord with 16th paragraph in original. See State v. Avery, 48 N.C. App. 675, 269 S.E.2d 708 (1980).

In accord with 17th paragraph in original. See State v. Lindsay, 45 N.C. App. 514, 263 S.E.2d 364 (1980); State v. LeDuc, 48 N.C. App. 227, 269 S.E.2d 220 (1980).

In accord with 19th paragraph in original. See State v. Jenkins, 300 N.C. 578, 268 S.E.2d 458 (1980).

In accord with 20th paragraph in original. See State v. Riddle, 300 N.C. 744, 268 S.E.2d 80 (1980).

To withstand defendant's motion to dismiss, the State must have presented evidence of every essential element of the crime. State v. Church, 43 N.C. App. 365, 258 S.E.2d 812 (1979).

The trial court in considering motions under this section is concerned only with the sufficiency of the evidence to carry the case to the jury and not with its weight. The trial court's function is to test whether a reasonable inference of the defendant's guilt of the crime charged may be drawn from the evidence. State v. Powell, 299 N.C. 95, 261 S.E.2d 114 (1980).

The test on a motion to dismiss is whether sufficient evidence has been presented to support a finding by the jury that defendant committed an offense with which he is charged. State v. Church, 43 N.C. App. 365, 258 S.E.2d 812 (1979).

When a motion for judgment as of nonsuit or a motion to dismiss is lodged in a criminal action, the court must consider all the evidence actually admitted, whether competent or incompetent, in the light most favorable to the State. All contradictions or discrepancies must be resolved in its favor, and it must be given the benefit of every reasonable inference to be drawn from the evidence. When all the evidence is so considered, it is for the court to decide whether there is sufficient evidence to support a finding that the charged offense has been committed and that the defendant was the perpetrator of the offense. If, when so con-

sidered, the evidence is only sufficient to raise a suspicion or conjecture that the offense has been committed or that the defendant committed the charged offense, then the motion for judgment as of nonsuit or the motion to dismiss should be allowed. State v. Brown, 300 N.C. 41, 265 S.E.2d 191 (1980).

Whether the evidence is direct, circumstantial, or both, if there is evidence from which a jury could find that the offense charged has been committed and that defendant committed it, the motion to nonsuit should be overruled. State v. Cummings, 301 N.C. 374, 271 S.E.2d 277 (1980).

On a motion to dismiss for insufficient evidence, the court must find that there is substantial evidence, whether direct, circumstantial, or both, that the offense charged has been committed and that defendant committed it, in order to properly deny the motion; if, on the other hand, the evidence raises merely a suspicion or conjecture as to either the commission of the offense or defendant's identity as the perpetrator, the motion should be allowed. State v. Collins, 50 N.C. App. 155, 272 S.E.2d 603 (1980).

Whether Competent or Incompetent. —

In accord with 7th paragraph in original. See State v. LeDuc, 48 N.C. App. 227, 269 S.E.2d 220 (1980).

In accord with 8th paragraph in original. See State v. Jenkins, 300 N.C. 578, 268 S.E.2d 458 (1980).

Effect of Defendant Introducing Testimony at Trial. —

In accord with lst paragraph in original. See State v. Jones, 296 N.C. 75, 248 S.E.2d 858 (1978).

Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. State v. Smith, 300 N.C. 71, 265 S.E.2d 164 (1980).

In considering a motion to dismiss, it is the duty of the court to ascertain whether there is substantial evidence of each essential element of the offense charged. State v. Smith, 300 N.C. 71, 265 S.E.2d 164 (1980).

On a motion for nonsuit or dismissal, the court must determine whether there is substantial evidence of all the material elements of the offense charged. State v. Avery, 48 N.C. App. 675, 269 S.E.2d 708 (1980).

Motion Must Be Renewed — Waiver. —

Where defendant's motion to dismiss made at the close of the State's evidence was denied, and following the denial of the motion, he put on evidence in his own behalf, and no motion was made at the conclusion of all the evidence, defendant, therefore, waived his prior motion and cannot bring it forward as appealable error. State v. Harden, 42 N.C. App. 677, 257 S.E.2d 635 (1979).

Under this section, a defendant, by presenting evidence, has waived his right to assert the denial of his motion to dismiss at the close of the State's evidence as a ground for appeal. The provisions of §§ 15A-1227(d) and 15A-1446(d)(5), allowing review on appeal of the sufficiency of the State's evidence in a criminal case without regard to whether the appropriate motion has been made, do not change this rule. State v. Mendez, 42 N.C. App. 141, 256 S.E.2d 405 (1979).

Having elected to offer evidence defendant waived her motion to dismiss at the close of the State's evidence, and proper consideration is thereafter upon her motion to dismiss made at the close of all the evidence. State v. Leonard, 300 N.C. 223, 266 S.E.2d 631, cert. denied, — U.S. —, 101 S. Ct. 372, 66 L. Ed. 2d 227 (1980).

Reasonable Inferences Unfavorable to State Must Be Ignored. — If the trial court determines that a reasonable inference of the defendant's guilt may be drawn from the evidence, it must deny the defendant's motion for nonsuit and send the case to the jury even though the evidence may also support reasonable inferences of the defendant's innocence. State v. McNeil, 46 N.C. App. 533, 265 S.E.2d 416 (1980).

When Motion Denied. —

In accord with 13th paragraph in original. See State v. Phillips, 300 N.C. 678, 268 S.E.2d 452 (1980).

When the evidence is considered in the light most favorable to the State, if there is substantial evidence, whether direct, circumstantial, or both, of all material elements of the offense charged, then the motion for nonsuit must be denied, and it is then for the jury to determine whether the evidence establishes guilt beyond a reasonable doubt. State v. Williams, 38 N.C. App. 138, 247 S.E.2d 630 (1978), cert. denied, 296 N.C. 108, 249 S.E.2d 807 (1979).

Sufficiency of Evidence. —

In accord with 6th paragraph in original. See State v. Smith, 300 N.C. 71, 265 S.E.2d 164 (1980); State v. Jenkins, 300 N.C. 578, 268 S.E.2d 458 (1980); State v. Joyner, 301 N.C. 18, 269 S.E.2d 125 (1980); State v. McNeil, 46 N.C. App. 533, 265 S.E.2d 416 (1980); State v. Avery, 48 N.C. App. 675, 269 S.E.2d 708 (1980); State v. Collins, 50 N.C. App. 155, 272 S.E.2d 603 (1980).

In accord with 30th paragraph in original. See State v. Williams, 38 N.C. App. 138, 247 S.E.2d 630 (1978), cert. denied, 296 N.C. 108, 249 S.E.2d 807 (1979); State v. Powell, 299 N.C. 95, 261 S.E.2d 114 (1980).

In accord with 31st paragraph in original. See State v. LeDuc, 48 N.C. App. 227, 269 S.E.2d 220 (1980).

In accord with 34th paragraph in original. See State v. Haywood, 295 N.C. 709, 249 S.E.2d 429 (1978); State v. Phillips, 300 N.C. 678, 268

S.E.2d 452 (1980); State v. Fletcher, 301 N.C. 515, 271 S.E.2d 913 (1980).

In accord with 40th paragraph in original. See State v. Jenkins, 300 N.C. 578, 268 S.E.2d 458 (1980).

In accord with 51st paragraph in original. See State v. Bryant, 50 N.C. App. 139, 272 S.E.2d 916 (1980).

In accord with 58th paragraph in original. See State v. Cummings, 301 N.C. 374, 271 S.E.2d 277 (1980).

In accord with 66th paragraph in original. See State v. Hunter, 48 N.C. App. 656, 270 S.E.2d 120 (1980).

In accord with 70th paragraph in original. See State v. Aleem, 49 N.C. App. 359, 271 S.E.2d 575 (1980).

In accord with 71st paragraph in original. See State v. Cooley, 47 N.C. App. 376, 268 S.E.2d 87, cert. denied, — N.C. —, 273 S.E.2d 442 (1980).

Upon defendant's motion to dismiss, or for judgment of nonsuit, the evidence for the State must be taken as true and the question for the court is whether there is substantial evidence that the offense charged in the bill of indictment, or a lesser offense included therein, has been committed, and that the defendant committed it. State v. Burke, 36 N.C. App. 577, 244 S.E.2d 477 (1978).

In ruling on a motion to dismiss, the court must consider the evidence in the light most favorable to the State, and may consider the defendant's evidence only if it is favorable to the State or if it serves to explain the State's evidence without conflicting with it. State v. Church, 43 N.C. App. 365, 258 S.E.2d 812 (1979).

In considering a motion to dismiss or a motion for judgment as in case of nonsuit, the evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion. State v. Powell, 299 N.C. 95, 261 S.E.2d 114 (1980).

In determining whether there is evidence sufficient for the judge to submit a case to the jury, all admitted evidence favorable to the State, whether competent or incompetent, must be considered and must be deemed true. State v. Riddle, 300 N.C. 744, 268 S.E.2d 80 (1980).

The test of the sufficiency of the evidence to withstand the motion for judgment of nonsuit is the same whether the evidence is circumstantial, direct or both. State v. LeDuc, 48 N.C. App. 227, 269 S.E.2d 220 (1980).

Same — Circumstantial Evidence. — In accord with 3rd paragraph in original. See State v. Joyner, 301 N.C. 18, 269 S.E.2d 125 (1980).

In accord with 7th paragraph in original. See State v. Fletcher, 301 N.C. 515, 271 S.E.2d 913 (1980).

When the motion for nonsuit calls into question the sufficiency of circumstantial evidence, the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. If so, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is guilty. State v. Mapp, 45 N.C. App. 574, 264 S.E.2d 348 (1980).

The credibility of witnesses and the weight to be given to their testimony is exclusively a matter for the jury and, further, upon a motion for nonsuit, the evidence for the State must be considered in the light most favorable to it; discrepancies and contradictions therein are disregarded. State v. Keller, 50 N.C. App. 364, 273 S.E.2d 741 (1981).

Same — Arson. — Evidence was sufficient to be submitted to the jury in an arson case where it tended to show that defendant had a motive to harm the person whose apartment was burned, and that he was angry over her decision to terminate their relationship; defendant had an opportunity to commit the crime since he knew that his girlfriend was not at home on the evening of the crime; testimony from several witnesses indicated that defendant was in the immediate vicinity of the apartment building just moments prior to the discovery of the fire; defendant was seen driving away from the area at a high rate of speed; the fire was started by igniting rags which had been piled on the living room sofa and on the bed; two officers stopped defendant a few hours after the fire driving a car matching the description given by several witnesses as the automobile in the area of the crime just prior to the fire; and upon approaching the car, the officers observed a bale of rags and a propane torch on the floorboard. State v. Wright, 302 N.C. 122, 273 S.E.2d 699 (1981).

Same — Prosecution for Homicide. — The State's evidence was sufficient to support defendant's conviction of second-degree murder where it tended to show that the victim entered a car occupied by defendant and defendant's companion in order to sell defendant a stolen M-16 rifle; the victim was seated in the front seat and defendant was seated in the back seat; defendant told the victim he had to pick up the money for the rifle at a friend's house; as the car was being driven by defendant's companion, defendant shot the victim in the head with a pistol which belonged to the girlfriend of the defendant's companion; defendant threatened to shoot his companion unless he followed

defendant's orders, whereupon the companion assisted defendant in burying the body; and a search of the residence of defendant and his companion uncovered the M-16 rifle. State v. Fletcher, 301 N.C. 709, 272 S.E.2d 859 (1981).

The State's evidence was sufficient to support convictions of defendants for second-degree murder where it tended to show that the victim, a State's witness, and another person were standing in the front yard of the witness's house at 4:00 A.M.; the witness heard a vehicle approaching the house, and heard one defendant screaming at him; the witness saw such defendant driving a pickup truck on the road in front of the house and saw the second defendant firing a gun from the back of the pickup; after passing the house, the pickup turned around and drove by the house again, at which time the second defendant fired several more shots; and the victim sustained a gunshot wound in the neck and died as a result thereof. State v. Spicer, 50 N.C. App. 214, 273 S.E.2d 521 (1981).

Evidence was insufficient to be submitted to the jury on charges of second-degree murder and voluntary manslaughter but was sufficient to be submitted on the charge of involuntary manslaughter where the evidence tended to show that defendant, a 16-year-old boy, shot his 10-year-old sister, but in showing the events leading up to and preceding the death of the sister, the State relied entirely on voluntary statements of defendant to the effect that he and his sister were fussing; defendant was "messing around with a shotgun"; and the gun accidentally went off. State v. Wagner, 50 N.C. App. 286, 273 S.E.2d 33 (1981).

Same — Rape. —

The State's evidence was sufficient for the jury in a prosecution for first degree rape where the prosecuting witness testified that defendant had intercourse with her on or about the Friday before Easter in 1978, that she was born on November 18, 1966, and therefore was under the age of 12 at that time, and that she had never had sexual intercourse with anyone prior to the incident in question, and where the fact that defendant was over 16 years of age was not contested. State v. Summitt, 301 N.C. 591, 272 S.E.2d 425, cert. denied, — U.S. —, 101 S. Ct. 2048, 68 L. Ed. 2d 349 (1981).

The trial court in a rape case did not err in failing to dismiss on the grounds that the State had not proved that there was penetration of the prosecuting witness by defendant since the testimony of the prosecutrix that she was forced to have intercourse against her will was clearly sufficient to withstand motion for nonsuit, and there was also sufficient evidence that defendant was the perpetrator of the offense charged where he admitted he was one of the four men in a car who abducted the prosecutrix; she testified that she was taken by the four men to a motel and raped by each of them and eventually driven home by the same four men; and defendant admitted being present the entire time but claimed he fell asleep and denied having sexual relations with the prosecutrix or seeing anyone else do so. State v. Hammonds, 301 N.C. 713, 272 S.E.2d 856 (1981).

An 11-year-old rape victim's tentative identification of defendant as her assailant and expert testimony that fingerprints lifted from the inside frame of the bedroom window where the victim's assailant entered matched defendant's fingerprints were sufficient to be submitted to the jury on issues of defendant's guilt of first-degree burglary and first-degree rape. State v. Harren, 302 N.C. 142, 273 S.E.2d 694 (1981).

Conflicting Evidence. —

In accord with 3rd paragraph in original. See State v. Smith, 300 N.C. 71, 265 S.E.2d 164 (1980).

Contradictions and discrepancies in the testimony of the State's witnesses are to be resolved by the jury and, for the purposes of this motion, they are to be deemed by the court as if resolved in favor of the State. State v. LeDuc, 48 N.C. App. 227, 269 S.E.2d 220 (1980).

For purposes of ruling on the motion, the court takes as true all of the State's evidence; whether the testimony is true or false and what it proves or fails to prove are matters for the jury. State v. Joyner, 301 N.C. 18, 269 S.E.2d 125 (1980).

Variance. —

There was no fatal variance between an indictment charging that the date of a felonious assault was April 17, 1979, and evidence that the assault occurred on February 17, 1979, where the variance was caused by a clerical mistake in the indictment; the statute of limitations was not involved; all of the evidence at trial concerned an incident on February 17; defense counsel's questioning of the witnesses clearly indicates that he was aware of the clerical error before trial; and defendant was not prejudiced in his preparation of an adequate defense by the variance. State v. Bailey, 49 N.C. App. 377, 271 S.E.2d 752 (1980).

Appeal of Denial of Motion without Exception in Record. — A defendant may properly present on appeal the questions enumerated in Rule 10(a) of the Rules of Appellate Procedure without taking any exceptions or making any assignments of error in the record and may properly present for review the denial of his motion for nonsuit under this section without making any exception in the record. However, in both these situations, the defendant must still bring those questions forward in his brief, argue them and cite authorities in support of his arguments. Failure to do so means that those questions are not properly presented for review. State v. Samuels, 298 N.C. 783, 260 S.E.2d 427 (1979).

Applied in State v. Correll, 38 N.C. App. 451, 248 S.E.2d 451 (1978); State v. Rhyne, 39 N.C. App. 319, 250 S.E.2d 102 (1979); State v. Hough, 299 N.C. 245, 262 S.E.2d 268 (1980); State v. Horton, 299 N.C. 690, 263 S.E.2d 745 (1980); State v. Harris, 47 N.C. App. 121, 266 S.E.2d 735 (1980).

Cited in State v. Hensley, 294 N.C. 231, 240 S.E.2d 332 (1978); State v. Adams, 298 N.C. 802, 260 S.E.2d 431 (1979); State v. Alston, 44 N.C. App. 72, 259 S.E.2d 767 (1979).

§ 15-173.1: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Editor's Note. —
Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

§ 15-174: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Editor's Note. —
Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

ARTICLE 17A.

Informing Jury in Case Involving Death Penalty.

§ 15-176.4. Instruction to jury on consequences of guilty verdict.

Legal Periodicals. — For survey of 1976 case law on criminal procedure, see 55 N.C.L. Rev. 989 (1977).

ARTICLE 17B.

Informing Jury of Possible Punishment upon Conviction.

§ 15-176.9. Loss of motor vehicle driver's license.

Legal Periodicals. — For survey of 1976 case law on criminal procedure, see 55 N.C.L. Rev. 989 (1977).

ARTICLE 18.

Appeal.

§§ 15-179 to 15-186: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Editor's Note. —
Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

ARTICLE 19.

Execution.

§ 15-187. Death by administration of lethal gas.

Legal Periodicals. — For comment on capital punishment and evolving standards of decency, see 16 Wake Forest L. Rev. 737 (1980).

§ 15-194. Time for execution.

Whenever the Supreme Court has filed an opinion upholding the sentence of death, or a stay of execution granted by any competent judicial tribunal or proceeding has expired or been terminated, or a reprieve by the Governor has expired or been terminated, a hearing shall be held in a superior court anywhere within the district where the case was tried to fix a new date for the execution of the original sentence. The district attorney shall promptly calendar such hearing. The condemned person shall be present at the hearing unless the condemned person has an attorney appearing at the hearing. The judge shall set the date of execution for not less than 60 days nor more than 90 days from the date of the hearing. The hearing may be conducted, whether or not in session, by any regular or special superior court judge resident in the district or assigned to hold court in this district wherever the case is docketed. The order fixing the date shall be recorded in the minutes of the court, and the clerk of the superior court shall immediately send a certified copy to the warden of the State penitentiary, at Raleigh. The clerk shall also send certified copies to the condemned person, the condemned person's attorney, and the district attorney who prosecuted the case. (1909, c. 443, s. 6; C. S., s. 4663; 1925, c. 55; 1951, c. 244, ss. 1, 2; 1973, c. 47, s. 2; 1981, c. 900.)

Effect of Amendments. — The 1981 amendment rewrote this section.

ARTICLE 19A.

Credits against the Service of Sentences and for Attainment of Prison Privileges.

§ 15-196.1. Credits allowed.

The minimum and maximum term of a sentence shall be credited with and diminished by the total amount of time a defendant has spent, committed to or in confinement in any State or local correctional, mental or other institution as a result of the charge that culminated in the sentence. The credit provided shall be calculated from the date custody under the charge commenced and shall include credit for all time spent in custody pending trial, trial de novo, appeal, retrial, or pending parole and probation revocation hearing: Provided, however, the credit available herein shall not include any time that is credited on the term of a previously imposed sentence to which a defendant is subject. (1973, c. 44, s. 1; 1977, c. 711, s. 16A; 1977, 2nd Sess., c. 1147, s. 30.)

Effect of Amendments. — Session Laws 1977, 2nd Sess., c. 1147, s. 30, effective July 1, 1978, amended Session Laws 1977, c. 711, by adding thereto a new s. 16A, amending this section. The amendment substituted "The minimum and maximum term of a" for "The term of a determinate sentence or the minimum and maximum term of an indeterminate" at the beginning of the section.

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

CASE NOTES

Applied in State v. Richardson, 295 N.C. 309, 245 S.E.2d 754 (1978).

§ 15-196.2. Allowance in cases of multiple sentences.

CASE NOTES

Applied in State v. Richardson, 295 N.C. 309, 245 S.E.2d 754 (1978).

§ 15-196.3. Effect of credit.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

CASE NOTES

Application to Re-Sentencing. — A person who was initially, and unconstitutionally, sentenced to death, and is re-sentenced to life imprisonment is entitled to receive credit for pre-trial custody provided in this section. Carey v. Garrison, 452 F. Supp. 485 (W.D.N.C. 1978).

§ 15-196.4. Procedures for judicial award.

CASE NOTES

Cited in State v. Mason, 295 N.C. 584, 248 S.E.2d 241 (1978).

Article 20.

Suspension of Sentence and Probation.

§§ 15-197 to 15-200.1: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Editor's Note. —
Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

§ 15-200.2: Repealed by Session Laws 1975, c. 309, s. 2, effective July 1, 1975.

Cross References. — For provisions as to post-trial relief, effective July 1, 1978, see §§ 15A-1411 through 15A-1422.

Editor's Note. — This section was again repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

§ 15-205. Duties and powers of the probation officers.

Editor's Note. — The historical citation to this section as it appears in the replacement volume should include 1977, c. 711, s. 18.

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

CASE NOTES

Authority to Arrest Probationer without Warrant. — If a simple conclusory statement from the probation officer, containing no factual allegations, is sufficient to permit another officer to arrest a probationer without a warrant, then it is reasonable to conclude that this section and § 15A-1345 read together, give the probation officer the authority to arrest a probationer under his supervision for violations of conditions of probation without a warrant or other written document. State v. Waller, 37 N.C. App. 133, 245 S.E.2d 808 (1978).

§ 15-205.1: Repealed by Sessions Law 1977, c. 711, s. 33, effective July 1, 1978.

Editor's Note. —
Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

ARTICLE 22.

Review of Criminal Trials.

§§ 15-217 to 15-222: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Editor's Note. —
Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

ARTICLE 23.

Expunction of Records.

§ 15-223. Expunction of records for first offenders under the age of 18 at the time of conviction of misdemeanor.

(a) Whenever any person who has not yet attained the age of 18 years and has not previously been convicted of any felony, or misdemeanor other than a traffic violation, under the laws of the United States, the laws of this State or any other state, pleads guilty to or is guilty of a misdemeanor other than a traffic violation, he may file a petition in the court where he was convicted for expunction of the misdemeanor from his criminal record. The petition cannot be filed earlier than two years after the date of the conviction or any period of probation, whichever occurs later, and the petition shall contain, but not be limited to, the following:

(1) An affidavit by the petitioner that he has been of good behavior for the two-year period since the date of conviction of the misdemeanor in question and has not been convicted of any felony, or misdemeanor other than a traffic violation, under the laws of the United States or the laws of this State or any other state.

(2) Verified affidavits of two persons who are not related to the petitioner or to each other by blood or marriage, that they know the character and reputation of the petitioner in the community in which he lives and that his character and reputation are good.

(3) A statement that the petition is a motion in the cause in the case wherein the petitioner was convicted.

(4) Affidavits of the clerk of superior court, chief of police, where appropriate, and sheriff of the county in which the petitioner was convicted

and, if different, the county of which the petitioner is a resident, showing that the petitioner has not been convicted of a felony or misdemeanor other than a traffic violation under the laws of this State at any time prior to the conviction for the misdemeanor in question or during the two-year period following that conviction.

The petition shall be served upon the district attorney of the court wherein the case was tried resulting in conviction. The district attorney shall have 10 days thereafter in which to file any objection thereto and shall be duly notified as to the date of the hearing of the petition.

The judge to whom the petition is presented is authorized to call upon a probation officer for any additional investigation or verification of the petitioner's conduct during the two-year period that he deems desirable.

(1979, c. 431, ss. 1, 2.)

Effect of Amendments. — The 1979 amendment rewrote subdivision (a)(4) and added the last paragraph of subsection (a).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (a) is set out.

OPINIONS OF ATTORNEY GENERAL

Where Several Misdemeanor Offenses Consolidated for Trial. — Where a person under the age of 18 years, who has not previously or subsequently been convicted of any offense, is charged with several misdemeanor offenses, the charges are consolidated for trial and judgment, and the sentence imposed is within the statutory limit for conviction of a single offense, the court may order expungement of the record pursuant to this section. See opinion of Attorney General to Honorable Russell G. Walker, Jr., District Attorney, Nineteenth-B Prosecutorial District, Aug. 28, 1979.

§ 15-224. Expunction of records when charges are dismissed or there are findings of not guilty.

Except as otherwise provided in G.S. 90-96, if any person is charged with a crime, either a misdemeanor or a felony, and the charge is dismissed, or a finding of not guilty is entered, that person may apply to the court of the county where the charge was brought for an order to expunge from all official records any entries relating to his apprehension or trial. The court shall hold a hearing on the application and, upon finding that at the time any of the proceedings against him occurred the person had not attained the age of 18 years and had not previously been convicted of any felony or misdemeanor other than a traffic violation under the laws of the United States, this State, or any other state, the court shall order the expunction. No person as to whom such an order has been entered shall be held thereafter under any provision of any law to be guilty of perjury, or to be guilty of otherwise giving a false statement or response to any inquiry made for any purpose, by reason of his failure to recite or acknowledge any expunged entries concerning apprehension or trial. The clerk shall send a copy of the expunction order to any public official known to be a custodian of such entries. (1979, c. 61.)

Chapter 15A.

Criminal Procedure Act.

SUBCHAPTER I. GENERAL.

ARTICLE 1.

Definitions and General Provisions.

§ 15A-101. Definitions.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

Legal Periodicals. — For an article on the North Carolina Speedy Trial Act, see 17 Wake Forest L. Rev. 173 (1981).

CASE NOTES

Quoted in State v. Ward, 46 N.C. App. 200, 264 S.E.2d 737 (1980).

ARTICLE 3.

Venue.

§ 15A-131. Venue generally.

CASE NOTES

The right to be tried in the county where the charged crime allegedly occurred is statutorily based, and is not a right grounded in the federal or State Constitutions. State v. Hood, 294 N.C. 30, 239 S.E.2d 802 (1978).

§ 15A-133. Waiver of venue; motion for change of venue; indictment may be returned in other county.

CASE NOTES

Cited in State v. Hood, 294 N.C. 30, 239 S.E.2d 802 (1978).

§ 15A-135. Allegation of venue conclusive in absence of timely motion.

CASE NOTES

Former Statute. —
The purpose of former § 15-134 was to forestall the possibility that a criminal offender would escape punishment merely because of uncertainty as to the county in which the crime was committed. State v. Batdorf, 293 N.C. 486, 238 S.E.2d 497 (1977).

Burden of Proof Is on State. — This section, like former § 15-134, is silent concerning the burden of proof with regard to proper venue. Hence, the common law controls and the burden of proof is upon the State to show that the offense occurred in the county named in the bill of indictment. State v. Batdorf, 293 N.C. 486, 238 S.E.2d 497 (1977).

But Venue Need Not Be Shown beyond Reasonable Doubt. — Venue need not be shown beyond a reasonable doubt, since it does not affect the question of a defendant's guilt or the power of the court to try him. Proof of venue by a preponderance of the evidence is sufficient. State v. Batdorf, 293 N.C. 486, 238 S.E.2d 497 (1977).

Applied in State v. Currie, 47 N.C. App. 446, 267 S.E.2d 390 (1980).

§ 15A-136. Venue for sexual offenses.

If a person is transported by any means, with the intent to violate any of the provisions of Article 7A of Chapter 14 (§ 14-27.1 et seq.) of the General Statutes and the intent is followed by actual violation thereof, the defendant may be tried in the county where transportation was offered, solicited, begun, continued or ended. (1979, c. 682, s. 2.)

Editor's Note. — Session Laws 1979, c. 682, ss. 13 and 14, provide:

"Sec. 13. All laws and clauses of laws in conflict with this act are hereby repealed, provided however, nothing in this act shall be construed to repeal any portion of Article 26 of Chapter 14 which relates to offenses against public morality and decency.

"Sec. 14. This act shall become effective January 1, 1980, and shall apply to offenses occurring on and after that date. Nothing herein shall be construed to render lawful acts committed prior to the effective date of this act [January 1, 1979] and unlawful at the time the said acts occurred; and nothing contained herein shall be construed to affect any prosecution instituted under any section repealed by this act pending on the effective date hereof."

Session Laws 1979, c. 682, s. 12, contains a severability clause.

§§ 15A-137 to 15A-140: Reserved for future codification purposes.

ARTICLE 4.

Entry and Withdrawal of Attorney in Criminal Case.

§ 15A-144. Withdrawal of attorney with permission of court.

CASE NOTES

Applied in State v. Logner, 297 N.C. 539, 256 S.E.2d 166 (1979).

SUBCHAPTER II. LAW-ENFORCEMENT AND INVESTIGATIVE PROCEDURES.

ARTICLE 9.

Search and Seizure by Consent.

§ 15A-221. General authorization; definition of "consent."

Legal Periodicals. — For article discussing the search and seizure provisions of Chapter 15A, see 52 N.C.L. Rev. 277 (1973).

CASE NOTES

An officer's threat to impound defendant's car if he would not consent to a search of the car did not constitute duress and negate the voluntary character of defendant's consent to search, since the officer had the legal right to impound the car, where the officer had probable cause to search. State v. Paschal, 35 N.C. App. 239, 241 S.E.2d 92 (1978).

Use of Evidence Obtained in Search by Consent. — Evidence obtained pursuant to the search of an automobile with the permission of the one in possession is competent against him and the occupants. State v. Jefferies, 41 N.C. App. 95, 254 S.E.2d 550, cert. denied, 297 N.C. 614, 257 S.E.2d 438 (1979).

Applied in State v. Kellam, 48 N.C. App. 391, 269 S.E.2d 197 (1980).

§ 15A-222. Person from whom effective consent may be obtained.

CASE NOTES

Consent by Person in Possession, etc. — In accord with original. See State v. Jefferies, 41 N.C. App. 95, 254 S.E.2d 550, cert. denied, 297 N.C. 614, 257 S.E.2d 438 (1979).

Person Must Possess Common Authority or Other Sufficient Relationship. — Permission to justify a search and seizure under § 15A-221 may be obtained from a third party who possessed common authority or other sufficient relationship to the premises or effects sought to be inspected. State v. Kellam, 48 N.C. App. 391, 269 S.E.2d 197 (1980).

A tenant in possession of the premises is a person entitled to give consent to a search of the premises under subdivision (3) of this section. State v. Reagan, 35 N.C. App. 140, 240 S.E.2d 805 (1978).

The lessee of an apartment was a person authorized to give consent to a search of the premises. State v. McNeill, 33 N.C. App. 317, 235 S.E.2d 274 (1977).

§ 15A-223. Permissible scope of consent search and seizure.

CASE NOTES

Failure to comply with § 15A-223(b) has no constitutional significance within the meaning of § 15A-974(1). State v. Richardson, 295 N.C. 309, 245 S.E.2d 754 (1978).

ARTICLE 10.

Other Searches and Seizures.

§ 15A-231. Other searches and seizures.

Legal Periodicals. — For article discussing the search and seizure provisions of Chapter 15A, see 52 N.C.L. Rev. 277 (1973).

For a survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

CASE NOTES

Warrantless Search Never Required. — The laws of this State provide for searches made pursuant to a warrant and do not require a warrantless search under any circumstances. State v. Squire, 302 N.C. 112, 273 S.E.2d 688 (1981).

Warrant Not Required Where Article Seized Is in Plain View. —

In accord with 8th paragraph in original. See In re Horne, 50 N.C. App. 97, 272 S.E.2d 905 (1980).

This section incorporated the United States Supreme Court "plain view" exception to the warrant requirement, which permits inclusion in evidence of the fruit of a legal, warrantless presence. State v. Blackwelder, 34 N.C. App. 352, 238 S.E.2d 190 (1977).

Evidence of crime falling in the plain view of an officer who has a right to be in a position to have that view is subject to seizure and may be introduced into evidence. State v. Mitchell, 300 N.C. 305, 266 S.E.2d 605 (1980).

A car reasonably believed to be the fruit, instrumentality or evidence of a crime can be seized whenever found in plain view. State v. Mitchell, 300 N.C. 305, 266 S.E.2d 605 (1980).

In a first-degree rape case where the victim contended that her assailant executed the crime at knife point, the trial court did not err in denying defendant's motion to suppress a knife found among his belongings on the ground that it was found during an illegal search, where a police officer and friend of defendant's family went to defendant's home to secure a change of clothing for defendant; the officer told defendant's mother of the arrest and the reason for the visit; the mother invited the officer into the kitchen where defendant's clothing was in two bags and defendant's mother opened one of the bags and a knife fell out since the officer had the right to take the knife under the "plain view" doctrine. State v. Jackson, 302 N.C. 101, 273 S.E.2d 666 (1981).

The "plain view" doctrine states that a law enforcement officer may properly seize evidence in plain view without a search warrant if the officer has prior justification for the intrusion onto the premises being searched, other than observing the object which is later contended to have been in plain view, and the incriminating evidence must be inadvertently discovered by the officer while on the premises. State v. Tillett, 50 N.C. App. 520, — S.E.2d — (1981).

Same — Probable Cause for Search for Other Contraband. — Defendants' Fourth Amendment rights were not violated by a warrantless search of their vehicle where an officer had probable cause to suspect that defendants might be engaged in criminal activity; the officer was merely investigating defendants' activity in an area of seasonal residences when he shone his light into their vehicle and inadvertently saw what he, an experienced law enforcement officer, perceived to be a marijuana cigarette, and contraband was thus in plain view subject to lawful seizure; furthermore, given the cigarette in plain view, the gray plastic film container on the ground next to one defendant's foot, and the defendants' response of "yes" when asked if anything was in the vehicle, the trial court's findings clearly established a probability that other contraband was contained in the vehicle, therefore justifying the warrantless search of the vehicle in which the balance of the contraband was discovered and seized. State v. Tillett, 50 N.C. App. 520, — S.E.2d — (1981).

Plain view alone is not enough to justify warrantless seizure of evidence. State v. Blackwelder, 34 N.C. App. 352, 238 S.E.2d 190 (1977).

Under § 15A-253, the statutory "plain view" doctrine is limited to the inadvertent discovery of items pursuant to a legal search under a valid warrant though these items are not specified in the search warrant. State v. Blackwelder, 34 N.C. App. 352, 238 S.E.2d 190 (1977).

Constitutionally permissible seizures under the "plain view" exception to the Fourth Amendment protection against warrantless searches and seizures have been restricted under § 15A-253 to those instances where the officer has legal justification to be at the place where he inadvertently sees a piece of evidence in plain view. The doctrine serves to supplement the prior justification. State v. Blackwelder, 34 N.C. App. 352, 238 S.E.2d 190 (1977).

Probable cause to seize may be defined as a reasonable ground to believe that the object seized will aid in the apprehension or conviction of the offender. State v. Mitchell, 300 N.C. 305, 266 S.E.2d 605 (1980).

The existence of "probable cause," etc. — In accord with 1st paragraph in original. See State v. Mitchell, 300 N.C. 305, 266 S.E.2d 605 (1980).

In accord with 2nd paragraph in original. See State v. Mitchell, 300 N.C. 305, 266 S.E.2d 605 (1980).

The search of an automobile, etc. — Warrantless searches of automobiles and seizures of contraband therefrom without consent are not per se regulated by the North Carolina General Statutes. State v. Summerlin, 35 N.C. App. 522, 241 S.E.2d 732, cert. denied, 294 N.C. 739, 244 S.E.2d 157 (1978).

A warrantless search of a vehicle capable of movement out of the location or jurisdiction may be conducted by officers when they have probable cause to search and exigent circumstances make it impracticable to secure a search warrant. State v. Summerlin, 35 N.C. App. 522, 241 S.E.2d 732, cert. denied, 294 N.C. 739, 244 S.E.2d 157 (1978); State v. Mitchell, 300 N.C. 305, 266 S.E.2d 605 (1980).

Reasonable Cause for Stop and Search of Vehicle. — In a prosecution for felonious possession of marijuana, there was no merit to defendants' contention that an officer did not have reasonable suspicions based upon definite facts that defendants were engaged in or had engaged in criminal conduct when he stopped their vehicle, where the evidence tended to show that the officer noticed the defendants late at night in a seasonably unoccupied residential area, that the officer knew only one of the residences was occupied at that time of the year, and that the officer was aware of reports of "fire-lighting" deer in that area on several occasions. State v. Tillett, 50 N.C. App. 520, — S.E.2d — (1981).

Impoundment and Search of Vehicle. — In a prosecution for rape, defendant could not complain that officers chose to afford defendant the protection of impounding his vehicle and keeping it locked and under custody until a search warrant could be obtained rather than seizing a knife which was in plain view on the dashboard of the car at the time the car was impounded. State v. Squire, 302 N.C. 112, 273 S.E.2d 688 (1981).

Property Which May Be Taken, etc. — In order to justify the seizure of a weapon as being incident to a lawful arrest it is not necessary that the weapon be on the person being arrested. State v. Richards, 294 N.C. 474, 242 S.E.2d 844 (1978).

Items Uncovered during Search Pursuant to Warrant. — Where a lawful search pursuant to a search warrant is being conducted, items uncovered during the course of this search may be seized if the items would have been seizable under previously announced rationales for warrantless, plain view seizures (i.e., the items were the instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of the person arrested might be effected, and property the possession of which is a crime, or were items for which probable cause existed to believe that they were evidence of criminal activity and would aid in a particular apprehension or conviction), and the items are discovered "inadvertently." State v. Richards, 294 N.C. 474, 242 S.E.2d 844 (1978).

The meaning of the inadvertence requirement is that there must be no intent on the part of investigators to search for and seize the contested items not named in the warrant. State v. Richards, 294 N.C. 474, 242 S.E.2d 844 (1978).

Standing to Contest Warrantless Search. — Where victim's pocketbook was found in defendant's car and searched pursuant to a warrantless probable cause search, the contents of the pocketbook should not have been suppressed at trial since one may not object to a search or seizure of the premises or property of another because immunity to unreasonable searches and seizures is a privilege personal to those whose rights thereunder have been infringed; thus, absent ownership or possessory interest in the premises or property, a person has no standing to contest the validity of a search. State v. Greenwood, 301 N.C. 705, 273 S.E.2d 438 (1981).

Where victim's pocketbook was found in defendant's car and searched pursuant to a warrantless probable cause search, the defendant failed to meet his burden of demonstrating an infringement of his personal rights by the

search since the defendant offered no evidence to show any legitimate property or possessory interest in the pocketbook, the State's evidence tended to show that it belonged to a third person and it had been stolen from her automobile which was parked near defendant's automobile, and defendant failed to show that the seizure and search of the pocketbook infringed upon his own personal rights under the Fourth Amendment; thus, defendant's motion to suppress the pocketbook and its contents was properly denied by the trial court. State v. Greenwood, 301 N.C. 705, 273 S.E.2d 438 (1981).

Article 11.

Search Warrants.

§ 15A-241. Definition of search warrant.

Legal Periodicals. — For article discussing the search and seizure provisions of Chapter 15A, see 52 N.C.L. Rev. 277 (1973).

§ 15A-242. Items subject to seizure under a search warrant.

Legal Periodicals. — For a survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

CASE NOTES

Provisions of Chapter 15A, particularly this section and § 15A-253, are codifications of federal constitutional requirements. State v. Richards, 294 N.C. 474, 242 S.E.2d 844 (1978).

Nontestimonial Identification Evidence. — In addition to a nontestimonial identification order pursuant to § 15A-272 and this section, a search warrant is a proper method to obtain nontestimonial identification evidence from a defendant. State v. McLean, 47 N.C. App. 672, 267 S.E.2d 695 (1980).

Photographs and Letters Held Admissible as Evidence of Identity. — Where deputies searched a mobile home pursuant to a validly issued "occupant warrant" which specified heroin as the object of the search, and from the trailer's bathroom, a substance later determined to be heroin was seized, and after the heroin was discovered, letters and photographs which had been seen earlier were also taken from the adjoining bedroom, the photographs and letters were admissible into evidence pursuant to § 15A-253 since under subdivision (4) of this section they constituted evidence of the identity of a person participating in an offense. State v. Williams, 299 N.C. 529, 263 S.E.2d 571 (1980).

Applied in State v. Armstrong, 45 N.C. App. 40, 262 S.E.2d 370 (1980).

§ 15A-243. Who may issue a search warrant.

CASE NOTES

Determination of Probable Cause. — The determination of the existence of probable cause is not concerned with the question of whether the offense charged has been committed in fact, or whether the accused is guilty or innocent, but only with whether the affiant has reasonable grounds for his belief. State v. Eutsler, 41 N.C. App. 182, 254 S.E.2d 250, cert. denied, 297 N.C. 614, 257 S.E.2d 438 (1979).

If the apparent facts set out in an affidavit for a search warrant are such that a reasonably discreet and prudent man would be led to believe that there was a commission of the offense charged, there is probable cause justifying the issuance of a search warrant.

State v. Eutsler, 41 N.C. App. 182, 254 S.E.2d 250, cert. denied, 297 N.C. 614, 257 S.E.2d 438 (1979).

Probable cause does not mean actual and positive cause, nor does it import absolute certainty. State v. Eutsler, 41 N.C. App. 182, 254 S.E.2d 250, cert. denied, 297 N.C. 714, 257 S.E.2d 438 (1979).

Within the meaning of this section through 15A-245, probable cause may be defined as a reasonable ground to believe that the proposed search will reveal the presence, upon the premises to be search, of the objects sought and that those objects will aid in the apprehension or conviction of the offender. State v. Eutsler, 41 N.C. App. 182, 254 S.E.2d 250, cert. denied, 297 N.C. 614, 257 S.E.2d 438 (1979).

Cited in State v. Summerlin, 35 N.C. App. 522, 241 S.E.2d 732 (1978); State v. Long, 37 N.C. App. 662, 246 S.E.2d 846 (1978); State v. Jones, 299 N.C. 298, 261 S.E.2d 860 (1980).

§ 15A-244. Contents of the application for a search warrant.

Legal Periodicals. — For comment on testing the credibility of search warrant affidavits, see 54 N.C.L. Rev. 477 (1976).

For a survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

CASE NOTES

"Probable Cause". — In accord with 4th paragraph in original. See State v. Dailey, 33 N.C. App. 600, 235 S.E.2d 917, appeal dismissed, 293 N.C. 362, 237 S.E.2d 849 (1977); State v. Bell, 36 N.C. App. 629, 244 S.E.2d 714 (1978); State v. Jones, 299 N.C. 298, 261 S.E.2d 860 (1980).

Probable cause does not mean actual and positive cause, nor does it import absolute certainty. State v. Eutsler, 41 N.C. App. 182, 254 S.E.2d 250, cert. denied, 297 N.C. 614, 257 S.E.2d 438 (1979).

Within the meaning of §§ 15A-243 through 15A-245, probable cause may be defined as a reasonable ground to believe that the proposed search will reveal the presence, upon the premises to be searched, of the objects sought and that those objects will aid in the apprehension or conviction of the offender. State v. Eutsler, 41 N.C. App. 182, 254 S.E.2d 250, cert. denied, 297 N.C. 614, 257 S.E.2d 438 (1979).

The determination of the existence of probable cause is not concerned with the question of whether the offense charged has been committed in fact, or whether the accused is guilty or innocent, but only with whether the affiant has reasonable grounds for his belief. State v. Eutsler, 41 N.C. App. 182, 254 S.E.2d 250, cert. denied, 297 N.C. 614, 257 S.E.2d 438 (1979).

Probable cause, as used in the Fourth Amendment, subdivision (2) of this section, and § 15A-245, means a reasonable ground to believe that the proposed search will reveal the presence upon the premises to be searched of the objects sought and that those objects will aid in the apprehension or conviction of the offender. State v. Harris, 43 N.C. App. 184, 258 S.E.2d 415 (1979).

Probable cause does not deal in certainties but deals rather in probabilities which are factual and practical considerations of everyday life upon which reasonable and prudent men may act. State v. Dailey, 33 N.C. App. 600, 235 S.E.2d 917, appeal dismissed, 293 N.C. 362, 237 S.E.2d 849 (1977).

If the apparent facts set out in an affidavit for a search warrant are such that a reasonably discreet and prudent man would be led to believe that there was a commission of the offense charged, there is probable cause justifying the issuance of a search warrant. State v. Eutsler, 41 N.C. App. 182, 254 S.E.2d 250, cert. denied, 297 N.C. 614, 257 S.E.2d 438 (1979).

Warrant May Be Based on Information Not Competent as Evidence. — A valid search warrant may be issued on the basis of an affidavit setting forth information which may not be competent as evidence in a criminal trial. State v. Dailey, 33 N.C. App. 600, 235 S.E.2d 917, appeal dismissed, 293 N.C. 362, 237 S.E.2d 849 (1977).

Police Officer May Rely, etc. — In accord with 1st paragraph in original. See State v. Dailey, 33 N.C. App. 600, 235 S.E.2d 917, appeal dismissed, 293 N.C. 362, 237 S.E.2d 849 (1977).

Requirements Where Affidavit Based on Hearsay. — The affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant; but the affidavit in such case must contain some of the underlying circumstances from which the affiant's informer concluded that the articles sought were where the informer claimed they were, and some of the underlying circumstances from which the affiant concluded that

the informer was credible and his information reliable. State v. Dailey, 33 N.C. App. 600, 235 S.E.2d 917, appeal dismissed, 293 N.C. 362, 237 S.E.2d 849 (1977).

Establishing Informant's Reliability. — An officer's statement in an affidavit to obtain a search warrant that a reliable and confidential informant who furnished information to him has been used by (another named officer) in the past and that information given by the source has proven correct in all cases met the minimum standard for setting forth the circumstances from which the affiant concluded that the informant was reliable. State v. Williams, 49 N.C. App. 184, 270 S.E.2d 604 (1980).

Absence of Magistrate's Signature. — Warrant held valid despite the absence of the magistrate's signature. See State v. Flynn, 33 N.C. App. 492, 235 S.E.2d 424, cert. denied, 293 N.C. 255, 237 S.E.2d 537 (1977).

Applied in State v. Stinson, 39 N.C. App. 313, 249 S.E.2d 891 (1979).

Cited in State v. Long, 37 N.C. App. 662, 246 S.E.2d 846 (1978).

§ 15A-245. Basis for issuance of a search warrant; duty of the issuing official.

CASE NOTES

When Probable Cause Exists. —

In accord with 2nd paragraph in original. See State v. Eutsler, 41 N.C. App. 182, 254 S.E.2d 250, cert. denied, 297 N.C. 614, 257 S.E.2d 438 (1979).

In accord with 3rd paragraph in original. See State v. Eutsler, 41 N.C. App. 182, 254 S.E.2d 250, cert. denied, 297 N.C. 614, 257 S.E.2d 438 (1979).

In accord with 5th paragraph in original. See State v. Dailey, 33 N.C. App. 600, 235 S.E.2d 917, appeal dismissed, 293 N.C. 362, 237 S.E.2d 849 (1977).

In accord with 6th paragraph in original. See State v. Eutsler, 41 N.C. App. 182, 254 S.E.2d 250, cert. denied, 297 N.C. 614, 257 S.E.2d 438 (1979).

In accord with 7th paragraph in original. See State v. Dailey, 33 N.C. App. 600, 235 S.E.2d 917, appeal dismissed, 293 N.C. 362, 237 S.E.2d 849 (1977); State v. Jones, 299 N.C. 298, 261 S.E.2d 860 (1980); State v. Sheetz, 46 N.C. App. 641, 265 S.E.2d 914 (1980).

Within the meaning of §§ 15A-243 through this section, probable cause may be defined as a reasonable ground to believe that the proposed search will reveal the presence, upon the premises to be searched, of the objects sought and that those objects will aid in the apprehension or conviction of the offender. State v. Eutsler, 41 N.C. App. 182, 254 S.E.2d 250, cert. denied, 297 N.C. 614, 257 S.E.2d 438 (1979).

Probable cause, as used in the Fourth Amendment, § 15A-244(2) and this section, means a reasonable ground to believe that the proposed search will reveal the presence upon the premises to be searched of the objects sought and that those objects will aid in the apprehension or conviction of the offender. State v. Harris, 43 N.C. App. 184, 258 S.E.2d 415 (1979).

Whether probable cause exists for the issuance of a search warrant depends upon a practical assessment of the relevant circumstances. State v. Jones, 299 N.C. 298, 261 S.E.2d 860 (1980).

The test to determine the sufficiency of affidavits, etc. —

In an application for a search warrant, the affidavit is deemed sufficient if it supplies reasonable cause to believe that the proposed search for evidence of the commission of the designated criminal offense will reveal the presence upon the described premises of the objects sought and that they will aid in the apprehension or conviction of the offender. State v. Hamlin, 36 N.C. App. 605, 244 S.E.2d 481 (1978).

A search warrant cannot be issued upon affidavits which are purely conclusory and which do not state underlying circumstances upon which the affiant's belief of probable cause is founded. Further, there must be facts or circumstances in the affidavit which implicate the premises to be searched. State v. Bright, 301 N.C. 243, 271 S.E.2d 368 (1980).

The affidavit must furnish reasonable cause to believe that the search will reveal the presence of the articles sought on the premises described in the application for the warrant and that such objects will aid in the apprehension or conviction of the offender. State v. Bright, 301 N.C. 243, 271 S.E.2d 368 (1980).

The affidavit upon which a search warrant is issued is sufficient if it supplies reasonable cause to believe that the proposed search for evidence of the commission of the designated criminal offense will reveal the presence upon the described premises of the objects sought and that they will aid in the apprehension or conviction of the offender. State v. Sheetz, 46 N.C. App. 641, 265 S.E.2d 914 (1980).

Basis Where Electronic Tracking Beepers Used. — See State v. Hendricks, 43 N.C. App. 245, 258 S.E.2d 872 (1979), cert. denied, 299 N.C. 123, 262 S.E.2d 6 (1980).

Finding May Be Based, etc. —

In accord with 2nd paragraph in original. See State v. Dailey, 33 N.C. App. 600, 235 S.E.2d 917, appeal dismissed, 293 N.C. 362, 237 S.E.2d 849 (1977).

An affidavit may be based on hearsay, etc. —

In accord with 3rd paragraph in original. See State v. Dailey, 33 N.C. App. 600, 235 S.E.2d 917, appeal dismissed, 293 N.C. 362, 237 S.E.2d 849 (1977).

Resolution of Doubtful Cases. —

Each case must be decided on its own facts and reviewing courts are to pay deference to judicial determinations of probable cause. The resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants. State v. Jones, 299 N.C. 298, 261 S.E.2d 860 (1980).

Affidavits Held Not to Furnish Adequate Basis for Finding Probable Cause. —

The allegation that agents have conducted an investigation which has disclosed evidence of irregularities which, if supported by evidence and found to be true, would constitute serious violations of the law on the part of the defendant, without the disclosure of facts from which the magistrate could ascertain the existence of irregularities that would constitute serious violations of the law, does not meet the constitutional standard for issuance of a search warrant. State v. Sheetz, 46 N.C. App. 641, 265 S.E.2d 914 (1980).

Typographical Error in Year Date. — Albeit subsection (a) of this section places restrictions upon what information can be used by the magistrate in finding probable cause, the trial judge did not go beyond the permissible scope of inquiry when he heard evidence on the issue of a typographical error in the year date. State v. Beddard, 35 N.C. App. 212, 241 S.E.2d 83 (1978).

Where the year had recently changed, a typographical error in the year date was not fatal to the sufficiency of the affidavit. State v. Beddard, 35 N.C. App. 212, 241 S.E.2d 83 (1978).

§ 15A-249. Officer to give notice of identity and purpose.

Legal Periodicals. — For survey of 1978 law on criminal procedure, see 57 N.C.L. Rev. 1007 (1979).

CASE NOTES

Purpose, etc. —

One of the purposes of this section is to protect the public from unreasonable searches and seizures and to guard the right to privacy in homes. State v. Brown, 35 N.C. App. 634, 242 S.E.2d 184 (1978).

Effect of Exigent Circumstances. — In a search and seizure case, where the exigent circumstances are adequate to justify the warrantless search of defendant's house by officers under the plain view doctrine, they would also be sufficient to excuse the officers from the knock and announce requirement. State v. Prevette, 43 N.C. App. 450, 259 S.E.2d 595 (1979), cert. denied and appeal dismissed, 299 N.C. 124, 261 S.E.2d 925, cert. denied, 447 U.S. 906, 100 S. Ct. 2988, 64 L. Ed. 2d 855 (1980).

Notice Held Sufficient. —

See State v. Fruitt, 35 N.C. App. 177, 241 S.E.2d 125 (1978); State v. Trapper, 48 N.C. App. 481, 269 S.E.2d 680, appeal dismissed, 301 N.C. 405, 273 S.E.2d 450 (1980).

Cited in State v. Sutton, 34 N.C. App. 371, 238 S.E.2d 305 (1977).

§ 15A-251. Entry by force.

Legal Periodicals. — For survey of 1978 law on criminal procedure, see 57 N.C.L. Rev. 1007 (1979).

CASE NOTES

Court of Appeals Decision Overruled. — State v. Watson, 19 N.C. App. 160, 198 S.E.2d 185 (1973) was overruled by this section. State v. Brown, 35 N.C. App. 634, 242 S.E.2d 184 (1978).

Effect of Exigent Circumstances on Announcement Requirement. — In a search and seizure case, where the exigent circumstances are adequate to justify the warrantless search of defendant's house by officers under the plain view doctrine, they would also be sufficient to excuse the officers from the knock and announce requirement. State v. Prevette, 43 N.C. App. 450, 259 S.E.2d 595 (1979), cert. denied and appeal dismissed, 299 N.C. 124, 261 S.E.2d 925, cert. denied, 447 U.S. 906, 100 S. Ct. 2988, 64 L. Ed. 2d 855 (1980).

Notice Held Sufficient. — See State v. Trapper, 48 N.C. App. 481, 269 S.E.2d 680, appeal dismissed, 301 N.C. 405, 273 S.E.2d 450 (1980).

Cited in State v. Sutton, 34 N.C. App. 371, 238 S.E.2d 305 (1977).

§ 15A-252. Service of a search warrant.

CASE NOTES

Compliance where actual reading of search warrant rendered impossible because of active obstruction of officers. See State v. Rogers, 43 N.C. App. 475, 259 S.E.2d 572 (1979).

Cited in State v. Fruitt, 35 N.C. App. 177, 241 S.E.2d 125 (1978).

§ 15A-253. Scope of the search; seizure of items not named in the warrant.

Legal Periodicals. — For a survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

CASE NOTES

Provisions of Chapter 15A, particularly § 15A-242 and this section are codifications of federal constitutional requirements. State v. Richards, 294 N.C. 474, 242 S.E.2d 844 (1978).

Plain view alone is not enough to justify warrantless seizure of evidence. State v. Blackwelder, 34 N.C. App. 352, 238 S.E.2d 190 (1977).

Items in Plain View Must Be Evidence of Criminal Activity. — Where a lawful search pursuant to a search warrant is being conducted, items uncovered during the course of this search may be seized if the items would have been seizable under previously announced rationales for warrantless, plain view seizures (i.e., the items were the instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of the person arrested might be effected, and property the possession of which is a crime, or were items for which probable cause existed to believe that they were evidence of criminal activity and would aid in a particular apprehension or conviction), and the items are discovered "inadvertently." State v. Richards, 294 N.C. 474, 242 S.E.2d 844 (1978).

Section Restricts "Plain View" Exception to Fourth Amendment. — Constitutionally permissible seizures under the "plain view" exception to the Fourth Amendment protection against warrantless searches and seizures have been restricted under this section to those instances where the officer has legal justification to be at the place where he inadvertently sees a piece of evidence in plain view. The doctrine serves to supplement the prior justification. State v. Blackwelder, 34 N.C. App. 352, 238 S.E.2d 190 (1977).

Under this section, the statutory "plain view" doctrine is limited to the inadvertent discovery of items pursuant to a legal search under a valid warrant though these items are not specified in the search warrant. State v. Blackwelder, 34 N.C. App. 352, 238 S.E.2d 190 (1977).

This section requires inadvertence of discovery of items not specified in a search warrant. State v. Absher, 34 N.C. App. 197, 237 S.E.2d 749, cert. denied, 293 N.C. 741, 241 S.E.2d 514 (1977).

The meaning of the inadvertence requirement is that there must be no intent on the part of investigators to search for and seize the contested items not named in the warrant. State v. Richards, 294 N.C. 474, 242 S.E.2d 844 (1978).

Mere suspicion of a thing's existence is clearly not destructive of inadvertence. Knowledge, presumable such as would generate probable cause, is required and a positive intent to search. State v. Absher, 34 N.C. App. 197, 237 S.E.2d 749, cert. denied, 293 N.C. 741, 241 S.E.2d 514 (1977).

Seizure of Weapons. — In order to justify the seizure of a weapon as being incident to a lawful arrest it is not necessary that the weapon be on the person being arrested. State v. Richards, 294 N.C. 474, 242 S.E.2d 844 (1978).

Exercise of Judgment by Investigators. — Investigators conducting a search will exercise some judgment and "discretion" in separating the innocuous from the incriminating. State v. Louchheim, 36 N.C. App. 271, 244 S.E.2d 195 (1978), aff'd, 296 N.C. 314, 250 S.E.2d 630, cert. denied, 295 N.C. 470, 257 S.E.2d 435, 444 U.S. 836, 100 S. Ct. 71, 62 L. Ed. 2d 47 (1979).

Applied in State v. Williams, 299 N.C. 529, 263 S.E.2d 571 (1980); State v. Armstrong, 45 N.C. App. 40, 262 S.E.2d 370 (1980).

§ 15A-254. List of items seized.

CASE NOTES

Cited in State v. Fruitt, 35 N.C. App. 177, 241 S.E.2d 125 (1978).

§ 15A-255. Frisk of persons present in premises or vehicle to be searched.

Legal Periodicals. — For survey of 1978 law on criminal procedure, see 57 N.C.L. Rev. 1007 (1979).

§ 15A-256. Detention and search of persons present in private premises or vehicle to be searched.

Legal Periodicals. — For survey of 1978 law on criminal procedure, see 57 N.C.L. Rev. 1007 (1979).

CASE NOTES

Cited in State v. Long, 37 N.C. App. 662, 246 S.E.2d 846 (1978).

§ 15A-259. Application of Article to all warrants; exception as to inspection warrants and special riot situations.

CASE NOTES

The requirements of this Article apply only to searches made under warrants. State v. Prevette, 43 N.C. App. 450, 259 S.E.2d 595 (1979), cert. denied and appeal dismissed, 299 N.C. 124, 261 S.E.2d 925, cert. denied, 447 U.S. 906, 100 S. Ct. 2988, 64 L. Ed. 2d 855 (1980).

ARTICLE 14.

Nontestimonial Identification.

§ 15A-271. Authority to issue order.

CASE NOTES

Applicability of Article. —

In accord with 1st paragraph in original. See State v. Thompson, 37 N.C. App. 651, 247 S.E.2d 235 (1978).

This article does not apply to an in-custody accused and this restrictive interpretation applies even to a defendant in custody on other charges at the time of the lineup. State v. Puckett, 46 N.C. App. 719, 266 S.E.2d 48, appeal dismissed, 300 N.C. 561, 270 S.E.2d 115 (1980).

Effect of Article. —

The thrust of this article is to provide the State with a valuable new investigative tool to compel the presence of unwilling suspects for nontestimonial identification procedures, even though insufficient probable cause exists to permit their arrest. State v. Watson, 294 N.C. 159, 240 S.E.2d 440 (1978).

When Use of Article Unnecessary. — It was unnecessary for the police to utilize the procedures in this article allowing involuntary detention for nontestimonial identification where the defendant voluntarily participated in the pretrial confrontation. State v. Watson, 294 N.C. 159, 240 S.E.2d 440 (1978).

Express Waiver of Right to Counsel Not Required. — In a prosecution for first-degree murder, the trial court's denial of defendant's motion to suppress nontestimonial identification evidence was without error where, pursuant to an order of the trial court, fingernail scrapings, samples of defendant's head and pubic hair, saliva samples, blood samples, and photographs of any wounds on defendant's body were taken; the order stated defendant's right to counsel; the State stipulated that nothing defendant said during the procedure would be offered into evidence; defendant was fully advised of his constitutional right to the presence of counsel; and the State was not in violation of any provisions under Chapter 15A, Article 14, by not procuring an express waiver from defendant, as the statute does not require an express waiver of the right to have counsel present at a nontestimonial identification procedure. State v. Temple, 302 N.C. 1, 273 S.E.2d 273 (1981).

§ 15A-272. Time of application; additional investigative procedures not precluded.

CASE NOTES

Search Warrants. — In addition to a nontestimonial identification order pursuant to this section and § 15A-242, a search warrant is a proper method to obtain nontestimonial identification evidence from a defendant. State v. McLean, 47 N.C. App. 672, 267 S.E.2d 695 (1980).

Applied in State v. McCain, 39 N.C. App. 213, 249 S.E.2d 812 (1978).

§ 15A-274. Issuance of order.

CASE NOTES

Cited in State v. Puckett, 46 N.C. App. 719, 266 S.E.2d 48 (1980).

§ 15A-278. Contents of order.

CASE NOTES

Defendant Arrested on Misdemeanor Charge. — The provisions of subdivision (5) of this section were not applicable where the defendant was legally arrested on a misdemeanor charge, and therefore, could be photographed without the aid of the nontestimonial order. State v. Carson, 296 N.C. 31, 249 S.E.2d 417 (1978).

Quoted in State v. Temple, 302 N.C. 1, 273 S.E.2d 273 (1981).

Cited in In re Vinson, 298 N.C. 640, 260 S.E.2d 591 (1979).

§ 15A-279. Implementation of order.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

CASE NOTES

Notification of Right to Counsel. — Given advance notice of his right to counsel in a nontestimonial identification order served on defendant three days before the withdrawal of fluid samples from defendant, any failure to remind defendant of his right to counsel prior to the taking of the fluid samples would not likely constitute a "substantial" violation of subsection (d) of this section requiring suppression of the evidence obtained. State v. Satterfield, 300 N.C. 621, 268 S.E.2d 510 (1980).

Stated in State v. Temple, 302 N.C. 1, 273 S.E.2d 273 (1981).

Cited in State v. Puckett, 46 N.C. App. 719, 266 S.E.2d 48 (1980).

§ 15A-281. Nontestimonial identification order at request of defendant.

CASE NOTES

Cited in In re Vinson, 298 N.C. 640, 260 S.E.2d 591 (1979).

SUBCHAPTER III. CRIMINAL PROCESS.

ARTICLE 17.

Criminal Process.

§ 15A-301. Criminal process generally.

(d) Return. —

(1) The officer who serves or executes criminal process must enter the date of the service or execution on the process and return it to the clerk of court in the county in which issued.

(2) If criminal process is not served or executed within a number of days indicated below, it must be returned to the clerk of court in the county in which it was issued, with a reason for the failure of service or execution noted thereon.

a. Warrant for arrest — 180 days.

b. Order for arrest — 180 days.

c. Criminal summons — 90 days or the date the defendant is directed to appear, whichever is earlier.

(3) Failure to return the process to the clerk does not invalidate the process, nor does it invalidate service or execution made after the period specified in subdivision (2).

(4) The clerk to which return is made may redeliver the process to a law-enforcement officer for further attempts at service. If the process is a criminal summons, he may reissue it only upon endorsement of a new designated time and date of appearance.

(e) Copies to Be Made by Clerk. —

(1) The clerk may make a certified copy of any criminal process filed in his office pursuant to subsection (a) when the original process has been lost or when the process has been returned pursuant to subdivision (d)(2). The copy may be executed as effectively as the original process whether or not the original has been redelivered as provided in G.S. 15A-301(d)(4).

(2) When criminal process is returned to the clerk pursuant to subdivision (d)(1) and it appears that the appropriate venue is in another county, the clerk must make and retain a certified copy of the process and transmit the original process to the clerk in the appropriate county.

(3) Upon request of a defendant, the clerk must make and furnish to him without charge one copy of every criminal process filed against him.

(4) Nothing in this section prevents the making and retention of uncertified copies of process for information purposes under G.S. 15A-401(a)(2) or for any other lawful purpose.

(1979, c. 725, ss. 1-3.)

Effect of Amendments. — The 1979 amendment substituted "180 days" for "90 days" in paragraphs a and b of subdivision (d)(2), added "whether or not the original has been redelivered as provided in G.S. 15A-301(d)(4)" to the second sentence of subdivision (e)(1) and added subdivision (e)(4).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsections (d) and (e) are set out.

CASE NOTES

Applied in State v. Soloman, 40 N.C. App. 600, 253 S.E.2d 270 (1979).

§ 15A-302. Citation.

CASE NOTES

Applied in State v. Wallace, 49 N.C. App. 475, 271 S.E.2d 760 (1980).

§ 15A-303. Criminal summons.

CASE NOTES

Cited in State v. Charlotte Liberty Mut. Ins. Co., 298 N.C. 270, 258 S.E.2d 343 (1979).

§ 15A-304. Warrant for arrest.

CASE NOTES

Stated in State v. Cooley, 47 N.C. App. 376, 268 S.E.2d 87 (1980).

Cited in State v. Hudson, 295 N.C. 427, 245 S.E.2d 686 (1978).

§ 15A-305. Order for arrest.

Editor's Note. —

The historical citation to this section as it appears in the replacement volume should include 1977, c. 711, s. 21.

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

SUBCHAPTER IV. ARREST.

ARTICLE 20.

Arrest.

§ 15A-401. Arrest by law-enforcement officer.

(a) Arrest by Officer Pursuant to a Warrant. —

(1) Warrant in Possession of Officer. — An officer having a warrant for arrest in his possession may arrest the person named or described therein at any time and at any place within the officer's territorial jurisdiction.

(2) Warrant Not in Possession of Officer. — An officer who has knowledge that a warrant for arrest has been issued and has not been executed, but who does not have the warrant in his possession, may arrest the person named therein at any time. The officer must inform the person arrested that the warrant has been issued and serve the warrant upon him as soon as possible. This subdivision applies even though the arrest process has been returned to the clerk under G.S. 15A-301.

(b) Arrest by Officer Without a Warrant. —

(1) Offense in Presence of Officer. — An officer may arrest without a warrant any person who the officer has probable cause to believe has committed a criminal offense in the officer's presence.

(2) Offense Out of Presence of Officer. — An officer may arrest without a warrant any person who the officer has probable cause to believe:

a. Has committed a felony; or

b. Has committed a misdemeanor, and:

1. Will not be apprehended unless immediately arrested, or

2. May cause physical injury to himself or others, or damage to property unless immediately arrested.

(3) Subdivisions (1) and (2) shall apply to arrest for assault, for communicating a threat, or for domestic criminal trespass, already committed or being committed by a person who is the spouse or former spouse of the alleged victim or by a person with whom the alleged victim is living or has lived as if married.

(1979, c. 561, s. 3; c. 725, s. 4.)

Effect of Amendments. — The first 1979 amendment, effective October 1, 1979, added subdivision (3) to subsection (b).

The second 1979 amendment added the last sentence of subdivision (a)(2).

Session Laws 1979, c. 561, s. 8, provides: "This act shall become effective October 1, 1979, and shall apply to all occurrences involving the acts enumerated above occurring on or after that date."

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsections (a) and (b) are set out.

Legal Periodicals. — For survey of 1979 law on criminal procedure, see 58 N.C.L. Rev. 1404 (1980).

For note on the fourth circuit requirement of search warrants for entry to arrest suspects in third-party dwellings, see 17 Wake Forest L. Rev. 120 (1981).

CASE NOTES

I. GENERAL CONSIDERATION.

Mere failure to comply with the letter of this section in making an arrest does not require that evidence discovered as a result of the arrest be excluded. State v. Sutton, 34 N.C. App. 371, 238 S.E.2d 305 (1977), cert. denied, 294 N.C. 186, 241 S.E.2d 521 (1978).

Identification Evidence Subsequently Obtained Not Excluded. — Nothing in the law of this State requires that identification evidence, obtained subsequent to an illegal arrest, be excluded. State v. Finch, 293 N.C. 132, 235 S.E.2d 819 (1977).

Finding That Defendant Was Taken, etc. — Just as a formal declaration of arrest is not essential to the making of an arrest, an officer's statement that a defendant was or was not under arrest is not conclusive. When a law enforcement officer, by word or actions, indicates that an individual must remain in the officer's presence or come to the police station against his will, the person is for all practical purposes under arrest if there is a substantial imposition of the officer's will over the person's liberty. State v. Sanders, 295 N.C. 361, 245 S.E.2d 674 (1978).

A person has the right, etc. —

In accord with original. See State v. Raynor, 33 N.C. App. 698, 236 S.E.2d 307 (1977).

Civil Liability of Arresting Officer. — For case discussing the civil liability for false imprisonment of an arresting officer, acting under a valid arrest warrant, who arrests the wrong person because of a mistake in the identity of the person arrested, see Robinson v. City of Winston-Salem, 34 N.C. App. 401, 238 S.E.2d 628 (1977).

Applied in State v. Cunningham, 34 N.C. App. 72, 237 S.E.2d 334 (1977); State v. Thompson, 37 N.C. App. 628, 246 S.E.2d 827 (1978); State v. Allison, 298 N.C. 135, 257

S.E.2d 417 (1979); State v. Whitehead, 42 N.C. App. 506, 257 S.E.2d 131 (1979); State v. Hunter, 299 N.C. 29, 261 S.E.2d 189 (1980); State v. Whitt, 299 N.C. 393, 261 S.E.2d 914 (1980); State v. Collins, 44 N.C. App. 141, 260 S.E.2d 650 (1979), cert. denied, 299 N.C. 123, 261 S.E.2d 925 (1980); Hinton v. City of Raleigh, 46 N.C. App. 305, 264 S.E.2d 777 (1980); State v. Spencer, 46 N.C. App. 507, 265 S.E.2d 451 (1980); State v. Duers, 49 N.C. App. 282, 271 S.E.2d 81 (1980).

Stated in State v. Odom, 35 N.C. App. 374, 241 S.E.2d 372 (1978).

Cited in State v. Robinson, 40 N.C. App. 514, 253 S.E.2d 311 (1979).

II. ARREST WITHOUT WARRANT.

A. In General.

Whether an arrest warrant must be obtained is determined by State law. State v. Wooten, 34 N.C. App. 85, 237 S.E.2d 301 (1977).

In this State the power of arrest without warrant, etc. —

Prior to this section North Carolina law limited arrest without a warrant for crimes not committed in the presence of the officer to felonies, when there was reasonable ground to believe that the person will evade arrest if not immediately taken into custody. This section broadens the authority to arrest for crimes committed out of an officer's presence to include felonies generally and misdemeanors when the officer has probable cause to believe the person (1) has committed a misdemeanor and (2) will not be apprehended unless immediately arrested, or may cause physical injury to himself or others, or damage to property unless immediately arrested. In re Pinyatello, 36 N.C. App. 542, 245 S.E.2d 185 (1978).

Subsection (b) of this section broadened the authority of a law-enforcement officer to make a warrantless arrest for crimes not committed in his presence. In re Gardner, 39 N.C. App. 567, 251 S.E.2d 723 (1979).

An arrest without warrant except as authorized, etc. —

In accord with 1st paragraph in original. See State v. Small, 293 N.C. 646, 239 S.E.2d 429 (1977).

"Probable Cause." —

In accord with 2nd paragraph in original. See State v. Phillips, 300 N.C. 678, 268 S.E.2d 452 (1980).

In accord with 3rd paragraph in original. See State v. Rudolph, 39 N.C. App. 293, 250 S.E.2d 318, cert. denied, 297 N.C. 179, 254 S.E.2d 40 (1979).

In accord with 4th paragraph in original. See State v. Phillips, 300 N.C. 678, 268 S.E.2d 452 (1980).

A warrantless arrest is based on probable cause if the facts and circumstances known to the arresting officer warrant a prudent man in believing that a felony has been committed and the person to be arrested is the felon. The standard is the same as that required by the United States Constitution. State v. Mathis, 295 N.C. 623, 247 S.E.2d 919 (1978).

When incriminating evidence comes to the officer's attention during detention, such evidence may establish a reasonable basis for finding the probable cause necessary for effecting a warrantless arrest. State v. Rudolph, 39 N.C. App. 293, 250 S.E.2d 318, cert. denied, 297 N.C. 179, 254 S.E.2d 40 (1979).

Whether probable cause exists depends upon whether at that moment the facts and circumstances within the officer's knowledge and of which he has reasonably trustworthy information are sufficient to warrant a prudent man in believing that the suspect has committed or is committing an offense. State v. Matthews, 40 N.C. App. 41, 251 S.E.2d 897 (1979).

The existence of probable cause, etc. —

In accord with 1st paragraph in original. See State v. Phillips, 300 N.C. 678, 268 S.E.2d 452 (1980).

In accord with 2nd paragraph in original. See State v. Small, 293 N.C. 646, 239 S.E.2d 429 (1977); In re Gardner, 39 N.C. App. 567, 251 S.E.2d 723 (1979).

To establish probable cause, etc. —

In accord with original. See State v. Small, 293 N.C. 646, 239 S.E.2d 429 (1977); State v. Phillips, 300 N.C. 678, 268 S.E.2d 452 (1980).

Probable cause and reasonable ground to believe, etc. —

In accord with 1st paragraph in original. See State v. Small, 293 N.C. 646, 239 S.E.2d 429 (1977); In re Gardner, 39 N.C. App. 567, 251 S.E.2d 723 (1979); State v. Matthews, 40 N.C. App. 41, 251 S.E.2d 897 (1979).

Information given by one officer to another officer is reasonably reliable information to provide probable cause. State v. Matthews, 40 N.C. App. 41, 251 S.E.2d 897 (1979).

Probable cause may be based upon information given to the officer by another, the source of such information being reasonably reliable. In re Gardner, 39 N.C. App. 567, 251 S.E.2d 723 (1979).

Probable cause for an arrest can be imputed from one officer to others acting at his request. The officers receiving the request are entitled to assume that the officer requesting aid had probable cause to believe that a crime had been committed. If the transmitting officer did not have probable cause, the arrest would be illegal. State v. Tilley, 44 N.C. App. 313, 260 S.E.2d 794 (1979).

Evidence That Person May Injure Self or Others. — The same evidence that provides

probable cause for a belief that a misdemeanor had been committed is sufficient to provide probable cause to believe that defendant might injure himself or others if allowed to leave the police station at that time. State v. Matthews, 40 N.C. App. 41, 251 S.E.2d 897 (1979).

Authority to Make Brief Detention of Citizens. — It is permissible for police officers to make, in the course of a routine investigation, a brief detention of citizens upon a reasonable suspicion that criminal activity has taken place. State v. Rudolph, 39 N.C. App. 293, 250 S.E.2d 318, cert. denied, 297 N.C. 179, 254 S.E.2d 40 (1979).

A law officer may lawfully detain a person where there is a need for immediate action, if, upon personal observation or reliable information, he has an honest and reasonable suspicion that the suspect either has committed or is preparing to commit a crime. In re Horne, 50 N.C. App. 97, 272 S.E.2d 905 (1980).

Factual Findings on Issue of Probable Cause. — In determining whether probable cause exists in any particular case, it is the function of the trial court, if there be conflicting evidence, to find the relevant facts. Such factual findings, if supported by competent evidence, are binding on appeal. However, whether the facts so found by the trial court or shown by uncontradicted evidence are such as to establish probable cause in a particular case, is a question of law as to which the trial court's ruling may be reviewed on appeal. In re Gardner, 39 N.C. App. 567, 251 S.E.2d 723 (1979).

Applied in State v. Graham, 47 N.C. App. 303, 267 S.E.2d 56 (1980); State v. Greenwood, 47 N.C. App. 731, 268 S.E.2d 835 (1980).

B. Illustrative Cases.

1. Offense in Presence of Officer.

Driving Motor Vehicle While under Influence of Intoxicants. —

The petitioner's driving privilege was properly revoked because of his unwillingness to take the breathalyzer test, whether or not his warrantless arrest was legal under this section, where the arrest was constitutionally valid by virtue of the fact that the arresting officer had ample information to provide him with probable cause to arrest the petitioner for operating a motor vehicle upon a public highway while under the influence of intoxicants. In re Gardner, 39 N.C. App. 567, 251 S.E.2d 723 (1979).

Threats and Profane Language in Presence of Officer. — The evidence was sufficient to sustain the legality of defendant's arrest without a warrant for disorderly conduct, where, although the arresting officer did not quote the defendant's precise language to the jury, he did testify that the defendant was cursing and threatening a cab driver and that the threats and profane language were continued in the presence of the officer. State v. Raynor, 33 N.C. App. 698, 236 S.E.2d 307 (1977).

Reasonable Grounds to Believe Defendant Was in Possession of Heroin. — Once the arresting agent corroborated the description of the defendant provided by an informant by observing the defendant at the named location, the agent had reasonable grounds to believe the defendant was in possession of heroin, a felony, thereby committing an offense in the agent's presence, and creating probable cause to arrest. State v. Wooten, 34 N.C. App. 85, 237 S.E.2d 301 (1977).

2. Offense Out of Presence of Officer.

Information Sufficient to Authorize Arrest for Robbery. —

Where the police officer first saw defendant on a bank near a wooded area, defendant matched the general description the officer had received of a robbery suspect, defendant's appearance gave rise to a reasonable inference that he had been through a wooded area, and the officer was aware that suspects in the robbery had escaped into woods less than one mile from the spot the officer was patrolling, the officer had probable cause to believe that a felony had been committed and that defendant had committed it. Defendant's arrest was therefore legal under subsection (b)(2) of this section. State v. Mathis, 295 N.C. 623, 247 S.E.2d 919 (1978).

Where defendant was in an automobile traveling away from the scene of the crime, the arresting officers were warranted in the belief that the defendant would not be apprehended unless immediately arrested. Thus, in arresting the defendant without a warrant for a misdemeanor offense not committed in their presence, the arresting officers complied with subsection (b) of this section, and the arrest was both constitutionally valid and legal. State v. Tilley, 44 N.C. App. 313, 260 S.E.2d 794 (1979).

III. USE OF FORCE IN ARREST.

Use of Force in Case of Assault on Law Officer. — In all cases where the charge is assault on a law officer in violation of § 14-33(b)(4), or assault of a law officer with a firearm (§ 14-34.2), the use of excessive force by the law officer in making an arrest or preventing escape from custody does not take the officer outside the performance of his duties, nor does it make the arrest unlawful. State v. Mensch, 34 N.C. App. 572, 239 S.E.2d 297 (1977), cert. denied, 294 N.C. 443, 241 S.E.2d 845 (1978).

In a prosecution for assault on a police officer it is not incumbent upon the State to prove that the law officer did not use excessive force in

making an arrest, but where there is evidence tending to show the use of such excessive force by the law officer, the trial court should instruct the jury that the assault by the defendant upon the law officer was justified or excused if the assault was limited to the use of reasonable force by the defendant in defending himself from that excessive force. State v. Mensch, 34 N.C. App. 572, 239 S.E.2d 297 (1977), cert. denied, 294 N.C. 443, 241 S.E.2d 845 (1978).

Discretion to Determine Reasonableness of Force. — Within reasonable limits, the officer is properly left with the discretion to determine the amount of force required under the circumstances as they appeared to him at the time of the arrest. State v. Anderson, 40 N.C. App. 318, 253 S.E.2d 48 (1979).

An officer of the law has the right to use such force as he may reasonably believe necessary in the proper discharge of his duties to effect an arrest. State v. Anderson, 40 N.C. App. 318, 253 S.E.2d 48 (1979).

One resisting an illegal arrest is not resisting an officer within the discharge of his official duties. State v. Anderson, 40 N.C. App. 318, 253 S.E.2d 48 (1979).

The right to defend oneself from the excessive use of force by a police officer must be carefully distinguished from the well-guarded right to resist an arrest which is unlawful. State v. Anderson, 40 N.C. App. 318, 253 S.E.2d 48 (1979).

The right to use force to defend oneself against the excessive use of force during an arrest may arise despite the lawfulness of the arrest, and the use of excessive force does not render the arrest illegal. State v. Anderson, 40 N.C. App. 318, 253 S.E.2d 48 (1979).

Bystander Aiding Arrestee. — The bystander coming to the aid of an arrestee is entitled to use only such force as is reasonably necessary to defend the arrestee from the excessive use of force. State v. Anderson, 40 N.C. App. 318, 253 S.E.2d 48 (1979).

The privilege to intervene in the context of a supposed felonious assault upon an arrestee by a person known or reasonably believed to be a police officer must be more limited than the traditionally recognized right to come to the defense of a third party. State v. Anderson, 40 N.C. App. 318, 253 S.E.2d 48 (1979).

One who comes to the aid of an arrestee must do so at his own peril and should be excused only when the individual would himself be justified in defending himself from the conduct of the arresting officers. State v. Anderson, 40 N.C. App. 318, 253 S.E.2d 48 (1979).

Instruction on Use of Force to Resist Excessive Force. — When there is evidence tending to show the excessive use of force by a law enforcement officer in making an arrest, the trial court is required to instruct the jury that the force used against the law enforcement officer was justified or excused if the assault was limited to the use of reasonable force by defendant in defending himself from excessive force. State v. Anderson, 40 N.C. App. 318, 253 S.E.2d 48 (1979).

IV. ENTRY ON PREMISES.

Entry Held Lawful. —

The fact that officers were standing under a light on a porch of a house from which a short time previously two shots had been fired, killing one person and seriously wounding another, was such an exigent circumstance that the officers were justified in entering the home and searching it to make sure no one else, including the officers, would be shot; and since the officers saw a shotgun in the house in plain view, evidence in regard to the gun was admissible. State v. Mackins, 47 N.C. App. 168, 266 S.E.2d 694 (1980).

§ 15A-402. Territorial jurisdiction of officers to make arrests.

Local Modification: Village of Pinehurst, 1979, 2nd Sess., c. 1168.

CASE NOTES

Violation of Section Held Not to Require Exclusion of Evidence. — Even if a deputy sheriff's investigatory stop of defendant was illegal because it was made outside the limits of his territorial jurisdiction, the stop was not unconstitutional so as to require the exclusion from the evidence of a pistol seized during the stop. Furthermore, even if the stop were an arrest in terms of subsection (b) of this section, this is not a substantial violation of Chapter 15A which would require exclusion of the evidence under § 15A-974. State v. Harris, 43 N.C. 346, 258 S.E.2d 802, appeal dismissed, 298 N.C. 808, 261 S.E.2d 920 (1979).

Stated in State v. Matthews, 40 N.C. App. 41, 251 S.E.2d 897 (1979).

§ 15A-405. Assistance to law-enforcement officers by private persons to effect arrest or prevent escape; benefits for private persons.

(b) Benefits to Private Persons. — A private person assisting a law-enforcement officer pursuant to subsection (a) is:

(1) To be treated as a citizen duly deputized as a deputy by a sheriff or other law-enforcement officer in an emergency for the purposes of G.S. 143-166(m) (Law-Enforcement Officers' Benefit and Retirement Fund);

(2) Entitled to the same benefits as a "law-enforcement officer" as that term is defined in G.S. 143-166.2(d) (Law-Enforcement Officers', Firemen's and Rescue Squad Workers' Death Benefit Act); and

(3) To be treated as an employee of the employer of the law-enforcement officer within the meaning of G.S. 97-2(2) (Workers' Compensation Act).

The Governor and the Council of State are authorized to allocate funds from the Contingency and Emergency Fund for the payment of benefits under subdivisions (1) and (3) when no other source is available for the payment of such benefits and when they determine that such allocation is necessary and appropriate. (1868-9, c. 178, subch. 1, s. 2; Code, s. 1125; Rev., s. 3181; C. S., s. 4547; 1973, c. 1286, s. 1; 1979, c. 714, s. 2.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, substituted "Workers' " for "Workmen's" in subdivision (3) of subsection (b).

SUBCHAPTER V. CUSTODY.

ARTICLE 23.

Police Processing and Duties upon Arrest.

§ 15A-501. Police processing and duties upon arrest generally.

Cross References. — As to authority of officer arresting a person for being intoxicated and disruptive in a public place, see § 14-447.

Legal Periodicals. — For a survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

For survey of 1978 law on criminal procedure, see 57 N.C.L. Rev. 1007 (1979).

For survey of 1979 law on criminal procedure, see 58 N.C.L. Rev. 1404 (1980).

CASE NOTES

Section Not Mandatory Procedure Affecting Validity of Trial. — The failure of law-enforcement personnel in complying with the provisions of this section and § 15A-511 can result in the violation of a person's constitutional rights. However, these statutes do not prescribe mandatory procedures affecting the validity of a trial. State v. Reynolds, 298 N.C. 380, 259 S.E.2d 843 (1979), cert. denied, 446 U.S. 941, 100 S. Ct. 2164, 64 L. Ed. 2d 795 (1980).

"Unnecessary Delay" under Subdivision (2). — Subdivision (2) of this section and § 15A-511(a)(1) only require that an arrested person be taken before a magistrate "without unnecessary delay," and a delay of only one hour after the defendant had been taken into custody and advised of his rights could not be considered undue delay. State v. Wheeler, 34 N.C. 243, 237 S.E.2d 874 (1977), cert. denied, 294 N.C. 187, 241 S.E.2d 522 (1978).

Delay Held Necessary and Reasonable. — The delay between the arrest of the defendant and his appearance before a magistrate was necessary and reasonable where the interim period was spent by the arresting officers in recovering the stolen goods and attempting to locate a person arrested with the defendant who had escaped. State v. Sings, 35 N.C. App. 1, 240 S.E.2d 471 (1978).

Violation of Subdivision (2). — Police officers violated subdivision (2) by failing to take defendant before a magistrate without unnecessary delay. State v. Sanders, 33 N.C. App. 284, 235 S.E.2d 94, cert. denied, 293 N.C. 257, 237 S.E.2d 539 (1977).

Meaning of Words "Reasonably Necessary" in Subdivision (4). — Based on the official commentary provided by the legislature, the words "reasonably necessary" in subdivision (4) have a stricter meaning than would ordinarily apply. Only exigent circumstances, such as were present in Stovall v. Denno, 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967), where the only eyewitness was critically injured, will suffice as "reasonably necessary." State v. Sanders, 33 N.C. App. 284, 235 S.E.2d 94, cert. denied, 293 N.C. 257, 237 S.E.2d 539 (1977).

Violation of Subdivision (4). — Police officers violated subdivision (4) by taking defendant to the town in which the crime was committed for a show-up after they had first prepared to take him before a magistrate in the town in which he was arrested. State v. Sanders, 33 N.C. App. 284, 235 S.E.2d 94, cert. denied, 293 N.C. 257, 237 S.E.2d 539 (1977).

Pretrial confrontations between a victim or witness and a suspect following the crime are not automatically so suggestive as to violate a defendant's constitutional rights unless the circumstances were so unnecessarily suggestive and conducive to irreparable misidentification as to offend fundamental standards of decency, fairness and justice. State v. Jordan, 49 N.C. App. 560, 272 S.E.2d 405 (1980).

Effect of Denial of Communication Rights. — Where the defendant was informed of his Miranda rights, waived those rights, and voluntarily submitted his statement admitting guilt to police, the defendant could not have suffered prejudice had he been denied his statutory right to communicate with friends. State v. Curmon, 295 N.C. 453, 245 S.E.2d 503 (1978).

Subdivision (5) Not Applicable to Breathalyzer Tests. — The legislature did not intend for the "reasonable time" contemplated by subdivision (5) of this section to apply to the specialized situation contemplated by § 20-16.2, a civil matter involving the administrative removal of driving privileges as a result of refusing to submit to a breathalyzer test. Seders v. Powell, 298 N.C. 453, 259 S.E.2d 544 (1979).

Applied in State v. Richardson, 295 N.C. 309, 245 S.E.2d 754 (1978).

Cited in State v. Watson, 294 N.C. 159, 240 S.E.2d 440 (1978); State v. Jolly, 297 N.C. 121, 254 S.E.2d 1 (1979).

§ 15A-502. Photographs and fingerprints.

(a) A person charged with the commission of a felony or a misdemeanor may be photographed and his fingerprints may be taken for law-enforcement records only when he has been:

(1) Arrested or committed to a detention facility, or

(2) Committed to imprisonment upon conviction of a crime, or

(3) Convicted of a felony.

It shall be the duty of the arresting law-enforcement agency to cause a person charged with the commission of a felony to be fingerprinted and to forward those fingerprints to the State Bureau of Investigation.

(b) This section does not authorize the taking of photographs or fingerprints when the offense charged is a misdemeanor under Chapter 20 of the General Statutes, "Motor Vehicles," for which the penalty authorized does not exceed a fine of five hundred dollars ($500.00), imprisonment for six months, or both.

(c) This section does not authorize the taking of photographs or fingerprints of a juvenile except under G.S. 7A-596 through 7A-627.

(d) This section does not prevent the taking of photographs, moving pictures, video or sound recordings, fingerprints, or the like to show a condition of intoxication or for other evidentiary use.

(e) Fingerprints or photographs taken pursuant to subsection (a) may be forwarded to the State Bureau of Investigation, the Federal Bureau of Investigation, or other law-enforcement agencies. (1973, c. 1286, s. 1; 1977, c. 711, s. 22; 1979, c. 850; 1981, c. 862, s. 3.)

Cross References. — As to taking of fingerprints of convicted felons for submission to State Bureau of Investigation with report of disposition of charges, see § 15A-1382.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

Effect of Amendments. — The 1979 amendment substituted, in subsection (c), "juvenile except under G.S. 7A-596 through 7A-627" for "'child' as defined for the purposes of G.S. 7A-278(2), unless the case has been transferred to the superior court division pursuant to G.S. 7A-280."

The 1981 amendment, effective January 1, 1982, added the second sentence of subsection (a).

CASE NOTES

Legislative Intent. — It was the intent of the legislature that photographs taken under the authority of this section could be used for any law enforcement purpose. State v. Carson, 296 N.C. 31, 249 S.E.2d 417 (1978).

The Official Commentary correctly states the legislature's intent that this section carries forward the concept of the present provisions of the former first two paragraphs of § 114-19. Those provisions have been simplified and broadened in some respects, but restricted as to motor vehicle and juvenile offenses. State v. Wilson, 296 N.C. 298, 250 S.E.2d 621 (1979).

Use of Photograph in Subsequent Identification Procedure. — Where a defendant was legally arrested for a misdemeanor and photographed under the authority of this section, the photograph could be used in a photographic identification procedure in connection with defendant's first-degree rape case. State v. Carson, 296 N.C. 31, 249 S.E.2d 417 (1978).

A photograph taken prior to the defendant's arrest for rape was not illegally taken in contravention of the provisions of this section. State v. Wilson, 296 N.C. 298, 250 S.E.2d 621 (1979).

This section does not create an exclusionary rule of evidence. State v. Wilson, 296 N.C. 298, 250 S.E.2d 621 (1979).

Applied in State v. Hamilton, 298 N.C. 238, 258 S.E.2d 350 (1979).

Quoted in In re Vinson, 298 N.C. 640, 260 S.E.2d 591 (1979).

§ 15A-504. Return of released person.

(a) Upon a magistrate's finding under G.S. 15A-511(c)(2) of no probable cause for a warrantless arrest, a law-enforcement officer may return the person previously arrested and any other person accompanying him to the scene of the arrest.

(b) No officer acting pursuant to this section may be held to answer in any civil or criminal action for injury to any person or damage to any property when damage results, whether directly or indirectly, from the actions of the person so released or transported.

(c) Nothing in this section shall be construed to supersede the provisions of G.S. 122-65.11. (1981, c. 928.)

§§ 15A-505 to 15A-510: Reserved for future codification purposes.

ARTICLE 24.

Initial Appearance.

§ 15A-511. Initial appearance.

Cross References. — As to return of person released after finding of no probable cause for warrantless arrest, see § 15A-504.

Legal Periodicals. — For a survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

CASE NOTES

Requirement that Person Be Taken Before Magistrate "Without Unnecessary Delay". — Subdivision (a)(1) of this section and § 15A-501(2) only require that an arrested person be taken before a magistrate "without unnecessary delay" and a delay of only one hour after the defendant had been taken into custody and advised of his rights could not be considered undue delay. State v. Wheeler, 34 N.C. 243, 237 S.E.2d 874 (1977), cert. denied, 294 N.C. 187, 241 S.E.2d 522 (1978).

Delay Held Necessary and Reasonable. — The delay between the arrest of the defendant and his appearance before a magistrate was necessary and reasonable where the interim period was spent by the arresting officers in recovering the stolen goods and attempting to locate a person arrested with the defendant who had escaped. State v. Sings, 35 N.C. App. 1, 240 S.E.2d 471 (1978).

Effect of Failure to Take Arrested Person Before Magistrate. —

The failure of law enforcement personnel in complying with the provisions of § 15A-501 and this section can result in the violation of a person's constitutional rights. However, these statutes do not prescribe mandatory procedures affecting the validity of a trial. State v. Reynolds, 298 N.C. 380, 259 S.E.2d 843 (1979), cert. denied, 446 U.S. 941, 100 S. Ct. 2164, 64 L. Ed. 2d 795 (1980).

Effect of Failure to Issue Magistrate's Order. — Compliance with subdivision (c)(3) of this section is not mandatory, and a failure to comply will not affect the validity of a trial. State v. Matthews, 40 N.C. App. 41, 251 S.E.2d 897 (1979).

Cited in State v. Watson, 294 N.C. 159, 240 S.E.2d 440 (1978); State v. Richardson, 295 N.C. 309, 245 S.E.2d 754 (1978).

ARTICLE 26.

Bail.

§ 15A-533. Right to pretrial release in capital and noncapital cases.

(a) A defendant charged with any crime, whether capital or noncapital, who is alleged to have committed this crime while still residing in or subsequent to his escape or during an unauthorized absence from involuntary commitment in a mental health facility designated or licensed by the Department of Human Resources, and whose commitment is determined to be still valid by the judge or judicial officer authorized to determine pretrial release to be valid, has no right to pretrial release. In lieu of pretrial release, however, the individual shall be returned to the treatment facility in which he was residing at the time of the alleged crime or from which he escaped or absented himself for continuation of his treatment pending the additional proceedings on the criminal offense.

(b) A defendant charged with a noncapital offense must have conditions of pretrial release determined, in accordance with G.S. 15A-534.

(c) A judge may determine in his discretion whether a defendant charged with a capital offense may be released before trial. If he determines release is warranted, the judge must authorize release of the defendant in accordance with G.S. 15A-534. (1973, c. 1286, s. 1; 1981, c. 936, s. 2.)

Cross References. — As to prohibition against holding deaf arrestee, otherwise eligible for release, pending arrival of interpreter, see § 8B-1; as to housing responsibilities for certain residents in or escapees from involuntary commitment in a mental health facility designated or licensed by the Department of Human Resources, see § 122-58.27.

Effect of Amendments. — The 1981 amendment, effective October 1, 1981, relettered former subsections (a) and (b) as present subsections (b) and (c) and added present subsection (a).

Session Laws 1981, c. 936, s. 3, provides: "This act shall become effective October 1, 1981, and applies to persons alleged to have committed crimes on or after this date."

CASE NOTES

Bail Discretionary for Capital Offense. — Whether a defendant charged with a capital offense is entitled to a bail bond is a matter in the discretion of the trial judge. State v. Oliver, 302 N.C. 28, 274 S.E.2d 183 (1981).

First-Degree Murder Is "Capital Offense" Regardless of Date Committed. — Whether or not a particular defendant, depending upon the date his crime was committed, faces the death penalty, the crime of first-degree murder is a "capital offense" within the meaning of subsection (b) of this section, so that the release of such defendant on bail is a matter to be determined within the discretion of the trial judge. This is so notwithstanding that the trial itself may not be a "capital case" within the meaning of the jury selection statute, § 15A-1217. State v. Sparks, 297 N.C. 314, 255 S.E.2d 373 (1979).

§ 15A-534. Procedure for determining conditions of pretrial release.

(c) In determining which conditions of release to impose, the judicial official must, on the basis of available information, take into account the nature and circumstances of the offense charged; the weight of the evidence against the defendant; the defendant's family ties, employment, financial resources, character, and mental condition; whether the defendant is intoxicated to such a degree that he would be endangered by being released without supervision; the length of his residence in the community; his record of convictions; his history of flight to avoid prosecution or failure to appear at court proceedings; and any other evidence relevant to the issue of pretrial release.

(1977, 2nd Sess., c. 1134, s. 5.)

Effect of Amendments. — The 1977, 2nd Sess., amendment, effective Oct. 1, 1978, inserted "whether the defendant is intoxicated to such a degree that he would be endangered by being released without supervision" near the middle of subsection (c).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (c) is set out.

CASE NOTES

Consideration of Defendant's Mental and Physical Condition. — In determining the conditions of release or the propriety of revoking a defendant's bond, the trial court may consider not only the question of whether the defendant will appear for trial but may also consider whether he will appear for trial in such mental and physical condition as to be able to proceed. State v. Brooks, 38 N.C. App. 445, 248 S.E.2d 369 (1978).

Where the defendant had specifically indicated to the court in his motion for a continuance that his illness and the medication it necessitated directly impaired his mental

capacity, and the defendant's evidence additionally indicated that, absent hospitalization and definitive treatment, the condition might well continue to impair his mental ability beyond the next criminal term of court, the trial court's order granting the defendant's motion for a continuance and revoking his appearance bond in order to insure that he would be both present and able to proceed with trial was without error. State v. Brooks, 38 N.C. App. 445, 248 S.E.2d 369 (1978).

The primary purpose of an appearance bond is to insure the defendant's presence at trial. State v. Jones, 295 N.C. 345, 245 S.E.2d 711 (1978).

The amount of bail pending trial is a matter within the trial judge's discretion. State v. Jones, 295 N.C. 345, 245 S.E.2d 711 (1978).

A claim that excessive bail prejudiced the efforts of the accused to prepare for trial will not be sustained on mere unsupported and conclusory allegations. State v. Jones, 295 N.C. 345, 245 S.E.2d 711 (1978).

§ 15A-534.1. Crimes of domestic violence; bail and pretrial release.

In all cases in which the defendant is charged with assault on or communicating a threat to a spouse or former spouse or a person with whom the defendant lives or has lived as if married, with domestic criminal trespass, or with violation of an order entered pursuant to Chapter 50B, Domestic Violence, of the General Statutes, the following provisions shall apply in addition to the provisions of G.S. 15A-534:

(1) Upon a determination by the judicial official that the immediate release of the defendant will pose a danger of injury to the alleged victim or to any other person or is likely to result in intimidation of the alleged victim and upon a determination that the execution of an appearance bond as required by G.S. 15A-534 will not reasonably assure that such injury or intimidation will not occur, a judicial official may retain the defendant in custody for a reasonable period of time while determining the conditions of pretrial release.

(2) A judicial official may impose the following conditions on pretrial release:

a. That the defendant stay away from the home, school, business or place of employment of the alleged victim;

b. That the defendant refrain from assaulting, beating, molesting, or wounding the alleged victim;

c. That the defendant refrain from removing, damaging or injuring specifically identified property;

d. That the defendant may visit his or her child or children at times and places provided by the terms of any existing order entered by a judge.

The conditions set forth above may be imposed in addition to requiring that the defendant execute a secured appearance bond.

(3) Should the defendant be an inebriate, mentally ill or imminently dangerous to himself or others the provisions of Article 5A of Chapter 122 "Involuntary Commitment" shall apply. (1979, c. 561, s. 4.)

Editor's Note. — Session Laws 1979, c. 561, s. 8, provides: "This act shall become effective October 1, 1979, and shall apply to all occurrences involving the acts enumerated above occurring on or after that date."

The reference in this section to Chapter 50B was erroneously printed 50A in the 1979 Supplement. The reference is to the Chapter enacted as Chapter 50A by Session Laws 1979, c. 561, but codified as Chapter 50B because of a conflict with another 1979 act.

§ 15A-536. Release after conviction in the superior court.

CASE NOTES

Discretion of Trial Court. — Under this section it is within the discretion of the trial court to grant or deny bail while a case is pending on appeal following conviction of defendant in superior court. State v. Sparks, 297 N.C. 314, 255 S.E.2d 373 (1979).

Conditions of Release. — The trial court had authority under subsection (d) of this section to require defendant to post a secured appearance bond for his post-conviction release while his appeal was pending and to consign defendant to the custody of the county probation office and to order that defendant report to the probation office by noon each Monday, and the trial court was authorized by § 15A-544(c) to enter a judgment of forfeiture of the bond upon determining that defendant failed to comply with the condition requiring him to report to the probation office and that defendant had failed to satisfy the court that his appearance in compliance with the condition was impossible or that his failure to appear was without his fault. State v. Cooley, 50 N.C. App. 544, — S.E.2d — (1981).

§ 15A-537. Persons authorized to effect release.

Editor's Note. —

Sessions Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

§ 15A-538. Modification of order on motion of person detained; substitution of surety.

CASE NOTES

Cited in State v. Rudolph, 39 N.C. App. 293, 250 S.E.2d 318 (1979).

§ 15A-544. Forfeiture.

CASE NOTES

Constitutionality. — Subsection (h) does not violate the constitutional provision that the proceeds of forfeitures are to remain in the several counties and be used in the public schools. State v. Locklear, 42 N.C. App. 486, 256 S.E.2d 830, appeal dismissed, 298 N.C. 302, 259 S.E.2d 303 (1979).

Subsection (e) was not applicable to a petition for remission of forfeited appearance bonds where more than 90 days had elapsed since entry of the judgment of forfeiture where the petition was filed on July 1, 1979; the hearing on the petition was set for July 30, 1979, the date the 90-day period elapsed; the hearing was continued at the request of the State until August 20, 1979; the hearing was not held until November 19, 1979; and the record fails to disclose why the hearing was not held on August 20, or at whose request the hearing was continued. State v. Rakina, 49 N.C. App. 537, 272 S.E.2d 3 (1980).

"Extraordinary Cause" Shown. — The trial court did not err in finding that the surety on a forfeited criminal appearance bond had shown "extraordinary cause" for remission to the surety of a portion of the amount forfeited where, after defendant was arrested for driving under the influence, the surety's personal efforts led to denial of any further bond for the defendant and resulted in defendant's detention

on the assault charge for which the bondsman had secured defendant's appearance. State v. Locklear, 42 N.C. App. 486, 256 S.E.2d 830, appeal dismissed, 298 N.C. 302, 259 S.E.2d 303 (1979).

Forfeiture For Failure to Report. — The trial court had authority under § 15A-536(d) to require defendant to post a secured appearance bond for his post-conviction release while his appeal was pending and to consign defendant to the custody of the county probation office and to order that defendant report to the probation office by noon each Monday, and the trial court was authorized by subsection (c) of this section to enter a judgment of forfeiture of the bond upon determining that defendant failed to comply with the condition requiring him to report to the probation office and that defendant had failed to satisfy the court that his appearance in compliance with the condition was impossible or that his failure to appear was without his fault. State v. Cooley, 50 N.C. App. 544, — S.E.2d — (1981).

SUBCHAPTER VI. PRELIMINARY PROCEEDINGS.

ARTICLE 29.

First Appearance before District Court Judge.

§ 15A-601. First appearance before a district court judge; right in felony and other cases in original jurisdiction of superior court; consolidation of first appearance before magistrate and before district court judge; first appearance before clerk of superior court.

(e) The clerk of the superior court in the county in which the defendant is taken into custody may conduct a first appearance as provided in this Article if a district court judge is not available in the county within 96 hours after the defendant is taken into custody. The clerk, in conducting a first appearance, shall proceed under this Article as would a district court judge. (1973, c. 1286, s. 1; 1975, 2nd Sess., c. 983, ss. 139, 140; 1979, c. 651.)

Effect of Amendments. — The 1979 amendment, effective October 1, 1979, added subsection (e).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (e) is set out.

Legal Periodicals. — For a survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

For survey of 1979 law on criminal procedure, see 58 N.C.L. Rev. 1404 (1980).

CASE NOTES

Purpose. — This statute was designed not only to insure the protection of a defendant's constitutional rights, but also to ensure the orderly progression of a criminal proceeding. The first appearance is a clear and specific directive of the General Statutes and the appropriate officials would be well advised to abide by the prescribed procedures. Indeed, the State runs the risk, in failing to provide the first appearance, of being forced to trial again for an obviously guilty, but prejudiced, defendant. State v. Pruitt, 42 N.C. App. 240, 256 S.E.2d 249 (1979).

This section does not prescribe mandatory procedures, etc. —

In accord with original. See State v. Pruitt, 42 N.C. App. 240, 256 S.E.2d 249 (1979); 44 N.C. App. 27, 259 S.E.2d 802 (1979).

Cited in State v. Sanders, 294 N.C. 337, 240 S.E.2d 788 (1978).

§ 15A-602. Warning of right against self-incrimination.

CASE NOTES

Applied in State v. Detter, 298 N.C. 604, 260 S.E.2d 567 (1979).

§ 15A-603. Assuring defendant's right to counsel.

(a) The judge must determine whether the defendant has retained counsel or, if indigent, has been assigned counsel.

(b) If the defendant is not represented by counsel, the judge must inform the defendant that he has important legal rights which may be waived unless asserted in a timely and proper manner and that counsel may be of assistance to the defendant in advising him and acting in his behalf. The judge must inform the defendant of his right to be represented by counsel and that he will be furnished counsel if he is indigent. The judge shall also advise the defendant that if he is convicted and placed on probation, payment of the expense of counsel assigned to represent him may be made a condition of probation, and that if he is acquitted, he will have no obligation to pay the expense of assigned counsel.

(c) If the defendant asserts that he is indigent and desires counsel, the judge must proceed in accordance with the provisions of Article 36 of Chapter 7A of the General Statutes.

(d) If the defendant is found not to be indigent and indicates that he desires to be represented by counsel, the judge must inform him that he should obtain counsel promptly.

(e) If the defendant desires to waive representation by counsel, the waiver must be in writing in accordance with the provisions of Article 36 of Chapter 7A of the General Statutes except as otherwise provided in this Article. (1973, c. 1286, s. 1; 1981, c. 409, s. 1.)

Effect of Amendments. — The 1981 amendment, effective October 1, 1981, added the last sentence of subsection (b).

CASE NOTES

Applied in State v. Detter, 298 N.C. 604, 260 S.E.2d 567 (1979).

§ 15A-604. Determination of sufficiency of charge.

CASE NOTES

The sufficiency of the charges is not determined in an adversarial setting through the introduction of evidence with examination and cross-examination of witnesses. Instead, this section simply recognizes that much time and trouble can be saved if the district court judge has the authority at the initial appearance to dispose of cases where it is obvious from the relevant process papers that they are insufficient on their face to adequately bring a charge against the defendant. State v. Detter, 298 N.C. 604, 260 S.E.2d 567 (1979).

§ 15A-605. Additional proceedings at first appearance before judge.

Legal Periodicals. — For survey of 1979 law on criminal procedure, see 58 N.C.L. Rev. 1404 (1980).

CASE NOTES

Applied in State v. Detter, 298 N.C. 604, 260 S.E.2d 567 (1979).

Stated in State v. Hudson, 295 N.C. 427, 245 S.E.2d 686 (1978).

§ 15A-606. Demand or waiver of probable-cause hearing.

Legal Periodicals. — For a survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

CASE NOTES

No Right to Hearing, etc. —

Subsection (a) of this section requires a probable-cause hearing only in those situations in which no indictment has been returned by a grand jury. State v. Lester, 294 N.C. 220, 240 S.E.2d 391 (1978); State v. Vaughn, 296 N.C. 167, 250 S.E.2d 210 (1978), cert. denied, 441 U.S. 935, 99 S. Ct. 2060, 60 L. Ed. 2d 665 (1979).

A probable-cause hearing is unnecessary after the grand jury finds an indictment. State v. Lester, 294 N.C. 220, 240 S.E.2d 391 (1978).

In a prosecution for first-degree murder and armed robbery, the denial of defendants' post-indictment motions for a probable cause hearing did not violate subsection (a) of this section or deprive defendants of equal protection and due process of law. State v. Oliver, 302 N.C. 28, 274 S.E.2d 183 (1981).

Applied in State v. Detter, 298 N.C. 604, 260 S.E.2d 567 (1979).

ARTICLE 30.

Probable-Cause Hearing.

§ 15A-611. Probable-cause hearing procedure.

CASE NOTES

The purpose of a preliminary hearing, etc. —

A probable-cause hearing may afford the opportunity for a defendant to discover the strengths and weaknesses of the State's case. However, discovery is not the purpose for such a hearing. The function of a probable-cause hearing is to determine whether there is probable cause to believe that a crime has been committed and that the defendant committed it. The establishment of probable cause ensures that a defendant will not be unjustifiably put to the trouble and expense of trial. State v. Hudson, 295 N.C. 427, 245 S.E.2d 686 (1978).

There is no constitutional requirement for a preliminary hearing. State v. Hudson, 295 N.C. 427, 245 S.E.2d 686 (1978).

Hearing Not Required, etc. —

A probable-cause hearing is unnecessary after the grand jury finds an indictment. State v. Lester, 294 N.C. 220, 240 S.E.2d 391 (1978); State v. Vaughn, 296 N.C. 167, 250 S.E.2d 210 (1978), cert. denied, 441 U.S. 935, 99 S. Ct. 2060, 60 L. Ed. 2d 665 (1979).

There is no necessity for a preliminary hearing after a grand jury returns a bill of indictment. State v. Hudson, 295 N.C. 427, 245 S.E.2d 686 (1978).

Cited in State v. Murchinson, 39 N.C. App. 163, 249 S.E.2d 871 (1978).

§ 15A-612. Disposition of charge on probable-cause hearing.

CASE NOTES

Section 15A-701(a1)(3) not an Exception to Subsection (b) of This Section. — Where there was a finding of no probable cause at a probable cause hearing, and where the State instituted a subsequent prosecution for the same offense, the period for computation of the time within which trial must be commenced under § 15A-701(a1)(3) began to run from the date of defendant's indictment on the new charge rather than from the date of his arrest on the original charge, since the General Assembly did not intend by the 1979 amendment to § 15A-701(a1)(3), where the phrase "or a finding of no probable cause pursuant to § 15A-612" was inserted, to carve out an exception to the clear intent of subsection (b) of this section to permit subsequent prosecution for the same offense where a finding of no probable cause has been entered. State v. Boltinhouse, 49 N.C. App. 660, 272 S.E.2d 148 (1980).

Cited in In re Ford, 49 N.C. App. 674, 272 S.E.2d 157 (1980).

§ 15A-613. Setting offense for trial in district court.

CASE NOTES

Applied in State v. Joyner, 33 N.C. App. 361, 235 S.E.2d 107 (1977).

ARTICLE 31.

The Grand Jury and Its Proceedings.

§ 15A-621. "Grand jury" defined.

CASE NOTES

Quoted in State v. House, 295 N.C. 189, 244 S.E.2d 654 (1978); State v. Richardson, 295 N.C. 309, 245 S.E.2d 754 (1978).

§ 15A-622. Formation and organization of grand juries; other preliminary matters.

(a) The mode of selecting grand jurors and of drawing and impaneling grand jurors is governed by this Article and Chapter 9 of the General Statutes, Jurors. Challenges to the panel from which grand jurors were drawn are governed by the procedure in G.S. 15A-1211.

(b) To impanel a new grand jury, the presiding judge must direct that the names of all persons returned as jurors be separately placed in a container. The clerk must draw out the names of 18 persons to serve as grand jurors. Of these 18, the first nine drawn serve until the first session of court at which criminal cases are heard held in the county after the following January 1, and thereafter until their replacements are selected and sworn. The next nine serve until the

first session of court at which criminal cases are heard held in the county after the following July 1, and thereafter until their replacements are selected and sworn. If this formula results in any term likely to be shorter than two months or longer than 15 months, the presiding judge impaneling the grand jury may modify the terms. Thereafter, beginning with the first session of superior court at which criminal cases are heard held in the county following January 1 and July 1 of each year, nine new grand jurors must be selected in the manner provided above to replace the jurors whose terms have expired. All new grand jurors so selected serve until the first session of court at which criminal cases are heard held after January 1 or July 1 which most nearly results in a 12-month term, and thereafter until their replacements are selected and sworn. If a vacancy occurs in the membership of the grand jury, the superior court judge next convening the jury or next holding a session of court at which criminal cases are heard in the county may order that a new juror be drawn in the manner provided above to fill the vacancy.

The senior resident superior court judge of the district may impanel a second grand jury in any county of the district to serve concurrently with the first. The second grand jury shall be impaneled as provided in the first paragraph of this subsection. The court shall continue to have two grand juries until the senior resident superior court judge orders the second grand jury to terminate.

In any county the senior resident superior court judge, if he finds that grand jury service is placing a disproportionate burden on grand jurors and their employers, may fix the term of service of a grand juror at six months rather than 12 months. In doing so, he shall prescribe procedures, consistent with this section, for replacement of half of the jurors of the grand jury or grand juries approximately every three months.

(c) Neither the grand jury panel nor any individual grand juror may be challenged, but a superior court judge may:

(1) At any time before new grand jurors are sworn, discharge them, or discharge the grand jury, and cause new grand jurors or a new grand jury to be drawn if he finds that jurors have not been selected in accordance with law or that the grand jury is illegally constituted; or

(2) At any time after a grand juror is drawn, refuse to swear him, or discharge him after he has been sworn, upon a finding that he is disqualified from service, incapable of performing his duties, or guilty of misconduct in the performance of his duties so as to impair the proper functioning of the grand jury.

(d) The presiding judge may excuse a grand juror from service of the balance of his term, upon his own motion or upon the juror's request for good cause shown. The foreman may excuse individual jurors from attending particular sessions of the grand jury, except that he may not excuse more than two jurors for any one session.

(e) After the impaneling of a new grand jury, or the impaneling of nine new jurors under the terms of this section, the presiding judge must appoint one of the grand jurors as foreman and may appoint another to act as foreman during any absence or disability of the foreman. Unless removed for cause by a superior court judge, the foreman serves until his successor is appointed and sworn.

(f) The foreman and other new grand jurors must take the oath prescribed in G.S. 11-11. After new grand jurors have been sworn, the presiding judge may give the grand jurors written or oral instructions relating to the performance of their duties. At subsequent sessions of court, the presiding judge is not required to give any additional instructions to the grand jurors.

(g) At any time when a grand jury is in recess, a superior court judge may, upon application of the prosecutor or upon his own motion, order the grand jury reconvened for the purpose of dealing with a matter requiring grand jury action. (1779, c. 157, s. 11, P. R.; R. C., c. 31, s. 33; 1879, c. 12; Code, ss. 404, 1742; Rev., ss. 1969, 1971; C. S., ss. 2333, 2336; 1929, c. 228; 1967, c. 218, s.

1; 1973, c. 1286, s. 1; 1975, c. 166, s. 27; 1977, c. 711, s. 24; 1979, c. 177, s. 1; 1981, c. 440, s. 1.)

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

Effect of Amendments. — The 1979 amendment added the second paragraph of subsection (b).

The 1981 amendment, effective July 1, 1981, added the third paragraph of subsection (b).

CASE NOTES

Stated in State v. Vaughn, 296 N.C. 167, 250 S.E.2d 210 (1978).

§ 15A-623. Grand jury proceedings and operations in general.

Legal Periodicals. — For article entitled, "Toward a Codification of the Law of Evidence in North Carolina," see 16 Wake Forest L. Rev. 669 (1980).

CASE NOTES

Public Policy Underlying Subsection (e). — The public policy of this State against allowing a defendant at trial to cross-examine the witnesses before the grand jury in order to show the nature and character of the evidence upon which the bill of indictment was founded is codified in subsection (e) of this section. State v. Phillips, 297 N.C. 600, 256 S.E.2d 212 (1979).

Quoted in State v. House, 295 N.C. 189, 244 S.E.2d 654 (1978); State v. Richardson, 295 N.C. 309, 245 S.E.2d 754 (1978).

§ 15A-627. Submission of bill of indictment to grand jury by prosecutor.

CASE NOTES

Effect of Probable Cause Hearing on Grand Jury. — A finding of probable cause by the district court is not a prerequisite to the returning of a true bill of indictment. State v. McGee, 47 N.C. App. 280, 267 S.E.2d 67, cert. denied, 301 N.C. 101, 273 S.E.2d 306 (1980).

The actions of a grand jury are not limited by the charges presented or determined at a probable cause hearing in the district court. State v. McGee, 47 N.C. App. 280, 267 S.E.2d 67, cert. denied, 301 N.C. 101, 273 S.E.2d 306 (1980).

§ 15A-628. Functions of grand jury; record to be kept by clerk.

CASE NOTES

Cited in State v. Hudson, 295 N.C. 427, 245 S.E.2d 686 (1978).

§ 15A-630. Notice to defendant of true bill of indictment.

CASE NOTES

Defendant Held Not Entitled to Notice. — Where counsel was appointed for a defendant on November 14, 1978, and a bill of indictment was returned on December 11, 1978, clearly defendant was not entitled to the benefits of the notice requirement of this section, since a reading of the statute reveals that its provisions are applicable to defendants "unless [they are] then represented by counsel of record." State v. Miller, 42 N.C. App. 342, 256 S.E.2d 512 (1979).

ARTICLE 32.

Indictment and Related Instruments.

§ 15A-641. Indictment and related instruments; definitions of indictment, information, and presentment.

CASE NOTES

A presentment does not institute a criminal proceeding, but is only a device whereby the grand jury brings to the attention of the district attorney subject matter which requires investigation by the district attorney and the submission of a properly drawn indictment by him to the grand jury when the facts so warrant. State v. Cole, 294 N.C. 304, 240 S.E.2d 355 (1978).

Subsection (c) Codifies Previous Holding of Court. — Subsection (c) of this section codifies and clarifies the holding in State v. Thomas, 236 N.C. 454, 73 S.E.2d 283 (1952). State v. Cole, 294 N.C. 304, 240 S.E.2d 355 (1978).

Quoted in State v. Midyette, 45 N.C. App. 87, 262 S.E.2d 353 (1980).

§ 15A-644. Form and content of indictment, information or presentment.

CASE NOTES

Subdivision (a)(5) is merely directory; an indictment is not invalid because it contained no attestation clause that 12 or more grand jurors concurred in the findings of a true bill. State v. Midyette, 45 N.C. App. 87, 262 S.E.2d 353 (1980).

Detail of Foreman's Entry. — Although it is better practice for the foreman's entry upon the bill of indictment, over his signature, to state expressly that 12 or more grand jurors concurred in such finding, since even a directory provision of a statute should be obeyed, this is not necessary to the validity of the bill of indictment where the foreman's statement upon the bill is clearly so intended and there is nothing to indicate the contrary. State v. House, 295 N.C. 189, 244 S.E.2d 654 (1978).

An indictment is not invalid merely because there is no specific expression in the indictment that it is "a true bill." State v. Midyette, 45 N.C. App. 87, 262 S.E.2d 353 (1980).

Failure to Allege Specific Dates of Offenses Not Fatal. — Indictments for embezzlement were not invalid because they

failed to allege the specific dates on which the offenses occurred but instead alleged that they occurred on or about January 1 of each year for which an indictment was returned since defendant presented no statute of limitations or alibi defense, and the time of the offenses was therefore not an essential fact; furthermore, defendant was not prejudiced by the issuance of one indictment for each year rather than separate indictments for each offense committed during that year. State v. Thompson, 50 N.C. App. 484, — S.E.2d — (1981).

Applied in State v. Richardson, 295 N.C. 309, 245 S.E.2d 754 (1978); State v. Bradsher, 49 N.C. App. 507, 271 S.E.2d 915 (1980).

§ 15A-646. Superseding indictments and informations.

CASE NOTES

Stated in State v. Berry, 35 N.C. App. 128, 240 S.E.2d 633 (1978).

SUBCHAPTER VII. SPEEDY TRIAL; ATTENDANCE OF DEFENDANTS.

ARTICLE 35.

Speedy Trial.

§ 15A-701. Time limits and exclusions.

(a) The trial of the defendant charged with a criminal offense shall begin within the time limits specified below:

(1) Within 90 days from the date the defendant is arrested, served with criminal process, waives an indictment or is indicted, whichever occurs last;

(2) Within 120 days from the first regularly scheduled criminal session of superior court, for which a calendar has not been published at the time of notice of appeal, held after the defendant has given notice of appeal in a misdemeanor case for trial de novo in the superior court;

(3) When a charge is dismissed, other than under G.S. 15A-703 or a finding of no probable cause pursuant to G.S. 15A-612, and the defendant is afterwards charged with the same offense or an offense based on the same act or transaction or on the same series of acts or transactions connected together or constituting parts of a single scheme or plan, then within 90 days from the date that the defendant was arrested, served with criminal process, waived an indictment, or was indicted, whichever occurs last for the original charge;

(4) When the defendant is to be tried again following a declaration by the trial judge of a mistrial, then within 90 days of that declaration; or

(5) Within 120 days from the date the action occasioning the new trial becomes final when the defendant is to be tried again following an appeal or collateral attack.

(a1) Notwithstanding the provisions of subsection (a) the trial of a defendant charged with a criminal offense who is arrested, served with criminal process, waives an indictment or is indicted, on or after October 1, 1978, and before October 1, 1983, shall begin within the time limits specified below:

(1) Within 120 days from the date the defendant is arrested, served with criminal process, waives an indictment, or is indicted, whichever occurs last;

(2) Within 120 days from the first regularly scheduled criminal session of superior court, for which a calendar has not been published at the time of notice of appeal, held after the defendant has given notice of appeal in a misdemeanor case for trial de novo in the superior court;

(3) When a charge is dismissed, other than under G.S. 15A-703 or a finding of no probable cause pursuant to G.S. 15A-612, and the defendant is afterwards charged with the same offense or an offense based on the same act or transaction or on the same series of acts or transactions connected together or constituting parts of a single scheme or plan, then within 120 days from the date that the defendant was arrested, served with criminal process, waived an indictment, or was indicted, whichever occurs last, for the original charge;

(4) When the defendant is to be tried again following a declaration by the trial judge of a mistrial, then within 120 days of that declaration; or

(5) Within 120 days from the date the action occasioning the new trial becomes final when the defendant is to be tried again following an appeal or collateral attack.

(b) The following periods shall be excluded in computing the time within which the trial of a criminal offense must begin:

(1) Any period of delay resulting from other proceedings concerning the defendant including, but not limited to, delays resulting from:

a. A mental or physical examination of the defendant, including all time when he is awaiting or undergoing treatment or examination, or a hearing on his mental or physical capacity; or

b. Trials with respect to other charges against the defendant;

c. Interlocutory appeals; or

d. Hearings on any pretrial motions or the granting or denial of such motions.

The period of delay under this subdivision must include all delay from the time a motion or other event occurs that begins the delay until the time a judge makes a final ruling on the motion or the event causing the delay is finally resolved;

(2) Any period of delay during which the prosecution is deferred by the prosecutor pursuant to written agreement with the defendant with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct;

(3) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness for the defendant or the State. For the purpose of this subdivision, a defendant or an essential witness shall be considered

a. Absent when his whereabouts are unknown and he is attempting to avoid apprehension or prosecution or when his whereabouts cannot be determined by due diligence; and

b. Unavailable when his whereabouts are known but his presence for testifying at the trial cannot be obtained by due diligence or he resists appearing at or being returned for trial;

(4) Any period of delay resulting from the fact that the defendant is mentally incapacitated or physically unable to stand trial;

(5) When a charge is dismissed by the prosecutor under the authority of G.S. 15A-931 and afterwards a new indictment or information is filed against the same defendant or the same defendant is arrested or served with criminal process for the same offense, or an offense based on the same act or transaction or on the same series of acts or transactions connected together or constituting parts of a single scheme or plan, any period of delay from the date the initial charge was dismissed to the date the time limits for trial under this section would have commenced to run as to the subsequent charge;

(6) A period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted;

(7) Any period of delay resulting from a continuance granted by any judge if the judge granting the continuance finds that the ends of justice served by granting the continuance outweigh the best interests of the public and the defendant in a speedy trial and sets forth in writing in the record of the case the reasons for so finding. A superior court judge must not grant a motion for continuance unless the motion is in writing and he has made written findings as provided in this subdivision.

The factors, among others, which a judge shall consider in determining whether to grant a continuance are as follows:

a. Whether the failure to grant a continuance would be likely to result in a miscarriage of justice; and

b. Whether the case taken as a whole is so unusual and so complex, due to the number of defendants or the nature of the prosecution or otherwise, that it is unreasonable to expect adequate preparation within the time limits established by this section;

c. Repealed by Session Laws 1977, 2nd Sess., c. 1179, s. 6;

When a judge grants a continuance pursuant to this subsection, he may specify in his order the period of time which shall be excluded from the time within which the trial of the criminal case must begin.

(8) Any period of delay occasioned by the venue of the defendant's case being within a county where, due to limited number of court sessions scheduled for the county, the time limitations of this section cannot reasonably be met;

(9) A period of delay resulting from the defendant's being in the custody of a penal or other institution of a jurisdiction other than the jurisdiction in which the criminal offense is to be tried;

(10) A period of delay when the defendant or his attorney has an obligation of service to the State of North Carolina or to the United States government and the court, with the consent of both the defendant and the State, continues the case for a period of time consistent with that obligation;

(11) A period of delay from time the prosecutor enters a dismissal with leave for the nonappearance of the defendant until the prosecutor reinstitutes the proceedings pursuant to G.S. 15A-932;

(12) When a charge is dismissed by a judge other than under G.S. 15A-703 or a finding of no probable cause pursuant to G.S. 15A-612, and afterwards a new indictment or information is filed against the same defendant or the same defendant is arrested or served with criminal process for the same offense, or an offense based on the same act or transaction or on the same series of transactions connected together or constituting parts of a single scheme or plan, any period of delay from the date the initial charge was dismissed to the date the time limits for trial under this section would have commenced to run as to the subsequent charge;

(13) Any period of delay from the time criminal process is served on a defendant who has previously been called and failed until the time that the district attorney receives notice that the criminal process has been served;

(14) Any period of delay from the time the defendant has been called and failed in open court until the time that the district attorney receives notice that the criminal process was stricken or was never issued; and

(15) Any period of delay from the time that a defendant has been returned from court-ordered or -approved hospitalization, treatment, or exam-

ination until the time that the district attorney receives notice that the defendant has returned.

(c) If trial does not begin within the time limitations specified in this section because the defendant entered a plea of guilty or no contest which was subsequently withdrawn to any or all charges, the applicable period of time limits as specified in this section shall begin to run on the day the order permitting withdrawal of the plea of guilty or no contest becomes final. (1973, c. 1286, s. 1; 1977, c. 787, s. 1; 1977, 2nd Sess., c. 1179, ss. 1-8; 1979, c. 1018, ss. 1-2A; 1979, 2nd Sess., c. 1317; 1981, c. 626, ss. 1-10; c. 902, ss. 1-3.)

Effect of Amendments. — The 1977, 2nd Sess., amendment substituted "is indicted" for "is notified pursuant to G.S. 15A-630 that an indictment has been filed with the superior court against him" in subdivision (a)(1) and for "is notified pursuant to G.S. 15A-630 that an indictment has been filed against him" in the introductory language and in subdivision (1) of subsection (a1), substituted "was indicted" for "was notified pursuant to G.S. 15A-630 that an indictment has been filed with the superior court against him" near the end of subdivisions (a)(3) and (a1)(3), added "and" at the end of paragraph a of subdivision (b)(7), deleted "and" at the end of paragraph b of subdivision (b)(7), repealed paragraph c of subdivision (b)(7), relating to delay after grand jury proceedings have begun in certain cases, added "and" at the end of subdivision (b)(10) and added subdivision (b)(11).

Session Laws 1977, c. 787, s. 2, as amended by Session Laws 1977, 2nd Sess., c. 1179, s. 9, provides: "This act shall apply to any person who is arrested, served with criminal process, waives an indictment, or is indicted on or after Oct. 1, 1978."

Session Laws 1977, c. 787, s. 3, which repealed subsection (a1) of this section effective July 1, 1980, was repealed by Session Laws 1977, 2nd Sess., c. 1179, s. 10.

The 1979 amendment substituted "from the first regularly scheduled criminal session of superior court held after the defendant has given notice" for "of the giving of notice" in subdivisions (a)(2) and (a1)(2) and inserted "or a finding of no probable cause pursuant to G.S. 15A-612," near the beginning of subdivision (a1)(3).

The 1979, 2nd Sess., amendment substituted "1981" for "1980" near the end of the introductory paragraph in subsection (a1).

The first 1981 amendment, in subsection (a), substituted "120 days" for "90 days" and inserted "for which a calendar has not been published at the time of notice of appeal" in paragraph (2), inserted "or is dismissed pursuant to a finding of no probable cause pursuant to G.S. 15A-612" in subdivision (3), substituted "90 days" for "60 days" in subdivision (4), and substituted "120 days" for "60 days" in subdivision (5); in subsection (a1), substituted "October 1, 1983" for "October 1, 1981" in the introductory paragraph and inserted "for which a calendar has not been published at the time of notice of appeal" in subdivision (2); and in subsection (b), inserted "including all time when he is awaiting or undergoing treatment or examination" and added "or" to the end, in paragraph a of subdivision (1), added the second sentence of subdivision (1), added the second sentence of the first paragraph of subdivision (7), added the last paragraph of subdivision (7), deleted "and" from the end of subdivision (10), and added subdivisions (12) through (15).

The second 1981 amendment inserted "or finding of no probable cause pursuant to G.S. 15A-612" in subdivision (3) of subsection (a) as amended by the first 1981 amendment, deleted a comma following "G.S. 15A-703" in subdivision (3) of subsection (a1), and deleted "is dismissed pursuant to" preceding "a finding of no probable cause" near the beginning of subdivision (12) of subsection (b).

Legal Periodicals. — For a survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

For an article on the North Carolina Speedy Trial Act, see 17 Wake Forest L. Rev. 173 (1981).

CASE NOTES

The Speedy Trial Act applies only to criminal prosecutions. In re Beddingfield, 42 N.C. App. 712, 257 S.E.2d 643 (1979).

And are inapplicable to juvenile proceedings. In re Beddingfield, 42 N.C. App. 712, 257 S.E.2d 643 (1979).

Retroactive Application. — The North Carolina Speedy Trial Act is a procedural statute. There is no vested right in procedure, and statutes affecting procedural matters may be given retroactive effect or applied to pending litigation, unless the alteration or modification

is so radical as to impair the obligation of contracts or to divest vested rights. Thus the 1979 amendment to subdivision (a1)(2) of this section controlled the time the clock began to run on the 120-day period where the defendant gave notice of appeal to superior court 95 days before its effective date. State v. Morehead, 46 N.C. App. 39, 264 S.E.2d 400, cert. denied, 300 N.C. 201, 269 S.E.2d 615 (1980).

The legislature, by the use of the words "from" and "held after," in subdivision (a1)(2) of this section, intended the 120-day period to start at the end of the first regularly scheduled criminal session of superior court which commenced after the defendant gave notice of appeal from the district court. State v. Morehead, 46 N.C. App. 39, 264 S.E.2d 400, cert. denied, 300 N.C. 201, 269 S.E.2d 615 (1980).

The words "held after" in subdivision (a1)(2) of this section refer to a criminal session of superior court that commences after the notice of appeal is made. A mixed session, civil cases having priority, or a mixed session, criminal cases having priority, do not constitute a "criminal session" of superior court within the meaning of subdivision (a1)(2) of this section. State v. Morehead, 46 N.C. App. 39, 264 S.E.2d 400, cert. denied, 300 N.C. 201, 269 S.E.2d 615 (1980).

Time Limit for New Trial After Dismissal without Prejudice. — Where a criminal charge is dismissed without prejudice upon a defendant's motion under § 15A-703, the trial of the defendant upon further prosecution by the State must begin within 120 days from the date the order is entered dismissing the charge without prejudice. State v. Ward, 46 N.C. App. 200, 264 S.E.2d 737 (1980).

Time Limit for Retrial after Erroneous Dismissal. — Where criminal charges are erroneously dismissed upon a defendant's motion under the Speedy Trial Act and the court's ruling is thereafter reversed by the appellate division, trial of the case must begin within 120 days, after the opinion of the appellate division is certified to the superior court. State v. Morehead, 46 N.C. App. 39, 264 S.E.2d 400, cert. denied, 300 N.C. 201, 269 S.E.2d 615 (1980).

Computation of time for bringing subsequent prosecution after finding of no probable cause. — Where there was a finding of no probable cause at a probable cause hearing, and where the State instituted a subsequent prosecution for the same offense, the period for computation of the time within which trial must be commenced under subdivision (a1)(3) of this section began to run from the date of defendant's indictment on the new charge rather than from the date of his arrest on the original charge, since the General Assembly did not intend by the 1979 amendment to that subdivision, where the phrase "or a finding of no probable cause pursuant to § 15A-612" was inserted, to carve out an exception to the clear intent of § 15A-612(b) to permit subsequent prosecution for the same offense where a finding of no probable cause has been entered. State v. Boltinhouse, 49 N.C. App. 660, 272 S.E.2d 148 (1980).

In determining exclusionary periods under the Speedy Trial Act, the trial court should detail for the record findings of fact and conclusions of law in support of its rulings. State v. Rogers, 49 N.C. App. 337, 271 S.E.2d 535, cert. denied, 301 N.C. 530, 273 S.E.2d 464 (1980).

Excludable Delay For Mental Examination. — In calculating the time within which a criminal trial must begin under the speedy trial act, the excludable delay permitted by subdivision (b)(1)(a) of this section for a mental examination of defendant runs from the date of entry of the order of commitment to the date the report of the mental examination becomes available to both defendant and the State. State v. Harren, 302 N.C. 142, 273 S.E.2d 694 (1981).

In calculating the time to be excluded for a mental examination of defendant in computing the time within which the trial of defendant must begin under the speedy trial statutes, the first day of the applicable period should be excluded and the last day of the period should be included. State v. Harren, 302 N.C. 142, 273 S.E.2d 694 (1981).

Period of Delay Resulting from Pretrial Motion. — A motion for change of venue is a "pretrial motion" within the meaning of subdivision (b)(1)(d) of this section, and the time between the filing of the motion and its disposition is properly excluded in computing the statutory speedy trial period, provided the motion is heard within a reasonable time after it is filed and the State does not delay the hearing for the purpose of thwarting the speedy trial statute. State v. Oliver, 302 N.C. 28, 274 S.E.2d 183 (1981).

"Period of Delay Resulting from Other Proceedings Concerning Defendant". — In computing the time within which the trial of a criminal case was required to commence pursuant to the Speedy Trial Act, the time between defendant's indictment and a stipulation of readiness for trial by defendant's attorney was properly excluded as a "period of delay resulting from other proceedings concerning the defendant" within the meaning of subdivision (b)(1) where defendant had informed the court at her first appearance in the district court that she would obtain private counsel and the State was waiting during that time for defendant to obtain such counsel. State v. Rogers, 49 N.C. App. 337, 271 S.E.2d 535, cert. denied, 301 N.C. 530, 273 S.E.2d 464 (1980).

A record indication of a period of delay between indictment and appointment of counsel, standing alone, is not sufficient to meet the burden imposed on the State by § 15A-703 of going forward with evidence to show that a period should be excluded from computation under the Speedy Trial Act pursuant to the exemption subdivision (b)(1) for other proceedings concerning the defendant. Rather, there must also be some factual basis in the record for a determination that the delay in appointing counsel was in some way occasioned by the defendant to merit exclusion under this provision. State v. Edwards, 49 N.C. App. 426, 271 S.E.2d 533 (1980).

No Violation of Time Limits Found. — There was no merit to defendants' contention that the Speedy Trial Act was violated because they were not brought to trial within 120 days of their arrest where there was nothing in the record to support their contention that they were arrested for an offense based on the same acts or transactions at a time earlier than that indicated in the record, and there was nothing in the record to show that the trial judge, in denying their motions to dismiss, considered anything other than the fact that defendants were brought to trial within 120 days of the date of indictment. State v. Lipfird, 48 N.C. App. 649, 269 S.E.2d 723 (1980).

Defendant, who was tried 319 days after he was indicted, was not denied his right to a speedy trial under this section, since, excluding 205 days consumed by defendant's continuances granted on the ground of lack of availability of an essential witness, he was tried within the 120-day limit of the statute. State v. Hartman, 49 N.C. App. 83, 270 S.E.2d 609 (1980).

Failure to Comply with Speedy Trial Act. — Defendant's motion to dismiss the charge against him for failure to comply with the Speedy Trial Act should have been granted where defendant was indicted on February 20, 1979; an attorney was appointed to represent him on May 31, 1979; the case was first calendared for trial at the August 8, 1979 session, a time well beyond the 120-day limitation imposed by subdivision (a1)(1); the case ultimately was tried at the October 8, 1979 session; and the State produced no evidence to sustain its burden imposed by § 15A-703. State v. Edwards, 49 N.C. App. 426, 271 S.E.2d 533 (1980).

Delay in Bringing Charges. —

In accord with original. See State v. Salem, 50 N.C. App. 419, — S.E.2d — (1981).

Applied in State v. Allen, 45 N.C. App. 417, 263 S.E.2d 630 (1980); State v. Rice, 46 N.C. App. 118, 264 S.E.2d 140 (1980); State v. Dunbar, 47 N.C. App. 623, 267 S.E.2d 577 (1980); State v. Hunter, 48 N.C. App. 656, 270 S.E.2d 120 (1980); State v. Brady, 299 N.C. 547, 264 S.E.2d 66 (1980); State v. Leonard, 300 N.C. 223, 266 S.E.2d 631 (1980); State v. Lynch, 300 N.C. 534, 268 S.E.2d 161 (1980); State v. Bradsher, 49 N.C. App. 507, 271 S.E.2d 915 (1980).

Stated in State v. Brooks, 49 N.C. App. 14, 270 S.E.2d 592 (1980).

Cited in Morrison v. Jones, 565 F.2d 272 (4th Cir. 1977); State v. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979); State v. Johnson, 41 N.C. App. 423, 255 S.E.2d 275 (1979); State v. McLawhorn, 43 N.C. App. 695, 260 S.E.2d 138 (1979).

§ 15A-702. Counties with limited court sessions.

Legal Periodicals. — For an article on the North Carolina Speedy Trial Act, see 17 Wake Forest L. Rev. 173 (1981).

CASE NOTES

Cited in State v. Allen, 45 N.C. App. 417, 263 S.E.2d 630 (1980).

§ 15A-703. Sanctions.

(a) If a defendant is not brought to trial within the time limits required by G.S. 15A-701 or within the time prescribed by the judge in his order for prompt trial under G.S. 15A-702(b), the charge shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting that motion but the State shall have the burden of going forward with evidence in connection with excluding periods from computation of time in determining whether or not the time limitations under this Article have been complied

with. In determining whether to order the charge's dismissal with or without prejudice, the court shall consider, among other matters, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; the impact of a re-prosecution on the administration of this Article and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of the plea of guilty or no contest shall constitute a waiver of the right to dismissal under this section. A dismissal with prejudice shall bar further prosecution of the defendant for the same offense or an offense based on the same act or transaction or on the same series of acts or transactions connected together or constituting parts of a single scheme or plan; a dismissal without prejudice shall not bar further prosecution.

(b) The 120-day limitation as provided in G.S. 15A-701 is the State policy in the district court division of the General Court of Justice, but none of the sanctions provided in this section shall apply to the proceedings in the district court division. (1973, c. 1286, s. 1; 1977, c. 787, s. 1; 1981, c. 626, s. 11.)

Effect of Amendments. — The 1981 amendment designated the former provisions of this section as subsection (a) and added subsection (b).

Session Laws 1981, c. 626, s. 12, provides in part: "Section 11 shall expire October 1, 1983."

Legal Periodicals. — For an article on the North Carolina Speedy Trial Act, see 17 Wake Forest L. Rev. 173 (1981).

CASE NOTES

A record indication of a period of delay between indictment and appointment of counsel, standing alone, is not sufficient to meet the burden imposed on the State by this section of going forward with evidence to show that a period should be excluded from computation under the Speedy Trial Act pursuant to the exemption of § 15A-701(b)(1) for other proceedings concerning the defendant. Rather, there must also be some factual basis in the record for a determination that the delay in appointing counsel was in some way occasioned by the defendant to merit exclusion under this provision. State v. Edwards, 49 N.C. App. 426, 271 S.E.2d 533 (1980).

Factors to be considered in determining whether a criminal action should be dismissed for failure to grant the defendant a speedy trial are: (1) the length of the delay; (2) the reason for the delay; (3) prejudice to the defendant; and (4) waiver by the defendant. State v. Mackins, 47 N.C. App. 168, 266 S.E.2d 694 (1980).

Failure to Comply with Speedy Trial Act. — Defendant's motion to dismiss the charge against him for failure to comply with the Speedy Trial Act should have been granted where defendant was indicted on February 20, 1979; an attorney was appointed to represent him on May 31, 1979; the case was first calendared for trial at the August 8, 1979 session, a time well beyond the 120-day limitation imposed by § 15A-701(a1)(1); the case ultimately was tried at the October 8, 1979 session; and the State produced no evidence to sustain its burden imposed by this section. State v. Edwards, 49 N.C. App. 426, 271 S.E.2d 533 (1980).

If the State were allowed to appeal as a matter of right an order dismissing a criminal charge without prejudice, it would defeat the very principles of speedy trial which the statute seeks to protect. State v. Ward, 46 N.C. App. 200, 264 S.E.2d 737 (1980).

Appellate Review of Dismissal without Prejudice. — The State must petition for writ of certiorari in order to seek appellate review of dismissal of criminal charges without prejudice for violation of a defendant's statutory speedy trial rights. State v. Ward, 46 N.C. App. 200, 264 S.E.2d 737 (1980).

A dismissal without prejudice, under this section of the Speedy Trial Act does not bar further prosecution by the State. It does not finally dispose of the case or charge against defendant, and therefore, it is not appealable. State v. Ward, 46 N.C. App. 200, 264 S.E.2d 737 (1980).

Applied in State v. Rogers, 49 N.C. App. 337, 271 S.E.2d 535 (1980).

Stated in State v. Dunbar, 47 N.C. App. 623, 267 S.E.2d 577 (1980).

Cited in State v. Allen, 45 N.C. App. 417, 263 S.E.2d 630 (1980); State v. Harren, 302 N.C. 142, 273 S.E.2d 694 (1981).

§ 15A-704. No bar to claim of denial of speedy trial.

Legal Periodicals. — For an article on the North Carolina Speedy Trial Act, see 17 Wake Forest L. Rev. 173 (1981).

ARTICLE 36.

Special Criminal Process for Attendance of Defendants.

§ 15A-711. Securing attendance of criminal defendants confined in institutions within the State; requiring prosecutor to proceed.

(a) When a criminal defendant is confined in a penal or other institution under the control of the State or any of its subdivisions and his presence is required for trial, the prosecutor may make written request to the custodian of the institution for temporary release of the defendant to the custody of an appropriate law-enforcement officer who must produce him at the trial. The period of the temporary release may not exceed 60 days. The request of the prosecutor is sufficient authorization for the release, and must be honored, except as otherwise provided in this section.

(1979, c. 107, s. 1.)

Effect of Amendments. — The 1979 amendment substituted "prosecutor" for "solicitor" near the middle of the first sentence of subsection (a).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (a) is set out.

CASE NOTES

Subsection (c) did not give a superior court judge the power to require a trial at a certain session or order a dismissal. The statute requires that the request for speedy trial be served on the solicitor (prosecutor), who then has six months to proceed. State v. Turner, 34 N.C. App. 78, 237 S.E.2d 318 (1977).

State Must Proceed within Six Months to Request Defendant's Release for Trial. — Subsection (c) provides that following defendant's request the State must proceed within six months "pursuant to subsection (a)," that is, not to trial but to request a defendant's temporary release for trial, which "temporary release may not exceed 60 days." State v. Dammons, 293 N.C. 263, 237 S.E.2d 834 (1977).

The legislature envisioned that trial following a request under subsection (c) would be held within eight months — the six-month period provided by subsection (c) plus the 60-day release period provided by subsection (a). This coincides with the eight-month period set out in § 15-10.2(a). State v. Dammons, 293 N.C. 263, 237 S.E.2d 834 (1977).

The fact that the defendant's trial was not held within the six-month period was not a violation of subsection (c), where the State proceeded within the six-month period by making a request for delivery of the defendant for trial. State v. Turner, 34 N.C. App. 78, 237 S.E.2d 318 (1977).

ARTICLE 37.

Uniform Criminal Extradition Act.

§ 15A-721. Definitions.

CASE NOTES

An extradition proceeding is intended to be a summary and mandatory executive proceeding. State v. Carter, 42 N.C. App. 325, 256 S.E.2d 535, cert. denied, 298 N.C. 301, 259 S.E.2d 302 (1979).

§ 15A-723. Form of demand for extradition.

CASE NOTES

The provision of this section requiring a demand for extradition to be accompanied by information supported by affidavit in the state having jurisdiction of the crime does not require that the supporting affidavits be dated prior to or contemporaneous with the information, and the trial information, the bench warrant, and the fugitive warrant, coupled with affidavits dated subsequent to the information, gave adequate assurance that the person sought was substantially charged with a crime in the demanding state as required by this section. In re Armstrong, 49 N.C. App. 175, 270 S.E.2d 619 (1980).

§ 15A-730. Rights of accused person; application for writ of habeas corpus.

CASE NOTES

Failure to Comply with Technical Procedures. — The Uniform Act contains no provision requiring dismissal of an underlying indictment where technical procedures are not complied with. State v. Love, 296 N.C. 194, 250 S.E.2d 220 (1978).

The trial court properly denied the defendant's motion to dismiss on the ground that he was detained in New York beyond the period provided for by New York law, since the courts of North Carolina are not the place for the defendant to assert alleged rights under New York law. State v. Love, 296 N.C. 194, 250 S.E.2d 220 (1978).

Cited in State v. Lynch, 300 N.C. 534, 268 S.E.2d 161 (1980).

§ 15A-744. Costs and expenses.

Subject to the requirements and restrictions set forth in this section, if the crime is a felony or if a person convicted in this State of a misdemeanor has broken the terms of his probation or parole, reimbursements for expenses shall be paid out of the State treasury on the certificate of the Governor. In all other cases, such expenses or reimbursements shall be paid out of the county treasury of the county wherein the crime is alleged to have been committed according to such regulations as the board of county commissioners may promulgate. In all cases, the expenses, for which repayment or reimbursement may be claimed, shall consist of the reasonable and necessary travel expense and subsistence costs of the extradition agent or fugitive officer, as well as the fugitive, together with such legal fees as were paid to the officials of the state on whose governor the requisition is made. The person or persons designated

to return the fugitive shall not be allowed, paid or reimbursed for any expenses in connection with any requisition or extradition proceeding unless the expenses are itemized, the statement of same be sworn to under oath, and shall not then be paid or reimbursed unless a receipt is obtained showing the amount, the purpose for which said item or sum was expended, the place, date and to whom paid, and said receipt or receipts attached to said sworn statement and filed with the Governor. The Governor shall have the authority, upon investigation, to increase or decrease any item or expenses shown in said sworn statement, or to include items of expenses omitted by mistake or inadvertence. The decision or determination of the Governor as to the correct amount to be paid for such expenses or reimbursements shall be final. When it is deemed necessary for more than one agent, extradition agent, fugitive officer or person, to be designated to return a fugitive from another state to this State, the district attorney or prosecuting officer shall file with his written application to the Governor of this State an affidavit setting forth in detail the grounds or reasons why it is necessary to have more than one extradition agent, fugitive officer or person to be so designated. Among other things, and not by way of limitation, the affidavit shall set forth whether or not the alleged fugitive is a dangerous person, his previous criminal record if any, and any record of said fugitive on file with the Federal Bureau of Investigation or with the prison authorities of this State. As a further ground or reason for more than one extradition agent or fugitive officer to be designated, it may be shown in said affidavit the number of fugitives to be returned to this State and any other grounds or reasons for which more than one extradition agent or fugitive officer is desired. If the Governor finds or determines from his own investigation and from the information made available to him that more than one extradition agent or fugitive officer is necessary for the return of a fugitive or fugitives to this State, he may designate more than one extradition agent or fugitive officer for such purpose. All travel for which expenses or reimbursements are paid or allowed under this section shall be by the nearest, direct, convenient route of travel. If the extradition agent or agents or person or persons designated to return a fugitive or fugitives from another state to this State shall elect to travel by automobile, a sum not exceeding seven cents (7¢) per mile may be allowed in lieu of all travel expense, and which shall be paid upon a basis of mileage for the complete trip. The Governor may promulgate executive orders, rules and regulations governing travel, forms of statements, receipts or any other matter or objective provided for in this section. The Governor may delegate any or all of the duties, powers and responsibilities conferred upon him by this section to any executive agent or executive clerk on his staff or in his office, and such executive agent or executive clerk, when properly authorized, may perform any or all of the duties, powers and responsibilities conferred upon the Governor. Provided that if the fugitive from justice is an alleged felon, and he be returned without the service of extradition papers by the sheriff or the agent of the sheriff of the county in which the felony was alleged to have been committed, the expense of said return shall be borne by the State of North Carolina under the rules and regulations made and promulgated by the Governor of North Carolina or the executive agent or the executive clerk to whom the said Governor may have delegated his duties under this section. (1937, c. 273, s. 24; 1953, c. 1203; 1955, c. 289; 1973, c. 1286, s. 16; 1975, c. 166, s. 27; 1981, c. 859, s. 13.9.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, in the first sentence, substituted "requirements and restrictions" for "requirements, restrictions and conditions hereinafter" and "is a felony or if a person convicted in this State of a misdemeanor has broken the terms of his probation or parole" for "shall be," and deleted "and warrant of the Auditor, as provided by this section" from the end.

Session Laws 1981, c. 859, s. 97 contains a severability clause.

ARTICLE 38.

Interstate Agreement on Detainers.

§ 15A-761. Agreement on Detainers entered into; form and contents.

Legal Periodicals. — For an article on the North Carolina Speedy Trial Act, see 17 Wake Forest L. Rev. 173 (1981).

CASE NOTES

Petition for Speedy Trial. — Defendant's argument that the prosecutor had knowledge of the place of his imprisonment is irrelevant to the fact that the bare motion for a speedy trial, filed without any of the accompanying information required by Article III(a), was insufficient to put the prosecutor on notice that the defendant was availing himself of the benefits of the provision and that the prosecutor would be required to put him to trial within 180 days. State v. Vaughn, 296 N.C. 167, 250 S.E.2d 210 (1978), cert. denied, 441 U.S. 935, 99 S. Ct. 2060, 60 L. Ed. 2d 665 (1979).

A petition for a speedy trial will not be considered as a request for a final disposition under Article III, unless the prisoner complies with the terms of that provision in order to put the appropriate authorities on notice that he is proceeding thereunder. State v. Vaughn, 296 N.C. 167, 250 S.E.2d 210 (1978), cert. denied, 441 U.S. 935, 99 S. Ct. 2060, 60 L. Ed. 2d 665 (1979).

The defendant cannot complain of delay, etc. —

The delay of 121 days in bringing the defendant to trial after arrival in North Carolina was "for good cause shown," where it was due to defendant's own motion for continuance due to his inability to obtain witnesses. State v. Vaughn, 296 N.C. 167, 250 S.E.2d 210 (1978), cert. denied, 441 U.S. 935, 99 S. Ct. 2060, 60 L. Ed. 2d 665 (1979).

Agreement Inapplicable to North Carolina Prosecution of Defendant Incarcerated in North Carolina. — The Agreement on Detainers has no application to proceedings which involve a North Carolina prosecution and a defendant incarcerated in North Carolina. State v. Dammons, 293 N.C. 263, 237 S.E.2d 834 (1977).

Effect of Mistrial on 120-Day Limit on Article IV(c). — For case discussing the effect of a mistrial on the 120-day limit of Article IV(c) of this section, see State v. Williams, 33 N.C. App. 344, 235 S.E.2d 269 (1977).

Defendant was not denied his right to a speedy trial under Art. III(a) of this section because he was not brought to trial within 180 days of his first request for a speedy trial where defendant first requested a speedy trial while he was in custody in New York awaiting trial in that state but before a detainer had been filed against him, and the period from the date a detainer was filed against defendant after his conviction in New York and his trial was less than 180 days. State v. Ferdinando, 298 N.C. 737, 260 S.E.2d 423 (1979).

Applied in State v. McQueen, 295 N.C. 96, 244 S.E.2d 414 (1978).

Cited in State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978); State v. Fate, 38 N.C. App. 68, 247 S.E.2d 310 (1978); State v. Williams, 40 N.C. App. 178, 252 S.E.2d 245 (1979).

§ 15A-767. Distribution of copies of Article.

Legal Periodicals. — For an article on the North Carolina Speedy Trial Act, see 17 Wake Forest L. Rev. 173 (1981).

SUBCHAPTER VIII. ATTENDANCE OF WITNESSES; DEPOSITIONS.

ARTICLE 42.

Attendance of Witnesses Generally.

§ 15A-801. Subpoena for witness.

CASE NOTES

The right to compulsory process is not absolute, and a state may require that a defendant requesting such process at state expense establish some colorable need for the person to be summoned, lest the right be abused by those who would make frivolous requests. State v. House, 295 N.C. 189, 244 S.E.2d 654 (1978).

§ 15A-803. Attendance of witnesses.

CASE NOTES

Discretion of Court. — The use of the term "may" suggests that the granting or denial of a motion for a material witness order is a matter committed largely to the discretion of the judge. Such discretion must, however, be exercised in a manner not inconsistent with the Sixth Amendment's guaranty that a criminal defendant be afforded "compulsory process for obtaining witnesses in his favor." State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

The trial judge's denial of the defendant's motion for material witness orders to compel the attendance of New York residents who had no contact with North Carolina did not infringe upon the defendant's Sixth Amendment right to compulsory process for obtaining witnesses in his favor. A state court need not engage in the futile issuance of ineffectual process in order to satisfy the requirements of the Fourteenth Amendment. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

Limitations on Authority of Court to Compel Attendance. — There are well recognized limitations on the authority of a state court to compel the attendance of witnesses who are not residents of the state, not present therein and who lack any contact therewith. That such limitations are of constitutional stature may be inferred from the United States Supreme Court's opinions. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

The General Assembly, in enacting this section, did not seek to confer upon judges of this State the novel and seemingly unconstitutional authority to issue material witness orders to compel the attendance of New York residents who have no contact with this jurisdiction. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

Where the trial court properly denied defendant's request under this section for a material witness order to compel attendance of witnesses from New York, the court was under no duty to search the statutes and suggest to defense counsel that § 15A-813 might provide a procedure for obtaining the result which he sought, but could not obtain, under this section. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

Burden on Accused. — An accused may not place the burden on the officers of the law and the court to see that he procures the attendance of witnesses and makes preparation for his defense. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

Cited in State v. McKoy, 294 N.C. 134, 240 S.E.2d 383 (1978); State v. McGuire, 297 N.C. 69, 254 S.E.2d 165 (1979).

ARTICLE 43.

Uniform Act to Secure Attendance of Witnesses from without a State in Criminal Proceedings.

§ 15A-811. Definitions.

CASE NOTES

Constitutionality. — The Uniform Act to secure attendance of witnesses from without a state in criminal proceedings, is constitutional. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

The provisions of this article are available to the defense as well as the prosecution. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

Applied in State v. Locklear, 41 N.C. App. 292, 254 S.E.2d 653 (1979).

§ 15A-813. Witness from another state summoned to testify in this State.

CASE NOTES

Scope of Court's Duty. — Where the trial court properly denied defendant's request under § 15A-803 for a material witness order to compel attendance of witnesses from New York, the court was under no duty to search the statutes and suggest to defense counsel that this section might provide a procedure for obtaining the result which he sought, but could not obtain, under § 15A-803. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

An accused may not place the burden on the officers of the law and the court to see that he procures the attendance of witnesses and makes preparation for his defense. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

Absence of Witness as Grounds for Continuance. — Ordinarily, the absence of a witness who could have been served with a subpoena does not constitute grounds for continuance. State v. Lee, 293 N.C. 570, 238 S.E.2d 299 (1977).

§ 15A-814. Exemption from arrest and service of process.

CASE NOTES

Exemption from Service Is Personal Privilege. — The privilege of claiming an exemption from service of civil process granted by this section is personal. The service is not void. It is merely voidable, and, until the defendant elects to exercise his privilege by claiming his exemption and establishing his nonresidence, the service is binding. Thrush v. Thrush, 246 N.C. 114, 97 S.E.2d 472 (1957).

A nonresident defendant while in the State in compliance with conditions of a bail bond is not exempt from the service of process. Hare v. Hare, 228 N.C. 740, 46 S.E.2d 840 (1948).

Res Judicata. — In an action against the driver of a car upon whom service of summons was had while he was in the State in obedience to a summons from a coroner to testify at an inquest, motion to vacate the service was allowed upon the court's finding from the evidence that defendant was a nonresident and that therefore he was exempt from service of process in connection with matters which arose before his entrance into the State in obedience to the coroner's summons. In a subsequent action arising out of the same collision, brought in another county by the administrator of a party killed in the collision, service was had upon the defendant at the same time and in the same manner. It was held that the prior adjudication that defendant was a nonresident and was exempt from service under this section was

in the nature of a judgment in rem and is res judicata as to the status and residence of the defendant, and is binding upon the administrator under the maxim res judicata pro veritate accipitur, and the holding of the court in the second action upon substantially the same evidence that defendant was a resident of this State and that the service of summons on him was valid must be reversed on appeal even though supported by evidence. Current v. Webb, 220 N.C. 425, 17 S.E.2d 614 (1941).

SUBCHAPTER IX. PRETRIAL PROCEDURE.

ARTICLE 48.

Discovery in the Superior Court.

§ 15A-901. Application of Article.

CASE NOTES

Purpose of Article. — The purpose of the discovery procedure authorized by this article was not to protect a defendant from the consequences of perjury. It was intended only to protect him from the consequences of unfair surprise and to enable him to have available at the trial any evidence which he could legitimately offer in his defense. State v. Stevens, 295 N.C. 21, 243 S.E.2d 771 (1978).

Cited in State v. Mason, 295 N.C. 584, 248 S.E.2d 241 (1978).

§ 15A-902. Discovery procedure.

CASE NOTES

Waiver of Discovery. — The failure to seek discovery pursuant to the terms of this section and § 15A-903 constitutes a waiver of the right to discovery pursuant to those statutes. State v. Hoskins, 36 N.C. App. 92, 242 S.E.2d 900, cert. denied, 295 N.C. 469, 246 S.E.2d 11 (1978).

Contention That Prosecution Failed to Comply with Section Held without Merit. — Where there was no showing in the record by the defendant that investigatory evidence of the prosecution not supplied to the defendant following a motion under this section was material or exculpatory, and the defendant was afforded the opportunity to cross-examine the witnesses regarding the evidence, the defendant's contention that the prosecution failed to comply with this section was without merit. State v. May, 292 N.C. 644, 235 S.E.2d 178, cert. denied, 434 U.S. 928, 98 S. Ct. 414, 54 L. Ed. 2d 288 (1977).

Where defendant has made neither a written request nor a motion to compel discovery as required by subsection (a) of this section, the State has no duty to produce a defendant's statement or to notify defendant of its intention to use a defendant's oral statement at trial. State v. Lang, 46 N.C. App. 138, 264 S.E.2d 821, rev'd on other grounds, 301 N.C. 508, 272 S.E.2d 123 (1980).

The State did not waive its right to receive a written request for defendant's oral statement by voluntarily producing defendant's written statement pursuant to an informal oral agreement between the prosecutor and defense counsel. State v. Lang, 46 N.C. App. 138, 264 S.E.2d 821, rev'd on other grounds, 301 N.C. 508, 272 S.E.2d 123 (1980).

Applied in State v. Gillespie, 33 N.C. App. 684, 236 S.E.2d 190 (1977); State v. Braxton, 294 N.C. 446, 242 S.E.2d 769 (1978); State v. Jones, 296 N.C. 75, 248 S.E.2d 858 (1978); State v. Harden, 42 N.C. App. 677, 257 S.E.2d 635 (1979); State v. Moore, 301 N.C. 262, 271 S.E.2d 242 (1980).

Quoted in State v. Jones, 295 N.C. 345, 245 S.E.2d 711 (1978).

Cited in State v. McKoy, 294 N.C. 134, 240 S.E.2d 383 (1978); State v. Stevens, 295 N.C. 21, 243 S.E.2d 771 (1978); State v. McCormick, 36 N.C. App. 521, 244 S.E.2d 433 (1978); State v. Allison, 298 N.C. 135, 257 S.E.2d 417 (1979).

§ 15A-903. Disclosure of evidence by the State — information subject to disclosure.

Legal Periodicals. — For a survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

For survey of 1978 law on criminal procedure, see 57 N.C.L. Rev. 1007 (1979).

CASE NOTES

The common law, etc. —

Questions concerning discovery must be resolved by reference to statutes and due process principles, as no right to pretrial discovery existed at common law. State v. McDougald, 38 N.C. App. 244, 248 S.E.2d 72 (1978), appeal dismissed, 296 N.C. 413, 251 S.E.2d 472 (1979).

Legislative Intent. — The intent of the legislature under subdivision (a)(2) of this section was to restrict a defendant's discovery of his oral statements to those made by him to persons acting on behalf of the State. State v. Crews, 296 N.C. 607, 252 S.E.2d 745 (1979); State v. Detter, 298 N.C. 604, 260 S.E.2d 567 (1979).

Meaning of "within the Possession, Custody, or Control of the State". — "Within the possession, custody, or control of the State" as used in subsections (d) and (e) of this section means within the possession, custody or control of the prosecutor or those working in conjunction with him and his office. State v. Crews, 296 N.C. 607, 252 S.E.2d 745 (1979).

Burden Is on Defendant to Request Discovery. — Subdivision (a)(2) of this section makes it clear that the burden is on defendant to request discovery in writing prior to a motion to compel discovery. State v. Lang, 46 N.C. App. 138, 264 S.E.2d 821, rev'd on other grounds, 301 N.C. 508, 272 S.E.2d 123 (1980).

Waiver of Discovery. — The failure to seek discovery pursuant to the terms of § 15A-902 and this section constitutes a waiver of the right to discovery pursuant to those statutes. State v. Hoskins, 36 N.C. App. 92, 242 S.E.2d 900, cert. denied, 295 N.C. 469, 246 S.E. 11 (1978).

Defendants waived their statutory right to have the trial court order the prosecutor to permit discovery where defendants did not argue or make any other showing in support of their discovery motion at the hearing before the trial judge, no objection was made upon his conclusion that the motion had been abandoned, and the judge never ruled on the motion. State v. Jones, 295 N.C. 345, 245 S.E.2d 711 (1978).

Inspection of Pretrial Statement. —

Where the prosecution failed to disclose to the defendants the corrected pretrial statement of the state's most crucial witness, whose credibility was the most basic issue in the case, the failure to disclose it constituted a violation of the defendants' due process rights and invalidated their convictions, since the amended statement would have revealed the witness' perjury and the production of the amended statement was requested at least six times in specific terms. Chavis v. North Carolina, 637 F.2d 213 (4th Cir. 1980).

Scope of Subsection (a). —

The correctness of a discovery order, presumably made pursuant to subdivision (a)(1), ordering disclosure of recorded statements made by defendant to witnesses, was questionable due to prior holdings that subdivision (a)(2) permits disclosure only of statements made by defendant to police officers. Statements made by defendant to witnesses are shielded from discovery by § 15A-904(a) even when those statements contain remarks made by defendant to those witnesses. State v. Detter, 298 N.C. 604, 260 S.E.2d 567 (1979).

Where the trial ordered disclosure by the state of "any and all statements, written or oral, made by the defendant to . . . any other person or persons," he exceeded his authority under subdivision (a)(2), which restricts a defendant's discovery of his oral statements to those made by him to persons acting on behalf of the state. State v. Detter, 298 N.C. 604, 260 S.E.2d 567 (1979).

The State is not required to disclose the substance of defendant's statements to third parties which the State intends to use as evidence against him unless the third party is an agent of the State. State v. Moore, 301 N.C. 262, 271 S.E.2d 242 (1980).

What Evidence Not Discoverable. — Internal police reports and memoranda pertaining to a criminal case, statements by witnesses other than the defendant and the criminal records of witnesses other than the defendant are not made discoverable by this section. State v. Gillespie, 33 N.C. App. 684, 236 S.E.2d 190 (1977).

Same — Prior Recorded Statement of State Witness. — Standing alone, subsection (d) of this section would allow discovery of a prior recorded statement of a State witness. On its face, subsection (d) would permit the discovery of any recorded or written statement that is material to the preparation of the

defense. However, the statutory scheme must be construed in its entirety. The very next section, § 15A-904, limits this section and is dispositive of the issue of prosecution witnesses' statements. Section 15A-904(a) provides that production of statements made by witnesses or prospective witnesses of the State to anyone acting on behalf of the State is not required. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

A trial judge's pretrial discovery order contemplating pretrial discovery by a defendant of a prosecution witness's prior statements would exceed the judge's authority. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

Statements by Codefendant. — Where there is no joint trial, defendant has no right under subsection (b) of this section to discover statements made by a codefendant. State v. Moore, 301 N.C. 262, 271 S.E.2d 242 (1980).

Defendant Not Entitled to Statement of Accomplice. — Defendants in a prosecution for burglary and armed robbery were not entitled to receive a written copy of the oral statement made by an accomplice to an S.B.I. agent or a list of the State's witnesses. State v. Abernathy, 295 N.C. 147, 244 S.E.2d 373 (1978).

Applicability of Subsection (d) Where Documents Used Only in Cross-examination. — The fact that the State did not offer the documents in question into evidence but merely used them on cross-examination does not mean that it was not error under subsection (d) of this section for the State to fail to disclose where disclosure of the documents in the possession of the State and which were intended to be used by the State in any manner was also essential to the preparation of defendant's defense. State v. Hill, 45 N.C. App. 136, 263 S.E.2d 14 (1980).

List of State Witnesses. —

In accord with 2nd paragraph in original. See State v. Harden, 42 N.C. App. 677, 257 S.E.2d 635 (1979).

In accord with 3rd paragraph in original. See State v. Moore, 301 N.C. 262, 271 S.E.2d 242 (1980).

The legislature has expressly rejected a proposal to require the State to disclose even the names and addresses of the witnesses it intends to call and also rejected a proposal to require the production of a proposed witness's criminal record. State v. Chappel, 36 N.C. App. 608, 244 S.E.2d 483, appeal dismissed, 295 N.C. 553, 248 S.E.2d 731 (1978).

North Carolina law does not grant defendant the right to discover the criminal record of a State's witness. This right did not exist at common law and this section does not grant the defendant the right to discover the names, addresses, or criminal records of the State's witnesses. State v. Ford, 297 N.C. 144, 254 S.E.2d 14 (1979).

This section affords an accused no right to discover the names and addresses of the State's witnesses and does not require the State to furnish the accused a list of the witnesses who will be called to testify against him. State v. Sledge, 297 N.C. 227, 254 S.E.2d 579 (1979).

This section does not entitle defendant to information on the internal policies of the district attorney's office. State v. Rudolph, 39 N.C. App. 293, 250 S.E.2d 318 (1979).

The prosecution was not required to provide the defendant with a full written description of a "career criminal" program pursued by a district attorney's office, consisting of a policy of vigorous prosecution of repeat offenders, since these documents were not material to the preparation of the defense, intended for use by the State as evidence, or obtained from the defendant. State v. Rudolph, 39 N.C. App. 293, 250 S.E.2d 318, cert. denied, 297 N.C. 179, 254 S.E.2d 40 (1979).

Unused Notes of Investigation Not Discoverable. — In a prosecution for first-degree rape, the trial court did not err in refusing to afford defendant access to notes carried to the witness stand by the investigating officer, since the officer never referred to the notes during his testimony and in fact never read the notes at all, and where a witness on the stand does not use or attempt to use the writings sought to be produced, even though the writings are under his control, opposing counsel cannot compel their production. State v. Jackson, 302 N.C. 101, 273 S.E.2d 666 (1981).

A district attorney's refusal to comply with a discovery order under this section does not automatically require the exclusion of the undisclosed evidence. A variety of sanctions is authorized by § 15A-910, and the choice of which to apply—if any—rests entirely within the discretion of the trial judge. His decision will not be reversed except for abuse of that discretion. State v. Stevens, 295 N.C. 21, 243 S.E.2d 771 (1978).

Procedure Following Request for Disclosure. — When a specific request is made at trial for disclosure of evidence in the state's possession, the judge must at a minimum, order an in camera inspection and make appropriate findings of fact, and if the judge, after the examination, rules against the defendant, the judge should order the sealed statement placed in the record for appellate review. State v. Voncannon, 49 N.C. App. 633, 272 S.E.2d 153 (1980), rev'd on other grounds, N.C. , 276 S.E.2d 370 (1981).

Right to Discovery Must Be Asserted in Trial Court to Be Passed upon on Appeal. — While this section requires the trial judge on

proper motion to order the prosecutor to permit certain kinds of discovery, the right must be asserted and the issue raised before the trial court. Further, the issue must be passed upon by the trial court in order for the right to be asserted in the appellate courts. State v. Jones, 295 N.C. 345, 245 S.E.2d 711 (1978).

Applied in State v. McCormick, 36 N.C. App. 521, 244 S.E.2d 433 (1978); State v. Jones, 296 N.C. 75, 248 S.E.2d 858 (1978); State v. Matthews, 299 N.C. 284, 261 S.E.2d 872 (1980).

Cited in State v. Hill, 294 N.C. 320, 240 S.E.2d 794 (1978); State v. Grady, 38 N.C. App. 152, 247 S.E.2d 624 (1978); State v. Allison, 298 N.C. 135, 257 S.E.2d 417 (1979).

§ 15A-904. Disclosure of evidence by the State — certain reports not subject to disclosure.

Legal Periodicals. — For a survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

CASE NOTES

Certain Categories of Evidence Not Discoverable. — Discovery of internal police reports and memoranda pertaining to a criminal case, statements by witnesses other than the defendant, and the criminal records of witnesses other than the defendant are not compelled. State v. Gillespie, 33 N.C. App. 684, 236 S.E.2d 190 (1977).

Section Limits § 15A-903. — Standing alone, § 15A-903(d) would allow discovery of a prior recorded statement of a State witness. On its face, § 15A-903(d) would permit the discovery of any recorded or written statement that is material to the preparation of the defense. However, the statutory scheme must be construed in its entirety. This section limits § 15A-903 and is dispositive of the issue of prosecution witnesses' statements. Subsection (a) of this section provides that production of statements made by witnesses or prospective witnesses of the State to anyone acting on behalf of the State is not required. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

Trial Court Has No Authority to Order Discovery Contrary to Section. — Where a statute expressly restricts pretrial discovery, as does subsection (a) of this section, the trial court has no authority to order discovery. This holding is in accordance with the federal courts' interpretation of their analogous provisions found in Fed. R. Crim. P. 16, and the Jencks Act, 18 U.S.C. § 3500. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

A trial judge's pretrial discovery order contemplating pretrial discovery by a defendant of a prosecution witness's prior statements would exceed the judge's authority. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

Identity of State Witnesses Is Shielded Prior to Trial. — Subsection (a) of this section is consistent with the legislature's desire, elsewhere expressed, to have the identity of State's witnesses shielded prior to trial. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

Defendants in a prosecution for burglary and armed robbery were not entitled to receive a written copy of the oral statement made by an accomplice to an S.B.I. agent or a list of the State's witnesses. State v. Abernathy, 295 N.C. 147, 244 S.E.2d 373 (1978).

Witnesses' Statements. — The trial court's denial in a prosecution for murder of the defendant's motion to compel production of any written statements or reports made by witnesses for the State was not error since the defendant did not have any statutory right to the material requested. State v. McDougald, 38 N.C. App. 244, 248 S.E.2d 72 (1978), appeal dismissed, 296 N.C. 413, 251 S.E.2d 472 (1979).

Subsection (a) of this section is an express restriction on pretrial discovery of witnesses' statements that a trial judge has no authority to exceed in his discovery order. State v. Detter, 298 N.C. 604, 260 S.E.2d 567 (1979).

But subsection (a) does not bar discovery of prosecution witnesses' statements at trial. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977); State v. Miller, 37 N.C. App. 163, 245 S.E.2d 561, cert. denied, 295 N.C. 651, 248 S.E.2d 255 (1978).

Subsection (a) of this section shields oral statements by a defendant other than those made by him to persons acting on behalf of the State only from pretrial discovery. It does not bar the discovery of prosecution witnesses' statements at trial. State v. Detter, 298 N.C. 604, 260 S.E.2d 567 (1979).

Denial of Motion for Discovery of Witnesses' Statements at Trial Held Harmless Error. — The trial court in an armed robbery case erred in the denial of defendants' motions at trial for discovery of statements given by the State's witnesses to police regarding their descriptions of the robber; however, such error

was harmless beyond a reasonable doubt where such statements were revealed to defendant during cross-examination of the police officers and were used by defendant in his cross-examination of the other State's witnesses. State v. Miller, 37 N.C. App. 163, 245 S.E.2d 561, cert. denied, 295 N.C. 651, 248 S.E.2d 255 (1978).

Election to Use Person as Witness Waives Privilege. — By electing to use a person as a witness the State waived any privilege it might have had with respect to matters covered in his testimony. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

The work product doctrine applies in criminal as well as civil cases. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

Purpose of Work Product Doctrine. — The work product doctrine was designed to protect the mental processes of the attorney from outside interference and provide a privileged area in which he can analyze and prepare his client's case. State v. Hardy, 193 N.C. 105, 235 S.E.2d 828 (1977).

The work product doctrine is a qualified privilege for certain materials prepared by an attorney acting on behalf of his client in anticipation of litigation. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

And Can Be Waived. — The work product privilege, like any other qualified privilege, can be waived. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

The work product privilege is certainly waived when the defendant or the State seeks at trial to make a testimonial use of the work product. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

What Constitutes Work Product. — Only roughly and broadly speaking can a statement of a witness that is reduced verbatim to a writing or a recording by an attorney be considered work product, if at all. It is work product only in the sense that it was prepared by the attorney or his agent in anticipation of trial. Such a statement is not work product in the same sense that an attorney's impressions, opinions and conclusions or his legal theories and strategies are work product. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

The work product doctrine has been extended to protect materials prepared for the attorney by his agents as well as those prepared by the attorney himself. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

Lab Report Prepared During Investigation. — In a first-degree rape case, the trial court did not err in denying defendant's motion for mistrial based on the discovery by defendant, on the fourth day of trial, of a previously undisclosed lab report which revealed that an expert had found insufficient characteristics present in the photographs of shoeprints at the crime scene to enable the examiner to render an opinion as to whether defendant's shoes could have made the heel impressions shown in the photographs, where the existence of that report in no way affected the competency of the investigating officer's testimony concerning his personal observation of the shoeprints; where defendant did not take advantage of the trial court's offer to assist in locating the expert if defendant thought his testimony would be helpful and where, although defendant obtained possession of the report before the State rested its case, he made no effort to introduce the report into evidence; inasmuch as the report was prepared in connection with the investigation of the case, the report was not statutorily discoverable except by voluntary disclosure. State v. Jackson, 302 N.C. 101, 273 S.E.2d 666 (1981).

Applied in State v. Hill, 45 N.C. App. 136, 263 S.E.2d 14 (1980).

Cited in State v. Rudolph, 39 N.C. App. 293, 250 S.E.2d 318 (1979); State v. Silhan, 297 N.C. 660, 256 S.E.2d 702 (1979).

§ 15A-906. Disclosure of evidence by the defendant — certain evidence not subject to disclosure.

CASE NOTES

The work product doctrine applies in criminal as well as civil cases. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

Purpose of Work Product Doctrine. — The work product doctrine was designed to protect the mental processes of the attorney from outside interference and provide a privileged area in which he can analyze and prepare his client's case. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

What Constitutes Work Product. — Only roughly and broadly speaking can a statement of a witness that is reduced verbatim to a writing or a recording by an attorney be considered work product, if at all. It is work product only in the sense that it was prepared by the attorney or his agent in anticipation of trial. Such a statement is not work product in the same sense that an attorney's impressions, opinions and conclusions or his legal theories

and strategies are work product. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

The work product doctrine has been extended to protect materials prepared for the attorney by his agents as well as those prepared by the attorney himself. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

The work product doctrine is a qualified privilege for certain materials prepared by an attorney acting on behalf of his client in anticipation of litigation. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

And Can Be Waived. — The work product privilege, like any other qualified privilege, can be waived. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

The work product privilege is certainly waived when the defendant or the State seeks at trial to make a testimonial use of the work product. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

§ 15A-907. Continuing duty to disclose.

CASE NOTES

Corrected Pretrial Statement. — Where the prosecution failed to disclose to the defendants the corrected pretrial statement of the state's most crucial witness, whose credibility was the most basic issue in the case, the failure to disclose it constituted a violation of the defendants' due process rights and invalidated their convictions, since the amended statement would have revealed the witness' perjury and the production of the amended statement was requested at least six times in specific terms. Chavis v. North Carolina, 637 F.2d 213 (4th Cir. 1980).

Applied in State v. Martin, 294 N.C. 702, 242 S.E.2d 762 (1978); State v. Moore, 301 N.C. 262, 271 S.E.2d 242 (1980).

Stated in State v. Jones, 296 N.C. 75, 248 S.E.2d 858 (1978).

Cited in State v. Hill, 294 N.C. 320, 240 S.E.2d 794 (1978).

§ 15A-908. Regulation of discovery — protective orders.

Legal Periodicals. — For a survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

CASE NOTES

Cited in State v. Abernathy, 295 N.C. 147, 244 S.E.2d 373 (1978).

§ 15A-910. Regulation of discovery — failure to comply.

CASE NOTES

Particular Remedy, etc. —

In accord with 1st paragraph in original. See State v. Moore, 301 N.C. 262, 271 S.E.2d 242 (1980).

In accord with 4th paragraph in original. See State v. Hill, 294 N.C. 320, 240 S.E.2d 794 (1978).

By its express terms, this section authorizes, but does not require, the trial court to prohibit the party offering nondisclosed evidence from introducing it. This is left to the discretion of the trial court. State v. Shaw, 293 N.C. 616, 239 S.E.2d 439 (1977).

The admission or exclusion of evidence not disclosed in accordance with a discovery order is left in the discretion of the trial court. State v. Braxton, 294 N.C. 446, 242 S.E.2d 769 (1978).

Imposition of these sanctions is within the discretion of the trial court. State v. Jones, 295 N.C. 345, 245 S.E.2d 711 (1978); State v. Detter, 298 N.C. 604, 260 S.E.2d 567 (1979).

The particular sanction to be imposed rests within the sound discretion of the trial court. State v. McDougald, 38 N.C. App. 244, 248 S.E.2d 72 (1978), appeal dismissed, 296 N.C. 413, 251 S.E.2d 472 (1979).

And not reviewable, etc. —

In accord with original. See State v. Hill, 294 N.C. 320, 240 S.E.2d 794 (1978); State v. Moore, 301 N.C. 262, 271 S.E.2d 242 (1980).

Not Error to Allow Recess so Defense Counsel Could Question Witness. — Where it became evident at trial that the State had not complied with a discovery order by failing to advise defendant of tests performed on the alleged murder weapon, it was not error for the trial court to declare a recess and give defendant's attorney an opportunity to question the witness rather than to prohibit the State from introducing the evidence not disclosed. State v. Mayo, 40 N.C. App. 626, 253 S.E.2d 276 (1979).

Whether A Mistrial Is Appropriate. — It should be left to the discretion of the trial court as to whether a mistrial is an appropriate order within the meaning of subdivision (4) of this section for the State's failure to comply with a discovery order. State v. Sowden, 48 N.C. App. 570, 269 S.E.2d 274 (1980).

Applied in State v. Cross, 293 N.C. 296, 237 S.E.2d 734 (1977); State v. Ruof, 296 N.C. 623, 252 S.E.2d 720 (1979); State v. Milano, 297 N.C. 485, 256 S.E.2d 154 (1979); State v. Locklear, 41 N.C. App. 292, 254 S.E.2d 653 (1979); State v. Matthews, 299 N.C. 284, 261 S.E.2d 872 (1980).

Cited in State v. Sneed, 38 N.C. App. 230, 247 S.E.2d 658 (1978); State v. Jones, 296 N.C. 75, 248 S.E.2d 858 (1978); State v. Allison, 298 N.C. 135, 257 S.E.2d 417 (1979); State v. Lovette, 299 N.C. 642, 263 S.E.2d 751 (1980).

ARTICLE 49.

Pleadings and Joinder.

§ 15A-922. Use of pleadings in misdemeanor cases generally.

(f) Amendment of Pleadings prior to or after Final Judgment. — A statement of charges, criminal summons, warrant for arrest, citation, or magistrate's order may be amended at any time prior to or after final judgment when the amendment does not change the nature of the offense charged.

(1979, c. 770.)

Effect of Amendments. — The 1979 amendment, effective October 1, 1979, inserted "citation" in subsection (f).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (f) is set out.

CASE NOTES

Applied in State v. Martin, 46 N.C. App. 514, 265 S.E.2d 456 (1980).

§ 15A-923. Use of pleadings in felony cases and misdemeanor cases initiated in the superior court division.

Legal Periodicals. — For survey of 1978 law on criminal procedure, see 57 N.C.L. Rev. 1007 (1979).

CASE NOTES

The term "amendment" in subsection (e) is defined as any change in the indictment which would substantially alter the charge set forth in the indictment. State v. Carrington, 35 N.C. App. 53, 240 S.E.2d 475, cert. denied, 294 N.C. 737, 244 S.E.2d 155 (1978).

Applied in State v. Tesenair, 35 N.C. App. 531, 241 S.E.2d 877 (1978).

Quoted in State v. Midyette, 45 N.C. App. 87, 262 S.E.2d 353 (1980).

Cited in State v. Martin, 46 N.C. App. 514, 265 S.E.2d 456 (1980).

§ 15A-924. Contents of pleadings; duplicity; alleging and proving previous convictions; failure to charge crime; surplusage.

CASE NOTES

Allegation of Defendant's Residence Unnecessary. — The trial court properly denied defendant's motion to dismiss murder indictments against him on the ground they described him as being a resident of Robeson County when in fact he resided in Columbus County since defendant's residence was immaterial and the allegations as to his county of residence were at most surplusage. State v. Oliver, 302 N.C. 28, 274 S.E.2d 183 (1981).

Joinder of Separate Offenses Arising from Same Act. — Neither the express language of § 15A-926(a) nor this section will support the contention that the two statutes, when taken together, reflect a legislative intent that separate offenses arising from the same acts or occurrences be joined for trial only when they are contained in separate counts of the same bill of indictment or other criminal pleading. State v. Williams, 41 N.C. App. 287, 254 S.E.2d 649, cert. denied, 297 N.C. 699, 259 S.E.2d 297 (1979).

Variance on Place. — Where an indictment alleges the particular place where an act took place, and such allegation is not descriptive of the offense, and is not required to be proved as laid in order to show the court's jurisdiction a variance which does not mislead accused or expose him to double jeopardy is not material. State v. Currie, 47 N.C. App. 446, 267 S.E.2d 390 (1980).

Variance on Time. — Where time is not of the essence of the offense charged and the statute of limitations is not involved, a discrepancy between the date in the indictment and the date shown by the State's evidence is ordinarily not fatal, but this salutary rule, preventing a defendant who does not rely on time as a defense from using a discrepancy between the time named in the bill and the time shown by the evidence for the State, cannot be used to ensnare a defendant and thereby deprive him of an opportunity to adequately present his defense. State v. Currie, 47 N.C. App. 446, 267 S.E.2d 390 (1980).

Applied in State v. Palmer, 293 N.C. 633, 239 S.E.2d 406 (1977); State v. Saults, 294 N.C. 722, 242 S.E.2d 801 (1978); State v. Holmon, 36 N.C. App. 569, 244 S.E.2d 491 (1978); State v. Cronin, 41 N.C. App. 415, 255 S.E.2d 240 (1979); State v. Trimble, 44 N.C. App. 659, 262 S.E.2d 299 (1980); State v. Bradsher, 49 N.C. App. 507, 271 S.E.2d 915 (1980).

Quoted in State v. Dammons, 293 N.C. 263, 237 S.E.2d 834 (1977).

Cited in State v. May, 292 N.C. 644, 235 S.E.2d 178 (1977); State v. Harris, 35 N.C. App. 401, 241 S.E.2d 370 (1978); State v. Rhyne, 39 N.C. App. 319, 250 S.E.2d 102 (1979); State v. Powell, 297 N.C. 419, 255 S.E.2d 154 (1979).

§ 15A-925. Bill of particulars.

CASE NOTES

When Applicable. —

The court must order the State to respond to a request for a bill of particulars only when the defendant shows that the information requested is necessary to enable him to prepare an adequate defense. State v. Easterling, 300 N.C. 594, 268 S.E.2d 800 (1980).

Granting or Denial of Motion Within Trial Court's Discretion. —

In accord with 1st paragraph in original. See State v. Easterling, 300 N.C. 594, 268 S.E.2d 800 (1980).

And not subject to review except for palpable and gross abuse, etc. —

In accord with original. See State v. Easterling, 300 N.C. 594, 268 S.E.2d 800 (1980).

A denial of a defendant's motion for a bill of particulars will be held error only when it clearly appears to the appellate court that the lack of timely access to the requested information significantly impaired defendant's preparation and conduct of his case. State v. Easterling, 300 N.C. 594, 268 S.E.2d 800 (1980).

Applied in State v. Detter, 298 N.C. 604, 260 S.E.2d 567 (1979).

Cited in State v. May, 292 N.C. 644, 235 S.E.2d 178 (1977); State v. Harris, 35 N.C. App. 401, 241 S.E.2d 370 (1978).

§ 15A-926. Joinder of offenses and defendants.

Legal Periodicals. — For survey of 1978 law on criminal procedure, see 57 N.C.L. Rev. 1007 (1979).

For article, "Prior Crimes as Evidence in Present Criminal Trials," see 1 Campbell L. Rev. 1 (1979).

CASE NOTES

I. GENERAL CONSIDERATION.

In General. —

In accord with 13th paragraph in original. See State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977); State v. Jefferies, 41 N.C. App. 95, 254 S.E.2d 550, cert. denied, 297 N.C. 614, 257 S.E.2d 438 (1979).

In accord with 17th paragraph in original. See State v. Travis, 33 N.C. App. 330, 235 S.E.2d 66, cert. denied, 293 N.C. 163, 236 S.E.2d 707 (1977).

Purpose of Subsection (c). — Subsection (c) of this section was designed to provide a means by which a defendant may protect himself from multiple trials on charges of related offenses when the charges later brought up for trial were not known to the defendant at the time of the first trial but, if the severed charges were pending at the time of the first trial, the defendant waives any right to joinder by failing to move for joinder. State v. Jones, 50 N.C. App. 263, 273 S.E.2d 327 (1981).

Subdivision (c)(2) of this section applies after a trial on another charge and the motion to dismiss is permitted unless the motion for joinder was previously decided against the defendant or unless the defendant has waived his right to object by his earlier failure to request joinder of related offenses. State v. Jones, 50 N.C. App. 263, 273 S.E.2d 327 (1981).

"Offense" may be construed to mean "indictment." State v. Jones, 47 N.C. App. 554, 268 S.E.2d 6 (1980).

Antagonistic defenses do not necessarily warrant severance. The test is whether the conflict in defendants' respective positions at trial is of such a nature that, considering all of the other evidence in the case, defendants were denied a fair trial. State v. Cook, 48 N.C. App. 685, 269 S.E.2d 743, cert. denied, 301 N.C. 528, 273 S.E.2d 456 (1980).

Consolidation Is within Discretion of Court. —

In accord with 7th paragraph in original. See State v. Brown, 300 N.C. 41, 265 S.E.2d 191 (1980); State v. Clark, 301 N.C. 176, 270 S.E.2d 425 (1980).

In accord with 8th paragraph in original. See State v. Allen, 301 N.C. 489, 272 S.E.2d 116 (1980).

In accord with 13th paragraph in original. See State v. Greene, 294 N.C. 418, 241 S.E.2d 662 (1978).

The question of consolidating offenses arising out of a single scheme or plan ordinarily is a matter within the discretion of the trial judge and his decision will not be disturbed absent a showing of abuse of discretion. State v. Wheeler, 34 N.C. App. 243, 237 S.E.2d 874 (1977), cert. denied, 294 N.C. 187, 241 S.E.2d 522 (1978).

In the absence of a showing that the joint trial deprived defendant of a fair trial, the exercise of the trial court's discretion in ordering the consolidation will not be disturbed upon appeal. State v. Travis, 33 N.C. App. 330, 235 S.E.2d 66, cert. denied, 293 N.C. 163, 236 S.E.2d 707 (1977).

The determination of whether to consolidate charges against a defendant in a single trial is addressed to the sound discretion of the trial judge. State v. Hairston, 36 N.C. App. 641, 244 S.E.2d 448, cert. denied, 295 N.C. 469, 246 S.E.2d 217 (1978).

The question of consolidation of charges is left to the discretion of the trial judge. State v. Jefferies, 41 N.C. App. 95, 254 S.E.2d 550, cert. denied, 297 N.C. 614, 257 S.E.2d 438 (1979).

Separate offenses may be joined for trial

when they arise from the same act or transaction, and the well-settled rule that the discretion of the trial court in joining cases for trial will not be disturbed absent a showing that the defendant has been deprived thereby of a fair trial, has not been abrogated by this Chapter and continues to apply. State v. Williams, 41 N.C. App. 287, 254 S.E.2d 649, cert. denied, 297 N.C. 699, 259 S.E.2d 297 (1979).

Exercise of discretion, etc. —

In accord with 3rd paragraph in original. See State v. Cook, 301 N.C. 176, 270 S.E.2d 425 (1980).

In accord with 4th paragraph in original. See State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977); State v. Cook, 48 N.C. App. 685, 269 S.E.2d 743, cert. denied, 301 N.C. 528, 273 S.E.2d 456 (1980).

In accord with 5th paragraph in original. See State v. Clark, 301 N.C. 176, 270 S.E.2d 425 (1980).

Whether defendants charged with committing identical offenses at the same time and place should be jointly or separately tried is within the sound discretion of the trial court, and the exercise of the trial court's discretion will not be disturbed on appeal absent a showing that a defendant was thereby deprived of a fair trial. State v. Pierce, 36 N.C. App. 770, 245 S.E.2d 195 (1978).

Whether the trials should be joint or separate is within the trial court's discretion, and absent a showing that joinder deprived the defendant of a fair trial the court's exercise of its discretion will not be disturbed on appeal. State v. Ervin, 38 N.C. App. 261, 248 S.E.2d 91 (1978).

This section differs from its predecessor, former § 15-152, in that it does not permit joinder on the basis that the acts were of the same class of crime or offense when there is no transactional connection, and in that it contains new language permitting joinder of offenses or crimes which are based on a series of acts or transactions "constituting parts of a single scheme or plan." State v. Greene, 294 N.C. 418, 241 S.E.2d 662 (1978).

Under this section there must be some sort of "transactional connection" between cases consolidated for trial. State v. Powell, 297 N.C. 419, 255 S.E.2d 154 (1979).

The nature of the offenses is one of the factors, etc. —

Although this section does not permit joinder of offenses solely on the basis that they are the same class, the nature of the offenses is a factor which may properly be considered in determining whether certain acts constitute parts of a single scheme or plan. State v. Street, 45 N.C. App. 1, 262 S.E.2d 365 (1980).

Offenses of same class. —

Although this section does not permit joinder of offenses solely on the basis that they are of the same class, the nature of the offenses is one of the factors which may properly be considered in determining whether certain acts or transactions constitute "parts of a single scheme or plan," as those words are used in subsection (a) of this section. State v. Greene, 294 N.C. 418, 241 S.E.2d 662 (1978).

Judge Should Consider Whether Accused Can Be Fairly Tried. — In ruling upon a motion for joinder of offenses, the trial judge should consider whether the accused can be fairly tried if joinder is permitted. If joinder would hinder or deprive defendant of his ability to present his defense, the motion should be denied. State v. Greene, 294 N.C. 418, 241 S.E.2d 662 (1978).

Offenses Separate in Time and Place and Distinct in Circumstances. — In determining whether an accused has been prejudiced by joinder, the question is not whether the evidence at the trial of one case would be competent and admissible at the trial of the other. The question is whether the offenses are so separate in time and place and so distinct in circumstances as to render a consolidation unjust and prejudicial to defendant. State v. Greene, 294 N.C. 418, 241 S.E.2d 662 (1978).

Time for Making Order of Consolidation. — A motion for joinder of cases made orally after the present case was called for trial came too late. The motion should have been made at defendant's arraignment. Only in unusual circumstances should the judge interrupt the trial of a case to conduct hearings on matters that should have been raised and resolved at arraignment or some other pre-trial stage of the proceedings. State v. Moore, 41 N.C. App. 148, 254 S.E.2d 191 (1979).

Determination of Prejudice Resulting from Joinder. — In determining whether a defendant has been prejudiced by joinder pursuant to this section, the question which must generally be addressed is whether the offenses are so separate in time and place and so distinct in circumstances as to render joinder unjust and prejudicial to the defendant. State v. Williams, 41 N.C. App. 287, 254 S.E.2d 649, cert. denied, 297 N.C. 699, 259 S.E.2d 297 (1979); State v. Clark, 301 N.C. 176, 270 S.E.2d 425 (1980).

Form of Criminal Pleading Where Offenses Joined. — Neither the express language of subsection (a) of this section nor § 15A-924 will support the contention that the two statutes, when taken together, reflect a legislative intent that separate offenses arising from the same acts or occurrences be joined for trial only when they are contained in separate counts of the same bill of indictment or other criminal pleading. State v. Williams, 41 N.C. App. 287, 254 S.E.2d 649, cert. denied, 297 N.C. 699, 259 S.E.2d 297 (1979).

Applied in State v. Potter, 295 N.C. 126, 244 S.E.2d 397 (1978); State v. Cannon, 38 N.C. App. 322, 248 S.E.2d 65 (1978); State v. Nelson, 298 N.C. 573, 260 S.E.2d 629 (1979); State v. Mapp, 45 N.C. App. 574, 264 S.E.2d 348 (1980); State v. Hunter, 48 N.C. App. 656, 270 S.E.2d 120 (1980).

Cited in State v. Haywood, 295 N.C. 709, 249 S.E.2d 429 (1978); State v. McGuire, 297 N.C. 69, 254 S.E.2d 165 (1979); State v. Lyles, 298 N.C. 179, 257 S.E.2d 410 (1979).

II. ILLUSTRATIVE CASES.

A. Joinder of Offenses.

Murder and Solicitation to Commit Murder. — This section was not applicable in prosecutions for murder and solicitation of another to commit murder where at the time of the defendant's first trial for murder no indictments had yet been returned against him for solicitation, and where there was nothing in the record to indicate that the State held the solicitation charges in reserve pending the outcome of the murder trial. State v. Furr, 292 N.C. 711, 235 S.E.2d 193, cert. denied, 434 U.S. 924, 98 S. Ct. 402, 54 L. Ed. 2d 281 (1977).

Second-degree Murder and Misdemeanor Child Abuse. — In a prosecution for second-degree murder and misdemeanor child abuse the acts perpetrated by the defendant which led to the misdemeanor charge of child abuse were the same acts and transactions which also resulted in the death of the child. Therefore, the two offenses were properly joined under this section. State v. Vega, 40 N.C. App. 326, 253 S.E.2d 94, cert. denied, 297 N.C. 457, 256 S.E.2d 809, 444 U.S. 968, 100 S. Ct. 459, 62 L. Ed. 2d 382 (1979).

Assault with Intent to Rape on One Victim and Rape and Kidnapping of Another. — The consolidation for trial of charges of assault with intent to rape against one victim, and second-degree rape and kidnapping against another victim was within the sound discretion of the trial judge since the offenses for which defendant was tried occurred in a single afternoon within a three-hour period, with a time lapse of approximately one hour and 25 minutes between offenses, and the offenses were similar in nature and occurred within such a short time span that they could logically be considered "all parts of a continuing program of action by the defendant." State v. Greene, 294 N.C. 418, 241 S.E.2d 662 (1978).

Kidnapping and Murder. — The trial court properly allowed the State to join for trial offenses of kidnapping one person and kidnapping and murdering another person where the State submitted a written motion to join prior to trial stating that it was made pursuant to this section, which provides for joinder when offenses are based on a series of acts or transactions connected together or constituting parts of a single scheme or plan, and where all of the matters out of which the joined cases grew occurred on the same afternoon of the same day and each was perpetrated according to a common modus operandi. State v. Clark, 301 N.C. 176, 270 S.E.2d 425 (1980).

Robbery. — It was error to consolidate for trial three indictments charging defendant with common-law robberies on April 17, 1979, April 25, 1979 and April 26, 1979, although each robbery occurred within a two-block area of Market Street in Wilmington and each robbery was committed in a similar manner in that two men would enter a small business in the afternoon and one man would assault the victim while the other took money from the cash register, since a scheme or plan to commit a series of robberies in the future is not a "series of acts or transactions" constituting a single scheme or plan within the meaning of subsection (a) of this section. State v. Bracey, 48 N.C. App. 603, 269 S.E.2d 289, cert. granted, 301 N.C. 528, 273 S.E.2d 455 (1980).

Incest and Rape. — Defendant could properly be charged with incest and second-degree rape, though the two offenses arose out of the same transaction and were based on the same facts, since the two offenses were separate and distinct and involved different elements. State v. Allen, 50 N.C. App. 173, 272 S.E.2d 785 (1980).

Armed Robbery and Murder. — In a prosecution of defendant for armed robbery and murder, the trial court did not err in consolidating defendant's case for trial with that of a codefendant since defendants were charged in separate indictments for the same crimes; they were tried upon the theory that the murder with which they were charged was committed in connection with a robbery committed by them jointly; their defenses were not antagonistic; and neither attempted to incriminate the other in the presentation of an alibi. State v. Smith, 301 N.C. 695, — S.E.2d — (1981).

Armed robbery and accessory after the fact of armed robbery are mutually exclusive offenses and not joinable for trial. State v. Cox, 37 N.C. App. 356, 246 S.E.2d 152, appeal dismissed, 295 N.C. 649, 248 S.E.2d 253 (1978), cert. denied, 440 U.S. 930, 99 S. Ct. 1268, 59 L. Ed. 2d 487 (1979).

The offenses of armed robbery and accessory after the fact to armed robbery were not joinable under this section since the defendant had not been charged with the offense of accessory after the fact at the time of his trial for armed robbery, and since armed robbery and accessory after the fact of armed robbery are mutually exclusive offenses and not joinable for trial. State v. Cox, 37 N.C. App. 356, 246 S.E.2d 152, appeal dismissed, 295 N.C. 649, 248 S.E.2d

253 (1978), cert. denied, 440 U.S. 930, 99 S. Ct. 1268, 59 L. Ed. 2d 487 (1979).

In a prosecution for felonious sale and delivery, etc. —

In accord with original. See State v. Cuthrell, 50 N.C. App. 195, 272 S.E.2d 616 (1980).

Waiver of Right of Joinder. — Defendant waived any right of joinder of offenses involving possession and sale of contraband where defendant failed to move for joinder, and there was no merit to defendant's argument that, since the State made a motion for joinder, it was not necessary for defendant to make the identical motion, since it was defendant's duty to let the court know that he was relying on the State's motion, and defendant failed to do so. State v. Jones, 50 N.C. App. 263, 273 S.E.2d 327 (1981).

B. Joinder of Defendants for Trial.

The mere fact that certain parts of the evidence against each defendant were inadmissible against the other would not by itself deprive either of a fair trial where they are tried jointly. State v. Pierce, 36 N.C. App. 770, 245 S.E.2d 195 (1978).

Where Witness for One Defendant was Attorney Representing Other Defendant. — There was no irreparable prejudice in the consolidation for trial of the charges against two defendants where one of the witnesses for one of the defendants was the attorney representing the other defendant. State v. Travis, 33 N.C. App. 330, 235 S.E.2d 66, cert. denied, 293 N.C. 163, 236 S.E.2d 707 (1977).

Where all of the offenses of rape were parts of a common scheme or plan and each of the defendants was present, aiding and abetting in each offense, the granting of the motion for consolidation for trial was in the sound discretion of the trial judge, and in the absence of a showing that the joint trial deprived the defendant of a fair trial, the judge's exercise of that discretion by consolidating the cases for trial would not be disturbed on appeal even though each of the successive rapes of the prosecutrix was a separate criminal offense. State v. Braxton, 294 N.C. 446, 242 S.E.2d 769 (1978).

§ 15A-927. Severance of offenses; objection to joinder of defendants for trial.

CASE NOTES

Untimely Motion. — A motion made after the verdict comes too late to avoid the waiver provision of subdivision (a)(2) of this section. State v. Brown, 300 N.C. 41, 265 S.E.2d 191 (1980).

Antagonistic defenses do not necessarily warrant severance. The test is whether the conflict in defendants' respective positions at trial is of such a nature that, considering all of the other evidence in the case, defendants were denied a fair trial. State v. Cook, 48 N.C. App. 685, 269 S.E.2d 743, cert. denied, 301 N.C. 528, 273 S.E.2d 456 (1980).

Discretion of Trial Judge. —

In accord with 2nd paragraph in original. See State v. Nelson, 298 N.C. 573, 260 S.E.2d 629 (1979), cert. denied, 446 U.S. 929, 100 S. Ct. 1867, 64 L. Ed. 2d 282 (1980); State v. Arsenault, 46 N.C. App. 7, 264 S.E.2d 592 (1980); State v. Cook, 48 N.C. App. 685, 269 S.E.2d 743, cert. denied, 301 N.C. 528, 273 S.E.2d 456 (1980); State v. Allen, 301 N.C. 489, 272 S.E.2d 116 (1980).

Whether the trials should be joint or separate is within the trial court's discretion, and absent a showing that joinder deprived the defendant of a fair trial the court's exercise of its discretion will not be disturbed on appeal. State v. Ervin, 38 N.C. App. 261, 248 S.E.2d 91 (1978).

Unsupported Statement of Possible Prejudice Insufficient to Show Abuse of Discretion. — Where defendant's only assertion of possible prejudice was that he might have elected to testify in one of the cases and not in the others, this unsupported statement of possible prejudice was not sufficient to show abuse of discretion on the part of the trial judge in denying defendant's motion to sever the cases for trial. State v. Sutton, 34 N.C. App. 371, 238 S.E.2d 305 (1977), cert. denied, 294 N.C. 186, 241 S.E.2d 521 (1978).

Trial Court Did Not Abuse Its Discretion. —

The trial court did not abuse its discretion in denying defendants' motions for severance or for a mistrial on the ground that they did not receive a fair and impartial trial due to the in-court outbursts of a codefendant, where, when possible, the trial judge immediately removed the members of the jury from the courtroom when an outburst occurred, and he admonished them not to deliberate on it, when it became apparent that the codefendant would continue to disrupt the proceedings despite the court's warnings, he was removed from the courtroom and at this time the court told the jury to totally disregard the whole matter, and they unanimously indicated that they could do

so, and where in his final charge to the jury, the judge again instructed the jury not to allow the codefendant's behavior to influence its decision. State v. McGuire, 297 N.C. 69, 254 S.E.2d 165, cert. denied, 444 U.S. 943, 100 S. Ct. 300, 62 L. Ed. 2d 310 (1979).

Defendant Not Prejudiced by Consolidation. — In a prosecution for rape, aggravated kidnapping and crime against nature, defendant's argument that he was prejudiced by consolidation of the cases because, had they not been consolidated, he could have elected to testify in one case if he so desired without being forced to testify in the others is without merit, since the offenses joined for trial were based on a series of acts or transactions connected together and constituted a continuing criminal episode; evidence of one offense would certainly be admissible in trials on the other offenses; defendant failed to show the manner in which his right against self-incrimination was violated; and defendant failed to move for severance at the close of all the evidence. State v. Creech, 37 N.C. App. 261, 245 S.E.2d 817, cert. denied, 295 N.C. 554, 248 S.E.2d 731 (1978).

Subsection (c)(1) of this section codifies substantially the decision in Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), which held that the receipt in evidence of the confession of one codefendant posed a substantial threat to the other codefendant's Sixth Amendment right of confrontation and cross-examination because the privilege against self-incrimination prevents those who are implicated from calling the defendant who made the statement to the stand. State v. Johnston, 39 N.C. App. 179, 249 S.E.2d 879 (1978), cert. denied, 296 N.C. 738, 254 S.E.2d 179 (1979).

Subsection (c)(1) Inapplicable. — Where the extrajudicial statements made by accomplices implicating the defendants were admitted at trial for the purpose of corroborating the testimony of the accomplices, the accomplices were subject to cross-examination by defendants, and subsection (c)(1) of this section did not apply. State v. Johnston, 39 N.C. App. 179, 249 S.E.2d 879 (1978).

Applied in State v. Braxton, 294 N.C. 446, 242 S.E.2d 769 (1978); State v. Hairston, 36 N.C. App. 641, 244 S.E.2d 448 (1978); State v. Liddell, 39 N.C. App. 373, 250 S.E.2d 77 (1979); State v. Crews, 296 N.C. 607, 252 S.E.2d 745 (1979).

Cited in State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977); State v. Haywood, 295 N.C. 709, 249 S.E.2d 429 (1978).

§ 15A-928. Allegation and proof of previous convictions in superior court.

CASE NOTES

Applicability. — This statute applies solely to cases in which the fact that the accused had a prior conviction raises an offense of lower grade to one of higher grade. State v. Jeffers, 48 N.C. App. 663, 269 S.E.2d 731 (1980).

Effect of Stipulation as to Prior Convictions. — In a prosecution for possession of a firearm by a felon, the trial court did not err in allowing the State to introduce defendant's stipulation as to his previous conviction of breaking and entering a motor vehicle, since the State merely introduced defendant's stipulation into evidence so there would be no doubt as to that particular element of the offense being satisfied; the State offered no other evidence in regard to defendant's prior conviction; and the court properly instructed the jury in its charge to consider the conviction only for the purpose of establishing an essential element of the offense and not as evidence of guilt or predisposition. State v. Jeffers, 48 N.C. App. 663, 269 S.E.2d 731 (1980).

Cross-examination for Impeachment Purposes Following Stipulation. — In a prosecution for driving under the influence, third offense, it was not error for the trial court to allow the State to cross-examine the defendant concerning prior convictions of driving under the influence of intoxicants though he had stipulated for the purpose of trial that he had been so previously convicted since the evidence sought by the cross-examination of the defendant was for impeachment purposes and not as substantive evidence of an element of the offense charged. State v. Crouch, 42 N.C. App. 729, 257 S.E.2d 646 (1979).

Instruction on Prior Convictions Following Stipulation. — In a prosecution of a defendant for driving under the influence, second offense, and driving while his license was revoked, fourth offense, where the defendant stipulated to previous convictions of those crimes, the trial court did not err in instructing jury with respect to defendant's prior convictions, since the harm was in the fact that evidence of these prior convictions was before the jury and not in the instructions concerning them, and it was not error to cross-examine the defendant on these prior convictions for impeachment purposes. State v. McLawhorn,

43 N.C. App. 695, 260 S.E.2d 138 (1979), cert. denied, 299 N.C. 123, 261 S.E.2d 925 (1980).

Quoted in State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978).

ARTICLE 50.

Voluntary Dismissal.

§ 15A-931. Voluntary dismissal of criminal charges by the State.

Legal Periodicals. — For a survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

CASE NOTES

Quoted in State v. Hice, 34 N.C. App. 468, 238 S.E.2d 619 (1977).

Cited in State v. Matthews, 295 N.C. 265, 245 S.E.2d 727 (1978).

§ 15A-932. Dismissal with leave when defendant fails to appear and cannot be readily found.

Legal Periodicals. — For an article on the North Carolina Speedy Trial Act, see 17 Wake Forest L. Rev. 173 (1981).

ARTICLE 51.

Arraignment.

§ 15A-941. Arraignment before judge.

CASE NOTES

Failure to Conduct Formal Arraignment. — Where there is no doubt that a defendant is fully aware of the charge against him, or is in no way prejudiced by the omission of a formal arraignment, it is not reversible error for the trial court to fail to conduct a formal arraignment proceeding. State v. Smith, 300 N.C. 71, 265 S.E.2d 164 (1980).

Defendant's Duty to Object If Not Informed of Charges. — Where the record showed that an arraignment took place and defendant, duly represented by counsel, entered a plea of not guilty, defendant was not prejudiced by failure of the record to show that the charges were read or summarized to defendant as required by this section, since it was the duty of defendant to object and to have appropriate entries made in the record to show the basis for the objection if he was not properly informed of the charges. State v. Small, 301 N.C. 407, 272 S.E.2d 128 (1980).

Cited in State v. Cross, 293 N.C. 296, 237 S.E.2d 734 (1977).

§ 15A-942. Right to counsel.

Legal Periodicals. — For survey of 1978 law on criminal procedure, see 57 N.C.L. Rev. 1007 (1979).

CASE NOTES

Inquiry into Defendant's Indigency. — Where a defendant charged with sale and delivery of phencyclidine (PCP) executed a written waiver of assigned counsel before a district court judge, defendant thereafter filed an affidavit of indigency and request for appointed counsel, a superior court judge found that defendant was not an indigent, and defendant appeared at his arraignment and trial three weeks later without counsel, the trial court was required by this section to inquire at the arraignment into the question of defendant's indigency at that time, and defendant is entitled to a new trial by reason of the court's failure to make such inquiry. State v. Elliott, 49 N.C. App. 141, 270 S.E.2d 550 (1980).

Waiver of Right Is Good Until Termination of Proceeding. — A waiver in writing of the right to assigned counsel once given was good and sufficient until the proceeding finally terminated, unless the defendant himself makes known to the court that he desires to withdraw the waiver and have counsel assigned to him. The burden of showing the change in the desire of the defendant for counsel rests upon the defendant. State v. Elliott, 49 N.C. App. 141, 270 S.E.2d 550 (1980).

Applied in State v. Sanders, 294 N.C. 337, 240 S.E.2d 788 (1978).

§ 15A-943. Arraignment in superior court — required calendaring.

Legal Periodicals. — For a survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

For survey of 1978 law on criminal procedure, see 57 N.C.L. Rev. 1007 (1979).

CASE NOTES

Purpose of Subsection (a). — Where the trial court permitted a prosecution for armed robbery to be tried by a jury panel which had the opportunity to hear guilty pleas and the presentation of evidence and sentencing thereon in other case, the procedure followed in the trial court did not contravene the language and objectives of subsection (a) of this section and did not violate the defendant's right to be tried by an impartial jury. State v. Brown, 39 N.C. App. 548, 251 S.E.2d 706, cert. denied, 297 N.C. 302, 254 S.E.2d 923 (1979).

Legislative Intent. — The legislative intent in enacting the last sentence of subsection (a) of this section was to minimize the imposition to the time of jurors and witnesses, and not to ensure the impartiality of jurors. State v. Brown, 39 N.C. App. 548, 251 S.E.2d 706, cert. denied, 297 N.C. 302, 254 S.E.2d 923 (1979).

Subsection (b) sets forth a statutory right of each defendant "not [to] be tried without his consent in the week in which he is arraigned." State v. Shook, 293 N.C. 315, 237 S.E.2d 843 (1977).

The last sentence of subsection (a) of this section does not indicate a legislative intent that prospective jurors not be allowed to observe proceedings involving other defendants because they might somehow become prejudiced against a defendant who might later be tried before them. State v. Brown, 39 N.C. App. 548, 251 S.E.2d 706, cert. denied, 297 N.C. 302, 254 S.E.2d 923 (1979).

Purpose of Subsection (b). — Subsection (b) is designed to ensure both the State and the defendant a sufficient interlude to prepare for trial. This is necessary because before arraignment neither the State nor defendant may know whether the case need proceed to trial. State v. Shook, 293 N.C. 315, 237 S.E.2d 843 (1977).

Subsection (b) vests a defendant with a right, for by its terms it requires his consent before a different procedure can be used. State v. Shook, 293 N.C. 315, 237 S.E.2d 843 (1977).

Application of Subsection (b) to Certain Counties Only. — Subsection (b) of this section was not violated where defendant was indicted for burglary on the same day the case was called to trial, since the protection of subsection (b) of this section, that a defendant may not be tried without his consent in the week in which he is arraigned, applies only to those counties in which there are regularly scheduled 20 or more weeks of trial in which criminal cases are heard, and Hertford County, in which defen-

dant was brought to trial, did not meet that requirement. State v. Revelle, 301 N.C. 153, 270 S.E.2d 476 (1980).

Prejudice Presumed from Violation of Subsection (b). — To require a defendant to show prejudice when asserting the violation of his statutory right under subsection (b), which he has insisted upon at trial, would be manifestly contrary to the intent of the legislature, which has provided that the week's time between arraignment and trial must be accorded him unless he consents to an earlier trial. Prejudice under these circumstances must necessarily be presumed. State v. Shook, 293 N.C. 315, 237 S.E.2d 843 (1977).

And Violation Is Reversible Error. — The infringement of the defendant's right under subsection (b) not to be tried without his consent during the week following his not guilty plea, where there was no waiver by defendant, was reversible error. State v. Shook, 293 N.C. 315, 237 S.E.2d 843 (1977).

But Defendant May Waive Right. — Defendant waived his statutory right not to be tried the week he was arraigned by failing to assert his right under this section in the trial court. Defendant did not move for a continuance under subsection (b) of this section and thereby consented to be tried in the same week as his arraignment. State v. Davis, 38 N.C. App. 672, 248 S.E.2d 883 (1978).

The week's interim provided in subsection (b) assures an opportunity for trial preparation and thereby helps to avoid preparation which may well be not only extensive but also unnecessary. State v. Shook, 293 N.C. 315, 237 S.E.2d 843 (1977).

The provisions of subsection (b) are more than directory. State v. Shook, 293 N.C. 315, 237 S.E.2d 843 (1977).

No Arraignment May Take Place Except at Time Calendared. — In order to effect the intent of the legislature, this statute must be construed to require not only that the solicitor "calendar arraignments" as provided but also that every arraignment be calendared and that, absent any waiver, no arraignment may take place except at a time when it is so calendared. State v. Shook, 293 N.C. 315, 237 S.E.2d 843 (1977).

Facts Showing Violation of Subsection (b). — The trial court violated the provisions of subsection (b) by proceeding with defendant's trial over his objection on the same day as his arraignment. State v. Shook, 293 N.C. 315, 237 S.E.2d 843 (1977).

The trial court violated the provisions of subsection (a) in failing to require that defendant's arraignment be calendared and held on a day provided by that subsection when no jury trial was scheduled. State v. Shook, 293 N.C. 315, 237 S.E.2d 843 (1977).

The financial interest of the State as well as the private interests of the individual jurors and witnesses are served by requiring arraignments to be calendared on days when jurors and witnesses are not called. State v. Shook, 293 N.C. 315, 237 S.E.2d 843 (1977).

Cited in State v. Shook, 38 N.C. App. 465, 248 S.E.2d 425 (1978); Ross Realty Co. v. First Citizens Bank & Trust Co., 296 N.C. 366, 250 S.E.2d 271 (1979); State v. Hunt, 297 N.C. 131, 254 S.E.2d 19 (1979).

§ 15A-945. Waiver of arraignment.

CASE NOTES

Whether a speedy trial has been afforded depends on the circumstances of each particular case, and the burden is on the defendant who asserts denial of a speedy trial to show that the delay was due to the neglect or willfulness of the prosecution. State v. Branch, 41 N.C. App. 80, 254 S.E.2d 255, appeal dismissed, 297 N.C. 612, 257 S.E.2d 220 (1979).

ARTICLE 52.

Motions Practice.

§ 15A-951. Motions in general; definition, service, and filing.

CASE NOTES

Applied in State v. Curmon, 295 N.C. 453, 245 S.E.2d 503 (1978); State v. Evans, 40 N.C. App. 390, 253 S.E.2d 35 (1979); State v. Clark, 301 N.C. 176, 270 S.E.2d 425 (1980).

§ 15A-952. Pretrial motions; time for filing; sanction for failure to file; motion hearing date.

CASE NOTES

A motion for continuance is ordinarily addressed to the sound discretion of the trial judge whose ruling is not subject to review absent an abuse of discretion. State v. Winston, 47 N.C. App. 363, 267 S.E.2d 43 (1980); State v. Weimer, 300 N.C. 642, 268 S.E.2d 216 (1980).

Defendant must show both error in the denial of his motion to continue and that he was prejudiced thereby before he will be granted a new trial. State v. Winston, 47 N.C. App. 363, 267 S.E.2d 43 (1980).

A motion for continuance which does not implicate constitutional rights is ordinarily addressed to the discretion of the trial court, and its denial will not be held error on appeal in the absence of an abuse of discretion. State v. Easterling, 300 N.C. 594, 268 S.E.2d 800 (1980).

Motions to Be Made at or before Time of Arraignment. — A motion to dismiss an indictment when there is ground for a challenge to the array must be made at or before the time of arraignment, or it is waived. State v. Lynch, 300 N.C. 534, 268 S.E.2d 161 (1980).

Oral Motion for Joinder at Trial Is Too Late. — A motion for joinder of cases made orally after the present case was called for trial came too late. The motion should have been made at defendant's arraignment. Only in unusual circumstances should the judge interrupt the trial of a case to conduct hearings on matters that should have been raised and resolved at arraignment or some other pre-trial stage of the proceedings. State v. Moore, 41 N.C. App. 148, 254 S.E.2d 191 (1979).

A motion in limine to exclude prejudicial evidence comes within the purview of subsection (a) of this section. State v. Tate, 44 N.C. App. 567, 261 S.E.2d 506, rev'd on other grounds, 300 N.C. 180, 265 S.E.2d 223 (1980).

Trial Court's Discretion in Refusing to Hear Untimely Motion to Dismiss. — Where defendants' motion to dismiss came at the conclusion of the evidence, under either common-law practice or this section, the motion was untimely and was therefore addressed to the discretion of the trial judge. His exercise of that discretion in refusing to hear the motion is not reviewable on appeal. State v. Phillips, 297 N.C. 600, 256 S.E.2d 212 (1979).

The trial court did not abuse its discretion in failing to rule on defendant's 26 pretrial motions until the day before the trial where only three months had elapsed since the filing of the first motion, defendant showed no vindictiveness on the part of the district attorney in not bringing the motions on for hearing earlier, and defendant showed no prejudice on the delay in ruling on the motions. State v. Setzer, 42 N.C. App. 98, 256 S.E.2d 485, cert. denied, 298 N.C. 571, 261 S.E.2d 127 (1979).

Applied in State v. Berry, 35 N.C. App. 128, 240 S.E.2d 633 (1978); State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978); State v. Evans, 40 N.C. App. 390, 253 S.E.2d 35 (1979); State v. Williams, 41 N.C. App. 287, 254 S.E.2d 649 (1979); State v. Cronin, 41 N.C. App. 415, 255 S.E.2d 240 (1979); State v. Street, 45 N.C. App. 1, 262 S.E.2d 365 (1980); State v. Cox, 48 N.C. App. 470, 269 S.E.2d 297 (1980).

Stated in State v. Johnson, 35 N.C. App. 729, 242 S.E.2d 517 (1978).

Cited in State v. Vincent, 35 N.C. App. 369, 241 S.E.2d 390 (1978); State v. Harris, 35 N.C. App. 401, 241 S.E.2d 370 (1978); State v. McDiarmid, 36 N.C. App. 230, 243 S.E.2d 398 (1978); State v. Cronin, 299 N.C. 229, 262 S.E.2d 277 (1980); State v. Partin, 48 N.C. App. 274, 269 S.E.2d 250 (1980).

§ 15A-954. Motion to dismiss — grounds applicable to all criminal pleadings; dismissal of proceedings upon death of defendant.

CASE NOTES

Legislative Intent. — The provisions of subsection (a)(4) were intended to embody the holding in State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971). State v. Joyner, 295 N.C. 55,

243 S.E.2d 367 (1978); State v. Curmon, 295 N.C. 453, 245 S.E.2d 503 (1978).

Prisoners confined for unrelated crimes are entitled to the benefits of the constitutional guaranty of a speedy and impartial trial. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

Every person formally accused of crime is guaranteed a speedy and impartial trial by this section and the Sixth and Fourteenth Amendments of the federal Constitution. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

The right to a full evidentiary hearing is not inherent in this section. State v. Spicer, 299 N.C. 309, 261 S.E.2d 893 (1980).

Since subsection (a)(4) contemplates drastic relief, a motion to dismiss under its terms should be granted sparingly. State v. Joyner, 295 N.C. 55, 243 S.E.2d 367 (1978).

Burden of Proof of Denial of Speedy Trial. — The burden is on an accused who asserts denial of a speedy trial to show that the delay has prejudiced him in his ability to defend himself, and prejudice will not be presumed merely upon a showing of a long period of delay. State v. Branch, 41 N.C. App. 80, 254 S.E.2d 255, appeal dismissed, 297 N.C. 612, 257 S.E.2d 220 (1979).

Same — Where Delay Is for Long Period. —

Ordinarily, the burden is on the defendant to show that the delay was due to the willful neglect of the prosecution and could have been avoided by a reasonable effort. The courts of this State, however, have recognized an exception to this general rule where the defendant shows a long period of delay. State v. Branch, 41 N.C. App. 80, 254 S.E.2d 255, appeal dismissed, 297 N.C. 612, 257 S.E.2d 220 (1979).

Once the defendant showed a 17-month delay after his request for a speedy trial, the State should have presented evidence fully explaining the reasons for the delay. State v. Branch, 41 N.C. App. 80, 254 S.E.2d 255, appeal dismissed, 297 N.C. 612, 257 S.E.2d 220 (1979).

But the constitutional guarantee of a speedy trial does not outlaw good faith delays which are reasonably necessary for the State to prepare and present its case. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

Test for Speedy Trial. —

Unless some fixed time limit is prescribed by statute, speedy trial questions must be resolved on a case-by-case basis. While all relevant circumstances must be considered, four interrelated factors are of primary significance: (1) the length of delay, (2) the reason for the delay, (3) the extent to which defendant has asserted his right, and (4) the extent to which defendant has been prejudiced. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

In determining whether an accused has been denied his right to a speedy trial, the courts have weighed four factors: (1) the length of the delay, (2) the cause of the delay, (3) waiver by the defendant, and (4) prejudice to the defendant. State v. Branch, 41 N.C. App. 80, 254 S.E.2d 255, appeal dismissed, 297 N.C. 612, 257 S.E.2d 220 (1979).

Weight of Demand for Speedy Trial. — The defendant's assertion of his speedy trial right is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

Failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

A criminal defendant who has caused or acquiesced in a delay will not be permitted to use it as a vehicle in which to escape justice. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

Irreparable Prejudice Necessary to Dismissal. — It is only when one can show that there has been a constitutional violation resulting in irreparable prejudice to the preparation of defendant's case that a dismissal is warranted under subsection (a)(4). State v. Joyner, 295 N.C. 55, 243 S.E.2d 367 (1978).

Denial of Motion to Confess. — Where the trial court actually did find facts and enter conclusions of law in denying defendant's motion to suppress evidence of defendant's confessions to police, by so denying the motion to suppress, the motion to dismiss was denied, ipso facto, for there was no showing of a constitutional violation by defendant upon which to base the motion. Thus the failure of the trial judge to enter an additional order specifically denying by name the motion to dismiss would be, at most, harmless error. State v. Joyner, 295 N.C. 55, 243 S.E.2d 367 (1978).

Flagrant Violation of Constitutional Rights Not Found. — Defendant's indictment, arraignment, and trial on the same day on a burglary charge was not such a flagrant violation of his due process rights that the court was required to dismiss the burglary indictment, since defendant, by not contesting indictments for armed robbery, larceny, and rape conceded that he had been given sufficient time in which to prepare a defense on these charges; the burglary indictment arose out of the same series of events which led to the three other indictments;

the offenses took place at such a close proximity in time that any defense which counsel might have prepared to the charge of burglary could not have significantly differed from the defenses he did prepare to the charges of larceny, armed robbery, and rape; and any proof of the nonexistence of the essential elements of burglary would necessarily be included in defendant's defense on the other charges in this case, because for each charge defendant would seek to disprove the State's evidence of the sequence of events leading up to the charge, which facts also supported the burglary indictment. State v. Revelle, 301 N.C. 153, 270 S.E.2d 476 (1980).

Applied in State v. Cronin, 41 N.C. App. 415, 255 S.E.2d 240 (1979); State v. Cronin, 299 N.C. 229, 262 S.E.2d 277 (1980).

Cited in State v. Holmon, 36 N.C. App. 569, 244 S.E.2d 491 (1978); State v. Killian, 37 N.C. App. 234, 245 S.E.2d 812 (1978); State v. Creech, 37 N.C. App. 261, 245 S.E.2d 817 (1978); State v. Rudolph, 39 N.C. App. 293, 250 S.E.2d 318 (1979); State v. Stewart, 40 N.C. App. 693, 253 S.E.2d 638 (1979); State v. Johnson, 42 N.C. App. 234, 256 S.E.2d 297 (1979); State v. Trimble, 44 N.C. App. 659, 262 S.E.2d 299 (1980).

§ 15A-955. Motion to dismiss — grounds applicable to indictments.

CASE NOTES

Motion Must Be Made at or before Time of Arraignment. — A motion to dismiss an indictment when there is ground for a challenge to the array must be made at or before the time of arraignment, or it is waived. State v. Lynch, 300 N.C. 534, 268 S.E.2d 161 (1980).

§ 15A-957. Motion for change of venue.

CASE NOTES

Inherent Authority to Change Venue in Interests of Justice. — The statutory power of the court to change the venue of a trial is limited to transferring the case to an adjoining county in the judicial district or to another county in an adjoining judicial district. Notwithstanding this apparent statutory limitation upon the power of a court to order a change of venue, a court of general jurisdiction, of which the superior court is one, has the inherent authority to order a change of venue in the interests of justice. State v. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979), cert. denied, 448 U.S. 907, 100 S. Ct. 3050, 65 L. Ed. 2d 1137, rehearing denied, 448 U.S. 918, 101 S. Ct. 41, 65 L. Ed. 2d 1181 (1980).

Burden of Showing Prejudice on Defendant. —

In accord with original. See State v. Faircloth, 297 N.C. 100, 253 S.E.2d 890, cert. denied, 444 U.S. 874, 100 S. Ct. 156, 59 L. Ed. 2d 90 (1979); State v. Sparks, 297 N.C. 314, 255 S.E.2d 373 (1979); State v. See, 301 N.C. 388, 271 S.E.2d 282 (1980).

The burden of proof in a hearing on a motion for change of venue is upon the defendant. State v. McDougald, 38 N.C. App. 244, 248 S.E.2d 72 (1978), appeal dismissed, 296 N.C. 413, 251 S.E.2d 472 (1979).

Defendant Must Show Likelihood That Fair Trial Will Be Prevented. — In order to prevail on a motion for change of venue, the defendant must show that there is a reasonable likelihood that the prejudicial publicity complained of will prevent a fair trial. State v. McDougald, 38 N.C. App. 244, 248 S.E.2d 72 (1978), appeal dismissed, 296 N.C. 413, 251 S.E.2d 472 (1979).

Defendant Must Show Verdict Likely on Prior Conclusions. — The defendant in a prosecution for second degree murder, upon his motion for change of venue, was required to go forward with evidence tending to affirmatively show that prospective jurors in his case were reasonably likely to base their verdict upon conclusions induced by outside influences rather than upon conclusions induced solely by evidence and arguments presented in open court. State v. McDougald, 38 N.C. App. 244, 248 S.E.2d 72 (1978), appeal dismissed, 296 N.C. 413, 251 S.E.2d 472 (1979).

Discretion, etc. —

In accord with 1st paragraph in original. See State v. Faircloth, 297 N.C. 100, 253 S.E.2d 890, cert. denied, 444 U.S. 874, 100 S. Ct. 156, 62 L. Ed. 2d 102 (1979).

In accord with 2nd paragraph in original. See State v. See, 301 N.C. 388, 271 S.E.2d 282 (1980).

The decision whether to order a change of venue or a special venire rests in the discretion of the trial judge, and his decision will not be reversed except for gross abuse, such as the denial of a constitutional right. State v. Matthews, 295 N.C. 265, 245 S.E.2d 727 (1978), cert. denied, 439 U.S. 1128, 99 S. Ct. 1046, 59 L. Ed. 2d 90 (1979).

The determination of whether the defendant has met his burden on a motion for change of venue rests within the sound discretion of the trial court. Absent a showing of abuse of discretion, its ruling will not be overturned on appeal. State v. McDougald, 38 N.C. App. 244, 248 S.E.2d 72 (1978), appeal dismissed, 296 N.C. 413, 251 S.E.2d 472 (1979).

Allegation of General Ill Will in Community. — Where defendant presents nothing more than an allegation of general ill will in the community, there is no evidence which would support a reversal for abuse of discretion. State v. Whitaker, 43 N.C. App. 600, 259 S.E.2d 316 (1979).

Accurate News Coverage of Prior Trial No Ground for Changed Venue. — The argument that news coverage which accurately reports the circumstances of a murder case and previous trial can be so innately conducive to the inciting of local prejudices as to require a change of venue is devoid of merit. State v. Matthews, 295 N.C. 265, 245 S.E.2d 727 (1978), cert. denied, 439 U.S. 1128, 99 S. Ct. 1046, 59 L. Ed. 2d 90 (1979).

The fact that the defendants in a murder case were black and the victim white is not per se grounds for a change of venue or special venire. State v. Matthews, 295 N.C. 265, 245 S.E.2d 727 (1978), cert. denied, 439 U.S. 1128, 99 S. Ct. 1046, 59 L. Ed. 2d 90 (1979).

No Prejudice Shown. —

A defendant has not borne his burden of showing that he will be denied an impartial jury solely by introducing evidence that his case has received widespread news coverage or that some prospective jurors have been exposed to such coverage and formed or expressed opinions based upon their exposure. The defendant must additionally show that it is reasonably likely that prospective jurors would base their conclusions in his case upon pretrial information rather than evidence introduced at trial and would be unable to put from their minds any previous impressions they may have formed. State v. McDougald, 38 N.C. App. 244, 248 S.E.2d 72 (1978), appeal dismissed, 296 N.C. 413, 251 S.E.2d 472 (1979).

Where the defendant fails to show that potential jurors would base their conclusions and verdict upon pretrial publicity and preconceived impressions, he has failed to show a reasonable likelihood that pretrial publicity will prevent a fair trial even though the case has received widespread publicity and some prospective jurors have formed or expressed opinions about the case. State v. McDougald, 38 N.C. App. 244, 248 S.E.2d 72 (1978), appeal dismissed, 296 N.C. 413, 251 S.E.2d 472 (1979).

In a prosecution for second degree murder in which most of the prospective jurors stated specifically that the publicity surrounding the case would have no effect upon them and that they would base their verdict upon the evidence and give the defendant a fair trial, and the one juror who indicated he had formed a preliminary opinion concerning the case, upon further questioning, specifically stated that he could put all such opinions or predispositions from his mind and give the defendant a fair trial upon the evidence presented in open court, the trial court did not err in denying the defendant's motion for change of venue. State v. McDougald, 38 N.C. App. 244, 248 S.E.2d 72 (1978), appeal dismissed, 296 N.C. 413, 251 S.E.2d 472 (1979).

The trial court in a prosecution for first-degree murder and armed robbery did not abuse its discretion in denying defendants' motion for change of venue based on pretrial publicity in radio broadcasts and newspaper articles where the articles were of a general nature likely to be found in any jurisdiction to which the trial might be moved; the coverage of defendants' arrest only indicated that defendants had been charged with a crime; the articles were factual, noninflammatory, and contained for the most part information that could have been offered in evidence at defendants' trial; and no juror objected to by defendants because of pretrial publicity was seated on the jury. State v. Oliver, 302 N.C. 28, 274 S.E.2d 183 (1981).

Proceeding to trial without ruling on defendants' motion for change of venue constituted a denial of that motion. State v. Partin, 48 N.C. App. 274, 269 S.E.2d 250, cert. denied, 301 N.C. 404, 273 S.E.2d 449 (1980).

Cited in State v. Hood, 294 N.C. 30, 239 S.E.2d 802 (1978).

§ 15A-958. Motion for a special venire from another county.

CASE NOTES

Discretion of Trial Judge. —

In accord with 4th paragraph in original. See State v. Silhan, 297 N.C. 660, 256 S.E.2d 702 (1979).

§ 15A-959. Notice of defense of insanity; pretrial determination of insanity.

Editor's Note. —

Session Laws 1977, c. 711, s. 39 as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

Legal Periodicals. — For a comment discussing the insanity defense in North Carolina, see 14 Wake Forest L. Rev. 1157 (1978).

CASE NOTES

Time for Filing Notice. — Although no reference is made in subsection (a) of this section to a specific subsection of § 15A-952, it seems clear that § 15A-952(c) covers the time within which pretrial motions must be made. State v. Johnson, 35 N.C. App. 729, 242 S.E.2d 517, cert. denied, 295 N.C. 263, 245 S.E.2d 779 (1978).

Proof of Insanity Where Notice Rejected as Untimely. — Under the general plea of not guilty, a defendant may prove affirmative defenses such as insanity even if his notice under subsection (a) has been rejected as untimely. State v. Johnson, 35 N.C. App. 729, 242 S.E.2d 517, cert. denied, 295 N.C. 263, 245 S.E.2d 779 (1978).

Bifurcated Trial. — The trial court did not abuse its discretion in denying of defendant's motion for a bifurcated trial on issues of his guilt or innocence and of his insanity where motion was made on the ground that he intended to raise inconsistent defenses of self-defense and insanity since nothing in the record indicated that defendant made more than a bare assertion of an intention to claim self-defense, since there was nothing inherently inconsistent between the two defenses and since the evidence of self-defense was meager if it existed at all. State v. Ward, 301 N.C. 469, 272 S.E.2d 84 (1980).

Instruction on Burden of Proof. — The trial court's instruction that defendant had the burden of proving his defense of insanity to the "reasonable satisfaction" rather than to the "satisfaction" of the jury was favorable to defendant, since "reasonable satisfaction" imposes a lesser burden than "satisfaction." State v. Ward, 301 N.C. 469, 272 S.E.2d 84 (1980).

Instruction Where Insanity Defense Not in Fact Presented. — Where defendant filed notice of intent to raise the defense in insanity, as required by this section, and, pursuant to § 15A-1213, the judge informed prospective jurors of the possibility that defendant might rely on the affirmative defense of insanity, it was proper at the close of all the evidence for the trial judge to inform the jurors that the insanity defense indeed had not been presented in order to eliminate any idea the jury might have had that they were still to consider the defense. State v. Hart, 44 N.C. 479, 261 S.E.2d 250 (1980).

Cited in State v. Byrd, 39 N.C. App. 659, 251 S.E.2d 712 (1979).

ARTICLE 53.

Motion to Suppress Evidence.

§ 15A-971. Definitions.

Legal Periodicals. — For article discussing the search and seizure provisions of Chapter 15A, see 52 N.C.L. Rev. 277 (1973).

CASE NOTES

Failure to Pursue Federal Fourth Amendment Claims in State Court Bars Federal Habeas Corpus. — Having failed to use the opportunity for litigating his Fourth Amendment claim in State court under this Article, the defendant was foreclosed by Stone v. Powell, 428 U.S. 465, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976), from pursuing it on federal habeas corpus. Sallie v. State, 587 F.2d 636 (4th Cir. 1978).

Cited in State v. Satterfield, 300 N.C. 621, 268 S.E.2d 510 (1980).

§ 15A-972. Motion to suppress evidence before trial in superior court in general.

CASE NOTES

A defendant has the burden of establishing that he is an "aggrieved" party before his motion to suppress will be considered. State v. Taylor, 298 N.C. 405, 259 S.E.2d 502 (1979).

When Defendant "Aggrieved". — A defendant is "aggrieved" and "may move to suppress evidence" under this section only when it appears that his personal rights, not those of some third party, may have been violated. State v. Taylor, 298 N.C. 405, 259 S.E.2d 502 (1979).

Defendant Not "Aggrieved". — The defendant was not "aggrieved" within the meaning of this section in a prosecution for murder where he was not on the premises at the time of the search and seizure, he neither owned nor rented the shed which was searched, and possession of the shotgun shells seized was not an essential element of the offense charged. State v. Alford, 38 N.C. App. 236, 247 S.E.2d 634, appeal dismissed, 295 N.C. 649, 253 S.E.2d 93 (1978), cert. denied, — N.C. —, 270 S.E.2d 111 (1980).

Where defendant was charged with felonious conspiracy to possess stolen property, but defendant was not present at the residence that was searched, and neither alleged nor showed any possessory or proprietary interest in either residence or any of the items seized and listed in the indictment charging him with felonious conspiracy to possess stolen property, defendant was not an aggrieved party for purposes of this section and thus lacked standing to contest a search allegedly violating his Fourth Amendment rights. State v. Sheppard, 42 N.C. App. 125, 256 S.E.2d 241 (1979).

Cited in State v. Satterfield, 300 N.C. 621, 268 S.E.2d 510 (1980).

§ 15A-974. Exclusion or suppression of unlawfully obtained evidence.

CASE NOTES

Defendant Has Burden of Establishing Procedural Compliance. — A defendant who seeks to suppress evidence upon a ground specified in this section must comply with the procedural requirements outlined in this article and he has the burden of establishing that his motion to suppress is timely and proper in form. State v. Satterfield, 300 N.C. 621, 268 S.E.2d 510 (1980).

Untimely Motion Results in Waiver. — When the motion to suppress must be made in limine but the defendant fails to make the motion at the proper time, then he has waived his right to contest the admissibility of the evidence at trial or on appeal on constitutional grounds. State v. Tate, 300 N.C. 180, 265 S.E.2d 223 (1980).

Suppression of Evidence under Subdivision (1). — Subdivision (1) of this section mandates the suppression of evidence only when the evidence sought to be suppressed is obtained in violation of defendant's constitutional rights. State v. Wilson, 293 N.C. 47, 235 S.E.2d 219 (1977).

Failure to comply with § 15A-223(b) has no constitutional significance within the meaning of subdivision (1) of this section. State v. Richardson, 295 N.C. 309, 245 S.E.2d 754 (1978).

Defendant's confession was not required to be suppressed by subdivision (1) despite a delay in bringing the defendant before a judi-

cial officer in violation of § 15A-501, since no constitutionally mandated exclusionary rule barred the defendant's confession. State v. Richardson, 295 N.C. 309, 245 S.E.2d 754 (1978).

The use of the term "result" in subdivision (2) indicates that a causal relationship must exist between the violation and the acquisition of the evidence sought to be suppressed. State v. Richardson, 295 N.C. 309, 245 S.E.2d 754 (1978).

Minimum Requirements of Subdivision (2). — Subdivision (2) requires, at a minimum, a "cause in fact" or "but-for" relationship between violations of this Chapter and the evidence objected to if such evidence is to be suppressed. In so holding, it is not decided that a mere "cause in fact" or "but-for" relationship is sufficient ipso facto to require exclusion of evidence obtained as a consequence of substantial violations of this Chapter. In certain cases, intervening circumstances might "dissipate the taint" of unlawfulness so that such evidence would be admissible at trial. State v. Richardson, 295 N.C. 309, 245 S.E.2d 754 (1978).

If the challenged evidence would have been obtained regardless of violation of this Chapter, such evidence has not been obtained "as a result of" such official illegality and is not, therefore, to be suppressed by reason of subdivision (2). State v. Richardson, 295 N.C. 309, 245 S.E.2d 754 (1978).

Failure of an officer to comply strictly with provisions of §§ 15A-252 and 15A-254 was not a "substantial" violation of Chapter 15A within the meaning of subdivision (2) of this section. See State v. Fruitt, 35 N.C. App. 177, 241 S.E.2d 125, cert. denied, 295 N.C. 93, 244 S.E.2d 261 (1978).

Determining Whether Violation Is "Substantial". — Evidence obtained in violation of this Chapter is required to be suppressed only if it is obtained as a result of a "substantial" violation of the provisions of the chapter. One of the critical circumstances to be considered in determining whether the violation is "substantial" is the extent to which exclusion will deter similar violations in the future. State v. Long, 37 N.C. App. 662, 246 S.E.2d 846, appeal dismissed, 295 N.C. 736, 248 S.E.2d 886 (1978).

Any violation of this Chapter occasioned by searches on military bases pursuant to proper military authority will not be deemed "substantial" within the meaning of this section since the exclusion of evidence seized in such circumstances would not in any way deter similar searches and seizures in the future. State v. Long, 37 N.C. App. 662, 246 S.E.2d 846, appeal dismissed, 295 N.C. 736, 248 S.E.2d 886 (1978).

And Such Construction Avoids Undue Conflict between State and Federal Authorities. — Construction of this section in such a manner as to hold the actions of members of the United States Air Force not to constitute "substantial" violations of the statutes, if they constitute violations of any type, has the added benefit of avoiding undue conflicts among the components of "Our Federalism." State v. Long, 37 N.C. App. 662, 246 S.E.2d 846, appeal dismissed, 295 N.C. 736, 248 S.E.2d 886 (1978).

Exclusionary Rule Applies Only to Unconstitutional Searches, Not to Those Merely Violative of Statute. — The exclusionary rule derived from Agnello v. United States, 269 U.S. 20, 46 S. Ct. 4, 70 L. Ed. 145 (1925), and Walder v. United States, 347 U.S. 62, 74 S. Ct. 354, 98 L. Ed. 503 (1954) concerning the inadmissibility for impeachment purposes of evidence unconstitutionally obtained applies, if at all, only where a search and seizure has been declared illegal for constitutional reasons. The rule would not apply in those instances where there has been a violation of the statutory procedures regulating searches and seizures contained in this Chapter, unless there has been a "substantial violation" of the statutory provisions under this section. State v. Ross, 295 N.C. 488, 246 S.E.2d 780 (1978).

Exclusion Extends to Indirect Products of Unlawful Search. — Evidence seized during an unlawful search cannot constitute proof against the victim of the search, and the exclusionary prohibition extends as well to the indirect as the direct products of such invasions. State v. Sheetz, 46 N.C. App. 641, 265 S.E.2d 914 (1980).

Defendant Must Have Possessory or Ownership Interest in Property Searched. — Where victim's pocketbook was found in defendant's car and searched pursuant to a warrantless probable cause search, the contents of the pocketbook should not have been suppressed at trial since one may not object to a search or seizure of the premises or property of another because immunity to unreasonable searches and seizures is a privilege personal to those whose rights thereunder have been infringed; thus, absent ownership or possessory interest in the premises or property, a person has no standing to contest the validity of a search. State v. Greenwood, 301 N.C. 705, 273 S.E.2d 438 (1981).

Where victim's pocketbook was found in defendant's car and searched pursuant to a warrantless probable cause search, the defendant failed to meet his burden of demonstrating an infringement of his personal rights by the search since the defendant offered no evidence to show any legitimate property or possessory interest in the pocketbook, the State's evidence tended to show that it belonged to a third person and it had been stolen from her automobile

which was parked near defendant's automobile, and defendant failed to show that the seizure and search of the pocketbook infringed upon his own personal rights under the Fourth Amendment; thus, defendant's motion to suppress the pocketbook and its contents was properly denied by the trial court. State v. Greenwood, 301 N.C. 705, 273 S.E.2d 438 (1981).

Insubstantial Violation of Right to Counsel. — Given advance notice of his right to counsel in a nontestimonial identification order served on defendant three days before the withdrawal of fluid samples from defendant, any failure to remind defendant of his right to counsel prior to the taking of the fluid samples would not likely constitute a "substantial" violation of § 15A-279(d) requiring suppression of the evidence obtained. State v. Satterfield, 300 N.C. 621, 268 S.E.2d 510 (1980).

Evidence Obtained Pursuant to Unlawful Subpoena. — A court order directing defendant to produce and turn over to the State Bureau of Investigation the business and working records of his florist and gift shop was a subpoena, and evidence obtained pursuant to the subpoena order should have been excluded in defendant's arson trial where it was obtained by exploitation of an earlier illegal search and seizure pursuant to a warrant not based on probable cause. State v. Sheetz, 46 N.C. App. 641, 265 S.E.2d 914 (1980).

Evidence Obtained outside Officer's Territorial Jurisdiction. — It is not fundamentally unfair nor prejudicial to a defendant that evidence is obtained by police officers outside of their territorial jurisdiction while conducting an undercover investigation. State v. Afflerback, 46 N.C. App. 344, 264 S.E.2d 784 (1980).

Evidence Seized in Stop Outside Sheriff's Jurisdiction. — Even if a deputy sheriff's investigatory stop of defendant was illegal because it was made outside the limits of his territorial jurisdiction, the stop was not unconstitutional so as to require the exclusion from the evidence of a pistol seized during the stop. Furthermore, even if the stop were an arrest in terms of § 15A-402(b), this is not a substantial violation of Chapter 15A which would require exclusion of the evidence under this section. State v. Harris, 43 N.C. 346, 258 S.E.2d 802, appeal dismissed, — N.C. —, 261 S.E.2d 920 (1979).

Incriminating Statements. — In a prosecution for armed robbery, defendant's incriminating statements to a bondsman were made knowingly and voluntarily where defendant testified that he was threatened with a shotgun and was struck on the head with the shotgun at the time he was taken into custody by the bondsman, the incriminating statements by defendant occurred a substantial time later during a drive to the county of trial and were made in an atmosphere of casual conversation, defendant testified that he had "shot" some drugs but that he was not under the influence of the drugs when he made the statements, and the trial judge made findings and conclusions to the effect that defendant understood all that was taking place prior to his arrest and during the trip back to the county of trial and that the bail bondsman did not use any tactics or pressure to secure a statement from defendant; thus, the bondsman's testimony could not be suppressed. State v. Perry, 50 N.C. App. 540, — S.E.2d — (1981).

Object Found in Plain View. — In a first-degree rape case, where the victim contended that her assailant executed the crime at knife point, the trial court did not err in denying defendant's motion to suppress a knife found among his belongings on the ground that it was found during an illegal search, where a police officer and friend of defendant's family went to defendant's home to secure a change of clothing for defendant; the officer told defendant's mother of the arrest and the reason for the visit; the mother invited the officer into the kitchen where defendant's clothing was in two bags and defendant's mother opened one of the bags and a knife fell out; the officer had the right to take the knife under the "plain view" doctrine. State v. Jackson, 302 N.C. 101, 273 S.E.2d 666 (1981).

Nontestimonial Identification. — In a prosecution for first-degree murder the trial court's denial of defendant's motion to suppress nontestimonial identification evidence was without error where, pursuant to an order of the trial court, fingernail scrapings, samples of defendant's head and pubic hair, saliva samples, blood samples, and photographs of any wounds on defendant's body were taken; the order stated defendant's right to counsel; the State stipulated that nothing defendant said during the procedure would be offered into evidence; defendant was fully advised of his constitutional right to the presence of counsel; and the State was not in violation of any provisions under Chapter 15A, Article 14, by not procuring an express waiver from defendant. State v. Temple, 302 N.C. 1, 273 S.E.2d 273 (1981).

Applied in State v. Sanders, 33 N.C. App. 284, 235 S.E.2d 94 (1977); State v. Brown, 35 N.C. App. 634, 242 S.E.2d 184 (1978); State v. Rogers, 43 N.C. App. 475, 259 S.E.2d 572 (1979).

Quoted in State v. Allison, 298 N.C. 135, 257 S.E.2d 417 (1979).

Stated in State v. Boone, 293 N.C. 702, 239 S.E.2d 459 (1977).

Cited in State v. Sutton, 34 N.C. App. 371, 238 S.E.2d 305 (1977); State v. Watson, 294 N.C. 159, 240 S.E.2d 440 (1978); State v. Sneed, 36 N.C. App. 341, 243 S.E.2d 908 (1978); In re

Gardner, 39 N.C. App. 567, 251 S.E.2d 723 (1979); State v. Tate, 44 N.C. App. 567, 261 S.E.2d 506 (1980); State v. LeDuc, 48 N.C. App. 227, 269 S.E.2d 220 (1980).

§ 15A-975. Motion to suppress evidence in superior court prior to trial and during trial.

CASE NOTES

To challege the admissibility, etc. — The general rule in this State is that the failure of the trial court to hold a voir dire examination and make findings of fact upon objection by a defendant to an in-court identification, while not approved, will be deemed harmless error where the record shows that the pretrial identification was proper or that the in-court identification of defendant had an origin independent from the pretrial identification. State v. Jordan, 49 N.C. App. 560, 272 S.E.2d 405 (1980).

As a general rule, motions to suppress must be made before trial. State v. Satterfield, 300 N.C. 621, 268 S.E.2d 510 (1980).

Effect of Failure to Make Pretrial Motion. — When no exception to making the motion to suppress before trial applies, failure to make the pretrial motion to suppress waives any right to contest the admissibility of the evidence at trial on constitutional grounds. State v. Detter, 298 N.C. 604, 260 S.E.2d 567 (1979).

Untimely Motion Results in Waiver. — When the motion to suppress must be made in limine but the defendant fails to make the motion at the proper time, then he has waived his right to contest the admissibility of the evidence at trial or on appeal on constitutional grounds. State v. Tate, 300 N.C. 180, 265 S.E.2d 223 (1980).

A defendant may move to suppress evidence at trial only if he demonstrates that he did not have a reasonable opportunity to make the motion before trial; or that the State did not give him sufficient advance notice (20 working days) of its intention to use certain types of evidence; or that additional facts have been discovered after a pretrial determination and denial of the motion which could not have been discovered with reasonable diligence before determination of the motion. State v. Satterfield, 300 N.C. 621, 268 S.E.2d 510 (1980).

This Article not only requires the defendant to raise his motion to suppress the evidence according to its mandate, but also places the burden on the defendant to demonstrate that he has done so. Thus, where the record reflects only general objections to the admission of the evidence obtained in a search, the defendants have waived any right to challenge the evidence on constitutional grounds. State v. Drakeford, 37 N.C. App. 340, 246 S.E.2d 55 (1978).

Defendant Waived Right to Challenge on Constitutional Grounds. — Where there was no finding by the trial court that the defendant had reasonable opportunity to move to suppress the evidence within the statutory time limit, and there was no indication in the record as to whether a motion to suppress was made at any time by the defendant, the Court of Appeals was unable to determine whether the defendant presented his objection in a timely fashion and in suitable form. The record reflecting only general objections to the admission of the evidence, the defendants waived any right to challenge the evidence on constitutional grounds. State v. Drakeford, 37 N.C. App. 340, 246 S.E.2d 55 (1978).

Applied in State v. Hill, 294 N.C. 320, 240 S.E.2d 794 (1978); State v. Nelson, 298 N.C. 573, 260 S.E.2d 629 (1979); State v. Sheppard, 42 N.C. App. 125, 256 S.E.2d 241 (1979).

Cited in State v. Bates, 37 N.C. App. 276, 245 S.E.2d 827 (1978).

§ 15A-976. Timing of pretrial suppression motion and hearing.

CASE NOTES

This Article not only requires the defendant to raise his motion to suppress the evidence according to its mandate, but also places the burden on the defendant to demonstrate that he has done so. Thus, where the record reflects only general objections to the

admission of the evidence obtained in a search, the defendants have waived any right to challenge the evidence on constitutional grounds. State v. Drakeford, 37 N.C. App. 340, 246 S.E.2d 55 (1978).

Defendant Waived Right to Challenge on Constitutional Grounds. — Where there was no finding by the trial court that the defendant had reasonable opportunity to move to suppress the evidence within the statutory time limit, and there was no indication in the record as to whether a motion to suppress was made at any time by the defendant, the Court of Appeals was unable to determine whether the defendant presented his objection in a timely fashion and in suitable form. The record reflecting only general objections to the admission of the evidence, the defendants waived any right to challenge the evidence on constitutional grounds. State v. Drakeford, 37 N.C. App. 340, 246 S.E.2d 55 (1978).

Applied in State v. Hill, 294 N.C. 320, 240 S.E.2d 794 (1978); State v. Sheppard, 42 N.C. App. 125, 256 S.E.2d 241 (1979).

§ 15A-977. Motion to suppress evidence in superior court; procedure.

CASE NOTES

Judge as Finder of Fact. — The judge is the finder of fact at the hearing on a motion to suppress evidence and must make written findings of fact and conclusions of law. State v. Grogan, 40 N.C. App. 371, 253 S.E.2d 20 (1979).

This Article not only requires the defendant to raise his motion to suppress the evidence according to its mandate, but also places the burden on the defendant to demonstrate that he has done so. Thus, where the record reflects only general objections to the admission of the evidence obtained in a search, the defendants have waived any right to challenge the evidence on constitutional grounds. State v. Drakeford, 37 N.C. App. 340, 246 S.E.2d 55 (1978).

When Findings of Fact Are Required. — When the competency of evidence is challenged and the trial judge conducts a voir dire to determine admissibility, the general rule is that he should make findings of fact to show the basis of his ruling. State v. Phillips, 300 N.C. 678, 268 S.E.2d 452 (1980).

If there is a material conflict on the evidence on voir dire conducted pursuant to this section, the trial judge must make findings of fact to show the basis of his ruling in order to resolve the conflict. State v. Phillips, 300 N.C. 678, 268 S.E.2d 452 (1980).

If there is no material conflict in the evidence on voir dire, it is not error to admit the challenged evidence without making specific findings of fact, although it is always the better practice to find all facts upon which the admissibility of the evidence depends. State v. Phillips, 300 N.C. 678, 268 S.E.2d 452 (1980).

Findings of Fact Not Required. — Where defendant's affidavit failed to support the motion to suppress, the court properly denied the motion summarily, without making findings of fact; additionally, findings of fact are not required where there is no conflict in the evidence at the suppression hearing. State v. Smith, 50 N.C. App. 188, 272 S.E.2d 621 (1980).

What Findings of Fact Must Include. — Subsection (f) of this section requires a judge to make findings of fact and conclusions of law when there is a motion to suppress. Such findings of fact must include findings on the issue of voluntariness. When the evidence is conflicting, the findings of fact must be sufficient to provide a basis for the judge's ruling. State v. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979), cert. denied, 448 U.S. 907, 100 S. Ct. 3050, 65 L. Ed. 2d 1137, rehearing denied, 448 U.S. 918, 101 S. Ct. 41, 65 L. Ed. 2d 1181 (1980).

Findings of fact by the trial court judge are conclusive if they are supported by competent evidence. State v. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979).

Requirements of a Motion to Suppress Made at Trial. — A motion to suppress made at trial, whether oral or written, should state the legal ground upon which it is made and should be accompanied by an affidavit containing facts supporting the motion and if the motion fails to allege a legal or factual basis for suppressing the evidence, it may be summarily dismissed by the trial judge. State v. Satterfield, 300 N.C. 621, 268 S.E.2d 510 (1980).

Defendant Waived Right to Challenge on Constitutional Grounds. — Where there was

no finding by the trial court that the defendant had reasonable opportunity to move to suppress the evidence within the statutory time limit, and there was no indication in the record as to whether a motion to suppress was made at any time by the defendant, the Court of Appeals was unable to determine whether the defendant presented his objection in a timely fashion and in suitable form. The record reflecting only general objections to the admission of the evidence, the defendants waived any right to challenge the evidence on constitutional grounds. State v. Drakeford, 37 N.C. App. 340, 246 S.E.2d 55 (1978).

Applied in State v. Martin, 38 N.C. App. 115, 247 S.E.2d 303 (1978); State v. Sheppard, 42 N.C. App. 125, 256 S.E.2d 241 (1979).

Cited in State v. Boone, 293 N.C. 702, 239 S.E.2d 459 (1977); State v. Summerlin, 35 N.C. App. 522, 241 S.E.2d 732 (1978); State v. Alford, 38 N.C. App. 236, 247 S.E.2d 634 (1978).

§ 15A-978. Motion to suppress evidence in superior court or district court; challenge of probable cause supporting search on grounds of truthfulness; when identity of informant must be disclosed.

CASE NOTES

Scope of Subsection (a). — Subsection (a) of this section permits a defendant to challenge only whether the affiant acted in good faith in including the information used to establish probable cause; it does not permit a defendant to attack the factual accuracy of the information supplied by an informant to the affiant. In re Caver, 40 N.C. App. 264, 252 S.E.2d 284 (1979).

Subsection (a) of this section permits a defendant to contest the validity of a search warrant by attacking the good faith of the affiant in providing the information, and not by attacking the factual accuracy of the information relied upon to establish probable cause. State v. Kramer, 45 N.C. App. 291, 262 S.E.2d 693, cert. denied, 300 N.C. 200, 269 S.E.2d 627 (1980).

Reliability Not Relevant. — The reliability of the informant is not relevant on the question of whether subsection (b)(2) requires that his identity be disclosed. The statute only requires corroboration of the informant's existence at the time he is supposed to have given the confidential information. State v. Bunn, 36 N.C. App. 114, 243 S.E.2d 189, cert. denied, 295 N.C. 261, 245 S.E.2d 778 (1978).

Corroboration Sufficient. — Corroboration of the existence of an informant was sufficient under subsection (b)(2) where a second officer testified that he knew of the informant's existence on the day of the arrest and was well acquainted with the informant, and that the first officer correctly predicted the defendant's future behavior based upon information he said came from the informant. State v. Bunn, 36 N.C. App. 114, 243 S.E.2d 189, cert. denied, 295 N.C. 261, 245 S.E.2d 778 (1978).

The trial court did not err in refusing to allow defendant, who was charged with possession of marijuana and methaqualane, to ask questions concerning the identity of a confidential informant whose tip led to defendant's arrest where an officer's testimony that he listened to telephone conversations between the informant and another officer provided sufficient corroboration of the informant's existence independent of the testimony in question. State v. Ellis, 50 N.C. App. 181, 272 S.E.2d 774 (1980).

Applied in State v. Sneed, 36 N.C. App. 341, 243 S.E.2d 908 (1978); State v. Collins, 44 N.C. App. 141, 260 S.E.2d 650 (1979), cert. denied, 299 N.C. 123, 261 S.E.2d 925 (1980).

Cited in State v. Louchheim, 296 N.C. 314, 250 S.E.2d 630 (1979).

§ 15A-979. Motion to suppress evidence in superior and district court; orders of suppression; effects of orders and of failure to make motion.

(c) An order by the superior court granting a motion to suppress prior to trial is appealable to the appellate division of the General Court of Justice prior to

trial upon certificate by the prosecutor to the judge who granted the motion that the appeal is not taken for the purpose of delay and that the evidence is essential to the case. The appeal is to the appellate court that would have jurisdiction if the defendant were found guilty of the charge and received the maximum punishment. If there are multiple charges affected by a motion to suppress, the ruling is appealable to the court with jurisdiction over the offense carrying the highest punishment.

(1979, c. 723.)

Effect of Amendments. — The 1979 amendment added the second and third sentences of subsection (c).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (c) is set out.

CASE NOTES

Appeal Is to Supreme Court from Imposition of Death Penalty or Life Imprisonment. — When this section and § 7A-27(a) are considered together, it is proper to appeal directly to the Supreme Court if the punishment for the charge(s) is either death or life imprisonment. State v. Silhan, 295 N.C. 636, 247 S.E.2d 902 (1978).

Right to Appeal Final Order Denying Suppression. — When the General Assembly granted the right to appeal orders finally denying motions to suppress "upon an appeal from a judgment of conviction," it impliedly prohibited appeals from such orders at any other time. State v. Grogan, 40 N.C. App. 371, 253 S.E.2d 20 (1979).

An order denying a defendant's motion to suppress prior to the first trial which ended in a mistrial was an order finally denying a motion to suppress evidence which could be brought forward as a part of an appeal from the later judgment of conviction in the second trial. State v. Grogan, 40 N.C. App. 371, 253 S.E.2d 20 (1979).

Time for Review of Denial. — Unlike an order granting a motion to suppress evidence in a criminal case, which is appealable prior to trial, an order denying a defendant's motion to suppress may be reviewed only after a judgment of conviction. State v. Grogan, 40 N.C. App. 371, 253 S.E.2d 20 (1979).

This Article not only requires the defendant to raise his motion to suppress the evidence according to its mandate, but also places the burden on the defendant to demonstrate that he has done so. Thus, where the record reflects only general objections to the admission of the evidence obtained in a search, the defendants have waived any right to challenge the evidence on constitutional grounds. State v. Drakeford, 37 N.C. App. 340, 246 S.E.2d 55 (1978).

Notice of Intention to Appeal Required. — When a defendant intends to appeal from a suppression motion denial pursuant to subsection (b) of this section, he must give notice of his intention to the prosecutor and the court before plea negotations are finalized or he will waive the appeal of right provisions of the statute. State v. Reynolds, 298 N.C. 380, 259 S.E.2d 843 (1979), cert. denied, 446 U.S. 941, 100 S. Ct. 2164, 64 L. Ed. 2d 795 (1980); State v. Afflerback, 46 N.C. App. 344, 264 S.E.2d 784 (1980).

Review of Judgment on Motion Made In Limine. — When the motion to suppress must be and is made in limine or can be and is made in limine, then the defendant can appeal if the motion is denied and he enters a plea of guilty; and the State can appeal if the motion is granted. State v. Tate, 300 N.C. 180, 265 S.E.2d 223 (1980).

Time for Appealing Denial of Motion Made for First Time at Trial. — When the motion to suppress can be and is made for the first time at trial, then, if the motion is denied, "an order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction." State v. Tate, 300 N.C. 180, 265 S.E.2d 223 (1980).

The clear implication of subsection (d) of this section is that motions to suppress evidence which are not based on the two grounds specified in § 15A-974 may or may not be made in limine. State v. Tate, 300 N.C. 180, 265 S.E.2d 223 (1980).

Defendant Waived Right to Challenge on Constitutional Grounds. — Where there was no finding by the trial court that the defendant had reasonable opportunity to move to suppress the evidence within the statutory time limit, and there was no indication in the record as to whether a motion to suppress was made at any time by the defendant, the Court of Appeals was

unable to determine whether the defendant presented his objection in a timely fashion and in suitable form. The record reflecting only general objections to the admission of the evidence, the defendants waived any right to challenge the evidence on constitutional grounds. State v. Drakeford, 37 N.C. App. 340, 246 S.E.2d 55 (1978).

Applied in State v. Jordan, 40 N.C. App. 412, 252 S.E.2d 857 (1979); State v. Hendricks, 43 N.C. App. 245, 258 S.E.2d 872 (1979).

Cited in State v. Flynn, 33 N.C. App. 492, 235 S.E.2d 424 (1977); State v. Dailey, 33 N.C. App. 600, 235 S.E.2d 917 (1977); State v. Thomas, 34 N.C. App. 534, 239 S.E.2d 281 (1977); State v. Fruitt, 35 N.C. App. 177, 241 S.E.2d 125 (1978); State v. Paschal, 35 N.C. App. 239, 241 S.E.2d 92 (1978); State v. Odom, 35 N.C. App. 374, 241 S.E.2d 372 (1978); State v. Summerlin, 35 N.C. App. 522, 241 S.E.2d 732 (1978); State v. Bunn, 36 N.C. App. 114, 243 S.E.2d 189 (1978); State v. McLeod, 36 N.C. App. 469, 244 S.E.2d 716 (1978); State v. Alford, 38 N.C. App. 236, 247 S.E.2d 634 (1978); State v. Stinson, 39 N.C. App. 313, 249 S.E.2d 891 (1979); State v. Prevette, 39 N.C. App. 470, 250 S.E.2d 682 (1979); State v. Forrest, 41 N.C. App. 160, 254 S.E.2d 194 (1979); State v. Morris, 41 N.C. App. 164, 254 S.E.2d 241 (1979); State v. Phifer, 297 N.C. 216, 254 S.E.2d 586 (1979); State v. Alford, 298 N.C. 465, 259 S.E.2d 242 (1979); State v. Sheppard, 42 N.C. App. 125, 256 S.E.2d 241 (1979); State v. Prevette, 43 N.C. App. 450, 259 S.E.2d 595 (1979); State v. Whitt, 299 N.C. 393, 261 S.E.2d 914 (1980); State v. Wynn, 45 N.C. App. 267, 262 S.E.2d 689 (1980); State v. Satterfield, 300 N.C. 621, 268 S.E.2d 510 (1980).

SUBCHAPTER X. GENERAL TRIAL PROCEDURE.

ARTICLE 56.

Incapacity to Proceed.

§ 15A-1001. No proceedings when defendant mentally incapacitated; exception.

Legal Periodicals. — For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

CASE NOTES

Subsection (a) of this section expresses a legislative intent to alter the existing case law governing the determination of whether a defendant is mentally incapable of proceeding to trial. State v. Jenkins, 300 N.C. 578, 268 S.E.2d 458 (1980).

Subsection (a) of this section clearly sets forth in the disjunctive three tests of mental incapacity to proceed, and the failure to meet any one would suffice to bar criminal proceedings against a defendant. The statute does not, however, require the trial judge to make a specific finding that defendant is able to cooperate with his counsel to the end that any available defense may be interposed. State v. Jenkins, 300 N.C. 578, 268 S.E.2d 458 (1980).

The test for capacity to stand trial is whether a defendant has capacity to comprehend his position, to understand the nature of the proceedings against him, to conduct his defense in a rational manner and to cooperate with his counsel so that any available defense may be interposed. State v. Jackson, 302 N.C. 101, 273 S.E.2d 666 (1981).

Incapacity to Enter Plea. — If a defendant is incompetent to stand trial, he is also incompetent to enter a voluntary, knowledgeable guilty plea. Meeks v. Smith, 512 F. Supp. 335 (W.D.N.C. 1981).

Question of Capacity in Trial Judge's Discretion. — The question of defendant's capacity is within the trial judge's discretion and his determination thereof, if supported by the evidence, is conclusive on appeal. State v. Reid, 38 N.C. App. 547, 248 S.E.2d 390 (1978), cert. denied, 296 N.C. 588, 254 S.E.2d 31 (1979).

Quoted in State v. Buie, 297 N.C. 159, 254 S.E.2d 26 (1979).

§ 15A-1002. Determination of incapacity to proceed; evidence; temporary commitment; temporary orders.

(d) Any report made to the court pursuant to this section shall be forwarded to the clerk of superior court in a sealed envelope addressed to the attention of a presiding judge, with a covering statement to the clerk of the fact of the examination of the defendant and any conclusion as to whether the defendant has or lacks capacity to proceed. A copy of the full report must be forwarded to defense counsel, or to the defendant if he is not represented by counsel, and to the district attorney. Until such report becomes a public record, the full report to the court shall be kept under such conditions as are directed by the court, and its contents shall not be revealed except as directed by the court. Any report made to the court pursuant to this section shall not be a public record unless introduced into evidence. (1973, c. 1286, s. 1; 1975, c. 166, ss. 20, 27; 1977, cc. 25, 860; 1979, 2nd Sess., c. 1313.)

Effect of Amendments. — The 1979, 2nd Sess., amendment substituted "must" for "shall" in the second sentence of subsection (d), added "and to the district attorney" at the end of that sentence, and deleted the former third sentence of subsection (d), which read "A copy of the covering statement shall be forwarded to the district attorney."

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (d) is set out.

Legal Periodicals. — For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

CASE NOTES

Constitutionality. — This State's statutory scheme for determining a defendant's capacity to proceed is, on its face, constitutionally adequate to protect a defendant's right not to be tried while legally incompetent. State v. Taylor, 298 N.C. 405, 259 S.E.2d 502 (1979).

Ability to Plead, etc. —

Where the evidence raises a "bona fide doubt" as to a defendant's competence to stand trial, the court must conduct a thorough inquiry before it allows a defendant to be tried or to plead guilty. Meeks v. Smith, 512 F. Supp. 335 (W.D.N.C. 1981).

Test of Capacity to Stand Trial. — In determining a defendant's capacity to stand trial, the test is whether he has the capacity to comprehend this position, to understand the nature and object of the proceedings against him, to conduct his defense in a rational manner, and to cooperate with his counsel to the end that any available defense may be interposed. State v. Bundridge, 294 N.C. 45, 239 S.E.2d 811 (1978), decided under repealed § 122-84.

Decision Rests Within Discretion of Trial Court. —

In accord with 2nd paragraph in 1979 Cum. Supp. See State v. See, 301 N.C. 388, 271 S.E.2d 282 (1980).

Under former § 122-91, the decision whether to grant a motion for commitment for psychiatric examination to determine competency lay within the sound discretion of the trial judge. This section contains no provision making the granting of such a motion mandatory, and the decision remains within the sound judicial discretion of the trial court. State v. Woods, 293 N.C. 58, 235 S.E.2d 47 (1977).

A defendant does not have an automatic right to a pretrial psychiatric examination and the resolution of this matter is within the trial court's discretion. State v. Crews, 296 N.C. 607, 252 S.E.2d 745 (1979).

The established rule in North Carolina, unchanged by statutory enactments, is that the decision whether to grant a motion for commitment for psychiatric examination to determine competency to stand trial lies within the sound discretion of the trial judge. State v. Williams, 38 N.C. App. 183, 247 S.E.2d 620 (1978).

Although a defendant has the right to a hearing on his capacity to proceed when that question is properly raised, whether to have a defendant examined by a medical expert is within the trial court's discretion. State v. McGuire, 297 N.C. 69, 254 S.E.2d 165, cert. denied, 444 U.S. 943, 100 S. Ct. 300, 62 L. Ed. 2d 310 (1979).

The question of capacity of a criminal defendant to proceed may be raised at any time by the defendant, defense counsel, prosecutor, or the court and, further, the court may order medical examination of the defendant or commitment of the defendant to a mental

health facility for observation and treatment, but it must hold a hearing to determine the defendant's capacity to proceed. Meeks v. Smith, 512 F. Supp. 335 (W.D.N.C. 1981).

Judge's Findings of Fact Conclusive on Appeal. — When the trial judge conducts the inquiry under this section without a jury, the court's findings of fact, if supported by competent evidence, are conclusive on appeal. State v. Clark, 300 N.C. 116, 265 S.E.2d 204 (1980).

In an inquiry into a defendant's capacity to proceed, the issue may be resolved by the trial court with or without the aid of a jury, and when the trial judge conducts the inquiry without a jury, the court's findings of fact, if supported by competent evidence, are conclusive on appeal. State v. Jackson, 302 N.C. 101, 273 S.E.2d 666 (1981).

Applicability of Physician-Patient Privilege. — Where the mental capacity of the accused to proceed to trial is questioned on motion of defense counsel and the trial court commits the defendant to a State mental health facility for examination to determine the defendant's capacity to proceed, the physician-patient privilege does not preclude the examining psychiatrist from testifying at trial on the insanity issue. State v. Hodgen, 47 N.C. App. 329, 267 S.E.2d 32, cert. denied, 301 N.C. 100, 273 S.E.2d 305 (1980).

No Equal Protection Issue Presented by Denial of Request for Commitment. — Since the fact that the defendant was indigent was irrelevant to the applicability of this section, there was no equal protection issue presented where the trial court denied the defendant's request for a commitment and psychiatric examination to determine his capacity to stand trial. State v. Woods, 293 N.C. 58, 235 S.E.2d 47 (1977).

Order Declaring Defendant Incapacitated as Evidence at Subsequent Trial. — An order entered by a trial judge declaring defendant mentally incapacitated and unable to proceed to trial was some evidence of defendant's mental condition and was admissible at trial on the question of his insanity. When such evidence is admitted, the trial judge should clearly instruct the jury that this evidence is not conclusive but is merely another circumstance to be considered by the jury in reaching its decision. State v. Bundridge, 294 N.C. 45, 239 S.E.2d 811 (1978), decided under repealed § 122-84.

Requirements of subdivision (b)(3) of this section held satisfied in prosecution for armed robbery. See State v. Williams, 38 N.C. App. 183, 247 S.E.2d 620 (1978).

That Defendant Is Competent Only as Result of Medication Not Important. — Where there was competent, uncontradicted expert opinion that the defendant was capable of standing trial based on personal observation of defendant and sufficient to support the trial court's conclusion that defendant was capable of proceeding, the additional fact that defendant was competent only as a result of receiving medication did not require a different result. State v. Buie, 297 N.C. 159, 254 S.E.2d 26, cert. denied, 444 U.S. 971, 100 S. Ct. 464, 62 L. Ed. 2d 386 (1979).

Waiver of Hearing Right. —

Where a defendant fails to assert his alleged incompetence at a hearing, he is not barred from seeking collateral relief, for an incompetent cannot waive the right to be exempt from trial, nor can his attorney's failure to raise the issue be construed as waiver. Meeks v. Smith, 512 F. Supp. 335 (W.D.N.C. 1981).

Failure to Determine Competency. — In a criminal prosecution where there was a reasonable doubt as to the defendant's sanity, and where neither the court nor counsel sought to utilize the procedures provided by the State for determining competency, the defendant was not afforded full protection of the law. Meeks v. Smith, 512 F. Supp. 335 (W.D.N.C. 1981).

Finding of Competency Supported By Evidence. — There was no merit to defendant's argument that because the court did not adopt the report by the State on defendant's capacity to stand trial, any finding that defendant suffered some sort of mental disease was unsupported by the evidence, nor was there merit to his argument that the trial court was required to adopt the psychiatric report of either the State or the defense but could not arrive at an independent conclusion, and the finding of the trial judge that defendant was competent to stand trial was clearly supported by the evidence where evidence offered by the State indicated defendant was fully capable of standing trial; testimony for the defense was to the effect that in stressful situations the defendant manifested some symptoms of mental illness; but defendant's expert witness also stated that in his opinion defendant understood the nature of the proceedings against him. State v. Jackson, 302 N.C. 101, 273 S.E.2d 666 (1981).

Applied in State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979); State v. Mayhand, 298 N.C. 418, 259 S.E.2d 231 (1979); State v. Potts, 42 N.C. App. 357, 256 S.E.2d 497 (1979); State v. Womble, 44 N.C. App. 503, 261 S.E.2d 263 (1980); State v. Hoyle, 49 N.C. App. 98, 270 S.E.2d 582 (1980); State v. Easterling, 300 N.C. 594, 268 S.E.2d 800 (1980); Chavis v. North Carolina, 637 F.2d 213 (4th Cir. 1980).

Cited in State v. Jones, 295 N.C. 345, 245 S.E.2d 711 (1978).

§ 15A-1003. Referral of incapable defendant for civil commitment proceedings.

CASE NOTES

Cited in In re Rogers, 44 N.C. App. 713, 262 S.E.2d 312 (1980); Meeks v. Smith, 512 F. Supp. 335 (W.D.N.C. 1981).

OPINIONS OF ATTORNEY GENERAL

Examination by Physician Is Required. — When a defendant is found incapable of proceeding with a criminal trial and the trial court takes the action directed by G.S. 15A-1003(a), the examination by a qualified physician as described in G.S. 122-58.4 is required. See opinion of Attorney General to Dr. William Thomas, Chief of Adult Services, Division of Mental Health and Mental Retardation Services, 48 N.C.A.G. 1 (1978).

ARTICLE 57.

Pleas.

§ 15A-1012. Aid of counsel; time for deliberation.

CASE NOTES

Defendant was not prejudiced by the fact that he may not have been informed of his right to be represented by counsel before he entered a guilty plea where defendant has not argued that he was indigent and therefore entitled to appointed counsel at the time he entered his guilty plea or that he lacked the opportunity to retain counsel between the time of his arrest and trial. State v. Grimes, 47 N.C. App. 476, 267 S.E.2d 387 (1980).

Quoted in State v. Lee, 40 N.C. App. 165, 252 S.E.2d 225 (1979).

Cited in State v. Sanders, 294 N.C. 337, 240 S.E.2d 788 (1978).

ARTICLE 58.

Procedures Relating to Guilty Pleas in Superior Court.

§ 15A-1021. Plea conference; improper pressure prohibited; submission of arrangement to judge; restitution and reparation as part of plea arrangement agreement, etc.

(a) In superior court, the prosecution and the defense may discuss the possibility that, upon the defendant's entry of a plea of guilty or no contest to one or more offenses, the prosecutor will not charge, will dismiss, or will move for the dismissal of other charges, or will recommend or not oppose a particular sentence, including a prison term different from the presumptive prison term applicable to the defendant, if convicted, under G.S. 15A-1340.4(f). If the defendant is represented by counsel in the discussions the defendant need not be present. The trial judge may participate in the discussions.

(b) No person representing the State or any of its political subdivisions may bring improper pressure upon a defendant to induce a plea of guilty or no contest.

(c) If the parties have reached a proposed plea arrangement in which the prosecutor has agreed to recommend a particular sentence, they may, with the permission of the trial judge, advise the judge of the terms of the arrangement and the reasons therefor in advance of the time for tender of the plea. The proposed plea arrangement may include a provision for the defendant to make restitution or reparation to an aggrieved party or parties for the damage or loss caused by the offense or offenses committed by the defendant. The judge may indicate to the parties whether he will concur in the proposed disposition. The judge may withdraw his concurrence if he learns of information not consistent with the representations made to him.

(d) When restitution or reparation by the defendant is a part of the plea arrangement agreement, if the judge concurs in the proposed disposition he may order that restitution or reparation be made as a condition of special probation pursuant to the provisions of G.S. 15A-1351, or probation pursuant to the provisions of G.S. 15A-1343(d). If an active sentence is imposed the court may order that the defendant make restitution or reparation out of any earnings gained by the defendant if he attains work release privileges under the provisions of G.S. 148-33.1, or that restitution or reparation be imposed as a condition of parole in accordance with the provisions of G.S. 148-57.1. The order providing for restitution or reparation shall be in accordance with the applicable provisions of G.S. 15A-1343(d).

When restitution or reparation is ordered as a part of a plea arrangement or a condition of parole or work release privileges, the sentencing court shall enter as a part of the commitment that restitution or reparation is ordered as a part of a plea arrangement. The Administrative Office of the Courts shall prepare and distribute forms which provide for ample space to make restitution or reparation orders incident to commitments. (1973, c. 1286, s. 1; 1975, c. 117; c. 166, s. 27; 1977, c. 614, ss. 3, 4; 1977, 2nd Sess., c. 1147, s. 1; 1979, c. 760, s. 3.)

Effect of Amendments. — The 1977, 2nd Sess., amendment, effective July 1, 1978, divided subsection (d) into two paragraphs, and, in the first paragraph, inserted "as a condition of special probation" and substituted "15A-1351" for "15-199(10)" and "15A-1343(d)" for "15-197.1" in the first sentence, inserted "probation" following "or" near the end of the first sentence and substituted "15A-1343(d)" for "15-199(10)" at the end of the third sentence. In the second paragraph of subsection (d), the amendment deleted "which forms shall be conveniently structured to enable the sentencing court to make its order" at the end of the paragraph.

The 1979 amendment, effective July 1, 1981, added at the end of the first sentence of subsection (a) "including a prison term different from the presumptive prison term applicable to the defendant, if convicted, under G.S. 115A-1340.4(f)." The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

Legal Periodicals. — For article, "Plea Bargaining in North Carolina," see 54 N.C.L. Rev. 823 (1976).

CASE NOTES

There is no absolute right to have a guilty plea accepted. State v. Collins, 300 N.C. 142, 265 S.E.2d 172 (1980).

The State may withdraw from a plea bargain arrangement at any time prior to, but not after, the actual entry of the guilty plea by defendant or any other change of position by him constituting detrimental reliance upon the arrangement. State v. Collins, 300 N.C. 142, 265 S.E.2d 172 (1980).

Where a defendant elects not to stand by his portion of a plea agreement, the State is not bound by its agreement to forego the greater charge. State v. Fox, 34 N.C. App. 576, 239 S.E.2d 471 (1977).

Appeal to Superior Court for Trial de Novo. — Where a defendant originally charged with felonies entered guilty pleas to misdemeanors in the district court pursuant to a plea bargain with the State, but then appealed to the superior court for a trial de novo, the State was not bound by the agreement and could try the defendant upon the felony charges or any lesser included offenses. State v. Fox, 34 N.C. App. 576, 239 S.E.2d 471 (1977).

Applied in State v. Puckett, 43 N.C. App. 153, 258 S.E.2d 393 (1979).

Cited in Warren v. Marion, 465 F. Supp. 303 (E.D.N.C. 1978); State v. Dickens, 299 N.C. 76, 261 S.E.2d 183 (1980).

§ 15A-1022. Advising defendant of consequences of guilty plea; informed choice; factual basis for plea; admission of guilt not required.

CASE NOTES

Factual Basis for Plea. — This section, if it is to be given any meaning at all, must contemplate that some substantive material independent of the plea itself appear of record which tends to show that defendant is, in fact, guilty. State v. Sinclair, 301 N.C. 193, 270 S.E.2d 418 (1980).

Sources of Information in Subsection (c) Not Exclusive. — Subsection (c) of this section does not require the trial judge to elicit evidence from each, any or all of the enumerated sources. Those sources are not exclusive because the statute specifically so provides. The trial judge may consider any information properly brought to his attention in determining whether there is a factual basis for a plea of guilty or no contest. State v. Dickens, 299 N.C. 76, 261 S.E.2d 183 (1980).

This section does not require the trial judge to elicit evidence from each, any or all of the enumerated sources. The trial judge may consider any information properly brought to his attention in determining whether there is a factual basis for a plea of guilty or no contest. State v. Sinclair, 301 N.C. 193, 270 S.E.2d 418 (1980).

"A written statement of the defendant" as a source of information under subsection (c) of this section ordinarily consists of defendant's written answers to the questions contained in a document entitled "Transcript of Plea." State v. Dickens, 299 N.C. 76, 261 S.E.2d 183 (1980).

Evidentiary hearings on a motion to withdraw a plea are mandatory "only when necessary to resolve questions of fact." State v. Sinclair, 45 N.C. App. 586, 263 S.E.2d 811 (1980) (in which no such question was found to exist).

Applied in State v. Puckett, 43 N.C. App. 153, 258 S.E.2d 393 (1979); State v. Dickens, 299 N.C. 76, 261 S.E.2d 183 (1980).

§ 15A-1023. Action by judge in plea arrangements relating to sentence; no approval required when arrangement does not relate to sentence.

CASE NOTES

There is no absolute right to have a guilty plea accepted. The State may withdraw from a plea bargain arrangement at any time prior to, but not after, the actual entry of the guilty plea by defendant or any other change of position by him constituting detrimental reliance upon the arrangement. State v. Collins, 300 N.C. 142, 265 S.E.2d 172 (1980).

Applied in State v. Collins, 44 N.C. App. 141, 260 S.E.2d 650 (1979).

§ 15A-1024. Withdrawal of guilty plea when sentence not in accord with plea arrangement.

CASE NOTES

Witness Withholding Evidence on Grounds Agreement Might Be Revoked. — A witness who had entered a guilty plea pursuant to a plea bargain to the same crimes for which defendant was being tried but who had not been sentenced had a right to refuse to answer questions in defendant's trial on the ground that his answers might tend to incriminate him since there was a possibility that the witness would be tried on the charges if the trial judge decided to impose a different sentence than that agreed upon in the plea bargain. State v. Corbin, 48 N.C. App. 194, 268 S.E.2d 260, cert. denied, 301 N.C. 97, 273 S.E.2d 301 (1980).

Applied in State v. Puckett, 299 N.C. 727, 264 S.E.2d 96 (1980).

§ 15A-1025. Plea discussion and arrangement inadmissible.

Legal Periodicals. — For survey of 1976 case law on criminal procedure, see 55 N.C.L. Rev. 989 (1977).

For a survey of 1977 law on evidence, see 56 N.C.L. Rev. 1069 (1978).

§ 15A-1026. Record of proceedings.

CASE NOTES

Applied in State v. Dickens, 299 N.C. 76, 261 S.E.2d 183 (1980).

ARTICLE 59.

Maintenance of Order in the Courtroom.

§ 15A-1031. Custody and restraint of defendant and witnesses.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

Legal Periodicals. — For an article entitled, "Trial Stage and Appellate Procedure Act: An Overview," see 14 Wake Forest L. Rev. 899 (1978).

For an article entitled, "Contempt, Order in the Courtroom, Mistrials," see 14 Wake Forest L. Rev. 909 (1978).

ARTICLE 61.

Granting of Immunity to Witnesses.

§ 15A-1051. Immunity; general provisions.

CASE NOTES

Standing to Challenge Grant of Immunity to Witness. — Defendants had no standing to challenge either the propriety or the effectiveness of a grant of immunity to a witness testifying against them since the privilege against self-incrimination is a personal one. State v. Phillips, 297 N.C. 600, 256 S.E.2d 212 (1979).

§ 15A-1052. Grant of immunity in court proceedings.

CASE NOTES

This section requires the trial judge to inform the jury "of the grant of immunity" and not the details of the grant. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

The legislature intended for the jury to know the witness was receiving something of value in exchange for his testimony which might bear on his credibility. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

Subsection (c) contains a mandatory "scrutiny" instruction when a witness testifies under immunity, but such an instruction is not mandated under an arrangement short of "immunity," such as charge reduction or sentence concession, as provided for in § 15A-1054. State v. Bagby, 48 N.C. App. 222, 268 S.E.2d 233 (1980).

Instruction Need Not Be Given Immediately before Witness's Testimony. — Nothing in this section requires the instruction in subsection (c) to be given immediately before the witness's testimony. The statute only specifies that the instruction be given "prior" to the testimony. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

Instruction Given before Any Witness Called. — The trial judge's instruction as to the grant of immunity complied with the spirit as well as the letter of the law where it was given before any witnesses were called in the case, but not immediately before the witness testified. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

Jury Should Be Instructed in Final Charge. — Subsection (c) clearly requires the court to instruct the jury as to the interest of the witness under the grant of immunity but "during the charge to the jury." This language means during the judge's final charge, and not in advance of the witness's testimony. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

Substantial Compliance. — Where the material terms of the grant of immunity are explained to the jury, there is substantial compliance with this section and no prejudicial error. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

Instruction on Interest Not Necessary. — Where there is no evidence to show that the witnesses were accomplices in the shooting, testifying under a grant of immunity from the State, or otherwise clearly interested witnesses, whether the witnesses should be considered interested parties is a question for jury. State v. Moore, 301 N.C. 262, 271 S.E.2d 242 (1980).

In a prosecution for murder, the trial court did not err in failing to instruct the jury that two witnesses who testified pursuant to an agreement that they would not be prosecuted for certain charges against them were interested in the verdict, the instruction on the credibility of the witnesses being sufficient where the court instructed that if either or both of the witnesses testified in whole or in part because of such concessions, the jury should examine the testimony of that witness with great care and caution, and that if the jurors should believe the testimony in whole or in part, they should treat what they believed the same as any other reliable evidence. State v. Keller, 50 N.C. App. 364, 273 S.E.2d 741 (1981).

§ 15A-1054. Charge reductions or sentence concessions in consideration of truthful testimony.

CASE NOTES

"Scrutiny" Instruction Not Required. — Section 15A-1052(c) contains a mandatory "scrutiny" instruction when a witness testifies under immunity, but such an instruction is not mandated under an arrangement short of "immunity," such as charge reduction or sentence concession, as provided for in this section. State v. Bagby, 48 N.C. App. 222, 268 S.E.2d 233 (1980).

Where Witness's Credibility Important, Jury Is Entitled to Know of Leniency Agreement. — Where the prosecutor remained silent while his witness testified that no plea arrangement had been made with the State, though he well knew that such an agreement did exist, and not only did the prosecutor allow the jury to be misled as to the witness's reasons for testifying, but by keeping him ignorant of the terms of the plea bargain, he contrived a means of ensuring that this evidence would not come before the jury, and the witness's credibility as a witness was an important issue in the case, evidence of any understanding or agreement for leniency was relevant to his credibility, and the jury was entitled to know of it. Campbell v. Reed, 594 F.2d 4 (4th Cir. 1979).

The remedy for failure to comply with subsection (c) of this section is the granting of a recess upon motion by the defendant, rather than suppression of the testimony. State v. Lester, 294 N.C. 220, 240 S.E.2d 391 (1978).

In a prosecution for murder, the district attorney violated subsection (c) of this section by failing to give defendants written notice prior to trial of an offer to permit a State's witness to plead guilty to misdemeanors in 11 felony cases pending against him in return for his truthful testimony against defendants where the witness testified that, although no deal had been made, he nevertheless expected the district attorney to reduce the felony charges to misdemeanors, and it appeared that the plea bargain offer may have induced the witness's testimony; however, the district attorney's noncompliance with the statute did not require suppression of the witness's testimony since the remedy for failure to comply with the statute was to move for a recess. State v. Spicer, 50 N.C. App. 214, 273 S.E.2d 521 (1981).

ARTICLE 62.

Mistrial.

§ 15A-1061. Mistrial for prejudice to defendant.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

Legal Periodicals. — For an article entitled, "Trial Stage and Appellate Procedure Act: An Overview," see 14 Wake Forest L. Rev. 899 (1978).

For an article entitled, "Contempt, Order in the Courtroom, Mistrials," see 14 Wake Forest L. Rev. 909 (1978).

CASE NOTES

A motion for mistrial must be granted if there occurs an incident of such a nature that it would render a fair and impartial trial impossible under the law. State v. McCraw, 300 N.C. 610, 268 S.E.2d 173 (1980).

Mistrial Is Matter of Court's Discretion. — The decision as to whether substantial and irreparable prejudice has occurred lies within the court's discretion and, absent a showing of abuse of that discretion, the decision of the trial court will not be disturbed on appeal. State v. Mills, 39 N.C. App. 47, 249 S.E.2d 446 (1978), cert. denied, 296 N.C. 588, 254 S.E.2d 33 (1979); State v. Allen, 50 N.C. App. 173, 272 S.E.2d 785 (1980).

Ruling on a motion for mistrial in a criminal

case less than capital rests largely in the discretion of the trial court. State v. McCraw, 300 N.C. 610, 268 S.E.2d 173 (1980).

The denial of a motion for a mistrial based on alleged misconduct affecting the jury is equivalent to a finding by the trial judge that prejudicial misconduct has not been shown. State v. Jones, 50 N.C. App. 263, 273 S.E.2d 327 (1981).

The trial court did not abuse its discretion in denying defendants' motions for severance or for a mistrial on the ground that they did not receive a fair and impartial trial due to the in-court outbursts of a codefendant, where, when possible, the trial judge immediately removed the members of the jury from the courtroom when an outburst occurred, and he admonished them not to deliberate on it, when it became apparent that the codefendant would continue to disrupt the proceedings despite the court's warnings, he was removed from the courtroom and at this time the court told the jury to totally disregard the whole matter, and they unanimously indicated that they could do so, and where in his final charge to the jury, the judge again instructed the jury not to allow the codefendant's behavior to influence its decision. State v. McGuire, 297 N.C. 69, 254 S.E.2d 165, cert. denied, 444 U.S. 943, 100 S. Ct. 300, 62 L. Ed. 2d 310 (1979).

Where one juror heard a statement made by a rejected juror during the jury selection process, the trial court did not err in not declaring a mistrial since only one juror heard the statement; defendant and his counsel stated that they did not want the juror removed; the court carefully examined the juror who heard the statement as to whether it would in any way influence his verdict in the case, and the court offered defendant's counsel an opportunity to examine the jury further with respect to the statement, but counsel stated they were content with the original 12 jurors. State v. Pollock, 50 N.C. App. 169, 273 S.E.2d 501 (1980).

The trial court did not err in denying defendant's motion for a mistrial made on the ground that one of the prosecuting witnesses entered the jury room during a recess at the conclusion of the trial but prior to the charge of the court, since the trial judge determined that the prosecuting witness knocked at the door of the jury room, came through the room and used the restroom, but did not communicate with any of the jurors. State v. Billups, 301 N.C. 607, — S.E.2d — (1981).

In a prosecution of defendant for conspiracy to commit forgery, and conspiracy to utter forged instruments, the trial court did not err in permitting the State to question a witness with respect to another offense unrelated to the case being tried and in denying defendant's motion for a mistrial because of the admission of the evidence and comments of the district attorney which followed, since the court instructed the jury that the objectionable evidence had nothing to do with the case, that the jury should strike the evidence from their minds, and that any juror who could not do so should raise his hand, which no juror did. State v. Pruitt, 301 N.C. 683, 273 S.E.2d 264 (1981).

In a prosecution of defendant for armed robbery and murder, trial court did not commit prejudicial error in denying defendant's motion for a mistrial after striking the testimony of several witnesses concerning the absence of fingerprints of defendant at the murder scene and the absence of gunpowder on the hands of bystanders after the robbery-murder since the trial court, after the motions to strike were allowed, instructed the jury not to consider the stricken evidence and specifically referred to the evidence and the witness who provided it, and since there was no way in which defendant would have been prejudiced by the evidence had it not been withdrawn from the jury's consideration; defendant's motion for mistrial was a matter addressed to the sound discretion of the trial judge, and no abuse of that discretion appeared. State v. Smith, 301 N.C. 695, — S.E.2d — (1981).

In a prosecution for first-degree murder and armed robbery, it was not improper for the prosecutor to use in his jury argument a revolver which had been offered in evidence in the trial so long as he did not attempt to draw any inferences from the weapon which were not supported by the evidence or to frighten or intimidate the jury with it; thus, the trial court properly did not grant a mistrial. State v. Oliver, 302 N.C. 28, 274 S.E.2d 183 (1981).

In a first-degree rape case the trial court did not err in denying defendant's motion for mistrial based on the discovery by defendant, on the fourth day of trial, of a previously undisclosed lab report which revealed that an expert had found insufficient characteristics present in the photographs of shoeprints at the crime scene to enable the examiner to render an opinion as to whether defendant's shoes could have made the heel impressions shown in the photographs where the existence of that report in no way affected the competency of the investigating officer's testimony concerning his personal observation of the shoeprints and where defendant did not take advantage of the trial court's offer to assist in locating the expert if defendant thought his testimony would be helpful and although defendant obtained possession of the report before the State rested its case, he made no effort to introduce the report into evidence; inasmuch as the report was prepared in connection with the investigation of the case, the report was not statutorily discoverable except by voluntary disclosure.

State v. Jackson, 302 N.C. 101, 273 S.E.2d 666 (1981).

The problem of exposure of jurors to news media reports during trial is primarily one for the trial judge, who must weigh all the circumstances in determining in his sound judicial discretion whether the defendant's right to a fair trial has been violated so as to require a mistrial when information or evidence reaches the jury which would not be admissible at trial. State v. Jones, 50 N.C. App. 263, 273 S.E.2d 327 (1981).

Same — Mistrial Not Required. — In a prosecution for possession and sale of heroin, where three jurors read a newspaper article which included information of defendant's prior conviction on a charge of selling heroin which was not admissible at trial, defendant was not entitled to a mistrial, since evidence of another prior transaction in which an officer paid defendant $350.00 for a white powder was properly admitted; the trial judge examined the jurors who had read the newspaper article and justifiably concluded that they had not formed an opinion as a result of reading the article and that they could make a decision based solely on the evidence presented at trial; and defendant did not request the right to examine the jurors. State v. Jones, 50 N.C. App. 263, 273 S.E.2d 327 (1981).

Cited in State v. Love, 296 N.C. 194, 250 S.E.2d 220 (1978).

§ 15A-1062. Mistrial for prejudice to the State.

CASE NOTES

By the enactment of this section and § 15A-1063 the General Assembly did not intend to limit the authority of trial judges to order a mistrial where events not instigated by the defendant or his lawyer have nevertheless colored the proceedings in such a way as to suggest that an impartial trial in accordance with law cannot be had. State v. Cooley, 47 N.C. App. 376, 268 S.E.2d 87, cert. denied, — N.C. —, 273 S.E.2d 442 (1980).

An order of mistrial based upon the provisions of this section was not proper even though there was some evidence of jury tampering, where there was no evidence of any connection between defendant or his attorney and the alleged jury tampering, and the possibility or risk that defendant might be the beneficiary of such activity was not sufficient to allow a conclusion that the acts were done at the behest of defendant or his lawyer. State v. Cooley, 47 N.C. App. 376, 268 S.E.2d 87, cert. denied, — N.C. —, 273 S.E.2d 442 (1980).

§ 15A-1063. Mistrial for impossibility of proceeding.

CASE NOTES

By the enactment of § 15A-1062 and this section the General Assembly did not intend to limit the authority of trial judges to order a mistrial where events not instigated by the defendant or his lawyer have nevertheless colored the proceedings in such a way as to suggest that an impartial trial in accordance with law cannot be had. State v. Cooley, 47 N.C. App. 376, 268 S.E.2d 87, cert. denied, — N.C. —, 273 S.E.2d 442 (1980).

Where the trial court has reasonable grounds to believe that one or more jurors have been tampered with, it has the constitutional authority, if not the duty, to stop the trial, dismiss the jury, and direct a retrial. State v. Cooley, 47 N.C. App. 376, 268 S.E.2d 87, cert. denied, — N.C. —, 273 S.E.2d 442 (1980).

SUBCHAPTER XI. TRIAL PROCEDURE IN DISTRICT COURT.

ARTICLE 65.

In General.

§ 15A-1101. Applicability of superior court procedure.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

Legal Periodicals. — For an article entitled, "Trial Stage and Appellate Procedure Act: An Overview," see 14 Wake Forest L. Rev. 899 (1978).

For an article reviewing trial procedure under Subchapters XI and XII, see 14 Wake Forest L. Rev. 949 (1978).

SUBCHAPTER XII. TRIAL PROCEDURE IN SUPERIOR COURT.

ARTICLE 71.

Right to Trial by Jury.

§ 15A-1201. Right to trial by jury.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

Legal Periodicals. — For an article entitled, "Trial Stage and Appellate Procedure Act: An Overview," see 14 Wake Forest L. Rev. 899 (1978).

For an article reviewing trial procedure under Subchapters XI and XII, see 14 Wake Forest L. Rev. 949 (1978).

ARTICLE 72.

Selecting and Impaneling the Jury.

§ 15A-1211. Selection procedure generally; role of judge; challenge to the panel; authority of judge to excuse jurors.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

Legal Periodicals. — For an article entitled, "Trial Stage and Appellate Procedure Act: An Overview," see 14 Wake Forest L. Rev. 899 (1978).

For an article reviewing trial procedure under Subchapters XI and XII, see 14 Wake Forest L. Rev. 949 (1978).

CASE NOTES

A motion made pursuant to subsection (c)(1) of this section must be made and decided before any juror is examined. State v. Lynch, 300 N.C. 534, 268 S.E.2d 161 (1980).

In order to justify a dismissal of an indictment on grounds that statutory procedures were violated in the compilation of the jury list, a party must show either corrupt intent, discrimination, or irregularities which affect the actions of the jurors actually drawn and summoned. State v. Vaughn, 296 N.C. 167, 250 S.E.2d 210 (1978), cert. denied, 441 U.S. 935, 99 S. Ct. 2060, 60 L. Ed. 2d 665 (1979).

Mere Violation of Statutory Procedures Will Not Merit Quashing an Indictment. — In the absence of statutory language indicating that preparation of jury lists shall be void if the directions of the act be not strictly observed, a mere showing of a violation of the statutory procedures will not merit the quashing of an indictment. State v. Vaughn, 296 N.C. 167, 250 S.E.2d 210 (1978), cert. denied, 441 U.S. 935, 99 S. Ct. 2060, 60 L. Ed. 2d 665 (1979).

Absent Proof That Qualified Person Was Disqualified, Motion to Quash Is Properly Denied. — Where the testimony by the chairman of a jury commission indicated that, in certain instances, the commission did not make proper inquiry before disqualifying certain individuals, but instead simply took the sheriff on his word that such persons were disqualified, but there was no evidence indicating that persons qualified to serve were disqualified from the list, and there was no evidence that the sheriff was unlawfully delegated the responsibility, and given the final say, of determining the jury list, the trial court properly denied a motion to quash the indictment. State v. Vaughn, 296 N.C. 167, 250 S.E.2d 210 (1978), cert. denied, 441 U.S. 935, 99 S. Ct. 2060, 60 L. Ed. 2d 665 (1979).

When Findings Not Required. — In the absence of evidence that any qualified person was excluded from jury service, and in the absence of contradictory and conflicting evidence as to the material facts, the judge is not required to make findings. State v. Vaughn, 296 N.C. 167, 250 S.E.2d 210 (1978), cert. denied, 441 U.S. 935, 99 S. Ct. 2060, 60 L. Ed. 2d 665 (1979).

Even a showing that certain qualified persons were improperly disqualified, would not require a dismissal of an indictment absent a showing of corrupt intent or systematic discrimination in the compilation of the list, or a showing of the presence upon the grand jury itself of a member not qualified to serve. State v. Vaughn, 296 N.C. 167, 250 S.E.2d 210 (1978), cert. denied, 441 U.S. 935, 99 S. Ct. 2060, 60 L. Ed. 2d 665 (1979).

The trial court did not err in failing to strike the entire jury panel even though the prosecutor's question, in inquiring into the fitness of jurors to serve, as to whether the jurors had formed an opinion that the defendant was guilty was clearly improper where the court sustained the defendant's objection to the question, and none of the jurors were permitted to respond to it. State v. Zigler, 42 N.C. App. 148, 256 S.E.2d 479 (1979).

§ 15A-1212. Grounds for challenge for cause.

Legal Periodicals. — For comment on capital sentencing statute, see 16 Wake Forest L. Rev. 765 (1980).

CASE NOTES

Challenges for cause are granted to ensure that defendants are tried by fair, impartial, and unbiased juries. State v. Leonard, 296 N.C. 58, 248 S.E.2d 853 (1978).

Merely Having Heard Case Discussed Not Ground for Challenge for Cause. — The fact that a prospective juror had heard the case to be tried discussed previously was not determinative of his competence to serve as a member of the jury. To exclude all individuals who had prior information concerning a given case from jury duty would, in cases involving extensive publicity, often tend to require the exclusion of most individuals who regularly read newspapers or otherwise kept themselves informed as to current affairs of public note. State v. Hunt, 37 N.C. App. 315, 246 S.E.2d 159 (1978).

Employment Alone Not Grounds for Excusing Juror. — An individual should not be excused for cause solely by virtue of the nature of his employment. Such holding might well require exclusion of numerous classes of individuals solely by virtue of employment or membership in voluntary associations which were perceived as indicating some type of predisposition on the part of a prospective juror. State v. Hunt, 37 N.C. App. 315, 246 S.E.2d 159 (1978).

In a murder prosecution a prospective juror could not be excluded for cause solely by virtue of his employment as a police officer and his exposure to some unspecified information about the case to be tried. State v. Hunt, 37 N.C. App. 315, 246 S.E.2d 159 (1978).

Juror Unable to Accept Law Is Incompetent. — A juror who reveals that he is unable to accept a particular defense or penalty recognized by law is prejudiced to such an extent that he can no longer be considered competent. State v. Leonard, 296 N.C. 58, 248 S.E.2d 853 (1978).

One who is unwilling to accept as a defense, if proved, that which the law recognizes as such should be removed from the jury when challenged for cause. State v. Leonard, 296 N.C. 58, 248 S.E.2d 853 (1978).

Jurors who are predisposed with regard to the law or evidence in a case are properly dismissed for cause. State v. Leonard, 296 N.C. 58, 248 S.E.2d 853 (1978).

Where Court Erred in Refusing to Dismiss, a New Trial Was Required. — Where jurors in a prosecution for murder stated that they could not acquit the defendant even though her insanity was proven to them, they were committed to disregarding the evidence presented to them as well as the court's instructions on the law arising from that evidence. The failure of the court to dismiss them for cause, coupled with the subsequent exhaustion of the defendant's peremptory challenges, forced her to accept a jury which cannot be considered impartial. For this reason a new trial was required. State v. Leonard, 296 N.C. 58, 248 S.E.2d 853 (1978).

Inability to Impose Death Penalty. — The trial court in a first-degree murder prosecution properly excused for cause prospective jurors who admitted a specific inability to impose the death penalty under any circumstances. State v. Oliver, 302 N.C. 28, 274 S.E.2d 183 (1981).

In a prosecution for first-degree murder and armed robbery where prospective jurors who admitted a specific inability to impose the death penalty under any circumstances were excused for cause, there was no merit in defendants' contention that this "death qualification" jury selection process deprived them of a jury selected from a representative, fair cross-section of the community on the guilt phase of the case. State v. Oliver, 302 N.C. 28, 274 S.E.2d 183 (1981).

Discretion of Court Not Abused. — In a prosecution for first-degree murder and armed robbery, the trial court did not abuse its discretion in the denial of defendant's challenge for cause of a 65-year-old juror who stated that she had a history of heart trouble, took medication daily for high blood pressure, utilized nitroglycerin if she experienced pain or became upset, was not sure her health would allow her to sit for more than one day and felt that a trial lasting more than a week would be too strenuous where the trial court fully questioned the juror about her health and observed that the work of a juror was not strenuous, that often veniremen with heart conditions serve on a jury, and that counsel on both sides had agreed that the trial would not last more than a week. State v. Oliver, 302 N.C. 28, 274 S.E.2d 183 (1981).

§ 15A-1213. Informing prospective jurors of case.

CASE NOTES

Purpose. — The purpose of this section, when read as a whole and considered together with the Official Commentary, is to avoid giving jurors a distorted view of the case through the stilted language of indictments. State v. Laughinghouse, 39 N.C. App. 655, 251 S.E.2d 667, appeal dismissed, 297 N.C. 615, 257 S.E.2d 438 (1979); State v. Hill, 45 N.C. App. 136, 263 S.E.2d 14 (1980).

The reading to the jury by the trial judge of a portion of the indictment as part of the charge after the close of the evidence was not a violation of this section where it would in no way serve the purpose of this section to avoid giving the jurors a distorted view of the case. State v. Laughinghouse, 39 N.C. App. 655, 251 S.E.2d 667, appeal dismissed, 297 N.C. 615, 257 S.E.2d 438 (1979); State v. Allen, 50 N.C. App. 173, 272 S.E.2d 785 (1980).

Instruction as to Insanity Defense Not in Fact Presented. — Where defendant filed notice of intent to raise the defense of insanity, as required by § 15A-959, and, pursuant to this section, the judge informed prospective jurors of the possibility that defendant might rely on the affirmative defense of insanity, it was proper at

the close of all the evidence for the trial judge to inform the jurors that the insanity defense indeed had not been presented in order to eliminate any idea the jury might have had that they were still to consider the defense. State v. Hart, 44 N.C. 479, 261 S.E.2d 250 (1980).

The prohibition against reading the pleadings to the jury is inapplicable to the judge's jury charge. State v. McNeil, 47 N.C. App. 30, 266 S.E.2d 824, cert. denied, 301 N.C. 102, 273 S.E.2d 306 (1980), — U.S. —, 101 S. Ct. 1356, 67 L. Ed. 2d 339 (1981).

The trial judge did not improperly refer to the bills of indictment returned against defendant while informing prospective jurors about the case where the judge summarized the indictments and explained to the jury the circumstances under which defendant was being tried. State v. McNeil, 47 N.C. App. 30, 266 S.E.2d 824, cert. denied, 301 N.C. 102, 273 S.E.2d 306 (1980), — U.S. —, 101 S. Ct. 1356, 67 L. Ed. 2d 339 (1981).

§ 15A-1214. Selection of jurors; procedure.

Legal Periodicals. — For a survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

CASE NOTES

Editor's Note. — Many of the cases cited in the following annotation were decided under § 9-21 which formerly governed jury selection.

The basic concept in jury selection is that each party to a trial has the right to present his cause to an unbiased and impartial jury. State v. Carey, 285 N.C. 497, 206 S.E.2d 213 (1974).

The State, like the defendant in a criminal case, is entitled to a jury all members of which are free from a preconceived determination to vote contrary to its contention concerning the defendant's guilt of the offense for which he is being tried. State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975).

The purpose of the voir dire examination and the exercise of challenges, either peremptory or for cause, is to eliminate extremes of partiality and to assure both the defendant and the State that the persons chosen to decide the guilt or innocence of the accused will reach that decision solely upon the evidence produced at trial. State v. Honeycutt, 285 N.C. 174, 203 S.E.2d 844 (1974), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3205, 49 L. Ed. 2d 1207 (1976).

Power of Trial Judge. — Former similar section did not deprive the trial judge of his power to closely regulate and supervise the selection of a jury to the end that the defendant and the State be given the benefit of a trial by a fair and impartial jury. State v. Harris, 283 N.C. 46, 194 S.E.2d 796, cert. denied, 414 U.S. 850, 94 S. Ct. 143, 38 L. Ed. 99 (1973).

Former similar section did not deprive the trial judge of his power to closely regulate and supervise the selection of the jury to the end that both the defendant and the State might receive a fair trial before an impartial jury. This discretion in the trial judge does not terminate at the impanelment of the jury. State v. Brady, 299 N.C. 547, 264 S.E.2d 66 (1980).

Discretion of Trial Court. — Decision as to a juror's competency at the time of selection and his continued competency to serve are matters resting in the trial judge's sound discretion and are not subject to review unless accompanied by some imputed error of law. State v. McKenna, 289 N.C. 668, 224 S.E.2d 537, death sentence vacated, 429 U.S. 912, 97 S. Ct. 301, 50 L. Ed. 2d 278 (1976).

Regulation of the manner and extent of the inquiry of a prospective juror concerning his fitness rests largely in the trial court's discretion and will not be found to constitute reversible error unless harmful prejudice and clear abuse of discretion are shown. State v. Hunt, 37 N.C. App. 315, 246 S.E.2d 159 (1978).

The right of the defendant to inquire into the fitness of jurors is subject to the close supervision of the trial court, and the extent of the inquiry lies within the court's discretion. State v. McDougald, 38 N.C. App. 244, 248 S.E.2d 72 (1978), appeal dismissed, 296 N.C. 413, 251 S.E.2d 472 (1979).

The provision of subsection (j) of this section vests in the trial judge discretion to allow individual voir dire and sequestration of jurors during voir dire. It is well settled in North Carolina that the trial judge has broad discretion to see that a competent, fair and impartial jury is impaneled and rulings of the trial judge in this regard will not be reversed absent a showing of abuse of discretion. State v. Johnson, 298 N.C. 355, 259 S.E.2d 752 (1979).

The trial judge has broad discretion to see that a competent, fair and impartial jury is impaneled and rulings of the trial judge in this regard will not be reversed absent a showing of abuse of discretion. State v. Phillips, 300 N.C. 678, 268 S.E.2d 452 (1980).

The presiding judge has the duty to supervise

the examination of prospective jurors and to decide all questions relating to their competency. State v. Phillips, 300 N.C. 678, 268 S.E.2d 452 (1980).

Reopening Examination after Impanelment. — It is well established that, prior to the impaneling of the jury, it is within the discretion of the trial judge to reopen the examination of a juror, previously passed by both the State and the defendant, and to excuse such juror upon challenge, either peremptory or for cause, and there is no reason for the termination of this discretion in the trial judge at the impanelment of the jury. State v. Kirkman, 293 N.C. 447, 238 S.E.2d 456 (1977), decided under repealed § 9-21.

The trial court should not permit counsel to question prospective jurors as to the kind of verdict they would render or how they would be inclined to vote, under a given state of facts. State v. Hunt, 37 N.C. App. 315, 246 S.E.2d 159 (1978).

The trial court properly sustained an objection to a hypothetical question which could not reasonably be expected to result in an answer bearing upon a juror's qualifications, but rather would tend to commit the juror to a decision on the performance of his duties prior to an instruction by the court with regard to their proper performance pursuant to law. State v. Hunt, 37 N.C. App. 315, 246 S.E.2d 159 (1978).

Posing General Questions to Panel as a Whole. — It remains the prerogative of the court to expedite jury selection by requiring certain general questions to be submitted to the panel as a whole. State v. Phillips, 300 N.C. 678, 268 S.E.2d 452 (1980).

Refusal to Allow Questioning. — When challenges for cause are supported by prospective jurors' answers to questions propounded by the prosecutor and by the court, the court does not abuse its discretion, at least in the absence of a showing that further questioning by defendant would likely have produced different answers, by refusing to allow defendant to question the juror challenged. State v. Oliver, 302 N.C. 28, 274 S.E.2d 183 (1981).

Excusal of Juror without Challenge by Party. — It is the duty of the trial judge to see that a competent, fair and impartial jury is impaneled, and to that end the judge may, in his discretion, excuse a prospective juror even without challenge from either party. State v. McKenna, 289 N.C. 668, 224 S.E.2d 537, death sentence vacated, 429 U.S. 912, 97 S. Ct. 301, 50 L. Ed. 2d 278 (1976).

Allowance of Challenge of Juror Previously Accepted by State and Tendered to Defendant. — Nothing in former similar section prohibited the trial court, in the exercise of its discretion, before the jury was impaneled, from allowing the State to challenge peremptorily or for cause a prospective juror previously accepted by the State and tendered to the defendant. State v. McKenna, 289 N.C. 668, 224 S.E.2d 537, death sentence vacated, 429 U.S. 912, 97 S. Ct. 301, 50 L. Ed. 2d 278 (1976).

Right of Challenge. — Every criminal, charged with a crime affecting his life, has a right to challenge a certain number of jurors, without assigning any cause, and as many more as he can assign a good cause for. State v. Patrick, 48 N.C. 443 (1856).

Challenge May Be Peremptory or For Cause. — A person charged with crime may, when called upon to plead to the bill of indictment, challenge the array; or he may, after his plea, challenge individual jurors for cause or peremptorily. State v. Rorie, 258 N.C. 162, 128 S.E.2d 229 (1962).

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).

A defendant on trial has the right to reject any juror for cause or within the limits of his peremptory challenges before the panel is completed. State v. Carey, 285 N.C. 497, 206 S.E.2d 213 (1974).

But Party Has No Right to Select Jurors. — It is well established that the system by which juries are selected does not include the right of any party to select certain jurors but to permit parties to protect themselves against prejudice by allowing them to exclude unacceptable jurors. State v. Woods, 286 N.C. 612, 213 S.E.2d 214 (1975), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3207, 49 L. Ed. 2d 1208 (1976).

An accused is not entitled to a jury of his choice and has no vested right to any particular juror. State v. McKenna, 289 N.C. 668, 224 S.E.2d 537, death sentence vacated, 429 U.S. 912, 97 S. Ct. 301, 50 L. Ed. 2d 278 (1976).

And defendant has no vested right to a particular juror. State v. Woods, 286 N.C. 612, 213 S.E.2d 214 (1975), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3207, 49 L. Ed. 2d 1208 (1976).

Defendant Has Last Opportunity to Challenge. — The effect of former similar section was to give the defendant the last opportunity to exercise his right of challenge when the State had all pertinent information concerning the fitness and competency of the juror before he was tendered to the defendant. State v. Harris, 283 N.C. 46, 194 S.E.2d 796, cert. denied, 414 U.S. 850, 94 S. Ct. 143, 38 L. Ed. 2d 99 (1973); State v. Bock, 288 N.C. 145, 217 S.E.2d 513 (1975), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3208, 49 L. Ed. 2d 1209 (1976).

The obvious purpose of former similar section was to protect defendants in criminal cases by giving them the last opportunity to challenge a

venireman. State v. Bock, 288 N.C. 145, 217 S.E.2d 513 (1975), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3208, 49 L. Ed. 2d 1209 (1976).

When Challenge Should Be Made. — The time for a prisoner to make his challenge, is when the juror is tendered, and before the juror is sworn, or the oath is commenced. State v. Patrick, 48 N.C. 443 (1856).

A defendant cannot wait until the jury has returned a verdict of guilty to challenge the competency of the jury to determine the question. State v. Rorie, 258 N.C. 162, 128 S.E.2d 229 (1962).

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).

If defense counsel desires to take exception to the act of the court in excusing a prospective juror, he should either enter into a stipulation with the State setting out in detail the reason for excusing the juror, or he should include a transcript of the voir dire examination as to that juror in the case on appeal. State v. Fowler, 285 N.C. 90, 203 S.E.2d 803 (1974), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1212 (1976).

In order to preserve an exception to the court's rulings on challenges to the polls, the appellant must exhaust his peremptory challenges and thereafter undertake to challenge an additional juror. State v. Young, 287 N.C. 377, 214 S.E.2d 763 (1975), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3207, 49 L. Ed. 2d 1208 (1976).

In a prosecution for murder the defendant properly preserved her exception to the court's denial of her challenge for cause by (1) exhausting her peremptory challenges and (2) thereafter asserting her right to challenge peremptorily an additional juror. State v. Leonard, 296 N.C. 58, 248 S.E.2d 853 (1978).

Waiver of Objection to Rejection of Juror. — If a juror is rejected upon an improper ground of challenge, made by the State, the prisoner cannot assign if for error, if a jury is obtained before he has exhausted his peremptory challenges. State v. Potts, 100 N.C. 457, 6 S.E. 657 (1888); State v. Sultan, 142 N.C. 569, 54 S.E. 841 (1906).

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).

§ 15A-1215. Alternate jurors.

(a) The judge may permit the seating of one or more alternate jurors. Alternate jurors must be sworn and seated near the jury with equal opportunity to see and hear the proceedings. They must attend the trial at all times with the jury, and obey all orders and admonitions of the judge. When the jurors are ordered kept together, the alternate jurors must be kept with them. If before final submission of the case to the jury, any juror dies, becomes incapacitated or disqualified, or is discharged for any other reason, an alternate juror becomes a juror, in the order in which selected, and serves in all respects as those selected on the regular trial panel. Alternate jurors receive the same compensation as other jurors and, unless they become jurors, must be discharged upon the final submission of the case to the jury.

(b) In all criminal actions in which one or more defendants is to be tried for a capital offense, or enter a plea of guilty to a capital offense, the presiding judge shall provide for the selection of at least two alternate jurors, or more as he deems appropriate. The alternate jurors shall be retained during the deliberations of the jury on the issue of guilt or innocence under such restrictions, regulations and instructions as the presiding judge shall direct. In case of sequestration of a jury during deliberations in a capital case, alternates shall be sequestered in the same manner as is the trial jury, but such alternates shall also be sequestered from the trial jury. In no event shall more than 12 jurors participate in the jury's deliberations. (1977, c. 711, s. 1; 1979, c. 711, s. 1.)

Effect of Amendments. — The 1979 amendment, effective October 1, 1979, designated the former provisions of this section as subsection (a) and added subsection (b).

CASE NOTES

Disqualification and Replacement of Juror for Lack of Attention. — Trial court did not abuse its discretion in disqualifying a juror on grounds of "lack of attention" and substituting an alternate juror at the conclusion of the final arguments of counsel and court was not required to explain what was meant by "lack of attention." State v. Barbour, 43 N.C. App. 38, 258 S.E.2d 72 (1979), cert. denied, 299 N.C. 122, 261 S.E.2d 924 (1980).

The trial judge did not abuse his discretion in removing a juror and substituting the alternate juror where the original juror contacted defense counsel at his home during the week-end recess and persisted in discussing matters of a personal nature, including counsel's marital status, and though there was no evidence that any matter which related to the trial of defendant was discussed during the conversation, the exercise of discretion by the trial judge served to safeguard the trial of defendant from even the appearance of impropriety. State v. Price, 301 N.C. 437, 272 S.E.2d 103 (1980).

Applied in State v. Nelson, 298 N.C. 573, 260 S.E.2d 629 (1979).

§ 15A-1217. Number of peremptory challenges.

CASE NOTES

Editor's Note. — Many of the cases cited in the following annotation were decided under § 9-21 which formerly governed jury selection.

Peremptory Challenge Defined. — Peremptory challenges are challenges which may be made or omitted 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); State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3203, 49 L. Ed. 2d 1205 (1976); State v. Carey, 285 N.C. 497, 206 S.E.2d 213 (1974); State v. Smith, 291 N.C. 505, 231 S.E.2d 663 (1977).

Peremptory challenges are challenges that may be made according to the judgment of the party entitled thereto. State v. Fowler, 285 N.C. 90, 203 S.E.2d 803 (1974), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1212 (1976).

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).

The reason for challenging a juror peremptorily cannot be inquired into. State v. Fowler, 285 N.C. 90, 203 S.E.2d 803 (1974), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1212 (1976).

The essential nature of the peremptory challenge denotes that it is a challenge exercised without a reason stated, without inquiry and without being subject to the court's control. In other words, the peremptory challenge permits rejection for a real or imagined partiality, and an examination of the prosecutor's reasons for the exercise of his challenges in any given case is not permitted. State v. Smith, 291 N.C. 505, 231 S.E.2d 663 (1977).

In the light of the purpose of the peremptory system and the function it serves in a pluralistic society in connection with the institution of jury trial, the Constitution does not require an examination of the prosecutor's reasons for the exercise of his challenges in any given case, even where defendant alleged that the peremptory challenges were used to exclude blacks from the jury. State v. Lynch, 300 N.C. 534, 268 S.E.2d 161 (1980).

Capital Case Defined. — A capital case has been defined as one in which the death penalty may, but need not necessarily, be imposed. State v. Clark, 18 N.C. App. 621, 197 S.E.2d 605 (1973).

When Case Ceases to Be Capital. — A case ceased to be a capital case when, before the selection of jurors began, the court announced that under no circumstances would the death penalty be imposed on defendant on account of the charges for which he was being tried. State v. Clark, 18 N.C. App. 621, 197 S.E.2d 605 (1973).

If it is determined during jury selection in a prosecution for a crime which formerly had been punishable by death that the death penalty may not be imposed upon conviction, the case loses its capital nature, thereby rendering statutes providing for an increased number of peremptory challenges in capital cases

inapplicable. State v. Barbour, 295 N.C. 66, 243 S.E.2d 380 (1978).

Where the district attorney announced at the beginning of a prosecution for first-degree murder that the State would not ask for the death penalty, the case lost its "capital nature," and the court committed no error in not allowing the defendant 14 peremptory challenges. State v. Leonard, 296 N.C. 58, 248 S.E.2d 853 (1978).

Wide Latitude Allowed in Interrogation of Jurors. — In order to permit intelligent exercise of peremptory challenges wide latitude must be allowed counsel in the interrogation of prospective jurors. State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975).

The right of peremptory challenge is not a right to select but to exclude. State v. Smith, 24 N.C. 402 (1842); State v. Banner, 149 N.C. 519, 63 S.E. 84 (1908).

This section does not authorize trial judges to permit either the State or a defendant to exercise more peremptory challenges than specified by statute. State v. Johnson, 298 N.C. 355, 259 S.E.2d 752 (1979).

Challenges Allotted on Basis of Number of Defendants. — Former similar statute allotted peremptory challenges to both the State and the defendant on the basis of the number of defendants and not the number of charges against any one defendant. State v. Boyd, 287 N.C. 131, 214 S.E.2d 14 (1975).

Where several defendants are tried together for a crime other than a capital felony each is entitled to four [now six] peremptory challenges to the jury, and where the court has ruled that the defense was a joint defense and has allowed but four [now six] peremptory challenges for all the defendants, a new trial will be granted upon appeal. State v. Burleson, 203 N.C. 779, 166 S.E. 905 (1932).

Where Bills of Indictment Are Consolidated. — Where several bills of indictment against a defendnat are consolidated for trial, the defendant is entitled to but four [now six] peremptory challenges to the jury and not to four [now six] peremptory challenges for each bill, the consolidated bills being treated as separate counts of the same bill. State v. Alridge, 206 N.C. 850, 175 S.E. 191 (1934).

Number of Challenges When Verdict of Manslaughter Asked. — Where, upon the trial of an indictment for murder, the solicitor states that he will ask only for a verdict of manslaughter, no special venire was necessary, and the defendant is not entitled to more than four [now six] peremptory challenges. State v. Hunt, 128 N.C. 584, 38 S.E. 473 (1901); State v. Caldwell, 129 N.C. 682, 40 S.E. 85 (1901).

Waiver of Objection to Number of Peremptory Challenges Allowed. — Assuming arguendo that defendant was entitled to 14 peremptory challenges, he waived his right to complain when he used only five peremptory challenges. State v. Clark, 18 N.C. App. 621, 197 S.E.2d 605 (1973).

Denial of Defendant's Right. — Because the district attorney violated a prior agreement, when defendant arrived, the jury had been selected, his peremptory challenges had been expended and he had been deprived of the right to question the jurors. Further, he was only given the opportunity to challenge for cause those jurors he knew. Thus, defendant faced a jury that he had no part in selecting. Under the circumstances of the case, defendant did not waive his right to be present at the jury selection and was denied a substantial right. State v. Hayes, 291 N.C. 293, 230 S.E.2d 146 (1976).

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 to challenge fourteen jurors peremptorily without cause. State v. Allred, 275 N.C. 554, 169 S.E.2d 833 (1969).

Cited in State v. Sparks, 297 N.C. 314, 255 S.E.2d 373 (1979); State v. Nelson, 298 N.C. 573, 260 S.E.2d 629 (1979).

ARTICLE 73.

Criminal Jury Trial in Superior Court.

§ 15A-1221. Order of proceedings in jury trial; reading of indictment prohibited.

(a) The order of a jury trial, in general, is as follows:

(1) The defendant must be arraigned and must have his plea recorded, out of the presence of the prospective jurors, unless he has waived arraignment under G.S. 15A-945.

(2) The judge must inform the prospective jurors of the case in accordance with G.S. 15A-1213.
(3) The jury must be sworn, selected and impaneled in accordance with Article 72, Selecting and Impaneling the Jury.
(4) Each party must be given the opportunity to make a brief opening statement, but the defendant may reserve his opening statement.
(5) The State must offer evidence.
(6) The defendant may offer evidence and, if he has reserved his opening statement, may precede his evidence with that statement.
(7) The State and the defendant may then offer successive rebuttals as provided in G.S. 15A-1226.
(8) At the conclusion of the evidence, the parties may make arguments to the jury in accordance with the provisions of G.S. 15A-1230.
(9) The judge must deliver a charge to the jury in accordance with the provisions of G.S. 15A-1231 and 15A-1232.
(10) The jury must retire to deliberate, and alternate jurors who have not been seated must be excused as provided in G.S. 15A-1215.

(b) At no time during the selection of the jury or during trial may any person read the indictment to the prospective jurors or to the jury. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, s. 2.)

Effect of Amendments. — The 1977, 2nd Sess., amendment, effective July 1, 1978, designated the former provisions of this section as subsection (a) and added subsection (b).

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

Legal Periodicals. — For an article reviewing trial procedure under Subchapters XI and XII, see 14 Wake Forest L. Rev. 949 (1978).

CASE NOTES

The trial judge did not improperly refer to the bills of indictment returned against defendant while informing prospective jurors about the case where the judge summarized the indictments and explained to the jury the circumstances under which defendant was being tried. State v. McNeil, 47 N.C. App. 30, 266 S.E.2d 824, cert. denied, 301 N.C. 102, 273 S.E.2d 306 (1980), — U.S. —, 101 S. Ct. 1356, 67 L. Ed. 2d 339 (1981).

Waiver of Right to Make Opening Statement. — By failure to request the opportunity to make an opening statement, defendant engaged in conduct inconsistent with a purpose to insist upon the exercise of a statutory right, therefore, his conduct at trial amounted to a waiver of this procedural right. State v. McDowell, 301 N.C. 279, 271 S.E.2d 286 (1980), cert. denied, U.S. , 101 S. Ct. 1731, 68 L. Ed. 2d 220 (1981).

Deviation From Prescribed Method of Jury Selection. — Though the trial court deviated from the statutorily prescribed method of jury selection under Article 72 of this chapter, defendant failed to show that he was prejudiced because he had full opportunity to examine and challenge prospective jurors and because, when the jury was finally constituted, defendant had one peremptory challenge remaining and had exercised no challenges for cause so that the jurors selected obviously met with his approval. State v. Harper, 50 N.C. App. 198, 272 S.E.2d 600 (1980).

Cited in State v. House, 295 N.C. 189, 244 S.E.2d 654 (1978); State v. Laughinghouse, 39 N.C. App. 655, 251 S.E.2d 667 (1979).

§ 15A-1222. Expression of opinion prohibited.

Legal Periodicals. — For article discussing North Carolina jury instruction practice, see 52 N.C.L. Rev. 719 (1974).

CASE NOTES

Former Law Essentially Unchanged. — This section and § 15A-1232 repealed and replaced former § 1-180 effective July 1, 1978. The new provisions restate the substance of § 1-180 and the law remains essentially unchanged. State v. Herbin, 298 N.C. 441, 259 S.E.2d 263 (1979).

Judge Creates Prejudice with Opinion. — The judge prejudices a party or his cause in the minds of the trial jurors whenever he violates the statute by expressing an opinion. State v. Guffey, 39 N.C. App. 359, 250 S.E.2d 96 (1979).

There Can Be No Justification for Expression of Opinion. — The fact that an accused may be charged with a despicable crime, and the evidence of guilt may appear to be overwhelming, does not justify the expression of an opinion. State v. Guffey, 39 N.C. App. 359, 250 S.E.2d 96 (1979).

And it is immaterial how an opinion is expressed or implied, whether in the charge of the court, in the examination of a witness, in the rulings upon objections to evidence, or in any other manner. State v. Alston, 38 N.C. App. 219, 247 S.E.2d 726 (1978), cert. denied, 296 N.C. 586, 254 S.E.2d 30 (1979).

But not every improper remark by a trial judge requires a new trial. State v. Guffey, 39 N.C. App. 359, 250 S.E.2d 96 (1979).

Determination of Prejudice Resulting from Remarks. — Whether an accused was deprived of a fair trial by remarks by the judge during any stage of the trial must be determined by what was said and its probable effect upon the jury in light of all attendant circumstances, the burden of showing prejudice being upon the appellant. State v. Faircloth, 297 N.C. 388, 255 S.E.2d 366 (1979).

Comments to Be Considered in Context. — It does not necessarily follow that every ill-advised comment by the trial judge which may tend to impeach the witness is so harmful as to constitute reversible error. The comment should be considered in light of all the facts and attendant circumstances disclosed by the record. State v. Brady, 299 N.C. 547, 264 S.E.2d 66 (1980).

Statement of Parties' Contentions. — When a court undertakes to restate the contentions of the parties, it must fairly present the contentions of both parties without giving undue stress to those of either side. It is sufficient if the contentions are restated with reasonable accuracy. Any minor discrepancies or misstatements in the charge must be brought to the attention of the judge at trial. State v. White, 298 N.C. 430, 259 S.E.2d 281 (1979).

Judge May Question Witness. — The trial judge may direct questions to a witness for the purpose of clarifying his testimony and promoting a better understanding of it. State v. Alston, 38 N.C. App. 219, 247 S.E.2d 726 (1978), cert. denied, 296 N.C. 586, 254 S.E.2d 30 (1979); State v. Fuller, 48 N.C. App. 418, 268 S.E.2d 879, cert. denied, 301 N.C. 403, 273 S.E.2d 448 (1980).

In a prosecution for rape and kidnapping, the trial court did not err in asking leading questions of the seven year old victim during the voir dire hearing on defendant's motion to suppress identification testimony since this section does not apply when the jury is not present during questioning, since a child may be asked leading questions concerning delicate matters of a sexual nature, and since the trial court may question a witness to clarify his testimony. State v. Bright, 301 N.C. 243, 271 S.E.2d 368 (1980).

But questioning by the trial judge must be conducted with care and in a manner which avoids prejudice to either party. State v. Alston, 38 N.C. App. 219, 247 S.E.2d 726 (1978), cert. denied, 296 N.C. 586, 254 S.E.2d 30 (1979).

Questions Posed for Purpose of Clarification. — The trial judge did not express an opinion in violation of this section in asking a witness to "describe what this defendant did," since the purpose of the question was to clarify testimony by the witness in which he used the word "they." State v. Fuller, 48 N.C. App. 418, 268 S.E.2d 879, cert. denied, 301 N.C. 403, 273 S.E.2d 448 (1980).

A trial judge's questions, propounded to a witness to clarify his confusing or contradictory testimony, do not constitute an expression of opinion unless a jury could reasonably infer that the questions intimated the court's opinion as to the witness's credibility, the defendants' guilt, or as to a factual controversy to be resolved by the jury. State v. Yellorday, 297 N.C. 574, 256 S.E.2d 205 (1979).

The trial judge is not bound to recapitulate all the evidence in his charge to the jury; it is sufficient for him to direct the attention of the jury to the principal questions they have to try, and explain the law applicable thereto. State v. Oxendine, 300 N.C. 720, 268 S.E.2d 212 (1980).

Omission of Word "Alleged" in Instruction. — Trial court's instruction to the jury that "if you are satisfied that the defendant was insane at the time of the robbery with a firearm he would be not guilty by reason of insanity and that would end the case" did not constitute an expression of opinion on a question of fact because of the one omission of the word "alleged" before "robbery with a firearm." State v. Linville, 43 N.C. App. 204, 258 S.E.2d 397 (1979), aff'd, 300 N.C. 135, 265 S.E.2d 150 (1980).

Remark about Sentencing Prior to Jury Verdict. — Since it is obvious that a defendant will not be sentenced unless he is first found guilty, a judge's premature remarks about sentencing, in response to an inquiry prior to the time the jury reached a verdict by the foreman to the court as to whether the jury could make an "explanation" of its verdict, assumes that the jury has already reached a guilty verdict, and leaves little doubt that the judge expects the jury to find the defendant guilty. Such an assumption amounts to an unwarranted expression of opinion on defendant's guilt and thereby encourages the rendering of a guilty verdict. State v. Griffin, 44 N.C. App. 601, 261 S.E.2d 292 (1980).

New Trial Required. —

Where the trial judge's statement prior to trial went to the heart of the trial, assuming the defendant's guilt, a new trial was required. State v. Guffey, 39 N.C. App. 359, 250 S.E.2d 96 (1979).

Where the trial judge told the jury that he could not allow them to take certain photographs which had not been received in evidence into the jury room because the defendant did not consent, his statement was an incorrect statement of the law under § 15A-1233 which was nevertheless harmless in itself since it led to a correct ruling that the jury could not take photographs not admitted in evidence into the jury room. However, the attempt by the trial judge to explain the reason for his failure to comply with the jury's request constituted an impermissible expression of opinion in violation of this section and § 15A-1232 which required a new trial. State v. Grogan, 40 N.C. App. 371, 253 S.E.2d 20 (1979).

Applied in State v. Moore, 37 N.C. App. 248, 245 S.E.2d 898 (1978); State v. Faircloth, 297 N.C. 388, 255 S.E.2d 366 (1979); State v. Gibbs, 297 N.C. 410, 255 S.E.2d 168 (1979); State v. Logner, 297 N.C. 539, 256 S.E.2d 166 (1979); State v. Detter, 298 N.C. 604, 260 S.E.2d 567 (1979); State v. Cody, 40 N.C. App. 735, 253 S.E.2d 642 (1979); State v. Williams, 41 N.C. App. 287, 254 S.E.2d 649, cert. denied, 297 N.C. 699, 259 S.E.2d 297 (1979); State v. Smith, 41 N.C. App. 600, 255 S.E.2d 210 (1979); State v. Barbour, 43 N.C. App. 143, 258 S.E.2d 475 (1979); State v. Matthews, 299 N.C. 284, 261 S.E.2d 872 (1980); State v. McCraw, 300 N.C. 610, 268 S.E.2d 173 (1980).

Stated in State v. Hewett, 295 N.C. 640, 247 S.E.2d 886 (1978).

Cited in State v. Whitted, 38 N.C. App. 603, 248 S.E.2d 442 (1978); State v. Blackmon, 38 N.C. App. 620, 248 S.E.2d 456 (1978); State v. Francum, 39 N.C. App. 429, 250 S.E.2d 705 (1979); State v. Collins, 44 N.C. App. 27, 259 S.E.2d 802 (1979); State v. Spicer, 299 N.C. 309, 261 S.E.2d 893 (1980); State v. Griffin, 44 N.C. App. 601, 261 S.E.2d 292 (1980); State v. Williams, 299 N.C. 652, 263 S.E.2d 774 (1980).

§ 15A-1223. Disqualification of judge.

CASE NOTES

Failure of Judge to Disqualify Himself Not Error. — Where the trial judge at the first trial of the defendant when declaring a mistrial, ruled that the emotional outburst heard by the jury could either consciously or subconsciously prevent them from rendering a verdict solely on the evidence, but there was no evidence in the record elicited by defense counsel or any other party of any prejudice or bias displayed by the presiding judge, and no showing that in the previous trial the judge reacted strongly to the outburst, nor any showing that the judge displayed marked personal feeling toward the defendant, the failure of the trial judge to disqualify himself was not error. State v. Vega, 40 N.C. App. 326, 253 S.E.2d 94, cert. denied, 297 N.C. 457, 256 S.E.2d 809, 444 U.S. 968, 100 S. Ct. 459, 62 L. Ed. 382 (1979).

Applied in State v. Hill, 45 N.C. App. 136, 263 S.E.2d 14 (1980).

§ 15A-1225. Exclusion of witnesses.

CASE NOTES

A motion to sequester witnesses is addressed to the sound discretion of the trial judge and will not be reviewed on appeal absent a showing of an abuse of discretion. State v. Royal, 300 N.C. 515, 268 S.E.2d 517 (1980).

Ineffective Assistance of Counsel. — Trial counsel's failure to move pursuant to this section for the exclusion of three State's witnesses from the courtroom until each one was called to testify is not evidence of ineffective assistance of counsel. State v. Roberts, 49 N.C. App. 52, 270 S.E.2d 559 (1980).

§ 15A-1226. Rebuttal evidence; additional evidence.

CASE NOTES

The trial court did not err in granting the State's motion to reopen its case in order to enter stipulated evidence concerning the results of a medical examination of the rape victim, since defendant could not have been surprised by the admission of the evidence, and there was therefore no prejudice to him. State v. Revelle, 301 N.C. 153, 270 S.E.2d 476 (1980).

Applied in State v. Person, 298 N.C. 765, 259 S.E.2d 867 (1979).

§ 15A-1227. Motion for dismissal.

Legal Periodicals. — For a survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

For an article entitled, "Trial Stage and Appellate Procedure Act: An Overview," see 14 Wake Forest L. Rev. 899 (1978).

CASE NOTES

Section 15-173 Compared. — Both § 15-173 and this section allow motions to dismiss to be made at the close of the State's evidence. However, they are not identical. Section 15-173 provides that "If the defendant introduces evidence, he thereby waives any motion for dismissal or judgment as in case of nonsuit which he may have made prior to the introduction of his evidence and cannot urge such prior motion as ground for appeal." Although no such provision is contained in this section, its enactment did not create a new type of motion to challenge the sufficiency of the evidence. State v. Mendez, 42 N.C. App. 141, 256 S.E.2d 405 (1979).

A challenge to the sufficiency of the evidence to sustain a conviction is still properly made by either a motion for dismissal or a motion for judgment as in the case of nonsuit. Both motions were known to the law for many years prior to the enactment of this section. The motion for dismissal referred to in this section is the same motion or dismissal referred to in § 15-173. Therefore, there is but one motion for dismissal for insufficiency of the evidence to sustain a conviction, and that motion is governed by the provisions of both § 15-173 and this section. State v. Mendez, 42 N.C. App. 141, 256 S.E.2d 405 (1979).

Effect of Subsection (d) on Waiver of Right to Appeal under § 15-173. — Under § 15-173, a defendant, by presenting evidence, has waived his right to assert the denial of his motion to dismiss at the close of the State's evidence as a ground for appeal. The provisions of subsection (d) of this section and § 15A-1446(d)(5), allowing review on appeal of the sufficiency of the State's evidence in a criminal case without regard to whether the appropriate motion has been made, do not change this rule. State v. Mendez, 42 N.C. App. 141, 256 S.E.2d 405 (1979).

Although defendant, under § 15-173, waived his motion for nonsuit made at the close of the State's evidence by presenting evidence and failing to renew his motion, pursuant to subsection (d) of this section and § 15A-1446(d)(5), defendant could have requested review of the sufficiency of all of the evidence without regard to whether the proper motion or exception had been made during trial. State v. Alston, 44 N.C. App. 72, 259 S.E.2d 767 (1979).

Motion for Dismissal Similar to Motion for Nonsuit. — A motion for dismissal pursuant to this section tests the sufficiency of the evidence to sustain a conviction. In that respect it is identical to a motion for judgment as in the case of nonsuit under § 15-173. State v. Smith, 40 N.C. App. 72, 252 S.E.2d 535 (1979); State v. Dunbar, 47 N.C. App. 623, 267 S.E.2d 577 (1980); State v. Jenkins, 300 N.C. 578, 268 S.E.2d 458 (1980).

Court Limited to Determination Whether Reasonable Inference of Guilt Possible. — In ruling upon the defendant's motion to dismiss or for judgment as in the case of nonsuit, the trial court is limited solely to the function of determining whether a reasonable inference

of the defendant's guilt of the crime charged may be drawn from the evidence. State v. Smith, 40 N.C. App. 72, 252 S.E.2d 535 (1979); State v. Callihan, 47 N.C. App. 360, 267 S.E.2d 28 (1980).

Upon defendant's motion for dismissal, the question for the court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied. State v. Powell, 299 N.C. 95, 261 S.E.2d 114 (1980); State v. Davis, 48 N.C. App. 526, 269 S.E.2d 291 (1980).

Evidence Favorable to State Considered as Whole. — In passing on a motion to dismiss or for judgment as in the case of nonsuit, evidence favorable to the State is to be considered as a whole in order to determine its sufficiency. This is especially necessary in a case when the proof offered is circumstantial, for rarely will one bit of such evidence be sufficient, in itself, to point to a defendant's guilt. State v. Smith, 40 N.C. App. 72, 252 S.E.2d 535 (1979).

Sufficiency, Not Weight, of Evidence Is Test. — The trial court in considering motions for nonsuit or for dismissal pursuant to this section is concerned only with the sufficiency of the evidence to carry the case to the jury and not with its weight. State v. Smith, 40 N.C. App. 72, 252 S.E.2d 535 (1979); State v. Sheetz, 46 N.C. App. 641, 265 S.E.2d 914 (1980).

Sufficiency of Evidence Test Same Whether the Evidence Is Circumstantial or Direct. — The test of whether the evidence is sufficient to withstand a motion to dismiss is whether a reasonable inference of defendant's guilt may be drawn from the evidence and the test is the same whether the evidence is circumstantial or direct. State v. Bright, 301 N.C. 243, 271 S.E.2d 368 (1980).

Nonsuit Improper if Substantial Evidence Exists. —

If there is substantial evidence to support a finding that the offense has been committed and that defendant committed it, a case for the jury is made and nonsuit should be denied. State v. Cummings, 46 N.C. App. 680, 265 S.E.2d 923 (1980).

If there is substantial evidence that the offense charged in the bill of indictment, or a lesser offense included therein has been committed, and that the defendant committed it, the case is properly for the jury. State v. Dunbar, 47 N.C. App. 623, 267 S.E.2d 577 (1980).

Controlling cases dealing with the sufficiency of evidence to withstand a motion for judgment as in the case of nonsuit are equally applicable to the sufficiency of the evidence to withstand a motion for dismissal pursuant to this section. State v. Smith, 40 N.C. App. 72, 252 S.E.2d 535 (1979).

"Substantial Evidence" Test. — The more modern cases agree that the amount of evidence required as to each essential element in order to withstand motions for judgment as in the case of nonsuit or for dismissal is controlled by the "substantial evidence" or "more than a scintilla of evidence" test. State v. Smith, 40 N.C. App. 72, 252 S.E.2d 535 (1979).

To withstanding a motion to dismiss, there must be substantial evidence of all material elements of the offense. State v. Keeter, 42 N.C. App. 642, 257 S.E.2d 480 (1979); State v. Murphy, 49 N.C. App. 443, 271 S.E.2d 573 (1980).

To withstand a motion to dismiss for insufficiency of the evidence there must be substantial evidence of all material elements of the offense charged. State v. Seufert, 49 N.C. App. 524, 271 S.E.2d 756 (1980).

In a prosecution for breaking and entering where the record was devoid of any evidence which even raised a suspicion or conjecture as to defendant's guilt, it certainly did not contain the substantial evidence of all material elements of the offense necessary to withstand a motion to dismiss. State v. Lanier, 50 N.C. App. 383, 273 S.E.2d 746 (1981).

Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. State v. Cummings, 46 N.C. App. 680, 265 S.E.2d 923 (1980).

The "more than a scintilla of evidence" test and the "substantial evidence" test are in reality only one test which is most frequently designated the "substantial evidence test." State v. Smith, 40 N.C. App. 72, 252 S.E.2d 535 (1979).

Anything more than a scintilla of evidence is "substantial evidence." State v. Smith, 40 N.C. App. 72, 252 S.E.2d 535 (1979).

Requirement of Substantiality of Evidence of Element. — The requirement that the State's evidence of each element be "substantial" is simply a requirement that it be existing and real, not just seeming or imaginary. State v. Smith, 40 N.C. App. 72, 252 S.E.2d 535 (1979).

Reasonable Inference Warrants Sending Case to Jury. — If the trial court determines that a reasonable inference of the defendant's guilt may be drawn from the evidence, it must deny the defendant's motion and send the case to the jury even though the evidence may also support reasonable inferences of the defendant's innocence. State v. Smith, 40 N.C. App. 72, 252 S.E.2d 535 (1979).

Existence of Substantial Evidence Is a Question of Law. — Whether the State offered substantial evidence to withstand a motion to dismiss for insufficiency of the evidence is a question of law for the trial court. State v.

Seufert, 49 N.C. App. 524, 271 S.E.2d 756 (1980).

Evidence Must Be Considered in Most Favorable Light to State. — In considering a motion for judgment as in the case of nonsuit or a motion for dismissal pursuant to this section, the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom. State v. Smith, 40 N.C. App. 72, 252 S.E.2d 535 (1979); State v. Sheetz, 46 N.C. App. 641, 265 S.E.2d 914 (1980); State v. Cummings, 46 N.C. App. 680, 265 S.E.2d 923 (1980); State v. Martin, 47 N.C. App. 223, 267 S.E.2d 35 (1980); State v. McGee, 47 N.C. App. 280, 267 S.E.2d 67, cert. denied, 301 N.C. 101, 273 S.E.2d 306 (1980); State v. McCaskill, 47 N.C. App. 289, 267 S.E.2d 331, cert. denied, 301 N.C. 101, 273 S.E.2d 306 (1980); State v. Dunbar, 47 N.C. App. 623, 267 S.E.2d 577 (1980); State v. Jones, 47 N.C. App. 554, 268 S.E.2d 6 (1980); State v. Easterling, 300 N.C. 594, 268 S.E.2d 800 (1980); State v. Fearing, 48 N.C. App. 329, 269 S.E.2d 245, cert. denied, 301 N.C. 99, 273 S.E.2d 303, 301 N.C. 403, 273 S.E.2d 448 (1980); State v. Murphy, 49 N.C. App. 443, 271 S.E.2d 573 (1980); State v. Bright, 301 N.C. 243, 271 S.E.2d 368 (1980).

All Evidence Favorable to State Must Be Accepted as True. — All evidence admitted during the trial, whether competent or incompetent, which is favorable to the State must be taken as true, and contradictions or discrepancies therein must be resolved in the State's favor. State v. Smith, 40 N.C. App. 72, 252 S.E.2d 535 (1979); State v. Sheetz, 46 N.C. App. 641, 265 S.E.2d 914 (1980).

Ruling on Motion Is Not Based on All Counts Taken as a Whole. — The State's argument that where a motion to nonsuit is not limited to a particular count but is addressed to all counts, the motion cannot be allowed where there is sufficient evidence to support any count was without merit. State v. Taylor, 37 N.C. App. 709, 246 S.E.2d 834, cert. denied, 295 N.C. 737, 248 S.E.2d 866 (1978).

The trial court is not required to determine that the evidence excludes every reasonable hypothesis of innocence prior to denying a defendant's motion to dismiss. State v. Smith, 40 N.C. App. 72, 252 S.E.2d 535 (1979).

If Any Fact Reasonably Tends to Prove Fact in Issue, Case Should Go to Jury. — If there be any evidence tending to prove the fact in issue or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture, the case should be submitted to the jury. State v. Smith, 40 N.C. App. 72, 252 S.E.2d 535 (1979).

Suspicion Insufficient to Withstand Motion. — Upon defendant's motion for dismissal, if the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed. This is true even though the suspicion so aroused by the evidence is strong. State v. Powell, 299 N.C. 95, 261 S.E.2d 114 (1980); State v. Bright, 301 N.C. 243, 271 S.E.2d 368 (1980).

For purposes of a motion to dismiss, incompetent evidence may be considered. Thus, assuming arguendo that a witness was improperly qualified as an expert, his testimony would still support denial of the motion to dismiss. State v. Sheetz, 46 N.C. App. 641, 265 S.E.2d 914 (1980).

Duty of Trial Court and Jury. — It is for the trial court to determine whether substantial evidence which will support a reasonable inference of the defendant's guilt has been introduced. The trial court having found that such evidence has been introduced, it is solely for the jury to determine whether the facts taken singly or in combination satisfy them beyond a reasonable doubt that the defendant is in fact guilty. State v. Smith, 40 N.C. App. 72, 252 S.E.2d 535 (1979).

A motion to dismiss which is improperly phrased will not destroy reviewability on appeal. State v. Taylor, 37 N.C. App. 709, 246 S.E.2d 834, cert. denied, 295 N.C. 737, 248 S.E.2d 866 (1978).

Waiver of Motion at Close of State's Evidence. — Having elected to offer evidence defendant waived her motion to dismiss at the close of the State's evidence, and proper consideration is thereafter upon her motion to dismiss made at the close of all the evidence. State v. Leonard, 300 N.C. 223, 266 S.E.2d 631, cert. denied, U.S. , 101 S. Ct. 372, 66 L. Ed. 2d 227 (1980).

Failure to Move for Dismissal Does Not Constitute Ineffective Representation. — Defense counsel's failure to move for dismissal on the grounds of insufficient evidence at the close of all the evidence did not prejudice the defendant and did not constitute ineffective representation because the sufficiency of the evidence is reviewable on appeal without regard to whether a motion was made at trial. State v. Roberts, 49 N.C. App. 52, 270 S.E.2d 559 (1980).

Applied in State v. Rhyne, 39 N.C. App. 319, 250 S.E.2d 102 (1979); State v. Benton, 299 N.C. 16, 260 S.E.2d 917 (1980); State v. Adams, 46 N.C. App. 57, 264 S.E.2d 126 (1980).

Cited in State v. Atkinson, 298 N.C. 673, 259 S.E.2d 858 (1979); State v. Hill, 41 N.C. App. 722, 255 S.E.2d 757 (1979); State v. Harden, 42 N.C. App. 677, 257 S.E.2d 635 (1979); State v. Cronin, 299 N.C. 229, 262 S.E.2d 277 (1980);

State v. Winston, 45 N.C. App. 99, 262 S.E.2d 331 (1980).

§ 15A-1228. Notes by the jury.

CASE NOTES

Judge May Act in Absence of Objection by Counsel. — This statute does not limit the authority of the trial judge to control the taking of notes by the jury during the course of the trial in the absence of objection by counsel. State v. McNeil, 46 N.C. App. 533, 265 S.E.2d 416 (1980).

§ 15A-1230. Limitations on argument to the jury.

CASE NOTES

Applied in State v. King, 299 N.C. 707, 264 S.E.2d 40 (1980).

Quoted in State v. McCaskill, 47 N.C. App. 289, 267 S.E.2d 331 (1980).

§ 15A-1231. Jury instructions.

CASE NOTES

The purpose of an instruction is to clarify the issues for the jury and to apply the law to the facts of the case. State v. Harris, 47 N.C. App. 121, 266 S.E.2d 735 (1980).

Test of Sufficiency. — Where the judge's charge fully instructs the jury on all the substantive areas of the case, and defines and applies the law thereto, it is sufficient. State v. McNeil, 47 N.C. App. 30, 266 S.E.2d 824, cert. denied, 301 N.C. 102, 273 S.E.2d 306 (1980), — U.S. —, 101 S. Ct. 1356, 67 L. Ed. 2d 339 (1981).

Requests for special instructions must be in writing and must be submitted before the beginning of the charge by the court. State v. Harris, 47 N.C. App. 121, 266 S.E.2d 735 (1980).

Applied in State v. Matthews, 299 N.C. 284, 261 S.E.2d 872 (1980).

§ 15A-1232. Jury instructions; explanation of law; opinion prohibited.

Legal Periodicals. — For article discussing North Carolina jury instruction practice, see 52 N.C.L. Rev. 719 (1974).

CASE NOTES

I. IN GENERAL.

This Section Is Essentially Same as Former Law. — While this section restates the substance of former § 1-180, the language requiring the judge to "give equal stress to the State and defendant in a criminal action" has been omitted. Even so, as indicated by the official commentary, what was heretofore explicit is now implicit and the law remains essentially unchanged. State v. Hewett, 295 N.C. 640, 247 S.E.2d 886 (1978).

Section 15A-1222 and this section repealed and replaced former § 1-180 effective July 1, 1978. The new provisions restate the substance of § 1-180 and the law remains essentially unchanged. State v. Herbin, 298 N.C. 441, 259 S.E.2d 263 (1979).

This section imposes a duty, etc. —

In accord with 4th paragraph in original. See State v. Hoskins, 36 N.C. App. 92, 242 S.E.2d 900, cert. denied, 295 N.C. 469, 246 S.E.2d 11 (1978).

This section requires that the judge maintain absolute impartiality until the verdict has been rendered because the jury, out of great respect for him, is easily influenced by his slightest suggestion. State v. Griffin, 44 N.C. App. 601, 261 S.E.2d 292 (1980).

Judge to Abstain from Prejudicial Conduct or Language. —

As a result of his exalted station and the respect for his opinion which jurors are presumed to hold, the trial judge must abstain from conduct or language which tends to discredit or prejudice the accused or his cause. State v. Whitted, 38 N.C. App. 603, 248 S.E.2d 442 (1978).

The provisions of this section are mandatory, etc. —

In accord with original. See State v. Hewett, 295 N.C. 640, 247 S.E.2d 886 (1978).

And Failure to Observe, etc. —

In accord with 1st paragraph in original. See State v. Hewett, 295 N.C. 640, 247 S.E.2d 886 (1978).

Applied in State v. Moore, 37 N.C. App. 248, 245 S.E.2d 898 (1978); State v. Wilkins, 297 N.C. 237, 254 S.E.2d 598 (1979); State v. Logner, 297 N.C. 539, 256 S.E.2d 166 (1979); State v. Nelson, 298 N.C. 573, 260 S.E.2d 629 (1979); State v. Detter, 298 N.C. 604, 260 S.E.2d 567 (1979); State v. Ferdinando, 298 N.C. 737, 260 S.E.2d 423 (1979); State v. Anderson, 40 N.C. App. 318, 253 S.E.2d 48 (1979); State v. Vega, 40 N.C. App. 326, 253 S.E.2d 94 (1979); State v. Cody, 40 N.C. App. 735, 253 S.E.2d 642 (1979); State v. May, 41 N.C. App. 370, 255 S.E.2d 303 (1979); State v. McLaurin, 41 N.C. App. 552, 255 S.E.2d 299 (1979); State v. Hoskins, 42 N.C. App. 108, 256 S.E.2d 290 (1979); State v. Horton, 44 N.C. App. 343, 260 S.E.2d 780 (1979); State v. Graham, 47 N.C. App. 303, 267 S.E.2d 56 (1980); State v. Avery, 48 N.C. App. 675, 269 S.E.2d 708 (1980).

Quoted in State v. Patton, 45 N.C. App. 676, 263 S.E.2d 796 (1980).

Stated in State v. Lang, 46 N.C. App. 138, 264 S.E.2d 821 (1980).

Cited in State v. Guffey, 39 N.C. App. 359, 250 S.E.2d 96 (1979); State v. Francum, 39 N.C. App. 429, 250 S.E.2d 705 (1979); State v. Collins, 44 N.C. App. 27, 259 S.E.2d 802 (1979); State v. Hart, 44 N.C. App. 479, 261 S.E.2d 250 (1980).

II. OPINION OF JUDGE.

A. General Consideration.

This section forbids the judge to intimate, etc. —

In accord with 1st paragraph in original. See State v. Whitted, 38 N.C. App. 603, 248 S.E.2d 442 (1978).

It is of no consequence whether the opinion of the trial judge is conveyed to the jury directly or indirectly as every defendant in a criminal case is entitled to the trial of his case before a neutral judge and an unbiased jury. State v. Whitted, 38 N.C. App. 603, 248 S.E.2d 442 (1978).

Expression of Opinion Is Ground for New Trial. — Any intimation or expression of opinion by the trial court which prejudices the jury against the accused is ground for a new trial. State v. Hoskins, 36 N.C. App. 92, 242 S.E.2d 900, cert. denied, 295 N.C. 469, 246 S.E.2d 11 (1978).

Section Not Confined to Charge. —

In accord with 1st paragraph in original. See State v. Alston, 38 N.C. App. 219, 247 S.E.2d 726 (1978), cert. denied, 296 N.C. 586, 254 S.E.2d 30 (1979).

In accord with 5th paragraph in original. See State v. Alston, 38 N.C. App. 219, 247 S.E.2d 726 (1978), cert. denied, 296 N.C. 586, 254 S.E.2d 30 (1979). State v. Evans, 298 N.C. 263, 258 S.E.2d 354 (1979).

Motive of Judge Immaterial. —

In accord with 2nd paragraph in original. See State v. May, 292 N.C. 644, 235 S.E.2d 178, cert. denied, 434 U.S. 928, 98 S. Ct. 414, 54 L. Ed. 2d 288 (1977).

Inadvertent Expression of Opinion. —

An expression of judicial leaning is absolutely prohibited regardless of the manner in which it is expressed, and this is so even when such expression of opinion is inadvertent. State v. Hudson, 295 N.C. 427, 245 S.E.2d 686 (1978).

Harmless Error. —

Not every indiscreet and improper remark by a trial judge is of such harmful effect as to require a new trial. State v. Whitted, 38 N.C. App. 603, 248 S.E.2d 442 (1978).

Weight and Sufficiency of Evidence Question for Jury. —

Whether the defendant's evidence is less credible than the State's evidence is an issue for the jury, not the trial judge. State v. Blackmon, 38 N.C. App. 620, 248 S.E.2d 456 (1978), cert. denied, 296 N.C. 412, 251 S.E.2d 471 (1979).

Credibility of Witnesses Is for Jury. —

A trial judge has the right and duty to control the examination of witnesses and to ask questions tending to clarify the witness's testimony for the jury, but in doing so, the judge must refrain from impeaching or discrediting a witness or demonstrating any hostility toward the witness. State v. Evans, 36 N.C. App. 166, 243 S.E.2d 812, cert. denied, 295 N.C. 469, 246 S.E.2d 217 (1978).

Whether an accused was deprived of a fair trial by remarks by the judge during any stage of the trial must be determined by what was said and its probable effect upon the jury in light of all attendant circumstances, the burden

of showing prejudice being upon the appellant. State v. Faircloth, 297 N.C. 388, 255 S.E.2d 366 (1979).

Questioning by the trial judge must be conducted with care and in a manner which avoids prejudice to either party. State v. Alston, 38 N.C. App. 219, 247 S.E.2d 726 (1978), cert. denied, 296 N.C. 586, 254 S.E.2d 30 (1979).

The trial judge may direct questions to a witness for the purpose of clarifying his testimony and promoting a better understanding of it. State v. Alston, 38 N.C. App. 219, 247 S.E.2d 726 (1978), cert. denied, 296 N.C. 586, 254 S.E.2d 30 (1979).

Considerations of Appellate Court. — In deciding whether the court's instructions forced a verdict or merely served as a catalyst for further deliberation, an appellate court must consider the circumstances under which the instructions were made and the probable impact of the instructions on the jury. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

Impermissible Comment May Be Challenged for First Time on Appeal. — Where the court impermissibly expresses an opinion in stating the contentions of the parties, the question may be considered for the first time on appeal. State v. Covington, 48 N.C. App. 209, 268 S.E.2d 231 (1980).

B. What Constitutes an Opinion.

Cumulative Effect of Errors. — It is possible that several errors, harmless in and of themselves, may combine to form an expression of opinion. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

The use of the convenient formula, etc. — In accord with 1st and 3rd paragraphs in original. See State v. Allen, 301 N.C. 489, 272 S.E.2d 116 (1980).

Questioning of Witnesses. —

It is proper for a trial judge to ask questions for the purpose of clarifying a witness's testimony. State v. White, 37 N.C. App. 394, 246 S.E.2d 71 (1978).

The trial judge may direct questions to a witness for the purpose of clarifying his testimony and promoting a better understanding of it. State v. Evans, 298 N.C. 263, 258 S.E.2d 354 (1979).

Giving Correct Instructions on Interested Witnesses and Failing to Repeat All the Original Instructions Not Error. — There was no merit to defendant's contention in a homicide prosecution that the trial judge impermissibly expressed an opinion (1) on the credibility of defendant and those of his relatives who testified on his behalf, since the court's instruction on interested witnesses was proper; (2) by failing to reinstruct the jury on the elements of self-defense when the jury on two occasions returned to the courtroom and requested additional instructions on the crimes charged, since a trial judge who has complied with a request by the jury for additional instructions is not required also to repeat his instructions as to other features of the case which have already been correctly given; and (3) in instructing the jury on the procedure which was to be followed upon their return of a verdict which found defendant guilty of first-degree murder, since the judge's comments did not precipitate a rush to judgment by the jury. State v. Price, 301 N.C. 437, 272 S.E.2d 103 (1980).

C. Illustrative Cases.

1. Remarks Held Not Erroneous.

b. Remarks Concerning Witnesses.

Clarification of Witness's Statement. — The trial judge did not make statements in the presence of the jury tending to add to the probative force of a witness's testimony, thereby expressing an opinion as to the credibility of the witness, where the trial judge merely clarified what a witness had already stated, that he did not recognize either defendant, but knew one defendant by name. State v. Aleem, 49 N.C. App. 359, 271 S.E.2d 575 (1980).

c. Remarks Concerning Weight and Credibility of Testimony.

Instruction That Jury Could Consider Inconsistencies in Details. — An instruction to the jury that they can consider inconsistencies in details which did not pertain to the essential elements of the charges in determining the degree of credibility to be given any witness is proper. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

d. Miscellaneous Remarks.

Comment on Jury's Duty. —

The trial judge may state to the jury the ills attendant upon disagreement including the resulting expense, the length of time the case has been tried, the number of times the case has been tried and that the case will in all probability have to be tried by another jury in the event that the jury fails to agree. However, when such matters are mentioned in the court's instructions, the trial judge must make it clear to the jury that by such instruction the court does not intend that any juror should surrender his conscientious convictions or judgment. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

A strong admonition, in readily understandable language, that, if after due deliberation, any juror sincerely believed that his decision was correct he should "stick to it though (he) stand(s) alone" was amply sufficient to convey to each member of the jury that he should not surrender any conscientious con-

viction in order to reach a unanimous verdict. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

The isolated mention in an instruction to the jury of the expense and inconvenience of retrying a case does not warrant a new trial unless the charge as a whole coerces a verdict. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

Statement of Judge's Recollection as to What Evidence Tended to Show. — The phrase, "I believe the evidence tends to show . . . ," does not constitute an expression of opinion that any particular facts had been fully proven but rather is a statement of the trial judge's recollection as to what the evidence tended to show. State v. Alston, 38 N.C. App. 219, 247 S.E.2d 726 (1978), cert. denied, 296 N.C. 586, 254 S.E.2d 30 (1979).

If the trial judge urges a jury to agree upon a verdict, he should emphasize in language readily understood by a lay juror that he is not injecting his views into the minds of the jurors and that he does not intend that any juror should surrender his own free will and judgment. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

Absent other factors, giving an instruction urging a jury to reach a verdict before the jury commences its deliberations is not reversible error. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

Chastisement of Counsel. — Where there is no reason to believe that jurors were informed of the fact that counsel had been chastised or rebuked by the trial court, no error is committed. State v. Hoskins, 36 N.C. App. 92, 242 S.E.2d 900, cert. denied, 295 N.C. 469, 246 S.E.2d 11 (1978).

Remarks of the trial court clearly addressed to both the district attorney and defendant's counsel for purposes of insuring an orderly trial could not prejudice the jury against the accused and did not, therefore, constitute error. State v. Hoskins, 36 N.C. App. 92, 242 S.E.2d 900, cert. denied, 295 N.C. 469, 246 S.E.2d 11 (1978).

Instruction That Injury Was Serious. — In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, an instruction that the victim's skull fracture was a serious injury did not violate this section. State v. Davis, 33 N.C. App. 262, 234 S.E.2d 762 (1977).

2. Remarks Held Erroneous.

d. Miscellaneous Remarks.

Charge Construed as Requiring Juror to Surrender Convictions. — A trial judge has no right to coerce a verdict, and a charge which might reasonably be construed by a juror as requiring him to surrender his well-founded convictions or judgment to the views of the majority is erroneous. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

Explanation by Judge of Reason for Failure to Comply with Jury's Request. — Where the trial judge told the jury that he could not allow them to take certain photographs which had not been received in evidence into the jury room because the defendant did not consent, his statement was an incorrect statement of the law under § 15A-1233 which was nevertheless harmless in itself since it led to a correct ruling that the jury could not take photographs not admitted in evidence into the jury room. However, the attempt by the trial judge to explain the reason for his failure to comply with the jury's request constituted an impermissible expression of opinion in violation of §§ 15A-1222 and 15A-1232 which required a new trial. State v. Grogan, 40 N.C. App. 371, 253 S.E.2d 20 (1979).

The trial judge's remark "who cares?" after a question asked by defendant's counsel was harmless error and a prejudicial expression of opinion. State v. Tew, 38 N.C. App. 33, 247 S.E.2d 40 (1978).

Comment as to Recommendation of Mercy in Capital Case. — Any expression of opinion by the judge on the issue of the defendant's guilt or innocence results in prejudice to his case which is virtually impossible to cure. Thus, for example, the judge may not, in a capital case, apprise the jury as to whether it can make a recommendation of mercy since such a recommendation assumes a guilty verdict. State v. Griffin, 44 N.C. App. 601, 261 S.E.2d 292 (1980).

III. EXPLANATION OF LAW AND EVIDENCE.

A. General Consideration of the Charge.

A charge to the jury should present, etc. —

In accord with 5th paragraph in original. See State v. Walton, 41 N.C. App. 281, 254 S.E.2d 661 (1979).

The law requires the trial judge to clarify and explain the law arising on the evidence. State v. Harris, 47 N.C. App. 121, 266 S.E.2d 735 (1980).

The charge of the court must be read as a whole. —

One of the cardinal rules governing appellate review of trial court instructions is that the charge will be read contextually and an excerpt will not be held prejudicial if a reading of the whole charge leaves no reasonable grounds to believe that the jury was misled. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

In determining the propriety of the trial judge's charge to the jury, the reviewing court must consider the instructions in their entirety,

and not in detached fragments. State v. Wright, 302 N.C. 122, 273 S.E.2d 699 (1981).

Taking More Time in Stating State's Contentions. —

Defendant may not object if the court takes more time in stating the State's contentions than in stating the defendant's, and the equal stress required does not mean that the statement of contentions of the State and of the defendant must be equal in length. State v. Thompson, 50 N.C. App. 484, — S.E.2d — (1981).

The trial court in an embezzlement case did not improperly fail to give equal stress to the contentions of the State and of the defendant by taking more time in stating the State's contentions than in stating those of defendant where the sole evidence offered by defendant was character evidence, the State introduced a considerably greater volume of testimony than did the defendant, and the contentions of the defendant were therefore very few in contrast with those of the State. State v. Thompson, 50 N.C. App. 484, — S.E.2d — (1981).

Test of Sufficiency. — Where the judge's charge fully instructs the jury on all the substantive areas of the case, and defines and applies the law thereto, it is sufficient. State v. McNeil, 47 N.C. App. 30, 266 S.E.2d 824, cert. denied, 301 N.C. 102, 273 S.E.2d 306 (1980), — U.S. —, 101 S. Ct. 1356, 67 L. Ed. 2d 339 (1981).

Requests for Instructions. —

This section only requires that the trial court state the evidence to the extent necessary to explain the application of the law to the evidence. It is incumbent upon defense counsel who desires more extensive instructions on the evidence to request them at trial. State v. Robinson, 40 N.C. App. 514, 253 S.E.2d 311 (1979).

Where the trial court instructs the jury on a particular point, a party desiring further elaboration on that point must make a timely request for special instructions. State v. Mitchell, 48 N.C. App. 680, 270 S.E.2d 117 (1980).

The court is not required to give a requested instruction in the exact language of the request, and when the request is correct in itself and supported by the evidence in the case, it suffices if the requested instruction is given in substance. State v. Bradsher, 49 N.C. App. 507, 271 S.E.2d 915 (1980).

Charge to Cover All Substantial Points Even in Absence of Special Request. —

The trial judge must charge the jury on all substantial and essential features of a case which arise upon the evidence, even when, as here, there is no special request for the instruction. State v. Fearing, 48 N.C. App. 329, 269 S.E.2d 245, cert. denied, 301 N.C. 99, 273 S.E.2d 303, 301 N.C. 403, 273 S.E.2d 448 (1980).

The statute requires the trial court to instruct the jury on every substantive feature of the case regardless of the absence of a request for such an instruction. State v. Mitchell, 48 N.C. App. 680, 270 S.E.2d 117 (1980).

Broadside Exception Untenable. —

In accord with 5th paragraph in original. See State v. Benton, 299 N.C. 16, 260 S.E.2d 917 (1980).

The jury charge must be construed as a whole in the same connected way in which it was given; and a disconnected portion may not be detached from the context of the charge and then critically examined for an interpretation from which erroneous expressions may be inferred. State v. Gadsden, 300 N.C. 345, 266 S.E.2d 665 (1980).

Errors Should Be Pointed Out at Trial. —

Objections to the charge in reviewing the evidence and stating the contentions of the parties must be made before the jury retires so as to afford the trial judge an opportunity for correction; otherwise they are deemed to have been waived and will not be considered on appeal. State v. Hewett, 295 N.C. 640, 247 S.E.2d 886 (1978); State v. Smith, 50 N.C. App. 188, 272 S.E.2d 621 (1980).

If objections to the review of the evidence are not timely made, they are deemed to have been waived and will not be considered on appeal. State v. Mills, 39 N.C. App. 47, 249 S.E.2d 446 (1978), cert. denied, 296 N.C. 588, 254 S.E.2d 33 (1979).

Objections to the trial court's review of the evidence must be made before the jury retires in order that the trial court may have an opportunity for correction. State v. Mills, 39 N.C. App. 47, 249 S.E.2d 446 (1978), cert. denied, 296 N.C. 588, 254 S.E.2d 33 (1979).

When counsel is unsatisfied with the summary of the evidence or contentions of the parties, in order to preserve the error, he must bring this to the court's attention before the jury is sent to deliberate on the issues. This affords the trial court the opportunity to correct any misstatements or to expand on its summary when this is deemed necessary. State v. Robinson, 40 N.C. App. 514, 253 S.E.2d 311 (1979).

Errors Should Be Pointed Out At Trial. — In a prosecution for rape there was no merit to defendant's assignment of error to the trial court's summary of the evidence because even if the trial court had not properly recapitulated the evidence in the charge to the jury the burden was on the defendant to make a proper objection; thus, defendant waived his objection by failing to do so. State v. Hammonds, 301 N.C. 713, 272 S.E.2d 856 (1981).

Waiver of Objections. — Generally objections to statements of the contentions of the parties not made at the time of trial so as to permit the court to correct them are deemed

waived. State v. Covington, 48 N.C. App. 209, 268 S.E.2d 231 (1980).

B. Explanation Required.

1. In General.

Rule Stated. —

In resolving whether an instruction should be given, the facts are to be interpreted in the light most favorable to the defendant. State v. Blackmon, 38 N.C. App. 620, 248 S.E.2d 456 (1978), cert. denied, 296 N.C. 412, 251 S.E.2d 471 (1979).

In accord with 2nd paragraph in original. See State v. Benton, 299 N.C. 16, 260 S.E.2d 917 (1980).

Where the court recounted the evidence of the State and defendant, and the jury was then instructed what they would have to find from the evidence in order to find the defendant guilty or not guilty of the various charges, this satisfies the requirements of this section. State v. Benton, 42 N.C. App. 228, 256 S.E.2d 279 (1979), aff'd, 299 N.C. 16, 260 S.E.2d 917 (1980).

Where Facts Are Simple. —

In accord with 3rd paragraph in original. See State v. Benton, 299 N.C. 16, 260 S.E.2d 917 (1980).

Contention of Parties. —

The trial judge is not required by this section to state the contentions of litigants. State v. Hewett, 295 N.C. 640, 247 S.E.2d 886 (1978).

Failure to state the contentions of the parties is not error, but failure to give equal stress to the State and defendant in a criminal action is error. So, when the judge states the contentions of one party he must also give the pertinent contentions of the opposing party. State v. Hewett, 295 N.C. 640, 247 S.E.2d 886 (1978).

This section does not require the trial court to state the contentions of the litigants; but if the court does so, it must give equal stress to the State and the defendant, and must state the pertinent contentions of both parties. State v. Thompson, 50 N.C. App. 484, — S.E.2d — (1981).

Explanation of Subordinate Features of Case. —

A substantive feature of a case is any component thereof which is essential to the resolution of the facts in issue. Evidence which does not relate to the elements of the crime itself or the defendant's criminal responsibility therefore are subordinate features of the case. State v. Atkinson, 39 N.C. App. 575, 251 S.E.2d 677 (1979).

The weight to be accorded the defendant's confessions concerns a subordinate feature of the case and is not a substantive feature thereof which requires a specific instruction in the absence of a special request. State v. Atkinson, 39 N.C. App. 575, 251 S.E.2d 677 (1979).

The judge is not required to instruct the jury as to evidentiary matters essentially "subordinate," i.e., those which do not relate to the elements of the crime charged or to defendant's criminal responsibility. State v. Ward, 300 N.C. 150, 266 S.E.2d 581 (1980).

In a prosecution for embezzlement where character evidence was a subordinate feature of the case, failure of the court to give an instruction as to how the jury should view character evidence was not error absent a request for such an instruction. State v. Thompson, 50 N.C. App. 484, — S.E.2d — (1981).

Failure to Give Any of Defendant's Contentions. — Prejudicial error requiring a new trial is committed when the trial judge in his charge to the jury in a criminal case gives the contentions of the State but fails to give any contentions of defendant. State v. Hewett, 295 N.C. 640, 247 S.E.2d 886 (1978).

Where the trial judge in his charge states fully the contentions of the State but fails to give any contentions of the defendant, the party whose contentions have been omitted is not required to object or otherwise bring the omission to the attention of the trial court. State v. Hewett, 295 N.C. 640, 247 S.E.2d 886 (1978); State v. Wade, 49 N.C. App. 257, 271 S.E.2d 77 (1980).

Failure to Summarize Evidence Favorable to Defendant Where Defendant Presented No Evidence. — The trial court did not err in its summary of the evidence to the jury by failing to relate any of the evidence favorable to defendant, since defendant presented no evidence in her behalf, and none of the state's evidence favorable to defendant or evidence elicited by defendant on cross-examination was necessary to an explanation of the applicable law. State v. Moore, 301 N.C. 262, 271 S.E.2d 242 (1980).

2. Statement of Evidence.

In General. —

Although the judge's charge need not, and indeed should not, encompass every fragment of evidence offered by the State and defendant, it is required to "segregate the material facts of the case, array the facts on both sides, and apply the pertinent principles of law to each, so that the jury may decide the case according to the credibility of the witnesses and the weight of the evidence." State v. Ward, 300 N.C. 150, 266 S.E.2d 581 (1980).

Failure to instruct upon a substantive or "material" feature of the evidence and the law applicable thereto will result in reversible error, even in the absence of a request for such an instruction. State v. Ward, 300 N.C. 150, 266 S.E.2d 581 (1980).

The court is required to instruct on all substantial features of a case. State v. Jones, 300 N.C. 363, 266 S.E.2d 586 (1980).

Defenses raised by the evidence constitute substantial features requiring an instruction. State v. Jones, 300 N.C. 363, 266 S.E.2d 586 (1980).

Slight inaccuracies, etc. —

As a general rule, a misstatement of the evidence or contentions by the trial judge will not entitle a defendant to a new trial unless the defendant makes a timely objection and calls it to the attention of the judge to permit him to correct it. State v. Evans, 36 N.C. App. 166, 243 S.E.2d 812, cert. denied, 295 N.C. 469, 246 S.E.2d 217 (1978).

The trial court in a kidnapping and rape case did not state a fact not in evidence, when he stated during recapitulation of the evidence that after four men had engaged in intercourse with the victim she was thereafter taken by [defendant] to a place to pick up her child, where the evidence showed that the victim was taken by all four men, including defendant, to a friend's house to pick up her daughter, and that one of the men, not defendant, escorted her into the house; furthermore, even if such fact were not in evidence, the court's statement did not amount to a misstatement of a material fact, and defendant cannot complain thereof where he failed to call the misstatement to the court's attention at trial. State v. Ashford, 301 N.C. 512, 272 S.E.2d 126 (1980).

Recapitulation Unnecessary. —

In accord with 1st paragraph in original. See State v. Oxendine, 300 N.C. 720, 268 S.E.2d 212 (1980).

In accord with 3rd paragraph in original. See State v. Sanders, 298 N.C. 512, 259 S.E.2d 258 (1979).

In accord with 4th paragraph in original. See State v. Oxendine, 300 N.C. 720, 268 S.E.2d 212 (1980).

Absent a special request, the court is not required to summarize that evidence which merely reflects upon the credibility of a given witness. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

In summarizing the evidence in his charge to the jury, a trial judge is required to state the evidence only to the extent necessary to apply the law applicable to the case. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978); State v. Mitchell, 48 N.C. App. 680, 270 S.E.2d 117 (1980); State v. Edwards, 49 N.C. App. 547, 272 S.E.2d 384 (1980).

The trial judge is not bound to recapitulate all of the evidence. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

The trial judge is not required to fully recapitulate all the evidence, but when he does so he must summarize the evidence in the case that is favorable to the defendant even though defendant presented no evidence. State v. Spicer, 299 N.C. 309, 261 S.E.2d 893 (1980).

While a trial judge must summarize evidence favorable to defendant which is brought out on cross-examination, there is no requirement that this be done when the evidence goes not to the establishment of a substantive defense but rather is of an impeaching quality and effect. State v. McDowell, 301 N.C. 279, 271 S.E.2d 286 (1980), cert. denied, U.S. , 101 S. Ct. 1731, 68 L. Ed. 2d 220 (1981).

Failure to Summarize Evidence of Defendant. — When the court recapitulates fully the evidence of the State but fails to summarize, at all, evidence favorable to the defendant, he violates the clear mandate of the statute which requires the trial judge to state the evidence to the extent necessary to explain the application of the law thereto. In addition, he violates the requirement that equal stress be given to the state and to the defendant. State v. Sanders, 298 N.C. 512, 259 S.E.2d 258 (1979); State v. Moore, 301 N.C. 262, 271 S.E.2d 242 (1980).

Where the trial judge failed to summarize evidence which raised inferences favorable to defendant including evidence of defendant's prior statement to police officers and evidence elicited on cross-examination, this omission constituted error prejudicial to defendant. State v. Sanders, 298 N.C. 512, 259 S.E.2d 258 (1979).

It is not error for the court merely to consume more time in summarizing the State's evidence than it does in restating the evidence for defendant. State v. Sanders, 298 N.C. 512, 259 S.E.2d 258 (1979); State v. Smith, 50 N.C. App. 188, 272 S.E.2d 621 (1980).

Contentions of Parties. —

When a trial judge elects to state the contention of one party, he must equally stress the contention of the opposing party. This does not mean that the statement of contentions of the respective parties must be of equal length for where one party's evidence is meager, his contentions must be few in contrast with those of an opposing party who offers a great volume of testimony which raises many pertinent contentions. State v. Banks, 295 N.C. 399, 245 S.E.2d 743 (1978); State v. Mitchell, 48 N.C. App. 680, 270 S.E.2d 117 (1980).

While the trial judge is not required to state the contentions of the parties, when he undertakes to do so he must give equal stress to the contentions of both parties. This is true even when the defendant does not testify. He still has contentions regarding the case that arise from his plea of not guilty, from the State's evidence and from his cross-examination of the State's witnesses. State v. Spicer, 299 N.C. 309, 261 S.E.2d 893 (1980).

The trial court's instructions to the jury were prejudicial where the trial court did not summarize the evidence as required by this section, but instead consistently and without exception stated the contentions of the parties,

and in stating the State's contentions, included matters that were not in evidence. State v. Wagner, 50 N.C. App. 286, 273 S.E.2d 33 (1981).

Statement of Material Fact Not in Evidence Is Reversible Error. — Although the court ordinarily should be informed of an inaccuracy in the summary of the evidence in the charge during or at the conclusion of the instructions so that any error may be corrected, a statement of a material fact not in evidence will constitute reversible error whether or not it is called to the court's attention. State v. Barbour, 295 N.C. 66, 243 S.E.2d 380 (1978).

Exclusion of Objectionable Evidence. — The trial judge has the right to exclude objectionable evidence without an objection by the opposing party. However, he is prohibited from doing so in such a manner as to exhibit any hostility toward the party offering the evidence thereby expressing an opinion. State v. Evans, 36 N.C. App. 166, 243 S.E.2d 812, cert. denied, 295 N.C. 469, 246 S.E.2d 217 (1978).

Due process requires that the evidence be reviewed in a fair and impartial manner. State v. Mills, 39 N.C. App. 47, 249 S.E.2d 446 (1978), cert. denied, 296 N.C. 588, 254 S.E.2d 33 (1979).

Hypothetical Facts. — Cases construing the prior statute (§ 1-180) have held that the law should be applied to the particular facts in evidence and not to a set of hypothetical facts. State v. Williams, 299 N.C. 652, 263 S.E.2d 774 (1980).

3. Explanation of Law.

Absence of Request for Special Instructions. —

An instruction must be given on every substantive feature of the case, even in the absence of a request for such an instruction. State v. Atkinson, 39 N.C. App. 575, 251 S.E.2d 677 (1979).

The trial court need not instruct the jury with any greater particularity than is necessary to enable the jury to apply the law to the substantive features of the case arising on the evidence when the defendant makes no request for additional instructions. State v. Atkinson, 39 N.C. App. 575, 251 S.E.2d 677 (1979).

Where the trial court's instruction on unanimity of the verdict complied with § 15A-1235, the court's failure to instruct that the individual jurors were not to surrender their own convictions solely in order to reach a verdict was not error since the defendant requested no instructions to that effect. State v. Ward, 301 N.C. 469, 272 S.E.2d 84 (1980).

Failure to Instruct as to Law of Self-Defense. —

When the defendant's evidence, even though contradicted by the State, raises an issue of self-defense, the failure of the trial court to charge on self-defense is error. State v. Blackmon, 38 N.C. App. 620, 248 S.E.2d 456 (1978), cert. denied, 296 N.C. 412, 251 S.E.2d 471 (1979); State v. Ferrell, 300 N.C. 157, 265 S.E.2d 210 (1980).

Felonious Intent. — The comprehensiveness and specificity of the definition and explanation of "felonious intent" required in a charge depends on the facts in the particular case. State v. Brown, 300 N.C. 41, 265 S.E.2d 191 (1980).

Included Offenses. — If there is evidence from which the jury could find that the defendant committed a lesser included offense, the judge must charge on that lesser offense. State v. Ferrell, 300 N.C. 157, 265 S.E.2d 210 (1980).

There is a duty to charge on any lesser included offense raised by the evidence even in the absence of a request for the instruction. State v. Moore, 300 N.C. 694, 268 S.E.2d 196 (1980).

When there is conflicting evidence of the essential elements of the greater crime and evidence of a lesser included offense, the trial judge must instruct on the lesser included offense even where there is no specific request for such instruction. An error in this respect will not be cured by a verdict finding a defendant guilty of the greater crime. State v. Brown, 300 N.C. 41, 265 S.E.2d 191 (1980).

The trial court judge must submit and instruct the jury on a lesser included offense when, and only when there is evidence from which the jury can find that a defendant committed the lesser included offense; conversely, when all the evidence tends to show that defendant committed the crime charged in the bill of indictment and there is no evidence of the lesser included offense, the court should refuse to charge on the lesser included offense. State v. Summitt, 301 N.C. 591, 273 S.E.2d 247 (1981).

C. Illustrative Cases.

Charge Held Improper. — By failing to give the converse or alternative view that acquittal should result if the jury were not satisfied beyond a reasonable doubt as to each and every stated element, the trial judge failed to provide even a general application of the law to the evidence raised by defendant's testimony. State v. Ward, 300 N.C. 150, 266 S.E.2d 581 (1980).

In his recapitulation of the evidence, the judge's failure to mention to the jury that evidence offered by the defendant tended to show that defendant did not fire the pistol in the direction of the deceased, was a material omission resulting in prejudicial error. State v. Ward, 300 N.C. 150, 266 S.E.2d 581 (1980).

Instruction on Illegality of Collecting a Debt By Force In Common-Law Robbery Prosecution. — The trial judge in a

common-law robbery case did not express an opinion as to the validity of defendant's defense when he charged on the illegality of collecting a debt by the use of force, since defendant's own testimony tended to show that he was attempting to collect a debt owed to him by the victim's brother at the time of the incident in question, and the legal issue thus arose on the evidence. State v. Thompson, 49 N.C. App. 684, 272 S.E.2d 160 (1980).

Defendant's Burden in Proving His Defense of Insanity. — The trial court's instruction that defendant had the burden of proving his defense of insanity to the "reasonable satisfaction" rather than to the "satisfaction" of the jury was favorable to defendant, since "reasonable satisfaction" imposes a lesser burden than "satisfaction." State v. Ward, 301 N.C. 469, 272 S.E.2d 84 (1980).

Failure to Reinstruct on Not Guilty By Reason of Insanity Defense Not Error. — The trial court did not err in failing to instruct that the jury could find defendant not guilty by reason of insanity, when the court instructed that if the jury had a reasonable doubt as to one of the elements of the offense charged it should return a verdict of not guilty, or when the court instructed that all twelve minds must agree on a verdict of guilty or not guilty where the court included the possible verdict of not guilty by reason of insanity at the beginning of the instructions, after the instructions on the elements of the offense charged, and in the final mandate. State v. Ward, 301 N.C. 469, 272 S.E.2d 84 (1980).

Instruction on Right to Prevent Felonious Assault. — The evidence in a homicide case was sufficient to require an instruction on the right of defendant as a private citizen to interfere with and prevent the victim from committing a felonious assault on another where defendant presented evidence tending to show that the victim had previously dated and fathered a child by the same woman that defendant was dating, that the victim had a prior history of taking violent actions, that the victim stated that he was going to get a gun and go beat the woman in question, and that the victim started walking toward the woman's house with his hand in his pocket so as to make the defendant believe he was carrying a gun. State v. Patterson, 50 N.C. App. 280, 272 S.E.2d 924 (1981).

Defendant's Admission of Fact. — In a prosecution for first-degree rape, where the trial court instructed that defendant's admission that he was in the car with the rape victim could be considered by the jury as an admission of a fact relating to the crime charged, there was no merit to defendant's contention that such instruction could have led the jury to believe that his mere presence was sufficient for conviction and that he had therefore committed the crime, since the trial court's instructions made clear what the jury must find in order to convict defendant. State v. Hammonds, 301 N.C. 713, 272 S.E.2d 856 (1981).

Instruction on Evidence to Be Considered. — In a prosecution of defendants for two armed robberies wherein one of the victims was unavailable to testify at the trial and the jury, after deliberating for some time, asked the court whether "we have to base the verdict on strictly the evidence we have heard due to the fact that one of the State's witnesses is not here," the trial court did not err in instructing the jury that it could consider only the evidence it heard from the witness stand and the exhibits. State v. Jones, 50 N.C. App. 560, — S.E.2d — (1981).

§ 15A-1233. Review of testimony; use of evidence by the jury.

CASE NOTES

Jury Cannot Take Materials Not Admitted in Evidence into Jury Room. — Where the trial judge told the jury that he could not allow them to take certain photographs which had not been received in evidence into the jury room because the defendant did not consent, his statement was an incorrect statement of the law under this section which was nevertheless harmless in itself since it led to a correct ruling that the jury could not take photographs not admitted in evidence into the jury room. However, the attempt by the trial judge to explain the reason for his failure to comply with the jury's request constituted an impermissible expression of opinion in violation of §§ 15A-1222 and 15A-1232 which required a new trial. State v. Grogan, 40 N.C. App. 371, 253 S.E.2d 20 (1979).

This section does not grant the trial judge authority to permit the jury to take exhibits or other materials which have not been received in evidence to the jury room under any circumstances. State v. Grogan, 40 N.C. App. 371, 253 S.E.2d 20 (1979).

Refusal to Allow Testimony to Be Read Back Not Error. — The trial judge did not

abuse his discretion in refusing to allow the jurors to have certain testimony read back to them after deliberations had begun, since the judge explained that the witness whose testimony was requested by the jury was one of a number of witnesses, and the court did not want to give special emphasis to any particular witness. State v. Jones, 47 N.C. App. 554, 268 S.E.2d 6 (1980).

Refusal to Allow Testimony to Be Read Back Prejudicial Error Where Actually a Refusal to Exercise Discretion. — Where the trial judge refused the jury's request to have the transcript of one of the defendant's witnesses read to it, on the grounds that the judge did not have the authority to grant the jury's request in his discretion, the trial judge's action was actually a refusal to exercise his discretion and the denial of the jury's request was prejudicial error entitling the defendant to a new trial. State v. Lang, 301 N.C. 508, 272 S.E.2d 123 (1980).

Refusal to Submit Statements Not Prejudicial. — Defendant was not prejudiced by the court's refusal to submit to the jury the first statement made by defendant to an officer where a portion of the statement had been deleted. State v. Bell, 48 N.C. App. 356, 269 S.E.2d 201, cert. denied, 301 N.C. 528, 273 S.E.2d 455 (1980).

The trial court erred in permitting the jury to take written statements of defendant and two witnesses into the jury room during its deliberations without defendant's consent, but such error was not sufficiently prejudicial to warrant a new trial where it does not appear that the error could have changed the outcome of the trial. State v. Bell, 48 N.C. App. 356, 269 S.E.2d 201, cert. denied, 301 N.C. 528, 273 S.E.2d 455 (1980).

Quoted in Doby v. Fowler, 49 N.C. App. 162, 270 S.E.2d 532 (1980).

Applied in State v. Prince, 49 N.C. App. 145, 270 S.E.2d 521 (1980).

§ 15A-1234. Additional instructions.

CASE NOTES

Repeated or Clarified Instructions Are Not Additional Instructions. — If the trial judge planned to give "additional instructions" in order to add to his previous charge because of omissions therein, then the judge might be required under this statute to inform the parties of the instructions he intended to give. However, when he is repeating or clarifying instructions previously given in response to the jury's question, these are not "additional instructions" as contemplated under subsection (c) of this section. State v. Farrington, 40 N.C. App. 341, 253 S.E.2d 24 (1979).

In a situation involving an exchange of questions and answers between the court and the jury, it would obviously be cumbersome, impractical and unnecessary for the court to confer with counsel before answering each question put to him by the jury. It is inconceivable that the legislature intended to require such a procedure. State v. Farrington, 40 N.C. App. 341, 253 S.E.2d 24 (1979).

§ 15A-1235. Length of deliberations; deadlocked jury.

Legal Periodicals. — For a survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

CASE NOTES

This section is based upon the standards approved by the American Bar Association. This enactment provides trial judges and practicing bar with clear standards for instructions urging verdicts. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

The Legislature intended by enactment of this section to provide that a North Carolina jury may no longer be advised of the potential expense and inconvenience of retrying the case should the jury fail to agree. State v. Easterling, 300 N.C. 594, 268 S.E.2d 800 (1980).

Discretion of Trial Judge. — The action of the judge in declaring or failing to declare a mistrial under this section is reviewable only in case of gross abuse of discretion. State v. Darden, 48 N.C. App. 128, 268 S.E.2d 225 (1980).

Standard of Review on Appeal. — The fundamental principle is that unless there is a reasonable probability that the alleged error in

the instruction changed the result at trial, the verdict should not be disturbed on appeal. State v. Hunter, 48 N.C. App. 689, 269 S.E.2d 736 (1980).

It should be the rule rather than the exception that a disregard of the guidelines established in this statute will require a finding on appeal of prejudicial error. State v. Easterling, 300 N.C. 594, 268 S.E.2d 800 (1980).

Standards Applicable to Charges to Deadlocked Jury. — This statute, which borrows from standards approved by the American Bar Association, is the proper reference for standards applicable to charges which may be given a jury that is apparently unable to agree upon a verdict. State v. Easterling, 300 N.C. 594, 268 S.E.2d 800 (1980).

Instruction on Juror's Duty. — A strong admonition, in readily understandable language, that, if after due deliberation, any juror sincerely believed that his decision was correct he should "stick to it though (he) stand(s) alone" was amply sufficient to convey to each member of the jury that he should not surrender any conscientious conviction in order to reach a unanimous verdict. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

If the trial judge urges a jury to agree upon a verdict, he should emphasize in language readily understood by a lay juror that he is not injecting his views into the minds of the jurors and that he does not intend that any juror should surrender his own free will and judgment. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

A trial judge has no right to coerce a verdict, and a charge which might reasonably be construed by a juror as requiring him to surrender his well-founded convictions or judgment to the views of the majority is erroneous. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

Absent other factors, giving an instruction urging a jury to reach a verdict before the jury commences its deliberations is not reversible error. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

Isolated mention of the necessity to retry the case does not warrant a new trial unless the charge as a whole is coercive. State v. Darden, 48 N.C. App. 128, 268 S.E.2d 225 (1980).

Comment on Expense of Retrying Case. — The isolated mention in an instruction to the jury of the expense and inconvenience of retrying a case does not warrant a new trial unless the charge as a whole coerces a verdict. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

The trial judge may state to the jury the ills attendant upon disagreement including the resulting expense, the length of time the case has been tried, the number of times the case has been tried and that the case will in all probability have to be tried by another jury in the event that the jury fails to agree. However, when such matters are mentioned in the court's instructions, the trial judge must make it clear to the jury that by such instruction the court does not intend that any juror should surrender his conscientious convictions or judgment. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

Where the jury foreman advised the court that in his opinion the jury could not reach a decision, it was error for the trial court to charge the jurors that if they did not agree upon a verdict another jury might be called upon to try the case; that the State and defendants had a tremendous amount of time and money invested; and that retrial involved a duplication of all the time and expense. State v. Lamb, 44 N.C. App. 251, 261 S.E.2d 130 (1979).

Charge Will Be Considered as a Whole. — One of the cardinal rules governing appellate review of trial court instructions is that the charge will be read contextually and an excerpt will not be held prejudicial if a reading of the whole charge leaves no reasonable grounds to believe that the jury was misled. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

In deciding whether the court's instructions forced a verdict or merely served as a catalyst for further deliberation, an appellate court must consider the circumstances under which the instructions were made and the probable impact of the instructions on the jury. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

Additional Instructions Held Proper. — The trial judge did not violate this section and coerce the jury into returning a verdict where the jury returned to the courtroom after an hour's deliberation, requested additional instructions, and indicated that some of the jurors felt they did not have enough evidence to reach a verdict; the trial judge recessed court until the following morning; and on the following morning he answered the jurors' questions and then instructed them that a mistrial, of course, will mean that more time and another jury will have to be selected to hear the cases and this evidence again, and they should try to reconcile the differences if such is possible without surrendering the conscientious convictions. State v. Lipfird, 48 N.C. App. 649, 269 S.E.2d 723 (1980).

The trial judge's additional instruction to the jury after it had deliberated for an hour that the case would have to be retried if the jury failed to reach a verdict and that the jurors were as capable of deciding the case as any other group of jurors, if contrary this section, did not constitute prejudicial error where the instruction was not directed to the minority but to all the jurors;

the court's reference to another trial in the event the jurors failed to agree was followed by an almost verbatim recital of the instructions set forth in subsection (b) of this section, and the charge made it clear that the court was not asking any juror to surrender any conscientious opinion he might have but was only asking the jurors to make every reasonable effort to arrive at a unanimous verdict. State v. Hunter, 48 N.C. App. 689, 269 S.E.2d 736 (1980).

The court's instruction that a disagreement meant "that if this case is not brought to a verdict as I previously instructed you that another judge and another jury in another week will try this case again" was not erroneous since an isolated mention of the necessity to retry the case does not warrant a new trial unless the charge as a whole is coercive. State v. Jones, 47 N.C. App. 554, 268 S.E.2d 6 (1980).

When the jury informed the court that it was divided 10 to two, the court's response that the jury could continue to deliberate that night, could return to deliberate the next day, and had two more days in which deliberations could take place did not coerce the jury into reaching a decision, particularly in light of the court's instruction the following morning that the jury should reach a unanimous verdict if possible without surrendering their conscientious convictions. State v. Jones, 47 N.C. App. 554, 268 S.E.2d 6 (1980).

Absence of Request for Special Instructions. — Where the trial court's instruction on unanimity of the verdict complied with this section, the court's failure to instruct that the individual jurors were not to surrender their own convictions solely in order to reach a verdict was not error since the defendant requested no instructions to that effect. State v. Ward, 301 N.C. 469, 272 S.E.2d 84 (1980).

Failure to Reinstruct on Not Guilty By Reason of Insanity Defense Not Error. — The trial court did not err in failing to instruct that the jury could find defendant not guilty by reason of insanity when the court instructed that if the jury had a reasonable doubt as to one of the elements of the offense charged, it should return a verdict of not guilty, or when the court instructed that all twelve minds must agree on a verdict of guilty or not guilty where the court included the possible verdict of not guilty by reason of insanity at the beginning of the instructions, after the instructions on the elements of the offense charged, and in the final mandate. State v. Ward, 301 N.C. 469, 272 S.E.2d 84 (1980).

§ 15A-1236. Admonitions to jurors; regulation and separation of jurors.

(a) The judge at appropriate times must admonish the jurors that it is their duty:

(1) Not to talk among themselves about the case except in the jury room after their deliberations have begun;

(2) Not to talk to anyone else, or to allow anyone else to talk with them or in their presence about the case and that they must report to the judge immediately the attempt of anyone to communicate with them about the case;

(3) Not to form an opinion about the guilt or innocence of the defendant, or express any opinion about the case until they begin their deliberations;

(4) To avoid reading, watching, or listening to accounts of the trial; and

(5) Not to talk during trial to parties, witnesses, or counsel.

The judge may also admonish them with respect to other matters which he considers appropriate.

(1977, 2nd Sess., c. 1147, s. 3.)

Effect of Amendments. — The 1977, 2nd Sess., amendment, effective July 1, 1978, added "until they begin their deliberations" at the end of subdivision (a)(3).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (a) is set out.

CASE NOTES

Delivery of Keys by Juror to Husband. — The admonitions prescribed by this section were not required where the trial judge merely permitted the juror to step out into the courtroom, or to the door of the courtroom, and deliver a set of keys to her husband, and there was nothing to suggest that the court permitted the juror to converse with her husband concerning the case — only that the court permitted the juror to speak to her husband briefly in connection with delivering him the keys. State v. Williams, 296 N.C. 693, 252 S.E.2d 739 (1979).

Failure of the trial court to admonish the jury pursuant to this section prior to an overnight recess was not reversible error per se where defendant failed to show that he was prejudiced by the court's failure to admonish and where defendant and his counsel, who were present in the courtroom when the overnight recess was ordered, should have called the court's attention to its failure to admonish if they were concerned about such omission. State v. Turner, 48 N.C. App. 606, 269 S.E.2d 270 (1980).

§ 15A-1237. Verdict.

CASE NOTES

This section is intended to aid the trial court in avoiding the taking of verdicts which are flawed by the inadvertent omission of some essential element of the verdict itself. State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979).

This section does not require that a verdict in a felonious larceny case establish the value of the allegedly stolen property. State v. Jefferies, 41 N.C. App. 95, 254 S.E.2d 550, cert. denied, 297 N.C. 614, 257 S.E.2d 438 (1979).

Inquiry or Polling of Jury Not Barred. — The statutory requirement of a written jury verdict does not bar inquiry from the court or a polling of the jury to insure that the written verdict is sufficiently clear and free from doubt. State v. Smith, 299 N.C. 533, 263 S.E.2d 563 (1980).

Written Verdict Not Required on Each Element. — Although every element of the offenses charged was not included in the form verdicts submitted to the jury, the offenses which the jury was to consider were sufficiently identified, and there was no requirement in this section that written verdicts contain each element of the offense to which they referred. State v. Partin, 48 N.C. App. 274, 269 S.E.2d 250, cert. denied, 301 N.C. 404, 273 S.E.2d 449 (1980).

Omission of Foreman's Signature Does Not Invalidate Verdict Where Jury's Intention Manifest. — Where no omission of the essential element of the verdict by the jury foreman was possible since the written verdict form properly set forth the essential elements of the verdicts that could be returned, and where the verdict substantially answered the issue so as to permit the trial judge to pass judgment in accordance with the manifest intention of the jury, there was no merit to defendant's contention that the verdict against him was invalid because the jury foreman did not sign it as required by this section. State v. Collins, 50 N.C. App. 155, 272 S.E.2d 603 (1980).

In cases where a plea of not guilty by reason of insanity is recorded, the court should first submit general issues of guilt or innocence, and thereafter, where the evidence justifies instructions on the defense of insanity, a special issue as to whether the jury found defendant not guilty because he was insane may be submitted as the last issue, but the jury should be instructed that it is not to consider the special issue unless it has returned a general verdict of not guilty. State v. Linville, 300 N.C. 135, 265 S.E.2d 150 (1980).

Specification of Theory of Guilty Verdict. — Where, in an indictment for murder, the evidence would support two guilty verdicts to the charge of first-degree murder, guilty by reason of the felony-murder rule or guilty by reason of premeditation and deliberation, it was appropriate for the trial court to require the jury to specify in its verdict the theory upon which they found defendant guilty, since if the jury's verdict specified the theory, the court could sentence appropriately. The required use of a specific written verdict in this case is consistent with the intent of this section and it enabled the trial court to avoid the difficulty which that provision seeks to alleviate. State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979).

When Verdict Should Be Received and Recorded. — If the verdict substantially answers the issue(s) so as to permit the trial judge to pass judgment in accordance with the manifest intention of the jury, then the verdict should be received and recorded. State v. Smith, 299 N.C. 533, 263 S.E.2d 563 (1980).

§ 15A-1238. Polling the jury.

CASE NOTES

Polling Not Barred by Written Verdict. — The statutory requirement of a written jury verdict does not bar inquiry from the court or a polling of the jury to insure that the written verdict is sufficiently clear and free from doubt. State v. Smith, 299 N.C. 533, 263 S.E.2d 563 (1980).

Quoted in State v. Nelson, 36 N.C. App. 235, 243 S.E.2d 392 (1978).

§ 15A-1240. Impeachment of the verdict.

Legal Periodicals. — For a survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

CASE NOTES

The determination of the existence and effect of jury misconduct is primarily for the trial court whose decision will be given great weight on appeal. State v. Gilbert, 47 N.C. App. 316, 267 S.E.2d 378 (1980).

Juror's Knowledge of Possibility of Parole. — Testimony by a newspaper reporter that a juror told her that the jury had recommended the death penalty for defendant because the jurors knew that defendant would be eligible for parole in 20 years if he was sentenced to life imprisonment was not rendered admissible to impeach the verdict by subdivision (c)(1) since a juror's knowledge that there is a possibility of parole for a defendant would not "violate the defendant's constitutional right to confront the witnesses against him." State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979), cert. denied, 446 U.S. 941, 100 S. Ct. 2165, 64 L. Ed. 2d 796 (1980).

In Addition to Photographs in Jury Room. — In a first-degree murder case, the trial court did not err in excluding from the record on appeal a juror's affidavit stating in substance that photographic exhibits of the victim's body were taken into the jury room, and a newspaper clipping indicating that the possibility of parole was a major consideration in the jury's deliberation on whether to recommend the death penalty, since no purpose would have been served by inclusion of the juror's affidavit and the newspaper clipping other than impeachment of the verdict. Any evidence relative to the jury's consideration of the possibility of parole would be excluded by subsection (a) of this section, and the affidavit concerning the pictures could not have been considered pursuant to subdivision (c)(1) of this section because the pictures had been admitted into evidence and in no event would consideration of them violate the defendant's constitutional right to confront the witnesses against him. State v. Johnson, 298 N.C. 355, 259 S.E.2d 752 (1979).

In instances where the contention is made by the defendant that the jury has been improperly influenced, it has been held that it must be shown that the jury was actually prejudiced against the defendant, to avail the defendant relief from the verdict, and the findings of the trial judge upon the evidence and facts are conclusive and not reviewable. State v. Gilbert, 47 N.C. App. 316, 267 S.E.2d 378 (1980).

Juror's Qualifications. — Testimony by one of defendant's friends that, after the trial was over, he heard a juror state, "If he [defendant] wasn't guilty, the judge would have dismissed it," was insufficient by itself to indicate that the juror was unqualified to serve; furthermore, the witness's testimony seeking to impeach the verdict was incompetent. State v. Puckett, 46 N.C. App. 719, 266 S.E.2d 48, appeal dismissed, 300 N.C. 561, 270 S.E.2d 115 (1980).

§ 15A-1241. Record of proceedings.

CASE NOTES

Applied in State v. Soloman, 40 N.C. App. 600, 253 S.E.2d 270 (1979).

§ 15A-1242. Defendant's election to represent himself at trial.

CASE NOTES

Compliance with the dictates of this section fully satisfies the constitutional requirement that waiver of counsel must be knowing and voluntary. State v. Thacker, 301 N.C. 348, 271 S.E.2d 252 (1980).

Applied in State v. Brincefield, 43 N.C. App. 49, 258 S.E.2d 81 (1979); State v. Brooks, 49 N.C. App. 14, 270 S.E.2d 592 (1980).

§ 15A-1243. Standby counsel for defendant representing himself.

CASE NOTES

Denial of Standby Counsel Held Proper. — Defendant had no right to standby counsel, and the court did not abuse its discretion in denying such counsel where defendant requested it, the motion was granted, defendant changed his mind and elected not to use standby counsel, defendant later requested such counsel again, and the court refused. State v. Brooks, 49 N.C. App. 14, 270 S.E.2d 592 (1980).

Applied in State v. Brincefield, 43 N.C. App. 49, 258 S.E.2d 81 (1979).

SUBCHAPTER XIII. DISPOSITION OF DEFENDANTS.

ARTICLE 78.

Order of Commitment to Imprisonment.

§ 15A-1301. Order of commitment to imprisonment when not otherwise specified.

When a judicial official orders that a defendant be imprisoned he must issue an appropriate written commitment order. When the commitment is to a sentence of imprisonment, the commitment must include the identification of the offense or offenses for which the defendant was convicted and, if the sentences are consecutive, the maximum sentence allowed by law upon conviction of each offense, and, if the sentences are concurrent or consolidated, the longest of the maximum sentences allowed by law upon conviction of any of the offenses. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, s. 4.)

Effect of Amendments. — The 1977, 2nd Sess., amendment, effective Aug. 1, 1978, added the second sentence.

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall

become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

Legal Periodicals. — For an article entitled, "Trial Stage and Appellate Procedure Act: An Overview," see 14 Wake Forest L. Rev. 899 (1978).

For an article entitled, "Disposition of Defendants Under Chapter 15A," see 14 Wake Forest L. Rev. 971 (1978).

ARTICLE 80.

Defendants Found Not Guilty by Reason of Insanity.

§ 15A-1321. Civil commitment of defendants found not guilty by reason of insanity.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

Legal Periodicals. — For an article entitled, "Trial Stage and Appellate Procedure Act: An Overview," see 14 Wake Forest L. Rev. 899 (1978).

For an article entitled, "Disposition of Defendants Under Chapter 15A," see 14 Wake Forest L. Rev. 971 (1978).

CASE NOTES

Instruction Required upon Request of Defendant Interposing Insanity Defense. — Upon request, a defendant who interposed a defense of insanity to a criminal charge was entitled to a jury instruction by the trial judge setting out in substance the commitment procedures outlined in repealed § 122-84.1. State v. Bundridge, 294 N.C. 45, 239 S.E.2d 811 (1978).

Cited in State v. Linville, 300 N.C. 135, 265 S.E.2d 150 (1980).

ARTICLE 81.

General Sentencing Provisions.

§ 15A-1331. Authorized sentences; conviction.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

Legal Periodicals. — For an article discussing the presentence diagnostic program in North Carolina, see 9 N.C. Cent. L.J. 133 (1978).

For an article entitled, "Trial Stage and Appellate Procedure Act: An Overview," see 14 Wake Forest L. Rev. 899 (1978).

For an article entitled, "Disposition of Defendants Under Chapter 15A," see 14 Wake Forest L. Rev. 971 (1978).

CASE NOTES

In using the word "adjudged" in subsection (b) of this section with respect to determining when a person has been "convicted" of an offense, the legislature was not referring to the formal entry of judgment by the court but rather to the return by the jury of a verdict of guilty. State v. Fuller, 48 N.C. App. 418, 268 S.E.2d 879, cert. denied, 301 N.C. 403, 273 S.E.2d 448 (1980).

Applied in In re Greene, 297 N.C. 305, 255 S.E.2d 142 (1979).

Quoted in State v. Vert, 39 N.C. App. 26, 249 S.E.2d 476 (1978).

§ 15A-1332. Presentence reports.

(a) Presentence Reports Generally. — To obtain a presentence report, the court may order either a presentence investigation as provided in subsection (b) or a presentence commitment for study as provided in subsection (c).

(b) Presentence Investigation. — The court may order a probation officer to make a presentence investigation of any defendant. The court may order the investigation only after conviction unless the defendant moves for an earlier presentence investigation. A motion for an earlier presentence investigation may be addressed only to the judge of the session of court for which the defendant's case is calendared or, if the case has not been calendared, to a resident superior court judge if the case is in the jurisdiction of the superior court or to the chief district court judge if the case is in the jurisdiction of the district court. When the court orders a presentence investigation, the probation officer must promptly investigate all circumstances relevant to sentencing and submit either a written report or an oral report either on the record or with defense counsel and the prosecutor present. The report may include sentence recommendations only if such recommendations are requested by the court.

(c) Presentence Commitment for Study. — When the court desires more detailed information as a basis for determining the sentence to be imposed than can be provided by a presentence investigation, the court may commit a defendant to the Department of Correction for study for the shortest period necessary to complete the study, not to exceed 90 days, if that defendant has been charged with or convicted of a crime or crimes for which he may be imprisoned for more than six months and if he consents. The period of commitment must end when the study is completed, and may not exceed 90 days. The Department must conduct a complete study of a defendant committed to it under this subsection, inquiring into such matters as the defendant's previous delinquency or criminal experience, his social background, his capabilities, his mental, emotional and physical health, and the availability of resources or programs appropriate to the defendant. Upon completion of the study or the end of the 90-day period, whichever occurs first, the Department of Correction must release the defendant to the sheriff of the county in which his case is docketed. The Department must forward the study to the clerk in that county, including whatever recommendations the Department believes will be helpful to a proper resolution of the case. When a defendant is returned from a presentence commitment for study, the conditions of pretrial release which obtained for the defendant before the commitment continue until judgment is entered, unless the conditions are modified under the provisions of G.S. 15A-534(e). (1977, c. 711, s. 1; 1981, c. 377, s. 1.)

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, in the first sentence of subsection (c), substituted "commit a defendant" for "after conviction of a crime or crimes which the defendant may be imprisoned for more than six months, and with the consent of the defendant, commit him for study", inserted "for study" following "Department of Correction," and added the language beginning "if that defendant has been charged" to the end.

CASE NOTES

In sentencing, the trial court is not confined to the evidence relating to the offense charged. It may inquire into such matters as age, character, education, environment, habits, mentality, propensities and record of the person about to be sentenced. And the court may inquire into alleged acts of misconduct in prison. State v. Locklear, 34 N.C. App. 37, 237 S.E.2d 289, cert. denied, 293 N.C. 591, 238 S.E.2d 150 (1977), rev'd on other grounds, 294 N.C. 210, 241 S.E.2d 65 (1978), decided under former § 15-198.

§ 15A-1334. The sentencing hearing.

Legal Periodicals. — For a survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

CASE NOTES

Subsection (b) of this section codifies the long standing rule in North Carolina that upon the conduct of a sentencing hearing, the court is permitted wide latitude and the rules of evidence are not strictly enforced. State v. Smith, 300 N.C. 71, 265 S.E.2d 164 (1980).

Formal Rules of Evidence Not Applicable. — In a first-degree rape case, there was no merit to defendant's contention that the trial court erred in admitting testimony at his sentencing hearing by a woman who recognized defendant as the man who raped her several days before the rape in question, though this testimony would not have been admissible at the guilt phase of the trial, since formal rules of evidence do not apply at a sentencing hearing, and there was no showing of abuse of discretion, as the sentence of life imprisonment for the rape conviction was mandated by statute. State v. Jackson, 302 N.C. 101, 273 S.E.2d 666 (1981).

Different evidentiary rules govern trial and sentencing procedures. State v. Locklear, 34 N.C. App. 37, 237 S.E.2d 289, cert. denied, 293 N.C. 591, 238 S.E.2d 150 (1977), rev'd on other grounds, 294 N.C. 210, 241 S.E.2d 65 (1978), decided under former § 15-198.

Sentencing Hearing Must Be Fair and Just. — It would be unreasonable to require that all information in a presentence report be free of hearsay. Nor should the formal rules of evidence apply to the testimony of witnesses in a sentencing hearing. But the sentencing hearing must be fair and just, and the trial court must provide the defendant with full opportunity to controvert hearsay and other representations in aggravation of punishment. State v. Locklear, 34 N.C. App. 37, 237 S.E.2d 289, cert. denied, 293 N.C. 591, 238 S.E.2d 150 (1977), rev'd on other grounds, 294 N.C. 210, 241 S.E.2d 65 (1978), decided under former § 15-198.

The trial judge should not base his sentence solely on "unsolicited whispered representations" or "rank hearsay." State v. Locklear, 34 N.C. App. 37, 237 S.E.2d 289, cert. denied, 293 N.C. 591, 238 S.E.2d 150 (1977), rev'd on other grounds, 294 N.C. 210, 241 S.E.2d 65 (1978), decided under former § 15-198.

Continuance within Discretion of Trial Judge. — Whether to allow a continuance of the sentencing hearing lies within the discretion of the judge upon a showing of what he determines to be good cause. State v. McLaurin, 41 N.C. App. 552, 255 S.E.2d 299 (1979), cert. denied, 300 N.C. 560, 270 S.E.2d 113 (1980).

In determining the proper sentence to impose upon a convicted defendant, it is appropriate for the trial judge to inquire into such matters as the age, character, education, environment, habits, mentality, propensities, and record of the person about to be sentenced. Such an inquiry is needed if the imposition of the criminal sanction is to best serve the goals of the substantive criminal law. State v. Smith, 300 N.C. 71, 265 S.E.2d 164 (1980).

Trial court did not violate this section by calling a detective on its own motion to testify at defendant's sentencing hearing. State v. Smith, 41 N.C. App. 600, 255 S.E.2d 210 (1979).

Failure to Hold Hearing Not Prejudicial. — Where, after the jury returned with its verdict, the trial judge asked if counsel were ready for the sentencing hearing, and then proceeded to sentence defendant without conducting the hearing as required by statute, inasmuch as defense counsel had conceded in oral argument that she had no further evidence to submit at the hearing, the defendant was not prejudiced by the trial judge's failure to conduct the hearing. State v. Sanders, 298 N.C. 512, 259 S.E.2d 258 (1979).

The court was authorized by subsection (c) of this section to enter judgment and

commitment against defendant in Chatham County upon a verdict of guilty returned by a jury after trial in Orange County where the court had ordered a presentence report since defendant had been adjudged guilty in Orange County even though prayer for judgment was continued in that county. State v. Fuller, 48 N.C. App. 418, 268 S.E.2d 879, cert. denied, 301 N.C. 403, 273 S.E.2d 448 (1980).

A judgment will not be disturbed because of sentencing procedures unless there is a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play. State v. Lane, 39 N.C. App. 33, 249 S.E.2d 449 (1978).

Applied in State v. Spicer, 299 N.C. 309, 261 S.E.2d 893 (1980).

§ 15A-1335. Resentencing after appellate review.

CASE NOTES

Applied in State v. McLaurin, 41 N.C. App. 552, 255 S.E.2d 299 (1979); State v. Safrit, 47 N.C. App. 189, 266 S.E.2d 719 (1980).

ARTICLE 81A.

Sentencing Persons Convicted of Felonies.

§ 15A-1340.1. Applicability of Article 81A; life sentence.

(a) This Article shall apply to the sentencing of all persons convicted of felonies, other than Class A or Class B felonies, that occur on or after July 1, 1981.

(b) Repealed by Session Laws 1979, 2nd Sess., c. 1316, s. 31, effective July 1, 1981. (1979, c. 760, s. 2; 1979, 2nd Sess., c. 1316, ss. 30, 31; 1981, c. 63, s. 1; c. 179, s. 14.)

Editor's Note. — This Article was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

Effect of Amendments. — The 1979, 2nd Sess., amendment, effective July 1, 1981, and applicable to offenses committed on or after that date, rewrote subsection (a) and repealed subsection (b) of the section as enacted by Session Laws 1979, c. 760, s. 2. The 1979, 2nd Sess., amendatory act was originally made effective March 1, 1981. It was postponed to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

The first 1981 amendment substituted "April 15, 1981" for "March 1, 1981" at the end of subsection (a).

The second 1981 amendment substituted "July 1, 1981" for "April 15, 1981" at the end of subsection (a).

§ 15A-1340.2. Definitions.

The following definitions apply in this Article.

(1) Convicted. — For the purpose of imposing sentence, a person has been convicted when he has been adjudged guilty or has entered a plea of guilty or no contest.

(2) Jail. — A jail is a local confinement facility maintained by a county as provided by G.S. 153A-218 or a district confinement facility

maintained by two or more units of local government as provided by G.S. 153A-219.

(3) Jailer. — A jailer is the sheriff or other person having the care and custody of a jail as provided by G.S. 162-22 or the administrator of a district confinement facility as provided by G.S. 153A-219.

(4) Prior Conviction. — A person has received a prior conviction when he has been adjudged guilty of or has entered a plea of guilty or no contest to a criminal charge, and judgment has been entered thereon, and the time for appeal has expired, or the conviction has been finally upheld on direct appeal.

(5) Prison Term. — A prison term is a period of imprisonment to be served either in the custody of the Department of Correction or a jail. (1979, c. 760, s. 2; 1979, 2nd Sess., c. 1316, s. 32.)

Effect of Amendments. — The 1979, 2nd Sess., amendment, effective July 1, 1981, and applicable to offenses committed on or after that date, rewrote the definition of "prior conviction" in subdivision (4). The 1979, 2nd Sess., amendatory act was originally made effective March 1, 1981. It was postponed to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

§ 15A-1340.3. Purposes of sentencing.

The primary purposes of sentencing a person convicted of a crime are to impose a punishment commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender's culpability; to protect the public by restraining offenders; to assist the offender toward rehabilitation and restoration to the community as a lawful citizen; and to provide a general deterrent to criminal behavior. (1979, c. 760, s. 2; 1979, 2nd Sess., c. 1316, s. 33.)

Effect of Amendments. — The 1979, 2nd Sess., amendment, effective July 1, 1981, and applicable to offenses committed on or after that date, deleted "who have demonstrated a propensity to commit further crimes" following "restraining offenders" near the middle of the section. The 1979, 2nd Sess., amendatory act was originally made effective March 1, 1981. It was postponed to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

§ 15A-1340.4. Presumptive punishment for felony other than Class A or Class B felony; prior felony convictions; consideration of aggravating and mitigating factors; written findings.

(a) If the sentencing judge imposes a prison term on a person convicted of a felony other than a Class A or Class B felony, he may suspend the sentence and place the convicted felon on probation as provided by Article 82 of this Chapter. If the convicted felon is under 21 years of age at the time of conviction and the sentencing judge elects to impose an active prison term, the judge must either sentence the felon as a committed youthful offender in accordance with Article 3B of Chapter 148 of the General Statutes and subject to the limit on the prison term provided by G.S. 148-49.14, or make a "no benefit" finding as provided by G.S. 148-49.14 and impose a regular prison term. If the judge imposes a prison term, whether or not the term is suspended, and whether or not he sentences the convicted felon as a committed youthful offender, he must impose the presumptive term provided in this section unless, after consideration of aggravating or mitigating factors, or both, he decides to impose a longer or

shorter term, or unless he imposes a prison term pursuant to any plea arrangement as to sentence under Article 58 of this Chapter. In imposing a prison term, the judge, under the procedures provided in G.S. 15A-1334(b), may consider any aggravating and mitigating factors that he finds are proved by the preponderance of the evidence, and that are reasonably related to the purposes of sentencing, whether or not such aggravating or mitigating factors are set forth herein, but unless he imposes the term pursuant to a plea arrangement as to sentence under Article 58 of this Chapter, he must consider each of the following aggravating and mitigating factors:

(1) Aggravating factors:

a. The defendant induced others to participate in the commission of the offense or occupied a position of leadership or dominance of other participants.

b. The offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

c. The offense was committed for hire or pecuniary gain.

d. The offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

e. The offense was committed against a present or former: law enforcement officer, employee of the Department of Correction, jailer, fireman, emergency medical technician, ambulance attendant, justice or judge, clerk or assistant or deputy clerk of court, magistrate, prosecutor, juror, or witness against the defendant, while engaged in the performance of his official duties or because of the exercise of his official duties.

f. The offense was especially heinous, atrocious, or cruel.

g. The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.

h. The defendant held public office at the time of the offense and the offense related to the conduct of the office.

i. The defendant was armed with or used a deadly weapon at the time of the crime.

j. The victim was very young, or very old, or mentally or physically infirm.

k. The defendant committed the offense while on pretrial release on another felony charge.

l. The defendant involved a person under the age of 16 in the commission of the crime.

m. The offense involved an attempted or actual taking of property of great monetary value or damage causing great monetary loss, or the offense involved an unusually large quantity of contraband.

n. The defendant took advantage of a position of trust or confidence to commit the offense.

o. The defendant has a prior conviction or convictions for criminal offenses punishable by more than 60 days' confinement. Such convictions include those occurring in North Carolina courts and courts of other states, the District of Columbia, and the United States, provided that any crime for which the defendant was convicted in a jurisdiction other than North Carolina would have been a crime if committed in this State. Such prior convictions do not include any crime that is joinable, under G.S. Chapter 15A, with the crime or crimes for which the defendant is currently being sentenced.

p. The offense involved the sale or delivery of a controlled substance to a minor.

Evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation, and the same item of evidence may not be used to prove more than one factor in aggravation.

The judge may not consider as an aggravating factor the fact that the defendant exercised his right to a jury trial.

(2) Mitigating factors:

a. The defendant has no record of criminal convictions or a record consisting solely of misdemeanors punishable by not more than 60 days' imprisonment.

b. The defendant committed the offense under duress, coercion, threat, or compulsion which was insufficient to constitute a defense but significantly reduced his culpability.

c. The defendant was a passive participant or played a minor role in the commission of the offense.

d. The defendant was suffering from a mental or physical condition that was insufficient to constitute a defense but significantly reduced his culpability for the offense.

e. The defendant's immaturity or his limited mental capacity at the time of commission of the offense significantly reduced his culpability for the offense.

f. The defendant has made substantial or full restitution to the victim.

g. The victim was more than 16 years of age and was a voluntary participant in the defendant's conduct or consented to it.

h. The defendant aided in the apprehension of another felon or testified truthfully on behalf of the prosecution in another prosecution of a felony.

i. The defendant acted under strong provocation, or the relationship between the defendant and the victim was otherwise extenuating.

j. The defendant could not reasonably foresee that his conduct would cause or threaten serious bodily harm or fear, or the defendant exercised caution to avoid such consequences.

k. The defendant reasonably believed that his conduct was legal.

l. Prior to arrest or at an early stage of the criminal process, the defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer.

m. The defendant has been a person of good character or has had a good reputation in the community in which he lives.

n. The defendant is a minor and has reliable supervision available.

(b) If the judge imposes a prison term for a felony that differs from the presumptive term provided in subsection (f), whether or not the term is suspended, and whether or not he sentences the convicted felon as a committed youthful offender, the judge must specifically list in the record each matter in aggravation or mitigation that he finds proved by a preponderance of the evidence. If he imposes a prison term that exceeds the presumptive term, he must find that the factors in aggravation outweigh the factors in mitigation, and if he imposes a prison term that is less than the presumptive term, he must find that the factors in mitigation outweigh the factors in aggravation. However, a judge need not make any findings regarding aggravating and mitigating factors if he imposes a prison term pursuant to any plea arrangement as to sentence under Article 58 of this Chapter, regardless of the length of the term, or if he imposes the presumptive term.

(c) Repealed by Session Laws 1981, c. 179, s. 3, effective July 1, 1981.

(d) Repealed by Session Laws 1981, c. 179, s. 3, effective July 1, 1981.

(e) A prior conviction may be proved by stipulation of the parties or by the original or a certified copy of the court record of the prior conviction. The original or certified copy of the court record, bearing the same name as that by

which the defendant is charged, shall be prima facie evidence that the defendant named therein is the same as the defendant before the court, and shall be prima facie evidence of the facts set out therein. No prior conviction which occurred while the defendant was indigent may be considered in sentencing unless the defendant was represented by counsel or waived counsel with respect to that prior conviction. A defendant may make a motion to suppress evidence of a prior conviction pursuant to Article 53 of this Chapter. If the motion is made for the first time during the sentencing stage of the criminal action, either the State or the defendant is entitled to a continuance of the sentencing hearing.

(f) Unless otherwise specified by statute, presumptive prison terms for felonies classified under Chapter 14 and any other specific penalty statutes are as follows:

(1) For a Class C felony, imprisonment for 15 years.
(2) For a Class D felony, imprisonment for 12 years.
(3) For a Class E felony, imprisonment for 9 years.
(4) For a Class F felony, imprisonment for 6 years.
(5) For a Class G felony, imprisonment for 4½ years.
(6) For a Class H felony, imprisonment for 3 years.
(7) For a Class I felony, imprisonment for 2 years.
(8) For a Class J felony, imprisonment for 1 year.

(g) Repealed by Session Laws 1981, c. 179, s. 3, effective July 1, 1981. (1979, c. 760, s. 2; 1981, c. 179, ss. 1-5; c. 889, s. 1.)

Effect of Amendments. — The first 1981 amendment, effective July 1, 1981, rewrote all of subsection (a) following the second sentence, substituted "specifically list in the record each matter in aggravation or mitigation that he finds proved by a preponderance of the evidence" for "enter on the record findings of fact regarding all aggravating and mitigating factors on which he bases his sentence" at the end of the first sentence in subsection (b), added the second and third sentences of subsection (b), deleted subsection (c), authorizing a judge to impose a fine in accordance with § 15A-1340.6 upon a person convicted of a felony other than a Class A felony, and subsections (d) and (g), relating to prior convictions, and rewrote subsections (e) and (f).

The second 1981 amendment, effective October 1, 1981, added paragraph p in subdivision (1) of subsection (a).

§ 15A-1340.5: Transferred to § 14-2.2 by Session Laws 1979, 2nd Sess., c. 1316, s. 34, effective July 1, 1981.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 48, as amended by Session Laws 1981, c. 63, s. 1, and c. 179, s. 14, provides that the act shall apply to offenses committed on or after July 1, 1981.

§ 15A-1340.6: Repealed by Session Laws 1979, 2nd Sess., c. 1316, s. 35, effective July 1, 1981.

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1316, s. 48, as amended by Session Laws 1981, c. 63, s. 1, and c. 179, s. 14, provides that the act shall apply to offenses committed on or after July 1, 1981.

§ 15A-1340.7. Service of term of imprisonment; credit for good behavior; prisoner conduct rules; informing prisoner of release date; reentry parole and committed youthful offender parole.

(a) An active term of imprisonment imposed for a felony shall be served in the custody of the Department of Correction or a jail, subject to the provisions of G.S. 15A-1352. Credit toward service of the term shall be given for time already served as provided by Article 19A of Chapter 15 of the General Statutes, and good behavior in prison or jail as provided by subsection (b) of this section, except that a life term imposed for a Class C felony shall not be subject to subsection (b) of this section but shall be subject to G.S. 148-13(b) for the purposes of good time and gain time deductions.

(b) A prisoner committed to the Department of Correction or a jail to serve a sentence for a felony shall receive credit for good behavior at the rate of one day deducted from his prison or jail term for each day he spends in custody without a major infraction of prisoner conduct rules. Prisoner conduct rules shall be issued by the Secretary of Correction with regard to all prisoners serving prison or jail terms for felony convictions. The rules shall clearly state types of forbidden conduct and a copy of the rules shall be given and explained to each convicted prisoner upon entry into prison or jail. Infractions of the rules shall be of two types, major and minor infractions. Major infractions shall be punishable by forfeiture of specific amounts of accrued good behavior time, disciplinary segregation, loss of privileges for specific periods, demotion in custody grade, extra work duties, or reprimand. Minor infractions shall be punishable by loss of privileges for specific periods, demotion in custody grade, extra work duties, or reprimand, but not by loss of accrued good behavior time or disciplinary segregation. A prisoner charged with infraction of conduct rules shall receive notice of the charge and be afforded a hearing.

(c) Within 30 days of a convicted felon's entry into prison or jail to serve his sentence, the Department of Correction or jailer shall inform him in writing of the date on which he will be released if he receives the maximum amount of time off for good behavior under subsection (b) of this section, and of the date on which he will be released if he receives no such credit for good behavior.

(d) A prisoner committed to the Department of Correction or a jail to serve a sentence imposed for a felony is eligible for reentry parole as provided by Article 85A of Chapter 15A of the General Statutes, and, if sentenced as a committed youthful offender, to parole as provided by Articles 3B and 4 of Chapter 148 of the General Statutes, and Article 85 of Chapter 15A of the General Statutes. (1979, c. 760, s. 2; 1979, 2nd Sess., c. 1316, ss. 36-38; 1981, c. 662, s. 7.)

Cross References. — As to sentencing, quartering, and control of prisoners with work-release privileges, see § 148-33.1. As to restitution by prisoners with work-release privileges, see § 148-33.2.

Effect of Amendments. — The 1979, 2nd Sess., amendment, effective July 1, 1981, and applicable to offenses committed on or after that date, deleted the fromer last sentence of subsection (a), which read "Additional credit may be given by the Department of Correction or jailer under regulations of the Secretary of Correction as provided by G.S. 148-13, and substituted "explained" for "read" in the third sentence of subsection (b) and deleted the last sentence which read "The provisions of this section shall not apply to persons convicted of Class A or Class B felonies," and added at the end of subsection (d) "and Article 85 of Chapter 15A of the General Statutes." The 1979, 2nd Sess., amendatory act was originally made effective March 1, 1981. It was postponed to Apr. 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

The 1981 amendment, effective July 1, 1981, added at the end of the present last sentence of subsection (a) the language beginning "except that a life term imposed for a Class C felony."

ARTICLE 82.

Probation.

§ 15A-1341. Probation generally.

(a) Use of Probation. — A person who has been convicted of any noncapital criminal offense not punishable by a minimum term of life imprisonment or a minimum term without benefit of probation may be placed on probation as provided by this Article. A person who has been charged with a criminal offense not punishable by a term of imprisonment greater than 10 years may be placed on probation as provided in this Article on motion of the defendant and the prosecutor if the court finds each of the following facts:

(1) Prosecution has been deferred by the prosecutor pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(2) Each known victim of the crime has been notified of the motion for probation by subpoena or certified mail and has been given an opportunity to be heard.

(3) The defendant has not been convicted of any felony or of any misdemeanor involving moral turpitude.

(4) The defendant has not previously been placed on probation and so states under oath.

(5) The defendant is unlikely to commit another offense punishable by a term of imprisonment greater than 30 days.

(b) Supervised and Unsupervised Probation. — The court may place a person on supervised or unsupervised probation. A person on unsupervised probation is subject to all incidents of probation except supervision by or assignment to a probation officer.

(c) Election to Serve Sentence or Be Tried on Charges. — Any person placed on probation may at any time during the probationary period elect to serve his suspended sentence of imprisonment in lieu of the remainder of his probation. Any person placed on probation upon deferral of prosecution may at any time during the probationary period elect to be tried upon the charges deferred in lieu of remaining on probation. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, ss. 4A, 5; 1981, c. 377, ss. 2, 3.)

Effect of Amendments. — The 1977, 2nd Sess., amendment, effective July 1, 1978, inserted "or a minimum term without benefit of probation" and substituted "by" for "in" preceding "this Article" in the present first sentence of subsection (a) and inserted "or assignment to" in the second sentence of subsection (b).

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

The 1981 amendment, effective Oct. 1, 1981, added the second sentence of subsections (a) and (c).

Legal Periodicals. — For a survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

For an article entitled, "Trial Stage and Appellate Procedure Act: An Overview," see 14 Wake Forest L. Rev. 899 (1978).

For an article entitled, "Disposition of Defendants Under Chapter 15A," see 14 Wake Forest L. Rev. 971 (1978).

For a note discussing the application of the warrant requirement for parolee searches, see 14 Wake Forest L. Rev. 1207 (1978).

CASE NOTES

Cited in In re Greene, 297 N.C. 305, 255 S.E.2d 142 (1979); State v. Camp, 299 N.C. 524, 263 S.E.2d 592 (1980).

§ 15A-1342. Incidents of probation.

(a) Period. — The court may place a convicted offender on probation for a maximum of five years. The court may place a defendant as to whom prosecution has been deferred on probation for a maximum of two years. The probation remains conditional and subject to revocation during the period of probation imposed, unless terminated as provided in subsection (b) or G.S. 15A-1341(c).

(b) Early Termination. — The court may terminate a period of probation and discharge the defendant at any time earlier than that provided in subsection (a) if warranted by the conduct of the defendant and the ends of justice.

(c) Conditions; Suspended Sentence. — When the court places a convicted offender on probation, it must determine conditions of probation as provided in G.S. 15A-1343. In addition, it must impose a suspended sentence of imprisonment, determined as provided in Article 83, Imprisonment, which may be activated upon violation of conditions of probation.

(d) Mandatory Review of Probation. — Each probation officer must bring the cases of each probationer assigned to him before a court with jurisdiction to review the probation when the probationer has served three years of a probationary period greater than three years. The probation officer must give reasonable notice to the probationer, and the probationer may appear. The court must review the case file of a probationer so brought before it and determine whether to terminate his probation.

(e) Out-of-State Supervision. — Supervised probationers are subject to out-of-State supervision under the provisions of G.S. 148-65.1.

(f) Appeal from Judgment of Probation. — A defendant may seek post-trial relief from a judgment which includes probation notwithstanding the authority of the court to modify or revoke the probation.

(g) Invalid Conditions; Timing of Objection. — A court may not revoke probation for violation of an invalid condition. The failure of a defendant to object to a condition of probation at the time it is imposed does not constitute a waiver of the right to object at a later time to the condition.

(h) Limitation on Jurisdiction to Alter or Revoke Unsupervised Probation. — In the judgment placing a person on unsupervised probation, the judge may limit jurisdiction to alter or revoke the sentence under G.S. 15A-1344. When jurisdiction to alter or revoke is limited, the effect is as provided in G.S. 15A-1344(b).

(i) Immunity from Prosecution upon Compliance. — Upon the expiration or early termination as provided in subsection (b) of a period of probation imposed after deferral of prosecution and before conviction, the defendant shall be immune from prosecution of the charges deferred. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, ss. 6, 7; 1981, c. 377, ss. 4-6.)

Effect of Amendments. — The 1977, 2nd Sess., amendment, effective July 1, 1978, substituted "the cases of each probationer" for "all probationers" in the first sentence and added the second sentence of subsection (d) and added "Supervised" at the beginning of subsection (e).

The 1981 amendment, effective Oct. 1, 1981, substituted "a convicted offender" for "an offender" in the first sentence of subsection (a) and in the first sentence of subsection (c), added the present second sentence of subsection (a), and added subsection (i).

Legal Periodicals. — For a note discussing the application of the warrant requirement for parolee searches, see 14 Wake Forest L. Rev. 1207 (1978).

CASE NOTES

Cited in State v. Camp, 299 N.C. 524, 263 S.E.2d 592 (1980).

§ 15A-1343. Conditions of probation.

(a) In General. — The court may impose conditions of probation reasonably necessary to insure that the defendant will lead a law-abiding life or to assist him to do so.

(b) Appropriate Conditions. — When placing a defendant on probation, the court may, as a condition of the probation, require that during the period of probation the defendant comply with one or more of the following conditions:

(1) Not commit any criminal offense.

(2) Work faithfully at suitable employment or faithfully pursue a course of study or of vocational training that will equip him for suitable employment.

(3) Undergo available medical or psychiatric treatment and remain in a specified institution if required for that purpose.

(4) Attend or reside in a facility providing rehabilitation, instruction, recreation, or residence for persons on probation.

(5) Support his dependents and meet other family responsibilities.

(6) Make restitution or reparation as provided in subsection (d).

(7) Pay a fine authorized by Article 84, Fines.

(8) Refrain from possessing a firearm or destructive device or other dangerous weapon unless granted written permission by the court or the probation officer.

(9) Report to a probation officer at reasonable times and in a reasonable manner, as directed by the court or the probation officer.

(10) Permit the probation officer to visit him at reasonable times at his home or elsewhere.

(11) Remain within the jurisdiction of the court, unless granted permission to leave by the court or the probation officer.

(12) Answer all reasonable inquiries by the probation officer and obtain prior approval from the probation officer for any change in address or employment.

(13) Promptly notify the probation officer of any change in address or employment.

(14) Repealed by Session Laws 1979, c. 662, s. 2, effective October 1, 1979.

(15) Submit at reasonable times to warrantless searches by a probation officer of his person, and of his vehicle and premises while he is present, for purposes reasonably related to his probation supervision. The court may not require as a condition of probation that the probationer submit to any other search that would otherwise be unlawful.

(16) Submit to imprisonment required for special probation under G.S. 15A-1351(a) or G.S. 15A-1344(e).

(16a) Within the first 30 days of his probation, visit, with his probation officer, a prison unit maintained by the Department of Correction for a tour thereof so that he may better appreciate the consequences of probation revocation.

(16b) Compensate the Department of Natural Resources and Community Development or the North Carolina Wildlife Resources Commission, as the case may be, for the replacement costs of any marine and estuarine resources or any wildlife resources which were taken, injured, removed, harmfully altered, damaged, or destroyed as a result of a criminal offense of which the defendant was convicted. If any

investigation is required by officers or agents of the Department of Natural Resources and Community Development or the Wildlife Resources Commission in determining the extent of the destruction of resources involved, the court may include compensation of the agency for investigative costs as a condition of probation. This subdivision does not apply in any case governed by G.S. 143-215.3(a)(7).

(17) Satisfy any other conditions reasonably related to his rehabilitation.

(c) Statement of Conditions. — A defendant released on supervised probation must be given a written statement explicitly setting forth the conditions on which he is being released. If any modification of the terms of that probation is subsequently made, he must be given a written statement setting forth the modifications.

(d) Restitution as a Condition of Probation. — As a condition of probation, a defendant may be required to make restitution or reparation to an aggrieved party or parties who shall be named by the court for the damage or loss caused by the defendant arising out of the offense or offenses committed by the defendant. When restitution or reparation is a condition imposed, the court shall take into consideration the resources of the defendant, his ability to earn, his obligation to support dependents, and such other matters as shall pertain to his ability to make restitution or reparation. The amount must be limited to that supported by the record, and the court may order partial restitution or reparation when it appears that the damage or loss caused by the offense or offenses is greater than that which the defendant is able to pay. The court shall fix the manner of performing the restitution or reparation, and in doing so, the court may take into consideration the recommendation of the probation officer. An order providing for restitution or reparation shall in no way abridge the right of any aggrieved party to bring a civil action against the defendant for money damages arising out of the offense or offenses committed by the defendant, but any amount paid by the defendant under the terms of an order as provided herein shall be credited against any judgment rendered against the defendant in such civil action. As used herein, "restitution" shall mean compensation for damage or loss as could ordinarily be recovered by an aggrieved party in a civil action. As used herein, "reparation" shall include but not be limited to the performing of community services, volunteer work, or doing such other acts or things as shall aid the defendant in his rehabilitation. As used herein, "aggrieved party" shall include individuals, firms, corporations, associations or other organizations, and government agencies, whether federal, State or local. Provided, that no government agency shall benefit by way of restitution except for particular damage or loss to it over and above its normal operating costs. A government agency may benefit by way of reparation even though the agency was not a party to the crime provided that when reparation is ordered, community service work shall be rendered only after approval has been granted by the owner or person in charge of the property or premises where the work will be done. Provided further, that no third party shall benefit by way of restitution or reparation as a result of the liability of that third party to pay indemnity to an aggrieved party for the damage or loss caused by the defendant. Restitution or reparation measures are ancillary remedies to promote rehabilitation of criminal offenders and to provide for compensation to victims of crime, and shall not be construed to be a fine or other punishment as provided for in the Constitution and laws of this State.

(e) Costs of Court and Appointed Counsel. — Unless the court finds there are extenuating circumstances, any person placed upon supervised or unsupervised probation under the terms set forth by the court shall, as a condition of probation, be required to pay all court costs and costs for appointed counsel or public defender in the case in which he was convicted. The court shall determine the amount due and the method of payment.

(f) Supervision Fee. — When any person is placed upon supervised probation, the court may require, as a condition of probation, that such person pay, during his probationary period, a monthly supervision fee of ten dollars ($10.00) to the clerk of superior court designated by the court. The probation officer shall not be required to collect the supervision fee. Any clerk of superior court receiving such a fee shall transmit this money to the State of North Carolina to be deposited in the general fund. In no event shall a person placed upon supervised probation be required to pay more than one monthly supervision fee. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, ss. 8-10; 1979, c. 662, s. 1, c. 801, s. 3; c. 830, s. 12; 1981, c. 530, ss. 1, 2.)

Effect of Amendments. — The 1977, 2nd Sess., amendment, effective July 1, 1978, rewrote subdivision (6) of subsection (b), added subdivision (16a) to subsection (b) and added subsection (d).

The first 1979 amendment, effective October 1, 1979, repealed subdivision (14) of subsection (b), which read: "Pay court costs and costs for appointed counsel or public defender to represent him in the case in which he was convicted," and added subsection (e).

The second 1979 amendment, effective Jan. 1, 1980, and applicable to persons placed on probation on and after that date, added subsection (f).

Session Laws 1979, c. 662, s. 3, provides that the act shall apply to any person placed on probation on or after its effective date. [October 1, 1979].

The third 1979 amendment, effective July 1, 1980, added subdivision (16b) to subsection (b).

The 1981 amendment in subsection (d), substituted "committed by the defendant" for "for which the defendant has been convicted" at the end of the first sentence, deleted "or reparation" following "restitution" in the ninth sentence, and added the present tenth sentence.

Legal Periodicals. — For a note discussing the application of the warrant requirement for parolee searches, see 14 Wake Forest L. Rev. 1207 (1978).

CASE NOTES

Reparation of injuries. —

The purpose of §§ 148-33.2 and 15A-1343(b)(6) is rehabilitation and not additional penalty or punishment, and the sum ordered or recommended must be reasonably related to the damages incurred. If the trial evidence does not support the amount ordered or recommended, then supporting evidence should be required in the sentencing hearing. State v. Killian, 37 N.C. App. 234, 245 S.E.2d 812 (1978).

Together §§ 148-33.2(c) and 15A-1343(b)(6) require that any order or recommendation of the sentencing court for restitution or restoration to the aggrieved party as a condition of attaining work-release privileges must be supported by the evidence. State v. Killian, 37 N.C. App. 234, 245 S.E.2d 812 (1978).

Documentation of Loss Not Required Where Restitution Ordered. — Under subsection (d) as it stood prior to the 1981 amendment, where defendant was ordered to make restitution or reparation for loss or injury resulting from the crime for which he was convicted, there need not have been documentation introduced in evidence as to the loss resulting from the offense for which defendant was convicted. State v. Stephenson, 43 N.C. App. 323, 258 S.E.2d 806 (1979), cert. denied, 299 N.C. 124, 262 S.E.2d 8 (1980).

Condition of Consent to Warrantless Search. —

Where subdivision (b)(15) was inapplicable because the defendant was convicted before the effective date of this section, waiver by the defendant of his constitutional right against a search without a warrant by a law enforcement officer was a valid condition of the suspension of his sentence and probation. State v. Moore, 37 N.C. App. 729, 247 S.E.2d 250 (1978).

Under subdivision (b)(15) of this section, a condition of probation that a defendant submit to a search by any law enforcement officer without a warrant is invalid. State v. Grant, 40 N.C. App. 58, 252 S.E.2d 98 (1979).

Physical Examination for Detection of Drugs. — A condition of defendant's probation requiring him to submit to physical testing or examination at the request of his probation officer for the detection of drugs or controlled substances was directly related to and grew out of the offense for which defendant was convicted and was therefore reasonable, and it was not an invalid condition of probation under subdivision (b) (15) of this section. State v. McCoy, 45 N.C. App. 686, 263 S.E.2d 801 (1980).

Warrantless Search by One Not a Probation Officer. — In State v. Grant, 40 N.C. App. 58, 252 S.E.2d 98 (1979), the court held only that the requirement that probationer submit

to a warrantless search by law-enforcement officers, not his probation officer, was invalid. State v. McCoy, 45 N.C. App. 686, 263 S.E.2d 801 (1980).

Stated in In re Wilkins, 294 N.C. 528, 242 S.E.2d 829 (1978).

Cited in State v. Lambert, 40 N.C. App. 418, 252 S.E.2d 855 (1979).

§ 15A-1344. Response to violations; alteration and revocation.

(a) Authority to Alter or Revoke. — Except as provided in subsection (b), probation may be reduced, terminated, continued, extended, modified, or revoked by any judge entitled to sit in the court which imposed probation and who is resident or presiding in the district where the sentence of probation was imposed, where the probationer violates probation, or where the probationer resides. The district attorney of the district in which probation was imposed must be given reasonable notice of any hearing to affect probation substantially.

(b) Limits on Jurisdiction to Alter or Revoke Unsupervised Probation. — If the sentencing judge has entered an order to limit jurisdiction to consider a sentence of unsupervised probation under G.S. 15A-1342(h), a sentence of unsupervised probation may be reduced, terminated, continued, extended, modified, or revoked only by the sentencing judge or, if the sentencing judge is no longer on the bench, by a presiding judge in the court where the defendant was sentenced.

(c) Procedure on Altering or Revoking Probation; Returning Probationer to District Where Sentenced. — When a judge reduces, terminates, extends, modifies, or revokes probation outside the county where the judgment was entered, the clerk must send a copy of the order and any other records to the court where probation was originally imposed. A court on its own motion may return the probationer to the district where probation was imposed or where the probationer resides for reduction, termination, continuation, extension, modification, or revocation of probation. In cases where the probation is revoked in a county other than the county of original conviction, the clerk in such county revoking probation shall file the Order of Revocation, which shall constitute sufficient permanent record of the proceedings in that court, and shall send one copy of the order revoking probation to the North Carolina Department of Correction to serve as a temporary commitment, and shall send the original order revoking probation and all other papers pertaining thereto, to the county of original conviction to be filed with the original records; the clerk of the county of original conviction shall then issue a formal commitment to the North Carolina Department of Correction.

(d) Extension and Modification; Response to Violations. — At any time prior to the expiration or termination of the probation period, the court may after notice and hearing and for good cause shown extend the period of probation up to the maximum allowed under G.S. 15A-1342(a) and may modify the conditions of probation. The probation period shall be tolled if the probationer shall have pending against him criminal charges in any court of competent jurisdiction, which, upon conviction, could result in revocation proceedings against him for violation of the terms of this probation. The hearing may be held in the absence of the defendant, if he fails to appear for the hearing after a reasonable effort to notify him. If a convicted defendant violates a condition of probation at any time prior to the expiration or termination of the period of probation, the court, in accordance with the provisions of G.S. 15A-1345, may continue him on probation, with or without modifying the conditions, may place the defendant on special probation as provided in subsection (e), or, if continuation, modification, or special probation is not appropriate, may revoke the probation and activate the suspended sentence imposed at the time of initial sentencing,

if any, or may order that charges as to which prosecution has been deferred be brought to trial; provided that probation may not be revoked solely for conviction of a misdemeanor unless it is punishable by imprisonment for more than 30 days. The court, before activating a sentence to imprisonment established when the defendant was placed on probation, may reduce the sentence. A sentence activated upon revocation of probation commences on the day probation is revoked and runs concurrently with any other period of probation, parole, or imprisonment to which the defendant is subject during that period unless the revoking judge specifies that it is to run consecutively with the other period.

(e) Special Probation in Response to Violation. — When a defendant has violated a condition of probation, the court may modify his probation to place him on special probation as provided in this subsection. In placing him on special probation, the court may continue or modify the conditions of his probation and in addition require that he submit to a period or periods of imprisonment, either continuous or noncontinuous, at whatever time or intervals within the period of probation the court determines. In addition to any other conditions of probation which the court may impose, the court shall impose, when imposing a period or periods of imprisonment as a condition of special probation, the condition that the defendant obey the Rules and Regulations of the Department of Correction governing conduct of inmates, and this condition shall apply to the defendant whether or not the court imposes it as a part of the written order. If imprisonment is for continuous periods, the confinement may be in either the custody of the Department of Correction or a local confinement facility. Noncontinuous periods of imprisonment under special probation may only be served in a designated local confinement or treatment facility. The total of all periods of confinement imposed as an incident of special probation, but not including an activated suspended sentence, may not exceed six months or one fourth the maximum penalty allowed by law for the offense, whichever is less. No confinement other than an activated suspended sentence may be required beyond the period of probation or beyond two years of the time the special probation is imposed, whichever comes first.

(f) Revocation after Period of Probation. — The court may revoke probation after the expiration of the period of probation if:

(1) Before the expiration of the period of probation the State has filed a written motion with the clerk indicating its intent to conduct a revocation hearing; and

(2) The court finds that the State has made reasonable effort to notify the probationer and to conduct the hearing earlier. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, ss. 11, 11A, 13A; 1979, c. 749, ss. 1-3; 1981, c. 377, s. 7.)

Effect of Amendments. — The 1977, 2nd Sess., amendment, effective July 1, 1978, substituted "of any hearing to affect probation substantially" for "if the hearing is to be held in any other district" at the end of subsection (a), added the proviso to the present fourth sentence of subsection (d) and substituted "continuous" for "consecutive" and "noncontinuous" for "nonconsecutive" throughout subsection (e).

The 1979 amendment added the third sentence of subsection (c), the second sentence of subsection (d), and the third sentence of subsection (e).

The 1981 amendment, effective Oct. 1, 1981, in the fourth sentence of subsection (d), inserted "convicted" preceding "defendant" and "if any, or may order that charges as to which prosecution has been deferred be brought to trial" preceding the proviso.

CASE NOTES

When Suspended Sentence May Be Put into Effect. — When a sentence has been suspended and defendant placed on probation on certain named conditions, the court may, at any time during the period of probation, require defendant to appear before it, inquire into alleged violations of the conditions, and, if found to be true, place the suspended sentence into effect. But the State may not do so after the expiration of the period of probation except as provided in subsection (f) of this section. State v. Camp, 299 N.C. 524, 263 S.E.2d 592 (1980).

§ 15A-1345. Arrest and hearing on probation violation.

(a) Arrest for Violation of Probation. — A probationer is subject to arrest for violation of conditions of probation by a law-enforcement officer or probation officer upon either an order for arrest issued by the court or upon the written request of a probation officer, accompanied by a written statement signed by the probation officer that the probationer has violated specified conditions of his probation. However, a probation revocation hearing under subsection (e) may be held without first arresting the probationer.

(c) When Preliminary Hearing on Probation Violation Required. — Unless the hearing required by subsection (e) is first held or the probationer waives the hearing, a preliminary hearing on probation violation must be held within seven working days of an arrest of a probationer to determine whether there is probable cause to believe that he violated a condition of probation. Otherwise, the probationer must be released seven working days after his arrest to continue on probation pending a hearing.

(d) Procedure for Preliminary Hearing on Probation Violation. — The preliminary hearing on probation violation must be conducted by a judge who is sitting in the county where the probationer was arrested or where the alleged violation occurred. If no judge is sitting in the county where the hearing would otherwise be held, the hearing may be held anywhere in the judicial district. The State must give the probationer notice of the hearing and its purpose, including a statement of the violations alleged. At the hearing the probationer may appear and speak in his own behalf, may present relevant information, and may, on request, personally question adverse informants unless the court finds good cause for not allowing confrontation. Formal rules of evidence do not apply at the hearing. If probable cause is found or if the probable cause hearing is waived, the probationer may be held for a revocation hearing, subject to release under the provisions of subsection (b). If the hearing is held and probable cause is not found, the probationer must be released to continue on probation.

(1977, 2nd Sess., c. 1147, ss. 12, 13; 1979, c. 749, s. 4; 1979, 2nd Sess., c. 1316, s. 39.)

Effect of Amendments. — The 1977, 2nd Sess., amendment, effective July 1, 1978, inserted "by a law-enforcement officer or probation officer" in the first sentence of subsection (a) and substituted "the alleged violation occurred" for "probation was imposed" at the end of the first sentence of subsection (d).

The 1979 amendment substituted "seven" for "five" near the middle of the first sentence of subsection (c).

The 1979, 2nd Sess., amendment, effective July 1, 1981, and applicable to offenses committed on or after that date, substituted "seven" for "four" in the second sentence of subsection (c). The 1979, 2nd Sess., amendatory act was originally made effective March 1, 1981. It was postponed to Apr. 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendments, only subsections (a), (c) and (d) are set out.

CASE NOTES

Procedure in This Section Should Be Followed Rather Than Contempt Proceeding. — When a probationer is charged with violating a condition of his probation, the procedure provided in this section should be followed rather than a proceeding to hold him in contempt. State v. Golden, 40 N.C. App. 37, 251 S.E.2d 875 (1979).

Warrantless Arrest of Probationer. — If a simple conclusory statement from the probation officer, containing no factual allegations, is sufficient to permit another officer to arrest a probationer without a warrant, then it is reasonable to conclude that § 15-205 and this section read together, give the probation officer the authority to arrest a probationer under his supervision for violations of conditions of probation without a warrant or other written document. State v. Waller, 37 N.C. App. 133, 245 S.E.2d 808 (1978).

Sufficient Notice of Intent to Pray Revocation of Sentence Suspension. — Defendant was given sufficient notice of the State's intent to pray revocation of the suspension of his sentence for abandonment and nonsupport of his wife and children, where the warrant providing the basis for the revocation hearing stated that the defendant had failed to comply with a support order and was in arrears in the amount of $690. State v. Hodges, 34 N.C. App. 183, 237 S.E.2d 576 (1977), decided under former § 15-200.1.

Reasons Why Evidentiary Rules Need Not Be Enforced. — The evidence showing violation of terms of probation need be such that reasonably satisfies the trial judge in the exercise of his sound discretion that the defendant has violated a valid condition on which the sentence was suspended. Because of this and also because it is a matter which a judge hears and not a jury, the rules of evidence need not be strictly enforced. State v. Freeman, 47 N.C. App. 171, 266 S.E.2d 723, cert. denied, 301 N.C. 99, 273 S.E.2d 304 (1980).

Sufficiency of Evidence. —

In accord with original. See State v. Freeman, 47 N.C. App. 171, 266 S.E.2d 723, cert. denied, 301 N.C. 99, 273 S.E.2d 304 (1980).

§ 15A-1347. Appeal from revocation of probation or imposition of special probation upon violation.

When a district court judge, as a result of a finding of a violation of probation, activates a sentence or imposes special probation, the defendant may appeal to the superior court for a de novo revocation hearing. At the hearing the probationer has all rights and the court has all authority they have in a revocation hearing held before the superior court in the first instance. Appeals from lower courts to the superior courts from judgments revoking probation may be heard in term or out of term, in the county or out of the county by the resident superior court judge of the district or the superior court judge assigned to hold the courts of the district, or a judge of the superior court commissioned to hold court in the district, or a special superior court judge residing in the district. When the defendant appeals to the superior court because a district court has found he violated probation and has activated his sentence or imposed special probation, and the superior court, after a de novo revocation hearing, orders that the defendant continue on probation under the same or modified conditions, the superior court is considered the court that originally imposed probation with regard to future revocation proceedings and other purposes of this Article. When a superior court judge, as a result of a finding of a violation of probation, activates a sentence or imposes special probation, either in the first instance or upon a de novo hearing after appeal from a district court, the defendant may appeal under G.S. 7A-27. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, s. 14.)

Effect of Amendments. — The 1977, 2nd Sess., amendment, effective July 1, 1978, added the fourth sentence.

ARTICLE 83.

Imprisonment.

§ 15A-1351. Sentence of imprisonment; incidents; special probation.

(a) The judge may sentence a defendant convicted of an offense for which the maximum penalty does not exceed 10 years to special probation. Under a sentence of special probation, the court may suspend the term of imprisonment and place the defendant on probation as provided in Article 82, Probation, and in addition require that the defendant submit to a period or periods of imprisonment in the custody of the Department of Correction or a designated local confinement or treatment facility at whatever time or intervals within the period of probation, consecutive or nonconsecutive, the court determines. In addition to any other conditions of probation which the court may impose, the court shall impose, when imposing a period or periods of imprisonment as a condition of special probation, the condition that the defendant obey the Rules and Regulations of the Department of Correction governing conduct of inmates, and this condition shall apply to the defendant whether or not the court imposes it as a part of the written order. If imprisonment is for continuous periods, the confinement may be in the custody of either the Department of Correction or a local confinement facility. Noncontinuous periods of imprisonment under special probation may only be served in a designated local confinement or treatment facility. The total of all periods of confinement imposed as an incident of special probation, but not including an activated suspended sentence, may not exceed six months or one fourth the maximum penalty allowed by law for the offense, whichever is less, and no confinement other than an activated suspended sentence may be required beyond two years of conviction. In imposing a sentence of special probation, the judge may credit any time spent committed or confined, as a result of the charge, to either the suspended sentence or to the imprisonment required for special probation. The period of probation, including the period of imprisonment required for special probation, may not exceed five years. The court may revoke, modify, or terminate special probation as otherwise provided for probationary sentences.

(b) Sentencing of a person convicted of a felony that occurred on or after the effective date of Article 81A of this Chapter is subject to that Article; a minimum term of imprisonment shall not be imposed on such a person. With regard to convicted persons not subject to Article 81A, a sentence to imprisonment must impose a maximum term and may impose a minimum term. The judgment may state the minimum term or may state that a term constitutes both the minimum and maximum terms. If the judgment states no minimum term, the defendant becomes eligible for parole in accordance with G.S. 15A-1371(a).

(c) Repealed by Session Laws 1979, c. 749, s. 7.

(d) Alternative to Minimum Term. — In lieu of imposing a minimum term, the court may recommend to the Parole Commission a minimum period of imprisonment the offender should serve before being granted parole. The recommendation has the effect provided in G.S. 15A-1371(c). This subsection shall not apply to a person convicted of a felony that occurred on or after the effective date of Article 81A of this Chapter.

(e) Youthful Offenders. — If an offender is under the age of 21 years at the time of conviction, the court may sentence the offender as a youthful offender under the provisions of Article 3B of Chapter 148 of the General Statutes.

(g) Credit. — Credit towards a sentence to imprisonment is as provided in Article 19A of Chapter 15 of the General Statutes. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, ss. 15-17; 1979, c. 749, ss. 5-7; 1979, c. 760, s. 4.)

Effect of Amendments. — 1977, 2nd Sess., amendment, effective July 1, 1978, added the present fourth and fifth sentences of subsection (a), substituted "Article 3B" for "Article 3A" in subsection (e) and added subsection (g).

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

The first 1979 amendment added the third sentences in subsections (a) and (b) and repealed subsection (c), which authorized a superior or district court judge to remove or reduce an imposed minimum term upon motion of the Department of Correction and Parole Commission.

The second 1979 amendment, effective July 1, 1981, rewrote the first sentence of subsection (b), which formerly read "A sentence to imprisonment must impose maximum term and may impose a minimum term," and added the last sentence of subsection (d). The second 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to Apr. 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsections (a), (b), (c), (d), (e) and (g) are set out.

Legal Periodicals. — For an article entitled, "Trial Stage and Appellate Procedure Act: An Overview," see 14 Wake Forest L. Rev. 899 (1978).

For an article entitled, "Disposition of Defendants Under Chapter 15A," see 14 Wake Forest L. Rev. 971 (1978).

CASE NOTES

Applied in State v. Bonds, 43 N.C. App. 467, 259 S.E.2d 377 (1979); State v. Thornton, 43 N.C. App. 564, 259 S.E.2d 381 (1979); State v. Bonds, 45 N.C. App. 62, 262 S.E.2d 340 (1980).

Cited in State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978).

§ 15A-1352. Commitment to Department of Correction or local confinement facility.

(a) A person sentenced to imprisonment for a misdemeanor under this Article or for nonpayment of a fine under Article 84 of this Chapter shall be committed for the term designated by the court to the custody of the Department of Correction or to a local confinement facility. If the sentence imposed for a misdemeanor is for a period of 180 days or less, the commitment must be to a facility other than one maintained by the Department of Correction, except as provided in G.S. 148-32.1(b).

(b) A person sentenced to imprisonment for a felony under this Article shall be committed for the term designated by the court to the custody of the Department of Correction; except that, upon request of the sheriff or the board of commissioners of a county, the presiding judge may, in his discretion, sentence the person to a local confinement facility in that county.

(c) A person sentenced to imprisonment for nonpayment of a fine under Article 84, Fines, shall be committed for the term designated by the court:

(1) To the custody of the Department of Correction if the person was fined for conviction of a felony;

(2) To the custody of the Department of Correction or to a local confinement facility if the person was fined for conviction of a misdemeanor, provided that if the sentence imposed is for a period of 180 days or less, the commitment shall be to a facility other than one maintained by the Department of Correction, except as provided in G.S. 148-32.1(b). (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, s. 18; 1979, c. 456, s. 1; c. 787, ss. 1, 2.)

Effect of Amendments. — The 1977, 2nd Sess., amendment, effective July 1, 1978, substituted "of 180 days or less" for "less than 180 days" and added "except as provided in G.S. 148-32.1(b)" in the second sentence of the section as it stood before the 1979 amendments, which sentence was similar to the second sentence of present subsection (a).

The first 1979 amendment rewrote this section.

The second 1979 amendment inserted "or for nonpayment of a fine under Article 84 of this Chapter" in the first sentence of subsection (a) and added at the end of subsection (b) the language beginning "except that."

Session Laws 1979, c. 456, s. 2, provides: "This act is effective upon ratification and applies to all persons sentenced on or after that date." The act was ratified April 24, 1979.

§ 15A-1353. Order of commitment when imprisonment imposed; release pending appeal.

(c) Unless a later time is directed in the order of commitment, or the defendant has been released from custody pursuant to Article 26, Bail, or the defendant is appealing from a judgment of the district court to the superior court for a trial de novo, the sheriff must cause the defendant to be placed in the custody of the agency specified in the judgment on the day service of sentence is to begin or as soon thereafter as practicable.

(1979, c. 758, s. 1.)

Effect of Amendments. — The 1979 amendment inserted "or the defendant is appealing from a judgment of the district court to the superior court for a trial de novo," near the middle of subsection (c) and deleted "the" preceding "sentence is to begin" near the end of subsection (c).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (c) is set out.

§ 15A-1354. Concurrent and consecutive terms of imprisonment.

(a) Authority of Court. — When multiple sentences of imprisonment are imposed on a person at the same time or when a term of imprisonment is imposed on a person who is already subject to an undischarged term of imprisonment, including a term of imprisonment in another jurisdiction, the sentences may run either concurrently or consecutively, as determined by the court. If not specified, sentences shall run concurrently.

(b) Effect of Consecutive Terms. — In determining the effect of consecutive sentences imposed under authority of this Article and the manner in which they will be served, the Department of Correction must treat the defendant as though he has been committed for a single term with the following incidents:

(1) The maximum prison sentence consists of the total of the maximum terms of the consecutive sentences; and

(2) The minimum term, if any, consists of the total of the minimum terms of the consecutive sentences. (1977, c. 711, s. 1; 1979, c. 760, s. 4; 1979, 2nd Sess., c. 1316, s. 40.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, added to subsection (a) a sentence reading as follows: "With respect to a person convicted of a felony that occurred on or after the effective date of Article 81A of this Chapter, G.S. 15A-1340.8 shall apply in addition to this subsection." The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to Apr. 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

The 1979, 2nd Sess., amendment, effective

July 1, 1981, and applicable to offenses committed on or after that date, deleted the sentence added by the 1979 amendment. The 1979, 2nd Sess., amendatory act was originally made effective March 1, 1981. It was postponed to Apr. 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

CASE NOTES

Cited in State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978).

§ 15A-1355. Calculation of terms of imprisonment.

(a) Commencement of Sentence. — The commencement date of a sentence of imprisonment under authority of this Article is as provided in G.S. 15A-1353(a), except when the sentence is a consecutive sentence. When it is a consecutive sentence, it commences to run when the State has custody of the defendant following completion of the prior sentence.

(b) Repealed by Session Laws 1977, 2nd Sess., c. 1147, s. 19, effective July 1, 1978.

(c) Credit for Good Behavior. — The Department of Correction and jailers, as defined by G.S. 15A-1340.2, must give credit for good behavior toward service of a prison or jail term imposed for a felony that occurred on or after the effective date of Article 81A, as required by G.S. 15A-1340.7. The provisions of this section shall not apply to persons convicted of Class A or Class B felonies. The Department of Correction and jailers may give time credit toward service of other prison or jail terms imposed for a felony or misdemeanor, according to regulations issued by the Secretary of Correction as provided by G.S. 148-13. The Department of Correction may give credit toward service of the maximum term and any minimum term of imprisonment and toward eligibility for parole for allowances of time as provided in rules and regulations made under G.S. 148-11 and 148-13. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, s. 19; 1979, c. 749, s. 8; c. 760, s. 4; 1981, c. 571; c. 1127, s. 84.)

Effect of Amendments. — The 1977, 2nd Sess., amendment, effective July 1, 1978, repealed subsection (b), relating to credit for time spent committed to or in confinement in correctional, mental or other institutions and for time spent in confinement in another jurisdiction.

The first 1979 amendment added to subsection (c) a sentence reading as follows: "Provided, that one serving a period or periods of imprisonment as a condition of special probation shall serve his term of imprisonment day for day, without any credits toward service of his term by any provisions of any rules and regulations made by the Department of Correction."

The second 1979 amendment, effective July 1, 1981, rewrote subsection (c). The second 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

The first 1981 amendment, ratified June 12, 1981, and effective on ratification, rewrote the first sentence of subsection (c) to read as follows: "The Department of Correction may give credit toward service of the maximum term and any minimum term of imprisonment and toward eligibility for parole for allowances of time as provided in rules and regulations made under G.S. 148-11 and 148-13."

The second 1981 amendment, effective July 1, 1981, added the last sentence in subsection (c) as set out above, which sentence is identical to the first sentence of subsection (c) as rewritten by the first 1981 amendment.

It appears that the first 1981 amendment was intended to amend subsection (c) as amended by Session Laws 1979, c. 749 and set out in the text in the 1979 Supplement, and the second 1981 amendment was intended to amend subsection (c) as amended by Session Laws 1979, c. 760, effective July 1, 1981. Therefore, in the section

as set out above, the first sentence of subsection (c) is set out as it appears in Session Laws 1979, c. 760, s. 4, and the last sentence of subsection (c) has been added from Session Laws 1981, c. 1127, s. 84.

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

CASE NOTES

Cited in State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978).

ARTICLE 84.

Fines.

§ 15A-1361. Authorized fines.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

Legal Periodicals. — For an article entitled, "Trial Stage and Appellate Procedure Act: An Overview," see 14 Wake Forest L. Rev. 899 (1978).

For an article entitled, "Disposition of Defendants Under Chapter 15A," see 14 Wake Forest L. Rev. 971 (1978).

ARTICLE 85.

Parole.

§ 15A-1370.1. Applicability of Article 85.

This Article is applicable to all sentenced prisoners, including Class A and Class B felons, and Class C felons who receive a sentence of life imprisonment, who are not subject to Article 85A of this Chapter. (1979, c. 760, s. 4; 1979, 2nd Sess., c. 1316, s. 41; 1981, c. 662, s. 3.)

Editor's Note. — This Article was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

Effect of Amendments. — The 1979 amendment, 2nd Sess., effective July 1, 1981, and applicable to offenses committed on or after that date, rewrote this section. The 1979, 2nd Sess., amendatory act was originally made effective March 1, 1981. It was postponed to April 15, 1981, by Session Laws, 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

The 1981 amendment, effective July 1, 1981, substituted "Class A and Class B felons, and Class C felons who receive a sentence of life imprisonment," for "Class A and B felons and committed youthful offenders."

§ 15A-1371. Parole eligibility, consideration, and refusal.

(a) Eligibility. — Unless his sentence includes a minimum sentence, a prisoner serving a term other than one included in a sentence of special probation imposed under authority of this Subchapter is eligible for release on parole at any time. A prisoner whose sentence includes a minimum term of imprisonment imposed under authority of this Subchapter is eligible for release on parole only upon completion of the service of that minimum term or one fifth of the maximum penalty allowed by law for the offense for which the prisoner is sentenced, whichever is less, less any credit allowed under G.S. 15A-1355(c) and Article 19A of Chapter 15 of the General Statutes. Under this section, when the maximum allowed by law for the offense is life imprisonment, one fifth of the maximum is calculated as 20 years.

(a1) A prisoner serving a term of life imprisonment with no minimum term is eligible for parole after serving 20 years. This subsection applies to offenses committed on and after July 1, 1981.

(b) Consideration for Parole. — The Parole Commission must consider the desirability of parole for each person sentenced for a maximum term of 18 months or longer:

(1) Within the period of 90 days prior to his eligibility for parole, if he is ineligible for parole until he has served more than a year; or

(2) Within the period of 90 days prior to the expiration of the first year of the sentence, if he is eligible for parole at any time. Whenever the Parole Commission will be considering for parole a prisoner who, if released, would have served less than half of the maximum term of his sentence, the Commission must notify the prisoner and the district attorney of the district where the prisoner was convicted at least 30 days in advance of considering the parole. If the district attorney makes a written request in such cases, the Commission must publicly conduct its consideration of parole. Following its consideration, the Commission must give the prisoner written notice of its decision. If parole is denied, the Commission must consider its decision while the prisoner is eligible for parole at least once a year until parole is granted and must give the prisoner written notice of its decision at least once a year.

(c) Statement of Reasons for Release before Minimum. — If parole is granted before the expiration of a minimum period of imprisonment imposed by the court under G.S. 15A-1351(b) or recommended by the court under G.S. 15A-1351(d), the Commission must state in writing the reasons why the imposed or recommended minimum was not followed.

(d) Criteria. — The Parole Commission may refuse to release on parole a prisoner it is considering for parole if it believes:

(1) There is a substantial risk that he will not conform to reasonable conditions of parole; or

(2) His release at that time would unduly depreciate the seriousness of his crime or promote disrespect for law; or

(3) His continued correctional treatment, medical care, or vocational or other training in the institution will substantially enhance his capacity to lead a law-abiding life if he is released at a later date; or

(4) There is a substantial risk that he would engage in further criminal conduct.

(e) Refusal of Parole. — A prisoner who has been granted parole may elect to refuse parole and to serve the remainder of his term of imprisonment.

(f) Mandatory Parole at End of Felony Term. — No later than six months prior to completion of his maximum term, the Parole Commission must parole every person convicted of a felony and sentenced to a maximum term of not less than 18 months of imprisonment, unless:

(1) The person is to serve a period of probation following his imprisonment;
(2) The person has been reimprisoned following parole as provided in G.S. 15A-1373(e); or
(3) The Parole Commission finds facts demonstrating a strong likelihood that the health or safety of the person or public would be endangered by his release at that time.

(g) Notwithstanding the provisions of subsection (a), a prisoner serving a sentence of not less than 30 days nor as great as 18 months for a felony or a misdemeanor may be released on parole when he completes service of one-third of his maximum sentence unless the Parole Commission finds in writing that:
(1) There is a substantial risk that he will not conform to reasonable conditions of parole; or
(2) His release at that time would unduly depreciate the seriousness of his crime or promote disrespect for law; or
(3) His continued correctional treatment, medical care, or vocational or other training in the institution will substantially enhance his capacity to lead a law-abiding life if he is released at a later date; or
(4) There is a substantial risk that he would engage in further criminal conduct.

If a prisoner is released on parole by operation of this subsection, the term of parole is the unserved portion of the sentence to imprisonment, and the conditions of parole, unless otherwise specified by the Parole Commission, are those authorized in G.S. 15A-1374(b)(4) through (10).

In order that the Parole Commission may have an adequate opportunity to make a determination whether parole under this section should be denied, no prisoner eligible for parole under this section shall be released from confinement prior to the fifth full working day after he shall have been placed in the custody of the Secretary of Correction or the custodian of a local confinement facility. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, ss. 19A-22; 1979, c. 749, ss. 9, 10; 1979, 2nd Sess., c. 1316, s. 42; 1981, c. 63, s. 1; c. 179, s. 14.)

Effect of Amendments. — The 1977, 2nd Sess., amendment, effective July 1, 1978, deleted "life imprisonment or" following "other than" in the first sentence of subsection (a), substituted "G.S. 15A-1355(c) and Article 19A of Chapter 15 of the General Statutes" for "G.S. 15A-1355(b) and (c)" at the end of the second sentence of subsection (a) and rewrote the former last sentence of subsection (a). In subsection (b), the amendment also substituted "Within the period of 90 days" for "at least 60 days" at the beginning of subdivisions (1) and (2), inserted "the prisoner and" preceding "the district attorney" in the second sentence of subdivision (2), and substituted "give the prisoner written notice of its decision" for "issue a formal order granting or denying parole" at the end of the fourth sentence and near the end of the last sentence of subdivision (2). The amendment also inserted "maximum" near the beginning of the introductory language in subsection (g).

The 1979 amendment deleted the former last sentence of subsection (a), which provided for release on parole of a prisoner whose sentence included a minimum sentence identical to a minimum sentence required by law. The amendment also rewrote the introductory language in subsection (g) and added the last paragraph of subsection (g).

The 1979, 2nd Sess., amendment, effective July 1, 1981, and applicable to offenses committed on or after that date, added subsection (a1). The 1979, 2nd Sess., amendatory act was originally made effective March 1, 1981. It was postponed to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

The first 1981 amendment substituted "April 15, 1981" for "March 1, 1981" at the end of subsection (a1).

The second 1981 amendment substituted "July 1, 1981" for "April 15, 1981" at the end of subsection (a1).

Session Laws 1977, c. 711, s. 38, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 31, effective July 1, 1978, provides: "The eligibility for parole and work release of prisoners sentenced before the effective date of this act is determined by the law applicable prior to the effective date of this act."

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32,

effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

Legal Periodicals. — For a survey of 1977 law on prisoners' rights, see 56 N.C.L. Rev. 1100 (1978).

For an article entitled, "Trial Stage and Appellate Procedure Act: An Overview," see 14 Wake Forest L. Rev. 899 (1978).

For an article entitled, "Disposition of Defendants Under Chapter 15A," see 14 Wake Forest L. Rev. 971 (1978).

CASE NOTES

Applied in State v. Bonds, 45 N.C. App. 62, 262 S.E.2d 340 (1980); State v. Wright, 302 N.C. 122, 273 S.E.2d 699 (1981).

Cited in State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978); State v. Wilkins, 297 N.C. 237, 254 S.E.2d 598 (1979).

§ 15A-1372. Length and effect of parole term.

(a) Minimum Term of Parole. — The term of parole for any person released from imprisonment may be no less than:

(1) One year, if the remainder of the maximum term of imprisonment is one year or more; or

(2) The remainder of the maximum term, if the remainder of the term of imprisonment is less than one year.

(b) Maximum Term of Parole. — The maximum term of parole is the lesser of the following:

(1) The remainder of the maximum term; or

(2) Five years when the maximum prison sentence imposed is greater than 20 years; or

(3) Three years when the maximum prison sentence imposed is greater than 10 years but no greater than 20 years; or

(4) Two years when the maximum prison sentence imposed is not greater than 10 years.

(c) Termination of Sentence. — When a parolee completes his period of parole, the sentence or sentences from which he was paroled are terminated.

(d) Parole and Terminate. — The Parole Commission is authorized simultaneously to parole and terminate supervision of a prisoner when such prisoner has less than 180 days remaining on his maximum sentence, and when the Commission finds that such action will not be incompatible with the public interest. (1977, c. 711, s. 1; 1981, c. 642.)

Effect of Amendments. — The 1981 amendment added subsection (d).

§ 15A-1373. Incidents of parole.

(d) Effect of Violation. — If the parolee violates a condition at any time prior to the expiration or termination of the period, the Commission may continue him on the existing parole, with or without modifying the conditions, or, if continuation or modification is not appropriate, may revoke the parole as provided in G.S. 15A-1376 and reimprison the parolee for a term consistent with the following requirements:

(1) The recommitment must be for the unserved portion of the maximum term of imprisonment imposed by the court under G.S. 15A-1351.

(2) The prisoner must be given credit against the term of reimprisonment for all time spent in custody as a result of revocation proceedings under G.S. 15A-1376.

(1979, c. 927.)

Effect of Amendments. — The 1979 amendment deleted "or six months, whichever is greater" at the end of subdivision (1) of subsection (d).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (d) is set out.

§ 15A-1374. Conditions of parole.

(b) Appropriate Conditions. — As conditions of parole, the Commission may require that the parolee comply with one or more of the following conditions:

(1) Work faithfully at suitable employment or faithfully pursue a course of study or vocational training that will equip him for suitable employment.

(2) Undergo available medical or psychiatric treatment and remain in a specified institution if required for that purpose.

(3) Attend or reside in a facility providing rehabilitation, instruction, recreation, or residence for persons on parole.

(4) Support his dependents and meet other family responsibilities.

(5) Refrain from possessing a firearm, destructive device, or other dangerous weapon unless granted written permission by the Commission or the parole officer.

(6) Report to a parole officer at reasonable times and in a reasonable manner, as directed by the Commission or the parole officer.

(7) Permit the parole officer to visit him at reasonable times at his home or elsewhere.

(8) Remain within the geographic limits fixed by the Commission unless granted written permission to leave by the Commission or the parole officer.

(9) Answer all reasonable inquiries by the parole officer and obtain prior approval from the parole officer for any change in address or employment.

(10) Promptly notify the parole officer of any change in address or employment.

(11) Submit at reasonable times to searches of his person by a parole officer for purposes reasonably related to his parole supervision. The Commission may not require as a condition of parole that the parolee submit to any other searches that would otherwise be unlawful.

(11a) Make restitution or reparation to an aggrieved party as provided in G.S. 148-57.1.

(12) Satisfy other conditions reasonably related to his rehabilitation. (1977, c. 711, s. 1; 1979, c. 749, s. 11.)

Effect of Amendments. — The 1979 amendment added subdivision (11a) to subsection (b).

Only Part of Section Set Out. — As subsection (a) was not changed by the amendment, it is not set out.

CASE NOTES

Restitution as Condition of Parole. — The parole commission may, but is not required to, implement the recommendation of the sentencing court for restitution as a condition of parole. State v. Killian, 37 N.C. App. 234, 245 S.E.2d 812 (1978).

Reimbursement of State for Counsel Fees. — Under the provisions of this section the parole commission may, but is not required to, implement the recommendation of the setencing court and impose as a condition of parole that the prisoner reimburse the State for counsel fees. State v. Killian, 37 N.C. App. 234, 245 S.E.2d 812 (1978).

§ 15A-1376. Arrest and hearing on parole violation.

(a) Arrest for Violation of Parole. — A parolee is subject to arrest by a law-enforcement officer or a parole officer for violation of conditions of parole only upon the issuance of an order of temporary or conditional revocation of parole by the Parole Commission. However, a parole revocation hearing under subsection (e) may be held without first arresting the parolee.

(b) When and Where Preliminary Hearing on Parole Violation Required. — Unless the hearing required by subsection (e) is first held or the parolee waives the hearing or a continuance is requested by the parolee, a preliminary hearing on parole violation must be held reasonably near the place of the alleged violation or arrest and within seven working days of the arrest of a parolee to determine whether there is probable cause to believe that he violated a condition of parole. Otherwise, the parolee must be released seven working days after his arrest to continue on parole pending a hearing. If the parolee is not within the State, his preliminary hearing is as prescribed by G.S. 148-65.1A.

(d) Procedure for Preliminary Hearing on Parole Violation. — The Department of Correction must give the parolee notice of the preliminary hearing and its purpose, including a statement of the violations alleged. At the hearing, the parolee may appear and speak in his own behalf, may present relevant information, and may, on request, personally question witnesses and adverse informants, unless the hearing officer finds good cause for not allowing confrontation. If the person holding the hearing determines there is probable cause to believe the parolee violated his parole, he must summarize the reasons for his determination and the evidence he relied on. Formal rules of evidence do not apply at the hearing. If probable cause is found, the parolee may be held in the custody of the Department of Correction to serve the appropriate term of imprisonment, subject to the outcome of a revocation hearing under subsection (e).

(e) Revocation Hearing. — Before finally revoking parole, the Parole Commission must, unless the parolee waived the hearing or the time limit, provide a hearing within 45 days of the parolee's reconfinement to determine whether to revoke parole finally. The Parole Commission must adopt regulations governing the hearing and must file and publish them as provided in Article 5 of Chapter 150A of the General Statutes. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, ss. 23-26.)

Effect of Amendments. — The 1977, 2nd Sess., amendment, effective July 1, 1978, inserted "by a law-enforcement officer or a parole officer" in the first sentence of subsection (a), inserted "or a continuance is requested by the parolee" near the beginning of the first sentence of subsection (b), substituted "seven" for "four" near the middle of the first sentence and in the second sentence and added the last sentence of subsection (b), substituted "hearing officer" for "court" near the end of the second sentence in subsection (d), and substituted the present second sentence of subsection (e) for provisions to the effect that the hearing should be governed by Article 3 of Chapter 150A, with certain exceptions.

Only Part of Section Set Out. — As subsection (c) was not changed by the amendment, it is not set out.

§ 15A-1377: Repealed by Session Laws 1977, 2nd Sess., c. 1147, s. 27, effective July 1, 1978.

ARTICLE 85A.

Parole of Certain Convicted Felons.

§ 15A-1380.1. Eligibility of felons for parole.

Parole eligibility for prisoners serving a prison or jail term imposed for a felony that occurred on or after the effective date of this Article shall be determined by the provisions of this Article, except that parole eligibility for Class A and Class B felons, and for Class C felons who receive a sentence of life imprisonment shall be determined as provided in Article 85 of this Chapter, and except that parole eligibility for committed youthful offenders shall be determined by G.S. 148-49.15. (1979, c. 760, s. 4; 1981, c. 662, s. 4.)

Editor's Note. — This Article was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, rewrote this section.

§ 15A-1380.2. Reentry parole of felons.

(a) The Parole Commission shall parole each prisoner serving a prison or jail term of 18 months or more for a felony 90 days before the expiration of his term, less credit for time already served as provided by Article 19A of Chapter 15 of the General Statutes, credit for good behavior as required by G.S. 15A-1340.7, and additional gain time credit that he may receive pursuant to the regulations of the Secretary of Correction issued under G.S. 148-13.

(b) The purpose of the parole established by this section is to facilitate the reentry of the felony prisoner into the free community. The Department of Correction shall provide such services as may be helpful for this purpose.

(c) The term of parole for a prisoner paroled under this section shall be 90 days.

(d) The provisions of G.S. 15A-1373, 15A-1375, and 15A-1376 regarding incidents of parole, commencement of parole, and arrest and hearing on parole violation, shall be applicable to reentry parole of felons, except that G.S. 15A-1373(d) regarding the effect of violation shall not apply. The only conditions of reentry parole shall be those provided by G.S. 15A-1374(b)(6), (7), (8), (9), and (10).

(e) If the parolee remains in compliance with conditions of parole during the 90 days of his reentry parole, he shall be unconditionally discharged from prison or jail at the end of the 90 days.

(f) If the parolee violates parole conditions before the end of his 90-day parole term, the Parole Commission may revoke his reentry parole. If reentry parole is revoked, the prisoner shall be returned to prison or jail where he shall serve 90 days, but shall continue to receive credit for good behavior required by G.S. 15A-1340.7(b), and any additional gain time credit to which he may be entitled pursuant to the regulations of the Secretary of Correction under G.S. 148-13, and shall be unconditionally discharged at the end of 90 days less any such credit received.

(g) Each prisoner eligible for reentry parole may refuse to accept such parole, in which case he shall remain in prison, but shall not lose accrued credit pursuant to G.S. 15A-1340.7 or 148-13, and shall continue to receive credit to which he may be entitled under those statutes. (1979, c. 760, s. 4; 1981, c. 662, s. 5.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, deleted the former second sentence in subsection (a), which read: "The provisions of this section shall not apply to persons convicted of Class A or Class B felonies."

ARTICLE 86.

Reports of Dispositions of Criminal Cases.

§ 15A-1381. Disposition defined.

As used in this Article, the term "disposition" means any action which results in termination or indeterminate suspension of the prosecution of a criminal charge. A disposition may be any one of the following actions:

(1) A finding of no probable cause pursuant to G.S. 15A-511(c)(2);
(2) An order of dismissal pursuant to G.S. 15A-604;
(3) A finding of no probable cause pursuant to G.S. 15A-612(3) [15A-612(a)(3)];
(4) A return of not a true bill pursuant to G.S. 15A-629;
(5) Dismissal of a charge pursuant to G.S. 15A-703;
(6) Dismissal pursuant to G.S. 15A-931 or 15A-932;
(7) Dismissal pursuant to G.S. 15A-954, 15A-955 or 15A-959;
(8) Finding of a defendant's incapacity to proceed pursuant to G.S. 15A-1002 or dismissal of charges pursuant to G.S. 15A-1008;
(9) Entry of a plea of guilty or no contest pursuant to G.S. 15A-1011, without regard to the sentence imposed upon the plea, and even though prayer for judgment on the plea be continued;
(10) Dismissal pursuant to G.S. 15A-1227;
(11) Return of verdict pursuant to G.S. 15A-1237, without regard to the sentence imposed upon such verdict and even though prayer for judgment on such verdict be continued. (1981, c. 862, s. 1.)

Editor's Note. — Session Laws 1981, c. 862, s. 5, makes the act effective January 1, 1982.

§ 15A-1382. Reports of disposition; fingerprints.

(a) When the defendant is fingerprinted pursuant to G.S. 15A-502 prior to the disposition of the case, a report of the disposition of the charges shall be made to the State Bureau of Investigation on a form supplied by the State Bureau of Investigation within 60 days following disposition.

(b) When a defendant is found guilty of any felony, regardless of the class of felony, a report of the disposition of the charges shall be made to the State Bureau of Investigation on a form supplied by the State Bureau of Investigation within 60 days following disposition. If a convicted felon was not fingerprinted pursuant to G.S. 15A-502 prior to the disposition of the case, his fingerprints shall be taken and submitted to the State Bureau of Investigation along with the report of the disposition of the charges on forms supplied by the State Bureau of Investigation. (1981, c. 862, s. 1.)

§ 15A-1383. Plans for implementation of Article; punishment for failure to comply; modification of plan.

(a) On January 1, 1982, the senior resident superior court judge of each judicial district shall file a plan with the Director of the State Bureau of

Investigation for the implementation of the provisions of this Article. The plan shall be entered as an order of the court on that date. In drawing up the plan, the senior resident superior court judge may consult with the chief district judge, the district attorney, the clerks of superior court within the district, the Department of Correction, the sheriffs and chiefs of police within the district and other persons as he may deem appropriate. Upon the request of the senior resident superior court judge, the State Bureau of Investigation shall provide such technical assistance in the preparation of the plan as the judge desires.

(b) A person who is charged by the plan with a duty to make reports who fails to make such reports as required by the plan is punishable for civil contempt under Article 2 of Chapter 5A of the General Statutes.

(c) When the senior resident superior court judge modifies, alters or amends a plan under this Article, the order making such modification, alteration or amendment shall be filed with the Director of the State Bureau of Investigation within 10 days of its entry.

(d) Plans prepared under this Article are not "rules" within the meaning of Chapter 150A of the General Statutes or within the meaning of Article 6C of Chapter 120 of the General Statutes. (1981, c. 862, s. 1.)

§§ 15A-1384 to 15A-1390: Reserved for future codification purposes.

SUBCHAPTER XIV. CORRECTION OF ERRORS AND APPEAL.

ARTICLE 88.

Post-Trial Motions and Appeal.

§ 15A-1401. Post-trial motions and appeal.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

Legal Periodicals. — For an article entitled, "Trial Stage and Appellate Procedure Act: An Overview," see 14 Wake Forest L. Rev. 899 (1978).

For an article entitled, "Post-Trial Motions and Appeals," see 14 Wake Forest L. Rev. 997 (1978).

ARTICLE 89.

Motion for Appropriate Relief and Other Post-Trial Relief.

§ 15A-1411. Motion for appropriate relief.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

Legal Periodicals. — For a survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

For an article entitled, "Trial Stage and Appellate Procedure Act: An Overview," see 14 Wake Forest L. Rev. 899 (1978).

For an article entitled, "Post-Trial Motions

and Appeals," see 14 Wake Forest L. Rev. 997 (1978).

For an article on the North Carolina Speedy Trial Act, see 17 Wake Forest L. Rev. 173 (1981).

CASE NOTES

Exhaustion of Remedies Provided by State. — North Carolina's institution of a new system of post-conviction review reaffirms its desire to review and correct possible criminal trial errors. The federal court welcomes such a manifest spirit and will require all state habeas corpus petitioners to avail themselves of §§ 15A-1411 to 1422, or demonstrate that they would not be allowed to pursue their claims in these proceedings, before deeming the exhaustion requirement met. Vester v. Stephenson, 465 F. Supp. 868 (E.D.N.C. 1978).

The prerequisites for a new trial on the grounds of newly discovered evidence are: (1) that the witness or witnesses will give the newly discovered evidence; (2) that such newly discovered evidence is probably true; (3) that it is competent, material and relevant; (4) that due diligence was used and proper means were employed to procure the testimony at the trial; (5) that the newly discovered evidence is not merely cumulative; (6) that it does not tend only to contradict a former witness or to impeach or discredit him; and (7) that it is of such a nature as to show that on another trial a different result will probably be reached and that the right will prevail. State v. Cronin, 299 N.C. 229, 262 S.E.2d 277 (1980).

Applied in State v. Lee, 40 N.C. App. 165, 252 S.E.2d 225 (1979).

Stated in State v. Jeffers, 48 N.C. App. 663, 269 S.E.2d 731 (1980).

§ 15A-1413. Trial judges empowered to act.

CASE NOTES

Applied in State v. Lee, 40 N.C. App. 165, 252 S.E.2d 225 (1979); State v. Bonds, 45 N.C. App. 62, 262 S.E.2d 340 (1980).

§ 15A-1414. Motion by defendant for appropriate relief made within 10 days after verdict.

(a) After the verdict but not more than 10 days after entry of judgment, the defendant by motion may seek appropriate relief for any error committed during or prior to the trial.

(b) Unless included in G.S. 15A-1415, all errors, including but not limited to the following, must be asserted within 10 days after entry of judgment:

(1) Any error of law, including the following:
   a. The court erroneously failed to dismiss the charge prior to trial pursuant to G.S. 15A-954.
   b. The court's ruling was contrary to law with regard to motions made before or during the trial, or with regard to the admission or exclusion of evidence.
   c. The evidence, at the close of all the evidence, was insufficient to justify submission of the case to the jury, whether or not a motion so asserting was made before verdict.
   d. The court erroneously instructed the jury.

(2) The verdict is contrary to the weight of the evidence.

(3) For any other cause the defendant did not receive a fair and impartial trial.

(4) The sentence imposed on the defendant is not supported by evidence introduced at the trial and sentencing hearing. This motion must be addressed to the sentencing judge.

(c) The motion may be made and acted upon in the trial court whether or not notice of appeal has been given. (1977, c. 711, s. 1; 1979, c. 760, s. 3; 1981, c. 179, s. 6.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, added subdivision (4) of subsection (b). The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

The 1981 amendment, effective July 1, 1981, added the second sentence of subdivision (4) of subsection (b).

CASE NOTES

Disposition of post-trial motions under this section and § 15A-1415 is within the discretion of the trial court and the refusal to grant them is not error absent a showing of abuse of that discretion. State v. Watkins, 45 N.C. App. 661, 263 S.E.2d 846 (1980).

Applied in State v. Person, 298 N.C. 765, 259 S.E.2d 867 (1979).

Stated in State v. Bonds, 45 N.C. App. 62, 262 S.E.2d 340 (1980).

Cited in State v. Johnson, 34 N.C. App. 328, 238 S.E.2d 313 (1977); Vester v. Stephenson, 465 F. Supp. 868 (E.D.N.C. 1978).

§ 15A-1415. Grounds for appropriate relief which may be asserted by defendant after verdict and without limitation as to time.

(a) At any time after verdict, the defendant by motion may seek appropriate relief upon any of the grounds enumerated in this section.

(b) The following are the only grounds which the defendant may assert by a motion for appropriate relief made more than 10 days after entry of judgment:

(1) The acts charged in the criminal pleading did not at the time they were committed constitute a violation of criminal law.

(2) The trial court lacked jurisdiction over the person of the defendant or over the subject matter.

(3) The conviction was obtained in violation of the Constitution of the United States or the Constitution of North Carolina.

(4) The defendant was convicted or sentenced under a statute that was in violation of the Constitution of the United States or the Constitution of North Carolina.

(5) The conduct for which the defendant was prosecuted was protected by the Constitution of the United States or the Constitution of North Carolina.

(6) Evidence is available which was unknown or unavailable to the defendant at the time of the trial, which could not with due diligence have been discovered or made available at that time, and which has a direct and material bearing upon the guilt or innocence of the defendant.

(7) There has been a significant change in law, either substantive or procedural, applied in the proceedings leading to the defendant's conviction or sentence, and retroactive application of the changed legal standard is required.

(8) The sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law. However, a motion for appropriate relief on the grounds that the sentence imposed on the defendant

is not supported by evidence introduced at the trial and sentencing hearing must be made before the sentencing judge.

(9) The defendant is in confinement and is entitled to release because his sentence has been fully served. (1977, c. 711, s. 1; 1981, c. 179, s. 7.)

Cross References. — As to finality of decisions of the Court of Appeals on motions for appropriate relief, see § 7A-28.

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, added the second sentence of subdivision (8) of subsection (b).

Legal Periodicals. — For an article on the North Carolina Speedy Trial Act, see 17 Wake Forest L. Rev. 173 (1981).

CASE NOTES

Granting of New Trial Is in Discretion of Trial Court. —

In accord with 2nd paragraph in original. See State v. Watkins, 45 N.C. App. 661, 263 S.E.2d 846 (1980); State v. Sprinkle, 46 N.C. App. 802, 266 S.E.2d 375, cert. denied, 300 N.C. 561, 270 S.E.2d 115 (1980).

Exhaustion of Remedies Provided by State. — Claims asserted in federal court under 28 U.S.C. § 2254 alleging that the state prisoner was denied the effective assistance of counsel, denied defense witnesses, not advised of the proper procedure for filing an appeal or the applicable time limitations and denied the right to appeal, were cognizable under this section and were required to be presented to a state court in order to meet federal exhaustion requirements. Vester v. Stephenson, 465 F. Supp. 868 (E.D.N.C. 1978).

Establishing Cause for Failing to Raise Claims on Appeal. — Claims asserted in federal court under 28 U.S.C. § 2254 alleging that the state prisoner was convicted on perjured evidence through the state's witnesses, was not given his right to allocution, and was not given a presentence hearing were cognizable under this section if the petitioner could establish good cause for failing to have raised them on appeal, and were required to be presented to a state court in order to meet federal exhaustion requirements. Vester v. Stephenson, 465 F. Supp. 868 (E.D.N.C. 1978).

Not only are collateral attacks proper under this section but there now exists the possibility that an unappealed error can be reviewed by the state courts when good cause is shown. Vester v. Stephenson, 465 F. Supp. 868 (E.D.N.C. 1978).

Newly Discovered Evidence. —

In accord with 3rd paragraph in original. State v. Martin, 40 N.C. App. 408, 252 S.E.2d 859, cert. denied, 297 N.C. 456, 256 S.E.2d 809 (1979); State v. Person, 298 N.C. 765, 259 S.E.2d 867 (1979); State v. Sprinkle, 46 N.C. App. 802, 266 S.E.2d 375, cert. denied, 300 N.C. 559, 270 S.E.2d 112 (1980).

Where the defendant in a prosecution for arson had filed a request for voluntary discovery of the report of any laboratory test, the prosecutor had agreed to comply and had, in part, complied, but apparently through oversight the prosecutor failed to make a report available when it came into his possession, the defendant was not lacking in due diligence within the meaning of subdivision (b)(6) of this section in failing to make a motion to compel discovery. There was nothing to put the defendant on notice that the prosecutor had failed or refused to comply with his request. State v. Jones, 296 N.C. 75, 248 S.E.2d 858 (1978).

A motion for a new trial on the ground of newly discovered evidence is addressed to the discretion of the trial court, and its order denying the motion will not be disturbed unless abuse of discretion appears. State v. Martin, 40 N.C. App. 408, 252 S.E.2d 859, cert. denied, 297 N.C. 456, 256 S.E.2d 809 (1979).

Collateral Attack on Guilty Plea. — An adjudication by a trial judge that a plea of guilty was voluntarily made did not bar a criminal defendant from collaterally attacking that plea in a post-conviction hearing. Edmondson v. State, 33 N.C. App. 746, 236 S.E.2d 397 (1977), decided under former Article 22 of Chapter 15.

Where a case had been appealed from the superior court to the Court of Appeals, the superior court had no authority to consider defendant's motion under this section for appropriate relief. Under § 15A-1418, such motion should have been made in the appellate division. State v. Brock, 46 N.C. App. 120, 264 S.E.2d 390 (1980).

Applied in State v. Lee, 40 N.C. App. 165, 252 S.E.2d 225 (1979); State v. Honeycutt, 46 N.C. App. 588, 265 S.E.2d 438 (1980); State v. Jeffers, 48 N.C. App. 663, 269 S.E.2d 731 (1980).

Quoted in State v. Bonds, 45 N.C. App. 62, 262 S.E.2d 340 (1980); State v. Brock, 46 N.C. App. 120, 264 S.E.2d 390 (1980).

Cited in State v. Saults, 299 N.C. 319, 261 S.E.2d 839 (1980); Young v. Sams, 510 F. Supp. 141 (E.D.N.C. 1981); Meeks v. Smith, 512 F. Supp. 335 (W.D.N.C. 1981).

§ 15A-1417. Relief available.

Legal Periodicals. — For an article on the North Carolina Speedy Trial Act, see 17 Wake Forest L. Rev. 173 (1981).

CASE NOTES

Resentencing Where No Error of Law Appears. — A trial court upon a motion for appropriate relief does not have authority to resentence a criminal defendant for discretionary reasons after the expiration of the session of court in which he was originally sentenced where no error of law appears upon the face of the judgment. State v. Bonds, 45 N.C. App. 62, 262 S.E.2d 340, appeal dismissed, 300 N.C. 376, 267 S.E.2d 687, cert. denied, — U.S. —, 101 S. Ct. 235, 66 L. Ed. 2d 107 (1980).

Applied in State v. Jones, 296 N.C. 75, 248 S.E.2d 858 (1978).

§ 15A-1418. Motion for appropriate relief in the appellate division.

CASE NOTES

Applied in State v. Jones, 296 N.C. 75, 248 S.E.2d 858 (1979); State v. Jeffers, 48 N.C. App. 663, 269 S.E.2d 731 (1980); State v. Burney, 301 N.C. 223, — S.E.2d — (1980).

Cited in Vester v. Stephenson, 465 F. Supp 868 (E.D.N.C. 1978).

§ 15A-1419. When motion for appropriate relief denied.

CASE NOTES

An ineffective assistance of counsel claim, coupled with an alleged failure to adequately inform petitioner of his appeal right, may show "good cause" within the meaning of subsection (b) of this section. Vester v. Stephenson, 465 F. Supp. 868 (E.D.N.C. 1978).

Federal Habeas Corpus Petition No Substitute for State Review Provisions. — Subsection (b) of this section was not intended to provide a state procedure for review of claims involving retroactive applications of law which were not raised on appeal and, it is not the province of federal court on a petition for habeas corpus to reinterpret the state procedural statute; accordingly, petitioner who failed to raise burden of proof issue on motion for appropriate relief in state court could not assert such claim on petition for habeas corpus. Young v. Sams, 510 F. Supp. 141 (E.D.N.C. 1981).

Applied in State v. McKenzie, 46 N.C. App. 34, 264 S.E.2d 391 (1980).

Quoted in Cole v. Stevenson, 620 F.2d 1055 (4th Cir. 1980).

Cited in Vester v. Stephenson, 465 F. Supp. 868 (E.D.N.C. 1978); Ellis v. Reed, 596 F.2d 1195 (4th Cir. 1979).

§ 15A-1420. Motion for appropriate relief; procedure.

CASE NOTES

Applied in State v. Mitchell, 298 N.C. 549, 259 S.E.2d 2254 (1979); State v. Dickens, 299 N.C. 76, 261 S.E.2d 183 (1980); State v. Arsenault, 46 N.C. App. 7, 264 S.E.2d 594 (1980).

Cited in State v. Roberts, 41 N.C. App. 187, 254 S.E.2d 216 (1979).

§ 15A-1422. Review upon appeal.

(a) The making of a motion for appropriate relief is not a prerequisite for asserting an error upon appeal.

(b) The grant or denial of relief sought pursuant to G.S. 15A-1414 is subject to appellate review only in an appeal regularly taken.

(c) The court's ruling on a motion for appropriate relief pursuant to G.S. 15A-1415 is subject to review:

(1) If the time for appeal from the conviction has not expired, by appeal.

(2) If an appeal is pending when the ruling is entered, in that appeal.

(3) If the time for appeal has expired and no appeal is pending, by writ of certiorari.

(d) There is no right to appeal from the denial of a motion for appropriate relief when the movant is entitled to a trial de novo upon appeal.

(e) When an error asserted upon appeal has also been the subject of a motion for appropriate relief, denial of the motion has no effect on the right to assert error upon appeal.

(f) Decisions of the Court of Appeals on motions for appropriate relief that embrace matter set forth in G.S. 15A-1415(b) are final and not subject to further review by appeal, certification, writ, motion, or otherwise. (1977, c. 711, s. 1; 1981, c. 470, s. 3.)

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, added subsection (f).

Session Laws 1981, c. 470, s. 4, provides: "This shall become effective October 1, 1981, and shall apply to all decisions of the Court of Appeals on G.S. 15A-1415(b) motions made on or after that date."

Defendant's appeal from an order denying his petition for writ of error coram nobis treated as petition for writ of certiorari. See State v. Lee, 40 N.C. App. 165, 252 S.E.2d 225 (1979).

Applied in State v. Roberts, 41 N.C. App. 187, 254 S.E.2d 216 (1979); State v. Brooks, 49 N.C. App. 14, 270 S.E.2d 592 (1980).

ARTICLE 90.

Appeals from Magistrates and District Court Judges.

§ 15A-1431. Appeals by defendant from magistrate and district court judge; trial de novo.

(b) A defendant convicted in the district court before the judge may appeal to the superior court for trial de novo with a jury as provided by law. Upon the docketing in the superior court of an appeal from a judgment imposed pursuant to a plea arrangement between the State and the defendant, the jurisdiction of the superior court over any misdemeanor dismissed, reduced, or modified pursuant to that plea arrangement shall be the same as was had by the district court prior to the plea arrangement.

(f) Appeal pursuant to this section stays the execution of portions of the judgment relating to fine and costs. Appeal stays portions of the judgment relating to confinement when the defendant has complied with conditions of pretrial release. If the defendant cannot comply with conditions of pretrial release, the judge may order confinement in a local confinement facility pending the trial de novo in superior court.

(1979, c. 758, s. 2; 1979, 2nd Sess., c. 1328, s. 1.)

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without

regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

Effect of Amendments. — The 1979 amendment added the third sentence of subsection (f).

The 1979, 2nd Sess., amendment, effective Oct. 1, 1980, added the second sentence of subsection (b).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsections (b) and (f) are set out.

Legal Periodicals. — For an article entitled, "Trial Stage and Appellate Procedure Act: An Overview," see 14 Wake Forest L. Rev. 899 (1978).

For an article entitled, "Post-Trial Motions and Appeals," see 14 Wake Forest L. Rev. 997 (1978).

For an article on the North Carolina Speedy Trial Act, see 17 Wake Forest L. Rev. 173 (1981).

§ 15A-1432. Appeals by State from district court judge.

CASE NOTES

Cited in State v. Cannon, 38 N.C. App. 322, 248 S.E.2d 65 (1978); State v. Stewart, 40 N.C. App. 693, 253 S.E.2d 638 (1979).

ARTICLE 91.

Appeal to Appellate Division.

§ 15A-1441. Correction of errors by appellate division.

Editor's Note. —

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

Legal Periodicals. — For a survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

For an article entitled, "Trial Stage and Appellate Procedure Act: An Overview," see 14 Wake Forest L. Rev. 899 (1978).

For an article entitled, "Post-Trial Motions and Appeals," see 14 Wake Forest L. Rev. 997 (1978).

§ 15A-1442. Grounds for correction of error by appellate division.

The following constitute grounds for correction of errors by the appellate division.

(1) Lack of Jurisdiction. —

a. The trial court lacked jurisdiction over the offense.

b. The trial court did not have jurisdiction over the person of the defendant.

(2) Error in the Criminal Pleading. — Failure to charge a crime, in that:

a. The criminal pleading charged acts which at the time they were committed did not constitute a violation of criminal law; or

b. The pleading fails to state essential elements of an alleged violation as required by G.S. 15A-924(a)(5).

(3) Insufficiency of the Evidence. — The evidence was insufficient as a matter of law.

(4) Errors in Procedure. —
   a. There has been a denial of pretrial motions or relief to which the defendant is entitled, so as to affect the defendant's preparation or presentation of his defense, to his prejudice.
   b. There has been a denial of a trial motion or relief to which the defendant is entitled, to his prejudice.
   c. There has been error in the admission or exclusion of evidence, to the prejudice of the defendant.
   d. There has been error in the judge's instructions to the jury, to the prejudice of the defendant.
   e. There has been a denial of a post-trial motion or relief to which the defendant is entitled, to his prejudice. This provision is subject to the provisions of G.S. 15A-1422.

(5) Constitutionally Invalid Procedure or Statute; Prosecution for Constitutionally Protected Conduct. —
   a. The conviction was obtained by a violation of the Constitution of the United States or of the Constitution of North Carolina.
   b. The defendant was convicted under a statute that is in violation of the Constitution of the United States or the Constitution of North Carolina.
   c. The conduct for which the defendant was prosecuted was protected by the Constitution of the United States or the Constitution of North Carolina.

(5a) Insufficient Basis for Sentence. — The sentence imposed on the defendant is not supported by evidence introduced at the trial and sentencing hearing.

(6) Other Errors of Law. — Any other error of law was committed by the trial court to the prejudice of the defendant. (1977, c. 711, s. 1; 1979, c. 760, s. 3.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, added subdivision (5a). The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

CASE NOTES

Instructions May Be Corrected Only When Prejudicial. — An error in the judge's instructions to the jury must be to the prejudice of defendant in order to warrant corrective relief by the appellate division. State v. Easterling, 300 N.C. 594, 268 S.E.2d 800 (1980).

Erroneous Instruction on Lesser Offense. — Where there is no reasonable possibility that a verdict more favorable to defendant would have occurred absent an erroneous instruction on a lesser offense not supported by the evidence, the error occasioned by such instruction is harmless. Conversely, where there does exist a reasonable possibility that defendant would have been acquitted had not the lesser offense been erroneously submitted, the error is prejudicial and defendant is entitled to appellate relief. State v. Ray, 299 N.C. 151, 261 S.E.2d 789 (1980).

§ 15A-1443. Existence and showing of prejudice.

CASE NOTES

Presumption of Correctness. — A ruling of the trial court on an evidentiary point is presumptively correct, and counsel asserting prejudicial error must demonstrate that the particular ruling was in fact incorrect. State v. Milby, 302 N.C. 137, 273 S.E.2d 716 (1981).

The test for prejudicial error is whether there is a reasonable possibility that the evidence complained of contributed to the conviction, not whether the appellate court is able to conclude beyond a reasonable doubt that the evidence was harmless to the rights of a defendant. State v. Milby, 302 N.C. 137, 273 S.E.2d 716 (1981).

The burden is on the appellant not only to show error but also to show that he suffered prejudice as a result of the error. State v. Milby, 302 N.C. 137, 273 S.E.2d 716 (1981).

Matter Must Appear of Record. — Where the matter complained of does not appear of record, appellant has failed to make the irregularity manifest and it will not be considered as a basis for prejudicial error. State v. Milby, 302 N.C. 137, 273 S.E.2d 716 (1981).

Same — The admission of an exhibit cannot be held to be prejudicial error when the exhibit complained of, or a description of same, does not appear of record in some fashion. State v. Milby, 302 N.C. 137, 273 S.E.2d 716 (1981).

Errors Affecting Constitutional Rights. — A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless. State v. Odom, 49 N.C. App. 278, 271 S.E.2d 98 (1980).

Errors Not Affecting Constitutional Rights. — Prejudice requiring corrective relief by the appellate division will normally be deemed to be present, in cases relating to rights arising other than under the Federal Constitution only when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial; the burden of showing that such a possibility exists rests upon the defendant. State v. Easterling, 300 N.C. 594, 268 S.E.2d 800 (1980).

Deviation From Prescribed Method of Jury Selection Not Prejudicial Where Defendant Failed to Object or Use His Challenges. — Though the trial court deviated from the statutorily prescribed method of jury selection under Article 72 of this chapter, defendant failed to show that he was prejudiced because he had full opportunity to examine and challenge prospective jurors and because, when the jury was finally constituted, defendant had one peremptory challenge remaining and had exercised no challenges for cause so that the jurors selected obviously met with his approval. State v. Harper, 50 N.C. App. 198, 272 S.E.2d 600 (1980).

Errors Deemed Prejudicial Per Se. — Trial errors which are deemed prejudicial or deemed reversible per se obviate the need for a litigant to show harm to his cause. Such errors generally violate established rules or procedures in the courts and justify reversal because they are prejudicial to the administration of justice. State v. Turner, 48 N.C. App. 606, 269 S.E.2d 270 (1980).

Error Must Affect Probable Result of Trial. — In a prosecution for robbery and assault with a deadly weapon, where the defendant alleged that the trial court committed error by allowing the State to introduce a purse and its contents found in the upstairs of the victim's home, the items apparently had no relevance to the case, but that alone did not warrant reversal since the appellant must show error positive and tangible, that has affected his rights substantially and not merely theoretically, and must show that a different result would have likely ensued. State v. Billups, 301 N.C. 607, — S.E.2d — (1981).

Same — Error Shown. — In a prosecution of defendants for conspiring to burn a building and personal property therein, the trial court erred in excluding a witness's testimony as to his opinion that the char pattern on the floor of the second story of the building did not indicate the use of an accelerant and that there was only one origin to the fire, since defendant should have been allowed to offer expert testimony to counter that introduced and relied upon by the State; one defendant's testimony that the condition of the building remained unchanged from the time of the fire until the time the expert witness observed it laid an adequate foundation for the expert testimony; and there was a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial, as the impact of another expert witness's testimony was severely diminished when he admitted that he was not an arson expert and had not had training in the investigation of arson and arson detection. State v. Culpepper, 302 N.C. 179, 273 S.E.2d 686 (1981).

An insubstantial technical error which could not have affected the result of the trial

will not be held prejudicial on appeal. State v. Easterling, 300 N.C. 594, 268 S.E.2d 800 (1980).

Incompetent evidence is harmless unless it is made to appear that the defendant was prejudiced thereby and that a different result would have likely occurred if the evidence had been excluded. State v. Jeffers, 48 N.C. App. 663, 269 S.E.2d 731 (1980).

The admission of irrelevant evidence is ordinarily considered harmless error and the burden is upon appellant to show that he was prejudiced. State v. Spicer, 50 N.C. App. 214, 273 S.E.2d 521 (1981).

Inversion of Order of Proof Not Prejudicial. — In a prosecution for first-degree murder, the trial court did not err in requiring defendant to present his evidence before the State put on its evidence during a hearing on defendant's motion to suppress, and there was no merit to defendant's contention that the inversion of the order of proof resulted in a shift of the burden of proof, since the order of proof is merely a matter of practice without legal effect; there was nothing in the trial court's order denying defendant's motion to suppress to indicate that the trial judge believed otherwise; and defendant was not prejudiced by the order of proof because it resulted in his having to call one of the State's principal witnesses as his own. State v. Temple, 302 N.C. 1, 273 S.E.2d 273 (1981).

Error in Admission of Evidence Not Prejudicial. — In the appeal of a conviction for robbery with a dangerous weapon and assault with a deadly weapon with intent to kill inflicting serious injury, where defendant assigned as error the failure of the trial court to sustain three objections made by defendant during the testimony of the victim in which the victim stated that she was not sure how good her husband's hearing was on the side where he had been shot; that she could still see the defendant's face when she closed her eyes; and that she let the defendant take the money because he had a gun, the defendant might be correct in his assertion that these answers were in places speculative or unresponsive, but neither the defendant nor the record showed that the errors were material or prejudicial, and absent such a showing defendant was not entitled to a new trial. State v. Billups, 301 N.C. 607, — S.E.2d — (1981).

In a prosecution for rape there was no merit to defendant's contention that an officer involved in the investigation of the crime charged should not have been allowed to testify that he left the room where defendant was being interrogated "in reference to the rape of [the victim]," since the officer's comment was not evidence tending to show that defendant had committed another offense but was simply a passing reference to one of the four men who allegedly raped the victim, and the statement was clearly not prejudicial. State v. Hammonds, 301 N.C. 713, 272 S.E.2d 856 (1981).

In a prosecution for first-degree murder and armed robbery where the district attorney on cross-examination asked a witness, who was himself a convicted felon, if he had testified in the case against him, whether the witness had testified in his own case was not a proper subject for cross-examination in the case against defendant since the fact that he testified or did not testify in no way bears on his credibility nor does it tend to impeach him as a witness; even so the court was satisfied the result of the trial would not have been different had this incident not occurred, and, therefore, defendant was not prejudiced by this aspect of the district attorney's cross-examination. State v. Oliver, 302 N.C. 28, 274 S.E.2d 183 (1981).

In a prosecution for armed robbery, the Court of Appeals erred in determining that the admission of handguns taken from defendants five weeks after the crime with which they were charged was prejudicial error, since the Court of Appeals held that there was no evidence to connect guns to the robbery for which defendants were being tried, but (1) on the basis of the record before the court, it was unable to conclude that the admission of the exhibits by the trial court was in fact error, as the exhibits in question were not placed before the court for its examination, nor was there any stipulation placed in the record which would serve to describe the exhibits; and (2) even if the exhibits were erroneously admitted, defendants were not prejudiced by their admission into evidence, as several witnesses positively identified defendants as the persons who perpetrated the robbery. State v. Milby, 302 N.C. 137, 273 S.E.2d 716 (1981).

Admission of Improper Testimony Held Harmless Error. — While evidence tending to show that defendant had sexual relations with other women might have been competent to show defendant's motive for hiring someone to kill his wife, the trial court erred in the admission of testimony detailing the manner in which defendant engaged in sexual relations with other women; however, such error was not prejudicial since the testimony did not make defendant out to be a moral degenerate and it could not have affected the result of the trial. State v. Small, 301 N.C. 407, 272 S.E.2d 128 (1980).

Although evidence elicited by the prosecutor in cross-examination of defendants' half-brother that he owned two shotguns and three rifles was irrelevant in this murder prosecution, error in the admission of such evidence was not prejudicial to defendants. State v. Spicer, 50 N.C. App. 214, 273 S.E.2d 521 (1981).

The trial court in a first-degree murder and armed robbery case did not err in the admission

of a witness's testimony that he saw two boys walking toward the crime scene shortly before the crimes occurred and that they were "dark people" and another witness's testimony tending to show that clothing he saw one defendant wearing on the day before the crime matched the description of such defendant's clothing on the day of the crimes; furthermore, such testimony could not have had the purpose of inflaming the jury and would be, at most, harmless error. State v. Oliver, 302 N.C. 28, 274 S.E.2d 183 (1981).

Admission of Photographs Harmless Error. — The trial court's error in a first-degree murder case in allowing the jury to be shown certain photographs of the victim's body lying in a casket was harmless beyond a reasonable doubt in view of the overwhelming evidence of defendant's guilt. State v. Temple, 302 N.C. 1, 273 S.E.2d 273 (1981).

Admission of Transcript Harmless Error. — In an action to reform a contract, the trial court's admission of a transcript from a previous proceeding when offered by defendant without the laying of a proper foundation was harmless error where the counterclaim was heard by a judge without a jury; the transcript of the prior proceeding was not necessary to a determination of the propriety of specific performance of the contract; and, nothing else appearing, it is presumed that the trial court disregarded it. Munchak Corp. v. Caldwell, 301 N.C. 689, 273 S.E.2d 281 (1981).

Misstatement By Court Not Prejudicial. — In a prosecution for kidnapping and rape, defendant waived objection to the court's misstatement of the date of the offenses as October 20, rather than the correct date of October 21, by failing to bring the misstatement to the court's attention in time to afford an opportunity for correction; furthermore, defendant was not prejudiced by the misstatement considering the amount of testimony referring to the date of the offenses as October 21, and the trial judge's instruction that the jury should be guided by its own recollection of the evidence. State v. Squire, 302 N.C. 112, 273 S.E.2d 688 (1981).

The presence of an alternate juror in the jury room during the jury's deliberations violates N.C. Const., Art. I, § 24 of the State Constitution and § 9-18 and constitutes reversible error per se. State v. Turner, 48 N.C. App. 606, 269 S.E.2d 270 (1980).

Erroneous Instruction on Lesser Offense. — Where there is no reasonable possibility that a verdict more favorable to defendant would have occurred absent an erroneous instruction on a lesser offense not supported by the evidence, the error occasioned by such instruction is harmless. Conversely, where there does exist a reasonable possibility that defendant would have been acquitted had not the lesser offense been erroneously submitted, the error is prejudicial and defendant is entitled to appellate relief. State v. Ray, 299 N.C. 151, 261 S.E.2d 789 (1980).

In a prosecution for rape where defendant's sole defense was that he did not commit the act upon which the greater and lesser offenses were based, and where there was no contention that there was anything in the charge to the jury which clouded that defense, the jury's verdict finding defendant guilty of second-degree rape implicitly, but clearly, rejected his defense that he did not commit the act upon which the charges were based; therefore, the submission of the lesser-included offense was not prejudicial to defendant but to the contrary was in his favor. State v. Summitt, 301 N.C. 591, 273 S.E.2d 425, cert. denied, — U.S. —, 101 S. Ct. 2048, 68 L. Ed. 2d 349 (1981).

The trial court's instructions to the jury were prejudicial where the trial court did not summarize the evidence as required by § 15A-1232, but instead consistently and without exception stated the contentions of the parties, and in stating the State's contentions, included matters that were not in evidence. State v. Wagner, 50 N.C. App. 286, 273 S.E.2d 33 (1981).

The denial of a motion for a mistrial based on alleged misconduct affecting the jury is equivalent to a finding by the trial judge that prejudicial misconduct has not been shown. State v. Jones, 50 N.C. App. 263, 273 S.E.2d 327 (1981).

Same — No Prejudicial Error. — In a prosecution of defendant for armed robbery and murder, trial court did not commit prejudicial error in denying defendant's motion for a mistrial after striking the testimony of several witnesses concerning the absence of fingerprints of defendant at the murder scene and the absence of gunpowder on the hands of bystanders after the robbery-murder, since, the trial court, after the motions to strike were allowed, instructed the jury not to consider the stricken evidence and specifically referred to the evidence and the witness who provided it, there was no way in which defendant would have been prejudiced by the evidence had it not been withdrawn from the jury's consideration, and defendant's motion for mistrial was a matter addressed to the sound discretion of the trial judge, and no abuse of that discretion appeared. State v. Smith, 301 N.C. 695, — S.E.2d — (1981).

Curing of Error. — When incompetent or objectionable evidence is withdrawn from the jury's consideration by appropriate instructions from the trial judge, any error in the admission of the evidence is cured and, in like manner, improper argument or remarks by counsel are usually cured by appropriate instructions by the court to the jury. State v. Pruitt, 301 N.C. 683, 273 S.E.2d 264 (1981).

When the court withdraws incompetent evidence and instructs the jury not to consider it, any prejudice is ordinarily cured. State v. Smith, 301 N.C. 695, — S.E.2d — (1981).

Error Not Cured. — The trial court in a homicide prosecution erred in failing to include not guilty by reason of defense of another in the final mandate to the jury, and such error was not cured by discussion of the law of defense of another in the body of the charge. State v. Patterson, 50 N.C. App. 280, 272 S.E.2d 924 (1981).

Applied in State v. Hudson, 295 N.C. 427, 245 S.E.2d 686 (1978); State v. Correll, 38 N.C. App. 451, 248 S.E.2d 451 (1978); State v. McQueen, 39 N.C. App. 64, 249 S.E.2d 464 (1978); State v. Johnston, 39 N.C. App. 179, 249 S.E.2d 879 (1978); State v. Sledge, 297 N.C. 227, 254 S.E.2d 579 (1979); State v. Sparks, 297 N.C. 314, 255 S.E.2d 373 (1979); State v. Logner, 297 N.C. 539, 256 S.E.2d 166 (1979); State v. Colvin, 297 N.C. 691, 256 S.E.2d 689 (1979); State v. Lyles, 298 N.C. 179, 257 S.E.2d 410 (1979); State v. Nelson, 298 N.C. 573, 260 S.E.2d 629 (1979); State v. Boone, 299 N.C. 681, 263 S.E.2d 758 (1980); State v. Jenkins, 300 N.C. 578, 268 S.E.2d 458 (1980); State v. Weimer, 300 N.C. 642, 268 S.E.2d 216 (1980); State v. Joyner, 301 N.C. 18, 269 S.E.2d 125 (1980); State v. Bell, 48 N.C. App. 356, 269 S.E.2d 201 (1980); State v. Prince, 49 N.C. App. 145, 270 S.E.2d 521 (1980); State v. Bright, 301 N.C. 243, 271 S.E.2d 368 (1980); State v. Harren, 302 N.C. 142, 273 S.E.2d 694 (1981).

Quoted in State v. Vert, 39 N.C. App. 26, 249 S.E.2d 476 (1978).

Cited in State v. Jolly, 297 N.C. 121, 254 S.E.2d 1 (1979).

§ 15A-1444. When defendant may appeal; certiorari.

(a) A defendant who has entered a plea of not guilty to a criminal charge, and who has been found guilty of a crime, is entitled to appeal as a matter of right when final judgment has been entered.

(a1) A defendant who has been found guilty, or entered a plea of guilty or no contest to a felony, is entitled to appeal as a matter of right the issue of whether his sentence is supported by evidence introduced at the trial and sentencing hearing only if the prison term of the sentence exceeds the presumptive term set by G.S. 15A-1340.4, and if the judge was required to make findings as to aggravating or mitigating factors pursuant to this Article. Otherwise, he is not entitled to appeal this issue as a matter of right but may petition the appellate division for review of this issue by writ of certiorari.

(b) Procedures for appeal from the magistrate to the district court are as provided in Article 90, Appeals from Magistrates and from District Court Judges.

(c) Procedures for appeal from the district court to the superior court are as provided in Article 90, Appeals from Magistrates and from District Court Judges.

(d) Procedures for appeal to the appellate division are as provided in this Article, the rules of the appellate division, and Chapter 7A of the General Statutes. The appeal must be perfected and conducted in accordance with the requirements of those provisions.

(e) Except as provided in subsection (a1) of this section and G.S. 15A-979, and except when a motion to withdraw a plea of guilty or no contest has been denied, the defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court, but he may petition the appellate division for review by writ of certiorari. If an indigent defendant petitions the appellate division for a writ of certiorari, the presiding superior court judge may in his discretion order the preparation of the record and transcript of the proceedings at the expense of the State.

(f) The ruling of the court upon a motion for appropriate relief is subject to review upon appeal or by writ of certiorari as provided in G.S. 15A-1422.

(g) Review by writ of certiorari is available when provided for by this Chapter, by other rules of law, or by rule of the appellate division. (1977, c. 711, s. 1; 1979, c. 760, s. 3; 1981, c. 179, ss. 8, 9.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, added subsection (a1). The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

The 1981 amendment, effective July 1, 1981, divided subsection (a1) into two sentences, substituted "has been found guilty, or entered a plea of guilty or no contest to a felony," for "entered a plea of not guilty to a felony and who has been found guilty of a felony" near the beginning of the present first sentence and added at the end of the present first sentence "and if the judge was required to make findings as to aggravating or mitigating factors pursuant to this Article." The amendment also substituted "Except as provided in subsection (a1) of this section and G.S. 15A-979" for "Except as provided in G.S. 15A-979" at the beginning of subsection (e).

CASE NOTES

Application of Former Statute to Certiorari to Review Judgment in Habeas Corpus. — By analogy, § 7A-27(a), former § 15-180.2 and App. R. 21(b) were logically applicable to petitions for certiorari to review judgments in habeas corpus proceedings involving the restraint of prisoners under sentences of death or life imprisonment. State v. Niccum, 293 N.C. 276, 238 S.E.2d 141 (1977).

When the language of subsection (e) of this section is read conversely, it provides that when a motion to withdraw a plea of guilty or no contest has been denied, the defendant is entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court. It follows that a defendant whose motion to withdraw his plea of guilty, made during the term and on the day following pronouncement of judgment, was denied, is entitled to appeal as a matter of right. State v. Dickens, 299 N.C. 76, 261 S.E.2d 183 (1980).

Evidence offered on the hearing of a post-trial motion for appropriate relief does not relate back so as to justify a holding that the trial judge erroneously instructed the jury at trial. State v. Leonard, 300 N.C. 223, 266 S.E.2d 631, cert. denied, — U.S. —, 101 S. Ct. 372, 66 L. Ed. 2d 227 (1980).

Applied in State v. Ervin, 38 N.C. App. 261, 248 S.E.2d 91 (1978); State v. Sinclair, 45 N.C. App. 586, 263 S.E.2d 811 (1980).

Quoted in State v. Johnson, 42 N.C. App. 234, 256 S.E.2d 297 (1979); State v. Ward, 46 N.C. App. 200, 264 S.E.2d 737 (1980).

§ 15A-1445. Appeal by the State.

CASE NOTES

The word "appeal" in this section includes "appellate review upon writ of certiorari." State v. Ward, 46 N.C. App. 200, 264 S.E.2d 737 (1980).

Case law in North Carolina has held that the State has no right of appeal from: an order of mistrial; a judgment granting a defendant a new trial for newly discovered evidence; an adjudication that certain duties of defendant under a probation judgment had ended; a determination that a suspended sentence could not be revoked. In all these cases, the orders attempted to be appealed were interlocutory and not final. State v. Ward, 46 N.C. App. 200, 264 S.E.2d 737 (1980).

Appeal from Dismissal Without Prejudice. — A dismissal without prejudice under § 15A-703 of the Speedy Trial Act does not bar further prosecution by the State. It does not finally dispose of the case or charge against defendant, and therefore, it is not appealable. State v. Ward, 46 N.C. App. 200, 264 S.E.2d 737 (1980).

The State must petition for writ of certiorari in order to seek appellate review of dismissal of criminal charges without prejudice for violation of a defendant's statutory speedy trial rights. State v. Ward, 46 N.C. App. 200, 264 S.E.2d 737 (1980).

Appeal from Grant of Motion to Suppress Made In Limine. — When the motion to suppress must be and is made in limine or can be and is made in limine, then the defendant can appeal if the motion is denied and he enters a plea of guilty; and the State can appeal if the motion is granted. State v. Tate, 300 N.C. 180, 265 S.E.2d 223 (1980).

Quoted in State v. Hamilton, 36 N.C. App. 538, 245 S.E.2d 91 (1978).

Cited in State v. Collins, 38 N.C. App. 617, 248 S.E.2d 405 (1978); State v. Charlotte Liberty Mut. Ins. Co., 39 N.C. App. 557, 251 S.E.2d 867 (1979); State v. Stewart, 40 N.C. App. 693, 253 S.E.2d 638 (1979).

§ 15A-1446. Requisites for preserving the right to appellate review.

(d) Errors based upon any of the following grounds, which are asserted to have occurred, may be the subject of appellate review even though no objection, exception or motion has been made in the trial division.

(1) Lack of jurisdiction of the trial court over the offense of which the defendant was convicted.

(2) Lack of jurisdiction of the trial court over the person of the defendant.

(3) The criminal pleading charged acts which, at the time they were committed, did not constitute a violation of criminal law.

(4) The pleading fails to state essential elements of an alleged violation, as required by G.S. 15A-924(a)(5).

(5) The evidence was insufficient as a matter of law.

(6) The defendant was convicted under a statute that is in violation of the Constitution of the United States or the Constitution of North Carolina.

(7) Repealed by Session Laws 1977, 2nd Sess., c. 1147, s. 28.

(8) The conduct for which the defendant was prosecuted was protected by the Constitution of the United States or the Constitution of North Carolina.

(9) Subsequent admission of evidence from a witness when there has been an improperly overruled objection to the admission of evidence on the ground that the witness is for a specified reason incompetent or not qualified or disqualified.

(10) Subsequent admission of evidence involving a specified line of questioning when there has been an improperly overruled objection to the admission of evidence involving that line of questioning.

(11) Questions propounded to a witness by the court or a juror.

(12) Rulings and orders of the court, not directed to the admissibility of evidence during trial, when there has been no opportunity to make an objection or motion.

(13) Error of law in the charge to the jury.

(14) The court has expressed to the jury an opinion as to whether a fact is fully or sufficiently proved.

(15) The defendant was not present at any proceeding at which his presence was required.

(16) Error occurred in the entry of the plea.

(17) The form of the verdict was erroneous.

(18) The sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law.

(19) A significant change in law, either substantive or procedural, applies to the proceedings leading to the defendant's conviction or sentence, and retroactive application of the changed legal standard is required. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, s. 28.)

Effect of Amendments. — The 1977, 2nd Sess., amendment, effective July 1, 1978, repealed subdivision (7) of subsection (d), which read: "The conviction was obtained in violation of the Constitution of the United States or the Constitution of North Carolina."

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (d) is set out.

Legal Periodicals. — For a survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

For survey of 1978 constitutional law, see 57 N.C.L. Rev. 958 (1979).

For article entitled, "Toward a Codification of the Law of Evidence in North Carolina," see 16 Wake Forest L. Rev. 669 (1980).

CASE NOTES

Subdivision (d)(6) Unconstitutional. — The General Assembly was without authority to enact subdivision (d)(6) of this section which permits appellate review of a contention that defendant was convicted under a statute that violates the United States Constitution or the North Carolina Constitution even though no objection, exception or motion on such ground was made in the trial division, since the statute violates the provisions of N.C. Const., art. IV, § 13(2) giving the Supreme Court the exclusive authority to make rules of practice and procedure for the appellate division. State v. Elam, 302 N.C. 157, 273 S.E.2d 661 (1981).

Sufficiency of the evidence may be raised on appeal pursuant to subsection (d)(5). State v. Martin, 47 N.C. App. 223, 267 S.E.2d 35 (1980).

Waiver under § 15-173 Unaffected by Subdivision (d)(5). — Under § 15-173, a defendant, by presenting evidence, has waived his right to assert the denial of his motion to dismiss at the close of the State's evidence as a ground for appeal. The provisions of § 15A-1227(d) and subdivision (d)(5), allowing review on appeal of the sufficiency of the State's evidence in a criminal case without regard to whether the appropriate motion has been made, do not change this rule. State v. Mendez, 42 N.C. App. 141, 256 S.E.2d 405 (1979).

Although defendant, under § 15-173, waived his motion for nonsuit made at the close of the State's evidence by presenting evidence and failing to renew his motion, pursuant to § 15A-1227(d) and subdivision (d)(5), defendant could have requested review of the sufficiency of all of the evidence without regard to whether the proper motion or exception had been made during trial. State v. Alston, 44 N.C. App. 72, 259 S.E.2d 767 (1979).

Failure to Note Exceptions Constitutes Waiver. — Failure of defendant, who represented himself, to note exceptions to rulings of the trial court constituted waiver of the right to assert the alleged errors on appeal. State v. Brooks, 49 N.C. App. 14, 270 S.E.2d 592 (1980).

Benefit of Objection Lost When Same Evidence Later Admitted Without Objection. — Where defendant only interposed a general objection and did not make a special request to have the witness qualified as an expert, this was insufficient to preserve an exception for review, since even if a general objection had been sufficient, its benefit was lost when substantially the same evidence was thereafter admitted without renewed objection. State v. Edwards, 49 N.C. App. 547, 272 S.E.2d 384 (1980).

Applied in State v. Jolly, 297 N.C. 121, 254 S.E.2d 1 (1979); State v. Wilkins, 297 N.C. 237, 254 S.E.2d 598 (1979); State v. Rhyne, 39 N.C. App. 319, 250 S.E.2d 102 (1979); State v. Hill, 41 N.C. App. 722, 255 S.E.2d 757 (1979); State v. O'Briant, 43 N.C. App. 341, 258 S.E.2d 839 (1979); State v. Truzy, 44 N.C. App. 53, 260 S.E.2d 113 (1979); State v. Puckett, 46 N.C. App. 719, 266 S.E.2d 48 (1980).

Cited in State v. Wilkins, 297 N.C. 237, 254 S.E.2d 598 (1979); State v. Harden, 42 N.C. App. 677, 257 S.E.2d 635 (1979).

§ 15A-1447. Relief available upon appeal.

CASE NOTES

Applied in State v. Boone, 297 N.C. 652, 256 S.E.2d 683 (1979); State v. Prince, 49 N.C. App. 145, 270 S.E.2d 521 (1980).

§ 15A-1448. Procedures for taking appeal.

(a) Time for Entry of Appeal; Jurisdiction over the Case. —

(1) A case remains open for the taking of an appeal to the appellate division for a period of 10 days after the entry of judgment.

(2) When a motion for appropriate relief is made during the 10-day period, the case remains open for the taking of an appeal until the expiration of 10 days after the court has ruled on the motion.

(3) The jurisdiction of the trial court with regard to the case is divested, except as to actions authorized by G.S. 15A-1453, when notice of appeal has been given and the period described in (1) and (2) has expired.

(4) If there has been no ruling by the trial judge on a motion for appropriate relief within 10 days after motion for such relief has been made, the motion shall be deemed denied.

(5) The right to appeal is not waived by withdrawal of an appeal if the appeal is reentered within the time specified in (1) and (2).

(6) The right to appeal is not waived by compliance with all or a portion of the judgment imposed. If the defendant appeals, the court may enter appropriate orders remitting any fines or costs which have been paid. The court may delay the remission pending the determination of the appeal.

(1977, 2nd Sess., c. 1147, s. 29.)

Effect of Amendments. — The 1977, 2nd Sess., amendment, effective July 1, 1978, rewrote subdivisions (3) and (4) of subsection (a).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (a) is set out.

CASE NOTES

Failure of Trial Judge to Rule within 10 Days. — There was no merit to defendant's contention that the trial judge erred in failing to rule upon his motion for appropriate relief, since defendant did receive a ruling on his motion under subsection (a)(4) of this section which provides that, if no ruling has been made by the trial judge on a motion for appropriate relief within 10 days, the motion is deemed denied. State v. Brooks, 49 N.C. App. 14, 270 S.E.2d 592 (1980).

Applied in State v. Ervin, 38 N.C. App. 261, 248 S.E.2d 91 (1978).

Cited in State v. Morris, 41 N.C. App. 164, 254 S.E.2d 241 (1979); State v. Evans, 46 N.C. App. 327, 264 S.E.2d 766 (1980).

SUBCHAPTER XV. CAPITAL PUNISHMENT.

ARTICLE 100.

Capital Punishment.

§ 15A-2000. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

(a) Separate Proceedings on Issue of Penalty. —

(1) Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. A capital felony is one which may be punishable by death.

(2) The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the guilty verdict is returned. If prior to the time that the trial jury begins its deliberations on the issue of penalty, any juror dies, becomes incapacitated or disqualified, or is

discharged for any reason, an alternate juror shall become a part of the jury and serve in all respects as those selected on the regular trial panel. An alternate juror shall become a part of the jury in the order in which he was selected. If the trial jury is unable to reconvene for a hearing on the issue of penalty after having determined the guilt of the accused, the trial judge shall impanel a new jury to determine the issue of the punishment. If the defendant pleads guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. A jury selected for the purpose of determining punishment in a capital case shall be selected in the same manner as juries are selected for the trial of capital cases.

(3) In the proceeding there shall not be any requirement to resubmit evidence presented during the guilt determination phase of the case, unless a new jury is impaneled, but all such evidence is competent for the jury's consideration in passing on punishment. Evidence may be presented as to any matter that the court deems relevant to sentence, and may include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (e) and (f). Any evidence which the court deems to have probative value may be received.

(4) The State and the defendant or his counsel shall be permitted to present argument for or against sentence of death. The defendant or defendant's counsel shall have the right to the last argument.

(b) Sentence Recommendation by the Jury. — Instructions determined by the trial judge to be warranted by the evidence shall be given by the court in its charge to the jury prior to its deliberation in determining sentence. In all cases in which the death penalty may be authorized, the judge shall include in his instructions to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the lists provided in subsections (e) and (f) which may be supported by the evidence, and shall furnish to the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances.

After hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based upon the following matters:

(1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exist;

(2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist; and

(3) Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.

The sentence recommendation must be agreed upon by a unanimous vote of the 12 jurors. Upon delivery of the sentence recommendation by the foreman of the jury, the jury shall be individually polled to establish whether each juror concurs and agrees to the sentence recommendation returned.

If the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment; provided, however, that the judge shall in no instance impose the death penalty when the jury cannot agree unanimously to its sentence recommendation.

(c) Findings in Support of Sentence of Death. — When the jury recommends a sentence of death, the foreman of the jury shall sign a writing on behalf of the jury which writing shall show:

(1) The statutory aggravating circumstance or circumstances which the jury finds beyond a reasonable doubt; and

(2) That the statutory aggravating circumstance or circumstances found by the jury are sufficiently substantial to call for the imposition of the death penalty; and,

(3) That the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found.

(d) Review of Judgment and Sentence. —

(1) The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of North Carolina pursuant to procedures established by the Rules of Appellate Procedure. In its review, the Supreme Court shall consider the punishment imposed as well as any errors assigned on appeal.

(2) The sentence of death shall be overturned and a sentence of life imprisonment imposed in lieu thereof by the Supreme Court upon a finding that the record does not support the jury's findings of any aggravating circumstance or circumstances upon which the sentencing court based its sentence of death, or upon a finding that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, or upon a finding that the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The Supreme Court may suspend consideration of death penalty cases until such time as the court determines it is prepared to make the comparisons required under the provisions of this section.

(3) If the sentence of death and the judgment of the trial court are reversed on appeal for error in the post-verdict sentencing proceeding, the Supreme Court shall order that a new sentencing hearing be conducted in conformity with the procedures of this Article.

(e) Aggravating Circumstances. — Aggravating circumstances which may be considered shall be limited to the following:

(1) The capital felony was committed by a person lawfully incarcerated.

(2) The defendant had been previously convicted of another capital felony.

(3) The defendant had been previously convicted of a felony involving the use or threat of violence to the person.

(4) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(5) The capital felony was committed while the defendant was engaged, or was an aider or abettor, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any homicide, robbery, rape or a sex offense, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(6) The capital felony was committed for pecuniary gain.

(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(8) The capital felony was committed against a law-enforcement officer, employee of the Department of Correction, jailer, fireman, judge or justice, former judge or justice, prosecutor or former prosecutor, juror or former juror, or witness or former witness against the defendant, while engaged in the performance of his official duties because of the exercise of his official duty.

(9) The capital felony was especially heinous, atrocious, or cruel.

(10) The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(11) The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons.

(f) Mitigating Circumstances. — Mitigating circumstances which may be considered shall include, but not be limited to, the following:

(1) The defendant has no significant history of prior criminal activity.
(2) The capital felony was committed while the defendant was under the influence of mental or emotional disturbance.
(3) The victim was a voluntary participant in the defendant's homicidal conduct or consented to the homicidal act.
(4) The defendant was an accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor.
(5) The defendant acted under duress or under the domination of another person.
(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.
(7) The age of the defendant at the time of the crime.
(8) The defendant aided in the apprehension of another capital felon or testified truthfully on behalf of the prosecution in another prosecution of a felony.
(9) Any other circumstance arising from the evidence which the jury deems to have mitigating value. (1977, c. 406, s. 2; 1979, c. 565, s. 1; c. 682, s. 9; 1981, c. 652, s. 1.)

Effect of Amendments. — The first 1979 amendment added subdivision (11) to subsection (e).

The second 1979 amendment, effective January 1, 1980, inserted "or a sex offense" near the middle of subdivision (5) of subsection (e).

The 1981 amendment inserted "homicide" near the middle of subdivision (5) of subsection (e). Session Laws 1981, c. 652, s. 2, provides: "This act is effective upon ratification and applies to capital felonies committed on or after that date."

Session Laws 1979, c. 565, s. 2, provides: "This act is effective upon ratification and shall apply to all offenses committed after the date of its ratification." The act was ratified May 14, 1979.

Session Laws 1979, c. 682, ss. 13 and 14, provides:

"Sec. 13. All laws and clauses of laws in conflict with this act are hereby repealed, provided however, nothing in this act shall be construed to repeal any portion of Article 26 of Chapter 14 which relates to offenses against public morality and decency.

"Sec. 14. This act shall become effective January 1, 1980, and shall apply to offenses occurring on and after that date. Nothing herein shall be construed to render lawful acts committed prior to the effective date of this act [January 1, 1980] and unlawful at the time the said acts occurred; and nothing contained herein shall be construed to affect any prosecution instituted under any section repealed by this act pending on the effective date hereof."

Session Laws 1979, c. 682, s. 12, contains a severability clause.

Legal Periodicals. — For a survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

For survey of 1979 law on criminal procedure, see 58 N.C.L. Rev. 1404 (1980).

For comment on capital punishment and evolving standards of decency, see 16 Wake Forest L. Rev. 737 (1980).

For comment on capital sentencing statute, see 16 Wake Forest L. Rev. 765 (1980).

CASE NOTES

Constitutionality. — For discussion of the constitutionality of the North Carolina Death Penalty Statutes, see State v. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979), cert. denied, 448 U.S. 907, 100 S. Ct. 3050, 65 L. Ed. 2d 1137, rehearing denied, 448 U.S. 918, 101 S. Ct. 41, 65 L. Ed. 2d 1181 (1980).

For discussion of factors governing interpretation of the death penalty statute, see State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

Imposition of Penalty Not Mandatory. — The present North Carolina death penalty statutes are not mandatory in nature but instead

provide for the exercise of guided discretion in the imposition of sentence. State v. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979).

No Authority to Avoid Statutory Scheme in Proper Case. — In a prosecution for first-degree murder, where there was evidence which tended to show the especially heinous, atrocious, and cruel manner in which the victim was clubbed to death, an aggravating circumstance listed in subsection (e)(9) of this section, the presiding judge, district attorney, and defense counsel had no legal authority whatsoever: (1) to announce that the State would not seek the death penalty, (2) to agree to make no motions concerning the death penalty, (3) to eliminate voir dire examinations of jurors with respect to the death penalty, (4) to eliminate the separate sentencing proceeding to determine whether the punishment should be death or life imprisonment, or (5) by consent to fix the punishment at life imprisonment should the jury convict defendant of murder in the first degree. State v. Jones, 299 N.C. 298, 261 S.E.2d 860 (1980).

Effect of Guilty Plea on Determination of Sentence. — The question of sentence in a capital case is to be determined in the same manner whether a defendant pleads guilty to the capital offense or is found guilty by a jury. State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

A defendant may not plead guilty to first-degree murder and by prearrangement with the State be sentenced to life imprisonment without the intervention of a jury. State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

Conditional Guilty Plea Not Permitted. — In a capital case, the trial judge did not err in construing this section and § 15A-2001 as not allowing a defendant to enter a plea of guilty on condition that his sentence be life imprisonment. State v. Johnson, 298 N.C. 355, 259 S.E.2d 752 (1979).

When Refusal to Sanction Plea Negotiation Proper. — Where, in a capital case, there is evidence tending to show the existence of two aggravating factors, i.e., that the murder occurred in the course of a rape or attempted rape and that the murder was especially heinous, atrocious and cruel, the issue whether the death penalty should be imposed is thus necessarily one for the jury, and it would not be error for the trial court to refuse to sanction a proposed plea negotiation. State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

Duty of Jury in Assessing Appropriateness of Penalty. — The deliberative process of the jury envisioned by this section is not a mere counting process. The jury is charged with the heavy responsibility of subjectively, within the parameters set out by the statute, assessing the appropriateness of imposing the death penalty upon a particular defendant for a particular crime. Nuances of character and circumstance cannot be weighed in a precise mathematical formula. At the same time, it would be improper to instruct the jury that they may disregard the procedure outlined by the legislature and impose the sanction of death at their own whim. To do so would be to revert to a system pervaded by arbitrariness and caprice. State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979).

Aggravating Circumstances in Felony Murder Cases. — When a defendant is convicted of first-degree murder under the felony murder rule, the trial judge may not submit to the jury at the sentencing phase of the trial an aggravating circumstance concerning the underlying felony. State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979), cert. denied, 446 U.S. 941, 100 S. Ct. 2165, 64 L. Ed. 2d 796 (1980).

Aggravating Circumstances in Felony-Murder Cases. — Where defendants were convicted of the capital offense of first-degree murder on the theory that the murder was committed during the perpetration of an armed robbery, it was error for the court to submit the underlying felony of armed robbery to the jury in the sentencing phase of the trial as an aggravating circumstance, and defendants who were sentenced to death were entitled to a new sentencing hearing since the jury may well have decided that the remaining aggravating circumstances were not sufficiently substantial to call for imposition of the death penalty had the jury not considered the underlying felony as an aggravating circumstance. State v. Oliver, 302 N.C. 28, 274 S.E.2d 183 (1981).

Same — Murder for Pecuniary Gain. — There is no error in submitting the aggravating circumstance as to whether a murder was committed "for pecuniary gain" in a felony-murder case in which the underlying felony is robbery notwithstanding the rule that the robbery itself cannot be submitted as such a circumstance, since the circumstance that the capital felony was committed for pecuniary gain does not constitute an element of the offense. State v. Oliver, 302 N.C. 28, 274 S.E.2d 183 (1981).

In a prosecution for the first-degree murder of a storekeeper during the perpetration of an armed robbery and the first-degree murder of an innocent bystander who had pulled up to the store to purchase gas, the trial court properly submitted to the jury during the sentencing phase of the trial the aggravating circumstances as to whether the bystander was murdered for "pecuniary gain" although the evidence showed that the money had already been obtained from the storekeeper at the time the bystander was shot, since the murder of the bystander was apparently committed in an effort to eliminate a witness to the robbery, and

the jury could find that both murders were committed for the purpose of permitting the defendants to enjoy pecuniary gain. State v. Oliver, 302 N.C. 28, 274 S.E.2d 183 (1981).

Subdivision (e)(3) Refers to Acts Prior to Present Murder Charge. — The "previously convicted" language used by the legislature in subdivision (e)(3) of this section refers to criminal activity conducted prior to the events out of which the charge of murder arose. To decide otherwise would lead to unnecessary duplication within the statute, for subdivision (e)(5) enumerates those felonies which occur simultaneously with the capital felony which the legislature deems worthy of consideration by the jury. It would be improper, therefore, to instruct the jury that this subdivision encompassed conduct which occurred contemporaneously with or after the capital felony with which the defendant is charged. State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979).

When Subdivision (e)(3) Instruction Proper. — It would be improper to instruct the jury upon the factor enumerated in subdivision (e)(3) of this section when there is no evidence which tends to show a felony conviction. Also, the felony for which the defendant has been convicted must be one involving threat or use of violence to the person. It cannot, under this provision, be a crime against property. State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979).

Subdivision (e)(3) requires that there be evidence that: (1) defendant had been convicted of a felony, (2) the felony for which he was convicted involved the "use or threat of violence to the person," and (3) the conduct upon which this conviction was based was conduct which occurred prior to the events out of which the capital felony charge arose. If there is no such evidence, it would be improper for the court to instruct the jury on this subsection. State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979).

When Subdivision (e)(4) Instruction Proper. — Subdivision (e)(4) on its face is unambiguous, but it must be construed properly so that instructions on the aggravating circumstances will only be given the jury in appropriate cases. In a broad sense every murder silences the victim, thus having the effect of aiding the criminal in the avoidance or prevention of his arrest. It is not accurate to say, however, that in every case this "purpose" motivates the killing. State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979).

Subdivisions (e)(5) and (e)(3) Compared. — Subdivision (e)(5) of this section differs from subdivision (e)(3) in that it guides the jury's deliberation upon criminal conduct of the defendant which takes place "while" or during the same transaction as the one in which the capital felony occurs, whereas subdivision (e)(3) deals with prior conduct. State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979).

Instruction on the provision of subdivision (e)(5) is appropriate only when the defendant is convicted for first-degree murder upon the theory of premeditation and deliberation. State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979).

Subdivision (e)(9) Not Applicable to Every Homicide. — While every murder is, at least arguably, heinous, atrocious, and cruel, subdivision (e)(9) is not intended to apply to every homicide. By using the word "especially" the legislature indicated that there must be evidence that the brutality involved in the murder in question must exceed that normally present in any killing before the jury would be instructed upon this subsection. State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979).

Subdivision (e)(9) Limited to Acts during Capital Felony. — Limiting application of subdivision (e)(9) of this section to acts done to the victim during the commission of the capital felony itself is an appropriate construction of the language of this provision. Under this construction, subdivision (e)(9) will not become a "catch all" provision which can always be employed in cases where there is no evidence of other aggravating circumstances. State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979).

Propriety of Instruction Under Subdivision (e)(9). — The trial court properly submitted to the jury the aggravating circumstances as to whether the first-degree murder of a storekeeper was "especially heinous, atrocious or cruel" where the State's evidence showed that the storekeeper, after opening his cash register in response to defendants' demands, begged for his life and that one defendant mercilessly shot him to death. However, the trial court erred in submitting the aggravating circumstance as to whether the death of an innocent bystander was "especially heinous, atrocious or cruel" where the State's evidence showed that one defendant, as he was running from the store, shot and killed the bystander who had pulled up to purchase gas, there was no unusual infliction of pain or suffering on the victim, and the brutality of the killing did not exceed that normally present in a case of first-degree murder. State v. Oliver, 302 N.C. 28, 274 S.E.2d 183 (1981).

Test When Aggravating Circumstance Erroneously Submitted. — Whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction is the test which should be applied when one of the aggravating circumstances listed in subsection (e) is erroneously submitted by the court and answered by the jury against the defendants. State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979).

Burden on Issue of Mitigating Circumstances. — The burden of persuading the jury on the issue of the existence of any mitigating

circumstance is upon the defendant and the standard of proof is by a preponderance of the evidence. State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

When Defendant Entitled to Instruction on Mitigating Circumstance. — Where, all of the evidence in the case, if believed, tends to show that a particular mitigating circumstance does exist, the defendant is entitled to a preemptory instruction on that circumstance. State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

Motion for Listing of Possible Mitigating Circumstances. — If, in a capital case, a defendant makes a timely request for a listing in writing of possible mitigating circumstances, supported by the evidence, and if these circumstances are such that the jury could reasonably deem them to have mitigating value, the trial judge must put such circumstances on the written list. State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

Where, in a capital case, there are a number of things including good character, which a defendant contends the jury should consider in mitigation, in order to insure that the trial judge mentions these to the jury in his instructions the defendant must file a timely request. Otherwise, failure of the court to mention any particular item as a possible mitigating factor will not be held for error so long as the trial judge instructs that the jury may consider any circumstances which it finds to have mitigating value pursuant to subdivision (f)(9). State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

The legislature intended that all mitigating circumstances, both those expressly mentioned in this statute and others which might be submitted under subdivision (f)(9), be on equal footing before the jury. If those which are expressly mentioned are submitted in writing, as they should be, then any other relevant circumstance proffered by the defendant as having mitigating value which is supported by the evidence and which the jury may reasonably deem to have mitigating value must, upon defendant's timely request, also be submitted in writing. Where, however, defendant makes no specific request to include possible "other mitigating circumstances" on the written verdict form submitted to the jury and, likewise, makes no timely request to include defendant's good character as a mitigating circumstance, the actions of the trial judge in failing to do these things are not erroneous. State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

Contention of Good Character Not Encompassed by Subdivision (f)(1). — The mitigating circumstance in a capital case which refers to a defendant's lack of "significant history of prior criminal activity" does not encompass a contention regarding defendant's good character, since good character imports more than simply the absence of criminal convictions. State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

Criminal Record Admissible to Negate Evidence Under Subdivision (f)(1). — Portions of defendant's criminal record which were read to the jury during the sentencing phase of a first-degree murder case were relevant and competent to negate evidence that defendant had no significant history of prior criminal activity which was submitted to the jury on his behalf as a possible mitigating circumstance. State v. Oliver, 302 N.C. 28, 274 S.E.2d 183 (1981).

Model Penal Code Test for Mental Capacity Adopted. — The legislature, by enactment of subdivision (f)(6), has determined to depart from the traditional M'Naghten test and to adopt the Model Penal Code test for mental capacity as a mitigating circumstance to be considered on the question of punishment in capital cases. State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

When Subdivision (f)(6) Circumstance Exists. — This mitigating circumstance may exist even if a defendant has capacity to know right from wrong, to know that the act he committed was wrong, and to know the nature and quality of that act. It would exist even under these circumstances if the defendant's capacity to appreciate (to fully comprehend or be fully sensible of) the criminality (wrongfulness) of his conduct was impaired (lessened or disminished), or if defendant's capacity to follow the law and refrain from engaging in the illegal conduct was likewise impaired (lessened or diminished). State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

In a first-degree murder prosecution in which there was evidence from which the jury could have found that, although defendant knew the difference between right and wrong at the time of the killing, he suffered from schizophrenia and that at the time of the killing defendant's schizophrenia had surfaced, defendant would be entitled to a new sentencing hearing where the trial judge, in his instruction, failed to explain the difference between defendant's capacity to know right from wrong, and the impairment of his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law within the meaning of subdivision (f)(6) of this section. State v. Johnson, 298 N.C. 355, 259 S.E.2d 752 (1979).

Power of Review in Supreme Court. — Read together, subdivisions (d)(1) and (d)(3) empower the Supreme Court of this State to review errors assigned in the trial and sentencing phases. When prejudicial error is found, the court must order a new sentencing hearing. State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979).

District Attorney's Reading of Subsection (d) to Jury Was Error. — During the sentencing phase of a bifurcated prosecution for murder, it was error for the district attorney to read to the jury § 15A-2000(d), relating to the review of judgment and sentence by the Supreme Court. A reference to appellate review has no relevance with regard to the jury's task of weighing any aggravating and mitigating circumstances for the purpose of recommending a sentence. More importantly such reference will, in all likelihood, result in the jury's reliance on the Supreme Court for the ultimate determination of sentence. State v. Jones, 296 N.C. 495, 251 S.E.2d 425 (1979).

The rule precluding any argument which suggests to the jurors that they can depend on judicial or executive review to correct an erroneous verdict and thereby lessen the jurors' responsibility applies with equal force to a sentence recommendation in a bifurcated trial. State v. Jones, 296 N.C. 495, 251 S.E.2d 425 (1979).

District Attorney's Reference to Parole Statute Was Error. — In a prosecution for murder, during the sentencing phase of a bifurcated trial, the district attorney's reference to the parole statute was erroneous. Neither the State nor the defendant should be allowed to speculate upon the outcome of possible appeals, paroles, executive commutations or pardons. The jury's sentence recommendation should be based solely on their balancing of the aggravating and mitigating factors before them. State v. Jones, 296 N.C. 495, 251 S.E.2d 425 (1979).

In the sentencing phase of a bifurcated trial, a reference to any statutory provision, which would have the effect of minimizing in the jurors' minds their role in recommending the sentence to be imposed, is precluded. The matters which a jury may consider in the sentencing phase of a bifurcated trial are clearly set forth in § 15A-2000(e) and (f). State v. Jones, 296 N.C. 495, 251 S.E.2d 425 (1979).

Rules of Evidence Not Altered. — The language of this section does not alter the usual rules of evidence or impair the trial judge's power to rule on the admissibility of evidence. State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979), cert. denied, 446 U.S. 941, 100 S. Ct. 2165, 64 L. Ed. 2d 796 (1980).

Evidence Unrelated to Defendant Properly Excluded. — Where the evidence offered by the defendant in a capital case and excluded by the trial judge was in no way connected to defendant, his character, his record or the circumstances of the charged offense, it was, therefore, irrelevant and of no probative value as mitigating evidence in the sentencing procedure of defendant's trial, and the trial judge's ruling excluding the evidence did not unduly limit the jury's consideration of mitigating factors in violation of subdivision (f)(9). State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979), cert. denied, 446 U.S. 941, 100 S. Ct. 2165, 64 L. Ed. 2d 796 (1980).

Eyewitness Account of Execution Properly Excluded. — In a capital case, it was not error for the trial judge to refuse to allow the defendant to present during the sentencing phase of the trial, an eyewitness account of a gas chamber execution, since the evidence was in no way connected to defendant, his character, his record or the circumstances of the charged offense. It was totally irrelevant and, therefore, properly excluded by the trial judge. State v. Johnson, 298 N.C. 355, 259 S.E.2d 752 (1979).

Applied in State v. Easterling, 300 N.C. 594, 268 S.E.2d 800 (1980); State v. McDowell, 301 N.C. 279, 271 S.E.2d 286 (1980).

Stated in State v. Niccum, 293 N.C. 276, 238 S.E.2d 141 (1977); Foster v. Barbour, 613 F.2d 59 (4th Cir. 1980).

Cited in State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978); State v. Carter, 296 N.C. 344, 250 S.E.2d 263 (1979); State v. Sparks, 297 N.C. 314, 255 S.E.2d 373 (1979); State v. Spaulding, 298 N.C. 149, 257 S.E.2d 391 (1979); State v. Boykin, 298 N.C. 687, 259 S.E.2d 883 (1979); State v. Avery, 299 N.C. 126, 261 S.E.2d 803 (1980); State v. Small, 301 N.C. 407, 272 S.E.2d 128 (1980); State v. Price, 301 N.C. 437, 272 S.E.2d 103 (1980).

§ 15A-2001. Capital offenses; plea of guilty.

Legal Periodicals. — For comment on capital sentencing statute, see 16 Wake Forest L. Rev. 765 (1980).

CASE NOTES

Guilty Plea Not Permitted Formerly. — Before the enactment of this statute defendant would not have been permitted to enter a plea of guilty to a crime for which the punishment might be death. State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

Conditional Plea of Guilty Not Proper. — In a capital case, the trial judge did not err in construing § 15A-2000 and this section as not allowing a defendant to enter a plea of guilty on condition that his sentence be life imprisonment. State v. Johnson, 298 N.C. 355, 259 S.E.2d 752 (1979).

Cited in State v. Jones, 299 N.C. 298, 261 S.E.2d 860 (1980).

§ 15A-2002. Capital offenses; jury verdict and sentence.

CASE NOTES

Legislative Intent. — This section clearly indicates the legislature's intention that the jury's sentence recommendation be binding on the trial judge. State v. Johnson, 298 N.C. 355, 259 S.E.2d 752 (1979).

Cited in State v. Detter, 298 N.C. 604, 260 S.E.2d 567 (1979); State v. Jones, 299 N.C. 298, 261 S.E.2d 860 (1980); State v. Smith, 299 N.C. 533, 263 S.E.2d 563 (1980).

§ 15A-2003. Disability of trial judge.

Legal Periodicals. — For an article on the North Carolina Speedy Trial Act, see 17 Wake Forest L. Rev. 173 (1981).

Chapter 16.
Gaming Contracts and Futures.

ARTICLE 2.

Contracts for "Futures."

§ 16-3. Certain contracts as to "futures" void.

CASE NOTES

Cited in Bache Halsey Stuart, Inc. v. Hunsucker, 38 N.C. App. 414, 248 S.E.2d 561 (1978).

Chapter 17.

Habeas Corpus.

Article 1.

Constitutional Provisions.

§ 17-1. Remedy without delay for restraint of liberty.

CASE NOTES

The purpose of this section and § 17-2 is to insure that a remedy is provided to inquire into the lawfulness of an inmate's restraint. Hoffman v. Edwards, 48 N.C. App. 559, 269 S.E.2d 311 (1980).

§ 17-2. Habeas corpus not to be suspended.

CASE NOTES

The purpose of § 17-1 and this section is to insure that a remedy is provided to inquire into the lawfulness of an inmate's restraint. Hoffman v. Edwards, 48 N.C. App. 559, 269 S.E.2d 311 (1980).

Article 2.

Application.

§ 17-7. Contents of application.

CASE NOTES

Applied in Hoffman v. Edwards, 48 N.C. App. 559, 269 S.E.2d 311 (1980).

Article 6.

Proceedings and Judgment.

§ 17-32. Proceedings on return; facts examined; summary hearing of issues.

CASE NOTES

Cited in State v. Niccum, 293 N.C. 276, 238 S.E.2d 141 (1977).

§ 17-33. When party discharged.

CASE NOTES

Quoted in Hoffman v. Edwards, 48 N.C. App. 559, 269 S.E.2d 311 (1980).

Chapter 17A.

Law-Enforcement Officers.

§§ 17A-1 to 17A-9: Recodified as §§ 17C-1 to 17C-12, effective January 1, 1980.

Editor's Note. — This Chapter was rewritten by Session Laws 1979, c. 763, s. 1, effective January 1, 1980, and has been recodified as Chapter 17C.

Chapter 17B.

North Carolina Criminal Justice Education and Training System.

§§ 17B-1 to 17B-6: Recodified as §§ 17D-1 to 17D-4, effective January 1, 1980.

Editor's Note. — This Chapter was rewritten by Session Laws 1979, c. 763, s. 2, effective January 1, 1980, and has been recodified as Chapter 17D.

Chapter 17C.

North Carolina Criminal Justice Education and Training Standards Commission.

§ 17C-1. Findings and policy.

The General Assembly finds that the administration of criminal justice is of statewide concern, and that proper administration is important to the health, safety and welfare of the people of the State and is of such nature as to require education and training of a professional nature. It is in the public interest that such education and training be made available to persons who seek to become criminal justice officers, persons who are serving as such officers in a temporary or probationary capacity, and persons already in regular service. (1971, c. 963, s. 1; 1979, c. 763, s. 1.)

Editor's Note. — This Chapter is Chapter 17A as rewritten by Session Laws 1979, c. 763, s. 1, effective January 1, 1979, and recodified. Where appropriate, the historical citations to the sections in the former Chapter have been added to corresponding sections in the Chapter as rewritten and recodified.

§ 17C-2. Definitions.

Unless the context clearly otherwise requires, the following definitions apply in this Chapter:

(a) "Commission" means the North Carolina Criminal Justice Education and Training Standards Commission;

(b) "Criminal justice agencies" means the State and local law enforcement agencies, the State correctional agencies, the jails and other correctional agencies maintained by local governments, and the juvenile justice agencies;

(c) "Criminal justice officer(s)" means and incorporates the administrative and subordinate personnel of all of the departments, agencies, units or entities comprising the "criminal justice agencies," as defined in subsection (a), who are sworn law enforcement officers, both State and local, with the power of arrest; State correctional officers; State probation and parole officers; or youth correctional officers. However, those individuals who are elected or appointed to criminal justice offices created under the Constitution of North Carolina are expressly exempted from the application of any minimum qualification standards or position certification requirements developed under the provision of this Chapter. This exemption shall not apply to relevant subordinate personnel of these constituted officials.

(d) "Entry level" means the initial appointment or employment of any person by a criminal justice agency, or any appointment or employment of a person

previously employed by a criminal justice agency who has not been employed by a criminal justice agency for the 12-month period preceding this appointment or employment, or any appointment or employment of a previously certified criminal justice officer to a position which requires a different type of certification. (1971, c. 963, s. 2; 1979, c. 763, s. 1.)

§ 17C-3. North Carolina Criminal Justice Education and Training Standards Commission established; members; terms; vacancies.

(a) There is hereby established the North Carolina Criminal Justice Education and Training Standards Commission, hereinafter called "the Commission," in the Department of Justice. The Commission shall be composed of 26 members as follows:

(1) Sheriffs. — Three sheriffs or other individuals serving in sheriffs' departments selected by the North Carolina Sheriffs' Association and one deputy sheriff selected by the North Carolina Law-Enforcement Officers' Association.

(2) Police Officers. — One police official selected by the North Carolina Association of Police Executives, one police chief selected by the North Carolina Association of Chiefs of Police, one police chief appointed by the Governor, and one police officer selected by the North Carolina Law-Enforcement Officers' Association.

(3) Departments. — The Attorney General of the State of North Carolina; the Secretary of the Department of Crime Control and Public Safety; the Secretary of the Department of Human Resources; and the Secretary of the Department of Correction.

(4) At-Large Groups. — One individual representing and appointed by each of the following organizations: one mayor selected by the League of Municipalities; one county commissioner selected by the North Carolina Association of County Commissioners; one law enforcement training officer selected by the North Carolina Law-Enforcement Training Officers' Association; one criminal justice educator selected by the North Carolina Association of Criminal Justice Educators; one sworn law enforcement officer selected by the North State Law-Enforcement Officers' Association; and one district attorney selected by the North Carolina Association of District Attorneys.

(5) Citizens and Others. — One trial court judge selected by the Chief Justice of the North Carolina Supreme Court; one senator selected by the Lieutenant Governor; one member of the House of Representatives selected by the Speaker of the House; the President of The University of North Carolina; the Director of the Institute of Government; the Director of Law-Enforcement Training of the Department of Community Colleges; and two citizens, one of whom shall be selected by the Governor and one of whom shall be selected by the Attorney General.

(b) The members shall be appointed for staggered terms. The initial appointments shall be made prior to January 1, 1980, and the appointees shall hold office until July 1 of the year in which their respective terms expire and until their successors are appointed and qualified as provided hereafter:

For the terms of one year: one member from subdivision (1) of subsection (a), serving as a deputy sheriff; one member from subdivision (2) of subsection (a), serving as a police officer; one member from subdivision (4), appointed by the North Carolina Law-Enforcement Training Officers' Association; and two members from subdivision (5), one appointed by the Governor and one appointed by the Attorney General.

For the terms of two years: two members from subdivision (1) of subsection (a); one member from subdivision (2) of subsection (a), appointed by the North Carolina Association of Chiefs of Police; two members from subdivision (4), one appointed by the North Carolina League of Municipalities and one appointed by the North Carolina Association of District Attorneys; and one member from subdivision (5), appointed by the Chief Justice.

For the terms of three years: two members from subdivision (1) of subsection (a), two members from subdivision (2) of subsection (a); three members from subdivision (4), and two members from subsection division (5).

Thereafter, as the term of each member expires, his successor shall be appointed for a term of three years. Notwithstanding the appointments for a term of years, each member shall serve at the will of the appointing authority.

The Attorney General, the Secretary of the Department of Crime Control and Public Safety, the Secretary of the Department of Human Resources, the Secretary of the Department of Correction, the President of The University of North Carolina, the Director of the Institute of Government, and the Director of Law-Enforcement Training of the Department of Community Colleges shall be continuing members of the Commission during their tenure. These members of the Commission shall serve ex officio and shall perform their duties on the Commission in addition to the other duties of their offices. The ex officio members may elect to serve personally at any or all meetings of the Commission or may designate, in writing, one member of their respective office, department, university or agency to represent and vote for them on the Commission at all meetings the ex officio members are unable to attend.

Vacancies in the Commission occurring for any reason shall be filled, for the unexpired term, by the authority making the original appointment of the person causing the vacancy. (1971, c. 963, s. 3; 1977, c. 70, ss. 29, 30; 1979, c. 763, s. 1.)

§ 17C-4. Compensation.

Members of the Commission who are State officers or employees shall receive no compensation for serving on the Commission, but may be reimbursed for their expenses in accordance with G.S. 138-6. Members of the Commission who are full-time salaried public officers or employees other than State officers or employees shall receive no compensation for serving on the Commission, but may be reimbursed for their expenses in accordance with G.S. 138-5(b). All other members of the Commission may receive compensation and reimbursement for expenses in accordance with G.S. 138-5. (1971, c. 963, s. 4; 1979, c. 763, s. 1.)

§ 17C-5. Chairman; vice-chairman; other officers; meetings; reports.

(a) The Attorney General shall designate one of the members of the Commission as chairman upon its creation, and shall appoint or reappoint a chairman each July 1 thereafter. The ex officio members shall not be eligible for this appointment.

(b) The Commission shall select a vice-chairman and such other officers and committee chairmen from among its members as it deems desirable at the first regular meeting of the Commission after its creation and at the first regular meeting after July 1 of each year thereafter. Nothing in this subsection, however, shall prevent the creation or abolition of committees or offices of the Commission, other than the office of vice-chairman, as the need may arise at any time during the year.

(c) The Commission shall hold at least four regular meetings per year upon the call of the chairman. Special meetings shall be held upon the call of the

chairman or the vice-chairman, or upon the written request of five members of the Commission. Such special meetings must be held within 30 days.

(d) The Commission shall present regular and special reports and recommendations to the Attorney General or the General Assembly, or both, as the need may arise or as the Attorney General or General Assembly may request. (1971, c. 963, s. 5; 1979, c. 763, s. 1.)

§ 17C-6. Powers of Commission.

(a) In addition to powers conferred upon the Commission elsewhere in this Chapter, the Commission shall have the following powers, which shall be enforceable through its rules and regulations, certification procedures, or the provisions of G.S. 17C-10:

(1) Promulgate rules and regulations for the administration of this Chapter, which rules may require (i) the submission by any criminal justice agency of information with respect to the employment, education, and training of its criminal justice officers, and (ii) the submission by any criminal justice training school of information with respect to its criminal justice training programs that are required by this Chapter;

(2) Establish minimum educational and training standards that must be met in order to qualify for entry level employment as a criminal justice officer in temporary or probationary status or in a permanent position;

(3) Certify, pursuant to the standards that it has established for the purpose, persons as qualified under the provisions of this Chapter to be employed at entry level as criminal justice officers;

(4) Establish minimum standards for the certification of criminal justice training schools and programs or courses of instruction that are required by this Chapter;

(5) Certify, pursuant to the standards that it has established for the purpose, criminal justice training schools and programs or courses of instruction that are required by this Chapter;

(6) Establish minimum standards and levels of education or equivalent experience for all criminal justice teachers who participate in programs or courses of instruction that are required by this Chapter;

(7) Certify, pursuant to the standards that it has established for the purpose, criminal justice teachers who participate in programs or courses of instruction that are required by this Chapter;

(8) Make such evaluations as may be necessary to determine if criminal justice agencies are complying with the provision of this Chapter;

(9) Adopt and amend bylaws, consistent with law, for its internal management and control;

(10) Enter into contracts incident to the administration of its authority pursuant to this Chapter.

(b) The Commission shall have the following powers, which shall be advisory in nature and for which the Commission is not authorized to undertake any enforcement actions:

(1) Identify types of criminal justice positions for which advanced or specialized training and education are appropriate, and establish minimum standards for the certification of persons as being qualified for those positions on the basis of specified education, training, and experience; provided, that compliance with these minimum standards shall be discretionary on the part of criminal justice agencies with respect to their criminal justice officers;

(2) Certify, pursuant to the standards that it has established for the purpose, criminal justice officers for those criminal justice agencies that elect to comply with the minimum education, training, and expe-

rience standards established by the Commission for positions for which advanced or specialized training, education, and experience are appropriate;

(3) Consult and cooperate with counties, municipalities, agencies of this State, other governmental agencies, and with universities, colleges, junior colleges, and other institutions concerning the development of criminal justice training schools and programs or courses of instruction;

(4) Study and make reports and recommendations concerning criminal justice education and training in North Carolina;

(5) Conduct and stimulate research by public and private agencies which shall be designed to improve education and training in the administration of criminal justice;

(6) Study, obtain data, statistics, and information and make reports concerning the recruitment, selection, education and training of persons serving criminal justice agencies in this State; to make recommendations for improvement in methods of recruitment, selection, education and training of persons serving criminal justice agencies;

(7) Make recommendations concerning any matters within its purview pursuant to this Chapter;

(8) Appoint such advisory committees as it may deem necessary;

(9) Do such things as may be necessary and incidental to the administration of its authority pursuant to this Chapter;

(10) Formulate basic plans for and promote the development and improvement of a comprehensive system of education and training for the officers and employees of criminal justice agencies consistent with its rules and regulations;

(11) Maintain liaison among local, State and federal agencies with respect to criminal justice education and training;

(12) Promote the planning and development of a systematic career development program for criminal justice professionals.

(c) All decisions and rules and regulations heretofore made by the North Carolina Criminal Justice Training and Standards Council and the North Carolina Criminal Justice Education and Training System Council shall remain in full force and effect unless and until repealed or suspended by action of the North Carolina Criminal Justice Education and Training Standards Commission established herein. The present Councils are terminated on December 31, 1979, and their power, duties and responsibilities vest in the North Carolina Criminal Justice Education and Training Standards Commission effective January 1, 1980. (1971, c. 963, s. 6; 1975, c. 372, s. 2; 1979, c. 763, s. 1.)

Amendment Effective July 1, 1982. — Session Laws 1979, 2nd Sess., c. 1184, s. 1, effective July 1, 1982, will add to subsection (a) new subdivisions reading as follows:

"(11) Establish minimum standards and levels of training for certification and periodic recertification of operators of and instructors for training programs in radio microwave and other electronic speed-measuring instruments.

"(12) Certify and recertify, pursuant to the standards that it has established, operators and instructors for training programs for each approved type of radio microwave and other electronic speed-measuring instruments.

"(13) In conjunction with the Secretary of Crime Control and Public Safety, approve use of specific models and types of radio microwave and other speed-measuring instruments and establish the procedures for operation of each approved instrument and standards for calibration and testing for accuracy of each approved instrument."

Session Laws 1979, 2nd Sess., c. 1184, s. 2, effective July 1, 1982, will add a new subsection (d), reading as follows:

"(d) The standards established by the Commission pursuant to G.S. 17C-6(a)(11) and (a)(12) and by the Commission and the Secretary of Crime Control and Public Safety pursuant to G.S. 17C-6(a)(13) shall not be less stringent than standards established by the U.S. Department of Transportation, National Highway Traffic Safety Administration, National Bureau of Standards, or the Federal Communications Commission."

§ 17C-7. Functions of the Department of Justice.

(a) The Attorney General shall provide such staff assistance as the Commission shall require in the performance of its duties.

(b) The Attorney General shall have legal custody of all books, papers, documents, or other records and property of the Commission. (1979, c. 763, s. 1.)

§ 17C-8. System established.

The North Carolina Criminal Justice Education and Training Standards Commission shall establish a North Carolina Criminal Justice Education and Training System. The system shall be a cooperative arrangement among criminal justice agencies, both State and local, and criminal justice education and training schools, both public and private, to provide education and training to the officers and employees of the criminal justice agencies of the State of North Carolina and its local governments. Members of the system shall include the North Carolina Justice Academy as well as such other public or private agencies or institutions within the State, that are engaged in criminal justice education and training, and desire to be affiliated with the system for the purpose of achieving greater coordination of criminal justice education and training efforts in North Carolina. (1979, c. 763, s. 1.)

§ 17C-9. Criminal Justice Standards Division of the Department of Justice established; appointment of director; duties.

(a) There is hereby established, within the Department of Justice, the Criminal Justice Standards Division, hereinafter called "the Division," which shall be organized and staffed in accordance with applicable laws and regulations and within the limits of authorized appropriations.

(b) The Attorney General shall appoint a director for the Division who shall be responsible to and serve at the pleasure of the Attorney General.

(c) The Division shall administer such programs as are assigned to it by the Commission. The Division shall also administer such additional related programs as may be assigned to it by the Attorney General or the General Assembly. Administrative duties and responsibilities shall include, but are not limited to, the following:

(1) Administering any and all programs assigned to the Division by the Commission and reporting any violations of or deviations from the rules and regulations of the Commission as the Commission may require;

(2) Compiling data, developing reports, identifying needs and performing research relevant to beneficial improvement of the criminal justice agencies;

(3) Developing new and revising existing programs for adoption consideration by the Commission;

(4) Monitoring and evaluating programs of the Commission;

(5) Providing technical assistance to relevant agencies of the criminal justice system to aid them in the discharge of program participation and responsibilities;

(6) Disseminating information on Commission programs to concerned agencies and/or individuals;

(7) Taking such other actions as may be deemed necessary or appropriate to carry out its assigned duties and responsibilities;

(8) The director may divulge any information in the Division's personnel file of a criminal justice officer or applicant for certification to the head of the criminal justice agency employing the officer or considering the applicant for employment when the director deems it necessary and essential to the retention or employment of said officer or applicant. The information may be divulged whether or not such information was contained in a personnel file maintained by a State or by a local government agency. (1979, c. 763, s. 1.)

§ 17C-10. Required standards.

(a) Criminal justice officers shall not be required to meet any requirement of subsections (b) and (c) of this section as a condition of continued employment, nor shall failure of any such criminal justice officer to fulfill such requirements make him ineligible for any promotional examination for which he is otherwise eligible if the criminal justice officer held a permanent appointment prior to March 15, 1973, and is a sworn law enforcement officer with power of arrest; prior to January 1, 1974, and is a State adult correctional officer; prior to July 1, 1975, and is a State probation and parole officer; or prior to July 1, 1974, and is a youth correctional officer. The legislature finds, and it is hereby declared to be the policy of this Chapter, that such criminal justice officers have satisfied such requirements by their experience. It is the intent of the Chapter that all criminal justice officers employed at the entry level after the Commission has adopted the required standards shall meet the requirements of this Chapter. If any criminal justice officer exempted from the required standards by this provision fails to serve as a criminal justice officer for a 12-month period, said officer shall be required to comply with the required standards established by the Commission pursuant to the authority otherwise granted in this section.

(b) The Commission shall provide, by regulation, that no person shall be appointed as a criminal justice officer at entry level, except on a temporary or probationary basis, unless such person has satisfactorily completed an initial preparatory program of training at a school certified by the Commission. Upon separation of a criminal justice officer from a criminal justice agency within the year of temporary or probationary appointment, the probationary certification shall be terminated by the Commission. Upon the reappointment to the same agency or appointment to another criminal justice agency of an officer who has separated from an agency within the year of probation, the officer shall be charged with the amount of time served during his initial appointment and allowed the remainder of the one year probationary period to complete the basic training requirement. Upon the reappointment to the same agency or appointment to another agency of an officer who has separated from an agency within the year of probation and who has remained out of service for more than one year from the date of separation, the officer shall be allowed another one-year period to satisfy the basic training requirement. Any criminal justice officer appointed on a temporary or probationary basis who does not comply with the training provisions of this Chapter within one year shall not be authorized to exercise the powers of a criminal justice officer and shall not be authorized to exercise the power of arrest. If, however, a criminal justice officer has enrolled in a Commission approved preparatory program of training that concludes later than the end of the officer's probationary period, the Commission may extend, for good cause shown, the probationary period for a period not to exceed six months.

(c) In addition to the requirements of subsection (b) of this section, the Commission, by rules and regulations, shall fix other qualifications for the employment and retention of criminal justice officers including minimum age, education, physical and mental standards, citizenship, good moral character, experience, and such other matters as relate to the competence and reliability of persons to assume and discharge the responsibilities of criminal justice offices, and the Commission shall prescribe the means for presenting evidence of fulfillment of these requirements. When a person presents competent evidence that he has been granted an unconditional pardon, to include but not be limited to a pardon of forgiveness, for a crime in this State, any other state, or the United States, the Commission shall not deny, suspend, or revoke that person's certification based solely on the commission of that crime or an alleged lack of good moral character due to the commission of that crime.

Where minimum educational standards are not met, yet the individual shows potential and a willingness to achieve the standards by extra study, they may be waived by the Commission for the reasonable amount of time it will take to achieve the standards required.

(d) The Commission may issue a certificate evidencing satisfaction of the requirements of subsections (b) and (c) of this section to any applicant who presents such evidence as may be required by its rules and regulations of satisfactory completion of a program or course of instruction in another jurisdiction equivalent in content and quality to that required by the Commission for approved criminal justice education and training programs in this State. (1971, c. 963, s. 1; 1979, c. 763, s. 1; 1981, c. 8; c. 400.)

Effect of Amendments. — The first 1981 amendment added the last sentence of the first paragraph of subsection (c).

The second 1981 amendment added the last sentence of subsection (b).

§ 17C-11. Injunctions authorized.

The Commission is hereby authorized to bring a civil action in the county of the residence of the alleged violation against any criminal justice agency which numbers among its employed or appointed criminal justice officers any criminal justice officer who fails to meet the required standards established by the Commission pursuant to G.S. 17C-10 of this Chapter to enjoin such criminal justice agency from allowing such criminal justice officer to perform any and all criminal justice officer functions, including exercising the power of arrest, until such time as such criminal justice officer shall comply with the required standards established by the Commission pursuant to G.S. 17C-10 of this Chapter. (1979, c. 763, s. 1.)

§ 17C-12. Grants under the supervision of Commission and the State; donations and appropriations.

(a) The Commission may accept for any of its purposes and functions under this Chapter any and all donations, both real and personal, and grants of money from any governmental unit or public agency, or from any institution, person, firm or corporation, and may receive, utilize and dispose of the same. Any arrangements pursuant to this section shall be detailed in an annual report of the Commission. Such report shall include the identity of the donor, the nature of the transaction, and the conditions, if any. Any money received by the Commission pursuant to this section shall be deposited in the State Treasury to the account of the Commission.

(b) The Commission may authorize the reimbursement to each political subdivision of the State not exceeding sixty percent (60%) of the salary and of the

allowable tuition, living and travel expenses incurred by the officers in attendance at approved training programs, providing said political subdivisions do in fact adhere to the selection and training standards established by the Commission.

(c) The Commission by rules and regulations, shall provide for administration of the grant program authorized by this section. In promulgating such rules, the Commission shall promote the most efficient and economical program of criminal justice training, including the maximum utilization of existing facilities and programs for the purpose of avoiding duplication.

(d) The Commission may provide grants as a reimbursement for actual expenses incurred by the State or political subdivision thereof for the provisions of training programs of officers from other jurisdictions within the State. (1971, c. 963, ss. 8, 9; 1979, c. 763, s. 1.)

Chapter 17D.

North Carolina Justice Academy.

Sec.

§ 17D-1. Definitions.

As used in this Chapter, unless the context otherwise requires:

(a) "Academy" means the North Carolina Justice Academy.

(b) "Academy property" means property that is owned or leased in whole or in part by the State of North Carolina and which is subject to the general management and control of the Department of Justice and is located in Salemburg, North Carolina, or at any other locations within the State which are dedicated to the use of the North Carolina Justice Academy subsequent to this Chapter being enacted.

(c) "The Commission" means the North Carolina Criminal Justice Education and Training Standards Commission.

(d) "Criminal justice agencies" means the State and local law enforcement agencies, the State and local police traffic service agencies, the State correctional agencies, the jails and other correctional agencies maintained by local governments, the courts of the State and the juvenile justice agencies.

(e) "Criminal justice personnel" means any person who serves or assists any State or local agency engaged in crime prevention, crime reduction, crime investigation, training or educating of persons employed by criminal justice agencies, or enforcement of the criminal law; or any person employed by a criminal justice agency.

(f) "Department" means the Department of Justice. (1973, c. 749; 1977, c. 831, s. 1; 1979, c. 763, s. 2.)

Editor's Note. — This Chapter is Chapter 17B as rewritten by Session Laws 1979, c. 763, s. 2, effective January 1, 1980, and recodified. Where appropriate, the historical citations to the sections in the former Chapter have been added to corresponding sections in the Chapter as rewritten and recodified.

§ 17D-2. Academy established; duties.

(a) The North Carolina Department of Justice shall establish a North Carolina Justice Academy.

(b) The Department of Justice shall employ the staff of the academy and direct its operations.

(c) Duties of the academy. The North Carolina Justice Academy shall have, but is not limited to, the following functions:

(1) It may provide training programs for criminal justice personnel.

(2) It may provide technical assistance upon request to criminal justice agencies to aid them in the discharge of their responsibilities.

(3) It may develop, publish, and distribute educational and training materials.

(4) It may take such other actions as may be deemed necessary or appropriate to carry out its assigned duties and responsibilities. (1973, c. 749; 1979, c. 763, s. 2.)

§ 17D-3. Donations.

The Department of Justice may accept for any of its purposes and functions under this Article any and all donations, both real and personal, and grants of money from any governmental unit or public agency, or from any institution, person, firm or corporation. Any arrangements pursuant to this section shall be detailed in an annual report of the academy. Such reports shall include the identity of the donor, the nature of the transaction, and the conditions, if any. Any money received by the Department of Justice pursuant to this section shall be deposited in the State Treasury to the account of the academy. All moneys involved shall be subject to audit by the State Auditor. (1979, c. 763, s. 2.)

§ 17D-4. Application of State highway and motor vehicles laws at the academy; authority of Department of Justice to regulate traffic, etc.

(a) Except as otherwise provided in this section, all of the provisions of Chapter 20 of the General Statutes relating to the use of highways of the State and the operation of vehicles thereon are applicable to all streets, alleys, driveways, and parking lots on academy property. Nothing in this section modifies any rights of ownership or control of academy property, now or hereafter vested in the State of North Carolina ex rel., Department of Justice.

(b) The Department of Justice may by ordinance prohibit, regulate, divert, control, and limit pedestrian or vehicular traffic and the parking of vehicles and other modes of conveyance on the campus. In fixing speed limits, the Department of Justice is not subject to G.S. 20-141(f) or (g), but may fix any speed limit reasonable and safe under the circumstances as conclusively determined by the Department of Justice. The Department of Justice may not regulate traffic on streets open to the public as of right, except as specifically provided in this section.

(c) The Department of Justice may by ordinance provide for the registration of vehicles maintained or operated on the campus by any student, faculty member, or employee of the academy and may fix fees for such registration. The ordinance may make it unlawful for any person to operate an unregistered vehicle on the campus when the vehicle is required by the ordinance to be registered.

(d) The Department of Justice may by ordinance set aside parking lots on the campus for use by students, faculty, and employees of the academy and members of the general public attending schools, conferences, or meetings at the academy, visiting or making use of any academy facilities, or attending to official business with the academy. The Department of Justice may issue permits to park in these lots and may charge a fee therefor. The Department of Justice may also by ordinance make it unlawful for any person to park a vehicle in any lot or other parking facility without procuring the requisite permit and displaying it on the vehicle.

(e) The Department of Justice may by ordinance provide for the issuance of stickers, decals, permits or other indicia representing the registration of vehicles or the eligibility of vehicles to park on the campus and may by ordinance prohibit the forgery, counterfeiting, unauthorized transfer, or unauthorized use of such stickers, decals, permits or other indicia.

(f) Violation of an ordinance adopted under any portion of this section is a misdemeanor punishable by a fine of not more than fifty dollars ($50.00) or imprisonment for not more than 30 days, in the discretion of the court. An ordinance may provide that certain acts prohibited thereby shall not be enforced by criminal sanctions, and in such cases a person committing any such act shall not be guilty of a misdemeanor.

(g) An ordinance adopted under this section may provide that a violation will subject the offender to a civil penalty. Penalties may be graduated according to the seriousness of the offense or the number of prior offenses committed by the person charged. The Department of Justice may establish procedure for the collection of these penalties and may enforce the penalties by civil action in the nature of debt. The Department of Justice may also provide for appropriate administrative sanctions if an offender does not pay a validly due penalty or has committed repeated offenses. Appropriate administrative sanctions include, but are not limited to, revocation of parking permits, termination of vehicle registration, and termination or suspension of enrollment in or employment by the academy.

(h) An ordinance adopted under this section may provide that any vehicle illegally parked may be removed to a storage area, in which case the person so removing the vehicle shall be deemed a legal possessor within the meaning of G.S. 44A-2(d).

(i) Evidence that a vehicle was found parked or unattended in violation of a council ordinance is prima facie evidence that the vehicle was parked by:

(1) The person holding an academy parking permit for the vehicle;

(2) If no academy parking permit has been issued for the vehicle, the person in whose name the vehicle is registered with the academy pursuant to subsection (c); or

(3) If no academy parking permit has been issued for the vehicle and the vehicle is not registered with the academy, the person in whose name it is registered with the North Carolina Department of Motor Vehicles or the corresponding agency of another state or nation.

The rule of evidence established by this subsection applies only in civil, criminal, or administrative actions or proceedings concerning violations of ordinances of the Department of Justice. G.S. 20-162.1 does not apply to such actions or proceedings.

(j) The Department of Justice shall cause to be posted appropriate notice to the public of applicable traffic and parking restrictions.

(k) All ordinances adopted under this section shall be filed in the offices of the North Carolina Attorney General and the Secretary of State. The Department of Justice shall provide for printing and distributing copies of its traffic and parking ordinances.

(l) All moneys received pursuant to this section shall be State funds as defined in G.S. 143-1. (1977, c. 831, s. 2; 1979, c. 763, s. 2.)

Chapter 18A.

Regulation of Intoxicating Liquors.

§§ 18A-1 to 18A-69: Repealed by Session Laws 1981, c. 412, s. 1, effective January 1, 1982.

Cross References. — For provisions covering the subject matter of the repealed Chapter, see Chapter 18B. And see the editor's note under § 18B-100.

Editor's Note. — Session Laws 1981, c. 412, s. 11, as amended by Session Laws 1981, c. 747, s. 65, provides: "This act shall become effective January 1, 1982, except that the following parts of the act are effective upon ratification: Section 9; that part of Section 2 that contains Article 6, Elections, of new Chapter 18B; and that part of Section 1 that concerns election provisions in conflict with Article 6. To implement Article 6 the State ABC Board may issue permits under Chapter 18A when the present permit is the equivalent of the permit authorized by Article 6, but the Board may not before January 1, 1982, issue permits authorized by Chapter 18B that are of a different character from permits issued under Chapter 18A and have no equivalent in present law. Except for matters directly related to the conduct of elections and the issuance of permits, Chapter 18A remains in effect until January 1, 1982, and references in Article 6 to other provisions in Chapter 18B are considered references to the equivalent provisions of Chapter 18A. An election called before the effective date of this act, to be held after the effective date, remains subject to the election procedures in effect when the election was called. In addition, those portions of Section 2 that contain G.S. 18B-107, G.S. 18B-900(e), G.S. 18B-1000(7), and the portions of G.S. 18B-1001 concerning convention centers shall become effective July 1, 1981. Establishments qualifying as convention centers under G.S. 18B-1000(7) may be issued on-premises malt beverage, on premises unfortified wine, special occasion, and mixed beverages permits from and after that date."

Chapter 18B.

Regulation of Alcoholic Beverages.

Article 1.

General Provisions.

Article 2.

State Administration.

Article 3.

Sale, Possession, and Consumption.

Article 4.

Transportation.

Article 5.

Law Enforcement.

Article 6.

Elections.

Article 7.

Local ABC Boards.

Article 8.

Operation of ABC Stores.

ARTICLE 1.

General Provisions.

§ 18B-100. Purpose of Chapter.

This Chapter is intended to establish a uniform system of control over the sale, purchase, transportation, manufacture, consumption, and possession of alcoholic beverages in North Carolina, and to provide procedures to insure the proper administration of the ABC laws under a uniform system throughout the State. This Chapter shall be liberally construed to the end that the sale, purchase, transportation, manufacture, consumption, and possession of alcoholic beverages shall be prohibited except as authorized in this Chapter.

Except as provided in this Chapter, local ordinances establishing different rules on the manufacture, sale, purchase, transportation, possession, consumption, or other use of alcoholic beverages, or requiring additional permits or fees, are prohibited. (1937, c. 49, s. 1; 1971, c. 872, s. 1; 1981, c. 412, s. 2.)

Editor's Note. — Session Laws 1981, c. 412, repealed Chapter 18A, effective January 1, 1982, and enacted this Chapter in lieu thereof. Where appropriate, the historical citations to the sections of the repealed Chapter have been added to the corresponding sections of the new Chapter.

Session Laws 1981, c. 412, s. 11, as amended by Session Laws 1981, c. 747, s. 65, provides: "This act shall become effective January 1, 1982, except that the following parts of the act are effective upon ratification: Section 9; that part of Section 2 that contains Article 6, Elections, of new Chapter 18B; and that part of Sec-

tion 1 that concerns election provisions in conflict with Article 6. To implement Article 6 the State ABC Board may issue permits under Chapter 18A when the present permit is the equivalent of the permit authorized by Article 6, but the Board may not before January 1, 1982, issue permits authorized by Chapter 18B that are of a different character from permits issued under Chapter 18A and have no equivalent in present law. Except for matters directly related to the conduct of elections and the issuance of permits, Chapter 18A remains in effect until January 1, 1982, and references in Article 6 to other provisions in Chapter 18B are considered references to the equivalent provisions of Chapter 18A. An election called before the effective date of this act, to be held after the effective date, remains subject to the election procedures in effect when the election was called. In addition, those portions of Section 2 that contain G.S. 18B-107, G.S. 18B-900(e), G.S. 18B-1000(7), and the portions of G.S. 18B-1001 concerning convention centers shall become effective July 1, 1981. Establishments qualifying as convention centers under G.S. 18B-1000(7) may be issued on-premises malt beverage, on-premises unfortified wine, special occasion, and mixed beverages permits from and after that date."

Session Laws 1981, c. 412, s. 10, as amended by Session Laws 1981, c. 747, s. 64, provides: "All sales of alcoholic beverages which were approved in elections held before the effective date of this act remain valid under the terms of those elections except as G.S. 18B-603 allows the issuance of permits that were not authorized under the comparable provisions of Chapter 18A. Any ABC permit issued before the effective date of this act remains valid until its expiration date, or until suspended or revoked or replaced with the equivalent permit issued under Chapter 18B.

"If the membership or method of appointment of a local ABC board is required to change by this act, the members serving on the board on January 1, 1982, may continue to serve until their present terms expire or until June 30, 1983, whichever occurs first. Thereafter vacancies on the board shall be filled by appointments made in the manner provided in this act. If, however, the size of the board is reduced by this act, no vacancy may be filled until the board has been reduced by vacancies to the size required by this act."

Session Laws 1981, c. 412, s. 6, provides: "Current forms, stationery, signs and other materials carrying the old name of the North Carolina Alcoholic Beverage Control Commission shall be used until they would otherwise be replaced, and no State or local funds other than then current appropriations to State and local ABC boards shall be used in effectuating the change of name of the State Board of Alcoholic Control of the North Carolina Alcoholic Beverage Control Commission. Replacements for current forms, stationery, signs and other materials shall carry the new name of the Commission."

The cases cited under the provisions of this Chapter were decided under similar provisions of former Chapters 18 and 18A.

Legal Periodicals. — For article, "A History of Liquor-by-the-Drink Legislation in North Carolina," see 1 Campbell L. Rev. 61 (1979).

§ 18B-101. Definitions.

As used in this Chapter, unless the context requires otherwise:

(1) "ABC law" or "ABC laws" means any statute or statutes in this Chapter or in Article 2C of Chapter 105, and the rules issued by the Commission under the authority of this Chapter.

(2) "ABC permit" or "permits" means any written or printed authorization issued by the Commission pursuant to the provisions of this Chapter, other than a purchase-transportation permit. Unless the context clearly requires otherwise, as in the provisions concerning applications for permits, "ABC permit" or "permit" means a presently valid permit.

(3) "ABC system" means a local board and all ABC stores operated by it, its law-enforcement branch, and all its employees.

(4) "Alcoholic beverage" means any beverage containing at least one-half of one percent (0.5%) alcohol by volume, including malt beverages, unfortified wine, fortified wine, spirituous liquor, and mixed beverages. Unless the context clearly requires otherwise, "alcoholic beverage" means taxpaid alcoholic beverage.

(5) "ALE Division" means the Alcohol Law Enforcement Division of the Department of Crime Control and Public Safety.

(6) "Commission" means the North Carolina Alcoholic Beverage Control Commission established under G.S. 18B-200.
(7) "Fortified wine" means any wine made by fermentation from grapes, fruits, berries, rice, or honey, to which nothing has been added other than pure brandy made from the same type of grape, fruit, berry, rice, or honey that is contained in the base wine, and which has an alcoholic content of not more than twenty-four percent (24%) alcohol by volume.
(8) "Local board" means a city or county ABC board, or local board created pursuant to the provisions of G.S. 18B-703.
(9) "Malt beverage" means beer, lager, malt liquor, ale, porter, and any other brewed or fermented beverage containing at least one-half of one percent (0.5%), and not more than six percent (6%), alcohol by volume.
(10) "Mixed beverage" means a drink composed in whole or in part of spirituous liquor and served in a quantity less than the quantity contained in a closed package.
(11) "Nontaxpaid alcoholic beverage" means any alcoholic beverage upon which the taxes imposed by the United States, this State, or any other territorial jurisdiction in which the alcoholic beverage was purchased have not been paid.
(12) "Person" means an individual, firm, partnership, association, corporation, other organization or group, or other combination of individuals acting as a unit.
(13) "Sale" means any transfer, trade, exchange, or barter, in any manner or by any means, for consideration.
(14) "Spirituous liquor" or "liquor" means distilled spirits or ethyl alcohol, including spirits of wine, whiskey, rum, brandy, gin and all other distilled spirits and mixtures of cordials, liqueur, and premixed cocktails, in closed containers for beverage use regardless of their dilution.
(15) "Unfortified wine" means wine that has an alcoholic content produced only by natural fermentation or by the addition of pure cane, beet, or dextrose sugar, and that has an alcoholic content of not less than six percent (6%) and not more than seventeen percent (17%) alcohol by volume. (1981, c. 412, s. 2.)

Legal Periodicals. — For article "A History of Liquor-by-the-Drink Legislation in North Carolina," see 1 Campbell L. Rev. 61 (1979).

For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

CASE NOTES

Alcoholic Content. — The State's evidence was sufficient for the jury in a prosecution of defendant for illegal possession of intoxicating liquor for the purpose of sale in violation of former § 18A-7 where it tended to show that defendant had in his constructive possession more than four liters of liquor with an alcoholic content of greater than 21%. State v. Harrell, 50 N.C. App. 531, — S.E.2d — (1981). (Decided under former § 18A-2).

§ 18B-102. Manufacture, sale, etc., forbidden except as expressly authorized.

(a) General Prohibition. — It shall be unlawful for any person to manufacture, sell, transport, import, export, deliver, furnish, purchase, consume, or possess any alcoholic beverages except as authorized by the ABC law.

(b) Violation a Misdemeanor. — Unless a different punishment is otherwise expressly stated, any person who violates any provision of this Chapter shall be guilty of a misdemeanor and upon conviction shall be punished by a fine,

by imprisonment for not more than two years, or both. In addition the court may impose the provisions of G.S. 18B-202 and of G.S. 18B-503, 18B-504, and 18B-505. (1923, c. 1, s. 1; C. S., s. 3411(a); 1937, c. 49, s. 24; c. 411; 1939, c. 158, s. 501; 1941, c. 339, ss. 1, 3, 4; 1945, c. 780; c. 903, ss. 1, 3, 10; 1971, c. 872, s. 1; 1973, c. 476, s. 193; c. 1014; 1975, c. 329; c. 411, s. 2; 1977, 2nd Sess., c. 1138, s. 1; 1979, c. 683, s. 1; 1981, c. 412, s. 2.)

§ 18B-103. Exemptions.

The following activities shall be permitted:

(1) The use of ethyl alcohol for scientific, chemical, pharmaceutical, mechanical, and industrial purposes;

(2) The use of ethyl alcohol by persons authorized to obtain it tax free, as provided by federal law;

(3) The use of ethyl alcohol in the manufacture and preparation of any product unfit for use as a beverage;

(4) The use of alcoholic beverages by licensed physicians, druggists, or dental surgeons for medicinal or pharmaceutical purposes; or the use of alcoholic beverages by medical facilities established and maintained for the treatment of patients addicted to the use of alcohol or drugs;

(5) The use of grain alcohol by college, university or State laboratories, and by manufacturers of medicine, for compounding, mixing, or preserving medicines or medical preparations, or for surgical purposes;

(6) The manufacture, importation, and possession of denatured alcohol produced and used as provided by federal law;

(7) The manufacture or sale of cider or vinegar;

(8) The possession and use of unfortified or fortified wine for sacramental purposes by any organized church or ordained minister.

(9) The possession and use of beverages containing ethyl alcohol as authorized under G.S. 20-139.1(g). (1923, c. 1, ss. 4, 19, 20; C. S., s. 3411(d), (s), (t); 1935, c. 114; 1971, c. 872, s. 1; c. 1233; 1981, c. 412, s. 2; c. 747, s. 36.)

Effect of Amendments. — The 1981 amendment added subdivision (9).

§ 18B-104. Administrative penalties.

(a) Penalties. — For any violation of the ABC laws, the Commission may take any of the following actions against a permittee:

(1) Suspend the permittee's permit for a specified period of time not longer than three years;

(2) Revoke the permittee's permit;

(3) Fine the permittee up to five hundred dollars ($500.00) for the first violation, up to seven hundred fifty dollars ($750.00) for the second violation, and up to one thousand dollars ($1,000) for the third violation; or

(4) Suspend the permittee's permit under subdivision (1) and impose a fine under subdivision (3).

(b) Compromise. — In any case in which the Commission is entitled to suspend or revoke a permit, the Commission may accept from the permittee an offer in compromise to pay a penalty of not more than five thousand dollars ($5,000). The Commission may either accept a compromise or revoke a permit, but not both. The Commission may accept a compromise and suspend the permit in the same case.

(c) Fines and Penalties to Treasurer. — All fines and penalties collected under subsections (a) and (b) shall be remitted by the Commission to the State Treasurer for the General Fund.

(d) Effect on Licenses. — Suspension or revocation of a permit includes automatic suspension or revocation of any related State or local revenue license.

(e) Effect on Other Permits. — Unless some other disposition is ordered by the Commission, revocation or suspension of a permit under subsection (a) includes automatic revocation or suspension, respectively, of any other ABC permit held by the same permittee for the same establishment. (1939, c. 158, s. 514; 1943, c. 400, s. 6; 1945, c. 903, s. 1; 1947, c. 1098, ss. 2, 3; 1949, c. 974, ss. 7, 14; 1953, c. 1207, ss. 2-5; 1957, cc. 1048, 1440; 1963, c. 426, ss. 4, 5, 10, 12; c. 460, s. 1; 1971, c. 872, s. 1; 1973, c. 476, s. 193; 1977, c. 669, s. 1; 1981, c. 412, s. 2.)

CASE NOTES

Editor's Note. — The cases cited in the following annotation were decided under former § 18A-43.

The law of this State under former § 18A-43 was that all acts of employees were imputed to the permittee. Dove v. North Carolina Bd. of Alcoholic Control, 37 N.C. App. 605, 246 S.E.2d 584 (1978).

Co-permittees did, as a matter of law, knowingly allow the use of their premises for an unlawful purpose where their employee sold heroin on the premises, even though there was no evidence, other than the physical proximity of one co-permittee, that either co-permittee had actual knowledge of the transaction, since all acts of employees were imputed to the permittee for the purposes of former similar section. Dove v. North Carolina Bd. of Alcoholic Control, 37 N.C. App. 605, 246 S.E.2d 584 (1978).

§ 18B-105. Advertising.

(a) General Rule. — No person shall advertise alcoholic beverages in this State except in compliance with the rules of the Commission.

(b) Rule-making Authority. — The Commission shall have the authority to adopt rules to:

(1) Prohibit or regulate advertising of alcoholic beverages by permittees in newspapers, pamphlets, and other print media;

(2) Prohibit or regulate advertising by on-premises permittees of brands or prices of alcoholic beverages via newspapers, radio, television, and other mass media;

(3) Prohibit deceptive or misleading advertising of alcoholic beverages;

(4) Require all advertisements of alcoholic beverages to disclose fully the identity of the advertiser and of the product being advertised;

(5) Prohibit advertisements of alcoholic beverages on the premises of a permittee, or regulate the size, number, and appearance of those advertisements;

(6) Prohibit or regulate advertisement of prices of alcoholic beverages on the premises of a permittee;

(7) Prohibit or regulate alcoholic beverage advertisements on billboards;

(8) Prohibit alcoholic beverage advertisements on outdoor signs, or regulate the nature, size, number, and appearance of those advertisements;

(9) Prohibit or regulate advertising of alcoholic beverages by mail;

(10) Prohibit or regulate contests, games, or other promotions which serve or tend to serve as advertisement for a specific brand or brands of alcoholic beverages; and

(11) Prohibit or regulate any advertising of alcoholic beverages which is contrary to the public interest. (1923, c. 1, s. 3; C. S., s. 3411(c); 1933, cc. 216, 229; 1945, c. 903, s. 1; 1947, c. 1098, ss. 2, 3; 1957, c. 1048; 1963, c. 426, s. 10; c. 460, s. 1; 1971, c. 872, s. 1; 1981, c. 412, s. 2.)

§ 18B-106. Alcoholic beverages for use on oceangoing ships.

(a) Delivery Permitted. — Alcoholic beverages for use outside the United States on oceangoing vessels shall be delivered as follows:

(1) Spirituous liquor may be imported into this State under United States customs bonds, held in United States customs bonded warehouses, and transferred between those warehouses. Spirituous liquors may only be released from customs bonds for delivery to an officer or agent of an oceangoing vessel who has obtained a permit from the Commission for that purpose.

(2) Malt beverages, unfortified wine, and fortified wine may be sold and delivered by any wholesaler or retailer licensed in this State to an officer or agent of an oceangoing vessel. The Commission may require the officer or agent to obtain a permit before purchasing alcoholic beverages under this subdivision.

(b) Definition. — "Oceangoing vessel" means a ship which plies the high seas in interstate or foreign commerce, in the transport of freight or passengers, or both, for hire exclusively.

(c) Rules. — The Commission may issue rules relating to applications for permits and otherwise regulate the importation, sale, and delivery of alcoholic beverages under this section to insure that those beverages are used only on oceangoing vessels outside the United States. (1981, c. 412, s. 2.)

§ 18B-107. Alcoholic beverages for use in air commerce.

(a) Purchase and Storage. — The Commission may issue permits authorizing air carriers offering regularly scheduled or chartered flights in foreign, interstate, or intrastate commerce to purchase malt beverages, unfortified wine, and fortified wine from any wholesaler or retailer licensed in this State, and to transport those alcoholic beverages. The Commission may also authorize air carriers to store, at facilities approved by the Commission, alcoholic beverages to be sold or served pursuant to subsection (b).

(b) Sale. — Air carriers may sell and serve alcoholic beverages anywhere in this State to passengers while in transit aboard any aircraft. At airports which service airplanes boarding at least 150,000 passengers annually, air carriers may serve complimentary alcoholic beverages to their passengers in air carrier passenger rooms approved by the Commission. Alcoholic beverages may not be sold in such a room unless a permit has been issued under Article 10 authorizing sale there. (1981, c. 412, s. 2.)

Editor's Note. — Session Laws 1981, c. 412, s. 11, as amended by Session Laws 1981, c. 747, s. 65 provides in part: "In addition, those portions of Section 2 that contain G.S. 18B-107, G.S. 18B-900(e), G.S. 18B-1000(7), and the portions of G.S. 18B-1001 concerning convention centers shall become effective July 1, 1981. Establishments qualifying as convention centers under G.S. 18B-1000(7) may be issued on-premises malt beverage, on-premises unfortified wine, special occasion, and mixed beverages permits from and after that date."

§ 18B-108. Sales on trains.

Malt beverages and unfortified wine may be sold on railroad trains in this State upon receipt of the required revenue license under G.S. 105-113.75. (1981, c. 412, s. 2; c. 747, s. 37.)

Effect of Amendments. — The 1981 amendment substituted "on railroad trains" for "in dining cars, buffet cars, Pullman cars, and club cars of railroad trains" and "G.S. 105-113.75" for "Chapter 105."

§ 18B-109. Direct shipment of alcoholic beverages into State.

(a) General Prohibition. — No person shall have any alcoholic beverage mailed or shipped to him from outside this State unless he has the appropriate ABC permit.

(b) Armed Forces Installation. — No person shall have malt beverages or unfortified wine shipped directly from a point outside this State to an armed forces installation within this State if those alcoholic beverages are for resale on the installation. (1923, c. 1, s. 2; C. S., s. 3411(b); 1971, c. 872, s. 1; 1975, c. 654, s. 4; 1981, c. 412, s. 2.)

§ 18B-110. Emergency.

When the Governor finds that a "state of emergency," as defined in G.S. 14-288.1, exists anywhere in this State, he may

(1) Order the closing of all ABC stores, and

(2) Order the cessation of all sales, transportation, manufacture, and bottling of alcoholic beverages.

The Governor's order shall apply in those portions of the State designated in the order, for the duration of the state of emergency. Any order by the Governor under this section shall be directed to the Chairman of the Commission and to the Secretary of Crime Control and Public Safety. (1969, c. 869, ss. 4, 5; 1971, c. 872, s. 1; 1977, c. 70, s. 21; 1977, 2nd Sess., c. 1138, s. 16; 1981, c. 412, s. 2.)

ARTICLE 2.

State Administration.

§ 18B-200. North Carolina Alcoholic Beverage Control Commission.

(a) Creation of Commission; Compensation. — The North Carolina Alcoholic Beverage Control Commission is created to consist of a chairman and two associate members. The chairman shall devote his full time to his official duties and receive a salary fixed by the Governor with the approval of the Advisory Budget Commission. The associate members shall be compensated for per diem, subsistence and travel as provided in Chapter 138 of the General Statutes.

(b) Appointment of Members. — Members of the Commission shall be appointed by the Governor to serve at his pleasure.

(c) Vacancy. — The Governor shall fill any vacancy on the Commission by appointing a successor to serve at the Governor's pleasure. If the chairman's seat becomes vacant, the Governor may designate either the new member or an existing member of the Commission as the chairman.

(d) Employees. — The Commission may authorize the chairman to employ, discharge, and otherwise supervise subordinate personnel of the Commission. The Commission shall appoint at least one hearing officer with authority to make investigations, hold hearings, and perform any other duties authorized by Chapter 150A. (1937, c. 49, ss. 2, 3; c. 411; 1939, c. 185, s. 5; 1941, c. 107, s. 5; 1963, c. 916, s. 1; 1965, c. 1102, ss. 1, 2; 1969, c. 294, ss. 1, 2; 1971, c. 872, s. 1; 1979, c. 336; 1981, c. 412, s. 2.)

§ 18B-201. Conflict of interest.

(a) Financial Interests Restricted. — No person shall be appointed to or employed by the Commission, a local board, or the ALE Division, if that person or a member of his household related to him by blood or marriage has or controls, directly or indirectly, a financial interest in any commercial alcoholic beverage enterprise, including any business required to have an ABC permit. The Commission may exempt from this provision any person, other than a Commission member, when the financial interest in question is so insignificant or remote that it is unlikely to affect the person's official actions in any way. Exemptions may be granted only to individuals, not to groups or classes of people, and each exemption shall be in writing, be available for public inspection, and contain a statement of the financial interest in question.

(b) Self-dealing. — The provisions of G.S. 14-234 shall apply to the Commission and local boards.

(c) Dealing for Family Members. — Neither the Commission nor any local board shall contract or otherwise deal in any business matter so that a member's spouse or any person related to him by blood to a degree of first cousin or closer in any way benefits, directly or indirectly, from the transaction unless:

(1) The member whose relative benefits from the transaction abstains from participating in any way, including voting, in the decision;

(2) The minutes of the meeting at which the final decision is reached specifically note the member whose spouse or relative is benefited and the amount involved in each transaction;

(3) The next annual audit of the Commission or local board specifically notes the member and the amount involved in each transaction occurring during the year covered by the audit; and

(4) If the transaction is by a local board, the Commission is notified at least two weeks before final board approval of the transaction. (1981, c. 412, s. 2.)

Editor's Note. — Session Laws 1981, c. 412, s. 7, provides that all local, public-local, and private acts in conflict with this section are repealed.

§ 18B-202. Discharge upon conviction.

In addition to imposing any other penalty authorized by law, a judge may remove from office or discharge from employment any Commission or local board member or employee, or any ALE agent, who is convicted of a violation of any provision of this Chapter or of any felony and may declare that person ineligible for membership or employment with the Commission, any local board, or the ALE Division, for a period of not longer than three years. Conviction of a crime under this Chapter or of any felony shall also be grounds for the Commission to remove from office or discharge from employment any local board member or employee. (1981, c. 412, s. 2.)

Cross References. — For provision making the unauthorized manufacture, sale, delivery, etc., of alcoholic beverages a misdemeanor, see § 18B-102.

§ 18B-203. Powers and duties of the Commission.

(a) Powers. — The Commission shall have authority to:

(1) Administer the ABC laws;
(2) Provide for enforcement of the ABC laws, in conjunction with the ALE Division;
(3) Set the prices of alcoholic beverages sold in local ABC stores as provided in Article 8;
(4) Require reports and audits from local boards as provided in G.S. 18B-205;
(5) Determine what brands of alcoholic beverages may be sold in this State;
(6) Contract for State ABC warehousing, as provided in G.S. 18B-204;
(7) Dispose of damaged alcoholic beverages, as provided in G.S. 18B-806;
(8) Remove for cause any member or employee of a local board;
(9) Supervise or disapprove purchasing by any local board and inspect all records of purchases by local boards;
(10) Approve or disapprove rules adopted by any local board;
(11) Approve or disapprove the opening and location of ABC stores, as provided in Article 8;
(12) Issue ABC permits, and impose sanctions against permittees;
(13) Provide for the testing of alcoholic beverages, as provided in G.S. 18B-206.

(b) Implied Powers. — The Commission shall have all other powers which may be reasonably implied from the granting of the express powers stated in subsection (a), or which may be incidental to, or convenient for, performing the duties given to the Commission. (1937, c. 49, s. 4; cc. 237, 411; 1945, c. 954; 1949, c. 974, s. 9; 1961, c. 956; 1963, c. 426, s. 12; c. 916, s. 2; c. 1119, s. 1; 1965, c. 1063; c. 1102, s. 3; 1967, c. 222, s. 2; c. 1240, s. 1; 1971, c. 872, s. 1; 1973, c. 28; c. 473, s. 1; c. 476, s. 133; c. 606; c. 1288, s. 1; cc. 1369, 1396; 1975, cc. 240, 453, 640; 1977, c. 70, ss. 15.1, 15.2, 16; c. 176, ss. 2, 6; 1977, 2nd Sess., c. 1138, ss. 3, 4, 18; 1979, c. 384, s. 1; c. 445, s. 5; c. 482; c. 801, s. 4; 1981, c. 412, s. 2; c. 747, s. 38.)

Effect of Amendments. — The 1981 amendment substituted "G.S. 18B-206" for "G.S. 18-206" in subdivision (13) of subsection (a).

Legal Periodicals. — For article "A History of Liquor-by-the-Drink Legislation in North Carolina," see 1 Campbell L. Rev. 61 (1979).

§ 18B-204. State warehouse.

(a) Contracting for Private Warehouse. — The Commission shall provide for the receipt, storage, and distribution of spirituous liquor by one of the following methods:

(1) By negotiated contract with a privately owned warehouse, or
(2) By negotiated contract with privately owned warehouses in several regions of the State. The Commission shall choose locations for the warehouses to promote efficient distribution of spirituous liquor to all local boards, to maintain control of that liquor, and to insure the Commission's supervision of warehousing procedures.

(b) Audits and Inspections. — Contracts entered into pursuant to this section shall provide the following:

(1) That an annual audited financial statement be prepared and submitted to the Commission by the person contracting with the Commission;
(2) That all warehouse records be available for inspection at all times by the Commission and the Department of Revenue; and

(3) That all warehouse accounts relating to the receipt, storage, or distribution of spirituous liquor be subject to audit by the State Auditor.

(c) Emergency or Temporary Operation. — If the independent operator of a warehouse changes, or if some other occurrence results in substantially impeded distribution of spirituous liquor from a warehouse, the Commission may operate that warehouse on an interim emergency or temporary basis.

(d) Rules. — The Commission may adopt rules regarding warehouse operations, and violations of those rules by a party with whom the Commission contracts shall be grounds for termination by the Commission of a contract entered into under this section. (1937, c. 49, s. 4; cc. 237, 411; 1945, c. 954; 1949, c. 974, s. 9; 1961, c. 956; 1963, c. 426, s. 12; c. 916, s. 2; c. 1119, s. 1; 1965, c. 1063; c. 1102, s. 3; 1967, c. 222, s. 2; c. 1240, s. 1; 1971, c. 872, s. 1; 1973, c. 28; c. 473, s. 1; c. 476, s. 133; c. 606; c. 1288, s. 1; cc. 1369, 1396; 1975, cc. 240, 453, 640; 1977, c. 70, ss. 15.1, 15.2, 16; c. 176, ss. 2, 6; 1977, 2nd Sess., c. 1138, ss. 3, 4, 18; 1979, c. 384, s. 1; c. 445, s. 5; c. 482; c. 801, s. 4; 1981, c. 412, s. 2.)

§ 18B-205. Accounts and reports required.

(a) Accounts and Reports. — The Commission may require local boards to submit quarterly mixed beverage reports, quarterly and annual audits, monthly sales records, and any other reports or audits relating to the operations of the local ABC systems.

(b) Accounting System. — The Commission may require local boards to use generally accepted accounting standards and a chart of accounts prescribed by the Commission in the operation of ABC stores, and to record all information necessary and useful to the Commission in auditing the operation of ABC systems and administering the ABC law.

(c) Audits. — The Commission may audit the operation of any local ABC store or board, and the books of those stores and boards shall remain open to the Commission for inspection. (1937, c. 49, s. 4; cc. 237, 411; 1945, c. 954; 1949, c. 974, s. 9; 1961, c. 956; 1963, c. 426, s. 12; c. 916, s. 2; c. 1119, s. 1; 1965, c. 1063; c. 1102, s. 3; 1967, c. 222, s. 2; c. 1240, s. 1; 1971, c. 872, s. 1; 1973, c. 28; c. 473, s. 1; c. 476, s. 133; c. 606; c. 1288, s. 1; cc. 1369, 1396; 1975, cc. 240, 453, 640; 1977, c. 70, ss. 15.1, 15.2, 16; c. 176, ss. 2, 6; 1977, 2nd Sess., c. 1138, ss. 3, 4, 18; 1979, c. 384, s. 1; c. 445, s. 5; c. 482; c. 801, s. 4; 1981, c. 412, s. 2.)

Editor's Note. — Session Laws 1981, c. 412, s. 7, provides that all local, public-local, and private acts in conflict with this section are repealed.

§ 18B-206. Standards for alcoholic beverages.

(a) Authority to Set Standards. — The Commission may set standards and adopt rules for malt beverages, unfortified wine, fortified wine, and spirituous liquor to protect the public against beverages containing harmful or impure substances, beverages containing an improper balance of substances as determined by the Commission, spurious or imitation beverages, and beverages unfit for human consumption. In setting standards and in issuing rules relating to them, the Commission may follow federal guidelines for standards of identity, labeling and advertising contained in Title 27 of the Code of Federal Regulations, or may adopt more restrictive standards.

(b) Effective Date of Standards. — A person possessing alcoholic beverages which do not meet a new standard set by the Commission shall have 60 days after the effective date of the standard to sell or otherwise dispose of those alcoholic beverages.

(c) Testing. — The Commission may test malt beverages, unfortified wine, fortified wine, and spirituous liquor possessed or offered for sale in this State

to determine whether they meet the standards set by the Commission. If the Commission chooses to test an alcoholic beverage, that test may be performed by the Commission, the Commission may arrange for the State Chemist to perform the testing, or the Commission may have the testing performed in some other manner. The manufacturer of tested alcoholic beverages shall pay the costs of the test. In lieu of testing an alcoholic beverage, the Commission may rely on testing by a federal agency or an agency of another state or may accept test results from a federal agency, an agency of another state, or the manufacturer of the alcoholic beverage or his authorized agent. A manufacturer who submits test results shall also submit a fee of ten dollars ($10.00) for each test result to cover administrative costs. (1939, c. 158, s. 514; 1943, c. 400, s. 6; 1949, c. 974, s. 14; 1953, c. 1207, ss. 2-4; 1957, c. 1440; 1963, c. 426, ss. 4, 5; 1971, c. 872, s. 1; 1977, c. 70, s. 20.4; 1981, c. 412, s. 2.)

§ 18B-207. Rules.

The Commission shall have authority to adopt, amend, and repeal rules to carry out the provisions of this Chapter. Those rules shall become effective when adopted and filed pursuant to the provisions of Chapter 150A of the General Statutes. (1937, c. 49, s. 4; cc. 237, 411; 1945, c. 954; 1949, c. 974, s. 9; 1961, c. 956; 1963, c. 426, s. 12; c. 916, s. 2; c. 1119, s. 1; 1965, c. 1063; c. 1102, s. 3; 1967, c. 222, s. 2; c. 1240, s. 1; 1971, c. 872, s. 1; 1973, c. 28; c. 473, s. 1; c. 476, s. 133; c. 606; c. 1288, s. 1; cc. 1369, 1396; 1975, cc. 240, 453, 640; 1977, c. 70, ss. 15.1, 15.2, 16; c. 176, ss. 2, 6; 1977, 2nd Sess., c. 1138, ss. 3, 4, 18; 1979, c. 384, s. 1; c. 445, s. 5; c. 482; c. 801, s. 4; 1981, c. 412, s. 2.)

Article 3.

Sale, Possession, and Consumption.

§ 18B-300. Purchase, possession and consumption of malt beverages and unfortified wine.

(a) Generally. — Except as otherwise provided in this Chapter, the purchase, consumption, and possession of malt beverages and unfortified wine by individuals 18 years old and older for their own use is permitted without restriction.

(b) Consumption at Off-Premises Establishment. — It shall be unlawful to consume, or for a permittee to allow the consumption of, malt beverages or unfortified wine on any premises having only an off-premises permit for the kind of alcoholic beverage being consumed.

(c) Local Ordinance. — A city or county may by ordinance regulate the consumption of malt beverages and unfortified wine on property owned or occupied by that city or county. (1939, c. 158, s. 503; 1971, c. 872, s. 1; 1973, c. 1452, ss. 1-3; 1977, c. 176, ss. 2, 3; c. 693; 1979, c. 19, s. 2; c. 445, § 4; c. 893, s. 11; 1981, c. 412, s. 2.)

§ 18B-301. Possession and consumption of fortified wine and spirituous liquor.

(a) Possession at Home. — It shall be lawful, without an ABC permit, for any person at least 21 years old to possess for lawful purposes any amount of fortified wine and spirituous liquor at his home or a temporary residence, such as a hotel room.

(b) Possession on Other Property. — It shall be lawful, without an ABC permit, for a person to possess for his personal use and the use of his guests not more than four liters of fortified wine or spirituous liquor, or four liters of the two combined, at the following places:

(1) The residence of any other person with that person's consent;

(2) Any other property not primarily used for commercial purposes and not open to the public at the time the alcoholic beverage is possessed, if the owner or other person in charge of the property consents to that possession and consumption;

(3) An establishment with a brown-bagging permit as defined in G.S. 18B-1001(7).

(c) Special Occasions. — It shall be lawful for a person to possess, without a permit and not for sale, any amount of fortified wine or spirituous liquor for a private party, private reception, or private special occasion, at the following places:

(1) His home or a temporary residence, such as a hotel room;

(2) Any other property not primarily used for commercial purposes, which is under his exclusive control and supervision, and which is not open to the public during the event;

(3) The licensed premises of any business for which the Commission has issued a Special Occasions permit under G.S. 18B-1001(8), if he is the host of that private function and has the permission of the permittee.

(d) Consumption. — It shall be lawful for a person to consume fortified wine and spirituous liquor in any place where it is lawful for him to possess those alcoholic beverages under subsections (a) through (c).

(e) Incident to Sale. — It shall be lawful to possess fortified wine and spirituous liquor at any place, such as an ABC store, where possession is a necessary incident to lawful sale. Consumption at such a place shall be unlawful unless the establishment has a permit authorizing consumption on the premises as well as sale.

(f) Unlawful Possession or Use. — As illustration, but not limitation, of the general prohibition stated in G.S. 18B-102(a), it shall be unlawful for:

(1) Any person to consume fortified wine, spirituous liquor, or mixed beverages or to offer such beverages to another person:
a. On the premises of an ABC store, or
b. Upon any property used or occupied by a local board, or
c. On any public road, street, highway, or sidewalk.

(2) Any person to display publicly at an athletic contest fortified wine, spirituous liquor, or mixed beverages;

(3) Any person to permit any fortified wine, spirituous liquor, or mixed beverages to be possessed or consumed upon any premises not authorized by this Chapter;

(4) Any person to possess or consume any fortified wine, spirituous liquor, or mixed beverages upon any premises where such possession or consumption is not authorized by law, or where the person has been forbidden to possess or consume that beverage by the owner or other person in charge of the premises;

(5) Any person to possess on any of the premises described in subsections (a) through (c) a greater amount of fortified wine or spirituous liquor than authorized by this Chapter;

(6) Any permittee, other than a mixed beverage or culinary permittee, to possess spirituous liquor or mixed beverages on his licensed premises. (1905, c. 498, ss. 6-8; Rev., ss. 3526, 3534; C.S., s. 3371; 1937, c. 49, ss. 12, 16, 22; c. 411; 1955, c. 999; 1967, c. 222, ss. 1, 8; c. 1256, s. 3; 1969, c. 1018; 1971, c. 872, s. 1; 1973, c. 1226; 1977, c. 176, s. 1; 1977, 2nd Sess., c. 1138, ss. 8-12, 18; 1979, c. 384, s. 3; c. 609, s. 2; c. 718; c. 893, s. 10; 1981, c. 412, s. 2; c. 747, s. 39.)

Effect of Amendments. — The 1981 amendment substituted "purposes" for "entertainment" in subdivisions (b)(2) and (c)(2).

Legal Periodicals. — For article "A History of Liquor-by-the-Drink Legislation in North Carolina," see 1 Campbell L. Rev. 61 (1979).

For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

§ 18B-302. Sale to or purchase by minors.

(a) Sale. — It shall be unlawful for any person to knowingly:

(1) Sell or give malt beverages or unfortified wine to anyone less than 18 years old; or

(2) Sell or give fortified wine, spirituous liquor, or mixed beverages to anyone less than 21 years old.

(b) Purchase or Possession. — It shall be unlawful for:

(1) A person less than 18 years old to purchase or possess malt beverages or unfortified wine; or

(2) A person less than 21 years old to purchase or possess fortified wine, spirituous liquor, or mixed beverages.

(c) Aider and Abettor. — Any person who aids or abets another in violation of subsection (a) or (b) shall be guilty of a misdemeanor.

(d) Presumptions. — A sale made in violation of subsection (a) shall be presumed to have been made knowingly unless the seller:

(1) Shows that the purchaser produced a driver's license, a special identification card issued under G.S. 20-37.7, a military identification card, or a passport, showing his age to be at least the required age for purchase and bearing a physical description of the person named on the card reasonably describing the purchaser; or

(2) Produces evidence of other facts which reasonably indicated at the time of sale that the purchaser was at least the required age.

(e) Fraudulent Driver's License. — It shall be unlawful for any person to use or attempt to use a fraudulent driver's license or a license issued to some other person, to obtain alcoholic beverages in violation of subsection (b). Conviction of a violation of this subsection shall be grounds for suspension of the defendant's driver's license for up to six months as provided in G.S. 20-16(a)(8).

(f) Allowing Use of License. — It shall be unlawful for any person to permit the use of his driver's license by any person who violates or attempts to violate subsection (e). In addition to any other penalty imposed by this Chapter, conviction of a violation of this subsection shall be grounds for the revocation of the defendant's driver's license for a period not exceeding six months as provided in G.S. 20-16(a)(8). (1933, c. 216, s. 8; 1959, c. 745, s. 1; 1967, c. 222, s. 3; 1969, c. 998; 1971, c. 872, s. 1; 1973, c. 27; 1977, 2nd Sess., c. 1138, s. 2; 1979, c. 683, s. 2; 1981, c. 412, s. 2; c. 747, ss. 40, 41.)

Effect of Amendments. — The 1981 amendment rewrote the second sentence of subsection (e) and added "as provided in G.S. 20-16(a)(8)" at the end of the second sentence of subsection (f).

§ 18B-303. Amounts of alcoholic beverages that may be purchased.

(a) Purchases Allowed. — Without a permit, a person may purchase at one time:

(1) Not more than 80 liters of malt beverages, other than draft malt beverages in kegs;

(2) Any amount of draft malt beverages in kegs;

(3) Not more than 20 liters of unfortified wine;

(4) Not more than four liters of either fortified wine or spirituous liquor, or four liters of the two combined.

(b) Unlawful Purchase. — Except as provided in subsection (c) and in Article 11, it shall be unlawful for any person to purchase, or for any person to sell, an amount of alcoholic beverages greater than that stated in subsection (a).

(c) Greater Amounts. — Amounts of alcoholic beverages greater than those listed in subdivisions (a)(3) and (a)(4) may be purchased with a purchase-transportation permit under G.S. 18B-403. (1905, c. 498, ss. 6-8; Rev., ss. 3526, 3534; C. S., s. 3371; 1937, c. 49, ss. 12, 16, 22; c. 411; 1955, c. 999; 1967, c. 222, ss. 1, 8; c. 1256, s. 3; 1969, c. 1018; 1971, c. 872, s. 1; 1973, c. 1226; 1977, c. 176, s. 1; 1977, 2nd Sess., c. 1138, ss. 8-12, 18; 1979, c. 384, s. 3; c. 609, s. 2; c. 718; c. 893, s. 10; 1981, c. 412, s. 2.)

§ 18B-304. Sale and possession for sale.

(a) Offense. — It shall be unlawful for any person to sell any alcoholic beverage, or possess any alcoholic beverage for sale, without first obtaining the applicable ABC permit and revenue licenses.

(b) Prima Facie Evidence. — Possession of the following amounts of alcoholic beverages, without a permit authorizing that possession, shall be prima facie evidence that the possessor is possessing those alcoholic beverages for sale:

(1) More than 80 liters of malt beverages, other than draft malt beverages in kegs;

(2) More than four liters of spirituous liquor; or

(3) Any amount of nontaxpaid alcoholic beverages. (1913, c. 44, s. 2; 1915, c. 97, s. 8; 1923, c. 1, ss. 2, 6, 10; C. S., ss. 3379, 3411(b), (f), (j); 1937, c. 49, ss. 13, 15; 1945, c. 635; 1949, c. 1251, s. 2; 1951, c. 850; 1955, c. 560; 1957, c. 984; c. 1235, s. 1; 1963, c. 932; 1967, c. 222, ss. 4, 6; 1969, c. 789; 1971, c. 872, s. 1; 1975, c. 654, s. 4; 1977, c. 176, ss. 1-3; 1981, c. 412, s. 2; c. 747, s. 42.)

Effect of Amendments. — The 1981 amendment substituted "the applicable ABC permit and revenue licenses" for "an ABC permit for the sale of that alcoholic beverage" at the end of subsection (a).

CASE NOTES

Editor's Note. — The cases cited in the following annotation were decided under former § 18A-7.

Evidence of Possession. — In a prosecution for illegal possession of intoxicating liquor for the purpose of sale, testimony concerning beer and wine found at defendant's home was competent as tending to show that defendant's possession of the intoxicating liquor was for the purpose of sale. State v. Harrell, 50 N.C. App. 531, — S.E.2d — (1981).

The State's evidence was sufficient for the jury in a prosecution of defendant for illegal possession of intoxicating liquor for the purpose of sale where it tended to show that defendant had in his constructive possession more than four liters of liquor with an alcoholic content of greater than 21%. State v. Harrell, 50 N.C. App. 531, — S.E.2d — (1981).

There was no fatal variance between a citation charging defendant with "possession of tax-paid whiskey for the purpose of sale that whiskey being intoxicating liquor" and a verdict finding defendant guilty of "possession of intoxicating liquor for the purpose of sale," since the reference in the citation to "tax-paid whiskey" was merely surplusage, and it was obvious that the jury found defendant guilty as charged. State v. Harrell, 50 N.C. App. 531, — S.E.2d — (1981).

§ 18B-305. Other prohibited sales.

(a) Sale to Intoxicated Person. — It shall be unlawful for a permittee or his employee or for an ABC store employee to knowingly sell or give alcoholic beverages to any person who is intoxicated.

(b) Discretion for Seller. — Any person authorized to sell alcoholic beverages under this Chapter may, in his discretion, refuse to sell to anyone. It shall be unlawful for any person to knowingly buy alcoholic beverages for someone who has been refused the right to purchase under this subsection. (1937, c. 49, ss. 11, 15; c. 411; 1971, c. 872, s. 1; 1977, 2nd Sess., c. 1138, s. 5; 1981, c. 412, s. 2.)

§ 18B-306. Making wines and malt beverages for private use.

An individual may make, possess, and transport native wines and malt beverages for his own use and for the use of his family and guests. Native wines shall be made principally from honey, grapes, or other fruit or grain grown in this State, or from wine kits containing honey, grapes, or other fruit or grain concentrates, and shall have only that alcoholic content produced by natural fermentation. Malt beverages may be made by use of malt beverage kits containing grain extracts or concentrates. Wine kits and malt beverage kits may be sold in this State. No ABC permit is required to make beverages pursuant to this section, and those beverages are exempt from taxation as provided in G.S. 105-113.70(e). (1971, c. 872, s. 1; 1973, c. 1218; 1981, c. 412, s. 2; c. 747, s. 43.)

Effect of Amendments. — The 1981 amendment rewrote the last sentence.

§ 18B-307. Manufacturing offenses.

(a) Offenses. — It shall be unlawful for any person, except as authorized by this Chapter, to:

(1) Sell or possess equipment or ingredients intended for use in the manufacture of any alcoholic beverage; or

(2) Knowingly allow real or personal property owned or possessed by him to be used by another person for the manufacture of any alcoholic beverage.

(b) Unlawful Manufacturing. — Except as provided in G.S. 18B-306, it shall be unlawful for any person to manufacture any alcoholic beverage without first obtaining the applicable ABC permit and revenue licenses.

(c) Second Offense of Manufacturing. — A second offense of unlawful manufacturing of alcoholic beverage shall be a Class I felony. (1905, c. 498, s. 2; Rev., s. 3533; 1923, c. 1, ss. 4, 6, 26; C. S., ss. 3407, 3411(d), (f), (z); 1937, c. 49, s. 13; 1945, c. 635; 1951, c. 850; 1955, c. 560; 1957, c. 984; c. 1235, s. 1; 1969, c. 789; 1971, c. 872, s. 1; 1979, c. 699, s. 1; 1981, c. 412, s. 2; c. 747, s. 44.)

Effect of Amendments. — The 1981 amendment designated the original subsection (b) as subsection (c) and added present subsection (b).

§ 18B-308. Sale and consumption at bingo games.

It shall be unlawful to sell or consume, or for the owner or other person in charge of the premises to allow the sale or consumption of, any alcoholic beverage in any room while a raffle or bingo game is being conducted in that room under G.S. 14-292.1. (1905, c. 498, ss. 6-8; Rev., ss. 3526, 3534; C.S., s. 3371; 1937, c. 49, ss. 12, 16, 22; c. 411; 1955, c. 999; 1967, c. 222, ss. 1, 8; c. 1256, s. 3; 1969, c. 1018; 1971, c. 872, s. 1; 1973, c. 1226; 1977, c. 176, s. 1; 1977, 2nd Sess., c. 1138, ss. 8-12, 18; 1979, c. 384, s. 3; c. 609, s. 2; c. 718; c. 893, s. 10; 1981, c. 412, s. 2.)

Article 4.

Transportation.

§ 18B-400. Amounts that may be transported.

A person may transport at one time the same amount of alcoholic beverages that he is allowed to buy under G.S. 18B-303(a). Greater amounts of fortified wine, unfortified wine and spirituous liquor may be transported with a purchase-transportation permit under G.S. 18B-403. (1923, c. 1, s. 25; C. S., s. 3411(y); 1937, c. 49, ss. 14, 16; c. 411; 1967, c. 222, ss. 1, 7; c. 1256, s. 3; 1969, c. 598, ss. 2, 3; c. 1018; 1971, c. 872, s. 1; 1977, c. 176, s. 1; c. 586; 1979, c. 607, s. 1; 1981, c. 412, s. 2.)

§ 18B-401. Manner of transportation.

(a) Open Bottle. — It shall be unlawful to transport fortified wine or spirituous liquor in the passenger area of a motor vehicle if the cap or seal on the container has been opened or broken. Violation of this subsection shall constitute a misdemeanor punishable by a fine of twenty-five dollars ($25.00) to five hundred dollars ($500.00), imprisonment for not more than 30 days, or both.

(b) Taxis. — It shall be unlawful for a person operating a for-hire passenger vehicle as defined in G.S. 20-4.01(27)b, to transport fortified wine or spirituous liquor unless the vehicle is transporting a paying passenger who owns the alcoholic beverage being transported. Not more than four liters of fortified wine or spirituous liquor, or combination of the two, may be transported by each passenger. A violation of this subsection shall not be grounds for suspension of the driver's license for illegal transportation of intoxicating liquors under G.S. 20-16(a)(8).

(c) Definition. — For purposes of this section, "passenger area of a motor vehicle" means the area designed to seat the driver and passengers and any area within the reach of a seated driver or passenger, including the glove compartment. In the case of a station wagon, hatchback or similar vehicle, the area behind the last upright back seat shall not be considered part of the passenger area. (1923, c. 1, s. 25; C. S., s. 3411(y); 1937, c. 49, ss. 14, 16; c. 411; 1967, c. 222, ss. 1, 7; c. 1256, s. 3; 1969, c. 598, ss. 2, 3; c. 1018; 1971, c. 872, s. 1; 1977, c. 176, s. 1; c. 586; 1979, c. 607, s. 1; 1981, c. 412, s. 2; c. 747, s. 45.)

Effect of Amendments. — The 1981 amendment substituted "suspension" for "revocation" in the last sentence of subsection (b).

§ 18B-402. Alcoholic beverages purchased out-of-State.

A person may bring into North Carolina alcoholic beverages purchased legally outside the jurisdiction of this State in the same amounts that may be legally transported within the State under G.S. 18B-400. (1923, c. 1, s. 25; C. S., s. 3411(y); 1937, c. 49, ss. 14, 16; c. 411; 1967, c. 222, ss. 1, 7; c. 1256, s. 3; 1969, c. 598, ss. 2, 3; c. 1018; 1971, c. 872, s. 1; 1977, c. 176, s. 1; c. 586; 1979, c. 607, s. 1; 1981, c. 412, s. 2.)

§ 18B-403. Purchase-transportation permit.

(a) Amounts. — With a purchase-transportation permit, a person may purchase and transport an amount of alcoholic beverages greater than the amount specified in G.S. 18B-303(a). A permit authorizes the holder to transport from the place of purchase to the destination indicated on the permit at one time the following amount of alcoholic beverages:

(1) A maximum of 100 liters of unfortified wine;
(2) A maximum of 40 liters of either fortified wine or spirituous liquor, or 40 liters of the two combined; or
(3) The amount of fortified wine or spirituous liquors specified on the purchase-transportation permit for a mixed beverage permittee.

(b) Issuance of Permit. — A purchase-transportation permit may be issued by:

(1) The local board chairman;
(2) A member of the local board;
(3) The general manager or supervisor of the local board; or
(4) The manager or assistant manager of an ABC store, if he is authorized to issue permits by the local board chairman.

(c) Disqualifications. — A purchase-transportation permit shall not be issued to a person who:

(1) Is not sufficiently identified or known to the issuer;
(2) Is known or shown to be an alcoholic or bootlegger;
(3) Has been convicted within the previous three years of an offense involving the sale, possession, or transportation of nontaxpaid alcoholic beverages; or
(4) Has been convicted within the previous three years of an offense involving the sale of alcoholic beverages without a permit.

(d) Form. — A purchase-transportation permit shall be issued on a printed form adopted by the Commission. The Commission shall adopt rules specifying the content of the permit form.

(e) Restrictions on Permit. — A purchase may be made only from the store named on the permit. One copy of the permit shall be kept by the issuing person, one by the purchaser, and one by the store from which the purchase is made. The purchaser shall display his copy of the permit to any law-enforcement officer upon request.

(f) Time. — A purchase-transportation permit is valid only until 9:30 P.M. on the date of purchase, which date shall be stated on the permit. (1969, c. 617, s. 1; 1971, c. 872, s. 1; 1973, c. 94; c. 819, s. 1; 1975, ss. 1-4; 1977, c. 176, ss. 1, 2, 4; 1979, c. 19, ss. 3, 4; c. 286, s. 1; c. 445, ss. 1, 3; c. 1076, ss. 1, 2, 3; 1981, c. 412, s. 2.)

Legal Periodicals. — For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

§ 18B-404. Additional provisions for purchase and transportation by mixed beverage permittees.

(a) Designated Employee. — A mixed beverages permittee may designate an employee to purchase and transport spirituous liquor as authorized by his permit.

(b) Issuance. — A mixed beverages purchase-transportation permit shall be issued only by the local board for the county or city in which a licensed establishment is located. If mixed beverages sales have been approved for an establishment under the last paragraph of G.S. 18B-603(d) or under G.S. 18B-603(e), the purchase-transportation permit for that establishment may be issued by the local board of any city located in the same county as the establishment, provided the city has approved the sale of mixed beverages.

(c) Designated Store. — A local board may designate a store within its system to make sales to mixed beverages permittees.

(d) Size of Bottles. — A purchase-transportation permit for a mixed beverages permittee shall authorize the purchase and transportation only of 750 milliliter or larger containers. (1981, c. 412, s. 2; c. 747, ss. 46, 47.)

Effect of Amendments. — The 1981 amendment rewrote the second sentence of subsection (b) and added subsection (d).

§ 18B-405. Transportation by permittee.

The holder of a permit for the retail sale of malt beverages, unfortified wine, or fortified wine may transport from a wholesaler's place of business to his licensed premises any amount of the alcoholic beverage he is authorized to sell, without a purchase-transportation permit or a commercial transportation permit under G.S. 18B-1112. (1923, c. 1, s. 15; C. S., s. 3411(o); 1939, c. 158, s. 503; 1971, c. 872, s. 1; 1975, c. 411, s. 7; 1977, c. 70, s. 20; c. 176, s. 7; 1979, c. 286, s. 5; 1981, c. 412, s. 2.)

§ 18B-406. Unlawful transportation.

It shall be unlawful to transport a greater amount of alcoholic beverage than permitted by this Article, unless the transportation is authorized under Article 11. (1981, c. 412, s. 2.)

ARTICLE 5.

Law Enforcement.

§ 18B-500. Alcohol law-enforcement agents.

(a) Appointment. — The Secretary of Crime Control and Public Safety shall appoint alcohol law-enforcement agents and other enforcement personnel. The Secretary of Crime Control and Public Safety may also appoint regular employees of the Commission as alcohol law-enforcement agents.

(b) Subject Matter Jurisdiction. — After taking the oath prescribed for a peace officer, an alcohol law-enforcement agent shall have authority to arrest and take other investigatory and enforcement actions for any criminal offense. The primary responsibility of an agent shall be enforcement of the ABC laws and Article 5 of Chapter 90 (The Controlled Substances Act); however, an agent may perform any law-enforcement duty assigned by the Secretary of Crime Control and Public Safety or the Governor.

(c) Territorial Jurisdiction. — An alcohol law-enforcement agent is a State officer with jurisdiction throughout the State.

(d) Service of Commission Orders. — Alcohol law-enforcement agents may serve and execute notices, orders, or demands issued by the Commission for the surrender of permits or relating to any administrative proceeding. While serving and executing such notices, orders, or demands, alcohol law-enforcement agents shall have all the power and authority possessed by law-enforcement officers when executing an arrest warrant.

(e) Discharge. — Alcohol law-enforcement agents are subject to the discharge provisions of G.S. 18B-202. (1939, c. 158, s. 514; 1943, c. 400, s. 6; 1949, c. 974, ss. 11, 14; c. 1251, s. 4; 1951, c. 1056, s. 1; c. 1186, ss. 1, 2; 1953, c. 1207, ss. 2-4; 1957, c. 1440; 1961, c. 645; 1963, c. 426, ss. 1, 2, 4, 5, 12; 1967, c. 868; 1971, c. 872, s. 1; 1977, c. 70, s. 17; 1981, c. 412, s. 2.)

§ 18B-501. Local ABC officers.

(a) Appointment. — Except as provided in subsection (f), each local board shall hire one or more ABC enforcement officers. The local board may designate one officer as the chief ABC officer for that board.

(b) Subject Matter Jurisdiction. — After taking the oath prescribed for a peace officer, a local ABC officer may arrest and take other investigatory and enforcement actions for any criminal offense; however, the primary responsibility of a local ABC officer is enforcement of the ABC laws and Article 5 of Chapter 90 (The Controlled Substances Act).

(c) Territorial Jurisdiction. — A local ABC officer has jurisdiction anywhere in the county in which he is employed except that a city ABC officer's territorial jurisdiction is subject to any limitation included in any local act governing that city ABC system. A local ABC officer may pursue outside his normal territorial jurisdiction anyone who commits an offense within that jurisdiction, as provided in G.S. 15A-402(d).

(d) Assisting Other Local Agencies. — The local ABC officers employed by a local board shall constitute a "law-enforcement agency" for purposes of G.S. 160A-288, and a local board shall have the same authority as a city or county governing body to approve cooperation between law-enforcement agencies under that section.

(e) Assisting State and Federal Enforcement. — A local ABC officer may assist State and federal law-enforcement agencies in the investigation of criminal offenses in North Carolina, under the following conditions:

(1) The local board employing the officer has adopted a resolution approving such assistance and stating the conditions under which it may be provided;

(2) The State or federal agency has made a written request for assistance from that local board, either for a particular investigation or for any investigation that might require assistance within a certain period of time;

(3) The local ABC officer is supervised by someone in the requesting agency; and

(4) As soon as practical after the assistance begins, an acknowledgement of the action is placed in the records of the local board.

A local ABC officer shall have territorial jurisdiction throughout North Carolina while assisting a State or federal agency under this section. While providing that assistance the officer shall continue to be considered an employee of the local board for purposes of salary, worker's compensation, and other benefits, unless a different arrangement is negotiated between the local board and the requesting agency.

(f) Contracts with Other Agencies. — Instead of hiring local ABC officers, a local board may contract to pay its enforcement funds to a sheriff's depart-

ment, city police department, or other local law-enforcement agency for enforcement of the ABC laws within the agency's territorial jurisdiction. Enforcement agreements may be made with more than one agency at the same time. When such a contract for enforcement exists, the officers of the contracting law-enforcement agency shall have the same authority to inspect under G.S. 18B-502 that an ABC officer employed by that local board would have.

(g) Discharge. — Local ABC officers are subject to the discharge provisions of G.S. 18B-202. (1949, c. 1251, s. 4; 1961, c. 645; 1963, c. 426, s. 2; 1967, c. 868; 1971, c. 872, s. 1; 1973, c. 29; 1977, c. 908; 1981, c. 412, s. 2.)

§ 18B-502. Inspection of licensed premises.

(a) Authority. — To procure evidence of violations of the ABC law, alcohol law-enforcement agents, employees of the Commission, local ABC officers, and officers of local law-enforcement agencies that have contracted to provide ABC enforcement under G.S. 18B-501(f) shall have authority to investigate the operation of each licensed premises for which an ABC permit has been issued, to make inspections that include viewing the entire premises, and to examine the books and records of the permittee. The inspection authorized by this section may be made at any time it reasonably appears that someone is on the premises.

(b) Interference with Inspection. — Refusal by a permittee or by any employee of a permittee to permit officers to enter the premises to make an inspection authorized by subsection (a) shall be cause for revocation, suspension or other action against the permit of the permittee as provided in G.S. 18B-104. It shall be a misdemeanor punishable by a fine of up to five hundred dollars ($500.00), imprisonment for up to six months, or both, for any person to resist or obstruct an officer attempting to make a lawful inspection under this section. (1939, c. 158, s. 514; 1943, c. 400, s. 6; 1949, c. 974, ss. 11, 14; c. 1251, s. 4; 1951, c. 1056, s. 1; c. 1186, ss. 1, 2; 1953, c. 1207, ss. 2-4; 1957, c. 1440; 1961, c. 645; 1963, c. 426, ss. 1, 2, 4, 5, 12; 1967, c. 868; 1971, c. 872, s. 1; 1977, c. 70, s. 17; 1981, c. 412, s. 2.)

§ 18B-503. Disposition of seized alcoholic beverages.

(a) Storage. — A law-enforcement officer who seizes alcoholic beverages as evidence of an ABC law violation shall provide for the storage of those alcoholic beverages until the commencement of the trial or administrative hearing relating to the violation, unless some other disposition is authorized under this section.

(b) Disposition Before Trial. — After giving notice to each defendant, to any other known owner, and to the Commission, a judge may make the following dispositions of alcoholic beverages seized as evidence of an ABC law violation:

(1) He shall order the destruction of any malt beverages except that amount needed for evidence at trial.

(2) He may order the sale of any alcoholic beverages other than malt beverages or nontaxpaid alcoholic beverages, and other than any alcoholic beverages needed for evidence at trial, if the trial is likely to be delayed for more than 90 days, or if the quantity or nature of the alcoholic beverages is such that storage is impractical or unduly expensive.

(3) He may order destruction of the alcoholic beverages if storage or sale is not practical.

(4) He may order continued storage of the alcoholic beverages.

(c) Disposition After Trial. — After the criminal charge is resolved, a judge may order the following dispositions of seized alcoholic beverages:

(1) If the owner or possessor of the alcoholic beverages is found guilty of a criminal charge relating to those alcoholic beverages, the judge may order the sale or destruction of any alcoholic beverages that were held until trial.

(2) If the owner or possessor of the alcoholic beverages is found not guilty, or if charges are dismissed or otherwise resolved in his favor, the judge shall order the alcoholic beverages returned to that owner or possessor, except as provided in subdivision (3).

(3) If the owner or possessor of the alcoholic beverages is found not guilty, or if charges are otherwise resolved in his favor, but possession of the alcoholic beverages by him would be unlawful, the judge shall order the alcoholic beverages either sold or destroyed.

(4) If ownership of the alcoholic beverages remains uncertain after trial or after the charges have been dismissed, the judge may order the alcoholic beverages held, or the alcoholic beverages sold and the proceeds held, for a specified time, until ownership of the alcoholic beverages can be determined.

(d) Holding for Administrative Hearings. — If alcoholic beverages used as evidence in a criminal proceeding are also needed as evidence at an administrative hearing, a judge shall not order any of the dispositions set out in subsection (c), but shall order the alcoholic beverages held for the administrative hearing and for a determination of final disposition by the Commission or one of its hearing officers. A hearing officer for the Commission may, before or after an administrative hearing, order any of the dispositions authorized under subsections (b) and (c). If no related criminal proceeding has commenced, the Commission or its hearing officers shall not order sale or destruction of alcoholic beverages until notice has been given to the district attorney for the district where the alcoholic beverages were seized or any violation of ABC laws related to the seizure of the alcoholic beverages is likely to be prosecuted.

(e) Sale Procedure. — The sale of unfortified wine or fortified wine shall be by public auction unless those wines would likely become spoiled or lose value in the time required to arrange a public auction. If spoilage or loss of value is likely, the judge or hearing officer ordering the sale may authorize sale at the prevailing wholesale price, as determined by the Commission, to one or more persons holding the appropriate retail wine permits in the county in which the wine was seized, or in a neighboring county if there are no such persons in the county in which the wine was seized. Spirituous liquor may be sold only to the local ABC board serving the city or county in which the liquor was seized, or, if there is no local board for that city or county, to the nearest local board. The sale price shall be at least ten percent (10%) less than the price the local board would pay for the same liquor bought through the State warehouse.

(f) Sale Proceeds. — An agency selling alcoholic beverages seized under the provisions of this Chapter shall keep the proceeds in a separate account until some other disposition is ordered by a judge or a Commission hearing officer. If, in a criminal proceeding, the owner or possessor of the alcoholic beverages is found guilty of a violation relating to seizure of the alcoholic beverages, or if he is found not guilty, or if the charge is dismissed or otherwise resolved in his favor, but the possession of the alcoholic beverages by him would be unlawful, or if the ownership of the alcoholic beverages cannot be determined, the proceeds from the sale of those alcoholic beverages shall be paid to the school fund of the county in which the alcoholic beverages were seized. If the owner or possessor of alcoholic beverages seized for violation of the ABC laws is found not guilty of criminal charges relating to the seizure of those beverages, or if the charge is dismissed or otherwise resolved in his favor, and if possession of the alcoholic beverages by him was lawful when the beverages were seized, the proceeds from the sale of those alcoholic beverages shall be paid to him. The agency making the sale may deduct and retain from the amount to be placed in

the county school fund the costs of storing the seized alcoholic beverages and of conducting the sale, but may not deduct those costs from the amount to be turned over to an owner or possessor of the alcoholic beverages.

(g) Court Action by Owner. — Any person who has any of the following claims resulting from the seizure of alcoholic beverages may bring an action in the superior court of the county in which the alcoholic beverages were seized:

(1) Alcoholic beverages owned by him are wrongfully held;

(2) Alcoholic beverages owned by him are needed as evidence in another proceeding;

(3) He is entitled to proceeds from a sale of seized alcoholic beverages;

(4) He is entitled to restitution for alcoholic beverages wrongfully destroyed. (1923, c. 1, s. 12; C. S., s. 3411(l); 1939, c. 12; 1941, c. 310; 1957, c. 1235, s. 3; 1971, c. 872, s. 1; 1981, c. 412, s. 2.)

Cross References. — For provision making the unauthorized manufacture, sale, delivery, etc., of alcoholic beverages a misdemeanor, see § 18B-102.

§ 18B-504. Forfeiture.

(a) Property Subject to Forfeiture. — The following kinds of property shall be subject to forfeiture:

(1) Motor vehicles, boats, airplanes, and all other conveyances used to transport nontaxpaid alcoholic beverages in violation of the ABC laws;

(2) Containers for alcoholic beverages which are manufactured, possessed, sold, or transported in violation of the ABC laws; and

(3) Equipment or ingredients used in the manufacture of alcoholic beverages in violation of the ABC laws.

(b) Exemption for Forfeiture. — Property which may be possessed lawfully shall not be subject to forfeiture when it was used unlawfully by someone other than the owner of the property and the owner did not consent to the unlawful use.

(c) Seizure of Property. — If property subject to forfeiture has not already been seized as part of an arrest or search, a law-enforcement officer may apply to a judge for an order authorizing seizure of that property. An order for seizure may be issued only after criminal process has been issued for an ABC law violation in connection with that property. The order shall describe the property to be seized and shall state the facts establishing probable cause to believe that the property is subject to forfeiture.

(d) Custody until Trial. — A law-enforcement officer seizing property subject to forfeiture shall provide for its safe storage until trial. The officer may destroy stills and perishable materials seized under subdivision (a)(3), if storage is impractical and if the absence of the property will not be likely to adversely affect the defendant's right to defend against the charge that is the basis for the forfeiture. If the officer having custody of the property is satisfied that it will be returned at the time of trial, he may return the property to the owner upon receiving a bond for the value of the property, signed by sifficient sureties. If the property is not returned at the time of trial, the full amount of the bond shall be forfeited to the court. Property which it is unlawful to possess may not be returned to the owner.

(e) Disposition after Trial. — The presiding judge in a criminal proceeding for violation of ABC laws may take the following actions after resolution of a charge against the owner or possessor of property subject to forfeiture under this section:

(1) If the owner or possessor of the property is found guilty of an ABC offense, the judge may order the property forfeited.

(2) If the owner or possessor of the property is found not guilty, or if the charge is dismissed or otherwise resolved in his favor, the judge shall order the property returned to the owner or possessor.

(3) If ownership of the property remains uncertain after trial, the judge may order the property held for a specified time to determine ownership. If the judge finds that ownership cannot be determined with reasonable effort, he shall order the property forfeited.

(4) Regardless of the disposition of the charge, if the property is something that may not be possessed lawfully, the judge shall order it forfeited.

(5) If the property is also needed as evidence at an administrative hearing, the judge shall provide that his order does not go into effect until the Commission or one of its hearing officers determines that the property is no longer needed for the administrative proceeding.

(f) Disposition of Forfeited Property. — A judge ordering forfeiture of property may order any one of the following dispositions:

(1) Sale at public auction;

(2) Sale at auction after notice to certain named individuals or groups, if only a limited number of people would have use for that property;

(3) Delivery to a named State or local law-enforcement agency, if the property is not suited for sale, with preference to be given in the following order, to: the agency that seized the property, the ALE Division, the Commission, the local board of the jurisdiction in which the property was seized, and the Department of Justice; or

(4) Destruction, if possession of the property would be unlawful and it could not be used or is not wanted for law enforcement, or if sale or other disposition is not practical.

(g) Proceeds of Sale. — If forfeited property is sold, the proceeds of that sale shall be paid to the school fund of the county in which the property was seized, except as provided in subsection (h). Before placing the proceeds in the school fund the agency making the sale may deduct and retain the costs of storing the property and conducting the sale.

(h) Innocent Parties. — At any time before forfeiture is ordered, an owner of seized property or a holder of a security interest in seized property, other than the defendant, may apply to protect his interest in the property. The application may be made to any judge who has jurisdiction to try the offense with which the property is associated. If the judge finds that the property owner or holder of a security interest did not consent to the unlawful use of the property, and that the property may be possessed lawfully by the owner or holder, the judge may order:

(1) That the property be returned to the owner, if it is not needed as evidence at trial;

(2) That the property be returned to the owner following trial or other resolution of the case; or

(3) That, if the property is sold following trial, a specified sum be paid from the proceeds of that sale to the holder of the security interest.

(i) Defendant Unavailable. — When property is seized for forfeiture, but the owner is unknown, the district attorney may seek forfeiture under this section by an action in rem against the property. If the owner is known and has been charged with an offense, but is unavailable for trial, the district attorney may seek forfeiture either by an action in rem against the property or by motion in the criminal action.

(j) When No Charge is Made. — Any owner of property seized for forfeiture may apply to a judge to have the property returned to him if no criminal charge has been made in connection with that property within a reasonable time after seizure. The judge may not order the return of the property if possession by the owner would be unlawful. (1923, c. 1, s. 6; C. S., s. 3411(f); 1927, c. 18; 1945, c. 635; 1951, c. 850; 1955, c. 560; 1957, c. 1235, s. 1; 1969, c. 789; 1971, c. 872, s. 1; 1977, c. 854, s. 2; 1981, c. 412, s. 2; c. 747, s. 48.)

Effect of Amendments. — The 1981 amendment added the second sentence of subsection (d).

§ 18B-505. Restitution.

When a person is convicted of a violation of the ABC laws, the court may order him to make restitution to any law-enforcement agency for reasonable expenditures made in purchasing alcoholic beverages from him or his agent as part of an investigation leading to his conviction. (1981, c. 412, s. 2.)

Article 6.

Elections.

§ 18B-600. Places eligible to hold alcoholic beverage elections.

(a) Kinds of Elections. — The following kinds of alcoholic beverage elections shall be permitted:

(1) Malt beverage;
(2) Unfortified wine;
(3) ABC store; and
(4) Mixed beverage.

(b) County Elections. — Any county may hold a malt beverage, unfortified wine, or ABC store election. A county may hold a mixed beverage election only if the county already operates at least one county ABC store or a county election on ABC stores is to be held at the same time as the mixed beverage election.

(c) City Malt Beverage and Unfortified Wine Elections. — A city may hold a malt beverage or unfortified wine election only if the county in which the city is located has already held such an election, the vote in the last county election was against the sale of that kind of alcoholic beverage, and:

(1) The city has a population of 500 or more; or
(2) The city operates an ABC store.

(d) City ABC Store Elections. — A city may hold an ABC store election only if:

(1) The city has a population of 500 or more; and
(2) The county in which the city is located does not operate ABC stores.

(e) City Mixed Beverage Elections. — A city may hold a mixed beverage election only if:

(1) The city has a population of 500 or more; and
(2) Either:
    a. The city already operates a city ABC store; or
    b. A city ABC store election is to be held at the same time as the mixed beverage election; or
    c. The city does not operate a city ABC store but:
        1. The county operates an ABC store;
        2. The county has already held a mixed beverage election; and
        3. The vote in the last county election was against the sale of mixed beverages. (1937, c. 49, ss. 25, 26; c. 431; 1947, c. 1084, ss. 1, 2, 4; 1951, c. 999, ss. 1, 2; 1957, c. 816; 1963, c. 265, ss. 1-3; 1965, c. 506; 1969, c. 647, s. 1; 1971, c. 872, s. 1; 1973, cc. 32, 33; 1977, c. 149, s. 1; c. 182, s. 2; 1977, 2nd Sess., c. 1138, s. 15; 1979, c. 140, ss. 2, 3; c. 609, s. 1; c. 683, s. 13; 1979, 2nd Sess., c. 1174; 1981, c. 412, s. 2; c. 747, s. 49.)

Editor's Note. — Session Laws 1981, c. 412, s. 9, provides that all local, public-local, and private acts in conflict with this Article are repealed except as provided in § 18B-604 (b) and (c) and in § 18B-605.

Effect of Amendments. — The 1981 amendment rewrote the introductory paragraph and subdivision (1) of subsection (c).

Legal Periodicals. — For article "A History of Liquor-by-the-Drink Legislation in North Carolina," see 1 Campbell L. Rev. 61 (1979).

§ 18B-601. Election procedure.

(a) Generally. — Except as otherwise provided in this section, an alcoholic beverage election shall be conducted in the same manner and under the same rules as a referendum under Chapter 163.

(b) How County Election Called. — A county alcoholic beverage election shall be conducted by the county board of elections. When a county is eligible to hold an election under G.S. 18B-600, the county board of elections shall hold the election upon receiving either:

(1) A written request for an election from the governing body of the county; or

(2) A petition requesting an election signed by at least twenty-five percent (25%) of the voters registered in the county at the time the petition was initiated.

(c) How City Election Called. — A city alcoholic beverage election shall be conducted by the county board of elections or, in the case of a city authorized under Chapter 163 to conduct its own elections, by the city board of elections. When a city is eligible to hold an election under G.S. 18B-600, the board of elections shall hold the election upon receiving either:

(1) A written request for an election from the city governing body; or

(2) A petition requesting an election signed by at least twenty-five percent (25%) of the voters registered in the city at the time the petition was initiated.

(d) Form of Request. — A request or petition for a malt beverage election shall state which of the four propositions in G.S. 18B-602(a) are to be voted upon. A request or petition for an unfortified wine election shall state which of the three propositions in G.S. 18B-602(d) are to be voted upon. More than one kind of alcoholic beverage election may be included in a single request or petition.

(e) Petitions. — A petition for an election shall be on a form provided by the appropriate local board of elections and shall contain the signature, name, address and precinct of each voter who signs. A petition shall be considered initiated at the time the form is delivered by the board of elections to the person who requests it. Within 72 hours after the petition is initiated, the board of elections shall certify the number of registered voters in the city or county at the time it was initiated. The petition shall be returned to the board of elections within 90 days of the time it is initiated. Failure to return the petition within that time shall render it void. The board of elections shall determine the sufficiency of the petition within 30 days after it is returned.

(f) Election Date. — The board of elections shall set the date for the alcoholic beverage election, which may not be sooner than 60 days nor later than 120 days from the date the request was received from the governing body or the petition was verified by the board.

(g) Registration. — No separate registration shall be required to vote in an alcoholic beverage election. Registration shall be closed for an alcoholic beverage election in the same manner and under the same schedule as for any other election.

(h) Notice. — The board of elections shall give notice of an alcoholic beverage election and notice of the close of registration in the same manner and under the same schedule as for any other election.

(i) Observers. — The proponents and opponents for an alcoholic beverage election, as determined by the local board of elections, shall have the right to appoint two watchers to attend each voting place. The persons authorized to appoint watchers shall, three days before the election, submit in writing to the registrar of each precinct a signed list of the watchers appointed for that precinct. The persons appointed as watchers shall be registered voters of the precinct for which appointed. The registrar and judges for the precinct may for good cause reject any appointee and require that another be appointed. Watchers shall do no electioneering at the voting place nor in any manner impede the voting process, interfere or communicate with or observe any voter in casting his ballot. Watchers shall be permitted in the voting place to make such observation and to take such notes as they may desire. (1937, c. 49, ss. 25, 26; c. 431; 1947, c. 1084, ss. 1, 2, 4; 1951, c. 999, ss. 1, 2; 1957, c. 816; 1963, c. 265, ss. 1-3; 1965, c. 506; 1969, c. 647, s. 1; 1971, c. 872, s. 1; 1973, cc. 32, 33; 1977, c. 149, s 1; c. 182, s. 2; 1977, 2nd Sess., c. 1138, s. 15; 1979, c. 140, ss. 2, 3; c. 609, s. 1; c. 683, s. 13; 1979, 2nd Sess., c. 1174; 1981, c. 412, s. 2.)

§ 18B-602. Form of ballots.

(a) Malt Beverage Elections. — Any one or more of the propositions listed below may be placed on the ballot for a malt beverage election. Each voter may vote on each proposition on the ballot. The propositions to be used shall be chosen by the governing body or petitioner requesting the election. The propositions shall read as follows:

(1) To permit the "on-premises" and "off-premises" sale of malt beverages.
☐ FOR
☐ AGAINST

(2) To permit the "on-premises" sale only of malt beverages.
☐ FOR
☐ AGAINST

(3) To permit the "off-premises" sale only of malt beverages.
☐ FOR
☐ AGAINST

(4) To permit the "on-premises" sale of malt beverages by Class A hotels, motels, and restaurants only; and to permit "off-premises" sales by other permittees.
☐ FOR
☐ AGAINST

(b) Determining Results of Malt Beverage Election. — The kind of malt beverage sales described in each proposition that receives a majority of votes "FOR" shall be allowed. If propositions (2) and (4) are both on the ballot and (2) receives a majority of votes "FOR," then sales shall be permitted according to that proposition regardless of the vote on (4). If one of the propositions receiving a majority of votes "FOR" is proposition (1), then the kind of sales described in that proposition shall be allowed regardless of the vote on any other proposition at that election.

(c) Subsequent Malt Beverage Elections. — A subsequent election in which a majority votes "AGAINST" malt beverage proposition (1) shall not affect the legality of sales that have previously been approved under proposition (2), (3), or (4). A subsequent election in which a majority votes "AGAINST" malt beverage proposition (2) shall not affect the legality of sales that have previously been approved under proposition (4).

(d) Unfortified Wine Elections. — Any one or more of the propositions listed below may be placed on the ballot for an unfortified wine election. Each voter may vote on each proposition on the ballot. The propositions to be used shall be chosen by the governing body or petitioner requesting the election. The propositions shall read as follows:

(1) To permit the "on-premises" and "off-premises" sale of unfortified wine.
☐ FOR
☐ AGAINST
(2) To permit the "on-premises" sale only of unfortified wine.
☐ FOR
☐ AGAINST
(3) To permit the "off-premises" sale only of unfortified wine.
☐ FOR
☐ AGAINST

(e) Determining Results of Unfortified Wine Election. — The kind of unfortified wine sales described in each proposition that receives a majority of votes "FOR" shall be allowed. If one of the propositions receiving a majority of votes "FOR" is proposition (1), then the kind of sales described in that proposition shall be allowed, regardless of the vote on any other proposition at that election.

(f) Subsequent Unfortified Wine Election. — A subsequent election in which a majority votes "AGAINST" unfortified wine proposition (1) shall not affect the legality of sales previously approved under proposition (2) or (3).

(g) ABC Store Elections. — The ballot for an ABC store election shall state the proposition as follows:

To permit the operation of ABC stores.
☐ FOR
☐ AGAINST

(h) Mixed Beverage Elections. — The ballot for a mixed beverage election shall state the proposition as follows:

To permit the sale of mixed beverages in hotels, restaurants, private clubs, and convention centers.
☐ FOR
☐ AGAINST

(1947, c. 1084, ss. 1, 2. 4; 1951, c. 999, ss. 1, 2; 1957, c. 816; 1963, c. 265, ss. 1-3; 1965, c. 506; 1969, c. 647, s. 1; 1971, c. 872, s. 1; 1973, c. 33; 1977, c. 149, s. 1; c. 182, s. 2; 1979, c. 140, s. 3; c. 683, s. 13; 1981, c. 412, s. 2.)

§ 18B-603. Effect of alcoholic beverage elections on issuance of permits.

(a) Malt Beverage Elections. — If a malt beverage election is held under G.S. 18B-602(a) and the sale of malt beverages is approved, the Commission may issue permits to qualified persons and establishments in the jurisdiction that held the election as follows:

(1) If on-premises sales are approved, the Commission may issue on-premises malt beverage permits.
(2) If off-premises sales are approved, the Commission may issue off-premises malt beverage permits.
(3) If both on-premises and off-premises sales are approved, the Commission may issue both on-premises and off-premises malt beverage permits.
(4) If the kinds of sales described in G.S. 18B-602(a)(4) are approved, the Commission may issue on-premises malt beverage permits to restaurants and hotels only and off-premises malt beverage permits to other permittees.

(b) Unfortified Wine Elections. — If an unfortified wine election is held under G.S. 18B-602(d) and the sale of unfortified wine is approved, the Commission may issue permits to qualified persons and establishments in the jurisdiction that held the election as follows:

(1) If on-premises sales are approved, the Commission may issue on-premises unfortified wine permits.

(2) If off-premises sales are approved, the Commission may issue off-premises unfortified wine permits.

(3) If both on-premises and off-premises sales are approved, the Commission may issue both on-premises and off-premises unfortified wine permits.

(c) ABC Store Elections. — If an ABC store election is held under G.S. 18B-602(g) and the establishment of ABC stores is approved, each of the following shall be authorized in the jurisdiction that held the election:

(1) The jurisdiction that held the election may establish and operate ABC stores in the manner described in Articles 7 and 8.

(2) The Commission may issue on-premises and off-premises fortified wine and unfortified wine permits to qualified persons and establishments in that jurisdiction, regardless of any unfortified wine election or any local act.

(3) The Commission may issue brown-bagging permits for restaurants and hotels in the county in which the election was held, whether the election was held by the county or by a city or other jurisdiction within the county. Brown-bagging permits shall not be issued, however, for restaurants or hotels in any jurisdiction in which the sale of mixed beverages has been approved.

(d) Mixed Beverage Elections. — If a mixed beverage election is held under G.S. 18B-602(h) and the sale of mixed beverages is approved, the Commission may issue permits to qualified persons and establishments in the jurisdiction that held the election as follows:

(1) The Commission may issue mixed beverage permits.

(2) The Commission may issue on-premises malt beverage, unfortified wine, and fortified wine permits for establishments with mixed beverage permits, regardless of any other election or any local act concerning sales of those kinds of alcoholic beverages.

(3) The Commission may issue off-premises malt beverage permits to any establishment that meets the requirements under G.S. 18B-1001(2) in any township which has voted to permit the sale of mixed beverages, regardless of any other local act concerning sales of those kinds of alcoholic beverages.

(4) The Commission may issue brown-bagging permits for private clubs, but may no longer issue and may not renew brown-bagging permits for restaurants and hotels. A restaurant or hotel shall not be issued a mixed beverage permit under subdivision (1) until it surrenders its brown-bagging permit.

(5) The Commission may continue to issue culinary permits for establishments that do not have mixed beverage permits. An establishment may not be issued a mixed beverage permit under subdivision (1) until it surrenders its culinary permit.

In any county in which the sale of mixed beverages has been approved in elections in at least three cities that, combined, contain more than two-thirds the total county population as of the most recent federal census, the county board of commissioners may by resolution approve the sale of mixed beverages throughout the county, and the Commission may issue permits as if mixed beverages had been approved in a county election.

(e) Mixed Beverages at Airports. — When the sale of mixed beverages has been approved in a city election, the Commission may also issue permits under subsection (d) for qualified establishments outside the city but within the same county, if:

(1) The establishment is on the property of an airport;

(2) The airport is operated by the city or by an airport authority in which the city participates; and

(3) The airport services planes which board at least 150,000 passengers annually.

(f) Permits Not Dependent on Elections. — The Commission may issue the following kinds of permits without approval at an election:

(1) Special occasion permits;

(2) Limited special occasion permits;

(3) Brown-bagging permits for private clubs;

(4) Culinary permits, except as restricted by subdivision (d)(4);

(5) Special one-time permits issued under G.S. 18B-1002;

(6) All permits listed in G.S. 18B-1100(a).

(g) Miscellaneous. — The definitions in G.S. 18B-1000 shall apply to this section. (1947, c. 1084, s. 3; 1969, c. 647, s. 2; 1971, c. 872, s. 1; 1981, c. 412, s. 2; c. 589.)

Effect of Amendments. — The 1981 amendment renumbered subdivisions (d)(3) and (d)(4) as subdivisions (d)(4) and (d)(5), respectively, and added subdivision (d)(3).

§ 18B-604. Timing and effect of subsequent elections.

(a) Time Limits. — No county alcoholic beverage election may be held within three years of the certification of the results of a previous election on the same kind of alcoholic beverages in that county. No city alcoholic beverage election may be held within three years of the certification of the results of a previous election on the same kind of alcoholic beverage in that city. Otherwise, alcoholic beverage elections may be held at any time, subject to the applicable provisions of this Chapter and Chapter 163.

(b) Effect of Favorable County Vote on City. — If a majority of voters vote in favor of certain alcoholic beverage sales in a county election, sale of that kind of alcoholic beverage shall be lawful throughout the county, regardless of the vote in any city at that or any previous election, and regardless of any local act making sales unlawful in that city, unless the local act was ratified before the effective date of Article II, Section 24(1)(j) of the Constitution of North Carolina. A county malt beverage or unfortified [wine] election in favor of a particular ballot proposition which is more restrictive than the form of sale already allowed in a city within that county shall not affect the legality of those previously authorized sales in the city.

(c) Effect of Negative County Vote on City. — If a majority of voters vote against certain alcoholic beverage sales in a county election, sale of that kind of alcoholic beverage shall be unlawful throughout the county, except that sale of that alcoholic beverage shall remain lawful in any city in which sale is lawful because of a city election or a local act.

(d) Effect of City Election on County. — A city alcoholic beverage election shall not affect the lawfulness of sale in any part of the county outside that city.

(e) ABC Store Required for Mixed Beverages. — The sale of mixed beverages may not continue in a city or county at any time after the ABC stores which are requisite to mixed beverage sales have closed.

(f) When Sales Stop. — When the sale of any alcoholic beverage that was previously lawful becomes unlawful because of an election, the sale of that alcoholic beverage shall cease 90 days after certification of the results of the election. (1937, c. 49, ss. 25, 26; c. 431; 1947, c. 1084, ss. 1, 2, 4; 1951, c. 999, ss. 1, 2; 1957, c. 816; 1963, c. 265, ss. 1-3; 1965, c. 506; 1969, c. 647, s. 1; 1971, c. 872, s. 1; 1973, cc. 32, 33; 1977, c. 149, s. 1; c. 182, s. 2; 1977, 2nd Sess., c. 1138, s. 15; 1979, c. 140, ss. 2, 3; c. 609, s. 1; c. 683, s. 13; 1979, 2nd Sess., c. 1174; 1981, c. 412, s. 2.)

Editor's Note. — Session Laws 1981, c. 412, s. 9, provides that all local, public-local, and private acts in conflict with Article 6 of Chapter 18B are repealed except as provided in subsections (b) and (c) of this section and in § 18B-605.

§ 18B-605. Local act elections.

If a jurisdiction has voted in favor of ABC stores or in favor of the sale of some kind of alcoholic beverage, pursuant to a local act enacted before the effective date of this Chapter, and the jurisdiction would not be eligible to hold another election under the conditions set by G.S. 18B-600, then that jurisdiction may hold subsequent elections under the terms of the applicable local act. Except for the authority to hold the election, however, the procedures of this Chapter shall apply to any subsequent election. (1981, c. 412, s. 2.)

Editor's Note. — Session Laws 1981, c. 412, s. 9, provides that all local, public-local, and private acts in conflict with Article 6 of Chapter 18B are repealed except as provided in § 18B-604(b) and (c) and in this section.

ARTICLE 7.

Local ABC Boards.

§ 18B-700. Appointment and organization of local ABC boards.

(a) Membership. — A local ABC board shall consist of three members appointed for three-year terms, unless a different membership or term is provided by a local act enacted before the effective date of this Chapter, or unless the board is a board for a merged ABC system under G.S. 18B-703 and a different size membership has been provided for as part of the negotiated merger. One member of the initial board of a newly created ABC system shall be appointed for a three-year term, one member for a two-year term, and one member for a one-year term. As the terms of initial board members expire, their successors shall each be appointed for three-year terms. The appointing authority shall designate one member of the local board as chairman.

(b) City Boards. — City ABC board members shall be appointed by the city governing body, unless a different method of appointment is provided in a local act enacted before the effective date of this Chapter.

(c) County Boards. — County ABC board members shall be appointed by the board of county commissioners, unless a different method of appointment is provided in a local act enacted before the effective date of this Chapter.

(d) Qualifications. — The appointing authority shall appoint members of a local board on the basis of the appointees' interest in public affairs, good judgment, knowledge, ability, and good moral character.

(e) Vacancy. — A vacancy on a local board shall be filled by the appointing authority for the remainder of the unexpired term. If the chairman's seat becomes vacant, the appointing authority may designate either the new member or an existing member of the local board to complete the chairman's term.

(f) Removal. — A member of a local board may be removed for cause at any time by the appointing authority. Local board members are subject to the removal provisions of G.S. 18B-202.

(g) Salary. — A local board member may be compensated as determined by the appointing authority.

(h) Conflict of Interest. — The provisions of G.S. 18B-201 shall apply to local board members and employees.

(i) Bond. — Before taking office, a local board member shall deposit with the Commission a bond of five thousand dollars ($5,000), secured by a corporate surety, for the faithful performance of his duties. The bond shall be payable to the State of North Carolina and to the city or county for which the local board is established and shall be approved by the Commission and by the authority appointing the local board member. The appointing authority may exempt from this bond requirement any board member who does not handle board funds, and it may also increase the amount of the bond for any member who does handle board funds. (1981, c. 412, s. 2; c. 747, s. 50.)

Local Modification. — Mecklenburg: 1981, c. 331.

Editor's Note. — Session Laws 1981, c. 412, s. 8, provides that all local, public-local, and private acts in conflict with this section are repealed except as provided in this section.

Effect of Amendments. — The 1981 amendment added "or unless the board is a board for a merged ABC system under G.S. 18B-703 and a different size membership has been provided for as part of the negotiated merger" at the end of the first sentence of subsection (a).

§ 18B-701. Powers of local ABC boards.

A local board shall have authority to:

(1) Buy, sell, transport, and possess alcoholic beverages as necessary for the operation of its ABC stores;
(2) Adopt rules for its ABC system, subject to the approval of the Commission;
(3) Hire and fire employees for the ABC system;
(4) Designate one employee as manager of the ABC system and determine his responsibilities;
(5) Require bonds of employees as provided in the rules of the Commission;
(6) Operate ABC stores as provided in Article 8;
(7) Issue purchase-transportation permits as provided in Article 4;
(8) Employ local ABC officers or make other provision for enforcement of ABC laws as provided in Article 5;
(9) Borrow money as provided in G.S. 18B-702;
(10) Buy and lease real and personal property, and receive property bequeathed or given, as necessary for the operation of the ABC system;
(11) Invest surplus funds as provided in G.S. 18B-702;
(12) Dispose of property in the same manner as a city council may under Article 12 of Chapter 160A of the General Statutes; and
(13) Perform any other activity authorized or required by the ABC law. (1937, c. 49, ss. 10, 12; cc. 411, 431; 1939, c. 98; 1957, cc. 1006, 1334; 1963, c. 1119, s. 2; 1967, c. 1178; 1969, cc. 118, 902; 1971, c. 872, s. 1; 1973, cc. 85, 185; c. 1000, ss. 1, 2; 1977, c. 618; 1979, c. 467, s. 20; c. 617; 1981, c. 412, s. 2.)

Editor's Note. — Session Laws 1981, c. 412, s. 7, provides that all local, public-local, and private acts in conflict with this section are repealed.

Legal Periodicals. — For article "A History of Liquor-by-the-Drink Legislation in North Carolina," see 1 Campbell L. Rev. 61 (1979).

§ 18B-702. Financial operations of local boards.

(a) Generally. — A local board may transact business as a corporate body, except as limited by this section. A local board shall not be considered a public authority under G.S. 159-7(b)(10).

(b) Borrowing Money. — A local board may borrow money only for the purchase of land, buildings, equipment and stock needed for the operation of its ABC system. A local board may pledge a security interest in any real or personal property it owns other than alcoholic beverages. A city or county whose governing body appoints a local board shall not in any way be held responsible for the debts of that board.

(c) Audits. — A local board shall submit to the Commission an annual independent audit of its operations, performed in accordance with generally accepted accounting standards and in compliance with a chart of accounts prescribed by the Commission. The audit report shall contain a summary of the requirements of this Chapter, or of any local act applicable to that local board, concerning the distribution of profits of that board and a description of how those distributions have been made, including the names of recipients of the profits and the activities for which the funds were distributed. A local board shall also submit to any other audits and submit any reports demanded by the Commission.

(d) Deposits and Investments. — A local board may deposit moneys at interest in any bank or trust company in this State in the form of savings accounts or certificates of deposit. Investment deposits shall be secured as provided in G.S. 159-31(b) and the reports required by G.S. 159-33 shall be submitted. A local board may invest all or part of the cash balance of any fund as provided in G.S. 159-30(c), and may deposit any portion of those funds for investment with the State Treasurer in the same manner as State boards and commissions under G.S. 147-69.3.

(e) Compliance with Commission Rules. — The Commission shall adopt, and each local board shall comply with, fiscal control rules concerning the borrowing of money, maintenance of working capital, investments, appointment of a financial officer, daily deposit of funds, bonding of employees, auditing of operations, and the schedule, manner and other procedures for distribution of profits. The Commission may also adopt any other rules concerning the financial operations of local boards which are needed to assure the proper accountability of public funds. (1937, c. 49, ss. 10, 12; cc. 411, 431; 1939, c. 98; 1957, cc. 1006, 1335; 1963, c. 1119, s. 2; 1967, c. 1178; 1969, cc. 118, 902; 1971, c. 872, s. 1; 1973, cc. 85, 185; c. 1000, ss. 1, 2; 1977, c. 618; 1979, c. 467, s. 20; c. 617; 1981, c. 412, s. 2.)

Editor's Note. — Session Laws 1981, c. 412, s. 7, provides that all local, public-local, and private acts in conflict with this section are repealed.

§ 18B-703. Merger of local ABC operations.

(a) Conditions for Merger. — Any city governing body or board of county commissioners may merge its ABC system with the system of one or more other cities or counties if:

(1) Stores operated by the systems of those jurisdictions serve the same general area or are in close proximity to each other; and

(2) The merger is approved by the Commission.

(b) Appointment of Board. — Upon merger of ABC systems, the local boards for those systems shall be replaced by one board appointed jointly by the appointing authorities for the previous boards.

(c) Distribution of Profits. — Before merger, the cities or counties involved shall agree upon a formula for distribution of the profits of the new merged ABC system, based as closely as practicable on the distribution previously authorized for the separate systems. This formula for distribution shall be subject to approval by the Commission.

(d) Enforcement. — Local officers hired by the local ABC board for the merged ABC system shall have the same territorial jurisdiction that officers for each of the merged boards would have.

(e) Dissolution. — With the approval of the Commission, the cities or counties that have merged their ABC systems may dissolve the merged operation at any time and resume their prior separate operations.

(f) Other Details Negotiated. — Issues not addressed in this section concerning the merger or dissolution of ABC systems, such as the method of appointment of the merged board, the size of the merged board, or the procedure for dissolution, may be negotiated by the affected cities and counties, subject to the approval of the Commission.

(g) Operation Follows General Law. — Except as otherwise provided in this section, the authority and operation of any local board established under this section shall be the same as for any other local board. (1981, c. 412, s. 2; c. 747, s. 51.)

Effect of Amendments. — The 1981 amendment inserted "the size of the merged board," in subsection (f).

Article 8.

Operation of ABC Stores.

§ 18B-800. Sale of alcoholic beverages in ABC stores.

(a) Spirituous Liquor. — Except as provided in Article 10 of this Chapter, spirituous liquor may be sold only in ABC stores operated by local boards.

(b) Other Alcoholic Beverages. — In addition to spirituous liquor, ABC stores may sell the following:

(1) Fortified wine, and

(2) Unfortified wine derived principally from fruits or berries grown in North Carolina.

(c) Commission Approval. — No ABC store may sell any alcoholic beverage which has not been approved by the Commission for sale in this State. (1981, c. 412, s. 2.)

Editor's Note. — Session Laws 1981, c. 412, s. 7, provides that all local, public-local, and private acts in conflict with this section are repealed.

§ 18B-801. Location, opening, and closing of stores.

(a) Number of Stores. — Each local board shall have the authority and duty to operate one ABC store. Additional stores may be operated with the approval of the Commission.

(b) Location of Stores. — A local board may choose the location of the ABC stores within its jurisdiction, subject to the approval of the Commission. In making its decision on a location, the Commission may consider:

(1) Whether the health, safety, or general welfare of the community will be adversely affected; and

(2) Whether the citizens of the community or city in which the proposed store is to be located voted for or against ABC stores in the last election on the question.

(c) Closing of Stores. — Subject to the provisions of subsection (a), a local board may close, or the Commission may order a local board to close, any store when the local board or the Commission determines that:

(1) The operation of the store is not sufficiently profitable to justify its continuation;
(2) The store is not operated in accordance with the ABC law; or
(3) The continued operation of that store will adversely affect the health, safety, or general welfare of the community in which the store operates. (1981, c. 412, s. 2.)

§ 18B-802. When stores operate.

(a) Time. — No ABC store shall be open, and no ABC store employee shall sell alcoholic beverages, between 9:00 P.M. and 9:00 A.M. The local board shall otherwise determine opening and closing hours of its stores.

(b) Days. — No ABC store shall be open, and no ABC store employee shall sell alcoholic beverages, on any Sunday, New Year's Day, Fourth of July, Labor Day, Thanksgiving Day, or Christmas Day. A local board may otherwise determine the days on which its stores shall be closed. (1981, c. 412, s. 2.)

Editor's Note. — Session Laws 1981, c. 412, s. 7, provides that all local, public-local, and private acts in conflict with this section are repealed.

§ 18B-803. Store management.

(a) Manager. — A local board shall provide for the management of each store operated by it. The board shall employ at least one manager for each store, who shall operate the store pursuant to the directions of that board.

(b) Bonding of Manager. — As a prerequisite to employment, each manager shall deposit with the local board a bond in an amount fixed by the board, secured by a corporate surety, for the faithful performance of his duties. The bond shall be payable to the State of North Carolina and to the city or county for which the local board is established and shall be approved by the Commission.

(c) Bonding of Other Employees. — A local board may require any of its other employees who handle board funds to obtain bonds in the manner prescribed in subsection (b). (1981, c. 412, s. 2.)

Editor's Note. — Session Laws 1981, c. 412, s. 7, provides that all local, public-local, and private acts in conflict with this section are repealed.

§ 18B-804. Alcoholic beverage pricing.

(a) Uniform Price of Spirituous Liquor. — The retail price of spirituous liquor sold in ABC stores shall be uniform throughout the State, unless otherwise provided by the ABC law.

(b) Sale Price of Spirituous Liquor. — The sale price of spirituous liquor shall consist of the following components:
(1) The distiller's price;
(2) The freight and bailment charges of the State warehouse as determined by the Commission;
(3) A markup for local boards as determined by the Commission;
(4) The tax levied under G.S. 105-113.93, which shall be levied on the sum of subdivisions (1), (2), and (3);
(5) An additional markup for local boards equal to three and one-half percent (3 ½%) of the sum of subdivisions (1), (2), and (3);
(6) A bottle charge of one cent (1¢) on each bottle containing 50 milliliters or less and five cents (5¢) on each bottle containing more than 50 milliliters;

(7) A rounding adjustment, the formula of which may be determined by the Commission, so that the sale price will be divisible by five; and

(8) If the spirituous liquor is sold to a mixed beverage permittee for resale in mixed beverages, a charge of ten dollars ($10.00) on each four liters and a proportional sum on lesser quantities.

(c) Sale Price of Fortified Wine. — The sale price of fortified wine shall include the tax levied by G.S. 105-113.95, as well as State and local sales taxes.

(d) Sale Price of Unfortified Wine. — The sale price of unfortified wine shall include the tax levied by G.S. 105-113.86, as well as State and local sales taxes. (1937, c. 49, s. 4; cc. 237, 411; 1945, c. 954; 1949, c. 974, s. 9; 1961, c. 956; 1963, c. 426, s. 12; c. 916, s. 2; c. 1119, s. 1; 1965, c. 1063; c. 1102, s. 3; 1967, c. 222, s. 2; c. 1240, s. 1; 1971, c. 872, s. 1; 1973, c. 28; c. 473, s. 1; c. 476, s. 133; c. 606; c. 1288, s. 1; cc. 1369, 1396; 1975, cc. 240, 453, 640; 1977, c. 70, ss. 15.1, 15.2, 16; c. 176, ss. 2, 6; 1977, 2nd Sess., c. 1138, ss. 3, 4, 18; 1979, c. 384, s. 1; c. 445, s. 5; c. 482; c. 801, s. 4; 1981, c. 412, s. 2.)

§ 18B-805. Distribution of revenue.

(a) Gross Receipts. — As used in this section, "gross receipts" means all revenue of a local board, including proceeds from the sale of alcoholic beverages, investments, interest on deposits, and any other source.

(b) Primary Distribution. — Before making any other distribution, a local board shall first pay the following from its gross receipts:

(1) The board shall pay the expenses, including salaries, of operating the local ABC system.

(2) Each month the local board shall pay to the Department of Revenue the taxes due the Department.

(3) Each month the local board shall pay to the Department of Human Resources ten percent (10%) of the mixed beverages surcharge required by G.S. 18B-804(b)(8). The Department of Human Resources shall spend those funds for treatment of alcoholism or for research or education on alcohol abuse.

(4) Each month the local board shall pay to the county commissioners of the county where the charge is collected the proceeds from the bottle charge required by G.S. 18B-804(b)(6), to be spent by the county commissioners for the purposes stated in subsection (h) of this section.

(c) Other Statutory Distributions. — After making the distributions required by subsection (b), a local board shall make the following quarterly distributions from the remaining gross receipts:

(1) Before making any other distribution under this subsection, the local board shall set aside the clear proceeds of the three and one-half percent (3 ½%) markup provided for in G.S. 18B-804(b)(5), to be distributed as part of the remaining gross receipts under subsection (e) of this section.

(2) The local board shall spend for law enforcement an amount set by the board which shall be at least five percent (5%) of the gross receipts remaining after the distribution required by subdivision (1). Notwithstanding the provisions of any local act, this provision shall apply to all local boards.

(3) The local board shall spend, or pay to the county commissioners to spend, for the purposes stated in subsection (h), an amount set by the board which shall be at least seven percent (7%) of the gross receipts remaining after the distribution required by subdivision (1). This provision shall not be applicable to a local board which is subject to a local act setting a different distribution.

(d) Working Capital. — After making the distributions provided for in subsections (b) and (c), the local board may set aside a portion of the remaining

gross receipts, within the limits set by the rules of the Commission, as cash to operate the ABC system. With the approval of the appointing authority for the board, the local board may also set aside a portion of the remaining gross receipts as a fund for specific capital improvements.

(e) Other Distributions. — After making the distributions provided in subsections (b), (c), and (d), the local board shall pay each quarter the remaining gross receipts to the general fund of the city or county for which the board is established, unless some other distribution or some other schedule is provided for by law. If the governing body of each city and county receiving revenue from an ABC system agrees, and if the Commission approves, those governing bodies may alter at any time the distribution to be made under this subsection. If any one of the governing bodies later withdraws its consent to the change in distribution, profits shall be distributed according to the original formula, beginning with the next quarter.

(f) Mixed Beverage Profit Shared. — When, pursuant to the last paragraph of G.S. 18B-603(d), spirituous liquor is bought at a city ABC store by a mixed beverages permittee for premises located outside the city, the local board operating the store at which the sale is made shall retain seventy-five percent (75%) of the local share of the mixed beverages surcharge required by G.S. 18B-804(b)(8) and the remaining twenty-five percent (25%) shall be divided equally among the local ABC boards for all other cities in the county that have authorized the sale of mixed beverages.

When, pursuant to G.S. 18B-603(e), spirituous liquor is bought at a city ABC store by a mixed beverages permittee for premises located at an airport outside the city, the local share of the mixed beverages surcharge required by G.S. 18B-804(b)(8) shall be divided equally among the local ABC boards for all cities in the county that have authorized the sale of mixed beverages.

(g) Quarterly Distributions. — When this section requires a distribution to be made quarterly, at least ninety percent (90%) of the estimated distribution shall be paid to the recipient by the local board within 30 days of the end of that quarter. Adjustments in the amount to be distributed resulting from the closing of the books and from audit shall be made with the next quarterly payment.

(h) Expenditure of Alcoholism Funds. — Funds distributed under subdivisions (b)(4) and (c)(3) of this section shall be spent for treatment of alcoholism, or for research or education on alcohol abuse. The minutes of the board of county commissioners or local board spending funds allocated under this subsection shall describe the activity for which the funds are to be spent. Any agency or person receiving funds from the county commissioners or local board under this subsection shall submit an annual report to the board of county commissioners or local board from which funds were received, describing how the funds were spent. (1981, c. 412, s. 2; c. 747, s. 52.)

Editor's Note. — Session Laws 1981, c. 412, s. 8, provides that all local, public-local, and private acts in conflict with this section are repealed except as provided in this section.

Effect of Amendments. — The 1981 amendment rewrote the first paragraph in subsection (f) and added the second paragraph in subsection (f).

Legal Periodicals. — For article "A History of Liquor-by-the-Drink Legislation in North Carolina," see 1 Campbell L. Rev. 61 (1979).

§ 18B-806. Damaged alcoholic beverages.

(a) Owned by Local Board. — All damaged alcoholic beverages owned by a local board shall be destroyed, given to a public or private hospital for medicinal use only, or given to the Commission.

(b) Not Owned by Local Board. — The Commission shall dispose of all damaged alcoholic beverages which are:

(1) Owned by the Commission;
(2) Damaged while in the State warehouse; or
(3) Damaged while in transit between the State warehouse and a local board.

The Commission shall dispose of the alcoholic beverages by giving them to a public or private hospital for medicinal use only, by selling them to a military installation, or by destroying them.

(c) Sale Procedure. — If damaged alcoholic beverages are sold under subsection (b), sale shall be by:

(1) Advertisement for sealed bids;
(2) Negotiated offer, advertisement and upset bids; or
(3) Exchange.

Funds derived from the sale of damaged alcoholic beverages shall be paid to the general fund of the State.

(d) Records. — Local boards and the Commission shall keep detailed records of all disposals of damaged alcoholic beverages, including brand, quantity and disposition. (1981, c. 412, s. 2.)

§ 18B-807. Rules.

The Commission may adopt rules concerning the organization and operation of self-service ABC stores, the size of ABC store signs, the display of alcoholic beverages, solicitation in and around ABC stores, and any other subject relating to the efficient operation of ABC stores. (1981, c. 412, s. 2.)

ARTICLE 9.

Issuance of Permits.

§ 18B-900. Qualifications for permit.

(a) Requirements. — To be eligible to receive and to hold an ABC permit, a person shall:

(1) Be at least 21 years old, unless the person is a manager of a business selling only malt beverages and unfortified wine, in which case the person shall be at least 18 years old;
(2) Be a resident of North Carolina unless:
   a. He is an officer, director or stockholder of a corporate applicant or permittee and is not a manager or otherwise responsible for the day-to-day operation of the business; or
   b. He has executed a power of attorney designating a qualified resident of this State to serve as attorney in fact for the purposes of receiving service of process and managing the business for which permits are sought; or
   c. He is applying for a nonresident malt beverage vendor permit, a nonresident wine vendor permit, or a vendor representative permit;
(3) Not have been convicted of a felony within three years, and, if convicted of a felony before then, shall have had his citizenship restored;
(4) Not have been convicted of an alcoholic beverage offense within two years;
(5) Not have been convicted of a misdemeanor controlled substance offense without two years; and
(6) Not have had an alcoholic beverage permit revoked within three years.

(b) Definition of Conviction. — A person has been "convicted" for the purposes of subsection (a) when he has been found guilty, or has entered a plea of guilty or nolo contendere, and judgment has been entered against him. A felony conviction in another jurisdiction shall disqualify a person from being eligible to receive or hold an ABC permit if his conduct would also constitute a felony in North Carolina. A conviction of an alcoholic beverage offense or misdemeanor drug offense in another jurisdiction shall disqualify a person from being eligible to receive or hold an ABC permit if his conduct would constitute an offense in North Carolina, unless the Commission determines that under North Carolina procedure judgment would not have been entered under the same circumstances. Revocation of a permit in another jurisdiction shall disqualify a person if his conduct would be grounds for revocation in North Carolina.

(c) Who Must Qualify; Exceptions. — For an ABC permit to be issued to and held for a business, each of the following persons associated with that business must qualify under subsection (a):

(1) The owner of a sole proprietorship;
(2) Each member of a firm, association or partnership;
(3) Each officer, director and owner of more than twenty-five percent (25%) of the stock of a corporation;
(4) The manager of an establishment operated by a corporation other than an establishment with only off-premises malt beverage, off-premises unfortified wine, or off-premises fortified wine permits;
(5) Any manager who has been empowered as attorney in fact for a nonresident individual or partnership.

(d) Manager of Off-Premises Establishment. — Although he need not otherwise meet the requirements of this section, the manager of an establishment operated by a corporation and holding off-premises permits for malt beverages, unfortified wine, or fortified wine shall be at least 18 years old and shall meet the requirements of subdivisions (3), (4), (5) and (6) of subsection (a).

(e) Convention Centers. — With the approval of the Commission, the manager of a convention center may contract with another person to provide food and beverages at conventions and banquets at the convention center, and that person may engage in the activities authorized by the convention center's permit, under conditions set by the Commission. The person with whom the convention center contracts must meet the qualifications of this section. (1949, c. 974, ss. 1, 2; 1963, c. 119; c. 426, s. 12; 1965, c. 326; 1971, c. 872, s. 1; 1973, c. 758, s. 2; c. 1012; 1975, c. 19, s. 5; 1977, c. 70, s. 19.1; c. 668, s. 3; c. 977, ss. 1, 2; 1979, c. 286, s. 4; 1981, c. 412, s. 2; c. 747, ss. 53, 54.)

Effect of Amendments. — The 1981 amendment rewrote paragraph c of subdivision (a)(2), and added "and shall meet the requirements of subdivisions (3), (4), (5) and (6) of subsection (a)" at the end of subsection (d).

The 1981 amendment was made effective on ratification (June 30, 1981); however, Session Laws 1981, c. 412, s. 11, as amended by Session Laws 1981, c. 747, s. 67, provides, in part: "In addition, those portions of Section 2 that contain G.S. 18B-107, G.S. 18B-900(e), G.S. 18B-1000(7), and the portions of G.S. 18B-1001 concerning convention centers shall become effective July 1, 1981."

§ 18B-901. Issuance of permits.

(a) Who Issues. — All ABC permits shall be issued by the Commission. Purchase-transportation permits shall be issued by local boards under G.S. 18B-403.

(b) Notice to Local Government. — Before issuing an ABC permit, for an establishment, the Commission shall give notice of the permit application to the governing body of the city in which the establishment is located. If the establishment is not inside a city, the Commission shall give notice to the

governing body of the county. The Commission shall allow the local governing body 10 days from the time the notice was mailed or delivered to file written objection to the issuance of the permit. To be considered by the Commission, the objection shall state the facts upon which it is based.

(c) Factors in Issuing Permit. — Before issuing a permit, the Commission shall be satisfied that the applicant is a suitable person to hold an ABC permit and that the location is a suitable place to hold the permit for which he has applied. To be a suitable place, the establishment shall comply with all applicable building and fire codes. Other factors the Commission may consider in determining whether the applicant and the business location are suitable are:

(1) The reputation, character, and criminal record of the applicant;
(2) The number of places already holding ABC permits within the neighborhood;
(3) Parking facilities and traffic conditions in the neighborhood;
(4) Kinds of businesses already in the neighborhood;
(5) Whether the establishment is located within 50 feet of a church or public school or church school;
(6) Zoning laws;
(7) The recommendations of the local governing body; and
(8) Any other evidence that would tend to show whether the applicant would comply with the ABC laws and whether operation of his business at that location would be detrimental to the neighborhood.

(d) Commission's Authority. — The Commission shall have the sole power, in its discretion, to determine the suitability and qualifications of an applicant for a permit. (1945, c. 903, s. 1; 1947, c. 1098, ss. 2, 3; 1949, c. 974, s. 1; 1957, cc. 1048, 1448; 1963, c. 426, ss. 10, 12; c. 460, s. 1; 1971, c. 872, s. 1; 1973, c. 476, s. 128; 1975, c. 586, s. 1; c. 654, ss. 1, 2; c. 722, s. 1; 1977, c. 70, s. 19; c. 182, s. 1; c. 669, ss. 1, 2; c. 676, ss. 1, 2; c. 911; 1979, c. 348, ss. 2, 3; c. 683, ss. 5, 6, 11, 12; 1981, c. 412, s. 2.)

§ 18B-902. Application for permit; fees.

(a) Form. — An application for an ABC permit shall be on a form prescribed by the Commission and shall be notarized. The application shall be signed and sworn to by each person required to qualify under G.S. 18B-900(c).

(b) Investigation. — Before issuing a new permit, the Commission, with the assistance of the ALE Division, shall investigate the applicant and the premises for which the permit is requested. The Commission may request the assistance of local ABC officers in investigating applications. An applicant shall cooperate fully with the investigation.

(c) False Information. — Knowingly making a false statement in an application for an ABC permit shall be grounds for denying, suspending, revoking or taking other action against the permit as provided in G.S. 18B-104 and shall also be unlawful.

(d) Fees. — An application for an ABC permit shall be accompanied by payment of the following application fee:

(1) On-premises malt beverage permit — $100.00.
(2) Off-premises malt beverage permit — $100.00.
(3) On-premises unfortified wine permit — $100.00.
(4) Off-premises unfortified wine permit — $100.00.
(5) On-premises fortified wine permit — $100.00.
(6) Off-premises fortified wine permit — $100.00.
(7) Brown-bagging permit — $200.00, unless the application is for a restaurant seating less than 50, in which case the fee shall be $100.00.
(8) Special occasion permit — $200.00.

(9) Limited special occasion permit — $25.00.
(10) Mixed beverages permit — $500.00.
(11) Culinary permit — $100.00.
(12) Unfortified winery permit — $100.00.
(13) Fortified winery permit — $100.00.
(14) Limited winery permit — $100.00.
(15) Brewery permit — $100.00.
(16) Distillery permit — $100.00.
(17) Fuel alcohol permit — $10.00.
(18) Wine importer permit — $100.00.
(19) Wine wholesaler permit — $100.00.
(20) Malt beverage importer permit — $100.00.
(21) Malt beverage wholesaler permit — $100.00.
(22) Bottler permit — $100.00.
(23) Salesman permit — $25.00.
(24) Vendor representative permit — $25.00.
(25) Nonresident malt beverage vendor permit — $25.00.
(26) Nonresident wine vendor permit — $25.00.
(27) Any special one-time permit under G.S. 18B-1002 — $25.00.

(e) Fee for Combined Applications. — If application is made at the same time for retail malt beverage, unfortified wine and fortified wine permits for a single business location, the total fee for those applications shall be one hundred dollars ($100.00). If application is made at the same time for brown-bagging and special occasion permits for a single business location, the total fee for those applications shall be three hundred dollars ($300.00). If application is made at the same time for wine and malt beverage importer permits, the total fee for those applications shall be one hundred dollars ($100.00). If application is made at the same time for wine and malt beverage wholesaler permits, the total fee for those applications shall be one hundred dollars ($100.00). If application is made in the same year for vendor representative permits to represent more than one vendor, only one fee shall be paid. If application is made at the same time for nonresident malt beverage vendor and nonresident wine vendor permits, the total fee for those applications shall be twenty-five dollars ($25.00).

(f) Fee Not Refundable. — The fee required by subsection (d) shall not be refundable even if the permit is denied or is later suspended or revoked.

(g) Fees to Treasurer. — All fees collected by the Commission under this or any other section of this Chapter shall be remitted to the State Treasurer for the General Fund. (1949, c. 974, ss. 1, 2; 1963, c. 119; c. 426, s. 12; 1965, c. 326; 1971, c. 872, s. 1; 1973, c. 758, s. 2; c. 1012; 1975, c. 19, s. 5; 1977, c. 70, s. 19.1; c. 668, s. 3; c. 977, ss. 1, 2; 1979, c. 286, s. 4; 1981, c. 412, s. 2; c. 747, ss. 55, 56.)

Effect of Amendments. — The 1981 amendment added subdivisions (24)-(26) of subsection (d), redesignated the original subdivision (24) of subsection (d) as subdivision (27), and added the last two sentences in subsection (e).

§ 18B-903. Duration of permit; renewal and transfer.

(a) Duration. — Once issued, ABC permits shall be valid for the following periods, unless earlier surrendered, suspended or revoked:

(1) On-premises and off-premises malt beverage, unfortified wine, and fortified wine permits; culinary permits; and all permits listed in G.S. 18B-1100 shall remain valid indefinitely;

(2) Limited special occasion permits shall be valid for 48 hours before and after the occasion for which the permit was issued;

(3) Special one-time permits issued under G.S. 18B-1002 shall be valid for the period stated on the permit;
(4) Temporary permits issued under G.S. 18B-905 shall be valid for 90 days; and
(5) All other ABC permits shall be valid for one year, from May 1 to April 30.

(b) Renewal. — Application for renewal of an ABC permit shall be on a form provided by the Commission. An application for renewal shall be accompanied by an application fee of twenty-five percent (25%) of the original application fee set in G.S. 18B-902, except that the renewal application fee for a mixed beverages permit shall be fifty percent (50%) of the original fee. A renewal fee shall not be refundable.

(c) Change in Ownership. — All permits for an establishment shall automatically expire and shall be surrendered to the Commission if:
(1) Ownership of the establishment changes; or
(2) There is a change in the membership of the firm, association or partnership owning the establishment, involving the acquisition of a twenty-five percent (25%) or greater share in the firm, association or partnership by someone who did not previously own a twenty-five percent (25%) or greater share; or
(3) Twenty-five percent (25%) or more of the stock of the corporate permittee owning the establishment is acquired by someone who did not previously own twenty-five percent (25%) or more of the stock.

(d) Change in Management. — A corporation holding a permit for an establishment for which the manager is required to qualify as an applicant under G.S. 18B-900(c) shall, within 30 days after employing a new manager, submit to the Commission an application for substitution of a manager. The application shall be signed by the new manager, shall be on a form provided by the Commission, and shall be accompanied by a fee of ten dollars ($10.00). The fee shall not be refundable.

(e) Transfer. — An ABC permit may not be transferred from one person to another or from one location to another. (1971, c. 872, s. 1; 1975, c. 330, s. 1; c. 411, s. 4; 1981, c. 412, s. 2; c. 747, s. 57.)

Effect of Amendments. — The 1981 amendment added subsection (e).

§ 18B-904. Miscellaneous provisions concerning permits.

(a) Who Receives Permit. — An ABC permit shall be issued to the owner of an establishment and shall authorize the permitted activity only on the premises of the establishment named in the permit.

(b) Posting Permit. — Each ABC permit that is held by an establishment shall be posted in a prominent place on the premises.

(c) Business Not Operating. — An ABC permit shall automatically expire and shall be surrendered to the Commission if the person to whom it is issued does not commence the activity authorized by the permit within six months of the date the permit is effective. Before the expiration of the six-month period, the Commission may waive this provision in individual cases for good cause.

(d) Notice of Issuance. — Upon issuing a permit the Commission shall send notice of the issuance, with the name and address of the permittee and the establishment, to:
(1) The Department of Revenue;
(2) The local board, if one exists, for the city or county in which the establishment is located;

(3) The governing body, sheriff, and tax collector of the county in which the establishment is located;
(4) If the establishment is located inside a city, the governing body, chief of police, and tax collector for the city; and
(5) The ALE Division. (1939, c. 158, s. 514; 1943, c. 400, s. 6; 1949, c. 974, s. 14; 1953, c. 1207, ss. 2-4; 1957, c. 1440; 1963, c. 426, ss. 4, 5; 1971, c. 872, s. 1; 1981, c. 412, s. 2; c. 747, s. 58.)

Effect of Amendments. — The 1981 amendment rewrote the last sentence of subsection (c).

§ 18B-905. Temporary permits.

When an application has been received in proper form, with the required application fee, the Commission may issue a temporary permit for any of the activities for which permits are authorized under G.S. 18B-1001 and 18B-1100. A temporary permit may be revoked summarily by the Commission without complying with the provisions of Chapter 150A. Revocation of a temporary permit shall be effective upon service of the notice of revocation upon the permittee or upon the expiration of three working days after the notice of the revocation has been mailed to the permittee at either his residence or the address given for the business in the permit application. No further notice shall be required. (1945, c. 903, s. 1; 1947, c. 1098, ss. 2, 3; 1949, c. 974, s. 1; 1957, cc. 1048, 1448; 1963, c. 426, ss. 10, 12; c. 460, s. 1; 1971, c. 872, s. 1; 1973, c. 476, s. 128; 1975, c. 586, s. 1; c. 654, ss. 1, 2; c. 722, s. 1; 1977, c. 70, s. 19; c. 182, s. 1; c. 669, ss. 1, 2; c. 676, ss. 1, 2; c. 911; 1979, c. 348, ss. 2, 3; c. 683, ss. 5, 6, 11, 12; 1981, c. 412, s. 2.)

§ 18B-906. Applicability of Administrative Procedure Act.

(a) Act Applies. — An ABC permit is a "license" within the meaning of G.S. 150A-2, and a Commission action on issuance, suspension or revocation of an ABC permit, other than a temporary permit issued under G.S. 18B-905, is a "contested case" subject to the provisions of Chapter 150A except as provided in subsection (b).

(b) Exception on Hearing Location. — Hearings on ABC permits shall be held in Ahoskie, Asheville, Bryson City, Charlotte, Elizabeth City, Fayetteville, Franklin, Goldsboro, Greensboro, Greenville, Hickory, Jacksonville, Kinston, New Bern, Raleigh, Statesville, Wilmington, and Winston-Salem. Hearings shall be held within 100 miles, as best can be determined by the Commission, of the county seat of the county in which the licensed business or proposed business is located. The hearing may be held, however, at any place upon agreement of the Commission and all other parties. (1939, c. 158, s. 514; 1943, c. 400, s. 6; 1945, c. 903, s. 1; 1947, c. 1098, ss. 2, 3; 1949, c. 974, ss. 8, 14; 1953, c. 1207, ss. 2-4; 1957, cc. 1048, 1440; 1963, c. 426, ss. 4, 5, 10-12; c. 460, s. 1; 1971, c. 872, s. 1; 1975, c. 825, s. 1; 1977, c. 176, s. 9; 1981, c. 412, s. 2.)

ARTICLE 10.

Retail Activity.

§ 18B-1000. Definitions concerning establishments.

The following requirements and definitions shall apply to this Chapter:

(1) Convention center — A publicly owned or operated establishment that is engaged in the business of sponsoring or hosting conventions and similar large gatherings. Convention centers shall include auditoriums, armories, civic centers, convention centers, and coliseums. A permit issued for a convention center shall be valid only for those parts of the building used for conventions and banquets and only during regularly scheduled conventions and banquets.

(2) Eating establishment — An establishment engaged in the business of regularly and customarily selling food, primarily to be eaten on the premises. Eating establishments shall include businesses that are referred to as restaurants, cafeterias, or cafes, but that do not qualify under subdivision (6). Eating establishments shall also include lunchstands, grills, snack bars, fast-food businesses, and other establishments, such as drugstores, which have a lunch counter or other section where food is sold to be eaten on the premises.

(3) Food business — An establishment engaged in the business of regularly and customarily selling food, primarily to be eaten off the premises. Food businesses shall include grocery stores, convenience stores, and other establishments, such as variety stores or drugstores, where food is regularly sold, and shall also include establishments engaged primarily in selling unfortified or fortified wine or both, for consumption off the premises.

(4) Hotel — An establishment substantially engaged in the business of furnishing lodging. A hotel shall have a restaurant either on or closely associated with the premises. The restaurant and hotel need not be owned or operated by the same person.

(5) Private club — An establishment that is organized and operated solely for a social, recreational, patriotic, or fraternal purpose and that is not open to the general public, but is open only to the members of the organization and their bona fide guests. Except for bona fide religious organizations, no organization that discriminates in the selection of its membership on the basis of religion shall be eligible to receive any permit issued under this Chapter.

(6) Restaurant — An establishment substantially engaged in the business of preparing and serving meals. To qualify as a restaurant, an establishment's gross receipts from food and nonalcoholic beverages shall be greater than its gross receipts from alcoholic beverages. A restaurant shall also have a kitchen and an inside dining area with seating for at least 36 people.

(7) Retail business — An establishment engaged in any retail business, regardless of whether food is sold on the premises. (1905, c. 498, ss. 6-8; Rev., ss. 3526, 3534; C. S., s. 3371; 1937, c. 49, ss. 12, 16, 22; c. 411; 1955, c. 999; 1967, c. 222, ss. 1, 8; c. 1256, s. 3; 1969, c. 1018; 1971, c. 872, s. 1; 1973, c. 1226; 1977, c. 176, s. 1; 1981, c. 412, s. 2.)

Editor's Note. — Session Laws 1981, c. 412, s. 10, as amended by Session Laws 1981, c. 747, s. 64, provides in part: "If the membership or method of appointment of a local ABC board is required to change by this act, the members serving on the board on January 1, 1982, may continue to serve until their present terms expire or until June 30, 1983, whichever occurs first. Thereafter vacancies on the board shall be filled by appointments made in the manner pro-

vided in this act. If, however, the size of the board is reduced by this act, no vacancy may be filled until the board has been reduced by vacancies to the size required by this act."

Session Laws 1981, c. 412, s. 11, as amended by Session Laws 1981, c. 747, s. 65, provides in part: "In addition, those portions of Section 2 that contain G.S. 18B-107, G.S. 18B-900(e), G.S. 18B-1000(7), and the portions of G.S. 18B-1001 concerning convention centers shall become effective July 1, 1981. Establishments qualifying as convention centers under G.S. 18B-1000(7) may be issued on-premises malt beverage, on-premises unfortified wine, special occasion, and mixed beverages permits from and after that date."

Legal Periodicals. — For article "A History of Liquor-by-the-Drink Legislation in North Carolina," see 1 Campbell L. Rev. 61 (1979).

§ 18B-1001. Kinds of ABC permits; places eligible.

When the issuance of the permit is lawful in the jurisdiction in which the premises is located, the Commission may issue the following kinds of permits:

(1) On-premises Malt Beverage Permit. — An on-premises malt beverage permit authorizes the retail sale of malt beverages for consumption on the premises and the retail sale of malt beverages in the manufacturer's original container for consumption off the premises. The permit may be issued for any of the following:
   a. Restaurants;
   b. Hotels;
   c. Eating establishments;
   d. Food businesses;
   e. Retail businesses;
   f. Private clubs;
   g. Convention centers.

(2) Off-premises Malt Beverage Permit. — An off-premises malt beverage permit authorizes the retail sale of malt beverages in the manufacturer's original container for consumption off the premises. The permit may be issued for any of the following:
   a. Restaurants;
   b. Hotels;
   c. Eating establishments;
   d. Food businesses;
   e. Retail businesses.

(3) On-premises Unfortified Wine Permit. — An on-premises unfortified wine permit authorizes the retail sale of unfortified wine for consumption on the premises, either alone or mixed with other beverages, and the retail sale of unfortified wine in the manufacturer's original container for consumption off the premises. The permit may be issued for any of the following:
   a. Restaurants;
   b. Hotels;
   c. Eating establishments;
   d. Private clubs;
   e. Convention centers.

(4) Off-premises Unfortified Wine Permit. — An off-premises unfortified wine permit authorizes the retail sale of unfortified wine in the manufacturer's original container for consumption off the premises. The permit may be issued for food businesses. The permit may also be issued for a winery for sale of its own unfortified wine.

(5) On-premises Fortified Wine Permit. — An on-premises fortified wine permit authorizes the retail sale of fortified wine, either alone or mixed with other beverages, for consumption on the premises. The permit may be issued for any of the following:

a. Restaurants;
b. Hotels;
c. Private clubs.

(6) Off-premises Fortified Wine Permit. — An off-premises fortified wine permit shall authorize the retail sale of fortified wine in the manufacturer's original container for consumption off the premises. The permit may be issued for food businesses. The permit may also be issued for a winery for sale of its own fortified wine.

(7) Brown-bagging Permit. — A brown-bagging permit authorizes each individual patron of a business, with the permission of the permittee, to bring up to four liters of fortified wine or spirituous liquor, or four liters of the two combined, onto the premises and to consume those alcoholic beverages on the premises. The permit may be issued for any of the following:
a. Restaurants;
b. Hotels;
c. Private clubs.

(8) Special Occasion Permit. — A special occasion permit authorizes the host of a reception, party or other special occasion, with the permission of the permittee, to bring fortified wine and spirituous liquor onto the premises of the business and to serve the same to his guests. The permit may be issued for any of the following:
a. Restaurants;
b. Hotels;
c. Eating establishments;
d. Private clubs;
e. Convention centers.

(9) Limited Special Occasion Permit. — A limited special occasion permit authorizes the permittee to bring fortified wine and spirituous liquor onto the premises of a business, with the permission of the owner of that property, and to serve those alcoholic beverages to the permittee's guests at a reception, party, or other special occasion being held there. The permit may be issued to any individual other than the owner or possessor of the premises. An applicant for a limited special occasion permit shall have the written permission of the owner or possessor of the property on which the special occasion is to be held.

(10) Mixed Beverages Permit. — A mixed beverages permit authorizes the retail sale of mixed beverages for consumption on the premises. The permit also authorizes a mixed beverages permittee to obtain a purchase-transportation permit under G.S. 18B-403 and 18B-404, and to use for culinary purposes spirituous liquor lawfully purchased for use in mixed beverages. The permit may be issued for any of the following:
a. Restaurants;
b. Hotels;
c. Private clubs;
d. Convention centers.

(11) Culinary Permit. — A culinary permit authorizes a permittee to possess up to 12 liters of either fortified wine or spirituous liquor, or 12 liters of the two combined, in the kitchen of a business and to use those alcoholic beverages for culinary purposes. The permit may be issued for either of the following:
a. Restaurants;
b. Hotels.

A culinary permit may also be issued to a catering service to allow the possession of the amount of fortified wine and spirituous liquor stated above at the business location of that service and at the cooking site. The permit shall also authorize the caterer to transport those

alcoholic beverages to and from the business location and the cooking site, and use them in cooking. (1945, c. 903, s. 1; 1947, c. 1098, ss. 2, 3; 1949, c. 974, s. 1; 1957, cc. 1048, 1448; 1963, c. 426, ss. 10, 12; c. 460, s. 1; 1971, c. 872, s. 1; 1973, c. 476, s. 128; 1975, c. 586, s. 1; c. 654, ss. 1, 2; c. 722, s. 1; 1977, c. 70, s. 19; c. 182, s. 1; c. 669, ss. 1, 2; c. 676, ss. 1, 2; c. 911; 1979, c. 348, ss. 2, 3; c. 683, ss. 5, 6, 11, 12; 1981, c. 412, s. 2.)

Editor's Note. — Session Laws 1981, c. 412, s. 11, as amended by Session Laws 1981, c. 747, s. 65, provides in part: "In addition, those portions of Section 2 that contain G.S. 18B-107, G.S. 18B-900(e), G.S. 18B-1000(7), and the portions of G.S. 18B-1001 concerning convention centers shall become effective July 1, 1981. Establishments qualifying as convention centers under G.S. 18B-1000(7) may be issued on-premises malt beverage, on-premises unfortified wine, special occasion, and mixed beverages permits from and after that date."

§ 18B-1002. Special one-time permits.

(a) Kinds of Permits. — In addition to the other permits authorized by this Chapter, the Commission may issue permits for the following activities:

(1) A permit may be issued to a person who acquires ownership or possession of alcoholic beverages through bankruptcy, inheritance, foreclosure, judicial sale, or other special occurrence, and who does not already have a permit authorizing the sale of that kind of alcoholic beverage. The permit may authorize the sale or other disposition of the alcoholic beverages in a manner prescribed by the Commission.

(2) A permit may be issued to a nonprofit organization to allow the retail sale of malt beverages, unfortified wine, or fortified wine, or to allow brown-bagging, at a single fund-raising event of that organization. A permit for this purpose shall not be issued to the same organization more than once during each quarter, and shall not be issued for the sale of any kind of alcoholic beverage in a jurisdiction where the sale of that alcoholic beverage is not lawful.

(3) A permit may be issued to a permittee who is going out of business to authorize the sale or other disposition of his alcoholic beverages stock in a manner that would not otherwise be authorized under his permit.

(4) A permit may be issued to a collector of wine or decorative decanters of spirituous liquor authorizing that person to bring into the State, transport, or possess as a collector, a greater amount of those alcoholic beverages than is otherwise authorized by this Chapter, or to sell those alcoholic beverages in a manner prescribed by the Commission.

(b) Intent. — Permits under this section are to be issued only for the limited circumstances listed in subsection (a) of this section and not as substitutes for other permits required by this Chapter.

(c) Conditions of Permit. — A permit issued under this section shall be valid only for the single transaction or the kind of activity specified in the permit and shall be subject to any conditions the Commission may impose as to the time, place and manner of the authorized activity.

(d) Administrative Procedure. — Denial or revocation of a permit under this section shall not entitle the applicant or permittee to a hearing under Chapter 150A. (1977, c. 854, s. 1; 1981, c. 412, s. 2.)

§ 18B-1003. Responsibilities of permittee.

(a) Premises. — For purposes of this Chapter, a permittee shall be responsible for the entire premises for which the permit is issued. The permittee shall keep the premises clean, well-lighted and orderly.

(b) Employees. — For purposes of this Chapter, a permittee shall be responsible for the actions of all employees of the business for which the permit is issued. Each holder of a salesman's permit shall be responsible for all sales and deliveries made by his helpers.

(c) Certain Employees Prohibited. — A permittee shall not knowingly employ in the sale or distribution of alcoholic beverages any person who has been:

(1) Convicted of a felony within three years;
(2) Convicted of a felony more than three years previously and has not had his citizenship restored;
(3) Convicted of an alcoholic beverage offense within two years; or
(4) Convicted of a misdemeanor controlled substances offense within two years.

For purposes of this subsection, "conviction" has the same meaning as in G.S. 18B-900(b). To avoid undue hardship, the Commission may, in its discretion, exempt persons on a case-by-case basis from this subsection. (1981, c. 412, s. 2.)

§ 18B-1004. Hours for sale and consumption.

(a) Hours. — Except as otherwise provided in this section, it shall be unlawful to sell malt beverages, unfortified wine, fortified wine, or mixed beverages between the hours of 1:00 A.M. and 7:00 A.M., or to consume any of those alcoholic beverages between the hours of 1:30 A.M. and 7:00 A.M., in any place which has been issued a permit under G.S. 18B-1001.

(b) Daylight Saving Time. — From the last Sunday in April until the last Sunday in October, sales of alcoholic beverages may continue until 2:00 A.M. rather than 1:00 A.M., and consumption of alcoholic beverages may continue until 2:30 A.M. rather than 1:30 A.M., on any licensed premises.

(c) Sunday Hours. — It shall be unlawful to sell or consume alcoholic beverages on any licensed premises from the time at which sale or consumption must cease on Sunday morning until 1:00 P.M. on that day.

(d) Local Option. — A city may adopt an ordinance prohibiting in the city the retail sale of malt beverages, unfortified wine, and fortified wine during any or all of the hours from 1:00 P.M. on Sunday until 7:00 A.M. on the following Monday. A county may adopt an ordinance prohibiting, in the parts of the county outside any city, the retail sale of malt beverages, unfortified wine, and fortified wine during any or all of the hours from 1:00 P.M. on Sunday until 7:00 A.M. on the following Monday. Neither a city nor a county, however, may prohibit those sales in establishments having brown-bagging or mixed beverages permits. (1943, c. 339, ss. 1-3; 1949, c. 974, s. 12; 1951, c. 997, s. 1; 1953, c. 675, s. 4; 1963, c. 426, ss. 7-9, 12; 1969, c. 1131; 1971, c. 872, s. 1; 1973, cc. 56, 153; 1979, c. 286, s. 3; 1981, c. 412, s. 2.)

§ 18B-1005. Conduct on licensed premises.

(a) Certain Conduct. — It shall be unlawful for a permittee to knowingly allow any of the following kinds of conduct to occur on his licensed premises:

(1) Any violation of the ABC laws;
(2) Any fighting or other disorderly conduct that can be prevented without undue danger to the permittee, his employees or patrons;
(3) Any violation of the controlled substances, gambling, or prostitution statutes, or any other unlawful acts;
(4) Any conduct or entertainment by any person whose private parts are exposed or who is wearing transparent clothing that reveals the private parts;

(5) Any entertainment that includes or simulates sexual intercourse or any other sexual act; or

(6) Any other lewd or obscene entertainment or conduct, as defined by the rules of the Commission.

(b) Supervision. — It shall be unlawful for a permittee to fail to superintend in person or through a manager the business for which a permit is issued. (1943, c. 400, s. 6; 1945, c. 708, s. 6; c. 903, s. 1; 1947, c. 1098, ss. 2, 3; 1949, c. 974, ss. 13, 15; c. 1251, s. 3; 1957, c. 1048; 1959, c. 745, s. 2; 1963, c. 426, ss. 6, 10, 12; c. 460, s. 1; 1971, c. 872, s. 1; 1973, c. 30; c. 1295; c. 1452, s. 4; 1977, c. 176, ss. 1-3; 1981, c. 412, s. 2.)

§ 18B-1006. Miscellaneous provisions on permits.

(a) School and College Campuses. — No permit for the sale of malt beverages, unfortified wine, or fortified wine shall be issued to a business on the campus or property of a public school or college unless that business is a hotel with a mixed beverages permit.

(b) Lockers at Clubs. — A private club which has been issued a brown-bagging permit may, but is not required to, provide lockers for its members to store their alcoholic beverages. If lockers are provided, however, they shall not be shared but shall be for individual members. Each locker and each bottle of alcoholic beverages on the premises shall be labelled with the name of the member to whom it belongs. No more than four liters each of malt beverages or unfortified wine may be stored by a member at one time. No more than four liters of either fortified wine or spirituous liquor, or four liters of the two combined, may be stored by a member at one time.

(c) Wine Sales. — Holders of retail or wholesale permits for the sale of unfortified or fortified wine may buy and sell only wines on the Commission's approved list. The Commission may authorize the importation and purchase of wines not on the approved list by permittees and others. An authorization shall state the kind and amount of wine that may be imported and purchased and the time within which the transaction shall be completed.

(d) Unlawful Possession or Consumption. — It shall be unlawful for a permittee to possess or consume, or allow any other person to possess or consume, on the licensed premises, any fortified wine or spirituous liquor, the possession or consumption of which is not authorized either by the permits issued to him for the premises or by any other provision of the ABC law.

(e) Facsimile Permit. — It shall be unlawful for any person to produce or possess any false or facsimile permit, or for a permittee to display any false or facsimile permit on his licensed premises.

(f) Failure to Surrender Permit. — It shall be unlawful for any person to refuse to surrender any permit to the Commission upon lawful demand of the Commission or its agents. (1981, c. 412, s. 2.)

§ 18B-1007. Additional requirements for mixed beverages permittees.

(a) Purchases. — A mixed beverages permittee may purchase spirituous liquor for resale as mixed beverages only at an ABC store designated by a local board and only with a purchase-transportation permit issued by that local board under G.S. 18B-403 and 18B-404.

(b) Handling Bottles. — It shall be unlawful for a mixed beverages permittee to do any of the following:

(1) Store any other spirituous liquor with liquor possessed for resale in mixed beverages;

(2) Refill any spirituous liquor container having a mixed beverages tax stamp with any other alcoholic beverage, or add to the contents of such a container any other alcoholic beverage;

(3) Transfer from one container to another a mixed beverages tax stamp.

(c) Price List. — Each mixed beverages permittee shall have available for its customers the printed prices of the most common or popular mixed beverages offered for sale by the permittee. Violation of this subsection shall not be a criminal offense, but shall be punishable under G.S. 18B-104. (1981, c. 412, s. 2; c. 746, s. 2.)

Effect of Amendments. — The 1981 amendment, effective October 1, 1981, added subsection (c).

§ 18B-1008. Rules concerning retail permits.

The Commission is authorized to use broad discretion in further defining the kinds of places eligible for permits under this Article. The rules may state the kind and amount of food that shall be sold to qualify in each category, the relationship between food sales and other receipts, the size of the establishment required for each category, the kinds of facilities needed to qualify, the kinds of activities at which alcoholic beverages may not be sold, and any other matters which are necessary to determine which businesses are bona fide establishments of the kinds listed in G.S. 18B-1000. Rules concerning private clubs may also include, but need not be limited to, requirements that the club have a membership committee to review all applications for membership, that the club charge membership dues substantially greater than what would be paid by a one-time or casual user, that the club restrict use by nonmembers, that the club provide facilities or activities other than those directly related to the use of alcoholic beverages, and that the club have a waiting period for membership. A waiting period required by the Commission shall not exceed 30 days. (1981, c. 412, s. 2.)

ARTICLE 11.

Commercial Activity.

§ 18B-1100. Commercial permits.

The Commission may issue the following commercial permits:

(1) Unfortified winery
(2) Fortified winery
(3) Limited winery
(4) Brewery
(5) Distillery
(6) Fuel alcohol
(7) Wine importer
(8) Wine wholesaler
(9) Malt beverages importer
(10) Malt beverages wholesaler
(11) Bottler
(12) Salesman
(13) Vendor representative
(14) Nonresident malt beverage vendor
(15) Nonresident wine vendor. (1981, c. 412, s. 2; c. 747, s. 59.)

Effect of Amendments. — The 1981 amendment deleted "(a) Types of permits" at the beginning of the section, added subdivisions (13) through (15) and deleted the original subsection (b), relating to evidence of domestication.

§ 18B-1101. Authorization of unfortified winery permit.

The holder of an unfortified winery permit may:

(1) Manufacture unfortified wine;

(2) Sell, deliver and ship unfortified wine in closed containers to wholesalers licensed under this Chapter as authorized by the ABC laws, except that wine may be sold to nonresident wholesalers only when the purchase is not for resale in this State;

(3) Ship its wine in closed containers to individual purchasers inside and outside this State;

(4) Furnish or sell "short-filled" packages, on which State taxes have been or will be paid, to its employees for the use of the employees or their families and guests in this State;

(5) Regardless of the results of any local wine election, sell the winery's wine for off-premises consumption upon obtaining a permit under G.S. 18B-1001(4).

A sale under subdivision (4) shall not be considered a retail or wholesale sale under the ABC laws. (1973, c. 511, ss. 1, 2; 1975, c. 411, s. 6; 1979, c. 224; 1981, c. 412, s. 2; c. 747, s. 60.)

Effect of Amendments. — The 1981 amendment deleted "If it is a resident North Carolina winery," at the beginning of subdivision (3).

§ 18B-1102. Authorization of fortified winery permit.

The holder of a fortified winery permit may:

(1) Manufacture, purchase, import and transport brandy and other ingredients and equipment used in the manufacture of fortified wine;

(2) Sell, deliver and ship fortified wine in closed containers to wholesalers licensed under this Chapter as authorized by the ABC laws, except that wine may be sold to nonresident wholesalers only when the purchase is not for resale in this State;

(3) Ship its wine in closed containers to individual purchasers inside and outside this State;

(4) Furnish or sell "short-filled" packages, on which State taxes have been or will be paid, to its employees for the use of the employees or their families and guests in this State;

(5) Regardless of the results of any local wine election, sell the winery's wine for off-premises consumption upon obtaining a permit under G.S. 18B-1001(6).

A sale under subdivision (4) shall not be considered a retail or wholesale sale under the ABC laws. (1945, c. 903, s. 1; 1947, c. 1098, ss. 2, 3; 1949, c. 974, s. 1; 1957, cc. 1048, 1448; 1963, c. 426, ss. 10, 12; c. 460, s. 1; 1971, c. 872, s. 1; 1973, c. 476, s. 128; 1975, c. 411, s. 6; c. 586, s. 1; c. 654, ss. 1, 2; c. 722, s. 1; 1977, c. 70, s. 19; c. 182, s. 1; c. 511, ss. 1, 2; c. 669, ss. 1, 2; c. 676, ss. 1, 2; c. 911; 1979, c. 224; c. 348, ss. 2, 3; c. 683, ss. 5, 6, 11, 12; 1981, c. 412, s. 2; s. 747, s. 60.)

Effect of Amendments. — The 1981 amendment deleted "If it is a resident North Carolina winery," at the beginning of subdivision (3).

§ 18B-1103. Authorization of limited winery permit.

(a) Special Qualifications. — Any winery which holds an unfortified winery permit and which produces its wine principally from honey, grapes or other fruit or grain grown in this State may obtain a limited winery permit.

(b) Authorized Acts. — The holder of a limited winery permit may give visitors free tasting samples of the wine. The Commission may issue rules regulating these tastings. (1981, c. 412, s. 2; c. 747, s. 61.)

Effect of Amendments. — The 1981 amendment deleted "resident" following "Any" in subsection (a).

§ 18B-1104. Authorization of brewery permit.

The holder of a brewery permit may:

(1) Manufacture malt beverages;

(2) Purchase malt, hops and other ingredients used in the manufacture of malt beverages;

(3) Sell, deliver and ship malt beverages in closed containers to wholesalers licensed under this Chapter as authorized by the ABC laws, except that malt beverages may be sold to nonresident wholesalers only when the purchase is not for resale in this State;

(4) Receive malt beverages manufactured by the permittee in some other state for transshipment to dealers in other states;

(5) Furnish or sell marketable malt beverage products, or packages which do not conform to the manufacturer's marketing standards, if State taxes have been or will be paid, to its employees for the use of the employees or their families and guests in this State;

(6) Give its products to its employees and guests for consumption on its premises.

A sale or gift under subdivision (5) or (6) shall not be considered a retail or wholesale sale under the ABC laws. (1945, c. 903, s. 1; 1947, c. 1098, ss. 2, 3; 1949, c. 974, s. 1; 1957, cc. 1048, 1448; 1963, c. 426, ss. 10, 12; c. 460, s. 1; 1971, c. 872, s. 1; 1973, c. 476, s. 128; 1975, c. 586, s. 1; c. 654, ss. 1, 2; c. 722, s. 1; 1977, c. 70, s. 19; c. 182, s. 1; c. 669, ss. 1, 2; c. 676, ss. 1, 2; c. 911; 1979, c. 348, ss. 2, 3; c. 683, ss. 5, 6, 11, 12; 1981, c. 412, s. 2.)

§ 18B-1105. Authorization of distillery permit.

(a) Authorized Acts. — The holder of a distillery permit may:

(1) Manufacture, purchase, import, possess and transport ingredients and equipment used in the distillation of spirituous liquor;

(2) Sell, deliver and ship spirituous liquor in closed containers at wholesale to local boards within the State, and, subject to the laws of other jurisdictions, at wholesale or retail to private or public agencies or establishments of other states or nations;

(3) Transport into or out of the distillery the maximum amount of liquor allowed under federal law, if the transportation is related to the distilling process.

(b) Distilleries for Fuel Alcohol. — Any person in possession of a Federal Operating Permit pursuant to Title 27, Code of Federal Regulations, Part 201.64 through 201.65 or Part 201.131 through 201.138 shall obtain a fuel alcohol permit before manufacturing any alcohol. The permit shall entitle the permittee to perform only those acts allowed by the Federal Operating Permit, and all conditions of the Federal Operating Permit shall apply to the State permit. (1979, 2nd Sess., c. 1329, s. 1; 1981, c. 412, s. 2.)

§ 18B-1106. Authorization of wine importer permit.

The holder of a wine importer permit may:

(1) Import fortified and unfortified wines from outside the United States in closed containers;

(2) Store those wines;

(3) Sell those wines at wholesale for purposes of resale. (1945, c. 903, s. 1; 1947, c. 1098, ss. 2, 3; 1949, c. 974, s. 1; 1957, cc. 1048, 1448; 1963, c. 426, ss. 10, 12; c. 460, s. 1; 1971, c. 872, s. 1; 1973, c. 476, s. 128; 1975, c. 586, s. 1; c. 654, ss. 1, 2; c. 722, s. 1; 1977, c. 70, s. 19; c. 182, s. 1; c. 669, ss. 1, 2; c. 676, ss. 1, 2; c. 911; 1979, c. 348, ss. 2, 3; c. 683, ss. 5, 6, 11, 12; 1981, c. 412, s. 2.)

§ 18B-1107. Authorization of wine wholesaler permit.

The holder of a wine wholesaler permit may:

(1) Receive, possess and transport shipments of fortified and unfortified wine;

(2) Sell, deliver and ship wine in closed containers for purposes of resale to wholesalers or retailers licensed under this Chapter as authorized by the ABC laws;

(3) Furnish and sell wine to its employees, subject to the rules of the Commission and the Department of Revenue;

(4) In locations where the sale is legal, furnish wine to guests and any other person who does not hold an ABC permit, for promotional purposes, subject to rules of the Commission. (1945, c. 903, s. 1; 1947, c. 1098, ss. 2, 3; 1949, c. 974, s. 1; 1957, cc. 1048, 1448; 1963, c. 426, ss. 10, 12; c. 460, s. 1; 1971, c. 872, s. 1; 1973, c. 476, s. 128; 1975, c. 586, s. 1; c. 654, ss. 1, 2; c. 722, s. 1; 1977, c. 70, s. 19; c. 182, s. 1; c. 669, ss. 1, 2; c. 676, ss. 1, 2; c. 911; 1979, c. 348, ss. 2, 3; c. 683, ss. 5, 6, 11, 12; 1981, c. 412, s. 2.)

§ 18B-1108. Authorization of malt beverages importer permit.

The holder of a malt beverages importer permit may:

(1) Import malt beverages from outside the United States in closed containers;

(2) Store those malt beverages;

(3) Sell those malt beverages at wholesale for purposes of resale. (1945, c. 903, s. 1; 1947, c. 1098, ss. 2, 3; 1949, c. 974, s. 1; 1957, cc. 1048, 1448; 1963, c. 426, ss. 10, 12; c. 460, s. 1; 1971, c. 872, s. 1; 1973, c. 476, s. 128; 1975, c. 586, s. 1; c. 654, ss. 1, 2; c. 722, s. 1; 1977, c. 70, s. 19; c. 182, s. 1; c. 669, ss. 1, 2; c. 676, ss. 1, 2; c. 911; 1979, c. 348, ss. 2, 3; c. 683, ss. 5, 6, 11, 12; 1981, c. 412, s. 2.)

§ 18B-1109. Authorization of malt beverages wholesaler permit.

(a) Authorization. — The holder of a malt beverages wholesaler permit may:

(1) Receive, possess and transport shipments of malt beverages;

(2) Sell, deliver and ship, in closed containers and in quantities of one case or container or more, malt beverages of any brand filed pursuant to subsection (b), to wholesalers or retailers licensed under this Chapter, as authorized by the ABC laws;

(3) Furnish and sell malt beverages filed pursuant to subsection (b) to its employees subject to the rules of the Commission and the Department of Revenue;

(4) In locations where the sale is legal, furnish malt beverages of any brand filed pursuant to subsection (b) to guests and any other person who does not hold an ABC permit, for promotional purposes, subject to the rules of the Commission.

(b) Distribution Agreements. — Pursuant to the authority of the State under the Twenty-First Amendment to the United States Constitution, to promote the public's interest in fair and efficient distribution of malt beverages, and to assure the public's interest in uniform and effective control of the distribution of malt beverage products within the State, it is unlawful for a wholesaler to sell any brand of malt beverage in this State except in the territory described in a distribution agreement filed pursuant to this subsection authorizing sale by the wholesaler of that brand within a designated area. Within that designated area the wholesaler shall service all dealer and retail permittees without discrimination. The distribution agreement shall be in writing, shall specify the brands it covers, and shall be filed with the Commission. If a brewer sells several brands, the agreement need not apply to all brands sold by the brewer and may apply to only one brand. No brewer, importer, or other supplier may provide by a distribution agreement for the distribution of a brand filed pursuant to this subsection to more than one distributor for all or any part of the designated territory. A wholesaler may, however, service a territory outside the territory designated in its distribution agreement during periods of temporary service interruptions when so requested by the brewer and the wholesaler whose service is temporarily interrupted, with the approval of the Commission.

Each wholesaler shall file a copy of its distribution agreement and any amendments with the Commission promptly following the effective date of this Chapter, unless an existing distribution agreement complies with the provisions of this subsection and is already on file with the Commission.

No provision of any distribution agreement may expressly, by implication, or in its operation, establish or maintain the resale price of any brand of malt beverage by a franchised wholesaler. (1945, c. 903, s. 1; 1947, c. 1098, ss. 2, 3; 1949, c. 974, s. 1; 1957, cc. 1048, 1448; 1963, c. 426, ss. 10, 12; c. 460, s. 1; 1971, c. 872, s. 1; 1973, c. 476, s. 128; 1975, c. 586, s. 1; c. 654, ss. 1, 2; c. 722, s. 1; 1977, c. 70, s. 19; c. 182, s. 1; c. 669, ss. 1, 2; c. 676, ss. 1, 2; c. 911; 1979, c. 348, ss. 2, 3; c. 683, ss. 5, 6, 11, 12; 1981, c. 412, s. 2; c. 747, s. 62.)

Effect of Amendments. — The 1981 amendment deleted "malt beverages of any brand filed pursuant to subsection (b)" following "ship" in subdivision (a)(2), and substituted "and in quantities of one case or container or more, malt beverages of any brand filed pursuant to subsection (b)" for "for purpose of resale" in subdivision (a)(2).

§ 18B-1110. Authorization of bottler permit.

The holder of a bottler permit may:

(1) Receive, possess and transport shipments of malt beverages, unfortified wine and fortified wine;

(2) Bottle, sell, deliver and ship malt beverages, unfortified wine, and fortified wine in closed containers to wholesalers licensed under this Chapter as authorized by the ABC laws;

(3) Furnish or sell packages which do not conform to the manufacturer's marketing standards, if State taxes have been or will be paid, to its employees for the use of the employees or their families and guests in this State.

A sale or gift under subdivision (3) shall not be considered a retail or wholesale sale under the ABC law. (1945, c. 903, s. 1; 1947, c. 1098, ss. 2, 3; 1949, c. 974, s. 1; 1957, cc. 1048, 1448; 1963, c. 426, ss. 10, 12; c. 460, s. 1; 1971, c. 872, s. 1; 1973, c. 476, s. 128; 1975, c. 586, s. 1; c. 654, ss. 1, 2; c. 722, s. 1;

1977, c. 70, s. 19; c. 182, s. 1; c. 669, ss. 1, 2; c. 676, ss. 1, 2; c. 911; 1979, c. 348, ss. 2, 3; c. 683, ss. 5, 6, 11, 12; 1981, c. 412, s. 2.)

§ 18B-1111. Authorization of salesman permit.

(a) Authorized Acts. — The holder of a salesman permit may sell and transport malt beverages for a malt beverage wholesaler or sell and transport unfortified and fortified wine for a wine wholesaler.

(b) Persons Required to Obtain Permit. — All route salesmen and salesmen working at a wholesaler's warehouse shall obtain the permit described in this section. All salesmen shall be at least 21 years old.

(c) Validity Period. — A salesman permit shall be valid as provided in G.S. 18B-903(a), except that it shall be valid only so long as the salesman is employed by the same wholesaler. (1951, c. 378, ss. 1, 2, 5-8; 1963, c. 426, s. 13; 1971, c. 872, s. 1; 1975, c. 330, s. 2; c. 411, s. 8; 1981, c. 412, s. 2.)

§ 18B-1112. Authorization of vendor representative permit.

(a) Authorized Acts. — The holder of a vendor representative permit may represent a nonresident malt beverage or wine vendor, either as an employee or as an agent, to solicit orders for the vendor's product. The vendor representative may sell, deliver and ship alcoholic beverages in this State only to wholesalers, importers and bottlers.

(b) Number of Permits. — A vendor representative shall secure a separate permit for each nonresident malt beverage or unfortified wine vendor he represents. A permit may not be issued without the approval of the vendor. (1981, c. 747, s. 63.)

§ 18B-1113. Authorization of nonresident malt beverage vendor permit.

The holder of a nonresident malt beverage vendor permit may sell, deliver and ship malt beverages in this State only to wholesalers, importers and bottlers licensed under this Chapter, as authorized by the ABC laws. A nonresident malt beverage vendor permit may be issued to a brewery, importer or bottler outside North Carolina who desires to sell, deliver and ship malt beverages into this State. (1981, c. 747, s. 63.)

§ 18B-1114. Authorization of nonresident wine vendor permit.

The holder of a nonresident wine vendor permit may sell, deliver and ship unfortified and fortified wine in this State only to wholesalers, importers and bottlers licensed under this Chapter, as authorized by the ABC laws. A nonresident wine vendor permit may be issued to a winery, wholesaler, importer, or bottler outside North Carolina who desires to sell, deliver and ship unfortified and fortified wine into this State. (1981, c. 747, s. 63.)

§ 18B-1115. Commercial transportation.

(a) Permit Required. — Unless a person holds a permit which otherwise allows him to transport more than 80 liters of malt beverages other than draft malt beverages in kegs, 20 liters of unfortified wine, or four liters of fortified wine or spirituous liquor, or is a retailer authorized to transport alcoholic beverages under G.S. 18B-405, each person transporting alcoholic beverages in excess of those quantities shall have the permit described in this section.

(b) When Transportation Legal. — No person may obtain a permit under this section to transport spirituous liquor unless the transportation is for delivery to a federal reservation over which North Carolina has ceded jurisdiction to the United States, for delivery to an ABC store, or for transport through this State to another state.

(c) Common Carriers. — Railroad companies and other common carriers having regularly established schedules of service in this State may transport alcoholic beverages into, out of, and between points in this State without a permit. Those companies shall keep accurate records of the character, volume and number of containers transported and shall allow the Commission and alcohol law-enforcement agents to inspect those records at any time. The Commission may require common carriers to make reports of shipments.

(d) Motor Vehicle Carriers. — Alcoholic beverages may be transported over the public highways of this State by motor vehicle carriers under the following conditions:

(1) The carrier shall notify the Commission of the character of the alcoholic beverages it will transport and of its authorization from the appropriate regulatory authority.

(2) The carrier shall obtain, at no charge, a fleet permit from the Commission authorizing the transportation.

(3) The driver or person in charge of each vehicle transporting alcoholic beverages shall possess a copy of the carrier's fleet permit certified by the carrier to be an exact copy of the original.

(4) The driver or person in charge of each vehicle transporting alcoholic beverages shall possess a bill of lading, invoice or other memorandum of shipment showing the name and address of the person from whom the alcoholic beverages were received, the character and contents of the shipment, the quantity and volume of the shipment, and the name and address of the person to whom the alcoholic beverages are being shipped.

(5) The driver or person in charge of each vehicle transporting the alcoholic beverages shall display all documents required by this section upon request of any law-enforcement officer. Failure to produce these documents or failure of the documents to disclose clearly and accurately the information required by this section shall be prima facie evidence of a violation of this section.

(6) Each carrier shall keep accurate records of character, volume and number of containers transported and shall allow the Commission and alcohol law-enforcement agents to inspect those records at any time. The Commission may require carriers to make reports of shipments.

(e) Transportation of Spirituous Liquor. — In addition to the requirements of subsection (d), motor vehicle carriers engaged in transporting spirituous liquor shall:

(1) Deposit with the Commission a surety bond for one thousand dollars ($1,000) conditioned that the carrier will not unlawfully transport spirituous liquor into or through this State. The bond, which shall be approved by the Commission, shall be payable to the State of North Carolina. If the bonded carrier is convicted of a violation covered by the bond, the proceeds of the forfeited bond shall be paid to the school fund of the county in which the liquor was seized.

(2) Include in its bill of lading, invoice or other memorandum of shipment the North Carolina code numbers of the spirituous liquor being transported.

(3) Include in its bill of lading, invoice or other memorandum of shipment the route which the vehicle will follow, and the vehicle shall not vary substantially from that stated route.

(f) Malt Beverages and Wine Transported by Boats. — The owner or operator of any boat may transport malt beverages, unfortified wine and fortified wine over the waters of this State if he satisfies all requirements of subsection (d).

(g) State Warehouse Carrier. — The Commission may exempt a carrier for the State warehouse from any of the requirements of this section provided that it determines that the requirements of this section are otherwise satisfied. (1923, c. 1, s. 15; C. S., s. 3411(o); 1939, c. 158, s. 503; 1971, c. 872, s. 1; 1975, c. 411, s. 7; 1977, c. 70, s. 20; c. 176, s. 7; 1979, c. 286, s. 5; 1981, c. 412, s. 2; c. 747, s. 63.)

Editor's Note. — This section was enacted as § 18B-1112. It was renumbered 18B-1115 by Session Laws 1981, c. 747, s. 63.

§ 18B-1116. Exclusive outlets prohibited.

(a) Prohibitions. — It shall be unlawful for any manufacturer, bottler, or wholesaler of any alcoholic beverages, or for any officer, director, or affiliate thereof, either directly or indirectly to:

(1) Require that an alcoholic beverage retailer purchase any alcoholic beverages from that person to the full or partial exclusion of any other alcoholic beverages offered for sale by other persons in this State; or

(2) Have any direct or indirect financial interest in the business of any alcoholic beverage retailer in this State or in the premises where the business of any alcoholic beverage retailer in this State is conducted; or

(3) Lend or give to any alcoholic beverage retailer in this State or his employee or to the owner of the premises where the business of any alcoholic beverage retailer in this State is conducted, any money, service, equipment, furniture, fixtures or any other thing of value.

(b) Exemptions. — The Commission may grant exemptions from the provisions of this section. In determining whether to grant an exemption, the Commission shall consider the public welfare, the quantity and value of articles involved, established trade customs not contrary to the public interest, and the purposes of this section. (1945, c. 708, s. 6; 1953, c. 1207, s. 1; 1971, c. 872, s. 1; 1981, c. 412, s. 2; c. 747, s. 63.)

Editor's Note. — This section was enacted as § 18B-1113. It was renumbered 18B-1116 by Session Laws 1981, c. 747, s. 63.

§ 18B-1117. Coercion and unjust franchise cancellations prohibited.

(a) Definition of Franchise. — It shall be prima facie evidence that a contractual franchise relationship within the contemplation of this section exists between a licensed malt beverage wholesaler and a brewery if:

(1) The brewery has shipped malt beverages, prepared malt beverages for shipment, or accepted any order for malt beverages from a licensed wholesaler within this State; or

(2) A wholesaler has paid or the brewery has accepted payment for an order of malt beverages intended for sale within this State.

(b) Prohibitions. — It shall be unlawful for any brewery, or an officer, agent or representative thereof to:

(1) Coerce or attempt to coerce or persuade any licensed wholesaler to enter into any agreement to violate any provision of the ABC laws or any rule of the Department of Revenue; or

(2) Cancel or terminate without just cause or provocation or without due regard for the equities of the wholesaler, any contract or franchise with a wholesaler to sell malt beverages manufactured at the brewery. The provisions of this subdivision shall be a part of each franchise or contract between a North Carolina wholesaler and any brewery doing business with that wholesaler, whether or not the provision is specifically agreed upon between the parties.

(c) Injunctions. — Based on the appropriate findings pursuant to subdivision (b)(2), the superior court has the jurisdiction and power to enjoin the termination of any franchise agreement with a wholesaler upon the application of the aggrieved wholesaler. The terms of the injunction shall require the aggrieved wholesaler to supply the customers in its territory with their reasonable retail requirements and to otherwise service the territory. On two days' written notice to the aggrieved wholesaler, any party enjoined pursuant to this subsection may appear and move for modification of the injunction. If the court finds that the aggrieved wholesaler has failed or refused to supply the customers in its territory with their reasonable retail requirements or otherwise service its territory, it may permit the brewery to make any other arrangements to supply the customers or service the territory, including arrangements with other wholesalers while the injunction is in effect. The Commission may revoke or suspend the permit of any wholesaler or brewery which the court finds violated the terms of an injunction ordered under this subsection. (1965, c. 1191; 1971, c. 872, s. 1; 1977, c. 70, s. 20.5; 1981, c. 412, s. 2; c. 747, s. 63.)

Editor's Note. — This section was enacted as § 18B-1114. It was renumbered 18B-1117 by Session Laws 1981, c. 747, s. 63.

Chapter 19.

Offenses against Public Morals.

ARTICLE 1.

Abatement of Nuisances.

§ 19-1. What are nuisances under this Chapter.

Cross References. —
As to constitutionality of final judgment and order under this Article, see note to § 19-5.

Legal Periodicals. — For article, "Regulating Obscenity Through the Power to Define and Abate Nuisances," see 14 Wake Forest L. Rev. 1 (1978).

For a survey of 1977 constitutional law, see 56 N.C.L. Rev. 943 (1978).

CASE NOTES

Constitutionality. — Even if § 19-5 unconstitutionally authorizes a judge to close a business after it has been declared a nuisance because of past exhibitions or sales of obscene material, a question not before the Supreme Court, § 19-5 is severable from the remaining provisions of chapter 19 and does not render chapter 19 unconstitutional on its face. State ex rel. Andrews v. Chateau X, Inc., 296 N.C. 251, 250 S.E.2d 603 (1979), vacated, 445 U.S. 947, 100 S. Ct. 1593, 63 L. Ed. 2d 782 (1980), on remand, 302 N.C. 321, 275 S.E.2d 443 (1981) (adopting opinion of 296 N.C. 251 by reference).

This section is not unconstitutionally vague or overbroad in describing one type of public nuisance as a place of business regularly operated or maintained for purposes of "prostitution," and as used in this section, "prostitution" includes the offering or receiving of the body, in return for a fee, for acts of vaginal intercourse, anal intercourse, fellatio, cunnilingus, masturbation, or physical contact with a person's genitals, pubic area, buttocks or breasts. State ex rel. Gilchrist v. Hurley, 48 N.C. App. 433, 269 S.E.2d 646 (1980), cert. denied, — N.C. —, 274 S.E.2d 233 (1981).

Applied in State ex rel. Jacobs v. Sherard, 36 N.C. App. 60, 243 S.E.2d 184 (1978).

§ 19-1.1. Definitions.

CASE NOTES

Quoted in Fehlhaber v. State, 445 F. Supp. 130 (E.D.N.C. 1978).

§ 19-1.2. Types of nuisances.

CASE NOTES

Burden on State to Prove Obscenity. — The State is required to prove all the elements of obscenity found in § 19-1.2(2) in a nuisance action, including proof that the material as a whole lacks "serious literary, artistic, political, educational, or scientific value." State ex rel. Andrews v. Chateau X, Inc., 296 N.C. 251, 250 S.E.2d 603 (1979), vacated, 445 U.S. 947, 100 S. Ct. 1593, 63 L. Ed. 2d 782 (1980), on remand, 302 N.C. 321, 275 S.E.2d 443 (1981) (adopting opinion of 296 N.C. 251 by reference).

In order for a bookstore to be a nuisance, the lewd publications must constitute a principal or substantial part of the stock in trade. State ex rel. Andrews v. Chateau X, Inc., 296 N.C. 251, 250 S.E.2d 603 (1979), vacated, 445 U.S. 947, 100 S. Ct. 1593, 63 L. Ed. 2d 782 (1980), on remand, 302 N.C. 321, 275 S.E.2d 443 (1981) (adopting opinion of 296 N.C. 251 by reference).

Not every isolated obscene publication is a nuisance that can be abated under § 19-5. First it must be found that the book or magazine is one of many, such that all together they make up a large part of the bookstore's inventory. Once this initial determination is made, however, each individual obscene publication is a nuisance, and any and every one of them can be abated. State ex rel. Andrews v. Chateau X, Inc., 296 N.C. 251, 250 S.E.2d 603 (1979), vacated, 445 U.S. 947, 100 S. Ct. 1593, 63 L. Ed. 2d 782 (1980), on remand, 302 N.C. 321, 275 S.E.2d 443 (1981) (adopting opinion of 296 N.C. 251 by reference).

Quoted in Fehlhaber v. State, 445 F. Supp. 130 (E.D.N.C. 1978); State ex rel. Gilchrist v. Hurley, 48 N.C. App. 433, 269 S.E.2d 646 (1980).

§ 19-2.1. Action for abatement; injunction.

Legal Periodicals. — For a comment on taxpayers' actions, see 13 Wake Forest L. Rev. 397 (1977).

For article entitled, "The Common Law Powers of the Attorney General of North Carolina," see 9 N.C. Cent. L.J. 1 (1977).

CASE NOTES

Burden on State to Prove Obscenity. — The State is required to prove all the elements of obscenity found in § 19-1.2(2) in a nuisance action, including proof that the material as a whole lacks "serious literary, artistic, political, educational, or scientific value." State ex rel. Andrews v. Chateau X, Inc., 296 N.C. 251, 250 S.E.2d 603 (1979), vacated, 445 U.S. 947, 100 S. Ct. 1593, 63 L. Ed. 2d 782 (1980), on remand, 302 N.C. 321, 275 S.E.2d 443 (1981) (adopting opinion of 296 N.C. 251 by reference).

Bond Requirement for Private Complainants is Constitutional. — The provision of this statute requiring a private citizen to post a bond, while the district attorney is not required to do so, is a valid distinction and does not thereby constitute arbitrary and capricious State action. State ex rel. Gilchrist v. Hurley, 48 N.C. App. 433, 269 S.E.2d 646 (1980), cert. denied, — N.C. —, 274 S.E.2d 233 (1981).

Quoted in State ex rel. Jacobs v. Sherard, 36 N.C. App. 60, 243 S.E.2d 184 (1978).

Stated in Fehlhaber v. State, 445 F. Supp. 130 (E.D.N.C. 1978).

§ 19-2.2. Pleadings; jurisdiction; venue; application for preliminary injunction.

CASE NOTES

A complaint in an action to abate a nuisance is sufficient if it denominates the type of nuisance sought to be abated and the conduct complained of is declared a nuisance under the statute. State ex rel. Gilchrist v. Hurley, 48 N.C. App. 433, 269 S.E.2d 646 (1980), cert. denied, — N.C. —, 274 S.E.2d 233 (1981).

Stated in Fehlhaber v. State, 445 F. Supp. 130 (E.D.N.C. 1978).

§ 19-2.3. Temporary order restraining removal of personal property from premises; service; punishment.

Cross References. — As to constitutionality of final order and judgment under this Article, see note to § 19-5.

CASE NOTES

The First Amendment right of the public to receive information is unaffected by the temporary restraining order, and the parallel right of the distributors to dispense the information is not discernibly chilled. Fehlhaber v. State, 445 F. Supp. 130 (E.D.N.C. 1978).

Temporary Restraining Order Does Not Operate as Prior Restraint. — The temporary restraining order authorized to be issued following the filing of the complaint and application for a preliminary injunction does not operate as a prior restraint on the distribution of particular publications and motion pictures presumptively protected by the First Amendment until an adversary hearing determines otherwise. Fehlhaber v. State, 445 F. Supp. 130 (E.D.N.C. 1978).

Construction of Inventory and Full Accounting Provisions of Section. — Reading this section as a whole, the apparent purpose of the inventory and accounting provision is to provide the factual basis for the determination of whether the business deals in obscene items as a "substantial" portion of its stock in trade, in the case of book stores, or "in the regular course of business," in the case of theaters. Such purpose could be accomplished by a full accounting that included no more than the date, item purchased, and amount paid. Because a statute may be declared unconstitutional on its face only if it offers no plausible constitutional interpretation, the court adopts this construction of the full accounting provision and not a construction which would require the recording of individual customers who purchase books or attend movies. Fehlhaber v. State, 445 F. Supp. 130 (E.D.N.C. 1978).

The requirement of an inventory by an officer does not require a warrantless search in contravention of the Fourth Amendment, since the clearest reading of the provision is that it directs an officer to enter an establishment that is open to the public and from that vantage point, make an inventory of items of personal property in plain view. Fehlhaber v. State, 445 F. Supp. 130 (E.D.N.C. 1978).

Order Does Not Take Private Property Without Due Process or Equal Protection. — The fact that the district attorney, upon filing a nuisance complaint, can obtain a temporary restraining order pursuant to this section without posting bond and without notice to the persons restrained does not constitute the taking of private property without due process or equal protection since the statute does not authorize the seizure or destruction of property but merely preserves the status quo until a hearing can be held; the statute establishes a procedure for the owner of the property in question immediately to challenge the validity of the temporary restraining order and places the burden of its continuance on the district attorney; and the procedure mandated by § 1A-1, Rule 65(b) applies to the issuance of the temporary restraining order. State ex rel. Gilchrist v. Hurley, 48 N.C. App. 433, 269 S.E.2d 646 (1980), cert. denied, — N.C. —, 274 S.E.2d 233 (1981).

§ 19-2.5. Hearing on the preliminary injunction; issuance.

CASE NOTES

Cited in State ex rel. Gilchrist v. Hurley, 48 N.C. App. 433, 269 S.E.2d 646 (1980).

§ 19-3. Priority of action; evidence.

CASE NOTES

Admission of General Reputation Evidence Is Constitutional. — The admission into evidence of the general reputation of the building or place allegedly constituting a nuisance does not permit an unconstitutional taking of property in a trial by rumor, hearsay, and innuendo, and does not deny defendants of their right of cross-examination. State ex rel. Gilchrist v. Hurley, 48 N.C. App. 433, 269 S.E.2d 646 (1980), cert. denied, — N.C. —, 274 S.E.2d 233 (1981).

Cited in State ex rel. Jacobs v. Sherard, 36 N.C. App. 60, 243 S.E.2d 184 (1978).

§ 19-4. Violation of injunction; punishment.

CASE NOTES

The plenary proceedings provided for in § 5A-15 apply to contempt actions following a chapter 19 injunction. State ex rel. Andrews v. Chateau X, Inc., 296 N.C. 251, 250 S.E.2d 603 (1979), vacated, 445 U.S. 947, 100 S. Ct. 1593, 63 L. Ed. 2d 782 (1980), on remand, 302 N.C. 321, 275 S.E.2d 443 (1981) (adopting opinion of 296 N.C. 251 by reference).

§ 19-5. Content of final judgment and order.

Legal Periodicals. — For a survey of 1977 constitutional law, see 56 N.C.L. Rev. 943 (1978).

CASE NOTES

Constitutionality. — Even if § 19-5 unconstitutionally authorizes a judge to close a business after it has been declared a nuisance because of past exhibitions or sales of obscene material, a question not before the Supreme Court, § 19-5 is severable from the remaining provisions of chapter 19 and does not render chapter 19 unconstitutional on its face. State ex rel. Andrews v. Chateau X, Inc., 296 N.C. 251, 250 S.E.2d 603 (1979), vacated, 445 U.S. 947, 100 S. Ct. 1593, 63 L. Ed. 2d 782 (1980), on remand, 302 N.C. 321, 275 S.E.2d 443 (1981) (adopting opinion of 296 N.C. 251 by reference).

Ban on Future Dissemination of Unnamed Books and Movies Is Unconstitutional. —

The clear meaning of this section is that upon a finding that a book store or movie house is a nuisance because it substantially or regularly trades in obscene materials, the superior court judge must enjoin the further distribution by the particular proprietor of any books or movies falling within the statutory definition of lewdness. Fehlhaber v. State, 445 F. Supp. 130 (E.D.N.C. 1978).

The blanket ban on the future dissemination of unnamed books and movies which is the effect of this section transgresses well established First Amendment standards, and thus is constitutionally infirm. Fehlhaber v. State, 445 F. Supp. 130 (E.D.N.C. 1978).

Restraining Order Was Not Unconstitutional Prior Restraint. — An order restraining defendants from selling or exhibiting obscene matter not actually before the court was not an unconstitutional prior restraint of their right of free speech in light of the unquestionably obscene nature of all of defendants' films and magazines before the court, the fact that the defendants were adequately warned of which materials they could not sell or exhibit by the specifically drawn order, and the procedural safeguards afforded the defendants. State ex rel. Andrews v. Chateau X, Inc., 296 N.C. 251, 250 S.E.2d 603 (1979), vacated, 445 U.S. 947, 100 S. Ct. 1593, 63 L. Ed. 2d 782 (1980), on remand, 302 N.C. 321, 275 S.E.2d 443 (1981) (adopting opinion of 296 N.C. 251 by reference).

Sufficiency of Injunction. — Where the trial judge enjoined only the sale of "illegal lewd matter" which is correctly and completely defined in § 19-1.2(2), but did not specifically state that the sexual conduct being depicted be "patently offensive," this minor omission was not fatal to the injunction. State ex rel. Andrews v. Chateau X, Inc., 296 N.C. 251, 250 S.E.2d 603 (1979), vacated, 445 U.S. 947, 100 S. Ct. 1593, 63 L. Ed. 2d 782 (1980), on remand, 302 N.C. 321, 275 S.E.2d 443 (1981) (adopting opinion of 296 N.C. 251 by reference).

Discretion of Judge in Formulating Abatement Order. — Once a business has been established as a nuisance, the judge is not required to enjoin the future distribution of any and all obscene matter as defined by § 19-1.1(2). The trial judge necessarily must be given some discretion in formulating his abatement order. State ex rel. Andrews v. Chateau X, Inc., 296 N.C. 251, 250 S.E.2d 603 (1979), vacated, 445 U.S. 947, 100 S. Ct. 1593, 63 L. Ed. 2d 782 (1980), on remand, 302 N.C. 321, 275 S.E.2d 443 (1981) (adopting opinion of 296 N.C. 251 by reference).

If an abatement order does issue, the trial court has some discretion to define what conduct is prohibited as long as it falls within constitutional and statutory mandates, and he has the duty to specifically warn the defendant of the prohibited conduct. State ex rel. Andrews v. Chateau X, Inc., 296 N.C. 251, 250 S.E.2d 603 (1979), vacated, 445 U.S. 947, 100 S. Ct. 1593,

63 L. Ed. 2d 782 (1980), on remand, 302 N.C. 321, 275 S.E.2d 443 (1981) (adopting opinion of 296 N.C. 251 by reference).

The legislature intended for judges to have some discretion in abating nuisances. State ex rel. Andrews v. Chateau X, Inc., 296 N.C. 251, 250 S.E.2d 603 (1979), vacated, 445 U.S. 947, 100 S. Ct. 1593, 63 L. Ed. 2d 782 (1980), on remand, 302 N.C. 321, 275 S.E.2d 443 (1981) (adopting opinion of 296 N.C. 251 by reference).

Not every isolated obscene publication is a nuisance that can be abated under § 19-5. First it must be found that the book or magazine is one of many, such that all together they make up a large part of the bookstore's inventory. Once this initial determination is made, however, each individual obscene publication is a nuisance, and any and every one of them can be abated. State ex rel. Andrews v. Chateau X, Inc., 296 N.C. 251, 250 S.E.2d 603 (1979), vacated, 445 U.S. 947, 100 S. Ct. 1593, 63 L. Ed. 2d 782 (1980), on remand, 302 N.C. 321, 275 S.E.2d 443 (1981) (adopting opinion of 296 N.C. 251 by reference).

The plenary proceedings provided for in § 5A-15 apply to contempt actions following a chapter 19 injunction. State ex rel. Andrews v. Chateau X, Inc., 296 N.C. 251, 250 S.E.2d 603 (1979), vacated, 445 U.S. 947, 100 S. Ct. 1593, 63 L. Ed. 2d 782 (1980), on remand, 302 N.C. 321, 275 S.E.2d 443 (1981) (adopting opinion of 296 N.C. 251 by reference).

Cited in State ex rel. Jacobs v. Sherard, 36 N.C. App. 60, 243 S.E.2d 184 (1978).

§ 19-6. Civil penalty; forfeiture; accounting; lien as to expenses of abatement; invalidation of lease.

CASE NOTES

Fees awarded to the plaintiff's attorneys and to the court-appointed referee in cases under §§ 19-1 et seq. are a matter within the court's discretion, and, absent an abuse of that discretion, such amounts will not be disturbed on appeal. State ex rel. Gilchrist v. Hurley, 48 N.C. App. 433, 269 S.E.2d 646 (1980), cert. denied, — N.C. —, 274 S.E.2d 233 (1981).

Quoted in Fehlhaber v. State, 445 F. Supp. 130 (E.D.N.C. 1978).

§ 19-8. Costs.

CASE NOTES

Fee Discretionary. —

Fees awarded to the plaintiff's attorneys and to the court-appointed referee in cases under §§ 19-1 et seq. are a matter within the court's discretion, and, absent an abuse of that discretion, such amounts will not be disturbed on appeal. State ex rel. Gilchrist v. Hurley, 48 N.C. App. 433, 269 S.E.2d 646 (1980), cert. denied, — N.C. —, 274 S.E.2d 233 (1981).

§ 19-8.2. Right of entry.

CASE NOTES

Stated in Fehlhaber v. State, 445 F. Supp. 130 (E.D.N.C. 1978).

§ 19-8.3. Severability.

CASE NOTES

Applied in Fehlhaber v. State, 445 F. Supp. 130 (E.D.N.C. 1978).

Cited in State ex rel. Andrews v. Chateau X, Inc., 296 N.C. 251, 250 S.E.2d 603 (1979).

ARTICLE 2.

Civil Remedy for Sales of Harmful Materials to Minors.

§ 19-9. Title.

Legal Periodicals. — For article, "Regulating Obscenity Through the Power to Define and Abate Nuisances," see 14 Wake Forest L. Rev. 1 (1978).

Chapter 19A.

Protection of Animals.

Article 1.

Civil Remedy for Protection of Animals.

§ 19A-1. Definitions.

For the purposes of this Chapter [Article] the following definition of terms shall be applicable:

(2) The terms "cruelty" and "cruel treatment" shall be held to include every act, omission, or neglect whereby unjustifiable physical pain, suffering, or death is caused or permitted; but such term shall not be construed to include lawful taking of animals under the jurisdiction and regulation of the Wildlife Resources Commission, lawful activities sponsored by agencies conducting biomedical research or training, lawful activities for sport, the production of livestock or poultry, or the lawful destruction of any animal for the purpose of protecting such livestock or poultry.

(1979, c. 808, s. 2.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, inserted "and 'cruel treatment' " near the beginning of subdivision (2) and rewrote the part of subdivision (2) following the semicolon.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only the introductory language and subdivision (2) are set out.

§ 19A-3. Preliminary injunction.

Upon the filing of a verfied complaint in the district court in the county in which cruelty to an animal has allegedly occurred, the judge may, in his discretion, issue a preliminary injunction in accordance with the procedures set forth in G.S. 1A-1, Rule 65. Every such preliminary injunction, if the complainant so requests, may give the complainant the right to provide suitable care for the animal. If it appears on the face of the complaint that the condition giving rise to the cruel treatment of an animal requires the animal to be removed from its owner or other person who possesses it, then it shall be proper for the court in the preliminary injunction to allow the complainant to take possession of the animal. (1969, c. 831; 1971, c. 528, s. 10; 1979, c. 808, s. 3.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, rewrote this section, which formerly provided for proceedings in the superior, rather than the district, court.

§ 19A-4. Permanent injunction.

In accordance with G.S. 1A-1, Rule 65, a district court judge in the county in which the original action was brought shall determine the merits of the action by trial without a jury, and upon hearing such evidence as may be presented, shall enter orders as he deems appropriate, including a permanent injunction or final determination of the animal's custody. (1969, c. 831; 1971, c. 528, s. 10; 1979, c. 808, s. 4.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, substituted, at the beginning of the section, "In accordance with G.S. 1A-1, Rule 65, a district court judge" for "On the date specified in a preliminary injunction or temporary restraining order, which date shall not be later than 20 days from the issuance thereof, a resident superior court judge or a superior court judge holding a regular or special session of superior court." The amendment also deleted "the issuance of" preceding "a permanent injunction" near the end of the section and substituted "animal's custody" for "custody of the animal where appropriate" at the end of the section.

ARTICLE 2.

Protection of Black Bears.

§ 19A-10. Unlawful to buy, sell or enclose (except as provided) black bear.

Cross References. — As to captivity license required for wild bears, see § 113-272.5.

§§ 19A-15 to 19A-19: Reserved for future codification purposes.

ARTICLE 3.

Animal Welfare Act.

§ 19A-20. Title of Article.

This Article may be cited as the Animal Welfare Act. (1977, 2nd Sess., c. 1217, s. 1.)

Editor's Note. — Session Laws 1977, 2nd Sess., c. 1217, s. 23, makes the act effective Jan. 1, 1979.

Session Laws 1977, 2nd Sess., c. 1217, s. 20, contains a severability clause.

§ 19A-21. Purposes.

The purposes of this Article are (i) to protect the owners of dogs and cats from the theft of such pets; (ii) to prevent the sale or use of stolen pets; (iii) to insure that animals, as items of commerce, are provided humane care and treatment by regulating the transportation, sale, purchase, housing, care, handling and treatment of such animals by persons or organizations engaged in transporting, buying, or selling them for such use; (iv) to insure that animals confined in pet shops, kennels, animal shelters and auction markets are provided humane care and treatment; (v) to prohibit the sale, trade or adoption of those animals which show physical signs of infection, communicable disease, or congenital abnormalities, unless veterinary care is assured subsequent to sale, trade or adoption. (1977, 2nd Sess., c. 1217, s. 2.)

§ 19A-22. Animal Welfare Section in Animal Health Division of Department of Agriculture created; Director.

There is hereby created within the Animal Health Division of the North Carolina Department of Agriculture, a new section thereof, to be known as the Animal Welfare Section of said division.

The Commissioner of Agriculture is hereby authorized to appoint a Director of said section whose duties and authority shall be determined by the Commissioner subject to the approval of the Board of Agriculture and subject to the provisions of this Article. (1977, 2nd Sess., c. 1217, s. 3.)

§ 19A-23. Definitions.

For the purposes of this Article, the following terms, when used in the Article or the rules and regulations or orders made pursuant thereto, shall be construed respectively to mean:

(1) "Adequate feed" means the provision at suitable intervals, not to exceed 24 hours, of a quantity of wholesome foodstuff suitable for the species and age, sufficient to maintain a reasonable level of nutrition in each animal. Such foodstuff shall be served in a sanitized receptacle, dish, or container.

(2) "Adequate water" means a constant access to a supply of clean, fresh, potable water provided in a sanitary manner or provided at suitable intervals for the species and not to exceed 24 hours at any interval.

(3) "Ambient temperature" means the temperature surrounding the animal.
(4) "Animal" means any domestic dog (Canis familiaris), domestic cat (Felis domestica).
(5) "Animal shelter" means a facility which is used to house or contain animals and which is owned, operated, or maintained by a duly incorporated humane society, animal welfare society, society for the prevention of cruelty to animals, or other nonprofit organization devoted to the welfare, protection and humane treatment of animals.
(5a) "Boarding kennel" means a facility or establishment which regularly offers to the public the service of boarding dogs or cats or both for a fee. Such a facility or establishment may, in addition to providing shelter, food and water, offer grooming or other services for dogs and/or cats.
(6) "Commissioner" means the Commissioner of Agriculture of the State of North Carolina.
(7) "Dealer" means any person who sells, exchanges, or donates, or offers to sell, exchange, or donate animals to another dealer, pet shop, or research facility; provided, however, that an individual who breeds and raises on his own premises no more than the offspring of five canine or feline females per year, unless bred and raised specifically for research purposes shall not be considered to be a dealer for the purposes of this Article.
(8) "Director" means the Director of the Animal Welfare Section of the Animal Health Division of the Department of Agriculture.
(9) "Euthanasia" means the human [humane] destruction of an animal accomplished by a method that involves rapid unconsciousness and immediate death or by a method that involves anesthesia, produced by an agent which causes painless loss of consciousness, and death during such loss of consciousness.
(10) "Housing facility" means any room, building, or area used to contain a primary enclosure or enclosures.
(11) "Person" means any individual, partnership, firm, joint-stock company, corporation, association, trust, estate, or other legal entity.
(12) "Pet shop" means a person or establishment that acquires for the purposes of resale animals bred by others whether as owner, agent, or on consignment, and that sells, trades or offers to sell or trade such animals to the general public at retail or wholesale.
(13) "Primary enclosure" means any structure used to immediately restrict an animal or animals to a limited amount of space, such as a room, pen, cage compartment or hutch.
(14) "Public auction" means any place or location where dogs or cats are sold at auction to the highest bidder regardless of whether such dogs or cats are offered as individuals, as a group, or by weight.
(15) "Research facility" means any place, laboratory, or institution at which scientific tests, experiments, or investigations involving the use of living animals are carried out, conducted, or attempted.
(16) "Sanitize" means to make physically clean and to remove and destroy to a practical minimum, agents injurious to health. (1977, 2nd Sess., c. 1217, s. 4; 1979, c. 734, s. 1.)

Effect of Amendments. — The 1979 amendment added subdivision (5a).

§ 19A-24. Rules and regulations of Board of Agriculture.

The Board of Agriculture is hereby authorized and empowered to make such reasonable rules and regulations with regard to animal welfare as may be necessary to carry out the objectives and the intent of this Article. Such rules and regulations may include but are not limited to provisions relating to humane transportation to and from registered or licensed premises, records of purchase and sale, identification of animals handled, primary enclosures, housing facilities, sanitation, euthanasia, ambient temperatures, feeding, watering, and veterinary medical care. It may, after public hearing shall have been held and notification of such hearing having been given to all licensees, adopt in whole or in part those portions of the rules and regulations, promulgated by the Secretary of the United States Department of Agriculture pursuant to the provisions of the United States Public Law 89-544, commonly known as the Laboratory Animal Welfare Act, which are consistent with the intent and purpose of this Article. (1977, 2nd Sess., c. 1217, s. 5.)

§ 19A-25. Employees; investigations; right of entry.

For the enforcement of the provisions of this Article, the Director is authorized, subject to the approval of the Commissioner to appoint employees as are necessary in order to carry out and enforce the provisions of this Article, and to assign them interchangeably with other employees of the Animal Health Division. The Director shall cause the investigation of all reports of violations of the provisions of this Article, and the rules and regulations adopted pursuant to the provisions hereof; provided further, that if any person shall deny the Director or his representative admittance to his property, either person shall be entitled to secure from any superior court judge a court order granting such admittance. (1977, 2nd Sess., c. 1217, s. 6.)

§ 19A-26. Certificate of registration required for animal shelter.

No person shall operate an animal shelter for more than one year subsequent to January 1, 1979, unless a certificate of registration for such animal shelter shall have been granted by the Director. Application for such certificate shall be made in the manner provided by the Director. No fee shall be required for such application or certificate. Certificates of registration shall be valid for a period of one year or until suspended or revoked and may be renewed for like periods upon application in the manner provided. (1977, 2nd Sess., c. 1217, s. 7.)

§ 19A-27. License required for operation of pet shop.

No person shall operate a pet shop as defined in this Article for more than six months subsequent to January 1, 1979, unless a license to operate such establishment shall have been granted by the Director. Application for such license shall be made in the manner provided by the Director. The license shall be for the fiscal year and the license fee shall be twenty-five dollars ($25.00) for each license period or part thereof beginning with the first day of the fiscal year. (1977, 2nd Sess., c. 1217, s. 8.)

§ 19A-28. License required for public auction or boarding kennel.

No person shall operate a public auction or a boarding kennel as defined in this Article for more than six months subsequent to January 1, 1979, unless a license to operate such establishment shall have been granted by the Director. Application for such license shall be made in the manner provided by the Director. The license period shall be the fiscal year and the license fee shall be twenty-five dollars ($25.00) for each license period or part thereof beginning with the first day of the fiscal year. (1977, 2nd Sess., c. 1217, s. 9.)

§ 19A-29. License required for dealer.

No person shall be a dealer as defined in this Article for more than six months after January 1, 1979, unless a license to deal shall have been granted by the Director to such person. Application for such license shall be in the manner provided by the Director. The license period shall be the fiscal year and the license fee shall be twenty-five dollars ($25.00) for each license period or part thereof, beginning with the first day of the fiscal year. (1977, 2nd Sess., c. 1217, s. 10.)

§ 19A-30. Refusal, suspension or revocation of certificate or license.

The Director may refuse to issue or renew or may suspend or revoke a certificate of registration for any animal shelter or a license for any public auction, kennel, pet shop, or dealer, if after an impartial investigation as provided in this Article he determines that any one or more of the following grounds apply:

(1) Material misstatement in the application for the original certificate of registration or license or in the application for any renewal under this Article;
(2) Willful disregard or violation of this Article or any regulations or rules issued pursuant thereto;
(3) Failure to provide adequate housing facilities and/or primary enclosures for the purposes of this Article, or if the feeding, watering, sanitizing and housing practices at the animal shelter, public auction, pet shop, or kennel are not consistent with the intent of this Article or with the intent of the rules and regulations which may be promulgated pursuant to the authority of this Article;
(4) Allowing one's license under this Article to be used by an unlicensed person;
(5) Conviction of any crime an essential element of which is misstatement, fraud, or dishonesty, or conviction of any felony;
(6) Making substantial misrepresentations or false promises of a character likely to influence, persuade, or induce in connection with the business of a public auction, commercial kennel, pet shop, or dealer;
(7) Pursuing a continued course of misrepresentation of or making false promises through advertising, salesmen, agents, or otherwise in connection with the business to be licensed;
(8) Failure to possess the necessary qualifications or to meet the requirements of this Article for the issuance or holding of a certificate of registration or license.

The Director shall, before refusing to issue or renew and before suspension or revocation of a certificate of registration or a license, give to the applicant or holder thereof a written notice containing a statement indicating in what

respects the applicant or holder has failed to satisfy the requirements for the holding of a certificate of registration or a license. If a certificate of registration or a license is suspended or revoked under the provisions hereof, the holder shall have five days from such suspension or revocation to surrender all certificates of registration or licenses issued thereunder to the Director or his authorized representative.

Any person to whom a certificate of registration or a license is denied, suspended, or revoked by the Director, may appeal such denial, suspension, or revocation by filing within five days in writing with the Director a request for a public hearing before the Board of Agriculture or its designated hearing officer, and such hearing shall be held within 10 days and shall be conducted in accordance with the provisions of G.S. 19A-32.

Any licensee whose license is revoked under the provisions of this Article shall not be eligible to apply for a new license hereunder until one year has elapsed from the date of the order revoking said license or if an appeal is taken from said order of revocation, one year from the date of the order or final judgment sustaining said revocation. Any person who has been an officer, agent, or employee of a licensee whose license has been revoked or suspended and who is responsible for or participated in the violation upon which the order of suspension or revocation was based, shall not be licensed within the period during which the order of suspension or revocation is in effect. (1977, 2nd Sess., c. 1217, s. 11.)

§ 19A-31. License not transferable; change in management, etc., of business or operation.

A license is not transferable. When there is a transfer of ownership, management, or operation of a business of a licensee hereunder, the new owner, manager, or operator, as the case may be, whether it be an individual, firm, partnership, corporation, or other entity shall have 10 days from such sale or transfer to secure a new license from the Director to operate said business. A licensee shall promptly notify the Director of any change in the name, address, management, or substantial control of his business or operation. (1977, 2nd Sess., c. 1217, s. 12.)

§ 19A-32. Proceedings under Article; appeals.

Proceedings under this Article shall be taken by the Board of Agriculture or its delegated hearing officer when accusation is made in writing and under oath. Upon receiving such accusation, the Board of Agriculture, or its hearing officer, shall serve notice by registered mail or personally of the time and place of the hearing, and a copy of the charges upon the accused at least 15 days before the date of the hearing. The Board of Agriculture, or its hearing officer, for sufficient cause in its discretion, may postpone or continue said hearing from time to time, or if after proper notice no appearance is made by the accused, the Board or the hearing officer may enter judgment at the time of hearing as prescribed herein, either by suspending or revoking the license of the accused or dismissing the accusation. Both the Board of Agriculture, or hearing officer, and the accused may have the benefit of counsel and the right to cross-examine witnesses, to take depositions, and to compel attendance of witnesses as in cases by subpoena issued by the Director under the seal of the Board of Agriculture, and in the name of the State of North Carolina. The testimony of all witnesses at any hearing before the Board of Agriculture, or hearing officer, shall be under oath or affirmation. The Director is authorized to reimburse witnesses for their time and travel, and to award expert witness fees to witnesses so qualified. The record of all hearings and judgments shall be kept by the Secretary of the Board of Agriculture, and in the event of

suspension or revocation of certificate of registration or license, the Secretary shall within 10 days transmit a certified copy of said judgment to the clerk of the superior court of the county of the residence of the accused or his registered agent, and the clerk shall file said judgment in the judgment docket of said county.

Any person may appeal to the Superior Court of Wake County the denial of a certificate of registration or license, and any holder of a certificate of registration or licensee may appeal to the Superior Court of Wake County the failure to renew any certificate of registration or license or the revocation or suspension of the license issued under the provisions of this Article, and such appeals shall be made pursuant to the provisions of Chapter 150A of the General Statutes. (1977, 2nd Sess., c. 1217, s. 13.)

§ 19A-33. Penalty for operation of pet shop, kennel or auction without license.

Operation of a pet shop, kennel, or public auction without a currently valid license shall constitute a misdemeanor subject to a penalty of not less than five dollars ($5.00) nor more than twenty-five dollars ($25.00), and each day of operation shall constitute a separate offense. (1977, 2nd Sess., c. 1217, s. 14.)

§ 19A-34. Penalty for acting as dealer without license; disposition of animals in custody of unlicensed dealer.

Acting as a dealer in animals as defined in this Article without a currently valid dealer's license shall constitute a misdemeanor subject to a penalty of not less than five dollars ($5.00) nor more than twenty-five dollars ($25.00), or imprisonment for a period not to exceed six months, or both fine and imprisonment. Continued illegal operation after conviction shall constitute a separate offense. Animals found in possession or custody of an unlicensed dealer shall be subject to immediate seizure and impoundment and upon conviction of such unlicensed dealer shall become subject to sale or euthanasia in the discretion of the Director. (1977, 2nd Sess., c. 1217, s. 15.)

§ 19A-35. Penalty for failure to adequately care for animals; disposition of animals.

Failure of any person licensed or registered under this Article to adequately house, feed, and water animals in his possession or custody shall constitute a misdemeanor, and such person shall be subject to a fine of not less than five dollars ($5.00) per animal or more than a total of one thousand dollars ($1,000). Such animals shall be subject to seizure and impoundment and upon conviction may be sold or euthanized at the discretion of the Director and such failure shall also constitute grounds for revocation of license after public hearing. The Director is hereby authorized to disburse State funds in such amount as in his discretion is necessary to provide for the welfare of the animals until either sold or euthanized and any fine levied in connection with this section shall be applied toward reimbursement of such State funds as the Director shall have expended. (1977, 2nd Sess., c. 1217, s. 16.)

§ 19A-36. Penalty for violation of Article by dog warden.

Violation of any provision of this Article which relates to the seizing, impoundment, and custody of an animal by a dog warden shall constitute a misdemeanor and the person convicted thereof shall be subject to a fine of not less than fifty dollars ($50.00) and not more than one hundred dollars ($100.00), and each animal handled in violation shall constitute a separate offense. (1977, 2nd Sess., c. 1217, s. 17.)

§ 19A-37. Application of Article.

This Article shall not apply to a place or establishment which is operated under the immediate supervision of a duly licensed veterinarian as a hospital where animals are harbored, boarded, and cared for incidental to the treatment, prevention, or alleviation of disease processes during the routine practice of the profession of veterinary medicine. This Article shall not apply to any dealer, pet shop, public auction, commercial kennel or research facility during the period such dealer or research facility is in the possession of a valid license or registration granted by the Secretary of Agriculture pursuant to the provisions of United States Public Law 89-544. This Article shall not apply to any individual who occasionally boards an animal on a noncommercial basis, although such individual may receive nominal sums to cover the cost of such boarding. (1977, 2nd Sess., c. 1217, s. 18.)

§ 19A-38. Use of license fees.

All license fees collected shall be used in enforcing and administering this Article. (1977, 2nd Sess., c. 1217, s. 19.)

§ 19A-39. Article inapplicable to establishments for training hunting dogs.

Nothing in this Article shall apply to those kennels or establishments operated primarily for the purpose of boarding or training hunting dogs. (1977, 2nd Sess., c. 1217, s. 21; 1979, c. 734, s. 2.)

Effect of Amendments. — The 1979 amendment inserted "boarding or."

§§ 19A-40 to 19A-44: Reserved for future codification purposes.

Article 4.

Animal Cruelty Investigators.

§ 19A-45. Appointment of animal cruelty investigators; term of office; removal; badge; oath; bond.

(a) The board of county commissioners is authorized to appoint one or more animal cruelty investigators to serve without any compensation or other employee benefits in his county. In making these appointments, the board may consider persons nominated by any society incorporated under North Carolina law for the prevention of cruelty to animals. Prior to making any such appointment, the board of county commissioners is authorized to enter into an agreement whereby any necessary expenses of caring for seized animals not

collectable pursuant to G.S. 19A-47 may be paid by the animal cruelty investigator or by any society incorporated under North Carolina law for the prevention of cruelty to animals that is willing to bear such expense.

(b) Animal cruelty investigators shall serve a one-year term subject to removal for cause by the board of county commissioners. Animal cruelty investigators shall, while in the performance of their official duties, wear in plain view a badge of a design approved by the board identifying them as animal cruelty investigators, and provided at no cost to the county.

(c) Animal cruelty investigators shall take and subscribe the oath of office required of public officials. The oath shall be filed with the clerk of superior court. Animal cruelty investigators shall not be required to post any bond.

(d) Upon approval by the board of county commissioners, the animal cruelty investigator or investigators may be reimbursed for all necessary and actual expenses, to be paid by the county. (1979, c. 808, s. 1.)

Editor's Note. — Session Laws 1979, c. 808, s. 6, makes the act effective July 1, 1979.

§ 19A-46. Powers; magistrate's order; execution of order; petition; notice to owner.

(a) Whenever any animal is being cruelly treated as defined in G.S. 19A-1(2), an animal cruelty investigator may file with a magistrate a sworn complaint requesting an order allowing the investigator to provide suitable care for and take immediate custody of the animal. The magistrate shall issue the order only when he finds probable cause to believe that the animal is being cruelly treated and that it is necessary for the investigator to immediately take custody of it. Any magistrate's order issued under this section shall be valid for only 24 hours after its issuance. After he executes the order, the animal cruelty investigator shall return it with a written inventory of the animals seized to the clerk of court in the county where the order was issued.

(b) The animal cruelty investigator may request a law enforcement officer or animal control officer to accompany him to help him seize the animal. An investigator may forcibly enter any premises or vehicle when necessary to execute the order only if he reasonably believes that the premises or vehicle is unoccupied by any person and that the animal is on the premises or in the vehicle. Forcible entry shall be used only when the animal cruelty investigator is accompanied by a law enforcement officer. In any case, he must give notice of his identity and purpose to anyone who may be present before entering said premises. Forcible entry shall only be used during the daylight hours.

(c) When he has taken custody of such an animal, the animal cruelty investigator shall file a complaint pursuant to Article 1 of this Chapter as soon as possible. When he seizes the animal, he shall leave with the owner, if known, or affixed to the premises or vehicle a copy of the magistrate's order and a written notice of a description of the animal, the place where the animal will be taken, the reason for taking the animal, and the investigator's intent to file a complaint in district court requesting custody of the animal pursuant to Article 1 of this Chapter.

(d) Notwithstanding the provisions of G.S. 7A-305(c), any person who commences a proceeding under this Article or Article 1 of this Chapter shall not be required to pay any court costs or fees prior to a final judicial determination as provided in G.S. 19A-4, at which time those costs shall be paid pursuant to the provisions of G.S. 6-18.

(e) Any judicial order authorizing forcible entry shall be issued by a district court judge. (1979, c. 808, s. 1.)

§ 19A-47. Care of seized animals.

The investigator must take any animal he seizes directly to some safe and secure place and provide suitable care for it. The necessary expenses of caring for seized animals, including necessary veterinary care, shall be a charge against the animal's owner and a lien on the animal to be enforced as provided by G.S. 44A-4. (1979, c. 808, s. 1.)

§ 19A-48. Interference unlawful.

It shall be a misdemeanor punishable by a fine of up to two hundred dollars ($200.00) or not more than ninety days imprisonment, or both, to interfere with an animal cruelty investigator in the performance of his official duties. (1979, c. 808, s. 1.)

§ 19A-49. Educational requirements.

Each animal cruelty investigator at his own expense must attend annually a course of at least six hours instruction offered by the North Carolina Humane Federation or some other agency. The course shall be designed to give the investigator expertise in the investigation of complaints relating to the care and treatment of animals. Failure to attend a course approved by the board of county commissioners shall be cause for removal from office. (1979, c. 808, s. 1.)

Chapter 20.

Motor Vehicles.

Article 1.

Division of Motor Vehicles.

Sec.

Article 1A.

Reciprocity Agreements as to Registration and Licensing.

Article 1B.

Reciprocal Provisions as to Arrest of Nonresidents.

Article 2.

Uniform Driver's License Act.

Article 2A.

Afflicted, Disabled or Handicapped Persons.

Article 2B.

Special Identification Cards for Nonoperators.

ARTICLE 1.

Division of Motor Vehicles.

§ 20-1. Division of Motor Vehicles of the Department of Transportation; powers and duties.

CASE NOTES

Cited in State v. Wyrick, 35 N.C. App. 352, 241 S.E.2d 355 (1978).

§ 20-4.01. Definitions.

Unless the context otherwise requires, the following words and phrases, for the purpose of this Chapter, shall have the following meanings:

(1) Business District. — The territory prescribed as such by ordinance of the Board of Transportation.

(2) Canceled. — As applied to drivers' licenses and permits, a declaration that a license or permit which was issued through error or fraud is void and terminated.

(3) Repealed by Session Laws 1979, c. 667, s. 1, effective January 1, 1981.

(4) Commissioner. — The Commissioner of Motor Vehicles.

(5) Dealer. — Every person engaged in the business of buying, selling, distributing, or exchanging motor vehicles, trailers or semitrailers in this State, having an established place of business in this State and being subject to the tax levied by G.S. 105-89.

The terms "motor vehicle dealer," " new motor vehicle dealer," and "used motor vehicle dealer" shall have the meaning set forth in G.S. 20-286.

(6) Division. — The Division of Motor Vehicles acting directly or through its duly authorized officers and agents.

(7) Driver. — The operator of a vehicle.

(8) Essential Parts. — All integral and body parts of a vehicle of any type required to be registered hereunder, the removal, alteration, or substitution of which would tend to conceal the identity of the vehicle or substantially alter its appearance, model, type, or mode of operation.

(9) Established Place of Business. — Except as provided in G.S. 20-286, the place actually occupied by a dealer or manufacturer at which a permanent business of bargaining, trading, and selling motor vehicles is or will be carried on and at which the books, records, and files necessary and incident to the conduct of the business of automobile dealers or manufacturers shall be kept and maintained.

(10) Explosives. — Any chemical compound or mechanical mixture that is commonly used or intended for the purpose of producing an explosion and which contains any oxidizing and combustive units or other ingredients in such proportions, quantities, or packing that an ignition by fire, by friction, by concussion, by percussion, or by detonator of any part of the compound or mixture may cause such a sudden generation of highly heated gases that the resultant gaseous presses [pressures] are capable of producing destructible effects on contiguous objects or of destroying life or limb.

(11) Farm Tractor. — Every motor vehicle designed and used primarily as a farm implement for drawing plows, mowing machines, and other implements of husbandry.

(12) Foreign Vehicle. — Every vehicle of a type required to be registered hereunder brought into this State from another state, territory, or country, other than in the ordinary course of business, by or through a manufacturer or dealer and not registered in this State.

(13) Highway or Street. — The entire width between property or right-of-way lines of every way or place of whatever nature, when any part thereof is open to the use of the public as a matter of right for the purposes of vehicular traffic. The terms "highway" or "street" or a combination of the two terms shall be used synonymously.

(14) House Trailer. — Any trailer or semitrailer designed and equipped to provide living or sleeping facilities and drawn by a motor vehicle.

(15) Implement of Husbandry. — Every vehicle which is designed for agricultural purposes and used exclusively in the conduct of agricultural operations.

(16) Intersection. — The area embraced within the prolongation of the lateral curblines or, if none, then the lateral edge of roadway lines of two or more highways which join one another at any angle whether or not one such highway crosses the other.

Where a highway includes two roadways 30 feet or more apart, then every crossing of each roadway of such divided highway by an intersecting highway shall be regarded as a separate intersection. In the event that such intersecting highway also includes two roadways 30 feet or more apart, then every crossing of two roadways of such highways shall be regarded as a separate intersection.

(17) License. — Any driver's license or any other license or permit to operate a motor vehicle issued under or granted by the laws of this State including:

a. Any temporary license or learner's permit;

b. The privilege of any person to drive a motor vehicle whether or not such person holds a valid license; and

c. Any nonresident's operating privilege.

(18) Local Authorities. — Every county, municipality, or other territorial district with a local board or body having authority to adopt local police regulations under the Constitution and laws of this State.

(19) Manufacturer. — Every person, resident, or nonresident of this State, who manufactures or assembles motor vehicles.

(20) Manufacturer's Certificate. — A certification on a form approved by the Division, signed by the manufacturer, indicating the name of the person or dealer to whom the therein-described vehicle is transferred, the date of transfer and that such vehicle is the first transfer of such vehicle in ordinary trade and commerce. The description of the vehicle shall include the make, model, year, type of body, identification number or numbers, and such other information as the Division may require.

(21) Metal Tire. — Every tire the surface of which in contact with the highway is wholly or partly of metal or other hard, nonresilient material.

(21a) Moped. — A type of passenger vehicle as defined in G.S. 20-4.01(27).

(22) Motorcycle. — A type of passenger vehicle as defined in G.S. 20-4.01(27).

(23) Motor Vehicle. — Every vehicle which is self-propelled and every vehicle designed to run upon the highways which is pulled by a self-propelled vehicle. This shall not include mopeds as defined in G.S. 20-4.01(27)d1.

(24) Nonresident. — Any person whose legal residence in some state, territory or jurisdiction other than North Carolina or in a foreign country.

(25) Operator. — A person in actual physical control of a vehicle which is in motion or which has the engine running.

(26) Owner. — A person holding the legal title to a vehicle, or in the event a vehicle is the subject of a chattel mortgage or an agreement for the conditional sale or lease thereof or other like agreement, with the right of purchase upon performance of the conditions stated in the agreement, and with the immediate right of possession vested in the mortgagor, conditional vendee or lessee, said mortgagor, conditional vendee or lessee shall be deemed the owner for the purpose of this Chapter. For the purposes of this Chapter, the lessee of a vehicle owned by the government of the United States shall be considered the owner of said vehicle.

(27) Passenger Vehicles. —

a. Excursion passenger vehicles. — Vehicles transporting persons on sight-seeing or travel tours.

b. For hire passenger vehicles. — Vehicles transporting persons for compensation. This classification shall not include vehicles operated as ambulances; vehicles operated by the owner where the costs of operation are shared by the passengers; vehicles operated on behalf of any employer pursuant to a ridesharing arrangement as defined in G.S. 136-44.21; vehicles transporting students for the public school system under contract with the State Board of Education or vehicles leased to the United States of America or any of its agencies on a nonprofit basis; or vehicles used for human service or volunteer transportation.

c. Common carriers of passengers. — Vehicles operated under a franchise certificate issued by the Utilities Commission for operation on the highways of this State between fixed termini or over a regular route for the transportation of persons or property for compensation.

d. Motorcycles. — Vehicles having a saddle for the use of the rider and designed to travel on not more than three wheels in contact with the ground, including motor scooters and motor-driven bicycles, but excluding tractors and utility vehicles equipped with an additional form of device designed to transport property, three-wheeled vehicles while being used by law-enforcement agencies and mo-peds as defined in subdivision d1 of this subsection.

d1. Mo-ped. — Vehicles having two or three wheels and operable pedals and equipped with a motor which does not exceed 50 cubic centimeters piston displacement and cannot propel the vehicle at a speed greater than 20 miles per hour on a level surface.

e. U-drive-it passenger vehicles. — Vehicles rented or leased to be operated by the lessee. This shall not include vehicles of nine-passenger capacity or less which are leased for a term of one year or more to the same person or vehicles leased or rented to public school authorities for driver-training instruction.

f. Ambulances. — Vehicles equipped for transporting wounded, injured, or sick persons.

g. Private passenger vehicles. — All other passenger vehicles not included in the above definitions.

(28) Person. — Every individual, firm, partnership, association, corporation, governmental agency, or combination thereof of whatsoever form or character.

(29) Pneumatic Tire. — Every tire in which compressed air is designed to support the load.

(30) Private Road or Driveway. — Every road or driveway not open to the use of the public as a matter of right for the purpose of vehicular traffic.

(31) Property-Hauling Vehicles. —

a. Exempt for-hire vehicles. — Vehicles used for the transportation of property for hire but not licensed as common carriers or contract carriers of property under franchise certificates or permits issued by the Utilities Commission or by the Interstate Commerce Commission; provided, that the term "for hire" shall include every arrangement by which the owner of a vehicle uses, or permits such vehicle to be used, for the transportation of the property of another for compensation, subject to the following exemptions:

1. The transportation of farm crops or products, including logs, bark, pulp, and tannic acid wood delivered from farms and

forest to the first or primary market, and the transportation of wood chips from the place where wood has been converted into chips to their first or primary market.

2. The transportation of perishable foods which are still owned by the grower while being delivered to the first or primary market by an operator who has not more than one truck, truck-tractor, or trailer in a for-hire operation.
3. The transportation of merchandise hauled for neighborhood farmers incidentally and not as a regular business in going to and from farms and primary markets.
4. The transportation of T.V.A. or A.A.A. phosphate and/or agricultural limestone in bulk which is furnished as a grant of aid under the United States Agricultural Adjustment Administration.
5. The transportation of fuel for the exclusive use of the public schools of the State.
6. Vehicles whose sole operation in carrying the property of others is limited to the transportation of the United States mail pursuant to a contract, or the extension or renewal of such contract.
7. Vehicles leased for a term of one year or more to the same person when used exclusively by such person in transporting his own property.

b. Common carrier of property vehicles. — Vehicles used for the transportation of property certified by the Utilities Commission or the Interstate Commerce Commission as common carriers.

c. Private hauler vehicles. — Vehicles used for the transportation of property not falling within one of the above-defined classifications; provided, self-propelled vehicles equipped with permanent living and sleeping facilities used for camping activities shall be classified as private passenger vehicles.

d. Semitrailers. — Vehicles without motive power designed for carrying property or persons and for being drawn by a motor vehicle, and so constructed that part of their weight or their load rests upon or is carried by the pulling vehicle.

e. Trailers. — Vehicles without motive power designed for carrying property or persons wholly on their own structure and to be drawn by a motor vehicle, including "pole trailers" or a pair of wheels used primarily to balance a load rather than for purposes of transportation.

f. Contract carrier of property vehicles. — Vehicles used for the transportation of property under a franchise permit of a regulated contract carrier issued by the Utilities Commission or the Interstate Commerce Commission.

(32) Public Vehicular Area. — Any drive, driveway, road, roadway, street, or alley upon the grounds and premises of any public or private hospital, college, university, school, orphanage, church, or any of the institutions maintained and supported by the State of North Carolina, or any of its subdivisions or upon the grounds and premises of any service station, drive-in theater, supermarket, store, restaurant or office building, or any other business, residential, or municipal establishment providing parking space for customers, patrons, or the public or any drive, driveway, road, roadway, street, alley or parking lot upon any property owned by the United States and subject to the jurisdiction of the State of North Carolina (the inclusion of property owned by the United States in this definition shall not limit assimilation of North Carolina law where applicable under the provi-

sion of Title 18, United States Code, section 13). The term "public vehicular area" shall also include any street opened to vehicular traffic within a subdivision which has been offered for dedication to the public by the filing of a map, plat or written instrument in the office of the Register of Deeds; provided however, a public authority (i) has not accepted the dedicaction of the street, and (ii) a public authority has not assumed control over the street.

(33) Reconstructed Vehicles. — Vehicles of a type required to be registered hereunder materially altered from their original construction by the removal, addition, or substitution of essential parts.

(34) Resident. — Any person who resides within this State for other than a temporary or transitory purpose for more than six months shall be presumed to be a resident of this State; but absence from the State for more than six months shall raise no presumption that the person is not a resident of this State.

(35) Residental District. — The territory prescribed as such by ordinance of the Department of Transportation.

(36) Revocation or Suspension. — Termination of a licensee's or permittee's privilege to drive or termination of the registration of a vehicle for a period of time stated in an order of revocation or suspension. The terms "revocation" or "suspension" or a combination of both terms shall be used synonymously.

(37) Road Tractors. — Vehicles designed and used for drawing other vehicles upon the highway and not so constructed as to carry any part of the load, either independently or as a part of the weight of the vehicle so drawn.

(38) Roadway. — That portion of a highway improved, designed, or ordinarily used for vehicular travel, exclusive of the shoulder. In the event of a highway includes two or more separate roadways the term "roadway" as used herein shall refer to any such roadway separately but not to all such roadways collectively.

(39) Safety Zone. — Traffic island or other space officially set aside within a highway for the exclusive use of pedestrians and which is so plainly marked or indicated by proper signs as to be plainly visible at all times while set apart as a safety zone.

(40) Security Agreement. — Written agreement which reserves or creates a security interest.

(41) Security Interest. — An interest in a vehicle reserved or created by agreement and which secures payments or performance of an obligation. The term includes but is not limited to the interest of a chattel mortgagee, the interest of a vendor under a conditional sales contract, the interest of a trustee under a chattel deed of trust, and the interest of a lessor under a lease intended as security. A security interest is "perfected" when it is valid against third parties generally.

(42) Solid Tire. — Every tire or rubber or other resilient material which does not depend upon compressed air for the support of the load.

(43) Specially Constructed Vehicles. — Vehicles of a type required to be registered hereunder not originally constructed under a distinctive name, make, model, or type by a generally recognized manufacturer of vehicles and not materially altered from their original construction.

(44) Special Mobile Equipment. — Every truck, truck-tractor, industrial truck, trailer, or semitrailer on which have been permanently attached cranes, mills, well-boring apparatus, ditch-digging apparatus, air compressors, electric welders, or any similar type apparatus or which have been converted into living or office quarters, or other self-propelled vehicles which were originally constructed in a similar manner which are operated on the highway only for the

purpose of getting to and from a nonhighway job and not for the transportation of persons or property or for hire. This shall also include trucks on which special equipment has been mounted and used by American Legion or Shrine Temples for parade purposes, trucks or vehicles privately owned on which fire-fighting equipment has been mounted and which are used only for fire-fighting purposes, and vehicles on which are permanently mounted feed mixers, grinders, and mills although there is also transported on the vehicle molasses or other similar type feed additives for use in connection with the feed-mixing, grinding, or milling process.

(45) State. — A state, territory, or possession of the United States, District of Columbia, Commonwealth of Puerto Rico, or a province of Canada.

(46) Street. — The entire width between property or right-of-way lines of every way or place of whatever nature, when any part thereof is open to the use of the public as a matter of right for the purposes of vehicular traffic. The terms "highway" or "street" or a combination of the two terms shall be used synonymously.

(47) Suspension. — Termination of a licensee's or permittee's privilege to drive or termination of the registration of a vehicle for a period of time stated in an order of revocation or suspension. The terms "revocation" or "suspension" or a combination of both terms shall be used synonymously.

(48) Truck Tractors. — Vehicles designed and used primarily for drawing other vehicles and not so constructed as to carry any load independent of the vehicle so drawn.

(49) Vehicle. — Every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, excepting devices moved by human power or used exclusively upon fixed rails or tracks; provided, that for the purposes of this Chapter bicycles shall be deemed vehicles and every rider of a bicycle upon a highway shall be subject to the provisions of this Chapter applicable to the driver of a vehicle except those which by their nature can have no application.

(50) Wreckers. — Vehicles with permanently attached cranes used to move other vehicles; provided, that said wreckers shall be equipped with adequate brakes for units being towed. (1973, c. 1330, s. 1; 1975, cc. 94, 208; c. 716, s. 5; c. 743; c. 859, s. 1; 1977, c. 313; c. 464, s. 34; 1979, c. 39; c. 423, s. 1; c. 574, ss. 1-4; c. 680; c. 667, s. 1; 1981, c. 606, s. 3; c. 792, s. 2.)

Effect of Amendments. — Session Laws 1979, c. 39, deleted "exclusively" following "facilities used" near the end of paragraph c of subdivision (31).

Session Laws 1979, c. 423, s. 1, added to subdivision (32) the provisions as to property owned by the United States and subject to the jurisdiction of the State of North Carolina.

Session Laws 1979, c. 574, ss. 1-4, effective July 1, 1979, added subdivision (21a), substituted "mo-peds as defined in G.S. 20-4.01(27)d1" for "bicycles with helper motors rated less than one brake horsepower which produce only ordinary pedaling speeds up to a maximum of 20 miles per hour" in the second sentence of subdivision (23), substituted "mo-peds as defined in subdivision d1 of this subsection" for "bicycles with helper motors rated less than one brake horsepower which produce only ordinary pedaling speeds up to a maximum of 20 miles per hour" in paragraph d of subdivision (27), and added paragraph d1 of subdivision (27).

Session Laws 1979, c. 667, s. 1, effective Jan. 1, 1981, substituted "drivers' licenses" for "operators' and chauffeurs' licenses" in subdivision (2) and deleted subdivision (3).

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.'"

Session Laws 1979, c. 680, effective July 1, 1979, added the second sentence of subdivision (32).

The first 1981 amendment, in paragraph b of subdivision (27), substituted "vehicles operated

by the owner where the costs of operation are shared by the passengers, vehicles operated on behalf of any employer pursuant to a ridesharing arrangement as defined in G.S. 136-44.21" for "vehicles (except those with wheel bases of 140 inches or more) operated by the owner where the cost of operation is shared by the passengers; vehicles (except those with wheel bases of 140 inches or more operated by any bona fide employee for the transportation of other bona fide employees and himself to and from the place(s) of their regular employment and operated for compensation only for one round trip per day to and from the work location(s)."

The second 1981 amendment, effective January 1, 1982, added "or vehicles used for human service or volunteer transportation" at the end of paragraph (27)b.

Session Laws 1981, c. 792, s. 4, contains a severability clause.

CASE NOTES

Construction of Subdivision (13). — The definition of "highway" in subdivision (13) is to be construed so as to give its terms their plain and ordinary meaning. Smith v. Powell, 293 N.C. 342, 238 S.E.2d 137 (1977).

The legislature has provided that, unless the context requires otherwise, the word "highway" is to be given the same connotation in all of the provisions of Chapter 20, whether they be penal, remedial or otherwise. Thus, the well known principles of statutory construction that a penal statute is to be strictly construed and a statute designed to promote safety is to be liberally construed have no application. Smith v. Powell, 293 N.C. 342, 238 S.E.2d 137 (1977).

"Highway" Distinguished from Road way. — The definitions of "highway" and "roadway," considered together, show that the legislature in defining "highway" intended to make it clear that the entire "width" between the right-of-way lines is included in a "highway" as distinguished from a "roadway." Smith v. Powell, 293 N.C. 342, 238 S.E.2d 137 (1977).

Definition of "Highway" Is Concerned with Width, Not Depth. — While it is true that a "highway" or a "street" is not limited to its surface so far as the right of the State to use, maintain and protect it from damage and private use are concerned, and in this sense, it includes not only the entire thickness of the pavement and the prepared base upon which it rests but also so much of the depth as may not unfairly be used as streets are used for the laying therein of drainage systems and conduits for sewer, water and other services, nevertheless, the primary concern of the legislature in defining "highway" as used in Chapter 20 was with the "width," not the depth. "Width" means "the lineal extent of a thing from side to side." Smith v. Powell, 293 N.C. 342, 238 S.E.2d 137 (1977).

Area beneath Highway Bridge Not "Highway". — A petitioner who drove a motor vehicle only within the limits of the area beneath a highway bridge did not drive on a "highway" as that term is used in § 20-16.2. Smith v. Powell, 293 N.C. 342, 238 S.E.2d 137 (1977).

Stated in Oroweat Employees Credit Union v. Stroupe, 48 N.C. App. 338, 269 S.E.2d 211 (1980).

Cited in Harper v. Peters, 42 N.C. App. 62, 255 S.E.2d 791 (1979); Lupo v. Powell, 44 N.C. App. 35, 259 S.E.2d 777 (1979).

ARTICLE 1A.

Reciprocity Agreements as to Registration and Licensing.

§ 20-4.2. Definitions.

As used in this Article:

(1) "Commercial vehicle" means any vehicle which is operated in furtherance of any commercial enterprise.

(1979, c. 470, s. 2.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1981, deleted "interstate" after "operated" in subdivision (1).

Only Part of Section Set Out. — As the other subdivisions were not changed by the amendment, only the introductory language and subdivision (1) are set out.

ARTICLE 1B.

Reciprocal Provisions as to Arrest of Nonresidents.

§ 20-4.18. Definitions.

Unless the context otherwise requires, the following words and phrases, for the purpose of this Article, shall have the following meanings:

(1) Citation. — Any citation, summons, ticket, or other document issued by a law-enforcement officer for the violation of a traffic law, ordinance, rule or regulation.

(2) Collateral or Bond. — Any cash or other security deposited to secure an appearance following a citation by a law-enforcement officer.

(3) Repealed by Session Laws 1979, c. 667, s. 2, effective January 1, 1981.

(4) Nonresident. — A person who holds a license issued by a reciprocating state.

(5) Personal Recognizance. — A signed agreement by a nonresident that he will comply with the terms of the citation issued to him.

(6) Reciprocating State. — Any state or other jurisdiction which extends by its laws to residents of North Carolina substantially the rights and privileges provided by this Article.

(7) State. — The State of North Carolina. (1973, c. 736; 1979, c. 667, s. 2; 1981, c. 508.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1981, deleted subdivision (3), which defined "License" as "Any operator's or chauffeur's license or any other license, permit, or privilege to operate a motor vehicle."

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.'"

§ 20-4.20. Division to transmit report to reciprocating state; suspension of license for noncompliance with citation issued by reciprocating state.

(c) A copy of any suspension order issued hereunder may be furnished to the licensing authority of the reciprocating state.

(1979, c. 104.)

Effect of Amendments. — The 1979 amendment, effective October 1, 1979, substituted "may" for "shall" in subsection (c).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (c) is set out.

ARTICLE 2.

Uniform Driver's License Act.

§ 20-7. Drivers' licenses; expiration; examination; fees.

(a) Except as otherwise provided in this Article, no person shall operate a motor vehicle on a highway unless such person has first been licensed by the Division under the provisions of this Article for the type or class of vehicle being driven. Drivers' licenses shall be classified as follows:

(1) Class "A" which entitles a licensee to drive any vehicle or combination of vehicles, except motorcycles, including all vehicles under Classes "B" or "C."

(2) Class "B" which entitles a licensee to drive a single vehicle weighing over 30,000 pounds gross vehicle weight, any such vehicle towing a vehicle weighing 10,000 pounds gross vehicle weight or less, a single vehicle designed to carry more than 12 passengers and all vehicles under Class "C." A Class "B" license does not entitle the licensee to drive a motorcycle.

(3) Class "C" which entitles a licensee to drive a single vehicle weighing 30,000 pounds gross vehicle weight or less; any such vehicle towing a vehicle weighing 10,000 pounds gross vehicle weight or less; a church bus, farm bus, volunteer transportation vehicle, or activity bus operated for a nonprofit organization when the activity bus is operated for a nonprofit purpose; and a fire-fighting vehicle or combination of vehicles (regardless of gross vehicle weight) when operated by any volunteer member of a municipal or rural fire department in the performance of his duty. A Class "C" license does not entitle the licensee to drive a motorcycle. A Class "C" license does not entitle the licensee to drive a vehicle designed to carry more than 12 passengers unless this subsection or G.S. 20-218(a) specifically entitles him to do so.

Any unusual vehicle shall be assigned by the Commissioner to the most appropriate class with suitable special restrictions if they appear to be necessary.

Any person who takes up residence in this State on a permanent basis is exempt from the provisions of this subsection for 30 days from the date that residence is established, if he is properly licensed in the jurisdiction of which he is a former resident.

(a1) No operator's or chauffeur's license issued on or after October 1, 1979, shall authorize the licensee to operate a motorcycle unless the license has been appropriately endorsed by the Division to indicate that the licensee has passed special road and written (or oral) tests demonstrating competence to operate a motorcycle. Any person licensed prior to January 1, 1978, who has operated a motorcycle for at least two years prior to that date, will be exempt from the provisions of this subsection upon filing with the Division of Motor Vehicles an affidavit attesting to said two years' experience. Nothing contained in this subsection shall be construed to require a mo-ped operator to have a driver's license.

(b) Every application for a driver's license shall be made upon the approved form furnished by the Division.

(c) No person shall hereafter be issued a driver's license until it is determined that such person is physically and mentally capable of safely operating motor vehicles (of the type or class for which the person applied to be licensed) over the highways of the State. In determining whether or not a person is physically and mentally capable of safely operating motor vehicles over the highways of the State, the Division shall require such person to demonstrate his capability by passing an examination, which may include road tests, oral and in the case of literate applicants written tests, and tests of vision, as the Division may require. The Commissioner may adopt regulations that allow employees of governmental agencies or private businesses to receive a driver's license without taking a road test if the conditions specified in the regulations are complied with. Provided, however, that persons 60 years of age and over, when being examined as herein provided, shall not be required to parallel park a motor vehicle as part of any such examination.

(d) The Division shall cause each person who has heretofore been issued a driver's license to be examined or reexamined, as the case may be, to determine whether or not such person is physically and mentally capable of safely operating motor vehicles over the highways of the State. Those persons found, as a result of such examination or reexamination, to be capable of safely

operating motor vehicles over the highways of the State shall be reissued drivers' licenses; and those persons found to be incapable of safely operating motor vehicles over the highways of the State shall not be reissued drivers' licenses. The examination required by this subsection may include such road tests, oral and in the case of literate applicants written tests, and tests of vision, as the Division may require and shall include such test as is necessary to assure that applicants recognize the "international symbol of access" for the handicapped (sign R7-8, Manual on Uniform Traffic Control Devices) and devices relative to handicapped drivers as set forth in Article 2A of this Chapter. Provided, however, that persons 60 years of age and over, when being examined as herein provided, shall not be required to parallel park a motor vehicle as part of any such examination.

(e) The Division is hereby authorized to grant unlimited licenses or licenses containing such limitations as it may deem advisable. Such limitation or limitations shall be noted on the face of the license, and it shall be unlawful for the holder of a license so limited to operate a motor vehicle without complying with the limitations, and the operation of a motor vehicle without complying with the limitations by a person holding a license with such limitations shall be the equivalent of operating a motor vehicle without a driver's license. If any applicant shall suffer from any physical defect or disease which affects his or her operation of a motor vehicle, the Division may require to be filed with it a certificate of such applicant's condition signed by some medical authority of the applicant's community designated by the Division. This certificate shall in all cases be treated as confidential. Nothing in this subsection shall be construed to prevent the Division from refusing to issue a license, either limited or unlimited, to any person deemed to be incapable of operating a motor vehicle with safety to himself and to the public: Provided, that nothing herein shall prohibit deaf persons from operating motor vehicles who in every other way meet the requirements of this section.

(f) The drivers' licenses issued under this section shall automatically expire on the birthday of the licensee in the fourth year following the year of issuance; and no new license shall be issued to any operator after the expiration of his license until such operator has again passed the examination specified in this section. Any operator may at any time within 60 days prior to the expiration of his license apply for a new license and if the applicant meets the requirements of this Article, the Division shall issue a new license to him. A new license issued within 60 days prior to the expiration of an applicant's old license or within 12 months thereafter shall automatically expire four years from the date of the expiration of the applicant's old license.

Any person serving in the armed forces of the United States on active duty and holding a valid driver's license properly issued under this section and stationed outside the State of North Carolina may renew his license by making application to the Division by mail. Any other person, except a nonresident as defined in this Article, who holds a valid driver's license issued under this section and who is temporarily residing outside North Carolina, may also renew by making application to the Division by mail. For purposes of this section "temporarily" shall mean not less than 30 days continuous absence from North Carolina. In either case, the Division may waive the examination and color photograph ordinarily required for the renewal of a driver's license, and may impose in lieu thereof such conditions as it may deem appropriate to each particular application; provided that such license shall expire 30 days after licensee returns to North Carolina, and such license shall be designated as temporary.

Provided further, that no person who applies for the renewal of his driver's license shall be required to take a written examination or road test as a part of any such examination unless such person has been convicted of a traffic violation or had prayer for judgment continued with respect to any traffic

violation within a four-year period immediately preceding the date of such person's renewal application or unless such person suffers from a mental or physical condition which impairs his ability to operate a motor vehicle.

(g) Repealed by Session Laws 1979, c. 667, s. 6, effective January 1, 1981.

(h) Repealed by Session Laws 1979, c. 113, s. 1.

(i) The fee for issuance or reissuance of a Class "C" license is ten dollars ($10.00). The fee for issuance or reissuance of a Class "B" or Class "A" license is fifteen dollars ($15.00). A person receiving at the same time a driver's license and an endorsement pursuant to G.S. 20-7(a1) shall be charged only the fee required for the class of driver's license he is receiving.

(i1) Any person whose driver's license or other privilege to operate a motor vehicle in this State has been suspended, canceled or revoked pursuant to the provisions of this Chapter shall pay a restoration fee of twenty-five dollars ($25.00) to the Division prior to the issuance of such person of a new driver's license or the restoration of such driver's license or privilege; such restoration fee shall be paid to the Division in addition to any and all fees which may be provided by law. This restoration fee shall not be required for any licensee whose license was suspended, canceled, or revoked for medical or health reasons following a medical evaluation pursuant to this Chapter.

(j) The fees collected under this section and G.S. 20-14 shall be placed in the Highway Fund.

(k) Any person operating a motor vehicle in violation of this section shall be guilty of a misdemeanor and upon conviction shall be punished as provided in this section.

(*l*) Any person who except for lack of instruction in operating a motor vehicle would be qualified to obtain an operator's license under this Article may apply for a temporary learner's permit, and the Division shall issue such permit, entitling the applicant, while having such permit in his immediate possession, to drive a specified type or class of motor vehicle upon the highways for a period of 18 months. The fee for issuance of a temporary learner's permit shall be four dollars ($4.00). Any such learner's permit may be renewed, or a, second learner's permit may be issued, for an additional period of 18 months. The permittee must, while operating a motor vehicle over the highways, be accompanied by a person who is licensed to operate the class or type of vehicle being operated and who is seated in the seat beside the permittee.

The fee for the issuance of a renewal or a second temporary learner's permit shall be seven dollars ($7.00).

(l-1) The Division upon receiving proper application may in its discretion issue a restricted instruction permit effective for a school year or a lesser period to an applicant who is enrolled in a driver training program as provided for in G.S. 20-88.1 even though the applicant has not yet reached the legal age to be eligible for a driver's license. Such instruction permit shall entitle the permittee when he has such permit in his immediate possession to operate a specified type or class of motor vehicle subject to the restrictions imposed by the Division. The restrictions which the Division may impose on such permits include but are not limited to restrictions to designated areas and highways and restrictions prohibiting operation except when an approved instructor is occupying a seat beside the permittee.

(m) The Division upon receiving proper application may in its discretion issue a restricted instruction permit effective for a school year or a lesser period to an applicant who is enrolled in a driver-training program approved by the State Superintendent of Public Instruction even though the applicant has not yet reached the legal age to be eligible for a driver's license. Such instruction permit shall entitle the permittee when he has such permit in his immediate possession to operate a specified type or class of motor vehicle subject to the restrictions imposed by the Division. The restrictions which the Division may impose on such permits include but are not limited to restrictions to designated

areas and highways and restrictions prohibiting operation except when an approved instructor is occupying a seat beside the permittee.

(n) Every driver's license issued by the Division shall bear thereon the distinguishing number assigned to the licensee and color photograph of the licensee of a size approved by the Commissioner and shall contain the name, age, residence address and a brief description of the licensee, who, for the purpose of identification and as a condition precedent to the validity of the license, immediately upon receipt thereof, shall endorse his or her regular signature in ink upon the same in the space provided for that purpose unless a facsimile of his or her signature appears thereon; provided the requirement that a color photograph of the licensee appear on the license may be waived by the Commissioner upon satisfactory proof that the taking of such photograph violates the religious convictions of the licensee. Such license shall be carried by the licensee at all times while engaged in the operation of a motor vehicle. However, no person charged with failing to carry a license shall be convicted if he produces in court a driver's license issued to him which was valid at the time of his arrest for the type or class of vehicle he was operating at the time of his arrest.

(o) Any person convicted of violating any provision of this section shall be guilty of a misdemeanor and punished in the discretion of the court: Provided, that no person shall be convicted of operating a motor vehicle without a driver's license if he produces in court at the time of his trial upon such charge an expired driver's license and a renewed driver's license issued to him within 30 days of the expiration date of the expired license and which would have been a defense to the charge had it been issued prior to the time of the alleged offense. (1935, c. 52, s. 2; 1943, c. 649, s. 1; c. 787, s. 1; 1947, c. 1067, s. 10; 1949, c. 583, ss. 9, 10; c. 826, ss. 1, 2; 1951, c. 542, ss. 1, 2; c. 1196, ss. 1-3; 1953, cc. 839, 1284, 1311; 1955, c. 1187, ss. 2-6; 1957, c. 1225; 1963, cc. 754, 1007, 1022; 1965, c. 410, s. 5; 1967, c. 509; 1969, c. 183; c. 783, s. 1; c. 865; 1971, c. 158; 1973, cc. 73, 705; c. 1057, s. 1; 1975, c. 162, s. 1; c. 295; c. 296, ss. 1, 2; c. 684; c. 716, s. 5; c. 841; c. 875, s. 4; c. 879, s. 46; 1977, c. 340, s. 3; c. 865, ss. 1, 3; 1979, c. 37, s. 1; c. 113; c. 178, s. 2; c. 667, ss. 3-11, 41; c. 678, ss. 1-3; c. 801, ss. 5, 6; 1981, c. 42; 690, ss. 8-10; c. 792, s. 3.)

Effect of Amendments. — Session Laws 1979, c. 37, added the final sentence to subsection (i1). Session Laws 1979, c. 37, s. 2, made the act effective 15 days after its ratification date, February 15, 1979.

Session Laws 1979, c. 113, repealed subsection (h), providing for interim physical examinations for licenses where a licensee's mental or physical condition had changed.

Session Laws 1979, c. 178, effective July 1, 1979, substituted "R7-8" for "D9-6" near the end of the third sentence of subsection (d).

Session Laws 1979, c. 667, effective Jan. 1, 1981, rewrote subsection (a) so as to substitute provisions for Class A, Class B, and Class C drivers' licenses for provisions for operators' and chauffeurs' licenses, inserted the phrase in parenthesis in the first sentence, and added the third sentence, in subsection (c), deleted the former fourth sentence of subsection (d), which related to issuance of licenses to operators who had passed examinations given between July 1, 1945 and July 1, 1947, repealed subsection (g), which related to expiration and renewal of chauffeurs' licenses, rewrote subsection (i) to conform to rewritten subsection (a), inserted "specified type or class of" near the end of the first sentence in subsection (l), in the second sentence of subsection (l-1) and in the second sentence of subsection (m), rewrote the fourth sentence of subsection (l), and, at the end of the last sentence of subsection (n), substituted the language beginning "a driver's license" for "an operator's or chauffeur's license theretofore issued to him and valid at the time of his arrest."

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.'"

Session Laws 1979, c. 678, effective October 1, 1979, substituted "October 1, 1979" for "January 1, 1978" in the first sentence of subsection (a1), and rewrote the last sentence of subsection (a1), which formerly read: "This section shall not apply to motorcycles which are rated at 190cc (cubic centimeters) or less."

Session Laws 1979, c. 801, effective July 1, 1979, substituted "on the fourth year" for "in the second year" and "four years" for "two years" near the beginning of subsection (g), and deleted the former second paragraph of subsection (g), which exempted from the written examination or road test persons applying for the renewal of a chauffeur's license, with the exception of persons convicted of a traffic violation within a four-year period or persons suffering from a mental or physical condition impairing their ability to operate a motor vehicle. The amendment also, in subsection (i), substituted "ten dollars ($10.00)" for "five dollars ($5.00)."

The first 1981 amendment, in subdivision (3) of subsection (a), deleted "and" preceding "a church bus" and added the language beginning "and a fire-fighting vehicle" to the end.

The second 1981 amendment, effective July 1, 1981, substituted "ten dollars ($10.00)" for "four dollars ($4.00)" in the first sentence and "fifteen dollars ($15.00)" for "ten dollars ($10.00)" in the second sentence of subsection (i), substituted "twenty-five dollars ($25.00)" for "fifteen dollars ($15.00)" in the first sentence of subsection (il) and substituted "four dollars ($4.00)" for "two dollars ($2.00)" in the second sentence of the first paragraph and "seven dollars ($7.00)" for "three dollars and twenty-five cents ($3.25)" in the second paragraph of subsection (1).

The third 1981 amendment, effective January 1, 1982, inserted "volunteer transportation vehicle," in the first sentence of subdivision (3) of subsection (a).

Session Laws 1981, c. 792, s. 4, contains a severability clause.

Legal Periodicals. — For survey of 1978 constitutional law, see 57 N.C.L. Rev. 958 (1979).

CASE NOTES

A violation of this section is not statutorily a lesser included offense of § 20-28. State v. Cannon, 38 N.C. App. 322, 248 S.E.2d 65 (1978).

The defendant could not be prosecuted for driving while his license was permanently revoked in violation of § 20-28 because of the prohibition against double jeopardy, where the defendant had previously pled guilty to driving without a license in violation of this section based upon the same event. While a violation of this section is not statutorily a lesser included offense of a violation of § 20-28, under the "additional facts test" of double jeopardy when applied to the defendant's offenses, the two offenses were the same both in fact and in law since the evidence that the defendant was driving an automobile while his license had been permanently revoked would sustain a conviction for driving without a license. State v. Cannon, 38 N.C. App. 322, 248 S.E.2d 65 (1978).

§ 20-7.01. Renewal of licenses after January 1, 1981.

(a) All operators' and chauffeurs' licenses issued before January 1, 1981, are valid until their normal date of expiration, subject to this Chapter's provisions for cancellation and suspension of drivers' licenses.

(b) A person holding a valid operator's or chauffeur's license on January 1, 1981, whose license expires after that date may receive a Class "C" license without taking a written or road test if he complies with the provisions of G.S. 20-7(f).

(c) A person holding a valid operator's or chauffeur's license on January 1, 1981, whose license expires after that date may receive a Class "A" or "B" license without taking a written or road test if:

(1) He files with the Division an affidavit stating that he was licensed by North Carolina on January 1, 1981, and that he has operated a vehicle of the class for which he wishes to be licensed for at least one year prior to that date; and

(2) He complies with the provisions of G.S. 20-7(f).

An applicant who is not exempt from the road and written tests pursuant to this subsection is deemed to be an original applicant. (1979, c. 667, s. 12.)

Editor's Note. — Session Laws 1979, c. 667, s. 43, makes the act effective Jan. 1, 1981, and provides that s. 12 of the act, which added this section, is repealed on July 1, 1986.

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight'."

§ 20-7.1. Notification of change of address.

Whenever the holder of a license issued under the provision of G.S. 20-7 has a change in the address as shown on such license, he or she shall apply for a duplicate license within 60 days after such address has been changed. (1975, c. 223, s. 1; 1979, c. 970.)

Effect of Amendments. — The 1979 amendment, effective October 1, 1979, substituted "provision" for "provisions," "has a change in the" for "changes his or her," and "apply for a duplicate license" for "notify the Division of Motor Vehicles of such change."

§ 20-7.2. Issuance of license to person failing to answer charge within 90 days.

(a) Upon receipt of a conviction report entered pursuant to the 90-day failure provision of G.S. 20-24(c), the Division shall not issue a driver's license to the party named in the conviction report until he complies with the provisions of this section and is otherwise eligible to receive a license.

(b) A party who appears before the court within 12 months of the entry of a 90-day failure may comply with this section by paying the costs of court as specified in G.S. 7A-304 or by appearing to answer the charge and complying with any order entered by the court. A party who appears before the court to comply with the provisions of this section more than 12 months after the entry of the 90-day failure must pay the court costs as specified in G.S. 7A-304, unless the court finds that the defendant has shown good cause for his failure to appear to answer the charge during the period from his originally scheduled court appearance to the present; upon such a finding, a party may comply with this section by appearing to answer the charge, and complying with any order entered by the court. This subsection does not, however, authorize a judge to set aside a conviction for a 90-day failure unless the order to set aside the conviction is consistent with G.S. 20-24(c).

(c) As used in this section, the phrase "issue a driver's license" means the issuing of an original or duplicate license, renewals of existing licenses, or restorations of licenses that have previously been revoked.

(d) The Administrative Office of the Courts shall promulgate forms for clerks of court to certify to the Division that a licensee has complied with the provisions of this section. The Commissioner may adopt regulations necessary to carry out the provisions of this section.

(e) In determining who is eligible to receive a license, the Division shall not consider any conviction for a failure to appear occurring before October 1, 1981. (1981, c. 896, s. 1.)

§ 20-8. Persons exempt from license.

The following are exempt from license hereunder:

(1) Any person while operating a motor vehicle the property of and in the service of the armed forces of the United States. This shall not be construed to exempt any opertors of the United States Civilian Conservation Corps motor vehicles;

(2) Any person while driving or operating any road machine, farm tractor, or implement of husbandry temporarily operated or moved on a highway;

(3) A nonresident who is at least 16 years of age who has in his immediate possession a valid driver's license issued to him in his home state or country if the nonresident is operating a motor vehicle in this State in accordance with the license restrictions and vehicle classifications that would be applicable to him under the laws and regulations of his home state or country if he were driving in his home state or country.

(4) to (6) Repealed by Session Laws 1979, c. 667, s. 13, effective January 1, 1981.

(7) Any person who is at least 16 years of age and while operating a mo-ped. (1935, c. 52, s. 3; 1963, c 1175; 1973, c. 1017; 1975, c. 859, s. 2; 1979, c. 574, s. 7; c. 667, s. 13.)

Effect of Amendments. — The first 1979 amendment, effective July 1, 1979, substituted "while operating a mo-ped" for "and while operating a bicycle with a helper motor rated less than one brake horsepower which produces only ordinary pedaling speeds up to a maximum of 20 miles per hour" in subdivision (7).

The second 1979 amendment, effective Jan. 1, 1981, deleted "chauffeurs or" preceding "operators" in the second sentence of subdivision (1), rewrote subdivision (3), and deleted subdivisions (4), (5) and (6), relating to the licensing of nonresidents at least 18 years of age.

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.'"

Legal Periodicals. — For survey of 1978 constitutional law, see 57 N.C.L. Rev. 958 (1979).

§ 20-9. What persons shall not be licensed.

(a) A Class "C" license shall not be issued to any person under 16 years of age and no Class "A" or Class "B" license shall be issued to any person under 18 years of age.

(b) The Division shall not issue a driver's license to any person whose license has been suspended or revoked during the period for which the license was suspended or revoked.

(c) The Division shall not issue a driver's license to any person who is an habitual drunkard or is an habitual user of narcotic drugs or barbiturates, whether or not such use be in accordance with the prescription of a physician.

(d) No driver's license shall be issued to any applicant who has been previously adjudged insane or an idiot, imbecile, or feebleminded, and who has not at the time of such application been restored to competency by judicial decree or released from a hospital for the insane or feebleminded upon a certificate of the superintendent that such person is competent, nor then unless the Division is satisfied that such person is competent to operate a motor vehicle with safety to persons and property.

(e) The Division shall not issue a driver's license to any person when in the opinion of the Division such person is afflicted with or suffering from such physical or mental disability or disease as will serve to prevent such person from exercising reasonable and ordinary control over a motor vehicle while operating the same upon the highways, nor shall a license be issued to any person who is unable to understand highway warnings or direction signs.

(f) The Division shall not issue a driver's license to any person whose license or driving privilege is in a state of suspension or revocation in any jurisdiction, if the acts or things upon which the suspension or revocation in such other jurisdiction was based would constitute lawful grounds for suspension or revocation in this State had those acts or things been done or committed in this State.

(g) The Division may issue a driver's license to any applicant covered by subsection (e) of this section under the following conditions:

(1) The Division may issue a license to any person who is afflicted with or suffering from physical or mental disability set out in subsection (e) of this section who is otherwise qualified to obtain a license, provided such person submits to the Division a certificate in the form prescribed in subdivision (2). Unless sooner revoked, suspended or canceled, such license continues in force as long as the licensee presents to the Division one year from the date of issuance of such license and at yearly intervals thereafter a certificate in the form prescribed in subdivision (2), provided the Commissioner may require the submission of such certificate at six months intervals where in his opinion public safety demands. In no event shall a license issued pursuant to this section be valid beyond the birthday of the licensee in the fourth year following the year of issuance, at which time the license is subject to renewal.

(2) The Division shall not issue a license pursuant to this section unless the applicant has submitted to a physical examination by a physician or surgeon duly licensed to practice medicine in this State and unless such examining physician or surgeon has completed and signed the certificate required by subdivision (1). Such certificate shall be devised by the Commissioner with the advice of qualified experts in the field of diagnosing and treating physical and mental disorders as he may select to assist him and shall be designed to elicit the maximum medical information necessary to aid in determining whether or not it would be a hazard to public safety to permit the applicant to operate a motor vehicle, including, if such is the fact, the examining physician's statement that the applicant is under medication and treatment and that such person's physical or mental disability is controlled. The certificate shall contain a waiver of privilege and the recommendation of the examining physician to the Commissioner as to whether a license should be issued to the applicant.

(3) The Commissioner is not bound by the recommendation of the examining physician but shall give fair consideration to such recommendation in exercising his discretion in acting upon the application, the criterion being whether or not, upon all the evidence, it appears that it is safe to permit the applicant to operate a motor vehicle. The burden of proof of such fact is upon the applicant. In deciding whether to issue or deny a license, the Commissioner may be guided by opinion of experts in the field of diagnosing and treating the specific physical or mental disorder suffered by an applicant and such experts may be compensated for their services on an equitable basis. The Commissioner may also take into consideration any other factors which bear on the issue of public safety.

(4) Whenever a license is denied by the Commissioner, such denial may be reviewed by a reviewing board upon written request of the applicant filed with the Division within 10 days after receipt of such denial. The reviewing board shall consist of the Commissioner or his authorized representative and four persons designated by the chairman of the Commission for Health Services. The persons designated by the chairman of the Commission for Health Services shall be either members of the Commission for Health Services or physicians duly licensed to practice medicine in this State. The members so designated by the chairman of the Commission for Health Services shall receive the same per diem and expenses as provided by law for members of the Commission for Health Services, which per diem and expenses shall be charged to the same appropriation as per diems and expenses for members of the Commission for Health Services. The Commissioner or his authorized representative, plus any two of the members designated by the chairman of the Commission for Health Services, consti-

tute a quorum. The procedure for hearings authorized by this section shall be as follows:

a. Applicants shall be afforded an opportunity for hearing, after reasonable notice of not less than 10 days, before the review board established by subdivision (4). The notice shall be in writing and shall be delivered to the applicant in person or sent by certified mail, with return receipt requested. The notice shall state the time, place, and subject of the hearing.

b. The review board may compel the attendance of witnesses and the production of such books, records and papers as it desires at a hearing authorized by the section. Upon request of an applicant, a subpoena to compel the attendance of any witness or a subpoena duces tecum to compel the production of any books, records, or papers shall be issued by the board. Subpoenas shall be directed to the sheriff of the county where the witness resides or is found and shall be served and returned in the same manner as a subpoena in a criminal case. Fees of the sheriff and witnesses shall be the same as that allowed in the district court in cases before that court and shall be paid in the same manner as other expenses of the Division of Motor Vehicles are paid. In any case of disobedience or neglect of any subpoena served on any person, or the refusal of any witness to testify to any matters regarding which he may be lawfully interrogated, the district court or superior court where such disobedience, neglect or refusal occurs, or any judge thereof, on application by the board, shall compel obedience or punish as for contempt.

c. A hearing may be continued upon motion of the applicant for good cause shown with approval of the board or upon order of the board.

d. The board shall pass upon the admissibility of evidence at a hearing but the applicant affected may at the time object to the board's ruling, and, if evidence offered by an applicant is rejected the party may proffer the evidence, and such proffer shall be made a part of the record. The board shall not be bound by common law or statutory rules of evidence which prevail in courts of law or equity and may admit and give probative value to evidence which possesses probative value commonly accepted by reasonably prudent men in the conduct of their affairs. They may exclude incompetent, immaterial, irrelevant and unduly repetitious evidence. Uncontested facts may be stipulated by agreement between an applicant and the board and evidence relating thereto may be excluded. All evidence, including records and documents in the possession of the Division of Motor Vehicles or the board, of which the board desires to avail itself shall be made a part of the record. Documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference. The board shall prepare an official record, which shall include testimony and exhibits. A record of the testimony and other evidence submitted shall be taken, but it shall not be necessary to transcribe shorthand notes or electronic recordings unless requested for purposes of court review.

e. Every decision and order adverse to an applicant shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law. The findings of fact shall consist of a concise statement of the board's conclusions on each contested issue of fact. Counsel for applicant, or applicant, if he has no counsel, shall be notified of the board's decision in person or by registered mail with return receipt requested. A copy of the

board's decision with accompanying findings and conclusions shall be delivered or mailed upon request to applicant's attorney of record or to applicant, if he has no attorney.

f. Actions of the reviewing board are subject to judicial review as provided under Chapter 150A of the General Statutes.

g. Repealed by Session Laws 1977, c. 840.

h. All records and evidence collected and compiled by the Division and the reviewing board shall not be considered public records within the meaning of Chapter [section] 132-1, and following, of the General Statutes of North Carolina and may be made available to the public only upon an order of a court of competent jurisdiction. All information furnished by or on behalf of an applicant under this section shall be without prejudice and shall be for the use of the Division, the reviewing board or the court in administering this section and shall not be used in any manner as evidence, or for any other purposes in any trial, civil or criminal.

(h) The Division shall not issue a driver's license to an applicant who is the holder of any license to drive issued by another state, district or territory of the United States and currently in force, unless the applicant surrenders such license or licenses; provided, this section shall not apply to nonresident military personnel or members of their household. (1935, c. 52, s. 4; 1951, c. 542, s. 3; 1953, c. 773; 1955, c. 118, s. 7; 1967, cc. 961, 966; 1971, c. 152; c. 528, s. 11; 1973, cc. 135, 441; c. 476, s. 128; c. 1331, s. 3; 1975, c. 716, s. 5; 1979, c. 667, ss. 14, 41.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1981, rewrote subsection (a) so as to substitute provisions as to Class A, Class B and Class C licenses for provisions as to operators' and chauffeurs' licenses, deleted "either as operator or chauffeur" following "person whose license" in subsection (b) and substituted references to "driver's license" for references to "operator's or chauffeur's license" throughout the section.

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.'"

Legal Periodicals. — For a note discussing the extension of the family purpose doctrine to motorcycles and private property, see 14 Wake Forest L. Rev. 699 (1978).

CASE NOTES

Alcoholism. — Findings and conclusions by the Driver License Medical Review Board were sufficient to support its order that petitioner not be granted driving privileges where the board found that petitioner had an alcohol problem; the board gave fair consideration to the recommendation of petitioner's physician that he be granted driving privileges, but the recommendation did not have to be expressly rejected by the board. McCormick v. Peters, 48 N.C. App. 365, 269 S.E.2d 168 (1980).

Epilepsy. —

The Division of Motor Vehicles was without authority to deny or withhold petitioner's license to operate a motor vehicle upon the highways of the State where the record showed that once or twice a year petitioner, who suffered from epilepsy, had an epileptic seizure and that with one exception when petitioner blacked out while driving and ran off the road, all the seizures had occurred in his sleep, and all the other evidence tended to show that his seizures were controlled and that he had exercised reasonable and ordinary control over his vehicle while operating it upon the highways. Chesnutt v. Peters, 300 N.C. 359, 266 S.E.2d 623 (1980).

Where the record on appeal contained no evidence that petitioner suffered from an "uncontrolled seizure disorder," although it did show that petitioner had suffered seizures from time to time, the whole record did not support the finding required by this section that petitioner be suffering from a mental or physical disability that prevents him from exercising reasonable and ordinary control in the operation of a motor vehicle on the highways. Chesnutt v. Peters, 44 N.C. App. 484, 261 S.E.2d 223, aff'd, 300 N.C. 359, 266 S.E.2d 623 (1980).

Cited in Nationwide Mut. Ins. Co. v. Chantos, 293 N.C. 431, 238 S.E.2d 597 (1977).

§ 20-10.1. Mo-peds.

It shall be unlawful for any person who is under the age of 16 years to operate a mo-ped as defined in G.S. 20-4.01(27)d1 upon any highway or public vehicular area of this State. (1979, c. 574, s. 8.)

Editor's Note. — Session Laws 1979, c. 574, s. 9, makes the act effective July 1, 1979.

§ 20-11. Application of minors.

(a) The Division shall not grant the application of any minor between the ages of 16 and 18 years for a driver's license or a learner's permit unless such application is signed both by the applicant and by the parent, guardian, husband, wife or employer of the applicant, or, if the applicant has no parent, guardian, husband, wife or employer residing in this State, by some other responsible adult person. It shall be unlawful for any person to sign the application of a minor under the provisions of this section when such application misstates the age of the minor and any person knowingly violating this provision shall be guilty of a misdemeanor.

The Division shall not grant the application of any minor between the ages of 16 and 18 years for a driver's license unless such minor presents evidence of having satisfactorily completed the driver training and safety education courses offered at the public high schools as provided in G.S. 20-88.1 or upon having satisfactorily completed a course of driving instruction offered at a licensed commercial driver training school or an approved nonpublic secondary school, provided instruction offered in such schools shall be approved by the State Commissioner of Motor Vehicles and the State Superintendent of Public Instruction and all expenses for such instruction shall be paid by the persons enrolling in such courses and/or by the schools offering them.

(b) The Division may grant an application for a limited learner's permit of any minor under the age of 16, who otherwise meets the requirements of licensing under this section, when such application is signed by both the applicant and his or her parent or guardian or some other responsible adult with whom the applicant resides and is approved by the Division of Motor Vehicles. The limited learner's permit shall entitle the applicant, while having the permit in his immediate possession, to drive a motor vehicle of the specified type or class upon the highways while accompanied by a parent, guardian, or other person approved by the Division, who is licensed under this Chapter to operate a motor vehicle (of the type or class being operated by the permittee) and who is actually occupying a seat beside the driver. The limited learner's permit shall be valid for six months or until the appliant attains the age of 16, whichever period is greater. Provided, however, a limited learner's permit as herein provided shall be issued only to those applicants who have reached the age of 15 years. In the event a minor who has been issued a limited learner's permit under this subsection operates a motor vehicle in violation of any provision herein, the permit shall be canceled.

Provided a driver who holds a learner's permit only shall not be deemed a male operator under age 25 for the purpose of determining the insurance premium rate for persons insured under automobile property damage and bodily injury liability insurance policies.

(c) The Division may, upon satisfactory proof that a minor between the ages of 16 and 18 years has become a resident of North Carolina and holds a valid motor vehicle driver's license from his prior state of residence but has not completed a course in driver education which meets the requirements of this State, grant to such minor a temporary driver's permit under such terms and

conditions as shall be deemed necessary by the Division to allow the minor to operate a motor vehicle of a specified type or class in this State in order to obtain the driver education courses necessary for driver's license in North Carolina. Every application for a temporary driver's permit shall be made upon the approved form furnished by the Division. A temporary driver's permit issued pursuant to this section shall be subject to all provisions of law relating to driver's license. (1935, c. 52, s. 6; 1953, c. 355; 1955, c. 1187, s. 8; 1963, c. 968, ss. 2, 2A; 1965, c. 410, s. 3; c. 1171; 1967, c. 694; 1969, c. 37; 1973, c. 191, ss. 1, 2; c. 664, ss. 1, 2; 1975, c. 79; c. 716, s. 5; 1979, c. 101; c. 667, ss. 15, 16, 41.)

Effect of Amendments. — The first 1979 amendment, effective October 1, 1979, substituted "The" for "Such" at the beginning of the second sentence of subsection (b), substituted "the" for "such" after "having" in that sentence, and deleted "for a period of six months" before "while" and "such minor is" after "while" in the same sentence. The amendment added the third sentence of subsection (b).

The second 1979 amendment, effective Jan. 1, 1981, substituted "a driver's" for "an operator's" near the beginning of the first sentence of the first paragraph of subsection (a) and near the beginning of the second paragraph of subsection (a), inserted "of the specified type or class" and "(of the type or class being operated by the permittee)" in the second sentence of subsection (b), substituted "driver's" for "operator's" throughout subsection (c) and inserted "of a specified type or class" near the end of the first sentence of subsection (c).

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.' "

§ 20-12. Instruction.

Any licensed driver may instruct a person who is 16 or more years of age in the operation of any motor vehicle that the person instructing is licensed to drive. Any person so instructing another must actually occupy the seat beside the permittee. (1935, c. 52, s. 7; 1953, c. 356; 1979, c. 667, s. 17.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1981, rewrote this section.

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.' "

§ 20-12.1. Giving instruction while under influence of alcohol or drugs.

(a) It shall be unlawful for any person who is under the influence of alcoholic beverages or who is under the influence of drugs to accompany or instruct another person as provided in G.S. 20-11 and G.S. 20-12 of this Article.

(b) Any person accompanying and instructing another person as provided in G.S. 20-11 and G.S. 20-12 of this Article shall be subject to the provisions of G.S. 20-16.2 to the same intent and in the same manner as persons who drive or operate a motor vehicle and in addition shall be subject to the provisions of G.S. 20-17(2). (1977, c. 116, ss. 1, 2; 1981, c. 412, s. 4; c. 747, s. 66.)

Effect of Amendments. — The 1981 amendments, effective January 1, 1982, substituted "alcoholic beverages" for "intoxicating liquor" in subsection (a).

§ 20-13. Suspension of license of provisional licensee.

(a) The Division may suspend, with or without a preliminary hearing, the operator's license of a provisional licensee upon receipt of notice of the licensee's conviction of a motor vehicle moving violation, in accordance with subsection (b), if the offense was committed while the person was still a provisional licensee. A provisional licensee is a licensee who is under 18 years of age. As used in this section, the phrase "motor vehicle moving violation" does not include the offenses listed in the third paragraph of G.S. 20-16(c) for which no points are assessed, nor does it include equipment violations specified in Part 9 of Article 3 of this Chapter.

(b) The Division may suspend the license of a provisional licensee as follows:

(1) For the first motor vehicle moving violation, the Division may not suspend the license of the provisional licensee. The Division must mail the licensee a warning letter, sent to his last known address, but failure of the licensee to receive the letter does not prevent the suspension of the person's license or the imposition of probation under this section.

(2) For conviction of a second motor vehicle moving violation committed within 12 months of the date the first offense was committed, the Division may suspend the licensee's license for up to 30 days.

(3) For conviction of a third motor vehicle moving violation committed within 12 months of the date the first offense was committed, the Division may suspend the licensee's license for up to 90 days.

(4) For conviction of a fourth motor vehicle moving violation committed within 12 months of the date the first offense was committed, the Division may suspend the licensee's license for up to six months.

The Division may, in lieu of suspension and with the written consent of the licensee, place the licensee on probation for a period of not more than 12 months on such terms and conditions as the Division sees fit to impose.

If the Division suspends the provisional licensee's license for at least 90 days without a preliminary hearing, the parent, guardian or other person standing in loco parentis of the provisional licensee may request a hearing to determine if the provisional licensee's license should be restored on a probationary status. The Division may wait until one-half the period of suspension has expired to hold the hearing. The Division may place the licensee on probation for up to 12 months on such terms and conditions as the Division sees fit to impose, if the licensee consents in writing to the terms and conditions of probation.

(c) In the event of conviction of two or more motor vehicle moving offenses committed on a single occasion, a licensee shall be charged, for purposes of this section, with only one moving offense, except as otherwise provided.

(d) The suspension provided for in this section is in addition to any other remedies which the Division may have against a licensee under other provisions of law; however, when the license of any person is suspended under this section and at the same time is also suspended under other provisions of law, the suspensions run concurrently.

(e) Operators whose licenses have been suspended under the provisions of this section are not required to maintain proof of financial responsibility upon reissuance of the license solely because of suspension pursuant to this section, except as provided under Article 13 of this Chapter. The registered owner's liability insurance policy shall insure said licensee who is a member of said registered owner's household or anyone who is in lawful possession of said automobile. (1963, c. 968, s. 1; 1965, c. 897; 1967, c. 295, s. 1; 1971, c. 120, ss. 1, 2; 1973, c. 439; 1975, c. 716, s. 5; 1979, c. 555, s. 1.)

Effect of Amendments. — The 1979 amendment rewrote this section, which formerly provided for mandatory revocation of licenses of provisional licensees.

Session Laws 1979, c. 555, s. 3, provides: "The provisions of this act shall not affect suspension orders promulgated pursuant to G.S. 20-13 or G.S. 20-13.1 before the effective date of this act [May 14, 1979]."

§ 20-13.1: Repealed by Session Laws 1979, c. 555, s. 2.

Editor's Note. —

Session Laws 1979, c. 555, s. 3, provides: "The provisions of this act shall not affect suspension orders promulgated pursuant to G.S. 20-13 or G.S. 20-13.1 before the effective date of this act [May 14, 1979]."

§ 20-14. Duplicate licenses.

In the event that a driver's license is lost or destroyed, or if it is necessary to change the name or address thereon, the person to whom the license is issued may, upon payment of a fee of five dollars ($5.00) and upon furnishing proof satisfactory to the Division that the license has been lost or destroyed, or that the person's name or address has been changed, obtain a duplicate or substitute license. (1935, c. 52, s. 9; 1943, c. 649, s. 2; 1969, c. 783, s. 2; 1975, c. 716, s. 5; 1979, c. 667, s. 41; 1981, c. 690, s. 11.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1981, substituted "a driver's" for "an operator's or chauffeur's" near the beginning of the section.

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.'"

The 1981 amendment, effective July 1, 1981, increased the fee for a duplicate license from $1.00 to $5.00.

§ 20-15. Authority of Division to cancel license.

(a) The Division shall have authority to cancel any driver's license upon determining that the licensee was not entitled to the issuance thereof hereunder, or that said licensee failed to give the required or correct information in his application, or committed fraud in making such application.

(1979, c. 667, s. 41.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1981, substituted "driver's" for "operator's or chauffeur's" near the beginning of subsection (a).

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.'"

Only Part of Section Set Out. — As subsection (b) was not changed by the amendment, it is not set out.

§ 20-16. Authority of Division to suspend license.

(a) The Division shall have authority to suspend the license of any operator with or without preliminary hearing upon a showing by its records or other satisfactory evidence that the licensee:

(1) to (4) Repealed by Session Laws 1979, c. 36, effective October 1, 1979;

(5) Has, under the provisions of subsection (c) of this section, within a three-year period, accumulated 12 or more points, or eight or more points in the three-year period immediately following the reinstatement of a license which has been suspended or revoked because of a conviction for one or more traffic offenses;

(6) Has made or permitted an unlawful or fraudulent use of such license or a learner's permit, or has displayed or represented as his own, a license or learner's permit not issued to him;

(7) Has committed an offense in another state, which if committed in this State would be grounds for suspension or revocation;

(8) Has been convicted of illegal transportation of alcoholic beverages or has been convicted under G.S. 18B-302(e) or (f) of fraudulent use of a driver's license to obtain alcoholic beverages.

(9) Has, within a period of 12 months, been convicted of two or more charges of speeding in excess of 55 and not more than 80 miles per hour, or of one or more charges of reckless driving and one or more charges of speeding in excess of 55 and not more than 80 miles per hour;

(10) Has been convicted of operating a motor vehicle at a speed in excess of 75 miles per hour on a public road or highway where the maximum speed is less than 70 miles per hour;

(10a) Has been convicted of operating a motor vehicle at a speed in excess of 80 miles per hour on a public highway where the maximum speed is 70 miles per hour; or

(11) Has been sentenced by a court of record and all or a part of the sentence has been suspended and a condition of suspension of the sentence is that the operator not operate a motor vehicle for a period of time.

(b) Pending an appeal from a conviction of any violation of the motor vehicle laws of this State, no driver's license shall be suspended by the Division of Motor Vehicles because of such conviction or because of evidence of the commission of the offense for which the conviction has been had.

(c) The Division shall maintain a record of convictions of every person licensed or required to be licensed under the provisions of this Article as an operator and shall enter therein records of all convictions of such persons for any violation of the motor vehicle laws of this State and shall assign to the record of such person, as of the date of commission for [of] the offense, a number of points for every such conviction in accordance with the following schedule of convictions and points, except that points shall not be assessed for convictions resulting in suspensions or revocations under other provisions of laws: Further, any points heretofore charged for violation of the motor vehicle inspection laws shall not be considered by the Division of Motor Vehicles as a basis for suspension or revocation of driver's license:

Schedule of Point Values

Passing stopped school bus	5
Reckless driving	4
Hit and run, property damage only	4
Following too close	4
Driving on wrong side of road	4
Illegal passing	4
Running through stop sign	3
Speeding in excess of 55 miles per hour	3
Failing to yield right-of-way	3
Running through red light	3
No driver's license or license expired more than one year	3
Failure to stop for siren	3
Driving through safety zone	3
No liability insurance	3

Failure to report accident where such report is required 3
Speeding in a school zone in excess of the posted school zone speed limit 3
All other moving violations 2

The [above] provisions of this subsection shall only apply to violations and convictions which take place within the State of North Carolina.

No points shall be assessed for conviction of the following offenses:

Overloads
Over length
Over width
Over height
Illegal parking
Carrying concealed weapon
Improper plates
Improper registration
Improper muffler
Public drunk within a vehicle
Possession of alcoholic beverages
Improper display of license plates or dealers' tags
Unlawful display of emblems and insignia
Failure to display current inspection certificate.

In case of the conviction of a licensee of two or more traffic offenses committed on a single occasion, such licensee shall be assessed points for one offense only and if the offenses involved have a different point value, such licensee shall be assessed for the offense having the greater point value.

Upon the restoration of the license or driving privilege of such person whose license or driving privilege has been suspended or revoked because of conviction for a traffic offense, any points that might previously have been accumulated in the driver's record shall be cancelled.

Whenever a licensee accumulates as many as four points hereunder, the Division shall mail a letter of warning to the licensee at his last known address, but failure to receive such warning letter shall not prevent a suspension under this subsection. Whenever any licensee accumulates as many as seven points or accumulates as many as four points during a three-year period immediately following reinstatement of his license after a period of suspension or revocation, the Division may request the licensee to attend a conference regarding such licensee's driving record. The Division may also afford any licensee who has accumulated as many as seven points or any licensee who has accumulated as many as four points within a three-year period immediately following reinstatement of his license after a period of suspension or revocation an opportunity to attend a driver improvement clinic operated by the Division and, upon the successful completion of the course taken at the clinic, three points shall be deducted from the licensee's conviction record; provided, that only one deduction of points shall be made on behalf of any licensee within any 10-year period.

When a license is suspended under the point system provided for herein, the first such suspension shall be for not more than 60 days; the second such suspension shall not exceed six months and any subsequent suspension shall not exceed one year.

Whenever the driver's license of any person is subject to suspension under this subsection and at the same time also subject to suspension or revocation under other provisions of laws, such suspensions or revocations shall run concurrently.

In the discretion of the Division, a period of probation not to exceed one year may be substituted for suspension or for any unexpired period of suspension under subsections (a)(1) through (a)(10a) of this section. Any violation of probation during the probation period shall result in a suspension for the unexpired

remainder of the suspension period. Any accumulation of three or more points under this subsection during a period of probation shall constitute a violation of the condition of probation.

(d) Upon suspending the license of any person as hereinbefore in this section authorized, the Division shall immediately notify the licensee in writing and upon his request shall afford him an opportunity for a hearing, unless a preliminary hearing was held before his license was suspended, as early as practical within not to exceed 20 days after receipt of such request in the county wherein the licensee resides unless the Division and the licensee agree that such hearing may be held in some other county, and such notice shall contain the provisions of this section printed thereon. Upon such hearing the duly authorized agents of the Division may administer oaths and may issue subpoenas for the attendance of witnesses and the production of relevant books and papers and may require a reexamination of the licensee. Upon such hearing the Division shall either rescind its order of suspension, or good cause appearing therefor, may extend the suspension of such license. Provided further upon such hearing, preliminary or otherwise, involving subsections (a)(1) through (a)(10a) of this section, the Division may for good cause appearing in its discretion substitute a period of probation not to exceed one year for the suspension or for any unexpired period of suspension. Probation shall mean any written agreement between the suspended driver and a duly authorized representative of the Division and such period of probation shall not exceed one year, and any violation of the probation agreement during the probation period shall result in a suspension for the unexpired remainder of the suspension period. The authorized agents of the Division shall have the same powers in connection with a preliminary hearing prior to suspension as this subsection provided in connection with hearings held after suspension. (1935, c. 52, s. 11; 1947, c. 893, ss. 1, 2; c. 1067, s. 13; 1949, c. 373, ss. 1, 2; c. 1032, s. 2; 1953, c. 450; 1955, c. 1152, s. 15; c. 1187, ss. 9-12; 1957, c. 499, s. 1; 1959, c. 1242, ss. 1-2; 1961, c. 460, ss. 1, 2(a); 1963, c. 1115; 1965, c. 130; 1967, c. 16; 1971, c. 234, ss. 1, 2; c. 793, ss. 1, 2; c. 1198, ss. 1, 2; 1973, c. 16; c. 17, ss. 1, 2; 1975, c. 716, s. 5; 1977, c. 902, s. 1; 1979, c. 36; c. 667, ss. 18, 41; 1981, c. 412, s. 4; c. 747, ss. 33, 66.)

Effect of Amendments. — The first 1979 amendment, effective October 1, 1979, deleted subdivisions (a)(1) through (a)(4) which provided for suspension of licenses where the licensee had committed an offense for which mandatory revocation would be required upon conviction, where the licensee was involved in an accident causing death or personal injury or serious property damage and such accident was obviously caused by the licensee's negligence, where the licensee was habitually reckless or negligent, and where the licensee was incompetent to drive.

The second 1979 amendment, effective Jan. 1, 1981, deleted "or chauffeur" following "operator" in the introductory paragraph of subsection (a) and near the end of subdivision (11) of subsection (a), deleted "or chauffeur's" following "driver's" in subsection (b), deleted "or chauffeur" following "operator" near the beginning of the introductory paragraph in subsection (c), substituted "driver's" for "operator's or chauffeur's" near the end of the introductory paragraph in subsection (c) and near the beginning of the next-to-last paragraph of subsection (c), and substituted "driver's" for "operator's" in the Schedule of Point Values in subsection (c).

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.'"

The first 1981 amendment, effective January 1, 1982, rewrote subdivision (8) of subsection (a), which formerly read "Has been convicted of illegal transportation of intoxicating liquors".

The second 1981 amendments, effective January 1, 1982, substituted "alcoholic beverages" for "intoxicating liquors" at the end of subdivision (a)(8) and substituted "alcoholic beverages" for "liquor" following "Possession of" in the list of offenses in subsection (c) for which no points shall be assessed.

CASE NOTES

I. IN GENERAL.

The power to issue, suspend or revoke a driver's license is vested exclusively in the Division of Motor Vehicles, subject to review by the superior court and, upon appeal, by the appellate division. Smith v. Walsh, 34 N.C. App. 287, 238 S.E.2d 157 (1977).

Power to suspend, etc. —

Under subdivision (a)(10) of this section and § 20-19(b), the discretionary authority to suspend petitioner's license for a period not exceeding 12 months was vested exclusively in the Division of Motor Vehicles. No discretionary power was conferred upon a superior court. Smith v. Walsh, 34 N.C. App. 287, 238 S.E.2d 157 (1977).

Applied in Whedbee v. Powell, 41 N.C. App. 250, 254 S.E.2d 645 (1979); Baggett v. Peters, 49 N.C. App. 435, 271 S.E.2d 581 (1980).

Stated in State ex rel. Comm'r of Ins. v. North Carolina Auto. Rate Administrative Office, 293 N.C. 365, 239 S.E.2d 48 (1977).

Cited in In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977); Heritage Village Church & Missionary Fellowship, Inc. v. State, 40 N.C. App. 429, 253 S.E.2d 473 (1979); State v. Robinson, 40 N.C. App. 514, 253 S.E.2d 311 (1979); Noyes v. Peters, 40 N.C. App. 763, 253 S.E.2d 584 (1979).

§ 20-16.1. Mandatory suspension of driver's license upon conviction of excessive speeding; limited driving permits for first offenders.

(a) Notwithstanding any other provisions of this Article, the Division shall suspend for a period of 30 days the license of any driver without preliminary hearing on receiving a record of such driver's conviction of exceeding by more than 15 miles per hour the speed limit, either within or outside the corporate limits of a municipality, if such person was also driving at a speed in excess of 55 miles per hour at the time of the offense.

(b)(1) Upon a first conviction only of violating subsection (a), the trial judge may when feasible allow a limited driving privilege or license to the person convicted for proper purposes reasonably connected with the health, education and welfare of the person convicted and his family. For purposes of determining whether conviction is a first conviction, no prior offense occurring more than 10 years before the date of the current offense shall be considered. The judge may impose upon such limited driving privilege any restrictions as in his discretion are deemed advisable including, but not limited to, conditions of days, hours, types of vehicles, routes, geographical boundaries and specific purposes for which limited driving privilege is allowed. Any such limited driving privilege allowed and restrictions imposed thereon shall be specifically recorded in a written judgment which shall be as near as practical to that hereinafter set forth and shall be signed by the trial judge and shall be affixed with the seal of the court and shall be made a part of the records of the said court. A copy of said judgment shall be transmitted to the Division of Motor Vehicles along with any driver's license in the possession of the person convicted and a notice of the conviction. Such permit issued hereunder shall be valid for such length of time as shall be set forth in the judgment of the trial judge. Such permit shall constitute a valid license to operate motor vehicles of the class or type that would be allowed by the person's license if it were not currently revoked upon the streets and highways of this or any other state in accordance with the restrictions noted thereon and shall be subject to all provisions of law relating to driver's license, not by their nature, rendered inapplicable.

(2) The judgment issued by the trial judge as herein permitted shall as near as practical be in form and content as follows:

STATE OF NORTH CAROLINA
COUNTY OF .....

IN THE GENERAL COURT OF JUSTICE
RESTRICTED DRIVING PRIVILEGES

This cause coming on to be heard and being heard before the Honorable ....., Judge presiding, and it appearing to the court that the defendant, ..., has been convicted of the offense of excessive speeding in violation of G.S. 20-16.1(a), and it further appearing to the court that the defendant should be issued a restrictive driving license and is entitled to the issuance of a restrictive driving privilege under and by the authority of G.S. 20-16.1(b);

Now, therefore, it is ordered, adjudged and decreed that the defendant be allowed to operate a motor vehicle under the following conditions and under no other circumstances.

Name: .....
Race: ..... Sex: .....
Height: ..... Weight: .....
Color of Hair: ..... Color of Eyes: .....
Birth Date: .....
Driver's License Number: .....
Signature of Licensee: ..... Conditions of Restriction: .....
Type of Vehicle .....
Geographic Restrictons: .....
Hours of Restriction: .....
Other Restrictions: .....
This limited license shall be effective from ..... to ..... subject to further orders as the court in its discretion may deem necessary and proper.

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

.....
(Judge Presiding)

(3) Upon conviction of such offense outside the jurisdiction of this State the person so convicted may apply to the resident judge of the superior court of the district in which he resides for limited driving privileges hereinbefore defined. Upon such application the judge shall have the authority to issue such limited driving privileges in the same manner as if he were the trial judge.

(4) Any violation of the restrictive driving privileges as set forth in the judgment of the trial judge allowing such privileges shall constitute the offense of driving while license has been suspended as set forth in G.S. 20-28. Whenever a person is charged with operating a motor vehicle in violation of the restrictions, the limited driving privilege shall be suspended pending the final disposition of the charge.

(5) This section is supplemental and in addition to existing law and shall not be construed so as to repeal any existing provision contained in the General Statutes of North Carolina.

(c) Upon conviction of a similar second or subsequent offense which offense occurs within one year of the first or prior offense, the license of such operator shall be suspended for 60 days, provided such first or prior offense occurs subsequent to July 1, 1953.

(d) Notwithstanding any other provisions of this Article, the Division shall suspend for a period of 60 days the license of any driver without preliminary hearing on receiving a record of such driver's conviction of having violated the laws against speeding described in subsection (a) and of having violated the laws against reckless driving on the same occasion as the speeding offense occurred.

(e) The provisions of this section shall not prevent the suspension or revocation of a license for a longer period of time where the same may be authorized by other provisions of law.

(f) Operators whose licenses have been suspended under the provisions of this section shall not be required to maintain proof of financial responsibility upon reissuance of the license solely because of suspension pursuant to this section. (1953, c. 1223; 1955, c. 1187, s. 15; 1959, c. 1264, s. 4; 1965, c. 133; 1975, c. 716, s. 5; c. 763; 1979, c. 667, ss. 19, 41.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1981, substituted "driver" for "operator or chauffeur" and "driver's" for "operator's or chauffeur's" throughout the section, inserted "of the class or type that would be allowed by the person's license if it were not currently revoked" in the last sentence of subdivision (1) of subsection (b) and deleted "or chauffeur" following "operator" in subsection (c) and "or chauffeurs" following "Operators" at the beginning of subsection (f).

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.' "

CASE NOTES

Cited in Rice v. Peters, 48 N.C. App. 697, 269 S.E.2d 740 (1980).

§ 20-16.2. Mandatory revocation of license in event of refusal to submit to chemical tests; right of driver to request test.

(a) Any person who drives or operates a motor vehicle upon any highway or any public vehicular area shall be deemed to have given consent, subject to the provisions of G.S. 20-139.1, to a chemical test or tests of his breath or blood for the purpose of determining the alcoholic content of his blood if arrested for any offense arising out of acts alleged to have been committed while the person was driving or operating a motor vehicle while under the influence of alcholic beverages. The test or tests shall be administered at the request of a law-enforcement officer having reasonable grounds to believe the person to have been driving or operating a motor vehicle on a highway or public vehicular area while under the influence of alcohlic beverages. The law-enforcement officer shall designate which of the aforesaid tests shall be administered. The person arrested shall forthwith be taken before a person authorized to administer a chemical test and this person shall inform the person arrested both verbally and in writing and shall furnish the person a signed document setting out:

(1) That he has a right to refuse to take the test;

(2) That refusal to take the test will result in revocation of his driving privilege for six months;

(3) That he may have a physician, qualified technician, chemist, registered nurse or other qualified person of his own choosing administer a chemical test or tests in addition to any administered at the direction of the law-enforcement officer; and

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

(b) Any person who is unconscious or who is otherwise in a condition rendering him incapable of refusal shall be deemed not to have withdrawn the

consent provided by subsection (a) of this section and the test or tests may be administered, subject to the provisions of G.S. 20-139.1.

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

(d) Upon receipt of the sworn report required by G.S. 20-16.2(c) the Division shall immediately notify the arrested person that his license to drive is revoked immediately unless said person requests in writing within three days of receipt of notice of revocation a hearing. If at least three days prior to hearing, the licensee shall so request of the hearing officer, the hearing officer shall subpoena the arresting officer and any other witnesses requested by the licensee to personally appear and give testimony at the hearing. If such person requests in writing a hearing, he shall retain his license until after the hearing. The hearing shall be conducted in the county where the arrest was made under the same conditions as hearings are conducted under the provisions of G.S. 20-16(d) except that the scope of such hearing for the purpose of this section shall cover the issues of whether the law-enforcement officer had reasonable grounds to believe the person had been driving or operating a motor vehicle upon a highway or public vehicular area while under the influence of alcoholic beverages, whether the person was placed under arrest, and whether he willfully refused to submit to the test upon the request of the officer. Whether the person was informed of his rights under the provision of G.S. 20-16.2(a)(1), (2), (3), (4) shall be an issue. The Division shall order that the revocation either be rescinded or sustained. If the revocation is sustained, the person shall surrender his license immediately upon notification.

(e) If the revocation is sustained after such a hearing, the person whose driving privilege has been revoked, under the provisions of this section, shall have the right to file a petition in the superior court for a hearing de novo to review the action of the Division in the same manner and under the same conditions as is provided in G.S. 20-25 except that such hearing shall be conducted in the judicial district where the arrest was made.

(f) When it has been finally determined under the procedures of this section that a nonresident's privilege to operate a motor vehicle in this State has been revoked, the Division shall give information, in writing of the action taken to the motor vehicle administrator of the state of the person's residence and of any state in which he has a license.

(g) Repealed by Session Laws 1973, c. 914.

(h) Repealed by Session Laws 1979, c. 423, s. 2.

(i) Notwithstanding any other provision of this Chapter, a person, who is stopped, detained or questioned by a law-enforcement officer having reasonable grounds to believe that the person has been driving or operating a motor vehicle on a highway or public vehicular area while under the influence of alcoholic beverages, may request and the law-enforcement officer shall cause the administration of the chemical tests provided for in this section prior to the person's arrest for violating any provision of G.S. 20-138. Prior to the administration of chemical tests under this subsection, the person who is stopped, detained or questioned shall sign a form, to be supplied by the Division, confirming his request. The tests provided for in this subsection shall be administered under the same conditions as are provided in this section for the administration of chemical tests after arrest. The results of the tests adminis-

tered under this subsection may be used in evidence in the trial of a charge arising out of the occurrence. (1963, c. 966, s. 1; 1965, c. 1165; 1969, c. 1074, s. 1; 1971, c. 619, ss. 3-6; 1973, c. 206, ss. 1, 2; cc. 824, 914; 1975, c. 716, s. 5; 1977, c. 812; 1979, c. 423, s. 2; 1979, 2nd Sess., c. 1160; 1981, c. 412, s. 4; c. 747, s. 66.)

Cross References. — For definition of "public vehicular area," see § 20-4.01, subdivision (32).

As to the availability of test records, see § 20-27.

Effect of Amendments. — The 1979 amendment repealed subsection (h), which defined "public vehicular area."

The 1979, 2nd Sess., amendment, effective October 1, 1980, added at the end of subsection (e) "except that such hearing shall be conducted in the judicial district where the arrest was made."

The 1981 amendments, effective January 1, 1982, substituted "alcoholic beverages" for "intoxicating liquor" throughout the section.

Legal Periodicals. — For survey of 1978 law on criminal procedure, see 57 N.C.L. Rev. 1007 (1979).

For survey of 1979 law on criminal procedure, see 58 N.C.L. Rev. 1404 (1980).

CASE NOTES

Because this section imposes a penalty, it must be strictly construed. Price v. North Carolina Dep't of Motor Vehicles, 36 N.C. App. 698, 245 S.E.2d 518, appeal dismissed, 295 N.C. 551, 248 S.E.2d 728 (1978).

The purpose of administering the breathalyzer test is to produce an accurate result. Bell v. Powell, 41 N.C. App. 131, 254 S.E.2d 191 (1979).

The purpose of the statute is fulfilled when the arrestee is given the option to submit or refuse to submit to a breathalyzer test and his decision is made after having been advised of his rights in a manner provided by the statute. Rice v. Peters, 48 N.C. App. 697, 269 S.E.2d 740 (1980).

Purpose of Procedures. — The administrative procedures provided for in this section are designed to promote breathalyzer tests as a valuable tool for law-enforcement officers in their enforcing the laws against driving under the influence while also protecting the rights of the State's citizens. Rice v. Peters, 48 N.C. App. 697, 269 S.E.2d 740 (1980).

Administration of the breathalyzer test, etc. —

In accord with original. See In re Gardner, 39 N.C. App. 567, 251 S.E.2d 723 (1979).

Subsection (a) of this section provides that administration of the breathalyzer test hinges solely upon the law-enforcement officer having reasonable grounds to believe the person to have been operating a motor vehicle on the highway while under the influence of intoxicating liquor, and not upon the illegality of the arrest for that offense. In re Pinyatello, 36 N.C. App. 542, 245 S.E.2d 185 (1978).

Suspect Not Entitled to Drive Own Car to Test Site. — A person suspected of driving while under the influence who requests a prearrest chemical test pursuant to § 20-16.2(i) does not have to be permitted to drive his own vehicle to the test site. Opinion of Attorney General to Chief P.L. McIver, Garner Police Department, Garner, N.C., 47 N.C.A.G. 89 (1977).

Option to Refuse Is Not Constitutionally Mandated. — This section only "coerces" a breathalyzer test in the limited instances in which the law-enforcement officer has reasonable grounds to believe that the driver has violated the law. In such situations the state could constitutionally require that the driver submit to an examination without any option to refuse. Montgomery v. North Carolina Dep't of Motor Vehicles, 455 F. Supp. 338 (W.D.N.C. 1978).

It is not impermissible nor a violation of equal protection of the laws for the State to allow drivers an option of refusing a breathalyzer examination that could be constitutionally required in exchange for risking license suspension of six months if the proper procedures are followed and the officer has probable cause to believe that the accused has driven a motor vehicle while under the influence of intoxicating liquor. Montgomery v. North Carolina Dep't of Motor Vehicles, 455 F. Supp. 338 (W.D.N.C. 1978).

The State is not constitutionally required to give an accused an option to refuse the breathalyzer test. Etheridge v. Peters, 45 N.C. App. 358, 263 S.E.2d 308 (1980).

The effect of subsection (a) of this section is to require a defendant to exercise his rights in a timely manner. State v. Lloyd, 33 N.C. App. 370, 235 S.E.2d 281 (1977).

Subsection (a) Complied with. — Having placed the information required by subsection (a) in writing before the defendant, the operator was not required to make defendant read it. The

operator complied fully with the statute when he orally advised defendant and placed the required information in writing before defendant with the opportunity on defendant's part to read the same. State v. Carpenter, 34 N.C. App. 742, 239 S.E.2d 596 (1977), cert. denied, 294 N.C. 183, 241 S.E.2d 518 (1978).

Considering the 1973 amendments to subsections (a) and (c) of this section together it is clear that the modification in subsection (c) that changed the phrase "law-enforcement officer" to "arresting officer" was designed to distinguish between the law-enforcement officer with reasonable grounds to believe that the suspect was driving under the influence of alcohol, (i.e., the arresting officer) and the law-enforcement officer who is to administer the test and give the four-part warning. Oldham v. Miller, 38 N.C. App. 178, 247 S.E.2d 767 (1978).

Notice of Rights Need Not Precede Request to Submit to Test. — Subsection (c) of this section does not require that an arrestee be requested to submit to a breathalyzer test after being informed of his statutory rights. Rice v. Peters, 48 N.C. App. 697, 269 S.E.2d 740 (1980).

Officers Authorized to Request a Test. — Subsection (c) of this section does not provide that the "arresting officer" is the sole person authorized to request that the petitioner submit to the test. The phrase "arresting officer" merely distinguishes between the two law-enforcement officers present at the administration of the test and makes it clear that the breathalyzer operator who gives the four-part warning set out in subsection (a) of this section is not the officer authorized to request that the petitioner take the test. Oldham v. Miller, 38 N.C. App. 178, 247 S.E.2d 767 (1978).

The full import of subsection (c) of this section requires an operator of a motor vehicle, who has been charged with the offense of driving under the influence of intoxicating liquor, to take a breathalyzer test, which means the person to be tested must follow the instructions of the breathalyzer operator. A failure to follow such instruction provides an adequate basis for the trial court to conclude that petititoner willfully refused to take a chemical test of breath in violation of law. Bell v. Powell, 41 N.C. App. 131, 254 S.E.2d 191 (1979).

Right to Confer with Counsel. — A person enjoys no constitutional right to confer with counsel before deciding whether to submit to the breathalyzer test. Etheridge v. Peters, 45 N.C. App. 358, 263 S.E.2d 308 (1980).

The operator of a motor vehicle has no constitutional right to confer with counsel prior to a decision to submit to the breathalyzer test. Seders v. Powell, 298 N.C. 453, 259 S.E.2d 544 (1979).

Presence of Counsel During Entire Process Not Required. — An accused has no absolute right to demand that an attorney view the entire process involved in administering the test, including the preliminary steps necessary to ready the machine itself. State v. Martin, 46 N.C. App. 514, 265 S.E.2d 456 (1980).

Effect of 1973 Amendment to Subdivision (a)(4). — The 1973 amendment of this section which inserted "for this purpose" in the place of "for these purposes" did so at the same time that it enumerated three other rights accruing to a driver faced with the prospect of a breathalyzer test. The limiting words were inserted to apply to the single generic right enumerated in subdivision (a)(4) of this section, the right to have advice and support during the testing process, as opposed to the other rights enumerated in the preceding subdivisions (a)(1) through (a)(3) of this section. Seders v. Powell, 298 N.C. 453, 259 S.E.2d 544 (1979).

Time Limit Is Constitutionally Sound. — Allowing the driver 30 minutes time to decide whether to submit to the test, while providing that he is deemed to have refused at the expiration of the 30 minutes, is a constitutionally sound principle. Etheridge v. Peters, 45 N.C. App. 358, 263 S.E.2d 308 (1980).

Time Limit on Right to Call Attorney and Select Witness. — The 30-minute time limit referred to by subdivision (a)(4) of this section applies both to the purpose of calling an attorney and to the purpose of selecting a witness to view the testing procedure. Seders v. Powell, 298 N.C. 453, 259 S.E.2d 544 (1979).

Section 15A-501(5) Not Applicable to Breathalyzer Tests. — Section 15A-501(5) which gives a criminal defendant a right to consult with counsel within a reasonable time after arrest, does not apply to breathalyzer tests. It would be incongruous to hold that subdivision (a)(4) of this section requires an accused to select a witness to view for him the testing procedure within 30 minutes but allows a greater period for the purpose of calling an attorney since, in virtually every situation, it would be easier for an accused to contact an attorney by telephone within 30 minutes than to contact anyone else and have them travel to the breathalyzer room to observe the test within that same time period. Seders v. Powell, 298 N.C. 453, 259 S.E.2d 544 (1979).

The legislature did not intend for the "reasonable time" contemplated by § 15A-501(5), a part of the Criminal Procedure Act, to apply to the specialized situation contemplated by this section, a civil matter involving the administrative removal of driving privileges as a result of refusing to submit to a breathalyzer test. When two statutes apparently overlap, it is well established that the statute special and particular shall control over the statute general in nature, even if the general statute is more

recent, unless it clearly appears that the legislature intended the general statute to control. Seders v. Powell, 298 N.C. 453, 259 S.E.2d 544 (1979).

Test Not Required to Be Administered within 30 Minutes. — This section does not require that the breathalyzer test be administered within 30 minutes of the time a person's rights are read to him. Pappas v. North Carolina Dep't of Motor Vehicles, 42 N.C. App. 497, 256 S.E.2d 829 (1979).

A willful refusal to submit to a chemical test within the meaning of this section occurs where a motorist: (1) is aware that he has a choice to take or to refuse to take the test; (2) is aware of the time limit within which he must take the test; (3) voluntarily elects not to take the test; and (4) knowingly permits the prescribed 30 minute time limit to expire before he elects to take the test. Etheridge v. Peters, 301 N.C. 76, 269 S.E.2d 133 (1980).

The breathalyzer test will be delayed a maximum of 30 minutes from the time defendant is notified of his rights. State v. Lloyd, 33 N.C. App. 370, 235 S.E.2d 281 (1977).

The purpose of the 30-minute delay is to allow the defendant, who exercises his rights, a reasonable but limited amount of time to procure the presence of a lawyer, doctor, nurse or witness. State v. Lloyd, 33 N.C. App. 370, 235 S.E.2d 281 (1977).

Delay After Being Informed of Rights, etc. —

In accord with original. See Seders v. Powell, 39 N.C. App. 491, 250 S.E.2d 690, aff'd, 298 N.C. 453, 259 S.E.2d 544 (1979).

Where petitioner's right to "call an attorney" was satisfied, petitioner had no right to delay the test in excess of 30 minutes while awaiting the arrival of his attorney. His declination to submit to the test was, therefore, a willful refusal under this section. Price v. North Carolina Dep't of Motor Vehicles, 36 N.C. App. 698, 245 S.E.2d 518, appeal dismissed, 295 N.C. 551, 248 S.E.2d 728 (1978), overrruled on other grounds, Seders v. Powell, 298 N.C. 453, 259 S.E.2d 544 (1979); Etheridge v. Peters, 45 N.C. App. 358, 263 S.E.2d 308 (1980).

Plaintiff had no right to delay the test in excess of 30 minutes while waiting for his attorney to return his call. His declination to take the breathalyzer test was thus a willful refusal under this section. Seders v. Powell, 39 N.C. App. 491, 250 S.E.2d 690 (1979), aff'd, 298 N.C. 453, 259 S.E.2d 544 (1979).

Test Administered Whether or Not Requested Persons Have Arrived. — Even if the defendant does exercise his rights within 30 minutes of notification, the test can and will be administered after the lapse of 30 minutes regardless of whether the requested persons have arrived. State v. Lloyd, 33 N.C. App. 370, 235 S.E.2d 281 (1977).

The police are not required to delay testing unless the defendant exercises his rights. State v. Lloyd, 33 N.C. App. 370, 235 S.E.2d 281 (1977).

When Delay of Less Than 30 Minutes Permissible. — This section provides for a delay not in excess of 30 minutes for defendant to exercise his rights, and a delay of less than 30 minutes is permissible where the record is barren of any evidence to support a contention, if made, that a lawyer or witness would have arrived to witness the proceeding had the operator delayed the test to the maximum time of 30 minutes. State v. Buckner, 34 N.C. App. 447, 238 S.E.2d 635 (1977).

Subdivision (a)(4) of this section constitutes a maximum of 30 minutes delay for the defendant to obtain a lawyer or witness. It does not require that the administering officer wait 30 minutes before giving the test when the defendant has waived the right to have a lawyer or witness present or when it becomes obvious that defendant does not intend to exercise this right. State v. Buckner, 34 N.C. App. 447, 238 S.E.2d 635 (1977).

There was no error in the testing procedures or in the admission of the test results where there was a period of 25 minutes after notification to the defendant of his rights during which the defendant made no effort to exercise rights, and where, at the time the test was administered, the defendant made no effort to exercise his rights. State v. Lloyd, 33 N.C. App. 370, 235 S.E.2d 281 (1977).

A hearing under subsection (d) of this section satisfies the constitutional due process requirement. Montgomery v. North Carolina Dep't of Motor Vehicles, 455 F. Supp. 338 (W.D.N.C. 1978).

Subsection (d) of this section provides an adequate opportunity for a hearing prior to revocation of a license for failure to submit to a breathalyzer examination. Montgomery v. North Carolina Dep't of Motor Vehicles, 455 F. Supp. 338 (W.D.N.C. 1978).

Subsection (d) of this section makes no reference to any question concerning the legality of the arrest as coming within the scope of the inquiry. In re Gardner, 39 N.C. App. 567, 251 S.E.2d 723 (1979).

The statutory distinction under this section is based on whether a motorist refuses to submit to a breath test. Since the motorist may not be subjected to such a test unless, pursuant to subsection (d) of this section, "the law-enforcement officer [has] reasonable grounds to believe the person had been driving or operating a motor vehicle upon a highway or public vehicular area while under the influence of intoxicating liquor," the State could have required that the motorist submit to the test without any refusal option and without any infringement of the constitutional rights

against self-incrimination or against unreasonable searches and seizures. Montgomery v. North Carolina Dep't of Motor Vehicles, 455 F. Supp. 338 (W.D.N.C. 1978).

Failure of Trial Court to Find Facts. — While the failure of the trial court to find facts with regard to whether the plaintiff was arrested on reasonable grounds within the meaning of subsection (d) of this section, there was no need to remand for a further finding of facts or to award the plaintiff a new trial, since the facts leading up to the arrest were essentially uncontradicted, and only the conclusion to be drawn from them was disputed. Poag v. Powell, 39 N.C. App. 363, 250 S.E.2d 93, cert. denied, 296 N.C. 736, 254 S.E.2d 178 (1979).

Revocation for Refusal to Submit, etc. — The petitioner's driving privilege was properly revoked because of his unwillingness to take the breathalyzer test, whether or not his warrantless arrest was legal under § 15A-401, where the arrest was constitutionally valid by virtue of the fact that the arresting officer had ample information to provide him with probable cause to arrest the petitioner for operating a motor vehicle upon a public highway while under the influence of intoxicants. In re Gardner, 39 N.C. App. 567, 251 S.E.2d 723 (1979).

The administrative punishment of license revocation is designed to promote breathalyzer examinations which provide the State law-enforcement officers with more accurate evidence of possible driving under the influence violations. Montgomery v. North Carolina Dep't of Motor Vehicles, 455 F. Sipp. 338 (W.D.N.C. 1978).

The evidence sought from a breathalyzer examination is directly related to the State's need to enforce the laws governing the operation of motor vehicles on the State's roads. The administrative penalty is appropriately designed to deny a right directly related to the laws whose enforcement may be hindered by refusal to take a breathalyzer examination. Montgomery v. North Carolina Dep't of Motor Vehicles, 455 F. Supp. 338 (W.D.N.C. 1978).

Revocation of a driver's license does not deprive the licensee of any fundamental constitutional right. Montgomery v. North Carolina Dep't of Motor Vehicles, 455 F. Supp. 338 (W.D.N.C. 1978).

Property Rights Not Denied. — Where plaintiff was arrested for driving under the influence of alcohol, refused to submit to a breathalyzer examination, and later received notice that his driver's license would be suspended, the plaintiff was not deprived of any property right without procedural due process although a notice of revocation was issued prior to a hearing, the plaintiff was provided a right to a hearing, before revocation was effectuated. In fact the plaintiff requested and received an administrative hearing, a trial de novo in superior court, and consideration of his appeals of the superior court's decision by both the North Carolina Court of Appeals and the North Carolina Supreme Court prior to actual revocation. Montgomery v. North Carolina Dep't of Motor Vehicles, 455 F. Supp. 338 (W.D.N.C. 1978).

Applied in Durland v. Peters, 42 N.C. App. 25, 255 S.E.2d 650 (1979); Harper v. Peters, 42 N.C. App. 62, 255 S.E.2d 791 (1979); State v. McLawhorn, 43 N.C. App. 695, 260 S.E.2d 138 (1979); Rawls v. Peters, 45 N.C. App. 461, 263 S.E.2d 330 (1980).

Cited in Church v. Powell, 40 N.C. App. 254, 252 S.E.2d 229 (1979).

§ 20-16.3. Preliminary breath test.

Any law-enforcement officer having reasonable grounds to believe that a person has been driving or operating a vehicle on a highway or public vehicular area while under the influence of alcoholic beverages may, without making an arrest, request that such person submit to a preliminary chemical breath test to be administered by the officer. The results of this test shall not be admissible in evidence and failure to submit to the test shall not constitute a violation of this Chapter. Nothing contained in this section shall be construed to prevent or require a subsequent chemical test pursuant to G.S. 20-16.2. The law-enforcement officer requesting the test shall advise orally and in writing the person to be tested that his failure to take the test or his taking of the test shall not be construed to prevent or require a subsequent chemical test pursuant to G.S. 20-16.2.

No device may be used to give a chemical test under the provisions of this section unless it has been approved as to type and make by the Department of Human Resources. (1973, c. 312, s. 1; c. 476, s. 128; 1981, c. 412, s. 4; c. 747, s. 66.)

Effect of Amendments. — The 1981 amendments, effective January 1, 1982, substituted "alcoholic beverages" for "intoxicating liquor" near the middle of the first sentence of the first paragraph.

CASE NOTES

Cited in State v. Hunter, 299 N.C. 29, 261 S.E.2d 189 (1980).

§ 20-17. Mandatory revocation of license by Division.

The Division shall forthwith revoke the license of any driver upon receiving a record of such driver's conviction for any of the following offenses when such conviction has become final:

(1) Manslaughter (or negligent homicide) resulting from the operation of a motor vehicle.

(2) Driving or operating a vehicle within this State while under the influence of alcoholic beverages or while under the influence of an impairing drug as defined in G.S. 20-19(h); or driving or operating a vehicle within this State with a blood alcohol level of 0.10 percent or more.

(3) Any felony in the commission of which a motor vehicle is used.

(4) Failure to stop and render aid as required under the laws of this State in the event of a motor vehicle accident.

(5) Perjury or the making of a false affidavit or statement under oath to the Division under this Article or under any other law relating to the ownership of motor vehicles.

(6) Conviction, or forfeiture of bail not vacated, upon two charges of reckless driving committed within a period of 12 months.

(7) Conviction, or forfeiture of bail not vacated, upon one charge of reckless driving while engaged in the illegal transportation of intoxicants for the purpose of sale.

(8) Conviction of using a false or fictitious name or giving a false or fictitious address in any application for a driver's license, or learner's permit, or any renewal or duplicate thereof, or knowingly making a false statement or knowingly concealing a material fact or otherwise committing a fraud in any such application or procuring or knowingly permitting or allowing another to commit any of the foregoing acts.

(9) Death by vehicle as defined in G.S. 20-141.4.

(10) Speeding in excess of 55 miles per hour and at least 15 miles per hour over the legal limit in violation of G.S. 20-141(j).

(11) Conviction of assault with a motor vehicle. (1935, c. 52, s. 12; 1947, c. 1067, s. 14; 1967, c. 1098, s. 2; 1971, c. 619, s. 7; 1973, c. 18, s. 1; c. 1081, s. 3; c. 1330, s. 2; 1975, c. 716, s. 5; c. 831; 1979, c. 667, ss. 20, 41; 1981, c. 412, s. 4; c. 747, s. 66.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1981, substituted "driver" for "operator or chauffeur" and "driver's" for "operator's or chauffeur's" in the introductory paragraph and "a driver's" for "an operator's or chauffeur's" near the beginning of subdivision (8).

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.'"

The 1981 amendment, effective January 1, 1982, substituted "alcoholic beverages" for "intoxicating liquor" in subdivision (2).

CASE NOTES

Applied in Whedbee v. Powell, 41 N.C. App. 250, 254 S.E.2d 645 (1979).

§ 20-18. Conviction of offenses described in § 20-181 not ground for suspension or revocation.

Conviction of offenses described in G.S. 20-181 shall not be cause for the suspension or revocation of driver's license under the terms of this Article. (1939, c. 351, s. 2; 1955, c. 913, s. 1; 1979, c. 667, s. 41.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1981, substituted "driver's" for "operator's or chauffeur's."

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.'"

§ 20-19. Period of suspension or revocation.

(a) When a license is suspended under subdivision (8) or (9) of G.S. 20-16(a), the period of suspension shall be in the discretion of the Division and for such time as it deems best for public safety but shall not exceed six months.

(b) When a license is suspended under subdivision (10) of G.S. 20-16(a), the period of suspension shall be in the discretion of the Division and for such time as it deems best for public safety but shall not exceed a period of 12 months.

(c) When a license is suspended under any other provision of this Article which does not specifically provide a period of suspension, the period of suspension shall be not more than one year.

(c1) When a license is revoked under subdivision (2) of G.S. 20-17, and the period of revocation is not determined by the provisions of G.S. 20-19(d) and (e), the period of revocation shall be one year unless the trial judge issues a limited driving privilege to the person convicted that contains a condition that the defendant successfully complete the course of instruction at an Alcohol and Drug Education Traffic School. If the trial judge issues a limited privilege and the person convicted complies with the conditions and restrictions included in the limited privilege, the Division must restore the person's license after six months if the person's license or limited driving privilege is not otherwise revoked or suspended, and if the Division has received a certificate from the Alcohol and Drug Education Traffic School certifying that the person convicted has successfully completed the program of instruction at the Alcohol and Drug Education Traffic School. If the person fails to comply with the conditions and restrictions contained in the limited privilege, the period of revocation is 12 months, beginning at the time the limited privilege is revoked.

(d) When a license is revoked because of a second conviction for driving or operating a vehicle while under the influence of alcoholic beverages or while under the influence of an impairing drug, occurring within three years after a prior conviction, the period of revocation shall be four years; provided, that the Division may, after the expiration of two years, issue a new license upon satisfactory proof that the former licensee has not been convicted within the past two years with a violation of any provision of the motor vehicle laws, alcoholic beverages laws or drug laws of North Carolina or any other state and is not an excessive user of alcohol or drugs and upon such terms and conditions which the Division may see fit to impose for the balance of said period of revocation; provided, that as to a license which has been revoked because of a second conviction for driving under the influence of alcoholic beverages or a narcotic drug prior to May 2, 1957, and which has not been restored, the Division may upon the application of the former licensee, and after the expiration of two years of such period of revocation, issue a new license upon satisfactory proof that the former licensee has not been convicted within the past two years with a violation of any provision of the motor vehicle laws,

alcoholic beverages laws or drug laws of North Carolina or any other state and is not an excessive user of alcohol or drugs. When a new license is issued pursuant to the provisions of this subsection, it may be issued upon such terms and conditions as the division may see fit to impose, including when feasible the condition that said former licensee successfully complete the program of instruction at an Alcohol and Drug Education Traffic School. The terms and conditions imposed by the Division may be imposed for the balance of a four-year revocation, which period shall be computed from the date of the original revocation.

(e) When a license is revoked because of a third or subsequent conviction for driving or operating a vehicle while under the influence of alcoholic beverages or while under the influence of an impairing drug, occurring within five years after a prior conviction, the period of revocation shall be permanent; provided, that the Division may, after the expiration of three years, issue a new license upon satisfactory proof that the former licensee has not been convicted within the past three years with a violation of any provision of motor vehicle laws, alcoholic beverages laws or drug laws of North Carolina or any other state and is not an excessive user of alcohol or drugs; provided, that as to a license which has been revoked because of a third or subsequent conviction for driving under the influence of alcoholic beverages or a narcotic drug prior to May 2, 1957, and which license has not been restored, the Division may, upon application of the former licensee and after the expiration of three years of such period of revocation, issue a new license upon satisfactory proof that the former licensee has not been convicted within the past three years with a violation of any provision of the motor vehicle laws, alcoholic beverages laws or drug laws of North Carolina or any other state and is not an excessive user of alcohol or drugs. When a new license is issued under the provisions of this subsection, it may be issued upon such terms and conditions as the Division may see fit to impose, including when feasible the condition that the former licensee successfully complete the program of instruction at an Alcohol and Drug Education Traffic School. The terms and conditions imposed by the Division may not exceed a period of three years.

(f) When a license is revoked under any other provision of this article which does not specifically provide a period of revocation, the period of revocation shall be one year.

(g) When a license is suspended under subdivision (11) of G.S. 20-16(a), the period of suspension shall be for a period of time not in excess of the period of nonoperation imposed by the court as a condition of the suspended sentence; further, in such case, it shall not be necessary to comply with the Motor Vehicle Safety and Financial Responsibility Act in order to have such license returned at the expiration of the suspension period.

(h) As used in this section, the term "under the influence of an impairing drug" shall mean under the influence of any narcotic drug or under the influence of any other drug to such degree that a person's physical or mental faculties are appreciably impaired. (1935, c. 52, s. 13; 1947, c. 1067, s. 15; 1951, c. 1202, ss. 2-4; 1953, c. 1138; 1955, c. 1187, ss. 13, 17, 18; 1957, c. 499, s. 2; c. 515, s. 1; 1959, c. 1264, s. 11A; 1969, c. 242; 1971, c. 619, ss. 8-10; 1973, c. 1445, ss. 1-4; 1975, c. 716, s. 5; 1979, c. 903, ss. 4-6; 1981, c. 412, s. 4; c. 747, ss. 34, 66.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1980, added subsection (c1), deleted "and upon such terms and conditions which the Division may see fit to impose for the balance of a four-year revocation period, which period shall be computed from the date of the original revocation" at the end of the first sentence in subsection (d), added the last two sentences of subsection (d), and added "including when feasible the condition that the former licensee successfully complete the program of instruction at an Alcohol and Drug Education Traffic School" at the end of the second sentence of subsection (e).

The first 1981 amendment, effective January 1, 1982, inserted the reference to subdivision (8) of § 20-16(a) in subsection (a).

The second 1981 amendment, effective January 1, 1982, substituted "alcoholic beverages" for "intoxicating liquor" in subsections (d) and (e), and substituted "alcoholic beverages laws" for "liquor laws" in subsections (d) and (e).

Legal Periodicals. — For survey of 1978 constitutional law, see 57 N.C.L. Rev. 958 (1979).

CASE NOTES

Subsection (e) of this section is not overbroad in violation of the Constitution since no conduct within the purview of the phrase "violation of liquor laws of North Carolina," including the commission of the crime of public drunkenness, is a constitutionally protected activity. In re Harris, 37 N.C. App. 590, 246 S.E.2d 532 (1978).

Subsection (e) Is Not Unconstitutionally Vague. — The phrase "liquor laws" in subsection (e) of this section, is not a term so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. In re Harris, 37 N.C. App. 590, 246 S.E.2d 532 (1978).

Legislative Intent. — The legislature fully intended to include the crime of public drunkenness in the phrase "violation of liquor laws of North Carolina" in subsection (e) of this section. In re Harris, 37 N.C. App. 590, 246 S.E.2d 532 (1978).

In enacting subsection (e) of this section, the legislature was demanding complete compliance with all laws governing the use of drugs, alcohol, and motor vehicles. In re Harris, 37 N.C. App. 590, 246 S.E.2d 532 (1978).

The power to issue, suspend or revoke a driver's license is vested exclusively in the Division of Motor Vehicles, subject to review by the superior court and, upon appeal, by the appellate division. Smith v. Walsh, 34 N.C. App. 287, 238 S.E.2d 157 (1977).

Under § 20-16(a)(10) and subsection (b) of this section, the discretionary authority to suspend petitioner's license for a period not exceeding 12 months was vested exclusively in the Division of Motor Vehicles. No discretionary power was conferred upon a superior court. Smith v. Walsh, 34 N.C. App. 287, 238 S.E.2d 157 (1977).

§ 20-20: Repealed by Session Laws 1981, c. 938, s. 5, effective January 1, 1982.

Cross References. — For present provisions concerning the surrender of operator's license which has been revoked or suspended, see § 20-45(b).

§ 20-21. No operation under foreign license during suspension or revocation in this State.

Any resident or nonresident whose driver's license or right or privilege to operate a motor vehicle in this State has been suspended or revoked as provided in this Article shall not operate a motor vehicle in this State under a license, permit or registration issued by another jurisdiction or otherwise during such suspension, or after such revocation until a new license is obtained when and as permitted under this Article. (1935, c. 52, s. 15; 1979, c. 667, s. 41.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1981, substituted "driver's" for "operator's or chauffeur's" near the beginning of the section.

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.' "

§ 20-22. Suspending privileges of nonresidents and reporting convictions.

(a) The privilege of driving a motor vehicle on the highways of this State given to a nonresident hereunder shall be subject to suspension or revocation by the Division in like manner and for like cause as a driver's license issued hereunder may be suspended or revoked.

(1979, c. 667, s. 41.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1981, substituted "a driver's" for "an operator's or chauffeur's" near the end of subsection (a).

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.'"

Only Part of Section Set Out. — As subsection (b) was not changed by the amendment, it is not set out.

§ 20-23. Suspending resident's license upon conviction in another state.

The Division is authorized to suspend or revoke the license of any resident of this State upon receiving notice of the conviction as defined in G.S. 20-24(c) of such person in another state of the offenses hereinafter enumerated which, if committed in this State, would be grounds for the suspension or revocation of the license of an operator. The provisions of this section shall apply only for the offenses as set forth in G.S. 20-26(a). (1935, c. 52, s. 17; 1971, c. 486, s. 2; 1975, c. 716, s. 5; 1979, c. 667, s. 22.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1981, deleted "or chauffeur" at the end of the first sentence.

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.'"

§ 20-23.1. Suspending or revoking operating privilege of person not holding license.

In any case where the Division would be authorized to suspend or revoke the license of a person but such person does not hold a license, the Division is authorized to suspend or revoke the operating privilege of such a person in like manner as it could suspend or revoke his license if such person held a driver's license, and the provisions of this Chapter governing suspensions, revocations, issuance of a license, and driving after license suspended or revoked, shall apply in the discretion of the Division in the same manner as if the license has been suspended or revoked. (1955, c. 1187, s. 19; 1969, c. 186, s. 2; 1975, c. 716, s. 5; 1979, c. 667, s. 41.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1981, substituted "a driver's" for "an operator's or chauffeur's" near the middle of the section.

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.'"

§ 20-23.2. Suspension of license for conviction of traffic offense in federal court.

Upon receipt of notice of conviction in any court of the federal government sitting in North Carolina of the offense of driving or operating a vehicle while under the influence of alcoholic beverages or while under the influence of an impairing drug as defined in G.S. 20-19(h), the Division is authorized to revoke the driving privilege of the person convicted in the same manner as if such conviction had occurred in a court of this State. (1969, c. 988; 1971, c. 619, s. 11; 1975, c. 716, s. 5; 1979, c. 903, s. 12; 1981, c. 412, s. 4; c. 747, s. 66.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1980, deleted the former last sentence, which made this section applicable only to offenses committed on highways in federal parks in this State.

The 1981 amendments, effective January 1, 1982, substituted "alcoholic beverages" for "intoxicating liquor" near the middle of the section.

§ 20-24. When court to forward license to Division and report convictions.

(a) Whenever any person is convicted of any offense for which this Article makes mandatory the revocation of the driver's license of such person by the Division, the court in which such conviction is had shall require the surrender to it of all drivers' licenses then held by the person so convicted and the court shall thereupon forward the same, together with a record of such conviction, to the Division within 30 days.

The clerks of court, assistant clerks of court and deputy clerks of court in which any person is convicted, and as a result thereof the revocation or suspension of the driver's license of such person is required under the provisions of this Chapter, are hereby designated as agents of the Division of Motor Vehicles for the purpose of receiving all drivers' licenses required to be surrendered under this section, and are hereby authorized to and shall give to such licensee a dated receipt for any such license surrendered, such receipt to be upon such form as may be approved by the Commissioner of Motor Vehicles. The original of such receipt shall be mailed forthwith to the Driver License Section of the Division of Motor Vehicles together with the driver's license. Any driver's license which has been surrendered and for which a receipt has been issued as herein required shall be revoked or suspended as the case may be as of the date shown upon the receipt issued to such person.

(b) Every court having jurisdiction over offenses committed under this Article, or any other law of this State regulating the operation of motor vehicles on highways, shall forward to the Division a record of the conviction of any person in said court for a violation of any [of] said laws, and may recommend the suspension of the driver's license of the person so convicted. Every court shall also forward to the Division a record of every conviction in which sentence is suspended on condition that the defendant not operate a motor vehicle for a period of time, and such report shall state the period of time for which such condition is imposed; provided that the punishment for the violation of this subsection shall be the same as provided in G.S. 20-7(o).

(b1) In any case where the record of conviction for any reason has been received by the Division for more than one year after the date of the final conviction, the Division may, in its discretion, substitute a period of probation for all or any part of a suspension or revocation required because of the conviction.

(c) For the purpose of this Article the term "conviction" shall mean a final conviction. Also, for the purposes of this Article a forfeiture of bail or collateral

deposited to secure a defendant's appearance in court, which forfeiture has not been vacated, shall be equivalent to a conviction. Also, a defendant shall be treated for the purposes of this Article as having been convicted of any offense under this Chapter as to which he:

(1) Has been served with process under Article 17, Criminal Process, Chapter 15A of the General Statutes;
(2) Has failed to appear upon due call of the case; and
(3) Has failed within 90 days thereafter to submit himself to the jurisdiction of the court to answer the charge.

Provided, that any conviction entered pursuant to the provisions of this subsection by reason of the defendant's failure to submit himself to the jurisdiction of the court to answer the charge within 90 days after his failure to appear at the call of the case, may be set aside within 12 months of such entry by a judge of the General Court of Justice in the same division and same jurisdiction in which the defendant failed to appear, upon a showing by the defendant, in open court, and after 10 days' notice to the District Attorney, that:

(1) Defendant's failure to appear was due to his excusable neglect, or the neglect or mistake of some other party; or
(2) The conviction was entered by clerical mistake or inadvertence; and
(3) Defendant has submitted himself to the jurisdiction of the court for trial.

Upon such action setting aside a conviction, the Division of Motor Vehicles shall be notified, and shall remove that conviction from the driving record of the defendant.

In addition to the foregoing provisions and for the purpose of this Article, a third or subsequent prayer for judgment continued within any five-year period shall be considered as a final conviction and to this end all orders entering prayer for judgments continued entered by the courts shall be reported to the Division of Motor Vehicles.

(d) After November 1, 1935, no driver's license shall be suspended or revoked except in accordance with the provisions of this Article. (1935, c. 52, s. 18; 1949, c. 373, ss. 3, 4; 1955, c. 1187, s. 14; 1959, c. 47; 1965, c. 38; 1973, c. 19; 1975, cc. 46, 445; c. 716, s. 5; c. 871, s. 1; 1979, c. 667, s. 41; 1981, c. 416; c. 839.)

Cross References. — As to issuance of license to person named in conviction report under subsection (c) for failure to answer charge within ninety days, see § 20-7.2.

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1981, substituted "driver's" for "operator's or chauffeur's" and "drivers'" for "operators' and chauffeurs'" throughout the section.

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.'"

The first 1981 amendment, in subsection (c), added the last two sentences of the first paragraph.

The second 1981 amendment added subsection (b1).

§ 20-25. Right of appeal to court.

CASE NOTES

Superior Court Is Not Vested with Discretionary Authority. — On appeal and hearing de novo in superior court, that court is not vested with discretionary authority. It makes judicial review of the facts, and if it finds that the license of petitioner is in fact and in law subject to suspension or revocation the order of the Division of Motor Vehicles must be affirmed. Smith v. Walsh, 34 N.C. App. 287, 238 S.E.2d 157 (1977).

Applied in Noyes v. Peters, 40 N.C. App. 763, 253 S.E.2d 584 (1979).

Cited in In re Harris, 37 N.C. App. 590, 246 S.E.2d 532 (1978); Seders v. Powell, 298 N.C. 453, 259 S.E.2d 544 (1979).

§ 20-26. Records; copies furnished; charge.

(a) The Division shall keep a record of test, proceedings and orders pertaining to all driver's licenses granted, refused, suspended or revoked. The Division shall keep records of convictions as defined in G.S. 20-24(c) occurring outside North Carolina only for the offenses of exceeding a stated speed limit of 55 miles per hour or more by more than 15 miles per hour, driving while license suspended or revoked, careless and reckless driving, engaging in prearranged speed competition, engaging willfully in speed competition, hit-and-run driving resulting in damage to property, unlawfully passing a stopped school bus, illegal transportation of alcoholic beverages, and the offenses included in G.S. 20-17.

(b) The Division shall furnish certified copies of license records required to be kept by subsection (a) of this section to State, county, municipal and court officials of this State for official use only, without charge. Provided a certified copy of such record may be transmitted via the police information network and that such copy shall be competent for the purpose of establishing the status of a person's operator's license and driving privilege without further authentication. The Attorney General and the Commissioner of Motor Vehicles are authorized to promulgate such rules and regulations as may be necessary to implement the provision of this subsection.

(c) The Division shall furnish copies of license records required to be kept by subsection (a) of this section to other persons, firms and corporations for uses other than official upon prepayment of the fee therefor, according to the following schedule:

(1) Limited extract copy of license record, for period up to three years $3.00
(2) Complete extract copy of license record 3.00
(3) Certified true copy of complete license record . . . . . 6.00.

All fees received by the Division under the provisions of this subsection shall be paid into and become a part of the "Highway Fund."

(d) The charge for records provided pursuant to this section shall not be subject to the provisions of Chapter 132 of the General Statutes. (1935, c. 52, s. 20; 1961, c. 307; 1969, c. 783, s. 3; 1971, c. 486, s. 1; 1975, c. 716, s. 5; 1979, c. 667, s. 23; c. 903, ss. 9, 10; 1981, c. 145, s. 1; c. 412, s. 4; c. 690, s. 13; c. 747, s. 66.)

Effect of Amendments. — The second 1979 amendment, effective Jan. 1, 1980, inserted "test" before "proceedings" in the first sentence of subsection (a), and added the proviso at the end of the first sentence, and the entire second sentence, of subsection (b).

The first 1979 amendment, effective Jan. 1, 1981, substituted "driver's" for "operator's and chauffeur's" near the beginning of subsection (a) and substituted "Highway Fund" for "Operator's and Chauffeur's License Fund" at the end of subsection (c).

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.'"

The first 1981 amendment added subsection (d).

The second 1981 amendment, effective July 1, 1981, increased the fees in subdivisions (1) and (2) of subsection (c) from one dollar to three dollars and the fee in subdivision (3) of subsection (c) from three dollars to six dollars.

The third 1981 amendment, effective January 1, 1982, substituted "alcoholic beverages" for "intoxicating liquors" near the end of the second sentence of subsection (a).

CASE NOTES

Division May Not Furnish Listings for Commercial Purposes. — The Division of Motor Vehicles is not required or permitted under the statutes to sell or furnish selective listings (i.e., by age, sex, etc.) in bulk or on computer tapes from the driver's license files for commercial purposes. Opinion of Attorney General to Mr. Zeb Hocutt, Jr., Director, Driver License Section, Division of Motor Vehicles, 47 N.C.A.G. 59 (1977).

§ 20-27. Availability of records.

(a) All records of the Division pertaining to application and to drivers' licenses, except the confidential medical report referred to in G.S. 20-7, of the current or previous five years shall be open to public inspection at any reasonable time during office hours and copies shall be provided pursuant to the provisions of G.S. 20-26.

(b) All records of the Division pertaining to chemical tests as provided in G.S. 20-16.2 shall be available to the courts as provided in G.S. 20-26(b). (1935, c. 52, s. 21; 1975, c. 716, s. 5; 1979, c. 667, s. 24; c. 903, s. 11; 1981, c. 145, s. 2.)

Effect of Amendments. — The first 1979 amendment, effective Jan. 1, 1981, substituted "drivers' licenses" for "operator's and chauffeur's license" near the beginning of subsection (a).

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.'"

The second 1979 amendment, effective Jan. 1, 1980, designated the existing paragraph as subsection (a) and added subsection (b).

The 1981 amendment added "and copies shall be provided pursuant to the provisions of G.S. 20-26" to the end of subsection (a).

§ 20-28. Unlawful to drive while license suspended or revoked.

(a) Any person whose driver's license has been suspended or revoked other than permanently, as provided in this Chapter, who shall drive any motor vehicle upon the highways of the State while such license is suspended or revoked shall be guilty of a misdemeanor and his license shall be suspended or revoked, as the case may be, for an additional period of one year for the first offense, two years for the second offense, and permanently for a third or subsequent offense.

Provided, however, any person whose license has been suspended or revoked under this section for 12 months may apply for a license after 90 days; any person whose license has been suspended or revoked under this section for two years may apply for a license after 12 months; any person whose license has been suspended or revoked under this section permanently may apply for a license after three years. Upon the filing of such application the Division may, with or without a hearing, issue a new license upon satisfactory proof that the former licensee has not been convicted within the suspension or revocation period of a violation of any provision of the motor vehicle laws, alcoholic beverages laws or drug laws of North Carolina or any other state. The new license may be issued upon such terms and conditions as the Division may see fit to impose for the balance of the suspension or revocation period. When the suspension or revocation period is permanent the terms and conditions imposed by the Division may not exceed three years.

Upon conviction, a violator of this section shall be punished by a fine of not less than two hundred dollars ($200.00) or imprisonment in the discretion of

the court not to exceed two years, or both; provided, however, the restoree of a suspended or revoked driver's license who operates a motor vehicle upon the streets or highways of the State without maintaining financial responsibility as provided by law shall be punished as for operating without a driver's license.

(b) Any person whose license has been permanently revoked or permanently suspended, as provided in this Article, who shall drive any motor vehicle upon the highways of this State while such license is permanently revoked or permanently suspended shall be guilty of a misdemeanor and shall be imprisoned for not less than one year. This subsection shall not apply to any license revocations under G.S. 20-17.1; penalty for violation of G.S. 20-17.1 shall be applied as prescribed under G.S. 20-28(a). (1935, c. 52, s. 22; 1945, c. 635; 1947, c. 1067, s. 16; 1955, c. 1020, s. 1; c. 1152, s. 18; c. 1187, s. 20; 1957, c. 1046; 1959, c. 515; 1967, c. 447; 1973, c. 47, s. 2; cc. 71, 1132; 1975, c. 716, s. 5; 1979, c. 377, ss. 1, 2; c. 667, s. 41; 1981, c. 412, s. 4; c. 747, s. 66.)

Effect of Amendments. — The first 1979 amendment, effective October 1, 1979, substituted the present first paragraph of subsection (a) for the former second half of the first paragraph, governing issuance of a new license to one whose license had been suspended or revoked, and the former second paragraph, authorizing the Division to exercise its discretion to suspend or revoke for lesser periods than those prescribed.

The second 1979 amendment, effective Jan. 1, 1981, substituted "driver's" for "operators or chauffeurs" near the beginning of the first sentence of the first paragraph of subsection (a) and in the proviso to the third paragraph of subsection (a) and substituted "a driver's" for "an operator's" at the end of subsection (a).

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.'"

The 1981 amendments, effective January 1, 1982, substituted "alcoholic beverages laws" for "liquor laws" in the second sentence of the second paragraph of subsection (a).

Legal Periodicals. — For survey of 1976 case law on criminal law, see 55 N.C.L. Rev. 976 (1977).

CASE NOTES

A violation of § 20-7 is not statutorily a lesser included offense of this section. State v. Cannon, 38 N.C. App. 322, 248 S.E.2d 65 (1978).

Double Jeopardy Bars Prosecution under This Section Where Defendant Already Pled Guilty to § 20-7. — The defendant could not be prosecuted for driving while his license was permanently revoked in violation of this section because of the prohibition against double jeopardy, where the defendant had previously pled guilty to driving without a license in violation of § 20-7 based upon the same event. While a violation of § 20-7 is not statutorily a lesser included offense of a violation of this section, under the "additional facts test" of double jeopardy when applied to the defendant's offenses, the two offenses were the same both in fact and in law since the evidence that the defendant was driving an automobile while his license had been permanently revoked would sustain a conviction for driving without a license. State v. Cannon, 38 N.C. App. 322, 248 S.E.2d 65 (1978).

Where the petitioner was convicted of violating this section the revocation of his license was mandatory, and the exercise of limited discretion by the division under subsection (a) of this section does not change the mandatory character of the revocation. Noyes v. Peters, 40 N.C. App. 763, 253 S.E.2d 584 (1979).

§ 20-28.1. Conviction of moving offense committed while driving during period of suspension or revocation of license; hearings upon recommendation of judge and district attorney.

(a) Upon receipt of notice of conviction of any person of a motor vehicle moving offense, such offense having been committed while such person's

driving privilege was in a state of suspension or revocation, the Division shall revoke such person's driving privilege for an additional period of time as set forth in subsection (b) hereof.

(b) When a driving privilege is subject to revocation under this section, the additional period of revocation shall be as follows:

(1) A first such revocation shall be for one year;

(2) A second such revocation shall be for two years; and

(3) A third or subsequent such revocation shall be permanent.

(c) Any person whose driving privilege has been suspended or revoked under this section for 12 months may apply for a license after 90 days; any person whose license has been suspended or revoked under this section for two years may apply for a license after 12 months; any person whose license has been suspended or revoked under this section permanently may apply for a license after three years. Upon the filing of such application the Division may, with or without a hearing, issue a new license upon satisfactory proof that the former licensee has not been convicted within the suspension or revocation period of a violation of any provision of the motor vehicle laws, alcoholic beverages laws, or drug laws of North Carolina or any other state. The new license may be issued upon such terms and conditions which the Division may see fit to impose for the balance of the suspension or revocation period. When the suspension or revocation period is permanent, the terms and conditions imposed by the Division may not exceed three years.

(d) Repealed by Session Laws 1979, c. 378, s. 2, effective October 1, 1979. (1965, c. 286; 1969, c. 348; 1971, c. 163; 1973, c. 47, s. 2; 1975, c. 716, s. 5; 1979, c. 378, ss. 1, 2; 1981, c. 412, s. 4; c. 747, s. 66.)

Effect of Amendments. — The 1979 amendment, effective October 1, 1979, rewrote subsection (c), which formerly provided only for application for a new license after a permanent revocation of the license and provided only general guidelines for such a decision, and repealed former subsection (d), which authorized the judge and district attorney to recommend an investigation to see if a lesser suspension or revocation was warranted.

The 1981 amendments, effective January 1, 1982, substituted "alcoholic beverages laws" for "liquor laws" in the second sentence of subsection (c).

§ 20-29. Surrender of license.

Any person operating or in charge of a motor vehicle, when requested by an officer in uniform, or, in the event of accident in which the vehicle which he is operating or in charge of shall be involved, when requested by any other person, who shall refuse to write his name for the purpose of identification or to give his name and address and the name and address of the owner of such vehicle, or who shall give a false name or address, or who shall refuse, on demand of such officer or such other person, to produce his license and exhibit same to such officer or such other person for the purpose of examination, or who shall refuse to surrender his license on demand of the Division, or fail to produce same when requested by a court of this State, shall be guilty of a misdemeanor and upon conviction shall be punished as provided in this Article. Pickup notices for drivers' licenses or revocation or suspension of license notices and orders or demands issued by the Division for the surrender of such licenses may be served and executed by patrolmen or other peace officers or may be served in accordance with G.S. 20-48. Patrolmen and peace officers, while serving and executing such notices, orders and demands, shall have all the power and authority possessed by peace officers when serving the executing warrants charging violations of the criminal laws of the State. (1935, c. 52, s. 23; 1949, c. 583, s. 7; 1975, c. 716, s. 5; 1979, c. 667, s. 25; 1981, c. 938, s. 1.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1981, substituted "drivers' " for "operators' or chauffeurs' " near the beginning of the second sentence.

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.' "

The 1981 amendment divided the former second sentence into the present second and third sentences by deleting "and such" from the beginning of the present third sentence and added "or may be served in accordance with G.S. 20-48" to the end of the present second sentence. Session Laws 1981, c. 938, s. 6, provides: "This act shall become effective January 1, 1982, and shall apply to any revocation, cancellation, suspension or other demand by the Commissioner to be issued on or after the effective date."

CASE NOTES

Stop of Defendant in Private Driveway Is "Seizure" within Fourth Amendment. — Where a patrolman, while not engaged in any patrol of the highway for purposes of observing traffic or making random license checks, spontaneously decided to stop petitioner, not while petitioner was "on a public highway" nor while petitioner was operating a vehicle, but instead while petitioner was in a private driveway, although petitioner would have had a meritorious defense to any prosecution based on failure to display his license, he was not entitled to invoke self-help against what was, at the time, an arguably lawful arrest, and petitioner's conviction for assaulting the highway patrolman can survive despite the finding that the officer's initial stop and demand were illegal as an unreasonable search and seizure under the Fourth Amendment. Keziah v. Bostic, 452 F. Supp. 912 (W.D.N.C. 1978).

Stated in State v. Greenwood, 47 N.C. App. 731, 268 S.E.2d 835 (1980).

§ 20-29.1. Commissioner may require reexamination; issuance of limited or restricted licenses.

The Commissioner of Motor Vehicles, having good and sufficient cause to believe that a licensed operator is incompetent or otherwise not qualified to be licensed, may, upon written notice of at least five days to such licensee, require him to submit to a reexamination to determine his competency to operate a motor vehicle. Upon the conclusion of such examination, the Commissioner shall take such action as may be appropriate, and may suspend or revoke the license of such person or permit him to retain such license, or may issue a license subject to restrictions or upon failure of such reexamination may cancel the license of such person until he passes a reexamination. Refusal or neglect of the licensee to submit to such reexamination shall be grounds for the cancellation of the license of the person failing to be reexamined, and the license so canceled shall remain canceled until such person satisfactorily complies with the reexamination requirements of the Commissioner. The Commissioner may, in his discretion and upon the written application of any person qualified to receive a driver's license, issue to such person a driver's license restricting or limiting the licensee to the operation of a single prescribed motor vehicle or to the operation of a particular class or type of motor vehicle. Such a limitation or restriction shall be noted on the face of the license, and it shall be unlawful for the holder of such limited or restricted license to operate any motor vehicle or class of motor vehicle not specified by such restricted or limited license, and the operation by such licensee of motor vehicles not specified by such license shall be deemed the equivalent of operating a motor vehicle without any driver's license. Any such restricted or limited licensee may at any time surrender such restricted or limited license and apply for and receive an unrestricted driver's license upon meeting the requirements therefor. (1943, c. 787, s. 2; 1949, c. 1121; 1971, c. 546; 1979, c. 667, ss. 26, 41.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1981, deleted "or chauffeur" following "operator" near the beginning of the first sentence and substituted "a driver's" for "an operator's or chauffeur's" in two places in the fourth sentence and "driver's" for "chauffeur's or operator's" near the end of the fifth sentence and for "operator's or chauffeur's" in the last sentence.

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight'."

§ 20-30. Violations of license or learner's permit provisions.

It shall be unlawful for any person to commit any of the following acts:

(1) To display or cause to be displayed or to have in possession a driver's license or learner's permit, knowing the same to be fictitious or to have been canceled, revoked, suspended or altered.

(2) To counterfeit, sell, lend to, or knowingly permit the use of, by one not entitled thereto, a driver's license or learner's permit.

(3) To display or to represent as one's own a license or learner's permit not issued to the person so displaying same.

(4) To fail or refuse to surrender to the Division upon demand any driver's license or learner's permit that has been suspended, canceled or revoked as provided by law.

(5) To use a false or fictitious name or give a false or fictitious address in any application for a driver's license or learner's permit, or any renewal or duplicate thereof, or knowingly to make a false statement or knowingly conceal a material fact or otherwise commit a fraud in any such application, or for any person to procure, or knowingly permit or allow another to commit any of the foregoing acts. Any license or learner's permit procured as aforesaid shall be void from the issuance thereof, and any moneys paid therefor shall be forfeited to the State.

(6) To photostat or otherwise reproduce a driver's license or learner's permit or to possess a driver's license or learner's permit which has been photostated or otherwise reproduced, unless such photostat or other reproduction was authorized by the Commissioner.

(7) To sell or offer for sale any reproduction or facsimile or simulation of a driver's license or learner's permit. The provisions of this subsection shall not apply to agents or employees of the Division while acting in the course and scope of their employment. Any person, firm or corporation violating the provisions of this subsection shall be guilty of a Class J felony. (1935, c. 52, s. 24; 1951, c. 542, s. 4; 1967, c. 1098, s. 1; 1973, c. 18, s. 2; 1975, c. 716, s. 5; 1979, c. 415; c. 667, ss. 27, 41; 1979, 2nd Sess., c. 1316, s. 22.)

Effect of Amendments. — The first 1979 amendment added subdivision (7).

The second 1979 amendment, effective Jan. 1, 1981, substituted "a driver's" for "any operator's or chauffeur's" in subdivisions (1) and (2) and for "an operator's or chauffeur's" near the beginning of the first sentence in subdivision (5), in two places in subdivision (6), and in the first sentence of subdivision (7). The second 1979 amendment also rewrote subdivision (4).

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.'"

The 1979, 2nd Sess., amendment, effective March 1, 1981, and applicable to offenses committed on or after that date, substituted "Class J felony" for "felony, and shall be punished by a fine of not less than five hundred dollars ($500) and not more than five thousand dollars ($5,000), imprisonment for not more than three years or both such fine and imprisonment" at the end of subdivision (7). The 1979,

2nd Sess., amendatory act was originally made effective March 1, 1981. It was postponed to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

§ 20-33: Repealed by Session Laws 1979, c. 667, s. 28, effective January 1, 1981.

§ 20-34.1. Unlawful to issue licenses for anything of value except prescribed fees.

It shall be unlawful for any employee of the Division of Motor Vehicles to charge or accept any money or other thing of value except the fees prescribed by law for the issuance of a driver's license, and the fact that the license is not issued after said employee charges or accepts money or other thing of value shall not constitute a defense to a criminal action under this section. In a prosecution under this section it shall not be a defense to show that the person giving the money or other thing of value or the person receiving the license or intended to receive the same is entitled to a license under the Uniform Driver's License Act. Any person violating this section shall be guilty of a felony and upon conviction shall be punished by imprisonment in the State's prison for not more than five years or by a fine of not more than five thousand dollars ($5,000) or by both such fine and imprisonment. (1951, c. 211; 1975, c. 716, s. 5; 1979, c. 667, s. 41.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1981, substituted "a driver's" for "an operator's or chauffeur's" near the middle of the first sentence.

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.' "

§ 20-37. Limitations on issuance of licenses.

There shall be no driver's license issued within this State other than that provided for in this Article, nor shall there be any other examination required: Provided, however, that cities and towns shall have the power to license, regulate and control drivers and operators of taxicabs within the city or town limits and to regulate and control operators of taxicabs operating between the city or town to points, not incorporated, within a radius of five miles of said city or town. (1935, c. 52, s. 34; 1943, c. 639, s. 2; 1979, c. 667, s. 41.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1981, substituted "driver's" for "operator's or chauffeur's" near the beginning of the section.

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.' "

ARTICLE 2A.

Afflicted, Disabled or Handicapped Persons.

§ 20-37.1. Motorized wheelchairs or similar vehicles.

Any afflicted or disabled person who is qualified to operate a motorized wheelchair or other similar vehicle not exceeding 1,000 pounds gross weight, may apply to the Division of Motor Vehicles for a special driver's license and permanent registration plates. When it is made to appear to the satisfaction of

the Division of Motor Vehicles that the applicant is qualified to operate such vehicle, and is dependent upon such vehicle as a means of conveyance or as a means of earning a livelihood, said Division shall, upon the payment of a license fee of one dollar ($1.00) for each such motor vehicle, issue to such applicant for his exclusive personal use a special vehicle driver's license, which shall be renewed annually upon the payment of a fee of fifty cents (50¢), and permanent registration plates for such vehicle. The initial one dollar ($1.00) fee required by this section shall be in full payment of the permanent registration plates issued for such vehicle and such plates need not thereafter be renewed and such plates shall be valid only on the vehicle for which issued and then only while such vehicle is owned by the person to whom the plates were originally issued.

Any person other than the licensee who shall operate any motor vehicle equipped with any such special license plate as is authorized by this section shall be guilty of a misdemeanor and upon conviction subject to punishment in the discretion of the court. (1949, c. 143; 1975, c. 716, s. 5; 1979, c. 667, s. 29.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1981, substituted "driver's" for "operator's" near the end of the first sentence and near the end of the second sentence in the first paragraph.

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.' "

§ 20-37.6. Handicapped; drivers and passengers; parking privileges.

(a) Any vehicle driven by or transporting a person who is handicapped as defined by G.S. 20-37.5 or transporting a person who is visually impaired as defined by G.S. 111-11, as certified by a licensed ophthalmologist, optometrist, or Division of Services for the Blind, may be parked for unlimited periods in parking zones restricted as to length of time parking is permitted. This provision has no application to those zones or during times in which the stopping, parking, or standing of all vehicles is prohibited or which are reserved for special types of vehicles. Any qualifying vehicle may park in spaces designated by aboveground markings as restricted to vehicles distinguished as being driven by or as transporting the handicapped or as transporting the visually impaired.

(b) Handicapped Car Owners; Distinguishing License Plates. — If the handicapped or visually impaired person is a registered owner of a vehicle, this vehicle may display a distinguishing license plate. This license plate shall be issued for the normal fee applicable to standard license plates. Any vehicle owner who qualifies for a distinguishing license plate may also receive up to two distinguishing placards as provided for in G.S. 20-37.6(c).

(c) Handicapped Drivers and Passengers; Distinguishing Placards. — A person who is either handicapped or visually impaired may apply for issuance of a distinguishing placard to be designed by the Division of Motor Vehicles of the Department of Transportation, in cooperation with the Office for the Handicapped of the Department of Insurance. Any organization which, as determined and certified by the State Vocational Rehabilitation Agency, regularly transports handicapped or visually impaired people, may also apply. The placard shall be at least 6 inches by 12 inches in size and shall contain all the information the Division of Motor Vehicles deems necessary for purpose of designation and enforcement. The placard shall be displayed on the driver's side of the dashboard of a vehicle only when the vehicle is being driven by a duly licensed handicapped driver or is being used to transport handicapped or

visually impaired passengers. When the placard is properly displayed, all parking rights and privileges extended to vehicles displaying a distinguishing license plate issued pursuant to G.S. 20-37.6(b) shall apply. The Division of Motor Vehicles shall establish procedures for the issuance of the distinguishing placards, may charge a fee sufficient to pay the actual cost of issuance. Two placards may be issued to an applicant on request. Applicants who are organizations may receive one placard for each transporting vehicle.

(d) Designation of Parking Places. — Designation of parking spaces for the physically handicapped and the visually impaired on streets and in other areas, including public vehicular areas specified in G.S. 20-4.01(32), shall be by the use of sign R7-8, Manual on Uniform Traffic Control Devices. Nonconforming signs in use prior to July 1, 1979, shall not constitute a violation during their useful lives, which shall not be extended by other means than normal maintenance.

(e) Enforcement of Handicapped Parking Privileges. — It shall be unlawful:

(1) To park or leave standing any vehicle in a space designated for handicapped or visually impaired persons when the vehicle does not display the distinguishing license plate or placard as provided in this section;

(2) For any person not qualifying for the rights and privileges extended to handicapped or visually impaired persons under this section to exercise or attempt to exercise such rights or privileges by the unauthorized use of a distinguishing license plate or placard issued pursuant to the provisions of this section;

(3) To park or leave standing any vehicle so as to obstruct a curb ramp or curb cut for handicapped persons as provided for by North Carolina Building Code or as designated in G.S. 136-44.14;

(4) For those responsible for designating parking spaces for the handicapped to erect or otherwise use signs not conforming to G.S. 20-37.6(d) for this purpose.

This section is enforceable in all public vehicular areas specified in G.S. 20-4.01(32).

(f) Penalties for violation.

(1) The penalty for a violation of G.S. 20-37.6(e)(1), (2) and (3) shall be ten dollars ($10.00) and whenever evidence shall be presented in any court of the fact that any automobile, truck, or other vehicle was found to be parked in a properly designated handicapped parking space in violation of the provisions of this section, it shall be prima facie evidence in any court in the State of North Carolina that the vehicle was parked and left in the space by the person, firm, or corporation in whose name the vehicle is registered and licensed according to the records of the Division of Motor Vehicles. No evidence tendered or presented under this authorization shall be admissible or competent in any respect in any court or tribunal except in cases concerned solely with a violation of this section.

(2) The penalty for violation of G.S. 20-37.6(e)(4) shall be fifty dollars ($50.00) and whenever evidence shall be presented in any court of the fact that any such nonconforming sign or markings are being used it shall be prima facie evidence in any court in the State of North Carolina that the person, firm, or corporation with ownership of the property where said nonconforming signs or markings are located is responsible for violation of this section. Building inspectors and others responsible for North Carolina State Building Code violations specified in G.S. 143-138(h) where such signs are required by the Handicapped Section of the North Carolina State Building Code, may cause a citation to be issued for this violation and may also initiate any appropriate action or proceeding to correct such violation.

(3) A law enforcement officer, including security officer who has authority to enforce laws on the property of his employer as specified in Chapter 74A, may cause a vehicle parked in violation of this section to be towed; and such officer shall be a legal possessor as provided in G.S. 20-161(d)(2). This law enforcement officer, or security officer, shall not be held to answer in any civil or criminal action to any owner, lienholder or other person legally entitled to the possession of any motor vehicle removed from such space pursuant to this section, except where such motor vehicle is willfully, maliciously, or negligently damaged in the removal from aforesaid space to place of storage.

(4) Notwithstanding any other provision of the General Statutes, the provisions of this section relative to handicapped parking shall be enforced by State, county, city and other municipal authorities in their respective jurisdictions whether on public or private property in the same manner as is used to enforce other parking laws and ordinances by said agencies. (1971, c. 374, s. 1; 1973, cc. 126, 1384; 1977, c. 340, s. 2; 1979, c. 632; 1981, c. 682, s. 7.)

Effect of Amendments. — Session Laws 1979, c. 632, effective July 1, 1979, rewrote this section to read as set out above.

Session Laws 1979, c. 178, ss. 1, 3 and 4, effective July 1, 1979, which amended this section as it stood before the enactment of c. 632, were repealed by Session Laws 1979, c. 812.

The 1981 amendment, effective July 1, 1981, substituted "G.S. 20-37.6(d)" for "G.S. 20-37.6(e)" near the end of subdivision (4) of subsection (e).

§ 20-37.6A. Vehicles designated for out-of-state handicapped; parking privileges.

Any vehicle displaying an out-of-state handicapped license plate, placard or other evidence of handicap or visual impairment issued by the appropriate authority of the appropriate jurisdiction may park in any space reserved for the handicapped or the visually impaired pursuant to G.S. 20-37.6. (1981, c. 48.)

ARTICLE 2B.

Special Identification Cards for Nonoperators.

§ 20-37.7. Special identification card.

(a) The Division of Motor Vehicles shall upon satisfactory proof of identification issue a special identification card to any person 16 years or older who is a resident of that State of North Carolina.

(b) Every application for a special identification card shall be made upon the approved form furnished by the Division.

(c) A special identification card issued under this section shall be similar in size, shape, and design to a driver's license and shall include a photograph, but the card shall be of a distinctive color and shall clearly state that it does not enable the person to whom it is issued to operate a motor vehicle.

(d) A special identification card shall not expire but may be reissued. The fee for the issuance or reissuance of a special identification card shall be three dollars ($3.00); provided that a special identification card may be issued without fee to a resident of North Carolina who is legally blind or has attained the age of 70 years.

(e) Any fraud or misrepresentation in the application for or use of a special identification card issued under this section is a misdemeanor, punishable by a fine of not more than five hundred dollars ($500.00) or by imprisonment of 90 days, or both.

(f) The Division of Motor Vehicles shall maintain information pertaining to the recipients of a special identification card and such indices as deemed appropriate, but such information shall not be required to be computerized. The Division may promulgate any rules and regulations it deems necessary for the effective implementation of the provisions of this section.

(g) The fact of issuance of a special identification card pursuant to this section shall not place upon the State of North Carolina or any agency thereof any liability for the misuse thereof and the acceptance thereof as valid identification is a matter left entirely to the discretion of any person to whom such card is presented.

(h) The Division may utilize the various communications media throughout the State to inform North Carolina residents of the provisions of this section. (1973, c. 438, s. 1; 1975, c. 716, s. 5; 1979, c. 469, c. 667, s. 30; 1981, c. 673, ss. 1, 2; c. 690, s. 12.)

Effect of Amendments. — The first 1979 amendment, effective October 1, 1979, deleted "hard copies of applications and" after "shall maintain" in the first sentence of subsection (f).

The second 1979 amendment, effective Jan. 1, 1981, substituted "'Highway Fund'" for "'Operators' and Chauffeurs' License Fund'" in subsection (d).

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.'"

The first 1981 amendment deleted "and for any reason does not possess a valid driver's license issued by the Division of Motor Vehicles" from the end of subsection (a) and substituted the language beginning "provided that a special identification card" for "and shall be placed in the "'Highway Fund'" for use as provided in G.S. 20-7(j)" at the end of the second sentence of subsection (d).

The second 1981 amendment, effective July 1, 1981, increased the fee in subsection (d) from $1.00 to $3.00.

§ 20-37.8. Fraudulent use prohibited.

(a) It shall be unlawful for any person to use a false or fictitious name or give a false or fictitious address in any application for a special identification card or knowingly to make a false statement or knowingly conceal a material fact or otherwise commit a fraud in any such application or to obtain or possess more than one such card for a fraudulent purpose or knowingly to permit or allow another to commit any of the foregoing acts.

(b) A violation of this section shall constitute a misdemeanor. (1979, c. 603, s. 1.)

Cross References. — Provision for punishment for misdemeanor when not otherwise specified, see § 14-3.

Editor's Note. — Session Laws 1979, c. 603, s. 2, makes this section effective October 1, 1979.

ARTICLE 3.

Motor Vehicle Act of 1937.

Part 2. Authority and Duties of Commissioner and Division.

§ 20-39. Administering and enforcing laws; rules and regulations; agents, etc.; seal.

(e) The Commissioner is authorized to cooperate with and provide assistance to the Environmental Management Commission, or appropriate local government officials, and to develop, adopt, and ensure enforcement of necessary rules and regulations, regarding programs of motor vehicle emissions inspection/maintenance required for areas in which ambient air pollutant concentrations exceed National Ambient Air Quality Standards. (1937, c. 407, s. 4; 1975, c. 716, s. 5; 1979, 2nd Sess., c. 1180, s. 1.)

Effect of Amendments. — The 1979, 2nd Sess., amendment, effective July 1, 1980, added subsection (e).

Session Laws 1979, 2nd Sess., c. 1180, s. 7.1 contains a severability clause.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (e) is set out.

§ 20-42. Authority to administer oaths and certify copies of records.

(a) Officers and employees of the Division designated by the Commissioner are, for the purpose of administering the motor vehicle laws, authorized to administer oaths and acknowledge signatures, and shall charge for the acknowledgment of signatures a fee according to the following schedule:

(1) One signature	$2.00
(2) Two signatures	3.00
(3) Three or more signatures	4.00

Funds received under the provisions of this subsection shall be used to defray a part of the costs of distribution of license plates, registration certificates and certificates of title issued by the Division.

(b) The Commissioner and such officers of the Division as he may designate are hereby authorized to prepare under the seal of the Division and deliver upon request a certified copy of any record of the Division, charging a fee of four dollars ($4.00) for each document so certified, and every such certified copy shall be admissible in any proceeding in any court in like manner as the original thereof, without further certification. Provided that any copy of any record of the Division furnished to State, county, municipal and court officials of this State for official use shall be furnished without charge. (1937, c. 407, s. 7; 1955, c. 480; 1961, c. 861, s. 1; 1967, c. 691, s. 41; c. 1172; 1971, c. 749; 1975, c. 716, s. 5; 1977, c. 785; 1979, c. 801, s. 7; 1981, c. 690, ss. 22, 23.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, substituted "two dollars ($2.00)" for "one dollar ($1.00)" in the first sentence of subsection (b).

The 1981 amendment, effective July 1, 1981, increased the fees in subdivisions (1), (2) and (3) of subsection (a) from one dollar to two dollars, from one dollar and fifty cents to three dollars, and from two dollars to four dollars, respectively, and substituted "four dollars ($4.00)" for "two dollars ($2.00)" in the first sentence of subsection (b).

§§ 20-43.1 to 20-43.3: Reserved for future codification purposes.

§ 20-43.4. Current list of licensed drivers to be provided to jury commissions.

The Commissioner of Motor Vehicles shall provide to each county jury commission an alphabetical list of all persons that he has determined are residents of the county, 18 years of age or older, and licensed to drive a motor vehicle as of July 1, 1983, and as of July 1 of each biennium thereafter. The list shall include those persons whose license to drive has been suspended, and those former licensees whose license has been canceled. The list shall contain the address and zip code of each driver, plus his date of birth and sex, and may be in either printed or computerized form, as requested by each county. (1981, c. 720, s. 2.)

Editor's Note. — Session Laws 1981, c. 720, s. 4, makes the act effective July 1, 1981.

§ 20-45. Seizure of documents and plates.

(a) The Division is hereby authorized to take possession of any certificate of title, registration card, permit, license, or registration plate issued by it upon expiration, revocation, cancellation, or suspension thereof, or which is fictitious, or which has been unlawfully or erroneously issued, or which has been unlawfully used.

(b) Nothing contained herein or elsewhere shall be construed to require the Division to take possession of any certificate of title, registration card permit, license, or registration plate which has expired, been revoked, canceled or suspended or which is fictitious or which has been unlawfully or erroneously issued, or which has been unlawfully used. The Division may give notice to the owner, licensee or lessee of its authority to take possession of any ownership document, operator's license, or plate and require that person to surrender it to the Commissioner or his officers or agents. Any person who fails to surrender the ownership document, operator's license, or plate, or any duplicate thereof upon personal service of notice or within 10 days after receipt of notice by mail, as provided in G.S. 20-48, shall be guilty of a misdemeanor. (1937, c. 407, s. 10; 1975, c. 716, s. 5; 1981, c. 938, s. 2.)

Effect of Amendments. — The 1981 amendment designated the former provisions of this section as subsection (a) and added subsection (b).

Session Laws 1981, c. 938, s. 6, provides: "This act shall become effective January 1, 1982, and shall apply to any revocation, cancellation, suspension or other demand by the Commissioner to be issued on or after the effective date."

§ 20-46: Repealed by Session Laws 1979, c. 99.

§ 20-49. Police authority of Division.

The Commissioner and such officers and inspectors of the Division as he shall designate and all members of the Highway Patrol shall have the power:

(8) To investigate reported thefts of motor vehicles, trailers and semitrailers and make arrest for thefts thereof.

(1979, c. 93.)

Effect of Amendments. — The 1979 amendment added "and make arrest for thefts thereof" at the end of subdivision (8).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only the introductory paragraph and subdivision (8) are set out.

CASE NOTES

Controlled substances, found inside a paper bag at the scene of an automobile accident, were not the products of an unreasonable search and seizure in violation of the defendant's Fourteenth Amendment rights where, under the circumstances, it was reasonable for a state trooper to look inside the paper bag to determine whether there was anything valuable belonging to the owner that the trooper should hold for safekeeping. State v. Francum, 39 N.C. App. 429, 250 S.E.2d 705 (1979).

Part 3. Registration and Certificates of Titles of Motor Vehicles.

§ 20-50. Owner to secure registration and certificate of title; temporary registration markers.

Legal Periodicals. — For a note discussing the extension of the family purpose doctrine to motorcycles and private property, see 14 Wake Forest L. Rev. 699 (1978).

§ 20-50.1: Repealed by Session Laws 1979, c. 574, s. 5, effective July 1, 1979.

Cross References. — For present provisions covering the subject matter of the repealed section, see § 20-51, subdivision (9).

§ 20-50.2. Applicant to certify as to ad valorem taxes on vehicle.

(a) Every owner of a vehicle when applying for registration or renewal of registration shall, in addition to complying with any other requirements of this Article, provide the following information on the application form:

(1) A certification statement setting forth the month and year and the name of the county in which the vehicle is listed for property taxes, if the applicant owned the vehicle on the most recent January 1 preceding the date on which the application is made; and

(2) A certification statement that no delinquent county or municipal property taxes are owed on the vehicle in the name of the applicant.

For purposes of this section, property taxes are considered "delinquent" when they are no longer payable at par in accordance with G.S. 105-360(a).

The Department of Transportation shall provide a place on the vehicle registration application form for the certification statements required by this section, and the statement shall appear on the form in substantially the following language:

"I owe no delinquent county or municipal taxes on this vehicle. I was the legal owner of this vehicle on January 1st of the year of this application and the vehicle was listed for property taxes in _____ County in (Month)_____(Year)____.

I was not the legal owner of this vehicle on January 1. ☐ (Check Block)."

(b) If the applicant fails to provide any of the information required by this section, then the Division of Motor Vehicles shall refuse registration until such time as the applicant provides the information so required.

(c) Any applicant who shall make a false certification concerning the information required by this section shall be guilty of a misdemeanor and upon conviction shall be subject to a fine not to exceed one hundred dollars ($100.00) or imprisonment not to exceed six months, or both such fine and imprisonment. (1981, c. 728, s. 1.)

Editor's Notes. — Session Laws 1981, c. 728, s. 2, provides: "This act shall become effective on January 1, 1982."

§ 20-51. Exempt from registration.

The following shall be exempt from the requirement of registration and certificate of title:

(9) Mo-peds as defined in G.S. 20-4.01(27)d1. (1937, c. 407, s. 16; 1943, c. 500; 1949, c. 429; 1951, c. 705, s. 2; 1953, c. 826, ss. 2, 3; c. 1316, s. 1; 1961, cc. 334, 817; 1963, c. 145; 1965, c. 1146; 1971, c. 107; 1973, cc. 478, 757, 964; 1979, c. 574, s. 6.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, added subdivision (9).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only the introductory paragraph and subdivision (9) are set out.

§ 20-57. Division to issue certificate of title and registration card.

(a) The Division upon registering a vehicle shall issue a registration card and a certificate of title as separate documents.

(b) The registration card shall be delivered to the owner and shall contain upon the face thereof the name and address of the owner, space for owner's signature, the registration number assigned to the vehicle, and such description of the vehicle as determined by the Commissioner, provided that if there are more than two owners the Division may show only two owners on the registration card and indicate that additional owners exist by placing after the names listed "et al." Upon application to the Division, the registered owner may acquire additional copies of the registration card at a fee of three dollars ($3.00) each.

(c) Every owner upon receipt of a registration card, shall write his signature thereon with pen and ink in the space provided. Every such registration card shall at all times be carried in the vehicle to which it refers or in the vehicle to which transfer is being effected, as provided by G.S. 20-64 at the time of its operation, and such registration card shall be displayed upon demand of any peace officer or any officer of the Division: Provided, however, any person charged with failing to so carry sucy registration card shall not be convicted if he produces in court a registration card theretofore issued to him and valid at the time of his arrest: Provided further, that in case of a transfer of a license plate from one vehicle to another under the provisions of G.S. 20-72, evidence of application for transfer shall be carried in the vehicle in lieu of the registration card.

(d) The certificate of title shall contain upon the face thereof the identical information required upon the face of the registration card except the abbreviation "et al." if such appears and in addition thereto the name of all

owners, the date of issuance and all liens or encumbrances disclosed in the application for title. All such liens or encumbrances shall be shown in the order of their priority, according to the information contained in such application.

(e) The certificate of title shall also contain upon the reverse side form of assignment of title or interest and warranty thereof, with space for notation of liens and encumbrances upon such vehicle at the time of the transfer.

(f) Certificates of title upon which liens or encumbrances are shown shall be delivered or mailed by the Division to the holder of the first lien or encumbrance.

(g) Certificates of title shall bear thereon the seal of the Division.

(h) Certificates of title need not be renewed annually, but shall remain valid until canceled by the Division for cause or upon a transfer of any interest shown therein. (1937, c. 407, s. 21; 1943, c. 715; 1961, c. 360, s. 2; c. 835, s. 5; 1963, c. 552, s. 2; 1973, c. 72; c. 764, ss. 1-3; c. 1118; 1975, c. 716, s. 5; 1979, c. 139; 1981, c. 690, s. 20.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, substituted "one dollar ($1.00)" for "fifty cents (50¢)" near the end of the second sentence of subsection (b).

The 1981 amendment, effective July 1, 1981, substituted "three dollars ($3.00)" for "one dollar ($1.00)" near the end of the second sentence of subsection (b).

CASE NOTES

Applied in Oroweat Employees Credit Union v. Stroupe, 48 N.C. App. 338, 269 S.E.2d 211 (1980).

§ 20-58. Perfection by indication of security interest on certificate of title.

Except as provided in G.S. 20-58.8, a security interest in a vehicle of a type for which a certificate of title is required shall be perfected only as hereinafter provided.

(1) If the vehicle is not registered in this State, the application for notation of a security interest shall be the application for certificate of title provided for in G.S. 20-52.

(2) If the vehicle is registered in this State, the application for notation of a security interest shall be in the form prescribed by the Division, signed by the debtor, and contain the date of application of each security interest, and name and address of the secured party from whom information concerning the security interest may be obtained. The application must be accompanied by the existing certificate of title unless in the possession of a prior secured party. If there is an existing certificate of title issued by this or any other jurisdiction in the possession of a prior secured party, the application for notation of the security interest shall in addition contain the name and address of such prior secured party. An application for notation of a security interest may be signed by the secured party instead of the debtor when the application is accompanied by documentary evidence of the applicant's security interest in that motor vehicle signed by the debtor and by affidavit of the applicant stating the reason the debtor did not sign the application. In the event the certificate cannot be obtained for recordation of the security interest, when title remains in the name of the debtor, the Division shall cancel the certificate and issue a new certificate of title listing all the respective security interests.

(3) If the application for notation of security interest is made in order to continue the perfection of a security interest perfected in another

jurisdiction, it may be signed by the secured party instead of the debtor. Such application shall be accompanied by documentary evidence of a perfected security interest. No such application shall be valid unless an application for a certificate of title has been made in North Carolina. The security interest perfected herein shall be subject to the provisions set forth in G.S. 20-58.5. (1937, c. 407, s. 22; 1955, c. 554, s. 2; 1961, c. 835, s. 6; 1969, c. 838, s. 1; 1975, c. 716, s. 5; 1979, c. 145, ss. 1, 2; c. 199.)

Effect of Amendments. — The first 1979 amendment, effective July 1, 1979, substituted "and contain the date of application of each security interest" for "and containing the amount, date and nature of the security agreement" in the first sentence of subdivision (2) and deleted "it is" after "unless" in the second sentence of that subdivision. The last sentence was added to subdivision (3).

The second 1979 amendment, effective July 1, 1979, added the final two sentences to subdivision (2).

§ 20-58.1. Duty of the Division upon receipt of application for notation of security interest.

(a) Upon receipt of an application for notation of security interest, the required fee and accompanying documents required by G.S. 20-58, the Division, if it finds the application and accompanying documents in order, shall either endorse upon the certificate of title or issue a new certificate of title containing, the name and address of each secured party, and the date of perfection of each security interest as determined by the Division. The Division shall deliver or mail the certificate to the first secured party named in it and shall also notify the new secured party that his security interest has been noted upon the certificate of title.

(1961, c. 835, s. 6; 1969, c. 838, s. 1; 1975, c. 716, s. 5; 1979, c. 145, s. 3.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, deleted "the amount of each security interest," after "secured party" in the first sentence of subsection (a).

Only Part of Section Set Out. — As subsection (b) was not changed by the amendment, it is not set out.

§ 20-58.3. Notation of assignment of security interest on certificate of title.

Legal Periodicals. — For note on commercial reasonableness and the public sale in North Carolina, see 17 Wake Forest L. Rev. 153 (1981).

§ 20-58.5. Duration of security interest in favor of corporations which dissolve or become inactive.

Any security interest recorded in favor of a corporation which, since the recording of such security interest, has dissolved or become inactive for any reason, and which remains of record as a security interest of such corporation for a period of more than three years from the date of such dissolution or becoming inactive, shall become null and void and of no further force and effect. (1961, c. 835, s. 6; 1969, c. 838, s. 1; 1979, c. 145, s. 4.)

Cross References. — As to perfection of security interest by indication on title certificate, see § 20-58.

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, deleted "firm or" after "of a," substituted "or become inactive" for

"ceased to do business, or gone out of business," deleted "firm or" after "interest of such" and substituted "such dissolution or becoming inactive" for "the recording thereof."

§ 20-63. (Effective until July 1, 1982) Registration plates furnished by Division; requirements; replacement of regular plates with First in Flight plates; surrender and reissuance; displaying; preservation and cleaning; alteration or concealment of numbers; commission contracts for issuance.

(a) The Division upon registering a vehicle shall issue to the owner one registration plate for a motorcycle, trailer or semitrailer and for every other motor vehicle. Registration plates issued by the Division under this Article shall be and remain the property of the State, and it shall be lawful for the Commissioner or his duly authorized agents to summarily take possession of any plate or plates which he has reason to believe is being illegally used, and to keep in his possession such plate or plates pending investigation and legal disposition of the same. Whenever the Commissioner finds that any registration plate issued for any vehicle pursuant to the provisions of this Article has become illegible or is in such a condition that the numbers thereon may not be readily distinguished, he may require that such registration plate, and its companion when there are two registration plates, be surrendered to the Division. When said registration plate or plates are so surrendered to the Division, a new registration plate or plates shall be issued in lieu thereof without charge. The owner of any vehicle who receives notice to surrender illegible plate or plates on which the numbers are not readily distinguishable and who willfully refuses to surrender said plates to the Division shall be guilty of a misdemeanor.

(b) Every license plate shall have displayed upon it the registration number assigned to the vehicle for which it is issed, also the name of the State of North Carolina, which may be abbreviated, the year number for which it is issued or the date of expiration, and, if the plate is issued for a commercial vehicle, as defined in G.S. 20-4.2(1), the word "commercial," designating "commercial vehicle." Provided such plates bearing the word "commercial" shall not be issued for trailers or vehicles licensed for less than 5,000 pounds. Subject to the provisions hereof, every private passenger vehicle and all private hauler vehicles licensed for 4,000 pounds gross weight registration plate manufactured for use after January 1, 1982, shall have the words "First in Flight" printed at the top of the plate above all other letters and numerals. The background of the plate shall depict the Wright Brothers biplane flying over Kitty Hawk Beach, with the plane flying slightly upward and to the right. The Department shall deplete the license plates in stock, on order, or for which a contract has been signed at the time of the ratification of this bill. Until all of the license plates previously referred to have been depleted, all plates issued to replace faded, worn-out or damaged plates shall be regular plates. Any person desiring to trade in a regular plate and thereby secure a First in Flight plate may do so by paying the fee provided in G.S. 20-85(5). As soon as feasible, but not later than July 1, 1983, all newly issued plates shall be issued as First in Flight plates; and as soon as feasible, but not later than January 1, 1984, all Special Issue, official and personalized plates shall be issued as First in Flight plates. Beginning July 1, 1983, the Department shall, as the same comes up for renewal, begin systematically replacing all regular license plates with First in Flight license plates beginning with the oldest series of existing plates and continuing thereafter on a staggered basis.

(c) Such registration plate and the required numerals thereon, except the year number for which issued, shall be of sufficient size to be plainly readable from a distance of 100 feet during daylight.

(d) Registration plates issued for a motor vehicle other than a motorcycle, trailer, or semitrailer shall be attached thereto, one in the front and the other in the rear: Provided, that when only one registration plate is issued for a motor vehicle other than a truck-tractor, said registration plate shall be attached to the rear of the motor vehicle. The registration plate issued for a truck-tractor shall be attached to the front thereof. Provided further, that when only one registration plate is issued for a motor vehicle and this motor vehicle is transporting a substance that may adhere to the plate so as to cover or discolor the plate or if the motor vehicle has a mechanical loading device that may damage the plate, the registration plate may be attached to the front of the motor vehicle.

(e) Preservation and Cleaning of Registration Plates. — It shall be the duty of each and every registered owner of a motor vehicle to keep the registration plates assigned to such motor vehicle reasonably clean and free from dust and dirt, and such registered owner, or any person in his employ, or who operates such motor vehicle by his authority, shall, upon the request of any proper officer, immediately clean such registration plates so that the numbers thereon may be readily distinguished, and any person who shall neglect or refuse to so clean a registration plate, after having been requested to do so, shall be guilty of a misdemeanor, and fined not exceeding fifty dollars ($50.00) or imprisoned not exceeding 30 days.

(f) Operating with False Numbers. — Any person who shall willfully operate a motor vehicle with a registration plate which has been repainted or altered or forged shall be guilty of a misdemeanor.

(g) Alteration, Disguise, or Concealment of Numbers. — Any operator of a motor vehicle who shall willfully mutilate, bend, twist, cover or cause to be covered or partially covered by any bumper, light, spare tire, tire rack, strap, or other device, or who shall paint, enamel, emboss, stamp, print, perforate, or alter or add to or cut off any part or portion of a registration plate or the figures or letters thereon, or who shall place or deposit or cause to be placed or deposited any oil, grease, or other substance upon such registration plates for the purpose of making dust adhere thereto, or who shall deface, disfigure, change, or attempt to change any letter or figure thereon, or who shall display a number plate in other than a horizontal upright position, shall be guilty of a misdemeanor.

(h) Commission Contracts for Issuance of Plates and Certificates. — All registration plates, registration certificates and certificates of title issued by the Division, outside of those issued from the Raleigh offices of the said Division and those issued and handled through the United States mail, shall be issued insofar as practicable and possible through commission contracts entered into by the Division for the issuance of such plates and certificates in localities throughout North Carolina with persons, firms, corporations or governmental subdivisions of the State of North Carolina and the Division shall make a reasonable effort in every locality, except as hereinbefore noted, to enter into a commission contract for the issuance of such plates and certificates and a record of these efforts shall be maintained in the Division. In the event the Division is unsuccessful in making commission contracts as hereinbefore set out it shall then issue said plates and certificates through the regular employees of the Division. Whenever registration plates, registration certificates and certificates of title are issued by the Division through commission contract arrangements, the Division shall provide proper supervision of such distribution. Commission contracts entered under this subsection shall provide for the payment of compensation at a rate of fifty-five cents (55¢) per transaction. Nothing contained in this subsection will allow or permit the

operation of fewer outlets in any county in this State than are now being operated. (1937, c. 407, s. 27; 1943, c. 726; 1951, c. 102, ss. 1-3; 1955, c. 119, s. 1; 1961, c. 360, s. 4; c. 861, s. 2; 1963, c. 552, s. 6; c. 1071; 1965, c. 1088; 1969, c. 1140; 1971, c. 945; 1973, c. 629; 1975, c. 716, s. 5; 1979, c. 604, s. 1; c. 917, s. 4; 1979, c. 470, s. 1; 1981, c. 750; c. 859, s. 76.)

Effect of Amendments. — The first 1979 amendment, effective October 1, 1979, added the final sentence to subsection (d).

The second 1979 amendment, effective July 1, 1979, substituted "transaction" for "registration plate" in the next-to-last sentence of subsection (h).

Session Laws 1975, 2nd Sess., c. 983, s. 93, as amended by Session Laws 1979, c. 917, s. 1, provides: "The commission contract rate under G.S. 20-63(h) shall be forty-five cents (45¢) per transaction, for fiscal year 1979-80, and fifty cents (50¢) per transaction for fiscal year 1980-81. The latter rate shall continue past June 30, 1981, until the rate is changed by the General Assembly."

Session Laws 1979, c. 470, effective Jan. 1, 1981, substituted "license" for "registration" near the beginning of the first sentence of subsection (b), deleted "and" following "abbreviated," in that sentence and substituted "and, if the plate is issued for a commercial vehicle, as defined in G.S. 20-4.2(1), the word 'commercial,' designating 'commercial vehicle'" for "thereof" at the end of that sentence, and added the second sentence in subsection (b).

§ 20-63. (Effective July 1, 1982) Registration plates furnished by Division; requirements; replacement of regular plates with First in Flight plates; surrender and reissuance; displaying; preservation and cleaning; alteration or concealment of numbers; commission contracts for issuance.

(a) The Division upon registering a vehicle shall issue to the owner one registration plate for a motorcycle, trailer or semitrailer and for every other motor vehicle. Registration plates issued by the Division under this Article shall be and remain the property of the State, and it shall be lawful for the Commissioner or his duly authorized agents to summarily take possession of any plate or plates which he has reason to believe is being illegally used, and to keep in his possession such plate or plates pending investigation and legal disposition of the same. Whenever the Commissioner finds that any registration plate issued for any vehicle pursuant to the provisions of this Article has become illegible or is in such a condition that the numbers thereon may not be readily distinguished, he may require that such registration plate, and its companion when there are two registration plates, be surrendered to the Division. When said registration plate or plates are so surrendered to the Division, a new registration plate or plates shall be issued in lieu thereof without charge. The owner of any vehicle who receives notice to surrender illegible plate or plates on which the numbers are not readily distinguishable and who willfully refuses to surrender said plates to the Division shall be guilty of a misdemeanor.

(b) Every license plate shall have displayed upon it the registration number assigned to the vehicle for which it is issued, also the name of the State of North Carolina, which may be abbreviated, the year number for which it is issued or the date of expiration, and, if the plate is issued for a commercial vehicle, as defined in G.S. 20-4.2(1), the word "commercial," designating "commercial vehicle." Provided such plates bearing the word "commercial" shall not be issued for trailers or vehicles licensed for less than 5,000 pounds. Subject to the provisions hereof, every private passenger vehicle and all private hauler vehicles licensed for 4,000 pounds gross weight registration plate manufactured for

use after January 1, 1982, shall have the words "First in Flight" printed at the top of the plate above all other letters and numerals. The background of the plate shall depict the Wright Brothers biplane flying over Kitty Hawk Beach, with the plane flying slightly upward and to the right. The Department shall deplete the license plates in stock, on order, or for which a contract has been signed at the time of the ratification of this bill. Until all of the license plates previously referred to have been depleted, all plates issued to replace faded, worn-out or damaged plates shall be regular plates. Any person desiring to trade in a regular plate and thereby secure a First in Flight plate may do so by paying the fee provided in G.S. 20-85(5). As soon as feasible, but not later than July 1, 1983, all newly issued plates shall be issued as First in Flight plates; and as soon as feasible, but not later than January 1, 1984, all special issue, official and personalized plates shall be issued as First in Flight plates. Beginning July 1, 1983, the Department shall, as the same comes up for renewal, begin systematically replacing all regular license plates with First in Flight license plates beginning with the oldest series of existing plates and continuing thereafter on a staggered basis.

(c) Such registration plate and the required numerals thereon, except the year number for which issued, shall be of sufficient size to be plainly readable from a distance of 100 feet during daylight.

(d) Registration plates issued for a motor vehicle other than a motorcyle, trailer, or semitrailer shall be attached thereto, one in the front and the other in the rear: Provided, that when only one registration plate is issued for a motor vehicle other than a truck-tractor, said registration plate shall be attached to the rear of the motor vehicle. The registration plate issued for a truck-tractor shall be attached to the front thereof. Provided further, that when only one registration plate is issued for a motor vehicle and this motor vehicle is transporting a substance that may adhere to the plate so as to cover or discolor the plate or if the motor vehicle has a mechanical loading device that may damage the plate, the registration plate may be attached to the front of the motor vehicle.

(e) Preservation and Cleaning of Registration Plates. — It shall be the duty of each and every registered owner of a motor vehicle to keep the registration plates assigned to such motor vehicle reasonably clean and free from dust and dirt, and such registered owner, or any person in his employ, or who operates such motor vehicle by his authority, shall, upon the request of any proper officer, immediately clean such registration plates so that the numbers thereon may be readily distinguished, and any person who shall neglect or refuse to so clean a registration plate, after having been requested to do so, shall be guilty of a misdemeanor, and fined not exceeding fifty dollars ($50.00) or imprisoned not exceeding 30 days.

(f) Operating with False Numbers. — Any person who shall willfully operate a motor vehicle with a registration plate which has been repainted or altered or forged shall be guilty of a misdemeanor.

(g) Alteration, Disguise, or Concealment of Numbers. — Any operator of a motor vehicle who shall willfully mutilate, bend, twist, cover or cause to be covered or partially covered by any bumper, light, spare tire, tire rack, strap, or other device, or who shall paint, enamel, emboss, stamp, print, perforate, or alter or add to or cut off any part or portion of a registration plate or the figures or letters thereon, or who shall place or deposit or cause to be placed or deposited any oil, grease, or other substance upon such registration plates for the purpose of making dust adhere thereto, or who shall deface, disfigure, change, or attempt to change any letter or figure thereon, or who shall display a number plate in other than a horizontal upright position, shall be guilty of a misdemeanor.

(h) Commission Contracts for Issuance of Plates and Certificates. — All registration plates, registration certificates and certificates of title issued by

the Division, outside of those issued from the Raleigh offices of the said Division and those issued and handled through the United States mail, shall be issued insofar as practicable and possible through commission contracts entered into by the Division for the issuance of such plates and certificates in localities throughout North Carolina with persons, firms, corporations or governmental subdivisions of the State of North Carolina and the Division shall make a reasonable effort in every locality, except as hereinbefore noted, to enter into a commission contract for the issuance of such plates and certificates and a record of these efforts shall be maintained in the Division. In the event the Division is unsuccessful in making commission contracts as hereinbefore set out it shall then issue said plates and certificates through the regular employees of the Division. Whenever registration plates, registration certificates and certificates of title are issued by the Division through commission contract arrangements, the Division shall provide proper supervision of such distribution. Commission contracts entered under this subsection shall provide for the payment of compensation at a rate of sixty cents (60¢) per transaction. Nothing contained in this subsection will allow or permit the operation of fewer outlets in any county in this State than are now being operated. (1937, c. 407, s. 27; 1943, c. 726; 1951, c. 102, ss. 1-3; 1955, c. 119, s. 1; 1961, c. 360, s. 4; c. 861, s. 2; 1963, c. 552, s. 6; c. 1071; 1965, c. 1088; 1969, c. 1140; 1971, c. 945; 1973, c. 629; 1975, c. 716, s. 5; 1979, c. 604, s. 1; c. 917, s. 4; 1979, c. 470, s. 1; 1981, c. 750; c. 859, s. 76.)

Cross References. — For this section as in effect until July 1, 1982, see the preceding section, also numbered 20-63.

Effect of Amendments. — The first amendment added the third through ninth sentences of subsection (b).

The second 1981 amendment, effective July 1, 1982, substituted the fourth sentence of subsection (h) for the former fourth sentence, which read "Commission contracts entered under this subsection shall provide for the payment of compensation at a rate of fifty-five (55¢) per transaction."

Session Laws 1981, c. 859, s. 97 contains a severability clause.

§ 20-64. Transfer of registration plates to another vehicle.

(a) Except as otherwise provided in this Article, registration plates shall be retained by the owner thereof upon disposition of the vehicle to which assigned, and may be assigned to another vehicle, belonging to such owner and of a like vehicle category within the meaning of G.S. 20-87 and 20-88, upon proper application to the Division and payment of a transfer fee and such additional fees as may be due because the vehicle to which the plates are to be assigned requires a greater registration fee than that vehicle to which the license plates were last assigned. In cases where the plate is assigned to another vehicle belonging to such owner, and is not of a like vehicle category within the meaning of G.S. 20-87 and 20-88, the owner shall surrender the plate to the Division and receive therefor a plate of the proper category, and the unexpired portion of the fee originally paid by the owner for the plate so surrendered shall be a credit toward the fee charged for the new plate of the proper category. Provided, that the owner shall not be entitled to a cash refund when the registration fee for the vehicle to which the plates are to be assigned is less than the registration fee for that vehicle to which the license plates were last assigned. Provided, however, registration plates may not be transferred under this section after December 31 of the year for which issued. An owner assigning or transferring plates to another vehicle as provided herein shall be subject to the same assessments and penalties for use of the plates on another vehicle or for improper use of the plates, as he could have been for the use of the plates on the vehicle to which last assigned. Provided, however, that upon compliance with the requirements of this section, the registration plates of vehicles owned

by and registered in the name of a corporation may be transferred and assigned to a like vehicle category within the meaning of G.S. 20-87 and 20-88, upon the showing that the vehicle to which the transfer and assignment is to be made is owned by a corporation which is a wholly owned subsidiary of the corporation applying for such transfer and assignment.

(b) Upon a change of the name of a corporation or a change of the name under which a proprietorship or partnership is doing business, the corporation, partnership or proprietorship shall forthwith apply for correction of the certificate of title of all vehicles owned by such corporation, partnership or proprietorship so as to correctly reflect the name of the corporation or the name under which the proprietorship or partnership is doing business, and pay the fees required by law.

(c) Upon a change in the composition of a partnership, ownership of vehicles belonging to such partnership shall not be deemed to have changed so long as one partner of the predecessor partnership remains a partner in the reconstituted partnership, but the reconstituted partnership shall forthwith apply for correction of the certificate of title of all vehicles owned by such partnership so as to correctly reflect the composition of the partnership and the name under which it is doing business, if any, and pay the fees required by law.

(d) When a proprietorship or partnership is incorporated, the corporation shall retain license plates assigned to vehicles belonging to it and may use the same, provided the corporation applies for and obtains transfers of the certificates of title of all vehicles and pays the fees required by law.

(e) Upon death of the owner of a registered vehicle, such registration shall continue in force as a valid registration until the end of the year for which the license is issued unless ownership of the vehicle passes or is transferred to any person other than the surviving spouse before the end of the year.

(f) The owner or transferor of a registered vehicle who surrenders the registration plate to the division may secure a refund for the unexpired portion of such plate prorated on a monthly basis, beginning the first day of the month following surrender of the plate to the division, provided the annual fee of such surrendered plate is sixty dollars ($60.00) or more. This refund may not exceed one half of the annual license fee. No refund shall be made unless the owner or transferor furnishes proof of financial responsibility on the registered vehicle effective until the date of the surrender of the plate. Proof of financial responsibility shall be furnished in a manner prescribed by the Commissioner. Any unauthorized refund may be recovered in the manner set forth in G.S. 20-99.

(g) The Commissioner of Motor Vehicles shall have the power to make such rules and regulations as he may deem necessary for the administration of transfers of license plates and vehicles under this Article. (1937, c. 407, s. 28; 1945, c. 576, s. 1; 1947, c. 914, s. 1; 1951, c. 188; c. 819, s. 1; 1961, c. 360, s. 5; 1963, cc. 1067, 1190; 1967, c. 995; 1973, c. 1134; 1975, c. 716, s. 5; 1981, c. 227.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, in subsection (f), substituted "the owner or transferor" for "Whenever the owner," "who surrenders" for "transfers or assigns his interest to another, such transferor may, by surrendering," "may secure a refund for" for "secure a refund of," and "the annual fee of" for "that the annual license fee for" in the first sentence, inserted "prorated" in the first sentence, added the present second sentence, and deleted "such" preceding "refund" and substituted "furnishes" for "can furnish" and "on the registered vehicle" for "upon such registered vehicle" in the present third sentence. The amendment also added the fourth and fifth sentences of subsection (f).

§ 20-65: Repealed by Session Laws 1979, 2nd Session, c. 1280, s. 1, effective July 1, 1980.

Editor's Note. — The repealed section was amended by Session Laws 1979, c. 40, s. 1, and c. 160, s. 1.

§ 20-66. Renewal of registration; semipermanent plates issued; renewal sticker annually; fees.

(b1) For renewal periods beginning January 1, 1978, and thereafter, renewal registrations of private hauler trucks licensed for 4,000 pounds gross weight, motorcycles, U-drive-it passenger vehicles and trailers may be made by issuance of stickers, tabs, or other devices in lieu of new registration plates, or in combination with new registration plates, at the discretion of the Commissioner. Such stickers, tabs or other devices shall show the period of validity of registration. This provision shall not apply to trucks licensed as common carriers, for-hire trucks, rental trucks or contract carrier trucks.

(d) The Division may also provide for the issuance of license plates for motor vehicles with the dates of expiration thereof to vary from month to month so as to approximately equalize the number that expire during the registration year.

(e) A vehicle license fee shall be computed by dividing the annual license fee by 12 and multiplying the quotient by the number of months remaining prior to the end of the month of expiration of the registration. Amounts so computed shall be rounded to the nearest multiple of twenty-five cents (25¢).

(f) No vehicle owner shall be required to pay the tax required by G.S. 20-88.1 at a rate greater than the annual rate prescribed in G.S. 20-88.1, because of Division of Motor Vehicles' procedures for implementing this subsection. Compliance with this restriction may be accomplished by computing the tax for a portion of a year by dividing the annual amount by 12 and multiplying the quotient by the number of months remaining prior to the end of the month of expiration of the registration. Amounts so computed shall be rounded to the nearest multiple of twenty-five cents (25¢).

(g) Registration of all vehicles required to be registered under the staggered system shall expire at midnight on the last day of the month designated on the validation sticker, tab or other device issued by the Division of Motor Vehicles to validate that registration: Provided, however, that it shall not be unlawful to continue to operate any vehicle upon the highways of this State after the expiration of the registration of said vehicle, registration card and registration plate during the 15-day period, inclusive of the fifteenth day immediately following the last day of the month designated on the validation sticker, tab or other device issued by the Division of Motor Vehicles to validate that registration if the registration plate validation sticker, tab or other device is registered to the vehicle prior to the first day of expiration month.

(h) Registration of all vehicles not required to be registered under the staggered system shall expire at midnight on the thirty-first day of December of each year: Provided, however, that it shall not be unlawful to continue to operate any vehicle upon the highways of this State after the expiration of the registration of said vehicle, registration card and registration plate during the period between the thirty-first day of December and the fifteenth day of February, inclusive, if the license plate is registered to the vehicle on which it is being used prior to the thirty-first day of December. Provided further that the fee required under G.S. 20-88.1 shall be paid and collected in its entirety at any time such vehicles are registered and is not to be prorated. (1937, c. 407, s. 30;

1955, c. 554, s. 3; 1973, c. 1389, s. 1; 1975, c. 716, s. 5; 1977, c. 337; 1979, 2nd Sess., c. 1280, ss. 2, 3.)

Effect of Amendments. — The 1979, 2nd Sess., amendment deleted "farm trucks," preceding "common carriers" in the third sentence of subsection (b1), inserted "registration" near the end of subsection (d) and added subsections (e), (f), (g) and (h). The amendment to subsection (b1) and new subsections (f), (g) and (h) were made effective January 1, 1981. The amendment to subsection (d) was made effective July 25, 1980. New subsection (e) was made effective July 1, 1980.

Only Part of Section Set Out. — As subsections (a), (b) and (c) were not changed by the amendment, they are not set out.

§ 20-67. Notice of change of address or name.

(a) Whenever any person, after making application for or obtaining the registration of a vehicle or a certificate of title, shall move from the address named in the application or shown upon a registration card or certificate of title, such person shall within 30 days thereafter notify the Division in writing of his old and new addresses.

(b) Whenever the name of any person who has made application for or obtained the registration of a vehicle or a certificate of title is thereafter changed by marriage or otherwise, such person shall thereafter forward or cause to be forwarded to the Division the certificate of title and to make application for correction of the certificate on forms provided by the Division. (1937, c. 407, s. 31; 1955, c. 554, s. 4; 1975, c. 716, s. 5; 1979, c. 106.)

Effect of Amendments. — The 1979 amendment substituted "30" for "10" near the end of subsection (a).

§ 20-71. Altering or forging certificate of title, registration card or application, a felony; reproducing or possessing blank certificate of title.

(b) It shall be unlawful for any person with fraudulent intent to reproduce or possess a blank North Carolina certificate of title or facsimile thereof. Any person, firm or corporation violating the provisions of this section shall be guilty of a felony and upon conviction shall be punished as provided in G.S. 20-177. (1937, c. 407, s. 35; 1959, c. 1264, s. 2; 1971, c. 99; 1975, c. 716, s. 5; 1979, c. 499.)

Effect of Amendments. — The 1979 amendment inserted "for any person with fraudulent intent" in the first sentence of subsection (b), deleted the former second sentence of subsection (b), which provided an exception for those employed to print certificates in the normal scope of their employment, and, in the present second sentence of subsection (b), substituted the present language making a violation of this section a felony for former language which declared it to be a misdemeanor punishable by a fine between $100 and $500 and imprisonment for not more than six months or both.

Only Part of Section Set Out. — As subsection (a) was not changed by the amendment, it is not set out.

§ 20-71.1. Registration evidence of ownership; ownership evidence of defendant's responsibility for conduct of operation.

Legal Periodicals. — For a note discussing the extension of the family purpose doctrine to motorcycles and private property, see 14 Wake Forest L. Rev. 699 (1978).

CASE NOTES

By enacting this section the legislature changed the prior common law. Broadway v. Webb, 462 F. Supp. 429 (W.D.N.C. 1977).

Legislative Intent. — By enacting this section the legislature showed a clear intent to provide victims of automobile accidents with the opportunity to recover from the owner as well as the driver of a car involved in an accident. Broadway v. Webb, 462 F. Supp. 429 (W.D.N.C. 1977).

Purpose of Section. —

The plain and obvious purpose of this section is to enable plaintiff to submit a prima facie case of agency to the jury which it can decide to accept or reject. Scallon v. Hooper, 49 N.C. App. 113, 270 S.E.2d 496 (1980).

Proof of Ownership Alone Takes Case to Jury on Issue of Agency. —

In accord with 3d paragraph in original. See Scallon v. Hooper, 49 N.C. App. 113, 270 S.E.2d 496 (1980); Norman v. Royal Crown Bottling Co., 49 N.C. App. 656, 272 S.E.2d 355 (1980).

Plaintiff Entitled to Instructions. — Plaintiff in a wrongful death action was entitled to an instruction, even absent a special request by plaintiff, on this section, where it was stipulated that one defendant who was not the driver was the registered owner of the vehicle at the time of the accident, and an instruction on the statute was required even though plaintiff presented no positive evidence that defendant driver was defendant owner's agent. Scallon v. Hooper, 49 N.C. App. 113, 270 S.E.2d 496 (1980).

A model instruction is available as a guide for explaining this section to the jury. Scallon v. Hooper, 49 N.C. App. 113, 270 S.E.2d 496 (1980).

The instruction must relate directly to particular facts shown by defendant's positive evidence. Scallon v. Hooper, 49 N.C. App. 113, 270 S.E.2d 496 (1980).

A peremptory instruction is warranted only when compelling evidence permitting one reasonable conclusion is presented. Scallon v. Hooper, 49 N.C. App. 113, 270 S.E.2d 496 (1980).

There is no authority that a peremptory instruction may be given in favor of a defendant who offers no evidence whatsoever on the critical issue. Scallon v. Hooper, 49 N.C. App. 113, 270 S.E.2d 496 (1980).

Defendant is entitled to a peremptory instruction when plaintiff relies solely on this section, and defendant offers uncontradicted evidence on the issue of agency tending to show that the driver was on a purely personal mission or errand at the time of the collision. Scallon v. Hooper, 49 N.C. App. 113, 270 S.E.2d 496 (1980).

Cited in United Roasters, Inc. v. Colgate-Palmolive Co., 485 F. Supp. 1049 (E.D.N.C. 1980).

Part 4. Transfer of Title or Interest.

§ 20-74. Penalty for failure to make application for transfer within the time specified by law.

It is the intent and purpose of this Article that every new owner or purchaser of a vehicle previously registered shall make application for transfer of title within 20 days after acquiring same, or see that such application is sent in by the lienholder with proper fees, and responsibility for such transfer shall rest on the purchaser. Any person, firm or corporation failing to do so shall pay a penalty of four dollars ($4.00) in addition to the fees otherwise provided in this Article. It is further provided that any dealer or owner who shall knowingly make any false statement in any application required by this Division as to the date a vehicle was sold or acquired shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars ($50.00) or imprisoned not more than 30 days. All moneys collected under this section shall go to the State Highway Fund. (1937, c. 407, s. 38; 1939, c. 275; 1961, c. 360, s. 10; 1975, c. 716, s. 5; 1979, c. 801, s. 8; 1981, c. 690, s. 21.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, substituted "three dollars ($3.00)" for "two dollars ($2.00)" in the second sentence.

The 1981 amendment, effective July 1, 1981, substituted "four dollars ($4.00)" for "three dollars ($3.00)" in the second sentence.

§ 20-78. When Division to transfer registration and issue new certificate; recordation.

CASE NOTES

Cited in Sutton v. Sutton, 35 N.C. App. 670, 242 S.E.2d 644 (1978).

Part 5. Issuance of Special Plates.

§ 20-79. Registration by manufacturers and dealers.

(a) Every manufacturer of or dealer in motor vehicles, trailers or semitrailers shall apply to the Motor Vehicle Division for a license as such upon official forms and shall in his application give the name of the manufacturer or dealer and his bona fide address of each partner; if a corporation, the name of the corporation and the state of incorporation; the bona fide address of the place of business; whether a dealer in new vehicles or in used vehicles and shall state how long in business. Upon receipt of said application the Division shall upon the payment of fees as required by law issue a license to such applicant, together with number plates, which plates shall bear thereon a distinctive number, the name of this State, which may be abbreviated, the year for which issued, together with the word dealer or a distinguishing symbol indicating that such plate or plates are issued to a dealer. The plates so issued may during the year for which issued be transferred from one vehicle to another owned and operated by such manufacturer or dealer.

Dealer and manufacturer plates shall after June 30, 1980, be issued on a fiscal year basis beginning July 1, and plates issued for fiscal year beginning July 1 shall expire on June 30 following the date of issuance.

Any person to whom license and number plates are issued under the provisions of this subsection upon discontinuing business as a dealer or manufacturer shall forthwith surrender to the Division license and all number plates so issued to him.

No person, firm, or corporation shall engage in the business of buying, selling, distributing or exchanging motor vehicles, trailers or semitrailers in this State unless he or it qualifies for and obtains the license required by this section.

Any person, firm, or corporation violating any provision of this subsection shall be guilty of a misdemeanor and for each offense shall be fined not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000).

(b) Every manufacturer of or dealer in motor vehicles shall obtain and have in his possession a certificate of title issued by the Division to such manufacturer or dealer of each vehicle owned and operated upon the highways by such manufacturer or dealer, except that a certificate of title shall not be required or issued for any new vehicle to be sold as such by a manufacturer or dealer prior to the sale of such vehicle by the manufacturer or dealer; and except that any dealer or any employee of any dealer may operate any motor vehicle, trailer or semitrailer, the property of the dealer, for the purpose of furthering

the business interest of the dealer in the sale, demonstration and servicing of motor vehicles, trailers and semitrailers, of collecting accounts, contacting prospective customers and generally carrying out routine business necessary for conducting a general motor vehicle sales business: Provided, that no use shall be made of dealer's demonstration plates on vehicles operated in any other business dealers may be engaged in: Provided further, that dealers may allow the operation of motor vehicles owned by dealers and displaying dealer's demonstration plates in the personal use of persons other than those employed in the dealer's business: Provided further, that said persons shall, at all times while operating a motor vehicle under the provisions of this section, have in their possession a certificate on such form as approved by the Commissioner from the dealer, which shall be valid for not more than 96 hours. This certificate may be renewed for one additional 96-hour period, pursuant to rules and regulations promulgated by the Commissioner.

(1979, c. 239; c. 612, s. 1.)

Effect of Amendments. — The first 1979 amendment, deleted "calendar" preceding "year" in the third sentence of the first paragraph of subsection (a), deleted the former fourth sentence of that paragraph, which read "The license and plates issued under this section shall be in lieu of the registration of such vehicle," and added the second paragraph of subsection (a).

The second 1979 amendment added the last sentence of subsection (b).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendments, only subsections (a) and (b) have been set out.

§ 20-79.2. Transporter registration.

(a) A person engaged in a business requiring the limited operation of motor vehicles to facilitate the manufacture, construction or rebuilding of truck cabs or bodies or the foreclosure or repossession of motor vehicles, or a public utility, as defined in G.S. 62-3(23)a, engaged in the movement of replaced vehicles for sale, may apply to the Commissioner for special registration to be issued to and used by the person or utility upon the following conditions:

(1) Application for Registration. — Only one application shall be required from each person, and such application for registration under this section shall be filed with the Commissioner of Motor Vehicles in such form and detail as the Commissioner shall prescribe, setting forth:

a. The name and residence address of applicant; if an individual, the name under which he intends to conduct business; if a partnership, the name and residence address of each member thereof, and the name under which the business is to be conducted; if a corporation, the name of the corporation and the name and residence address of each of its officers.

b. The complete address or addresses of the place or places where the business is to be conducted.

c. Such further information as the Commissioner may require.

(2) Applications for registration under this section shall be verified by the applicant, and the Commissioner may require the applicant for registration to appear at such time and place as may be designated by the Commissioner for examination to enable him to determine the accuracy of the facts set forth in the written application, either for initial registration or renewal thereof.

(3) Fees. — The annual fee for such registration under this section or renewal thereof shall be nineteen dollars ($19.00), plus an annual fee of six dollars ($6.00) for each set of plates. The application for registration and number plates shall be accompanied by the required

annual fee. There shall be no refund of registration fee or fees for number plates in the event of suspension, revocation or voluntary cancellation of registration. There shall be no quarterly reduction in fees under this section.

(4) Issuance of Certificate. — If the Commissioner approves the application, he shall issue a registration certificate in such form as he may prescribe. A registrant shall notify the Commissioner of any change of address of his principal place of business within 30 days after such change is made, and the Commissioner shall be authorized to cancel the registration upon failure to give such notice.

(5) Use. — Transporter number plates issued under this section may be transferred from vehicle to vehicle, but shall be used only for the limited operation of vehicles in connection with the manufacture, construction or rebuilding of truck cabs or bodies or with the foreclosure or repossession of vehicles, or, if the registrant is a public utility, for the limited movement of vehicles in connection with the sale of a replaced vehicle.

(6) Suspension, Revocation or Refusal to Issue or to Renew a Registration. — The Commissioner may deny the application of any person for registration under this section and may suspend or revoke a registration or refuse to issue a renewal thereof if he determines that such applicant or registrant has:

a. Made a material false statement in his application;
b. Used or permitted the use of number plates contrary to law;
c. Been guilty of fraud or fraudulent practices; or
d. Failed to comply with any of the rules and regulations of the Commissioner for the enforcement of this section or with any provisions of this Chapter applicable thereto.

(b) The Commissioner of Motor Vehicles may make all rules and regulations he may deem necessary for the proper administration of this section, particularly with regard to the requirements of evidence of financial responsibility of applicants for transporter plates. (1961, c. 360, s. 21; 1969, c. 600, s. 1; 1975, c. 222; 1979, c. 473, ss. 1, 2; c. 627, ss. 1-3; 1981, c. 727, ss. 1, 2.)

Effect of Amendments. — The first 1979 amendment, effective July 1, 1979, inserted "or a public utility, as defined in G.S. 62-3(23)a, engaged in movement of replaced vehicles for sale," in the introductory paragraph of subsection (a), and substituted "the" for "such" preceding "person" and inserted "or utility" near the end of that paragraph. In subdivision (a)(5) the amendment added "or, if the registrant is a public utility, for the limited movement of vehicles in connection with the sale of a replaced vehicle" at the end of the subdivision.

The second 1979 amendment substituted "manufacturer, construction or rebuilding of truck cabs" for "manufacturer or construction of cabs" near the beginning of the introductory paragraph in subsection (a) and near the middle of subdivision (5) of subsection (a).

The 1981 amendment, effective October 1, 1981, in subsection (a), deleted "such" preceding "motor vehicles" in the introductory paragraph and deleted "owned or controlled by the registrant" following "foreclosure or repossession of vehicles" in subdivision (5).

§ 20-81. Official license plates.

Official license plates issued to officials shall be subject to the same fees and transfer provisions as provided in G.S. 20-87 and 20-64 respectively and shall be issued as follows:

(1) Senate and Congressional. — Official license plates issued to the United States Senators shall bear the words "U.S. Senate," be numbered 1 and 2, and shall be issued on the basis of seniority. The official plates issued to United States Congressmen shall bear the words "U.S.

House" and be numbered 1 through 11 and shall be issued on the basis of congressional districts.

(2) North Carolina General Assembly. — Official plates issued to members of the North Carolina State Senate or House of Representatives shall bear the words "Senate" or "State House" followed by the Senator's or Representative's assigned seat number.

(3) Judicial. — Official plates issued to the judiciary shall be issued as follows:

a. Appellate division. — Official plates that shall be issued upon request to the Chief Justice and Associate Justices of the Supreme Court of North Carolina and the Chief Judge and Associate Judges of North Carolina Court of Appeals shall bear the letter "J" followed by numerical designation from 1 through 19. The Chief Justice upon request shall be issued the plate bearing number 1 and the remaining plates shall first be issued upon request to the Associate Justices on the basis of seniority. The Chief Judge shall be issued upon request the next such judicial plate and the remaining plates shall be issued upon request to the Associate Judges on the basis of seniority. Retired members of the Supreme Court and the Court of Appeals shall receive an official plate upon request similar in every respect to the plate issued to the regular justices and judges bearing the numerical designation of his or her position of seniority at the time of retirement except that the numerical designation shall be followed with the letter "X." Official plate J-20 may be issued upon request to the Director of the Administrative Office of the Courts.

b. Superior court. — Official plates shall be issued to the various senior resident judges of the superior court upon request and shall bear the letter "J" followed by a numerical designation equal to the sum of the numerical designation of their respective judicial districts plus 20. Where there is more than one resident judge of the superior court within a district, official plates shall upon request be issued to other resident judges serving within the district similar to the official plate to be issued upon request to the senior resident judge of the district except the numerical designation on each subsequent plate shall be followed by a letter of the alphabet beginning with the letter "A," which shall be indicative of the recipient's position as to seniority. Special judges and emergency judges of the superior court shall be issued an official plate bearing the letter "J" with a numerical designation as designated by the Administrative Office of the Courts with the approval of the Chief Justice of the Supreme Court of North Carolina. Retired judges shall be issued a similar plate except that the numerical designation shall be followed by the letter "X."

c. North Carolina district court judges. — An official plate shall be issued upon request to each chief judge of the district courts of North Carolina which shall bear the letter "J" followed by a numerical designation equal to the sum of the numerical designation of their respective judicial districts plus 100 and all other judges of the district courts serving within the same judicial district shall, upon request, be issued an official plate bearing the same letter and numerical designation as appears on the official plate issued to the chief district judge of the judicial district except that on each subsequent official plate issued within a district, the numerical designation shall be followed by a letter of the alphabet beginning with the letter "A" which shall be indicative of the recipient's position as to seniority. Retired judges shall be issued

a similar plate except that the numerical designation shall be followed by the letter "X."

d. District attorneys. — Official plates shall be issued upon request to the various district attorneys which plates shall bear the letters "DA" followed by a numerical designation indicative of their judicial district.

e. United States judges. — Official plates shall be issued upon request to Justices of the United States Supreme Court, Judges of the United States Circuit Court of Appeals and to the District Judges of the United States District Courts residing in North Carolina and shall bear the words "U.S. Judge" followed by a numerical designation beginning with the number "1" which shall be indicative of the judge's seniority position as to the date he began continuous service as a United States Judge as designated by the Secretary of State. Retired judges and judges who have taken senior status shall be issued similar plates except that the numerical designation shall be based upon the date of such retirement or assumption of senior status and shall follow the numerical designation of active justices and judges.

f. United States attorneys. — Official plates shall be issued upon request to the United States Attorneys, which plates shall bear the letters, "U.S. Attorney," followed by a numerical designation indicative of their district, with 1 being the Eastern District, 2 being the Middle District, and 3 being the Western District.

g. United States marshals. — Official plates shall be issued upon request to the United States Marshals, which plates shall bear the letters, "U.S. Marshal" followed by a numerical designation indicative of their district, with 1 being the Eastern District, 2 being the Middle District, and 3 being the Western District.

(4) Elective and Appointive. — Official plates issued to elective and appointive members of State government shall bear number designations beginning with number 1 which shall be assigned to the Governor of North Carolina and numbers following thereafter shall be issued to in the following order:

2. Lieutenant Governor of North Carolina.
3. Speaker of the House of Representatives.
4. President Pro Tempore of the Senate.
5. Secretary of State.
6. State Auditor.
7. State Treasurer.
8. Superintendent of Public Instruction.
9. Attorney General.
10. Commissioner of Agriculture.
11. Commissioner of Labor.
12. Commissioner of Insurance.
13. Speaker Pro Tempore of the House.
14. Legislative Services Officer.
15. Secretary of Administration.
16. Secretary of Natural Resources and Community Development.
17. Secretary of Revenue.
18. Secretary of Human Resources.
19. Secretary of Commerce.
20. Secretary of the Department of Correction.
21. Secretary of Cultural Resources.
22. Secretary of Crime Control and Public Safety.

23-29. To be reserved for and assigned to members of the Governor's staff at the direction of the Governor.

30. State Budget Officer.
31. State Personnel Director.
32-41. To be reserved for and assigned to nonlegislative members of the Advisory Budget Commission at the direction of the Governor.
42. Chairman, State Board of Education.
43. President, U. N. C. System.
44. Chairman, A.B.C. Board.
45. Member, A.B.C. Board.
46. Member, A.B.C. Board.
47. Assistant Commissioner of Agriculture.
48. Assistant Commissioner of Agriculture.
49. Deputy Secretary of State.
50. Deputy State Treasurer.
51. Assistant State Treasurer.
52. Deputy Commissioner, Department of Labor.
53. Chief Deputy, Department of Insurance.
54. Assistant Commissioner of Insurance.
55-65. Shall be reserved for and assigned to the Attorney General's deputies and assistants only. Specific number assignments shall be at the direction of the Attorney General.
66-88. Shall be reserved for and assigned upon request to nonlegislative members of the Board of Economic Development. Specific number assignments to such members shall be at the direction of the Governor.
89-96. Shall be reserved for and assigned upon request to nonlegislative members of the State Ports Authority. Specific number assignments to such members shall be at the direction of the Governor.
97-104. Shall be reserved for and assigned upon request to members of the Utilities Commission. Number 97 to be upon request assigned to the Chairman of the Utilities Commission with remaining numbers to be assigned upon request to the remaining members of the Utilities Commission on the basis of seniority.
105-109. Shall be reserved for and assigned upon request to members of the Parole Commission. Number 105 to be upon request assigned to the Chairman of the Parole Commission with remaining numbers to be assigned upon request to the remaining members of the Parole Commission on the basis of seniority.
110-200. Shall be reserved for and assigned upon request to members of State boards and commissions and State employees at the direction of the Governor.

(5) Department of Transportation. — Official plates shall be issued upon request to various members of the Divisions of the Department of Transportation which shall bear the letters "DOT" followed by a number designated from 1 through 85. Specific number assignments to members of the Divisions of the Department of Transportation shall be at the direction of the Governor.

(6) Consular and Diplomatic Officials. — Official plates shall be issued upon request to an accredited consul, honorary consul, or diplomatic officer of a foreign government, if the person requesting the plate is a national of the country by which he is appointed. The plate shall bear the letters "Consul" followed by the international alphabetical designation for the country represented by the consul or diplomatic officer and followed by a numerical designation beginning with the number "1" and followed sequentially based on the number of applicants. Every application for a registration plate under this subsection

shall be accompanied by a certificate from the Secretary of State of the United States or his agent that the applicant is an accredited consul, honorary consul, or diplomatic officer.

License plates issued by the Division of Motor Vehicles of the Department of Transportation pursuant to this section shall be assessed a fee of ten dollars ($10.00), in addition to any fees charged under G.S. 20-87 and 20-88. These plates will be subject to the same transfer provisions as provided in G.S. 20-64.

The revenue derived from the additional fee for such plates shall be placed in a separate fund designated the "Officials Registration Plate Fund." After deducting the cost of the plates, plus budgetary requirements for handling an issuance, to be determined by the Commissioner of Motor Vehicles, any remaining moneys derived from the additional fee for such plate shall be periodically transferred in accordance with G.S. 20-81.3(c). (1937, c. 407, s. 45; 1961, c. 360, s. 17; 1975, cc. 432, 865; 1977, c. 762, s. 1; 1979, c. 443, ss. 1, 2; 1981, c. 240.)

Effect of Amendments. — The 1979 amendment deleted "State" preceding "officials" in the introductory paragraph, added paragraph g of subdivision (3) and deleted "to State officials" after "issued" in the first sentence of the next-to-last unnumbered paragraph.

The 1981 amendment, effective January 1, 1982, added subdivision (6).

§ 20-81.1. Special plates for amateur radio operators.

(a) Every owner of a motor vehicle who holds an unrevoked and unexpired amateur radio license of a renewable nature, issued by the Federal Communications Commission, shall, upon payment of registration and licensing fees for such vehicle as required by law and an additional fee as required by G.S. 20-81.3(b) for special personalized licensed plates, be issued plates of similar size and design as the regular registration plates provided for by G.S. 20-63 or other provisions of law, upon which shall be inscribed, in lieu of the usual registration number, the official amateur radio call letters of such persons as assigned by the Federal Communications Commission.

(b) Application for special registration plates shall be made on forms which shall be provided by the Division of Motor Vehicles and shall contain proof satisfactory to the Division that the applicant holds an unrevoked and unexpired official amateur radio license and shall state the call letters which have been assigned to the applicant. Applications must be filed prior to 90 days before the day when regular registration plates for the year are made available to motor vehicle owners.

(c) Special registration plates issued pursuant to this section shall be replaced annually to the same extent as regular registration plates are replaced. These plates shall be valid during the year for which issued. If the amateur radio license of a person holding a special plate issued pursuant to this section shall be canceled or rescinded by the Federal Communications Commission, such person shall immediately return the special plates to the Division of Motor Vehicles.

(d) The provisions of this section shall apply to calendar years beginning after December 31, 1974. The Division of Motor Vehicles is authorized to, and shall, make such provisions prior to January 1, 1975, as are necessary for the issuance for the year 1975 of the special plates provided for in this section.

(e) The revenue derived from the additional fee for the amateur radio plates shall be placed in a separate fund designated the "Amateur Radio Registration Plate Fund." After deducting the cost of the plates, plus budgetary requirements for handling and issuance to be determined by the Commissioner of Motor Vehicles, any remaining moneys derived from the additional fee for such plates shall be periodically transferred to the Department of Transportation as

provided in G.S. 20-81.3(c)(2). (1951, c. 1099; 1955, c. 291; 1961, c. 360, s. 18; 1971, c. 589, ss. 1, 2; c. 829, ss. 1, 2, 4; 1973, c. 507, s. 5; c. 1395, s. 1; 1975, c. 716, s. 5; 1977, c. 464, s. 34; 1979, c. 137, ss. 1, 2.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, deleted "which is primarily used for pleasure or communication purposes" after "motor vehicle" near the beginning of subsection (a), substituted "as required by G.S. 20-81.3(b) for special personalized licensed plates" for "of four dollars ($4.00)" near the middle of subsection (a), and substituted "90" for "60" in the second sentence of subsection (b).

§ 20-81.3. Special personalized registration plates.

(a) The Commissioner may issue under such regulation as he shall deem appropriate a special personalized registration plate to the owner of a private passenger motor vehicle or private trucks in lieu of another number plate. Such personalized registration plate shall be of such design and shall bear such letter or letters and numerals as the Commissioner shall prescribe, but there shall be no duplication of a registration plate. The Commissioner shall in his discretion refuse the issue of such letter combinations which might carry connotations offensive to good taste and decency.

(f) In the event a personalized registration plate is lost, stolen or mutilated, the owner may not obtain another such plate bearing the same letter, letters or numerals until the next registration year. He may, upon proper application and payment of a fee of five dollars ($5.00), obtain a plate of the regular series. Provided, further, that a special personalized registration plate revoked for violation of the motor vehicle laws shall not be reissued, but in lieu thereof a plate of the regular series will be issued upon payment of the appropriate fee for the new registration plate. (1967, c. 413; 1971, c. 42; 1973, c. 507, s. 5; c. 1262, s. 86; 1975, c. 716, s. 5; 1977, c. 464, s. 3; c. 771, s. 4; 1979, c. 126, ss. 1, 2.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, deleted "not to exceed one ton manufacturer's rated capacity" following "trucks" near the end of the first sentence in subsection (a), and substituted "five dollars ($5.00)" for "one dollar ($1.00)" in the second sentence of subsection (f).

Only Part of Section Set Out. — As the other subsections were not changed by the amendment, only subsections (a) and (f) are set out.

§ 20-81.4. Free registration plates to disabled veterans and former prisoners of war.

(a1) From and after January 1, 1979, the North Carolina Division of Motor Vehicles, upon request by an ex-prisoner of war residing in this State, shall provide and issue free of charge to such ex-prisoner of war registration and special prisoner of war registration plates for either one automobile or one pickup truck, where a pickup truck is the ex-prisoner of war's only mode of transportation and is not used for hire; an ex-prisoner of war being, for the purpose of this subsection, an American service person captured and held prisoner by forces hostile to the United States while serving in the armed forces of the United States in World War I, World War II, Korean service or Vietnam service.

(c1) The registration plate provided for by this section for ex-prisoners of war shall be issued free of charge and only upon proof as may be required by the Division of Motor Vehicles as to ex-prisoners of war's status and proof of

financial responsibility as required by the motor vehicle laws of North Carolina.

(1979, 2nd Sess., c. 1191.)

Effect of Amendments. — The 1979, 2nd Sess., amendment changed the date at the beginning of subsection (a1) from 1976 to 1979, substituted, near the beginning of subsection (a1), "upon request by an ex-prisoner of war residing in this State, shall provide and issue free of charge to such ex-prisoner of war registration and special prisoner of war" for "on a first-come first-serve basis to each ex-prisoner of war in this State registration and special P.O.W." and substituted "free of charge" for "at no additional fee" near the beginning of subsection (c1).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsections (a1) and (c1) are set out.

§ 20-81.5. Civil Air Patrol plates.

(a) The Commissioner shall cause to be made each year sufficient number of license plates to furnish each member of the North Carolina Wing of the Civil Air Patrol with not more than two thereof, said license plates to be in the same form and character as other license plates now or hereinafter authorized by law to be used upon private vehicles registered in this State, except that such license plates shall bear on the face thereof the following: the words "North Carolina," the year designation, and the words "Civil Air Patrol." The said license plates shall be issued only to members of the North Carolina Wing of the Civil Air Patrol and for each license plate the Commissioner shall collect a fee as required by G.S. 20-81.3(b) for special personalized registration plates, in addition to the fees in an amount equal to the fees collected for the licensing and registering of private vehicles. The Commander of the North Carolina Wing of the Civil Air Patrol shall furnish the Commissioner annually with a list of the number of such distinctive plates required accompanied by the fee referred to hereinabove and such list shall contain the rank of each officer listed in order of his seniority in the North Carolina Civil Air Patrol. The said license plates to be set aside for officer personnel shall be numbered beginning with the number 201 and running in numerical sequence thereafter up to and including the number 500, according to seniority; the senior officer being issued the plate bearing the number 201. Enlisted personnel, senior members and cadet members applying for such distinctive plates shall, upon application and payment of the required fee, receive such plates in numerical sequence beginning with the number 501. Applications for such distinctive license plates shall be on forms as may be agreed upon by the Wing Commander of the North Carolina Civil Air Patrol and the Division of Motor Vehicles. If a holder of such a distinctive license plate shall be discharged from the North Carolina Civil Air Patrol under other than honorable conditions, he shall within 30 days exchange such distinctive plate for a standard plate.

(1979, cc. 193, 746.)

Effect of Amendments. — The first 1979 amendment, effective July 1, 1979, deleted "automobile" after "number of" and "passenger" after "private" in the first sentence of subsection (a) and substituted "as required by G.S. 20-81.3(b) for special personalized registration plates" for "of five dollars ($5.00)" in the second sentence of that subsection.

The second 1979 amendment, effective July 1, 1979, deleted "five dollar ($5.00)" preceding "fee" in the third sentence of subsection (a).

Only Part of Section Set Out. — As subsection (b) was not changed by the amendment, it is not set out.

§ 20-81.6. Special plates for Class D citizens radio station operators.

(a) Every owner of a motor vehicle who holds an unrevoked and unexpired Class D citizens radio station license of a renewable nature, issued by the Federal Communications Commission, shall, upon payment of registration and licensing fees for such vehicle as required by law and an additional fee of ten dollars ($10.00), be issued plates of similar size and design as the regular registration plates provided for by G.S. 20-63 or other provisions of law, upon which shall be inscribed, in lieu of the usual registration number, the official Class D citizens radio station call letters of such persons as assigned by the Federal Communications Commission.

(b) Application for special registration plates shall be made on forms which shall be provided by the Division of Motor Vehicles and shall contain proof satisfactory to the Division that the applicant holds an unrevoked and unexpired official Class D citizens radio station license and shall state the call letters which have been assigned to the applicant. Applications must be filed prior to 90 days before the day when regular registration plates for the year are made available to motor vehicle owners.

(1979, c. 176, ss. 1-3.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, deleted "which is primarily used for pleasure or communication purposes" after "motor vehicle" near the beginning of subsection (a), deleted a former proviso at the end of that subsection providing for a ten dollar fee for a Class D citizens radio station license, and substituted "90 days" for "60 days" in the last sentence of subsection (b).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsections (a) and (b) are set out.

Part 6. Vehicles of Nonresidents of State, etc.

§ 20-84. Vehicles owned by State, municipalities or orphanages, etc.; certain vehicles operated by local chapters of American National Red Cross.

The Division upon proper proof being filed with it that any motor vehicle for which registration is herein required is owned by the State or any department thereof, or by any county, township, city or town, or by any board of education, or by any orphanage or civil air patrol, or incorporated emergency rescue squad, shall collect three dollars and fifty cents ($3.50) for the registration of such motor vehicles, but shall not collect any fee for application for certificate of title in the name of the State or any department thereof, or by any county, township, city or town, or by any board of education or orphanage: Provided, that the term "owned" shall be construed to mean that such motor vehicle is the actual property of the State or some department thereof or of the county, township, city or town, or of the board of education, and no motor vehicle which is the property of any officer or employee of any department named herein shall be construed as being "owned" by such department. Provided, that the above exemptions from registration fees shall also apply to any church-owned bus used exclusively for transporting children and parents to Sunday school and church services and for no other purpose.

In lieu of the annual three dollars and fifty cents ($3.50) registration provided for in this section, the Division may for the license year 1950 and thereafter provide for a permanent registration of the vehicles described in this section and issue permanent registration plates for such vehicles. The perma-

nent registration plates issued pursuant to this paragraph shall be of a distinctive color and shall bear thereon the word "permanent." Such plates may be transferred as provided in G.S. 20-78 to a replacement vehicle of the same classification. For the permanent registration and issuance of permanent registration plates provided for in this paragraph, the Division shall collect a fee of three dollars and fifty cents ($3.50) for each vehicle so registered and licensed.

The provisions of this section are hereby made applicable to vehicles owned by a rural fire department, agency or association.

The Division of Motor Vehicles shall issue to the North Carolina Tuberculosis Association, Incorporated, or any local chapter or association of said corporation, for a fee of three dollars and fifty cents ($3.50) for each plate a permanent registration plate which need not be thereafter renewed for each motor vehicle in the form of a mobile X-ray unit which is owned by said North Carolina Tuberculosis Association, Incorporated, or any local chapter or local association thereof and operated exclusively in this State for the purpose of diagnosis, treatment and discovery of tuberculosis. The initial three dollars and fifty cents ($3.50) fee required by this section and for this purpose shall be in full payment of the permanent registration plates issued for such vehicle operated as a mobile X-ray unit, and such plates need not thereafter be renewed, and such plates may be transferred as provided in G.S. 20-78 to replacement vehicles to be used for the purposes above described and for which the plates were originally issued.

The Division of Motor Vehicles shall issue to the American National Red Cross, upon application of any local chapter thereof and payment of a fee of three dollars and fifty cents ($3.50) for each plate, a permanent registration plate, which need not be thereafter renewed, for all disaster vans, bloodmobiles, handivans, and such sedans and station wagons as are used for emergency or disaster work, and operated by a local chapter in this State in the business of the American National Red Cross. Such plates may be transferred as provided in G.S. 20-78 to a replacement vehicle to be used for the purposes above described and for which the plates were originally issued. In the event of transfer of ownership to any other person, firm or corporation, or transfer or reassignment of any vehicle bearing such registration plate to any chapter or association of the American National Red Cross in any other state, territory or country, the registration plate assigned to such vehicle shall be surrendered to the Division of Motor Vehicles.

In lieu of all other registration requirements, the Commissioner shall each year assign to the State Highway Patrol, upon payment of three dollars and fifty cents ($3.50) per registration plate, a sufficient number of regular registration plates of the same letter prefix and in numerical sequence beginning with number 100 to meet the requirements of the State Highway Patrol for use on Division vehicles assigned to the State Highway Patrol. The commander of the Patrol shall, when such plates are assigned, issue to each member of the State Highway Patrol a registration plate for use upon the Division vehicle assigned to him pursuant to G.S. 20-190 and assign a registration plate to each Division service vehicle operated by the Patrol. An index of such assignments of registration plates shall be kept at each State Highway Patrol radio station and a copy thereof shall be furnished to the registration division of the Division. Information as to the individual assignments of such registration plates shall be made available to the public upon request to the same extent and in the same manner as regular registration information. The commander, when necessary, may reassign registration plates provided that such reassignment shall be made to appear upon the index required herein within 20 days after such reassignment.

The Division of Motor Vehicles shall upon appropriate certification of financial responsibility issue to sheltered workshops recognized or approved by the Division of Vocational Rehabilitation Services of the Department of Human

Resources upon application and payment of a fee of three dollars and fifty cents ($3.50) for each plate, a permanent registration plate for vehicles registered to and operated by such sheltered workshops. The initial three dollars and fifty cents ($3.50) fee required by this section and for this purpose shall be in full payment of the permanent registration plate issued for such vehicle operated by a sheltered workshop and such plates need not thereafter be renewed, and such plates may be transferred as provided in G.S. 20-78 to a replacement vehicle to be used by the sheltered workshop designated on the registration card.

On and after January 1, 1972, permanent registration plates used on all vehicles owned by the State of North Carolina or a department thereof shall be of a distinctive color and design which shall be readily distinguishable from all other permanent registration plates issued pursuant to this section or G.S. 20-84.1. For the purpose of carrying out the intent of this paragraph, all vehicles owned by the State of North Carolina or a department thereof in operation as of October 1, 1971, and bearing a permanent registration shall be reregistered during the months of October, November and December, 1971, and upon reregistration, registration plates issued for such vehicles shall be of a distinctive color and design as provided for hereinabove. (1937, c. 407, s. 48; 1939, c. 275; 1949, c. 583, s. 1; 1951, c. 388; 1953, c. 1264; 1955, cc. 368, 382; 1967, c. 284; 1969, c. 800; 1971, c. 460, s. 1; 1975, c. 548; c. 716, s. 5; 1977, c. 370, s. 1; 1979, c. 801, s. 9.)

Cross References. — As to motor vehicles owned by local boards of education, see § 115C-520.

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, substituted "three dollars and fifty cents ($3.50)" for "one dollar ($1.00)" throughout the section.

§ 20-84.1. Permanent plates for city buses.

The Division may for the license year 1950 and thereafter provide for a permanent registration and issue permanent registration plates for city buses and trackless trolleys when such buses and trolleys are operated under franchises authorizing the use of city streets, but no bus or trackless trolley shall be registered or licensed under this section if it is operated under a franchise authorizing an intercity operation. The permanent registration plates issued pursuant to the provisions of this section shall be of a distinctive color and shall bear thereon the word "permanent." Such plates may be transferred as provided in G.S. 20-78 to a replacement vehicle of the same classification. For the permanent registration and issuance of permanent registration plates as provided for in this section, the Division shall collect a fee of three dollars and fifty cents ($3.50) for each vehicle so registered and licensed. (1949, c. 583, s. 6; 1975, c. 716, s. 5; 1977, c. 370, s. 2; 1979, c. 801, s. 10.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, substituted "three dollars and fifty cents ($3.50)" for "one dollar ($1.00)" in the last sentence.

Part 7. Title and Registration Fees.

§ 20-85. Schedule of fees.

Except as provided in G.S. 20-68, there shall be paid to the Division for the issuance of certificates of title, transfer of registration and replacement of registration plates fees according to the following schedules:

(1) Each application for certificate of title $5.00

(2) Each application for duplicate or corrected certificate of title $7.00
(3) Each application of repossessor for certificate of title 5.00
(4) Each transfer of registration 4.00
(5) Each set of replacement registration plates 9.00
(6) Each application for duplicate registration certificate 3.00
(7) Each application for recording supplementary lien 3.00
(8) Each application for removing a lien from a certificate of title . . . . . 4.00.

(1937, c. 407, s. 49; 1943, c. 648; 1947, c. 219, s. 9; 1955, c. 554, s. 4; 1961, c. 360, s. 19; c. 835, s. 11; 1975, c. 430; c. 716, s. 5; c. 727; c. 875, c. 4; c. 879, s. 46; 1979, c. 801, s. 11; 1981, c. 690, s. 19.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, added "Except as provided in G.S. 20-68" at the beginning of the introductory paragraph, increased the fees in subdivisions (1) and (3) from $2.00 to $3.50, in subdivision (2) from $2.00 to $5.00, and in subdivision (6) from .50 to $2.00.

The 1981 amendment, effective July 1, 1981, increased all fees in subdivisions (1) through (8).

§ 20-86.1. International Registration Plan.

(a) The registration fees required under this Article may be proportioned for vehicles which qualify and are licensed under the provisions of the International Registration Plan.

(b) Notwithstanding any other provisions of this Chapter, the Commissioner is hereby authorized to promulgate and enforce such rules and regulations as may be necessary to carry out the provisions of any agreement entered pursuant to the International Registration Plan. (1975, c. 767, s. 2; 1981, c. 859, s. 77; c. 1127, s. 53.)

Cross References. — As to authority of the Secretary of Revenue in performing the auditing functions associated with the International Registration Plan, see § 20-91(f).

Effect of Amendments. — The first 1981 amendment, effective July 1, 1981, added to this section a new subsection reading as follows: "(c) Any auditing function associated with the National Registration Plan shall be performed by the Department of Revenue."

The first 1981 amendment was repealed by the second 1981 amendment, effective November 15, 1981.

Session Laws 1981, c. 859, s. 97, contains a severability clause.

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

§ 20-87. Passenger vehicle registration fees.

There shall be paid to the Division annually, as of the first day of January, for the registration and licensing of passenger vehicles, fees according to the following classifications and schedules:

(1) Common Carrier, Contract Carriers and Exempt For-Hire Passenger Carrier Vehicles. — For-hire passenger vehicles shall be taxed at the rate of seventy-five dollars ($75.00) per year for each vehicle of nine-passenger capacity or less and vehicles of over nine-passenger capacity shall be classified as buses and shall be taxed at a rate of one dollar and forty cents ($1.40) per hundred pounds of empty weight per year for each vehicle; provided, however, no license shall be issued for the operation of any taxicab until the governing body of the city or town in which such taxicab is principally operated, if the principal operation is in a city or town, has issued a certificate showing:

a. That the operator of such taxicab has provided liability insurance or other form of indemnity for injury to person or damage to

property resulting from the operation of such taxicab, in such amount as required by the city or town, and

b. That the convenience and necessity of the public requires the operation of such taxicab.

All persons operating taxicabs on January 1, 1945, shall be entitled to a certificate of necessity and convenience for the number of taxicabs operated by them on such date, unless since said date the license of such person or persons to operate a taxicab or taxicabs has been revoked or their right to operate has been withdrawn or revoked; provided that all persons operating taxicabs in Edgecombe, Lee, Nash and Union Counties on January 1, 1945, shall be entitled to certificates of necessity and convenience only with the approval of the governing authority of the town or city involved.

A taxicab shall be defined as any motor vehicle, seating nine or fewer passengers, operated upon any street or highway on call or demand, accepting or soliciting passengers indiscriminately for hire between such points along streets or highways as may be directed by the passenger or passengers so being transported, and shall not include motor vehicles or motor vehicle carriers as defined in G.S. 62-259 through G.S. 62-281. Such taxicab shall not be construed to be a common carrier nor its operator a public service corporation.

(2) U-Drive-It Passenger Vehicles. — U-drive-it passenger vehicles shall pay the following tax:

Motorcycles:	1-passenger capacity	$15.00
	2-passenger capacity	19.00
	3-passenger capacity	23.00

Automobiles: Thirty-eight dollars ($38.00) per year for each vehicle of nine-passenger capacity or less, and vehicles of over nine-passenger capacity shall be classified as buses and shall pay one dollar and forty cents ($1.40) per hundred pounds empty weight of each vehicle.

(3) Repealed by Session Laws 1981, c. 976, s. 3, effective January 1, 1982.

(4) Limousine Vehicles. — For-hire passenger vehicles on call or demand which do not solicit passengers indiscriminately for hire between points along streets or highways, shall be taxed at the same rate as for-hire passenger vehicles under G.S. 20-87(1) but shall be issued appropriate registration plates to distinguish such vehicles from taxicabs.

(5) Private Passenger Vehicles. — There shall be paid to the Division annually, as of the first day of January, for the registration and licensing of private passenger vehicles, fees according to the following classifications and schedules:

Private passenger vehicles of not more than nine passengers	$13.00
Private passenger vehicles over nine passengers	16.00

Provided, that a fee of only one dollar ($1.00) shall be charged for any vehicle given by the federal government to any veteran on account of any disability suffered during war so long as such vehicle is owned by the original donee or other veteran entitled to receive such gift under Title 38, section 252, United States Code Annotated.

(6) Private Motorcycles. — The tax on private passenger motorcycles shall be six dollars ($6.00); except that when a motorcycle is equipped with an additional form of device designed to transport persons or property, the tax shall be thirteen dollars ($13.00).

(7) Manufacturers and Motor Vehicle Dealers. — Manufacturers and dealers in motor vehicles, trailers and semitrailers for license and for one set of dealer's plates for each place of business licensed under

Article 12 of Chapter 20 of the General Statutes shall pay the sum of thirty-five dollars ($35.00), and for each additional set of dealer's plates the sum of one dollar ($1.00).

(8) Driveaway Companies. — Any person, firm or corporation engaged in the business of driving new motor vehicles from the place of manufacture to the place of sale in this State for compensation shall pay as a registration fee and for one set of plates one hundred twenty-five dollars ($125.00) and for each additional set of plates six dollars ($6.00).

(9) House Trailers. — In lieu of other registration and license fees levied on house trailers under this section or G.S. 20-88, the registration and license fee on house trailers shall be four dollars ($4.00) for the license year or any portion thereof.

(10) Special Mobile Equipment. — The tax for special mobile equipment shall be four dollars ($4.00) for the license year or any portion thereof; provided, that vehicles on which are permanently mounted feed mixers, grinders and mills and on which are also transported molasses or other similar type feed additives for use in connection with the feed mixing, grinding or milling process shall be taxed an additional sum of thirty dollars ($30.00) for the license year or any portion thereof, in addition to the basic four dollars ($4.00) tax provided for herein. (1937, c. 407, s. 51; 1939, c. 275; 1943, c. 648; 1945, c. 564, s. 1; c. 576, s. 2; 1947, c. 220, s. 3; c. 1019, ss. 1-3; 1949, c. 127; 1951, c. 819, ss. 1, 2; 1953, c. 478; c. 826, s. 4; 1955, c. 1313, s. 2; 1957, c. 1340, s. 3; 1961, c. 1172, s. 1a; 1965, c. 927; 1967, c. 1136; 1969, c. 600, ss. 3-11; 1971, c. 952; 1973, c. 107; 1975, c. 716, s. 5; 1981, c. 976, ss. 1-4.)

Effect of Amendments. — The 1981 amendment, effective January 1, 1982, rewrote subdivision (1) so as to include provisions for contract carriers and exempt for-hire passenger carrier vehicles as well as common carriers, substituted "one dollar and forty cents ($1.40)" for "two dollars and forty cents ($2.40)" near the end of subdivision (2), deleted subdivision (3), relating to contract carrier and exempt for-hire passenger carrier vehicles, and substituted "G.S. 20-87(1)" for "G.S. 20-87(3)" in subdivision (4).

§ 20-87.1. Interchange of passenger buses with nonresident common carriers of passengers.

When a resident common carrier of passengers of this State interchanges a properly licensed bus with another common carrier of passengers who is a resident of another state, and adequate records are on file in its office to verify such interchanges, the North Carolina licensed common carrier of passengers may use the bus licensed in such other state the same as if it is its own during the time the nonresident carrier is using the North Carolina licensed bus. (1971, c. 871, s. 1; 1975, c. 716, s. 5; 1981, c. 976, s. 5.)

Effect of Amendments. — The 1981 amendment, effective January 1, 1982, deleted former subsection (a), extending reciprocity to passenger buses operated by common carriers licensed in other states, etc., but requiring such carriers to have validly licensed in this State the average number of buses required to operate the total miles operated by it in and through the State during the preceding year. The amendment also deleted the designation "(b)" at the beginning of the present section.

§ 20-88. Property-hauling vehicles.

(a) Determination of Weight. — For the purpose of licensing, the weight of self-propelled property-carrying vehicles shall be the empty weight and heaviest load to be transported, as declared by the owner or operator; provided, that any determination of weight shall be made only in units of 1,000 pounds or major fraction thereof, weights of over 500 pounds counted as 1,000 and weights of 500 pounds or less disregarded. The declared gross weight of self-propelled property-carrying vehicles operated in conjunction with trailers or semitrailers shall include the empty weight of the vehicles to be operated in the combination and the heaviest load to be transported by such combination at any time during the registration period, except that the gross weight of a trailer or semitrailer is not required to be included when the operation is to be in conjunction with a self-propelled property-carrying vehicle which is licensed for 6,000 pounds or less gross weight and the gross weight of such combination does not exceed 9,000 pounds, except wreckers as defined under G.S. 20-4.01(50). Those property-hauling vehicles registered for 4,000 pounds shall be permitted a tolerance of 500 pounds above the weight permitted under the table of weights and rates appearing in subsection (b) of this section.

(b) There shall be paid to the Division annually, as of the first day of January, for the registration and licensing of self-propelled property-carrying vehicles, fees according to the following classification and schedule and upon the following conditions:

SCHEDULE OF WEIGHTS AND RATES

Rates Per Hundred Pound Gross Weight

	Farmer
Not over 4,500 pounds	$0.23
4,501 to 8,500 pounds inclusive	.29
8,501 to 12,500 pounds inclusive	.37
12,501 to 16,500 pounds inclusive	.51
Over 16,500 pounds	.58

SCHEDULE OF WEIGHTS AND RATES

Rates Per Hundred Pound Gross Weight

	Private Hauler, Contract Carriers, Flat Rate Common Carriers and Exempt for-Hire Carriers
Not over 4,500 pounds	$0.46
4,501 to 8,500 pounds inclusive	.58
8,501 to 12,500 pounds inclusive	.73
12,501 to 16,500 pounds inclusive	1.01
Over 16,500 pounds	1.15

SCHEDULE OF WEIGHTS AND RATES

Rates Per Hundred Pound Gross Weight

	Common Carrier of Property (Deposit)
Not over 4,500	$0.87
4,501 to 8,500 pounds inclusive	.87
8,501 to 12,500 pounds inclusive	.87
12,501 to 16,500 pounds inclusive	.87
Over 16,500 pounds	.87.

(1) The minimum fee for a vehicle licensed under this subsection shall be fourteen dollars and fifty cents ($14.50) at the farmer rate and eighteen dollars and fifty cents ($18.50) at the private hauler, contract carrier and common carrier rates.

(2) The term "farmer" as used in this subsection means any person engaged in the raising and growing of farm products on a farm in North Carolina not less than 10 acres in area, and who does not engage in the business of buying products for resale.

(3) License plates issued at the farmer rate shall be placed upon trucks and truck-tractors that are operated exclusively in the carrying or transportation of applicant's farm products, raised or produced on his farm, and farm supplies and not operated in hauling for hire.

(4) "Farm products" means any food crop, livestock, poultry, dairy products, flower bulbs, or other nursery products and other agricultural products designed to be used for food purposes, including in the term "farm products" also cotton, tobacco, logs, bark, pulpwood, tannic acid wood and other forest products grown, produced, or processed by the farmer.

(5) The Division shall issue necessary rules and regulations providing for the recall, transfer, exchange or cancellation of "farmer" plates, when vehicle bearing such plates shall be sold or transferred.

(5a) Notwithstanding any other provision of this Chapter, license plates issued pursuant to this subsection at the farmer rate may be purchased for any three-month period at one fourth of the annual fee.

(6) There shall be paid to the Division annually as of the first of January, the following fees for "wreckers" as defined under G.S. 20-38(39): a wrecker fully equipped weighing 7,000 pounds or less, seventy-two dollars ($72.00); wreckers weighing in excess of 7,000 pounds shall pay one hundred forty-five dollars ($145.00). Fees to be prorated quarterly. Provided, further, that nothing herein shall prohibit a licensed dealer from using a dealer's license plate to tow a vehicle for a customer.

(c) There shall be paid to the Division annually, as of the first day of January, for the registration and licensing of trailers or semitrailers, seven dollars ($7.00) for any part of the license year for which said license is issued.

(d) Rates on trucks, trailers and semitrailers wholly or partially equipped with solid tires shall be double the above schedule.

(e) Repealed by Session Laws 1981, c. 976, s. 6, effective January 1, 1982.

(f) Nonresident motor vehicle carriers which do not operate in intrastate commerce in this State, and the title to whose vehicles are not required to be registered under the provisions of this Article, shall be taxed for the use of the roads in this State and shall pay the same fees therefor as are required with reference to like vehicles owned by residents of this State: Provided, that if any such fees as applied to nonresidents shall at any time become inoperative, such

carriers shall be taxed for the use of the roads of this State as common carriers of property as provided above: Provided, further, that this provision shall not prevent the extension to vehicles of other states of the benefits of the reciprocity provisions provided by law.

(g) Repealed by Session Laws 1969, c. 600, s. 17.

(h) Repealed by Session Laws 1979, c. 419. (1937, c. 407, s. 52; 1939, c. 275; 1941, cc. 36, 227; 1943, c. 648; 1945, c. 569, s. 1; c. 575, s. 1; c. 576, s. 3; c. 956, ss. 1, 2; 1949, cc. 355, 361; 1951, c. 583; c. 819, ss. 1, 2; 1953, c. 568; c. 694, s. 1; c. 1122; 1955, c. 554, s. 8; 1957, c. 681, s. 2; c. 1215; 1959, c. 571; 1961, c. 685; 1963, c. 501; c. 702, ss. 2, 3; 1967, c. 1095, ss. 1, 2; 1969, c. 600, ss. 12-17; c. 1056, s. 1; 1973, c. 154, ss. 1, 2; c. 291; 1975, c. 716, s. 5; 1977, c. 638; 1979, c. 419; c. 631; 1981, c. 67; c. 690, ss. 29, 30; c. 976, s. 6.)

Effect of Amendments. — The first 1979 amendment repealed subsection (h), which required quarterly reports to be filed with the Commissioner by operators of diesel-fuel operated vehicles, and that the tax be paid upon such fuel, and which declared it a felony to fail to make such reports or to make a false report.

The second 1979 amendment, effective April 1, 1980, added subdivision (5a) of subsection (b).

Section 20-38, referred to in subdivision (6) of subsection (b), was repealed by Session Laws 1973, c. 1330. For present definition of "wreckers," see § 20-4.01, subdivision (50).

The first 1981 amendment substituted "livestock" for "cattle, hogs" in subdivision (4) of subsection (b).

The second 1981 amendment, effective July 1, 1981, increased the rates throughout the schedule in subsection (b), substituted "fourteen dollars and fifty cents ($14.50)" for "twelve dollars and fifty cents ($12.50)" and "eighteen dollars and fifty cents ($18.50)" for "sixteen dollars ($16.00)" in subdivision (1) of subsection (b) and "seventy-two dollars ($72.00)" for "sixty-two dollars and fifty cents ($62.50)" and "one hundred forty-five dollars ($145.00)" for "one hundred twenty-five dollars ($125.00)" in subdivision (6) of subsection (b) and "seven dollars ($7.00)" for "four dollars ($4.00)" in subsection (c).

The third 1981 amendment, effective January 1, 1982, deleted subsection (e), relating to the tax on common carriers of property.

§ 20-89: Repealed by Sessions Laws 1981, c. 976, s. 7, effective January 1, 1982.

§ 20-90: Repealed by Session Laws 1981, c. 976, s. 8, effective January 1, 1982.

§ 20-91. Records, applications, reports or returns required of carriers of passengers and property.

(a) Individual motor vehicle mileage records, motor vehicle equipment records, motor vehicle inventory records and motor vehicle revenue records shall be prepared and maintained in accordance with rules and regulations issued by the Commissioner.

Applications for licensing or registering motor vehicles in North Carolina shall be applied for on forms approved by the Commissioner and filed in accordance with rules and regulations issued by the Commissioner. Applications for licensing or registering motor vehicles in North Carolina are accepted subject to audit.

(b) It shall be the duty of the Commissioner, by competent auditors, to have the books, records, tax returns, applications, and any and all other pertinent records or documents of any registrant licensing or registering motor vehicles, or that are required to license or register motor vehicles, under the provisions of this Article, audited for the purpose of determining whether such registrant is maintaining acceptable records, filing correct applications and paying correct registration fees or taxes as required.

Every registrant subject to licensing or registration and audit under the provisions of this Article shall retain all pertinent licensing and registration

documents, books, records, tax returns, applications and all supporting records and documents on which an application for licensing or registration is based for a period of three full registration years. These records shall at all times during the business hours of the day be subject to audit. If it is determined these records are not located in North Carolina and it becomes necessary for the auditors to travel to the place where such records are normally kept, the registrant shall reimburse North Carolina for per diem and travel expense incurred in the performance of such audit. Where more than one registrant is audited on the same out-of-state trip, the per diem and travel expense may be prorated.

The Commissioner may enter into reciprocal audit agreements with other agencies of this State or agencies of another state or states, for the purpose of conducting joint audits of any registrant subject to audit under this Article.

(c) If an audit is conducted and it becomes necessary to assess the registrant for deficiencies in registration fees or taxes due based on the audit, the assessment will be determined based on the schedule of rates prescribed for that registration year, adding thereto and as a part thereof an amount equal to five percent (5%) of the tax to be collected. If, during an audit, it is determined that:

(1) A registrant failed or refused to make acceptable records available for audit as provided by law; or

(2) A registrant misrepresented, falsified or concealed his records, then all plates and cab cards shall be deemed to have been issued erroneously and are subject to cancellation. The Commissioner may assess the registrant for an additional percentage up to one hundred percent (100%) North Carolina registration fees at the rate prescribed for that registration year, adding thereto and as a part thereof an amount equal to five percent (5%) of the tax to be collected. The Commissioner may cancel all registration and reciprocal privileges.

As a result of an audit, no assessment shall be issued and no claim for refund shall be allowed which is in an amount of less than ten dollars ($10.00).

The notice of any assessments will be sent to the registrant by registered or certified mail at the address of the registrant as it appears in the records of the Division of Motor Vehicles in Raleigh. The notice, when sent in accordance with the requirements indicated above, will be sufficient regardless of whether or not it was ever received.

The failure of any registrant to pay any additional registration fees or tax within 30 days after the billing date, shall constitute cause for revocation of registration license plates, cab cards and reciprocal privileges.

(d) Except in accordance with proper judicial order, or as otherwise provided by law, it shall be unlawful for the Commissioner of Motor Vehicles, any deputy, assistant, agent, clerk, other officer, employee, or former officer or employee, to divulge or make known in any manner the amount of tax paid by any carrier of passengers or carrier of property as set forth or disclosed in any application, report or return required in remitting said tax, or as otherwise disclosed. Nothing in this section shall be construed to prohibit the publication of statistics, so classified as to prevent the identification of particular applications, reports or returns, and the items thereof; the inspection of such applications, reports or returns by the Governor, Attorney General, Utilities Commissioner, or their or its duly authorized representatives; or the inspection by a legal representative of the State of the application, report or return of any carrier of passengers or carrier of property which shall bring an action to set aside or review the tax based thereon, or against which action or proceeding has been instituted to recover any tax or penalty imposed by this Article. Any person, officer, agent, clerk, employee, or former officer or employee violating the provisions of this section shall be guilty of a misdemeanor. Nothing in this subsection or in any other law shall prevent the exchange of information between the Division of Motor Vehicles and the Department of Revenue when

such information is needed by either or both of said departments for the purposes of properly enforcing the laws with the administration of which either or both of said departments is charged. (1937, c. 407, s. 55; 1939, c. 275; 1941, c. 36; 1943, c. 726; 1945, c. 575, s. 3; 1947, c. 914, s. 2; 1951, c. 190, s. 1; c. 819, s. 1; 1955, c. 1313, s. 2; 1967, c. 1079, s. 2; 1975, c. 716, s. 5; c. 767, s. 3; 1981, c. 859, s. 78; c. 976, s. 9; c. 1127, s. 53.)

Effect of Amendment. — The first 1981 amendment, effective July 1, 1981, added to this section a new subsection reading as follows: "(f) To the extent necessary to perform the auditing functions associated with the International Registration Plan, the Secretary of Revenue shall have the same authority granted to the Commissioner of Motor Vehicles by this section."

Session Laws 1981, c. 859, s. 97, contains a severability clause.

The second 1981 amendment, effective January 1, 1982, rewrote this section.

The third 1981 amendment, effective November 15, 1981, repealed the first 1981 amendment.

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

§ 20-91.1. Taxes to be paid; suits for recovery of taxes.

Legal Periodicals. — For survey of 1976 case law on taxation, see 55 N.C.L. Rev. 1083 (1977).

CASE NOTES

Cited in C & H Transp. Co. v. North Carolina Div. of Motor Vehicles, 34 N.C. App. 616, 239 S.E.2d 309 (1977).

§ 20-93: Repealed by Session Laws 1981, c. 976, s. 10, effective January 1, 1982.

§ 20-94. Partial payments.

In the purchase of licenses, where the gross amount of the license to any one owner amounts to more than four hundred dollars ($400.00), half of such payment may, if the Commissioner is satisfied of the financial responsibility of such owner, be deferred until June 1 in any calendar year upon the execution to the Commissioner of a draft upon any bank or trust company upon forms to be provided by the Commissioner in an amount equivalent to one half of such tax, plus a carrying charge of one percent (1%): Provided, that any person using any tag so purchased after the first day of June in any such year without having first provided for the payment of such draft, shall be guilty of a misdemeanor. No further license plates shall be issued to any person executing such a draft after the due date of any such draft so long as such draft or any portion thereof remains unpaid. Any such draft being dishonored and not paid shall be subject to the penalties prescribed in G.S. 20-178 and shall be immediately turned over by the Commissioner to his duly authorized agents and/or the State Highway Patrol, to the end that this provision may be enforced. When the owner of the vehicles for which a draft has been given sells or transfers ownership to all vehicles covered by the draft, such draft shall become payable immediately, and such vehicles shall not be transferred by the Division until the draft has been paid. Any one owner whose gross license amounts to more than two hundred dollars ($200.00) but not more than four hundred dollars ($400.00) may also be permitted to sign a draft in accordance with the foregoing

provisions of this section provided such owner makes application for the draft on or before February 1 during the license renewal period. (1937, c. 407, s. 58; 1943, c. 726; 1945, c. 49, ss. 1, 2; 1947, c. 219, s. 10; 1953, c. 192; 1967, c. 712; 1975, c. 716, s. 5; 1979, c. 801, s. 12.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, substituted "one percent (1%)" for "one-half of one percent (½ of 1%)" preceding the proviso in the first sentence.

§ 20-95. Licenses for less than a year.

(a) Except as provided in subsection (b) of this section, licenses issued on or after April 1 and before July 1 of each year shall be three fourths of the annual fee; licenses issued on or after July 1 and before October 1 shall be one half of the annual fee; and licenses issued on or after October 1 shall be one fourth of the annual fee.

(b) This section shall not apply to licenses issued pursuant to G.S. 20-65, 20-79.1, 20-79.2, 20-79.3, 20-81.2, 20-84, 20-84.1, 20-87(9) through (10) and 20-88(c). (1937, c. 407, s. 59; 1947, c. 914, s. 3; 1979, c. 476.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1980, rewrote the former provisions of this section as subsection (a) and added subsection (b). In subsection (a), the amendment combined the former three sentences into one, added "Except as provided in subsection (b) of this section," at the beginning of the subsection, and deleted provisions excepting two-wheel trailers under 1500 pounds weight pulled by passenger cars.

Section 20-65, referred to in subsection (b) of this section, was repealed by Session Laws 1979, 2nd Sess., c. 1280.

§ 20-97. Taxes compensatory; no additional tax.

(a) All taxes levied under the provisions of this Article are intended as compensatory taxes for the use and privileges of the public highways of this State, and shall be paid by the Commissioner to the State Treasurer, to be credited by him to the State Highway Fund; and no county or municipality shall levy any license or privilege tax upon the use of any motor vehicle licensed by the State of North Carolina, except that cities and towns, other than the City of Charlotte, the City of Greenville, the City of Hendersonville, the Town of Cape Carteret, the Town of Chadbourn, the Town of Kenansville, the Town of Magnolia, the Town of Mount Olive, the Town of Stoneville, the City of Brevard, the Town of Battleboro, the Town of Bridgeton, the Town of Fairmont, the Town of Farmville, the Town of Fountain, the Town of Jameston, the Town of Parkton, the Town of Plymouth, the Town of Raeford, and the Town of Williamston, the Town of Wallace and all incorporated cities and towns in the counties of Buncombe, Cumberland, Dare, Davidson, Granville, Johnston, Lenoir, Madison, McDowell, New Hanover, Pender, and Yancey, may levy not more than one dollar ($1.00) per year upon any such vehicle resident therein, the City of Concord in Cabarrus County may levy not more than three dollars ($3.00) per year upon any such vehicle resident therein, the City of Henderson, City of Roanoke Rapids, the Town of Weldon, the Town of Enfield, the Town of Garner, the Town of Bethal, the Town of Mebane, the Town of Jackson, the Town of Wendell, the Town of Elizabethtown and the Town of Zebulon, may levy not more than three dollars ($3.00) per year upon any such vehicle resident therein, and the City of Charlotte, the City of Greenville, the City of Hendersonville, the Town of Cape Carteret, the Town of Chadbourn, the Town of Mount Olive, the Town of Rose Hill, the Town of Stoneville, the City of Brevard, the Town of Battleboro, the Town of Bridgeton, the Town of Fairmont, the Town of Farmville, the Town of Fountain, the Town

of Raeford, the Town of Jameston, the Town of Parkton, the Town of Plymouth, and the Town of Williamston and all incorporated cities and towns in the counties of Buncombe, Cumberland, Dare, Davidson, Granville, Johnston, Lenoir, Madison, McDowell, New Hanover, Pender, and Yancey, may levy not more than five dollars ($5.00) per year upon any such vehicle resident therein: Provided, however, that cities and towns may levy, in addition to the amounts hereinabove provided for, a sum not to exceed fifteen dollars ($15.00) per year upon each vehicle operated in such city or town as a taxicab.

(b) No additional franchise tax, license tax, or other fee shall be imposed by the State against any franchise motor vehicle carrier taxed under this Article nor shall any county, city or town impose a franchise tax or other fee upon them, except that cities and towns may levy a license tax not in excess of fifteen dollars ($15.00) per year on each vehicle operated in such city as a taxicab as provided in subsection (a) hereof.

(c) In addition to the appropriation carried in the appropriations act there shall be appropriated to the Motor Vehicle Division the additional sum of fifteen thousand dollars ($15,000) from the State highway fund: Provided, that such additional sum shall be made available only in the event that the regular appropriation is insufficient and it shall be determined by the Director of the Budget that such additional amount is necessary to carry out the provisions of this Article. (1937, c. 407, s. 61; 1941, c. 36; 1943, c. 639, ss. 3, 4; 1975, c. 716, s. 5; 1977, c. 433, s. 1; c. 880, s. 1; 1979, c. 173, s. 1; c. 216, s. 1; c. 217; c. 248, s. 1; c. 398; c. 400, s. 1; c. 458; c. 530, s. 1; c. 790; 1979, 2nd Sess., c. 1152; c. 1153, s. 1; c. 1155, s. 1; c. 1189; c. 1308, s. 1; 1981, cc. 74, 129, 210, 228, 310, 311, 312, 315, 368, 370, s. 10; c. 415, s. 10; cc. 857, 858, 991.)

Local Modification. — Caswell: 1979, c. 450.

Cross References. — As to motor vehicle taxes, see § 160A-213.

Editor's Note. — Subsection (b) of this section was inadvertently omitted from the Replacement Volume.

Effect of Amendments. — Session Laws 1979, c. 173, s. 1, inserted "the Town of Stoneville" in two places in subsection (a).

Session Laws 1979, c. 216, s. 1, inserted "the City of Hendersonville" in two places in subsection (a).

Session Laws 1979, c. 217, effective January 1, 1980, inserted the provision as to the City of Concord in Cabarrus County in subsection (a).

Session Laws 1979, c. 248, s. 1, inserted "Lenoir" in the list of counties in subsection (a).

Session Laws 1979, c. 398, inserted "Granville" in the list of counties in subsection (a).

Session Laws 1979, c. 400, s. 1, inserted "the Town of Cape Carteret" in two places in subsection (a).

Session Laws 1979, c. 458, effective January 1, 1980, inserted the provisions as to the City of Roanoke Rapids and the Town of Elizabethtown in subsection (a).

Session Laws 1979, c. 530, s. 1, inserted "the Town of Mount Olive" in two places in subsection (a).

Session Laws 1979, c. 790, effective January 1, 1980, inserted the provisions as to the Town of Weldon and the Town of Garner in subsection (a).

Session Laws 1979, 2nd Sess., c. 1152, inserted the provisions as to the Town of Wendell and the City of Henderson in subsection (a).

Session Laws 1979, 2nd Sess., c. 1153, s. 1, inserted the provisions as to the Town of Chadbourn in subsection (a).

Session Laws 1979, 2nd Sess., c. 1155, s. 1, inserted the provisions as to the City of Greenville in subsection (a).

Session Laws 1979, 2nd Sess., c. 1189, effective January 1, 1981, inserted the provisions as to the Town of Jackson and the Town of Zebulon in subsection (a).

Session Laws 1979, 2nd Sess., c. 1308, s. 1, inserted the provisions as to the Towns of Magnolia, Rose Hill and Wallace in subsection (a).

Session Laws 1981, c. 74, inserted the provisions as to the Town of Battleboro in subsection (a).

Session Laws 1981, c. 129, inserted the provisions as to the Town of Fairmont and the Town of Raeford in subsection (a).

Session Laws 1981, c. 210, inserted the provisions as to the Town of Williamston in subsection (a).

Session Laws 1981, c. 228, inserted the provisions as to the Town of Farmville and the Town of Fountain in subsection (a).

Session Laws 1981, c. 310, inserted the provisions as to the Town of Enfield in subsection (a).

Session Laws 1981, c. 311, inserted the provisions as to the Town of Bethel in subsection (a).

Session Laws 1981, c. 312, inserted the provisions as to the county of Dare in subsection (a).

Session Laws 1981, c. 315, inserted the provisions as to the Town of Kenansville in subsection (a).

Session Laws 1981, c. 368, inserted the provisions as to the Town of Parkton in subsection (a).

Session Laws 1981, c. 370, inserted the provisions as to the Town of Jameston in subsection (a).

Session Laws 1981, c. 415, inserted the provisions as to the City of Brevard in subsection (a).

Session Laws 1981, c. 857, inserted the provisions as to the Town of Mebane in subsection (a).

Session Laws 1981, c. 858, inserted the provisions as to the Town of Plymouth in subsection (a).

Session Laws 1981, c. 991, inserted the provisions as to the Town of Bridgeton in subsection (a).

Session Laws 1977, c. 433, s. 2, as amended by Session Laws 1977, c. 880, s. 2, Session Laws 1979, c. 173, s. 2, c. 216, s. 2, c. 248, s. 2, c. 400, s. 2, c. 530, s. 2, Session Laws 1979, 2nd Sess., c. 1153, s. 2, c. 1155, s. 2, and Session Laws 1981, c. 315, s. 2, provides: "This act applies only to the city of Charlotte, the City of Greenville, the City of Hendersonville, the Town of Cape Carteret, the Town of Chadbourn, the Town of Kenansville, the Town of Magnolia, the Town of Mount Olive, the Town of Rose Hill, the Town of Stoneville, the Town of Wallace and to the incorporated cities and towns and the counties of Buncombe, Cumberland, Davidson, Johnston, Lenoir, Madison, McDowell, New Hanover, Pender, and Yancey."

CASE NOTES

Applied in Cooke v. Futrell, 37 N.C. App. 441, 246 S.E.2d 65 (1978).

Part 8. Anti-Theft and Enforcement Provisions.

§ 20-106. Receiving or transferring stolen vehicles.

Any person who, with intent to procure or pass title to a vehicle which he knows or has reason to believe has been stolen or unlawfully taken, receives or transfers possession of the same from or to another, or who has in his possession any vehicle which he knows or has reason to believe has been stolen or unlawfully taken, and who is not an officer of the law engaged at the time in the performance of his duty as such officer shall be punished as a Class I felon. (1937, c. 407, s. 70; 1979, c. 760, s. 5.)

Cross References. —

For statute providing the maximum punishment for felonies, effective July 1, 1980, see § 14-1.1.

As to seizure and forfeiture of conveyances used in committing a crime under this section, see § 14-86.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "shall be punished as a Class I felon" for "is guilty of a felony" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

Legal Periodicals. — For survey of 1976 case law on criminal law, see 55 N.C.L. Rev. 976 (1977).

CASE NOTES

The purpose of this section, etc. —

In accord with 1st paragraph in original. See State v. Murchinson, 39 N.C. App. 163, 249 S.E.2d 871 (1978), overruled on other grounds, 45 N.C. App. 510, 263 S.E.2d 298 (1980).

Exception for Police. — The provision exculpating police officers in the line of duty was apparently placed in the statute out of an abundance of legislative caution. Such a provision may have been thought necessary in light of the fact that the crime charged merely requires possession with knowledge that the vehicle is stolen, not criminal intent. The provision is an exception to the statute, not an element of the offense. State v. Murchinson, 39 N.C. App. 163, 249 S.E.2d 871 (1978), overruled on other grounds, 45 N.C. App. 510, 263 S.E.2d 298 (1980).

Whether the defendant was a policeman in the line of duty is not an essential element of the substantive crime under this section. State v. Murchinson, 39 N.C. App. 163, 249 S.E.2d 871 (1978).

Section 14-71 Not Lesser Included Offense. — The two offenses under this section and § 14-71 are separate offenses. The latter is not a lesser included offense under the former. State v. Carlin, 37 N.C. App. 228, 245 S.E.2d 586 (1978).

No Felonious Intent Required. —

This section requires only that the State prove defendant "knew or [had] reason to believe" that the vehicle in his possession was stolen. No felonious intent is required. State v. Murchinson, 39 N.C. App. 163, 249 S.E.2d 871 (1978).

Sufficiency of Evidence. — Evidence that the defendant was in possession of the stolen vehicle approximately one month after it was stolen was not sufficient to raise an inference that the defendant knew or had reason to believe that the automobile was stolen where the evidence offered by the State demonstrated the intervening agency of others. State v. Leonard, 34 N.C. App. 131, 237 S.E.2d 347 (1977).

Evidence tending to show that the public vehicle identification number plate on an automobile had been replaced was not sufficient to raise an inference that defendant knew or had reason to believe that the vehicle was stolen, where there was no evidence that the alteration was made by defendant or with his knowledge. State v. Leonard, 34 N.C. App. 131, 237 S.E.2d 347 (1977).

Doctrine of Possession of Recently Stolen Goods Justifies Denial of Nonsuit. — The doctrine of the possession of recently stolen goods is, under appropriate circumstances, applicable to justify a denial of a motion for nonsuit in a case charging illegal possession of a stolen vehicle pursuant to this section. State v. Murchinson, 39 N.C. App. 163, 249 S.E.2d 871 (1978), overruled on other grounds, 45 N.C. App. 510, 263 S.E.2d 298 (1980).

§ 20-109. Altering or changing engine or other numbers.

(a) It shall be unlawful and constitute a misdemeanor for:

(1) Any person to willfully deface, destroy, remove, cover, or alter the manufacturer's serial number, transmission number, or engine number; or

(2) Any vehicle owner to knowingly permit the defacing, removal, destroying, covering, or alteration of the serial number, transmission number, or engine number; or

(3) Any person except a licensed vehicle manufacturer as authorized by law to place or stamp any serial number, transmission number, or engine number upon a vehicle, other than one assigned thereto by the Division; or

(4) Any vehicle owner to knowingly permit the placing or stamping of any serial number or motor number upon a motor vehicle, except such numbers as assigned thereto by the Division.

A violation of this subsection shall be punishable by a fine or imprisonment not to exceed two years, or both, in the discretion of the court.

(b) It shall be unlawful and constitute a felony for:

(1) Any person, with intent to conceal or misrepresent the true identity of the vehicle, to deface, destroy, remove, cover, alter, or use any serial or motor number assigned to a vehicle by the Division; or

(2) Any vehicle owner, with intent to conceal or misrepresent the true identity of the vehicle, to permit the defacing, destruction, removal, covering, alteration, or use of a serial or motor number assigned to a vehicle by the Division; or

(3) Any vehicle owner, with the intent to conceal or misrepresent the true identity of a vehicle, to permit the defacing, destruction, removal, covering, alteration, use, gift, or sale of any manufacturer's serial number, serial number plate, or any part or parts of a vehicle containing the serial number or portions of the serial number.

A violation of this subsection shall be punishable as a Class I felony. (1937, c. 407, s. 73; 1943, c. 726; 1953, c. 216; 1965, c. 621, s. 3; 1967, c. 449; 1973, c. 1089; 1975, c. 716, s. 5; 1979, c. 760, s. 5.)

Cross References. —

For statute providing the maximum punishment for felonies, effective July 1, 1980, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "as a Class I felony" for "by a fine of not less than two thousand dollars ($2,000) or imprisonment for not more than five years, or both, in the discretion of the court" at the end of subsection (b). The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

CASE NOTES

The requirement that a serial or motor number alleged to have been altered be one assigned to a vehicle by the Division of Motor Vehicles of the Department of Transportation is an essential element of the offense condemned by subdivision (b)(1) of this section. Before the State is entitled to a conviction, it must prove the presence of this element beyond a reasonable doubt from the evidence. State v. Wyrick, 35 N.C. App. 352, 241 S.E.2d 355 (1978).

§ 20-110. When registration shall be rescinded.

(a) The Division shall rescind and cancel the registration of any vehicle which the Division shall determine is unsafe or unfit to be operated or is not equipped as required by law.

(b) The Division shall rescind and cancel the registration of any vehicle whenever the person to whom the registration card or registration number plates therefor have been issued shall make or permit to be made any unlawful use of the said card or plates or permit the use thereof by a person not entitled thereto.

(c) The Division shall rescind and cancel the license of any dealer to whom such license has been issued when such dealer allows his registration number plates to be used for other than demonstration purposes except as provided by G.S. 20-79, fails to carry out the provisions of G.S. 20-79 and 20-82, or is convicted of a felony.

(d) The Division shall rescind and cancel the certificate of title to any vehicle which has been erroneously issued or fraudulently obtained or is unlawfully detained by anyone not entitled to possession.

(e) The Division shall rescind and cancel the license and dealer plates issued to any person when it is found that false or fraudulent statements have been made in the application for the same, and when and if it is found that the applicant does not have a bona fide place of business as provided by this Article.

(f) The Division shall rescind and cancel the dealer's license and dealer's license plates issued to any person who knowingly delivers a certificate of title to a vehicle purchased from him which does not show a proper or correct transfer of ownership or who willfully fails to deliver proper certificate of title to a motor vehicle sold by him.

(g) The Division shall rescind and cancel the registration plates issued to a carrier of passengers or property which has been secured by such carrier as provided under G.S. 20-50 when the license is being used on a vehicle other than the one for which it was issued or which is being used by the lessor-owner after the lease with such lessee has been terminated.

(h) The Division may rescind and cancel the registration or certificate of title on any vehicle on the grounds that the application therefor contains any false or fraudulent statement or that the holder of the certificate was not entitled to the issuance of a certificate of title or registration.

(i) The Division may rescind and cancel the registration or certificate of title of any vehicle when the Division has reasonable grounds to believe that the vehicle is a stolen or embezzled vehicle, or that the granting of registration or the issuance of certificate of title constituted a fraud against the rightful owner or person having a valid lien upon such vehicle.

(j) The Division may rescind and cancel the registration or certificate of title of any vehicle on the grounds that the registration of the vehicle stands suspended or revoked under the motor vehicle laws of this State.

(k) The Division shall rescind and cancel a certificate of title when the Division finds that such certificate has been used in connection with the registration or sale of a vehicle other than the vehicle for which the certificate was issued. (1937, c. 407, s. 74; 1945, c. 576, s. 5; 1947, c. 220, s. 4; 1951, c. 985, s. 1; 1953, c. 831, s. 4; 1955, c. 294, s. 1; c. 554, s. 11; 1975, c. 716, s. 5; 1981, c. 976, s. 11.)

Effect of Amendments. — The 1981 amendment, effective January 1, 1982, deleted "common" preceding "carrier" in two places in subsection (g).

§ 20-111. Violation of registration provisions.

It shall be unlawful for any person to commit any of the following acts:

(1) To operate or for the owner thereof knowingly to permit the operation upon a highway of any vehicle, trailer, or semitrailer required to be registered and which is not registered or for which a certificate of title has not been issued, or which does not have attached thereto and displayed thereon the registration number plate or plates assigned thereto by the Division for the current registration year, subject to the provisions of G.S. 20-64 and 20-72(a) and the exemptions mentioned in G.S. 20-65 and 20-79.

(2) To display or cause or permit to be displayed or to have in possession any registration card, certificate of title or registration number plate knowing the same to be fictitious or to have been canceled, revoked, suspended or altered, or to willfully display an expired license or registration plate on a vehicle knowing the same to be expired.

(3) The giving, lending, or borrowing of a license plate for the purpose of using same on some motor vehicle other than that for which issued shall make the giver, lender, or borrower guilty of a misdemeanor, and upon conviction he shall be fined not more than fifty dollars ($50.00), or imprisoned not more than 30 days. Where license plate is found being improperly used, such plate or plates shall be revoked or canceled, and new license plates must be purchased before further operation of the motor vehicle.

(4) To fail or refuse to surrender to the Division, upon demand, any title certificate, registration card or registration number plate which has been suspended, canceled or revoked as in this Article provided. Service of the demand shall be in accordance with G.S. 20-48.

(5) To use a false or fictitious name or address in any application for the registration of any vehicle or for a certificate of title or for any renewal or duplicate thereof, or knowingly to make a false statement or knowingly to conceal a material fact or otherwise commit a fraud in any such application. A violation of this subdivision shall constitute a misdemeanor punishable in the discretion of the court not to exceed two years.

(6) To give, lend, sell or obtain a certificate of title for the purpose of such certificate being used for any purpose other than the registration, sale, or other use in connection with the vehicle for which the certificate was issued. Any person violating the provisions of this subdivision shall be guilty of a misdemeanor. (1937, c. 407, s. 75; 1943, c. 592, s. 2; 1945, c. 576, s. 6; c. 635; 1949, c. 360; 1955, c. 294, s. 2; 1961, c. 360, s. 20; 1975, c. 716, s. 5; 1981, c. 938, s. 3.)

Effect of Amendments. — The 1981 amendment added the second sentence of subdivision (4). Session Laws 1981, c. 938, s. 6, provides: "This act shall become effective January 1, 1982, and shall apply to any revocation, cancellation, suspension or other demand by the Commissioner to be issued on or after the effective date."

§ 20-114. Duty of officers; manner of enforcement.

CASE NOTES

Cited in Shay v. Nixon, 45 N.C. App. 108, 262 S.E.2d 294 (1980).

Part 9. The Size, Weight, Construction and Equipment of Vehicles.

§ 20-116. Size of vehicles and loads.

(a) The total outside width of any vehicle or the load thereon shall not exceed 96 inches, except as otherwise provided in this section: Provided that when hogsheads of tobacco are being transported, a tolerance of five inches shall be allowed.

(b) No passenger-type vehicle shall be operated on any highway with any load carried thereon extending beyond the line of the fenders on the left side of such vehicle nor extending more than six inches beyond the line of the fenders on the right side thereof.

(c) No vehicle, unladen or with load, shall exceed a height of 13 feet, six inches. Provided, however, that neither the State of North Carolina nor any agency or subdivision thereof, nor any person, firm or corporation, shall be required to raise, alter, construct or reconstruct any underpass, wire, pole, trestle, or other structure to permit the passage of any vehicle having a height, unladen or with load, in excess of 12 feet, six inches. Provided further, that the operator or owner of any vehicle having an overall height, whether unladen or with load, in excess of 12 feet, six inches, shall be liable for damage to any structure caused by such vehicle having a height in excess of 12 feet, six inches. The term "automobile transport" as used in this subsection shall mean only

vehicles engaged exclusively in transporting automobiles, trucks and other commercial vehicles.

(d) A vehicle having two axles shall not exceed 35 feet in length of extreme overall dimensions inclusive of front and rear bumpers. Provided, however, a bus with two axles may be up to 40 feet in length overall of dimensions inclusive of front and rear bumpers. A vehicle having three axles shall not exceed 40 feet in length overall of dimensions inclusive of front and rear bumpers. A truck-tractor and semitrailer shall be regarded as two vehicles for the purpose of determining lawful length and license taxes.

(e) No combination of vehicles coupled together shall consist of more than two units and no such combination of vehicles shall exceed a total length of 55 feet inclusive of front and rear bumpers, subject to the following exceptions: Said length limitation shall not apply to vehicles operated in the daytime when transporting poles, pipe, machinery or other objects of a structural nature which cannot readily be dismembered, nor to such vehicles transporting such objects operated at nighttime by a public utility when required for emergency repair of public service facilities or properties, but in respect to such night transportation every such vehicle and the load thereon shall be equipped with a sufficient number of clearance lamps on both sides and marker lamps upon the extreme ends of said projecting load to clearly mark the dimensions of such load: Provided that vehicles designed and used exclusively for the transportation of motor vehicles shall be permitted an overhang tolerance front or rear not to exceed five feet. Provided, that wreckers in an emergency may tow a combination tractor and trailer to the nearest feasible point for repair and/or storage: Provided, that the Department of Transportation shall have authority to designate any highways upon the State system as light-traffic roads when, in the opinion of the Department of Transportation, such roads are inadequate to carry and will be injuriously affected by the maximum load, size, and/or width of trucks or buses using such roads as herein provided for, and all such roads so designated shall be conspicuously posted as light-traffic roads and the maximum load, size and/or width authorized shall be displayed on proper signs erected thereon. Provided, however, that a combination of a house trailer used as a mobile home, together with its towing vehicle, shall not exceed a total length of 55 feet exclusive of front and rear bumpers. The operation of any vehicle whose gross load, size and/or width exceed the maximum shown on such signs over the roads thus posted shall constitute a misdemeanor: Provided further, that no standard concrete highway, or other highway built of material of equivalent durability, and not less than 18 feet in width, shall be designated as a light-traffic road: Provided further, that the limitations placed on any road shall not be less than eighty percent (80%) of the standard weight, unless there shall be available an alternate improved route of not more than twenty percent (20%) increase in the distance; provided, however, that such restriction of limitations shall not apply to any county road, farm-to-market road, or any other road of the secondary system: Provided further, that the said limitation that no combination of vehicles coupled together shall consist of more than two units shall not apply to trailers not exceeding three in number drawn by a motor vehicle used by municipalities for the removal of domestic and commercial refuse and street rubbish, but such combination of vehicles shall not exceed a total length of 50 feet inclusive of front and rear bumpers. Provided further, that the said limitation that no combination of vehicles coupled together shall consist of more than two units shall not apply to a combination of vehicles coupled together by a saddle mount device used to transport motor vehicles in a driveway service when no more than two saddle mounts are used and provided further, that equipment used in said combination is approved by the safety regulations of the Interstate Commerce Commission and the safety regulations of the North Carolina Division of Motor Vehicles and the Department of Transportation.

(f) The load upon any vehicle operated alone, or the load upon the front vehicle of a combination of vehicles, shall not extend more than three feet beyond the front wheels of such vehicle or the front bumper of such vehicle, if it is equipped with such a bumper.

(g) No vehicle shall be driven or moved on any highway unless such vehicle is so constructed or loaded as to prevent any of its load from dropping, sifting, leaking, or otherwise escaping therefrom, except that sand may be dropped for the purpose of securing traction, or water or other substance may be sprinkled on a roadway in cleaning or maintaing such roadway.

Trucks, trailers or other vehicles when loaded with rock, gravel, stone or other similar substances which could blow, leak, sift or drop shall not be driven or moved on any highway unless the height of the load against all four walls does not extend above a horizontal line six inches below their tops when loaded at the loading point, or if not so loaded, unless the load shall be securely covered by tarpaulin or some other suitable covering, or unless it is otherwise constructed so as to prevent any of its load from dropping, sifting, leaking, blowing, or otherwise escaping therefrom.

Provided this section shall not be applicable to or in any manner restrict the transportation of seed cotton, of poultry or livestock or silage or other feed grain used in the feeding of poultry or livestock.

(h) Whenever there exist two highways of the primary State highway system of approximately the same distance between two or more points, the Department of Transportation shall have authority when in the opinion of the Department of Transportation, based upon engineering and traffic investigation, safety will be promoted or the public interest will be served thereby, to designate one of said highways the "truck route" between said points, and to prohibit the use of the other highway by heavy trucks or other vehicles of a gross vehicle weight or axle load limit in excess of a designated maximum. In such instances the highways so selected for heavy vehicle traffic shall be so designated as "truck routes" by signs conspicuously posted thereon, and the highways upon which heavy vehicle traffic is prohibited shall likewise be so designated by signs conspicuously posted thereon showing the maximum gross vehicle weight or axle load limits authorized for said highways. The operation of any vehicle whose gross vehicle weight or axle load exceeds the maximum limits shown on such signs over the highway thus posted shall constitute a misdemeanor: Provided, that nothing herein shall prohibit a truck or other motor vehicle whose gross vehicle weight or axle load exceeds that prescribed for such highways from using such highway when the destination of such vehicle is located solely upon said highway, road or street: Provided, further, that nothing herein shall prohibit passenger vehicles or other light vehicles from using any highways so designated for heavy truck traffic.

(i) Repealed by Session Laws 1973, c. 1330, s. 39.

(j) Self-propelled grain combines of other farm equipment self-propelled, pulled or otherwise, not exceeding 18 feet in width may be operated on any highway, except a highway or section of highway that is a part of the National System of Interstate and Defense Highways: Provided that all such combines or equipment which exceed 10 feet in width may be so operated only under the following conditions:

(1) Said equipment may only be so operated during daylight hours; and

(2) Said equipment must display a red flag on front and rear, said flags shall not be smaller than three feet wide and four feet long and be attached to a stick, pole, staff, etc., not less than four feet long and shall be so attached to said equipment as to be visible from both directions at all times while being operated on the public highway for not less than 300 feet; and

(3) Equipment [covered] by this section, which by necessity must travel more than 10 miles or where by nature of the terrain or obstacles the

flags referred to in subdivision (2) are not visible from both directions for 300 feet at any point along the proposed route, must be preceded at a distance of 300 feet and followed at a distance of 300 feet by a flagman in a vehicle having mounted thereon an appropriate warning light or flag.

(4) Every such piece of equipment so operated shall operate to the right of the center line when meeting traffic coming from the opposite direction and at all other times when possible and practical.

(5) Violation of this section shall not constitute negligence per se.

(6) When said equipment is causing a delay in traffic, the operator of said equipment shall move the equipment off the paved portion of the highway at the nearest practical location until the vehicles following said equipment have passed.

(k) Nothing in this section shall be construed to prevent the operation of passenger buses having an overall width of 102 inches, exclusive of safety equipment, upon the highways of this State which are 20 feet or wider and that are designated as the State primary system, or as municipal streets, when, and not until, the federal law and regulations thereunder permit the operation of passenger buses having a width of 102 inches or wider on the National System of Interstate and Defense Highways. (1937, c. 246; c. 407, s. 80; 1943, c. 213, s. 1; 1945, c. 242, s. 1; 1947, c. 844; 1951, c. 495, s. 1; c. 733; 1953, cc. 682, 1107; 1955, c. 296, s. 2; c. 729; 1957, c. 65, s. 11; cc. 493, 1183, 1190; 1959, c. 559; 1963, c. 356, s. 1; c. 610, ss. 1, 2; c. 702, s. 4; c. 1027, s. 1; 1965, c. 471; 1967, c. 24, s. 4; c. 710; 1969, cc. 128, 880; 1971, cc. 128, 680, 688, 1079; 1973, c. 507, s. 5; c. 546; c. 1330, s. 39; 1975, c. 148, ss. 1-5; c. 716, s. 5; 1977, c. 464, s. 34; 1979, cc. 21, 218; 1981, c. 169, s. 1.)

Effect of Amendments. — The first 1979 amendment inserted the first proviso in the first sentence of subsection (e).

The second 1979 amendment added the second sentence to subsection (d).

The 1981 amendment, effective July 1, 1981, inserted "of seed cotton" in the last paragraph of subsection (g).

OPINIONS OF ATTORNEY GENERAL

Subsection (g) applies to a basically unloaded truck that is depositing material on the road. See opinion of Attorney General to Mr. Randy Jones, Department of Natural Resources & Community Development, Oct. 3, 1979.

§ 20-118. Weight of vehicles and load.

No vehicle or combination of vehicles shall be moved or operated on any highway or bridge when the gross weight thereof exceeds the limits specified below:

(1) When the wheel is equipped with high-pressure pneumatic, solid rubber or cushion tire, 8,000 pounds.

(2) When the wheel is equipped with low-pressure pneumatic tire, 9,000 pounds.

(3) The gross weight on any one axle of the vehicle when the wheels attached to said axle are equipped with high-pressure solid rubber or cushion tires, 16,000 pounds.

(4) The single axle weight when the wheels attached to said axle are equipped with low-pressure pneumatic tires, 19,000 pounds, provided that the maximum weight per axle when in tandem shall remain at 18,000 pounds.

(5) For each violation of subdivisions (3) or (4), or for each violation of the maximum axle-weight limits established by the Department of Transportation in connection with light-traffic roads, the owner of the vehicle shall pay to the Division a penalty for each pound of weight of [on] such axle in excess of the said maximum weight in accordance with the following schedule: for the first 1,000 pounds or any part thereof, four cents (4¢) per pound; for the next 1,000 pounds or any part thereof, six cents (6¢) per pound; and for each additional pound, ten cents (10¢) per pound. Provided, however, the penalty shall not apply if the excess weight on any one axle does not exceed 1,000 pounds. Provided, however, vehicles transporting meats and row crop products originating from a farm, or forest products orginating from a farm or from woodlands to first market, shall pay to the Division a penalty for each pound of weight on such axle in excess of the maximum weight allowed under subdivisions (3) and (4) in accordance with the following schedule: for the first 1,000 pounds or any part thereof, two cents (2¢) per pound; for the next 1,000 pounds or any part thereof, three cents (3¢) per pound; and for each additional pound, five cents (5¢) per pound. Said 1,000 pounds shall constitute a tolerance and no additional tolerance on axle weight shall be granted administratively or otherwise. In all cases of violation of the axle-weight limitation, the penalty shall be computed and assessed on each pound of weight in excess of the maximum permitted in subdivisions (3) and (4) including the 1,000-pound tolerance. The penalties herein provided shall constitute sole punishment for violation of this subdivision and violators thereof shall not be subject to criminal action. Provided, that a truck or other motor vehicle whose axle load exceeds that prescribed for light-traffic roads shall be exempt from such limitations when transporting supplies, material or equipment necessary to carry out a farming operation engaged in the production of meats and row crops when the destination of such vehicle and load is located solely upon said light-traffic road. Provided further that a truck or other motor vehicle whose axle weight exceeds that prescribed for light-traffic roads shall be exempt from such limitations when transporting meats and row crop products originating from a farm, or forest products originating from a farm or from woodlands, on a light-traffic road to the nearest State maintained road which is not posted to prohibit the transportation of statutory legal local limits. Provided further that nothing herein contained shall be construed in order to raise the load limit heretofore or hereafter set by the Department of Transportation on any bridge. In the event of undue damage to any light-traffic road heretofore referred as a result of this action, such road or roads may then be restricted by the Division of Highways. Provided, that when it is discovered that a vehicle is in violation of subdivisions (3) or (4), or is in violation of the maximum axle-weight limits established by the Department of Transportation in connection with light-traffic roads, the owner of the vehicle shall be permitted to shift without penalty the weight from one axle to another to comply with the axle limits set forth in this section in the following instances, provided, that the gross weight of the vehicle is within the legal limit:

a. In cases where the single-axle load exceeds the statutory limits, but does not exceed 21,000 pounds.
b. In cases where the vehicle has tandem axles and the weight exceeds the statutory limits, but does not exceed 40,000 pounds for any two-axle combination or 60,000 pounds for any three-axle combination.

c. In cases where the axle weight does not exceed 15,500 pounds and the limit placed on the road or highway by the Department of Transportation is 13,000 pounds per axle.

(6) Axle Weights. — For the purposes of this section, the following definitions shall apply:

a. Single-axle weight. — The total load on all wheels whose centers are included within two parallel transverse planes less than 48 inches apart.

b. Tandem-axle weight. — The total load on all wheels whose centers are at least 48 inches apart but not more than 104 inches apart and are equipped with a connecting mechanism designed to equalize the load on all axles except that as to any vehicle equipped with tandem axles prior to July 1, 1969, the portion of this definition concerning a connecting mechanism designed to equalize the load on all axles shall not apply.

(7) For the purposes of this section every pneumatic tire designed for use and used when inflated with air to less than 100 pounds pressure shall be deemed a low-pressure pneumatic tire, and every pneumatic tire inflated to 100 pounds pressure or more shall be deemed a high-pressure pneumatic tire.

(8) The gross weight of any vehicle having two axles shall not exceed 30,000 pounds, unless used in connection with a combination consisting of four axles or more. For the purpose of determining the maximum weight to be allowed for passenger buses to be operated upon the highways of this State, the Commissioner of Motor Vehicles shall require, prior to the issuance of license, a certificate showing the weight of such bus when fully equipped for the road. Unless the applicant holds a special permit from the Department of Transportation, no license shall be issued to any passenger bus with two axles having a weight, when fully equipped for operation on the highways, of more than 22,500 pounds, and no license shall be issued for any passenger bus with three axles having a weight, when fully equipped for operation on the highways, of more than 30,000 pounds, unless the bus for which application for license is made shall have been licensed in the State of North Carolina prior to the first day of February, 1949.

(9) The gross weight of any vehicle or combination of vehicles having three axles shall not exceed 47,500 pounds. For the purpose of determining gross weight, no axle shall be considered unless the wheels thereof are equipped with adequate brakes. For the purposes of this subdivision, brakes shall not be required on the front wheels; provided, however, such vehicle must be capable of complying with the performance requirements of G.S. 20-124(e).

(10) The gross weight of any vehicle or combination of vehicles having four or more axles shall not exceed 64,000 pounds. For the purpose of determining gross weight, no axle shall be considered unless the wheels thereof are equipped with adequate brakes; provided, the gross weight of any vehicle or combination of vehicles having five or more axles shall not exceed the maximum weight given for the respective distance between the first and last axle of the group of axles measured longitudinally to the nearest foot as set forth in the following table:

Distance in feet between the extremes of any axles	*Maximum weight in pounds on any 5-axle group*
35 or under	70,000
36	70,500
37	71,000
38	72,000

Distance in feet between the extremes of any axles	*Maximum weight in pounds on any 5-axle group*
39	72,500
40	73,000
41	73,500
42	74,000
43	75,000
44	75,500
45	76,000

For the purpose of determining gross weight, no axle shall be considered unless the wheels thereof are equipped with adequate brakes: Provided a wrecker towing a disabled vehicle or vehicles of an emergency nature, only the weight of the vehicle or combination of vehicles being towed shall be considered. For the purposes of this subdivision, brakes shall not be required on the front wheels; provided, however, such vehicle must be capable of complying with the performance requirements of G.S. 20-124(e).

(11) The gross weight with normal load of passengers of any vehicle propelled by electric power obtained from trolley wires, but not operated upon rails, commonly known as an electric trackless trolley coach, which is operated as a part of the general trackless trolley system of passenger transportation of the City of Greensboro and vicinity, shall not exceed 30,000 pounds.

(12) No vehicle shall be operated on any highway the weight of which, resting on the surface of such highway, exceeds 600 pounds upon any inch of tire roller or other support.

Any vehicle or combination of vehicle and load may exceed the gross weight limitations for the vehicle or vehicle and load hereinbefore set out in this section by not more than five per centum (5%), except that under no circumstances shall the total weight, including tolerance, exceed 73,280 pounds on the National System of Interstate and Defense Highways unless changed by federal law.

For each violation of the gross weight limitation for the vehicle or vehicle and load the owner of the vehicle shall pay to the Division a penalty for each pound of weight of such vehicle or vehicle and load in excess of the weight limitations, including the five percent (5%), hereinbefore set out in this section for each vehicle or vehicle and load in accordance with the following schedule: for the first 2,000 pounds or any part thereof, two cents (2¢) per pound; for the next 3,000 pounds or any part thereof, four cents (4¢) per pound; for each pound in excess of 5,000 pounds, ten cents (10¢) per pound. Provided, however, for each violation of the gross weight limitation for the vehicle or vehicle and load when transporting meats and row crop products orginating from a farm, or forest products originating from a farm or from woodlands to first market, the owner of the vehicle shall pay the penalty according to the following schedule: for the first 2,000 pounds or any part thereof, one cent (1¢) per pound; for the next 3,000 pounds or any part thereof, two cents (2¢) per pound; for each pound in excess of 5,000 pounds, five cents (5¢) per pound.

Any vehicle or combination of vehicles operated on any highway on the State highway system shall also be subject to the safe load-carrying capacity for bridges as established and posted by the Department of Transportation pursuant to G.S. 136-72. (1937, c. 407, s. 82; 1943, c. 213, s. 2; cc. 726, 784; 1945, c. 242, s. 2; c. 569, s. 2; c. 576, s. 7; 1947, c. 1079; 1949, c. 1207, s. 2; 1951, c. 495, s. 2; c. 942, s. 1; c. 1013, ss. 5, 6, 8; 1953, cc. 214, 1092; 1959, c. 872; c. 1264, s. 6; 1963, c. 159; c. 610, ss. 3-5; c. 702, s. 5; 1965, cc. 483, 1044; 1969, c. 537; 1973, c. 507, s. 5; c. 1449, ss. 1, 2; 1975, c. 325; c. 373, s. 2; c. 716, s. 5; c. 735; c. 736, ss. 1-3; 1977, c. 461; c. 464, s. 34; 1977, 2nd Sess., c. 1178; 1981, c. 690, ss. 27, 28; c. 726; c. 1127, s. 53.1.)

Effect of Amendments. — The 1977, 2nd Sess., amendment, in subdivision (8), added "Unless the applicant holds a special permit from the Department of Transportation" at the beginning of the third sentence and deleted the former last sentence, which read: "No special permits shall be issued for any passenger buses exceeding the foregoing specified weights for each group."

The first 1981 amendment, effective July 1, 1981, substituted "four cents (4¢)" for "two cents (2¢)," "six cents (6¢)" for "three cents (3¢)," and "ten cents (10¢)" for "five cents (5¢)," in the first sentence of subdivision (5) and substituted "two cents (2¢)" for "one cent (1¢)," "four cents (4¢)" for "two cents (2¢)" and "ten cents (10¢)" for "five cents (5¢)" near the end of the next-to-last paragraph of the section.

The second 1981 amendment, in the seventh sentence of subdivision (5), substituted "axle weight" for "axle load" and "legal local limits" for "legal load limits" and inserted "or forest products originating from a farm or from woodlands."

The third 1981 amendment added the third sentence in subdivision (5) and added the second sentence of the next-to-last paragraph of the section.

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

§ 20-118.1. Peace officer may weigh vehicle and require removal of excess load; refusal to permit weighing.

Any peace officer having reason to believe that the weight of a vehicle and load is unlawful is authorized to weigh the same either by means of North Carolina Department of Transportation portable or stationary scales, and may require that such vehicle be driven to the nearest North Carolina Department of Transportation stationary scales in the event such scales are within five miles. The officer may then require the driver to unload immediately such portion of the load as may be necessary to decrease the gross weight of such vehicle to the maximum therefor specified in this Article. All material so unloaded shall be cared for by the owner or operator of such vehicle at the risk of such owner or operator. Any person who refuses to permit a vehicle being operated by him to be weighed as in this section provided or who refuses to drive said vehicle upon the scales provided for weighing for the purpose of being weighed, shall be guilty of a misdemeanor. No vehicle more than two miles from a North Carolina Department of Transportation stationary scales may be required to be driven to such scales unless the peace officer knows or reasonably suspects the vehicle has driven so as to avoid being weighed at the scales. (1927, c. 148, s. 37; 1949, c. 1207, s. 3; 1951, c. 1013, s. 4; 1979, c. 436, ss. 1, 2.)

Effect of Amendments. — The 1979 amendment inserted "North Carolina Department of Transportation" near the middle of the first sentence of this section, inserted "North Carolina Department of Transportation stationary" near the end of that sentence, and substituted "five" for "two" near the end of that sentence. The last sentence of this section was added.

§ 20-119. Special permits for vehicles of excessive size, weight, or number of units; fees.

(a) The Department of Transportation may, in their discretion, upon application, for good cause being shown therefor, issue a special permit in writing authorizing the applicant to operate or move a vehicle of a size or weight or number of units exceeding a maximum specified in this Article upon any highway under the jurisdiction and for the maintenance of which the body granting the permit is responsible. However, the Department is not authorized to issue any permit to operate or move over the State highways twin trailers, commonly referred to as double bottom trailers. Every such permit shall be carried in the vehicle to which it refers and shall be open to inspection by any

peace officer; and it shall be a misdemeanor for any person to violate any of the terms or conditions of such special permit: Provided, the authorities in any incorporated city or town may grant permits in writing and for good cause shown, authorizing the applicant to move a vehicle over the streets of such city or town, the size or weight exceeding the maximum expressed in this Article.

(b) Upon the issuance of a special permit for an oversize or overweight vehicle by the Department of Transportation in accordance with this section, the applicant shall pay to the Department a fee of five dollars ($5.00) for a single trip permit or twenty-five dollars ($25.00) for an annual permit issued for a single vehicle. Any person, firm or corporation who operates more than one vehicle may apply for, and the Department may issue, an annual permit for all oversize or overweight vehicles operated by said person, firm or corporation, and said applicant shall pay to the Department an annual fee based on the following schedule:

No. of Vehicles	*Annual Permit Rate Per Vehicle*
First 50	$25.00
51 to 100	20.00
101 to 150	15.00
Over 150	10.00

Any vehicle required to obtain an overweight permit shall not be charged an additional fee for oversize. Any vehicle required to obtain an oversize permit shall not be charged an additional fee for overweight. This subsection shall not apply to farm equipment or machinery being used at the time for agricultural purposes, nor to the moving of a house as provided for by the license and permit requirements of Article 16 of this Chapter. Fees will not be assessed for permits for oversize and overweight vehicles issued to any agency of the United States Government or the State of North Carolina, its agencies, institutions, subdivisions or municipalities, provided the vehicle is registered in the name of such governmental body.

(c) Nothing in this section shall require the Department of Transportation to issue any permit for any load. (1937, c. 407, s. 83; 1957, c. 65, s. 11; 1959, c. 1129; 1973, c. 507, s. 5; 1977, c. 464, s. 34; 1981, c. 690, ss. 31, 32; c. 736, ss. 1, 2.)

Effect of Amendments. — The first 1981 amendment, effective September 1, 1981, designated the former provisions of this section as subsection (a) and added subsections (b) and (c). In present subsection (a), the amendment substituted "for" for "in writing and" following "application" near the beginning of the first sentence and "weight" for "width" in the proviso at the end of the subsection.

The second 1981 amendment inserted "or number of units" in the first sentence and added the present second sentence of subsection (a).

CASE NOTES

Cited in C & H Transp. Co. v. North Carolina Div. of Motor Vehicles, 34 N.C. App. 616, 239 S.E.2d 309 (1977).

§ 20-122. Restrictions as to tire equipment.

(a) No vehicle will be allowed to move on any public highway unless equipped with tires of rubber or other resilient material which depend upon compressed air, for support of a load, except by special permission of the Department of Transportation which may grant such special permits upon a showing of necessity. This subsection shall have no application to the movement of farm vehicles on highways.

(1979, c. 515.)

Effect of Amendments. — The 1979 amendment rewrote subsection (a), which formerly provided that every solid rubber tire on vehicles moving on the highways of this state should have at least one and a half inches of rubber above the flange around the entire traction surface.

Only Part of Section Set Out. — As the other subsections were not changed by the amendment, only subsection (a) is set out.

§ 20-124. Brakes.

CASE NOTES

Violation Negligence Per Se. — The willingness of plaintiff's employee-driver and partner-owner to operate the tractor on a public highway with defective or malfunctioning brakes and knowledge thereof is negligence as a matter of law. Rose v. Herring Tractor & Truck Co., 47 N.C. App. 643, 267 S.E.2d 717 (1980).

§ 20-125. Horns and warning devices.

(a) Every motor vehicle when operated upon a highway shall be equipped with a horn in good working order capable of emitting sound audible under normal conditions from a distance of not less than 200 feet, and it shall be unlawful, except as otherwise provided in this section, for any vehicle to be equipped with or for any person to use upon a vehicle any siren, compression or spark plug whistle or for any person at any time to use a horn otherwise than as a reasonable warning or to make any unnecessary or unreasonable loud or harsh sound by means of a horn or other warning device. All such horns and warning devices shall be maintained in good working order and shall conform to regulation not inconsistent with this section to be promulgated by the Commissioner.

(b) Every vehicle owned and operated by a police department or by the Department of Crime Control and Public Safety including the State Highway Patrol or by the Wildlife Resources Commission and used exclusively for law-enforcement purposes, or by a fire department, either municipal or rural, or by a fire patrol, whether such fire department or patrol be a paid organization or a voluntary association, vehicles designed, equipped and used exclusively for the transportation of human tissues and organs for transplantation, and every ambulance used for answering emergency calls, shall be equipped with special lights, bells, sirens, horns or exhaust whistles of a type approved by the Commissioner of Motor Vehicles.

The operators of all such vehicles so equipped are hereby authorized to use such equipment at all times while engaged in the performance of their duties and services, both within their respective corporate limits and beyond.

In addition to the use of special equipment authorized and required by this subsection, the chief and assistant chiefs of any police department or of any fire department, whether the same be municipal or rural, paid or voluntary, county fire marshals and civil preparedness coordinators, are hereby authorized to use such special equipment on privately owned vehicles operated by them while actually engaged in the performance of their official or semiofficial duties or services either within or beyond their respective corporate limits.

And vehicles driven by inspectors in the employ of the North Carolina Utilities Commission shall be equipped with a bell, siren, or exhaust whistle of a type approved by the Commissioner, and all vehicles owned and operated by the State Bureau of Investigation for the use of its agents and officers in the performance of their official duties may be equipped with special lights, bells,

sirens, horns or exhaust whistles of a type approved by the Commissioner of Motor Vehicles.

Every vehicle used or operated for law-enforcement purposes by the sheriff or any salaried deputy sheriff or salaried rural policeman of any county, whether owned by the county or not, may be, but is not required to be, equipped with special lights, bells, sirens, horns or exhaust whistles of a type approved by the Commissioner of Motor Vehicles. Such special equipment shall not be operated or activated by any person except by a law-enforcement officer while actively engaged in performing law-enforcement duties.

In addition to the use of special equipment authorized and required by this subsection, the chief and assistant chiefs of each emergency rescue squad which is recognized or sponsored by any municipality or civil preparedness agency, are hereby authorized to use such special equipment on privately owned vehicles operated by them while actually engaged in their official or semiofficial duties or services either within or beyond the corporate limits of the municipality which recognizes or sponsors such organization.

(c) Repealed by Session Laws 1979, c. 653, s. 2, effective October 1, 1979. (1937, c. 407, s. 88; 1951, cc. 392, 1161; 1955, c. 1224; 1959, c. 166, s. 1; c. 494; c. 1170, s. 1; c. 1209; 1965, c. 257; 1975, c. 588; c. 734, s. 15; 1977, c. 52, s. 1; c. 438, s. 1; 1979, c. 653, s. 2; 1981, c. 964, s. 19.)

Effect of Amendments. — The 1979 amendment, effective October 1, 1979, repealed subsection (c), which authorized a special blue warning light for use on vehicles used for law-enforcement purposes and declared it to be unlawful for any other person to have or use such blue lights.

The 1981 amendment inserted "Department of Crime Control and Public Safety including the" near the beginning of the first paragraph of subsection (b).

§ 20-128.2. Motor vehicle emission standards.

(a) The rules and regulations promulgated pursuant to G.S. 143-215.107(a)(6) for the purposes of this section shall be limited to carbon monoxide, shall be statewide in scope but enforced on a county unit basis when ambient air pollutant concentrations exceed the National Ambient Air Quality Standards established pursuant to the Clean Air Act of 1970 as amended by the Clean Air Act amendments of 1977 and when the Environmental Management Commission certifies to the Commissioner of Motor Vehicles that the ambient air quality within a specified county requires a motor vehicle inspection/maintenance program; provided the Environmental Management Commission may prescribe different standards for different areas as may be necessary and appropriate to facilitate accomplishment of the stated purposes of this section. Such standards shall be no more restrictive or stringent than federal standards, as required by G.S. 143-215.107(f).

(b) Rules and regulations promulgated pursuant to this section shall be implemented through the use of the safety inspection stations licensed pursuant to Article 3A of Chapter 20 of the General Statutes. (1979, 2nd Sess., c. 1180, s. 2.)

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1180, s. 8, makes the act effective July 1, 1980.

Session Laws 1979, 2nd Sess., c. 1180, s. 7.1, contains a severability clause.

§ 20-129. Required lighting equipment of vehicles.

(a) When Vehicles Must Be Equipped. — Every vehicle upon a highway within this State during the period from a half hour after sunset to a half hour before sunrise, and at any other time when there is not sufficient light to render clearly discernible any person on the highway at a distance of 400 feet ahead, shall be equipped with lighted headlamps and rear lamps as in this section respectively required for different classes of vehicles, and subject to exemption with reference to lights on parked vehicles as declared in G.S. 20-134.

(b) Headlamps on Motor Vehicles. — Every self-propelled motor vehicle other than motorcycles, road machinery, and farm tractors shall be equipped with at least two headlamps, all in good operating condition with at least one on each side of the front of the motor vehicle. Headlamps shall comply with the requirements and limitations set forth in G.S. 20-131 or 20-132.

(c) Headlamps on Motorcycles. — Every motorcycle shall be equipped with at least one and not more than two headlamps which shall comply with the requirements and limitations set forth in G.S. 20-131 or 20-132. The headlamps on a motorcycle shall be lighted at all times while the motorcycle is in operation on highways or public vehicular areas.

(d) Rear Lamps. — Every motor vehicle, and every trailer or semitrailer attached to a motor vehicle and every vehicle which is being drawn at the end of a combination of vehicles, shall have all originally equipped rear lamps or the equivalent in good working order, which lamps shall exhibit a red light plainly visible under normal atmospheric conditions from a distance of 500 feet to the rear of such vehicle. One rear lamp or a separate lamp shall be so constructed and placed that the number plate carried on the rear of such vehicle shall under like conditions be illuminated by a white light as to be read from a distance of 50 feet to the rear of such vehicle. Every trailer or semitrailer shall carry at the rear, in addition to the originally equipped lamps, a red reflector of the type which has been approved by the Commissioner and which is so located as to height and is so maintained as to be visible for at least 500 feet when opposed by a motor vehicle displaying lawful undimmed lights at night on an unlighted highway.

Notwithstanding the provisions of the first paragraph of this subsection, it shall not be necessary for a trailer weighing less than 4,000 pounds to carry or be equipped with a rear lamp, provided such vehicle is equipped with and carries at the rear two red reflectors of a diameter of not less than three inches, such reflectors to be approved by the Commissioner, and which are so designed and located as to height and are maintained so that each reflector is visible for at least 500 feet when approached by a motor vehicle displaying lawful undimmed headlights at night on an unlighted highway.

The rear lamps of a motorcycle shall be lighted at all times while the motorcycle is in operation on highways or public vehicular areas.

(e) Lamps on Bicycles. — Every bicycle shall be equipped with a lighted lamp on the front thereof, visible under normal atmospheric conditions from a distance of at least 300 feet in front of such bicycle, and shall also be equipped with a reflex mirror or lamp on the rear, exhibiting a red light visible under like conditions from a distance of at least 200 feet to the rear of such bicycle, when used at night.

(f) Lights on Other Vehicles. — All vehicles not heretofore in this section required to be equipped with specified lighted lamps shall carry on the left side one or more lighted lamps or lanterns projecting a white light, visible under normal atmospheric conditions from a distance of not less than 500 feet to the front of such vehicle and visible under like conditions from a distance of not less than 500 feet to the rear of such vehicle, or in lieu of said lights shall be equipped with reflectors of a type which is approved by the Commissioner.

Farm tractors operated on a highway at night must be equipped with at least one white lamp visible at a distance of 500 feet from the front of the tractor and with at least one red lamp visible at a distance of 500 feet to the rear of the tractor. Two red reflectors each having a diameter of at least four inches may be used on the rear of the tractor in lieu of the red lamp.

(g) No person shall sell or operate on the highways of the State any motor vehicle, motorcycle or motor-driven cycle, manufactured after December 31, 1955, unless it shall be equipped with a stop lamp on the rear of the vehicle. The stop lamp shall display a red or amber light visible from a distance of not less than 100 feet to the rear in normal sunlight, and shall be actuated upon application of the service (foot) brake. The stop lamp may be incorporated into a unit with one or more other rear lamps. (1937, c. 407, s. 92; 1939, c. 275; 1947, c. 526; 1955, c. 1157, ss. 3-5, 8; 1957, c. 1038, s. 1; 1967, cc. 1076, 1213; 1969, c. 389; 1973, c. 531, ss. 1, 2; 1979, c. 175; 1981, c. 549, s. 1.)

Effect of Amendments. — The 1979 amendment substituted "400" for "200" near the middle of subsection (a).

The 1981 amendment substituted "three inches" for "four inches" near the middle of the second paragraph of subsection (d).

CASE NOTES

What Constitutes Violation. —

A five-cell flashlight taped to the handlebars of plaintiffs' motorcycle did not meet the qualifications implicit in the definition of the term headlamp; therefore, in an action to recover for injuries sustained in an accident between an automobile and plaintiffs' motorcycle, the trial court properly directed verdicts in favor of defendants because plaintiffs' failure to have a lighted headlamp as required by law constituted contributory negligence as a matter of law. Bigelow v. Johnson, 49 N.C. App. 40, 270 S.E.2d 503 (1980).

Violation as Negligence Per Se. —

In accord with 3rd paragraph in original. See Bigelow v. Johnson, 49 N.C. App. 40, 270 S.E.2d 503 (1980).

Headlamp Substitutes. — This section does not provide for headlamp substitutes, however powerful or reasonable. Bigelow v. Johnson, 49 N.C. App. 40, 270 S.E.2d 503 (1980).

Lights on Motor Vehicles Serve Two Purposes. —

In accord with original. See Bigelow v. Johnson, 49 N.C. App. 40, 270 S.E.2d 503 (1980).

Opportunity to Observe Whether Headlamps Were On. — Testimony of the plaintiff that she stopped at an intersection, looked both ways, and did not see lights coming from either direction, is evidence from which the jury could conclude that defendant approached the intersection without lights, since the plaintiff had adequate opportunity to observe whether headlights were on. McLean v. Henderson, 45 N.C. App. 707, 264 S.E.2d 120 (1980).

Cited in C & H Transp. Co. v. North Carolina Div. of Motor Vehicles, 34 N.C. App. 616, 239 S.E.2d 309 (1977); State v. Stewart, 40 N.C. App. 693, 253 S.E.2d 638 (1979).

§ 20-130. Additional permissible light on vehicle.

CASE NOTES

Applied in Bigelow v. Johnson, 49 N.C. App. 40, 270 S.E.2d 503 (1980).

§ 20-130.1. Use of red or blue lights on vehicles prohibited; exceptions.

(a) It is unlawful for any person to install or activate or operate a red light in or on any vehicle in this State. As used in this subsection, unless the context requires otherwise, "red light" means an operable red light not sealed in the manufacturer's original package which: (i) Is designed for use by an emergency vehicle or is similar in appearance to a red light designed for use by an emergency vehicle; and (ii) can be operated by use of the vehicle's battery, vehicle's electrical system, or a dry cell battery.

(b) The provisions of subsection (a) of this section do not apply to the following:

(1) A police car;
(2) A highway patrol car;
(3) A vehicle owned by the Wildlife Resources Commission and operated exclusively for law-enforcement purposes;
(4) An ambulance;
(5) A vehicle designed, equipped, and used exclusively for the transportation of human tissues and organs for transplantation;
(6) A fire-fighting vehicle;
(7) A school bus;
(8) A vehicle operated by any member of a municipal or rural fire department in the performance of his duties, regardless of whether members of that fire department are paid or voluntary;
(9) A vehicle of a voluntary lifesaving organization (including the private vehicles of the members of such an organization) that has been officially approved by the local police authorities and which is manned or operated by members of that organization while answering an official call;
(10) A vehicle operated by medical doctors or anesthetists in emergencies;
(11) A motor vehicle used in law-enforcement by the sheriff, or any salaried rural policeman in any county, regardless of whether or not the county owns the vehicle;
(12) A vehicle operated by any county fire marshal or civil preparedness coordinator in the performance of his duties, regardless of whether or not the county owns the vehicle; and
(13) Any lights that may be prescribed by the Interstate Commerce Commission.

(c) It is unlawful for any person to possess a blue light in or on any vehicle in this State. As used in this subsection, unless the context requires otherwise, "blue light" means an operable blue light not sealed in the manufacturer's original package which:

(1) Is designed for use by an emergency vehicle, or is similar in appearance to a blue light designed for use by an emergency vehicle; and
(2) Can be operated by use of the vehicle's battery, the vehicle's electrical system, or a dry cell battery.

(d) The provisions of subsection (c) of this section do not apply to a publicly owned vehicle used primarily for law-enforcement purposes or any other vehicle used primarily by law-enforcement officers in the performance of their official duties.

(e) Violation of subsection (a) or (c) of this section is a misdemeanor punishable under G.S. 14-3(a). (1943, c. 726; 1947, c. 1032; 1953, c. 354; 1955, c. 528; 1957, c. 65, s. 11; 1959, c. 166, s. 2; c. 1170, s. 2; 1967, c. 651, s. 1; 1971, c. 1214; 1977, c. 52, s. 2; c. 438, s. 2; 1979, c. 653, s. 1; c. 887.)

Effect of Amendments. — The first 1979 amendment, effective October 1, 1979, rewrote this section.

The second 1979 amendment inserted "(including the private vehicles of the members of such an organization)" near the beginning of subdivision (9) of subsection (b).

§ 20-130.2. Use of amber lights on certain vehicles.

All wreckers operated on the highways of the State shall be equipped with an amber-colored flashing light which shall be so mounted and located as to be clearly visible in all directions from a distance of 500 feet, which light shall be activated when at the scene of an accident or recovery operation and when towing a vehicle which has a total outside width exceeding 96 inches or which exceeds the width of the towing vehicle. It shall be lawful to equip any other vehicle with a similar warning light including, but not by way of limitation, maintenance or construction vehicles or equipment of the Department of Transportation engaged in performing maintenance or construction work on the roads, maintenance or construction vehicles of any person, firm or corporation, and any other vehicles required to contain a warning light. Radio Emergency Associated Citizens Team (REACT) vehicles may be equipped with amber lights which shall be activated only when the vehicles are parked. (1967, c. 651, s. 2; 1973, c. 507, s. 5; 1977, c. 464, s. 34; 1979, c. 1; c. 765; 1981, c. 390.)

Effect of Amendments. — The first 1979 amendment added "which light shall be activated when towing a vehicle" at the end of the first sentence.

The second 1979 amendment added the third sentence.

The 1981 amendment substituted the language beginning "when at the scene of an accident" for "when towing a vehicle" at the end of the first sentence.

CASE NOTES

Cited in Leisure Prods., Inc. v. Clifton, 44 N.C. App. 233, 260 S.E.2d 803 (1979).

§ 20-131. Requirements as to headlamps and auxiliary driving lamps.

CASE NOTES

Legislative Intent That Headlamp Be of Certain Type. — The requirement of this section that a motor vehicle headlamp be so constructed, arranged, and adjusted to produce visibility of a person 200 feet ahead indicates that the General Assembly intended that a headlamp be a certain type of specifically designed and positioned light, not merely any object which would illuminate the road for a minimum distance. Bigelow v. Johnson, 49 N.C. App. 40, 270 S.E.2d 503 (1980).

Persons Lying or Sleeping on Highway. — As the law does not require a motorist to anticipate that a person may be lying or sleeping on the travelled portion of the highway, this statute does not require that persons lying or sleeping on the highway be rendered clearly discernible as human beings by motor vehicle headlights. Sink v. Sumrell, 41 N.C. App. 242, 254 S.E.2d 665 (1979).

§ 20-134. Lights on parked vehicles.

CASE NOTES

Quoted in Thomas v. Deloatch, 45 N.C. App. 322, 263 S.E.2d 615 (1980).

§ 20-137.1. (Effective July 1, 1982) Child restraint systems required.

(a) Every driver required to have a North Carolina driver's license who is transporting his own child of less than two years of age, when the driver is operating his own motor vehicle (or a family purpose vehicle), shall have such child properly secured in a child passenger restraint system which is of a type (and which is installed in a manner) approved by the Commissioner of Motor Vehicles. Provided, however, this section shall not apply unless such child is occupying a seating position where seat safety belts are required by federal law or regulation. The requirements of this section may be met when the child is one year of age or older by securing the child in a seat safety belt.

The provisions of this section shall not apply: (i) to vehicles registered in another state or jurisdiction; (ii) to ambulances or other emergency vehicles; (iii) when the child's personal needs are being attended to; or (iv) if all seating positions equipped with child passenger restraint systems or seat safety belts are occupied.

(b) Any person violating this section during the period from July 1, 1982, to June 30, 1984, shall be given a warning ticket only. Thereafter a fine of ten dollars ($10.00) will be levied against violators. No driver license points shall be assessed for a violation of this section.

(c) A violation of this section shall not constitute negligence per se or contributory negligence per se. (1981, c. 804, ss. 1, 4, 5.)

Editor's Note. — Session Laws 1981, c. 804, s. 6, provides: "This act shall become effective on July 1, 1982, and shall expire on June 30, 1985."

§ 20-137.2. Operation of vehicles resembling law enforcement vehicles unlawful; punishment.

(a) It is unlawful for any person other than a law-enforcement officer of the State or of any county, municipality, or other political subdivision thereof, with the intent to impersonate a law-enforcement officer, to operate any vehicle, which by its coloration, insignia, lettering, and blue or red light resembles a vehicle owned, possessed, or operated by any law-enforcement agency.

(b) Violation of subsection (a) of this section is a misdemeanor punishable under G.S. 14-3. (1979, c. 567, s. 1.)

Editor's Note. — Session Laws 1979, c. 567, s. 2, makes the act effective January 1, 1980.

§§ 20-137.3 to 20-137.5: Reserved for future codification purposes.

Part 10. Operation of Vehicles and Rules of the Road.

§ 20-138. Persons under the influence of alcoholic beverages.

(a) It is unlawful and punishable as provided in G.S. 20-179 for any person who is under the influence of alcoholic beverages to drive or operate any vehicle upon any highway or any public vehicular area within this State.

(b) It is unlawful for any person to operate any vehicle upon any highway or any public vehicular area within this State when the amount of alcohol in such person's blood is 0.10 percent or more by weight and upon conviction if such conviction is a first conviction under this section, he shall be eligible for consideration for limited driving privileges pursuant to the provisions of G.S. 20-179(b), provided that second and subsequent convictions under this section shall be punishable as provided in G.S. 20-179(a)(2) and (3). An offense under this subsection shall be treated as a lesser included offense of the offense of driving under the influence. (1937, c. 407, s. 101; 1971, c. 619, s. 1; 1973, c. 1081, s. 1; 1981, c. 412, s. 4; c. 747, s. 66.)

Effect of Amendments. — The 1981 amendments, effective January 1, 1982, substituted "alcoholic beverages" for "intoxicating liquor" near the middle of subsection (a).

Legal Periodicals. — For survey of 1976 case law on criminal law, see 55 N.C.L. Rev. 976 (1977).

For a survey of 1977 criminal law, see 56 N.C.L. Rev. 965 (1978).

For survey of 1979 law on criminal procedure, see 58 N.C.L. Rev. 1404 (1980).

CASE NOTES

I. GENERAL CONSIDERATIONS.

A person may be "under the influence" of intoxicants in violation of this section of the motor vehicle laws and yet be quite capable of forming and carrying out a specific intent to kill. State v. Medley, 295 N.C. 75, 243 S.E.2d 374 (1978).

Cited in State v. Hice, 34 N.C. App. 468, 238 S.E.2d 619 (1977); In re Pinyatello, 36 N.C. App. 542, 245 S.E.2d 185 (1978); In re Gardner, 39 N.C. App. 567, 251 S.E.2d 723 (1979).

V. INSTRUCTIONS.

It is not mandated that the offense defined in subsection (b) be instructed on everytime there is an offense charged pursuant to subsection (a). State v. McLawhorn, 43 N.C. App. 695, 260 S.E.2d 138 (1979), cert. denied, 299 N.C. 123, 261 S.E.2d 925 (1980).

In a prosecution for driving under the influence of intoxicating liquor, second offense, and driving with a revoked license, fourth offense, where evidence was introduced which indicated that a breathalyzer test revealed 0.11 percent alcohol by blood weight in defendant, it was not error to fail to instruct the jury on the offense of operating a vehicle on a public highway when blood alcohol content is 0.10 percent by weight in violation of subsection (b), since, although the instruction could have been given, the omission of the instruction was to defendant's benefit, since under subsection (a), the State must prove beyond a reasonable doubt defendant was under the influence of intoxicating liquor, while for a conviction under subsection (b) the State need only prove that the amount of alcohol in defendant's blood was 0.10 percent or more by weight. Thus, by not instructing on the latter motor vehicle violation, the trial judge benefited defendant and handicapped the State. State v. McLawhorn, 43 N.C. App. 695, 260 S.E.2d 138 (1979), cert. denied, 299 N.C. 123, 261 S.E.2d 925 (1980).

Instructions on Lesser Included, etc. —

Where the State's evidence was positive as to each and every element of operating a motor vehicle under the influence of intoxicating liquor, and there was no conflicting evidence presented which might support a charge on the lesser degree of reckless driving, the trial judge correctly refused to submit requested instructions with respect to reckless driving. State v. Snead, 295 N.C. 615, 247 S.E.2d 893 (1978).

The trial judge, on trial de novo in the superior court, erred in instructing the jury on reckless driving under § 20-140(a) and should have instructed on § 20-140(c), where the defendant had been charged in the district court with drunken driving under this section but

was convicted of the lesser included offense under § 20-140(c), since the offense of reckless driving under § 20-140(c) is a specific misdemeanor, and the superior court has no jurisdiction to try an accused for a specific misdemeanor on the warrant of an inferior court unless he is first tried and convicted, and appeals to the superior court from the sentence pronounced. State v. Robinson, 40 N.C. App. 514, 253 S.E.2d 311 (1979).

VI. CONVICTIONS.

Second Offense Provision of § 20-179(a) Not Triggered By Allegation of Prior Conviction More Than Three Years Previous. — A statement of charges for the offense of driving under the influence of alcoholic beverages did not allege a second violation of this section so as to trigger the second offense provision of § 20-179(a), since it alleged that defendant had previously been convicted of the same offense on a date more than three years prior to the date of the current offense; therefore, defendant was prejudiced by the state's introduction of evidence of his earlier conviction and by numerous references to the earlier conviction throughout the trial. State v. Woodson, 49 N.C. App. 689, 272 S.E.2d 167 (1980).

Applied in In re Greene, 297 N.C. 305, 255 S.E.2d 142 (1979).

Cited in Durland v. Peters, 42 N.C. App. 25, 255 S.E.2d 650 (1979).

§ 20-139. Persons under the influence of drugs.

Legal Periodicals. — For survey of 1979 law on criminal procedure, see 58 N.C.L. Rev. 1404 (1980).

CASE NOTES

Applied in In re Greene, 297 N.C. 305, 255 S.E.2d 142 (1979).

§ 20-139.1. Result of a chemical analysis admissible in evidence; presumption.

(a) In any criminal action arising out of acts alleged to have been committed by any person while driving or operating a vehicle while under the influence of alcoholic beverages or with a blood alcohol content of 0.10 percent or more by weight, the amount of alcohol in the person's blood at the time alleged as shown by chemical analysis of the person's breath or blood shall be admissible in evidence. The percent by weight of alcohol in the blood shall be based upon milligrams of alcohol per 100 cubic centimeters of blood. The provisions of this section shall not be construed as limiting the introduction of any other competent evidence, including other types of chemical analyses.

(b) Chemical analyses of the person's breath or blood, to be considered valid under the provisions of this section, shall have been performed according to methods approved by the Commission for Health Services and by an individual possessing a valid permit issued by the Department of Human Resources for this purpose. The Department of Human Resources is authorized to approve satisfactory techniques or methods, to ascertain the qualifications and competence of individuals to conduct such analyses, and the Department of Human Resources may issue permits which shall be subject to termination or revocation at the discretion of the Department of Human Resources; provided, that in no case shall the arresting officer or officers administer said test.

(c) When a person shall submit to a blood test at the request of a law-enforcement officer under the provisions of G.S. 20-16.2 only a physician or a registered nurse (or other qualified person) may withdraw blood for the purpose of determining the alcoholic content therein. If the person withdrawing the blood indicates his desire for written confirmation of the law-enforcement officer's request for the withdrawal of blood, the officer shall

furnish it prior to the withdrawal of blood. When blood is withdrawn pursuant to an officer's request, neither the person withdrawing the blood nor any hospital, laboratory, or other institution, person, firm, or corporation employing him, or contracting for the service of withdrawing blood, shall be held criminally or civilly liable by reason of withdrawing blood from another; provided that there shall be no immunity from liability for negligent acts or omissions in withdrawing blood from another pursuant to this section.

(d) The person tested may have a physician, or a qualified technician, chemist, registered nurse, or other qualified person of his own choosing administer a chemical test or tests in addition to any administered at the direction of a law-enforcement officer. The failure or inability of the person tested to obtain an additional test shall not preclude the admission of evidence relating to the test or tests taken at the direction of a law-enforcement officer. Any law-enforcement officer having in his charge any person who has submitted to the chemical test under the provisions of G.S. 20-16.2 shall assist such person in contacting a qualified person as set forth above for the purpose of administering such additional test.

(e) The individual making such chemical analysis of a person's breath shall record in writing the time of arrest and the time and results of such analysis, a copy of which record shall be furnished to the person submitting to said test or to his attorney prior to any trial or proceeding where the results of the test may be used.

(f) If a person under arrest refuses to submit to a chemical test or tests under the provisions of G.S. 20-16.2, evidence of refusal shall be admissible in any criminal action arising out of acts alleged to have been committed while the person was driving or operating a vehicle while under the influence of alcoholic beverages.

(g) The Department of Human Resources is empowered to make regulations concerning the ingestion of controlled amounts of beverages containing ethyl alcohol by individuals submitting to chemical analyses as a part of scientific, experimental, educational, or demonstration programs. Such regulations shall prescribe procedures consistent with controlling federal law governing the acquisition, transportation, possession, storage, administration, and disposition of ethyl alcohol or of beverages containing ethyl alcohol intended for use in such programs. Any person acquiring ethyl alcohol or beverages containing ethyl alcohol under such regulations shall keep records accounting for the disposition of all ethyl alcohol and beverages containing ethyl alcohol so acquired, and such records shall at all reasonable times be available for inspection upon the request of any federal or State law-enforcement officer with jurisdiction over the laws relating to alcohol or alcoholic beverages. All acts done pursuant to such regulations reasonably in furtherance of bona fide objectives of the chemical testing program within this State shall be lawful notwithstanding the provisions of any other general, special, or local statute or any ordinance or regulation of the State or of any agency or subdivision of the State. Regulations of the Department of Human Resources adopted pursuant to this section shall be filed and published in accordance with the provisions of Chapter 150A of the General Statutes. (1963, c. 966, s. 2; 1967, c. 123; 1969, c. 1074, s. 2; 1971, c. 619, ss. 12, 13; 1973, c. 476, s. 128; c. 1081, s. 2; c. 1331, s. 3; 1975, c. 405; 1979, 2nd Sess., c. 1089; 1981, c. 412, s. 4; c. 747, s. 66.)

Effect of Amendments. — The 1979, 2nd Sess., amendment, effective October 1, 1980, substituted the present second and third sentences of subsection (c) for the former second sentence, which read: "No such person shall be held to answer in any criminal or civil action for assault or battery by reason of withdrawing blood from another under this section; provided, however, that no person shall be relieved of liability for negligent acts of or omissions in withdrawing blood from another under the provisions of this section."

The 1981 amendments, effective January 1, 1982, substituted "alcoholic beverages" for

"intoxicating liquor" in subsections (a), (f) and (g).

Legal Periodicals. — For survey of 1978 law on criminal procedure, see 57 N.C.L. Rev. 1007 (1979).

CASE NOTES

I. GENERAL CONSIDERATION.

This section relates only, etc. —

The chemical analysis (Breathalyzer) test authorized by this section is, by its express terms, applicable only to criminal actions arising out of the operation of a motor vehicle and has no application to criminal responsibility for homicide. State v. Medley, 295 N.C. 75, 243 S.E.2d 374 (1978).

What the state must establish under subsection (b) of this section are (1) that the person administering the test possessed "a valid permit issued by the Department of Human Resources for this purpose" and (2) that the test was "performed according to methods approved by the Commission for Health Services." State v. Martin, 46 N.C. App. 514, 265 S.E.2d 456 (1980).

The state need not offer proof of "preventive maintenance procedures." State v. Martin, 46 N.C. App. 514, 265 S.E.2d 456 (1980).

II. ADMINISTRATION OF TEST.

The purpose, etc. —

In accord with original. See State v. Jordan, 35 N.C. App. 652, 242 S.E.2d 192 (1978).

The principle that underlies the limitation in subsection (b) of this section seems to be that, in the interest of fairness as well as the appearance of fairness, an officer, whose judgment in selecting a defendant for arrest or in making the arrest may be at issue at trial, should not administer the chemical test that will either confirm or refute the soundness of his earlier judgment in causing the arrest. State v. Jordan, 35 N.C. App. 652, 242 S.E.2d 192 (1978).

Officer Who Previously Arrested Defendant on Similar Charge May Administer Test. — Where an officer had nothing to do with defendant's second arrest, his arrest of defendant on a similar charge earlier in the morning did not bring him within the disqualification set out in subsection (b) of this section. State v. Jordan, 35 N.C. App. 652, 242 S.E.2d 192 (1978).

How Mandate of Subsection (b) Can Be Met. — The mandate of subsection (b) of this section can be met in one of three ways: (1) by stipulation between the defendant and the State that the individual who administers the test holds a valid permit issued by the Department of Human Resources; or (2) by offering the permit of the individual who administers the test into evidence and in the event of conviction from which an appeal is taken, by bringing forward the exhibit as a part of the record on appeal; or (3) by presenting any other evidence which shows that the individual who administered the test holds a valid permit issued by the Department of Human Resources. State v. Mullis, 38 N.C. App. 40, 247 S.E.2d 265 (1978).

How Mandate of Subsection (b) Can Be Met. —

A statement by the State trooper who administered a breathalyzer test to the defendant that he holds a particular certificate number from the Department of Human Resources stating that he is qualified as a breathalyzer operator provides the basis for a reasonable inference that he possessed a valid permit at the time he administered the test to defendant, although it is not established when the permit was issued. State v. Doggett, 41 N.C. App. 304, 254 S.E.2d 793 (1979).

Arresting Officer Cannot Administer Test. — An officer cannot administer the breathalyzer test if he was at the scene of a crime and participated in the arrest. State v. Spencer, 46 N.C. App. 507, 265 S.E.2d 451 (1980).

The breathalyzer operator is not required to remind the subject of his Miranda rights, since the test does not constitute evidence of a testimonial nature. State v. Spencer, 46 N.C. App. 507, 265 S.E.2d 451 (1980).

§ 20-140. Reckless driving.

(a) Any person who drives any vehicle upon a highway or any public vehicular area carelessly and heedlessly in willful or wanton disregard of the rights or safety of others shall be guilty of reckless driving.

(b) Any person who drives any vehicle upon a highway or any public vehicular area without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property shall be guilty of reckless driving.

(c) Any person who operates a motor vehicle upon a highway or public vehicular area after consuming such quantity of alcoholic beverages as directly and visibly affects his operation of said vehicle shall be guilty of reckless driving and such offense shall be a lesser included offense of driving under the influence of alcoholic beverages as defined in G.S. 20-138 as amended.

(d) Any person convicted of violating subsection (a) or subsection (b) of this section shall be punished by imprisonment not to exceed six months or by a fine not to exceed five hundred dollars ($500.00) or by both such imprisonment and fine, in the discretion of the court.

(e) Any person convicted of violating subsection (c) of this section shall be punished by a fine of not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00) and a term of imprisonment not to exceed six months, which term of imprisonment may be suspended by the trial court upon such terms and conditions as it may see fit provided that such terms and conditions shall include the term and condition that the person so convicted shall successfully complete the program of instruction at an Alcohol and Drug Education Traffic School established pursuant to G.S. 20-179.2 within 90 days of the date of said conviction, unless the judges make a written finding in the record that:

(1) There is no Alcohol or Drug Education Traffic School within a reasonable distance of the defendant's residence; or

(2) The defendant, because of his history of alcohol or drug abuse, is not likely to benefit from the program of instruction; or

(3) There are specific, extenuating circumstances which make it likely that the defendant will not benefit from the program of instruction.

The trial judge shall enter such specific findings in the record provided that in the case of subdivision (2) above such findings shall include the exact reasons why the defendant is not likely to benefit from the program of instruction and that in the case of subdivision (3) above such findings shall include the specific, extenuating circumstances which make it likely that the defendant will not benefit from the program of instruction. (1937, c. 407, s. 102; 1957, c. 1368, s. 1; 1959, c. 1264, s. 8; 1973, c. 1330, s. 3; 1979, c. 903, ss. 7, 8; 1981, c. 466, s. 7.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1980, substituted "violating subsection (a) or subsection (b) of this section" for "reckless driving" near the beginning of subsection (d), and added subsection (e).

The first 1981 amendment, effective Oct. 1, 1981, substituted "established pursuant to G.S. 20-179.2 within 90 days" for "within 75 days" near the end of the introductory portion of the first sentence of subsection (e). Session Laws 1981, c. 466, s. 8, provides: "This act shall become effective October 1, 1981, and shall apply to persons assigned to Alcohol and Drug Education Traffic Schools on and after that date."

The second 1981 amendment, effective January 1, 1982, substituted "alcoholic beverages" for "intoxicating liquor" in subsection (c).

CASE NOTES

I. GENERAL CONSIDERATION.

Applied in State v. McLawhorn, 43 N.C. App. 695, 260 S.E.2d 138 (1979).

Quoted in State v. Snead, 35 N.C. App. 724, 242 S.E.2d 530 (1978); State v. Covington, 48 N.C. App. 209, 268 S.E.2d 231 (1980).

VII. INSTRUCTIONS.

Failure of Court to Instruct on Reckless Driving Was Prejudicial Error. — Where the defendant, who had obviously been drinking, was observed driving at an excessive speed with at least half the car over the center line at times and weaving severely, this was some evidence from which a jury might find that defendant was driving after consuming "such quantity of intoxicating liquor as directly and visibly affects his operation of said vehicle." The jury should, therefore, have been instructed concerning the statutory offense of reckless driving under sub-

section (c) of this section and the failure of the court to do so was prejudicial error. State v. Davis, 37 N.C. App. 735, 247 S.E.2d 14 (1978).

Trial Court Correctly Refused Reckless Driving Instruction. — Where the State's evidence was positive as to each and every element of operating a motor vehicle under the influence of intoxicating liquor, and there was no conflicting evidence presented which might support a charge on the lesser degree of reckless driving, the trial judge correctly refused to submit requested instructions with respect to reckless driving. State v. Snead, 295 N.C. 615, 247 S.E.2d 893 (1978).

Charge on Lesser Included, etc. — The trial judge, on trial de novo in the superior court, erred in instructing the jury on reckless driving under subsection (a) of this section and should have instructed on subsection (c) of this section, where the defendant had been charged in the district court with drunken driving under § 20-138 but was convicted of the lesser included offense under subsection (c) of this section, since the offense of reckless driving under that subsection is a specific misdemeanor, and the superior court has no jurisdiction to try an accused for a specific misdemeanor on the warrant of an inferior court unless he is first tried and convicted, and appeals to the superior court from the sentence pronounced. State v. Robinson, 40 N.C. App. 514, 253 S.E.2d 311 (1979).

§ 20-141. Speed restrictions.

CASE NOTES

I. GENERAL CONSIDERATION.

Hazardous Conditions. — This section requires the motorist to decrease his speed when special hazards exist by reason of weather and highway conditions, to the end that others using the highway may not be injured. Sessoms v. Roberson, 47 N.C. App. 573, 268 S.E.2d 24 (1980).

Applied in State v. Spellman, 40 N.C. App. 591, 253 S.E.2d 320 (1979).

Cited in Holt v. City of Statesville, 35 N.C. App. 381, 241 S.E.2d 362 (1978); Cockrell v. Cromartie Transp. Co., 295 N.C. 444, 245 S.E.2d 497 (1978); Woods v. Smith, 297 N.C. 363, 255 S.E.2d 174 (1979); Sink v. Sumrell, 41 N.C. App. 242, 254 S.E.2d 665 (1979).

OPINIONS OF ATTORNEY GENERAL

Section 20-141(m) Does Create a Criminal Offense of Failure to Decrease Speed as Necessary to Avoid a Collision as Well as a "Standard of Care" in Establishing Civil Negligence. — See opinion of Attorney General to Ms. Mary Claire McNaught, Public Safety Attorney, Winston-Salem, N.C., 48 N.C.A.G. 2 (1979).

§ 20-141.1. Speed limits in school zones.

The Board of Transportation or local authorities within their respective jurisdictions may, by ordinance, set speed limits lower than those designated in G.S. 20-141 for areas adjacent to or near a public, private or parochial school. Limits set pursuant to this section shall become effective when signs are erected giving notice of the school zone, the authorized speed limit, and the days and hours when the lower limit is effective, or by erecting signs giving notice of the school zone, the authorized speed limit and which indicate the days and hours the lower limit is effective by an electronic flasher operated with a time clock. Limits set pursuant to this section may be enforced only on days when school is in session, and no speed limit below 20 miles per hour may be set under the authority of this section. (1977, c. 902, s. 2; 1979, c. 613.)

Effect of Amendments. — The 1979 amendment added "or by erecting signs giving notice of the school zone, the authorized speed limit and which indicate the days and hours the lower limit is effective by an electronic flasher operated with a time clock" at the end of the second sentence of this section.

§ 20-141.3. Unlawful racing on streets and highways.

(d) The Commissioner of Motor Vehicles shall revoke the driver's license or privilege to drive of every person convicted of violating the provisions of subsection (a) or subsection (c) of this section, said revocation to be for three years; provided any person whose license has been revoked under this section may apply for a new license after 18 months from revocation. Upon filing of such application the Division may issue a new license upon satisfactory proof that the former licensee has been of good behavior for the past 18 months and that his conduct and attitude are such as to entitle him to favorable consideration and upon such terms and conditions which the Division may see fit to impose for the balance of the three-year revocation period, which period shall be computed from the date of the original revocation.

(e) The Commissioner may suspend the driver's license or privilege to drive of every person convicted of violating the provisions of subsection (b) of this section. Such suspension shall be for a period of time within the discretion of the Commissioner, but not to exceed one year.

(1979, c. 667, s. 31.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1981, substituted "driver's" for "operator's or chauffeur's" near the beginning of the first sentences of subsections (d) and (e).

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.' "

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsections (d) and (e) are set out.

CASE NOTES

Violation of the racing statute is negligence per se. Harrington v. Collins, 40 N.C. App. 530, 253 S.E.2d 288, aff'd, 298 N.C. 535, 259 S.E.2d 275 (1979).

Passenger Must Actively Participate, Not Merely Fail to Speak, to Be Negligent. — In order for a passenger to be a party to the offense under subsection (a) of this section and to be jointly and concurrently negligent, he must do more than fail to speak, remonstrate or leave the car. The evidence must show the passenger in some way participated or was involved in the race in order to constitute acquiescence. Harrington v. Collins, 40 N.C. App. 530, 253 S.E.2d 288, aff'd, 298 N.C. 535, 259 S.E.2d 275 (1979).

Where defendant driver's participation in a prearranged speed competition in violation of this section constituted willful or wanton conduct and was a proximate cause of plaintiff's injuries, and plaintiff had no notice of an agreement to race when he entered the car, plaintiff's failure to remonstrate or to leave the car at a rural crossroads minutes past midnight on a cold Christmas Eve does not constitute willful or wanton conduct as a matter of law which would bar his action against the driver of the second car involved in the race for injuries caused by defendant's willful or wanton conduct. Harrington v. Collins, 298 N.C. 535, 259 S.E.2d 275 (1979).

Defendant's participation in a prearranged automobile race constituted willful or wanton conduct and was, as a matter of law, a proximate cause of injuries received by plaintiff passenger in a collision during the race. Harrington v. Collins, 40 N.C. App. 530, 253 S.E.2d 288, aff'd, 298 N.C. 535, 259 S.E.2d 275 (1979).

§ 20-141.4. Death by vehicle.

Legal Periodicals. — For survey of 1976 case law on criminal law, see 55 N.C.L. Rev. 976 (1977).

CASE NOTES

State Need Not Prove Any Intentional or Reckless Conduct. — A jury instruction which, in distinguishing death by vehicle from involuntary manslaughter, merely pointed out that with respect to the offense of death by vehicle the State is not required to prove any intentional or reckless conduct on the part of the defendant, comported with the definition in this section. State v. Thompson, 37 N.C. App. 444, 246 S.E.2d 81, cert. denied, 295 N.C. 652, 248 S.E.2d 257 (1978).

The failure of the trial judge to allow the jury to consider the lesser degree of homicide of death by vehicle constituted prejudicial error that was not cured by a verdict of guilty of the more serious crime of involuntary manslaughter, where the evidence would have permitted the jury to find the defendant guilty of death by vehicle. State v. Baum, 33 N.C. App. 633, 236 S.E.2d 31, cert. denied, 293 N.C. 253, 237 S.E.2d 536 (1977).

Expert Testimony as to Cause of Death Unnecessary. — It is not always necessary to have an expert testify as to the cause of death where all of the facts disclose a set of circumstances from which any person of average intelligence could be satisfied beyond a reasonable doubt that the fatality occurred in the collision. State v. Smith, 37 N.C. App. 64, 245 S.E.2d 227 (1978).

Charge Based on Conviction for Violating § 20-174(e). — Where the evidence is sufficient to permit conviction for a violation of § 20-174(e), it follows that submission of the charge of death by vehicle based on a violation of that section was proper. State v. Fearing, 48 N.C. App. 329, 269 S.E.2d 245, cert. denied, 301 N.C. 99, 273 S.E.2d 303, 301 N.C. 403, 273 S.E.2d 448 (1980).

Cited in State v. Hice, 34 N.C. App. 468, 238 S.E.2d 619 (1977).

§ 20-143.1. Certain vehicles must stop at railroad grade crossings.

(a) The driver of every school bus, every motor vehicle carrying passengers for compensation and every property-hauling motor vehicle licensed in excess of 10,000 pounds which is carrying explosives or any dangerous article as a cargo or part of a cargo, before crossing at grade any track or tracks of a railroad, shall stop such vehicle within 50 feet but not less than 10 feet from the nearest rail of such railroad and while so stopped shall listen and look in both directions along such track for any approaching train and for any signals indicating the approach of a train, except as hereinafter provided, and shall not proceed until he can do so safely. Upon proceeding, the driver of such vehicle shall cross only in such gear of the vehicle that there shall be no necessity for changing gears and the driver shall not change gears while crossing the track or tracks.

(b) Except for school buses, the provisions of this section shall not require the driver of a vehicle to stop:

(1) At railroad tracks used exclusively for industrial switching purposes within a business district.

(2) At a railroad grade crossing which a police officer or crossing flagman directs traffic to proceed.

(3) At a railroad grade crossing protected by a gate or flashing signal designed to stop traffic upon the approach of a train, when such gate or flashing signal does not indicate the approach of a train.

(4) At an abandoned railroad grade crossing which is marked with a sign indicating that the rail line is abandoned.

(5) At an industrial or spur line railroad grade crossing marked with a sign reading "Exempt Crossing," which sign has been erected by or with the consent of the appropriate State or local authority.

(c) "Dangerous article" shall mean any flammable liquids, flammable solids, oxidizing materials, corrosive liquids, compressed gases, poisonous substances or radioactive materials as hereinafter defined.

(1) "Flammable liquids" shall mean any liquid which gives off flammable vapors, (as determined by flash point from Tagliabue's open-cup tester

as used for test of burning oil) at or below a temperature of 80 degrees F.

(2) "Flammable solids" shall mean any solid substance which is liable, under conditions incident to transportation, to cause fires through friction, through absorption of moisture, through spontaneous chemical changes, or as a result of retained heat from its manufacturing or processing.

(3) "Oxidizing materials" shall mean any substance such as chlorate, permanganate, peroxide, or a nitrate, that yields oxygen readily to stimulate the combustion of organic matter.

(4) "Corrosive liquids" shall mean those acids, alkaline caustic liquids and other corrosive liquids which, when in contact with living tissue, will cause severe damage of such tissue by chemical action, or in case of leakage, will materially damage or destroy other freight by chemical action, or are liable to cause fire when in contact with organic matter or with certain chemicals.

(5) "Compressed gas" shall mean any material or mixture having in the container either an absolute pressure exceeding 40 pounds per square inch at 70 degrees F., or an absolute pressure exceeding 104 pounds per square inch at 130 degrees F., or both, or any liquid flammable material having a Reid vapor pressure exceeding 40 pounds per square inch absolute at 100 degree F.

(6) "Poisonous substances" shall mean liquids and gases of such nature that a very small amount of the gas or vapor of the liquid mixed with air is dangerous to life, or such liquid or solid substance as, upon contact with fire or when exposed to air, gives off dangerous or intensely irritating fumes or substances, which are chiefly dangerous by external contact with the body or by being taken internally.

(7) "Radioactive materials" shall mean any material or combination of materials that spontaneously emits ionizing radiation.

(d) It shall be unlawful to transport by motor vehicle upon the highways of this State any dangerous article without conspicuously marking or placarding such motor vehicle on each side and on the rear thereof with the word "DANGEROUS" or the common or generic name of the article transported or its principal hazard. Additionally, the rear of every such vehicle shall be conspicuously marked with the words "THIS VEHICLE STOPS AT RAILROAD CROSSINGS."

(e) The provisions of this section shall not apply to taxicabs nor to vehicles subject to the rules and regulations adopted by the North Carolina Utilities Commission and the United States Department of Transportation. (1969, c. 1231, s. 2; 1973, c. 1330, s. 12; 1981, c. 98.)

Effect of Amendments. — The 1981 amendment added "Except for school buses" to the beginning of subsection (b).

§ 20-146. Drive on right side of highway; exceptions.

CASE NOTES

The purpose of this section, etc. —

In accord with original. See Sessoms v. Roberson, 47 N.C. App. 573, 268 S.E.2d 24 (1980).

Violation of this section is negligence per se. —

In accord with 3rd paragraph in original. See Sessoms v. Roberson, 47 N.C. App. 573, 268 S.E.2d 24 (1980).

Negligence Per Se Rule Inapplicable to Police. — The principle that violation of this section constitutes negligence per se is not applicable to law-enforcement officers, who are not to be deemed negligent merely for failure to

observe the rules of the road while engaged in the pursuit of lawbreakers. Wade v. Grooms, 37 N.C. App. 428, 246 S.E.2d 17 (1978).

Proximate Cause. —

In accord with 3rd paragraph in original. See Sessoms v. Roberson, 47 N.C. App. 573, 268 S.E.2d 24 (1980).

Defendant May Show Cause of Violation Not Negligence. — A violation of this section (requiring a vehicle operator to drive on the right side of the highway, with certain exceptions) is negligence per se. However, a defendant may escape liability by showing that he was on the wrong side of the road from a cause other than his own negligence. Nationwide Mut. Ins. Co. v. Chantos, 298 N.C. 246, 258 S.E.2d 334 (1979).

Evidence Sufficient to Show Violation, etc. —

In accord with 5th paragraph in original. See Sessoms v. Roberson, 47 N.C. App. 573, 268 S.E.2d 24 (1980).

Applied in Asbury v. City of Raleigh, 48 N.C. App. 56, 268 S.E.2d 562 (1980).

§ 20-147. Keep to the right in crossing intersections or railroads.

CASE NOTES

Cited in Rector v. James, 41 N.C. App. 267, 254 S.E.2d 633 (1979).

§ 20-148. Meeting of vehicles.

CASE NOTES

Applied in Asbury v. City of Raleigh, 48 N.C. App. 56, 268 S.E.2d 562 (1980).

Cited in Harris v. Bridges, 46 N.C. App. 207, 264 S.E.2d 804 (1980).

§ 20-150. Limitations on privilege of overtaking and passing.

(e) The driver of a vehicle shall not overtake and pass another on any portion of the highway which is marked by signs, markers or markings placed by the Department of Transportation stating or clearly indicating that passing should not be attempted.

(1979, c. 472.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, deleted "or" before "markers" and added "or markings" after that word near the middle of subsection (e).

Only Part of Section Set Out. — As the other subsections were not changed by the amendment, only subsection (e) is set out.

CASE NOTES

Cited in Bell v. Brueggemyer, 35 N.C. App. 658, 242 S.E.2d 392 (1978); Rector v. James, 41 N.C. App. 267, 254 S.E.2d 633 (1979).

OPINIONS OF ATTORNEY GENERAL

Solid center lines are considered to be "markers." See opinion of Attorney General to Ms. Claire McNaught, Public Safety Attorney, July 2, 1979.

§ 20-150.1. When passing on the right is permitted.

CASE NOTES

Cited in Oliver v. Royall, 36 N.C. App. 239, 243 S.E.2d 436 (1978).

§ 20-152. Following too closely.

CASE NOTES

Cited in Shay v. Nixon, 45 N.C. App. 108, 262 S.E.2d 294 (1980).

§ 20-154. Signals on starting, stopping or turning.

(a) The driver of any vehicle upon a highway before starting, stopping or turning from a direct line shall first see that such movement can be made in safety, and if any pedestrian may be affected by such movement shall give a clearly audible signal by sounding the horn, and whenever the operation of any other vehicle may be affected by such movement, shall give a signal as required in this section, plainly visible to the driver of such other vehicle, of the intention to make such movement. The driver of a vehicle shall not back the same unless such movement can be made with safety and without interfering with other traffic.

(b) The signal herein required shall be given by means of the hand and arm in the manner herein specified, or by any mechanical or electrical signal device approved by the Division, except that when a vehicle is so constructed or loaded as to prevent the hand and arm signal from being visible, both to the front and rear, the signal shall be given by a device of a type which has been approved by the Division.

Whenever the signal is given the driver shall indicate his intention to start, stop, or turn by extending the hand and arm from and beyond the left side of the vehicle as hereinafter set forth.

Left turn — hand and arm horizontal, forefinger pointing.

Right turn — hand and arm pointed upward.

Stop — hand and arm pointed downward.

All hand and arm signals shall be given from the left side of the vehicle and all signals shall be maintained or given continuously for the last 100 feet traveled prior to stopping or making a turn. Provided, that in all areas where the speed limit is 45 miles per hour or higher and the operator intends to turn from a direct line of travel, a signal of intention to turn from a direct line of travel shall be given continuously during the last 200 feet traveled before turning.

Any motor vehicle in use on a highway shall be equipped with, and required signal shall be given by, a signal lamp or lamps or mechanical signal device when the distance from the center of the top of the steering post to the left

outside limit of the body, cab or load of such motor vehicle exceeds 24 inches, or when the distance from the center of the top of the steering post to the rear limit of the body or load thereof exceeds 14 feet. The latter measurement shall apply to any single vehicle, also to any combination of vehicles except combinations operated by farmers in hauling farm products.

(c) No person shall operate over the highways of this State a right-hand-drive motor vehicle or a motor vehicle equipped with the steering mechanism on the right-hand side thereof unless said motor vehicle is equipped with mechanical or electrical signal devices by which the signals for left turns and right turns may be given. Such mechanical or electrical devices shall be approved by the Division.

(d) A violation of this section shall not constitute negligence per se. (1937, c. 407, s. 116; 1949, c. 1016, s. 1; 1951, cc. 293, 360; 1955, c. 1157, s. 9; 1957, c. 488, s. 2; 1965, c. 768; 1973, c. 1330, s. 19; 1975, c. 716, s. 5; 1981, c. 599, s. 4.)

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, deleted a proviso from the end of the sixth paragraph of subsection (b), which read "and provided further that the violation of this section shall not constitute negligence per se."

Session Laws 1981, c. 599, s. 21, provides that the act shall not affect pending litigation.

CASE NOTES

I. GENERAL CONSIDERATION.

This section imposes two duties, etc. — In accord with 4th paragraph in original. See Taylor v. Hudson, 49 N.C. App. 296, 271 S.E.2d 70 (1980).

Cited in Cardwell v. Ware, 36 N.C. App. 366, 243 S.E.2d 915 (1978); Jones v. Morris, 42 N.C. App. 10, 255 S.E.2d 619 (1979); Harris v. Bridges, 46 N.C. App. 207, 264 S.E.2d 804 (1980).

II. TURNING MOVEMENTS.

Turn Must Be Delayed until It Can Be Made in Safety. — Without regard to whether the turning driver gives the appropriate signal, other motorists affected have the right to assume that he will delay his movement until it may be made in safety. Brown v. Brown, 38 N.C. App. 607, 248 S.E.2d 397 (1978).

III. SIGNALS.

Signal Unnecessary Where Turn Will Not Affect Other Vehicles. — Subsection (a) of this section does not require that a motorist give a signal before turning unless the surrounding circumstances afford reasonable grounds for apprehending that the turn may affect the operation of another vehicle. Brown v. Brown, 38 N.C. App. 607, 248 S.E.2d 397 (1978).

But under circumstances making subsection (a) of this section applicable, the statute imposes both the duty of giving the required turn signal and the duty to see prior to turning that such movement can be made in safety. Brown v. Brown, 38 N.C. App. 607, 248 S.E.2d 397 (1978).

And that Approaching Motorist Will, etc.. —

In accord with original. See Taylor v. Hudson, 49 N.C. App. 296, 271 S.E.2d 70 (1980).

IV. NEGLIGENCE AND PROXIMATE CAUSE.

Violation to Be Considered, etc. —

In accord with 1st paragraph in original. See Mintz v. Foster, 35 N.C. App. 638, 242 S.E.2d 181 (1978).

§ 20-155. Right-of-way.

CASE NOTES

Applied in U.S. Indus., Inc. v. Tharpe, 47 N.C. App. 754, 268 S.E.2d 824 (1980).

§ 20-158. Vehicle control signs and signals.

(b) Control of Vehicles at Intersections. —

(1) When a stop sign has been erected or installed at an intersection, it shall be unlawful for the driver of any vehicle to fail to stop in obedience thereto and yield the right-of-way to vehicles operating on the designated main-traveled or through highway. When stop signs have been erected at three or more entrances to an intersection, the driver, after stopping in obedience thereto, may proceed with caution.

(2) Vehicles facing a red light from a steady or strobe beam stoplight shall not enter the intersection while the steady or strobe beam stoplight is emitting a red light; provided that, except where prohibited by an appropriate sign, vehicular traffic facing a red light, after coming to a complete stop at the intersection, may enter the intersection to make a right turn but such vehicle shall yield the right-of-way to pedestrians and to other traffic using the intersection. When the stoplight is emitting a steady yellow light, vehicles facing the yellow light are warned that a red light will be immediately forthcoming. When the stoplight is emitting a steady green light, vehicles may proceed with due care through the intersection subject to the rights of pedestrians and other vehicles as may otherwise be provided by law.

(3) When a flashing red light has been erected or installed at an intersection, approaching vehicles facing the red light shall stop and yield the right-of-way to vehicles in or approaching the intersection. The right to proceed shall be subject to the rules applicable to making a stop at a stop sign.

(4) When a flashing yellow light has been erected or installed at an intersection, approaching vehicles facing the yellow flashing light may proceed through the intersection with caution, yielding the right-of-way to vehicles in or approaching the intersection.

(5) When a stop sign, stoplight, flashing light, or other traffic-control device authorized by subsection (a) requires a vehicle to stop at an intersection, the driver shall stop at an appropriately marked stop line, or if none, before entering a marked crosswalk, or if none, before entering the intersection at the point nearest the intersecting street where the driver has a view of approaching traffic on the intersecting street.

(1979, c. 298, s. 1.)

Effect of Amendments. — The 1979 amendment rewrote the first sentence of subdivision (b)(2), which formerly required vehicles facing a steady red light at an intersection to come to a complete stop. Also, in subdivision (b)(2), the amendment substituted "are" for "shall be" near the middle of the second sentence, deleted "and that vehicles may not enter the intersection on such a red light; provided, that except where prohibited by appropriate sign, vehicular traffic facing a steady red light may enter an intersection to make a right turn after coming to a complete stop and yielding the right-of-way to pedestrians and to other traffic using the intersection" at the end of the second sentence, and inserted "with due care" near the middle of the third sentence.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (b) is set out.

CASE NOTES

I. GENERAL CONSIDERATION.

Right to Assume That Automobile Will Stop, etc. —

In accord with 5th paragraph in original. See U.S. Indus., Inc. v. Tharpe, 47 N.C. App. 754, 268 S.E.2d 824, cert. denied, 301 N.C. 90, 273 S.E.2d 311 (1980).

II. STOP SIGNS.

Liability of Driver Required to Stop. — The motorist who is required to stop and ascertain whether he can proceed safely is deemed to have seen what he would have been able to see had he looked, and his liability to one injured in a collision with his vehicle is determined as it would have been had he looked, observed the prevailing conditions and continued to drive as he did. U.S. Indus., Inc. v. Tharpe, 47 N.C. App. 754, 268 S.E.2d 824, cert. denied, 301 N.C. 90, 273 S.E.2d 311 (1980).

When Driver Should Proceed. — The driver who is required to stop should not proceed, with oncoming vehicles in view, until in the exercise of due care he has determined that he can proceed safely. U.S. Indus., Inc. v. Tharpe, 47 N.C. App. 754, 268 S.E.2d 824, cert. denied, 301 N.C. 90, 273 S.E.2d 311 (1980).

§ 20-161. Stopping on highway prohibited; warning signals; removal of vehicles from public highway.

CASE NOTES

I. GENERAL CONSIDERATION.

Applied in Northwestern Distribs., Inc. v. N.C. Dep't of Transp., 41 N.C. App. 548, 255 S.E.2d 203 (1979).

Cited in Digsby v. Gregory, 35 N.C. App. 59, 240 S.E.2d 491 (1978).

II. DISABLED VEHICLES.

Exception as to Disabled Vehicles, etc. — Prohibiting the parking or leaving of a vehicle on "the paved or main traveled portion of any highway" does not prohibit the emergency parking of a vehicle on the shoulder of a highway, paved or otherwise, which is outside the main traveled part. Thomas v. Deloatch, 45 N.C. App. 322, 263 S.E.2d 615 (1980).

§ 20-162. Parking in front of private driveway, fire hydrant, fire station, intersection of curb lines or fire lane.

(a) No person shall park a vehicle or permit it to stand, whether attended or unattended, upon a highway in front of a private driveway or within 15 feet in either direction of a fire hydrant or the entrance to a fire station, nor within 25 feet from the intersection of curb lines or if none, then within 15 feet of the intersection of property lines at an intersection of highways; provided, that local authorities may by ordinance decrease the distance within which a vehicle may park in either direction of a fire hydrant.

(b) No person shall park a vehicle or permit it to stand, whether attended or unattended, upon any public vehicular area, street, highway or roadway in any area designated as a fire lane. This prohibition includes designated fire lanes in shopping center or mall parking lots and all other public vehicular areas. Provided, however, persons loading or unloading supplies or merchandise may park temporarily in a fire lane located in a shopping center or mall parking lot as long as the vehicle is not left unattended. The prima facie rule of evidence created by G.S. 20-162.1 is applicable to prosecutions for violation of this section. The owner of a vehicle parked in violation of this subsection shall be deemed to have appointed any State, county or municipal law-enforcement officer as his agent for the purpose of arranging for the transportation and safe storage of such vehicle. No law-enforcement officer removing such a vehicle

shall be held criminally or civilly liable in any way for any acts or omissions arising out of or caused by carrying out or enforcing any provisions of this subsection, unless the conduct of the officer amounts to wanton conduct or intentional wrongdoing. (1937, c. 407, s. 124; 1939, c. 111; 1979, c. 552; 1981, c. 574, s. 1.)

Local Modification. — City of Charlotte: 1981, c. 99.

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, designated the former section as subsection (a) and added subsection (b).

The 1981 amendment, effective October 1, 1981, added the present third sentence of subsection (b).

§ 20-162.1. Prima facie rule of evidence for enforcement of parking regulations.

Local Modification. — Mecklenburg County: 1981, c. 239; City of Clinton: 1979, c. 326; City of Charlotte: 1981, c. 99; City of Goldsboro: 1981, c. 314; Town of Fremont: 1981, c. 314.

§ 20-166. Duty to stop in event of accident or collision; furnishing information or assistance to injured person, etc.; persons assisting exempt from civil liability.

(b) The driver of any vehicle involved in an accident or collision resulting in damage to property and in which there is not involved injury or death of any person shall immediately stop his vehicle at the scene of the accident or collision and shall give his name, address, driver's license number and the registration number of his vehicle to the driver or occupants of any other vehicle involved in the accident or collision or to any person whose property is damaged in the accident or collision; provided that if the damaged property is a parked and unattended vehicle and the name and location of the owner is not known to or readily ascertainable by the driver of the responsible vehicle, the said driver shall furnish the information required by this subsection to the nearest available peace officer, or, in the alternative, and provided he thereafter within 48 hours fully complies with G.S. 20-166.1(c), shall immediately place a paper-writing containing said information in a conspicuous place upon or in the damaged vehicle and, provided that if the damaged property is a guardrail, utility pole, or other fixed object owned by the Department of Transportation, a public utility, or other public service corporation to which report cannot readily be made at the scene, it shall be sufficient if the responsible driver shall furnish the information required to the nearest peace officer or make written report thereof containing said information by U.S. certified mail, return receipt requested, to the North Carolina Division of Motor Vehicles within five days following said collision. Any person violating the provisions of this subsection shall be guilty of a misdemeanor and fined or imprisoned for a period of not more than two years, or both, in the discretion of the court.

(c) The driver of any vehicle involved in any accident or collision resulting in injury or death to any person shall also give his name, address, driver's license number and the registration number of his vehicle to the person struck or the driver or occupants of any vehicle collided with, and shall render to any person injured in such accident or collision reasonable assistance, including the carrying of such person to a physician or surgeon for medical or surgical

treatment if it is apparent that such treatment is necessary or is requested by the injured person, and it shall be unlawful for any person to violate this provision, and such violator shall be punishable as provided in G.S. 20-182.

(1979, c. 667, s. 32.)

Cross References. — As to immunity from liability of any person rendering first aid or emergency health care treatment to an unconscious, ill or injured person in certain circumstances, see § 90-21.14.

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1981, substituted "driver's" for "operator's or chauffeur's" near the beginning of the first sentence of subsection (b) and near the beginning of subsection (c).

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.'"

Only Part of Section Set Out. — As subsections (a) and (d) were not changed by the amendment, they are not set out.

CASE NOTES

I. GENERAL CONSIDERATION.

Purpose. —

The general purpose of this statute is to facilitate investigation of automobile accidents and to assure immediate aid to anyone injured by such collision. State v. Fearing, 48 N.C. App. 329, 269 S.E.2d 245, cert. denied, 301 N.C. 99, 273 S.E.2d 303, 301 N.C. 403, 273 S.E.2d 448 (1980).

Knowledge of Accident Is Essential, etc. —

In accord with 1st paragraph in original. See State v. Fearing, 48 N.C. App. 329, 269 S.E.2d 245, cert. denied, 301 N.C. 99, 273 S.E.2d 303, 301 N.C. 403, 273 S.E.2d 448 (1980).

Driver Must Stop at Scene, etc. —

In accord with 5th paragraph in original. See State v. Fearing, 48 N.C. App. 329, 269 S.E.2d 245, cert. denied, 301 N.C. 99, 273 S.E.2d 303, 301 N.C. 403, 273 S.E.2d 448 (1980).

To support a verdict of guilty under subsection (a) of this section, the State must prove that defendant was driving the automobile involved in the accident at the time it occurred; that the vehicle defendant was driving came into contact with another person resulting in injury or death; and that defendant, knowing he had struck the victim, failed to stop immediately at the scene. State v. Fearing, 48 N.C. App. 329, 269 S.E.2d 245, cert. denied, 301 N.C. 99, 273 S.E.2d 303, 301 N.C. 403, 273 S.E.2d 448 (1980).

Definition of Terms Used in Subsection (c). — Subsection (c) of this section requires that the driver involved give the required information "to the person struck or the driver or occupants of any vehicle collided with, ..." "The person struck" means a pedestrian and "the driver or occupants of any vehicle collided with" means a driver or passengers in a vehicle. State v. Gatewood, 46 N.C. App. 28, 264 S.E.2d 375, cert. denied, 300 N.C. 559, 270 S.E.2d 112 (1980).

Liability under Subsection (c) Where Vehicle Occupants Not Injured. — Where defendant's car struck and killed a pedestrian and then sideswiped an approaching vehicle, but the collision did not result in injury or death to the driver or any passengers in the sideswiped vehicle collided with, defendant did not violate subsection (c) of this section in failing to give the required information to the driver. State v. Gatewood, 46 N.C. App. 28, 264 S.E.2d 375, cert. denied, 300 N.C. 559, 270 S.E.2d 112 (1980).

Absence of Fault No Defense. —

In accord with original. See State v. Fearing, 48 N.C. App. 329, 269 S.E.2d 245, cert. denied, 301 N.C. 99, 273 S.E.2d 303, 301 N.C. 403, 273 S.E.2d 448 (1980).

III. EVIDENCE.

Evidence of Aiding Driver in Avoiding Arrest Supports Charge as Accessory After the Fact. — In a prosecution of defendant for being an accessory after the fact to the willful failure immediately to stop a motor vehicle at the scene of an accident and collision resulting in injury or death, evidence was sufficient to be submitted to the jury where it tended to show that a third person, while driving an automobile owned by defendant, struck, injured and killed a named person; the driver knew he had struck a person but did not stop at the scene of the accident; and upon learning that the driver had struck a person and had not stopped, defendant, who was not in the car nor present at the scene of the accident, assisted the driver in avoiding apprehension, arrest, and punishment for such offense. State v. Fearing, 50 N.C. App. 475, — S.E.2d — (1981).

But Knowledge of Injury or Death is Required. — In order to lay the basis for punishment under § 20-182, the State must show that defendant willfully violated subsection (a) of this section by failing to stop at the scene of an accident knowing that there was an accident

and knowing that a person had been injured or killed in the accident; therefore, in a prosecution of defendant for being an accessory after the fact to hit and run driving, the trial court's instruction was erroneous because it gave the impression that, if the accident did involve injury or death to a person, knowledge that an accident had occurred was sufficient to provide the element of willful failure to stop, and did not require a showing of the driver's knowledge of injury or death to a person. State v. Fearing, 50 N.C. App. 475, — S.E.2d — (1981).

Cited in State v. Tise, 39 N.C. App. 495, 250 S.E.2d 674 (1979).

§ 20-166.1. Reports and investigations required in event of collision.

(a) The driver of a vehicle involved in a collision resulting in injury to or death of any person or total property damage to an apparent extent of two hundred dollars ($200.00) or more shall immediately, by the quickest means of communication, give notice of the collision to the local police department if the collision occurs within a municipality, or to the office of the sheriff or other qualified rural police of the county wherein the collision occurred.

(b) The driver of any vehicle involved in a collision resulting in injury to or death of any person or total property damage to an apparent extent of two hundred dollars ($200.00) or more shall furnish proof of financial responsibility on forms prescribed by the Division.

(c) Notwithstanding any other provisions of this section, the driver of any motor vehicle which collides with another motor vehicle left parked or unattended on any street or highway of this State shall within 48 hours report the collision to the owner of such parked or unattended motor vehicle. Such report shall include the time, date and place of the collision, the driver's name, address, driver's license number and the registration number of the vehicle being operated by the driver at the time of the collision, and such report may be oral or in writing. Such written report must be transmitted to the current address of the owner of the parked or unattended vehicle by United States certified mail, return receipt requested, and a copy of such report shall be transmitted to the North Carolina Division of Motor Vehicles.

No report, oral or written, made pursuant to this Article shall be competent in any civil action except to establish identity of the person operating the moving vehicle at the time of the collision referred to therein.

Any person who violates this subsection is guilty of a misdemeanor and shall be punishable by fine or imprisonment, or both, in the discretion of the court.

(d) The Division may require the driver of a vehicle involved in a collision which is required to be reported by this section to file a supplemental report when the original report is insufficient in the opinion of the Division.

(e) It shall be the duty of the State Highway Patrol or the sheriff's office or other qualified rural police to investigage all collisions required to be reported by this section when the collisions occur outside the corporate limits of a city or town; and it shall be the duty of the police department of each city or town to investigate all collisions required to be reported by this section when the collisions occur within the corporate limits of the city or town. Every law-enforcement officer who investigates a collision as required by this subsection, whether the investigation is made at the scene of the collision or by subsequent investigations and interviews, shall, within 24 hours after completing the investigation, forward a written report of the collision to the Division if the collision occurred outside the corporate limits of a city or town, or to the police department of the city or town if the collision occurred within the corporate limits of such city or town. Police departments should forward such reports to the Division within 10 days of the date of the collision. Provided, when a collision occurring outside the corporate limits of a city or town is investigated by a duly qualified law-enforcement officer other than a member

of the State Highway Patrol, as permitted by this section, such other officer shall forward a written report of the collision to the office of the sheriff or rural police of the county wherein the collision occurred and the office of the sheriff or rural police shall forward such reports to the Division within 10 days of the date of the collision. The reports by law-enforcement officers shall be in addition to, and not in place of, the reports required of drivers by this section.

When any person involved in an automobile collision shall die as a result of said collision within a period of 12 months following said collision, and such death shall not have been reported in the original report, it shall be the duty of investigating enforcement officers to file a supplemental report setting forth the death of such person.

(f) Every person holding the office of medical examiner in this State shall report to the Division the death of any person as a result of a collision involving a motor vehicle and the circumstances of the collision within five days following such death. Every hospital shall notify the medical examiner of the county in which the collision occurred of the death within the hospital of any person who dies as a result of injuries apparently sustained in a collision involving a motor vehicle.

(g) With respect to a collision between a common carrier and another vehicle, which collision is required to be reported by this section, the common carrier shall make a written report of the collision to the Division within 10 days from the date of the collision, and the report shall be in addition to the report required of the driver. When the original report submitted by a common carrier is insufficient in the opinion of the Division, the Division may require it to file a supplemental report.

(h) The Division shall prepare and shall upon request supply to police, [medical examiners], sheriffs, and other suitable agencies, or individuals, forms for collision reports calling for sufficiently detailed information to disclose with reference to a highway collision the cause, conditions then existing, and the persons and vehicles involved. All collision reports required by this section shall be made on forms supplied or approved by the Division.

(i) All collision reports, including supplemental reports, above mentioned, except those made by State, city or county police, shall be without prejudice and shall be for the use of the Division and shall not be used in any manner as evidence, or for any other purpose in any trial, civil or criminal, arising out of such collision except that the Division shall furnish upon demand of any court a properly executed certificate stating that a particular collision report has or has not been filed with the Division solely to prove a compliance with this section.

The reports made by State, city or county police and medical examiners, but no other reports required under this section, shall be subject to the inspection of members of the general public at all reasonable times, and the Division shall furnish a certified copy of any such report to any member of the general public who shall request the same, upon receipt of a fee of four dollars ($4.00) [for a] certified copy, or the Division is authorized to furnish without charge to departments of the governments of the United States, states, counties, and cities certified copies of such collision reports for official use.

Nothing herein provided shall prohibit the Division from furnishing to interested parties only the name or names of insurers and insured and policy number shown upon any reports required under this section.

(j) The Division shall receive collision reports required to be made by this section and may tabulate and analyze such reports and publish annually, or at more frequent intervals, statistical information based thereon as to the number, cause and location of highway collisions.

Based upon its findings after analysis, the Division may conduct further necessary detailed research to determine more fully the cause and control of highway collisions. It may further conduct experimental field tests within

areas of the State from time to time to prove the practicability of various ideas advanced in traffic control and collision prevention. (1953, c. 1340, s. 2; 1955, c. 913, s. 9; 1963, c. 1249; 1965, c. 577; 1971, c. 55; c. 763, s. 1; c. 958, ss. 2, 3; 1973, c. 1133, ss. 1, 2; c. 1330, s. 29; 1975, c. 307; c. 716, s. 5; 1979, c. 667, s. 33; 1981, c. 690, s. 14.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1981, substituted "driver's" for "operator's or chauffeur's" in the second sentence of the first paragraph of subsection (c).

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.'"

The 1981 amendment, effective July 1, 1981, increased the fee in the second paragraph of subsection (i) from two dollars and fifty cents to four dollars.

Legal Periodicals. — For a note on the State's inability to suspend the driver's license of a bankrupt who fails to satisfy an accident judgment debt, see 50 N.C.L. Rev. 350 (1972).

CASE NOTES

Controlled substances, found inside a paper bag at the scene of an automobile accident, were not the products of an unreasonable search and seizure in violation of the defendant's Fourteenth Amendment rights where, under the circumstances, it was reasonable for a state trooper to look inside the paper bag to determine whether there was anything valuable belonging to the owner that the trooper should hold for safekeeping. State v. Francum, 39 N.C. App. 429, 250 S.E.2d 705 (1979).

§ 20-168. Drivers of State, county, and city vehicles subject to the provisions of this Article.

(a) Subject to the exceptions in subsection (b), the provisions of this Article applicable to the drivers of vehicles upon the highways shall apply to the drivers of all vehicles owned or operated by the State or any political subdivision thereof.

(b) While actually engaged in maintenance or construction work on the highways, but not while traveling to or from such work, drivers of vehicles owned or operated by the State or any political subdivision thereof are exempt from all provisions of this Article except:

(1) G.S. 20-138. Persons under the influence of alcoholic beverages.
(2) G.S. 20-139. Persons under the influence of drugs.
(3) G.S. 20-139.1. Result of a chemical analysis admissible in evidence; presumption.
(4) G.S. 20-140. Reckless driving.
(5) G.S. 20-140.4 [G.S. 20-141.4]. Death by vehicle.
(6) G.S. 20-141. Speed restrictions. (1937, c. 407, s. 130; 1973, c. 1330, s. 30; 1981, c. 412, s. 4; c. 747, s. 66.)

Effect of Amendments. — The 1981 amendments, effective January 1, 1982, substituted "alcoholic beverages" for "intoxicating liquor" at the end of subdivision (b)(1).

CASE NOTES

Applied in Northwestern Distribs., Inc. v. N.C. Dep't of Transp., 41 N.C. App. 548, 255 S.E.2d 203 (1979).

§ 20-169. Powers of local authorities.

Local authorities, except as expressly authorized by G.S. 20-141 and 20-158, shall have no power or authority to alter any speed limitations declared in this Article or to enact or enforce any rules or regulations contrary to the provisions of this Article, except that local authorities shall have power to provide by ordinances for the regulation of traffic by means of traffic or semaphores or other signaling devices on any portion of the highway where traffic is heavy or continuous and may prohibit other than one-way traffic upon certain highways, and may regulate the use of the highways by processions or assemblages and except that local authorities shall have the power to regulate the speed of vehicles on highways in public parks, but signs shall be erected giving notices of such special limits and regulations. Signaling devices of a stop-light nature erected pursuant to this section and which emit alternate red and green lights shall be so arranged and placed that the red light shall appear at the top and the green light shall appear at the bottom of the signaling unit. Provided, that all traffic signs, signals, markings, islands, and all other traffic-control devices installed or erected on streets or highways on the State highway system within the corporate limits of a municipality shall be subject to the approval of the Department of Transportation and be installed or erected in substantial conformance with the specifications set forth in the Manual on Uniform Traffic Control Devices for Streets and Highways, or any subsequent revisions of the same, published by the United States Department of Commerce, Bureau of Public Roads and dated June, 1961. Provided further that the Department of Transportation is authorized and directed to assume the cost of installing and erecting such traffic-control devices provided the same are installed and erected with the approval of the Department of Transportation and in conformity with this section, and the Department of Transportation is authorized and directed to assume the costs of altering existing traffic-control devices on the State highway system to conform to the said specifications set out above. (1937, c. 407, s. 131; 1949, c. 947, s. 2; 1955, c. 384, s. 2; 1963, c. 559; 1973, c. 507, s. 5; 1979, c. 298, s. 2.)

Effect of Amendments. The 1979 amendment substituted "Department of Transportation" for "Board of Transportation" in the third sentence and in three places in the fourth sentence.

Part 11. Pedestrians' Rights and Duties.

§ 20-174. Crossing at other than crosswalks; walking along highway.

CASE NOTES

Subsection (e) States the Common Law. —

In accord with 1st paragraph in original. See State v. Fearing, 48 N.C. App. 329, 269 S.E.2d 245, cert. denied, 301 N.C. 99, 273 S.E.2d 303, 301 N.C. 403, 273 S.E.2d 448 (1980).

Motorist's Duty under Subsection (e). — Under subsection (e) of this section, a motorist

has the duty, which is applicable to all motorists generally, to operate his vehicle at a reasonable rate of speed, keep a lookout for persons on or near the highway, decrease his speed when special hazards exist with respect to pedestrians, and give warning of his approach by sounding his horn if the circumstances warrant. State v. Fearing, 48 N.C. App. 329, 269 S.E.2d 245, cert. denied, 301 N.C. 99, 273 S.E.2d 303, 301 N.C. 403, 273 S.E.2d 448 (1980).

A violation of subsection (e) of this section may not be considered negligence per se, and the jury, if they find as a fact that subsection (e) of this section is violated, must consider the violation along with all other facts and circumstances and decide whether, when so considered, the person found guilty of such violation has breached his common law and statutory duty of exercising ordinary care. Pope v. Deal, 39 N.C. App. 196, 249 S.E.2d 866 (1978), cert. denied, 296 N.C. 737, 254 S.E.2d 178 (1979).

The failure of a pedestrian to yield, etc. —

In accord with 3rd paragraph in original. See Oliver v. Powell, 47 N.C. App. 59, 266 S.E.2d 830 (1980).

In accord with 4th paragraph in original. See Oliver v. Powell, 47 N.C. App. 59, 266 S.E.2d 830 (1980).

In accord with 5th paragraph in original. See Lewis v. Dove, 39 N.C. App. 599, 251 S.E.2d 669 (1979).

Test on Defendants' Motion for Summary Judgment. — In an action to recover damages by plaintiff pedestrian where she was struck by defendants' car while crossing the highway at a point where there was neither a crosswalk nor an intersection, in passing upon defendants' motion for summary judgment, the evidence must be tested by the rule of the reasonably prudent man, in the light of the duties imposed upon both plaintiff and defendant by subsections (a) and (e) of this section. Ragland v. Moore, 299 N.C. 360, 261 S.E.2d 666 (1980).

Summary Judgment Not Warranted. — In an action to recover for personal injuries sustained by plaintiff jogger when he was struck by defendant's automobile, the trial court erred in entering summary judgment for defendants where there were issues of fact as to whether (1) one defendant was negligent in driving the automobile into plaintiff on the highway while the visibility was clear, thereby failing to keep a proper lookout or to keep the vehicle under control; (2) plaintiff's negligence in violating subsection (d) of this section by not jogging on the left-hand side of the road was a proximate cause of his injury; and (3) plaintiff failed to keep a proper lookout in that he saw the vehicle, took three or four more steps, and then started to cross the road in front of the vehicle. Parker v. Windborne, 50 N.C. App. 410, 273 S.E.2d 750 (1981).

Applied in Sessoms v. Roberson, 47 N.C. App. 573, 268 S.E.2d 24 (1980).

§ 20-174.1. Standing, sitting or lying upon highways or streets prohibited.

CASE NOTES

The legislative intent, etc. —

In accord with 2nd paragraph in original. See Self v. Dixon, 39 N.C. App. 679, 251 S.E.2d 661 (1979).

Conduct Not Constituting Violation of Section. — Where the evidence showed that the plaintiff in a personal injury action stood "half on and half off" the pavement for the purpose of picking up a rag dropped by her niece and that she saw the defendant's approaching automobile but was unable to get off the pavement before being struck, there was not sufficient evidence tending to show that the plaintiff willfully placed her body on the street to impede or block traffic in violation of this section. Self v. Dixon, 39 N.C. App. 679, 251 S.E.2d 661 (1979).

Part 12. Sentencing; Penalties.

§ 20-176. Penalty for misdemeanor.

CASE NOTES

This Section Is Inapplicable to § 20-140. — The trial judge, on trial de novo in the superior court, erred in instructing the jury on reckless driving under § 20-140(a) and should

have instructed on § 20-140(c), where the defendant had been charged in the district court with drunken driving under § 20-138 but was convicted of the lesser included offense under § 20-140(c), since the offense of reckless driving under § 20-140(c) is a specific misdemeanor, and the superior court has no jurisdiction to try an accused for a specific misdemeanor on the warrant of an inferior court unless he is first tried and convicted, and appeals to the superior court from the sentence pronounced. State v. Robinson, 40 N.C. App. 514, 253 S.E.2d 311 (1979).

§ 20-177. Penalty for felony.

Any person who shall be convicted of a violation of any of the provisions of this Article herein or by the laws of this State declared to constitute a felony shall, unless a different penalty is prescribed herein or by the laws of this State, be punished as a Class I felon. (1937, c. 407, s. 138; 1979, c. 760, s. 5.)

Effect of amendments. — The 1979 amendment, effective July 1, 1981, substituted "as a Class I felon" for "by imprisonment in the State prison for a term not less than one year nor more than five years, or by a fine of not less than five hundred dollars ($500.00) nor more than five thousand dollars ($5,000), or by both fine and imprisonment" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses commited on or after that date, unless specific language of the act indicates otherwise."

Cross References. — For statute providing the maximum punishment for felonies, effective July 1, 1981, see § 14-1.1.

§ 20-178. Penalty for bad check.

When any person, firm, or corporation shall tender to the Division any uncertified check for payment of any tax, fee or other obligation due by him under the provisions of this Article, and the bank upon which such check shall be drawn shall refuse to pay it on account of insufficient funds of the drawer on deposit in such bank, and such check shall be returned to the Division, an additional tax shall be imposed by the Division upon such person, firm or corporation, which additional tax shall be equal to ten percent (10%) of the tax or fee in payment of which such check was tendered: Provided, that in no case shall the additional tax be less than ten dollars ($10.00); provided, further, that no additional tax shall be imposed if, at the time such check was presented for payment, the drawer had on deposit in any bank of this State funds sufficient to pay such check and by inadvertence failed to draw the check upon such bank, or upon the proper account therein. The additional tax imposed by this section shall not be waived or disminished by the Division. (1937, c. 407, s. 139; 1953, c. 1144; 1975, c. 716, s. 5; 1981, c. 690, s. 24.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, substituted "ten dollars ($10.00)" for "one dollar ($1.00)" in the first proviso to the first sentence.

§ 20-179. Penalty for driving or operating vehicle while under the influence of alcoholic beverages, narcotic drugs, or other impairing drugs; limited driving permits for first offenders.

(a) Every person who is convicted of violating G.S. 20-138(a), 20-138(b), 20-139(a), or 20-139(b) shall be punished as follows:

(1) For a conviction of a first offense, a fine of not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00), by imprisonment for not more than six months, or by both such fine and imprisonment, in the discretion of the court;

(2) For a conviction of a second offense, imprisonment for not less than three days nor more than one year and a fine not less than two hundred dollars ($200.00) nor more than five hundred dollars ($500.00);

(3) For a conviction of a third or subsequent offense, imprisonment for not less than three days nor more than two years and a fine of not less than five hundred dollars ($500.00).

The first three days of imprisonment pursuant to subdivisions (2) and (3) above shall not be subject to suspension or parole; provided that in lieu of such imprisonment pursuant to subdivision (2) above the court may allow the defendant to participate in a program for alcohol or drug rehabilitation approved for this purpose by the Department of Human Resources; and upon defendant's successful completion of such program the court may suspend all or any part of the term of imprisonment. Convictions for offenses occurring prior to July 1, 1978, or more than three years prior to the current offense shall not be considered prior offenses for the purpose of subdivisions (2) and (3) above.

(b) (1) Upon a first conviction only of any offense included in G.S. 20-138 or 20-139, and subject to the provisions of this subsection (b) the trial judge may issue a limited driving privilege when feasible and if the person convicted requests that he do so. The limited privilege, if issued, shall contain a condition that the person convicted enroll in and successfully complete, within 90 days of the date of the issuance of said limited privilege, the program of instruction at an Alcohol and Drug Education Traffic School approved by the Department of Human Resources pursuant to G.S. 20-179.2. The limited privilege shall contain a provision allowing the person convicted to drive to and from classes required for successful completion of such program of instruction. In addition, the judge may include in the limited privilege conditions allowing the person convicted to drive a motor vehicle for proper purposes directly connected with the health, education and welfare of the person convicted and his family. The judge, in establishing the limited driving privilege, may impose restrictions as to the days, hours, types of vehicles, routes and geographic boundaries and specific purposes for which the limited driving privilege is issued. The trial judge may issue a limited driving privilege that does not contain a condition that the defendant successfully complete the program of instruction at an Alcohol and Drug Education Traffic School if:

a. There is no Alcohol or Drug Education Traffic School within a reasonable distance of the defendant's residence; or

b. The defendant because of his history of alcohol or drug abuse, is not likely to benefit from the program of instruction; or

c. There are specific, extenuating circumstances which make it likely that the defendant will not benefit from the program of instruction.

The trial judge shall enter such specific findings in the record provided that in the case of subsection b above such findings shall include the exact reasons why the defendant is not likely to benefit from the program of instruction and that in the case of subsection c above such findings shall include the specific, extenuating circumstances which make it likely that the defendant will not benefit from the program of instruction.

For the purposes of determining whether the conviction is a first conviction, no prior offense occurring more than seven years before the date of the current offense shall be considered. In addition, convictions for violations of any provision of G.S. 20-138(a), 20-138(b), 20-139(a), or 20-139(b) shall be considered previous convictions. Convictions prior to January 1, 1980, shall be considered for purposes of this subsection.

The limited driving privilege and the restrictions imposed thereon shall be specifically recorded in a written judgment of the court, shall be signed by the trial judge and shall be affixed with the seal of the court. The written judgment shall be as near as practicable in the format established by G.S. 20-179(b)(2). A notice of the conviction and a copy of the judgment must be transmitted to the Division of Motor Vehicles, along with any operator's or chauffeur's license in the possession of the person convicted.

The limited driving privilege is valid for such length of time, not to exceed six months, as shall be set forth in the judgment of the trial judge. A limited privilege that does not contain a condition that the defendant successfully complete the program of instruction at an Alcohol or Drug Education Traffic School is valid for such length of time, not to exceed 12 months, as shall be set forth in the judgment of the trial court. Such permit shall constitute a valid license to operate a motor vehicle upon the streets and highways of this or any other state in accordance with the restrictions noted thereon. The holder of a limited driving privilege is subject to all provisions of this Chapter concerning operator's or chauffeur's licenses which are not by their nature inapplicable.

A limited driving privilege issued pursuant to this subsection does not authorize a person to drive while the license of such person is also revoked pursuant to G.S. 20-16.2 for failure to take a chemical test of the blood or breath to determine blood alcoholic content.

(2) The judgment issued by the trial judge as herein permitted shall as near as practical be in the form and contents as follows:

STATE OF NORTH CAROLINA
COUNTY OF . . . . . .

IN THE GENERAL COURT OF JUSTICE
RESTRICTED DRIVING PRIVILEGES

This cause coming on to be heard and being heard before the Honorable . . . . . ., Judge presiding, and it appearing to the Court that the defendant, ... , has been convicted of the offense of (describe offense under G.S. 20-138 or 20-139 or as appropriate), and it further appearing to the Court that the defendant should be issued a limited driving privilege and is entitled to the issuance of a limited driving privilege under and by the authority of G.S. 20-179(b);

Now, therefore, it is ordered, adjudged and decreed that the defendant be allowed to operate a motor vehicle under the following conditions and under no other circumstances.

Name: . . . . . .
Address: . . . . . .

Race: . . . . . Sex: . . . . .
Height: . . . . . Weight: . . . . .
Color of Hair: . . . . . Color of Eyes: . . . . .
Birth Date: . . . . . .
Driver's License Number: . . . . . .

CONDITIONS OF RESTRICTION

1. The defendant must successfully complete the approved program of instruction at an Alcohol and Drug Education Traffic School within 90 days from the date when this limited privilege was issued.
2. Geographical restrictions: . . . . . .
. . . . . .
3. Hours of restriction: . . . . . .
. . . . . .
4. Type(s) of vehicles that may be operated: . . . . . .
. . . . . .
. . . . . .
5. Other restrictions: . . . . . .
. . . . . .
. . . . . .
. . . . . .

This limited license shall be effective from . . . . . to . . . . . subject to further orders as the court
(month) (day), (year)
in its discretion may deem necessary and proper.

Issued on this . . . . . day of . . . . . , 19 . . . . .
. . . . . .
(Judge Presiding)

Accepted on this . . . . . day of . . . . . , 19 . . . .
. . . . . .
(Signature of Licensee)

(3) If a person is convicted in another state or county or in a federal court of an offense that is equivalent to one of the provisions of G.S. 20-138(a), 20-138(b), 20-139(a) or 20-139(b), and if the person's North Carolina driver's license is revoked as a result of that conviction, the person so convicted may apply to the presiding or resident judge of the superior court or a district court judge of the district in which he resides for a limited driving privilege. Upon such application the judge may issue a limited driving privilege in the same manner as if he were the trial judge.

(4) A district court judge may modify a limited driving privilege if:
a. The holder of the limited privilege petitions the court for a modification of the privilege; and
b. The privilege was issued by a district court judge; and
c. The privilege was issued in the county in which the district judge is conducting court.

A superior court judge may modify a limited driving privilege if:
a. The holder of the limited privilege petitions the court for a modification of the privilege; and
b. The privilege was issued by a superior court judge; and
c. The privilege was issued in the county in which the superior court judge is conducting court.

(5) Any violation of the conditions or restrictions as set forth in the judgment of the trial court allowing such privileges, other than the failure to successfully complete the prescribed program of instruction at an Alcohol and Drug Education Traffic School, shall constitute the of-

fense of driving while license revoked as set forth in G.S. 20-28(a). When a person is charged with operating a motor vehicle in violation of the restrictions, the limited driving privilege shall be suspended pending the final disposition of the charge.

Failure to successfully complete an approved program of instruction at an Alcohol and Drug Education Traffic School shall constitute grounds to revoke the limited privilege for the remainder of the time for which such limited privilege was issued. Failure to successfully complete an approved program of instruction at an Alcohol and Drug Education Traffic School shall not constitute the offense of driving while license revoked. For purposes of this subsection, the phrase "failure to successfully complete the prescribed program of instruction at an Alcohol and Drug Education Traffic School" includes failure to attend scheduled classes without a valid excuse, failure to complete the course within 90 days of the issuance of the limited privilege, willful failure to pay the required fee for the course, or any other manner in which the person fails to complete the course successfully. The instructor of the course to which a person is assigned shall report any failure of a person to successfully complete the program of instruction to the court which issued the limited driving privilege. The court shall revoke the limited privilege. The person possessing the limited privilege may obtain a hearing prior to revocation.

(6) Notwithstanding any other provisions of this section, no person who has willfully refused to submit to a chemical test upon request of the officer as provided by G.S. 20-16.2 may be granted a limited driving privilege or license while the driving privilege of such person is revoked pursuant to the provisions of G.S. 20-16.2(c) for the willful refusal of such person to submit to such chemical test.

(7) This subsection is supplemental and in addition to existing law and shall not be construed so as to repeal any existing provision contained in the General Statutes of North Carolina. (1937, c. 407, s. 140; 1947, c. 1067, s. 18; 1967, c. 510; 1969, c. 50; c. 1283, ss. 1-5; 1971, c. 619, s. 16; c. 1133, s. 1; 1975, c. 716, s. 5; 1977, c. 125; 1977, 2nd Sess., c. 1222, s. 1; 1979, c. 453, ss. 1, 2; c. 903, ss. 1, 2; 1981, c. 466, ss. 4-6.)

Effect of Amendments. — The 1977, 2nd Sess., amendment, effective March 1, 1979, rewrote subsection (a).

The first 1979 amendment substituted "court" for "trial judge" in the first sentence of subdivision (4) of subsection (b) as it stood before the second 1979 amendment and added at the end of subdivision (1) of subsection (b) a sentence reading as follows: "The holder of a limited driver's privilege or license may petition either the superior court, if the limited driver's privilege or license was granted in superior court, or the district court, if the limited driver's privilege or license was granted in district court, of the county of issuance of his limited permit to modify his permit at its discretion."

The second 1979 amendment, effective Jan. 1, 1980, substituted "G.S. 20-138(a), G.S. 20-138(b)" for "G.S. 20-138" in the introductory paragraph of subsection (a), and rewrote subsection (b) to read as set out above.

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight'."

Because subsection (b) of this section was rewritten in its entirety by Acts 1979, c. 903, ratified June 8, 1979, and effective Jan. 1, 1980, the amendment to subsection (b) in Acts 1979, c. 667, s. 34, ratified May 29, 1979, and effective Jan. 1, 1981, cannot be given effect. However, pursuant to Acts 1979, c. 667, s. 41, "driver's" has been substituted for "operator's or chauffeur's" in two places in subsection (b) as set out above.

The 1981 amendment, effective Oct. 1, 1981, and applicable to persons assigned to Alcohol and Drug Education Traffic Schools on and after that date, in subsection (b), substituted "90 days" for "75 days" in the second sentence of subdivision (1), in the first condition of restriction in subdivision (2), and in the third sentence of the second paragraph of subdivision (5).

Legal Periodicals. — For survey of 1979 law on criminal procedure, see 58 N.C.L. Rev. 1404 (1980).

CASE NOTES

Second Offense Provision Not Triggered By Allegation of Prior Conviction More Than Three Years Previous. — A statement of charges for the offense of driving under the influence of alcoholic beverages did not allege a second violation of § 20-138 so as to trigger the second offense provision of subsection (a) of this section, since it alleged that defendant had previously been convicted of the same offense on a date more than three years prior to the date of the current offense; therefore, defendant was prejudiced by the state's introduction of evidence of his earlier conviction and by numerous references to the earlier conviction throughout the trial. State v. Woodson, 49 N.C. App. 689, 272 S.E.2d 167 (1980).

Applied in In re Greene, 297 N.C. 305, 255 S.E.2d 142 (1979).

Cited in In re Gardner, 39 N.C. App. 567, 251 S.E.2d 723 (1979); State v. McLawhorn, 43 N.C. App. 695, 260 S.E.2d 138 (1979).

OPINIONS OF ATTORNEY GENERAL

A Fee Charged for an Alcohol Rehabilitation Course Offered Pursuant to G.S. 20-179(a)(3) Must Not Be Imposed by the Court as a Part of the Cost and Collected by the Clerk and Distributed to the Provider of the Rehabilitation Course. — See opinion of Attorney General to Honorable George M. Britt, Chief District Judge, Seventh Judicial District, 48 N.C.A.G. 2 (1979).

Application for Limited Driving Privilege. — Under the provisions of subdivision (b)(3) of this section, the application for a limited driving privilege by a person convicted in a county other than the county of his residence must be made to a court of equivalent jurisdiction. See Opinion of Attorney General to James W. Hardison, Assistant District Attorney, 49 N.C.A.G. 119 (1980).

§ 20-179.1. Presentence investigation of persons convicted of driving while under the influence of alcoholic beverages.

(a) In the case of a first or subsequent conviction of driving a motor vehicle upon a highway while under the influence of alcoholic beverages, the trial judge may request a presentence investigation to determine whether a person convicted of such offense would benefit from treatment for persons who are habitual users of alcohol. Provided however, if the person convicted objects, the sentence of the court shall be entered.

(b) In any case, the trial court may order suitable treatment for the person, as a condition for suspension of a sentence, in addition to imposing any penalties required by this Article. (1973, c. 612; 1981, c. 412, s. 4; c. 747, s. 66.)

Effect of Amendments. — The 1981 amendments, effective January 1, 1982, substituted "alcoholic beverages" for "intoxicating liquor" near the middle of the first sentence in subsection (a).

§ 20-179.2. Alcohol and drug education traffic schools curriculum approved by Commission for Mental Health, Mental Retardation and Substance Abuse Services; responsibilities of the Department of Human Resources; fees.

(a) The Commission for Mental Health, Mental Retardation and Substance

Abuse Services shall establish standards and guidelines for the curriculum and operation of local alcohol and drug education traffic school programs. The Department shall oversee the development of a statewide system of schools and shall insure that schools are available in all localities of the State as soon as is practicable.

(1) A fee of one hundred dollars ($100.00) shall be paid by all persons enrolling in an Alcohol and Drug Education Traffic School program established pursuant to this section. That fee must be paid to an official designated for that purpose and at a time and place specified by the Area Mental Health, Mental Retardation and Substance Abuse Authority providing the course of instruction in which the person is enrolled, except that if the clerk of court in the county in which the person is convicted agrees to collect the fees, the clerk shall collect all fees for persons convicted in that county. The clerk shall pay the fees collected to the area mental health, mental retardation and substance abuse authority for the catchment area where the clerk is located regardless of the location where the defendant attends the Alcohol and Drug Education Traffic School and that authority shall distribute the funds in accordance with the rules and regulations of the Department. The fee must be paid in full within two weeks of the date the person is convicted and before he attends any classes, unless the court, upon a showing of reasonable hardship, allows the person additional time to pay the fee or allows him to begin the course of instruction without paying the fee. If the person enrolling in the school demonstrates to the satisfaction of the court that ordered him to enroll in the school that he is unable to pay and his inability to pay is not willful, the court may excuse him from paying the fee.

(3) Fees collected under this section and retained by Area Mental Health, Mental Retardation, and Substance Abuse Authorities shall be placed in a nonreverting fund. That fund must be used, as necessary, for the operation, evaluation and administration of Alcohol and Drug Education Traffic School programs; excess funds may only be used to fund other drug or alcohol programs. Area authorities shall remit five percent (5%) of each fee collected to the Department of Human Resources on a monthly basis. Fees received by the Department as required by this section may only be used in supporting, evaluating, and administering Alcohol and Drug Education Traffic Schools, and any excess funds will revert to the General Fund.

(4) All fees collected by the area mental health, mental retardation, and substance abuse authorities under the authority of this section may not be used in any manner to match other State funds or to be included in any computation for State formula-funded allocations.

(b) Willful failure to pay the fee is one ground for a finding that a person given a limited privilege has not successfully completed the course. Willful failure to pay the fee does not include cases in which the court determines the person is unable to pay. (1979, c. 903, s. 3; 1981, c. 51, s. 5; c. 466, ss. 1-3.)

Editor's Note. — Session Laws 1979, c. 903, s. 15, makes the act effective Jan. 1, 1980.

Session Laws 1979, c. 903, s. 14, provides: "There shall be an evaluation of the effectiveness of the course of instruction at alcohol and drug education traffic schools, and the result of that evaluation shall be made available to the 1983 Session of the General Assembly."

Pursuant to Session Laws 1979, c. 358, s. 26, "area mental health, mental retardation and substance abuse authority(ies)" has been substituted for "area mental health authority(ies)" in this section as enacted by Session Laws 1979, c. 903, s. 3.

Effect of Amendments. — The first 1981 amendment, effective July 1, 1981, substituted "Commission for Mental Health, Mental Retar-

dation and Substance Abuse Services" for "the Commission for Mental Health and Mental Retardation Services" in the first sentence of subsection (a).

The second 1981 amendment, effective Oct. 1, 1981, and applicable to persons assigned to Alcohol and Drug Education Traffic Schools on and after that date, in subsection (a), rewrote subdivisions (1) and (3) and substituted "under the authority of this section" for "from the clerks of court" in subdivision (4).

§ 20-182. Penalty for failure to stop in event of accident involving injury or death to a person.

Every person convicted of willfully violating G.S. 20-166, relative to the duties to stop or render aid or give the information required in the event of accidents, except as otherwise provided, involving injury or death to a person, shall be punished as a Class I felony. The Commissioner shall revoke the driver's license of the person so convicted. In no case shall the court have power to suspend judgment upon payment of costs. (1937, c. 407, s. 142; 1955, c. 913, s. 8; 1979, c. 667, s. 35; c. 760, s. 5.)

Cross References. —

For statute providing the maximum punishment for felonies, effective July 1, 1981, see § 14-1.1.

Effect of Amendments. — The first 1979 amendment, effective Jan. 1, 1981, substituted "driver's" for "operator's or chauffeur's" in the second sentence.

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight'."

The second 1979 amendment, effective July 1, 1981, substituted "as a Class I felony" for "by imprisonment for not less than one nor more than five years, or in the State prison for not less than one nor more than five years or by fine of not less than five hundred dollars ($500.00) or by both such fine and imprisonment" at the end of the first sentence. The second 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

CASE NOTES

Instruction. — In order to lay the basis for punishment under this section, the State must show that defendant willfully violated § 20-166(a) by failing to stop at the scene of an accident knowing that there was an accident and knowing that a person had been injured or killed in the accident; therefore, in a prosecution of defendant for being an accessory after the fact to hit and run driving, the trial court's instruction was erroneous because it gave the impression that, if the accident did involve injury or death to a person, knowledge that an accident had occurred was sufficient to provide the element of willful failure to stop, and did not require a showing of the driver's knowledge of injury or death to a person. State v. Fearing, 50 N.C. App. 475, — S.E.2d — (1981).

§ 20-183. Duties and powers of law-enforcement officers; warning by local officers before stopping another vehicle on highway; warning tickets.

Legal Periodicals. — For a survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

For survey of 1978 law on criminal procedure, see 57 N.C.L. Rev. 1007 (1979).

CASE NOTES

Unrestrained Discretion to Stop Vehicle Violates Standards of Terry v. Ohio. — To permit vehicle stops in the unrestrained discretion of police officers is to allow such stops to be used as pretexts for investigations and to sanction stops which could not have been justified under the standards set out in Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Keziah v. Bostic, 452 F. Supp. 912 (W.D.N.C. 1978).

State Power Must Accommodate Individual Interest. — The State has the power to enforce its vehicle safety and registration laws through some system of vehicle stops, but the Fourth Amendment also requires some accommodation of the individual interest in being left alone. Keziah v. Bostic, 452 F. Supp. 912 (W.D.N.C. 1978).

Vehicle license checks must not be used as pretexts for harassment or for baseless investigations. Keziah v. Bostic, 452 F. Supp. 912 (W.D.N.C. 1978).

Policeman's Stopping Individual in Private Driveway Constituted Fourth Amendment "Seizure". — Where a patrolman, while not engaged in any patrol of the highway for purposes of observing traffic or making random license checks, spontaneously decided to stop petitioner, not while petitioner was "on a public highway" nor while petitioner was operating a vehicle, but instead while petitioner was in a private driveway, it would have been perfectly natural for the petitioner to assume that he was about to be subjected to a search or inquiry for some purpose other than a routine license check and that the officer meant to accost him for some purpose. There is no doubt that the officer's stop and demand was a "seizure" within the meaning of the Fourth Amendment. Keziah v. Bostic, 452 F. Supp. 912 (W.D.N.C. 1978).

Power to Stop Vehicle Does Not Include Power to Search. — The power to stop a vehicle under this section does not include the power to search. The power to search incident to a warrantless arrest is clearly limited to situations where the officer, after stopping the vehicle, has found a person "violating the provisions of this Article." State v. Blackwelder, 34 N.C. App. 352, 238 S.E.2d 190 (1977).

State's Interests Do Not Justify Unreasonable Interference with Individual's Rights. — The decision in State v. Allen, 282 N.C. 503, 194 S.E.2d 9 (1973), is not sufficiently sensitive to the need to accommodate the State's interest in enforcing its vehicle laws to the individual's right to be free from unreasonable interference with his travel on the highways. Keziah v. Bostic, 452 F. Supp. 912 (W.D.N.C. 1978).

Illustration of Danger of Blanket Approval for Vehicle Stops. — Where a patrolman, while not engaged in any patrol of the highway for the purposes of observing traffic or making random license checks, spontaneously decided to stop petitioner, not while petitioner was "on a public highway" nor while petitioner was operating a vehicle, but instead while petitioner was in a private driveway, the patrolman's actions illustrate the danger inherent in blanket approval of all vehicle stops where the nominal purpose is to check registration or licenses. Keziah v. Bostic, 452 F. Supp. 912 (W.D.N.C. 1978).

The power to stop a vehicle under this section is not dependent on probable cause to believe a violation has occurred. State v. Blackwelder, 34 N.C. App. 352, 238 S.E.2d 190 (1977).

Stopping Vehicle to Determine If Driver Possessed Contraband Drugs. — Where there was no evidence that the officer stopped the vehicle operated by the defendant for the purpose of determining if he had violated a motor vehicle statute, but rather, the obvious purpose in stopping the vehicle was to determine if the defendant possessed contraband drugs, the officer had no right to remove the defendant from and search the vehicle. State v. Blackwelder, 34 N.C. App. 352, 238 S.E.2d 190 (1977).

Defendant Not Entitled to Resist Arguably Lawful Arrest. — Where a patrolman, while not engaged in any patrol of the highway for purposes of observing traffic or making random license checks, spontaneously decided to stop petitioner, not while petitioner was "on a public highway" nor while petitioner was operating a vehicle, but instead while petitioner was in a private driveway, although petitioner would have had a meritorious defense to any prosecution based on failure to display his license, he was not entitled to invoke self-help against what was, at the time, an arguably lawful arrest, and petitioner's conviction for assaulting the highway patrolman can survive despite the finding that the officer's initial stop and demand were illegal as an unreasonable search and seizure under the Fourth Amendment. Keziah v. Bostic, 452 F. Supp. 912 (W.D.N.C. 1978).

Cited in State v. Bridges, 35 N.C. App. 81, 239 S.E.2d 856 (1978).

ARTICLE 3A.

Motor Vehicle Law of 1947.

Part 2. Equipment Inspection of Motor Vehicles.

§ 20-183.2. Equipment inspection required; inspection certificate; one-way permit to move vehicle to inspection station.

(b) Every inspection certificate issued under this Part shall be valid for not less than 12 months and shall expire at midnight on the last day of the month designated on said inspection certificate. It shall be unlawful to operate any motor vehicle on the highway until there is displayed thereon a current inspection certificate as provided by this Part, indicating that the vehicle has been inspected within the previous 12 months and has been found to comply with the standard for safety equipment prescribed by this Chapter subject to the following provisions:

(1) Vehicles of a type required to be inspected under subsection (a), which are owned by a resident of this State, that have been outside of North Carolina continuously for a period of 30 days, or more, immediately preceding the expiration of the then current inspection certificate shall within 10 days of reentry to the State be inspected and have an approved certificate attached thereto if vehicle is to continue operation on the streets and highways.

(2) Any vehicle owned or possessed by a dealer, manufacturer or transporter within this State and operated over the public streets and highways displaying thereon a dealer demonstration, manufacturer or transporter plate must have affixed to the windshield thereof a valid certificate of inspection and approval, except a dealer, manufacturer or transporter or his agent may operate a motor vehicle displaying dealer demonstration, manufacturer or transporter plates from source of purchase to his place of business or to an inspection station, provided it is within 10 days of purchase, foreclosure or repossession. Provided further, that a new car dealer may operate a new motor vehicle prior to first sale for customer demonstration purposes only without affixing thereto an inspection certificate as required by this section if such dealer causes an inspection of the equipment enumerated in G.S. 20-183.3 to be made and affixes on the window of the vehicle adjacent to the manufacturer's price list a certificate as near as practical in form and content as follows:

Dealer . . . . . .
Dealer license number . . . . . .
Vehicle make . . . . . Year model . . . . . .
Vehicle identification number . . . . . .

Equipment Item	*Check square when inspected and approved*
Brakes	☐
Lights	☐
Horn	☐
Steering Mechanism	☐
Windshield Wiper	☐
Directional Signals	☐

Tires ☐
Rear View Mirror ☐
Exhaust System ☐

I certify that the above items of equipment have been inspected and found to be in good working order.

. . . . . .
Dealer or Agent

(3) Vehicles acquired by residents of this State from dealers or owners located outside of the State must, upon entry to this State, be inspected and approved, certificate attached, within 10 days after the vehicle becomes subject to registration.

(4) Vehicles acquired by residents within this State, not displaying current North Carolina inspection certificates, must be inspected and have approved inspection certificate attached within 10 days from date registration plate issued or if registration plate is to be transferred, within 10 days of the date of purchase.

(5) Owners of motor vehicles moving their residence to North Carolina from other states must within 10 days from the date the vehicles are subject to registration have same inspected and have an approved certificate attached thereto.

(6) The Commissioner of Motor Vehicles or his duly authorized agent is empowered to grant special written one-way permits to operate motor vehicles without current inspection certificates solely for the purpose of moving such vehicles to an authorized inspection station to obtain the inspection required under this Part.

(7) Vehicles which are base plated in North Carolina under the International Registration Plan but which are stationed in another jurisdiction shall be permitted to operate in North Carolina on their initial trip into North Carolina without displaying a valid inspection certificate.

(1979, c. 77.)

Effect of Amendments. — The 1979 amendment added subdivision (7) to subsection (b).

Only Part of Section Set Out. — As the other subsections were not changed by the amendment, they are not set out.

§ 20-183.3. Inspection requirements.

(a) Before an approval certificate may be issued for a motor vehicle, the vehicle must be inspected by a safety equipment inspection station, and if required by Chapter 20 of the General Statutes of North Carolina, must be found to possess in safe operating condition the following articles and equipment:

(1) Brakes,
(2) Lights,
(3) Horn,
(4) Steering mechanism,
(5) Windshield wiper,
(6) Directional signals,
(7) Tires,
(8) Rearview mirror or mirrors.

No inspection certificate shall be issued by a safety equipment inspection station for a motor vehicle manufactured after model year 1967 unless the vehicle is equipped with such emission control devices to reduce air pollution as were installed at the time of manufacture which are readily visible, provided the foregoing requirements shall not apply where such devices have been

removed for the purpose of converting the motor vehicle to operate on natural or liquified petroleum gas or other modifications have been made in order to reduce air pollution, further provided that such modifications shall have first been approved by the Department of Water and Air Resources [Department of Natural Resources and Community Development].

In addition to the items listed above, safety inspection equipment stations shall inspect the exhaust systems of all vehicles inspected and report the condition of each exhaust system to the owners or to the persons offering the vehicles for inspection.

The inspection requirements herein provided for shall not exceed the standards provided in the current General Statutes for such equipment.

(b) When required pursuant to G.S. 20-128.2, and as a condition for approval certificate issuance under subsection (a) of this section, exhaust emissions shall be inspected and shall comply with those standards established pursuant to G.S. 20-128.2 on gasoline-powered vehicles manufactured within the previous 12 years which shall include the current year model and, to this end, the Commissioner of Motor Vehicles is authorized to adopt and enforce such rules and regulations as may be necessary to carry out the intent and purpose of this section. (1965, c. 734, s. 1; 1969, c. 378, s. 2; 1971, c. 455, s. 2; c. 478, ss. 1, 2; 1979, 2nd Sess., c. 1180, s. 3.)

Effect of Amendments. — The 1979, 2nd Sess., amendment, effective July 1, 1980, designated the former provisions of this section as subsection (a) and added subsection (b).

Session Laws 1979, 2nd Sess., c. 1180, s. 7.1, contains a severability clause.

§ 20-183.7. Charges for inspections and certificates; safety equipment inspection station records.

(a) Every safety equipment inspection station shall charge a fee of three dollars and sixty-five cents ($3.65) for inspecting a motor vehicle to determine compliance with the safety inspection requirements of this Article and shall give the vehicle operater a dated receipt, indicating the articles and equipment approved and disapproved. At any time within 90 days thereafter, when the receipt is presented to the inspection station which issued it with a request for reinspection, that inspection station shall reinspect the vehicle at no charge. When said vehicle is approved, the inspection station shall obtain a fee of sixty cents (60¢) for a valid inspection certificate, and affix the certificate to that vehicle.

(a1) For inspection of vehicles required to be inspected under the inspection/maintenance provisions of G.S. 20-183.3(b), every safety equipment inspection station shall charge a fee of not less than three dollars and sixty-five cents ($3.65), nor more than ten dollars ($10.00), for inspecting a motor vehicle to determine compliance with the safety inspection requirements and the exhaust emission standards pursuant to the inspection/maintenance requirements of this Article and shall give the vehicle operator a dated receipt indicating the articles and equipment approved or disapproved and whether the vehicle met the emission control standards. If the vehicle is disapproved, at any time within 30 days thereafter when the receipt is presented to the inspection station which issued it with a request for reinspection, that inspection station shall reinspect the vehicle at no charge. When said vehicle is approved, the inspection stations shall obtain a fee of not less than sixty cents (60¢) nor more than two dollars ($2.00) for a valid inspection certificate covering both the safety inspection requirements and the emission control inspection/maintenance requirements and affix the certificate to that vehicle. The amount of the fees under this subsection shall be set by the Commissioner of Motor Vehicles.

(b) Self-inspector stations licensed under G.S. 20-183.4 are exempt from the inspecting fee provisions of subsection (a) above, but shall pay to the Division of Motor Vehicles the prescribed certificate fee for each inspection certificate issued by it.

(c) Fees collected for inspection certificates shall be paid to the Division of Motor Vehicles in accordance with its regulations and shall be periodically transferred as follows:

(1) The sixty cents (60¢) fee collected pursuant to subsection (a) shall be transferred to the Highway Fund.

(2) The fee of not less than thirty-five cents (35¢) nor more than two dollars ($2.00) collected pursuant to subsection (a1) shall be transferred as follows: the first sixty cents (60¢) to the Division of Environmental Management, and any excess up to one dollar and sixty-five cents ($1.65) to the Highway Fund.

(d) Each inspection station shall maintain a record of inspections performed, in a form approved by the Division of Motor Vehicles, for a period of 18 months and such records shall be made available for inspection by any law-enforcement officer, upon demand, during normal business hours. (1965, c. 734, s. 1; 1969, c. 1242; 1973, c. 1480; 1975, c. 547; c. 716, s. 5; c. 875, s. 4; 1979, c. 688; 1979, 2nd Sess., c. 1180, ss. 5, 6; 1981, c. 690, s. 17.)

Effect of Amendments. — The 1979 amendment rewrote the former section, redesignated it as subsection (a), and added subsections (b), (c), and (d). As enacted this amendment was to become effective July 1, 1979, but Session Laws 1979, c. 814 changed the effective date to Jan. 1, 1980.

The 1979, 2nd Sess., amendment, effective July 1, 1980, inserted "safety" preceding "inspection" near the middle of the first sentence in subsection (a), added subsection (a1) and rewrote subsection (c).

Session Laws 1979, 2nd Sess., c. 1180, s. 7.1, contains a severability clause.

The 1981 amendment, effective January 1, 1982, substituted "sixty cents (60¢)" for "thirty-five cents (35¢)" in the last sentence of subsection (a), in the third sentence of subsection (a1) and in subdivisions (1) and (2) of subsection (c).

§ 20-183.8. Commissioner of Motor Vehicles to issue regulations subject to approval of Governor; penalties for violation; fictitious or unlawful inspection certificate; 30-day grace period for expired inspection certificates.

(d) No person shall display or cause to be displayed or permit to be displayed upon any motor vehicle any inspection certificate, knowing the same to be fictitious or to be issued for another motor vehicle or to be issued without inspection and approval having been made. The Division is hereby authorized to take immediate possession of any inspection certificate which is fictitious or which has been otherwise unlawfully or erroneously issued or which has been unlawfully used. Any person violating the provisions of this subsection shall be guilty of a misdemeanor punishable by fine not to exceed fifty dollars ($50.00) or imprisonment not to exceed 30 days.

(1979, 2nd Sess., c. 1180, s. 4.)

Effect of Amendments. — The 1979, 2nd Sess., amendment, effective July 1, 1980, deleted "safety" preceding "inspection certificate" in the first and second sentences of subsection (d).

Session Laws 1979, 2nd Sess., c. 1180, s. 7.1, contains a severability clause.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (d) is set out.

CASE NOTES

Applied in Bigelow v. Johnson, 49 N.C. App. 40, 270 S.E.2d 503 (1980).

ARTICLE 3B.

Permanent Weighing Stations and Portable Scales.

§ 20-183.9. Establishment and maintenance of permanent weighing stations.

The Department of Transportation is hereby authorized, empowered and directed to establish during the biennium ending June 30, 1953, not less than six nor more than 13 permanent weighing stations equipped to weigh vehicles using the streets and highways of this State to determine whether such vehicles are being operated in accordance with legislative enactments relating to weights of vehicles and their loads. The permanent weighing stations shall be established at such locations on the streets and highways in this State as will enable them to be used most advantageously in determining the weight of vehicles and their loads. Said permanent weighing stations shall be equipped by the Department of Transportation and shall be maintained by said Department of Transportation. (1951, c. 988, s. 1; 1957, c. 65, s. 11; 1973, c. 507, s. 5; 1977, c. 464, ss. 34, 37; 1979, c. 76.)

Effect of Amendments. — The 1979 amendment substituted "13" for "12" near the middle of the first sentence.

ARTICLE 4.

State Highway Patrol.

§ 20-185. Personnel; appointment; salaries.

(b)-(f) Repealed by Session Laws 1979, 2nd Session, c. 1272, s. 2. (1979, 2nd Sess., c. 1272, s. 2.)

Cross References. — As to payment of salaries of certain State law-enforcement officers incapacitated as the result of injury by accident or occupational disease arising out of and in the course of performance of their duties, see § 143-166.13 et seq.

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, substituted "Workers' " for "Workmen's" near the end of the first sentence in subsection (c) and in former subsection (e).

The 1979, 2nd Sess., amendment deleted subsections (b) through (f), which related to payment of salaries of officers or members of the State Highway Patrol incapacitated by injury, accident or occupational disease arising out of and in the course of the performance of their duties.

Session Laws 1979, 2nd Sess., c. 1272, s. 5, provides: "This act is effective upon ratification and shall apply to persons injured or contracting an occupational disease on or after January 1, 1981."

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsections (b) through (f) are set out.

§ 20-187.2. Badges and service side arms of deceased or retiring members of State, city and county law-enforcement agencies; revolvers of active members.

(a) Surviving spouses, or in the event such members die unsurvived by a spouse, surviving children of members of North Carolina State, city and county law-enforcement agencies killed in the line of duty or who are members of such agencies at the time of their deaths, and retiring members of such agencies shall receive upon request and at no cost to them, the badge worn or carried by such deceased or retiring member. The governing body of a law-enforcement agency may, in its discretion, also award to a retiring member or surviving relatives as provided herein, upon request, the service side arm of such deceased or retiring members, at a price determined by such governing body, upon securing a permit as required by G.S. 14-402 et seq. or 14-409.1 et seq., or without such permit provided the revolver shall have been rendered incapable of being fired. Governing body shall mean for county and local alcohol beverage control officers, the county or local board of alcoholic control; for all other law-enforcement officers with jurisdiction limited to a municipality or town, the city or town council; for all other law-enforcement officers with countywide jurisdiction, the board of county commissioners; for all State law-enforcement officers, the head of the department.

(b) Active members of North Carolina State law-enforcement agencies, upon change of type of revolvers, may purchase the revolver worn or carried by such member at a price which shall be the average yield to the State from the sale of similar revolvers during the preceding year. (1971, c. 669; 1973, c. 1424; 1975, c. 44; 1977, c. 548; 1979, c. 882.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, divided the former first sentence into the present first and second sentences. The amendment deleted "and service revolver" following "the badge" near the end of the present first sentence, added "The governing body of a law-enforcement agency may, in its discretion, also award to a retiring member or surviving relatives as provided herein, upon request, the service side arm of such deceased or retiring members, at a price determined by such governing body," at the beginning of the present second sentence, and added the third sentence.

§ 20-187.3. Quotas prohibited.

The Secretary of Crime Control and Public Safety shall not make or permit to be made any order, rule, or regulation requiring the issuance of any minimum number of traffic citations, or ticket quotas, by any member or members of the State Highway Patrol. Pay and promotions of members of the Highway Patrol shall be based on their overall job performance and not on the basis of the volume of citations issued or arrests made. (1981, c. 429.)

§ 20-190. Uniforms; motor vehicles and arms; expense incurred; color of vehicle.

The Department of Crime Control and Public Safety shall adopt some distinguishing uniform for the members of said State Highway Patrol, and furnish each member of the Patrol with an adequate number of said uniforms and each member of said Patrol force when on duty shall be dressed in said uniform. The Department of Crime Control and Public Safety shall likewise furnish each member of the Patrol with a suitable motor vehicle, and necessary arms, and provide for all reasonable expense incurred by said Patrol while on

duty, provided, that not less than eighty-three percent (83%) of the number of motor vehicles operated on the highways of the State by members of the State Highway Patrol shall be painted a uniform color of black and silver. (1929, c. 218, s. 5; 1941, c. 36; 1955, c. 1132, ss. 1, 1¼, 1¾; 1957, c. 478, s. 1; c. 673, s. 1; 1961, c. 342; 1975, c. 716, s. 5; 1977, c. 70, s. 15; 1979, c. 229.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1980, substituted "eighty-three percent (83%)" for "seventy-nine percent (79%)" near the end of the second sentence.

Article 7.

Miscellaneous Provisions Relating to Motor Vehicles.

§ 20-217. Motor vehicles to stop for properly marked and designated school buses in certain instances; evidence of identity of driver.

(a) The driver of any vehicle upon approaching from any direction on the same street or highway any school bus (including privately owned buses transporting children and school buses transporting elderly persons under G.S. 115-183.1), while such bus is displaying its mechanical stop signal, or is stopped for the purpose of receiving or discharging passengers, shall bring his vehicle to a full stop before passing or attempting to pass such bus, and shall remain stopped until the mechanical stop signal has been withdrawn or until the bus has moved on. The driver of a vehicle upon any interstate or other controlled-access highway need not stop upon meeting or passing a school bus which is in the roadway across the dividing space or physical barrier separating the roadways.

The provisions of this section are applicable only in the event the school bus bears upon the front and rear a plainly visible sign containing the words "school bus" in letters not less than eight inches in height.

Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not to exceed two hundred dollars ($200.00) or imprisoned not to exceed 90 days.

(b) Proof that a motor vehicle has passed a stopped school bus in violation of this section is prima facie evidence that that motor vehicle was operated at the time of the violation by the registered owner of the vehicle. (1925, c. 265; 1943, c. 767; 1947, c. 527; 1955, c. 1365; 1959, c. 909; 1965, c. 370; 1969, c. 952; 1971, c. 245, s. 1; 1973, c. 1330, s. 35; 1977, 2nd Sess., c. 1280, s. 4; 1979, 2nd Sess., c. 1323.)

Effect of Amendments. — The 1977, 2nd Sess., amendment added "and school buses transporting elderly persons under G.S. 115-183.1" in the parenthetical phrase in the first sentence of the first paragraph of subsection (a).

The 1979, 2nd Sess., amendment, effective October 1, 1980, designated the former provisions of this section as subsection (a) and added subsection (b).

§ 20-218. Standard qualifications for school bus drivers; speed limit.

(a) No person shall drive or operate a school bus over the public roads of North Carolina while the same is occupied by children unless said person shall be fully trained in the operation of motor vehicles, and shall furnish to the

superintendent of the schools of the county in which said bus shall be operated a certificate from any representative duly designated by the Commissioner of Motor Vehicles, and the chief mechanic in charge of school buses in said county showing that he has been examined by a representative duly designated by the Commissioner of Motor Vehicles, and said chief mechanic in charge of school buses in said county and that he is a fit and competent person to operate or drive a school bus over the public roads of the State. Notwithstanding the provisions of G.S. 20-7(a)(3), the driver of a school bus must be at least 16 years of age and hold a driver's license of Class "A", "B", or "C" and a school bus driver's certificate, and the driver of a school activity bus must hold a driver's license of Class "C" and a school bus driver's certificate or a driver's license of Class "A" or Class "B".

(b) It shall be unlawful for any person to operate or drive a school bus loaded with children over the public roads of North Carolina at a greater rate of speed than 35 miles per hour, with the following exceptions:

(1) For school activity buses which are painted a different color from regular school buses and which are being used for transportation of students or others to or from places for participation in events other than regular classroom work, it shall be unlawful to operate such a school activity bus at a greater rate of speed than 45 miles per hour.

(2) For school buses or special buses with a capacity of 16 pupils or less that are used to transport students who are children with special needs, it shall be unlawful to operate the buses at a greater rate of speed than 45 miles per hour.

(3) For private school buses that pick up children at a central point and deposit the children at a single school, without picking up children along the way, it shall be unlawful to operate the buses at a greater rate of speed than 45 miles per hour.

(c) Any person violating this section shall, upon conviction, be fined not more than fifty dollars ($50.00) or imprisoned for not more than 30 days. (1937, c. 397, ss. 1-3; 1941, c. 21; 1943, c. 440; 1945, c. 216; 1957, cc. 139, 595; 1971, c. 293; 1977, c. 791, ss. 1, 2; c. 1102; 1979, c. 31, ss. 1, 2; c. 667, s. 36; 1981, c. 30.)

Effect of Amendments. — The 1979 amendment, effective Oct. 1, 1979, deleted "from the Highway Patrol of North Carolina, or" after "a certificate" and "a member of the said Highway Patrol or" after "examined by" near the middle of the first sentence of subsection (a).

The second 1979 amendment, effective Jan. 1, 1981, added the second sentence of subsection (a).

The 1981 amendment added subdivision (3) of subsection (b).

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight'."

OPINIONS OF ATTORNEY GENERAL

This section as rewritten by Session Laws 1977, c. 791, contains the correct version of the statute. Opinion of Attorney General to Major D.R. Emory, N.C. State Highway Patrol, 47 N.C.A.G. 75 (1977).

§ 20-219.2. Removal of unauthorized vehicles from private lots.

(c) This section shall apply only to the Counties of Craven, Dare, Forsyth, Gaston, Guilford, New Hanover, Orange, Robeson, Wake, Wilson and to the Cities of Durham and Charlotte. (1969, cc. 173, 288; 1971, c. 986; 1973, c. 183;

c. 981, s. 1; c. 1330, s. 36; 1975, c. 575; 1979, c. 380; 1979, 2nd Sess., c. 1119.)

Effect of Amendments. — The 1979 amendment substituted "Cities of Durham and Charlotte" for "City of Durham" at the end of subsection (c).

The 1979, 2nd Sess., amendment, effective July 1, 1980, made this section applicable to Dare County.

Only Part of Section Set Out. — As subsections (a) and (b) were not changed by the amendment, they are not set out.

Article 9A.

Motor Vehicle Safety and Financial Responsibility Act of 1953.

§ 20-279.1. Definitions.

The following words and phrases, when used in this Article, shall, for the purposes of this Article, have the meanings respectively ascribed to them in this section, except in those instances where the context clearly indicates a different meaning:

(11) "Proof of financial responsibility": Proof of ability to respond in damages for liability, on account of accidents occurring subsequent to the effective date of said proof, arising out of the ownership, maintenance or use of a motor vehicle, in the amount of twenty-five thousand dollars ($25,000) because of bodily injury to or death of one person in any one accident, and, subject to said limit for one person, in the amount of fifty thousand dollars ($50,000) because of bodily injury to or death of two or more persons in any one accident, and in the amount of ten thousand dollars ($10,000) because of injury to or destruction of property of others in any one accident. Nothing contained herein shall prevent an insurer and an insured from entering into a contract, not affecting third parties, providing for a deductible as to property damage at a rate approved by the Commissioner of Insurance.

(1979, c. 832, s. 1.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1980, substituted "twenty-five thousand dollars ($25,000)" for "fifteen thousand dollars ($15,000)," "fifty thousand dollars ($50,000)" for "thirty thousand dollars ($30,000)," and "ten thousand dollars ($10,000)" for "five thousand dollars ($5,000)" in the first sentence of subdivision (11).

Session Laws 1979, c. 832, s. 12, provides: "This act will not affect any policy in effect on the effective date of this act [Jan. 1, 1980] nor will this act affect pending litigation."

Section 13 makes this act effective January 1, 1980.

Only Part of Section Set Out. — As the other subdivisions were not changed by the amendment, only the introductory paragraph and subdivision (11) are set out.

Legal Periodicals. — For comment, "Compulsory Motor Vehicle Liability Insurance: Joinder of Insurers as Defendants in Actions Arising out of Automobile Accidents," see 14 Wake Forest L. Rev. 200 (1978).

§ 20-279.2. Commissioner to administer Article; appeal to court.

Legal Periodicals. — For article entitled, "Toward a Codification of the Law of Evidence in North Carolina," see 16 Wake Forest L. Rev. 669 (1980).

§ 20-279.5. Security required unless evidence of insurance; when security determined; suspension; exceptions.

(c) This section shall not apply under the conditions stated in G.S. 20-279.6 nor:

(1) To such operator or owner if such owner had in effect at the time of such accident an automobile liability policy with respect to the motor vehicle involved in such accident;

(2) To such operator, if not the owner of such motor vehicle, if there was in effect at the time of such accident a motor vehicle liability policy or bond with respect to his operation of motor vehicles not owned by him;

(3) To such operator or owner if the liability of such operator or owner for damages resulting from such accident is, in the judgment of the Commissioner, covered by any other form of liability insurance policy or bond or sinking fund or group assumption of liability;

(4) To any person qualifying as a self-insurer, nor to any operator for a self-insurer if, in the opinion of the Commissioner from the information furnished him, the operator at the time of the accident was probably operating the vehicle in the course of the operator's employment as an employee or officer of the self-insurer; nor

(5) To any employee of the United States government while operating a vehicle in its service and while acting within the scope of his employment, such operations being fully protected by the Federal Tort Claims Act of 1946, which affords ample security to all persons sustaining personal injuries or property damage through the negligence of such federal employee.

No such policy or bond shall be effective under this section unless issued by an insurance company or surety company authorized to do business in this State, except that if such motor vehicle was not registered in this State, or was a motor vehicle which was registered elsewhere than in this State at the effective date of the policy or bond, or the most recent renewal thereof, or if such operator not an owner was a nonresident of this State, such policy or bond shall not be effective under this section unless the insurance company or surety company if not authorized to do business in this State shall execute a power of attorney authorizing the Commissioner to accept service on its behalf of notice or process in any action upon such policy, or bond arising out of such accident, and unless said insurance company or surety company, if not authorized to do business in this State, is authorized to do business in the state or other jurisdiction where the motor vehicle is registered or, if such policy or bond is filed on behalf of an operator not an owner who was a nonresident of this State, unless said insurance company or surety company, if not authorized to do business in this State, is authorized to do business in the state or other jurisdiction of residence of such operator; provided, however, every such policy or bond is subject, if the accident has resulted in bodily injury or death, to a limit, exclusive of interest and cost, of not less than twenty-five thousand dollars ($25,000) because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, to a limit of not less than fifty thousand dollars ($50,000) because of bodily injury to or death of two or more persons in any one accident, and, if the accident has resulted in injury to or destruction of property, to a limit of not less than ten thousand dollars ($10,000) because of injury to or destruction of property of others in any one accident. (1953, c. 1300, s. 5; 1955, cc. 138, 854; c. 855, s. 1; c. 1152, ss. 4-8; c. 1355; 1967, c. 277, s. 2; 1971, c. 763, s. 3; 1973, c. 745, s. 2; 1979, c. 832, s. 2.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1980, substituted "twenty-five thousand dollars ($25,000)" for "fifteen thousand dollars ($15,000)," "fifty thousand dollars ($50,000)" for "thirty thousand dollars ($30,000)," and "ten thousand dollars ($10,000)" for "five thousand dollars ($5,000)" near the end of the last unnumbered paragraph of subsection (c).

Session Laws 1979, c. 832, s. 12, provides: "This act will not affect any policy in effect on the effective date of this act [Jan. 1, 1980] nor will this act affect pending litigation."

Section 13 makes this act effective January 1, 1980.

Only Part of Section Set Out. — As subsections (a) and (b) were not changed by the amendment, they were not set out.

§ 20-279.10. Custody, disposition and return of security; escheat.

(a) Security deposited in compliance with the requirements of this Article shall be placed by the Commissioner in the custody of the State Treasurer and shall be applicable only to the payment of a judgment or judgments rendered against the person or persons on whose behalf the deposit was made, for damages arising out of the accident in question in an action at law, begun not later than one year after the date of such accident, or within one year after the date of deposit of any security under subdivision (3) of G.S. 20-279.7, or to the payment in settlement, agreed to by the depositor, of a claim or claims arising out of such accident. Such deposit or any balance thereof shall be returned to the depositor or his personal representative when evidence satisfactory to the Commissioner has been filed with him that there has been a release from liability, or a final adjudication of nonliability, or a duly acknowledged agreement, in accordance with subdivision (4) of G.S. 20-279.6, or a settlement accepted by the Commissioner as provided in subdivision (5) of G.S. 20-279.6, or a conviction accepted by the Commissioner as provided in subdivision (6) of G.S. 20-279.6, or whenever, after the expiration of one year from the date of the accident, or from the date of deposit of any security under subdivision (3) of G.S. 20-279.7, whichever is later, the Commissioner shall be given reasonable evidence that there is no such action pending and no judgment rendered in such action left unpaid.

(b) One year from the deposit of any security under the terms of this Article, the Commissioner shall notify the depositor thereof by registered mail addressed to his last known address that the depositor is entitled to a refund of the security upon giving reasonable evidence that no action at law for damages arising out of the accident in question is pending or that no judgment rendered in any such action remains unpaid. If, at the end of three years from the date of deposit, no claim therefor has been received, the Division shall notify the depositor thereof by registered mail and shall cause a notice to be posted at the courthouse door of the county in which is located the last known address of the depositor for a period of 60 days. Such notice shall contain the name of the depositor, his last known address, the date, amount and nature of the deposit, and shall state the conditions under which the deposit will be refunded. If, at the end of two years from the date of posting of such notice, no claim for the deposit has been received, the Commissioner shall certify such fact together with the facts of notice to the State Treasurer. These deposits shall be turned over to the Escheat Fund of the Department of State Treasurer. (1953, c. 1300, s. 10; 1955, c. 1152, s. 13; 1967, c. 1227; 1975, c. 716, s. 5; 1981, c. 531, s. 16.)

Effect of Amendments. — The 1981 amendment deleted "and the Treasurer shall turn such deposit over to the University of North Carolina as an escheat" at the end of the next-to-last sentence of subsection (b) and added the last sentence of subsection (b).

§ 20-279.13. Suspension for nonpayment of judgment; exceptions.

(b) The Commissioner shall not, however, revoke or suspend the license of an owner or driver if the insurance carried by him was in a company which was authorized to transact business in this State and which subsequent to an accident involving the owner or operator and prior to settlement of the claim therefor went into liquidation, so that the owner or driver is thereby unable to satisfy the judgment arising out of the accident.

(1979, c. 667, s. 37.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1981, substituted "owner or driver" for "owner, operator or chauffeur" in two places in subsection (b).

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight'."

Only Part of Section Set Out. — As subsections (a) and (c) were not changed by the amendment, they are not set out.

CASE NOTES

Cited in Lupo v. Powell, 44 N.C. App. 35, 259 S.E.2d 777 (1979).

§ 20-279.15. Payment sufficient to satisfy requirements.

In addition to other methods of satisfaction provided by law, judgments herein referred to shall, for the purpose of this Article, be deemed satisfied:

(1) When twenty-five thousand dollars ($25,000) has been credited upon any judgment or judgments rendered in excess of that amount because of bodily injury to or death of one person as the result of any one accident; or

(2) When, subject to such limit of twenty-five thousand dollars ($25,000) because of bodily injury to or death of one person, the sum of fifty thousand dollars ($50,000) has been credited upon any judgment or judgments rendered in excess of that amount because of bodily injury to or death of two or more persons as the result of any one accident; or

(3) When ten thousand dollars ($10,000) has been credited upon any judgment or judgments rendered in excess of that amount because of injury to or destruction of property of others as a result of any one accident;

Provided, however, payments made in settlement of any claims because of bodily injury, death or property damage arising from a motor vehicle accident shall be credited in reduction of the amounts provided for in this section. (1953, c. 1300, s. 15; 1963, c. 1238; 1967, c. 277, s. 3; 1973, c. 745, s. 3; c. 889; 1979, c. 832, ss. 3-5.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1980, substituted "twenty-five thousand dollars ($25,000)" for "fifteen thousand dollars ($15,000)" near the beginning of subdivision (1), substituted "twenty-five thousand dollars ($25,000)" for "fifteen thousand dollars ($15,000)" near the beginning of subdivision (2), and substituted "fifty thousand dollars ($50,000)" for "thirty thousand dollars ($30,000)" and "ten thousand dollars ($10,000)" for "five thousand dollars ($5,000)" near the beginning of subdivision (3).

Session Laws 1979, c. 832, s. 12, provides: "This act will not affect any policy in effect on the effective date of this act [Jan. 1, 1980] nor will this act affect pending litigation."

Section 13 makes this act effective January 1, 1980.

CASE NOTES

Coverage Extends to Property Damage as Well as Personal Injuries. — Under subdivision (3) of this section, coverage within this Article extends to property damage as well as to personal damages occurring to the victim of an accident. Nationwide Mut. Ins. Co. v. Knight, 34 N.C. App. 96, 237 S.E.2d 341, cert. denied, 293 N.C. 589, 239 S.E.2d 263 (1977).

Property Damage from Intentional Ramming of Defendant's Car. — An automobile insurer was required to compensate defendant for any property damage arising out of the intentional ramming of defendant's automobile by the insured. Nationwide Mut. Ins. Co. v. Knight, 34 N.C. App. 96, 237 S.E.2d 341, cert. denied, 293 N.C. 589, 239 S.E.2d 263 (1977).

§ 20-279.21. "Motor vehicle liability policy" defined.

(b) Such owner's policy of liability insurance:

(1) Shall designate by explicit description or by appropriate reference all motor vehicles with respect to which coverage is thereby to be granted;

(2) Shall insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured, or any other persons in lawful possession, against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicle or motor vehicles within the United States of America or the Dominion of Canada subject to limits exclusive of interest and costs, with respect to each such motor vehicle, as follows: twenty-five thousand dollars ($25,000) because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, fifty thousand dollars ($50,000) because of bodily injury to or death of two or more persons in any one accident, and ten thousand dollars ($10,000) because of injury to or destruction of property of others in any one accident; and

(3) No policy of bodily injury liability insurance, covering liability arising out of the ownership, maintenance, or use of any motor vehicle, shall be delivered or issued for delivery in this State with respect to any motor vehicle registered or principally garaged in this State unless coverage is provided therein or supplemental thereto, in limits for bodily injury or death set forth in subsection (c) of G.S. 20-279.5, under provisions filed with and approved by the Commissioner of Insurance, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom; and provided that an insured shall be entitled to secure increased limits coverage of twenty-five thousand dollars ($25,000) because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, fifty thousand dollars ($50,000) because of bodily injury to or death of two or more persons in any one accident if the policy of such insured carries liability limits of equal or greater amounts for the protection of third persons. Such provisions shall include coverage for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of injury to or destruction of the property of such insured, with a limit in the aggregate for all insureds in any one accident of ten thousand dollars ($10,000) and subject, for each insured, to an exclusion of the first one hundred dollars ($100.00) of such damages. Such provision shall further provide that a written statement by the liability insurer, whose name appears on the certification of financial responsibility made by the owner of any vehicle

involved in an accident with the insured, that such other motor vehicle was not covered by insurance at the time of the accident with the insured shall operate as a prima facie presumption that the operator of such other motor vehicle was uninsured at the time of the accident with the insured for the purposes of recovery under this provision of the insured's liability insurance policy. The coverage required under this section shall not be applicable where any insured named in the policy shall reject the coverage.

In addition to the above requirements relating to uninsured motorist insurance, every policy of bodily injury liability insurance covering liability arising out of the ownership, maintenance or use of any motor vehicle, which policy is delivered or issued for delivery in this State, shall be subject to the following provisions which need not be contained therein.

a. A provision that the insurer shall be bound by a final judgment taken by the insured against an uninsured motorist if the insurer has been served with copy of summons, complaint or other process in the action against the uninsured motorist by registered or certified mail, return receipt requested, or in any manner provided by law; provided however, that the determination of whether a motorist is uninsured may be decided only by an action against the insurer alone. The insurer, upon being served as herein provided, shall be a party to the action between the insured and the uninsured motorist though not named in the caption of the pleadings and may defend the suit in the name of the uninsured motorist or in its own name. The insurer, upon being served with copy of summons, complaint or other pleading, shall have the time allowed by statute in which to answer, demur or otherwise plead (whether such pleading is verified or not) to the summons, complaint or other process served upon it. The consent of the insurer shall not be required for the initiation of suit by the insured against the uninsured motorist: Provided, however, no action shall be initiated by the insured until 60 days following the posting of notice to the insurer at the address shown on the policy or after personal delivery of such notice to the insurer or its agent setting forth the belief of the insured that the prospective defendant or defendants are uninsured motorists. No default judgment shall be entered when the insurer has timely filed an answer or other pleading as required by law.

b. Where the insured, under the uninsured motorist coverage, claims that he has sustained bodily injury as the result of collision between motor vehicles and asserts that the identity of the operator or owner of a vehicle (other than a vehicle in which the insured is a passenger) cannot be ascertained, the insured may institute an action directly against the insurer: Provided, in such event, the insured, or someone in his behalf, shall report the accident within 24 hours or as soon thereafter as may be practicable, to a police officer, peace officer, other judicial officer, or to the Commissioner of Motor Vehicles. The insured shall also within a reasonable time give notice to the insurer of his injury, the extent thereof, and shall set forth in such notice the time, date and place of such injury. Thereafter, on forms to be mailed by the insurer within 15 days following receipt of the notice of the accident to the insurer, the insured shall furnish to insurer such further reasonable information concerning the accident and the injury as the insurer shall request. If such forms are not so furnished within 15 days, the insured shall be deemed to have complied with the requirements

for furnishing information to the insurer. Suit may not be instituted against the insurer in less than 60 days from the posting of the first notice of such injury or accident to the insurer at the address shown on the policy or after personal delivery of such notice to the insurer or its agent.

Provided under this section the term "uninsured motor vehicle" shall include, but not be limited to, an insured motor vehicle where the liability insurer thereof is unable to make payment with respect to the legal liability within the limits specified therein because of insolvency.

An insurer's insolvency protection shall be applicable only to accidents occurring during a policy period in which its insured's uninsured motorist coverage is in effect where the liability insurer of the tort-feasor becomes insolvent within three years after such an accident. Nothing herein shall be construed to prevent any insurer from affording insolvency protection under terms and conditions more favorable to the insured than is provided herein.

In the event of payment to any person under the coverage required by this section and subject to the terms and conditions of such coverage, the insurer making such payment shall, to the extent thereof, be entitled to the proceeds of any settlement for judgment resulting from the exercise of any limits of recovery of such person against any person or organization legally responsible for the bodily injury for which such payment is made, including the proceeds recoverable from the assets of the insolvent insurer.

For the purpose of this section, an "uninsured motor vehicle" shall be a motor vehicle as to which there is no bodily injury liability insurance and property damage liability insurance in at least the amounts specified in subsection (c) of G.S. 20-279.5, or there is such insurance but the insurance company writing the same denies coverage thereunder, or has become bankrupt, or there is no bond or deposit of money or securities as provided in G.S. 20-279.24 or 20-279.25 in lieu of such bodily injury and property damage liability insurance, or the owner of such motor vehicle has not qualified as a self-insurer under the provisions of G.S. 20-279.33, or a vehicle that is not subject to the provisions of the Motor Vehicle Safety and Financial Responsibility Act; but the term "uninsured motor vehicle" shall not include:

a. A motor vehicle owned by the named insured;
b. A motor vehicle which is owned or operated by a self-insurer within the meaning of any motor vehicle financial responsibility law, motor carrier law or any similar law;
c. A motor vehicle which is owned by the United States of America, Canada, a state, or any agency of any of the foregoing (excluding, however, political subdivisions thereof);
d. A land motor vehicle or trailer, if operated on rails or crawler-treads or while located for use as a residence or premises and not as a vehicle; or
e. A farm-type tractor or equipment designed for use principally off public roads, except while actually upon public roads.

For purposes of this section "persons insured" means the named insured and, while resident of the same household, the spouse of any such named insured and relatives of either, while in a motor vehicle or otherwise, and any person who uses with the consent, expressed or implied, of the named insured, the motor vehicle to which the policy applies and a guest in such motor vehicle to which the policy applies or the personal representative of any of the above or any other person or persons in lawful possession of such motor vehicle.

(4) In addition to the coverages set forth in subdivisions (1) through (3) of this subsection, at the written request of the insured, shall provide for underinsured motorist insurance coverage to be used with policies affording uninsured motorist at limits in excess of the limits prescribed by the applicable financial responsibility law pursuant to this section, as required or permitted by the applicable uninsured motorist insurance law, but not exceeding the policy limits for automobile bodily injury liability as specified in the owner's policy. An "uninsured motor vehicle," as described in subdivision (3) of this subsection, shall include an "underinsured highway vehicle" which means a highway vehicle with respect to the ownership, maintenance, or use of which, the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of liability under this insurance coverage. For the purposes of this subdivision, the term "highway vehicle" means a land motor vehicle or trailer other than (i) a farm-type tractor or other vehicle designed for use principally off public roads and while not upon public roads, (ii) a vehicle operated on rails or crawler-treads, or (iii) a vehicle while located for use as a residence or premises. The insurer shall not be obligated to make any payment because of bodily injury to which this insurance applies and which arises out of the ownership, maintenance, or use of an underinsured highway vehicle until after the limits of liability under all bodily injury liability bonds or insurance policies applicable at the time of the accident have been exhausted by payment of judgments or settlements.

(f) Every motor vehicle liability policy shall be subject to the following provisions which need not be contained therein:

(1) Except as hereinafter provided, the liability of the insurance carrier with respect to the insurance required by this Article shall become absolute whenever injury or damage covered by said motor vehicle liability policy occurs; said policy may not be canceled or annulled as to such liability by any agreement between the insurance carrier and the insured after the occurrence of the injury or damage; no statement made by the insured or on his behalf and no violation of said policy shall defeat or void said policy. As to policies issued to insureds in this State under the assigned risk plan or through the North Carolina Motor Vehicle Reinsurance Facility, a default judgment taken against such an insured shall not be used as a basis for obtaining judgment against the insurer unless counsel for the plaintiff has forwarded to the insurer, or to one of its agents, by registered or certified mail with return receipt requested, or served by any other method of service provided by law, a copy of summons, complaint, or other pleadings, filed in the action. The return receipt shall, upon its return to plaintiff's counsel, be filed with the clerk of court wherein the action is pending against the insured and shall be admissible in evidence as proof of notice to the insurer. The refusal of insurer or its agent to accept delivery of the registered mail, as provided in this section, shall not affect the validity of such notice and any insurer or agent of an insurer refusing to accept such registered mail shall be charged with the knowledge of the contents of such notice. When notice has been sent to an agent of the insurer such notice shall be notice to the insurer. The word "agent" as used in this subsection shall include, but shall not be limited to, any person designated by the insurer as its agent for the service of process, any person duly licensed by the insurer in the State as insurance agent, any general agent of the company in the State of North Carolina, and any employee of the company in a managerial or other responsible position, or the North

Carolina Commissioner of Insurance; provided, where the return receipt is signed by an employee of the insurer or an employee of an agent for the insurer, shall be deemed for the purposes of this subsection to have been received. The term "agent" as used in this subsection shall not include a producer of record or broker, who forwards an application for insurance to the North Carolina Motor Vehicle Reinsurance Facility.

The insurer, upon receipt of summons, complaint or other process, shall be entitled, upon its motion, to intervene in the suit against its insured as a party defendant and to defend the same in the name of its insured. In the event of such intervention by an insurer it shall become a named party defendant. The insurer shall have 30 days from the signing of the return receipt acknowledging receipt of the summons, complaint or other pleading in which to file a motion to intervene, along with any responsive pleading, whether verified or not, which it may deem necessary to protect its interest: Provided, the court having jurisdiction over the matter may, upon motion duly made, extend the time for the filing of responsive pleading or continue the trial of the matter for the purpose of affording the insurer a reasonable time in which to file responsive pleading or defend the action. If, after receiving copy of the summons, complaint or other pleading, the insurer elects not to defend the action, if coverage is in fact provided by the policy, the insurer shall be bound to the extent of its policy limits to the judgment taken by default against the insured, and noncooperation of the insured shall not be a defense.

If the plaintiff initiating an action against the insured has complied with the provisions of this subsection, then, in such event, the insurer may not cancel or annul the policy as to such liability and the defense of noncooperation shall not be available to the insurer: Provided, however, nothing in this section shall be construed as depriving an insurer of its defenses that the policy was not in force at the time in question, that the operator was not an "insured" under policy provisions, or that the policy had been lawfully canceled at the time of the accident giving rise to the cause of action.

Provided further that the provisions of this subdivision shall not apply when the insured has delivered a copy of the summons, complaint or other pleadings served on him to his insurance carrier within the time provided by law for filing answer, demurrer or other pleadings.

(2) The satisfaction by the insured of a judgment for such injury or damage shall not be a condition precedent to the right or duty of the insurance carrier to make payment on account of such injury or damage;

(3) The insurance carrier shall have the right to settle any claim covered by the policy, and if such settlement is made in good faith, the amount thereof shall be deductible from the limits of liability specified in subdivision (2) of subsection (b) of this section;

(4) The policy, the written application therefor, if any, and any rider or endorsement which does not conflict with the provisions of the Article shall constitute the entire contract between the parties.

(1979, c. 190; c. 675; c. 832, ss. 6, 7.)

Effect of Amendments. — The first 1979 amendment substituted "North Carolina Motor Vehicle Reinsurance Facility" for "assigned risk bureau" at the end of the last sentence of the first paragraph of subdivision (1) of subsection (f), and deleted the former last two sentences of that paragraph, which read: "The Commissioner of Motor Vehicles and the North Carolina assigned risk bureau shall, upon request made, furnish to the plaintiff or his counsel the identity and address of the insurance carrier as shown upon the records of the

Division or the bureau, and whether the policy is an assigned risk policy. Neither the Division of Motor Vehicles nor the assigned risk bureau shall be subject to suit by reason of a mistake made as to the identity of the carrier and its address in response to a request made for such information."

The second 1979 amendment, effective Oct. 1, 1979, added subdivision (4) to subsection (b).

The third 1979 amendment, effective Jan. 1, 1980, substituted "twenty-five thousand dollars ($25,000)" for "fifteen thousand dollars ($15,000)," "fifty thousand dollars ($50,000)" for "thirty thousand dollars ($30,000)," and "ten thousand dollars ($10,000)" for "five thousand dollars ($5,000)" near the end of subdivision (2) of subsection (b). In subdivision (3) of subsection (b) the amendment substituted "twenty-five thousand dollars ($25,000)" for "fifteen thousand dollars ($15,000)" and "fifty thousand dollars ($50,000)" for "thirty thousand dollars ($30,000)" near the end of the first sentence, and "ten thousand dollars ($10,000)" for "five thousand dollars ($5,000)" near the middle of the second sentence.

Session Laws 1979, c. 832, s. 12, provides: "This act will not affect any policy in effect on the effective date of this act [Jan. 1, 1980] nor will this act affect pending litigation."

Section 13 makes this act effective January 1, 1980.

Only Part of Section Set Out. — As only subsections (b) and (f) were changed by the amendments, the other subsections are not set out.

Legal Periodicals. — For survey of 1973 case law with regard to the construction of the omnibus clause, see 52 N.C.L. Rev. 809 (1974).

For a survey of 1977 law on insurance, see 56 N.C.L. Rev. 1084 (1978).

For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

CASE NOTES

I. GENERAL CONSIDERATION.

The manifest purpose, etc. —

The mandatory coverage required by this Article is solely for the protection of innocent victims who may be injured by financially irresponsible motorists. Nationwide Mut. Ins. Co. v. Chantos, 293 N.C. 431, 238 S.E.2d 597 (1977); Engle v. State Farm Mut. Auto. Ins. Co., 37 N.C. App. 126, 245 S.E.2d 532, cert. denied, 295 N.C. 645, 248 S.E.2d 250 (1978).

A manifest purpose of subdivision (f)(1) of this section is to require the plaintiff to give the insurer of assigned risk or Reinsurance Facility individuals notice of actions brought against such persons so that the insurer may protect its interests. Love v. Nationwide Mut. Ins. Co., 45 N.C. App. 444, 263 S.E.2d 337 (1980).

Medical Payment Coverage. — The mandatory coverage required by this Article does not require the insurer to extend medical payment coverage beyond the terms of the policy to one who receives liability coverage solely by virtue of the Article. Nationwide Mut. Ins. Co. v. Chantos, 293 N.C. 431, 238 S.E.2d 597 (1977).

Statute Applies to All Financially Irresponsible Persons, Including Minors. — The language of the Financial Responsibility Act leaves no doubt that the legislature intended to make all financially irresponsible persons, including minors, subject to its provisions. Nationwide Mut. Ins. Co. v. Chantos, 293 N.C. 431, 238 S.E.2d 597 (1977).

The provisions of this section are written into every policy, etc. —

The provisions of the Financial Responsibility Act are "written" into every automobile liability policy as a matter of law, and, when the terms of the policy conflict with the statute, the provisions of the statute will prevail. Nationwide Mut. Ins. Co. v. Chantos, 293 N.C. 431, 238 S.E.2d 597 (1977); Engle v. State Farm Mut. Auto. Ins. Co., 37 N.C. App. 126, 245 S.E.2d 532, cert. denied, 295 N.C. 645, 248 S.E.2d 250 (1978).

Insurer Is Liable for Property Damage Intentionally Inflicted by Insured. — An automobile insurer in this State is liable, within the maximum coverage required by this Article, for property damage caused by an insured who intentionally drives an automobile into plaintiff's property. Nationwide Mut. Ins. Co. v. Knight, 34 N.C. App. 96, 237 S.E.2d 341, cert. denied, 293 N.C. 589, 239 S.E.2d 263 (1977).

An automobile insurer was required to compensate defendant for any property damage arising out of the intentional ramming of defendant's automobile by the insured. Nationwide Mut. Ins. Co. v. Knight, 34 N.C. App. 96, 237 S.E.2d 341, cert. denied, 293 N.C. 589, 239 S.E.2d 263 (1977).

A wound caused by gunshots fired from the insured's moving automobile did not constitute an accident arising out of the ownership, maintenance or use of such automobile. Nationwide Mut. Ins. Co. v. Knight, 34 N.C. App. 96, 237 S.E.2d 341, cert. denied, 293 N.C. 589, 239 S.E.2d 263 (1977).

There was no causal relationship between the ownership, maintenance and use of the insured's moving vehicle, and the injury sustained by the minor defendant as a result of gunshots fired from that moving vehicle. Nationwide Mut. Ins. Co. v. Knight, 34 N.C.

App. 96, 237 S.E.2d 341, cert. denied, 293 N.C. 589, 239 S.E.2d 263 (1977).

Provision Requiring Forwarding of Suit Papers Is Valid. — Policy provisions in an insurance contract requiring prompt forwarding of legal process as a condition precedent to recovery on the policy are valid so long as they do not conflict with this Article. Rose Hill Poultry Corp. v. American Mut. Ins. Co., 34 N.C. App. 224, 237 S.E.2d 564 (1977).

Effect of Failure to Forward Suit Papers. — The insured's failure under the terms of a policy to forward suit papers or otherwise notify the insurer of an action instituted in another state by an injured third party did not defeat or void the insurer's liability under the policy with respect to the third party; however, it did relieve the insurer of its obligations under the policy to afford protection for the insured. The insured was not the innocent victim this Article was designed to protect, and thus the provision requiring forwarding of legal process was not in conflict with the purpose of this Article. Rose Hill Poultry Corp. v. American Mut. Ins. Co., 34 N.C. App. 224, 237 S.E.2d 564 (1977).

Settlement of Claims by Insurer. —

When exercised in good faith, subdivision (f)(3) of this section, authorizing the insurer to negotiate and settle claims, is valid and binding on the insured. Nationwide Mut. Ins. Co. v. Chantos, 293 N.C. 431, 238 S.E.2d 597 (1977).

An insurer may have reimbursement from a stranger to the insurance contract whose negligence caused the injuries and damages for which the insurer had paid as a result of liability imposed by statute. Nationwide Mut. Ins. Co. v. Chantos, 293 N.C. 431, 238 S.E.2d 597 (1977).

Policy Provision for Reimbursement by Insured. — Subsection (h) of this section does not compel reimbursement by the insured, it merely allows the insurer and the insured to enter into such an agreement. Nationwide Mut. Ins. Co. v. Chantos, 293 N.C. 431, 238 S.E.2d 597 (1977).

A policy provision providing for reimbursement by the insured is merely a contractual agreement between the parties to the policy and does not have the effect or force of a statute. Nationwide Mut. Ins. Co. v. Chantos, 293 N.C. 431, 238 S.E.2d 597 (1977).

Default Judgment. — "Default judgment," as this term is used in subdivision (f)(1) of this section, must be construed so as to include all judgments obtained where an insured person falling within the provisions of this subdivision has not timely filed a responsive pleading or has otherwise made himself subject to a § 1A-1, Rule 55 default. Love v. Nationwide Mut. Ins. Co., 45 N.C. App. 444, 263 S.E.2d 337 (1980).

A trial which results in findings or a verdict against a nonappearing defendant does not take the resulting judgment for the appearing party out of the "default" category within the meaning of subdivision (f)(1) of this section. Love v. Nationwide Mut. Ins. Co., 45 N.C. App. 444, 263 S.E.2d 337 (1980).

The giving of notice of a default judgment is a condition precedent to maintaining a subsequent action against the insurer on the judgment, and the failure to provide that notice operates as a bar to the action. Love v. Nationwide Mut. Ins. Co., 45 N.C. App. 444, 263 S.E.2d 337 (1980).

Applied in Ford Marketing Corp. v. National Grange Mut. Ins. Co., 33 N.C. App. 297, 235 S.E.2d 82 (1977); Nationwide Mut. Ins. Co. v. Chantos, 298 N.C. 246, 258 S.E.2d 334 (1979); Tucker v. Peerless Ins. Co., 41 N.C. App. 302, 254 S.E.2d 656 (1979); Jones v. Nationwide Mut. Ins. Co., 42 N.C. App. 43, 255 S.E.2d 617 (1979); Caison v. Nationwide Ins. Co., 45 N.C. App. 30, 262 S.E.2d 296 (1980).

II. THE OMNIBUS CLAUSE.

Legislative Intent. — The preamble to chapter 1162 of the 1967 Session Laws, which reinstated the words "or any other persons in lawful possession" in subsection (b)(2) of this section suggests very strongly that the reason for adding the quoted words was to alleviate the necessity of proving that the operator of a vehicle belonging to another had the express or implied permission of the owner to drive (the vehicle) on the very trip and occasion of the collision. Engle v. State Farm Mut. Auto. Ins. Co., 37 N.C. App. 126, 245 S.E.2d 532, cert. denied, 298 N.C. 246, 258 S.E.2d 334 (1978).

The terms "permission" and "lawful possession" are not synonymous, and parties seeking recovery under a theory of permission must meet a higher standard than those seeking recovery under a theory of mere lawful possession. Caison v. Nationwide Ins. Co., 36 N.C. App. 173, 243 S.E.2d 429 (1978).

Permission is an element, etc. —

The statement in the paragraph under this catchline in the bound volume was overruled in Packer v. Travelers' Ins. Co., 28 N.C. App. 365, 221 S.E.2d 707 (1976); Caison v. Nationwide Ins. Co., 36 N.C. App. 173, 243 S.E.2d 429 (1978).

Permission Not Essential to "Lawful Possession". — The clear intent of the legislature as expressed in the preamble to the 1967 amendment was that permission, express or implied, is not an essential element of lawful possession. Packer v. Travelers' Ins. Co., 28 N.C. App. 365, 221 S.E.2d 707 (1976), overruling Jernigan v. State Farm Mut. Auto. Ins. Co., 16 N.C. App. 46, 190 S.E.2d 866 (1972).

The clear intent of the legislature was that permission, express or implied, is not an essential element of lawful possession. Caison v. Nationwide Ins. Co., 36 N.C. App. 173, 243 S.E.2d 429 (1978).

Liberal Construction, etc. —
In accord with 4th paragraph in original. See Caison v. Nationwide Ins. Co., 36 N.C. App. 173, 243 S.E.2d 429 (1978).

Who May Grant Permission. —
In accord with 6th paragraph in original. See Engle v. State Farm Mut. Auto. Ins. Co., 37 N.C. App. 126, 245 S.E.2d 532, cert. denied, 295 N.C. 645, 248 S.E.2d 250 (1978).

The victim's rights under the act against the insurer are not derived through the insured, as in the case of voluntary insurance. Such rights are statutory and become absolute upon the occurrence of injury or damage inflicted by the named insured, by one driving with his permission, or by one driving while in lawful possession of the named insured's car, regardless of whether or not the nature or circumstances of the injury are covered by the contractual terms of the policy. Engle v. State Farm Mut. Auto. Ins. Co., 37 N.C. App. 126, 245 S.E.2d 532, cert. denied, 295 N.C. 645, 248 S.E.2d 250 (1978).

III. UNINSURED MOTORIST COVERAGE.

Purpose, etc. —
The uninsured motorist provision of this section was enacted in order to close "gaps" in the motor vehicle financial responsibility legislation and thus, to provide financial recompense to innocent persons who receive injuries through the wrongful conduct of motorists who are uninsured and financially irresponsible. Autry v. Aetna Life & Cas. Ins. Co., 35 N.C. App. 628, 242 S.E.2d 172, cert. denied, 295 N.C. 89, 244 S.E.2d 257 (1978).

The term "uninsured motor vehicle" in subdivision (b)(3) of this section is intended to include motor vehicles which should be insured under this Article but are not, and motor vehicles which, though not subject to compulsory insurance under this Article, are at some time operated on the public highways. Autry v. Aetna Life & Cas. Ins. Co., 35 N.C. App. 628, 242 S.E.2d 172, cert. denied, 295 N.C. 89, 244 S.E.2d 257 (1978).

No Coverage of Injury on Private Property by Vehicle Not Subject to Financial Responsibility Law. — The uninsured motorist provision was not intended to provide financial recompense to one injured on private property by a vehicle not subject to the registration and compulsory insurance provisions of the motor vehicle financial responsibility legislation. Autry v. Aetna Life & Cas. Ins. Co., 35 N.C. App. 628, 242 S.E.2d 172, cert. denied, 295 N.C. 89, 244 S.E.2d 257 (1978).

"Other Insurance" Clauses Unenforceable Where Insured's Actual Damages Exceed Statutory Minimum. — "Other insurance" clauses in policies providing uninsured motorist coverage may not be enforced if such enforcement results in limiting an insured to recovery of an amount equal only to the coverage compelled by the act, when the actual damages suffered by the insured are greater than that amount. Turner v. Masias, 36 N.C. App. 213, 243 S.E.2d 401 (1978).

But Where Actual Damages Are Less, Such Clauses Are Valid. — While an "other insurance" clause in uninsured motorist coverage would be invalid to prevent the insured from being made whole, the use of such clauses to establish the rights of insurers in cases in which the damages were less than the coverage required by the act is not offensive to either the terms or intent of the act. The fact that two policies of insurance of different types are combined to provide the uninsured motorist coverage required by the act does not contravene its terms and, in fact, is specifically provided for in subsection (j). Turner v. Masias, 36 N.C. App. 213, 243 S.E.2d 401 (1978).

Neither the language of the act nor the public policy served by it is concerned with which insurance company makes the insured whole, so long as the "other insurance" clause is not used to defeat recovery of actual damages by an insured who has not rejected uninsured motorist coverage. Turner v. Masias, 36 N.C. App. 213, 243 S.E.2d 401 (1978).

Insured Is Not Limited, etc. —
In accord with original. See Turner v. Masias, 36 N.C. App. 213, 243 S.E.2d 401 (1978).

§ 20-279.25. Money or securities as proof.

(a) Proof of financial responsibility may be evidenced by the certificate of the State Treasurer that the person named therein has deposited with him sixty thousand dollars ($60,000) in cash, or securities such as may legally be purchased by savings banks or for trust funds of a market value of sixty thousand dollars ($60,000). The State Treasurer shall not accept any such deposit and issue a certificate therefor and the Commissioner shall not accept such certificate unless accompanied by evidence that there are no unsatisfied judgments of any character against the depositor in the county where the depositor resides.

(1979, c. 832, s. 8.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1980, substituted "sixty thousand dollars ($60,000)" for "forty-five thousand dollars ($45,000)" in two places in the first sentence.

Session Laws 1979, c. 832, s. 12, provides: "This act will not affect any policy in effect on the effective date of this act [Jan. 1, 1980] nor will this act affect pending litigation."

Section 13 makes this act effective January 1, 1980.

Only Part of Section Set Out. — As subsection (b) was not changed by the amendment, it is not set out.

§ 20-279.32. Exceptions.

This Article, except its provisions as to the filing of proof of financial responsibility by a common carrier and its drivers, does not apply to any vehicle operated under a permit or certificate of convenience or necessity issued by the North Carolina Utilities Commission, or by the Interstate Commerce Commission, if public liability and property damage insurance for the protection of the public is required to be carried upon it. This Article does not apply to any motor vehicle owned by the State of North Carolina, nor does it apply to the operator of a vehicle owned by the State of North Carolina who becomes involved in an accident while operating the state-owned vehicle if the Commissioner determines that the vehicle at the time of the accident was probably being operated in the course of the operator's employment as an employee or officer of the State. This Article does not apply to the operator of a vehicle owned by a political subdivision of the State of North Carolina who becomes involved in an accident while operating such vehicle if the Commissioner determines that the vehicle at the time of the accident was probably being operated in the course of the operator's employment as an employee or officer of the subdivision providing that the Commissioner finds that the political subdivision has waived any immunity it has with respect to such accidents and has in force an insurance policy or other method of satisfying claims which may arise out of the accident. This Article does not apply to any motor vehicle owned by the federal government, nor does it apply to the operator of a motor vehicle owned by the federal government who becomes involved in an accident while operating the government-owned vehicle if the Commissioner determines that the vehicle at the time of the accident was probably being operated in the course of the operator's employment as an employee or officer of the federal government. (1953, c. 1300, s. 32; 1955, c. 1152, s. 19; 1979, c. 667, s. 38.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1981, deleted "and chauffeurs" following "drivers" near the beginning of the first sentence.

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.' "

Article 10.

Financial Responsibility of Taxicab Operators.

§ 20-280. Filing proof of financial responsibility with governing board of municipality or county.

(b) As used in this section "proof of financial responsibility" shall mean a certificate of any insurance carrier duly authorized to do business in the State of North Carolina certifying that there is in effect a policy of liability insurance insuring the owner and operator of the taxicab business, his agents and

employees while in the performance of their duties against loss from any liability imposed by law for damages including damages for care and loss of services because of bodily injury to or death of any person and injury to or destruction of property caused by accident and arising out of the ownership, use or operation of such taxicab or taxicabs, subject to limits (exclusive of interests and costs) with respect to each such motor vehicle as follows: twenty-five thousand dollars ($25,000) because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, fifty thousand dollars ($50,000) because of bodily injury to or death of two or more persons in any one accident, and ten thousand dollars ($10,000) because of injury to or destruction of property of others in any one accident.

(c) Every person, firm or corporation who engages in the taxicab business and who is a member of or participates in any trust fund or sinking fund, which said trust fund or sinking fund is for the sole purpose of paying claims, damages or judgments against persons, firms or corporations engaging in the taxicab business and which trust fund or sinking fund is approved by the governing body of any city or municipality with a population of over 50,000, shall be deemed a compliance with the financial responsibility provisions of this section.

Provided, however, that in the case of operators of 15 or more taxicabs, the limits (exclusive of interests and costs), with respect to each such motor vehicle shall be as follows: twenty thousand dollars ($20,000) because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, forty thousand dollars ($40,000) because of bodily injury to or death of two or more persons in any one accident, and ten thousand dollars ($10,000) because of injury to or destruction of property of others in any one accident. (1951, c. 406; 1965, c. 350, s. 1; 1967, c. 277, s. 7; 1973, c. 745, s. 6; 1979, c. 832, ss. 9, 10.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1980, substituted "twenty-five thousand dollars ($25,000)" for "fifteen thousand dollars ($15,000)," "fifty thousand dollars ($50,000)" for "thirty thousand dollars ($30,000)" and "ten thousand dollars ($10,000)" for "five thousand dollars ($5,000)" near the end of subsection (b). In the second paragraph of subsection (c) the amendment substituted "twenty thousand dollars ($20,000)" for "ten thousand dollars ($10,000)" and "forty thousand dollars ($40,000)" for "twenty thousand dollars ($20,000)" near the middle of the paragraph, and "ten thousand dollars ($10,000)" for "one thousand dollars ($1,000)" near the end of the paragraph.

Session Laws 1979, c. 832, s. 12, provides: "This act will not affect any policy in effect on the effective date of this act [Jan. 1, 1980] nor will this act affect pending litigation."

Section 13 makes this act effective January 1, 1980.

Only Part of Section Set Out. — As subsection (a) was not changed by the amendment, it is not set out.

ARTICLE 11.

Liability Insurance Required of Persons Engaged in Renting Motor Vehicles.

§ 20-281. Liability insurance prerequisite to engaging in business; coverage of policy.

From and after July 1, 1953, it shall be unlawful for any person, firm or corporation to engage in the business of renting or leasing motor vehicles to the public for operation by the rentee or lessee unless such person, firm or corporation has secured insurance for his own liability and that of his rentee or lessee, in such an amount as is hereinafter provided, from an insurance company duly

licensed to sell motor vehicle liability insurance in this State. Each such motor vehicle leased or rented must be covered by a policy of liability insurance insuring the owner and rentee or lessee and their agents and employees while in the performance of their duties against loss from any liability imposed by law for damages including damages for care and loss of services because of bodily injury to or death of any person and injury to or destruction of property caused by accident arising out of the operation of such motor vehicle, subject to the following minimum limits: twenty-five thousand dollars ($25,000) because of bodily injury to or death of one person in any one accident, and fifty thousand dollars ($50,000) because of bodily injury to or death of two or more persons in any one accident, and ten thousand dollars ($10,000) because of injury to or destruction of property of others in any one accident. Provided, however, that nothing in this Article shall prevent such operators from qualifying as self-insurers under terms and conditions to be prepared and prescribed by the Commissioner of Motor Vehicles or by giving bond with personal or corporate surety, as now provided by G.S. 20-279.24, in lieu of securing the insurance policy hereinbefore provided for. (1953, c. 1017, s. 1; 1955, c. 1296; 1965, c. 349, s. 1; 1967, c. 277, s. 8; 1973, c. 745, s. 7; 1979, c. 832, s. 11.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1980, substituted "twenty-five thousand dollars ($25,000)" for "fifteen thousand dollars ($15,000)," "fifty thousand dollars ($50,000)" for "thirty thousand dollars ($30,000)" and "ten thousand dollars ($10,000)" for "five thousand dollars ($5,000)" near the end of the second sentence.

Session Laws 1979, c. 832, s. 12, provides: "This act will not affect any policy in effect on the effective date of this act [Jan. 1, 1980] nor will this act affect pending litigation."

Section 13 makes this act effective January 1, 1980.

CASE NOTES

Cited in Travelers Ins. Co. v. Ryder Truck Rental, Inc., 34 N.C. App. 379, 238 S.E.2d 193 (1977); Engle v. State Farm Mut. Auto. Ins. Co., 37 N.C. App. 126, 245 S.E.2d 532 (1978).

ARTICLE 12.

Motor Vehicle Dealers and Manufacturers Licensing Law.

§ 20-285. Regulation of motor vehicle distribution in public interest.

CASE NOTES

Quoted in Mazda Motors of America, Inc. v. Southwestern Motors, Inc., 36 N.C. App. 1, 243 S.E.2d 793 (1978).

§ 20-288. (Effective until July 1, 1982) Application for license; information required and considered; expiration of license; supplemental license; bond.

(a) Application for license shall be made to the Division at such time, in such form, and contain such information as the Division shall require, and shall be accompanied by the required fee.

(b) The Division shall require in such application, or otherwise, information relating to matters set forth in G.S. 20-294 as grounds for the refusing of licenses, and to other pertinent matter commensurate with the safeguarding of the public interest, all of which shall be considered by the Division in determining the fitness of the applicant to engage in the business for which he seeks a license.

(c) All licenses that are granted shall expire unless sooner revoked or suspended, on June 30 of the year following date of issue.

(d) Supplemental licenses shall be issued for each place of business, operated or proposed to be operated by the licensee, that is not contiguous to other premises for which a license is issued.

(e) Each applicant approved by the Division for license as a motor vehicle dealer, manufacturer, distributor branch, or factory branch shall furnish a corporate surety bond or cash bond or fixed value equivalent thereof in the principal sum of fifteen thousand dollars ($15,000) and an additional principal sum of five thousand dollars ($5,000) for each additional place of business within this State at which motor vehicles are sold. Each application for a license or a renewal of a license shall be accompanied by a list of locations at which the applicant engages in the business of selling motor vehicles in this State. A corporate surety bond shall be approved by the Commissioner as to form and shall be conditioned that the obligor will faithfully conform to and abide by the provisions of this Article. A cash bond or fixed value equivalent thereof shall be approved by the Commissioner as to form and terms of deposits as will secure the ultimate beneficiaries of the bond; and such bond shall not be available for delivery to any person contrary to the rules of the Commissioner. Any purchaser of a motor vehicle who shall have suffered any loss or damage by any act of a motor vehicle dealer that constitutes a violation of this Article shall have the right to institute an action to recover against such motor vehicle dealer and the surety. Every licensee against whom such action is instituted shall notify the Commissioner of the action within 10 days after process is served on the licensee. A corporate surety bond shall remain in force and effect and may not be canceled by the surety unless the motor vehicle dealer, manufacturer, distributor branch, or factory branch has terminated the operations of its business nor unless its license has been denied, suspended, or revoked under G.S. 20-294. Such cancellation may be had only upon 30 days' written notice to the Commissioner and shall not affect any liability incurred or accrued prior to the termination of such 30-day period. Provided nothing herein shall apply to a motor vehicle dealer, manufacturer, distributor branch or factory branch which deals only in trailers having an empty weight of 4,000 pounds or less. (1955, c. 1243, s. 4; 1975, c. 716, s. 5; 1977, c. 560, s. 2; 1979, c. 254.)

Cross References. — For this section as amended effective July 1, 1982, see the following section, also numbered 20-288.

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, added the last sentence to subsection (e).

CASE NOTES

Section 20-294(4) Does Not Enlarge Coverage of Subsection (e). — Section 20-294(4) only sets out grounds for which the State may suspend or revoke a license. It does not enlarge the coverage of subsection (e) of this section to any parties other than a purchaser. Triplett v. James, 45 N.C. App. 96, 262 S.E.2d 374, cert. denied, 300 N.C. 202, 269 S.E.2d 621 (1980).

Subsection (e) of this section grants only to purchasers the right to recover on the bond, and the fact that, under § 20-294(4), a dealer may lose his license for defrauding any person in the conduct of his business does not mean that the bond specifically required by subsection (e) and specifically limited by that section as a source of indemnity to purchasers only is available as a remedy to any defrauded party. Triplett v.

James, 45 N.C. App. 96, 262 S.E.2d 374, cert. denied, 300 N.C. 202, 269 S.E.2d 621 (1980).

§ 20-288. (Effective July 1, 1982) Application for license; information required and considered; expiration of license; supplemental license; bond.

(a) Application for license shall be made to the Division at such time, in such form, and contain such information as the Division shall require, and shall be accompanied by the required fee.

(b) The Division shall require in such application, or otherwise, information relating to matters set forth in G.S. 20-294 as grounds for the refusing of licenses, and to other pertinent matter commensurate with the safeguarding of the public interest, all of which shall be considered by the Division in determining the fitness of the applicant to engage in the business for which he seeks a license.

(c) All licenses that are granted shall expire unless sooner revoked or suspended, on June 30 of the year following date of issue.

(d) Supplemental licenses shall be issued for each place of business, operated or proposed to be operated by the licensee, that is not contiguous to other premises for which a license is issued.

(e) Each applicant approved by the Division for license as a motor vehicle dealer, manufacturer, distributor branch, or factory branch shall furnish a corporate surety bond or cash bond or fixed value equivalent thereof in the principal sum of fifteen thousand dollars ($15,000) and an additional principal sum of five thousand dollars ($5,000) for each additional place of business within this State at which motor vehicles are sold. Each application for a license or a renewal of a license shall be accompanied by a list of locations at which the applicant engages in the business of selling motor vehicles in this State. A corporate surety bond shall be approved by the Commissioner as to form and shall be conditioned that the obligor will faithfully conform to and abide by the provisions of this Article. A cash bond or fixed value equivalent thereof shall be approved by the Commissioner as to form and terms of deposits as will secure the ultimate beneficiaries of the bond; and such bond shall not be available for delivery to any person contrary to the rules of the Commissioner. Any purchaser of a motor vehicle who shall have suffered any loss or damage by any act of a motor vehicle dealer that constitutes a violation of this Article shall have the right to institute an action to recover against such motor vehicle dealer and the surety. Every licensee against whom such action is instituted shall notify the Commissioner of the action within 10 days after process is served on the licensee. A corporate surety bond shall remain in force and effect and may not be canceled by the surety unless the motor vehicle dealer, manufacturer, distributor branch, or factory branch has terminated the operations of its business nor unless its license has been denied, suspended, or revoked under G.S. 20-294. Such cancellation may be had only upon 30 days' written notice to the Commissioner and shall not affect any liability incurred or accrued prior to the termination of such 30-day period. Provided nothing herein shall apply to a motor vehicle dealer, manufacturer, distributor branch or factory branch which deals only in trailers having an empty weight of 4,000 pounds or less. This subsection shall not apply to manufacturers of, or dealers in, mobile or manufactured homes who furnish a corporate surety bond, cash bond, or fixed value equivalent thereof, pursuant to G.S. 143-143.12. (1955, c. 1243, s. 4; 1975, c. 716, s. 5; 1977, c. 560, s. 2; 1979, c. 254; 1981, c. 952, s. 3.)

Cross References. — For this section as in effect until July 1, 1982, see the preceding section, also numbered 20-288.

Effect of Amendments. — The 1981 amendment, effective July 1, 1982, added the last sentence in subsection (e).

Session Laws 1981, c. 952, s. 4, contains a severability clause.

§ 20-289. License fees.

(a) The license fee for each fiscal year, or part thereof, shall be as follows:

(1) For motor vehicle dealers, distributors, and wholesalers, thirty dollars ($30.00) for each principal place of business, plus eight dollars ($8.00) for a supplementary license for each car lot not immediately adjacent thereto;

(2) For manufacturers, seventy-five dollars ($75.00), and for each factory branch in this State, forty-five dollars ($45.00);

(3) For motor vehicle salesmen, five dollars ($5.00);

(4) For factory representatives, or distributor branch representatives, six dollars ($6.00);

(5) Manufacturers, wholesalers, and distributors may operate as a motor vehicle dealer, without any additional fee or license.

(b) The fees and licenses collected under this section shall be placed in the Highway Fund. Provided, that nothing contained in this section or in any other section of this Article shall be construed as exempting any person from any license tax or fee imposed by any other provision of the law. (1955, c. 1243, s. 5; 1969, c. 593; 1977, c. 802, s. 8; 1981, c. 690, s. 16.)

Effect of Amendments. — The 1981 amendment, effective January 1, 1982, increased the fees in subdivisions (1) through (4) of subsection (a).

§ 20-294. Grounds for denying, suspending or revoking licenses.

CASE NOTES

Subdivision (4) Does Not Enlarge Coverage of § 20-288(e). — Subdivision (4) of this section only sets out grounds for which the State may suspend or revoke a license. It does not enlarge the coverage of § 20-288(e) to any parties other than a purchaser. Triplett v. James, 45 N.C. App. 96, 262 S.E.2d 374, cert. denied, 300 N.C. 202, 269 S.E.2d 621 (1980).

Section 20-288(e) grants only to purchasers the right to recover on the bond, and the fact that, under subdivision (4) of this section, a dealer may lose his license for defrauding any person in the conduct of his business does not mean that the bond specifically required by § 20-288(e) and specifically limited by that section as a source of indemnity to purchasers only is available as a remedy to any defrauded party. Triplett v. James, 45 N.C. App. 96, 262 S.E.2d 374, cert. denied, 300 N.C. 202, 269 S.E.2d 621 (1980).

§ 20-296. Notice and hearing upon denial, suspension, revocation or refusal to renew license.

No license shall be suspended or revoked or denied, or renewal thereof refused, until a written notice of the complaint made has been furnished to the licensee against whom the same is directed, and a hearing thereon has been had before the Commissioner, or a person designated by him. At least 10 days' written notice of the time and place of such hearing shall be given to the licensee by certified mail with return receipt requested to his last known address as shown on his license or other record of information in possession of

the Division. At any such hearing, the licensee shall have the right to be heard personally or by counsel. After hearing, the Division shall have power to suspend, revoke or refuse to renew the license in question. Immediate notice of any such action shall be given to the licensee in the manner herein provided in the case of notices of hearing. (1955, c. 1243, s. 12; 1975, c. 716, s. 5; 1981, c. 108.)

Effect of Amendments. — The 1981 amendment substituted "certified mail with return receipt requested" for "registered mail" in the second sentence.

§ 20-305. Coercing dealer to accept commodities not ordered; threatening to cancel franchise; preventing transfer of ownership; granting additional franchises; terminating franchises without good cause; preventing family succession.

Legal Periodicals. — For survey of 1978 constitutional law, see 57 N.C.L. Rev. 958 (1979).

For a comment on the business opportunity approach to regulating the sale of franchise, see 17 Wake Forest L. Rev. No. 4 (1981).

CASE NOTES

Subdivision (6) Is Constitutional. — The General Assembly reasonably concluded that subdivision (6) promotes the public welfare in an area vitally affecting the general economy of the State, and it is constitutional. Mazda Motors of America, Inc. v. Southwestern Motors, Inc., 36 N.C. App. 1, 243 S.E.2d 793 (1978), aff'd in part, rev'd in part, 296 N.C. 357, 250 S.E.2d 250 (1979).

Subdivision (6) Does Not Unconstitutionally "Impair the Obligations of Contracts". — Subdivision (6) is not a state "law impairing the obligations of contracts" in the constitutional sense. Mazda Motors of America, Inc. v. Southwestern Motors, Inc., 36 N.C. App. 1, 243 S.E.2d 793 (1978), aff'd in part, rev'd in part, 296 N.C. 357, 250 S.E.2d 250 (1979).

Subdivision (6) Does Not Unconstitutionally Take Property without Compensation. — Subdivision (6) does not involve any disturbance of essential or core expectations arising from contract or amount to a taking without compensation. Rather, it constitutes a reasonable exercise of the police power by the State in furtherance of the public welfare. Mazda Motors of America, Inc. v. Southwestern Motors, Inc., 36 N.C. App. 1, 243 S.E.2d 793 (1978), aff'd in part, rev'd in part, 296 N.C. 357, 250 S.E.2d 250 (1979).

Subdivision (6) Is Not Unconstitutionally Retroactive. — Subdivision (6), which requires a filing of notice prior to termination of automobile franchise contracts, is not made unconstitutional by retroactive application to existing contracts. Mazda Motors of America, Inc. v. Southwestern Motors, Inc., 36 N.C. App. 1, 243 S.E.2d 793 (1978), aff'd in part, rev'd in part, 296 N.C. 357, 250 S.E.2d 250 (1979).

Subdivision (6) Is Not an Ex Post Facto Law. — Although this Article provides criminal sanctions for violations of subdivision (6), its retroactive application to an existing contract does not constitute it an ex post facto law prohibited by the Constitution of the United States. U.S. Const., Art. I, § 10, cl. 1. That clause applies only in cases in which a crime is created or punishment for a criminal act is increased after the fact and does not speak to the effect of statutes passed after the fact when employed in civil cases. Mazda Motors of America, Inc. v. Southwestern Motors, Inc., 36 N.C. App. 1, 243 S.E.2d 793 (1978), aff'd in part, rev'd in part, 296 N.C. 357, 250 S.E.2d 250 (1979).

The provisions of subdivision (6) are free from ambiguity, apply solely to unilateral franchise terminations by the manufacturer, and do not extend to mutual agreements between manufacturer and dealer to terminate a franchise. Mazda Motors of America, Inc. v. Southwestern Motors, Inc., 296 N.C. 357, 250 S.E.2d 250 (1979).

Subdivision (6) Applies to Unilateral Action by Manufacturers, Not Mutual Agreements Between Manufacturer and

Dealer. — In effect, the express language of subdivision (6) imposes substantial curbs on the unilateral actions of a manufacturer with respect to franchise termination. The express language does not cover voluntary mutual termination agreements between manufacturer and dealer. Mazda Motors of America, Inc. v. Southwestern Motors, Inc., 296 N.C. 357, 250 S.E.2d 250 (1979).

Voluntariness of Termination Irrelevant to Question of Notice to Commissioner. — Subdivision (6) specifically commands that the Commissioner of Motor Vehicles be given the required notice prior to termination or expiration of an automobile dealership franchise. Failure to give the required notice prior to termination or expiration is specifically declared to be unlawful. The voluntariness of such agreements is irrelevant. Mazda Motors of America, Inc. v. Southwestern Motors, Inc., 36 N.C. App. 1, 243 S.E.2d 793 (1978), aff'd in part, rev'd in part, 296 N.C. 357, 250 S.E.2d 250 (1979).

ARTICLE 13.

The Vehicle Financial Responsibility Act of 1957.

§ 20-309. Financial responsibility prerequisite to registration; must be maintained throughout registration period.

(a) No self-propelled motor vehicle shall be registered in this State unless the owner at the time of registration has financial responsibility for the operation of such motor vehicle, as provided in this Article. The owner of each motor vehicle registered in this State shall maintain financial responsibility continuously throughout the period of registration.

(b) Financial responsibility shall be a liability insurance policy or a financial security bond or a financial security deposit or by qualification as a self-insurer, as these terms are defined and described in Article 9A, Chapter 20 of the General Statutes of North Carolina, as amended.

(c) When it is certified that financial responsibility is a liability insurance policy, the Commissioner of Motor Vehicles may require that the owner produce records to prove the fact of such insurance, and failure to produce such records shall be prima facie evidence that no financial responsibility exists with regard to the vehicle concerned. It shall be the duty of insurance companies, upon request of the Division, to verify the accuracy of any owner's certification.

(d) When liability insurance with regard to any motor vehicle is terminated by cancellation or failure to renew, or the owner's financial responsibility for the operation of any motor vehicle is otherwise terminated, the owner shall forthwith surrender the registration certificate and plates of the vehicle to the Division of Motor Vehicles unless financial responsibility is maintained in some other manner in compliance with this Article.

(e) Upon termination by cancellation or otherwise of an insurance policy provided in subsection (d), the insurer shall notify the North Carolina Division of Motor Vehicles of such termination as directed by the Commissioner of the Division of Motor Vehicles in accordance with subsection (f) of this section. The Division of Motor Vehicles, upon receiving notice of cancellation or termination of an owner's financial responsibility as required by this Article, shall notify such owner of such cancellation or termination, and such owner shall, to retain the registration plate for the vehicle registered or required to be registered, within 15 days from date of notice given by the Division either:

(1) Certify to the Division that he has financial responsibility effective on or prior to the date of such termination, or

(2) Certify to the Division that he has financial responsibility effective on the date of certification and pay a twenty-five dollar ($25.00) administrative fee for the cost of action taken.

Failure of the owner to certify that he has financial responsibility as herein required shall be prima facie evidence that no financial responsibility exists with regard to the vehicle concerned and, unless the owner's registration plate has been surrendered to the Division of Motor Vehicles by surrender to an agent or representative of the Division of Motor Vehicles designated by the Division of Motor Vehicles, or depositing the same in the United States mail, addressed to the Division of Motor Vehicles, Raleigh, North Carolina, the Division shall revoke the owner's registration plate for 60 days.

In no case shall any vehicle, the registration of which has been revoked for failure to have financial responsibility, be registered in the name of the registered owner, spouse, or any child of the spouse, or any child of such owner within less than 60 days after the date of receipt of the registration plate by the Division of Motor Vehicles, except that a spouse living separate and apart from the registered owner may register such vehicle immediately in such spouse's name. Provided, the revocation of the registration plate shall be rescinded by the Division of Motor Vehicles upon receipt of certification of current financial responsibility as required by this Article and payment of sixty dollars ($60.00) restoration fee. Any person, firm or corporation failing to give notice of termination shall be subject to a civil penalty of two hundred dollars ($200.00) to be assessed by the Commissioner of Insurance upon a finding by the Commissioner of Insurance that good cause is not shown for such failure to give notice of termination to the Division of Motor Vehicles.

(f) The Commissioner shall administer and enforce the provisions of this Article and may make rules and regulations necessary for its administration and shall provide for hearings upon request of persons aggrieved by orders or acts of the Commissioner under the provisions of this Article. (1957, c. 1393, s. 1; 1959, c. 1277, s. 1; 1963, c. 964, s. 1; 1965, c. 272; c. 1136, ss. 1, 2; 1967, c. 822, ss. 1, 2; c. 857, ss. 1, 2; 1971, c. 477, ss. 1, 2; c. 924; 1975, c. 302; c. 348, ss. 1-3; c. 716, s. 5; 1979, 2nd Sess., c. 1279, s. 1; 1981, c. 690, s. 25.)

Effect of Amendments. — The 1979, 2nd Sess., amendment, effective January 1, 1981, deleted, at the end of the first sentence in subsection (a), "and certifies that he has such financial responsibility," deleted "and the Division of Motor Vehicles shall revoke the owner's registration plate for sixty days" at the end of the first sentence of subsection (c), deleted the former second, third and fourth sentences of subsection (c) relating to reregistration of a vehicle registration of which has been revoked for failure to have financial responsibility, and the former sixth sentence of subsection (c), relating to failure by an insurance policy to deny coverage within twenty days. The amendment rewrote subsections (e) and (f).

The 1981 amendment, effective July 1, 1981, substituted "twenty-five dollars ($25.00)" for "fifteen dollars ($15.00)" in subdivision (2) of subsection (e).

Legal Periodicals. — For a note on the State's inability to suspend the driver's license of a bankrupt who fails to satisfy an accident judgment debt, see 50 N.C.L. Rev. 350 (1972).

CASE NOTES

Stated in State ex rel. Hunt v. North Carolina Reinsurance Facility, 49 N.C. App. 206, 271 S.E.2d 302 (1980).

§ 20-311. Revocation of registration when financial responsibility not in effect.

The Division of Motor Vehicles, upon receipt of evidence that financial responsibility for the operation of any motor vehicle registered or required to be registered in this State is not or was not in effect at the time of operation or certification that insurance was in effect, shall revoke the owner's regis-

tration plate issued for the vehicle at the time of operation or certification that insurance was in effect or the current registration plate for the vehicle if the year registration has changed for 60 days. In no case shall any vehicle the registration of which has been revoked for failure to have financial responsibility be reregistered in the name of such owner, spouse or any child of the spouse or any child of such owner within less than 60 days after the registration plates have been surrendered to the Division except that a spouse living separate and apart from the registered owner may reregister such vehicle immediately in such spouse's name. As a condition precedent to the reregistration of the vehicle the owner shall pay a restoration fee of fifteen dollars ($15.00) and the appropriate fee for a new registration plate. Provided the revocation of the registration plate shall be rescinded by the Division of Motor Vehicles upon receipt of certification of current financial responsibility as required by this Article and payment of a sixty dollar ($60.00) restoration fee. (1957, c. 1393, s. 3; 1959, c. 1277, s. 2; 1963, c. 964, s. 4; 1965, c. 205; c. 1136, s. 3; 1967, c. 822, s. 3; c. 857, s. 4; 1971, c. 477, s. 3; 1975, c. 348, s. 4; c. 716, s. 5; 1979, 2nd Sess., c. 1279, s. 2.)

Effect of Amendments. — The 1979, 2nd Sess., amendment, effective January 1, 1981, added the last sentence.

§ 20-312. Failure of owner to deliver certificate of registration and plates after revocation; notice of revocation.

Failure of an owner to deliver the certificate of registration and registration plates issued by the Division of Motor Vehicles, after revocation thereof as provided in this Article, shall constitute a misdemeanor. Notice of revocation of the certificate of registration or registration plates shall be issued in accordance with G.S. 20-48. (1957, c. 1393, s. 4; 1975, c. 716, s. 5; 1981, c. 938, s. 4.)

Effect of Amendments. — The 1981 amendment added the second sentence. Session Laws 1981, c. 938, s. 6, provides: "This act shall become effective January 1, 1982, and shall apply to any revocation, cancellation, suspension or other demand by the Commissioner to be issued on or after the effective date."

§ 20-319. Effective date.

Legal Periodicals. — For a note on the State's inability to suspend the driver's license of a bankrupt who fails to satisfy an accident judgment debt, see 50 N.C.L. Rev. 350 (1972).

ARTICLE 14.

Driver Training School Licensing Law.

§ 20-320. Definitions.

As used in this Article:

(1) "Commercial driver training school" or "school" means a business enterprise conducted by an individual, association, partnership or corporation which educates or trains persons to operate or drive motor vehicles or which furnishes educational materials to prepare an applicant for an examination given by the State for a driver's license or

learner's permit, and charges a consideration or tuition for such service or materials.

(1979, c. 667, s. 39.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1981, substituted "a driver's" for "an operator's or chauffeur's" near the end of subdivision (1).

Session Laws 1979, c. 667, s. 40, provides: "The Commissioner of Motor Vehicles is authorized to adopt and enforce rules and regulations as may be necessary to carry out the provisions of this act, including the promulgation of rules defining 'gross vehicle weight.' "

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only the introductory language and subdivision (1) are set out.

§ 20-324. Expiration and renewal of licenses; fees.

All licenses issued under the provisions of this Article shall expire on the last day of June in the year following their issuance and may be renewed upon application to the Commissioner as prescribed by his regulations. Each application for a new or renewal school license shall be accompanied by a fee of forty dollars ($40.00), and each application for a new or a renewal instructor's license shall be accompanied by a fee of eight dollars ($8.00). The license fees collected under this section shall be used under the supervision and direction of the Director of the Budget for the administration of this Article. No license fee shall be refunded in the event that the license is rejected, suspended, or revoked. (1965, c. 873; 1977, c. 802, s. 9; 1981, c. 690, s. 15.)

Effect of Amendments. — The 1981 amendment, effective January 1, 1982, substituted "forty dollars ($40.00)" for "twenty-five dollars ($25.00)" and "eight dollars ($8.00)" for "five dollars ($5.00)" in the second sentence.

Article 15.

Vehicle Mileage Act.

§ 20-343. Unlawful change of mileage.

It is unlawful for any person or his agent to disconnect, reset, or alter the odometer of any motor vehicle with the intent to change the number of miles indicated thereon. Whenever evidence shall be presented in any court of the fact that an odometer has been reset or altered to change the number of miles indicated thereon, it shall be prima facie evidence in any court in the State of North Carolina that the resetting or alteration was made by the person, firm or corporation who held title or by law was required to hold title to the vehicle in which the reset or altered odometer was installed at the time of such resetting or alteration or if such person has more than 20 employees and has specifically and in writing delegated responsibility for the motor vehicle to an agent, that the resetting or alteration was made by the agent. (1973, c. 679, s. 1; 1979, c. 696.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, added the second sentence.

§ 20-346. Lawful service, repair, or replacement of odometer.

CASE NOTES

Applied in Roberts v. Buffaloe, 43 N.C. App. 368, 258 S.E.2d 861 (1979).

§ 20-347. Disclosure requirements.

CASE NOTES

Applied in Roberts v. Buffaloe, 43 N.C. App. 368, 258 S.E.2d 861 (1979).

§ 20-348. Private civil action.

CASE NOTES

Intent to Defraud Essential to Action for Damages. — There must be more than a technical failure to comply in order to give rise to an action for damages under the Vehicle Mileage Act. The noncompliance must be accompanied by an intent to defraud. American Imports, Inc. v. G.E. Employees W. Region Fed. Credit Union, 37 N.C. App. 121, 245 S.E.2d 798 (1978).

Where plaintiff seeks treble damages and punitive damages in an action against defendant car dealer in which he alleges that defendant sold him a car and alleged that the odometer reading was accurate when he knew that the true mileage was far in excess of that shown on the odometer, plaintiff's prayer for punitive damages cannot be sustained, even if the jury answers the liability issue in favor of plaintiff. Plaintiff's recovery, if any, will be the greater of three times his actual damages of $1500, costs and reasonable attorneys fees as determined by the court. Roberts v. Buffaloe, 43 N.C. App. 368, 258 S.E.2d 861 (1979).

ARTICLE 16.

Professional Housemoving.

Cross References. — As to review and evaluation of the programs and functions authorized under this Article, see § 143-34.26.

§ 20-356. Definitions.

Editor's Note. — Section 18 of Session Laws 1977, c. 720, which enacted this Article, originally provided that the act should expire August 1, 1979. Session Laws 1979, c. 475, s. 2, effective August 1, 1979, amended Session Laws 1977, c. 720, s. 18, so as to eliminate the provision for expiration of the act.

§ 20-358. Qualifications to become licensed.

The Department shall issue annual printed licenses to applicants meeting the following conditions:

(1) The applicant must be at least 18 years of age; present acceptable evidence of good character and show sufficient housemoving experience on the application form furnished by the Department. Housemoving experience means extensive and responsible training gained by the applicant while engaged actively and directly on a full-time basis in the moving of houses and structures on public roads and highways with at least 24 months experience. Examples of the capacity in which a person may work in gaining experience include the following in building moving operations:
   a. Moving superintendent,
   b. Moving foreman, and
   c. General mechanic and helper in the housemoving profession or trade.

(2) Repealed by Session Laws 1981, c. 818, s. 3, effective August 1, 1981.

(3) The applicant must furnish proof that all of the vehicles, excluding "beams and dollies" and "hauling units," to be used in the movement of buildings, structures, or other extraordinary objects wider than 14 feet have met the requirements of G.S. 20-183.2 pertaining to the equipment inspection of motor vehicles; provided that the "beams and dollies" and "hauling units" are excluded from inspection under G.S. 20-183.2 and, further, are not required to be equipped with brakes.

(4) Exhibit his federal employer's identification number. (1977, c. 720, s. 3; 1981, c. 818, s. 3.)

Cross References. — For present provisions similar to the subject matter of repealed subdivision (2), see § 20-359.1.

Effect of Amendments. — The 1981 amendment, effective August 1, 1981, repealed subdivision (2), which read: "The applicant must furnish proof that he has (i) complied with Article 13, Chapter 20 of the North Carolina General Statutes for the liability imposed by law to the ownership, operation, maintenance or use of motor vehicles in his business operation; (ii) a permit or license bond in the amount of five thousand dollars ($5,000)."

§ 20-359.1. Insurance requirements.

(a) No license shall be issued or renewed pursuant to this Article unless the applicant presents to the Department a certificate or certificates of insurance, from an insurance company or companies licensed to do business in this State, providing:

(1) Motor vehicle insurance with minimum coverage of one hundred thousand dollars ($100,000) for bodily injury to or death of one person in any one accident, three hundred thousand dollars ($300,000) for bodily injury to or death of two or more persons in any one accident, and fifty thousand dollars ($50,000) for injury to or destruction of property of others in any one accident;

(2) Comprehensive general liability insurance with a minimum coverage of three hundred fifty thousand dollars ($350,000) combined single limit of liability; and

(3) Worker's Compensation insurance that complies with Chapter 97 if the person licensed as a professional housemover is not exempt from that Chapter.

(b) The certificate or certificates shall provide for continuous coverage during the effective period of the license issued pursuant to this Article.

(c) The Department shall be notified by the person licensed as a professional housemover of and 30 days prior to any cancellation or changes made to any provision of the insurance required by subsection (a) of this section.

(d) In lieu of the insurance certificate or certificates required by subsection (a) of this section, the applicant may post with the Department a cash bond or other acceptable surety in the amount of fifty thousand dollars ($50,000) for the benefit of any person filing a claim for personal injury, death, or property damage arising from the movement of a structure pursuant to this Article. (1981, c. 818, s. 1.)

Editor's Note. — Session Laws 1981, c. 818, s. 4, provides: "This act shall become effective August 1, 1981."

§ 20-360. Requirements for permit.

(a) Persons licensed as professional housemovers shall also be required to secure a permit from the Department for every move undertaken on the State Highway System of roads; that permit shall be issued by the Department after determining that the applicant is (i) properly licensed, (ii) furnished special surety bonds as required by the Department, and (iii) complying with such other regulations as required by the Department.

(b) It shall be the duty of the applicant to see that the "beams and dollies" and "hauling units" used shall be constructed with proper material in a suitable manner and utilized so as to provide for the safety of the general public and the structure being relocated. Any violation of this duty may result in suspension or revocation of his license by the Department.

(c) A license shall not be required for individuals moving their own buildings from or to property owned individually by those persons; however, a permit will be required for all moves.

(d) Licensed housemovers shall furnish front and rear escort vehicles on all moves, one or both of which may be a marked police, sheriff or State Highway Patrol vehicle, or one or two private escort vehicles equipped with flashing amber lights depending on the number of law-enforcement vehicles escorting the move; escort vehicles shall operate where possible at a distance of 300 feet from the structure being moved; that this interval will be closed in cities and other congested areas to protect other traffic from the swing of the load at corners and turns and, the private escort vehicles shall burn their headlights and be equipped with red flags on each side at the front; in addition, the private escort vehicles shall be equipped with a sign across the front or rear bumper bearing the legend "Wide Load" or "Oversized Load Following" or "Oversized Load Ahead," whichever is appropriate, with black letters at least 10 inches high on a yellow background. (1977, c. 720, s. 5; 1981, c. 818, s. 2.)

Effect of Amendments. — The 1981 amendment, effective August 1, 1981, inserted "from or to property owned individually by those persons" in subsection (c).

§ 20-369. Out-of-state licenses and permits.

An out-of-state person, partnership, or corporation engaging in the structural moving business may apply to the Department for a license to engage in the housemoving profession in North Carolina, and obtain permits for moves by complying with the provisions of this Article and the regulations of the Department in the same manner as is required of North Carolina residents and by showing that the state in which the housemover operates his business extends similar privileges to housemovers licensed in North Carolina. (1977, c. 720, s. 14; 1979, c. 475, s. 1.)

Effect of Amendments. — The 1979 amendment, effective August 1, 1979, added at the end of the section "and by showing that the state in which the housemover operates his business extends similar privileges to housemovers licensed in North Carolina."

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

RALEIGH, NORTH CAROLINA

October 15, 1981

I, Rufus L. Edmisten, Attorney General of North Carolina, do hereby certify that the foregoing 1981 Supplement to the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Department of Justice of the State of North Carolina.

RUFUS L. EDMISTEN
Attorney General of North Carolina