THE GENERAL STATUTES OF NORTH CAROLINA

1975 CUMULATIVE SUPPLEMENT

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

UNDER THE DIRECTION OF

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Volume 1B

Place in Pocket of 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 1B contains the general laws of a permanent nature enacted at the 1971, the First and Second 1973 and the 1975 Sessions of the General Assembly, which are within the scope of such volume, and brings to date the annotations included therein. At the First 1973 Session, the General Assembly enacted Session Laws 1973, Chapters 1 to 826. At the Second 1973 Session, which was held in 1974, the General Assembly enacted Session Laws 1973, Chapters 827 to 1482.

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

Chapter analyses show all sections except catchlines carried for the purpose of notes only. An index to all statutes codified herein appears in Replacement Volumes 4B, 4C and 4D and the 1975 Cumulative Supplements thereto.

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

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

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

Scope of Volume

Statutes:

Permanent portions of the general laws enacted at the 1971, the First and Second 1973 and the 1975 Sessions of the General Assembly affecting Chapters 2 through 14 of the General Statutes.

Annotations:

Sources of the annotations:

North Carolina Reports volumes 275 (p. 342)-288 (p. 121).
North Carolina Court of Appeals Reports volumes 5 (p. 228)-26 (p. 535).
Federal Reporter 2nd Series volumes 410 (p. 449)-518 (p. 32).
Federal Supplement volumes 298 (p. 1201)-396 (p. 256).
Federal Rules Decisions volumes 56 (p. 663)-67 (p. 193).
United States Reports volumes 394 (p. 576)-419 (p. 984).
Supreme Court Reporter volumes 89 (p. 2152)-95 (p. 2683).
North Carolina Law Review volumes 47 (p. 732)-49 (p. 1006).
Wake Forest Intramural Law Review volumes 6, 7 (p. 697).
Opinions of the Attorney General.

The General Statutes of North Carolina
1975 Cumulative Supplement

VOLUME 1B

Chapter 2.

Clerk of Superior Court.

ARTICLE 1.

The Office.

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

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

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

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

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

ARTICLE 2.

Assistant Clerks.

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

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

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

ARTICLE 3.

Deputies.

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

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

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

ARTICLE 4.

Powers and Duties.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ARTICLE 5.

Reports.

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

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

ARTICLE 6.

Money in Hand; Investments.

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

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

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

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

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

Chapter 3.

Commissioners of Affidavits and Deeds.

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

Chapter 4.

Common Law.

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

Common Law Adopted as of Date of Signing of Declaration of Independence. — This section adopted the common law of England as of the date of the signing of the Declaration of Independence. Steelman v. City of New Bern, 279 N.C. 589, 184 S.E.2d 239 (1971).

Extent of Common Law. —

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

Statutes Construed According to Common-Law Definition. — When a statute punishes an act, giving it a name known to the common law without otherwise defining it, the statute is construed according to the common-law definition. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971); State v. Roberts, 286 N.C. 265, 210 S.E.2d 396 (1974).

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

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

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

The doctrine of governmental immunity was not a part of the common law of England which was adopted by the State of North Carolina in this section. Steelman v. City of New Bern, 279 N.C. 589, 184 S.E.2d 239 (1971).

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

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

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

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

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

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

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

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

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

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

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

By virtue of this section, the common law with reference to kidnapping became the law of this State. State v. Roberts, 286 N.C. 265, 210 S.E.2d 396 (1974).

Since § 14-39 does not define kidnapping, the common-law definition of that crime is the law of this State. State v. Murphy, 280 N.C. 1, 184 S.E.2d 845 (1971); State v. Hudson, 281 N.C. 100, 187 S.E.2d 756 (1972).

Obligation of Father to Support Child. — At common law it is the duty of a father to support his minor children. The common-law obligation of a father to support his child is not a debt in the legal sense, but an obligation imposed by

law. It is not a property right of the child but is a personal duty of the father which is terminated by his death. These common-law principles have not been abrogated or modified by statute and are in full force and effect in this jurisdiction. Mullen v. Sawyer, 277 N.C. 623, 178 S.E.2d 425 (1971).

Right of Father of Illegitimate Child to Visitation Privileges. — The principle that the father of an illegitimate child is not entitled to visitation privileges absent consent of the mother has been abrogated by statutes as well as case law. Conley v. Johnson, 24 N.C. App. 122, 210 S.E.2d 88 (1974).

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

Rape. — By this section the common-law death penalty for rape was adopted in North Carolina. State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973).

The common-law definition of arson, etc. — In accord with original. See State v. Arnold, 285 N.C. 751, 208 S.E.2d 646 (1974).

Attempt to Commit Arson. — The common-law rule that an attempt to commit arson is a misdemeanor was changed by § 14-67, which made an attempt to commit arson a felony. State v. Arnold, 285 N.C. 751, 208 S.E.2d 646 (1974).

Stated in In re Johnston, 16 N.C. App. 38, 190 S.E.2d 879 (1972).

Chapter 5.

Contempt.

§ 5-1. Contempts enumerated; common law repealed. — Any person guilty of any of the following acts may be punished for contempt:

(1) Disorderly, contemptuous, or insolent behavior committed during the sitting of any court of justice, in immediate view and presence of the court, and directly tending to interrupt its proceedings, or to impair the respect due to its authority.

(2) Behavior of the like character committed in the presence of any referee or referees, while actually engaged in any trial or hearing pursuant to the order of any court, or in the presence of any jury while actually sitting for the trial of a cause, or upon any inquest or other proceeding authorized by law.

(3) Any breach of the peace, noise or other disturbance directly tending to interrupt the proceedings of any court.

(4) Willful disobedience of any process or order lawfully issued by any court.

(5) Resistance willfully offered by any person to the lawful order or process of any court.

(6) The contumacious and unlawful refusal of any person to be sworn as a witness, or, when so sworn, the like refusal to answer any legal and proper interrogatory.

(7) The publication of grossly inaccurate reports of the proceedings in any court, about any trial, or other matter pending before said court, made with intent to misrepresent or to bring into contempt the said court; but no person can be punished as for a contempt in publishing a true, full and fair report of any trial, argument, decision or proceeding had in court.

(8) Misbehavior of any officer of the court in any official transaction.

(9) Refusal to testify or produce other information upon the order of a judge acting pursuant to Article 61 of Chapter 15A, Granting of Immunity to Witnesses. Nothing in this subdivision is intended to prevent a proceeding under G.S. 5-8 if there is a continuing need for the testimony or other information.

The several acts, neglects, and omissions of duty, malfeasances, misfeasances, and nonfeasances, above specified and described, shall be the only acts, neglects and omissions of duty, malfeasances, misfeasances and nonfeasances which shall be the subject of contempt of court. And if there are any parts of the common law now in force in this State which recognized other acts, neglects, omissions of duty, malfeasances, misfeasances and nonfeasances besides those specified and described above, the same are hereby repealed and annulled. (Code, s. 648; 1905, c. 449; Rev., s. 939; C. S., s. 978; 1973, c. 1286, s. 2.)

I. GENERAL CONSIDERATION.

Editor's Note. —

The 1973 amendment, effective Sept, 1, 1975, added subdivision (9).

Session Laws 1973, c. 1286, s. 29, contains a severability clause.

Session Laws 1973, c. 1286, s. 31, provides: "Sec. 31. This act becomes effective on July 1, 1975, and is applicable to all criminal proceedings begun on and after that date and each provision is applicable to criminal proceedings pending on that date to the extent practicable, except § 12 [§§ 15-176.3 through 15-176.5] of this act which becomes effective on July 1, 1974."

Session Laws 1975, c. 573, amends Session Laws 1973, c. 1286, s. 31, so as to make the 1973 act effective Sept. 1, 1975, rather than July 1, 1975.

For note on right to jury trial in criminal contempt proceedings, see 6 Wake Forest Intra. L. Rev. 356 (1970). For note on the right of an individual to freedom of speech, and the right of the State to carry out normal functions of the judiciary, a balancing of interests, see 6 Wake Forest Intra. L. Rev. 491 (1970). For article surveying recent decisions by the North Carolina Supreme Court in the area of criminal procedure, see 49 N.C.L. Rev. 262 (1971).

Contempts are defined and classified generally by two statutes: this section and § 5-8. In re Edison, 15 N.C. App. 354, 190 S.E.2d 235 (1972).

Nature and Purpose of Proceedings. —

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

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

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

Contempt in North Carolina is treated as an offense against "the majesty of the law," is essentially criminal in nature, and is superintended or controlled pursuant to statutory authority solely by means of punishment. United Artists Records, Inc. v. Eastern Tape Corp., 18 N.C. App. 183, 196 S.E.2d 598 (1973).

Although labeled "civil" contempt, a proceeding as for contempt is by no means a civil action or proceeding to which § 6-18 (when costs shall be allowed to plaintiff as a matter of course), or § 6-20 (allowance of costs in discretion of court) would apply. United Artists Records, Inc. v. Eastern Tape Corp., 18 N.C. App. 183, 196 S.E.2d 598 (1973).

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

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

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

This section and § 5-8 recognize and preserve the fundamental distinction between civil and criminal contempt in substance but not in name. In re Edison, 15 N.C. App. 354, 190 S.E.2d 235 (1972).

Proceedings for contempt are classified as criminal and civil. In re Edison, 15 N.C. App. 354, 190 S.E.2d 235 (1972).

The proceedings for criminal and civil contempt are "for contempt" and "as for contempt," respectively. In re Edison, 15 N.C. App. 354, 190 S.E.2d 235 (1972).

Acts or omissions which ordinarily constitute criminal contempt as defined in the textbooks are designated by this section as punishable "for contempt," without further designation; the acts or omissions which ordinarily constitute civil contempt as defined in the books are designated by § 5-8 as punishable "as for contempt." In re Edison, 15 N.C. App. 354, 190 S.E.2d 235 (1972).

Contempts Classified as Direct and Indirect. — Contempts of court are classified in two main divisions known as direct and indirect contempt. In re Edison, 15 N.C. App. 354, 190 S.E.2d 235 (1972).

As to direct and indirect contempt, see §§ 5-5 and 5-7 and the notes thereto.

Nature of Offense. —

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

Same — Jury Trial. —

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

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

The possibilities that striking workers adjudged guilty of criminal contempt under this

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

II. SUBDIVISION (1).

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

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

Behavior committed during the sitting of any court of justice, in immediate view and presence of the court, and directly tending to interrupt its proceedings or to impair the respect due to its authority may be punished for contempt. In re Hennis, 6 N.C. App. 683, 171 S.E.2d 211 (1969).

Trial courts must be on guard against confusing offenses to their sensibilities with obstruction to the administration of justice. In re Little, 404 U.S. 553, 92 S. Ct. 659, 30 L. Ed. 2d 708 (1972).

The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil. In re Little, 404 U.S. 553, 92 S. Ct. 659, 30 L. Ed. 2d 708 (1972).

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

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

Accused Conducting His Own Defense. — Where the accused defended himself at his criminal trial when his motion for continuance, by reason of another trial engagement of his retained counsel, was denied, and he was adjudged in contempt for stating in summation after the close of evidence that the court was biased and had prejudged his case, and that he was a political prisoner, the court held that he was entitled to as much latitude in conducting his defense as is enjoyed by counsel vigorously espousing a client's cause, and that his statements did not constitute criminal contempt, as they were not uttered in a boisterous tone, did not actually disrupt the court proceeding, or constitute an imminent threat to the administration of justice. In re Little, 404 U.S. 553, 92 S. Ct. 659, 30 L. Ed. 2d 708 (1972).

A contempt citation delivered to a drunk who had been put into a holding cell at the far end of the room from the booking area, and who was behaving in a boisterous, rude, profane and obscene manner, by a magistrate who never engaged in any work on the drunk's warrant, was an unconstitutional act fundamentally unfair which violated due process of law. Thompson v. Stahl, 346 F. Supp. 401 (W.D.N.C. 1972).

IV. SUBDIVISION (4).

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

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

Applied in In re Hogan, 24 N.C. App. 51, 209 S.E.2d 880 (1974).

VI. SUBDIVISION (6).

The giving of testimony which is obviously false can constitute contempt. In re Edison, 15 N.C. App. 354, 190 S.E.2d 235 (1972).

Although It Is Also a Crime. — Making a false statement under oath may constitute contempt, notwithstanding that the conduct may also be a crime, such as perjury or false swearing. In re Edison, 15 N.C. App. 354, 190 S.E.2d 235 (1972).

And Can Be Punished Civilly or Criminally. — Giving "obviously false" testimony can be punishable by contempt civilly or criminally. In

re Edison, 15 N.C. App. 354, 190 S.E.2d 235 (1972).

False Testimony as Direct or Indirect Contempt. — See note to § 5-5.

Obviously False or Evasive Testimony, Since the power of the court over a witness in requiring proper responses is inherent and necessary for the furtherance of justice, it must be conceded that testimony which is obviously false or evasive is equivalent to a refusal to testify within the intent and meaning of this section and § 5-8, and therefore punishable "as contempt" or "as for contempt," depending upon the facts of the particular case. In re Edison, 15 N.C. App. 354, 190 S.E.2d 235 (1972).

The refusal of a witness to testify, etc. — From the tenor of subdivision (6) of this section and subdivision (4), of § 5-8, the refusal of a witness to testify at all or to answer any legal or proper question is made punishable both "as contempt" and "as for contempt." In re Edison, 15 N.C. App. 354, 190 S.E.2d 235 (1972).

§ 5-2. Appeal from judgment of guilty.

Editor's Note. —

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

Applied in Blue Jeans Corp. of America v. Amalgamated Clothing Workers, 275 N.C. 503, 169 S.E.2d 867 (1969); In re Contempt of West, 21 N.C. App. 302, 204 S.E.2d 244 (1974).

§ 5-4. Punishment. — Punishment for contempt for matters set forth in the preceding sections shall be by fine not to exceed two hundred and fifty dollars ($250.00), or imprisonment not to exceed 30 days, or both, in the discretion of the court, except that the punishment for refusal in violation of G.S. 5-1(9) is a fine not to exceed five hundred dollars ($500.00), imprisonment not to exceed six months, or both, in the discretion of the court. (Code, s. 649; Rev., s. 940; C. S., s. 981; 1973, c. 1286, s. 3.)

Editor's Note. —

The 1973 amendment, effective Sept. 1, 1975, added the language beginning "except that the punishment" at the end of the section.

Session Laws 1973, c. 1286, s. 29, contains a severability clause.

Session Laws 1973, c. 1286, s. 31, provides:

"Sec. 31. This act becomes effective on July 1, 1975, and is applicable to all criminal proceedings begun on and after that date and each provision is applicable to criminal proceedings pending on that date to the extent practicable, except § 12 [§§ 15-176.3 through 15-176.5] of this act which becomes effective on July 1, 1974."

Session Laws 1975, c. 573, amends Session Laws 1973, c. 1286, s. 31, so as to make the 1973 act effective Sept. 1, 1975, rather than July 1, 1975.

For note on right to jury trial in criminal contempt proceedings, see 6 Wake Forest Intra. L. Rev. 356 (1970). For article surveying recent decisions by the North Carolina Supreme Court in the area of criminal procedure, see 49 N.C.L. Rev. 262 (1971).

No Constitutional Right to Jury Trial. — In view of the punishment, contempt is a petty offense for which there is no constitutional right to a jury trial. Thompson v. Thompson, 25 N.C. App. 79, 212 S.E.2d 243 (1975).

Punishment Immediate. —

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

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

§ 5-5. Summary punishment for direct contempt.

Constitutionality. —

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

A contention that a defendant was denied due process when the court summarily sentenced him for direct contempt committed in the presence of the court, in that he did not have sufficient opportunity to prepare his defense or obtain a lawyer, he was not offered a lawyer, he was not informed of the right to have witnesses and compel their attendance, he was not proven guilty beyond a reasonable doubt, he had no

opportunity to confront and cross-examine witnesses, and he was not informed of his right against self-incrimination, is without merit, since summary punishment for direct contempt committed in the presence of the court does not contemplate such a trial. In re Hennis, 6 N.C. App. 683, 171 S.E.2d 211 (1969).

Direct contempt of court is punishable summarily. —

Where the contempt is committed directly under the eye or within the view of the court, it may proceed upon its own knowledge of the facts, and punish the offender, without further proof, and without issue or trial in any form. In re Edison, 15 N.C. App. 354, 190 S.E.2d 235 (1972).

Where a court acts immediately to punish for contemptuous conduct committed under its eye, the contemner is present of course. There is then no question of identity, nor is hearing in a formal sense necessary because the judge has personally seen the offense and is acting on the basis of his own observations. Moreover, in such a situation, the contemner has normally been given an opportunity to speak in his own behalf in the nature of a right of allocution. In re Edison, 15 N.C. App. 354, 190 S.E.2d 235 (1972).

And the offended court, etc. —

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

When Notice and Hearing Required Regardless of Kind of Contempt Involved. — Regardless of what kind of contempt was involved, in order to hold a person in contempt for perjury committed in a bond forfeiture hearing held three weeks previously, notice and a hearing would be required as is the practice when an order to show cause is issued in an indirect contempt. In re Edison, 15 N.C. App. 354, 190 S.E.2d 235 (1972).

Where more than three full weeks elapsed between the conduct charged and the sentencing for contempt, the giving of notice and a hearing to the person in contempt is imperative. In re Edison, 15 N.C. App. 354, 190 S.E.2d 235 (1972).

The proceeding by attachment for violating an order of the court made in furtherance of a pending action is necessarily summary and prompt, and to be effectual it must be so. The judge determines the facts and adjudges the contempt, and while he may avail himself of a jury and have their verdict upon a disputed and doubtful matter of fact, it is in his discretion to do so or not. Blue Jeans Corp. of America v. Amalgamated Clothing Workers, 275 N.C. 503, 169 S.E.2d 867 (1969).

What Is Direct Contempt. —

In accord with original. See In re Hennis, 6 N.C. App. 683, 171 S.E.2d 211 (1969); In re Edison, 15 N.C. App. 354, 190 S.E.2d 235 (1972); In re Contempt of West, 21 N.C. App. 302, 204 S.E.2d 244 (1974).

False Testimony as Direct or Indirect Contempt. — Where all the facts necessary to establish false testimony were not before the court, it is impossible to say that there were words spoken or acts committed in the actual presence of the court which would constitute direct contempt. In re Edison, 15 N.C. App. 354, 190 S.E.2d 235 (1972).

A contempt citation delivered to a drunk who had been put into a holding cell at the far end of the room from the booking area, and who was behaving in a boisterous, rude, profane and obscene manner, by a booking magistrate who never engaged in any work on the drunk's warrant, was an unconstitutional act fundamentally unfair which violated due process of law. Thompson v. Stahl, 346 F. Supp. 401 (W.D.N.C. 1972).

Remedy by Habeas Corpus. —

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

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

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

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

Editor's Note. —

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

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

Use of Contempt Power by Trial Judge. — By virtue of criminal nature of contempt proceedings and the statutory provisions for enforcement of the contempt power by punishment only, a trial judge in North Carolina has no authority to award indemnifying fines or other compensation to a private plaintiff in a contempt proceeding. United Artists Records, Inc. v. Eastern Tape Corp., 18 N.C. App. 183, 196 S.E.2d 598 (1973).

Use of Contempt Power by Booking Magistrate. — Neither the reasonable intention of this section nor the fairness requirements of the United States Constitution support use of a court's power of contempt by a booking magistrate to maintain order among drunks in the booking room late at night. Thompson v. Stahl, 346 F. Supp. 401 (W.D.N.C. 1972).

Power of Legislative Body to Punish for Contempt. — A legislature, like a court, must, of necessity, possess the power to act immediately and instantly to quell disorders in the chamber if it is to be able to maintain its authority and continue with the proper dispatch of its business. Where, however, the contemptuous episode has occurred two days previously, it is much more difficult to argue that action without notice or hearing of any kind is necessary to preserve order and enable a legislative body to proceed with its business. In re Edison, 15 N.C. App. 354, 190 S.E.2d 235 (1972).

Where a legislative body acts two days after the event, in the absence of the contemner, and without notice to him, there is no assurance that the members of the legislature are acting, as a judge does in a contempt case, on the basis of personal observation and identification of the contemner engaging in the conduct charged, nor is there any opportunity whatsoever for him to speak in defense or mitigation, if he is in fact the offender. In re Edison, 15 N.C. App. 354, 190 S.E.2d 235 (1972).

Procedural Requirements, etc. —

When the conduct complained of was before a commissioner or other subordinate officer of the court and the court has no direct knowledge of the facts constituting the alleged contempt, in order for the court to take original cognizance thereof and determine the question of contempt, the proceedings must follow the procedural requirements as prescribed for indirect contempt and be based on rule to show cause or other process constituting an initiatory accusation meeting the requirements of due process as prescribed by the statute. In re Edison, 15 N.C. App. 354, 190 S.E.2d 235 (1972).

Cited in In re Little, 404 U.S. 553, 92 S. Ct. 659, 30 L. Ed. 2d 708 (1972).

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

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

Indirect Contempt Defined. —

In accord with original. See In re Edison, 15 N.C. App. 354, 190 S.E.2d 235 (1972); In re Contempt of West, 21 N.C. App. 302, 204 S.E.2d 244 (1974).

Failure to comply with a prior court order would amount to an act committed outside the presence of the court, at a distance from it, which tends to degrade the court or interrupts, prevents or impedes the administration of justice and would be classified an indirect contempt. Ingle v. Ingle, 18 N.C. App. 455, 197 S.E.2d 61 (1973).

False Testimony as Direct or Indirect Contempt. — See note to § 5-5.

Practice. —

In cases of misbehavior of which the judge cannot have personal knowledge, and is informed thereof only by the confession of the party, or by the testimony under oath of others, the proper practice is, by rule or other process, to require the offender to appear and show cause why he should not be punished. In re Edison, 15 N.C. App. 354, 190 S.E.2d 235 (1972).

Prescribed Procedure Must Be Followed. — When the contempt is indirect, the procedure prescribed by this section, providing that an order issue directing an offender to appear within a reasonable time and show cause why he should not be attached for contempt, must be followed. Ingle v. Ingle, 18 N.C. App. 455, 197 S.E.2d 61 (1973).

Findings Required. — An order, entered pursuant to a contempt hearing, which confines a person to jail until he complies with a support order must find not only that his failure to comply with the support order was wilful but also that he presently possesses the means to comply with the order. Ingle v. Ingle, 18 N.C. App. 455, 197 S.E.2d 61 (1973).

When Notice and Hearing Required Regardless of Kind of Contempt Involved. — Regardless of what kind of contempt was involved, in order to hold a person in contempt for perjury committed in a bond forfeiture

hearing held three weeks previously, notice and a hearing would be required as is the practice when an order to show cause is issued in an indirect contempt. In re Edison, 15 N.C. App. 354, 190 S.E.2d 235 (1972).

Where more than three full weeks elapsed between the conduct charged and the sentencing for contempt, the giving of notice and a hearing to the person in contempt is imperative. In re Edison, 15 N.C. App. 354, 190 S.E.2d 235 (1972).

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

Cited in In re Martin, 13 N.C. App. 158, 185 S.E.2d 25 (1971); State v. Howell, 16 N.C. App. 707, 193 S.E.2d 418 (1972).

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

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

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

(6.1) Any person served with a criminal summons directing him to appear to answer to criminal charges, who willfully fails to appear as directed.

(1971, c. 381, s. 2; 1973, c. 1286, s. 4.)

Editor's Note. —

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

The 1973 amendment, effective Sept. 1, 1975, added subdivision (6.1).

Session Laws 1973, c. 1286, s. 29, contains a severability clause.

Session Laws 1973, c. 1286, s. 31, provides:

"Sec. 31. This act becomes effective on July 1, 1975, and is applicable to all criminal proceedings begun on and after that date and each provision is applicable to criminal proceedings pending on that date to the extent practicable, except § 12 [§§ 15-176.3 through 15-176.5] of this act which becomes effective on July 1, 1974."

Session Laws 1975, c. 573, amends Session Laws 1973, c. 1286, s. 31, so as to make the 1973 act effective Sept. 1, 1975, rather than July 1, 1975.

Only the opening paragraph of the section and the subdivisions changed or added by the amendments are set out.

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

Nature of Offense. —

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

Contempt in North Carolina is treated as an offense against "the majesty of the law," is essentially criminal in nature, and is superintended or controlled pursuant to statutory authority solely by means of punishment. United Artists Records, Inc. v. Eastern Tape Corp., 18 N.C. App. 183, 196 S.E.2d 598 (1973).

Contempts are defined and classified generally by two statutes: § 5-1 and this section. In re Edison, 15 N.C. App. 354, 190 S.E.2d 235 (1972).

Criminal and Civil Contempt Distinguished. —

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

Proceedings for contempt are classified as criminal and civil. In re Edison, 15 N.C. App. 354, 190 S.E.2d 235 (1972).

The proceedings for criminal and civil contempt are "for contempt" and "as for

contempt," respectively. In re Edison, 15 N.C. App. 354, 190 S.E.2d 235 (1972).

Acts or omissions which ordinarily constitute criminal contempt as defined in the textbooks are designated by § 5-1 as punishable "for contempt," without further designation; the acts or omissions which ordinarily constitute civil contempt as defined in the books are designated by this section as punishable "as for contempt." In re Edison, 15 N.C. App. 354, 190 S.E.2d 235 (1972).

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

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

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

This section and § 5-1 recognize and preserve the fundamental distinction between civil and criminal contempt in substance but not in name. In re Edison, 15 N.C. App. 354, 190 S.E.2d 235 (1972).

Direct and Indirect Contempt. — Contempts of court are classified in two main divisions known as direct and indirect contempt. In re Edison, 15 N.C. App. 354, 190 S.E.2d 235 (1972).

As to direct and indirect contempt, see §§ 5-5 and 5-7 and the notes thereto.

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

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

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

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

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

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

Where Defendant Cannot Be Charged with Violation of this Section. — Where there is no showing that any act of defendants, however improper, was such as tended to defeat, impair, impede, or prejudice the rights or remedies of any party to any action then pending in court, defendants cannot be charged with violation of this section. State v. Howell, 16 N.C. App. 707, 193 S.E.2d 418 (1972).

The refusal of a witness to testify, etc. —

From the tenor of § 5-1(6) and subdivision (4) of this section, the refusal of a witness to testify at all or to answer any legal or proper question is made punishable both "as contempt" and "as for contempt." In re Edison, 15 N.C. App. 354, 190 S.E.2d 235 (1972).

Obviously False or Evasive Testimony, etc. —

Since the power of the court over a witness in requiring proper responses is inherent and necessary for the furtherance of justice, it must be conceded that testimony which is obviously false or evasive is equivalent to a refusal to testify within the intent and meaning of the foregoing statutes, and therefore punishable "as contempt" or "as for contempt," depending upon the facts of the particular case. In re Edison, 15 N.C. App. 354, 190 S.E.2d 235 (1972).

The giving of testimony which is "obviously false" can constitute contempt. In re Edison, 15 N.C. App. 354, 190 S.E.2d 235 (1972).

Although It Is Also a Crime. — Making a false statement under oath may constitute contempt, notwithstanding that the conduct may

also be a crime, such as perjury or false swearing. In re Edison, 15 N.C. App. 354, 190 S.E.2d 235 (1972).

And Can Be Punished Civilly or Criminally. — Giving "obviously false" testimony can be punishable by contempt civilly or criminally. In re Edison, 15 N.C. App. 354, 190 S.E.2d 235 (1972).

False Testimony as Direct or Indirect Contempt. — See note to § 5-5.

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

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

Error to Imprison for Failure to Pay Whole Amount of Alimony. — Where the trial judge found that the party was a healthy and able-bodied man for his age, and further found that he could pay at least a portion of the alimony, it was error to imprison him until he should pay the whole amount. Cox v. Cox, 10 N.C. App. 476, 179 S.E.2d 194 (1971).

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

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

Applied in Whitehead v. Whitehead, 13 N.C. App. 393, 185 S.E.2d 706 (1972).

Cited in City of Brevard v. Ritter, 285 N.C. 576, 206 S.E.2d 151 (1974).

§ 5-9. Trial of proceedings in contempt.

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

Trial court did not have jurisdiction to conduct contempt proceedings while appeal is pending, because, under § 1-294, all proceedings below are stayed; therefore order finding defendant in contempt is void, at least until appeal is perfected. Collins v. Collins, 18 N.C. App. 45, 196 S.E.2d 282 (1973).

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

Chapter 6.

Liability for Court Costs.

ARTICLE 1.

Generally.

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

Editor's Note. —

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

Dependent upon Statutes. —

Today in this State, all costs are given in a court of law by virtue of some statute. Costs, in this State, are entirely creatures of legislation, and without this they do not exist. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

An award of costs is an exercise of statutory authority; if the statute is misinterpreted, the judgment is erroneous. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

At common law neither party recovered costs in a civil action and each party paid his own witnesses. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

Statutes Strictly Construed. — Since the right to tax costs did not exist at common law and costs are considered penal in their nature, statutes relating to costs are strictly construed. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

Costs May Not Be Adjudged on Mere Equitable or Moral Grounds. — Since costs may be taxed solely on the basis of statutory authority, it follows a fortiori that courts have no power to adjudge costs against anyone on mere equitable or moral grounds. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

Parties Entitled to Actual Costs Reasonably Incurred and Specifically Authorized. — Parties to whom judgment is given are entitled to recover their actual costs reasonably incurred and specifically authorized by statutes. Such reimbursement is the limit of their entitlement. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

Costs and Expenses Unnecessarily Incurred. — Even when allowed by statute, costs and expenses unnecessarily incurred by the prevailing party will not be taxed against the unsuccessful party. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

The expense of procuring surveys, maps, plans, photographs and documents are not taxable as costs unless there is clear statutory authority therefor or they have been ordered by the court. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

Attorneys' Fees. — In this jurisdiction, in the absence of express statutory authority, attorneys' fees are not allowable as part of the court costs in civil actions. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

The power to make an allowance of counsel fees from a fund brought into court is susceptible of great abuse, and should be exercised with jealous caution. With the power of award being limited to items of reasonable attorney fees and expenses, so as to exclude compensation or allowance of any kind for the time and effort of the suing taxpayer, thus fixing it so the taxpayer may not capitalize on the suit, there is no real danger of abuse. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

Witness Fees Generally. — The losing party is taxed with the costs of his adversary's witness only if the witness was subpoenaed and examined or tendered. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

Witness Fees Not Allowed and Taxed for Party Testifying in His Own Case. — The general rule is that, unless authorized by express statute provision, witness fees cannot be allowed and taxed for a party to the action. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

In construing this section, it is not necessary to resort to rules of construction. Clearly, the legislature did not contemplate that a party would disburse or become liable to himself for a fee when he testified as a witness for himself in his own case. Neither did it contemplate that a party would pay an officer to subpoena himself as a witness. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

If a successful party is not entitled to have a witness fee for himself taxed against his losing adversary, he is not entitled to have taxed an expert witness fee for himself. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

Expert witness fees can be taxed against an adverse party only when the testimony of the witness examined or tendered was or would have been material and competent. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

The testimony of the expert civil engineer that his plan for widening the street was as good as city's, was totally irrelevant to the question of city's right to condemn the property in question. The record disclosed no facts which would justify taxing, as a part of the costs for which the city was liable, an expert witness fee. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

Compensation for Time and Effort Devoted to Litigation. — Parties are not entitled to recover an hourly wage or per diem for the time they expended in attending hearings, or securing evidence or exhibits; a party is not entitled to compensation for the time and effort he devotes to the litigation. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

Mileage, Meals and Hotel Bills. — No statute authorizes the inclusion of expenses of parties for mileage, meals and hotel bills expended in securing evidence and attending hearings, in court costs. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

Applied in In re Custody of Cox, 17 N.C. App. 687, 195 S.E.2d 132 (1973); Brady v. Smith, 18 N.C. App. 293, 196 S.E.2d 580 (1973).

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

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

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

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

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

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

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

ARTICLE 2.

When State Liable for Costs.

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

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

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

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

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

ARTICLE 3.

Civil Actions and Proceedings.

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

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

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

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

(4) When several actions are brought on one bond, recognizance, promissory note, bill of exchange or instrument in writing, or in any other case, for the same cause of action against several parties who might have been joined as defendants in the same action, no costs other than disbursements shall be allowed to the plaintiff in more than one of such actions, which shall be at his election, provided the party or parties proceeded against in such other action or actions were within the State and not secreted at the commencement of the previous action or actions. (R. C., c. 31, s. 78; 1874-5, c. 119; Code, s. 525; Rev., s. 1264; C. S., s. 1241; 1971, c. 269, s. 6.)

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

Section Inapplicable to Contempt Proceeding. — Although labeled "civil" contempt, a proceeding as for contempt is by no means a civil action or proceeding to which this section or § 6-20, allowing costs in discretion of court, would apply. United Artists Records, Inc. v. Eastern Tape Corp., 18 N.C. App. 183, 196 S.E.2d 598 (1973).

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

Discretion Not Reviewable. —

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

Section Inapplicable to Contempt Proceeding. — Although labeled "civil" contempt, a proceeding as for contempt is by no means a civil action or proceeding to which § 6-18, providing when costs shall be allowed to plaintiff as a matter of course, or this section would apply. United Artists Records, Inc. v. Eastern Tape Corp., 18 N.C. App. 183, 196 S.E.2d 598 (1973).

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

Attorneys' Fees. —

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

The trial court had authority to tax a reasonable attorney's fee as part of the costs and to apportion it among the parties in an action for a declaratory judgment and for instructions to the trustees in connection with the sale of certain trust property. Tripp v. Tripp, 17 N.C. App. 64, 193 S.E.2d 366 (1972).

Construction of Trust Instruments. — In a declaratory judgment action in which the paper writing in question was insufficient as a trust instrument and was not executed as a will, the trial judge erred in ordering that plaintiff's counsel fees should be taxed against decedent's estate since the action did not involve a caveat or the construction of a trust instrument within the purview of this section. Baxter v. Jones, 283 N.C. 327, 196 S.E.2d 193 (1973).

Applied in Dillon v. North Carolina Nat'l Bank, 6 N.C. App. 584, 170 S.E.2d 571 (1969); Citizens Nat'l Bank v. Grandfather Home for Children, Inc., 280 N.C. 354, 185 S.E.2d 836 (1972).

Stated in In re King, 281 N.C. 533, 189 S.E.2d 158 (1972).

Cited in City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

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

The obvious purpose of this section is to provide relief for a person who has sustained injury or property damage in an amount so small that, if he must pay his attorney out of his recovery, he may well conclude that it is not economically feasible to bring suit on his claim. In such a situation the legislature apparently concluded that the defendant, though at fault, would have an unjustly superior bargaining power in settlement negotiations. A great majority of such claims arise out of automobile accidents in which the alleged wrongdoer is insured and his insurance carrier controls the litigation. Hicks v. Albertson, 284 N.C. 236, 200 S.E.2d 40 (1973).

The obvious purpose of this section is to provide relief for a person who has sustained injury or property damage in an amount so small that, if he must pay his attorney out of his recovery, he may well conclude that it is not economically feasible to bring suit on his claim. Hubbard v. Lumbermen's Mut. Cas. Co., 24 N.C. App. 493, 211 S.E.2d 544 (1975).

This section, being remedial, should be construed liberally to accomplish the purpose of the legislature and to bring within it all cases fairly falling within its intended scope. Hicks v. Albertson, 284 N.C. 236, 200 S.E.2d 40 (1973); Hubbard v. Lumbermen's Mut. Cas. Co., 24 N.C. App. 493, 211 S.E.2d 544 (1975).

Ordinarily, attorneys' fees are not recoverable as an item of damages or part of the costs in litigation. U.S. Piping, Inc. v. Travelers Indem. Co., 9 N.C. App. 561, 176 S.E.2d 835 (1970); Hicks v. Albertson, 18 N.C. App. 599, 197 S.E.2d 624, aff'd, 284 N.C. 236, 200 S.E.2d 40 (1973).

In the absence of statutory authority therefor, a court may not include an allowance of attorneys' fees as part of the costs recoverable by the successful party to an action or proceeding. Hicks v. Albertson, 284 N.C. 236, 200 S.E.2d 40 (1973).

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

This section creates an exception to the general rule that attorney's fees are not allowable as part of the costs in civil actions. Hill v. Jones, 26 N.C. App. 168, 215 S.E.2d 168 (1975).

Section Is Applicable to Actions against Hospital Service Corporation Organized under § 57-1. — See opinion of Attorney General to Mr. Bobby H. Griffin, Union County Attorney, 43 N.C.A.G. 357 (1974).

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

The allowance of counsel fees under the authority of this section is, by express language of this section, in the discretion of the presiding judge. Hubbard v. Lumbermen's Mut. Cas. Co., 24 N.C. App. 493, 211 S.E.2d 544 (1975).

Because this section provides for the award of "a reasonable attorney fee," the court has a large measure of discretion in fixing or recommending the amount to be paid. Hill v. Jones, 26 N.C. App. 168, 215 S.E.2d 168 (1975).

"Presiding Judge" Means Judge Presiding over Court in Which Action Instituted. — The term "presiding judge" means the judge presiding over the court in which the action is instituted. Such judge can, without danger of injustice, fix a reasonable fee for the attorney of the party recovering damages by settlement prior to trial. Hicks v. Albertson, 284 N.C. 236, 200 S.E.2d 40 (1973).

The legislature contemplated that the judge who presided at the trial would determine whether a fee for the attorney of the party recovering damages should be allowed and, if so, the amount. Such judge would be in a better position than any other to make this determination. Hicks v. Albertson, 284 N.C. 236, 200 S.E.2d 40 (1973).

The clerk has no authority to determine whether a fee should be allowed as part of the costs or to fix the amount of such fee. Hicks v. Albertson, 284 N.C. 236, 200 S.E.2d 40 (1973).

When Judge Other Than Trial Judge May Make Allowance. — While it is proper that the trial judge in an action which proceeds to trial may allow a reasonable attorney fee to the successful litigant under this section, the presiding judge of the court in which the suit is instituted may allow such fee when judgment is obtained without the necessity for trial. In cases where the judge who presided at the trial is unable because of death, disability, or other valid reason to make such allowance, the presiding judge of the court in which the suit is instituted would have such authority. Hicks v. Albertson, 18 N.C. App. 599, 197 S.E.2d 624, aff'd, 284 N.C. 236, 200 S.E.2d 40 (1973).

Findings of Fact Required. — In awarding reasonable counsel fees under this section, the judge presiding must make some findings of fact to support the award. Hill v. Jones, 26 N.C. App. 168, 215 S.E.2d 168 (1975).

And Such Findings May Be Limited. — Since this section determines the nature of an action and limits the amount involved, the findings of fact may be limited to the quantity and quality of all the services rendered by the attorney for his client until the final determination of the action for which the judge presiding, in his discretion, allows an attorney fee. Hill v. Jones, 26 N.C. App. 168, 215 S.E.2d 168 (1975).

Fee Is Allowed as Part of Costs. — This section does not provide for the recovery of a reasonable attorney's fee in addition to the court costs but "as a part of the court costs." Where the acceptance of an offer of judgement by the plaintiff proceeded from a reasonable interpretation by the plaintiff of the defendant's offer, if this was not the interpretation intended by the defendant, the misunderstanding is due to ambiguous language used by the defendant in making his offer and the defendant must bear any loss resulting therefrom. Hicks v. Albertson, 284 N.C. 236, 200 S.E.2d 40 (1973).

Effect of Settlement. — To hold that use of the adjective "presiding" shows the legislature intended that no fee be allowed in any case settled without actual trial is to give this word an unreasonably strict construction and would defeat its purpose. Hicks v. Albertson, 284 N.C. 236, 200 S.E.2d 40 (1973).

This section refers specifically to the "institution" of a suit, not its trial, and allows an attorney fee to be awarded without regard to how that judgment is obtained. To permit an offer of judgment, or indeed any settlement prior to a completed trial, to avoid the payment of a reasonable attorney fee in the discretion of the court would defeat in large measure the purpose of the statute. Hicks v. Albertson, 18 N.C. App. 599, 197 S.E.2d 624, aff'd, 284 N.C. 236, 200 S.E.2d 40 (1973).

Where there is a clear indication in the record that an application for attorney fee as a part of the costs was to be considered by the court, and the settlement was effected with knowledge of this proposed application, allowance should be made for fees. Hicks v. Albertson, 18 N.C. App. 599, 197 S.E.2d 624, aff'd, 284 N.C. 236, 200 S.E.2d 40 (1973).

If a party wishes to avoid payment of attorney fee in cases to which this section may be applicable, he should make his offer of settlement before the suit is instituted. Hicks v. Albertson, 18 N.C. App. 599, 197 S.E.2d 624, aff'd, 284 N.C. 236, 200 S.E.2d 40 (1973).

Presiding judge may award compensation for legal services rendered on appeal. Hill v. Jones, 26 N.C. App. 168, 215 S.E.2d 168 (1975).

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

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

Applied in Brady v. Smith, 18 N.C. App. 293, 196 S.E.2d 580 (1973).

Stated in In re King, 281 N.C. 533, 189 S.E.2d 158 (1972).

Cited in City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

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

Meaning of "Security Agreement". — As used in the Commercial Code, the general term "security agreement" is ordinarily understood to embrace chattel mortgages, conditional sales contracts, assignments of accounts receivable, trust receipts, etc. The term has a similar connotation in subdivision (5) of this section. EAC Credit Corp. v. Wilson, 281 N.C. 140, 187 S.E.2d 752 (1972).

A guaranty contract is not a "security agreement" within the language of subdivision (5) of this section. EAC Credit Corp. v. Wilson, 281 N.C. 140, 187 S.E.2d 752 (1972).

Guaranty of Payment Alone Does Not

Render Guarantors Liable for Attorneys' Fees. — This section does not authorize collection of attorneys' fees if the guaranty contract sued upon does not so provide. Guaranty of payment alone does not render the guarantors liable for attorneys' fees which the principal debtor, by the terms of the note, is bound to pay. EAC Credit Corp. v. Wilson, 281 N.C. 140, 187 S.E.2d 752 (1972).

Nor Does Provision in Promissory Note Requiring Debtor to Pay Attorneys' Fees. — Where a promissory note contained a provision requiring the debtor to pay reasonable attorneys' fees of the creditor in collection of the note, but a guaranty of payment of the note contained no such provision, the guarantors were not liable under this section for attorneys' fees incurred by the creditor in an action on the guaranty contract. EAC Credit Corp. v. Wilson, 281 N.C. 140, 187 S.E.2d 752 (1972).

Where a promissory note contained a provision requiring the debtor to pay reasonable attorneys' fees of the creditor in collection of the note, but a guaranty of payment of the note contained no such provision, the guarantors were not liable for attorneys' fees of the creditor in an action on the contract of guaranty, since this section authorizes collection of attorneys' fees only in cases in which the instrument on which suit is brought expressly so provides. EAC Credit Corp. v. Wilson, 12 N.C. App. 481, 183 S.E.2d 859 (1971), aff'd, 281 N.C. 140, 187 S.E.2d 752 (1972).

Subdivision (5) of this section sets no time limit on the giving of the notice required. First Citizens Bank & Trust Co. v. Larson, 22 N.C. App. 371, 206 S.E.2d 775 (1974).

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

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

Cited in International Harvester Credit Corp. v. Ricks, 16 N.C. App. 491, 192 S.E.2d 707 (1972).

§ 6-21.3. Remedies for returned check. — In an action by a holder to recover the sum payable of a check drawn by the defendant on which payment has been refused by the payor bank because the drawer had no account or insufficient funds, upon a determination that the plaintiff has prevailed the presiding judge or magistrate shall add to the amount due to the plaintiff the sum of five dollars ($5.00) to defray the costs of processing the returned check, and the presiding judge or magistrate shall tax to the defendant, as part of the court costs payable, a reasonable attorney's fee to the duly licensed attorney representing the plaintiff in such suit upon a finding (i) that at least 10 days prior to instituting the action the plaintiff mailed the defendant written notice at the defendant's last known address of the intent to file such suit if payment for the check was not received, and (ii) that the defendant failed to deliver payment or evidence of bank error to the plaintiff within 10 days after mailing of such notice. (1975, c. 129, s. 1.)

Editor's Note. — Session Laws 1975, c. 129, s. 2, provides: "This act shall take effect upon ratification but shall not affect pending cases." The act was ratified April 10, 1975.

§ 6-23. Defendant unreasonably defending after notice of no personal claim to pay costs.

Cited in City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

§ 6-24. Suits in forma pauperis; no costs unless recovery.

Editor's Note. — For comment on access indigents into the civil courtroom, see 49 N.C.L. Rev. 683 (1971).

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

ARTICLE 4.

Costs on Appeal.

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

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

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

ARTICLE 5.

Liability of Counties in Criminal Actions.

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

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

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

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

ARTICLE 6.

Liability of Defendant in Criminal Actions.

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

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

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

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

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

ARTICLE 7.

Liability of Prosecuting Witness for Costs.

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

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

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

sentence, substituted "prosecuting witness's" for "prosecutor's" in that sentence, deleted "or justice" following "judge" near the beginning of the second paragraph, and substituted "prosecuting witness" for "prosecutor" three times in that paragraph.

Standing to Challenge Constitutionality of Section. — The plaintiff lacks standing to put in issue the constitutionality of this section where he is under no present threat of prosecution under these statutes, the likelihood that he will run afoul of them in the future is remote and speculative in the extreme, and it can be safely assumed that he does not contemplate either presently or in the future the institution of a prosecution in North Carolina. Fowler v. Alexander, 478 F.2d 694 (4th Cir. 1973).

The mere fact that earlier the plaintiff was caught in the net of the challenged statutes gives him no standing, where his earlier encounter with the statutes has become moot, the costs assessed have been paid, and he is no longer restrained. Fowler v. Alexander, 478 F.2d 694 (4th Cir. 1973).

The mere fact that the statutes may chill in some indefinable way the urge to prosecute is of no moment in the absence of any real likelihood that plaintiff has or will have reason to prosecute someone in North Carolina. Fowler v. Alexander, 478 F.2d 694 (4th Cir. 1973).

Declaratory Judgment as to Validity of Section Denied. — A grant of declaratory relief that this section was invalid and unconstitutional was held to be outside the equitable jurisdiction of the court for the reasons no bad faith had been alleged, nor any harassment, nor any impediment to the resolution of the constitutional validity in the General Court of Justice of North Carolina. Fowler v. Alexander, 340 F. Supp. 168 (M.D.N.C. 1972).

Intervention by Federal Court in Operation of Section. — The taxing of costs to a prosecuting witness is a constituent part of the criminal procedure of North Carolina. Comity precludes not only the injunction of criminal proceedings in the state courts, but also any disruptive interference thereof. Therefore only when the whole proceeding may be enjoined does the federal district court have jurisdiction to intervene in any way in the operation of this section. Fowler v. Alexander, 340 F. Supp. 168 (M.D.N.C. 1972), aff'd, 478 F.2d 694 (4th Cir. 1973).

§ 6-50. Imprisonment of prosecuting witness for willful nonpayment of costs if prosecution frivolous. — Every such prosecuting witness may be adjudged not only to pay the costs, but he shall also be imprisoned for the willful nonpayment thereof, when the judge before whom the case was tried shall adjudge that the prosecution was frivolous or malicious. (1800, c. 558; R. C., c. 35, s. 37; 1879, c. 49; 1881, c. 176; Code, s. 738; Rev., s. 1297; C. S., s. 1272; 1971, c. 269, s. 11.1.)

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

Standing to Challenge Constitutionality of Section. — The plaintiff lacks standing to put in issue the constitutionality of this section where he is under no present threat of prosecution under these statutes, the likelihood that he will run afoul of them in the future is remote and speculative in the extreme, and it can be safely assumed that he does not contemplate either presently or in the future the institution of a prosecution in North Carolina. Fowler v. Alexander, 478 F.2d 694 (4th Cir. 1973).

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section. Fowler v. Alexander, 340 F. Supp. 168 (M.D.N.C. 1972), aff'd, 478 F.2d 694 (4th Cir. 1973).

ARTICLE 8.

Fees of Witnesses.

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

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

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

In General. —

The court's power to tax costs is entirely dependent upon statutory authorization. State v. Johnson, 282 N.C. 1, 191 S.E.2d 641 (1972).

When Witness Fees Taxed against Losing Party. — The losing party is taxed with the costs of his adversary's witness only if the witness was subpoenaed and examined or tendered. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

Expert witness fees can be taxed against an adverse party only when the testimony of the witness examined or tendered was or would have been material and competent. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

Where neither expert witness testified in obedience to a subpoena, the court was without authority to allow either of them an expert fee or to tax the losing party with the amount of the fee as a part of the costs. Couch v. Couch, 18 N.C. App. 108, 196 S.E.2d 64 (1973).

Party Giving Evidence in His Own Behalf. — The legislature never intended, in allowing parties to be witnesses for themselves, to put them on a par with other witnesses in respect to witness fees, when they attend the trial to give evidence in their own favor. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

If a successful party is not entitled to have a witness fee for himself taxed against his losing adversary he is not entitled to have taxed an expert witness fee for himself. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

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

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

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

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

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

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

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

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

ARTICLE 9.

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

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

Chapter 7.

Courts.

SUBCHAPTER II. SUPERIOR COURTS.

Article 7.

Organization.

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

Article 9.

Judicial and Solicitorial Districts and Terms of Court.

7-68. [Repealed.]

Article 11.

Special Regulations.

7-89. [Repealed.]

SUBCHAPTER IV. DOMESTIC RELATIONS COURTS.

Article 13.

Domestic Relations Courts.

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

SUBCHAPTER V. JUSTICES OF THE PEACE.

Article 14.

Election and Qualification.

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

Article 15.

Jurisdiction.

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

Article 16.

Dockets.

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

Article 17.

Fees.

7-134. [Repealed.]

Article 17A.

Warrants and Receipts.

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

Article 18.

Process.

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

Article 19.

Pleading and Practice.

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

Article 20.

Jury Trial.

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

Article 21.

Judgment and Execution.

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

Article 22.

Appeal.

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

Article 23.

Forms.

7-184. [Repealed.]

SUBCHAPTER VI. RECORDERS' COURTS.

Article 24.

Municipal Recorders' Courts.

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

Article 25.

County Recorders' Courts.

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

Article 27.

Provisions Applicable to All Recorders' Courts.

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

Article 28.

Civil Jurisdiction of Recorders' Courts.

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

Article 29.

Elections to Establish Recorders' Courts.

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

Article 29A.

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

7-264.1. [Repealed.]

SUBCHAPTER VII. GENERAL COUNTY COURTS.

Article 30.

Establishment, Organization and Jurisdiction.

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

Article 31.

Practice and Procedure.

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

SUBCHAPTER IX. COUNTY CRIMINAL COURTS.

Article 36.

County Criminal Courts.

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

SUBCHAPTER X. SPECIAL COUNTY COURTS.

Article 37.

Special County Courts.

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

SUBCHAPTER XI. JUDICIAL COUNCIL.

Article 38.

Judicial Council.

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

SUBCHAPTER II. SUPERIOR COURTS.

ARTICLE 7.

Organization.

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

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

ARTICLE 9.

Judicial and Solicitorial Districts and Terms of Court.

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

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

ARTICLE 11.

Special Regulations.

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

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

SUBCHAPTER IV. DOMESTIC RELATIONS COURTS.

ARTICLE 13.

Domestic Relations Courts.

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

SUBCHAPTER V. JUSTICES OF THE PEACE.

ARTICLE 14.

Election and Qualification.

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

ARTICLE 15.

Jurisdiction.

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

ARTICLE 16.

Dockets.

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

ARTICLE 17.

Fees.

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

ARTICLE 17A.

Warrants and Receipts.

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

ARTICLE 18.

Process.

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

ARTICLE 19.

Pleading and Practice.

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

ARTICLE 20.

Jury Trial.

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

ARTICLE 21.

Judgment and Execution.

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

ARTICLE 22.

Appeal.

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

ARTICLE 23.

Forms.

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

SUBCHAPTER VI. RECORDERS' COURTS.

ARTICLE 24.

Municipal Recorders' Courts.

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

ARTICLE 25.

County Recorders' Courts.

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

ARTICLE 27.

Provisions Applicable to All Recorders' Courts.

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

ARTICLE 28.

Civil Jurisdiction of Recorders' Courts.

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

ARTICLE 29.

Elections to Establish Recorders' Courts.

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

ARTICLE 29A.

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

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

SUBCHAPTER VII. GENERAL COUNTY COURTS.

ARTICLE 30.

Establishment, Organization and Jurisdiction.

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

ARTICLE 31.

Practice and Procedure.

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

SUBCHAPTER IX. COUNTY CRIMINAL COURTS.

ARTICLE 36.

County Criminal Courts.

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

SUBCHAPTER X. SPECIAL COUNTY COURTS.

ARTICLE 37.

Special County Courts.

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

SUBCHAPTER XI. JUDICIAL COUNCIL.

ARTICLE 38.

Judicial Council.

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

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

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

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

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

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

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

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

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

Chapter 7A.

Judicial Department.

§ 7A-1. Short title.

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

SUBCHAPTER I. GENERAL COURT OF JUSTICE.

ARTICLE 1.

Judicial Power and Organization.

§ 7A-4. Composition and organization.

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

ARTICLE 1A.

[Reserved.]

ARTICLE 1B.

Age Limits for Service as Justice or Judge.

§ 7A-4.20. Age limit for service as justice or judge; exception. — (a) No justice or judge of the appellate division of the General Court of Justice may

continue in office beyond the last day of the month in which he attains his seventy-second birthday, and no judge of the Superior Court or District Court Divisions of the General Court of Justice may continue in office beyond the last day of the month in which he attains his seventieth birthday, except that any justice or judge in office on January 1, 1973 may continue to serve for the remainder of the term for which he was selected. Any superior court judge in office on January 1, 1973, who continues in office until the last day of the month in which he reaches age 70, and who at that time has not served as a judge a sufficient number of years to be eligible for retirement compensation under G.S. 7A-51, may, notwithstanding this subsection, serve the additional number of calendar months necessary to make him eligible for retirement compensation under G.S. 7A-51.

(b) Subsection (a) of this section is inapplicable to emergency justices or judges, who may continue to serve as provided in G.S. 7A-39.3 and G.S. 7A-52. (1971, c. 508, s. 1; c. 1194; 1973, c. 248.)

Editor's Note. — Session Laws 1971, c. 508, s. 5, provides that the act shall become effective Jan. 1, 1973, if the amendment to N.C. Const., Art. IV, § 8, proposed by Session Laws 1971, c. 451, is approved by the voters. The amendment was approved by the voters at the general election held November 7, 1972. Session Laws 1971, c. 508, s. 4, contains a severability clause.

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

The 1973 amendment deleted "who has attained the age prescribed in this section for mandatory retirement" preceding "may continue to serve" in the first sentence of subsection (a).

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

ARTICLE 2.

Appellate Division Organization.

§ 7A-5. Organization.

Stated in Fetherbay v. Sharpe Motor Lines, 8 N.C. App. 58, 173 S.E.2d 589 (1970); Adams-Millis Corp. v. Town of Kernersville, 281 N.C. 147, 187 S.E.2d 704 (1972).

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

(b) The Administrative Officer of the Courts shall contract for the printing of the reports of the Supreme Court and the Court of Appeals, and for the advance sheets of each court. He shall select a printer for the reports and prescribe such contract terms as will insure issuance of the reports as soon as practicable after a sufficient number of opinions are filed. He shall make such contract after consultation with the Department of Administration and comparison of prices for similar work in other states to such an extent as may be practicable. He shall also sell the reports and advance sheets of the appellate division, to the general public, at a price not less than cost nor more than cost plus ten percent (10%), to be fixed by him in his discretion. Proceeds of such sales shall be remitted to the State treasury.

(c) The Administrative Officer of the Courts shall furnish, without charge, one copy of the advance sheets of the Appellate Division to each justice and judge of the General Court of Justice, to each public defender, and to each superior court clerk. He shall furnish two copies to each superior court solicitor, and as many copies as may be reasonably necessary to the Supreme Court

library. (1967, c. 108, s. 1; c. 691, s. 57; 1969, c. 1190, s. 1; 1971, c. 377, s. 2; 1975, c. 879, s. 46.)

Editor's Note. —

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

The 1975 amendment, effective July 1, 1975, substituted "Department of Administration" for "Division of Purchase and Contract" in the third sentence of subsection (b).

As subsection (a) was not changed by the amendments, it is not set out.

ARTICLE 3.

The Supreme Court.

§ 7A-10.1. Authority to prescribe standards of judicial conduct. — The Supreme Court is authorized, by rule, to prescribe standards of judicial conduct for the guidance of all justices and judges of the General Court of Justice. (1973, c. 89.)

§ 7A-11. Clerk of the Supreme Court; salary; bond; fees; oath. — The clerk of the Supreme Court shall be appointed by the Supreme Court to serve at its pleasure. The annual salary of the clerk shall be fixed by the Administrative Officer of the Courts, subject to the approval of the Supreme Court. The clerk may appoint assistants in the number and at the salaries fixed by the Administrative Officer of the Courts. The clerk shall perform such duties as the Supreme Court may assign, and shall be bonded to the State, for faithful performance of duty, in the same manner as the clerk of superior court, and in such amount as the Administrative Officer of the Courts shall determine. He shall adopt a seal of office, to be approved by the Supreme Court. A fee bill for services rendered by the clerk shall be fixed by rule of the Supreme Court, and all such fees shall be remitted to the State treasury, except that charges to litigants for the reproduction of appellate records and briefs shall be fixed and administered as provided by rule of the Supreme Court. The State Auditor shall audit the financial accounts of the clerk at least once a year. Before entering upon the duties of his office, the clerk shall take the oath of office prescribed by law. (1967, c. 108, s. 1; 1969, c. 1190, s. 2; 1973, c. 750.)

Editor's Note. —

The 1973 amendment, effective Oct. 15, 1973, substituted "at its pleasure" for "for a term of eight years" at the end of the first sentence.

The salary of the clerk for the year 1973-74 is fixed by Session Laws 1973, c. 533, s. 28.

§ 7A-12. Supreme Court marshal.

Editor's Note. — The salary of the marshal for the year 1973-74 is fixed by Session Laws 1973, c. 533, s. 28.

§ 7A-13. Supreme Court library; functions; librarian; library committee; seal of office.

Editor's Note. — The salary of the librarian for the year 1973-74 is fixed by Session Laws 1973, c. 533, s. 28.

§ 7A-14. Reprints of Supreme Court Reports. — The Supreme Court is authorized to have such of the Reports of the Supreme Court of the State of North Carolina as are not on hand for sale, republished and numbered consecutively, retaining the present numbers and names of the reporters and by means of star pages in the margin retaining the original numbering of the pages. The Supreme Court is authorized to have such Reports reprinted without any alteration from the original edition thereof, except as may be directed by the Supreme Court. The contract for such reprinting and republishing shall be made by the Administrative Office of the Courts in the manner prescribed in G.S. 7A-6. Such republication shall thus continue until the State shall have for sale all of such Reports; and hereafter when the editions of any number or volume of the Supreme Court Reports shall be exhausted, it shall be the duty of the Supreme Court to have the same reprinted under the provisions of this section and G.S. 7A-6. In reprinting the Reports that have already been annotated, the annotations and the additional indexes therein shall be retained. (Code, s. 3634; 1885, c. 309; 1889, c. 473, ss. 1-4, 6; Rev., s. 5361; 1907, c. 503; 1917, cc. 201, 292; C. S., s. 7671; 1923, c. 176; 1929, c. 39, s. 2; 1975, c. 328.)

Editor's Note. — This section was formerly § 147-52. It was revised and transferred to its present position by Session Laws 1975, c. 328.

§ 7A-15: Reserved for future codification purposes.

ARTICLE 4.

Court of Appeals.

§ 7A-16. Creation and organization. — The Court of Appeals is created effective January 1, 1967. It shall consist initially of six judges, elected by the qualified voters of the State for terms of eight years. The Chief Justice of the Supreme Court shall designate one of the judges as Chief Judge, to serve in such capacity at the pleasure of the Chief Justice. Before entering upon the duties of his office, a judge of the Court of Appeals shall take the oath of office prescribed for a judge of the General Court of Justice.

The Governor on or after July 1, 1967, shall make temporary appointments to the six initial judgeships. The appointees shall serve until January 1, 1969. Their successors shall be elected at the general election for members of the General Assembly in November, 1968, and shall take office on January 1, 1969, to serve for the remainder of the unexpired term which began on January 1, 1967.

Upon the appointment of at least five judges, and the designation of a Chief Judge, the court is authorized to convene, organize, and promulgate, subject to the approval of the Supreme Court, such supplementary rules as it deems necessary and appropriate for the discharge of the judicial business lawfully assigned to it.

Effective January 1, 1969, the number of judges is increased to nine, and the Governor, on or after March 1, 1969, shall make temporary appointments to the

additional judgeships thus created. The appointees shall serve until January 1, 1971. Their successors shall be elected at the general election for members of the General Assembly in November, 1970, and shall take office on January 1, 1971, to serve for the remainder of the unexpired term which began on January 1, 1969.

The Court of Appeals shall sit in panels of three judges each. The Chief Judge insofar as practicable shall assign the members to panels in such fashion that each member sits a substantially equal number of times with each other member. He shall preside over the panel of which he is a member, and shall designate the presiding judge of the other panel or panels.

Three judges shall constitute a quorum for the transaction of the business of the court, except as may be provided in § 7A-32.

In the event the Chief Judge is unable, on account of absence or temporary incapacity, to perform the duties placed upon him as Chief Judge, the Chief Justice shall appoint an acting Chief Judge from the other judges of the Court, to temporarily discharge the duties of Chief Judge. (1967, c. 108, s. 1; 1969, c. 1190, s. 3; 1973, c. 301.)

Editor's Note. —
The 1973 amendment added the last paragraph.

Cited in Adams-Millis Corp. v. Town of Kernersville, 281 N.C. 147, 187 S.E.2d 704 (1972).

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

Editor's Note. — The salary of the clerk for the year 1973-74 is fixed by Session Laws 1973, c. 533, s. 28.

ARTICLE 5.

Jurisdiction.

§ 7A-26. Appellate jurisdiction of the Supreme Court and the Court of Appeals.

Appeals in Civil Causes Distinguished from Appeals in Criminal Causes. — The constitutional and statutory structure of the General Court of Justice provides that, generally, appeals from the district court in civil causes go to the Court of Appeals, while appeals in criminal causes must first go to the superior court. State v. Killian, 25 N.C. App. 224, 212 S.E.2d 419 (1975).

Supreme Court Has Authority to Give Relief for Error of Law. — Supreme Court has authority to review the record on appeal and to give appropriate relief for an error of law committed by the trial court. State v. Lampkins, 286 N.C. 497, 212 S.E.2d 106 (1975).

But No Authority to Grant Relief from Criminal Trial Free from Error of Law. — Supreme Court has no authority to grant relief to a defendant convicted of a criminal offense in a trial free from an error of law for the reason that it disagrees with the jury concerning the credibility of a witness for the State. State v. Lampkins, 286 N.C. 497, 212 S.E.2d 106 (1975).

The Court of Appeals has no jurisdiction to entertain a motion for summary judgment made for the first time on appeal. Britt v. Allen, 12 N.C. App. 399, 183 S.E.2d 303 (1971).

It is not the function of the Court of Appeals to make findings of fact. Horton v. Horton, 12 N.C. App. 526, 183 S.E.2d 794 (1971).

When Findings of Trial Court Conclusive on Appeal. — Where evidence properly in the record fully supports the findings of fact which the trial court made, and the record itself does not disclose that these findings were based on information obtained by the trial judge in a manner violative of plaintiff's rights, the trial court's findings are conclusive on appeal. Horton v. Horton, 12 N.C. App. 526, 183 S.E.2d 794 (1971).

Supreme Court must accept as conclusive the verdict of the jury, so far as the credibility of witnesses is concerned. State v. Lampkins, 286 N.C. 497, 212 S.E.2d 106 (1975).

§ 7A-27. Appeals of right from the courts of the trial divisions. — (a) From a judgment of a superior court which includes a sentence of death or imprisonment for life, unless the judgment was based on a plea of guilty or nolo contendere, appeal lies of right directly to the Supreme Court.

(b) From any final judgment of a superior court, other than one described in subsection (a) of this section, or one based on a plea of guilty or nolo contendere, or one entered in a post-conviction hearing under Article 22 of Chapter 15, including any final judgment entered upon review of a decision of an administrative agency, appeal lies of right to the Court of Appeals.

(e) From any other order or judgment of the superior court from which an appeal is authorized by statute, appeal lies of right directly to the Court of Appeals. (1967, c. 108, s. 1; 1971, c. 377, s. 3; 1973, c. 704.)

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

The 1973 amendment inserted "unless the judgment was based on a plea of guilty or nolo contendere" in subsection (a) and "or one based on a plea of guilty or nolo contendere" in subsection (b). The amendment also substituted "a" for "any" preceding "judgment" in subsection (a).

As subsections (c) and (d) were not changed by the amendment, they are not set out.

For all practical purposes there is an unlimited right of appeal in North Carolina to the Appellate Division of the General Court of Justice from any final judgment of the superior court or the district court in civil and criminal cases. State v. Black, 7 N.C. App. 324, 172 S.E.2d 217 (1970).

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

Rule against Allowing Appeal from Interlocutory Orders Strictly Construed. — Strict construction of the rule against allowing appeal from an interlocutory order of the trial court serves the purpose of eliminating the unnecessary delay and expense of fragmented appeals and of presenting the whole case for determination in a single appeal from a final judgment. Funderburk v. Justice, 25 N.C. App. 655, 214 S.E.2d 310 (1975).

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

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

Subsection (d) of this section makes no provision for an appeal as a matter of right from an interlocutory order in a criminal action. State v. Bryant, 12 N.C. App. 530, 183 S.E.2d 824 (1971), rev'd on other grounds, 280 N.C. 407, 185 S.E.2d 854 (1972).

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

Nor Is Order Granting Motion to Amend and Denying Motion for Judgment on the Pleadings. — An order granting a motion to amend and denying a motion for judgment on the pleadings is obviously not a final judgment but is interlocutory. Consequently, no appeal lies of right. Funderburk v. Justice, 25 N.C. App. 655, 214 S.E.2d 310 (1975).

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

Appeal from Order of Superior Court Affirming Annexation Ordinance. — By this section initial appellate jurisdiction of an appeal from an order of the superior court affirming an annexation ordinance is given to the Court of Appeals, subject, however, to the provisions of § 7A-31. Adams-Millis Corp. v. Town of Kernersville, 281 N.C. 147, 187 S.E.2d 704 (1972).

Right to Counsel. — Section 7A-450 et seq. has generally been construed to limit the right to appointed counsel in criminal cases to direct appeals taken as of right. Ross v. Moffitt, 417 U.S. 600, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974).

Applied in State v. Moore, 276 N.C. 142, 171 S.E.2d 453 (1970); State v. Tomblin, 276 N.C. 273, 171 S.E.2d 901 (1970); State v. Henderson, 276 N.C. 430, 173 S.E.2d 291 (1970); Cline v. Cline, 6 N.C. App. 523, 170 S.E.2d 645 (1969); State v. Bryant, 280 N.C. 407, 185 S.E.2d 854 (1972); State v. Miller, 281 N.C. 70, 187 S.E.2d 729 (1972); State v. Cox, 281 N.C. 275, 188 S.E.2d 356 (1972); State v. Harris, 281 N.C. 542, 189 S.E.2d 249 (1972); State v. Lee, 282 N.C. 566, 193 S.E.2d 705 (1973); State v. Edwards, 282 N.C. 578, 193 S.E.2d 736 (1973); State v. Talbert, 282 N.C. 718,

194 S.E.2d 822 (1973); State v. Watkins, 283 N.C. 17, 194 S.E.2d 800 (1973); State v. Washington, 283 N.C. 175, 195 S.E.2d 534 (1973); State v. Davis, 284 N.C. 701, 202 S.E.2d 770 (1974); Spartan Leasing, Inc. v. Brown, 285 N.C. 689, 208 S.E.2d 649 (1974); State v. Little, 286 N.C. 185, 209 S.E.2d 749 (1974); State v. Ward, 286 N.C. 304, 210 S.E.2d 407 (1974); National Home Life Assurance Co. v. Ingram, 21 N.C. App. 591, 205 S.E.2d 313 (1974); State v. Lowery, 286 N.C. 698, 213 S.E.2d 255 (1975); State v. Smathers, 287 N.C. 226, 214 S.E.2d 112 (1975); State v. Buchanan, 287 N.C. 408, 215 S.E.2d 80 (1975); State v. Brunson, 287 N.C. 436, 215 S.E.2d 94 (1975); State v. Woodson, 287 N.C. 578, 215 S.E.2d 607 (1975); State v. King, 287 N.C. 645, 215 S.E.2d 540 (1975).

Cited in State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970); State v. Hamby, 276 N.C. 674, 174 S.E.2d 385 (1970); State v. Blackwell, 276 N.C. 714, 174 S.E.2d 534 (1970); Shaw v. Stiles, 13 N.C. App. 173, 185 S.E.2d 268 (1971); Fishel v. Grifton United Methodist Church, 13 N.C. App. 238, 185 S.E.2d 322 (1971); State v. White, 286 N.C. 395, 211 S.E.2d 445 (1975); State v. McCall, 286 N.C. 472, 212 S.E.2d 132 (1975); State v. Killian, 25 N.C. App. 224, 212 S.E.2d 419 (1975).

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

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

And its decisions rendered thereon are not subject to further review in the courts of this State. Dantzic v. State, 10 N.C. App. 369, 178 S.E.2d 790 (1971).

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

§ 7A-29. Appeals of right from certain administrative agencies. — From any final order or decision of the North Carolina Utilities Commission, the North Carolina Industrial Commission, the North Carolina State Bar pursuant to G.S. 84-28 or an appeal from the Commissioner of Insurance pursuant to G.S. 58-9.4, appeal lies of right directly to the Court of Appeals. (1967, c. 108, s. 1; 1971, c. 703, s. 5; 1975, c. 582, s. 12.)

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

The 1975 amendment, effective July 1, 1975, inserted "the North Carolina State Bar pursuant to G.S. 84-28."

The 1975 amendatory act provides that it shall apply to all cases, actions and proceedings arising on and after its effective date.

Right of Appeal Expressly Granted. — The right of appeal from any final order or decision of the Utilities Commission is expressly granted by this section. Morgan v. Duke Power Co., 22 N.C. App. 497, 206 S.E.2d 507 (1974).

Applied in Morgan v. VEPCO, 22 N.C. App. 300, 206 S.E.2d 338 (1974).

Cited in State ex rel. Utilities Comm'n v. General Tel. Co., 17 N.C. App. 727, 195 S.E.2d 311 (1973).

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

Legislative Intent. — The General Assembly of North Carolina intended to insure a review by the Supreme Court of questions on which there was a division in the intermediate appellate court; no such review was intended for claims joined or consolidated in the lower appellate court and on which that court rendered unanimous decision. Hendrix v. Alsop, 278 N.C. 549, 180 S.E.2d 802 (1971); State v. Campbell, 282 N.C. 125, 191 S.E.2d 752 (1972).

In establishing the North Carolina Court of Appeals, defining its jurisdiction, and providing a system of appeals, the General Assembly followed the basic principle that there should be only one trial on the merits and one appeal on the law, as of right, in every case. Consequently, double appeals as of right — first to the Court of Appeals and then to the Supreme Court — are authorized only in the three instances specified by this section. State v. Cumber, 280 N.C. 127, 185 S.E.2d 141 (1971).

Had the General Assembly intended to limit double appeals in criminal cases to the defendant only, it would have said so. State v. Campbell, 282 N.C. 125, 191 S.E.2d 752 (1972).

Requirements of Constitutional Question. —

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

Question Should Be Raised and Passed on

in Trial Court. — Appellate courts will not ordinarily pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the trial court. State v. Mitchell, 276 N.C. 404, 172 S.E.2d 527 (1970); State v. Cumber, 280 N.C. 127, 185 S.E.2d 141 (1971).

Where there was failure to show involvement of a substantial constitutional question which was raised and passed upon in the trial court and properly brought forward for consideration by the Court of Appeals, there was no legal basis for an appeal to the Supreme Court, and the appeal was dismissed. State v. Cumber, 280 N.C. 127, 185 S.E.2d 141 (1971).

And Preserved by Appropriate Objection, etc., Assignment of Error and Argument in Brief. — The Supreme Court will not pass upon the merits of a litigant's contention that his constitutional right has been violated by a ruling or order of a lower court, unless, at the time the alleged violation of such right occurred or was threatened by a proposed procedure, ruling or offer of evidence, or at the earliest opportunity thereafter, the litigant made an appropriate objection, exception or motion and thereafter preserved the constitutional question at each level of appellate review by an appropriate assignment of error and by argument in his brief. State v. Mitchell, 276 N.C. 404, 172 S.E.2d 527 (1970).

Dissent Allows Appeal as a Matter of Right. — The aggrieved party, whether the State or the defendant, may appeal to the Supreme Court as of right from any decision of the Court of Appeals in which there is a dissent. State v. Campbell, 282 N.C. 125, 191 S.E.2d 752 (1972).

Scope of Review. —

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

Dismissal, etc. —

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

Respondent's appeal based solely on the assertion that the district court's allowance of an amendment to a juvenile petition deprived him of a constitutional right was dismissed by the Supreme Court, ex mero motu, because it does not directly involve a substantial constitutional question within the meaning of this section. In re Jones, 279 N.C. 616, 184 S.E.2d 267 (1971).

This section requires that an appellant must either allege and show the existence of a real and substantial constitutional question which has not already been the subject of conclusive judicial determination or suffer dismissal. Thompson v. Thompson, 288 N.C. 120, 215 S.E.2d 606 (1975).

Mouthing of Constitutional Phrases, etc. —

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

Right to Counsel. — Section 7A-450 et seq. has generally been construed to limit the right to appointed counsel in criminal cases to direct appeals taken as of right. Ross v. Moffitt, 417 U.S. 600, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974).

Applied in Southern Ry. v. City of Winston-Salem, 275 N.C. 465, 168 S.E.2d 396 (1969); State v. Horton, 275 N.C. 651, 170 S.E.2d 466 (1969); State v. Bumper, 275 N.C. 670, 170 S.E.2d 457 (1969); State v. Strickland, 276 N.C. 253, 173 S.E.2d 129 (1970); State v. Barrow, 276 N.C. 381, 172 S.E.2d 512 (1970); State v. McCloud, 276 N.C. 518, 173 S.E.2d 753 (1970); North Carolina State Highway Comm'n v. Asheville School, Inc., 276 N.C. 556, 173 S.E.2d 909 (1970); Atkins v. Moye, 277 N.C. 179, 176 S.E.2d 789 (1970); State v. Green, 277 N.C. 188, 176 S.E.2d 756 (1970); Goldman v. Parkland of Dallas, Inc., 277 N.C. 223, 176 S.E.2d 784 (1970); State v. Gaiten, 277 N.C. 236, 176 S.E.2d 778 (1970); State v. Lee, 277 N.C. 242, 176 S.E.2d 772 (1970); Marrone v. Long, 277 N.C. 246, 176 S.E.2d 762 (1970); State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970); State v. Jordan, 277 N.C. 341, 177 S.E.2d 289 (1970); State v. Hatcher, 277 N.C. 380, 177 S.E.2d 892 (1970); Williamson v. McNeill, 277 N.C. 447, 177 S.E.2d 859 (1970); Allred v. City of Raleigh, 277 N.C. 530, 178 S.E.2d 432 (1971); In re Johnson, 277 N.C. 688, 178 S.E.2d 470 (1971); Southern Ry. v. City of Raleigh, 277 N.C. 709, 178 S.E.2d 490 (1971); Keiger v. Winston-Salem Bd. of Adjustment, 278 N.C. 17, 178 S.E.2d 616 (1971); Blackwell v. Butts, 278 N.C. 615, 180 S.E.2d 835 (1971); State v. Lynch, 279 N.C. 1, 181 S.E.2d 561 (1971); Watkins v. Central Motor Lines, 279 N.C. 132, 181 S.E.2d 588 (1971); Nationwide Mut. Ins. Co. v. Fireman's Fund Ins. Co., 279 N.C. 240, 182 S.E.2d 571 (1971); Brewer v. Harris, 279 N.C. 288, 182 S.E.2d 345 (1971); State v. Harris, 279 N.C. 307, 182 S.E.2d 364 (1971); State v. Hunter, 279 N.C. 498, 183 S.E.2d 665 (1971); First-Citizens Bank & Trust Co. v. Carr, 279 N.C. 539, 184 S.E.2d 268 (1971); Pleasant v. Motors Ins. Co., 280 N.C. 100, 185 S.E.2d 164 (1971); State v. Jackson, 280 N.C. 122, 185 S.E.2d 202 (1971); State v. Speights, 280 N.C. 137, 185 S.E.2d 152 (1971); State v. McCluney, 280 N.C. 404, 185 S.E.2d 870 (1972); State v. Bryant, 280 N.C. 407, 185 S.E.2d 854 (1972); In re Tew, 280 N.C. 612, 187 S.E.2d 13 (1972); State v. Greenwood, 280 N.C. 651, 187 S.E.2d 8 (1972); Willis v. J.M. Davis Indus., Inc., 280 N.C. 709, 186 S.E.2d 913 (1972); State v. Harvey, 281 N.C. 1, 187 S.E.2d 706 (1972); Roberts v. William N. & Kate B. Reynolds Mem. Park, 281 N.C. 48, 187 S.E.2d 721 (1972); State v. Ford, 281 N.C. 62, 187 S.E.2d 741 (1972); State ex rel. Banking Comm'n v. Lexington State Bank, 281 N.C. 108, 187 S.E.2d 747 (1972); State v. Spencer, 281 N.C. 121, 187 S.E.2d 779 (1972); EAC Credit Corp. v. Wilson, 281 N.C. 140, 187 S.E.2d 752 (1972); Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317

(1972); Investment Properties of Asheville, Inc. v. Allen, 281 N.C. 174, 188 S.E.2d 441 (1972); Investment Properties of Asheville, Inc. v. Norburn, 281 N.C. 191, 188 S.E.2d 342 (1972); Robbins v. Nicholson, 281 N.C. 234, 188 S.E.2d 350 (1972); State v. Accor, 281 N.C. 287, 188 S.E.2d 332 (1972); Stevenson v. City of Durham, 281 N.C. 300, 188 S.E.2d 281 (1972); Calloway v. Ford Motor Co., 281 N.C. 496, 189 S.E.2d 484 (1972); Ferguson v. Morgan, 282 N.C. 83, 191 S.E.2d 817 (1972); State v. Brown, 282 N.C. 117, 191 S.E.2d 659 (1972); State v. Killian, 282 N.C. 138, 191 S.E.2d 699 (1972); State v. Summrell, 282 N.C. 157, 192 S.E.2d 569 (1972); Marks v. Thompson, 282 N.C. 174, 192 S.E.2d 311 (1972); McNair v. Boyette, 282 N.C. 230, 192 S.E.2d 457 (1972); State v. Russell, 282 N.C. 240, 192 S.E.2d 294 (1972); Variety Theatres, Inc. v. Cleveland County, 282 N.C. 272, 192 S.E.2d 290 (1972); Braswell v. Purser, 282 N.C. 388, 193 S.E.2d 90 (1972); State ex rel. Utilities Comm'n v. City of Durham, 13 N.C. App. 69, 190 S.E.2d 851 (1972); Hoots v. Calaway, 282 N.C. 477, 193 S.E.2d 709 (1973); State v. Dix, 282 N.C. 490, 193 S.E.2d 897 (1973); Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973); State ex rel. Utilities Comm'n v. J.D. McCotter, Inc., 283 N.C. 104, 194 S.E.2d 859 (1973); State v. Cameron, 283 N.C. 191, 195 S.E.2d 481 (1973); State v. Streeter, 283 N.C. 203, 195 S.E.2d 502 (1973); State v. Fredell, 283 N.C. 242, 195 S.E.2d 300 (1973); Investment Properties of Asheville, Inc. v. Allen, 283 N.C. 277, 196 S.E.2d 262 (1973); Tennessee Carolina Transp., Inc. v. Strick Corp., 283 N.C. 423, 196 S.E.2d 711 (1973); Anderson v. Butler, 284 N.C. 723, 202 S.E.2d 585 (1974); State v. Horn, 285 N.C. 82, 203 S.E.2d 37 (1974); State v. Heard, 285 N.C. 167, 203 S.E.2d 826 (1974); Sanders v. Wilkerson, 285 N.C. 215, 204 S.E.2d 17 (1974); State v. Castor, 285 N.C. 286, 204 S.E.2d 848 (1974); State v. Shore, 285 N.C. 328, 204 S.E.2d 682 (1974); State v. Austin, 285 N.C. 364, 204 S.E.2d 675 (1974); Smith v. Keator, 285 N.C. 530, 206 S.E.2d 203 (1974); Robertson v. Stanley, 285 N.C. 561, 206 S.E.2d 190 (1974); State v. Luther, 285 N.C. 570, 206 S.E.2d 238 (1974); Spartan Leasing, Inc. v. Brown, 285 N.C. 689, 208 S.E.2d 649 (1974); Estate of Loftin v. Loftin, 285 N.C. 717, 208 S.E.2d 670 (1974); Little v. Rose, 285 N.C. 724, 208 S.E.2d 666 (1974); Zimmerman v. Hogg & Allen, 286 N.C. 24, 209 S.E.2d 795 (1974); Rhodes v. Hogg & Allen, 286 N.C. 40, 209 S.E.2d 794 (1974); State v. Crews, 286 N.C. 41, 209 S.E.2d 462 (1974); Norfolk & W. Ry. v. Werner Indus., Inc., 286 N.C. 89, 209 S.E.2d 734 (1974); State v. Edwards, 286 N.C. 162, 209 S.E.2d 758 (1974); State v. Black, 286 N.C. 191, 209 S.E.2d 458 (1974); Heath v. Mosley, 286 N.C. 197, 209 S.E.2d 740 (1974); State v. Lindley, 286 N.C. 255, 210 S.E.2d 207 (1974); State ex rel. Utilities Comm'n v. VEPCO, 21 N.C. App. 45, 203 S.E.2d 418 (1974); Quick v. United Benefit Life Ins. Co., 287 N.C. 47, 213 S.E.2d 563 (1975); State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Administrative Office, 287 N.C. 192, 214 S.E.2d 98 (1975); State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975); Hinson v. Jefferson, 287 N.C. 422, 215 S.E.2d 102 (1975); State v. Jackson, 287 N.C. 470, 215 S.E.2d 123 (1975); State v. Pope, 287 N.C. 505, 215 S.E.2d 139 (1975); State v. Brown, 287 N.C. 523, 215 S.E.2d 150 (1975); Rape v. Lyerly, 287 N.C. 601, 215 S.E.2d 737 (1975); Tucker v. Tucker, 288 N.C. 81, 216 S.E.2d 1 (1975); Thompson v. Thompson, 288 N.C. 120, 215 S.E.2d 606 (1975).

Cited in Hicks v. Hicks, 275 N.C. 370, 167 S.E.2d 761 (1969); City of Raleigh v. Norfolk S. Ry., 275 N.C. 454, 168 S.E.2d 396 (1969); State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970); Surratt v. State, 276 N.C. 725, 174 S.E.2d 524 (1970); State v. Simmons, 278 N.C. 468, 180 S.E.2d 97 (1971); Dantzic v. State, 279 N.C. 212, 182 S.E.2d 563 (1971); Ross v. Perry, 281 N.C. 570, 189 S.E.2d 226 (1972); Younts v. State Farm Mut. Auto. Ins. Co., 281 N.C. 582, 189 S.E.2d 137 (1972); Branch v. Branch, 282 N.C. 133, 191 S.E.2d 671 (1972); State ex rel. Utilities Comm'n v. City of Durham, 282 N.C. 308, 193 S.E.2d 95 (1972); Bulova Watch Co. v. Brand Distribs. of N. Wilkesboro, Inc., 20 N.C. App. 648, 202 S.E.2d 350 (1974); State ex rel. Utilities Comm'n v. Beatties Ford Util., Inc., 21 N.C. App. 213, 203 S.E.2d 649 (1974); Master Hatcheries, Inc. v. Coble, 286 N.C. 518, 212 S.E.2d 150 (1975); Setzer v. Annas, 286 N.C. 534, 212 S.E.2d 154 (1975).

§ 7A-31. Discretionary review by the Supreme Court. — (a) In any cause in which appeal has been taken to the Court of Appeals, except a cause appealed from the North Carolina Utilities Commission or the North Carolina Industrial Commission, and except a cause involving review of a post-conviction proceeding under Article 22, Chapter 15, the Supreme Court may in its discretion, on motion of any party to the cause or on its own motion, certify the cause for review by the Supreme Court, either before or after it has been determined by the Court of Appeals. A cause appealed to the Court of Appeals from the Utilities Commission or the Industrial Commission may be certified in similar fashion but only after determination of the cause in the Court of Appeals. The effect of such certification is to transfer the cause from the Court of Appeals to the Supreme Court for review by the Supreme Court. If the cause is certified for transfer

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

The State may move for the certification for review of any criminal cause, but only after determination of the cause by the Court of Appeals.

(1975, c. 555.)

Editor's Note. —

The 1975 amendment deleted "or any cause involving review of a post-conviction proceeding" following "criminal cause" in the second paragraph of subsection (a).

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

This section is a sweepingly broad statute. Spartan Leasing, Inc. v. Brown, 285 N.C. 689, 208 S.E.2d 649 (1974).

Scope of Review. —

In accord with 1st paragraph in original. See Peaseley v. Virginia Iron, Coal & Coke Co., 282 N.C. 585, 194 S.E.2d 133 (1973); State v. Miller, 282 N.C. 633, 194 S.E.2d 353 (1973).

In accord with 2nd paragraph in original. See State v. Miller, 282 N.C. 633, 194 S.E.2d 353 (1973).

When the Supreme Court grants certiorari pursuant to this section, review is ordinarily restricted to the rulings of the Court of Appeals which are assigned as error in the petition for certiorari and brought forward in petitioner's brief. State v. Muse, 280 N.C. 31, 185 S.E.2d 214 (1971).

Under this section the Supreme Court is to review only those cases of substantial general or legal importance or in which review is necessary to preserve the integrity of precedent established by the Supreme Court. Peaseley v. Virginia Iron, Coal & Coke Co., 282 N.C. 585, 194 S.E.2d 133 (1973).

As a general rule the Supreme Court will consider only those aspects of a decision of the Court of Appeals which are assigned as error in the petition for certiorari and which are preserved by argument or the citation of authority with reference thereto in the brief filed by the petitioner in the Supreme Court. Peaseley v. Virginia Iron, Coal & Coke Co., 282 N.C. 585, 194 S.E.2d 133 (1973).

The Supreme Court may review the entire proceedings and consider any errors which have occurred during the course of the litigation, provided that the parties have taken the proper steps to preserve the questions for appellate review. Spartan Leasing, Inc. v. Brown, 285 N.C. 689, 208 S.E.2d 649 (1974).

Where defendant in its petition for certiorari to the Supreme Court assigned as error decisions of the trial court and of the Court of Appeals throughout the course of the litigation and preserved these assignments by arguments or citation of authorities in its brief filed in the Supreme Court, the previous denials of certiorari in prior appeals to the Supreme Court in this case did not constitute approval of either the reasoning or the merits of the prior decisions of the Court of Appeals. Peaseley v. Virginia Iron, Coal & Coke Co., 282 N.C. 585, 194 S.E.2d 133 (1973).

In a criminal case in which the State petitioned for certiorari and the Court of Appeals ruled on only one of defendant's assignments of error in granting a new trial, the Supreme Court elected to depart from the general rule (that review under this section is ordinarily restricted to the rulings of the Court of Appeals which are assigned as error) and to consider the remaining assignments of error not considered by the Court of Appeals. State v. Muse, 280 N.C. 31, 185 S.E.2d 214 (1971).

The failure of plaintiff to petition for a writ of certiorari to review the interlocutory decree of the Court of Appeals does not preclude the Supreme Court from granting certiorari after final judgment and thereupon considering and rectifying any errors which occurred at any stage of the proceedings. Spartan Leasing, Inc. v. Brown, 285 N.C. 689, 208 S.E.2d 649 (1974).

The denial of a writ of certiorari imports no expression of opinion upon the merits of the case. Peaseley v. Virginia Iron, Coal & Coke Co., 282 N.C. 585, 194 S.E.2d 133 (1973).

Denial of certiorari does not mean that the Supreme Court has determined that the decision of the Court of Appeals is correct. Denial may simply mean that in the opinion of the Supreme Court the case does not require further review under the provisions of this section. Peaseley v. Virginia Iron, Coal & Coke Co., 282 N.C. 585, 194 S.E.2d 133 (1973).

Section 7A-451 Does Not Give Indigent Right to Counsel. — An indigent is entitled to have a lawyer at his trial, and for direct review of that trial, but § 7A-451 is not intended to cover the discretionary power of the North Carolina Supreme Court to grant a writ of certiorari under this section. Moffitt v. Blackledge, 341 F. Supp. 853 (W.D.N.C. 1972).

Section 7A-450 et seq. has generally been construed to limit the right to appointed counsel in criminal cases to direct appeals taken as of

right. Ross v. Moffitt, 417 U.S. 600, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974).

And Equal Protection Clause Does Not Require Free Counsel for Discretionary Appeals. — The equal protection clause does not require North Carolina to provide free counsel for indigent defendants seeking to take discretionary appeals to the North Carolina Supreme Court, or to file petitions for certiorari to the Supreme Court. Ross v. Moffitt, 417 U.S. 600, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974).

The duty of the State is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process. Ross v. Moffitt, 417 U.S. 600, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974).

A defendant is not denied meaningful access to the North Carolina Supreme Court simply because the State does not appoint counsel to aid him in seeking discretionary review in that court. At that stage he will have a transcript or other record of trial proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and often an opinion by the Court of Appeals disposing of his case. These materials, supplemented by whatever submission respondent may make pro se, would appear to provide the Supreme Court of North Carolina with an adequate basis on which to base its decision to grant or deny review. Ross v. Moffitt, 417 U.S. 600, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974).

Once a defendant's claims of error are organized and presented in a lawyer-like fashion to the Court of Appeals, the justices of the Supreme Court of North Carolina who make the decision to grant or deny discretionary review should be able to ascertain whether his case satisfies the standards established by the legislature for such review. Ross v. Moffitt, 417 U.S. 600, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974).

Applied in State v. Horton, 275 N.C. 651, 170 S.E.2d 466 (1969); State v. McBane, 276 N.C. 60, 170 S.E.2d 913 (1969); State v. Jennings, 276 N.C. 157, 171 S.E.2d 447 (1970); Whitley v. Redden, 276 N.C. 263, 171 S.E.2d 894 (1970); Hoyle v. City of Charlotte, 276 N.C. 292, 172 S.E.2d 1 (1970); King v. Baldwin, 276 N.C. 316, 172 S.E.2d 12 (1970); Smith v. Mercer, 276 N.C. 329, 172 S.E.2d 489 (1970); State v. Riera, 276 N.C. 361, 172 S.E.2d 535 (1970); Morse v. Curtis, 276 N.C. 371, 172 S.E.2d 495 (1970); State Educ. Assistance Authority v. Bank of Statesville, 276 N.C. 576, 174 S.E.2d 551 (1970); Martin v. North Carolina Housing Corp., 277 N.C. 29, 175 S.E.2d 665 (1970); Home Sec. Life Ins. Co. v. McDonald, 277 N.C. 275, 177 S.E.2d 291 (1970); Whitney Stores, Inc. v. Clark, 277 N.C. 322, 177 S.E.2d 418 (1970); Mansour v. Rabil, 277 N.C. 364, 177 S.E.2d 849 (1970); State v. McVay, 277 N.C. 410, 177 S.E.2d 874 (1970); In re Ellis, 277 N.C. 419, 178 S.E.2d 77 (1970); State v. Harris, 277 N.C. 435, 177 S.E.2d 865 (1970); State Keg, Inc. v. State Bd. of Alcoholic Control, 277 N.C. 450, 177 S.E.2d 861 (1970); Styers v. Phillips, 277 N.C. 460, 178 S.E.2d 583 (1971); State v. Crump, 277 N.C. 573, 178 S.E.2d 366 (1971); Stegall v. Housing Authority, 278 N.C. 95, 178 S.E.2d 824 (1971); State v. Brooks, 279 N.C. 45, 181 S.E.2d 553 (1971); Strickland v. Powell, 279 N.C. 183, 181 S.E.2d 464 (1971); Joyner v. Garrett, 279 N.C. 226, 182 S.E.2d 553 (1971); Wachovia Bank & Trust Co. v. Morgan, 279 N.C. 265, 182 S.E.2d 356 (1971); Mutual Sav. & Loan Ass'n v. Lanier, 279 N.C. 299, 182 S.E.2d 368 (1971); Cogdill v. North Carolina State Highway Comm'n, 279 N.C. 313, 182 S.E.2d 373 (1971); Dr. T.C. Smith Co. v. North Carolina State Highway Comm'n, 279 N.C. 328, 182 S.E.2d 383 (1971); State v. Allred, 279 N.C. 398, 183 S.E.2d 553 (1971); State v. Moore, 279 N.C. 455, 183 S.E.2d 456 (1971); State v. Fields, 279 N.C. 460, 183 S.E.2d 666 (1971); State v. Battle, 279 N.C. 484, 183 S.E.2d 641 (1971); State v. Allen, 279 N.C. 492, 183 S.E.2d 659 (1971); State v. Roberts, 279 N.C. 500, 183 S.E.2d 647 (1971); State v. Smith, 279 N.C. 505, 183 S.E.2d 649 (1971); State v. Collins, 279 N.C. 508, 183 S.E.2d 549 (1971); State v. Carnes, 279 N.C. 549, 184 S.E.2d 235 (1971); State v. Gladden, 279 N.C. 566, 184 S.E.2d 249 (1971); Steelman v. City of New Bern, 279 N.C. 589, 184 S.E.2d 239 (1971); State v. Richardson, 279 N.C. 621, 185 S.E.2d 102 (1971); State v. Williams, 279 N.C. 663, 185 S.E.2d 174 (1971); State v. Stimpson, 279 N.C. 716, 185 S.E.2d 168 (1971); State v. Rummage, 280 N.C. 51, 185 S.E.2d 221 (1971); State v. Jones, 280 N.C. 60, 184 S.E.2d 862 (1971); State v. Hudson, 280 N.C. 74, 185 S.E.2d 189 (1971); Sutton v. Figgatt, 280 N.C. 89, 185 S.E.2d 97 (1971); Wiggins v. Bunch, 280 N.C. 106, 184 S.E.2d 879 (1971); State v. Burleson, 280 N.C. 112, 184 S.E.2d 869 (1971); Forrester v. Garrett, 280 N.C. 117, 184 S.E.2d 858 (1971); State v. Williams, 280 N.C. 132, 184 S.E.2d 875 (1971); State v. Tart, 280 N.C. 172, 184 S.E.2d 842 (1971); State v. Allison, 280 N.C. 175, 184 S.E.2d 857 (1971); State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972); State v. Jones, 280 N.C. 322, 185 S.E.2d 858 (1972); State v. Gainey, 280 N.C. 366, 185 S.E.2d 874 (1972); State v. Holden, 280 N.C. 426, 185 S.E.2d 889 (1972); State v. Ballard, 280 N.C. 479, 186 S.E.2d 372 (1972); Smith v. County of Mecklenburg, 280 N.C. 497, 187 S.E.2d 67 (1972); State v. Jackson, 280 N.C. 563, 187 S.E.2d 27 (1972); Hall v. Wake County Bd. of Elections, 280 N.C. 600, 187 S.E.2d 52 (1972); Adams-Millis Corp. v. Town of Kernersville, 281 N.C. 147, 187 S.E.2d 704 (1972); City of Kings Mountain v. Cline, 281 N.C. 269, 188 S.E.2d 284 (1972); In re Strong Tire Serv., Inc., 281 N.C. 293, 188 S.E.2d 306 (1972); State v. McIntyre, 281 N.C. 304, 188 S.E.2d 304 (1972); Allgood v. Town of Tarboro, 281 N.C. 430, 189 S.E.2d 255 (1972);

North Carolina State Highway Comm'n v. Farm Equip. Co., 281 N.C. 459, 189 S.E.2d 272 (1972); State v. Johnson, 282 N.C. 1, 191 S.E.2d 641 (1972); Lutz v. Board of Educ., 282 N.C. 208, 192 S.E.2d 463 (1972); Albemarle Elec. Membership Corp. v. Alexander, 282 N.C. 402, 192 S.E.2d 811 (1972); State v. Lee, 282 N.C. 566, 193 S.E.2d 705 (1973); State v. Underwood, 283 N.C. 154, 195 S.E.2d 489 (1973); State v. Beach, 283 N.C. 261, 196 S.E.2d 214 (1973); State v. Sawyer, 283 N.C. 289, 196 S.E.2d 250 (1973); City of Kings Mountain v. Goforth, 283 N.C. 316, 196 S.E.2d 231 (1973); Baxter v. Jones, 283 N.C. 327, 196 S.E.2d 193 (1973); State v. Braswell, 283 N.C. 332, 196 S.E.2d 185 (1973); State v. Black, 283 N.C. 344, 196 S.E.2d 225 (1973); State v. Allen, 283 N.C. 354, 196 S.E.2d 256 (1973); Rayfield v. Clark, 283 N.C. 362, 196 S.E.2d 197 (1973); Smoky Mountain Enterprises, Inc. v. Rose, 283 N.C. 373, 196 S.E.2d 189 (1973); State v. Glover, 283 N.C. 379, 196 S.E.2d 207 (1973); State v. Bumgarner, 283 N.C. 388, 196 S.E.2d 210 (1973); State v. Moses, 283 N.C. 390, 196 S.E.2d 211 (1973); State v. Mitchell, 283 N.C. 462, 196 S.E.2d 736 (1973); State v. Williams, 283 N.C. 550, 196 S.E.2d 756 (1973); State v. Eubanks, 283 N.C. 556, 196 S.E.2d 706 (1973); In re Appeal of Hanes Dye & Finishing Co., 285 N.C. 598, 207 S.E.2d 729 (1974); Greene v. City of Winston-Salem, 287 N.C. 66, 213 S.E.2d 231 (1975); United Tel. Co. v. Universal Plastics, Inc., 287 N.C. 232, 214 S.E.2d 49 (1975); State v. Hunt, 287 N.C. 360, 215 S.E.2d 40 (1975); Dean v. Carolina Coach Co., 287 N.C. 515, 215 S.E.2d 89 (1975); State v. Wortham, 287 N.C. 541, 215 S.E.2d 131 (1975); State v. Woodson, 287 N.C. 578, 215 S.E.2d 607 (1975).

Cited in Nationwide Mut. Ins. Co. v. Hayes, 276 N.C. 620, 174 S.E.2d 511 (1970); Kale v. Forrest, 278 N.C. 1, 178 S.E.2d 622 (1971); State v. Winford, 278 N.C. 67, 178 S.E.2d 777 (1971); Kelly v. International Harvester Co., 278 N.C. 153, 179 S.E.2d 396 (1971); State v. Woods, 278 N.C. 210, 179 S.E.2d 358 (1971); Ervin v. Clayton, 278 N.C. 219, 179 S.E.2d 353 (1971); In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971); City of Statesville v. Bowles, 278 N.C. 497, 180 S.E.2d 111 (1971); Hendrix v. Alsop, 278 N.C. 549, 180 S.E.2d 802 (1971); In re Annexation Ordinance, 278 N.C. 641, 180 S.E.2d 851 (1971); State v. Parker, 279 N.C. 168, 181 S.E.2d 432 (1971); Glusman v. Trustees of Univ. of N.C., 281 N.C. 629, 190 S.E.2d 213 (1972); City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972); Keiger v. Winston-Salem Bd. of Adjustment, 281 N.C. 715, 190 S.E.2d 175 (1972); Plemmer v. Matthewson, 281 N.C. 722, 190 S.E.2d 204 (1972); State v. Joyner, 286 N.C. 366, 211 S.E.2d 320 (1975).

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

Appeal by Trustees of Charitable Trust. — Although an appeal by the trustees of a charitable trust was subject to dismissal on the ground that there were no parties aggrieved by the order of the superior court modifying the trust, the Court of Appeals nonetheless can consider the appeal, in the exercise of its supervisory power, where the order will affect the interests of a substantial number of public and private hospitals in the State, as well as thousands of persons who will be hospitalized as charity patients. Wachovia Bank & Trust Co. v. Morgan, 9 N.C. App. 460, 176 S.E.2d 860 (1970).

Applied in City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972); Stanback v. Stanback, 287 N.C. 448, 215 S.E.2d 30 (1975).

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

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

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

Applied in Hamm v. Texaco, Inc., 17 N.C. App. 451, 194 S.E.2d 560 (1973).

Cited in Lee v. Rowland, 11 N.C. App. 27, 180 S.E.2d 445 (1971); Terrell v. H. & N. Chevrolet Co., 11 N.C. App. 310, 181 S.E.2d 124 (1971); Duke v. Meisky, 12 N.C. App. 329, 183 S.E.2d 292 (1971); State v. Andrews, 12 N.C. App. 421, 184 S.E.2d 69 (1971); Lattimore v. Powell, 15 N.C. App. 522, 190 S.E.2d 288 (1972); Finley v. Finley, 15 N.C. App. 681, 190 S.E.2d 660 (1972); Neff v. Queen City Coach Co., 16 N.C. App. 466, 192 S.E.2d 587 (1972); Williams v. Hartis, 18 N.C. App. 89, 195 S.E.2d 806 (1973).

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

ARTICLE 6.

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

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

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

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

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

Session Laws 1971, c. 508, s. 5, provides that the act shall become effective Jan. 1, 1973, if the amendment to N.C. Const., Art. IV, § 8, proposed by Session Laws 1971, c. 451, is approved by the voters. The amendment was approved by the voters at the general election held November 7, 1972. Session Laws 1971, c. 508, s. 4, contains a severability clause.

§ 7A-39.3. Retired justices and judges constituted emergency justices and judges subject to recall to active service; compensation. — (a) The justices of the Supreme Court and judges of the Court of Appeals who retire under the provisions of G.S. 7A-39.2 or the Uniform Judicial Retirement Act are hereby constituted emergency justices of the Supreme Court and emergency judges of the Court of Appeals, respectively, for life, and shall be subject to temporary recall to active service in the place of any justice of the Supreme Court or judge of the Court of Appeals, respectively, who is temporarily incapacitated to the extent that he cannot perform efficiently and promptly all the duties of his office.

(b) In addition to the compensation provided in G.S. 7A-39.2, each emergency justice or emergency judge recalled for temporary active service shall be paid by the State his actual expenses, plus one hundred dollars ($100.00) for each week of active service rendered under recall. (1967, c. 108, s. 1; 1973, c. 640, s. 3.)

Cross Reference. — For the Uniform Judicial Retirement Act, see §§ 135-50 to 135-71.

Editor's Note. — The 1973 amendment, effective Jan. 1, 1974, inserted "or the Uniform Judicial Retirement Act" in subsection (a).

§ 7A-39.12. Applicability of §§ 7A-39.2 and 7A-39.11. — The provisions of G.S. 7A-39.2 and G.S. 7A-39.11 shall apply only to justices and judges who entered into office prior to January 1, 1974. The extent of such application is specified in Chapter 135, Article 4 (Uniform Judicial Retirement Act). (1973, c. 640, s. 5.)

Editor's Note. — Session Laws 1973, c. 640, s. 7, makes the act effective Jan. 1, 1974.

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

ARTICLE 7.

Organization.

§ 7A-40. Composition; judicial powers of clerk. — The Superior Court Division of the General Court of Justice consists of the several superior courts of the State. The clerk of superior court in the exercise of the judicial power conferred upon him as ex officio judge of probate, and in the exercise of other judicial powers conferred upon him by law in respect of special proceedings and the administration of guardianships and trusts, is a judicial officer of the Superior Court Division, and not a separate court. (1965, c. 310, s. 1; 1967, c. 691, s. 1; 1969, c. 1190, s. 4; 1971, c. 377, s. 4.)

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

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

Judicial Division	Judicial District	Counties	No. of Resident Judges	No. of Full-Time Asst. District Attorneys
First	1	Camden, Chowan, Currituck, Dare, Gates, Pasquotank, Perquimans	1	3
	2	Beaufort, Hyde, Martin, Tyrrell, Washington	1	3
	3	Carteret, Craven, Pamlico, Pitt	1	5
	4	Duplin, Jones, Onslow, Sampson	1	4

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

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

Senior regular resident judges and regular resident judges possess equal judicial jurisdiction, power, authority and status, but all duties placed by the Constitution or statutes on the resident judge of a judicial district, including the appointment to and removal from office, which are not related to a case,

controversy, or judicial proceeding and which do not involve the exercise of judicial power, shall be discharged by the senior regular resident judge. A senior regular resident superior court judge in a multi-judge district, by notice in writing to the Administrative Officer of the Courts, may decline to exercise the authority vested in him by this section, in which event such authority shall be exercised by the regular resident judge next senior in point of service or age, respectively.

In the event the senior regular resident judge of a multi-judge district is unable, due to mental or physical incapacity, to exercise the authority vested in him by the statute, and the Chief Justice, in his discretion, has determined that such incapacity exists, the Chief Justice shall appoint an acting senior regular resident judge from the other regular resident judges of the district, to exercise, temporarily, the authority of the senior regular resident judge. Such appointee shall serve at the pleasure of the Chief Justice and until his temporary appointment is vacated by appropriate order. (1969, c. 1190, s. 4; 1971, c. 377, s. 5; c. 997; 1973, c. 47, s. 2; c. 646; c. 855, s. 1; 1975, c. 529; c. 956, ss. 1, 2.)

Editor's Note. —

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

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

The first 1973 amendment substituted "district attorneys" for "solicitors" throughout the section.

The second 1973 amendment, effective July 1, 1973, increased the number of full-time assistant district attorneys in the third, fourth, fifth, tenth, twelfth, thirteenth, sixteenth, eighteenth, twentieth, twenty-first, twenty-second, and twenty-sixth judicial districts.

The third 1973 amendment, effective Jan. 1, 1975, amended the table so as to provide for an additional resident judge in the seventh, tenth, fourteenth, twenty-fifth, twenty-sixth, and twenty-seventh districts. Session Laws 1973, c. 855, s. 2, provides that candidates for the additional judgeships shall run in the primary and general election of 1974.

The first 1975 amendment added the last paragraph.

The second 1975 amendment, effective July 1, 1975, increased the number of full-time assistant district attorneys in all the judicial districts except 4, 9, 13, 16, 22, 23 and 24 and added the information relating to prosecutorial districts 27-A and 27-B in judicial district 27.

Stated in Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971); Holshouser v. Scott, 335 F. Supp. 928 (M.D.N.C. 1971).

Cited in Kelly v. Davenport, 7 N.C. App. 670, 173 S.E.2d 600 (1970); State v. Braswell, 283 N.C. 332, 196 S.E.2d 185 (1973).

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

§ 7A-44. Salary and expenses of superior court judge. — A judge of the superior court, regular or special, shall receive the annual salary set forth in the Budget Appropriations Act, and in addition shall be allowed [five thousand five hundred dollars ($5,500)] per year, payable monthly, in lieu of necessary travel and subsistence expenses while attending court or transacting official business at a place other than in the county of his residence and in lieu of other professional expenses incurred in the discharge of his official duties. The Administrative Officer of the Courts may also reimburse superior court judges, in addition to the above funds for travel and subsistence, for travel and subsistence expenses incurred for professional education. (Code, ss. 918, 3734; 1891, c. 193; 1901, c. 167; 1905, c. 208; Rev., s. 2765; 1907, c. 988; 1909, c. 85; 1911, c. 82; 1919, c. 51; C. S., s. 3884; 1921, c. 25, s. 3; 1925, c. 227; 1927, c. 69, s. 2; 1949, c. 157, s. 1; 1953, c. 1080, s. 1; 1957, c. 1416; 1961, c. 957, s. 2; 1963, c. 839, s. 2; 1965, c. 921, s. 2; 1967, c. 691, s. 40; 1969, c. 1190, s. 36; 1973, c. 1474.)

Editor's Note. —
The 1973 amendment effective July 1, 1974, increased the travel and subsistence allowance in the first sentence from $5,000 to $5,500 a year and deleted "outside of the State" following "incurred" near the end of the second sentence. The amendment to the first sentence of this section referred to lines 2 and 3 of the section, whereas the words to be changed in fact appeared in lines 3 and 4, and the editors have therefore substituted "five thousand five hundred dollars ($5,500)" in brackets for "five thousand dollars ($5,000.00)" in the section as set out above.

§ 7A-44.1. Secretarial and clerical help. — The senior regular superior court judge of each judicial district is authorized to appoint a judicial secretary to serve the secretarial and clerical needs of the superior court judges of the district under the direction of the senior regular resident superior court judge. The appointment may be full- or part-time and the compensation and allowances of such secretary shall be fixed by the senior regular resident superior court judge, within limits determined by the Administrative Office of the Courts, and paid by the State. (1975, c. 956, s. 3.)

Editor's Note. — Session Laws 1975, c. 956, s. 20, makes the act effective July 1, 1975.

§ 7A-45. Special judges; appointment; removal; vacancies; authority. — (a) The Governor may appoint eight special superior court judges. A special judge takes the same oath of office and is subject to the same requirements and disabilities as is or may be prescribed by law for regular judges of the superior court, save the requirement of residence in a particular district. Initial appointments made under this section shall be to terms of office beginning July 1, 1967, and expiring June 30, 1971. As the terms expire, the Governor may appoint successors for terms of four years each. All incumbents shall continue in office until their successors are appointed and qualified.
(1973, c. 82.)

Editor's Note. —
The 1973 amendment added the last sentence of subsection (a).

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

§ 7A-49.2. Civil business at criminal sessions; criminal business at civil sessions. — (a) At criminal sessions of court, motions in civil actions may be heard upon due notice, and trials in civil actions may be heard by consent of parties. Motions for confirmation or rejection of referees' reports may also be heard upon 10 days' notice and judgment may be entered on such reports. The court may also enter consent orders and consent judgments, and try uncontested civil actions.
(1973, c. 503, s. 1.)

Editor's Note. —
The 1973 amendment, effective Oct. 1, 1973, deleted "and uncontested divorce cases" at the end of subsection (a).

As subsection (b) was not changed by the amendment, it is not set out.

Failure to Give Notice. —
Under § 1A-1, Rule 7, plaintiff's application for default judgment is considered a motion in a civil action; therefore, where subsection (a) of this section requires notice to be given before motions in civil actions may be heard at criminal sessions of court and no notice was given defendant, default judgment granted plaintiff must be vacated. Miller v. Belk, 18 N.C. App. 70, 196 S.E.2d 44 (1973).

Divorce Action at Civil Session Held Nullity. — The purported trial of a contested divorce action conducted over defendant's protest and in disregard of his motion for continuance for trial at a civil session was a nullity. Branch v. Branch, 282 N.C. 133, 191 S.E.2d 671 (1972).

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

Solicitor's Responsibility for Calendaring Criminal Cases. — See opinion of Attorney General to Mr. Archie Taylor, Solicitor, Fourth Solicitorial District, 41 N.C.A.G. 37 (1970).

ARTICLE 8.

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

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

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

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

Session Laws 1971, c. 508, s. 5, provides that the act shall become effective Jan. 1, 1973, if the amendment to N.C. Const., Art. IV, § 8, proposed by Session Laws 1971, c. 451, is approved by the voters. The amendment was approved by the voters at the general election held November 7, 1972. Session Laws 1971, c. 508, s. 4, contains a severability clause.

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

§ 7A-52. Retired judges constituted emergency judges subject to recall to active service; compensation for emergency judges on recall. — (a) Judges of the superior court who retire under the provisions of G.S. 7A-51 or the Uniform Judicial Retirement Act are hereby constituted emergency judges of the superior court for life. The Chief Justice of the Supreme Court may order any emergency judge who, in his opinion, is competent to perform the duties of a superior court judge, to hold regular or special sessions of superior court, as needed. Orders of assignment shall be in writing and entered upon the minutes of the superior court.

(b) In addition to the compensation provided in G.S. 7A-51, each emergency judge assigned to temporary active service shall be paid by the State his actual expenses, plus one hundred dollars ($100.00), for each week of the active service rendered under recall. (1967, c. 108, s. 2; 1973, c. 640, s. 4.)

Cross Reference. — For the Uniform Judicial Retirement Act, see §§ 135-50 through 135-71.

Editor's Note. — The 1973 amendment, effective Jan. 1, 1974, inserted "or the Uniform Judicial Retirement Act" in the first sentence of subsection (a).

§ 7A-56. Applicability of §§ 7A-51 and 7A-55. — The provisions of G.S. 7A-51 and G.S. 7A-55 shall apply only to judges (and any Administrative Officer of the Courts) who entered office prior to January 1, 1974. The extent of such application is specified in Chapter 135, Article 4 (Uniform Judicial Retirement Act). (1973, c. 640, s. 6; 1975, c. 19, s. 2.)

Editor's Note. — Session Laws 1973, c. 640, s. 7, makes the act effective Jan. 1, 1974.

The 1975 amendment corrected an error in the 1973 act by inserting "such" preceding "application" in the second sentence.

§§ 7A-57 to 7A-59: Reserved for future codification purposes.

ARTICLE 9.

District Attorneys and Judicial Districts.

§ 7A-60. District attorneys and prosecutorial districts. — (a) Except as provided in subsection (b), effective January 1, 1971, the State shall be divided into prosecutorial districts, the numbers and boundaries of which shall be identical with those of the superior and district court judicial districts. In the general election of November, 1970, a district attorney shall be elected for a four-year term for each prosecutorial district. The district attorney shall be a resident of the district for which elected, and shall take office on January 1 following the election. A vacancy in the office of district attorney shall be filled as provided in Article IV, Sec. 19 of the Constitution.

(b) Effective July 1, 1975, the twenty-seventh prosecutorial district is divided into two prosecutorial districts, to be known as Prosecutorial Districts 27-A and 27-B. District 27-A shall consist of Gaston County, and District 27-B shall consist of Cleveland and Lincoln Counties. The current district attorney of the twenty-seventh prosecutorial district shall become the district attorney of Prosecutorial District 27-B, and the senior regular resident superior court judge shall appoint a district attorney for Prosecutorial District 27-A. The appointee shall serve until January 1, 1977, and his successor shall be chosen in the general election of November, 1976. The successor shall serve for the remainder of the term expiring December 31, 1978. (1967, c. 1049, s. 1; 1975, c. 956, s. 4.)

Editor's Note. — The 1975 amendment, effective July 1, 1975, rewrote this section.

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

Editor's Note. —

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

As to interchangeability of terms "solicitor" and "district attorney," see Session Laws 1973, c. 47, s. 2.

The proper role of the solicitor or privately employed counsel in the prosecution of one charged with a criminal offense is the conviction of the guilty, the acquittal of the innocent and punishment of the guilty, appropriate to the circumstances, in the interest of the future protection of society. In the discharge of his duties the prosecuting attorney is not required to be, and should not be, neutral. He is not the judge, but the advocate of the State's interest in the matter at hand. State v. Best, 280 N.C. 413, 186 S.E.2d 1 (1972).

This section makes the office of solicitor a full-time job. State v. Best, 280 N.C. 413, 186 S.E.2d 1 (1972).

But this Article did not change the role of the solicitor in a criminal case to that of an impartial officer of the court. State v. Best, 280 N.C. 413, 186 S.E.2d 1 (1972).

And It Does Not Prohibit Practice of Employing Private Counsel to Assist Solicitor. — This Article does not prohibit the practice of employing private counsel to assist the solicitor in a criminal case. State v. Best, 280 N.C. 413, 186 S.E.2d 1 (1972).

The Supreme Court reaffirmed its recognition of the practice of employing private counsel to assist in prosecuting criminal cases. State v. Best, 280 N.C. 413, 186 S.E.2d 1 (1972).

Allowing Special Counsel Is within Discretion of Trial Court. — It is within the discretion of the trial court to allow special counsel to aid the prosecuting attorney in the prosecution of a case. State v. Best, 280 N.C. 413, 186 S.E.2d 1 (1972).

The discretion vested in the trial judge to permit private counsel to appear with the solicitor has existed in our courts from their incipiency. State v. Page, 22 N.C. App. 435, 206 S.E.2d 771 (1974).

However, the solicitor should not relinquish the duties of his office to privately employed counsel. State v. Page, 22 N.C. App. 435, 206 S.E.2d 771 (1974).

But Should Remain in Charge of and Responsible for Action. — The solicitor should remain in charge of and responsible for the prosecution of criminal actions. State v. Page, 22 N.C. App. 435, 206 S.E.2d 771 (1974).

Except for the most compelling reasons, the trial judge should not permit the solicitor to abdicate his duties and responsibilities in a criminal action and permit privately employed counsel to assume responsibility for the prosecution. State v. Page, 22 N.C. App. 435, 206 S.E.2d 771 (1974).

Holding Delinquency Hearing in Absence of Solicitor. — A contention by a juvenile who was represented by counsel that the trial court erred in proceeding with a delinquency hearing in the absence of the solicitor in that the court was cast in the role of a prosecutor was held without merit where the record showed that someone other than the judge examined witnesses of both the petitioner and the juvenile, and that the questions asked by the court were fair and demonstrated no bias. In re Potts, 14 N.C. App. 387, 188 S.E.2d 643 (1972).

Cited in State v. Rimmer, 25 N.C. App. 637, 214 S.E.2d 225 (1975).

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

Editor's Note. —

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

Duties of Assistant District Attorneys. — The legislative intent and the statutory provisions contemplate that an assistant district attorney is fully authorized to carry out such duties of the district attorney as the district attorney may assign to him. State v. Rimmer, 25 N.C. App. 637, 214 S.E.2d 225 (1975).

Stated in State v. Best, 280 N.C. 413, 186 S.E.2d 1 (1972).

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

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

Stated in State v. Best, 280 N.C. 413, 186 S.E.2d 1 (1972).

§ 7A-66. Removal of district attorneys. — The following are grounds for suspension of a district attorney or for his removal from office:

(1) Mental or physical incapacity interfering with the performance of his duties which is, or is likely to become, permanent;
(2) Willful misconduct in office;
(3) Willful and persistent failure to perform his duties;
(4) Habitual intemperance;
(5) Conviction of a crime involving moral turpitude;

(6) Conduct prejudicial to the administration of justice which brings the office into disrepute; or

(7) Knowingly authorizing or permitting an assistant district attorney to commit any act constituting grounds for removal, as defined in subdivisions (1) through (6) hereof.

A proceeding to suspend or remove a district attorney is commenced by filing with the clerk of superior court of the county where the solicitor resides a sworn affidavit charging the district attorney with one or more grounds for removal. The clerk shall immediately bring the matter to the attention of the senior regular resident superior court judge for the district, who shall within 15 days either review and act on the charges or refer them for review and action within 15 days to another superior court judge residing in or regularly holding the courts of the district. If the superior court judge upon review finds that the charges if true constitute grounds for suspension, and finds probable cause for believing that the charges are true, he may enter an order suspending the district attorney from performing the duties of his office until a final determination of the charges on the merits. During the suspension the salary of the district attorney continues.

If a hearing, with or without suspension, is ordered, the district attorney should receive immediate written notice of the proceedings and a true copy of the charges, and the matter shall be set for hearing not less than 10 days nor more than 30 days thereafter. The matter shall be set for hearing before the judge who originally examined the charges or before another regular superior court judge resident in or regularly holding the courts of the district. The hearing shall be open to the public. All testimony shall be recorded. At the hearing the superior court judge shall hear evidence and make findings of fact and conclusions of law and if he finds that grounds for removal exist, he shall enter an order permanently removing the district attorney from office, and terminating his salary. If he finds that no grounds exist, he shall terminate the suspension, if any.

The district attorney may appeal from an order of removal to the Court of Appeals on the basis of error of law by the superior court judge. Pending decision of the case on appeal, the district attorney shall not perform any of the duties of his office. If, upon final determination, he is ordered reinstated either by the appellate division or by the superior court upon remand his salary shall be restored from the date of the original order of removal. (1967, c. 1049, s. 1; 1973, c. 148, s. 1.)

Editor's Note. — The 1973 amendment rewrote this section.

§ 7A-66.1. Office of solicitor may be denominated as office of district attorney; "solicitor" and "district attorney" made interchangeable; interchangeable use authorized in proceedings, documents, and quotations. — (a) The constitutional office of solicitor may be denominated as the office of "district attorney" for all purposes, and the terms "solicitor" and "district attorney" shall be identical in meaning and interchangeable in use. All terms derived from or related to the term "solicitor" may embody this denomination.

(b) Repealed by Session Laws 1975, c. 956, s. 5, effective July 1, 1975.

(c) The interchangeable use authorized in this section includes use in all forms of oral, written, visual, and other communication including:

(1) Oaths of office;

(2) Other oaths or orations required or permitted in court or official proceedings;

(3) Ballots;

(4) Statutes;
(5) Regulations;
(6) Ordinances;
(7) Judgments and other court orders and records;
(8) Opinions in cases;
(9) Contracts;
(10) Bylaws;
(11) Charters;
(12) Official commissions, orders of appointment, proclamations, executive orders, and other official papers or pronouncements of the Governor or any executive, legislative, or judicial official of the State or any of its subdivisions;
(13) Official and unofficial letterheads;
(14) Campaign advertisements;
(15) Official and unofficial public notices; and
(16) In all other contexts not enumerated.

The interchangeability authorized in this section extends to the privilege of substituting terminology in matter quoted in oral, written, and other modes of communication without making indication of such change, except where such change may result in a substantive misunderstanding. Reprints or certifications of the text of the Constitution of North Carolina made by the Secretary of State, however, must retain the original terminology and indicate in brackets beside the original terminology the appropriate alternative words. (1973, c. 47, s. 1; 1975, c. 956, s. 5.)

Editor's Note. — The 1975 amendment, effective July 1, 1975, repealed subsection (b), which provided that the terms "solicitorial district" and "judicial district" be identical in meaning.

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

§ 7A-68. Administrative assistants. — (a) Each district attorney shall be entitled to one administrative assistant to be appointed by the district attorney and to serve at his pleasure. The assistant need not be an attorney licensed to practice law in the State of North Carolina.

(b) It shall be the duty of the administrative assistant to assist the district attorney in preparing cases for trial and in expediting the criminal court docket, and to assist in such other duties as may be assigned by the district attorney.

(c) When traveling on official business, each administrative assistant is entitled to reimbursement for his subsistence and travel expenses to the same extent as State employees generally. (1973, c. 807.)

§ 7A-69. Investigatorial assistants. — The district attorney in the tenth, twelfth, fourteenth, eighteenth, twentieth, twenty-first, twenty-sixth, twenty-seventh and twenty-eighth judicial districts is entitled to one investigatorial assistant to be appointed by the district attorney and to serve at his pleasure. It shall be the duty of the investigatorial assistant to investigate cases preparatory to trial and to perform such other duties as may be assigned by the district attorney. The investigatorial assistant is entitled to reimbursement for his subsistence and travel expenses to the same extent as State employees generally. (1975, c. 956, s. 6.)

Editor's Note. — Session Laws 1975, c. 956, s. 20, makes the act effective July 1, 1975.

ARTICLE 10.

§§ 7A-70 to 7A-94: Reserved for future codification purposes.

ARTICLE 11.

Special Regulations.

§ 7A-95. Reporting of trials.

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

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

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

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

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

ARTICLE 12.

Clerk of Superior Court.

§ 7A-100. Election; term of office; oath; vacancy; office and office hours; appointment of acting clerk. — (a) A clerk of the superior court for each county shall be elected by the qualified voters thereof, to hold office for a term of four years, in the manner prescribed by Chapter 163 of the General Statutes. The clerk, before entering on the duties of his office, shall take the oath of office prescribed by law. If the office of clerk of superior court becomes vacant otherwise than by the expiration of the term, or if the people fail to elect a clerk, the senior regular resident superior court judge for the county shall fill the vacancy by appointment until an election can be regularly held. In cases of death or resignation of the clerk, the senior regular resident superior court judge, pending appointment of a successor clerk, may appoint an acting clerk of superior court for a period of not longer than 30 days.

(b) The county commissioners shall provide an office for the clerk in the courthouse or other suitable place in the county seat. The clerk shall observe such office hours and holidays as may be directed by the Administrative Officer of the Courts. (Const., art. 4, ss. 16, 17, 29; C. C. P., ss. 139-141; 1871-72, c. 136; Code, ss. 74, 76, 78, 80, 114, 115; 1903, c. 467; Rev., ss. 890-893, 895, 909, 910; C. S., ss. 926, 930, 931, 945, 946; 1935, c. 348; 1939, c. 82; 1941, c. 329; 1949, c. 122, ss. 1, 2; 1971, c. 363, s. 1; 1973, c. 240.)

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

The 1973 amendment added the last sentence of subsection (a).

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

Population	Salary
Less than 10,000	$ 9,900.00
10,000 to 19,999	12,500.00
20,000 to 49,999	15,000.00
50,000 to 99,999	17,000.00
100,000 to 199,999	19,800.00
200,000 and above	24,000.00

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

The clerk shall receive no fees or commission by virtue of his office. The salary set forth in this section is the clerk's sole official compensation, but if, on June 30, 1975, the salary of a particular clerk, by reason of previous but no longer authorized merit increments, is higher than that set forth in the table, that higher salary shall not be reduced during his continuance in office. (1965, c. 310, s. 1; 1967, c. 691, s. 5; 1969, c. 1186, s. 3; 1971, c. 877, ss. 1, 2; 1973, c. 571, ss. 1, 2; 1975, c. 956, s. 7.)

Editor's Note. —

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

The 1973 amendment, effective July 1, 1973, revised the salary schedule in former subsection (a), and made changes in former subsection (b).

The 1975 amendment, effective July 1, 1975, deleted "(a)" at the beginning of the section, substituted "199,999" for "199,000" in the schedule, deleted "federal" preceding "decennial census" near the the beginning of the second paragraph, substituted "(July 1, 1981; July 1, 1991; etc.)" for "(July 1, 1971; July 1, 1981; etc.)" in that paragraph, substituted "during his continuance in office" for "during his term" at the end of that paragraph, rewrote the third paragraph and deleted former subsection (b), which related to an increase in the annual salary of the clerk of superior court.

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

(b) An assistant clerk is authorized to perform all the duties and functions of the office of clerk of superior court, and any act of an assistant clerk is entitled to the same faith and credit as that of the clerk. A deputy clerk is authorized to certify the existence and correctness of any record in the clerk's office, to take the proofs and examinations of the witnesses touching the execution of a will as required by G.S. 31-17, and to perform any other ministerial act which the clerk may be authorized and empowered to do, in his own name and without reciting the name of his principal. The clerk is responsible for the acts of his assistants and deputies. (1777, c. 115, s. 86; P. R.; R. C., c. 19, s. 15; Code, s. 75; 1899, c. 235, ss. 2, 3; Rev., ss. 898-900; 1921, c. 32, ss. 1-3; C. S., ss. 934(a)-934(c),

935-937; 1951, c. 159, ss. 1, 2; 1959, c. 1297; 1963, c. 1187; 1965, c. 264; c. 310, s. 1; 1971, c. 363, s. 2; 1973, c. 678.)

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

The 1973 amendment inserted "to take the proofs and examinations of the witnesses touching the execution of a will as required by G.S. 31-17" in the second sentence of subsection (b).

§ 7A-102.1. Transfer of sick leave earned as county or municipal employees by certain employees in offices of clerks of superior court. — (a) All assistant clerks, deputy clerks and other employees of the clerks of the superior court of this State, secretaries to superior court judges and solicitors, and court reporters of the superior courts, who have heretofore been, or shall hereafter be, changed in status from county employees to State employees by reason of the enactment of Chapter 7A of the General Statutes, shall be entitled to transfer sick leave accumulated as a county employee pursuant to any county system and standing to the credit of such employee at the time of such change of status to State employee, without any maximum limitation thereof. Such earned sick leave credit shall be certified to the Administrative Office of the Courts by the official or employee responsible for keeping sick leave records for the county, and the Administrative Office of the Courts shall accord such transferred sick leave credit the same status as if it had been earned as a State employee.

(b) All clerks, assistant clerks, deputy clerks and other employees of any court inferior to the superior court which has been or may be abolished by reason of the enactment of Chapter 7A of the General Statutes, who shall thereafter become a State employee by employment in the Judicial Department, shall be entitled to transfer sick leave earned as a municipal or county employee pursuant to any municipal or county system in effect on the date said court was abolished, without any maximum limitation thereof. Such earned sick leave credit shall be certified to the Administrative Office of the Courts by the official or employee responsible for keeping sick leave records for the municipality or county, and the Administrative Office of the Courts shall accord such transferred sick leave credit the same status as if it had been earned as a State employee.

(c) Any employee covered by this section who retires on or after May 22, 1973, shall be given credit for all sick leave accumulated on May 22, 1973. (1967, c. 1187, ss. 1, 2; 1969, c. 1190, s. 8; 1973, c. 795, ss. 1-3.)

Editor's Note. —

The 1973 amendment substituted "without any maximum limitation thereof" for "not exceeding earned sick leave in an amount totaling 30 work days" near the end of the first sentences of subsections (a) and (b) and added subsection (c).

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

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

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

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

(4) Issue citations and orders to show cause to parties in all matters cognizable in his court, and to compel the appearance of such parties.
(5) Enforce all lawful orders and decrees, by execution or otherwise, against those who fail to comply therewith or to execute lawful process. Process may be issued by the clerk, to be executed in any county of the State, and to be returned before him.
(6) Certify and exemplify, under seal of his court, all documents, papers or records therein, which shall be received in evidence in all the courts of the State.
(7) Preserve order in his court and to punish contempts.
(8) Adjourn any proceeding pending before him from time to time.
(9) Open, vacate, modify, set aside, or enter as of a former time, decrees or orders of his court.
(10) Enter default or judgment in any action or proceeding pending in his court as authorized by law.
(11) Award costs and disbursements as prescribed by law, to be paid personally, or out of the estate or fund, in any proceeding before him.
(12) Compel an accounting by magistrates and compel the return to the clerk of superior court by the person having possession thereof, of all money, records, papers, dockets and books held by such magistrate by virtue or color of his office.
(13) Grant and revoke letters testamentary, letters of administration, and letters of trusteeship.
(14) Appoint and remove guardians and trustees, as provided by law.
(15) Audit the accounts of fiduciaries, as required by law.
(16) Exercise jurisdiction conferred on him in every other case prescribed by law. (C. C. P., ss. 417, 418, 442; Code, ss. 103, 108; 1901, c. 614, s. 2; Rev., s. 901; 1919, c. 140; C. S., s. 938; 1949, c. 57, s. 1; 1951, c. 28, s. 1; 1961, c. 341, s. 2; 1971, c. 363, s. 3.)

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

A reasonable fee for legal advice and assistance in the management of a trust estate is allowable as a necessary expense of the trust estate. Tripp v. Tripp, 17 N.C. App. 64, 193 S.E.2d 366 (1972).

§ 7A-104. Disqualification; waiver; removal; when judge acts. — (a) The clerk shall not exercise any judicial powers in relation to any estate, proceeding, or civil action:
(1) If he has, or claims to have, an interest by distribution, by will, or as creditor or otherwise;
(2) If he is so related to any person having or claiming such an interest that he would, by reason of such relationship, be disqualified as a juror, but the disqualification on this ground ceases unless the objection is made at the first hearing of the matter before him;
(3) If he or his wife is a party or a subscribing witness to any deed of conveyance, testamentary paper or nuncupative will, but this disqualification ceases when such deed, testamentary paper, or will has been finally admitted to probate by another clerk, or before the judge of the superior court;
(4) If he or his wife is named as executor or trustee in any testamentary or other paper, but this disqualification ceases when the will or other paper is finally admitted to probate by another clerk, or before the judge of the superior court. The clerk may renounce the executorship

and endorse the renunciation on the will or on some paper attached thereto, before it is propounded for probate, in which case the renunciation must be recorded with the will if it is admitted to probate.

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

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

(c) In any case in which the clerk of the superior court is executor, administrator, collector, or guardian of an estate at the time of his election or appointment to office, in order to enable him to settle such estate, the resident or presiding judge of the superior court is empowered to make such orders as may be necessary in the settlement of the estate; and he may audit the accounts or appoint a commissioner to audit the accounts of such executor or administrator, and report to him for his approval, and when the accounts are so approved, the judge shall order the proper records to be made by the clerk. (C. C. P., ss. 419-421; 1871-72, cc. 196, 197; Code, ss. 104-107; Rev., ss. 902-905; 1913, c. 70, s. 1; C. S., ss. 939-942; 1935, c. 110, s. 1; 1971, c. 363, s. 4.)

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

§ 7A-105. Suspension, removal, and reinstatement of clerk. — A clerk of superior court may be suspended or removed from office for willful misconduct or mental or physical incapacity, and reinstated, under the same procedures as are applicable to a superior court solicitor, except that the procedure shall be initiated by the filing of a sworn affidavit with the chief district judge of the district in which the clerk resides, and the hearing shall be conducted by the senior regular resident superior court judge serving the county of the clerk's residence. If suspension is ordered, the judge shall appoint some qualified person to act as clerk during the period of the suspension. (1967, c. 691, s. 6; 1971, c. 363, s. 10; 1973, c. 148, s. 2.)

Editor's Note. — The above section was formerly numbered § 7A-104. It was renumbered § 7A-105 by Session Laws 1971, c. 363, s. 10, effective Oct. 1, 1971. Former § 7A-105 was renumbered § 7A-107 by the same 1971 act. The 1973 amendment rewrote this section.

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

(b) Any clerk going out of office or such other person having custody of the records, books, papers, moneys, and property of the office who fails to transfer and deliver them as directed shall forfeit and pay the State one thousand dollars

($1,000), which shall be sued for by the solicitor. (R. C., c. 19, s. 14; C. C. P., s. 142; Code, ss. 81, 124; Rev., ss. 906, 907; C. S., s. 943; 1971, c. 363, s. 5.)

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

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

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

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

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

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

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

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

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

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

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

(4) To provide a system of indexing that will afford adequate access to all records maintained by the clerk;
(5) To provide, to the extent possible, for the maintenance of records affecting the same action or proceeding in one rather than several units; and
(6) To provide a reservoir of information useful to those interested in measuring the effectiveness of the laws and the efficiency of the courts in administering them.

(b) The rules shall provide for indexing according to the minimum criteria set out below:
(1) Civil actions — the names of all parties;
(2) Special proceedings — the names of all parties;
(3) Administration of estates — the name of the estate and in the case of testacy the name of each devisee;
(4) Criminal actions — the names of all defendants;
(5) Juvenile actions — the names of all juveniles;
(6) Judgments, liens, lis pendens, etc. — the names of all parties against whom a lien has been created by the docketing of a judgment, notice of lien, transcript, certificate, or similar document and the names of all parties in those cases in which a notice of lis pendens has been filed with the clerk and abstracted on the judgment docket.

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

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

§ 7A-109.1. List of prisoners furnished to judges. — (a) The clerk of superior court must furnish to each judge presiding over a criminal court a report listing the name, reason for confinement, period of confinement, and, when appropriate, charge or charges, amount of bail and conditions of release, and next scheduled court appearance of each person listed on the most recent report filed under the provisions of G.S. 153A-229.

(b) The clerk must file the report with superior court judges presiding over mixed or criminal sessions at the beginning of each session and must file the report with district court judges at each session or weekly, whichever is the less frequent. (1973, c. 1286, s. 5; 1975, c. 166, s. 22.)

Editor's Note. —

The 1975 amendment, effective Sept. 1, 1975, substituted "prisoners" for "jailed defendants" in the catchline of this section.

Session Laws 1973, c. 1286, s. 31, provides:

"Sec. 31. This act becomes effective on July 1, 1975, and is applicable to all criminal proceedings begun on and after that date and each provision is applicable to criminal proceedings pending on that date to the extent practicable, except § 12 [§§ 15-176.3 through 15-176.5] of this act which becomes effective on July 1, 1974."

Session Laws 1975, c. 573, amends Session Laws 1973, c. 1286, s. 31, so as to make the 1973 act effective Sept. 1, 1975, rather than July 1, 1975. See Editor's note following the analysis to Chapter 15A.

§ 7A-110. List of attorneys furnished to Secretary of Revenue. — On or before the first of May each year the clerk of superior court shall certify to the Secretary of Revenue the names and addresses of all attorneys-at-law located within the clerk's county who are engaged in the practice of law. (1931, c. 290; 1971, c. 363, s. 7; 1973, c. 476, s. 193.)

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

The 1973 amendment, effective July 1, 1973, substituted "Secretary of Revenue" for "Commissioner of Revenue."

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

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

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

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

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

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

(d) The determination of incapacity authorized in subsection (a) of this section is separate and distinct from the procedure for the determination of incompetency provided in G.S. Chapter 35. (1899, c. 82; Rev., s. 924; 1911, c. 29, s. 1; 1919, c. 91; C. S., s. 962; Ex. Sess., 1924, c. 1, s. 1; 1927, c. 76; 1929, c. 15;

1933, c. 363; 1937, c. 201; 1945, c. 160, ss. 1, 2; 1949, c. 188; 1953, c. 101; 1959, c. 794, ss. 1, 2; 1961, c. 377; 1971, c. 363, s. 8; c. 1231, s. 1.)

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

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

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

(1) Obligations of the United States or obligations fully guaranteed both as to principal and interest by the United States;

(2) Obligations of the State of North Carolina;

(3) Obligations of North Carolina cities or counties approved by the Local Government Commission; and

(4) Shares of any building and loan association organized under the laws of this State, or of any federal savings and loan association having its principal office in this State, and certificates of deposit for time deposits or savings accounts in any bank or trust company authorized to do business in North Carolina, to the extent in each instance that such shares or deposits are insured by the State or federal government or any agency thereof or by any mutual deposit guaranty association authorized by the Administrator of the Savings and Loan Division of North Carolina to do business in North Carolina pursuant to Article 7A of Chapter 54 of the General Statutes. If the clerk desires to deposit in a bank, saving and loan, or trust company funds entrusted to him by virtue or color of his office, beyond the extent that such deposits are insured by the State or federal government or an agency thereof or by any mutual deposit guaranty association authorized by the Administrator of the Savings and Loan Division of North Carolina to do business in North Carolina pursuant to Article 7A of Chapter 54 of the General Statutes, the clerk shall require such depository to furnish a corporate surety bond or bonds of the United States government or of the State of North Carolina, or of counties and municipalities of North Carolina whose bonds have been approved by the Local Government Commission.

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

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

(d) It shall be unlawful for the clerk of the superior court of any county receiving any money by virtue or color of his office to apply or invest any of

it except as authorized under this section. Any clerk violating the provisions of this section shall be guilty of a misdemeanor. (1931, c. 281, ss. 1-3, 5; 1937, c. 188; 1939, cc. 86, 110; 1943, c. 543; 1971, c. 363, s. 9; c. 956, s. 1; 1973, c. 1446, s. 4; 1975, c. 496, ss. 1, 2.)

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

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

The 1973 amendment inserted "dollars" following "two thousand" the second time those words appear in the second sentence of subsection (b).

The 1975 amendment added "or by any mutual deposit guaranty association authorized by the Administrator of the Savings and Loan Division of North Carolina to do business in North Carolina pursuant to Article 7A of Chapter 54 of the General Statutes" at the end of the first sentence and near the middle of the second sentence of subdivision (4) of subsection (a).

Cited in In re Castillian Apts., Inc., 281 N.C. 709, 190 S.E.2d 161 (1972).

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

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

ARTICLE 13.

Creation and Organization of the District Court Division.

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

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

§ 7A-131. Establishment of district courts.

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

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

Cited in State v. Caudle, 7 N.C. App. 276, 172 S.E.2d 231 (1970); Kelly v. Davenport, 7 N.C. App. 670, 173 S.E.2d 600 (1970); State v. Barker, 8 N.C. App. 311, 173 S.E.2d 88 (1970); Bryant v. Kelly, 279 N.C. 123, 181 S.E.2d 938 (1971); Ford Motor Credit Co. v. Hayes, 10 N.C. App. 527, 179 S.E.2d 181 (1971); State v. Stafford, 11 N.C. App. 520, 181 S.E.2d 741 (1971); In re Hopper, 11 N.C. App. 611, 182 S.E.2d 228 (1971); State v. Elledge, 13 N.C. App. 462, 186 S.E.2d 192 (1972).

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

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

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

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

District	Judges	County	Magistrates Min.	Magistrates Max.	Additional Seats of Court
1	2	Camden	1	2	
		Chowan	2	3	
		Currituck	1	2	
		Dare	2	3	
		Gates	2	3	
		Pasquotank	3	4	
		Perquimans	2	3	
2	2	Martin	3	5	
		Beaufort	4	5	
		Tyrrell	1	2	
		Hyde	2	3	
		Washington	3	4	
3	4	Craven	5	7	
		Pitt	9	11	Farmville Ayden
		Pamlico	2	3	
		Carteret	4	7	
4	4	Sampson	5	7	
		Duplin	9	10	
		Jones	2	3	
		Onslow	8	10	
5	3	New Hanover	6	9	
		Pender	4	6	
6	3	Northampton	5	6	
		Halifax	7	11	Roanoke Rapids, Scotland Neck
		Bertie	4	5	
		Hertford	5	6	
7	4	Nash	7	10	Rocky Mount
		Edgecombe	4	6	Rocky Mount
		Wilson	4	6	
8	5	Wayne	5	7	Mount Olive
		Greene	2	3	
		Lenoir	4	7	
9	3	Person	3	4	
		Granville	3	5	
		Vance	3	4	
		Warren	3	4	
		Franklin	3	5	
10	6	Wake	12	16	Apex

District	Judges	County	Magistrates Min.-Max.		Additional Seats of Courts
					Wendell
					Fuquay-Varina
11	4	Harnett	7	10	Dunn
		Johnston	10	12	Benson and Selma
		Lee	3	5	
12	5	Cumberland	10	15	
		Hoke	2	3	
13	3	Bladen	4	6	
		Brunswick	4	6	Shallotte
		Columbus	6	8	Tabor City
14	3	Durham	6	8	
15	4	Alamance	7	9	Burlington
		Chatham	3	6	Siler City
		Orange	4	8	Chapel Hill
16	3	Robeson	8	12	Fairmont Maxton Red Springs Rowland St. Pauls
		Scotland	2	3	
17	4	Caswell	2	4	
		Rockingham	4	8	Reidsville Eden Madison
		Stokes	2	3	
		Surry	4	6	Mt. Airy
18	7	Guilford	17	22	High Point
19	5	Cabarrus	4	7	Kannapolis
		Montgomery	2	3	
		Randolph	4	7	Liberty
		Rowan	4	8	
20	4	Stanly	5	6	
		Union	4	6	
		Anson	4	5	
		Richmond	5	6	Hamlet
		Moore	5	7	Southern Pines
21	5	Forsyth	3	15	Kernersville
22	4	Alexander	2	3	
		Davidson	5	8	Thomasville
		Davie	2	3	
		Iredell	4	8	Mooresville
23	2	Alleghany	1	2	
		Ashe	2	3	
		Wilkes	4	6	
		Yadkin	2	3	
24	2	Avery	2	3	
		Madison	3	4	
		Mitchell	3	4	
		Watauga	3	4	
		Yancey	2	3	
25	5	Burke	4	6	

District	Judges	County	Magistrates Min.	Magistrates Max.	Additional Seats of Court
		Caldwell	4	7	
		Catawba	6	9	Hickory
26	8	Mecklenburg	15	25	
27	5	Cleveland	5	8	
		Gaston	10	18	
		Lincoln	3	5	
28	4	Buncombe	6	12	
29	3	Henderson	4	6	
		McDowell	3	4	
		Polk	2	3	
		Rutherford	6	8	
		Transylvania	2	3	
30	2	Cherokee	3	4	
		Clay	1	2	
		Graham	2	3	
		Haywood	5	7	Canton
		Jackson	3	4	
		Macon	3	4	
		Swain	2	3	

(1965, c. 310, s. 1; 1967, c. 691, s. 8; 1969, c. 1190, s. 10; c. 1254; 1971, c. 377, s. 7; cc. 727, 840, 841, 842, 843, 865, 866, 898; 1973, cc. 132, 373, 483; c. 838, s. 1; c. 1376; 1975, c. 956, s. 10.)

Editor's Note. —

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

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

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

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

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

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

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

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

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

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

The first 1973 amendment, effective Jan. 1, 1974, reduced the minimum number of magistrates in Forsyth County from 10 to three.

The second 1973 amendment increased the maximum number of magistrates in New Hanover County from eight to nine.

The third 1973 amendment increased the maximum number of magistrates in Lenoir County from six to seven.

The fourth 1973 amendment, effective Dec. 2, 1974, amended the table so as to authorize an additional district court judge in the eighth, tenth, twelfth, thirteenth, twenty-fifth and twenty-sixth districts.

The fifth 1973 amendment increased the maximum number of magistrates in Granville County from four to five.

The 1975 amendment, effective July 1, 1975, increased the quotas of magistrates in Carteret, Harnett, Chatham, Orange, Randolph, Moore, Davidson, Iredell, Caldwell, Buncombe, Cherokee, Haywood, Jackson and Macon Counties.

Session Laws 1973, c. 838, s. 2, provides: "Candidates for the additional judgeships created in section 1 of this act shall run in the primary and general election in 1974."

Amendment Effective December 6, 1976. — Session Laws 1975, c. 956, s. 8, effective Dec. 6, 1976, will amend the table so as to increase the number of district court judges for districts 3, 9, 16, 18 and 30 by one, and these districts will read as follows:

"Districts	Judges
3	5
9	4
16	4
18	8
30	3"

Session Laws 1975, c. 956, s. 9, provides: "Candidates for the additional judgeships created in section 8 of this act shall run in the primary and general election of 1976."

§ 7A-134: Repealed by Session Laws 1973, c. 1339, s. 2, effective July 1, 1974.

Cross Reference. — For present provisions as to juvenile services, see §§ 7A-289.1 through 7A-289.7.

Editor's Note. — The repealed section was amended by Session Laws 1973, c. 1446, s. 22.

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

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

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

ARTICLE 14.

District Judges.

§ 7A-142. Vacancies in office. — A vacancy in the office of district judge shall be filled for the unexpired term by appointment of the Governor from nominations submitted by the bar of the judicial district. If the district bar fails to submit nominations within four weeks from the date the vacancy occurs, the Governor may appoint to fill the vacancy without waiting for nominations. (1965, c. 310, s. 1; 1975, c. 441.)

Editor's Note. — The 1975 amendment substituted "four weeks" for "two weeks" in the second sentence.

§ 7A-143: Repealed by Session Laws 1973, c. 148, s. 6.

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

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

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

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

(3) Supervising the clerk of superior court in the discharge of the clerical functions of the district court;
(4) Assigning matters to magistrates, and prescribing times and places at which magistrates shall be available for the performance of their duties;
(5) Making arrangements with proper authorities for the drawing of civil court jury panels and determining which sessions of district court shall be jury sessions;
(6) Arranging for the reporting of civil cases by court reporters or other authorized means;
(7) Arranging sessions, to the extent practicable for the trial of specialized cases, including traffic, domestic relations, and other types of cases, and assigning district judges to preside over these sessions so as to permit maximum practicable specialization by individual judges;
(8) Promulgating a schedule of traffic offenses for which magistrates and clerks of court may accept written appearances, waivers of trial, and pleas of guilty, and establishing a schedule of fines therefor;
(9) Assigning magistrates, in an emergency, to temporary duty outside the county of their residence, but within the district; and
(10) Designating another district judge of his district as acting chief district judge, to act during the absence or disability of the chief district judge. (1965, c. 310, s. 1; 1971, c. 377, s. 8.)

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

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

Authority of Judge Other Than Chief District Judge to Hear Motions and Enter Interlocutory Orders. — Under the provisions of the first portion of § 7A-192, before a district court judge, other than the chief district judge, may hear motions and enter interlocutory orders at any session of district court in cases calendared for trial or hearing at such session, he must be first assigned by the chief district judge under the provisions of subdivision (1) of this section to preside at such session. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

In order to have authority to act on any motion, a district judge, other than the chief district judge, must be properly authorized under the provisions of this section and § 7A-192 to hold a session of court at which the matter is properly before him, or under § 7A-192 to hear the matter in chambers. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

§ 7A-147. Specialized judgeships.

(c) The policy of the State is to encourage specialization in juvenile cases by district court judges who are qualified by training and temperament to be effective in relating to youth and in the use of appropriate community resources to meet their needs. The Administrative Office of the Courts is therefore authorized to encourage judges who hear juvenile cases to secure appropriate training whether or not they were elected to a specialized judgeship as provided herein. Such training shall be provided within the funds available to the Administrative Office of the Courts for such training, and judges attending such training shall be reimbursed for travel and subsistence expenses at the same rate as is applicable to other State employees.

The Administrative Office of the Courts is authorized to develop a plan whereby a district court judge may be certified as qualified to hear juvenile cases by reason of training, experience and demonstrated ability. Any district court judge who meets such certification requirements shall receive a certificate to this effect from the Administrative Office of the Courts. In districts where there is a district court judge who is certified as qualified to hear juvenile cases as

herein provided, the chief district judge shall assign such cases to this judge where practical and feasible. (1965, c. 310, s. 1; 1975, c. 823.)

Editor's Note. — The 1975 amendment, effective July 1, 1975, added subsection (c). As the rest of the section was not changed by the amendment, only subsection (c) is set out.

ARTICLE 15.

District Prosecutors.

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

ARTICLE 16.

Magistrates.

§ 7A-170. Nature of office; oath; office and court hours.

A magistrate is an officer of the district court, and in issuing a warrant a magistrate performs a judicial act. Foust v. Hughes, 21 N.C. App. 268, 204 S.E.2d 230 (1974).

And Is Not Subject to Civil Action for Errors in Discharge of His Duties. — A judge of a court of this State is not subject to civil action for errors committed in the discharge of his official duties. This immunity applies even when the judge is accused of acting maliciously and corruptly, and is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences. Thus in the instant case plaintiff failed to state a claim for false imprisonment against a magistrate by reason of any act of the magistrate in issuing warrants for plaintiff's arrest. Foust v. Hughes, 21 N.C. App. 268, 204 S.E.2d 230 (1974).

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

Stated in Chandler v. Cleveland Sav. & Loan Ass'n, 24 N.C. App. 455, 211 S.E.2d 484 (1975).

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

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

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

(1971, c. 84, s. 1; 1973, c. 503, s. 2.)

Editor's Note. —

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

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

The 1973 amendment, effective Oct. 1, 1973, deleted "(or the senior regular resident superior court judge, if there is no chief district judge)" following "chief district judge" in the first sentence of subsection (b).

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

Judge Has Duty to Appoint Magistrates Which May Be Enforced by a Writ of Mandamus. — See opinion of Attorney General to Honorable Ralph A. Allison, Clerk of Superior Court, 40 N.C.A.G. 137 (1970).

§ 7A-172. Minimum and maximum salaries. — Magistrates shall receive not less than one thousand two hundred dollars ($1,200) and not more than ten thousand seventy-four dollars ($10,074) per year. (1965, c. 310, s. 1; 1969, c. 1186, s. 6; 1971, c. 877, s. 3; 1973, c. 571, s. 3; c. 1236.)

Editor's Note. —

The 1971 amendment, effective July 1, 1971, substituted "seven thousand, nine hundred and forty-four dollars ($7,944.00)" for "seventy-two hundred dollars ($7,200.00)."

The first 1973 amendment, effective July 1, 1973, substituted "eight thousand seven hundred and sixty dollars ($8,760)" for "seven thousand nine hundred and forty-four dollars ($7,944.00)."

The second 1973 amendment, effective July 1, 1974, substituted "ten thousand seventy-four dollars ($10,074)" for "eight thousand seven hundred and sixty dollars ($8,760)."

§ 7A-173. Suspension; removal; reinstatement. — (a) A magistrate may be suspended from performing the duties of his office by the chief district judge, or removal from office by the senior regular resident superior court judge or any regular superior court judge holding court in the district. Grounds for suspension or removal are the same as for a judge of the General Court of Justice.

(c) If a hearing, with or without suspension, is ordered, the magistrate against whom the charges have been made shall be given immediate written notice of the proceedings and a true copy of the charges, and the matter shall be set by the chief district judge for hearing before the senior regular resident superior court judge or a regular superior court judge holding court in the district. The hearing shall be held within the district not less than 10 days nor more than 30 days after the magistrate has received a copy of the charges. The hearing shall be open to the public. All testimony offered shall be recorded. At the hearing the superior court judge shall receive evidence, and make findings of fact and conclusions of law. If he finds that grounds for removal exist, he shall enter an order permanently removing the magistrate from office, and terminating his salary. If he finds that no such grounds exist, he shall terminate the suspension, if any.

(1973, c. 148, ss. 3, 4.)

Editor's Note. —

The 1973 amendment substituted "judge of the General Court of Justice" for "district judge" in the second sentence of subsection (a), substituted "a hearing, with or without suspension" for "suspension" in the first sentence of subsection (c), and added "if any" at the end of the last sentence of subsection (c).

Only those subsections changed by the amendment are set out.

§ 7A-177. Training course in duties of magistrate. — Within six months of taking the oath of office as a magistrate for the first time, a magistrate is required to attend and satisfactorily complete a course of basic training of at least 40 hours in the civil and criminal duties of a magistrate. The Administrative Office of the Courts is authorized to contract with the Institute of Government or with any other qualified educational organization to conduct this training, and to reimburse magistrates for travel and subsistence expenses incurred in taking such training. (1975, c. 956, s. 11.)

Editor's Note. — Session Laws 1975, c. 956, s. 20, makes the act effective July 1, 1975.

§§ 7A-178, 7A-179: Reserved for future codification purposes.

ARTICLE 17.

Clerical Functions in the District Court.

§ 7A-180. Functions of clerk of superior court in district court matters. — The clerk of superior court:

(3) Maintains, under the supervision of the Administrative Office of the Courts, an office of uniform consolidated records of all judicial proceedings in the superior court division and the district court division of the General Court of Justice in his county. Those records shall include civil actions, special proceedings, estates, criminal actions, juvenile actions, minutes of the court and all other records required by law to be maintained. The form and procedure for filing, docketing, indexing, and recording shall be as prescribed by the Administrative Officer of the Courts notwithstanding any contrary statutory provision as to the title and form of the record or as a method of indexing;

(4) Has the power to accept written appearances, waivers of trial and pleas of guilty to certain traffic offenses in accordance with a schedule of offenses and fines promulgated by the chief district judge, and, in such cases, to enter judgment and collect the fines and costs;

(6) Has the power to conduct an initial appearance in accordance with Chapter 15A, Article 24, Initial Appearance, and to fix conditions of release in accordance with Chapter 15A, Article 26, Bail; and

(8) Has the power to accept written appearances, waivers of trial and pleas of guilty to violations of G.S. 14-107 when restitution is made, the amount of the check is three hundred dollars ($300.00) or less, and the warrant does not charge a fourth or subsequent violation of this statute, and, in such cases, to enter such judgments as the chief district judge shall direct and, forward the amounts collected as restitution to the appropriate prosecuting witnesses and to collect the costs. (1965, c. 310, s. 1; 1967, c. 691, s. 16; 1969, c. 1190, s. 14; 1973, c. 503, ss. 3, 4; c. 1286, s. 6; 1975, c. 166, s. 23; c. 626, s. 2.)

Editor's Note. —

The first 1973 amendment, effective Oct. 1, 1973, deleted "In any county wherein a district court is established" at the beginning and "thereupon" at the end of the introductory language preceding the colon, deleted "Immediately sets up and thereafter" at the beginning of subdivision (3) and inserted "enter judgment and" near the end of subdivision (4).

The second 1973 amendment, effective Sept. 1, 1975, inserted "to conduct an initial appearance" in subdivision (6).

The first 1975 amendment, effective Sept. 1, 1975, rewrote subdivision (6).

The second 1975 amendment, effective Sept. 1, 1975, added subdivision (8).

Session Laws 1973, c. 1286, s. 29, contains a severability clause.

Session Laws 1973, c. 1286, s. 31, provides: "Sec. 31. This act becomes effective on July 1, 1975, and is applicable to all criminal proceedings begun on and after that date and each provision is applicable to criminal proceedings pending on that date to the extent practicable, except § 12 [§§ 15-176.3 through 15-176.5] of this act which becomes effective on July 1, 1974."

Session Laws 1975, c. 573, amends Session Laws 1973, c. 1286, s. 31, so as to make the 1973 act effective Sept. 1, 1975, rather than July 1, 1975. See Editor's note following the analysis to Chapter 15A.

As the rest of the section was not changed by the amendments, only the introductory language and subdivisions (3), (4), (6) and (8) are set out.

Stated in State v. Bellar, 16 N.C. App. 339, 192 S.E.2d 86 (1972).

§ 7A-181. Functions of assistant and deputy clerks of superior court in district court matters. — Assistant and deputy clerks of superior court:

(1) Have the same powers and duties with respect to matters in the district court division as they have in the superior court division;

(2) Have the same powers as the clerk of superior court with respect to the issuance of warrants and acceptance of written appearances, waivers of trial and pleas of guilty; and

(3) Have the same power as the clerk of superior court to fix conditions of release in accordance with Chapter 15A, Article 26, Bail, and the same power as the clerk of superior court to conduct an initial appearance in accordance with Chapter 15A, Article 24, Initial Appearance. (1965, c. 310, s. 1; 1967, c. 691, s. 17; 1973, c. 503, s. 5; 1975, c. 166, s. 24; c. 626, s. 3.)

Editor's Note. —

The 1973 amendment, effective Oct. 1, 1973, deleted "In any county wherein a district court is established" at the beginning and "thereupon" at the end of the introductory language preceding the colon.

The first 1975 amendment, effective Sept. 1, 1975, rewrote subdivision (3). See Editor's note following the analysis to Chapter 15A.

The second 1975 amendment, effective Sept. 1, 1975, deleted "to traffic offenses" following "pleas of guilty" at the end of subdivision (2).

ARTICLE 18.

District Court Practice and Procedure Generally.

§ 7A-190. District courts always open.

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

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

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

This section and § 7A-192 make a distinction between the jurisdiction of the district courts and the power and authority of a district judge other than the chief district judge to act. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

And Recognize Distinction between Trial on Merits and Hearing of Motion. — This section and § 7A-192 recognize a fundamental procedural distinction between a trial on the merits and the hearing of a motion in the cause. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

A hearing on motions in a cause comes within the purview of "all other proceedings, hearings and acts" referred to in this section. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

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

This section and § 7A-191 make a distinction between the jurisdiction of the district courts and the power and authority of a district judge other than the chief district judge to act. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

And recognize a fundamental procedural distinction between a trial on the merits and the hearing of a motion in the cause. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

Limitations on Authority of Judge Other Than Chief Judge to Hear Motions and Enter Interlocutory Orders. — The authority of a district judge (other than the chief district judge) to hear motions and enter interlocutory orders in cases properly pending in the district court is a special authority which is limited by this section. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

Under the provisions of the first portion of this section, before a district court judge, other than the chief district judge, may hear motions and enter interlocutory orders at any session of district court in cases calendared for trial or hearing at such session, he must be first assigned by the chief district judge under the provisions of subdivision (1) of § 7A-146 to preside at such session. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

In order to have authority to act on any motion, a district judge, other than the chief district judge, must be properly authorized under the provisions of § 7A-146 and this section to hold a session of court at which the matter is properly before him, or under this section to hear the matter in chambers. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

Authority of Such Judge Must Affirmatively Appear on Record. — There is no presumption that a district judge (other than the chief district judge) has authority in chambers to hear motions and enter interlocutory orders in all cases pending in the district courts of the district; it must affirmatively appear in the record that the district judge was authorized pursuant to this section. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

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

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

§ 7A-193. Civil procedure generally.

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

This Chapter does not change the effect of § 1A-1, Rule 52(a)(1), and therefore it is necessary for the district judge who is authorized to hear a case involving the custody and support of minor children to find the facts specially and state separately his conclusions of law before entering an appropriate judgment. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

Applied in Boston v. Freeman, 6 N.C. App. 736, 171 S.E.2d 206 (1969); Little v. Little, 12 N.C. App. 353, 183 S.E.2d 278 (1971).

§ 7A-196. Jury trials.

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

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

When Demand Timely. — The demand for trial by jury in a civil case is timely if made in writing not later than 10 days after the filing of the last pleading directed to the issues. Ford

Motor Credit Co. v. Hayes, 10 N.C. App. 527, 179 S.E.2d 181 (1971).

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

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

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

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

Applied in Kelly v. Davenport, 7 N.C. App. 670, 173 S.E.2d 600 (1970); Wendell Tractor & Implement Co. v. Lee, 9 N.C. App. 524, 176 S.E.2d 854 (1970); Williams v. Williams, 13 N.C. App. 468, 186 S.E.2d 210 (1972).

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

Stated in In re Burrus, 275 N.C. 517, 169 S.E.2d 879 (1969); State v. Greenwood, 12 N.C. App. 584, 184 S.E.2d 386 (1971); State v. Guffey, 283 N.C. 94, 194 S.E.2d 827 (1973).

§ 7A-198. Reporting of civil trials.

A hearing on a motion for alimony pendente lite is not a civil trial within the meaning of this section. Howell v. Howell, 19 N.C. App. 260, 198 S.E.2d 462 (1973).

The absence of stenographic notes is not always fatal, even when oral testimony is introduced, if no prejudice is shown to result. McAlister v. McAlister, 14 N.C. App. 159, 187 S.E.2d 449 (1972).

When Motion for Services of Reporter May Be Refused. — If the case is one in which a court reporter's services can be dispensed with without prejudice, and no reporter can be found, it is not error to refuse a motion for the the services of a reporter. McAlister v. McAlister, 14 N.C. App. 159, 187 S.E.2d 449 (1972).

It is not error for the trial judge to fail to appoint a stenographer where no stenographer is available and where the defendant made no motion that any other means be employed when his motion for a court reporter was denied. McAlister v. McAlister, 14 N.C. App. 159, 187 S.E.2d 449 (1972).

ARTICLE 19.

Small Claim Actions in District Court.

§ 7A-210. Small claim action defined. — For purposes of this Article a small claim action is a civil action wherein:

(1) The amount in controversy, computed in accordance with G.S. 7A-243, does not exceed five hundred dollars ($500.00); and

(2) The only principal relief prayed is monetary, or the recovery of specific personal property, or summary ejectment, or any combination of the foregoing in properly joined claims; and

(3) The plaintiff has requested assignment to a magistrate in the manner provided in this Article.

The seeking of the ancillary remedy of claim and delivery does not prevent an action otherwise qualifying as a small claim action under this Article from so qualifying. (1965, c. 310, s. 1; 1973, c. 1267, s. 1.)

Editor's Note. — The 1973 amendment, effective July 1, 1974, substituted "five hundred dollars ($500.00)" for "three hundred dollars ($300.00)" in subdivision (1).

Remedy of summary ejectment may be obtained in a small claim action heard by a magistrate. Chandler v. Cleveland Sav. & Loan Ass'n, 24 N.C. App. 455, 211 S.E.2d 484 (1975).

§ 7A-212. Judgment of magistrate in civil action improperly assigned or not assigned.

Judgment of magistrate in civil action assigned to him by chief district judge is judgment of the district court. Chandler v. Cleveland Sav. & Loan Ass'n, 24 N.C. App. 455, 211 S.E.2d 484 (1975).

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

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

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

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

§ 7A-217. Methods of subjecting person of defendant to jurisdiction. — When by order or rule a small claim action is assigned to a magistrate, the defendant may be subjected to the jurisdiction of the court over his person by the following methods:

(1) By delivering a copy of the summons and of the complaint to him or by leaving copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. When the defendant is under any legal disability, he may be

subject to personal jurisdiction only by personal service of process in the manner provided by law.

(1973, c. 90.)

Editor's Note. —

The 1973 amendment rewrote the first sentence and substituted "be subject to personal jurisdiction only" for "only be subjected to personal jurisdiction" in the second sentence of subdivision (1).

As subdivisions (2), (3) and (4) were not changed by the amendment, they are not set out.

§ 7A-219. Certain counterclaims; cross claims; third-party claims not permissible. — No counterclaim, cross claim or third-party claim which would make the amount in controversy exceed five hundred dollars ($500.00) is permissible in a small claim action assigned to a magistrate. No determination of fact or law in an assigned small claim action estops a party thereto in any subsequent action which, except for this section, might have been asserted under the Code of Civil Procedure as a counterclaim in the small claim action. (1965, c. 310, s. 1; 1973, c. 1267, s. 2.)

Editor's Note. — The 1973 amendment, effective July 1, 1974, substituted "five hundred dollars ($500.00)" for "three hundred dollars ($300.00)" in the first sentence.

Applied in Chandler v. Cleveland Sav. & Loan Ass'n, 24 N.C. App. 455, 211 S.E.2d 484 (1975).

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

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

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

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

Cited in Chandler v. Cleveland Sav. & Loan Ass'n, 24 N.C. App. 455, 211 S.E.2d 484 (1975).

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

FORM 4.

COMPLAINT ON A PROMISSORY NOTE

NORTH CAROLINA

. . . . . COUNTY

General Court of Justice
District Court Division
SMALL CLAIM

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

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

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

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

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

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

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

Service by mail is, is not, requested.

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

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

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

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

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

ARTICLE 20.

Original Civil Jurisdiction of the Trial Divisions.

§ 7A-240. Original civil jurisdiction generally.

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

And Has Concurrent Jurisdiction to Hear Application for Restraining Order Pending Trial on the Merits. — An application for a restraining order pending trial on the merits is a justiciable matter of a civil nature which is cognizable in the General Court of Justice, and

the original general jurisdiction to hear the application and issue such order is vested concurrently in the superior court division and the district court division. Boston v. Freeman, 6 N.C. App. 736, 171 S.E.2d 206 (1969).

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

Judicial Immunity. — Judges of courts of general jurisdiction are fully clothed by both logic and precedent with the shield of judicial immunity. Fowler v. Alexander, 340 F. Supp. 168 (M.D.N.C. 1972).

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

Stated in Stanback v. Stanback, 287 N.C. 448, 215 S.E.2d 30 (1975).

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

Opinions of Attorney General. — Honorable Hubert E. May, Special Judge, Superior Court, 40 N.C.A.G. 145 (1969).

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

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

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

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

Cited in In re Will of Spinks, 7 N.C. App. 417, 173 S.E.2d 1 (1970); Turner v. Lea, 25 N.C. App. 113, 212 S.E.2d 391 (1975).

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

Administrative allocations of case loads between the divisions are not jurisdictional since a judgment is not void or voidable for the reason that it was rendered by a court of the trial division which by the statutory allocation was the improper division for hearing and determining the matter. Stanback v. Stanback, 287 N.C. 448, 215 S.E.2d 30 (1975).

Party May Move for Transfer of Case as Matter of Right. — Although the case allocations of this Chapter are merely administrative directives, a party may move, as a matter of right, for transfer of a case in accordance with the proper statutory allocation. Stanback v. Stanback, 287 N.C. 448, 215 S.E.2d 30 (1975).

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

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

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

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

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

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

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

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

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

§ 7A-244. Domestic relations.

This section is merely an administrative allocation of annulment, divorce, alimony, child support and child custody actions to the district court division. Stanback v. Stanback, 287 N.C. 448, 215 S.E.2d 30 (1975).

The district court is, under the provisions of this section, a court of general jurisdiction for the trial of civil actions and proceedings for annulment, divorce, alimony, child support, and child custody. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

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

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

An order for the payment of alimony is not a final judgment, since it may be modified upon application of either party; thus, an action for alimony would continue to be "pending" in the court of proper jurisdiction, which is now the district court. Peoples v. Peoples, 8 N.C. App. 136, 174 S.E.2d 2 (1970).

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

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

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

Cited in In re Hopper, 11 N.C. App. 611, 182 S.E.2d 228 (1971); In re Greer, 26 N.C. App. 106, 215 S.E.2d 404 (1975).

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

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

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

§ 7A-246. Special proceedings; exception; guardianship and trust administration. — The superior court division is the proper division, without regard to the amount in controversy, for the hearing and trial of all special proceedings except proceedings under the Protection of the Abused or Neglected Elderly Act (Chapter 108, Article 4, of the General Statutes), except proceedings for involuntary commitment to treatment facilities (Chapter 122, Article 5, of the General Statutes) and of all proceedings involving the appointment of guardians and the administration by legal guardians and trustees of express trusts of the estates of their wards and beneficiaries, according to the practice and procedure provided by law for the particular proceeding. (1965, c. 310, s. 1; 1973, c. 726, s. 5; c. 1378, s. 3.)

Editor's Note. — The first 1973 amendment, effective Sept. 1, 1973, inserted "except proceedings for involuntary commitment to treatment facilities (Chapter 122, Article 5, of the General Statutes)."

The second 1973 amendment, effective July 1, 1974, inserted "except proceedings under the Protection of the Abused or Neglected Elderly Act (Chapter 108, Article 4, of the General Statutes)."

Chapter 122, Article 5, § 122-58, was repealed by Session Laws 1973, c. 726, s. 2. For present provisions as to involuntary commitment to mental hospitals, see Chapter 122, Article 5A, § 122-58.1 et seq.

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

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

§ 7A-249. Corporate receiverships. — The superior court division is the proper division, without regard to the amount in controversy, for actions for corporate receiverships under Chapter 1, Article 38, of the General Statutes, and proceedings under Chapters 55 (Business Corporation Act) and 55A (Nonprofit Corporation Act) of the General Statutes. (1965, c. 310, s. 1; 1973, c. 503, s. 6.)

Editor's Note. — The 1973 amendment, effective Oct. 1, 1973, added, at the end of the section, the language beginning "and proceedings under Chapters 55."

§ 7A-250. Review of decisions of administrative agencies. — The superior court division is the proper division, without regard to the amount in controversy, for review by original action or proceeding, or by appeal, of the decisions of administrative agencies, according to the practice and procedure provided for the particular action, or proceeding, or appeal, except that the Court of Appeals shall have jurisdiction to review final orders or decisions of the North Carolina Utilities Commission and the North Carolina Industrial Commission, as provided in Article 5 of this Chapter, and any order or decision of the Commissioner of Insurance described in G.S. 58-9.4. (1965, c. 310, s. 1; 1967, c. 108, s. 6; 1973, c. 503, s. 7.)

Cross Reference. — As to jurisdiction of the Court of Appeals to review orders or decisions of the Commissioner of Insurance under this section, see § 58-9.4.

Editor's Note. —

The 1973 amendment, effective Oct. 1, 1973, added, at the end of the section, "and any order or decision of the Commissioner of Insurance described in G.S. 58-9.4."

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

§ 7A-251. Appeal from clerk to judge.

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

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

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

ARTICLE 21.

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

§ 7A-257. Waiver of proper division.

Party May Move for Transfer of Case as Matter of Right. — Although the case allocations of this Chapter are merely administrative directives, a party may move, as a matter of right, for transfer of a case in accordance with the proper statutory allocation. Stanback v. Stanback, 287 N.C. 448, 215 S.E.2d 30 (1975).

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

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

§ 7A-258. Motion to transfer. — (a) Any party, including the plaintiff, may move on notice to all parties to transfer the civil action or special proceeding to the proper division when the division in which the case is pending is improper under the rules stated in this Subchapter. A motion to transfer to another division may also be made if all parties to the action or proceeding consent thereto, and if the judge deems the transfer will facilitate the efficient administration of justice.

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

Editor's Note. —

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

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

Party May Move for Transfer of Case as Matter of Right. — Although the case allocations of this Chapter are merely administrative directives, a party may move, as a matter of right, for transfer of a case in accordance with the proper statutory allocation. Stanback v. Stanback, 287 N.C. 448, 215 S.E.2d 30 (1975).

Except Where Case Has Reached Trial Stage. — The General Assembly did not intend that cases called for trial or cases already tried and reduced to judgment be transferred under this section as a matter of right. Stanback v. Stanback, 287 N.C. 448, 215 S.E.2d 30 (1975).

Because this section clearly applies only to cases in the pleading stage. Stanback v. Stanback, 287 N.C. 448, 215 S.E.2d 30 (1975).

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

The district court has no authority to modify a child-custody order entered in the superior court where the cause was pending in the

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

Applied in In re Hopper, 11 N.C. App. 611, 182 S.E.2d 228 (1971).

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

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

Causes Pending in Superior Court at Time of Establishment of District Court. — All causes pending in the superior court at the time of the establishment of the district court remained pending in the superior court unless and until transferred to the district court by proper order. In re Hopper, 11 N.C. App. 611, 182 S.E.2d 228 (1971).

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

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

When Judge Not Authorized to Order Transfer. — A judge, on his own motion, is not authorized to order a transfer once the case has reached the trial stage and has been calendared. Stanback v. Stanback, 287 N.C. 448, 215 S.E.2d 30 (1975).

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

Applied in H & B Co. v. Hammond, 17 N.C. App. 534, 195 S.E.2d 58 (1973); Blackley v. Blackley, 285 N.C. 358, 204 S.E.2d 678 (1974).

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

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

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

§ 7A-260. Review of transfer matters.

Applied in Bryant v. Kelly, 279 N.C. 123, 181 S.E.2d 438 (1971); In re Hopper, 11 N.C. App. 611, 182 S.E.2d 228 (1971).

Cited in Stanback v. Stanback, 287 N.C. 448, 215 S.E.2d 30 (1975).

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

ARTICLE 22.

Jurisdiction of the Trial Divisions in Criminal Actions.

§ 7A-271. Jurisdiction of superior court.

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

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

Editor's Note. —

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

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

Appeals in Civil Causes Distinguished from Appeals in Criminal Causes. — The constitutional and statutory structure of the General Court of Justice provides that, generally, appeals from the district court in civil causes go to the Court of Appeals, while appeals in criminal causes must first go to the superior court. State v. Killian, 25 N.C. App. 224, 212 S.E.2d 419 (1975).

Jurisdiction in Prosecution for Misdemeanor. — Where a prosecution was instituted under statutes which created misdemeanors, for which the district court has exclusive, original jurisdiction, until defendants were tried and convicted in the district court and appealed to the superior court for a trial de novo that court had no jurisdiction of the case. State v. Bryant, 280 N.C. 407, 185 S.E.2d 854 (1972).

A superior court has no original jurisdiction in a case involving a violation of § 20-28(b), a misdemeanor; the jurisdiction of the superior court in such cases is derivative, and where the record does not disclose that defendant was convicted and sentenced in district court for this offense, the superior court is without jurisdiction to try him, and the trial in the superior court for that charge upon the original warrant is a nullity. State v. Guffey, 283 N.C. 94, 194 S.E.2d 827 (1973).

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 for such misdemeanor in the inferior court and appeals to the superior court from the sentence pronounced against him by the inferior court on his conviction for such misdemeanor. State v. Craig, 21 N.C. App. 51, 203 S.E.2d 401 (1974).

The superior court has no original jurisdiction of a trial for the misdemeanor violation of either § 14-33(b)(1) or § 14-34, for one of which defendant was charged and for one of which he was convicted. Its jurisdiction of these offenses is derivative and arises only upon appeal from a conviction in district court of the misdemeanor for which he stands charged in superior court or the misdemeanor with respect to which the jury returned a guilty verdict in superior court. State v. Caldwell, 21 N.C. App. 723, 205 S.E.2d 322 (1974).

Acceptance of Plea of Guilty on Appeal from Misdemeanor Conviction. — The acceptance of a plea of guilty by the superior court to a related charge in misdemeanor appeals from the district court is conditioned upon the requirement that the related charge be contained in a written information. State v. Craig, 21 N.C. App. 51, 203 S.E.2d 401 (1974).

The superior court does not have jurisdiction to accept a plea of guilty to a charge of reckless driving when defendant is before the court on appeal from a conviction in the district court for operating a motor vehicle while under the influence of intoxicating liquor. State v. Craig, 21 N.C. App. 51, 203 S.E.2d 401 (1974).

The imposition of a greater sentence after a conviction by a jury in the superior court, upon appeal from a district court, does not violate a defendant's constitutional rights. State v. Martin, 16 N.C. App. 609, 192 S.E.2d 596 (1972).

Applied in State v. Harrell, 279 N.C. 464, 183 S.E.2d 638 (1971); State v. Rowland, 13 N.C. App. 253, 185 S.E.2d 296 (1971); State v. Harris, 14 N.C. App. 268, 188 S.E.2d 1 (1972); State v. Snipes, 16 N.C. App. 416, 192 S.E.2d 62 (1972); State v. Weiderman, 19 N.C. App. 753, 200 S.E.2d 202 (1973).

Stated in State v. Barbour, 278 N.C. 449, 180 S.E.2d 115 (1971); State v. White, 22 N.C. App. 123, 205 S.E.2d 757 (1974).

§ 7A-272. Jurisdiction of district court.

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

Where a prosecution was instituted under statutes which created misdemeanors, for which the district court had exclusive, original jurisdiction, until defendants were tried and convicted in the district court and appealed to the superior court for a trial de novo that court had no jurisdiction of the case. State v. Bryant, 280 N.C. 407, 185 S.E.2d 854 (1972).

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

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

A preliminary hearing is not a trial; and the district judge, in his capacity as committing magistrate, passes only on the narrow question of whether probable cause exists and, if so, the fixing of bail if the offense is bailable. State v. Cradle, 281 N.C. 198, 188 S.E.2d 296 (1972).

But is simply an inquiry into whether the accused should be discharged or whether, on the other hand, there is probable cause to submit the State's evidence to the grand jury and seek a bill of indictment to the end that the accused may be placed upon trial. State v. Cradle, 281 N.C. 198, 188 S.E.2d 296 (1972); State v. Bryant, 283 N.C. 227, 195 S.E.2d 509 (1973).

In his capacity as examining magistrate, the district judge is concerned only with determining (1) whether a felonious offense has been committed and (2) whether there is probable cause to charge the prisoner therewith. State v. Bass, 280 N.C. 435, 186 S.E.2d 384 (1972).

When performing his duties under subsection (b) of this section the district judge sits only as an examining magistrate in all felony cases because the trial of felonies is beyond the jurisdiction of the district court. State v. Bass, 280 N.C. 435, 186 S.E.2d 384 (1972); State v. Bryant, 283 N.C. 227, 195 S.E.2d 509 (1973).

And District Judge Does Not Render a Verdict. — The district judge, when sitting as a committing magistrate as authorized by subsection (b) of this section, does not render a verdict; and a discharge of the accused is not an acquittal and does not bar a later indictment. State v. Cradle, 281 N.C. 198, 188 S.E.2d 296 (1972); State v. Bryant, 283 N.C. 227, 195 S.E.2d 509 (1973).

And Court Is without Jurisdiction to Impose Sentence for Felony. — District courts are without jurisdiction to impose sentences in felony cases. State v. Jackson, 14 N.C. App. 75, 187 S.E.2d 470 (1972).

Or to Dismiss First-Degree Murder Charge. — A district judge sitting as a committing magistrate in a preliminary hearing has no authority to dismiss a first-degree murder charge. State v. Bryant, 283 N.C. 227, 195 S.E.2d 509 (1973).

A preliminary hearing is not a necessary step in the prosecution of a person accused of crime, and an accused person is not entitled to a preliminary hearing as a matter of substantive right. State v. Bryant, 283 N.C. 227, 195 S.E.2d 509 (1973).

A preliminary hearing is not an essential prerequisite to the finding of a bill of indictment and it is proper to try the accused upon a bill of indictment without a preliminary hearing. State v. Bryant, 283 N.C. 227, 195 S.E.2d 509 (1973).

Applied in State v. Harrell, 279 N.C. 464, 183 S.E.2d 638 (1971); State v. Harris, 14 N.C. App. 268, 188 S.E.2d 1 (1972); State v. Martin, 16 N.C. App. 609, 192 S.E.2d 596 (1972); State v. Guffey, 283 N.C. 94, 194 S.E.2d 827 (1973); State v. Craig, 21 N.C. App. 51, 203 S.E.2d 401 (1974).

Cited in State v. Flynt, 8 N.C. App. 323, 174 S.E.2d 120 (1970); State v. Godwin, 13 N.C. App. 700, 187 S.E.2d 400 (1972); State v. Caldwell, 21 N.C. App. 723, 205 S.E.2d 322 (1974).

§ 7A-273. Powers of magistrates in criminal actions. — In criminal actions, any magistrate has power:

(1) In misdemeanor cases, other than traffic offenses, in which the maximum punishment which can be adjudged cannot exceed imprisonment for 30 days, or a fine of fifty dollars ($50.00), exclusive of costs, to accept guilty pleas and enter judgment;

(2) In misdemeanor cases involving traffic offenses, to accept written appearances, waivers of trial and pleas of guilty, in accordance with a schedule of offenses and fines promulgated by the chief district judge, and, in such cases, to enter judgment and collect the fine and costs;

(3) To issue arrest warrants valid throughout the State;

(4) To issue search warrants valid throughout the county; and

(5) To grant bail before trial for any noncapital offense;

(6) Notwithstanding the provisions of subdivision (1) of this section, to hear and enter judgment in all worthless check cases brought under G.S. 14-107, when the amount of the check is fifty dollars ($50.00) or less;

(7) To conduct an initial appearance as provided in G.S. 15A-511;

(8) To accept written appearances, waivers of trial and pleas of guilty to violations of G.S. 14-107 and enter such judgments as the chief district judge shall direct, when the amount of the check is three hundred dollars ($300.00) or less, restitution is made, and the warrant does not charge a fourth or subsequent violation of this statute. (1965, c. 310, s. 1; 1969, c. 876, s. 2; c. 1190, s. 25; 1973, c. 6; c. 503, s. 8; c. 1286, s. 7; 1975, c. 626, s. 4.)

Editor's Note. —

The first 1973 amendment, effective Oct. 1, 1973, deleted former subdivision (3), which authorized magistrates to conduct preliminary hearings in misdemeanor cases, and renumbered former subdivisions (4) through (7) as (3) through (6).

The second 1973 amendment, effective Oct. 1,

1973, added "and, in such cases, to enter judgment and collect the fine and costs" at the end of subdivision (2).

The third 1973 amendment, effective Sept. 1, 1975, added subdivision (7).

The 1975 amendment, effective Sept. 1, 1975, added subdivision (8).

Session Laws 1973, c. 1286, s. 29, contains a severability clause.

Session Laws 1973, c. 1286, s. 31, provides: "Sec. 31. This act becomes effective on July 1, 1975, and is applicable to all criminal proceedings begun on and after that date and each provision is applicable to criminal proceedings pending on that date to the extent practicable, except § 12 [§§ 15-176.3 through 15-176.5] of this act which becomes effective on July 1, 1974."

Session Laws 1975, c. 573, amends Session Laws 1973, c. 1286, s. 31, so as to make the 1973 act effective Sept. 1, 1975, rather than July 1, 1975.

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

ARTICLE 23.

Jurisdiction and Procedure Applicable to Children.

§ 7A-277. Purpose. — The purpose of this Article is to provide procedures and resources for children within the juvenile jurisdiction of the district court which are different in purpose and philosophy from the procedures applicable to criminal cases involving adults. These procedures are intended to provide a simple judicial process to provide such protection, treatment, rehabilitation or correction as may be appropriate in relation to the needs of each child subject to juvenile jurisdiction and the best interest of the State. The intent of this Article is to assure that, where possible, the court will arrange for the available community resources to be utilized to strengthen the child's family relationships in order to avoid removal of the child from his own home or community. Therefore, this Article should be interpreted as remedial in its purposes to the end that any child subject to the procedures applicable to children in the district court will be benefitted through the exercise of the court's juvenile jurisdiction. (1969, c. 911, s. 2; 1973, c. 270.)

Editor's Note. — The 1973 amendment substituted "within the juvenile jurisdiction of the district court" for "under the age of sixteen years" in the first sentence, rewrote the second sentence and added the third sentence.

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

State's Interest in Juvenile Proceeding. — The fact that the proceeding is not an ordinary criminal prosecution, but is a juvenile proceeding, does not lessen, but should actually increase, the burden upon the State to see that the child's rights were protected. In re Meyers, 25 N.C. App. 555, 214 S.E.2d 268 (1975).

This Article vests exclusive, original jurisdiction over any case involving a child in the district court judge and provides in detail for procedures in the district court in cases involving children. State v. Miller, 281 N.C. 70, 187 S.E.2d 729 (1972).

District Courts Have Original, Exclusive Jurisdiction of a Person under the Age of Fourteen Charged with a Crime. — See opinion of Attorney General to Mr. Charles B. Winberry, Chief District Prosecutor, Seventh Judicial District, 41 N.C.A.G. 23 (1970).

Delinquency Proceedings May Result in Commitment. — Juvenile proceedings to determine delinquency, though not the same as criminal prosecutions of an adult, may nevertheless result in commitment to an institution in which the juvenile's freedom is curtailed. In re Meyers, 25 N.C. App. 555, 214 S.E.2d 268 (1975).

Applied in In re Burrus, 275 N.C. 517, 169 S.E.2d 879 (1969); In re Martin, 9 N.C. App. 576, 176 S.E.2d 849 (1970); In re Potts, 14 N.C. App. 387, 188 S.E.2d 643 (1972); In re Colson, 14 N.C. App. 643, 188 S.E.2d 682 (1972).

Quoted in State v. Rush, 13 N.C. App. 539, 186 S.E.2d 595 (1972); In re McMillan, 21 N.C. App. 712, 205 S.E.2d 541 (1974).

Cited in In re Roberts, 8 N.C. App. 513, 174 S.E.2d 667 (1970); McKeiver v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971); In re Walker, 282 N.C. 28, 191 S.E.2d 702 (1972).

§ 7A-278. Definitions. — The terms or phrases used in this Article shall be defined as follows, unless the context or subject matter otherwise requires:

(1) "Child" is any person who has not reached his eighteenth birthday and is not married, emancipated, or a member of the armed services of the United States: Provided that, for the purposes of subdivision (2) of this section, "child" is any person who has not reached his sixteenth birthday.

(1973, c. 463; 1975, c. 238.)

Editor's Note. — The 1973 amendment added the second sentence of subdivision (1).

The 1975 amendment rewrote subdivision (1).

As the rest of the section was not changed by the amendments, only the introductory language and subdivision (1) are set out.

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

Amendment Effective July 1, 1977. — Session Laws 1975, c. 929, effective July 1, 1977, will amend subdivision (2) to read as follows:

"(2) 'Delinquent child' includes any child who has committed any criminal offense under State law or under an ordinance of local government, including violations of the motor vehicle laws."

Constitutionality. — This section does not violate the equal protection clause of the United States Constitution by classifying and treating children differently from adults. In re Walker, 282 N.C. 28, 191 S.E.2d 702 (1972).

The provisions of subdivision (5) are not unconstitutionally vague or indefinite. In re Walker, 14 N.C. App. 356, 188 S.E.2d 731 (1972).

Allowing a child to be adjudged undisciplined and placed on probation without benefit of counsel, while at the same time requiring counsel before a child may be adjudged delinquent, does not deny equal protection of the laws to the undisciplined child. In re Walker, 282 N.C. 28, 191 S.E.2d 702 (1972).

Distinction between Undisciplined and Delinquent Children Is Relevant to State's Objective. — In seeking solutions which provide in each case for the protection, treatment, rehabilitation and correction of the child, it is impellingly relevant to the achievement of the State's objective that distinctions be made between undisciplined children on the one hand and delinquent children on the other. In re Walker, 282 N.C. 28, 191 S.E.2d 702 (1972).

District Courts Have Original, Exclusive Jurisdiction of a Person under the Age of Fourteen Charged with a Crime. — See opinion of Attorney General to Mr. Charles B. Winberry, Chief District Prosecutor, Seventh Judicial District, 41 N.C.A.G. 23 (1970).

District court had no right to assume custody jurisdiction of minor children upon its finding that they were "neglected" children to the exclusion of the district court which had previously acquired custody jurisdiction in a divorce and custody proceeding of the children's parents. In re Greer, 26 N.C. App. 106, 215 S.E.2d 404 (1975).

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

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

Evidence Sufficient to Convict of Crime Is Sufficient to Permit Finding of Delinquency. — Where there is sufficient evidence to convict the accused of the crime alleged in the petition, then there is sufficient evidence to permit a finding that the accused is a delinquent child. State v. Rush, 13 N.C. App. 539, 186 S.E.2d 595 (1972).

Applied in In re Dunston, 12 N.C. App. 33, 182 S.E.2d 9 (1971); In re Harper, 13 N.C. App. 330, 185 S.E.2d 437 (1971); In re Potts, 14 N.C. App. 387, 188 S.E.2d 643 (1972); In re Colson, 14 N.C. App. 643, 188 S.E.2d 682 (1972); In re Dowell, 17 N.C. App. 134, 193 S.E.2d 302 (1972); In re Stanley, 17 N.C. App. 370, 194 S.E.2d 219 (1973); State v. Bridges, 19 N.C. App. 567, 199 S.E.2d 477 (1973); In re McMillan, 21 N.C. App. 712, 205 S.E.2d 541 (1974); In re Meyers, 25 N.C. App. 555, 214 S.E.2d 268 (1975).

Cited in McKeiver v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971); In re Jones, 279 N.C. 616, 184 S.E.2d 267 (1971); State v. Worley, 13 N.C. App. 198, 185 S.E.2d 270

(1971); In re Brown, 21 N.C. App. 227, 203 S.E.2d 418 (1974); Forsyth County Dep't of Social Servs. v. Roberts, 22 N.C. App. 658, 207 S.E.2d 368 (1974); In re Simmons, 24 N.C. App. 28, 210 S.E.2d 84 (1974); In re Smith, 24 N.C. App. 321, 210 S.E.2d 453 (1974).

§ 7A-279. Juvenile jurisdiction. — The court shall have exclusive, original jurisdiction over any case involving a child who resides in or is found in the district and who is alleged to be delinquent, undisciplined, dependent or neglected, or who comes within the provisions of the Interstate Compact on Juveniles, except as otherwise provided. This jurisdiction shall be exercised solely by the district judge. The court shall also have jurisdiction to conduct a juvenile hearing to determine whether a child under aftercare supervision of a court counselor in the district has violated the terms of the conditional release under which such child was released from an institution or training school or other youth services program by the Department of Human Resources. (1965, c. 310, s. 1; 1969, c. 911, s. 2; 1975, c. 742, s. 2.)

Editor's Note. — The 1975 amendment, effective July 1, 1975, added the last sentence.

Venue of District Courts in Juvenile Cases. — See opinion of Attorney General to Mrs. Helen S. Cunningham, Chief Counselor, Twenty-Seventh Judicial District, 40 N.C.A.G. 669 (1970).

§ 7A-280. Felony cases.

Constitutionality. — This section has been held to be constitutional. In re Smith, 24 N.C. App. 321, 210 S.E.2d 453 (1974).

This section is not a penal statute which either forbids or requires the doing of an act to constitute a criminal offense. In re Bullard, 22 N.C. App. 245, 206 S.E.2d 305 (1974).

It Is Sufficiently Explicit to Meet Constitutional Requirements. — This section sets out a method of procedure and is sufficiently explicit to meet constitutional requirements. In re Bullard, 22 N.C. App. 245, 206 S.E.2d 305 (1974).

This section does not place anyone in the position of being unable to determine whether his conduct is against the law. In re Bullard, 22 N.C. App. 245, 206 S.E.2d 305 (1974).

Juvenile Is Not Placed in Jeopardy by Adjudicatory and Dispositional Hearings. — Since there has been only a determination of probable cause, and not an adjudication of guilt, the juveniles have not yet been placed in jeopardy as a result of the adjudicatory hearing and the dispositional hearing in the district court before the cases' transfer to the Supreme Court under this section. In re Bullard, 22 N.C. App. 245, 206 S.E.2d 305 (1974).

Separate Evidentiary Hearing upon Cause for Transfer Not Mandated. — While circumstances may sometimes make it more appropriate for the court to conduct a separate evidentiary hearing upon the cause for transfer of a juvenile charged with a felony to the superior court, this section does not mandate a separate hearing. In re Smith, 24 N.C. App. 321, 210 S.E.2d 453 (1974).

Detailed Findings of Fact Are Not Required. — The North Carolina statutes relating to juveniles do not require that a determination of probable cause be supported by detailed findings of fact. In re Bullard, 22 N.C. App. 245, 206 S.E.2d 305 (1974).

Substantial Compliance with Section. — Where the district court held a preliminary hearing, determined whether there was probable cause to believe the juveniles guilty, and transferred the case to the superior court, in substance, though not in form, the court complied with the requirements of this section. In re Bullard, 22 N.C. App. 245, 206 S.E.2d 305 (1974).

Venue of District Courts in Juvenile Cases. — See opinion of Attorney General to Mrs. Helen S. Cunningham, Chief Counselor, Twenty-Seventh Judicial District, 40 N.C.A.G. 669 (1970).

Stated in State v. Bridges, 19 N.C. App. 567, 199 S.E.2d 477 (1973).

Cited in In re Owens, 22 N.C. App. 313, 206 S.E.2d 342 (1974).

§ 7A-281. Petition. — Any person having knowledge or information that a case has arisen which invokes the juvenile jurisdiction established by this Article may file a verified petition with the clerk of superior court. The petition shall contain the name, age and address of the child, the name and last known address of his parents or guardian or custodian, and shall allege the facts which invoke the juvenile jurisdiction of the court.

When the office of the clerk of superior court is closed, a magistrate or other court official or officials may be authorized by the chief judge of the district court to issue juvenile petitions when requested by a juvenile probation officer, a representative of the county department of social services or a law-enforcement officer. Such authority is limited to emergency situations such as cases where a petition is required in order to detain a child after hours. Any juvenile petition so issued shall be delivered to the office of the clerk of superior court for customary processing as soon as said office is open for business.

After a petition is filed, any judge exercising juvenile jurisdiction may arrange for evaluation of juvenile cases through the county director of social services or the chief family counselor or such other personnel as may be available to the court. The purpose of this procedure is to use available community resources for the diagnosis or treatment or protection of a child in cases where it is in the best interest of the child or the community to adjust the matter without a formal hearing. (1919, c. 97, s. 5; C. S., s. 5043; 1969, c. 911, s. 2; 1973, c. 269.)

Editor's Note. — The 1973 amendment added the second paragraph.

Applied in State v. Rush, 13 N.C. App. 539, 186 S.E.2d 595 (1972); In re Colson, 14 N.C. App. 643, 188 S.E.2d 682 (1972).

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

§ 7A-283. Service of summons and petition.

This section is not the procedure for service of process in proceedings to terminate parental rights under § 7A-288 because § 7A-288 expressly provides for the procedures to be used. In re Phillips, 18 N.C. App. 65, 196 S.E.2d 59 (1973).

Trial Court Is without Jurisdiction Where No Notice Was Served. — A trial court did not have jurisdiction to enter orders in a juvenile delinquency proceeding where no summons, petition or other notice was ever served on the juvenile, her parents, guardian or custodian prior to any of the hearings. In re McAllister, 14 N.C. App. 614, 188 S.E.2d 723 (1972).

Failure of Record to Show Time and Manner of Service. — Failure of a record of a juvenile delinquency proceeding to show the exact time and manner of service of the summons and petition upon the juvenile and his parents was not fatal where the record affirmatively shows that the juvenile and his mother were in fact accorded sufficient notice of the hearing at which he was adjudicated delinquent to provide adequate opportunity to prepare, that at least seven days prior to the hearing he had been represented by privately employed counsel, and that he was represented by such counsel at the hearing, which had already been once continued. In re Collins, 12 N.C. App. 142, 182 S.E.2d 662 (1971).

§ 7A-284. Immediate custody of a child.

Section Is Constitutional. — Considering the interest and loss experienced by the parent under this section when compared to the possible consequences and interests of the child, and considering the Supreme Court's statements on the need for flexibility in establishing due process procedures and the cases where exceptions to the usual due process procedures have been approved, this section is "constitutionally defensible" and not in violation of the due process clause of the Fourteenth Amendment. Newton v. Burgin, 363 F. Supp. 782 (W.D.N.C. 1973), aff'd, 414 U.S. 1139, 94 S. Ct. 889, 39 L. Ed. 2d 96 (1974).

Control and custody of a child by its parent is a constitutionally protected right. Newton v.

Burgin, 363 F. Supp. 782 (W.D.N.C. 1973), aff'd, 414 U.S. 1139, 94 S. Ct. 889, 39 L. Ed. 2d 96 (1974).

Public Interest in Welfare of Children. — The single fact that any citizen, as opposed to a government official, can initiate a juvenile petition should not outweigh the strong State and public interest in prompt attention to the welfare of its children. Newton v. Burgin, 363 F. Supp. 782 (W.D.N.C. 1973), aff'd, 414 U.S. 1139, 94 S. Ct. 889, 39 L. Ed. 2d 96 (1974).

Applied in State v. Rush, 13 N.C. App. 539, 186 S.E.2d 595 (1972).

§ 7A-285. Juvenile hearing. — Juvenile hearings shall be held in each county in the district at such times and places as the chief district judge shall designate. The general public may be excluded from any juvenile hearing in the discretion of the judge. Reporting of juvenile cases shall be as provided by G.S. 7A-198 for reporting of civil trials.

The juvenile hearing shall be a simple judicial process designed to adjudicate the existence or nonexistence of any of the conditions defined by G.S. 7A-278(2) through (5) which have been alleged to exist, and to make an appropriate disposition to achieve the purposes of this Article. In the adjudication part of the hearing, the judge shall find the facts and shall protect the rights of the child and his parents in order to assure due process of law, including the right to written notice of the facts alleged in the petition, the right to counsel, the right to confront and cross-examine witnesses, and the privilege against self-incrimination. In cases where the petition alleges that a child is delinquent or undisciplined and where the child may be committed to a State institution, the child shall have a right to assigned counsel as provided by law in cases of indigency.

The court may continue any case from time to time to allow additional factual evidence, social information or other information needed in the best interest of the child. If the court finds that the conditions alleged do not exist, or that the child is not in need of the care, protection or discipline of the State, the petition shall be dismissed.

At the conclusion of the adjudicatory part of the hearing, the court may proceed to the disposition part of the hearing, or the court may continue the case for disposition after the juvenile probation officer or family counselor or other personnel available to the court has secured such social, medical, psychiatric, psychological or other information as may be needed for the court to develop a disposition related to the needs of the child or in the best interest of the State. The disposition part of the hearing may be informal, and the court may consider written reports or other evidence concerning the needs of the child.

The child or his parents, guardian or custodian shall have an opportunity to present evidence if they desire to do so, or they may advise the court concerning the disposition which they believe to be in the best interest of the child.

In all cases, the court order shall be in writing and shall contain appropriate findings of fact and conclusions of law. In any juvenile hearing dealing with the revocation of conditional release, the court shall protect the due process rights of the child which shall include the same rights guaranteed in adjudication of delinquency where the child could lose his freedom. (1919, c. 97, s. 9; C. S., s. 5047; 1929, c. 84; 1957, c. 100, s. 1; 1963, c. 631; 1969, c. 911, s. 2; 1975, c. 742, s. 3.)

Editor's Note. — The 1975 amendment, effective July 1, 1975, added the last sentence.

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

This section does not violate the equal protection clause of the United States Constitution by classifying and treating children differently from adults. In re Walker, 282 N.C. 28, 191 S.E.2d 702 (1972).

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

But Proceedings Are Criminal for Fifth Amendment Purposes. — Juvenile proceedings must be regarded as "criminal" for Fifth

Amendment purposes of the privilege against self-incrimination. State v. Rush, 13 N.C. App. 539, 186 S.E.2d 595 (1972).

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

Though juvenile proceedings are not criminal prosecutions and a finding of delinquency in a juvenile hearing is not synonymous with the conviction of a crime, a juvenile is entitled to certain constitutional safeguards and fairness. State v. Rush, 13 N.C. App. 539, 186 S.E.2d 595 (1972).

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

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

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

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

Requirements of Equal Protection. — In a procedural context, as in this section, the equal protection clause of the United States Constitution requires no more than the due process clause requires. In re Walker, 282 N.C. 28, 191 S.E.2d 702 (1972).

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

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

Counsel is not constitutionally required at the hearing on an undisciplined child petition. In re Walker, 282 N.C. 28, 191 S.E.2d 702 (1972).

Allowing a child to be adjudged undisciplined and placed on probation without benefit of counsel, while at the same time requiring counsel before a child may be adjudged delinquent, does not deny equal protection of the laws to the undisciplined child. In re Walker, 282 N.C. 28, 191 S.E.2d 702 (1972).

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

The fact that a mother testified that she knew that she could have appeared with counsel at a juvenile hearing, is not a waiver of the right to counsel which she and her juvenile son had. They had a right expressly to be advised that they might retain counsel and to be confronted with the need for specific consideration of whether they did or did not choose to waive the right. If they were unable to afford to employ counsel, they were entitled in view of the seriousness of the charge and the potential commitment, to appointed counsel, unless they chose waiver. The knowledge that she could employ counsel was not an intentional relinquishment or abandonment of a fully-known right. In re Garcia, 9 N.C. App. 691, 177 S.E.2d 461 (1970).

Adjudication of delinquency must be set aside where the record shows only that the parties know of their right to counsel and of the child's right, if indigent, to assigned counsel, but the record fails to show that the juvenile's parents were advised of their right, if indigent, to appointment of counsel or that they waived that right. In re Stanley, 17 N.C. App. 370, 194 S.E.2d 219 (1973).

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

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

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

This section makes it a discretionary matter with the trial judge whether the general public (which includes newspaper reporters) is excluded from a juvenile hearing. In re Potts, 14 N.C. App. 387, 188 S.E.2d 643 (1972).

Trial Judge May Question Witnesses. — The trial judge in a juvenile delinquency proceeding may question the witnesses to elicit relevant testimony and to aid in arriving at the truth. State v. Rush, 13 N.C. App. 539, 186 S.E.2d 595 (1972).

The informal procedure contemplated by this section allows the questioning of witnesses by the trial judge to elicit relevant testimony and to aid in arriving at the truth. In re Potts, 14 N.C. App. 387, 188 S.E.2d 643 (1972).

And May Give Opinion on Evidence. — The provisions of § 1-180 prohibiting a court from giving an opinion on the evidence do not apply in a juvenile delinquency proceeding where no jury is present. State v. Rush, 13 N.C. App. 539, 186 S.E.2d 595 (1972).

The failure of the trial judge to state that he finds the facts "beyond a reasonable doubt" is not fatal if the evidence is sufficient to support his findings by that quantum of proof, but the better practice dictates that the judge's order recite affirmatively that the findings are made beyond a reasonable doubt. In re Walker, 282 N.C. 28, 191 S.E.2d 702 (1972).

Quoted in In re Meyers, 25 N.C. App. 555, 214 S.E.2d 268 (1975).

Cited in In re Bullard, 22 N.C. App. 245, 206 S.E.2d 305 (1974).

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

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

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

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

The following alternatives for disposition shall be available to any judge exercising juvenile jurisdiction, and the judge may combine any two of the

applicable alternatives when he finds such disposition to be in the best interest of the child:

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

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

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

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

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

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

(3) In the case of any child who is alleged to be delinquent or undisciplined and where the court finds it necessary that such child be detained in secure custody for the protection of the community or in the best interest of the child before or after a hearing on the merits of the case, the court may order that such child be detained in a juvenile detention home as provided in G.S. 110-24, or if no juvenile detention home is available, in a separate section of a local jail which meets the requirements of G.S. 110-24, provided the court shall notify the parent, guardian or custodian of the child of such detention. In order to provide authority for approval of detention care when the district court is not in session, the chief district judge or the district judge having primary responsibility for hearing juvenile cases in the district may delegate the court's authority to detain by administrative order which shall be filed in the office of the clerk of superior court. Such administrative order shall specify which judicial officials shall be contacted for approval of detention care in the following order: any available district judge; the chief juvenile probation officer or any juvenile probation officer; or the clerk or assistant clerk of superior court. No child shall be held in any juvenile detention home or jail for more than five calendar days without a hearing to determine the need for continued detention under the

special procedures established by this Article. If the judge orders that the child continue in the detention home or jail after such a hearing to determine the need for continued detention, the court order shall be in writing with appropriate findings of fact.

(4) In the case of any child who is delinquent or undisciplined, the court shall consider the following summary of State policy in relation to such child in order to design an appropriate disposition to meet the needs of the child and to achieve the objectives of the State in exercising these two categories of juvenile jurisdiction: The initial approach should involve working with the child in his own home so that the appropriate primary resources (such as the parents, school and other community services) may be involved in child care, supervision and treatment according to the needs of the child. Thus, the court should arrange for appropriate community-level services to be provided to the child and/or his family in order to strengthen his own home, such as juvenile probation services, mental health services, educational services, social services and others as may be appropriate. In cases where it is necessary to place a delinquent child outside his own home, first consideration should be given to residential resources in the child's own community, such as a relative's home, a foster home, small group homes, halfway houses, group child care, and others as may be available. A child should not be committed to training school or to any other institution solely for unlawful absence from school; such a child should generally be helped through community-level resources. A commitment to training school or to any State institution is generally appropriate only for a child over 10 years of age whose offense would be a crime if committed by an adult and where the child's behavior constitutes some threat to the safety of persons or property in the community so that the child needs to be removed from the community for the protection of the community. After considering these policy objectives, the court may:

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

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

c. Excuse the child from compliance with the compulsory school attendance law, provided the court finds that suitable alternative plans can be arranged by the family or through other community resources for one of the following: an education related to the needs or abilities of the child, such as (but not limited to) vocational education or special education; a suitable plan of supervision or placement; or some other plan that the court finds to be in the best interest of the child.

(5) In the case of a child who is delinquent, the court may commit the child to the Department of Correction, for placement in one of the residential programs operated by the Department, provided the court finds that such child meets each of the following four criteria for commitment to an institution and supports such finding with appropriate findings of fact in the order of commitment as follows:

a. The child has not or would not adjust in his own home on probation or while other services are being provided;

b. Community-based residential care has already been utilized or would not be successful or is not available;

c. The child's behavior constitutes some threat to persons or property in the community or to the child's own safety or personal welfare.

d. If the child is less than 10 years of age or his offense would not be a crime if committed by an adult, the court must find that all community-level alternatives for services and residential care have been exhausted.

Said commitment shall be for a definite term or an indefinite term, not to extend beyond the eighteenth birthday of the child, as the Department or its administrative personnel may find to be in the best interest of the child. The Department, or its administrative personnel, shall have final authority to determine when any child who has been admitted to any program operated by the Department has sufficiently benefited from the program as to be ready for release. If the Department finds that any child committed to its care is not suitable for any program operated by the Department, the Department shall have the right to make a motion in the cause so that the court may enter an alternative disposition.

(6) In any case, the court may order that the child be examined by a physician, psychiatrist, psychologist or other professional person as may be needed for the court to determine the needs of the child. If the court finds the child to be in need of medical, surgical, psychiatric, psychological or other treatment, the court may allow the parents or other responsible persons to arrange for such care. If the parents decline or are unable to make such arrangements, the court may order the needed treatment, surgery or other needed care, and the court may order the parents or other responsible parties to pay the cost of such care, or if the court finds the parents are unable to pay the cost of such care, such cost shall be a charge upon the county when approved by the court. If the court believes, or if there is evidence presented to the effect that the child is mentally ill or is mentally retarded the court shall refer the child to the area mental health director or local mental health director for appropriate action. In no case will a child be committed directly to a State hospital or mental retardation center. The area mental health director or local mental health director shall be responsible for arranging an interdisciplinary evaluation of the child and mobilizing resources to meet the child's needs. If institutionalization is determined to be the best service for the child, then admission shall be with the voluntary consent of the parent or guardian; provided, that the consent of the parent or guardian shall not be required in those cases wherein the alternative to admission to a State hospital or mental retardation center is the commitment of the child to a juvenile corrections facility.

(7) In any case where there is no parent to appear in a hearing with the child or where the court finds it would be in the best interest of the child, the court may appoint a guardian of the person for the child, who shall operate under the supervision of the court with or without bond, and who shall file only such reports as the court shall require. Such guardian of the person shall have the care, custody and control of the child or may arrange a suitable placement for the child, and may represent the child in legal actions before any court. Such guardian of the person shall also have authority to consent to certain actions on the part of the child in place of the parents, including but not limited to marriage, enlisting in the armed forces, major surgery, or such other actions as the court shall designate where parental consent is required.

The authority of the guardian of the person shall continue for whatever period of time the court shall designate during the minority of the child. (1919, c. 97, s. 9; C. S., s. 5047; 1929, c. 84; 1957, c. 100, s. 1; 1963, c. 631; 1969, c. 911, s. 2; 1971, c. 432, ss. 1, 2; c. 967; c. 1180, ss. 1-4; 1973, cc. 674, 1157; c. 1262, s. 10; 1975, c. 19, s. 3.)

Cross Reference. — As to transfer of functions, etc., of the Department of Social Rehabilitation and Control to the Department of Correction, see § 143B-262.

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

The second 1971 amendment added the third paragraph.

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

The first 1973 amendment added the second and third sentences, inserted "calendar" and "to determine the need for continued detention" in the fourth sentence, and substituted "a hearing to determine the need for continued detention" for "hearing" in the fifth sentence, all in subdivision (3), and rewrote subdivisions (4) and (5).

The second 1973 amendment, effective July 1, 1974, rewrote the former last two sentences of subdivision (6) as the present last four sentences of the subdivision.

Pursuant to Session Laws 1973, c. 1262, s. 10, effective July 1, 1974, "Department of Correction" has been substituted for "Office of Youth Development, Department of Social Rehabilitation and Control" in subdivision (5) of this section. Neither the Office of Youth Development nor the Department of Social Rehabilitation and Control is specifically mentioned in the 1973 act, but their functions have devolved upon the Department of Correction.

The 1975 amendment corrected an error in the second 1973 amendatory act by substituting "is" for "in" following "mental retardation center" near the end of the last sentence of subdivision (6).

Judge Not Required to Incorporate Detailed Findings of Fact in Order. — This section gives the trial judge ample tools to make a study in order to dispose of the case to provide such protection, treatment, rehabilitation or correction as may be appropriate, but it is not incumbent upon the trial judge to incorporate detailed findings of fact in this order. In re Steele, 20 N.C. App. 522, 201 S.E.2d 709 (1974).

This section does not violate the equal protection clause of the United States Constitution by classifying and treating children differently from adults. In re Walker, 282 N.C. 28, 191 S.E.2d 702 (1972).

Constitutional Rights of Child. — The question as to the extent to which a child's constitutional rights are impaired by a restraint upon its freedom has arisen many times with reference to statutes authorizing the commitment of dependent, incorrigible, or delinquent children to the custody of some institution, and the decisions appear to warrant the statement, as a general rule, that, where the investigation is into the status and needs of the child, and the institution to which he or she is committed is not of a penal character, such investigation is not one to which the constitutional guaranty of a right to trial by jury extends, nor does the restraint put upon the child amount to a deprivation of liberty within the meaning of the Declaration of Rights, nor is it a punishment for crime. In re Whichard, 8 N.C. App. 154, 174 S.E.2d 281 (1970).

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

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

Articles 4 and 5A, Chapter 122, do not revoke the authority which subdivision (6) of this section vests in a district court judge exercising juvenile jurisdiction to secure placement of a juvenile needing residential care and treatment for mental impairment to an appropriate facility. Opinion of Attorney General to Mr. R. Patterson Webb, Division of Mental Health, Department of Human Resources, 43 N.C.A.G. 163 (1973).

Training schools are established for the training and moral and industrial development

of the delinquent children of the State. In re Whichard, 8 N.C. App. 154, 174 S.E.2d 281 (1970).

Child Found to Be Undisciplined Cannot Be Committed so as to Curtail Freedom. — Under this section no judge exercising juvenile jurisdiction has any authority upon finding the child to be undisciplined to commit such child to the Board of Juvenile Correction for assignment to a State facility in which the juvenile's freedom is curtailed. In re Walker, 282 N.C. 28, 191 S.E.2d 702 (1972), decided prior to the 1973 amendment to this section.

Section Does Not Authorize District Court Judge to Commit Juvenile to Center for Mentally Retarded. — See opinion of Attorney General to Dr. Ann F. Wolfe, Division of Mental Health Services, 44 N.C.A.G. 126 (1974).

Right to Counsel Does Not Attach at Hearing Alleging Child to Be Undisciplined. — Section 7A-451(a)(8) does not afford a child the right to counsel at the hearing on the initial petition alleging him to be an undisciplined child, for under the wording of subdivision (4) of this section that hearing could not result in his commitment to an institution in which his freedom would be curtailed. In re Walker, 282 N.C. 28, 191 S.E.2d 702 (1972), decided prior to the 1973 amendment to this section.

Allowing a child to be adjudged undisciplined and placed on probation without benefit of counsel, while at the same time requiring counsel before a child may be adjudged delinquent, does not deny equal protection of the laws to the undisciplined child. In re Walker, 282 N.C. 28, 191 S.E.2d 702 (1972), decided prior to the 1973 amendment to this section.

"Calendar Days" Includes Saturdays, Sundays and Legal Holidays. — See opinion of Attorney General to Mr. Fred K. Elkins, 43 N.C.A.G. 37 (1973).

Duration of Child Custody by County Social Services Department. — See opinion of Attorney General to Mrs. Margaret H. Coman, 40 N.C.A.G. 311 (1970).

Applied in In re Martin, 9 N.C. App. 576, 176 S.E.2d 849 (1970); In re Jones, 279 N.C. 616, 184 S.E.2d 267 (1971); In re Harper, 13 N.C. App. 330, 185 S.E.2d 437 (1971); In re Potts, 14 N.C. App. 387, 188 S.E.2d 643 (1972).

Cited in In re Bullard, 22 N.C. App. 245, 206 S.E.2d 305 (1974).

§ 7A-286.1. Conditional release revocation hearings. — The district court having jurisdiction over a juvenile on conditional release from a Department of Human Resources institution or agency shall hold a conditional release revocation hearing upon motion for review from the juvenile's court counselor or the Secretary of the Department of Human Resources or his designee. If the district court finds that the juvenile has violated the terms of his conditional release the court may revoke said conditional release or make any other disposition that the court feels to be in the best interest of the child.

With respect to any hearing pursuant to this Article, the juvenile:

(1) Shall have reasonable notice in writing of the nature and content of the allegations in the petition, including notice that the purpose of the hearing is to determine whether the juvenile has violated the terms of his conditional release to the extent that his conditional release should be revoked.

(2) Shall be permitted to be represented by legal counsel at the hearing. If the juvenile shall be found to be indigent, the provisions of G.S. 7A-450 will apply.

(3) Shall have the right to confront and cross-examine any persons who have made allegations against him, unless the court determines that such confrontation would present a substantial present or subsequent danger of harm to such person or persons.

(4) May admit, deny or explain the violation alleged and may present proof, including affidavits or other evidence, in support of his contentions. A record of the proceeding shall be made and preserved in the child's juvenile record. (1975, c. 793.)

§ 7A-287. Juvenile records; adjudication of delinquency not disqualification for public office nor deemed a criminal conviction.

Cross-Examination of Defendant as to Prior Adjudications of Delinquency. — For purposes of impeachment, it is permissible to cross-examine a juvenile defendant with reference to his prior convictions or adjudications of guilt of prior conduct which, if committed by an adult, would have constituted a conviction of crime. State v. Miller, 281 N.C. 70, 187 S.E.2d 729 (1972).

In a criminal case, the rule, that when a defendant takes the stand he may be impeached by cross-examination with respect to previous convictions of crime, applies to every defendant who takes the stand, regardless of his age at the time of his previous conviction. State v. Miller, 281 N.C. 70, 187 S.E.2d 729 (1972).

Whether labeled adjudication as required by this section, or conviction, testimony of defendant relating to a previous violation of the criminal law is admissible for consideration by the jury solely as bearing upon his credibility as a witness. State v. Miller, 281 N.C. 70, 187 S.E.2d 729 (1972).

Quoted in State v. Alexander, 279 N.C. 527, 184 S.E.2d 275 (1971).

§ 7A-288. Termination of parental rights.

This section provides for the custody of, and the termination of parental rights in, neglected children. Browne v. Catawba County Dep't of Social Servs., 22 N.C. App. 476, 206 S.E.2d 792 (1974).

The court is not required to terminate parental rights under any circumstances. Forsyth County Dep't of Social Servs. v. Roberts, 22 N.C. App. 658, 207 S.E.2d 368 (1974).

But Has Discretionary Authority to Do So. — This section gives the court the authority to terminate parental rights in the exercise of its discretion. Forsyth County Dep't of Social Servs. v. Roberts, 22 N.C. App. 658, 207 S.E.2d 368 (1974).

Authority of Court to Proceed with Hearing Where There Is No Personal Service. — Before conducting a hearing to consider any case involving termination of parental rights under this section, where there is no personal service, the court's authority to proceed with the hearing depends upon whether service on respondent is under the procedures established by § 1A-1, Rule 4. In re Phillips, 18 N.C. App. 65, 196 S.E.2d 59 (1973).

Service by Publication under § 7A-283 is Improper under This Section. — Section 7A-283, allowing service by publication when the court finds it impractical to obtain personal service, is not the procedure for service of process in proceedings to terminate parental rights under this section because this section expressly provides for the procedures to be used. In re Phillips, 18 N.C. App. 65, 196 S.E.2d 59 (1973).

A Child May Be Adjudicated Neglected or Dependent and Parental Rights Terminated in a Single Proceeding under This Article. — See opinion of Attorney General to Mrs. Robin Peacock, Division of Social Services, Department of Human Resources, 43 N.C.A.G. 139 (1973).

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

§ 7A-289. Appeals; modification of order after affirmation. — Any child, parent, guardian, custodian or agency who is a party to a proceeding under this Article may appeal from an adjudication or any order of disposition to the Court of Appeals, provided that notice of appeal is given in open court at the time of the hearing or in writing within 10 days after the hearing. Pending disposition of an appeal, the court may enter such temporary order affecting the custody or placement of the child as the court finds to be in the best interest of the child or the best interest of the State. Upon the affirmation of the order of adjudication or disposition of the district court in a juvenile case by the Court of Appeals, or by the Supreme Court in the event of such an appeal, the district court shall have authority to modify or alter its original order of adjudication or disposition as the court finds to be in the best interest of the child to reflect any adjustment made by the child or change in circumstances during the period of time the case on appeal was pending, provided that if such modifying order be entered ex parte, the Court shall give notice to interested parties to show cause, if any there be, within 10 days thereafter, as to why said modifying order

should be vacated or altered. (1919, c. 97, s. 20; C. S., s. 5058; 1949, c. 976; 1969, c. 911, s. 2; 1973, c. 722.)

Editor's Note. — The 1973 amendment added the last sentence.

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

This section is intended to remedy the long-standing practice of indefinite continuations of disposition of juvenile cases. In re Meyers, 22 N.C. App. 11, 205 S.E.2d 569 (1974).

When Appeal Should Be Deferred Pending Order of Disposition. — Where the time lapse between adjudication and order of disposition is short and reasonable and for a specific purpose, the appeal should be deferred until the disposition. In re Meyers, 22 N.C. App. 11, 205 S.E.2d 569 (1974).

When Appeal Should Be Maintained. — Where there has been an adjudication of delinquency, but the order of disposition has been indefinitely delayed, appeal from the adjudication of delinquency should be maintained. In re Meyers, 25 N.C. App. 555, 214 S.E.2d 268 (1975).

ARTICLE 24.

Juvenile Services.

§ 7A-289.1. Purpose. — The purpose of this Article is to provide for a statewide and uniform system of juvenile probation and aftercare which provides adequate and appropriate services to certain children who are found to be within the juvenile jurisdiction of the district court and to authorize an intake process for diversion of selected juvenile offenders from the juvenile justice system. (1973, c. 1339, s. 1.)

Editor's Note. — Session Laws 1973, c. 1339, s. 3, makes the act effective July 1, 1974.

§ 7A-289.2. Definitions. — The terms or phrases used in this Article shall be defined according to the definitions contained in G.S. 7A-278 and as follows, unless the context or subject matter otherwise requires:

(1) "Administrator" is the Administrator for Juvenile Services in the Administrative Office of the Courts who is responsible for planning, organizing and administering a statewide system of juvenile probation and aftercare services as authorized by this Article.

(2) "Aftercare" means the legal status of a child who has been committed by the court to the Department of Correction for placement by said agency in one or more of its institutions or programs and who is being granted conditional release to return to the community as authorized by G.S. 134-17.

(3) "Chief court counselor" is the professional person responsible for administration and supervision of juvenile probation and aftercare in each judicial district under the supervision of the court and the Administrator for Juvenile Services.

(4) "Court counselor" is a professional person responsible for juvenile probation and aftercare services to children on probation or on conditional release from the Office of Youth Development, Department of Social Rehabilitation and Control under the supervision of the chief court counselor.

(5) "Director" is the Director of the Administrative Office of the Courts.

(6) "Division" is the Division of Juvenile Services to administer juvenile probation and aftercare services to juveniles as authorized by this Article.

(7) "Probation" means the legal status of a child who is delinquent or undisciplined and is placed on probation as authorized by G.S. 7A-286(4) under conditions of probation related to the needs of the child as authorized by G.S. 110-22. (1973, c. 1262, s. 10; c. 1339, s. 1.)

Editor's Note. — Pursuant to Session Laws 1973, c. 1262, "Department of Correction" has been substituted for "Office of Youth Development, Department of Social Rehabilitation and Control" in this section as enacted by Session Laws 1973, c. 1339. Chapter 1262 did not expressly refer either to the Office of Youth Development or to the Department of Social Rehabilitation and Control, but their functions have devolved upon the Department of Correction.

§ 7A-289.3. Division of Juvenile Services. — A Division of Juvenile Services is hereby created within the Administrative Office of the Courts to be responsible for administration of a statewide and uniform system of juvenile probation and aftercare services in all judicial districts of the State. The administrative head of the Division shall be the Administrator for Juvenile Services who shall be appointed by the Director. The Administrator shall be responsible for planning, organizing and administering juvenile probation and aftercare services on a statewide basis to the end that juvenile services will be uniform throughout the State and of sufficient quality to meet the needs of the children under supervision. (1973, c. 1339, s. 1.)

§ 7A-289.4. Duties and powers of Administrator. — The Administrator shall have the following powers and duties under the supervision of the Director:

(1) To plan for a statewide program of juvenile probation and aftercare services;

(2) To appoint such personnel within the Administrative Office of the Courts as may be necessary to administer a statewide and uniform system of juvenile probation and aftercare;

(3) To appoint the chief court counselor in each judicial district with the approval of the chief district judge and the Director;

(4) To study the various issues related to qualifications, salary ranges, appointment of personnel on a merit basis (including chief court counselors, court counselors, secretaries and other appropriate personnel) at the State and district levels in order to recommend appropriate policies and procedures governing personnel to the Director who may adopt such personnel policies as he finds to be in the best interest of the juvenile services program;

(5) To develop a statewide plan for staff development and training so that chief court counselors, court counselors and other personnel responsible for juvenile services may be appropriately trained and qualified; such plan may include attendance at appropriate professional meetings and opportunities for educational leave for academic study;

(6) To develop, promulgate and enforce such policies, procedures, rules and regulations as he may find necessary and appropriate to implement a statewide and uniform program of juvenile probation and aftercare services. (1973, c. 1339, s. 1.)

§ 7A-289.5. Duties and powers of chief court counselors. — The chief court counselor in each judicial district who is appointed as provided by this Article shall have the following powers and duties:

(1) To appoint such court counselors, secretaries and other personnel as may be authorized by the Administrative Office of the Courts with the approval of the Administrator in accordance with the personnel policies adopted by the Director.

(2) To supervise and direct the program of juvenile probation and aftercare services within the district under the supervision of the court and the Administrator according to the statewide practices and procedures promulgated by the Administrator.

(3) To provide in-service training for staff as required by the Administrator.

(4) To keep such records and make such reports as may be requested by the Administrator in order to provide statewide data and information about juvenile needs and services. (1973, c. 1339, s. 1.)

§ 7A-289.6. Duties and powers of court counselors. — The court counselors in each district shall have the duties and powers of juvenile probation officers as provided by G.S. 110-23 and as follows:

(1) To conduct a prehearing social study of any child alleged to be delinquent or undisciplined if so instructed by the court, provided that no social study shall be made prior to an adjudication that the child is within the juvenile jurisdiction of the court unless the child and his parent or attorney or guardian or custodian files a written statement with the court counselor declaring the child's intention to admit the allegations contained in the juvenile petition and giving consent to such prehearing social study; when such a prehearing social study has been completed, the court counselor shall prepare a written report for the court summarizing the findings which may be reviewed by the court prior to the juvenile hearing and which shall contain recommendations as to the type of care and/or treatment needed by the child and which shall be in the form developed by the Administrator for such reports.

(2) To assist the court in handling cases where a child alleged or adjudicated delinquent or undisciplined needs detention care prior to the juvenile hearing, or after a hearing to determine the need for detention, or pending admission of the child to an institution or other residential program as authorized by G.S. 7A-286(3).

(3) To bring any child on probation to the attention of the court for review and termination when the child's period of probation is ended as provided by G.S. 110-22; the counselor may also recommend termination of probation prior to the end of the child's period of probation when such a recommendation is merited by the progress and adjustment of the child.

(4) To assist the court as requested in matters related to children within the juvenile jurisdiction of the court as undisciplined, dependent or neglected or within the Interstate Compact on Juveniles. This provision shall not be construed, however, to deprive the Department of Social Services of the functions assigned to it by law in the area of dependent or neglected children. (1973, c. 1339, s. 1.)

§ 7A-289.7. Intake authorized. — The chief court counselor in each judicial district may establish intake services within his office under the supervision of the Administrator. If intake services are established by the chief court counselor, such services shall be organized as follows:

(1) All complaints concerning any child alleged to be within the juvenile jurisdiction of the court as undisciplined or delinquent shall be received by personnel designated by the chief court counselor as responsible for

intake services. The personnel so assigned shall conduct a preliminary inquiry to determine whether it is in the best interest of the child or the State that a juvenile petition be filed. Such preliminary inquiry may be carried on over a period of 15 days after receipt of the complaint, but the inquiry shall be completed within said 15 days. The personnel conducting such inquiry may hold conferences with the child, his family, the school and other appropriate community resources to adjust the case so that filing a petition will not be necessary.

(2) If the intake personnel determine that a petition should be filed, the complainant should be notified and assisted with the filing of a juvenile petition with the clerk of superior court.

(3) If it is determined that a petition should not be filed, the intake personnel shall notify the complainant of this decision and of the complainant's right to have such decision reviewed by a judge of the court. Such intake personnel may refer the case to an appropriate public or private agency with notice to the complainant after which the intake file may be closed, subject to judicial review. (1973, c. 1339, s. 1.)

§§ 7A-289.8 to 7A-289.12: Reserved for future codification purposes.

ARTICLE 24A.

Delinquency Prevention and Youth Services.

§ 7A-289.13. Legislative intent. — The General Assembly hereby declares its intent to reduce the number of children committed by the courts for delinquency to institutions operated by the Division of Youth Development, Department of Human Resources or other State agencies. The primary intent of this Article is to provide a comprehensive plan for the development of community-based alternatives to training school commitment so that "status offenders" (defined by this Article to include "those juveniles guilty of offenses which would not be violations of the law if committed by an adult") may be eliminated from the youth development institutions of this State. Additionally it is the intent of this legislation to provide noninstitutional disposition options in any case before the juvenile court where such disposition is deemed to be in the best interest of the child and the community.

The policy and intent of the General Assembly in delinquency prevention and community-based services can be summarized as follows:

(1) Such programs should be planned and organized at the community level within the State, and such planning efforts should include appropriate representation from local government, local agencies serving families and children (both public and private), local business leaders, citizens with an interest in youth problems, youth representatives, and others as may be appropriate in a particular community. The role of the State should be to provide technical assistance, access to funding, program information, and to assist local leadership in appropriate planning.

(2) When a child is adjudicated to be within the juvenile jurisdiction of the district court such child should be carefully evaluated through the available community-level resources (including mental health, social services, public health and other available medical services, public schools, and others as appropriate) prior to the juvenile hearing dealing with disposition so that the disposition of the court may be made with an understanding of the needs of the child and after consideration of the resources available to meet these needs.

(3) It is contrary to the policy of the State for a court to separate a child from his own family or commit a child to an institution or training school without a careful evaluation of the needs of the child.

(4) The General Assembly finds that State and local government should be responsive to the need for community-based services which would provide a viable alternative to commitment to an institution or training school. The General Assembly intends that State government should be responsive to this need through the Department of Human Resources by helping public and private local groups to plan, develop and fund community-based programs, both residential and nonresidential. It is recognized that such efforts will require the cooperation of several major State departments in addition to Human Resources, such as Public Instruction, Administrative Office of the Courts, and the Governor's Committee on Law and Order.

(5) It is the intent of the General Assembly that the Secretary of the Department of Human Resources in conjunction with the Technical Advisory Committee described in G.S. 143B-207 of this Article develop a funding mechanism that will provide State support for programs that meet the standards as developed under the provisions of this Article. (1975, c. 929.)

§ 7A-289.14. Duties of Secretary of Human Resources. — It shall be the duty of the Secretary of Human Resources to arrange for the appropriate unit or units of the Department of Human Resources to implement this Article as follows:

(1) To designate the appropriate unit of the Department of Human Resources to be responsible for coordination of state-level services in relation to delinquency prevention and youth services so that any citizen may go to one place in State government to receive services or access to services.

(2) To provide staff services to the Technical Advisory Committee on Delinquency Prevention and Youth Services created by this Article;

(3) To arrange appropriate coordination and planning within the child-serving agencies of the Department of Human Resources and promote interdepartmental coordination by regular interaction with the Technical Advisory Committee.

(4) To assist local governments and private service agencies in the development of community-based programs, and to provide information on the availability of potential funding sources and whatever assistance may be requested in making application for needed funding.

(5) To approve yearly program evaluations and to make recommendations to the General Assembly concerning continuation funding that might be supported by that evaluation.

(6) To approve program evaluation standards by which all programs developed under the provisions of this Article may be objectively evaluated.

Such standards as may be developed for the purpose of program evaluation shall be in addition to any current standards as may be applicable under the existing authority of the Social Services Commission and the Department of Human Resources.

Minimum operating standards as well as program evaluation standards as may be needed for new program models designed to fulfill the intent of this Article, may be developed at the discretion of the Secretary either by the Social Services Commission or the Technical Advisory Committee.

(7) To develop in coordination with the Technical Advisory Committee as described in G.S. 143B-207 of this Article a formula for funding on a matching basis community-based services as provided for in this Article. This formula shall be based upon the county's or counties' relative ability to fund community-based programs for juveniles.

Local governments receiving State matching funds for programs under the provisions of this Article must maintain the same overall level of effort that existed at the time of the filing of the county assessment of youth needs with the Department of Human Resources as provided in G.S. 7A-289.16 of this Article. (1975, c. 929.)

§ 7A-289.15. Purchase of care or services from programs meeting State standards. — The Department of Human Resources and any other appropriate State or local agency are hereby authorized to purchase care or services from public or private agencies providing delinquency prevention programs or community-based services, provided the program meets the State standards as authorized by G.S. 7A-289.14. As institutional populations are reduced, the Department of Human Resources may divert State funds appropriated for institutional programs to purchase such services, pursuant to the provisions of the Executive Budget Act.

The Technical Advisory Committee shall prepare an annual report on the progress of the community-based programs of this State which shall include the most current institutional populations of children being served by the various departments of State government which shall include comparative costs of all child-serving agencies. Such report shall be submitted to the Governor, the General Assembly and the various State departments providing services to children. (1975, c. 929.)

§ 7A-289.16. County assessment of youth needs. — The board of county commissioners of each participating county shall conduct or arrange for a study of youth needs in the county, giving particular attention to the need for delinquency prevention programs and community-based services (residential or nonresidential) which would provide an alternative to commitment to training school. The board of county commissioners may delegate the responsibility to any appropriate board or department of county government, or it may contract with an appropriate private agency or group for the study. Adjoining counties may cooperate in conducting such study on a regional basis, utilizing appropriate public or private resources.

The board of county commissioners of any county may request technical assistance from the Secretary of Human Resources in conducting such study. Each participating county shall develop a study plan for submission to the Secretary of Human Resources by January 1, 1976. Each participating county shall file a report of preliminary findings from such study to the Secretary of Human Resources by January 1, 1977, and its full report by January 1, 1978. Each participating county shall plan for a continuing assessment of youth needs in the county or region with annual reports to the Secretary of Human Resources. (1975, c. 929.)

ARTICLE 25.

Jurisdiction and Procedure in Criminal Appeals from District Courts.

§ 7A-290. Appeals from district court in criminal cases; notice; appeal bond. — Any defendant convicted in district court before the magistrate may appeal to the district court for trial de novo before the district court judge. Any defendant convicted in district court before the judge may appeal to the superior court for trial de novo. Notice of appeal may be given orally in open court, or to the clerk in writing within 10 days of entry of judgment. Upon expiration of the 10-day period in which an appeal may be entered, if an appeal has been entered and not withdrawn, the clerk shall transfer the case to the district or superior court docket. The original bail shall stand pending appeal, unless the

judge orders bail denied, increased, or reduced. (1965, c. 310, s. 1; 1967, c. 601, s. 1; 1969, c. 876, s. 3; c. 911, s. 5; c. 1190, s. 26; 1971, c. 377, s. 16.)

Editor's Note. —

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

Opinions of Attorney General. — Mr. Carroll R. Holmes, Attorney at Law, 40 N.C.A.G. 96 (1969). Mr. W.H.S. Burgwyn, Jr., Solicitor, Sixth Judicial District, 40 N.C.A.G. 135 (1969).

Duty of Clerk in Event of Appeal in a Criminal Case. — See opinion of Attorney General to Mrs. Lena M. Leary, Clerk, Chowan County Superior Court, 40 N.C.A.G. 101 (1969).

Defendants are entitled to a trial de novo in the superior court even though their trials in the inferior court were free from error. State v. Spencer, 276 N.C. 535, 173 S.E.2d 765 (1970); State v. Coats, 17 N.C. App. 407, 194 S.E.2d 366 (1973).

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

Purpose of State's de novo procedure is to provide all criminal defendants charged with misdemeanor violations the right to a "speedy trial" in the district court and to offer them an opportunity to learn about the State's case without revealing their own. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

Trial de novo in the superior court is a new trial from beginning to end, on both law and facts, disregarding completely the plea, trial, verdict and judgment below; and the superior court judgment entered upon conviction there is wholly independent of any judgment which was entered in the inferior court. State v. Spencer, 276 N.C. 535, 173 S.E.2d 765 (1970); State v. Coats, 17 N.C. App. 407, 194 S.E.2d 366 (1973).

As If Case Had Been Brought There Originally. — When an appeal of right is taken to the superior court, in contemplation of law it is as if the case had been brought there originally and there had been no previous trial. The judgment appealed from is completely annulled and is not thereafter available for any purpose. State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970); State v. Bryant, 11 N.C. App. 423, 181 S.E.2d 211 (1971); State v. Coats, 17 N.C. App. 407, 194 S.E.2d 366 (1973).

Transcript of District Court Proceedings Not Required. — State's de novo procedure has no requirement that a defendant purchase and provide the superior court with a transcript of the district court proceedings in order to secure full appellate review. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

There is no merit in the argument that a transcript of the district court proceedings is needed for an effective appeal for trial de novo in superior court. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

Nor Is Indigent Entitled to Free Transcript. — There are no constitutional infirmities in the denial of a free transcript of the district court proceedings to an indigent defendant. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

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

In the sound discretion of the superior court judge, the defendant's sentence may be lighter or heavier than that imposed in the district court. State v. Spencer, 276 N.C. 535, 173 S.E.2d 897 (1970).

Upon appeal from an inferior court for a trial de novo in the superior court, the superior court may impose punishment in excess of that imposed in the inferior court provided the punishment imposed does not exceed the statutory maximum. State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970); State v. Spencer, 276 N.C. 535, 173 S.E.2d 765 (1970).

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

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

And Heavier Sentence Is No Violation of Constitutional or Statutory Rights. — The fact that a defendant received a greater sentence in the superior court than he received in a recorder's court is no violation of his constitutional or statutory rights. State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970); State v. Coats, 17 N.C. App. 407, 194 S.E.2d 366 (1973).

The fact that defendants received a greater sentence in the superior court than they received in the district court is no violation of their constitutional rights. State v. Spencer, 276 N.C. 535, 173 S.E.2d 765 (1970).

The United States Supreme Court did not reach the question of whether a more severe sentence imposed after a trial de novo in a superior court was a denial of federal due process, in that by discouragement it impinges upon the State-given appeal since the threshold issue of mootness was improperly disposed of by the United States Court of Appeals. North Carolina v. Rice, 404 U.S. 244, 92 S. Ct. 402, 30 L. Ed. 2d 413 (1971).

But Reasons for Imposing Heavier Sentence Must Affirmatively Appear. — Whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal. State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970).

Validity of Trial without Jury in Inferior Court. — The fact that a right of appeal was given where the defendant was convicted in the lower court without the intervention of a jury has generally been regarded as a sufficient reason, in support of the validity of such trials without a jury in the inferior tribunal, as by appealing the defendant secures his right to a jury trial in the superior court, and therefore cannot justly complain that he has been deprived of his constitutional right. State v. Spencer, 276 N.C. 535, 173 S.E.2d 765 (1970); State v. Coats, 17 N.C. App. 407, 194 S.E.2d 366 (1973).

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

Remand for Clarification of Judgment or Other Proceedings. — Where the appeal has been docketed in the superior court, the judge presiding, at term, has the authority, upon satisfactory cause shown and with the consent of the defendant, to remand the case to the inferior court for clarifying judgment or other proceedings. This would reinstate the case and revest the inferior court with jurisdiction. State v. Bryant, 11 N.C. App. 423, 181 S.E.2d 211 (1971).

Stated in State v. Greenwood, 12 N.C. App. 584, 184 S.E.2d 386 (1971).

Cited in State v. Speights, 280 N.C. 137, 185 S.E.2d 152 (1971); Perry v. Blackledge, 453 F.2d 856 (4th Cir. 1971).

ARTICLE 26.

Additional Powers of District Court Judges and Magistrates.

§ 7A-291. Additional powers of district court judges. — In addition to the jurisdiction and powers assigned in this Chapter, a district court judge has the following powers:

(5) To issue arrest warrants valid throughout the State, and search warrants valid throughout the district of issue; and

(1973, c. 1286, s. 11.)

Editor's Note. —

The 1973 amendment, effective Sept. 1, 1975, deleted "peace and" preceding "search warrants" in subdivision (5).

Session Laws 1973, c. 1286, s. 29, contains a severability clause.

Session Laws 1973, c. 1286, s. 31, provides:

"Sec. 31. This act becomes effective on July 1, 1975, and is applicable to all criminal proceedings begun on and after that date and each provision is applicable to criminal proceedings pending on that date to the extent practicable, except § 12 [§§ 15-176.3 through 15-176.5] of this act which becomes effective on July 1, 1974."

Session Laws 1975, c. 573, amends Session Laws 1973, c. 1286, s. 31, so as to make the 1973 act effective Sept. 1, 1975, rather than July 1, 1975.

As the rest of the section was not changed by the amendment, only the introductory paragraph and subdivision (5) are set out.

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

(1) To administer oaths;
(2) To punish for contempt;
(3) When authorized by the chief district judge, to take depositions and examinations before trial;
(4) To issue subpoenas and capiases valid throughout the county;
(5) To take affidavits for the verification of pleadings;
(6) To issue writs of habeas corpus ad testificandum, as provided in G.S. 17-41;
(7) To assign a year's allowance to the surviving spouse and a child's allowance to the children as provided in Chapter 30, Article 4, of the General Statutes;
(8) To take acknowledgments of instruments, as provided in G.S. 47-1;
(9) To perform the marriage ceremony, as provided in G.S. 51-1;
(10) To take acknowledgment of a written contract or separation agreement between husband and wife, and to make a private examination of the wife, as provided in G.S. 52-6;
(11) Repealed by Session Laws 1973, c. 503, s. 9, effective October 1, 1973.
(12) To assess contribution for damages or for work done on a dam, canal, or ditch, as provided in G.S. 156-15; and
(13) Repealed by Session Laws 1973, c. 503, s. 9, effective October 1, 1973.

(1965, c. 310, s. 1; 1967, c. 691, s. 25; 1971, c. 377, s. 17; 1973, c. 503, s. 9.)

Editor's Note. —

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

The 1973 amendment, effective Oct. 1, 1973, deleted subdivisions (11), authorizing magistrates to conduct proceedings for the valuation of a division fence, and (13), authorizing magistrates to perform any civil, quasi-judicial or ministerial function assigned to the office of justice of the peace.

SUBCHAPTER VI. REVENUES AND EXPENSES OF THE JUDICIAL DEPARTMENT.

ARTICLE 27.

Expenses of the Judicial Department.

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

(1) Salaries, departmental expense, printing and other costs of the appellate division;
(2) Salaries and expenses of superior court judges, solicitors, assistant solicitors, public defenders, and assistant public defenders, and fees and expenses of counsel assigned to represent indigents under the provisions of Subchapter IX of this Chapter;
(3) Salaries, travel expenses, departmental expense, printing and other costs of the Administrative Office of the Courts;

(4) Salaries and travel expenses of district judges, magistrates, and family court counselors;
(5) Salaries and travel expenses of clerks of superior court, their assistants, deputies, and other employees, and the expenses of their offices, including supplies and materials, postage, telephone and telegraph, bonds and insurance, equipment, and other necessary items;
(6) Fees and travel expenses of jurors, and of witnesses required to be paid by the State;
(7) Compensation and allowances of court reporters;
(8) Briefs for counsel and transcripts and other records for adequate appellate review when an appeal is taken by an indigent person;
(9) Transcripts of preliminary hearings in indigency cases and, in cases in which the defendant pays for a transcript of the preliminary hearing, a copy for the solicitor;
(10) Transcript of the evidence and trial court charge furnished the solicitor when a criminal action is appealed to the appellate division;
(11) All other expenses arising out of the operations of the Judicial Department which by law are made the responsibility of the State; and
(12) Operating expenses of the Judicial Council and the Judicial Standards Commission.

(b) Repealed by Session Laws 1971, c. 377, s. 32. (1965, c. 310, s. 1; 1967, c. 108, s. 9; c. 1049, s. 5; 1969, c. 1013, s. 2; 1971, c. 377, ss. 18, 32; 1973, c. 503, ss. 10, 11.)

Editor's Note. —

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

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

The 1973 amendment, effective Oct. 1, 1973, added to subdivision (9) of subsection (a) the language beginning "and, in cases in which the defendant pays" and added subdivision (12) of subsection (a).

Application of Subchapter. — In cases which were instituted after the establishment of the district court, the costs, including a "facilities fee," shall be assessed according to §§ 7A-300 through 7A-317.1. Blackwell v. Montague, 15 N.C. App. 564, 190 S.E.2d 384 (1972).

§ 7A-302. Counties and municipalities responsible for physical facilities.

Cited in Blackwell v. Montague, 15 N.C. App. 564, 190 S.E.2d 384 (1972).

ARTICLE 28.

Uniform Costs and Fees in the Trial Divisions.

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

(1) For each arrest or personal service of criminal process, including citations and subpoenas, the sum of two dollars ($2.00), to be remitted to the county wherein the arrest was made or process was served, except that in those cases in which the arrest was made or process

served by a law-enforcement officer employed by a municipality, the fee shall be paid to the municipality employing the officer.

(2) For the use of the courtroom and related judicial facilities, the sum of three dollars ($3.00) in the district court, including cases before a magistrate, and the sum of fifteen dollars ($15.00) in superior court, to be remitted to the county in which the judgment is rendered. In all cases where the judgment is rendered in facilities provided by a municipality, the facilities fee shall be paid to the municipality. Funds derived from the facilities fees shall be used exclusively by the county or municipality for providing, maintaining, and constructing adequate courtroom and related judicial facilities, including: Adequate space and furniture for judges, district attorneys, public defenders, magistrates, juries, and other court related personnel; office space, furniture and vaults for the clerk; jail and juvenile detention facilities; free parking for jurors; and a law library (including books) if one has heretofore been established or if the governing body hereafter decides to establish one. In the event the funds derived from the facilities fees exceed what is needed for these purposes, the county or municipality may, with the approval of the Administrative Officer of the Courts as to the amount, use any or all of the excess to retire outstanding indebtedness incurred in the construction of the facilities, or to reimburse the county or municipality for funds expended in constructing or renovating the facilities (without incurring any indebtedness) within a period of two years before or after the date a district court is established in such county, or to supplement the operations of the General Court of Justice in the county.

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

(4) For support of the General Court of Justice, the sum of seventeen dollars ($17.00) in the district court, including cases before a magistrate, and the sum of twenty dollars ($20.00) in the superior court, to be remitted to the State Treasurer.

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

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

(1967, c. 1049, s. 5; 1971, c. 377, ss. 19-21; c. 1129; 1973, c. 47, s. 2; 1975, c. 558, ss. 1, 2.)

Cross Reference. — See note to § 6-1.

Editor's Note. —

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

The first 1971 amendment, effective Oct. 1, 1971, inserted "and collected" in two places in the opening paragraph of subsection (a), added

the second and third sentences of subsection (b) and substituted "jail fees and cost of necessary trial transcripts" for "and jail fees" in subsection (c).

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

The 1973 amendment substituted "district attorneys" for "solicitors" in subdivision (2) of subsection (a).

The 1975 amendment, effective July 1, 1975, substituted "three dollars ($3.00)" for "two dollars ($2.00)" near the beginning, and inserted "free parking for jurors" near the middle, of subdivision (2) of subsection (a), and substituted "seventeen dollars ($17.00)" for "nine dollars ($9.00)" in subdivision (4) of subsection (a).

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

"Facilities Fee". — In cases which were instituted after the establishment of the district court, the costs, including a "facilities fee," shall be assessed according to §§ 7A-300 through 7A-317.1. The "facilities fee" assessed in this classification of cases shall be disbursed monthly by the clerk of superior court to the county or municipality providing the facilities. Blackwell v. Montague, 15 N.C. App. 564, 190 S.E.2d 384 (1972).

§ 7A-305. Costs in civil actions. — (a) In every civil action in the superior or district court the following costs shall be assessed:

(1) For the use of courtroom and related judicial facilities, the sum of three dollars ($3.00) in cases heard before a magistrate, and the sum of six dollars ($6.00) in district and superior court, to be remitted to the county in which the judgment is rendered, except that in all cases in which the judgment is rendered in facilities provided by a municipality, the facilities fee shall be paid to the municipality. Funds derived from the facilities fees shall be used in the same manner, for the same purposes, and subject to the same restrictions, as facilities fees assessed in criminal actions.

(2) For support of the General Court of Justice, the sum of twenty dollars ($20.00) in the superior court, and the sum of ten dollars ($10.00) in the district court, except that in the district court if the amount sued for does not exceed five hundred dollars ($500.00), excluding interest, the sum shall be five dollars ($5.00). Sums collected under this subsection shall be remitted to the State Treasurer.

(b) On appeal, costs are cumulative, and when cases heard before a magistrate are appealed to the district court, the General Court of Justice fee and the facilities fee applicable in the district court shall be added to the fees assessed before the magistrate. When an order of the clerk of the superior court is appealed to either the district court or the superior court, no additional General Court of Justice fee or facilities fee shall be assessed.

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

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

(1) Witness fees, as provided by law.

(2) Jail fees, as provided by law.

(3) Counsel fees, as provided by law.

(4) Expense of service of process by certified mail and by publication.

(5) Costs on appeal to the superior court, or to the appellate division, as the case may be, of the original transcript of testimony, if any, insofar as essential to the appeal.

(6) Fees for personal service of civil process and other sheriff's fees, as provided by law.

(7) Fees of guardians ad litem, referees, receivers, commissioners, surveyors, arbitrators, appraisers, and other similar court appointees, as provided by law. The fee of such appointees shall include reasonable reimbursement for stenographic assistance, when necessary.

(8) Fees of interpreters, when authorized and approved by the court.

(9) Premiums for surety bonds for prosecution, as authorized by G.S. 1-109.

(e) Nothing in this section shall affect the liability of the respective parties for costs as provided by law. (1965, c. 310, s. 1; 1967, c. 108, s. 10; c. 691, s. 30; 1971, c. 377, ss. 23, 24; c. 1181, s. 1; 1973, c. 503, ss. 12-14; c. 1267, s. 3; 1975, c. 558, s. 3.)

Editor's Note. —

The first 1971 amendment, effective Oct. 1, 1971, added the second sentence of subsection (c) and added subdivision (9) of subsection (d).

The second 1971 amendment, effective Oct. 1, 1971, deleted "next friends" preceding "referees" in subsection (d)(7).

The first 1973 amendment, effective Oct. 1, 1973, rewrote the first sentence of subdivision (a) (2), deleted, at the end of the first sentence of subsection (b), a provision as to the General Court of Justice fee and the facilities fee when cases in the district court are appealed to the superior court and added "and by publication" at the end of subdivision (d) (4).

The second 1973 amendment, effective July 1, 1974, substituted "five hundred dollars ($500.00)" for "three hundred dollars ($300.00)" in subdivision (2) of subsection (a).

The 1975 amendment, effective July 1, 1975, substituted "three dollars ($3.00)" for "two dollars ($2.00)" and "six dollars ($6.00)" for "five dollars ($5.00)" near the beginning of subdivision (1) of subsection (a).

The Rules of Civil Procedure are found in § 1A-1.

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

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

The Rules of Civil Procedure are found in § 1A-1.

§ 7A-306. Costs in special proceedings.

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

(1) Witness fees, as provided by law.

(2) Counsel fees, as provided by law.

(3) Costs on appeal, of the original transcript of testimony, if any, insofar as essential to the appeal.

(4) Fees for personal service of civil process, and other sheriff's fees, and for service by publication, as provided by law.

(5) Fees of guardians ad litem, referees, receivers, commissioners, surveyors, arbitrators, appraisers, and other similar court appointees, as provided by law. The fees of such appointees shall include reasonable reimbursement for stenographic assistance, when necessary.

(6) Fees for a special jury, if any, at two dollars ($2.00) per special juror for each proceeding. If a special proceeding lasts more than one-half day, the same daily compensation as regular jurors.

(1971, c. 377, s. 25; c. 1181, s. 1; 1973, c. 503, s. 15.)

Editor's Note. —

The first 1971 amendment, effective Oct. 1, 1971, added the second sentence of subdivision (6) of subsection (c).

The second 1971 amendment, effective Oct. 1, 1971, deleted "next friends" preceding "referees" in subsection (c)(5).

The 1973 amendment, effective Oct. 1, 1973, inserted "and for service by publication" in subdivision (4) of subsection (c).

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

§ 7A-307. Costs in administration of estates. — (a) In the administration of the estates of decedents, minors, incompetents, of missing persons, and of trusts under wills and under powers of attorney, the following costs shall be assessed:

(1) For the use of courtroom and related judicial facilities, the sum of two dollars ($2.00), to be remitted to the county. Funds derived from the facilities fees shall be used in the same manner, for the same purposes, and subject to the same restrictions, as facilities fees assessed in criminal actions.

(2) For support of the General Court of Justice, the sum of eight dollars ($8.00), plus an additional ten cents (10¢) per one hundred dollars ($100.00), or major fraction thereof, of the gross estate. Gross estate shall include the fair market value of all personalty when received, and all proceeds from the sale of realty coming into the hands of the fiduciary, but shall not include the value of realty. This fee shall be computed from the information reported in the inventory and shall be paid when the inventory is filed with the clerk. If additional gross estate, including income, comes into the hands of the fiduciary after the filing of the inventory, the fee for such additional value shall be assessed and paid upon the filing of any account or report disclosing such additional value. For each filing the minimum fee shall be one dollar ($1.00). In no case shall the cumulative fee exceed two thousand dollars ($2,000). Sums collected under this subsection shall be remitted to the State Treasurer.

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

(1) Witness fees, as provided by law.

(2) Counsel fees, as provided by law.

(3) Costs on appeal, of the original transcript of testimony, if any, insofar as essential to the appeal.

(4) Fees for personal service of civil process, and other sheriff's fees, as provided by law.

(5) Fees of guardians ad litem, referees, receivers, commissioners, surveyors, arbitrators, appraisers, and other similar court appointees, as provided by law.

(1971, c. 1181, s. 1; 1973, c. 1335, s. 1.)

Editor's Note. —

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

The 1973 amendment substituted "two thousand dollars ($2,000)" for "one thousand dollars ($1,000.00)" in the next-to-last sentence of subsection (a)(2).

Session Laws 1973, c. 1335, s. 2, provides: "The provisions of this act shall not affect court costs in any estate the administration of which was begun prior to the ratification of this act." The act was ratified April 12, 1974.

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

Proceeds recovered for the wrongful death of a decedent are not subject to the assessment of costs in the administration of estates of decedents provided for under subsection (a)(2) of this section, since the proceeds recovered under the wrongful death statute are not a part of the decedent's estate. In re Below, 12 N.C. App. 657, 184 S.E.2d 378 (1971).

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

(1) Foreclosure under power of sale in deed of trust or mortgage $15.00
(2) Inventory of safe deposits of a decedent 5.00
(3) Proceeding supplemental to execution 5.00
(4) Confession of judgment 4.00
(5) Taking a deposition 3.00
(6) Execution 2.00
(7) Notice of resumption of maiden name 2.00
(8) Taking an acknowledgment or administering an oath, or both, with or without seal, each certificate (except that oaths of office shall be administered to public officials without charge) 1.00
(9) Bond, taking justification or approving 1.00
(10) Certificate, under seal 1.00
(11) Recording or docketing (including indexing) any document, per page or fraction thereof, excluding welfare liens 1.00
(12) Preparation of copies, including transcripts, per page or fraction thereof 0.25
(13) Substitution of trustee in deed of trust 1.00
(14) Probate of any instrument 0.50
(15) On all funds placed with the clerk by virtue or color of his office, to be administered, invested, or administered in part and invested in part, a commission of one percent (1%), with a minimum fee of fifteen dollars ($15.00) and a maximum fee of five hundred dollars ($500.00), except that on accounts of two hundred dollars ($200.00) or less, there shall be no commission. For purposes of assessing a commission, receipts are cumulative for the life of an account.

(1971, c. 956, s. 2; 1973, c. 503, s. 16; c. 886; 1975, c. 829.)

Editor's Note. —
The 1971 amendment, effective Oct. 1, 1971, rewrote subdivision (15) of subsection (a).

The first 1973 amendment, effective Oct. 1, 1973, rewrote subdivision (15) of subsection (a).

The second 1973 amendment, effective July 1, 1974, substituted "0.25" for "0.50" in subdivision (12) of subsection (a).

The 1975 amendment substituted "$15.00" for "$10.00" in subdivision (a)(1).

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

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

§ 7A-309. Magistrate's special fees. — The following special fees shall be collected by the magistrate and remitted to the clerk of the superior court for the use of the State in support of the General Court of Justice:

(1) Performing marriage ceremony $5.00

(1973, c. 503, s. 17.)

Editor's Note. — The 1973 amendment, effective Oct. 1, 1973, substituted "$5.00" for "$4.00" in subdivision (1).

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

§ 7A-311. Uniform civil process fees. — (a) In a civil action or special proceeding, the following fees and commissions shall be assessed, collected, and remitted to the county:

(1) For each item of civil process, including summons, subpoenas, notices, motions, orders, writs and pleadings, served, two dollars ($2.00). When two or more items of civil process are served simultaneously on one party, only one two-dollar ($2.00) fee shall be charged. When an item of civil process is served on two or more persons or organizations, a separate service charge shall be made for each person or organization. If the process is served, or attempted to be served, by a city policeman, the fee shall be remitted to the city rather than the county. If the process is served, or attempted to be served by the sheriff, the fee shall be remitted to the county. This subsection shall not apply to service of summons to jurors.

(2) For the seizure of personal property and its care after seizure, all necessary expenses, in addition to any fees for service of process.

(3) For all sales by the sheriff of property, either real or personal, or for funds collected by the sheriff under any judgment, five percent (5%) on the first five hundred dollars ($500.00), and two and one-half percent (2½%) on all sums over five hundred dollars ($500.00), plus necessary expenses of sale. Whenever an execution is issued to the sheriff, and subsequently while the execution is in force and outstanding, and after the sheriff has served or attempted to serve such execution, the judgment, or any part thereof, is paid directly or indirectly to the judgment creditor, the fee herein is payable to the sheriff on the amount so paid. The judgment creditor shall be responsible for collecting and paying all execution fees on amounts paid directly to the judgment creditor.

(4) For execution of a judgment of ejectment, all necessary expenses, in addition to any fees for service of process.

(5) For necessary transportation of individuals to or from State institutions or another state, the same mileage and subsistence allowances as are provided for State employees.

(1973, c. 417, ss. 1, 2; c. 503, s. 18; c. 1139.)

Editor's Note.—

The first 1973 amendment, effective July 1, 1973, deleted "or attempted to be served" following "served" in the first sentence of subdivision (1) and added the second and third sentences of subdivision (3) of subsection (a).

The second 1973 amendment, effective Oct. 1, 1973, added the fourth sentence of subdivision (1) of subsection (a).

The third 1973 amendment added the next-to-last sentence of subdivision (1) of subsection (a).

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

§ 7A-312. Uniform fees for jurors; meals. — A juror in the General Court of Justice, including a coroner's juror, but excluding a juror in a special proceeding, shall receive eight dollars ($8.00) per day. A juror required to remain overnight at the site of the trial shall be furnished adequate accommodations and subsistence. If required by the presiding judge to remain in a body during the trial of a case, meals shall be furnished the jurors during the period of sequestration. A juror in a special proceeding shall receive two dollars ($2.00) for each proceeding, except that if a special proceeding lasts more than one-half day, the special jurors shall receive the same daily compensation as regular jurors. Jurors from out of the county summoned to sit on a special venire shall receive mileage at the same rate as State employees. (1965, c. 310, s. 1; 1967, c. 1169; 1969, c. 1190, s. 32; 1971, c. 377, s. 26; 1973, c. 503, s. 19.)

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

The 1973 amendment, effective Oct. 1, 1973, added the last sentence.

§ 7A-313. Uniform jail fees. — Any person lawfully confined in jail awaiting trial shall be liable to the county or municipality maintaining the jail in the sum of five dollars ($5.00) for each 24 hours' confinement, or fraction thereof, except that a person so confined shall not be liable for this fee if a nolle prosequi is entered, or if acquitted, or if judgment is arrested, or if probable cause is not found, or if the grand jury fails to return a true bill. (1965, c. 310, s. 1; 1969, c. 1190, s. 33; 1973, c. 503, s. 20; 1975, c. 444.)

Editor's Note.—
The 1973 amendment, effective Oct. 1, 1973, substituted "24 hours' " for "day's."

The 1975 amendment, effective July 1, 1975, increased the fee from $3.00 to $5.00 a day.

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

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

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

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

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

(d) An expert witness, other than a salaried State, county, or municipal law-enforcement officer, shall receive such compensation and allowances as the court, or the Judicial Standards Commission, in its discretion, may authorize. A law-enforcement officer who appears as an expert witness shall receive

reimbursement for travel expenses only, as provided in subsection (b) of this section.

(e) If more than two witnesses are subpoenaed, bound over, or recognized, to prove a single material fact, the expense of the additional witnesses shall be borne by the party issuing or requesting the subpoena. (1965, c. 310, s. 1; 1969, c. 1190, s. 34; 1971, c. 377, s. 27; 1973, c. 503, ss. 21, 22.)

Cross Reference. — See notes to §§ 6-1, 6-53.

Editor's Note. —

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

The 1973 amendment, effective Oct. 1, 1973, inserted "Judicial Standards Commission" near the middle and "except as to witnesses before the Judicial Standards Commission" near the end of subsection (a) and inserted "or the Judicial Standards Commission" in the first sentence of subsection (d).

The court's power to tax costs is entirely dependent upon statutory authorization. State v. Johnson, 282 N.C. 1, 191 S.E.2d 641 (1972).

As to expert witnesses, subsection (d) modifies subsection (a) by permitting the court, in its discretion, to increase their compensation and allowances, but the modification relates only to the amount of an expert witness's fee; it does not abrogate the requirement that all witnesses must be subpoenaed before they are entitled to compensation. State v. Johnson, 282 N.C. 1, 191 S.E.2d 641 (1972).

Subsections (a) and (d) of this section must be considered together. State v. Johnson, 282 N.C. 1, 191 S.E.2d 641 (1972).

Where the witnesses did not testify in obedience to a subpoena, the trial court was without authority to allow them expert fees or to tax the losing party with the costs of their attendance. State v. Johnson, 282 N.C. 1, 191 S.E.2d 641 (1972); Couch v. Couch, 18 N.C. App. 108, 196 S.E.2d 64 (1973).

§ 7A-316. Payment of witness fees in criminal actions. — A witness in a criminal action who is entitled to a witness fee and who proves his attendance prior to assessment of the bill of costs shall be paid by the clerk from State funds and the amount disbursed shall be assessed in the bill of costs. When the State is liable for the fee, a witness who proves his attendance not later than the last day of court in the week in which the trial was completed shall be paid by the clerk from State funds. If more than two witnesses shall be subpoenaed, bound over, or recognized, to prove a single material fact, disbursements to such additional witnesses shall be charged against the party issuing or requesting the subpoena. (1965, c. 310, s. 1; 1971, c. 377, s. 28.)

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

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

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

§ 7A-318. Determination and disbursement of costs on and after date district court established.

General Court of Justice Fee and Facilities Fee to Be Remitted to State. — This section clearly provides that the General Court of Justice fee and the "facilities fee" assessed in the class of pending cases shall be remitted to the State for the support of the General Court of Justice. The requirement of the statute is unambiguous and requires no interpretation. Blackwell v. Montague, 15 N.C. App. 564, 190 S.E.2d 384 (1972).

Assessment of Costs in Cases Pending When District Court Established. — This section clearly provides that in cases pending at the time of the establishment of the district court, in which costs had not been finally assessed according to prior law, the costs shall be assessed as provided in Article 27 of this Chapter. Blackwell v. Montague, 15 N.C. App. 564, 190 S.E.2d 384 (1972).

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

SUBCHAPTER VII. ADMINISTRATIVE MATTERS.

ARTICLE 29.

Administrative Office of the Courts.

§ 7A-340. Administrative Office of the Courts; establishment; officers.

The holder of office under the authority of this section is an officer of the General Court of Justice assisting the Chief Justice, and serving at his pleasure. He is a servant of the General Court of Justice and the Chief Justice. As such, he acts as an extension of the judicial personality of the Chief Justice. He is considered by North Carolina to be among its judicial personnel and is equivalent to service as a judge of the Superior Court Division of the General Court of Justice in certain instances. His position entitles him to the judicial immunity held by other judicial personnel. Fowler v. Alexander, 340 F. Supp. 168 (M.D.N.C. 1972).

§ 7A-341. Appointment and compensation of Director.

Stated in Fowler v. Alexander, 340 F. Supp. 168 (M.D.N.C. 1972).

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

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

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

Editor's Note. — The 1967 amendment, effective Jan. 1, 1971, deleted "prosecutors" following "solicitors" in subdivision (2).

As the rest of the section was not changed by the amendment, only the opening paragraph and subdivision (2) are set out.

Cited in Fowler v. Alexander, 340 F. Supp. 168 (M.D.N.C. 1972).

§ 7A-344. Special duties of Director concerning representation of indigent persons. — In addition to the duties prescribed in G.S. 7A-343, the Director shall also:

(4) Accept and utilize federal or private funds, as available, to improve defense services for the indigent, including indigent juveniles alleged to be delinquent or undisciplined. To facilitate processing of juvenile cases, the administrative officer is further authorized, in any judicial district, with the approval of the chief district court judge, to engage the services of a particular attorney or attorneys to provide specialized representation on a full-time or part-time basis. (1969, c. 1013, s. 4; 1975, c. 956, s. 12.)

Editor's Note. —
The 1975 amendment, effective July 1, 1975, added the language beginning "including indigent juveniles" in subdivision (4).

As the rest of the section was not changed by the amendment, only the introductory language and subdivision (4) are set out.

Cited in Fowler v. Alexander, 340 F. Supp. 168 (M.D.N.C. 1972).

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

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

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

ARTICLE 30.

Judicial Standards Commission.

§ 7A-375. Judicial Standards Commission. — (a) The Judicial Standards Commission shall consist of: one Court of Appeals judge, one superior court judge, and one district court judge, each appointed by the Chief Justice of the Supreme Court; two members of the State Bar who have actively practiced in the courts of the State for at least 10 years, elected by the State Bar Council; and two citizens who are not judges, active or retired, nor members of the State Bar, appointed by the Governor. The Court of Appeals judge shall act as chairman of the Commission.

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

(c) If a member of the Commission who is a judge becomes disabled, or becomes a respondent before the Commission, the Chief Justice shall appoint an alternate member to serve during the period of disability or disqualification. The alternate member shall be from the same division of the General Court of Justice as the judge whose place he takes. If a member of the Commission who is not a judge becomes disabled, the Governor, if he appointed the disabled member, shall appoint, or the State Bar Council, if it elected the disabled member, shall elect, an alternate member to serve during the period of disability. In a particular case, if a member disqualifies himself, or is successfully challenged for cause, his seat for that case shall be filled by an alternate member selected as provided in this subsection.

(d) A member may serve after expiration of his term only to participate until the conclusion of a formal proceeding begun before expiration of his term. Such participation shall not prevent his successor from taking office, but the successor may not participate in the proceeding for which his predecessor's term was extended. This subsection shall apply also to any judicial member whose membership on the Commission is automatically terminated by retirement or resignation from judicial office, or expiration of the term of judicial office. (1971, c. 590, s. 1; 1973, c. 50; 1975, c. 956, s. 13.)

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

Section 3 of Session Laws 1971, c. 590, enacting this Article, provides: "This act is effective January 1, 1973, provided Article IV, Sec. 17 of the Constitution of North Carolina is amended by the amendment proposed in H.B. 86 [Session Laws 1971, c. 560] ratified June 14, 1971, the same being entitled An Act to Amend Article IV of the Constitution of North Carolina As Amended Effective July 1, 1971, to Authorize the General Assembly to Prescribe Procedures for the Censure and Removal of Justices or Judges of the General Court of Justice. If the amendment proposed by H.B. 86 is not approved by the voters, this act shall be of no effect." The amendment was approved by the voters of the general election November 7, 1972.

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

The 1973 amendment added subsections (c) and (d).

The 1975 amendment, effective July 1, 1975, inserted "all members are entitled to" in the last sentence of subsection (b).

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

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

in any recommendation to censure or remove any justice or judge. A respondent who is recommended for censure or removal is entitled to a copy of the proposed record to be filed with the Supreme Court, and if he has objections to it, to have the record settled by the Commission. He is also entitled to present a brief and to argue his case, in person and through counsel, to the Supreme Court. A majority of the members of the Supreme Court voting must concur in any order of censure or removal. The Supreme Court may approve the recommendation, remand for further proceedings, or reject the recommendation. A justice of the Supreme Court or a member of the Commission who is a judge is disqualified from acting in any case in which he is a respondent.

(b) The Commission is authorized to employ an executive secretary to assist it in carrying out its duties. For specific cases, the Commission may also employ special counsel or call upon the Attorney General to furnish counsel. For specific cases the Commission may also employ an investigator or call upon the Director of the State Bureau of Investigation to furnish an investigator. While performing duties for the Commission such executive secretary, special counsel, or investigator shall have authority throughout the State to serve subpoenas or other process issued by the Commission in the same manner and with the same effect as an officer authorized to serve process of the General Court of Justice. (1971, c. 590, s. 1; 1973, c. 808.)

Editor's Note. — The 1973 amendment added the third and fourth sentences of subsection (b).

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

Article 31.

Judicial Council.

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

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

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

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

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

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

(4) All other members shall hold office from the time of their designation or appointment until June 30th of the next odd-numbered year. Those authorized to designate or appoint members to the Council shall make such designation or appointment to take effect on July 1st of each odd-numbered year or as soon thereafter as practicable. Any member is eligible for redesignation or reappointment provided he continues to have the qualifications prescribed in G.S. 7A-400. (1949, c. 1052, s. 2; 1953, c. 74, ss. 2, 3; 1969, c. 1015, ss. 2-4; 1971, c. 377, s. 1.1.)

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

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

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

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

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

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

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

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

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

§ 7A-408. Executive secretary; stenographer or clerical assistant. — The Council and the Chief Justice of the Supreme Court, by and with the advice, consent and approval of the Governor and Council of State, may employ an executive secretary who shall be a licensed attorney and fix his salary and also may employ a stenographer or clerical assistant and fix his or her salary. Said salaries shall be paid out of the Contingency and Emergency Fund. The executive secretary shall perform such duties as the Council may assign to him. When not actively engaged in the discharge of duties assigned to him by said

Council, he shall perform such duties as the Chief Justice may assign to him. (1949, c. 1052, s. 9; 1953, c. 1111, ss. 1, 2; 1957, c. 1417; 1971, c. 377, s. 1.1.)

SUBCHAPTER VIII.

ARTICLES 32 TO 35.

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

SUBCHAPTER IX. REPRESENTATION OF INDIGENT PERSONS.

ARTICLE 36.

Entitlement of Indigent Persons Generally.

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

Editor's Note. — For comment on assigned counsel and public defender systems, see 49 N.C.L. Rev. 705 (1971).

Legislative Intent. — This Article clearly manifests the legislative intent that every defendant in a criminal case, to the limit of his ability to do so, shall pay the cost of his defense. It is not the public policy of this State to subsidize any portion of a defendant's defense which he himself can pay. State v. Hoffman, 281 N.C. 727, 190 S.E.2d 842 (1972).

The purpose of the statutory provision for appointment of counsel, at public expense, for indigent defendants is to put indigent defendants on an equality with affluent defendants in trials upon criminal charges. To deny, or to restrict the right of the indigent to waive counsel, i.e., to represent himself, while permitting the affluent defendant to exercise such right, has no reasonable relation to the objective of equal opportunity to prevail at the trial of the case. Such classification is beyond the power of the legislature. State v. Mems, 281 N.C. 658, 190 S.E.2d 164 (1972).

Right Is Limited to Direct Appeals Taken as of Right. — Section 7A-450 et seq. has generally been construed to limit the right to appointed counsel in criminal cases to direct appeals taken as of right. Ross v. Moffitt, 417 U.S. 600, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974).

Who Is Indigent. — An indigent is not one who lacks sufficient funds over and above his homestead and personal property exemptions and his preexisting debts and obligations to pay the total costs of his defense from beginning to end. An indigent is one who does not have available, at the time they are required, adequate funds to pay a necessary cost of his defense. State v. Hoffman, 281 N.C. 727, 190 S.E.2d 842 (1972).

The court makes the final determination of indigency, and this may be determined or redetermined by the court at any stage of the proceeding at which the indigent is entitled to representation. State v. Cradle, 281 N.C. 198, 188 S.E.2d 296 (1972).

Right to Counsel Attaches upon Such Determination. — If a defendant is determined to be indigent, he is entitled to have counsel provided by the State to represent him during any critical stage of the action or proceeding. State v. Moses, 16 N.C. App. 174, 191 S.E.2d 368 (1972).

The requirement that the State furnish counsel to each defendant charged with a criminal offense beyond the class of petty misdemeanor is conditioned upon a showing of indigency and inability to procure counsel for that reason. State v. Turner, 283 N.C. 53, 194 S.E.2d 831 (1973).

Where a defendant is charged with a felony or a serious misdemeanor, it is the duty of the trial judge to (1) settle the question of indigency, and (2) if defendant is indigent, appoint counsel to represent him unless counsel is knowingly and understandingly waived. State v. Moses, 16 N.C. App. 174, 191 S.E.2d 368 (1972).

Waiver of counsel may not be presumed from a silent record. State v. Moses, 16 N.C. App. 174, 191 S.E.2d 368 (1972).

Appointment of Counsel for Limited Purpose Where Defendant Conducts Own Defense. — Defendant was not prejudiced in any respect by the appointment of counsel for the limited purpose of furnishing advice to him if so requested, even though defendant did waive counsel and conducted his own defense. State v. Harper, 21 N.C. App. 30, 202 S.E.2d 795 (1974).

Denial of counsel without evidence to support a finding of nonindigency entitles defendant to a new trial. State v. Haire, 19 N.C. App. 89, 198 S.E.2d 31 (1973).

The trial court erred in finding that defendant was not an indigent and in refusing to appoint counsel to represent her at her preliminary hearing on a felony charge where defendant's affidavit of indigency stated that she had no income, no money and no property except a 1958 automobile which was paid for, and that she had three children, an unemployed husband and owed $3,000, and nothing in the record refuted or contradicted the import of

defendant's affidavit of indigency. State v. Cradle, 281 N.C. 198, 188 S.E.2d 296 (1972).

In a prosecution for the capital crime of rape, the trial court erred in finding that defendant was not indigent and could employ counsel at the time he confessed and that he, therefore, could not invoke the provision of § 7A-457 that counsel could not be waived in a capital case, where the evidence before the court disclosed that when arrested defendant was earning $149.00 per month, that he had $5.00 in cash, an automobile on which $56.00 per month was due, and two bonds costing $18.75 each which were in his mother's possession, that his stepfather earned $9,000 per year and had a wife and eleven children other than defendant, and that any contribution the stepfather might make would have to be borrowed. State v. Wright, 281 N.C. 38, 187 S.E.2d 761 (1972).

The trial court erred in failing to determine defendant's indigency and to appoint counsel for him until after he had entered his plea and the jury had been selected, sworn and empaneled. State v. Moses, 16 N.C. App. 174, 191 S.E.2d 368 (1972).

The fact that the defendant was a painter capable of earning $60.00 per week when he was able to obtain work and that he had made little, if any, effort to secure counsel, either privately or by court appointment, is not sufficient to sustain a finding that he was not indigent at the time of trial, and, therefore, not entitled to a court-appointed attorney when it was requested at the trial. State v. Haire, 19 N.C. App. 89, 198 S.E.2d 31 (1973).

Defendant Not Indigent at Time of Arrest and Interrogation. — The record affirmatively disclosed that at the time of his interrogation on the morning of his arrest defendant had funds, immediately available and adequate, with which to employ counsel to provide the legal advice he then needed. His ability to pay the costs of subsequent proceedings was not then a question. That was a matter to be determined when that question arose. The admissibility of defendant's statements to the officers was not, therefore, affected by this article. The statements were competent evidence and defendant's assignments of error relating to their admission are overruled. State v. Hoffman, 281 N.C. 727, 190 S.E.2d 842 (1972).

At the time of defendant's arrest, according to his sworn statement, he had $160 in the bank. The Supreme Court took judicial notice that for a fee of less than $160 defendant could have obtained counsel for the purpose of advising him with reference to the course of conduct which would serve his best interest at that time. State v. Hoffman, 281 N.C. 727, 190 S.E.2d 842 (1972).

An indigent appellant is entitled to receive a copy of the trial transcript at State expense in order to perfect an appeal. State v. Rich, 13 N.C. App. 60, 185 S.E.2d 288 (1971).

An indigent defendant was not entitled as a matter of right, to a daily transcript of his trial. State v. Rich, 13 N.C. App. 60, 185 S.E.2d 288 (1971).

There was no deprivation of a substantial constitutional right by denial of an indigent defendant's motion that he be provided a daily transcript of the testimony during the trial where defendant could not show that he would be deprived of an opportunity to receive adequate review. State v. Rich, 13 N.C. App. 60, 185 S.E.2d 288 (1971).

Burden of Proving Inadequacy of Alternatives to Transcript. — A defendant who claims the right to a free transcript does not bear the burden of proving inadequate such alternatives as may be suggested by the State or conjured up by a court in hindsight. Britt v. North Carolina, 404 U.S. 226, 92 S. Ct. 431, 30 L. Ed. 2d 400 (1971).

Substantially Equivalent Alternative to Transcript. — Where the trials of a case took place in a small town, and according to defendant's counsel, the court reporter was a good friend of all the local lawyers and was reporting the second trial, and it appears that the reporter would at any time have read back to counsel his notes of the mistrial, well in advance of the second trial, if counsel had simply made an informal request, the defendant could have obtained from the court reporter far more assistance than that available to the ordinary defendant, and consequently he had available an informal alternative which appears to be substantially equivalent to a transcript. Thus the State court properly determined that the mistrial transcript requested was not needed for a proper defense. Britt v. North Carolina, 404 U.S. 226, 92 S. Ct. 431, 30 L. Ed. 2d 400 (1971).

Applied in State v. Hairston, 280 N.C. 220, 185 S.E.2d 633 (1972); State v. Cradle, 13 N.C. App. 120, 185 S.E.2d 35 (1971).

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

§ 7A-451. Scope of entitlement. — (a) An indigent person is entitled to services of counsel in the following actions and proceedings:

(1) Any case in which imprisonment, or a fine of five hundred dollars ($500.00), or more, is likely to be adjudged;
(2) A hearing on a petition for a writ of habeas corpus under Chapter 17 of the General Statutes;
(3) A post-conviction proceeding under Chapter 15 of the General Statutes;
(4) A hearing for revocation of probation, if confinement is likely to be adjudged as a result of the hearing;
(5) A hearing in which extradition to another state is sought;
(6) A proceeding for judicial hospitalization under Chapter 122, Article 7 (Judicial Hospitalization) or Article 11 (Mentally Ill Criminals), of the General Statutes and a proceeding for involuntary commitment to a treatment facility under Article 5A of Chapter 122 of the General Statutes;
(7) A civil arrest and bail proceeding under Chapter 1, Article 34, of the General Statutes;
(8) In the case of a juvenile, a hearing as a result of which commitment to an institution or transfer to the superior court for trial on a felony charge is possible;
(9) A hearing for revocation of parole at which the right to counsel is provided in accordance with the provisions of Chapter 148, Article 4, of the General Statutes;
(10) A proceeding for sterilization under Chapter 35, Article 7 (Sterilization of Persons Mentally Ill and Mentally Retarded) of the General Statutes; and
(11) A proceeding for the provision of protective services according to Chapter 108, Article 4, of the General Statutes.

(b) In each of the actions and proceedings enumerated in subsection (a) of this section, entitlement to the services of counsel begins as soon as feasible after the indigent is taken into custody or service is made upon him of the charge, petition, notice or other initiating process. Entitlement continues through any critical stage of the action or proceeding, including, if applicable:

(1) An in-custody interrogation;
(2) A pretrial identification procedure which occurs after formal charges have been preferred and at which the presence of the indigent is required;
(3) A hearing for the reduction of bail, or to fix bail if bail has been earlier denied;
(4) A preliminary hearing;
(5) Trial and sentencing; and
(6) Review of any judgment or decree pursuant to G.S. 7A-27, G.S. 7A-30(1), G.S. 7A-30(2), and G.S. 15-222. (1969, c. 1013, s. 1; 1973, c. 151, ss. 1, 2; c. 616; c. 726, s. 4; c. 1116, s. 1; c. 1125; c. 1320; c. 1378, s. 2.)

Editor's Note. — The first 1973 amendment rewrote subdivisions (1) and (4) of subsection (a) and subdivision (2) of subsection (b).

The second 1973 amendment inserted "Article 7 (Judicial Hospitalization) or" in subdivision (6) of subsection (a).

The third 1973 amendment, effective Sept. 1, 1973, added to subdivision (6) of subsection (a) the language beginning "and a proceeding for involuntary commitment."

The fourth 1973 amendment, effective July 1, 1974, added subdivision (9) to subsection (a).

The fifth 1973 amendment rewrote subdivision (6) of subsection (b).

The sixth 1973 amendment, effective Jan. 1, 1975, added subdivision (10) to subsection (a).

The seventh 1973 amendment, effective July 1, 1974, added subdivision (11) to subsection (a).

For comment on assigned counsel and public defender systems, see 49 N.C.L. Rev. 705 (1971).

Section Does Not Cover Discretionary Grant of Certiorari under § 7A-31. — An indigent is entitled to have a lawyer at his trial, and for direct review of that trial, but this section is not

intended to cover the discretionary power of the North Carolina Supreme Court to grant a writ of certiorari under § 7A-31. Moffitt v. Blackledge, 341 F. Supp. 853 (W.D.N.C. 1972).

And Failure to Appoint Counsel for Defendant Seeking Discretionary Review Does Not Violate Constitution. — A defendant is not denied meaningful access to the North Carolina Supreme Court simply because the State does not appoint counsel to aid him in seeking discretionary review in that court. At that stage he will have a transcript or other record of trial proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and often an opinion by the Court of Appeals disposing of his case. These materials, supplemented by whatever submission respondent may make pro se, would appear to provide the Supreme Court of North Carolina with an adequate basis on which to base its decision to grant or deny review. Ross v. Moffitt, 417 U.S. 600, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974).

The duty of the State is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process. Ross v. Moffitt, 417 U.S. 600, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974).

Once a defendant's claims of error are organized and presented in a lawyer-like fashion to the Court of Appeals, the justices of the Supreme Court of North Carolina who make the decision to grant or deny discretionary review should be able to ascertain whether his case satisfies the standards established by the legislature for such review. Ross v. Moffitt, 417 U.S. 600, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974).

An indigent defendant must accept counsel appointed by the court, unless he desires to present his own defense. State v. Gibson, 14 N.C. App. 409, 188 S.E.2d 683 (1972).

And Is Not Entitled to Have Court Appoint Counsel of His Own Choosing. — An indigent is entitled to have the court appoint competent counsel to represent him at his trial, but he is not entitled to have the court appoint counsel of his own choosing or to have the court change his counsel in the middle of the trial. State v. Frazier, 280 N.C. 181, 185 S.E.2d 652 (1972).

Clearly, and for cogent reasons, an indigent defendant is not entitled to have the court appoint counsel of his own choosing. State v. Smith, 24 N.C. App. 498, 211 S.E.2d 539 (1975).

Dissatisfaction with Court-Appointed Counsel. — An expression of an unfounded dissatisfaction with his court-appointed counsel does not entitle defendant to the services of another court-appointed attorney. State v. Gibson, 14 N.C. App. 409, 188 S.E.2d 683 (1972).

Determining Whether Offense Is Petty or Serious. — Whether an offense is petty or serious is measured, in both State and federal courts, by the punishment authorized by law for the particular offense in question. State v. Green, 277 N.C. 188, 176 S.E.2d 756 (1970); State v. Speights, 280 N.C. 137, 185 S.E.2d 152 (1971) (The above cases were decided prior to the 1973 amendments to this section — Ed. note.)

Where eleven charges were made against defendant, six for issuing worthless checks in amounts below $50 and five for checks in amounts above $50, the indigent defendant was entitled to court-appointed counsel under subsection (a)(1) since, upon his fourth conviction for any of the charges against him, defendant could have been incarcerated for as long as two years as a general misdemeanant. Lawrence v. State, 18 N.C. App. 260, 196 S.E.2d 623 (1973), decided prior to the 1973 amendments to this section.

Consolidated Trial of Two Petty Offenses. — The State's duty to furnish counsel does not extend to include those cases consolidated for trial in which an individual is charged with more than one petty offense. State v. Speights, 280 N.C. 137, 185 S.E.2d 152 (1971), decided prior to the 1973 amendments of this section.

A defendant charged with his first offense of drunken driving is not entitled to the appointment of counsel. State v. Hickman, 9 N.C. App. 592, 176 S.E.2d 910 (1970), decided prior to the 1973 amendments to this section.

Therefore, the trial court is not required to go into the question of defendant's indigency. State v. Hickman, 9 N.C. App. 592, 176 S.E.2d 910 (1970).

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

Statements Made While Accused Was Charged Only with Petty Misdemeanor. — Statements made by an indigent defendant to the arresting officer without benefit of counsel were admissible in a first degree murder prosecution where defendant had been arrested only for the petty misdemeanor of carrying a concealed weapon when the statements were made and the officer had no knowledge that a capital felony had been committed, since at all times pertinent to the statements, the indigent was charged with a petty misdemeanor and was not entitled to the services of counsel at the State's expense. State v. Ratliff, 281 N.C. 397,

189 S.E.2d 179 (1972), decided prior to the 1973 amendments to this section.

Right of Counsel to Consult with Witnesses and Prepare Defense. — An indigent charged with a felony is entitled to representation by counsel as a matter of right, and the right to counsel includes the right of counsel to consult with witnesses and to prepare a defense. State v. Mays, 14 N.C. App. 90, 187 S.E.2d 479 (1972), decided prior to the 1973 amendments to this section.

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

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

The entitlement to counsel begins as soon as possible after the defendant is taken into custody and continues through any critical stage of the proceeding, including an in-custody interrogation. State v. Jackson, 12 N.C. App. 566, 183 S.E.2d 812 (1971).

In-custody interrogation is a critical stage in the proceeding, at which time the defendant is entitled to counsel. State v. Doss, 279 N.C. 413, 183 S.E.2d 671 (1971).

But Statement Made in Custody Is Not Necessarily Incompetent. — The fact that a statement is made while the accused is in custody does not, in itself, render a confession incompetent. State v. Chance, 279 N.C. 643, 185 S.E.2d 227 (1971).

Where There Was No "In-Custody Interrogation". — Where it was clear that defendant was in custody, but equally clear that no statements were made as a result of questions from the police officers and that statements made by defendant were volunteered, the Supreme Court held that there was no "in-custody interrogation"; thus the presence of counsel was not required, and the trial judge correctly admitted into evidence the statements made by defendant. State v. Chance, 279 N.C. 643, 185 S.E.2d 227 (1971).

Where defendant's narrative confession was not the result of an in-custody interrogation, even though his indigency be assumed, the presence of counsel was not required at that time. State v. Lynch, 279 N.C. 1, 181 S.E.2d 561 (1971).

Custodial interrogation means questioning initiated by law-enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. State v. Haddock, 281 N.C. 675, 190 S.E.2d 208 (1972).

Volunteered statements are competent evidence, and their admission is not barred under any theory of the law, State or federal. And a voluntary in-custody statement does not become the product of an "in-custody interrogation" simply because an officer, in the course of defendant's narration, asks defendant to explain or clarify something he has already said voluntarily. State v. Haddock, 281 N.C. 675, 190 S.E.2d 208 (1972).

Admission of Statement Where Defendant Had Previously Testified to Same Facts While Represented by Counsel. — Admission over objection of an in-custody statement made by defendant without the presence of counsel was harmless error where defendant, while represented by counsel, had testified to the same facts at the trial of his alleged accomplice. State v. Frazier, 280 N.C. 181, 185 S.E.2d 652 (1972).

A confession is not inadmissible merely because the person making it is a minor. State v. Lynch, 279 N.C. 1, 181 S.E.2d 561 (1971).

"Totality of Circumstances" Rule Applicable to Confessions of Minors. — In determining whether a minor's in-custody confession was voluntarily and understandingly made, the judge will consider not only his age, but his intelligence, education, experience, the fact that he was in custody, and any other factor bearing upon the question. In other words, the "totality of circumstances" rule for the admission of out-of-court confessions applies to the confessions of minors as well as adults. State v. Lynch, 279 N.C. 1, 181 S.E.2d 561 (1971).

Minor May Waive Counsel. — A minor who has arrived at the age accountability for crime may waive counsel in the manner provided by law and make a voluntary confession without the presence of either counsel or an adult member of his family, provided he fully understands his constitutional rights and the meaning and consequences of his statement. State v. Lynch, 279 N.C. 1, 181 S.E.2d 561 (1971).

No Right to Counsel at Hearing on Initial Petition Alleging Child to Be Undisciplined. — Subsection (a)(8) does not afford a child the right to counsel at the hearing on the initial petition alleging him to be an undisciplined child, where a hearing could not result in his commitment to an institution in which his freedom would be curtailed. In re Walker, 282 N.C. 28, 191 S.E.2d 702 (1972).

Accused Is Entitled to Counsel at Pretrial In-Custody Lineup. — A pretrial in-custody lineup for identification purposes is a critical stage in the proceedings, and an accused so exposed is entitled to the presence of counsel. State v. Bass, 280 N.C. 435, 186 S.E.2d 384 (1972).

One who, under § 7A-457 as it stood before the 1971 amendment thereto, was precluded in a capital case from waiving the right to counsel during an in-custody, pretrial lineup stood in the same position as an accused who did not knowingly, understandingly and voluntarily waive the right to counsel before the enactment of this Article. But where, the State, on voir dire, showed by clear and convincing evidence that an in-court identification was of independent origin and was not tainted by the lineup procedures, the in-court identification evidence was competent. State v. Chance, 279 N.C. 643, 185 S.E.2d 227 (1971).

But Not When Eyewitnesses Are Viewing Photographs for Purposes of Identification. — A suspect has no constitutional right to the presence of counsel when eyewitnesses are viewing photographs for purposes of identification, and this is true regardless of whether he is at liberty or in custody at the time. Such pretrial identification procedure is not a critical stage of the proceeding. State v. Stepney, 280 N.C. 306, 185 S.E.2d 844 (1972).

Counsel Required at Pretrial Identification Proceedings Only after Formal Charges Preferred. — The General Assembly amended subdivision (b)(2), effective April 10, 1973, to require counsel for indigents at pretrial identification proceedings only after formal charges have been preferred and at which the presence of the indigent was required. This amendment apparently stems from the holding in Kirby v. Illinois, 406 U.S. 682, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972). State v. Henderson, 285 N.C. 1, 203 S.E.2d 10 (1974).

Admitting Confession without Making Specific Findings. — When no conflicting testimony is offered on voir dire, it is not error for the judge to admit the confession without making specific findings. Clearly, however, it is always the better practice for the court to find the facts upon which it concludes any confession is admissible. State v. Lynch, 279 N.C. 1, 181 S.E.2d 561 (1971).

Conflicting Testimony Bearing on Admissibility of Confession. — If, on voir dire, there is conflicting testimony bearing on the admissibility of confession, it is error for the judge to admit it upon a mere statement of his conclusion that the confession was freely and voluntarily made. In such a situation the judge must make specific findings so that the appellate court can determine whether the facts found will support his conclusions. State v. Lynch, 279 N.C. 1, 181 S.E.2d 561 (1971).

Confession and Waiver of Right to Counsel Held Admissible. — Undisputed evidence on the voir dire examination fully supported the findings by the trial court to the effect that the defendant voluntarily went to the police station, waived in writing his right to counsel and his right to remain silent, voluntarily, with full understanding of his rights and while not under arrest, made, in the presence of his parents, the oral confession, which was subsequently reduced to writing, and voluntarily signed the written statement of it. Under these circumstances, there was no error in the admission in evidence of either the written confession or the written waiver. State v. Williams, 279 N.C. 515, 184 S.E.2d 282 (1971).

Admission of Confession Held Error. — The trial court erred in the admission of a confession made by defendant in a prosecution for the capital crime of rape at a time when he was indigent and without counsel. State v. Wright, 281 N.C. 38, 187 S.E.2d 761 (1972).

Preliminary Hearing. — Prior to the enactment of this section a defendant did not have a right to an attorney at a preliminary hearing. Dawson v. State, 8 N.C. App. 566, 174 S.E.2d 610 (1970).

A preliminary hearing is not an essential prerequisite to a bill of indictment; however, since this section declares a preliminary hearing to be "a critical stage of the action," it follows that an indigent defendant is entitled to the appointment of counsel if such a hearing is held. State v. Gainey, 280 N.C. 366, 185 S.E.2d 874 (1972).

Defendant Found Not Indigent for Purpose of Preliminary Hearing Has No Right to Appointed Counsel. — If found not indigent for the purpose of the preliminary hearing, a defendant does not have the right to appointed counsel, and he can waive counsel and elect to defend himself. State v. Hairston, 280 N.C. 220, 185 S.E.2d 633 (1972).

Failure to Appoint Counsel for Preliminary Hearing Held Harmless Error. — The failure to appoint counsel to represent an indigent defendant at her preliminary hearing on charges of forgery and uttering a forged check was harmless error beyond a reasonable doubt where the testimony at the hearing was not transcribed and was never put before the trial court, the jury which convicted defendant never knew that a preliminary hearing had been conducted, the record does not show that defendant pled guilty or made any disclosures at the preliminary hearing which were used against her at the trial, and the record did not show the loss of any defenses or pleas or motions by failure to assert them at the preliminary hearing. State v. Cradle, 281 N.C. 198, 188 S.E.2d 296 (1972).

Subsequent Pleas of Guilty Not Invalidated. — Failure to accord an indigent defendant his statutory right to counsel at the time he waived preliminary hearing did not invalidate his subsequent pleas of guilty, where the pleas were given at a time when defendant was represented by counsel and the trial court fully inquired into the voluntariness of the pleas. State v. Elledge, 13 N.C. App. 462, 186 S.E.2d 192 (1972).

Applied in State v. McAllister, 287 N.C. 178, 214 S.E.2d 75 (1975).

Quoted in State v. Mems, 281 N.C. 658, 190 S.E.2d 164 (1972).

Cited in State v. Butcher, 10 N.C. App. 93, 177 S.E.2d 924 (1970); State v. Jenkins, 12 N.C. App. 387, 183 S.E.2d 268 (1971); Farrington v. North Carolina, 391 F. Supp. 714 (M.D.N.C. 1975).

§ 7A-452. Source of counsel; fees.

(c) (1) The clerk of superior court is authorized to make a determination of indigency and to appoint counsel, as authorized by this Article. The word "court," as it is used in this Article and in any rules pursuant to this Article, includes the clerk of superior court.

(2) A judge of superior or district court having authority to appoint counsel in a particular case may give directions to the clerk with regard to the appointment of counsel in that case; may, if he finds it appropriate, change or modify the appointment of counsel when counsel has been appointed by the clerk; and may set aside a finding of waiver of counsel made by the clerk. (1969, c. 1013, s. 1; 1971, c. 377, s. 32; 1973, c. 1286, s. 8.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, repealed former subsection (c).

The 1973 amendment, effective Sept. 1, 1975, added subsection (c).

Session Laws 1973, c. 1286, s. 29, contains a severability clause.

Session Laws 1973, c. 1286, s. 31, provides:

"Sec. 31. This act becomes effective on July 1, 1975, and is applicable to all criminal proceedings begun on and after that date and each provision is applicable to criminal proceedings pending on that date to the extent practicable, except § 12 [§§ 15-176.3 through 15-176.5] of this act which becomes effective on July 1, 1974."

Session Laws 1975, c. 573, amends Session Laws 1973, c. 1286, s. 31, so as to make the 1973 act effective Sept. 1, 1975, rather than July 1, 1975.

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

Quoted in State v. Mems, 281 N.C. 658, 190 S.E.2d 164 (1972).

§ 7A-453. Duty of custodian of a possibly indigent person; determination of indigency.

(b) In districts which do not have a public defender, the authority having custody of a person who is without counsel for more than 48 hours after being taken into custody shall so inform the clerk of superior court.

(c) In any district, if a defendant, upon being taken into custody, states that he is indigent and desires counsel, the authority having custody shall immediately inform the defender or the clerk of superior court, as the case may be, who shall take action as provided in this Article.

(1973, c. 1286, s. 8.)

Editor's Note. — The 1973 amendment, effective Sept. 1, 1975, deleted, in subsection (b), the former second, third and fourth sentences, which provided for a preliminary determination as to entitlement to counsel by the clerk and final determination by the court. The amendment also substituted "Article" for "section" at the end of subsection (c).

Session Laws 1973, c. 1286, s. 29, contains a severability clause.

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"Sec. 31. This act becomes effective on July 1, 1975, and is applicable to all criminal proceedings begun on and after that date and each provision is applicable to criminal proceedings pending on that date to the extent practicable, except § 12 [§§ 15-176.3 through 15-176.5] of this act which becomes effective on July 1, 1974."

Session Laws 1975, c. 573, amends Session Laws 1973, c. 1286, s. 31, so as to make the 1973 act effective Sept. 1, 1975, rather than July 1, 1975.

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

The court makes the final determination of indigency, and this may be determined or

redetermined by the court at any stage of the proceeding at which the indigent is entitled to representation. State v. Cradle, 281 N.C. 198, 188 S.E.2d 296 (1972).

Applied in State v. Cradle, 13 N.C. App. 120, 185 S.E.2d 35 (1971); State v. Avery, 286 N.C. 459, 212 S.E.2d 142 (1975).

§ 7A-454. Supporting services.

Stated in State v. Lewis, 7 N.C. App. 178, 171 S.E.2d 793 (1970).

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

When Judgment for Cost of Public Defender Services Vacated. — Judgment, after criminal conviction, for amount of cost of public defender services, will be vacated where court finds judgment not supported in record by sufficient findings of fact or conclusions of law. State v. Crews, 284 N.C. 427, 201 S.E.2d 840 (1974).

Quoted in State v. Hoffman, 281 N.C. 727, 190 S.E.2d 842 (1972).

Quoted in State v. Mems, 281 N.C. 658, 190 S.E.2d 164 (1972).

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

§ 7A-457. Waiver of counsel; pleas of guilty. — (a) An indigent person who has been informed of his right to be represented by counsel at any in-court proceeding, may, in writing, waive the right to in-court representation by counsel, if the court finds of record that at the time of waiver the indigent person acted with full awareness of his rights and of the consequences of the waiver. In making such a finding, the court shall consider, among other things, such matters as the person's age, education, familiarity with the English language, mental condition, and the complexity of the crime charged.

(b) If an indigent person waives counsel as provided in subsection (a), and pleads guilty to any offense, the court shall inform him of the nature of the offense and the possible consequences of his plea, and as a condition of accepting the plea of guilty the court shall examine the person and shall ascertain that the plea was freely, understandably and voluntarily made, without undue influence, compulsion or duress, and without promise of leniency.

(c) An indigent person who has been informed of his right to be represented by counsel at any out-of-court proceeding, may, either orally or in writing, waive the right to out-of-court representation by counsel. (1969, c. 1013, s. 1; 1971, c. 1243; 1973, c. 151, s. 3.)

Cross Reference. — See note to § 7A-451.

Editor's Note. — The 1971 amendment rewrote the first sentence of subsection (a), deleted the third sentence of that subsection, deleted the second sentence of subsection (b), and added subsection (c).

The 1973 amendment deleted "except one charged with a capital crime" following "person" near the beginning of the first sentence of subsection (a).

Prior to the passage of this Article it was unquestioned that an accused could waive his right to counsel at in-custody proceedings, either orally or in writing, if he did so freely, voluntarily and understandingly. State v. Chance, 279 N.C. 643, 185 S.E.2d 227 (1971).

The purpose of the statutory provision for appointment of counsel, at public expense, for indigent defendants is to put indigent defendants on an equality with affluent defendants in trials upon criminal charges. To deny, or to restrict the right of the indigent to waive counsel, i.e., to represent himself, while permitting the affluent defendant to exercise such right, has no reasonable relation to the objective of equal opportunity to prevail at the trial of the case. Such classification is beyond the power of the legislature. State v. Mems, 281 N.C. 658, 190 S.E.2d 164 (1972).

The rule is that one may waive counsel if he does so freely and voluntarily and with full understanding that he has the right to be represented by an attorney. State v. Lynch, 279

N.C. 1, 181 S.E.2d 561 (1971) (decided prior to the 1971 amendment).

Stringency of Requiring Waiver in Writing. — In imposing the requirement that an indigent's waiver of counsel must be in writing, the North Carolina General Assembly imposed a more stringent requirement than the federal courts have done. State v. Lynch, 279 N.C. 1, 181 S.E.2d 561 (1971) (decided prior to the 1971 amendment).

Prior to the enactment of § 7A-450 et seq., effective July 1, 1969, there was no difference in the requirements for a waiver of counsel by indigents and nonindigents. Each could waive the right either orally or in writing. State v. Lynch, 279 N.C. 1, 181 S.E.2d 561 (1971) (decided prior to the 1971 amendment).

Words of subsection (a), "in writing," are directory only and not mandatory. State v. Smith, 24 N.C. App. 498, 211 S.E.2d 539 (1975).

The waiver in writing once given is 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. State v. Watson, 21 N.C. App. 374, 204 S.E.2d 537 (1974).

The burden of showing the change in the desire of the defendant for counsel rests upon the defendant. State v. Watson, 21 N.C. App. 374, 204 S.E.2d 537 (1974).

This section does not require successive waivers in writing at every court level of the proceeding. State v. Watson, 21 N.C. App. 374, 204 S.E.2d 537 (1974).

Trial in district court and trial in superior court on appeal constitute one in-court proceeding. State v. Watson, 21 N.C. App. 374, 204 S.E.2d 537 (1974).

Waiver at Out-of-Court Proceeding No Longer Required to Be in Writing. — The General Assembly, by Session Laws 1971, c. 1243, amended this section so as to relax the requirement that a waiver of counsel must be in writing. State v. Turner, 281 N.C. 118, 187 S.E.2d 750 (1972).

But Waiver Must Be Specifically Made after Miranda Warnings. — No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the Miranda warnings. Silence and waiver are not synonymous. Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver. State v. Blackmon, 284 N.C. 1, 199 S.E.2d 431 (1973).

Waiver of counsel may not be presumed from a silent record. State v. Moses, 16 N.C. App. 174, 191 S.E.2d 368 (1972).

Necessity for Evidence or Findings of Waiver. — Admission of a defendant's inculpatory statement to the police was erroneous where there was neither evidence nor findings to show that defendant had waived his right to counsel as provided by this section. State v. Hudson, 281 N.C. 100, 187 S.E.2d 756 (1972).

Waiver Required Only Where Defendant Is Subjected to In-Custody Interrogation. — Miranda warnings and waiver of counsel are only required where defendant is being subjected to custodial interrogation. State v. Blackmon, 284 N.C. 1, 199 S.E.2d 431 (1973).

No waiver is involved with respect to volunteered statements. State v. Haddock, 281 N.C. 675, 190 S.E.2d 208 (1972).

Assuming defendant's indigency, the presence of counsel was not required because defendant's statement at the police station was not the result of an in-custody interrogation initiated by the officers. Rather, it was defendant's own voluntary narration, freely and understandingly related. State v. Haddock, 281 N.C. 675, 190 S.E.2d 208 (1972).

An indigent's right to or waiver of counsel under this section does not arise and is not involved with respect to volunteered statements. State v. Blackmon, 284 N.C. 1, 199 S.E.2d 431 (1973).

Although defendant was in custody at the time he made the incriminating statements, where his statements were not made in response to police "interrogation," as that word is defined in Miranda, but were more in the nature of volunteered assertions and narrations, statements are admissible. State v. Blackmon, 284 N.C. 1, 199 S.E.2d 431 (1973).

Where there is no evidence of any interrogation or other police procedure tending to overbear the will of the accused and defendant spoke in the voluntary exercise of his own will and without the slightest compulsion of in-custody interrogation procedures, his statements were properly admitted into evidence as volunteered statements made under circumstances requiring neither warnings nor the presence of counsel. State v. Blackmon, 284 N.C. 1, 199 S.E.2d 431 (1973).

Any statement given freely and voluntarily without any compelling influence is admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. State v. Haddock, 281 N.C. 675, 190 S.E.2d 208 (1972).

Defendant's volunteered confession would have been admissible by constitutional standards even in the absence of warning or waiver of his rights. State v. Haddock, 281 N.C. 675, 190 S.E.2d 208 (1972).

A volunteered confession is admissible by constitutional standards even in the absence of warning or waiver of rights. State v. Blackmon, 284 N.C. 1, 199 S.E.2d 431 (1973).

The constitutional right to counsel does not justify forcing counsel upon an accused who wants none. State v. Mems, 281 N.C. 658, 190 S.E.2d 164 (1972).

Refusal to Sign Waiver of Counsel Will Not Defeat Determination That Counsel Was Properly Waived. — When all of the provisions of this section have been otherwise fully complied with, and the indigent defendant has refused to accept court-appointed counsel, his refusal to sign a waiver of counsel will not defeat a determination that such defendant freely, voluntarily and understandingly waived in-court representation by counsel, and in such case the State may proceed with the trial of the indigent defendant without counsel. State v. Smith, 24 N.C. App. 498, 211 S.E.2d 539 (1975).

Right of Defendant to Represent Himself. — A defendant in a criminal proceeding has a right to handle his own case without interference by, or the assistance of, counsel forced upon him against his wishes. State v. Mems, 281 N.C. 658, 190 S.E.2d 164 (1972).

The United States Constitution does not deny to a defendant the right to defend himself. State v. Mems, 281 N.C. 658, 190 S.E.2d 164 (1972).

Having been fully advised by the court that an attorney would be appointed to represent him if he so desired, the defendant had the right to reject the offer of such appointment and to represent himself in the trial and disposition of his case. State v. Mems, 281 N.C. 658, 190 S.E.2d 164 (1972).

Appointment of Counsel for Limited Purpose Where Defendant Represents Himself. — Defendant was not prejudiced in any respect by the appointment of counsel for the limited purpose of furnishing advice to him if so requested, even though defendant did waive counsel and conducted his own defense. State v. Harper, 21 N.C. App. 30, 202 S.E.2d 795 (1974).

Waiver in Capital Case Prior to 1971 Amendment. — See State v. Doss, 279 N.C. 413, 183 S.E.2d 671 (1971); State v. Chance, 279 N.C. 643, 185 S.E.2d 227 (1971); State v. Bass, 280 N.C. 435, 186 S.E.2d 384 (1972); State v. Mems, 281 N.C. 658, 190 S.E.2d 164 (1972).

Failure to Interrogate Defendant Entering Plea of Guilty. — Failure on the part of the trial judge to follow the recommended procedure that he interrogate every defendant, whether represented by counsel or not, who enters a plea of guilty, in order to be sure that he has freely, voluntarily and intelligently consented to and authorized the entry of such plea, is not fatal to a conviction. This rule has not been modified by this section. However, when a defendant who is represented by counsel tenders a plea of guilty or a plea of nolo contendere it must appear affirmatively in the record that he did so voluntarily and understandingly. State v. Ford, 281 N.C. 62, 187 S.E.2d 741 (1972).

Failure to Inform Defendant Pleading Nolo Contendere of Minimum Sentence. — Where the trial court informed defendant that he could be imprisoned for as much as 30 years upon his plea of nolo contendere to a charge of armed robbery, the failure of the court to inform defendant that the minimum sentence was five years did not vitiate defendant's plea of nolo contendere. State v. Blake, 14 N.C. App. 367, 188 S.E.2d 607 (1972).

Applied in State v. Griffin, 10 N.C. App. 134, 177 S.E.2d 760 (1970); State v. Doss, 279 N.C. 413, 183 S.E.2d 671 (1971); State v. Wright, 281 N.C. 38, 187 S.E.2d 761 (1972); State v. Edwards, 282 N.C. 201, 192 S.E.2d 304 (1972); State v. Simmons, 286 N.C. 681, 213 S.E.2d 280 (1975).

Cited in State v. Blackmon, 280 N.C. 42, 185 S.E.2d 123 (1971); State v. Hoffman, 281 N.C. 727, 190 S.E.2d 842 (1972); In re Appeal of Martin, 286 N.C. 66, 209 S.E.2d 766 (1974).

§ 7A-459. Implementing regulations by State Bar Council.

Editor's Note. — For comment on assigned counsel and public defender systems, see 49 N.C.L. Rev. 705 (1971).

ARTICLE 37.

The Public Defender.

§ 7A-465. Public defender; defender districts; qualifications; compensation. — The office of public defender is established, effective January 1, 1970, in the following judicial districts: the twelfth and the eighteenth.

The office of public defender is established, effective July 1, 1973, in the twenty-eighth judicial district.

The office of public defender is established, effective July 1, 1975, in the twenty-sixth and twenty-seventh judicial districts.

The public defender shall be an attorney licensed to practice law in North Carolina, and shall devote his full time to the duties of his office. The compensation of the defender is the same as that of a full-time district attorney, and is paid by the State. (1969, c. 1013, s. 1; 1973, c. 47, s. 2; c. 799, s. 1; 1975, c. 956, s. 14.)

Editor's Note. — The first 1973 amendment substituted "district attorney" for "district solicitor" near the end of the last paragraph.

The second 1973 amendment, effective July 1, 1973, added the second paragraph.

The 1975 amendment, effective July 1, 1975, added the present third paragraph.

For comment on assigned counsel and public defender systems, see 49 N.C.L. Rev. 705 (1971).

Entitlement of Public Defender to Solicitor's Travel Allowance and Full-Time Duties. — See opinion of Attorney General to Mr. Wallace C. Harrelson, Public Defender, Eighteenth Judicial District, 40 N.C.A.G. 142 (1969).

§ 7A-466. Selection of defender; term; removal. — The public defender in the twelfth, eighteenth, twenty-sixth and twenty-seventh judicial districts shall be appointed by the Governor from a list of not less than two and not more than three names nominated by written ballot of the attorneys resident in the district who are licensed to practice law in North Carolina. The public defender in the twenty-eighth judicial district shall be appointed by the senior resident superior court judge of that judicial district from a list of not less than two names and not more than three names nominated by written ballot of the attorneys resident in the district who are licensed to practice law in North Carolina. The balloting shall be conducted pursuant to regulations promulgated by the Administrative Office of the Courts. The terms of office of the public defenders authorized in G.S. 7A-465 are for four years, beginning on the dates specified in that section for each district, and each fourth year thereafter.

A vacancy in the office of public defender is filled, in the same manner as the original appointment, for the unexpired term.

A public defender or assistant public defender may be suspended or removed from office, and reinstated, for the same causes and under the same procedures as are applicable to removal of a superior court district attorney. (1969, c. 1013, s. 1; 1973, c. 47, s. 2; c. 148, s. 5; c. 799, s. 2; 1975, c. 956, ss. 15, 16.)

Editor's Note. — The first 1973 amendment substituted "superior court solicitor" for "district court judge" in the last paragraph. Pursuant to Session Laws 1973, c. 47, s. 2, "district attorney" has been substituted for "solicitor" in the paragraph as amended by the first 1973 amendment.

The second 1973 amendment, effective July 1, 1973, inserted "in the twelfth and eighteenth judicial districts" in the first sentence and in the former next-to-last sentence of the first paragraph, and added the second sentence and the former last sentence of the first paragraph.

The 1975 amendment, effective July 1, 1975, inserted "twenty-sixth and twenty-seventh" near the beginning of the first sentence of the first paragraph and substituted the present last sentence of that paragraph for the former last two sentences of that paragraph, which provided for different beginning dates for the public defenders in the twelfth, eighteenth and twenty-eighth judicial districts.

SUBCHAPTER X. NORTH CAROLINA COURTS COMMISSION.

ARTICLE 40.

North Carolina Courts Commission.

§§ 7A-500 to 7A-505: Repealed by Session Laws 1975, c. 956, s. 18, effective July 1, 1975.

Editor's Note. — Session Laws 1975, c. 956, s. 18, provides in part: "All unexpended appropriations heretofore made to the Courts Commission shall revert to the general fund."

Chapter 8.

Evidence.

Article 1.

Statutes.

§ 8-4. Judicial notice of laws of United States, other states and foreign countries.

Editor's Note. — For note on choice of law rules in North Carolina, see 48 N.C.L. Rev. 243 (1970).

Applied in American Inst. of Marketing Sys., Inc. v. Willard Realty Co., 277 N.C. 230, 176 S.E.2d 784 (1970); Tennessee Carolina Transp., Inc. v. Strick Corp., 283 N.C. 423, 196 S.E.2d 711 (1973).

Cited in Tennessee-Carolina Transp., Inc. v. Strick Corp., 286 N.C. 235, 210 S.E.2d 181 (1974).

§ 8-5. Town ordinances certified. — In a trial in which the offense charged is the violation of a town ordinance, a copy of the ordinance alleged to have been violated, proven as provided in G.S. 160A-79, shall be prima facie evidence of the existence of such ordinance. (1899, c. 277, s. 2; Rev., s. 1595; C. S., s. 1750; 1971, c. 381, s. 3; 1973, c. 1446, s. 17.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, substituted "In a trial in which" for "In the trial of appeals from mayors' courts, when."

The 1973 amendment substituted "proven as provided in G.S. 160A-79" for "certified by the mayor."

ARTICLE 2.

Grants, Deeds and Wills.

§ 8-6. Copies certified by Secretary of State or State Archivist.

Editor's Note. — Session Laws 1973, c. 476, s. 48, effective July 1, 1973, substitutes "Department of Cultural Resources" for "Department of Archives and History" throughout the General Statutes.

§ 8-7. Certified copies of grants and abstracts.

Editor's Note. — Session Laws 1973, c. 476, s. 48, effective July 1, 1973, substitutes "Department of Cultural Resources" for "Department of Archives and History" throughout the General Statutes.

ARTICLE 3.

Public Records.

§ 8-34. Copies of official writings.

Editor's Note. — Session Laws 1973, c. 476, s. 48, effective July 1, 1973, substitutes "Department of Cultural Resources" for "Department of Archives and History" throughout the General Statutes.

§ 8-35. Authenticated copies of public records.

A record of the Department of Motor Vehicles, etc. —

The records of the Department, properly authenticated, are competent for the purpose of establishing the status of a person's operator's license and driving privilege. State v. Teasley, 9 N.C. App. 477, 176 S.E.2d 838 (1970); State v. Rhodes, 10 N.C. App. 154, 177 S.E.2d 754 (1970).

Department of Motor Vehicles Employee's Certification of Original Renders Copy Admissible. — Certification by an employee of the Department of Motor Vehicles that the original of an order of security requirement or suspension of driving privilege was mailed to defendant on a specified date at his address shown on the records of the Department of Motor Vehicles is sufficient to render admissible a copy of the document in a prosecution of a defendant for driving while his license was suspended. State v. Herald, 10 N.C. App. 263, 178 S.E.2d 120 (1970).

Certified Copy of Driver's License Record Admissible to Show Revocation. — In a prosecution of a defendant for driving while his license was suspended, a properly certified copy of the driver's license record of defendant on file with the Department of Motor Vehicles is admissible as evidence that the defendant's license was in a state of revocation for a period covering the date of the offense for which he was charged. State v. Herald, 10 N.C. App. 263, 178 S.E.2d 120 (1970).

Initialed certificate lacking notary's authentication meets all the requirements of § 20-48 and provides prima facie evidence of the genuineness of such certificate, the truth of the statements made in such certificate, and the official character of the person who purportedly initialed and executed it. State v. Johnson, 25 N.C. App. 630, 214 S.E.2d 278 (1975).

Applied in State v. Williams, 17 N.C. App. 39, 193 S.E.2d 452 (1972).

Stated in State v. Parker, 20 N.C. App. 146, 201 S.E.2d 35 (1973).

Cited in Taylor v. Garrett, 7 N.C. App. 473, 173 S.E.2d 31 (1970).

§ 8-35.1. Division of Motor Vehicles' record admissible as prima facie evidence of convictions under §§ 20-138 and 20-139. — Notwithstanding the

provisions of G.S. 15A-924(d), a properly certified copy under G.S. 8-35 of the license records of a defendant kept by the Division of Motor Vehicles under G.S. 20-26(a) is admissible as prima facie evidence of any prior convictions of a defendant under G.S. 20-138 and 20-139. (1975, c. 642, s. 1; c. 716, s. 5.)

Editor's Note. — Session Laws 1975, c. 642, s. 3, makes the act effective Oct. 1, 1975.

Pursuant to Session Laws 1975, c. 716, s. 5, effective July 1, 1975, "Division of Motor Vehicles" has been substituted for "Department of Motor Vehicles" in this section as enacted by Session Laws 1975, c. 642, s. 1.

§ 8-37. Certificate of Commissioner of Motor Vehicles as to ownership of automobile.

Admission of Copy in Criminal Action. — This section, which specifically provides for the admission of a copy in civil actions, does not foreclose its admission in a criminal action. State v. Parker, 20 N.C. App. 146, 201 S.E.2d 35 (1973).

ARTICLE 4.

Other Writings in Evidence.

§ 8-39. Parol evidence to identify land described.

The purpose of parol evidence, etc. —

In accord with 1st paragraph in original. See Builders Supplies Co. v. Gainey, 282 N.C. 261, 192 S.E.2d 449 (1972).

Parol evidence is admissible to fit the description to the land. Such evidence cannot, however, be used to enlarge the scope of the descriptive words. The deed itself must point to the source from which evidence aliunde to make the description complete is to be sought. State v. Brooks, 279 N.C. 45, 181 S.E.2d 553 (1971); Builders Supplies Co. v. Gainey, 282 N.C. 261, 192 S.E.2d 449 (1972).

Applied in Taylor v. Tri-County Elec. Membership Corp., 10 N.C. App. 277, 178 S.E.2d 130 (1970).

§ 8-40. Proof of handwriting by comparison.

Comparison by Jury. —

The enactment of this section in 1913 changed the rule existing theretofore, and comparison of writings by the jury has been approved. If the genuineness of a signature or writing is established to the satisfaction of the judge, a witness may compare the established writing with the disputed writing; and then the testimony of the witness and the writings themselves may be submitted to the jury. State v. Simmons, 8 N.C. App. 561, 174 S.E.2d 627 (1970).

Neither this section nor North Carolina rules of evidence permit the jury, unaided by competent opinion testimony, to compare writings to determine genuineness. State v. Simmons, 8 N.C. App. 561, 174 S.E.2d 627 (1970).

§ 8-44.1. Copies of medical records. — Copies of hospital records in connection with the treatment of any patient or the charges therefor shall be received as evidence, if otherwise admissible, in any court or quasi-judicial proceeding if testified to be authentic by a person in the hospital whose duty it is to have charge or custody of such records. (1973, c. 1332, s. 1.)

Editor's Note. — Session Laws 1973, c. 1332, s. 2, makes the act effective July 1, 1974.

§ 8-45. Itemized and verified accounts.

Applied in Planters Indus., Inc. v. Wiggins, 17 N.C. App. 132, 193 S.E.2d 303 (1972).

ARTICLE 4A.

Photographic Copies of Business and Public Records.

§ 8-45.1. Photographic reproductions admissible; destruction of originals.

Reproductions Are Primary Evidence. — Photostatic copies of deposit slips and checks made by an employee of a bank in the usual course of business and identified by such employee are competent as primary evidence without proof of the loss or destruction of the originals. Jones v. Metropolitan Life Ins. Co., 5 N.C. App. 570, 169 S.E.2d 6 (1969).

Failure to Show That Copy Was Made in Regular Course of Business or by Whom It Was Made. — A photostatic copy of a purported written designation of plaintiff by deceased as the beneficiary of deceased's governmental life insurance benefits should not be admitted as evidence where plaintiff failed to show that the copy was made in the regular course of business or activity of any federal agency or by whom it was made. Jones v. Metropolitan Life Ins. Co., 5 N.C. App. 570, 169 S.E.2d 6 (1969).

ARTICLE 5.

Life Tables.

§ 8-46. Mortuary tables as evidence. — Whenever it is necessary to establish the expectancy of continued life of any person from any period of such person's life, whether he be living at the time or not, the table hereto appended shall be received in all courts and by all persons having power to determine litigation, as evidence, with other evidence as to the health, constitution and habits of such person, of such expectancy represented by the figures in the columns headed by the words "completed age" and "expectation" respectively:

Completed Age	*Expectation*
0	68.40
1	69.64
2	68.78
3	67.86
4	66.92
5	65.98
6	65.02
7	64.06
8	63.09
9	62.12
10	61.15
11	60.18
12	59.20
13	58.22
14	57.25
15	56.29
16	55.34
17	54.39
18	53.45
19	52.52
20	51.58
21	50.65
22	49.72

Completed Age	*Expectation*
23	48.80
24	47.87
25	46.94
26	46.02
27	45.09
28	44.17
29	43.25
30	42.33
31	41.41
32	40.49
33	39.58
34	38.67
35	37.76
36	36.85
37	35.95
38	35.06
39	34.17
40	33.29
41	32.42
42	31.57
43	30.72
44	29.87
45	29.04
46	28.21
47	27.38
48	26.56
49	25.76
50	24.96
51	24.18
52	23.40
53	22.64
54	21.89
55	21.15
56	20.42
57	19.70
58	18.99
59	18.29
60	17.61
61	16.94
62	16.29
63	15.65
64	15.02
65	14.40
66	13.79
67	13.20
68	12.61
69	12.04
70	11.48
71	10.93
72	10.39
73	9.86
74	9.35
75	8.84
76	8.35
77	7.87
78	7.40

Completed Age	*Expectation*
79	6.96
80	6.53
81	6.12
82	5.75
83	5.39
84	5.05
85	4.70
86	4.38
87	4.08
88	3.79
89	3.54
90	3.30
91	3.08
92	2.89
93	2.72
94	2.56
95	2.43
96	2.32
97	2.21
98	2.10
99	2.01
100	1.91
101	1.83
102	1.75
103	1.67
104	1.60
105	1.53
106	1.46
107	1.40
108	1.35
109	1.29

(1883, c. 225; Code, s. 1352; Rev., s. 1626; C. S., s. 1790; 1955, c. 870; 1971, c. 968.)

Editor's Note. — The 1971 amendment revised the mortuary table.

But it is not admissible unless there is evidence, etc. —

In accord with 1st paragraph in original. See McCoy v. Dowdy, 16 N.C. App. 242, 192 S.E.2d 81 (1972).

Applied in Teachey v. Woolard, 16 N.C. App. 249, 191 S.E.2d 903 (1972).

Stated in Petition of United States, 303 F. Supp. 1282 (E.D.N.C. 1969).

Cited in Vanhoy v. Phillips, 15 N.C. App. 102, 189 S.E.2d 557 (1972).

ARTICLE 7.

Competency of Witnesses.

§ 8-50.1. Competency of evidence of blood tests. — In the trial of any criminal action or proceedings in any court in which the question of paternity arises, regardless of any presumptions with respect to paternity, the court before whom the matter may be brought, upon motion of the defendant, shall direct and order that the defendant, the mother and the child shall submit to a blood-grouping test; provided, that the court, in its discretion, may require the person requesting the blood-grouping test to pay the cost thereof. The results of such blood-grouping tests shall be admitted in evidence when offered by a duly licensed practicing physician or other qualified person. In any such case, where the result of such blood test is not shown to conflict with the result of any other such blood tests, and where the result of such blood test indicates that the defendant cannot be the father of the child, the jury shall be instructed that

if they believe the witness presenting the result testified truthfully as to it, and if they believe that the test was conducted properly, then it will be their duty to return a verdict of not guilty.

In the trial of any civil action, the court before whom the matter may be brought, upon motion of either party, shall direct and order that the defendant, the plaintiff, the mother and the child shall submit to a blood-grouping test; provided, that the court, in its discretion, may require the person requesting the blood-grouping test to pay the cost thereof. The results of such blood-grouping tests shall be admitted in evidence when offered by a duly licensed practicing physician or other duly qualified person. In any such case, where the result of such blood test is not shown to conflict with the result of any other such blood tests, and where the result of such blood test indicates that the defendant cannot be the father of the child, the jury shall be instructed that if they believe the witness presenting the result testified truthfully as to it, and if they believe that the test was conducted properly, then it will be their duty to return a verdict in favor of the defendant. (1949, c. 51; 1965, c. 618; 1975, c. 449, ss. 1, 2.)

Editor's Note. —

The 1975 amendment rewrote the last sentence of the first paragraph, which formerly provided merely that such evidence should be competent to rebut any presumption of paternity, and added the last sentence of the second paragraph.

The cases cited in the following annotation were decided under this section as it stood before the 1975 amendment.

The provisions of this section were intended to apply alike in civil and criminal actions except in those particulars involving procedural differences. Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972).

But Only in Actions in Which Question of Paternity Arises. — This section requires blood-grouping tests only in actions in which the question of paternity arises. Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972).

Since the sole purpose of the blood-grouping tests is to procure scientific evidence relating to the paternity of the child, it is clear that the clause "in which the question of paternity arises," although it appears only in the first paragraph of this section, is equally applicable to both criminal and civil actions. Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972).

Weight Given Tests Is Legislative Question. — It is for the General Assembly to decide the question of the weight to be given blood-grouping tests. State v. Camp, 286 N.C. 148, 209 S.E.2d 754 (1974).

Results of Tests Are Competent to Rebut Any Presumption of Paternity. — In both criminal and civil actions in which the question of paternity arises, the results of blood-grouping tests must be admitted in evidence when offered by a duly licensed practicing physician or other qualified person, regardless of any presumptions with respect to paternity, and such evidence shall be competent to rebut any presumptions of paternity. Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972).

Including Common-Law Presumption of Legitimacy. — Assuming blood-grouping tests are made and offered in evidence by qualified persons, the results thereof, if they tend to exclude defendant as the father of the child, may be offered in evidence to rebut the common-law presumption of legitimacy. Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972).

Tests Cannot Prove Paternity. — The value of serological blood tests, when made and interpreted by specifically qualified technicians, using approved testing procedures and reagents of standard strength, is now generally recognized. Such tests, however, can never prove the paternity of any individual, and they cannot always exclude the possibility. Nevertheless, in a significant number of cases, they can disprove it. State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970).

Tests Conclusive Only in Excluding Putative Father. — The blood-grouping test results are conclusive only in excluding the putative father. The results might show him to have a blood type which the father of the child must have had; but this only indicates that of all the people of that blood type or group, he, as well as anyone else with that blood type or group, could have been the father of the child. State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970).

Chance of Proving Nonpaternity. — The result of a blood test to determine parentage will be either "exclusion of paternity demonstrated" or "exclusion of paternity not possible." It has been estimated that by tests, based upon each of three blood-type classifications, A-B-O, M-N, and Rh-hr, a man falsely accused has a 50-55% chance of proving his nonpaternity. State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970).

Defendant Has Right to Blood Test. — There can be no doubt that a defendant's right to a blood test to determine parentage is a substantial right and that, upon defendant's

motion, the court must order the test when it is possible to do so. State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970).

The only areas in which the results of blood grouping tests should be open to attack are in the method of testing or in the qualifications of the persons performing the tests. State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970).

Tests May Not Be Accurate until Infant Six Months Old. — In a few cases it has been found that an infant's blood group cannot be established immediately after birth. However, by the age of six months, an accurate determination can always be had. State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970).

When the death of the child makes a blood test impossible the situation is analogous to that which occurs when an eyewitness to events constituting the basis for an indictment dies before the accused has interviewed him or taken his deposition. It would hardly be suggested that to try the defendant after the death of that witness would deprive him of due process and that therefore the prosecution must be dismissed. State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970).

Tests May Be Ordered in Action for Alimony and Child Support Where Husband Denies Paternity. — In plaintiff-wife's action for alimony, alimony pendente lite and child support, defendant-husband was entitled under this section to an order for a blood-grouping test where plaintiff alleged and defendant denied that he was the father of a child born to plaintiff during the subsistence of the marriage. Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972).

And Results of Test May Also Be Evidence of Adultery. — While there is no authority for blood-grouping tests unless an issue of paternity is raised, in a case in which the issue of paternity is raised, the results of the blood-grouping tests, if they exclude defendant as the father of a child admittedly born during the subsistence of the marriage, also would be evidence of adultery. Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972).

Applied in Johnson v. Johnson, 7 N.C. App. 310, 172 S.E.2d 264 (1970).

§ 8-51. A party to a transaction excluded, when the other party is dead.

I. GENERAL CONSIDERATION.

Purpose of Section. —

In accord with 3rd paragraph in original. See Whitley v. Redden, 5 N.C. App. 705, 169 S.E.2d 260 (1969).

When Testimony Is Incompetent, etc. —

This section does not render the testimony of a witness incompetent in any case unless these four questions require an affirmative answer: 1. Is the witness (a) a party to the action, or (b) a person interested in the event of the action, or (c) a person from, through or under whom such a party or interested person derives his interest or title? 2. Is the witness testifying (a) in his own behalf or interest, or (b) in behalf of the party succeeding to his title or interest? 3. Is the witness testifying against (a) the personal representative of a deceased person, or (b) the committee of a lunatic, or (c) a person deriving his title or interest from, through or under a deceased person or lunatic? 4. Does the testimony of the witness concern a personal transaction or communication between the witness and the deceased person or lunatic? Ballard v. Lance, 6 N.C. App. 24, 169 S.E.2d 199 (1969).

The rule that evidence offered is admissible if it is competent for any purpose ought not to be used as a sword with which to attack a decedent's estate by destroying the express provisions of this section. Whitley v. Redden, 5 N.C. App. 705, 169 S.E.2d 260 (1969).

Testimony Competent as to Only One of Two Defendants, etc. —

In accord with original. See Brown v. Whitley, 12 N.C. App. 306, 183 S.E.2d 258 (1971).

Courts are not disposed to extend the disqualification. —

In accord with original. See Brown v. Whitley, 12 N.C. App. 306, 183 S.E.2d 258 (1971).

Testimony as to Independent Facts. —

In accord with 1st paragraph in original. See Brown v. Whitley, 12 N.C. App. 306, 183 S.E.2d 258 (1971).

Any acts done in observation of a deceased person are considered independent acts and not within the statutory exclusion. Brown v. Whitley, 12 N.C. App. 306, 183 S.E.2d 258 (1971).

The acts of two independent drivers, total strangers to each other up to the point of impact, cannot be said to be acts done with a deceased person but are acts done in observation of a deceased person, thus, testimony as to these acts are not excluded by this section. Brown v. Whitley, 12 N.C. App. 306, 183 S.E.2d 258 (1971).

A defendant is not prevented from describing the conduct and movements of a deceased's car by the phrase "concerning a personal transaction" when the movements were quite independent and apart from, and in no way connected with, or prompted or influenced by reason of, the conduct of the party testifying. Brown v. Whitley, 12 N.C. App. 306, 183 S.E.2d 258 (1971).

Applied in Bryant v. Kelly, 279 N.C. 123, 181 S.E.2d 438 (1971); Schoolfield v. Collins, 281 N.C. 604, 189 S.E.2d 208 (1972); Woodard v. McGee, 21 N.C. App. 487, 204 S.E.2d 871 (1974); Brown v. Moore, 286 N.C. 664, 213 S.E.2d 342 (1975).

Cited in Peaseley v. Virginia Iron, Coal & Coke Co., 12 N.C. App. 226, 182 S.E.2d 810 (1971); Wall v. Sneed, 13 N.C. App. 719, 187 S.E.2d 454 (1972).

II. THE SECTION DISQUALIFIES WHOM.

A. Parties to the Action.

Surviving tenant by the entirety is the "survivor of a deceased person" within the meaning of this section in an action which attacks the validity of a deed by which the tenancy by the entirety was created. Gribble v. Gribble, 25 N.C. App. 366, 213 S.E.2d 376 (1975).

B. Persons Interested in the Event of the Action.

1. General Consideration.

Nature of Interest Involved. —

To be disqualified as a "person interested in the event" the witness must have a direct legal or pecuniary interest in the outcome of the litigation. Brown v. Whitley, 12 N.C. App. 306, 183 S.E.2d 258 (1971).

2. Applications.

Agent of Third Person in Transaction with Deceased. — Assuming that a collision between two motor vehicles is a "transaction" within the meaning of this section, then one who has acted as an agent for a third person in a transaction with a person since deceased, is ordinarily competent to testify to conversations or transactions of the decedent. Brown v. Whitley, 12 N.C. App. 306, 183 S.E.2d 258 (1971).

Witness may have a very large pecuniary interest in fact — as the interest of a wife in an important lawsuit to which her husband is a party — and still be competent, while a comparatively slight legal interest will disqualify the witness. Rape v. Lyerly, 287 N.C. 601, 215 S.E.2d 737 (1975).

Where plaintiffs acquire ownership as issue of devisee, devisee's husband has no pecuniary legal interest in plaintiffs' real property; therefore, his testimony as to the decedent's devise is not incompetent under this section. Rape v. Lyerly, 287 N.C. 601, 215 S.E.2d 737 (1975).

III. WHEN THE DISQUALIFICATION EXISTS.

Contest over Will. — As between the propounder or an interested executor and a person who is interested in the result of the trial, this section, rendering an interested survivor incompetent as a witness to a personal transaction with a deceased person, applies in a contest over a will, notwithstanding the proceeding is in rem. There is an exception when the evidence is directed solely towards the question or issue of mental condition or testamentary capacity. In that case, it is competent for the interested witness to give testimony of such transaction or conversation, solely, however, as a basis for the opinion formed as to the mental condition or capacity of the deceased. Whitley v. Redden, 276 N.C. 263, 171 S.E.2d 894 (1970).

IV. SUBJECT MATTER OF THE TRANSACTION.

Test, etc. —

In accord with 1st paragraph in original. See Whitley v. Redden, 5 N.C. App. 705, 169 S.E.2d 260 (1969).

In accord with 2nd paragraph in original. See Ballard v. Lance, 6 N.C. App. 24, 169 S.E.2d 199 (1969).

Testimony Relating Solely to Issue of Mental Capacity. —

A person (who would otherwise be precluded from testifying by this section), after testifying as to the mental capacity of a deceased person may testify to transactions and communications with deceased in order to show the jury that the opinion was well founded. Whitley v. Redden, 276 N.C. 263, 171 S.E.2d 894 (1970).

This is one of those states which has a "dead man's" statute and allows an interested witness, where there is an issue of mental capacity, to relate personal transactions and communications between the witness and a decedent or lunatic as a basis for his opinion as to the mental capacity of the decedent or lunatic; however, such evidence will be rejected when it is offered for the purpose of proving and does tend to prove vital and material facts which will fix liability against the representative of a deceased person, or committee of a lunatic, or anyone deriving his title or interest through them. Whitley v. Redden, 276 N.C. 263, 171 S.E.2d 894 (1970).

Where this section is in conflict with the rule that testimony of personal transactions and communications is competent on the question of the mental capacity of a deceased person where the opinion of the interested witness as to the mental competency has been formed from conversations and communications with such deceased person, and when these two principles of law conflict with each other because the testimony of an interested witness concerning personal transactions and communications with a deceased person tends directly to establish the material facts in issue, in addition to mental capacity, then this section should control. Whitley v. Redden, 5 N.C. App. 705, 169 S.E.2d 260 (1969).

Two occupants of the same automobile are engaged in a "personal transaction," thereby rendering incompetent the testimony of one against the personal representative of the

other's estate. Brown v. Whitley, 12 N.C. App. 306, 183 S.E.2d 258 (1971).

A collision between two motor vehicles is not a "personal transaction" within the meaning of this section. Brown v. Whitley, 12 N.C. App. 306, 183 S.E.2d 420 (1971).

And Section Does Not Exclude Testimony of Surviving Driver. — Considering the fact that the only relationship between a defendant and a decedent was the impact of their vehicles, such a collision is not a personal transaction within the meaning of the term, and this section is not applicable to the testimony of the surviving driver in a two-vehicle collision. Brown v. Whitley, 12 N.C. App. 306, 183 S.E.2d 258 (1971).

V. EXCEPTIONS.

This section contains only two exceptions, one of which relates to the identity of the driver of a motor vehicle, and the other relates to cases in which the representative of the lunatic or deceased person has "opened the door" by testifying or offering the testimony of the deceased or insane person. Whitley v. Redden, 5 N.C. App. 705, 169 S.E.2d 260 (1969).

Evidence Relating to Mental Capacity. — The Supreme Court has stated what seems to be another exception to this section which provides that after a witness has stated his opinion as to the mental capacity of such deceased person, and where this opinion has been formed from conversations and communications with such person, it is competent to offer such in evidence as constituting the basis of such opinion. While it is conceded that a sane declaration by a person may be some evidence of sanity, the statute as written by the legislature does not contain this exception. Whitley v. Redden, 5 N.C. App. 705, 169 S.E.2d 260 (1969). See ante, this note, analysis line IV.

Illustrations. —

If the challenged testimony did violate this section, it was rendered admissible when the sister of intestate, as plaintiff's witness, testified that defendant was driving and that he was not intoxicated. This opened the door for defendant's version of the matter. Bryant v. Ballance, 13 N.C. App. 181, 185 S.E.2d 315 (1971).

§ 8-51.1. Dying declarations. — The dying declarations of a deceased person regarding the cause or circumstances of his death shall be admissible in evidence in all civil and criminal trials and other proceedings before courts, administrative agencies and other tribunals to the same extent and for the same purposes that they might have been admissible had the deceased survived and been sworn as a witness in the proceedings, subject to proof that:

(1) At the time of the making of such declaration the deceased was conscious of approaching death and believed there was no hope of recovery;

(2) Such declaration was voluntarily made. (1973, c. 464, s. 1.)

Editor's Note. — Session Laws 1973, c. 464, s. 4, makes the act effective Oct. 1, 1973.

§ 8-52: Repealed by Session Laws 1973, c. 41.

§ 8-53. Communications between physician and patient.

Editor's Note. —

For note on reporting patients for review of driver's license, see 48 N.C.L. Rev. 1003 (1970).

Application to Nurses, Technicians, and Others. —

In accord with 2nd paragraph in original. See State v. Wooten, 18 N.C. App. 269, 196 S.E.2d 603 (1973).

Privilege Is That of Patient. —

The records of patients at a hospital are privileged but the privilege is that of the patient — not the hospital. Reserve Life Ins. Co. v. Davis Hosp., 36 F.R.D. 434 (W.D.N.C. 1965).

Trial Judge May Compel Disclosure. —

In a prosecution for possession of heroin, the trial court did not err in ruling that a physician should be required in the interest of justice to give testimony concerning a matchbox containing heroin found on defendant's person when she was undressed in a hospital emergency room in order that the physician could determine the cause of her unconsciousness. State v. Wooten, 18 N.C. App. 269, 196 S.E.2d 603 (1973).

Applied in Wilder v. Edwards, 7 N.C. App. 513, 173 S.E.2d 72 (1970); Gibson v. Montford, 9 N.C. App. 251, 175 S.E.2d 776 (1970); State v. Cooper, 286 N.C. 549, 213 S.E.2d 305 (1975).

§ 8-53.1. Physician-patient privilege waived in child abuse. — Notwithstanding the provisions of G.S. 8-53, the physician-patient privilege shall not be ground for excluding evidence regarding the abuse or neglect of a child under the age of 16 years or regarding an illness of or injuries to such child or the cause thereof in any judicial proceeding related to a report pursuant to the Child Abuse Reporting Law, Article 8 of Chapter 110 of the General Statutes of North Carolina. (1965, c. 472, s. 2; 1971, c. 710, s. 2.)

Editor's Note. — The 1971 amendment, effective July 1, 1971, substituted "related to a report pursuant to the Child Abuse Reporting Law, Article 8 of Chapter 110 of the General Statutes of North Carolina" for "resulting from a report pursuant to §§ 14-318.2 and 14-318.3" at the end of the section.

§ 8-53.4. School counselor privilege. — No person certified by the State Department of Public Instruction as a school counselor and duly appointed or designated as such by the governing body of a public school system within this State or by the head of any private school within this State shall be competent to testify in any action, suit, or proceeding concerning any information acquired in rendering counseling services to any student enrolled in such public school system or private school, and which information was necessary to enable him to render counseling services; provided, however, that this section shall not apply where the student in open court waives the privilege conferred; provided further that the presiding judge may compel such disclosure, if in his opinion the same is necessary to a proper administration of justice. (1971, c. 943.)

§ 8-54. Defendant in criminal action competent but not compellable to testify.

Historical Background. —

Prior to the adoption of this section defendants in criminal actions were not competent to testify in their own behalf. The prevailing theory prior to the adoption of the statute was that the frailty of human nature and the overpowering desire for freedom would ordinarily induce a person charged with crime, if permitted to testify, to swear falsely. State v. Williams, 6 N.C. App. 611, 170 S.E.2d 640 (1969).

Privilege and Not a Duty. —

This section gives a criminal defendant the privilege of testifying in his own behalf. It is not his duty to do so, and he cannot be compelled to testify. If he does, however, he occupies the position of any other witness. He is entitled to the same privileges and is equally liable to be impeached or discredited. State v. Austin, 20 N.C. App. 539, 202 S.E.2d 293 (1974).

Defendant Treated as Other Witnesses. —

If a defendant in a criminal action testifies, he occupies the position of any other witness, and he is entitled to the same privileges and is equally liable to be impeached or discredited. State v. Williams, 279 N.C. 663, 185 S.E.2d 174 (1971).

While defendant in a criminal action may not be required to become a witness unless he voluntarily does so, once he does so, he becomes subject to cross-examination and may be required to answer questions designed to impeach or discredit him as a witness. State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974).

Rules relative to cross-examination for purposes of impeachment apply equally to the cross-examination of all witnesses, including but not limited to the cross-examination of a defendant in a criminal action. State v. Williams, 279 N.C. 663, 185 S.E.2d 174 (1971).

Extent of Cross-Examination Permitted. — It is permissible, for purposes of impeachment, to cross-examine a witness, including the defendant in a criminal case, by asking disparaging questions concerning collateral matters relating to his criminal and degrading conduct. State v. Williams, 279 N.C. 663, 185 S.E.2d 174 (1971); State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975).

In order to impeach a defendant's credibility as a witness, the solicitor is permitted to cross-examine the defendant as to collateral matters, including other criminal offenses, if the questions are based upon information and are asked in good faith. State v. Lea, 17 N.C. App. 71, 193 S.E.2d 383 (1972).

Cross-examination by the State is permitted for the purpose of impeaching the credibility of a witness, including a defendant in a criminal case, and not for the purpose of proving prior offenses. State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975).

Same — Discretion of Trial Judge. — The limits of legitimate cross-examination of a defendant are largely within the discretion of the trial judge and, absent a showing that the verdict was improperly influenced by his rulings on the scope of that cross-examination, those rulings will not be held for error. State v. Lea, 17 N.C. App. 71, 193 S.E.2d 383 (1972).

The scope of cross-examination of a criminal defendant is subject to the discretion of the trial judge and the questions must be asked in good faith. State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975).

Defendant May Be Recalled for Further Cross-Examination. — A defendant who avails himself of the privilege of testifying in his own behalf is subject to being recalled for further cross-examination, since the court has full discretion to allow a witness to be examined at any stage of the trial out of the usual order or to be recalled for reexamination. State v. Austin, 20 N.C. App. 539, 202 S.E.2d 293 (1974).

Cross-Examination with Respect to Prior Convictions. — A witness, including the defendant in a criminal case, may be cross-examined for purposes of impeachment with respect to prior convictions of crime. State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975).

Contradicting Witness's Denial of Prior Offenses. — Denial of prior offenses by a witness, including a defendant in a criminal case, may not be contradicted by introducing the record of his conviction or otherwise proving by other witnesses that he was, in fact, convicted. State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975).

Cross-Examination as to Other Offenses for Which Defendant Has Been Indicted. — For purposes of impeachment, a witness, including the defendant in a criminal case, may not be cross-examined as to whether he has been indicted or is under indictment for a criminal offense other than that for which he is then on trial. In respect of this point, State v. Maslin, 195 N.C. 537, 143 S.E. 3 (1928), and decisions in accord with Maslin, are overruled, on the basic ground that an indictment cannot rightly be considered as more than an unproved accusation. State v. Williams, 279 N.C. 663, 185 S.E.2d 174 (1971).

The rule that a witness, including the defendant in a criminal case, may no longer be cross-examined for impeachment purposes as to whether he has been indicted or is under indictment for a criminal offense other than that for which he is then on trial applies only to trials begun after December 15, 1971, the date of the decision in State v. Williams, 279 N.C. 663, 185 S.E.2d 174 (1971). State v. Harris, 281 N.C. 542, 189 S.E.2d 249 (1972).

Cross Examination as to Unproved Accusations or Arrests for Unrelated Offenses Not Allowed. — For purposes of impeachment, a witness, including the defendant in a criminal case, may not be cross-examined as to whether he has been accused, either informally or by affidavit on which a warrant is issued, of a criminal offense unrelated to the case on trial, nor cross-examined as to whether he has been arrested for such unrelated criminal offense. State v. Williams, 279 N.C. 663, 185 S.E.2d 174 (1971).

Failure to Take Stand. —

A defendant's failure to testify may not be considered an admission of the truth of testimony which tends to incriminate him. State v. McCall, 286 N.C. 472, 212 S.E.2d 132 (1975).

Defendant's silence in the rightful exercise of his privilege against self-incrimination may not be considered an admission of the truth of incriminating statements made in defendant's presence by a prospective State's witness in response to a police officer's questions. State v. McCall, 286 N.C. 472, 212 S.E.2d 132 (1975).

Same — How Far Subject to Comment. —

In accord with 2nd paragraph in original. See State v. Bryant, 283 N.C. 227, 195 S.E.2d 509 (1973).

The effect of this section has been to prohibit the district attorney from making any reference to or comment on defendant's failure to testify. State v. McCall, 286 N.C. 472, 212 S.E.2d 132 (1975).

Counsel may not comment upon the failure of a defendant in a criminal prosecution to testify. State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975).

Adverse comments on a defendant's failure to testify at trial are impermissible. State v. McCall, 286 N.C. 472, 212 S.E.2d 132 (1975).

The law is that the jury is not to infer guilt from the fact that the defendant neither testifies nor presents evidence. State v. Willis, 22 N.C. App. 465, 206 S.E.2d 729 (1974).

Failure of Codefendant to Take Stand. — A codefendant on trial cannot be required over his own objection to testify as a witness for defendant. State v. Hanford, 16 N.C. App. 353, 191 S.E.2d 910 (1972).

Prejudice Removed by Instruction.—

If the district attorney improperly comments on defendant's failure to testify, the error may be cured by a withdrawal of the remark or by a statement from the court that it was improper, followed by an instruction to the jury not to consider the failure of the accused to offer himself as a witness. State v. McCall, 286 N.C. 472, 212 S.E.2d 132 (1975).

Improper comment on defendant's failure in a criminal case to testify may be cured by an instruction from the court that the argument is improper followed by prompt and explicit instructions to the jury to disregard it. State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975).

Erroneous Instructions. —
Instruction that the defendants "did not offer any evidence as they have the right to do" was incomplete and prejudicially erroneous. State v. Baxter, 285 N.C. 735, 208 S.E.2d 696 (1974).

Proper Instruction. —
There is no hard and fast form of expression or consecrated formula required, but the jury may be instructed that as to the defendant the jury should scrutinize his testimony in the light of his interest in the outcome of the prosecution but that if after such scrutiny the jury believes that the witness has told the truth, it should give his testimony the same weight it would give the testimony of any other credible witness. It is not mandatory that the judge charge the jury in this respect, but the charge is permissible and it appears to be the uniform practice. State v. Williams, 6 N.C. App. 611, 170 S.E.2d 640 (1969).

Giving unrequested proper instructions relating to the failure of the defendant to exercise his right to testify or refrain from testifying under the provisions of this section is not reversible error. State v. Powell, 11 N.C. App. 465, 181 S.E.2d 754 (1971).

The trial judge's statement in his charge to the jury does not constitute prejudicial error where the charge, taken as a whole, does not give the jury the impression that defendant's failure to present evidence was to be taken against him. State v. Harlow, 16 N.C. App. 312, 191 S.E.2d 900 (1972).

Although it is the better practice to give no instruction concerning the failure of defendant to testify unless he requests it, the trial court's instruction in a first degree murder case to the effect that defendant's failure to testify should not be considered by the jury was not prejudicial to defendant. State v. Bryant, 283 N.C. 227, 195 S.E.2d 509 (1973).

While it is the better practice to give no instructions in such a case, there is no error in giving an unrequested instruction on defendants' failure to testify if it correctly states the law. State v. Willis, 22 N.C. App. 465, 206 S.E.2d 729 (1974).

The failure of the trial court to instruct the jury upon the effect of defendant's failure to testify is not error because such an instruction is not required unless specifically requested by defendant. State v. Smith, 24 N.C. App. 498, 211 S.E.2d 539 (1975).

Instruction Discretionary absent Request. — Ordinarily, it would seem better to give no instruction concerning a defendant's failure to testify unless such an instruction is requested by the defendant. State v. Powell, 11 N.C. App. 465, 181 S.E.2d 754 (1971); State v. Rankin, 282 N.C. 572, 193 S.E.2d 740 (1973); State v. Bryant, 283 N.C. 227, 195 S.E.2d 509 (1973).

Instructions concerning the failure of a defendant to testify relate to a subordinate feature of the case. Absent a request, it is discretionary with the trial judge as to whether he does or does not instruct the jury on a subordinate feature of a case. State v. Powell, 11 N.C. App. 465, 181 S.E.2d 754 (1971).

Court's Duty in Undertaking to Charge. — While the court is not required to charge on a subordinate feature of the case, nevertheless when it undertakes to do so, it becomes the duty of the court to charge thereon fully and accurately. State v. Powell, 11 N.C. App. 465, 181 S.E.2d 754 (1971).

Language of Statute Should Be Used. — The better practice is for the trial judge to use the language employed in this section without additions if there is a request for such instructions. State v. Powell, 11 N.C. App. 465, 181 S.E.2d 754 (1971).

An instruction which incorporates the precise language of this section is not only acceptable, but it has often been suggested as being the preferred instruction. State v. Penland, 20 N.C. App. 73, 200 S.E.2d 672 (1973).

Trial court's instruction that the jury must be very careful not to allow defendant's silence to influence their decision in any way did not constitute prejudicial error, though an instruction more nearly in the language of this section would have been preferable. State v. Phifer, 17 N.C. App. 101, 193 S.E.2d 413 (1972); State v. House, 17 N.C. App. 97, 193 S.E.2d 327 (1972).

A slip of the tongue in an instruction on defendants' failure to testify will not be held to be prejudicial error if not called to the attention of the court and if it does not appear that the jury could have been prejudiced thereby. State v. Willis, 22 N.C. App. 465, 206 S.E.2d 729 (1974).

Cited in State v. Castor, 285 N.C. 286, 204 S.E.2d 848 (1974).

§ 8-55. Testimony enforced in certain criminal investigations; immunity. — If any justice, judge or magistrate of the General Court of Justice shall have good reason to believe that any person within his jurisdiction has knowledge of the existence and establishment of any faro bank, faro table or other gaming table prohibited by law, or of any place where intoxicating liquors are sold contrary to law, in any town or county within his jurisdiction, such person not being minded to make voluntary information thereof on oath, then it shall be lawful for such justice, magistrate, or judge to issue to the sheriff of the county in which such faro bank, faro table, gaming table, or place where intoxicating

liquors are sold contrary to law is supposed to be, a subpoena, capias ad testificandum, or other summons in writing, commanding such person to appear immediately before such justice, magistrate, or judge and give evidence on oath as to what he may know touching the existence, establishment and whereabouts of such faro bank, faro table or other gaming table, or place where intoxicating liquors are sold contrary to law, and the name and personal description of the keeper thereof. Such evidence, when obtained, shall be considered and held in law as an information on oath, and the justice, magistrate or judge may thereupon proceed to seize and arrest such keeper and destroy such table, or issue process therefor as provided by law. No person shall be excused, on any prosecution, from testifying touching any unlawful gaming done by himself or others; but no discovery made by the witness upon such examination shall be used against him in any penal or criminal prosecution, and he shall be altogether pardoned of the offenses so done or participated in by him. (R. C., c. 35, s. 50; 1858-9, c. 34, s. 1; Code, ss. 1050, 1215; 1889, c. 355; Rev., ss. 1637, 3721; 1913, c. 141; C. S., s. 1800; 1969, c. 44, s. 22; 1971, c. 381, s. 4.)

Editor's Note. —

The 1971 amendment, effective Oct. 1, 1971, in the first sentence, deleted "or justice of the peace, or mayor of a town" following "General Court of Justice," deleted "of the peace" following "justice" in two places, deleted "mayor" following "magistrate" in two places, and deleted "or to any constable of the town or township" following "sheriff of the county." In the second sentence, the amendment deleted "mayor" following "magistrate."

§ 8-56. Husband and wife as witnesses in civil action.

Editor's Note. —

For note on testimony by one spouse against the other of adultery under North Carolina law, see 48 N.C.L. Rev. 131 (1969).

Common Law. —

In accord with 2nd paragraph in original. See Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972).

At common law husband and wife could not testify in an action to which either was a party. Hicks v. Hicks, 275 N.C. 370, 167 S.E.2d 761 (1969).

Section Applies to Answers to Interrogatories. — The provisions of this section and § 50-10 which render a husband or wife an incompetent witness apply to answers to interrogatories as well as to testimony at trial. Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972).

The provision of Rule 26(b) of the Rules of Civil Procedure that "it is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence" refers only to testimony that will or might be inadmissible at trial. This section and § 50-10 are distinguishable from Rule 26(b) in that they relate to the disqualification of husband or wife as a witness with reference to specific matters, not to the admissibility or inadmissibility of the testimony of a qualified witness. Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972).

Neither Husband Nor Wife May Testify in Action or Proceeding in Consequence of Adultery. — Under this section and § 50-10, neither a husband nor a wife is a competent witness in any action inter se to give evidence for or against the other in any action or proceeding in consequence of adultery, or in any action or proceeding for divorce on account of adultery, and may not be compelled to give such evidence. Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972).

Construing this section and § 50-10 together, neither the husband nor the wife is a competent witness in any action inter se to give evidence for or against the other in any action or proceeding in consequence of adultery, or in any action or proceeding for divorce on account of adultery, and may not be compelled to give such evidence. Greene v. Greene, 15 N.C. App. 314, 190 S.E.2d 258 (1972).

Public policy demands that the wife be protected against the absolute defense of adultery which the husband seeks to prove by his own testimony. Hicks v. Hicks, 275 N.C. 370, 167 S.E.2d 761 (1969).

Action for Alimony as Action "in Consequence of Adultery". — A husband's interposition of the plea of adultery in the wife's action for alimony and alimony pendente lite converted the action into an "action or proceeding in consequence of adultery" within the meaning of this section. Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972).

Acts of Sexual Intercourse Are "Confidential Communications". — In the wife's action for alimony and alimony pendente lite, the wife may not be compelled to answer interrogatories which seek to elicit her answers under oath as to acts of sexual intercourse between the husband and wife, since such an act is a "confidential communication" within the meaning of this section. Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972).

§ 8-57. Husband and wife as witnesses in criminal actions. — The husband or wife of the defendant, in all criminal actions or proceedings, shall be a competent witness for the defendant, but the failure of such witness to be examined shall not be used to the prejudice of the defense. Every such person examined as a witness shall be subject to be cross-examined as are other witnesses. No husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage. Nothing herein shall render any spouse competent or compellable to give evidence against the other spouse in any criminal action or proceeding, except to prove the fact of marriage and facts tending to show the absence of divorce or annulment in cases of bigamy and in cases of criminal cohabitation in violation of the provisions of G.S. 14-183, and except that in all criminal prosecutions of a spouse for an assault upon the other spouse, all criminal prosecutions of a spouse for communicating a threat to the other spouse, or in any criminal prosecution of a spouse for trespass in or upon the separate residence of the other spouse when living separate and apart from each other by mutual consent or by court order, or for any criminal offense against a legitimate or illegitimate or adopted or foster minor child of either spouse, or for abandonment, or for neglecting to provide for the spouse's support, or the support of the children of such spouse, it shall be lawful to examine a spouse in behalf of the State against the other spouse: Provided that this section shall not affect pending litigation relating to a criminal offense against a minor child. (1856-7, c. 23; 1866, c. 43; 1868-9, c. 209; 1881, c. 110; Code, ss. 588, 1353, 1354; Rev., ss. 1634, 1635, 1636; C. S., s. 1802; 1933, c. 13, s. 1; c. 361; 1951, c. 296; 1957, c. 1036; 1967, c. 116; 1971, c. 800; 1973, c. 1286, s. 11.)

Editor's Note. — The 1971 amendment inserted in the last sentence "or in any criminal prosecution of a spouse for trespass in or upon the separate residence of the other spouse when living separate and apart from each other by mutual consent or by court order."

The 1973 amendment, effective Sept. 1, 1975, inserted "all criminal prosecutions of a spouse for communicating a threat to the other spouse" near the middle of the last sentence.

Session Laws 1973, c. 1286, s. 29, contains a severability clause.

Session Laws 1973, c. 1286, s. 31, provides:

"Sec. 31. This act becomes effective on July 1, 1975, and is applicable to all criminal proceedings begun on and after that date and each provision is applicable to criminal proceedings pending on that date to the extent practicable, except § 12 [§§ 15-176.3 through 15-176.5] of this act which becomes effective on July 1, 1974."

Session Laws 1975, c. 573, amends Session Laws 1973, c. 1286, s. 31, so as to make the 1973 act effective Sept. 1, 1975, rather than July 1, 1975.

In General. —

No statute provides that a husband is not a competent witness against his wife or that a wife is not a competent witness against her husband in any criminal action or proceeding. This section and the statutes on which it is based simply provide that the rules of the common law with reference to whether a husband is competent to testify against his wife or a wife is competent to testify against her husband in a criminal action or proceeding are unaffected by these statutes. State v. Robinson, 15 N.C. App. 362, 190 S.E.2d 270 (1972).

This section in effect forbids the testimony of one spouse against another in criminal proceedings unless the case falls within one of the exceptions enumerated in the statute. State v. Reavis, 19 N.C. App. 497, 199 S.E.2d 139 (1973).

Effect of Termination of Marital Relation. — When the marital relationship terminates, the asserted reasons for this section, the preservation of the sanctity of the home and the fictional oneness of husband and wife, are no longer pertinent; but evidence that defendant and his wife were experiencing less than harmonious marital relations is insufficient to terminate the privilege. State v. Reavis, 19 N.C. App. 497, 199 S.E.2d 139 (1973).

Felony Committed by One Spouse against the Other. — It appears that an exception to the general common-law rule that one spouse is not a competent witness against the other in a criminal proceeding is applicable where one spouse is tried for a felony committed against the other spouse. State v. Robinson, 15 N.C. App. 362, 190 S.E.2d 270 (1972).

A wife may be a witness against her husband for felonies perpetrated, or attempted to be perpetrated on her. State v. Robinson, 15 N.C. App. 362, 190 S.E.2d 270 (1972).

Where defendant was charged with a serious felony which she and others allegedly perpetrated against the man she contended was her husband, the public's interest in having her brought to justice far outweighed any conceivable interest the public might have in precluding her alleged husband from testifying against her. State v. Robinson, 15 N.C. App. 362, 190 S.E.2d 270 (1972).

Husband's Extrajudicial Statement Implicating Codefendant Wife. — Where testimony disclosed that any part of the husband's extrajudicial statement implicating the codefendant wife was deleted by the State, there was no violation of the rule of this section. State v. Mathis, 13 N.C. App. 359, 185 S.E.2d 448 (1971).

Stated in State v. Jones, 280 N.C. 322, 185 S.E.2d 858 (1972).

Cited in State v. Byrd, 21 N.C. App. 734, 205 S.E.2d 326 (1974).

§ 8-57.1. Husband-wife privilege waived in child abuse. — Notwithstanding the provisions of G.S. 8-56 and G.S. 8-57, the husband-wife privilege shall not be ground for excluding evidence regarding the abuse or neglect of a child under the age of 16 years or regarding an illness of or injuries to such child or the cause thereof in any judicial proceeding related to a report pursuant to the Child Abuse Reporting Law, Article 8 of Chapter 110 of the General Statutes of North Carolina. (1971, c. 710, s. 3.)

Editor's Note. — Session Laws 1971, c. 710, s. 8, makes the act effective July 1, 1971.

§ 8-58: Repealed by Session Laws 1973, c. 1286, ss. 11, 26, effective September 1, 1975.

Cross Reference. — See Editor's note following the analysis to Chapter 15.

Editor's Note. — Session Laws 1973, c. 1286, ss. 27 and 28, effective July 1, 1975, provide:

"Sec. 27. All statutes which refer to sections repealed or amended by this act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose.

"Sec. 28. None of the provisions of this act providing for the repeal of certain sections of the General Statutes shall constitute a reenactment of the common law."

Session Laws 1973, c. 1286, s. 29, contains a severability clause.

Session Laws 1973, c. 1286, s. 31, provides:

"Sec. 31. This act becomes effective on July 1, 1975, and is applicable to all criminal proceedings begun on and after that date and each provision is applicable to criminal proceedings pending on that date to the extent practicable, except § 12 [§§ 15-176.3 through 15-176.5] of this act which becomes effective on July 1, 1974."

Session Laws 1975, c. 573, amends Session Laws 1973, c. 1286, s. 31, so as to make the 1973 act effective Sept. 1, 1975, rather than July 1, 1975.

ARTICLE 8.

Attendance of Witness.

§ 8-59. Issue and service of subpoena. — In obtaining the testimony of witnesses in causes pending in the trial divisions of the General Court of Justice,

subpoenas shall be issued and served in the manner provided in Rule 45 of the Rules of Civil Procedure for civil actions. (1777, c. 115, s. 36, P. R.; R. C., c. 31, s. 59; Code, s. 1355; Rev., s. 1639; C. S., s. 1803; 1959, c. 522, s. 2; 1967, c. 954, s. 3; 1971, c. 381, s. 5.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, substituted "pending in the trial divisions of the General Court of Justice" for "depending in the superior, criminal and inferior courts."

§ 8-63. Witnesses attend until discharged; effect of nonattendance. — Every witness, being summoned to appear in any of the said courts, in manner before directed, shall appear accordingly, and, subject to the provisions of G.S. 6-51, continue to attend from session to session until discharged, when summoned in a civil action or special proceeding, by the court or the party at whose instance such witness shall be summoned, or, when summoned in a criminal prosecution, until discharged by the court, the prosecuting officer, or the party at whose instance he was summoned; and in default thereof shall forfeit and pay, in civil actions or special proceedings, to the party at whose instance the subpoena issued, the sum of forty dollars ($40.00), to be recovered by motion in the cause, and shall be further liable to his action for the full damages which may be sustained for the want of such witness's testimony; or if summoned in a criminal prosecution shall forfeit and pay eighty dollars ($80.00) for the use of the State, or the party summoning him. If the civil action or special proceeding shall, in the vacation, be compromised and settled between the parties, and the party at whose instance such witness was summoned should omit to discharge him from further attendance, and for want of such discharge he shall attend the next session, in that case the witness, upon oath made of the facts, shall be entitled to a ticket from the clerk in the same manner as other witnesses, and shall recover from the party at whose instance he was summoned the allowance which is given to witnesses for their attendance, with costs.

No execution shall issue against any defaulting witness for the forfeiture aforesaid but after notice made known to him to show cause against the issuing thereof; and if sufficient cause be shown of his incapacity to attend, execution shall not issue, and the witness shall be discharged of the forfeiture without costs; but otherwise the court shall, on motion, award execution for the forfeiture against the defaulting witness. (1777, c. 115, ss. 37, 38, 43, P. R.; 1799, c. 528, P. R.; 1801, c. 591, P. R.; R. C., c. 31, ss. 60, 61, 62; Code, s. 1356; Rev., s. 1643; C. S., s. 1807; 1965, c. 284; 1971, c. 381, s. 12.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, substituted "session to session" for "term to term" in the first sentence and "session" for "term" in the second sentence.

ARTICLE 9.

Attendance of Witnesses from without State.

§§ 8-65 to 8-70: Transferred to §§ 15A-811 to 15A-816 by Session Laws 1973, c. 1286, s. 9, effective September 1, 1975.

Cross Reference. — See Editor's note following analysis to Chapter 15.

Editor's Note. — Session Laws 1975, c. 573, amends Session Laws 1973, c. 1286, s. 31, so as to make the 1973 act effective Sept. 1, 1975, rather than July 1, 1975.

ARTICLE 10.

Depositions.

§ 8-74. Depositions for defendant in criminal actions. — In all criminal actions, hearings and investigations it shall be lawful for the defendant in any such action to make affidavit before the clerk of the superior court of the county in which said action is pending, that it is important for the defense that he have the testimony of any person, whose name must be given, and that such person is so infirm, or otherwise physically incapacitated, or nonresident of this State, that he cannot procure his attendance at the trial or hearing of said cause. Upon the filing of such affidavit, it shall be the duty of the clerk to appoint some responsible person to take the deposition of such witness, which deposition may be read in the trial of such criminal action under the same rules as now apply by law to depositions in civil actions: Provided, that the solicitor or prosecuting attorney of the district, county or town in which such action is pending have 10 days' notice of the taking of such deposition, who may appear in person or by representative to conduct the cross-examination of such witness. (Code, s. 1357; 1891, c. 522; 1893, c. 80; Rev., s. 1652; 1915, c. 251; C. S., s. 1812; 1971, c. 381, s. 6.)

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

The common law recognized no right of discovery in criminal cases. State v. Hoffman, 281 N.C. 727, 190 S.E.2d 842 (1972).

This section provides for taking the deposition of an incapacitated defense witness, whose name must be given to the court. Patently this section has no application to defendant's motion for a list of the State's witnesses. State v. Hoffman, 281 N.C. 727, 190 S.E.2d 842 (1972).

Defendant Not Entitled to List of State's Witnesses. — In the absence of a statute requiring the State to furnish it, the defendant in a criminal case is not entitled to a list of the State's witnesses who are to testify against him. There is no such statute in this State. State v. Hoffman, 281 N.C. 727, 190 S.E.2d 842 (1972).

§ 8-75: Repealed by Session Laws 1971, c. 381, s. 13, effective October 1, 1971.

§ 8-81. Objection to deposition before trial.

When Trial Begins. —

In accord with 1st and 2nd paragraphs in original. See State v. Swann, 5 N.C. App. 385, 168 S.E.2d 429, rev'd on other grounds, 275 N.C. 644, 170 S.E.2d 611 (1969).

When a trial commences is a difficult question, and the answer may vary according to the statute being construed and according to the circumstances in a particular case. State v. Swann, 5 N.C. App. 385, 168 S.E.2d 429, rev'd on other grounds, 275 N.C. 644, 170 S.E.2d 611 (1969).

The trial begins when the jury are called into the box for examination as to their qualifications — when the work of impaneling the jury begins — and the calling of a jury is a part of the trial. State v. Swann, 5 N.C. App. 385, 168 S.E.2d 429, rev'd on other grounds, 275 N.C. 644, 170 S.E.2d 611 (1969).

§ 8-83. When deposition may be read on the trial. — Every deposition taken and returned in the manner provided by law may be read on the trial of the action or proceeding, or before any referee, in the following cases, and not otherwise:

(10) If the action is pending in a magistrate's court the deposition may be read on the trial of the action, provided the witness is more than 75 miles by the usual public mode of travel from the place where the court is sitting.

(1971, c. 381, s. 7.)

Editor's Note. —
The 1971 amendment, effective Oct. 1, 1971, substituted "magistrate's" for "justice's" in subdivision (10).

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

§ 8-84: Repealed by Session Laws 1975, c. 762, s. 4, effective January 1, 1976.

Editor's Note. — Session Laws 1975, c. 762, s. 5, provides: "This act shall become effective on January 1, 1976, and shall apply to pending litigation where such application is feasible and would not work an injustice."

ARTICLE 11.

Perpetuation of Testimony.

§ 8-85. Court reporter's certified transcription. — Testimony taken and transcribed by a court reporter and certified by the reporter or by the judge who presided at the trial at which the testimony was given, may be offered in evidence in any court as the deposition of the witness whose testimony is so taken and transcribed, in the manner, and under the rules governing the introduction of depositions in civil actions. (1971, c. 377, s. 1.)

Editor's Note. — The above section is the seventh paragraph of former § 7-89. It was revised and transferred to its present position by Session Laws 1971, c. 377, s. 1, effective Oct. 1, 1971. Former § 8-85 was repealed by Session Laws 1967, c. 954, s. 4, effective Jan. 1, 1970.

ARTICLE 12.

Inspection and Production of Writings.

§ 8-89.1: Repealed by Session Laws 1975, c. 762, s. 4, effective January 1, 1976.

Editor's Note. — Session Laws 1975, c. 762, s. 5, provides: "This act shall become effective on January 1, 1976, and shall apply to pending litigation where such application is feasible and would not work an injustice."

Chapter 8A.

Interpreters for Deaf Persons.

Sec.
8A-1. Appointment of interpreters for deaf parties or witnesses; costs.

§ 8A-1. Appointment of interpreters for deaf parties or witnesses; costs. — Whenever any deaf person is a party to any legal proceeding of any nature, or a witness therein, the court upon request of any party shall appoint a qualified interpreter of the deaf sign language to interpret the proceedings to and the testimony of such deaf person. In proceedings involving possible commitment of a deaf person to a mental institution, the court shall appoint such interpreter upon its own initiative. In criminal cases and commitment proceedings, the court shall determine a reasonable fee for all such interpreter services which shall be paid by the State, and in civil cases, the said fee shall be taxed as part of the court costs. (1965, c. 868; 1971, c. 381, s. 8.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, substituted "by the State" for "out of the general county funds" in the last sentence.

Chapter 9.

Jurors.

ARTICLE 1.

Jury Commissions, Preparation of Jury Lists, and Drawing of Panels.

§ 9-2. Preparation of jury list; sources of names. — It shall be the duty of the jury commission at least 30 days prior to January 1, 1968, and each biennium thereafter, to prepare a list of prospective jurors qualified under this Chapter to serve in the ensuing biennium. In preparing the list, the jury commission shall use the tax lists of the county and voter registration records, and, in addition, may use any other source of names deemed by it to be reliable, but it shall exercise reasonable care to avoid duplication of names. The commission may use less than all of the names from any one source if it uses a systematic selection procedure (e.g., every second name), and provided the list contains not less than one and one-quarter times and not more than three times as many names as were drawn for jury duty in all courts in the county during the previous biennium, but in no event shall the list include less than 500 names.

The custodians of the appropriate property tax and election registration records in each county shall cooperate with the jury commission in its duty of compiling the list of jurors required by this section. (1806, c. 694, P. R.; Code, ss. 1722, 1723; 1889, c. 559; 1897, cc. 117, 539; 1899, c. 729; Rev., s. 1957; C. S., s. 2312; 1947, c. 1007, s. 1; 1967, c. 218, s. 1; 1969, c. 205, s. 1; c. 1190, s. 49½; 1973, c. 83, ss. 1, 2.)

Editor's Note. —

The 1973 amendment substituted "one and one-quarter times" for "two times" in the third sentence of the first paragraph and added, at the end of that sentence, "but in no event shall the list include less than five hundred names."

Power of State to Prescribe Qualifications of Jurors. — Absent discrimination by race or other identifiable group or class, a state is at liberty to prescribe such qualifications for jurors as it deems proper without offending the Fourteenth Amendment. State v. Rogers, 275 N.C. 411, 168 S.E.2d 345 (1969).

The plan in this section for the selection and drawing of jurors is constitutional and provides a jury system completely free of discrimination to any cognizable group. State v. Cornell, 281 N.C. 20, 187 S.E.2d 768 (1972).

A jury list is not discriminatory or unlawful because it is drawn from the tax list of the county. State v. Cornell, 281 N.C. 20, 187 S.E.2d 768 (1972).

Use of a jury box containing only the names of property owners is not per se discriminatory as to race and does not unfairly narrow the choice of jurors so as to impinge defendant's statutory or constitutional rights. State v. Rogers, 275 N.C. 411, 168 S.E.2d 345 (1969).

Even if the tax lists contained a disproportionate male-female ratio, such disproportion did not result from a systematic, arbitrary and intentionally discriminatory process on the part of the jury commission. State v. Tant, 16 N.C. App. 113, 191 S.E.2d 387 (1972).

Nor is a jury commission limited to the sources specifically designated by this section.

State v. Cornell, 281 N.C. 20, 187 S.E.2d 768 (1972).

Failure to Use List of Names Not Appearing on Tax Lists. — The fact that the county commissioners did not also use a list of names of persons who do not appear on the tax lists does not show racial discrimination in the selection of prospective jurors. State v. Rogers, 275 N.C. 411, 168 S.E.2d 345 (1969).

Mere irregularity on the part of the jury commissioners in preparing the jury list, unless obviously, designedly or intentionally discriminatory, will not vitiate the list or afford a basis for a challenge to the array. State v. Tant, 16 N.C. App. 113, 191 S.E.2d 387 (1972).

Jury Commission Need Not Ascertain Validity of Procedures Used in Compiling Lists. — To hold that a jury commission must ascertain the validity of the procedures used by independent bodies in compiling tax and voter registration lists before using such lists as sources of names of prospective jurors would be to impose an impossible burden. State v. Tant, 16 N.C. App. 113, 191 S.E.2d 387 (1972).

How Prima Facie Case of Purposeful Discrimination Established. — The petitioner has the initial burden of establishing a prima facie case of purposeful discrimination. A prima facie case of jury discrimination can be established through a showing of a substantial disparity between the percentage of Negro residents in the county as a whole and on the jury lists, or by a showing of such disparity between the percentages of Negroes on the tax rolls, from which the jury lists are drawn, and on the jury lists. Such a showing is strengthened where the disparity originated, at least in part, at the one point in the selection process where the jury commissioners invoked their subjective judgment rather than objective criteria. Parker v. Ross, 330 F. Supp. 13 (E.D.N.C. 1971).

The disparity between the percentage of Negroes over 21 years of age in a county (45.5%) and on the jury list (04.5%) constituted a prima facie case of systematic exclusion of Negroes from the county grand and petit jury lists. Parker v. Ross, 330 F. Supp. 13 (E.D.N.C. 1971).

Effect of State's Failure to Justify Disparity. — If a prima facie case of jury discrimination is proven, the State must justify the disparity. However, the State's failure to do so does not mean that a guilty defendant must go free. The State may indict and try him again by the procedure which conforms to constitutional requirements. Parker v. Ross, 330 F. Supp. 13 (E.D.N.C. 1971).

Absence of Names of Persons between Ages of 18 and 21. — See note to § 9-3.

Commission's Control of List Ceases Upon Preparation of List. — See opinion of Attorney General to Honorable Louise S. Allen, 42 N.C.A.G. 260 (1973).

Applied in State v. Barnwell, 17 N.C. App. 299, 194 S.E.2d 63 (1973); State v. Hubbard, 19 N.C. App. 431, 199 S.E.2d 146 (1973).

Cited in Garner v. State, 8 N.C. App. 109, 174 S.E.2d 92 (1970).

§ 9-3. Qualifications of prospective jurors. — All persons are qualified to serve as jurors and to be included on the jury list who are citizens of the State and residents of the county, who have not served as jurors during the preceding two years, who are 18 years of age or over, who are physically and mentally competent, who have not been convicted of a felony or pleaded guilty or nolo contendere to an indictment charging a felony (or if convicted of a felony or having pleaded guilty or nolo contendere to an indictment charging a felony have had their citizenship restored pursuant to law), and who have not been adjudged non compos mentis. Persons not qualified under this section are subject to challenge for cause. (1806, c. 694, P. R.; Code, ss. 1722, 1723; 1889, c. 559; 1897, cc. 117, 539; 1899, c. 729; Rev., s. 1957; C. S., s. 2312; 1947, c. 1007, s. 1; 1967, c. 218, s. 1; 1971, c. 1231, s. 1; 1973, c. 230, ss. 1, 2.)

Editor's Note. — The 1971 amendment substituted "18" for "twenty-one" in the first sentence.

The 1973 amendment inserted "guilty or" where those words first appear and inserted the clause in parentheses in the first sentence.

The North Carolina plan which imposes a two-year lapse in preparation of new jury lists is constitutional and provides a jury system completely free of discrimination to any cognizable group. State v. Kirby, 15 N.C. App. 480, 190 S.E.2d 320 (1972).

The absence from the jury list of the names of persons between the ages of 18 and 21 during the period from July 21, 1971, the effective date of the amendment of § 9-3 lowering the age requirement for jurors from 21 years to 18 years, and September 21, 1971, the date of defendants trial, was not unreasonable and did not constitute systematic exclusion of this age group from jury service. State v. Cornell, 281 N.C. 20, 187 S.E.2d 768 (1972); State v. Harris, 281 N.C. 542, 189 S.E.2d 249 (1972); State v. Barnwell, 17 N.C. App. 299, 194 S.E.2d 63 (1973).

The petit jury which served at the trial of a 20-year-old defendant was not invalidated by the fact that the jury list had not been revised to include the names of persons under 21 years of age. State v. Long, 14 N.C. App. 508, 188 S.E.2d 690 (1972).

Person's Mental and Physical Competency Must Be Considered Each Time Person's Name Appears on Prospective Jury List. — See opinion of Attorney General to Mr. J.C. Taylor, 43 N.C.A.G. 292 (1973).

Applied in State v. Hubbard, 19 N.C. App. 431, 199 S.E.2d 146 (1973).

Stated in Glover v. North Carolina, 301 F. Supp. 364 (E.D.N.C. 1969).

§ 9-5. Procedure for drawing panel of jurors; numbers drawn.

No language in this Chapter requires the clerk personally, or through an assistant or deputy clerk, to make the random drawing of names of those on the panel from the box so as to render illegal such drawing by someone else. State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975).

§ 9-6. Jury service a public duty; excuses to be allowed in exceptional cases; procedure.

(b) Pursuant to the foregoing policy, the chief district judge of each district shall promulgate procedures whereby he or any district judge designated by him, prior to the date that a jury session (or sessions) of superior or district court convenes, shall receive, hear, and pass on applications for excuses from jury duty. The procedures shall provide for the time and place, publicly announced, at which applications for excuses will be heard, and prospective jurors who have been summoned for service shall be so informed.

(1971, c. 377, s. 30.)

Editor's Note.—

The 1971 amendment, effective Oct. 1, 1971, deleted the former second sentence of subsection (b), relating to procedures to be followed before the establishment of a district court in a county.

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

Cited in State v. White, 6 N.C. App. 425, 169 S.E.2d 895 (1969).

§ 9-8: Repealed by Session Laws 1967, c. 218, s. 1, effective January 1, 1971.

ARTICLE 2.

Petit Jurors.

§ 9-11. Supplemental jurors; special venire.

There is no statutory or case authority prescribing the methods by which tales jurors must be selected. State v. White, 6 N.C. App. 425, 169 S.E.2d 895 (1969).

Nowhere in the statute is there a provision delineating discretionary restrictions to be placed on an officer in fulfilling the court's order. The statutory recognition that tales jurors may be needed and the statutory language used contemplate a system easily and expeditiously administered. To place procedural restrictions unnecessarily on their selection would defeat the purpose of the system, which is to facilitate the dispatch of the business of the court. State v. White, 6 N.C. App. 425, 169 S.E.2d 895 (1969).

The language of this section is clear and unambiguous, and its provisions authorize the trial judge to order the summoning of supplemental jurors in order to insure orderly, uninterrupted, and speedy trials. State v. Fountain, 282 N.C. 58, 191 S.E.2d 674 (1972).

Discretion of Selecting Officer. — Where an officer is empowered to select and summon talesmen he is vested with some discretion. It is his right and duty to use his best judgment in securing men of intelligence, courage, and good moral character, but he must act with entire

impartiality. State v. White, 6 N.C. App. 425, 169 S.E.2d 895 (1969).

Tales jurors are selected infrequently and only to provide a source from which to fill the unexpected needs of the court. They must still possess the statutory qualifications and are still subject to the same challenges as regular jurors and may be examined by both parties on voir dire. In order to retain the flexibility needed in the administration of such a system, the summoning official must be permitted some discretion, whether he be located in a relatively small community or a more heavily populated area, and to restrict the discretion placed in the summoning official, without proven cause, is to presume he is not worthy of the office which he holds. State v. White, 6 N.C. App. 425, 169 S.E.2d 895 (1969).

Mere Possibility of Discrimination Does Not Make Panel Objectionable. — Obviously it would be possible for a sheriff, sent out to execute an order of the court under this section to discriminate in the selection of persons to be summoned. This mere possibility does not make the panel actually summoned by him objectionable where the record shows that he did not so discriminate. State v. White, 6 N.C. App. 425, 169 S.E.2d 895 (1969).

The provisions of this section and § 9-21 are easily harmonized. State v. Fountain, 282 N.C. 58, 191 S.E.2d 674 (1972).

The requirement in § 9-21 that the clerk read the names of the jurors to enable defendants to exercise their rights of challenge before the jury is impaneled applies to original venires and additional venires with equal force, and relates to the time before the jury is finally formed. State v. Fountain, 282 N.C. 58, 191 S.E.2d 674 (1972).

An accused is not prejudiced because he is not furnished a list of persons called as supplemental jurors where it became necessary to summons them after the court had properly excluded jurors from the original venire. State v. Fountain, 282 N.C. 58, 191 S.E.2d 674 (1972).

Objections Made by Challenges to the Array. — Objections to the special venire based on partiality, misconduct of the sheriff, or irregularity in making out the jury list, are properly made by challenges to the array. State v. Shaw, 284 N.C. 366, 200 S.E.2d 585 (1973).

A motion challenging the array of special jurors was properly denied where the motion did not challenge the order of the court directing the sheriff to select six supplemental jurors, nor the action of the sheriff in selecting the jurors, nor contend that members of the Negro race were systematically excluded by the sheriff in his selection of the six jurors. State v. Hollingsworth, 11 N.C. App. 674, 182 S.E.2d 26 (1971).

Applied in State v. Brown, 13 N.C. App. 261, 185 S.E.2d 471 (1971).

§ 9-12. Supplemental jurors from other counties.

(c) Repealed by Session Laws 1971, c. 377, s. 32. (1913, c. 4, ss. 1, 2; C. S., s. 473; 1931, c. 308; 1933, c. 248; 1961, c. 110; 1967, c. 218, s. 1; 1971, c. 377, s. 32.)

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

As subsections (a) and (b) were not changed by the amendment, they are not set out.

Discretion of Court.—

A defendant's motion for a change of venue and his alternative motion for a special venire from another county are addressed to the sound legal discretion of the trial court. State v. Penley, 6 N.C. App. 455, 170 S.E.2d 632 (1969).

This section places the matter of ordering jurors to be summoned from another county in the sound discretion of the judge of the superior court. State v. Edwards, 286 N.C. 140, 209 S.E.2d 789 (1974).

Review.—

A defendant's motions for a change of venue or for a special venire from another county on the ground that he could not get a fair and impartial trial in the county because of extensive publicity and public discussion of the cases, was addressed to the sound legal discretion of the trial court, whose ruling in denying these motions was not disturbed on appeal because (1) the newspaper articles filed in support of the motions were not unduly inflammatory in nature, (2) the articles were published three months prior to the trial and there was no evidence of repeated or excessive publication, and (3) those of the prospective jurors who had read the newspaper accounts stated that they could return an impartial verdict. State v. Penley, 6 N.C. App. 455, 170 S.E.2d 632 (1969).

The courts have consistently held that a motion for removal to an adjacent county or to cause a jury to be selected from an adjacent county on the grounds of unfavorable publicity is addressed to the sound discretion of the court, and that absent a showing of abuse of discretion the decision of the trial court is not reviewable. State v. Jackson, 24 N.C. App. 394, 210 S.E.2d 876 (1975).

Order Justified. — Due to the prior trials and the widespread publicity, the court on motion of the State was justified in ordering the trial jury

drawn from another county. State v. Cutshall, 281 N.C. 588, 189 S.E.2d 176 (1972).

Applied in State v. Roseboro, 276 N.C. 185, 171 S.E.2d 886 (1970); State v. Jackson, 287 N.C. 470, 215 S.E.2d 123 (1975).

Cited in State v. Mitchell, 283 N.C. 462, 196 S.E.2d 736 (1973).

§ 9-14. Jury sworn; judge decides competency.

The question of whether a juror is competent is one for the trial judge.—

In accord with original. See State v. Johnson, 280 N.C. 281, 185 S.E.2d 698 (1972); State v. Watson, 281 N.C. 221, 188 S.E.2d 289 (1972); State v. Cameron, 17 N.C. App. 229, 193 S.E.2d 485 (1972); State v. Harris, 283 N.C. 46, 194 S.E.2d 796 (1973); State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974).

The competency of jurors to serve is left largely to the sound legal discretion of the trial judge, and his rulings thereon are not subject to review on appeal unless accompanied by some imputed error of law. State v. Chavis, 24 N.C. App. 148, 210 S.E.2d 555 (1974).

Ruling on motion for competency of jurors is discretionary with the trial judge and will not be reviewed absent a showing of abuse of discretion or an error of law. State v. Moore, 24 N.C. App. 582, 211 S.E.2d 470 (1975).

The trial court has broad discretion in the voir dire selection of jurors, and the exercise of the party's right to examine prospective jurors should be carefully supervised by the trial court. State v. Wood, 20 N.C. App. 267, 201 S.E.2d 231 (1973).

The desire of a prospective juror to affirm rather than take an oath.—

In accord with original. See State v. Harris, 283 N.C. 46, 194 S.E.2d 796 (1973).

Challenges for Cause.—

A juror, who is related to the defendant by blood or marriage within the ninth degree of kinship, is properly rejected when challenged by the State for cause on that ground. State v. Allred, 275 N.C. 554, 169 S.E.2d 833 (1969); State v. Watson, 281 N.C. 221, 188 S.E.2d 289 (1972).

A relationship within the ninth degree between a juror and a State's witness, standing alone, is not legal ground for challenge for cause. Where such relationship exists and is known and recognized by the juror, a defendant's challenge for cause should be rejected only if it should appear clearly that, under the circumstances of the particular case, the challenged juror would have no reason or disposition to favor his kinsman by giving added weight to his testimony or otherwise. State v. Allred, 275 N.C. 554, 169 S.E.2d 833 (1969); State v. Watson, 281 N.C. 221, 188 S.E.2d 289 (1972).

The trial court did not err in the denial of defendant's challenge for cause directed to the district solicitor's father-in-law as a juror, where the challenge was denied allowed only after the juror stated, upon being questioned by the court, that he would not convict on his relationship to the solicitor, and after it was ascertained that the district solicitor was not prosecuting defendant's case. State v. Watson, 281 N.C. 221, 188 S.E.2d 289 (1972).

Excusing Unchallenged Juror.—

In accord with 2nd paragraph in original. See State v. Harris, 283 N.C. 46, 194 S.E.2d 796 (1973).

The erroneous allowance of an improper challenge.—

In accord with original. See State v. Harris, 283 N.C. 46, 194 S.E.2d 796 (1973).

Review.—

In accord with 1st paragraph in original. See State v. Gibbs, 5 N.C. App. 457, 168 S.E.2d 507 (1969); State v. Johnson, 280 N.C. 281, 185 S.E.2d 698 (1972); State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974).

A ruling in respect to the impartiality of a juror presents no question of law for review. State v. Chavis, 24 N.C. App. 148, 210 S.E.2d 555 (1974).

Defendant seeking to establish on appeal that the exercise of judicial discretion constitutes reversible error must show harmful prejudice as well as clear abuse of discretion. State v. Young, 287 N.C. 377, 214 S.E.2d 763 (1975).

The right of challenge is not one to accept, but to reject. It is not given for the purpose of enabling the defendant, or the State, to pick a jury, but to secure an impartial one. State v. Allred, 275 N.C. 554, 169 S.E.2d 833 (1969); State v. Chavis, 24 N.C. App. 148, 210 S.E.2d 555 (1974).

Excluding Jurors for Opposition to Capital Punishment. — Under the decision of Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968), a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. State v. Ruth, 276 N.C. 36, 170 S.E.2d 897 (1969).

Judgment of the superior court sentencing defendant to death for first-degree murder must be vacated under the decision of Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968), where the trial court allowed the State's challenges for cause to seven prospective

jurors who stated simply a general objection to or conscientious scruples against capital punishment, notwithstanding the trial occurred prior to the Witherspoon decision, since that decision is fully retroactive. State v. Ruth, 276 N.C. 36, 170 S.E.2d 897 (1969).

A trial judge should allow challenge for cause when a venireman is not willing to consider all possible penalties provided by State law and when the venireman is unalterably committed to vote against the death penalty, regardless of the evidence which might be presented at trial. State v. Watson, 281 N.C. 221, 188 S.E.2d 289 (1972).

In a capital case a juror may be properly challenged for cause if he indicates he could not return a verdict of guilty knowing the penalty would be death, even though the State proved to him by the evidence and beyond a reasonable doubt that the accused was guilty of the capital crime charged. State v. Honeycutt, 285 N.C. 174, 203 S.E.2d 844 (1974).

In a capital case it is proper to inquire into a prospective juror's views on capital punishment in order to determine his competency to serve in an impartial manner. State v. Fowler, 285 N.C. 90, 203 S.E.2d 803 (1974).

If a prospective juror states that under no circumstances could he vote for a verdict that would result in the imposition of the death penalty no matter how aggravated the case and regardless of the evidence shown, the trial court can properly dismiss the juror upon a challenge for cause. State v. Fowler, 285 N.C. 90, 203 S.E.2d 803 (1974).

Applied in State v. Boyd, 287 N.C. 131, 214 S.E.2d 14 (1975); State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975); State v. Wetmore, 287 N.C. 344, 215 S.E.2d 51 (1975).

Cited in State v. Waddell, 279 N.C. 442, 183 S.E.2d 644 (1971); State v. Moye, 12 N.C. App. 178, 182 S.E.2d 814 (1971).

§ 9-15. Questioning jurors without challenge; challenges for cause. — (a) The court, and any party to an action, or his counsel of record shall be allowed, in selecting the jury, to make direct oral inquiry of any prospective juror as to the fitness and competency of any person to serve as a juror, without having such inquiry treated as a challenge of such person, and it shall not be considered by the court that any person is challenged as a juror until the party shall formally state that such person is so challenged.

(1973, c. 95.)

Editor's Note. — The 1973 amendment substituted "and" for "or" preceding "any party to an action," deleted "civil or criminal" following "any party to an action" and inserted "or his counsel of record," "direct oral" and "of any prospective juror" in subsection (a).

As subsections (b) and (c) were not changed by the amendment, they are not set out.

Purpose of Voir Dire. — The voir dire examination of jurors is a right secured to the defendant by the statutes and has a definite double purpose: first, to ascertain whether there exists grounds for challenge for cause; and, second, to enable counsel to exercise intelligently the peremptory challenges allowed by law. State v. Allred, 275 N.C. 554, 169 S.E.2d 833 (1969); State v. Dawson, 281 N.C. 645, 190 S.E.2d 196 (1972); State v. Carey, 285 N.C. 497, 206 S.E.2d 213 (1974).

The voir dire examination of prospective jurors serves a dual purpose: (1) to ascertain whether grounds exist for challenge for cause; and (2) to enable counsel to exercise intelligently the peremptory challenges allowed by law. State v. Young, 287 N.C. 377, 214 S.E.2d 763 (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).

The right to challenge is not given so as to allow a party to pick a jury, but so that he may obtain an impartial jury. State v. Bryant, 282 N.C. 92, 191 S.E.2d 745 (1972).

Regulation of Voir Dire Rests in Trial Judge's Discretion. — Regulation of the manner and the extent of the inquiry on voir dire rests largely in the trial judge's discretion. State v. Young, 287 N.C. 377, 214 S.E.2d 763 (1975).

Any party to an action, whether civil or criminal, is entitled to inquire into the fitness and competency of any prospective juror. State v. Wood, 20 N.C. App. 267, 201 S.E.2d 231 (1973).

The right of inquiry concerning a prospective juror's competency and fitness to serve may, of course, be exercised by or on behalf of the defendant as well as the State. State v. Carey, 285 N.C. 497, 206 S.E.2d 213 (1974).

Questioning of Jurors by Court or by Counsel. — Although this section assures a defendant of the right to have due inquiry made as to the competency and fitness of any person to serve as a juror, the actual questioning of prospective jurors to elicit the pertinent information may be conducted either by the court or by counsel for the State and counsel for

the defendant. The trial judge, in his discretion, may decide which course to pursue in a particular case. State v. Dawson, 281 N.C. 645, 190 S.E.2d 196 (1972); State v. Harris, 283 N.C. 46, 194 S.E.2d 796 (1973).

Counsel's exercise of the right to inquire into the fitness of jurors is subject to the trial judge's close supervision, and the regulation of the manner and the extent of the inquiry rests largely in the trial judge's discretion. State v. Bryant, 282 N.C. 92, 191 S.E.2d 745 (1972).

Refusal of Court to Ask Question Requested by Counsel. — If the court, when it conducts the questioning, declines to ask a question requested by the defendant's counsel, an exception may be noted so that an appellate court can consider the propriety, pertinence and substance of such question. This procedure avoids repetitive questioning without precluding or restricting any inquiry suggested and requested by defendants' counsel, and was not violative of this section or otherwise objectionable. State v. Dawson, 281 N.C. 645, 190 S.E.2d 196 (1972).

Prospective jurors may be asked questions which will elicit information not per se a ground for challenge in order that the party, propounding the question, may exercise intelligently his or its peremptory challenges. State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721 (1974).

Voir dire examination of prospective jurors in capital cases is proper. State v. Honeycutt, 285 N.C. 174, 203 S.E.2d 844 (1974).

And Jurors May Be Examined concerning Attitudes toward Capital Punishment. — In capital cases all prospective jurors may be examined concerning their attitudes toward capital punishment. State v. Britt, 285 N.C. 256, 204 S.E.2d 817 (1974).

In a capital case both the State and the defendant may, on the voir dire examination of prospective jurors, make inquiry concerning a prospective juror's moral or religious scruples, his beliefs and attitudes toward capital punishment, to the end that both the defendant and the State may be insured a fair trial before an unbiased jury. State v. Britt, 285 N.C. 256, 204 S.E.2d 817 (1974).

In order to insure a fair trial before an unbiased jury, it is entirely proper in a capital case for both the State and the defendant to make appropriate inquiry concerning a prospective juror's moral or religious scruples, beliefs, and attitudes toward capital punishment. State v. Honeycutt, 285 N.C. 174, 203 S.E.2d 844 (1974).

In many capital cases solicitors may ask prospective jurors whether they have moral or religious scruples against capital punishment, and if so, whether they are willing to consider all of the penalties provided by law, or are irrevocably committed to vote against a verdict carrying the death penalty regardless of the facts and circumstances that might be revealed by the evidence. State v. Carey, 285 N.C. 497, 206 S.E.2d 213 (1974).

There is no error in permitting questions to be propounded to prospective jurors concerning their views about the death penalty. State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975).

Counsel involved in the trial of capital cases, and prosecuting attorneys in particular, should take greater pains when interrogating veniremen to ascertain those whose scruples and attitudes irrevocably commit them to vote against any conviction that carries the death penalty regardless of the evidence adduced in the course of the trial. State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975).

Subject to Trial Judge's Control and Supervision. — The extent of the inquiries to prospective jurors concerning their attitudes toward capital punishment remains under the control and supervision of the trial judge. State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975).

Voir Dire Should Be Based on Questions Phrased in Witherspoon Language. — Since Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968) has so clearly specified the ultimate question that must be answered, the voir dire examination of prospective jurors should be based on questions phrased in Witherspoon language, because unless this course is followed, new trials will often be necessary in cases otherwise free from prejudicial error. State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975).

Excluding Jurors for Opposition to Capital Punishment. — If a prospective juror states that under no circumstances could he vote for a verdict that would result in the imposition of the death penalty no matter how aggravated the case and regardless of the evidence shown, the trial court can properly dismiss the juror upon a challenge for cause. State v. Avery, 286 N.C. 459, 212 S.E.2d 142 (1975).

Jurors who indicated they were irrevocably committed to vote against a verdict carrying the death penalty regardless of the facts and circumstances that might be revealed by the evidence were properly excused for cause. State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975).

Veniremen who are unwilling to consider all of the penalties provided by law and who are irrevocably committed, before the trial has begun, to vote against the death penalty regardless of the facts and circumstances that might emerge in the course of the trial may be challenged for cause on that ground. State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975).

Where juror voiced general reservations about the death penalty, but made no affirmative, unequivocal statement that she was unwilling to consider the death penalty or that she was irrevocably committed to vote against

it regardless of the facts and circumstances that might be revealed by the evidence, she was erroneously excused for cause. State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975).

Defendant seeking to establish on appeal that the exercise of judicial discretion constitutes reversible error must show harmful prejudice as well as clear abuse of discretion. State v. Young, 287 N.C. 377, 214 S.E.2d 763 (1975).

A hypothetical question is improper when it is faulty in form so as to be ambiguous and confusing, or when it is phrased so as to contain an incorrect or inadequate statement of the law. State v. Bryant, 282 N.C. 92, 191 S.E.2d 745 (1972).

Effect of District Attorney's Improper Statements During Voir Dire. — In a capital case, improper statements made by a district attorney in the presence of prospective jurors during their voir dire examination may well be as prejudicial as a similar statement made by him during argument to the jury. State v. Hines, 286 N.C. 377, 211 S.E.2d 201 (1975).

Erroneous allowance of an improper challenge for cause does not entitle the adverse party to a new trial, so long as only those who are competent and qualified to serve are actually empaneled upon the jury which tried his case. State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975).

§ 9-17. Jurors impaneled to try case furnished with accommodations; separation of jurors.

No Federal Constitutional Issue Presented. — Petitioner's contention that he was denied a fair and impartial trial in that the jurors were not sequestered does not present a federal constitutional issue. It is a matter of state procedural law, and does not reach constitutional proportions. Baldwin v. Blackledge, 330 F. Supp. 183 (E.D.N.C. 1971).

Whether or not a jury is to be sequestered is within the discretion of the trial court. There being no showing of an obvious abuse of discretion, the matter is not subject to review. Baldwin v. Blackledge, 330 F. Supp. 183 (E.D.N.C. 1971).

§ 9-18. Alternate jurors.

Participation of Alternate Juror in Deliberation is Error. — A decision that a deliberation by 13 jurors is error is compelled both by this section and by the appellate decisions of the State. State v. Alston, 21 N.C. App. 544, 204 S.E.2d 860 (1974).

Where a thirteenth alternate juror was allowed to retire with the jury and participate in the deliberation of the verdict, the court held reversible error was committed and ordered a new trial. State v. Alston, 21 N.C. App. 544, 204 S.E.2d 860 (1974).

Alternate Juror's Presence in Jury Room Not Prejudicial. — Although the alternate juror was not discharged when the jury retired as required by this section, where the record shows that the court corrected its mistake after only three or four minutes had elapsed, and that the alternate did not participate in the deliberation and verdict of the other 12, his brief visit to the jury room was not prejudicial. State v. Bindyke, 25 N.C. App. 273, 212 S.E.2d 666 (1975).

Quoted in State v. Fox, 277 N.C. 1, 175 S.E.2d 561 (1970).

ARTICLE 3.

Peremptory Challenges.

§ 9-21. Peremptory challenges in criminal cases.

(b) In all capital cases the State may challenge peremptorily without cause nine jurors for each defendant and no more. In all other criminal cases the State may challenge peremptorily without cause four jurors for each defendant and no more. The State's challenge, peremptory or for cause, must be made before the juror is tendered to the defendant. The State does not have the right to stand any jurors at the foot of the panel. (22 Hen. VIII, c. 14, s. 6; 33 Edw. I, c. 4; 1777, c. 115, s. 85, P. R.; 1801, c. 592, s. 1, P. R.; 1812, c. 833, P. R.; 1826, c. 9; 1827, c. 10; R. S., c. 35, ss. 19, 21; R. C., c. 35, ss. 32, 33; 1871-2, c. 39; Code, ss. 1199,

1200; 1887, c. 53; Rev., ss. 3263, 3264; 1907, c. 415; 1913, c. 31, ss. 3, 4; C. S., ss. 4633, 4634; 1935, c. 475, ss. 2, 3; 1967, c. 218, s. 1; 1969, c. 205, s. 7; 1971, c. 75.)

Editor's Note.—

The 1971 amendment substituted "nine" for "six" in the first sentence of subsection (b).

As subsection (a) was not changed by the amendment, it is not set out.

Purpose.—

The purpose of this section is to keep the defendant and his counsel informed as to the composition of the jury venires until the time the jury is impaneled. State v. Fountain, 282 N.C. 58, 191 S.E.2d 674 (1972).

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).

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 effect of this section is to give the defendant the last opportunity to exercise his right of challenge when the State has all pertinent information concerning the fitness and competency of the juror before he is tendered to the defendant. State v. Harris, 283 N.C. 46, 194 S.E.2d 796 (1973).

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).

And defendant has no vested right to a particular juror. State v. Woods, 286 N.C. 612, 213 S.E.2d 214 (1975).

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 provisions of this section and § 9-11 are easily harmonized. State v. Fountain, 282 N.C. 58, 191 S.E.2d 674 (1972).

The requirement in this section that the clerk read the names of the jurors to enable defendants to exercise their rights of challenge before the jury is impaneled applies to original venires and additional venires with equal force, and relates to the time before the jury is finally formed. State v. Fountain, 282 N.C. 58, 191 S.E.2d 674 (1972).

This section does 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 (1973).

Waiver of Objection to Rejection of Juror.—

A defendant has not been prejudiced by the acceptance of a juror who is challenged for cause and the cause is disallowed unless he exhausts his peremptory challenges before the panel is completed. State v. Allred, 275 N.C. 554, 169 S.E.2d 833 (1969).

Challenge May Be Peremptory or for Cause. — A challenge to the poll (to each prospective juror) may be peremptory within the limits allowed by law, or for cause without limit if cause is shown. State v. Allred, 275 N.C. 554, 169 S.E.2d 833 (1969).

Peremptory Challenge Defined. — Peremptory challenges are challenges which may be made or 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); State v. Carey, 285 N.C. 497, 206 S.E.2d 213 (1974).

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).

The right of peremptory challenge, etc. —

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).

Peremptory Challenges Limited in Number. —

Under the express provisions of this section, in all capital cases the defendant may challenge 14 jurors and the State may challenge nine jurors "and no more." State v. Woods, 286 N.C. 612, 213 S.E.2d 214 (1975).

Challenges Allotted on Basis of Number of Defendants. — This section allots 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).

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).

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).

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).

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).

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).

Where the trial court in a capital case erroneously disallowed defendant's challenge for cause of a prospective juror, and defendant exercised all of his peremptory challenges, including one for the juror for whom the challenge for cause was erroneously disallowed, the trial court's refusal to allow defendant to challenge peremptorily an additional juror on the ground that defendant had exhausted his peremptory challenges is a denial of defendant's right under this section to challenge fourteen jurors peremptorily without cause. State v. Allred, 275 N.C. 554, 169 S.E.2d 833 (1969).

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).

Applied in State v. Sanders, 276 N.C. 598, 174 S.E.2d 487 (1970); State v. Brown, 13 N.C. App. 261, 185 S.E.2d 471 (1971); State v. Dawson, 281 N.C. 645, 190 S.E.2d 196 (1972); State v. Harris, 283 N.C. 46, 194 S.E.2d 796 (1973); State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975); State v. Miller, 26 N.C. App. 190, 215 S.E.2d 181 (1975).

Cited in State v. McNeil, 277 N.C. 162, 176 S.E.2d 732 (1970); State v. Perry, 277 N.C. 174, 176 S.E.2d 729 (1970).

ARTICLE 4.

Grand Jurors.

§§ 9-22 to 9-26: Repealed by Session Laws 1973, c. 1286, s. 26, effective September 1, 1975.

Cross References. — For present provisions as to grand juries, see §§ 15A-621 through 15A-630. And see the Editor's note following the analysis to Chapter 15A.

Editor's Note. — Session Laws 1975, c. 573, amends Session Laws 1973, c. 1286, s. 31, so as to make the 1973 act effective Sept. 1, 1975, rather than July 1, 1975.

Repealed § 9-22 had been amended by Session Laws 1973, c. 922.

Chapter 10.

Notaries.

Revision of Chapter. — Session Laws 1973, c. 680, revised and rewrote this Chapter, substituting present §§ 10-1 through 10-17 for former §§ 10-1 through 10-16. No attempt has been made to point out the changes made by the revision, but, where appropriate, the historical citations to the old sections have been added to the sections in the revised Chapter.

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§ 10-1. Appointment and commission; term of office; revocation of commission. — The Secretary of State may, from time to time, at his discretion, appoint one or more fit persons in every county to act as notaries public and shall issue to each a commission upon payment of a fee of ten dollars ($10.00). The commission shall show that it is for a term of five years and shall show the effective date and the date of expiration. The term of the commission shall be computed by including the effective date and shall end at midnight of the day preceding the anniversary of the effective date, five years thereafter. The commission shall be sent to the register of deeds of the county in which the appointee lives and a copy of the letter of transmittal to the register of deeds shall be sent to the appointee concerned. The commission shall be retained by the register of deeds until the appointee has qualified in the manner provided in G.S. 10-2.

Any commission so issued by the Secretary of State or his predecessor, shall be revocable by him in his discretion upon complaint being made against such notary public and when he shall be satisfied that the interest of the public will be best served by the revocation of said commission. Whenever the Secretary of State shall have revoked the commission of any notary public appointed by him, or his predecessor in office, it shall be his duty to file with the register of deeds in the county of such notary public a copy of said order and mail a copy of same to said notary public.

Any person holding himself out to the public as a notary public, or any person attempting to act in such capacity after his commission shall have been revoked by the Secretary of State, shall be guilty of a misdemeanor and upon conviction shall be fined or imprisoned, or both, in the discretion of the court. (Code, ss. 3304, 3305; Rev., ss. 2347, 2348; C. S., s. 3172; 1927, c. 117; 1959, c. 1161, s. 2; 1969, c. 563, s. 1; c. 912, s. 1; 1973, c. 680, s. 1.)

§ 10-2. To qualify before register of deeds; record of qualification. — Upon appearing before the register of deeds to which their commissions were delivered, the notaries shall be duly qualified by taking before the register an oath of office, and the oaths prescribed for officers. Following the administration of the oaths of office, the notary shall place his signature in a book designated as "The Record of Notaries Public." The Record of Notaries Public shall contain the name of the notary, the signature of the notary, the effective date and expiration date of the commission, the date the oath was administered, and the date of revocation if the commission is revoked by the Secretary of State. The information contained in The Record of Notaries Public shall constitute the official record of the qualification of notaries public, and the register of deeds shall deliver the commission to the notary following his qualification and notify the Secretary of State of such qualification. (Code, ss. 3304, 3305; Rev., ss. 2347, 2348; C. S., s. 3173; 1969, c. 912, s. 2; 1973, c. 680, s. 1.)

§ 10-3. Clerks notaries ex officio; may certify own seals. — The clerks of the superior court may act as notaries public, in their several counties, by virtue of their offices as clerks, and may certify their notarial acts under the seals of their respective courts. (1833, c. 7, ss. 1, 2; R. C., c. 75, s. 3; Code, s. 3306; Rev., s. 2349; C. S., s. 3174; 1973, c. 680, s. 1.)

§ 10-4. Register of deeds notary ex officio with respect to certain instruments; to use seal of office. — With respect to instruments offered for registration in their county, the register of deeds and his assistants and deputies may act as notaries public by virtue of their office, and may certify their notarial acts under the seal of the office of the register of deeds. (1969, c. 664, s. 1; 1973, c. 680, s. 1.)

§ 10-5. Powers of notaries public. — (a) Subject to the exception stated in subsection (c), a notary public commissioned under the laws of this State acting anywhere in this State may:

(1) Take and certify the acknowledgment or proof of the execution or signing of any instrument or writing except a contract between a husband and wife governed by the provisions of G.S. 52-6;
(2) Take affidavits and depositions;
(3) Administer oaths and affirmations, including oaths of office, except when such power is expressly limited to some other public officer;
(4) Protest for nonacceptance or nonpayment, notes, bills of exchange and other negotiable instruments; and
(5) Perform such acts as the law of any other jurisdiction may require of a notary public for the purposes of that jurisdiction.

(b) Any act within the scope of subsection (a) performed in another jurisdiction by a notary public of that jurisdiction has the same force and effect in this State as fully as if such act were performed in this State by a notary public commissioned under the laws of this State.

(c) A notary public who, individually or in any fiduciary capacity, is a party to any instrument, cannot take the proof or acknowledgment of himself in such fiduciary capacity or of any other person thereto.

(d) A notary public who is a stockholder, director, officer, or employee of a corporation is not disqualified to exercise any power, which he is authorized by this section to exercise, with respect to any instrument or other matter to which such corporation is a party or in which it is interested unless he is individually a party thereto. (1866, c. 30; 1879, c. 128; Code, s. 3307; Rev., s. 2350; C. S., s. 3175; 1951, c. 1006, s. 1; 1967, c. 24, s. 22; 1973, c. 680, s. 1.)

Construction in Contracts between Husband and Wife. — In contracts between husband and wife, this section must be construed in light of and governed by the language of § 52-6. Kanoy

v. Kanoy, 17 N.C. App. 344, 194 S.E.2d 201 (1973) (decided prior to the 1973 revision of this Chapter).

§ 10-6. May exercise powers in any county. — Notaries public have full power and authority to perform the functions of their office in any and all counties of the State, and full faith and credit shall be given to any of their official acts wheresoever the same shall be made and done. (1891, c. 248; Rev., s. 2351; C. S., s. 3176; 1973, c. 680, s. 1.)

§ 10-7. Certificates of official character. — The Secretary of State and the register of deeds in the county in which the notary public qualified may certify to the official character and authority of such notary public. (1973, c. 680, s. 1.)

§ 10-8. Fees of notaries. — Notaries public shall be allowed the following fees:

(1) Taking and certifying the acknowledgment or proof of the execution or signing of any instrument or writing $0.50
(2) Taking affidavits 0.50
(3) Administering oaths (except that oaths of office shall be administered to public officials without charge) 1.00

(Code, s. 3749; 1889, c. 446; 1895, c. 296; 1903, c. 734; Rev., s. 2800; C. S., s. 3178; 1973, c. 680, s. 1.)

§ 10-9. Official acts of notaries public; signatures; appearance of names; notarial stamps or seals; expiration of commissions. — Official acts of notaries public in the State of North Carolina shall be attested:

(1) By their proper signatures;
(2) By the readable appearance of their names, either from their signatures or otherwise;
(3) By the clear and legible appearance of their notarial stamps or seals;
(4) By a statement of the date of expiration of their commissions;

provided, that the failure to comply with the provisions of subdivisions (2) and (4) shall not invalidate their official acts. (Rev., s. 2352; C. S., s. 3179; 1953, c. 836; 1961, c. 733; 1967, c. 984; 1973, c. 680, s. 1.)

It Is Essential That Notary Specify Expiration Date of His Commission. — See opinion of Attorney General to Mr. Alex T. Wood, Register of Deeds, Franklin County, 41 N.C.A.G. 225 (1971), issued prior to the 1973 revision of this Chapter.

Notarial Stamp Need Not Contain the Word "Stamp". — See opinion of Attorney General to Mr. Mark Stewart, Guilford County Register of Deeds, 40 N.C.A.G. 604 (1970), issued prior to the 1973 revision of this Chapter.

§ 10-10. Notarial stamp or seal. — A notary public shall provide and keep an official stamp or seal which shall clearly show and legibly reproduce under photographic methods, when embossed, stamped, impressed or affixed to a document, the name of the notary, the name of the county in which appointed and qualified, the words "North Carolina" or an abbreviation thereof, and the words "Notary Public." It shall be the duty of a notary public to replace a seal which has become so worn that it can no longer clearly show or legibly reproduce under photographic methods the information required by this section. Provided, that a notary public appointed prior to July 1, 1973, who has adopted and is using a seal which does not meet the requirements of this section, shall be entitled to continue to use such seal until the expiration of his current commission. (1973, c. 680, s. 1.)

§ 10-11. Acts of minor notaries validated. — All acts of notaries public for the State of North Carolina who were not yet 21 years of age at the time of the performance of such acts are hereby validated; and in every case where deeds or other instruments have been acknowledged before such notary public who was not yet 21 years of age at the time of taking of said acknowledgment, such acknowledgment taken before such notary public is hereby declared to be sufficient and valid. (1941, c. 233; 1973, c. 680, s. 1.)

§ 10-12. Acts of certain notaries prior to qualification validated. — All acknowledgments taken and other official acts done by any person who has heretofore been appointed as a notary public, but who at the time of acting had failed to qualify as provided by law, shall, notwithstanding, be in all respects valid and sufficient; and property conveyed by instruments in which the acknowledgments were taken by such notary public are hereby validated and shall convey the properties therein purported to be conveyed as intended thereby. (1945, c. 665; 1973, c. 680, s. 1.)

§ 10-13. Acts of notaries public in certain instances validated. — The acts of any person heretofore performed after appointment as a notary public and prior to qualification as a notary public or upon reappointment and prior to qualification:

(1) In taking any acknowledgment, or

(2) In notarizing any instrument,

are all hereby declared to be valid and of the same legal effect as if such person had qualified as a notary public prior to performing any such acts. (1947, c. 313; 1949, c. 1; 1965, c. 37; 1969, c. 716, s. 1; 1971, c. 229, s. 1; 1973, c. 680, s. 1.)

§ 10-14. Validation of acknowledgment wherein expiration of notary's commission erroneously stated. — All deeds, deeds of trust, mortgages, conveyances, affidavits, and all other paper writings similar or dissimilar to those enumerated herein, whether or not permitted or required to be recorded or filed under the laws of this State heretofore or hereafter executed, bearing an official act of a notary public in which the date of the notary's commission is erroneously stated, are, together with all subsequent acts or actions taken thereon, including but not limited to probate and registration, hereby declared in all respects to be valid to the extent as if the correct expiration date had been stated and shall be binding on the parties of such paper writings and their privies; and such paper writings, together with their certificates may, if otherwise competent, be read in evidence as a muniment of title for all intents and purposes in any of the courts of this State: Provided, that at the date of such official act the notary's commission was actually in force. (1953, c. 702; 1961, c. 734; 1973, c. 680, s. 1.)

§ 10-15. Validation of instruments which do not contain readable impression of notary's name. — All deeds, deeds of trust, mortgages, conveyances, affidavits and all other paper writings similar or dissimilar to those enumerated herein, whether or not permitted or required to be recorded or filed under the laws of this State heretofore executed, bearing the official act of a notary public as attested by his notarial seal, but which seal does not contain a readable impression of the notary's name are, together with all subsequent acts or actions taken thereon, including but not limited to probate and registration, hereby declared in all respects to be valid to the same extent as if a seal containing a readable impression of the notary's name had been affixed thereto, and shall be binding on the parties of such paper writings and their privies; and such paper writings, together with their certificates, if otherwise competent, may be read in evidence as a muniment of title for all intents and purposes in any of the courts of this State. (1961, c. 483; 1973, c. 680, s. 1.)

§ 10-16. Acts of notaries with seal containing name of another state validated. — The notarial acts of any person heretofore duly commissioned as a notary public in this State, who used in performing such acts a seal correctly containing the name of the notary and the proper county but mistakenly containing the abbreviation for the State of Georgia instead of North Carolina, are hereby validated and given the same legal effect as if such misprint or incorrect designation of the State had not appeared on the seal or seal imprint so used. (1969, c. 83; 1973, c. 680, s. 1.)

§ 10-17. Validation of certain instruments acknowledged prior to January 1, 1945. — Where any person has taken an acknowledgment as a notary public of a person acting through another by virtue of the execution of a power of attorney and by said person acting in his individual capacity and said notary public has failed to include within his certificate the acknowledgment of said person in his capacity as attorney-in-fact, and such acknowledgment has been otherwise duly probated and recorded, then such acknowledgment is hereby declared to be sufficient and valid: Provided, this section shall apply only to those deeds and other instruments acknowledged prior to January 1, 1945. (1969, c. 951, s. 1; 1973, c. 680, s. 1.)

Chapter 11.

Oaths.

Article 1.

General Provisions.

Article 2.

Forms of Official and Other Oaths.

Article 1.

General Provisions.

§ 11-2. Administration of oath upon the Gospels. — Judges and other persons who may be empowered to administer oaths, shall (except in the cases in this Chapter excepted) require the party sworn to lay his hand upon the Holy Evangelists of Almighty God, in token of his engagement to speak the truth, as he hopes to be saved in the way and method of salvation pointed out in that blessed volume; and in further token that, if he should swerve from the truth, he may be justly deprived of all the blessings of the Gospel, and made liable to that vengeance which he has imprecated on his own head. (1777, c. 108, s. 2, P. R.; R. C., c. 76, s. 1; Code, s. 3309; Rev., s. 2354; C. S., s. 3189; 1941, c. 11; 1971, c. 381, s. 9.)

Editor's Note. — The 1971 amendment, effective Oct. 1, 1971, deleted "and justices of the peace" following "Judges" near the beginning of this section.

§ 11-7.1. Who may administer oaths of office. — (a) Except as otherwise specifically required by statute, an oath of office may be administered by:

(1) A justice, judge, magistrate, clerk, assistant clerk, or deputy clerk of the General Court of Justice;
(2) The Secretary of State;
(3) A notary public;
(4) A register of deeds;
(5) A mayor of any city, town, or incorporated village.

(b) The administration of an oath by any judge of the Court of Appeals prior to March 7, 1969, is hereby validated. (1953, c. 23; 1969, c. 44, s. 25; c. 499; c. 713, s. 1; 1971, c. 381, s. 10.)

Editor's Note.—
The 1971 amendment, effective Oct. 1, 1971, deleted subdivision (3) and renumbered subdivisions (4), (5), and (6) to be subdivisions (3), (4), and (5), respectively.

Federal Judge Has No Authority to Administer Oath of Office in North Carolina. — See opinion of Attorney General to Mr. Fred Morrison, Governor's Office, 41 N.C.A.G. 740 (1972).

Article 2.

Forms of Official and Other Oaths.

§ 11-11. Oaths of sundry persons; forms. — The oaths of office to be taken by the several persons hereafter named shall be in the words following the names of said persons respectively:

Administrator

You swear (or affirm) that you believe A. B. died without leaving any last will and testament; that you will well and truly administer all and singular the goods and chattels, rights and credits of the said A. B., and a true and perfect inventory thereof return according to law; and that all other duties appertaining to the charge reposed in you, you will well and truly perform, according to law, and with your best skill and ability; so help you, God.

Attorney at Law

I, A. B., do swear (or affirm) that I will truly and honestly demean myself in the practice of an attorney, according to the best of my knowledge and ability; so help me, God.

Attorney General, State Solicitors and County Attorneys

I, A. B., do solemnly swear (or affirm) that I will well and truly serve the State of North Carolina in the office of Attorney General (solicitor for the State or attorney for the State in the county of . . . . . .); I will, in the execution of my office, endeavor to have the criminal laws fairly and impartially administered, so far as in me lies, according to the best of my knowledge and ability; so help me, God.

Auditor

I, A. B., do solemnly swear (or affirm) that I will well and truly execute the trust reposed in me as auditor, without favor or partiality, according to law, to the best of my knowledge and ability; so help me, God.

Book Debt Oath

You swear (or affirm) that the matter in dispute is a book account; that you have no means to prove the delivery of such articles, as you propose to prove by your own oath, or any of them, but by yourself; and you further swear that the account rendered by you is just and true; and that you have given all just credits; so help you, God.

Book Debt Oath for Administrator

You, as executor or administrator of A. B., swear (or affirm) that you verily believe this account to be just and true, and that there are no witnesses, to your knowledge, capable of proving the delivery of the articles therein charged; and that you found the book or account so stated, and do not know of any other or further credit to be given than what is therein given; so help you, God.

Clerk of the Supreme Court

I, ..., do solemnly swear that I will discharge the duties of the office of clerk of the Supreme Court without prejudice, affection, favor, or partiality, according to law and to the best of my skill and ability, so help me, God.

Clerk of the Superior Court

I, A. B., do swear (or affirm) that, by myself or any other person, I neither have given, nor will I give, to any person whatsoever, any gratuity, fee, gift or reward, in consideration of my election or appointment to the office of clerk of the superior court for the county of . . . . . .; nor have I sold, or offered to sell, nor will I sell or offer to sell, my interest in the said office; I also solemnly swear that I do not, directly or indirectly, hold any other lucrative office in the State; and I do further swear that I will execute the office of clerk of the superior court for the county of . . . . . without prejudice, favor, affection or partiality, to the best of my skill and ability; so help me, God.

Commissioners Allotting a Year's Provisions

You and each of you swear (or affirm) that you will lay off and allot to the petitioner a year's provisions for herself and family, according to law, and with your best skill and ability; so help you, God.

Commissioners Dividing and Allotting Real Estate

You and each of you swear (or affirm) that, in the partition of the real estate now about to be made by you, you will do equal and impartial justice among the several claimants, according to their several rights, and agreeably to law; so help you, God.

Commissioner of Wrecks

I, A. B., do solemnly swear (or affirm) that I will truly and faithfully discharge the duties of a commissioner of wrecks, for the district of . . . . . ., in the county of . . . . . ., according to law; so help me, God.

Cotton Weigher for Public

I, ..., public weigher for the city of . . . . . (or as the case may be), do solemnly swear that I will justly, impartially and without any deduction, except as may be allowed by law, weigh all cotton that may be brought to me for that purpose, and tender a true account thereof to the parties concerned, if required so to do; so help me, God.

Entry-Taker

I, A. B., do solemnly swear (or affirm) that I will well and impartially discharge the several duties of the office of entry-taker for the county of . . . . according to law; so help me, God.

Executor

You swear (or affirm) that you believe this writing to be and contain the last will and testament of A. B., deceased; and that you will well and truly execute the same by first paying his debts and then his legacies, as far as the said estate shall extend or the law shall charge you; and that you will well and faithfully execute the office of an executor, agreeably to the trust and confidence reposed in you, and according to law; so help you, God.

Grand Jury—Foreman of

You, as foreman of this grand inquest for the body of this county, shall diligently inquire and true presentment make of all such matters and things as shall be given you in charge; the State's counsel, your fellows' and your own you shall keep secret; you shall present no one for envy, hatred or malice; neither shall you leave anyone unpresented for fear, favor or affection, reward or the hope of reward; but you shall present all things truly, as they come to your knowledge, according to the best of your understanding; so help you, God.

Grand Jurors

The same oath which your foreman hath taken on his part, you and each of you shall well and truly observe and keep on your part; so help you, God.

Grand Jury—Officer of

You swear (or affirm) that you will faithfully carry all papers sent from the court to the grand jury, or from the grand jury to the court, without alteration or erasement, and without disclosing the contents thereof; so help you, God.

Jury—Officer of

You swear (or affirm) that you will keep every person sworn on this jury in some private and convenient place when in your charge. You shall not suffer any person to speak to them, neither shall you speak to them yourself, unless it be to ask them whether they are agreed in their verdict, but with leave of the court; so help you, God.

Oath for Petit Juror

You do solemnly swear (affirm) that you will truthfully and without prejudice or partiality try all issues in civil or criminal actions that come before you and give true verdicts according to the evidence, so help you, God.

Justice, Judge, or Magistrate of the General Court of Justice

I, ..., do solemnly swear (affirm) that I will administer justice without favoritism to anyone or to the State; that I will not knowingly take, directly or indirectly, any fee, gift, gratuity or reward whatsoever, for any matter or thing done by me or to be done by me by virtue of my office, except the salary and allowances by law provided; and that I will faithfully and impartially discharge all the duties of ..... of the ..... Division of the General Court of Justice to the best of my ability and understanding, and consistent with the Constitution and laws of the State; so help me, God.

Register of Deeds

I, A. B., do solemnly swear (or affirm) that I will faithfully and truly, according to the best of my skill and ability, execute the duties of the office of register of deeds for the county of ....., in all things according to law; so help me, God.

Secretary of State

I, A. B., do swear (or affirm) that I will, in all respects, faithfully and honestly execute the office of Secretary of State of the State of North Carolina, during my continuance in office, according to law; so help me, God.

Sheriff

I, A. B., do solemnly swear (or affirm) that I will execute the office of sheriff of . . . . . county to the best of my knowledge and ability, agreeably to law; and that I will not take, accept or receive, directly or indirectly, any fee, gift, bribe, gratuity or reward whatsoever, for returning any man to serve as a juror or for making any false return on any process to me directed; so help me, God.

Standard Keeper

I, A. B., do swear (or affirm) that I will not stamp, seal or give any certificate for any steelyards, weights or measures, but such as shall, as near as possible, agree with the standard in my keeping; and that I will, in all respects, truly and faithfully discharge and execute the power and trust by law reposed in me, to the best of my ability and capacity; so help me, God.

State Treasurer

I, A. B., do swear (or affirm) that, according to the best of my abilities and judgment, I will execute impartially the office of State Treasurer, in all things according to law, and account for the public taxes; and I will not, directly or indirectly, apply the public money to any other use than by law directed; so help me, God.

Stray Valuers

You swear (or affirm) that you will well and truly view and appraise the stray, now to be valued by you, without favor or partiality, according to your skill and ability; so help you, God.

Surveyor for a County

I, A. B., do solemnly swear (or affirm) that I will well and impartially discharge the several duties of the office of surveyor for the county of . . . . . ., according to law; so help me, God.

Treasurer for a County

I, A. B., do solemnly swear (or affirm) that, according to the best of my skill and ability, I will execute impartially the office of treasurer for the county of . . . . . ., in all things according to law; that I will duly and faithfully account for all public moneys that may come into my hands, and will not, directly or indirectly, apply the same, or any part thereof, to any other use than by law directed; so help me, God.

Witness to Depose before the Grand Jury

You swear (or affirm) that the evidence you shall give to the grand jury, upon this bill of indictment against A. B., shall be the truth, the whole truth, and nothing but the truth; so help you, God.

Witness in a Capital Trial

You swear (or affirm) that the evidence you shall give to the court and jury in this trial, between the State and the prisoner at the bar, shall be the truth, the whole truth, and nothing but the truth; so help you, God.

Witness in a Criminal Action

You swear (or affirm) that the evidence you shall give to the court and jury in this action between the State and A. B. shall be the truth, the whole truth, and nothing but the truth; so help you, God.

Witness in Civil Cases

You swear (or affirm) that the evidence you shall give to the court and jury in this cause now on trial, wherein A. B. is plaintiff and C. D. defendant, shall be the truth, the whole truth, and nothing but the truth; so help you, God.

Witness to Prove a Will

You swear (or affirm) that you saw C. D. execute (or heard him acknowledge the execution of) this writing as his last will and testament; that you attested it in his presence and at his request; and that at the time of its execution (or at the time the execution was acknowledged) he was, in your opinion, of sound mind and disposing memory; so help you, God.

General Oath

Any officer of the State or of any county or township, the term of whose oath is not given above, shall take an oath in the following form:

I, A. B., do swear (or affirm) that I will well and truly execute the duties of the office of ..... according to the best of my skill and ability, according to law; so help me, God. (R. C., c. 76, s. 6; 1874-5, c. 58, s. 2; Code, ss. 3057, 3315; 1903, c. 604; Rev., s. 2360; C. S., s. 3199; 1947, c. 71; 1959, c. 879, s. 5; 1967, c. 218, s. 2; 1969, c. 1190, ss. 50, 51; 1971, c. 381, s. 11.)

Editor's Note.—

The 1971 amendment, effective Oct. 1, 1971, deleted the oath for "Constable" and the oath for "Justice of the Peace."

The desire of a prospective juror to affirm rather than take an oath.—

In accord with original. See State v. Harris, 283 N.C. 46, 194 S.E.2d 796 (1973).

The erroneous allowance of an improper challenge.—

In accord with original. See State v. Harris, 283 N.C. 46, 194 S.E.2d 796 (1973).

Action of the grand jury in returning two fictitious bills of indictment charging undercover agents with narcotics violations, including the undercover agent who was the principal witness against defendant, was improper, but did not necessarily taint all processes of that grand jury so as to require as a matter of law that a bill of indictment charging defendant with transportation of marijuana be quashed. State v. Long, 14 N.C. App. 508, 188 S.E.2d 690 (1972).

Chapter 12.

Statutory Construction.

Sec.
12-4. Construction of amended statute.

§ 12-2. Repeal of statute not to affect actions.

Repeals by implication are not favored by the law. State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975).

General Rule in Criminal Actions. — Where a repealing statute contains a saving clause as to crimes committed prior to the repeal or as to pending prosecutions, the offender may be tried and punished under the old law. State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975).

§ 12-3. Rules for construction of statutes.

II. DETERMINATION OF INTENT AND MEANING.

A. In General.

Language of a statute will be interpreted so as to avoid an absurd consequence. Taylor v. Crisp, 286 N.C. 488, 212 S.E.2d 381 (1975).

Where a literal reading of a statute will lead to absurd results, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded. Taylor v. Crisp, 286 N.C. 488, 212 S.E.2d 381 (1975).

Statute should not be construed in such manner as to render it partly ineffective or inefficient if another construction will make it effective. State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975).

B. Legislative Intent.

Motive and Purpose of Legislature. — In the interpretation of a statute, the legislature will be presumed to have inserted every part thereof for a purpose. State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975).

A statute must be construed, if possible, so as to give effect to every part of it, it being presumed that the legislature did not intend any of its provisions to be surplusage. State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975).

Where a literal reading of a statute will contravene the manifest purpose of the legislature as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded. Taylor v. Crisp, 286 N.C. 488, 212 S.E.2d 381 (1975).

Application to Capital Cases. — Rules of statutory construction, which have been evolved and declared throughout the years whereby courts are to determine legislative intent, apply to capital cases just as to other cases. State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975).

IV. STATUTES STRICTLY CONSTRUED.

B. Criminal Statutes.

Statute will not be construed to operate retrospectively so as to take away a penalty or condone a crime unless such intention is clearly expressed. State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975).

V. CONSTRUCTION IN ACCORD WITH CONSTITUTION.

A. Construction.

Presumption in Favor, etc.— When the constitutionality of a statute is challenged, "every presumption is to be indulged in favor of its validity." Martin v. North Carolina Housing Corp., 277 N.C. 29, 175 S.E.2d 665 (1970).

Existence of Facts Preserving Constitutionality Presumed. — If the constitutionality of a statute depends on the existence of certain facts and circumstances, the existence of such facts and circumstances will generally be presumed for the purpose of giving validity to the statute, if such a state of facts can reasonably be presumed to exist, and if any such facts may be reasonably conceived in the mind of the court. This rule does not apply if the evidence is to the contrary, or if facts judicially known or proved, compel otherwise. Martin v. North Carolina Housing Corp., 277 N.C. 29, 175 S.E.2d 665 (1970).

Court Determines Constitutionality Only Where Statute Attacked. — Ordinarily, the Supreme Court will not undertake to determine whether a statute is unconstitutional except with reference to a ground on which it is attacked and definitely drawn into focus by the attacker's pleadings. Martin v. North Carolina Housing Corp., 277 N.C. 29, 175 S.E.2d 665 (1970).

§ 12-4. Construction of amended statute. — Where a part of a statute is amended it is not to be considered as having been repealed and reenacted in the amended form; but the portions which are not altered are to be considered as having been the law since their enactment, and the new provisions as having been enacted at the time of the amendment.

Whenever the General Assembly (i) enacts a bill which purports to amend an existing general statute by deleting, adding, or substituting specific words or figures, and (ii) such bill also purports to set out the wording of the amended statute, or a portion thereof, as it will read after the amendment is accomplished, and (iii) there is a variance between the latter and the former, then, in such case, the latter shall control and be presumed to express the amendatory intent of the General Assembly. (1868-9, c. 270, s. 22; 1870-1, c. 111; Code, s. 3766; Rev., s. 2832; C. S., s. 3950; 1971, c. 115.)

Editor's Note.—

The 1971 amendment added the second paragraph.

Repeals by implication are not favored by the law. State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975).

Discovering Legislative Intent of Original Enactment Through Amendatory Legislation. — An amendment to an act may be resorted to for the discovery of the legislative intention in the enactment amended, as where the act amended is ambiguous. Taylor v. Crisp, 286 N.C. 488, 212 S.E.2d 381 (1975).

Where amendatory legislation carries a saving clause as to prior offenses, the law as it stood at the time of the offense is applied to the prosecution and sentencing of the violator. State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975).

Chapter 13.

Citizenship Restored.

Revision of Chapter. — Session Laws 1971, c. 902, revised and rewrote this Chapter, substituting sections numbered 13-1 to 13-3 for former §§ 13-1 to 13-10. Session Laws 1973, c. 251, again revised and rewrote the chapter, substituting present §§ 13-1 to 13-4 for §§ 13-1 to 13-3 as enacted in 1971.

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§ 13-1. Restoration of citizenship. — Any person convicted of a crime, whereby the rights of citizenship are forfeited, shall have such rights restored upon the occurrence of any one of the following conditions:

(1) The unconditional discharge of an inmate by the State Department of Correction or the North Carolina Department of Correction, of a probationer by the State Department of Correction, or of a parolee by the Department of Correction; or of a defendant under a suspended sentence by the court.
(2) The unconditional pardon of the offender.
(3) The satisfaction by the offender of all conditions of a conditional pardon. (1971, c. 902; 1973, c. 251; c. 1262, s. 10.)

Editor's Note. — The 1973 amendment, effective July 1, 1974, substituted "Department of Correction" for "Board of Juvenile Correction" and for "Probation Commission" near the middle of subdivision (1) and for "Board of Paroles" near the end of subdivision (1). The Board of Juvenile Correction is not specifically mentioned in the 1973 act, but the substitution has been made because the functions of the Board have devolved upon the Department of Correction.

Legislative Intent. — The 1971 General Assembly, in rewriting this Chapter, intended to substantially relax the requirements necessary for a convicted felon to have his citizenship restored. These requirements were further relaxed in 1973. State v. Currie, 284 N.C. 562, 202 S.E.2d 153 (1974).

Statute Revising This Chapter Given Retroactive Application. — Chapter 251, Session Laws of 1973, which revised this Chapter, must be given retroactive application in order to be constitutionally valid. State v. Currie, 19 N.C. App. 241, 198 S.E.2d 491 (1973).

Though the 1973 revision of this section was enacted after a defendant was indicted for felonious possession of a firearm, it is applicable. State v. Williams, 20 N.C. App. 639, 202 S.E.2d 284 (1974).

§ 13-2. Issuance and filing of certificate or order of restoration. — The agency, department, or court having jurisdiction over the inmate, probationer, parolee or defendant at the time his rights of citizenship are restored under the provisions of G.S. 13-1(1) shall immediately issue a certificate or order in duplicate evidencing the offender's unconditional discharge and specifying the restoration of his rights of citizenship.

The original of such certificate or order shall be promptly transmitted to the clerk of the General Court of Justice in the county where the official record of the case from which the conviction arose is filed. The clerk shall then file the

certificate or order without charge with the official record of the case. (1971, c. 902; 1973, c. 251.)

Quoted in State v. Currie, 19 N.C. App. 241, 198 S.E.2d 491 (1973).

§ 13-3. Issuance, service and filing of warrant of unconditional pardon. — In the event the rights of citizenship are restored by an unconditional pardon as specified in G.S. 13-1(2), the Governor, under the provisions of G.S. 147-23, shall issue his warrant therefor specifying the restoration of rights of citizenship to the offender; and the officer to whom the Governor issues his warrant to effect the release of the offender shall deliver a copy of the warrant to the offender under the provisions of G.S. 147-25. The original warrant bearing the officer's return as specified in G.S. 147-25 shall be filed by the clerk of the General Court of Justice without charge in the county where the official record of the case from which the conviction arose is filed. (1971, c. 902; 1973, c. 251.)

Stated in State v. Currie, 284 N.C. 562, 202 S.E.2d 153 (1974).

Cited in State v. Currie, 19 N.C. App. 241, 198 S.E.2d 491 (1973).

§ 13-4. Endorsement of warrant, service and filing of conditional pardon. — When the offender has satisfied all of the conditions of a conditional pardon, and his rights of citizenship have been restored under the provisions of G.S. 13-1(3), the Governor shall issue an endorsement to the original warrant which specified the conditions of the pardon. Such endorsement shall acknowledge that the offender has satisfied all of the conditions of the pardon.

The Governor shall then deliver the endorsement to the officer specified in G.S. 147-25 for service and delivery to the clerk. Service and delivery to the clerk and filing by the clerk shall be done in accordance with the provisions of G.S. 13-3 so that the endorsement reflecting satisfaction of all conditions of the pardon will be served and recorded as if it were a warrant of unconditional pardon. (1973, c. 251.)

§§ 13-5 to 13-10: Repealed by Session Laws 1971, c. 902.

Revision of Chapter. — See the note following the analysis to this Chapter.

Chapter 14.

Criminal Law.

SUBCHAPTER I. GENERAL PROVISIONS.

Article 1.

Felonies and Misdemeanors.

Sec.

Article 2A.

Habitual Felons.

SUBCHAPTER III. OFFENSES AGAINST THE PERSON.

Article 6.

Homicide.

Article 7.

Rape and Kindred Offenses.

Article 8.

Assaults.

Article 10.

Kidnapping and Abduction.

Article 11.

Abortion and Kindred Offenses.

Article 12.

Libel and Slander.

SUBCHAPTER IV. OFFENSES AGAINST THE HABITATION AND OTHER BUILDINGS.

Article 14.

Burglary and Other Housebreakings.

Sec.

Article 15.

Arson and Other Burnings.

SUBCHAPTER V. OFFENSES AGAINST PROPERTY.

Article 16.

Larceny.

SUBCHAPTER VIII. OFFENSES AGAINST PUBLIC JUSTICE.

Article 28.

Perjury.

Sec.
14-214. False statement to procure benefit of insurance policy or certificate.

Article 30.

Obstructing Justice.

14-221.1. Altering, destroying, or stealing evidence of criminal conduct.
14-224. [Repealed.]

Article 31.

Misconduct in Public Office.

14-230. Willfully failing to discharge duties.
14-232. Swearing falsely to official reports.
14-234. Director of public trust contracting for his own benefit.
14-239. Allowing prisoners to escape; burden of proof.
14-240. Solicitor to prosecute officer for escape.
14-245. [Repealed.]
14-246. Failure of ex-magistrate to turn over books, papers and money.
14-249. Limitation of amount expended for vehicle.
14-250. Publicly owned vehicle to be marked.

Article 33.

Prison Breach and Prisoners.

14-258.1. Furnishing poison, controlled substances, deadly weapons, cartridges, ammunition or intoxicating liquor to inmates of charitable, mental or penal institutions or local confinement facilities.
14-258.2. Possession of dangerous weapon by prisoner.
14-258.3. Taking of hostage, etc., by prisoner.
14-262. [Repealed.]

SUBCHAPTER IX. OFFENSES AGAINST THE PUBLIC PEACE.

Article 35.

Offenses against the Public Peace.

14-269.2. Weapons on campus or other educational property.
14-276. [Repealed.]
14-277.1. Communicating threats.

SUBCHAPTER X. OFFENSES AGAINST THE PUBLIC SAFETY.

Article 36.

Offenses against the Public Safety.

Sec.
14-286. Giving false fire alarms; molesting fire-alarm, fire-detection or fire-extinguishing system.

Article 36A.

Riots and Civil Disorders.

14-288.1. Definitions.
14-288.4. Disorderly conduct.
14-288.8. Manufacture, assembly, possession, storage, transportation, sale, purchase, delivery, or acquisition of weapon of mass death and destruction; exceptions.

SUBCHAPTER XI. GENERAL POLICE REGULATIONS.

Article 37.

Lotteries and Gaming.

14-291.2. Pyramid and chain schemes prohibited.
14-298. Gaming tables, illegal punchboards and slot machines to be destroyed by police officers.
14-299. Property exhibited by gamblers to be seized; disposition of same.

Article 39.

Protection of Minors.

14-314. [Repealed.]
14-316. Permitting young children to use dangerous firearms.
14-316.1. Contributing to delinquency and neglect by parents and others.
14-318.2. Child abuse a general misdemeanor.
14-318.3. [Repealed.]
14-319. [Repealed.]
14-320. Separating child under six months old from mother.

Article 40.

Protection of the Family.

14-322.2. Failure to support handicapped dependent.

Article 41.

Intoxicating Liquors.

14-327, 14-328. [Repealed.]
14-330 to 14-332. [Repealed.]

Article 42.

Public Drunkenness.

14-333. [Repealed.]
14-335. Public drunkenness.

SUBCHAPTER I. GENERAL PROVISIONS.

ARTICLE 1.

Felonies and Misdemeanors.

§ 14-1. Felonies and misdemeanors defined.

Applied in State v. Roberts, 276 N.C. 98, 171 S.E.2d 440 (1970).

Cited in Lofton v. Lofton, 26 N.C. App. 203, 215 S.E.2d 861 (1975).

§ 14-2. Punishment of felonies; what constitutes life sentence. — Every person who shall be convicted of any felony for which no specific punishment is prescribed by statute shall be punished by fine, by imprisonment for a term not exceeding 10 years, or by both, in the discretion of the court. A sentence of life imprisonment shall be considered as a sentence of imprisonment for a term of 80 years in the State's prison. (R. C., c. 34, s. 27; Code, s. 1096; Rev., s. 3292; C. S., s. 4172; 1967, c. 1251, s. 2; 1973, c. 1201, s. 6.)

Editor's Note. —

The 1973 amendment substituted "punished" for "punishable" near the middle of the first sentence and added the second sentence. The 1973 amendatory act became effective April 8, 1974, and provides that it shall be applicable to all offenses thereafter committed.

Specific Punishment. — A statute prescribing punishment "by fine or imprisonment in the State's prison, or both, in the discretion of the court," does not prescribe "specific punishment" within the meaning of that term as used in this section. State v. Stimpson, 279 N.C. 716, 185 S.E.2d 168 (1971).

Breaking and Entering. — Sentence of imprisonment for not less than six nor more than ten years for felonious breaking and entering was punishment within the limits authorized by statute and is not cruel and unusual punishment within the constitutional prohibition. State v. Strickland, 10 N.C. App. 540, 179 S.E.2d 162 (1971).

A sentence of ten years is not in excess of that permitted by the statute upon a conviction of the felony of breaking and entering in violation of § 14-54(a). State v. Cleary, 9 N.C. App. 189, 175 S.E.2d 749 (1970).

Involuntary Manslaughter. — Involuntary manslaughter is a felony and punishable under this section permitting a maximum prison sentence of 10 years. State v. Murrell, 18 N.C. App. 327, 196 S.E.2d 606 (1973).

The maximum lawful term of imprisonment for involuntary manslaughter is 10 years. State v. Stimpson, 279 N.C. 716, 185 S.E.2d 168 (1971).

Where Felony and Misdemeanor Counts Consolidated for Judgment. — Where defendant was tried and convicted upon an indictment charging felonious breaking and entering and misdemeanor larceny, and both counts were consolidated for judgment, the fact that the one sentence imposed is in excess of that permissible upon conviction of the misdemeanor is immaterial and is not prejudicial where it does not exceed that permitted upon conviction of the felony. State v. Cleary, 9 N.C. App. 189, 175 S.E.2d 749 (1970).

The fact that others tried on similar charges are given shorter sentences is not ground for legal objection, the punishment imposed in a particular case, if within statutory limits, being within the sound discretion of the trial judge. State v. Best, 11 N.C. App. 286, 181 S.E.2d 138 (1971).

Credit for Time Spent in Custody Prior to Commitment. — A prisoner should be given credit for time spent in custody prior to commitment where he has been given a maximum sentence. Culp v. Bounds, 325 F. Supp. 416 (W.D.N.C. 1971).

Fundamental notions of fair play as well as the double jeopardy clause require that a prisoner receive credit for pre-commitment incarceration. Culp v. Bounds, 325 F. Supp. 416 (W.D.N.C. 1971).

Constitution Requires Credit for Punishment Already Exacted. — The constitutional guarantee against multiple punishments for the same offense absolutely requires that punishment already exacted must be fully "credited" in imposing sentence upon a new conviction for the same offense. Culp v. Bounds, 325 F. Supp. 416 (W.D.N.C. 1971).

Pretrial Custody Added to Sentence Cannot Exceed Statutory Maximum Punishment. — The time a prisoner spends in custody prior to trial when added to the sentence to be served upon commitment cannot total more than the statutory maximum punishment for the crime involved. Culp v. Bounds, 325 F. Supp. 416 (W.D.N.C. 1971).

The court assumed, without deciding, that where the time spent in custody before commitment when added to the sentence given after trial is less than the statutory maximum, no constitutional issue is presented. In that situation, the court would be reluctantly inclined to indulge the fiction that the trial judge who imposes sentence has given the defendant credit for time served before commitment. Culp v. Bounds, 325 F. Supp. 416 (W.D.N.C. 1971).

Pretrial detention is nothing less than punishment. An unconvicted accused who is not allowed or cannot raise bail is deprived of his liberty. His incarceration is indistinguishable in effect from that of one who is retried after obtaining post-conviction relief. Culp v. Bounds, 325 F. Supp. 416 (W.D.N.C. 1971).

Failure to Give Credit Violates Constitution. — North Carolina's failure to give a prisoner credit for time served before trial where he has received a maximum sentence violates the Constitution in two ways. First, it constitutes multiple punishment for a single offense, thereby offending the double jeopardy clause of the Fifth Amendment which is applicable to the

states through the Fourteenth Amendment. Second, the fact that only those accused who are unable to raise bail are subjected to extra pretrial incarceration when their prison time exceeds the statutory maximum is an invidious discrimination against the poor in violation of the equal protection clause of the Fourteenth Amendment. Culp v. Bounds, 325 F. Supp. 416 (W.D.N.C. 1971).

The state's refusal to give a prisoner credit for pretrial detention is an unconstitutional discrimination on the basis of wealth prohibited by the Fourteenth Amendment. Wealthy defendants (except where no bail is allowed) are able to remain out of prison until conviction and sentencing; the poor stay behind bars. Culp v. Bounds, 325 F. Supp. 416 (W.D.N.C. 1971).

Applied in State v. Price, 8 N.C. App. 94, 173 S.E.2d 644 (1970); State v. Batts, 8 N.C. App. 551, 174 S.E.2d 704 (1970); State v. Lynch, 9 N.C. App. 71, 175 S.E.2d 327 (1970); State v. Goode, 16 N.C. App. 188, 191 S.E.2d 241 (1972); State v. Huffman, 16 N.C. App. 653, 192 S.E.2d 621 (1972); State v. Mitchell, 283 N.C. 462, 196 S.E.2d 736 (1973).

Stated in State v. Hanford, 16 N.C. App. 353, 191 S.E.2d 910 (1972).

Cited in State v. Melton, 7 N.C. App. 721, 173 S.E.2d 610 (1970); State v. Perry, 8 N.C. App. 83, 173 S.E.2d 521 (1970); State v. Richardson, 8 N.C. App. 298, 174 S.E.2d 77 (1970); Wood v. Ross, 434 F.2d 297 (4th Cir. 1970); State v. Washington, 11 N.C. App. 441, 181 S.E.2d 261 (1971); State v. Stepney, 280 N.C. 306, 185 S.E.2d 844 (1972); State v. Gainey, 280 N.C. 366, 185 S.E.2d 874 (1972); State v. Houston, 19 N.C. App. 542, 199 S.E.2d 668 (1973); State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975); Quick v. United Benefit Life Ins. Co., 287 N.C. 47, 213 S.E.2d 563 (1975).

§ 14-3. Punishment of misdemeanors, infamous offenses, offenses committed in secrecy and malice or with deceit and intent to defraud.

Constitutionality. — The punishment provisions of subsection (a) of this section are not unconstitutional. State v. Hullender, 8 N.C. App. 41, 173 S.E.2d 581 (1970).

Infamous Offense. —

Subsection (b) and the reported cases leave some lack of certainty as to what crimes may be designated and punished as infamous. State v. Keen, 25 N.C. App. 567, 214 S.E.2d 242 (1975).

An attempt to commit robbery is an infamous crime. State v. Best, 11 N.C. App. 286, 181 S.E.2d 138 (1971).

Larceny. — The punishment upon conviction of the misdemeanor of larceny may not exceed two years. State v. Cleary, 9 N.C. App. 189, 175 S.E.2d 749 (1970).

Solicitation to Commit Murder. — Since it appears to be settled that conspiracy to murder is an infamous offense and punishable as a felony, and that solicitation to commit murder is but one step away from conspiracy to murder, sentence of not less than five nor more than 10 years was authorized by law. State v. Keen, 25 N.C. App. 567, 214 S.E.2d 242 (1975).

Where Felony and Misdemeanor Counts Consolidated for Judgment. — Where defendant was tried and convicted upon an indictment charging felonious breaking and entering and misdemeanor larceny, and both counts were consolidated for judgment, the fact that the one sentence imposed is in excess of that permissible upon conviction of the misdemeanor is immaterial and is not prejudicial where it does not exceed that permitted upon conviction of the felony. State v. Cleary, 9 N.C. App. 189, 175 S.E.2d 749 (1970).

The fact that others tried on similar charges are given shorter sentences is not ground for legal objection, the punishment imposed in a particular case, if within statutory limits, being within the sound discretion of the trial judge. State v. Best, 11 N.C. App. 286, 181 S.E.2d 138 (1971).

Applied in State v. Batiste, 5 N.C. App. 511, 168 S.E.2d 510 (1969); State v. Crabb, 9 N.C. App. 333, 176 S.E.2d 39 (1970); State v. Shirley, 12 N.C. App. 440, 183 S.E.2d 880 (1971); State v. Wade, 14 N.C. App. 414, 188 S.E.2d 714 (1972); State v. Lewis, 17 N.C. App. 117, 193 S.E.2d 455 (1972); State v. Toler, 18 N.C. App. 149, 196 S.E.2d 295 (1973); Lawrence v. State, 18 N.C. App. 260, 196 S.E.2d 623 (1973).

Cited in State v. Spencer, 276 N.C. 535, 173 S.E.2d 765 (1970); State v. Melton, 7 N.C. App. 721, 173 S.E.2d 610 (1970); State v. Perry, 8 N.C. App. 83, 173 S.E.2d 521 (1970); State v. Benfield, 278 N.C. 199, 179 S.E.2d 388 (1971); State v. Oakley, 15 N.C. App. 224, 189 S.E.2d 605 (1972); State v. Jacobs, 25 N.C. App. 500, 214 S.E.2d 254 (1975).

§ 14-4. Violation of local ordinances misdemeanor.

Cited in Walker v. City of Charlotte, 276 N.C. 166, 171 S.E.2d 431 (1970); Clarke v. Kerchner, 11 N.C. App. 454, 181 S.E.2d 787 (1971); State v. Clemmons, 17 N.C. App. 112, 193 S.E.2d 290 (1972).

ARTICLE 2.

Principals and Accessories.

§ 14-5. Accessories before the fact; trial and punishment.

Elements of Crime. —

In accord with 1st paragraph in original. See State v. Benton, 275 N.C. 378, 167 S.E.2d 775 (1969); State v. Chavis, 24 N.C. App. 148, 210 S.E.2d 555 (1974).

In accord with 2nd paragraph in original. See State v. Spicer, 285 N.C. 274, 204 S.E.2d 641 (1974); State v. Chavis, 24 N.C. App. 148, 210 S.E.2d 555 (1974).

Who Are Principals. —

A principal in the first degree is the person who actually perpetrates the deed either by his own hand or through an innocent agent. Any other who is actually or constructively present at the place of the crime either aiding, abetting, assisting, or advising in its commission, or is present for that purpose, is a principal in the second degree. The distinction between principals in the first and second degrees is a distinction without a difference. Both are principals and equally guilty. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

All who are present at the place of a crime and are either aiding, abetting, assisting, or advising in its commission, or are present for such purpose to the knowledge of the actual perpetrator, are principals and equally guilty. State v. Dawson, 281 N.C. 645, 190 S.E.2d 196 (1972).

One who is present, aiding and abetting in a crime actually perpetrated by another, is equally guilty with the actual perpetrator. State v. Miller, 15 N.C. App. 610, 190 S.E.2d 722 (1972).

To render one who does not actually participate in the commission of a crime guilty of the offense committed there must be some evidence tending to show that he, by word or deed, gave active encouragement to the perpetrator of the crime or by his conduct made it known to such perpetrator that he was standing by to lend assistance when and if it should become necessary. State v. Dawson, 281 N.C. 645, 190 S.E.2d 196 (1972).

When two or more persons aid and abet each other in the commission of a crime, all are principals and equally guilty. State v. Torain, 20 N.C. App. 69, 200 S.E.2d 665 (1973).

A person who actually commits the offense or is present with another and does some act which forms a part thereof, although not doing all of the acts necessary to constitute the crime, is a principal in the first degree. State v. Mitchell, 24 N.C. App. 484, 211 S.E.2d 645 (1975).

Same — Second Degree. —

One who is actually or constructively present when the crime is committed and aids or abets the other in its commission is a principal in the second degree. State v. Mitchell, 24 N.C. App. 484, 211 S.E.2d 645 (1975).

"Aider and Abettor". —

An aider and abettor is one who advises, counsels, procures, or encourages another to commit a crime. State v. Dawson, 281 N.C. 645, 190 S.E.2d 196 (1972).

To be guilty as an aider and abettor, a defendant's actual presence is not necessary as he may be constructively present. State v. Torain, 20 N.C. App. 69, 200 S.E.2d 665 (1973).

Mere presence at the scene of the crime is not sufficient to denominate an accused and aider and abettor. It is not sufficient that the accused is aware of the commission of a crime, makes no effort to prevent the crime, or silently acquiesces or intends to render aid if necessary. He must give active encouragement to the perpetrator by work or deed or make known his intention to render aid if necessary. State v. Vample, 20 N.C. App. 518, 201 S.E.2d 694 (1974).

An accomplice is a person who knowingly, voluntarily, and with common intent with the principal offender unites with him in the commission of the crime charged. State v. Miller, 15 N.C. App. 610, 190 S.E.2d 722 (1972).

The witness granted immunity to testify was an accomplice only if the offenses charged were in fact committed. It was proper for the court to leave the question of whether he was an accomplice to the jury. State v. Miller, 15 N.C. App. 610, 190 S.E.2d 722 (1972).

One Charged with Murder, etc. —

The crime of accessory before the fact to the crime charged in an original indictment is, in North Carolina, a lesser includable offense. Richardson v. Ross, 310 F. Supp. 134 (E.D.N.C. 1970).

An original indictment of murder in the first degree, handed down by a grand jury, is sufficient to support a plea of guilty to the lesser

includable offense of accessory before the fact. Richardson v. Ross, 310 F. Supp. 134 (E.D.N.C. 1970).

Who Is Accessory before the Fact. — An accessory before the fact is one who was absent from the scene when the crime was committed but who procured, counseled, commanded or encouraged the principal to commit it. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970); State v. Wiggins, 16 N.C. App. 527, 192 S.E.2d 680 (1972).

The concept of accessory before the fact has been held to presuppose some arrangement with respect to the commission of the crime in question. State v. Chavis, 24 N.C. App. 148, 210 S.E.2d 555 (1974).

Guilt of Principal Must Be Established beyond Reasonable Doubt. — In order to warrant the conviction of an accessory, the guilt of the principal must be established to the same degree of certainty as if he himself were on trial, that is, beyond a reasonable doubt. State v. Benton, 275 N.C. 378, 167 S.E.2d 775 (1969).

In a separate trial of a defendant as a principal in the second degree to armed robbery, it is incumbent upon the State to establish beyond a reasonable doubt by evidence in that separate trial the guilt of those referred to as principals in the first degree. State v. Benton, 275 N.C. 378, 167 S.E.2d 775 (1969).

Where the conviction of the principal has been vacated by an order for a new trial, a new trial as to the alleged abettor defendant must also be ordered. State v. Spencer, 18 N.C. App. 499, 197 S.E.2d 232 (1973).

The only distinction between a principal and an accessory before the fact is that the latter was not present when the crime was actually committed. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970); State v. Wiggins, 16 N.C. App. 527, 192 S.E.2d 680 (1972).

And Actual Presence Is Immaterial When Crime Was Committed by Innocent Agent. — Actual presence, in distinguishing between a principal and an accessory before the fact, becomes immaterial when a person causes a crime to be committed by an innocent agent, that is, one who is not himself legally responsible for the act. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

Constructive Presence. — The actual distance of a person from the place where a crime is perpetrated is not always material in determining whether the person is constructively present. A person is deemed to be constructively present if he is near enough to render assistance if need be and to encourage the actual perpetration of the felony. State v. Wiggins, 16 N.C. App. 527, 192 S.E.2d 680 (1972).

Evidence tending to show that defendant drove the automobile that carried men to a store, that to the knowledge of defendant the men entered the store, armed, that defendant stayed with the car, that later they were together when police stopped them and that defendant told police where they could find the stolen money, was sufficient to support an inference that defendant was constructively present at the time of the robbery. State v. Torain, 20 N.C. App. 69, 200 S.E.2d 665 (1973).

If a person causes a crime to be committed through the instrumentality of an innocent agent, he is the principal in the crime, and punishable accordingly, although he was not present at the time and place of the offense. Under such circumstances, an exception to the rules applicable to principals and accessories, in the trial of criminal cases arises ex necessitate legis. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

But This Rule Applies Only When Agent Is Innocent. — When one acts through an agent, he can himself be guilty as a principal in the first degree only when the agent is innocent. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

Where one incites or employs a mental defective to kill another, the question whether the employer is guilty as a principal depends upon whether the defective was criminally responsible for his act under the McNaughten rule. If the agent is legally responsible for his own acts, the instigator is only an accessory before the fact, if he is absent when the crime is committed. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

Parties involved in the commission of a murder are either principals or accessories. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

And There May Be Accessories before the Fact to Murder in Both Degrees. — Since malice, express or implied, is a constituent element of murder in any degree, there may be accessories before the fact to the crime of murder in both degrees. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

Admittedly the concept of accessory before the fact presupposes some arrangement between the accessory and the principal with respect to the commission of the crime. It does not follow, however, that there can be no accessory before the fact to second-degree murder, which imports a specific intent to do an unlawful act. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

There may, of course, be accessories before the fact in all kinds of murder with deliberation, or premeditation, or malice aforethought, including murder in the second degree, which involves malice. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

Proper Instruction. — Where the court instructed the jury that if defendant was merely in close proximity to the scene of the crime and just happened to be there then this would not be sufficient to convict him of being an aider and

abettor but that they, the jury, must find actual participation, this instruction was not error. State v. Burch, 24 N.C. App. 514, 211 S.E.2d 511 (1975).

Applied in State v. Buie, 26 N.C. App. 151, 215 S.E.2d 401 (1975).

§ 14-6. Punishment of accessories before the fact.

Life Sentence for Accessory to Murder Valid. — The punishment for an accessory before the fact to a murder in any degree remains imprisonment for life. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

It cannot be assumed that the legislature's division of murder into degrees and reduction of the punishment for murder in the second degree implied the reduction in the sentence for an accessory before the fact in second-degree murder. Had the legislature intended this revision it would doubtedly have made it ipsissimis verbis. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

Though Principal Received Lesser Sentence. — Imposition of a sentence of life imprisonment upon a defendant's conviction of accessory before the fact to the murder of her husband — the actual murderer having received a sentence of 20 to 30 years' imprisonment upon acceptance of his guilty plea to second-degree murder — is not cruel and unusual punishment nor does it deny a defendant the equal protection of the laws in violation of the Fourteenth Amendment. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

The contention that the sentence of an accessory may not exceed that of the principal in murder in the second degree is clearly refuted. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

Quoted in State v. Benton, 275 N.C. 378, 167 S.E.2d 775 (1969).

Stated in State v. Wiggins, 16 N.C. App. 527, 192 S.E.2d 680 (1972); State v. Buie, 26 N.C. App. 151, 215 S.E.2d 401 (1975).

§ 14-7. Accessories after the fact; trial and punishment.

In General. —

In accord with 2nd paragraph in original. See State v. Williams, 17 N.C. App. 39, 193 S.E.2d 452 (1972).

To convict parents of the accused son as accessories to the crime of rape, the State had the burden of proving beyond a reasonable doubt these essentials of the offense charged, namely: (1) That the son had actually committed the alleged crime of rape; (2) that the parents knew that the son had committed the alleged crime of rape; and (3) that the parents assisted the son in his efforts to avoid detection, arrest and punishment. State v. Overman, 284 N.C. 335, 200 S.E.2d 604 (1973).

Applied in State v. Poole, 25 N.C. App. 715, 214 S.E.2d 774 (1975).

ARTICLE 2A.

Habitual Felons.

§ 14-7.1. Persons defined as habitual felons. — Any person who has been convicted of or pled guilty to three felony offenses in any federal court or state court in the United States or combination thereof is declared to be an habitual felon. For the purpose of this Article, a felony offense is defined as an offense which is a felony under the laws of the State or other sovereign wherein a plea of guilty was entered or a conviction was returned regardless of the sentence actually imposed. Provided, however, that federal offenses relating to the manufacture, possession, sale and kindred offenses involving intoxicating liquors shall not be considered felonies for the purposes of this Article. For the purposes of this Article, felonies committed before a person attains the age of 18 years shall not constitute more than one felony. The commission of a second felony shall not fall within the purview of this Article unless it is committed after the conviction of or plea of guilty to the first felony. The commission of a third felony shall not fall within the purview of this Article unless it is committed after the conviction of or plea of guilty to the second felony. Pleas of guilty to or convictions of felony offenses prior to July 6, 1967, shall not be felony offenses

within the meaning of this Article. Any felony offense to which a pardon has been extended shall not for the purpose of this Article constitute a felony. The burden of proving such pardon shall rest with the defendant and the State shall not be required to disprove a pardon. (1967, c. 1241, s. 1; 1971, c. 1231, s. 1.)

Editor's Note. — The 1971 amendment substituted "18" for "21" in the fourth sentence.

SUBCHAPTER II. OFFENSES AGAINST THE STATE.

ARTICLE 4A.

Prohibited Secret Societies and Activities.

§ 14-12.12. Placing burning or flaming cross on property of another or on public street or highway.

Cited in State v. Frazier, 278 N.C. 458, 180 S.E.2d 128 (1971).

SUBCHAPTER III. OFFENSES AGAINST THE PERSON.

ARTICLE 6.

Homicide.

§ 14-17. Murder in the first and second degree defined; punishment. — A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death. All other kinds of murder shall be deemed murder in the second degree, and shall be punished by imprisonment for a term of not less than two years nor more than life imprisonment in the State's prison. (1893, cc. 85, 281; Rev., s. 3631; C. S., s. 4200; 1949, c. 299, s. 1; 1973, c. 1201, s. 1.)

Cross References. —

As to what constitutes a sentence of life imprisonment, see § 14-2. As to eligibility of prisoners serving life sentence for parole, see § 148-58.

I. IN GENERAL.

Editor's Note. —

The 1973 amendment inserted "kidnapping" in the first sentence and deleted, at the end of the first sentence, a former proviso authorizing the jury to recommend life imprisonment. The amendment also rewrote the second sentence so as to increase the maximum punishment for murder in the second degree from 30 years to life imprisonment. The 1973 amendatory act became effective April 8, 1974, and is applicable to all offenses thereafter committed.

Session Laws 1973, c. 1201, s. 7, provides: "In the event it is determined by the North Carolina Supreme Court or the United States Supreme Court that a sentence of death may not be constitutionally imposed for any capital offense for which the death penalty is provided by this Act, the punishment for the offense shall be life imprisonment."

In accord with original. See State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973).

For article entitled "Capital Punishment and Life Imprisonment in North Carolina, 1946 to 1968: Implications for Abolition of the Death Penalty," see 6 Wake Forest Intra. L. Rev. 417 (1970).

For note on voluntariness of guilty pleas in plea-bargaining context, see 49 N.C.L. Rev. 795 (1971).

History. —

Prior to 1893 there were no degrees of murder in North Carolina. Any unlawful killing of a human being with malice aforethought, express or implied, was murder and punishable by death. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970); State v. Talbert, 282 N.C. 718, 194 S.E.2d 822 (1973); State v. Watkins, 283 N.C. 17, 194 S.E.2d 800 (1973).

This section is capable of standing alone. State v. Roseboro, 276 N.C. 185, 171 S.E.2d 886 (1970); Garner v. State, 8 N.C. App. 109, 174 S.E.2d 92 (1970).

Former § 15-162.1 did not alter this section. State v. Roseboro, 276 N.C. 185, 171 S.E.2d 886 (1970); Garner v. State, 8 N.C. App. 109, 174 S.E.2d 92 (1970).

The repeal of § 15-162.1, etc. —

The repeal in 1969 of § 15-162.1 neither added to, nor took from this section. State v. Roseboro, 276 N.C. 185, 171 S.E.2d 886 (1970); Garner v. State, 8 N.C. App. 109, 174 S.E.2d 92 (1970).

The repeal of § 15-162.1 did not modify, change, add to, or take from this section. State v. Hill, 276 N.C. 1, 170 S.E.2d 885 (1969).

If former § 15-162.1 (repealed 1969) should be held invalid upon the grounds suggested in United States v. Jackson, 390 U.S. 570, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968), or otherwise, such decision will not and cannot affect the validity of this section, a wholly separate, independent, previously existing and surviving statute. State v. Sanders, 276 N.C. 598, 174 S.E.2d 487 (1970).

Definitions. —

Manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation. State v. Duboise, 279 N.C. 73, 181 S.E.2d 393 (1971).

Constitutionality of Single-Verdict Procedure. — The Supreme Court of North Carolina has consistently upheld the single-verdict procedure established by this statute, and federal courts hold that this procedure does not violate due process or infringe upon defendant's constitutionally guaranteed right of silence. State v. Sanders, 276 N.C. 598, 174 S.E.2d 487 (1970).

In capital cases, under this section, the single-verdict procedure is valid and does not violate a defendant's constitutional rights. Such procedure does not violate due process nor infringe upon defendant's constitutional right to remain silent. State v. Lee, 277 N.C. 205, 176 S.E.2d 765 (1970).

Nothing in the Constitution of the United States forbids a state to adopt a procedure whereby the jury shall return simultaneously its verdict upon the issue of guilt and its determination of the sentence to be imposed. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971).

No provision of the Constitution of this State supports the defendant's contention that the General Assembly may not provide, as it has done in this section, that the jury shall make its determination as to punishment at the same time it renders its verdict upon the question of guilt. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971).

After guilt in a capital case has been established by the jury, its recommendation as to punishment does not violate the defendant's constitutional rights. State v. Roseboro, 276 N.C. 185, 171 S.E.2d 886 (1970).

The procedure which permits the trial jury in a capital case to decide guilt and at the same time and as a part of the verdict fix the punishment at life imprisonment has been repeatedly upheld. State v. Smith, 278 N.C. 36, 178 S.E.2d 597 (1971).

The 1949 amendment to this section providing that the jury, as a part of its guilty verdict, might by recommendation fix the punishment at life imprisonment rather than death, is not an unlawful division of powers between the court and the jury. State v. Miller, 276 N.C. 681, 174 S.E.2d 481 (1970).

The provision of this section which permits the jury to recommend life imprisonment for first degree murder is not unconstitutional in failing to prescribe any standard or rule to govern the jury in determining whether to make a recommendation. State v. Roseboro, 276 N.C. 185, 171 S.E.2d 886 (1970).

Constitutional rights of a defendant on trial for the capital crime of first degree murder were not violated by the single verdict procedure. State v. Doss, 279 N.C. 413, 183 S.E.2d 671 (1971); State v. Frazier, 280 N.C. 181, 185 S.E.2d 652 (1972).

See also post, this note, analysis line III.

Voluntary drunkenness, etc. —

Defendant's intoxicated condition went only to negate the specific intent necessary to find him guilty of first-degree murder. State v. Cummings, 22 N.C. App. 452, 206 S.E.2d 781 (1974).

Self-Defense. —

In accord with original. See State v. Jackson, 284 N.C. 383, 200 S.E.2d 596 (1973).

The right to act in self-defense is based upon necessity, real or apparent, and a person may use such force as is necessary or apparently necessary to save himself from death or great bodily harm in the lawful exercise of his right of self-defense. State v. Deck, 285 N.C. 209, 203 S.E.2d 831 (1974).

A person may kill even though it be not necessary to kill to avoid death or great bodily harm if he believes it to be necessary and he has reasonable grounds for such belief. State v. Deck, 285 N.C. 209, 203 S.E.2d 831 (1974).

In order that the right of self-defense may be restored to a person who has provoked or commenced a combat, he must attempt in good faith to withdraw from the combat. He must also in some manner make known his intention to his adversary; and if the circumstances are such that he cannot notify his adversary, as where the injuries inflicted by him are such as to deprive his adversary of his capacity to receive impressions concerning his assailant's design and endeavor to cease further combat, it is the assailant's fault and he must bear the consequences. As long as a person keeps his gun

in his hand prepared to shoot, the person opposing him is not expected or required to accept any act or statement as indicative of an intent to discontinue the assault. State v. Winford, 279 N.C. 58, 181 S.E.2d 423 (1971).

The term "quitting the combat," within the meaning of these decisions, does not always and necessarily require that a defendant should physically withdraw therefrom. If the counterattack is of such a character that he cannot do this consistently with safety of life or limb, such a course is not required; but before the right of perfect self-defense can be restored to one who has wrongfully brought on a difficulty, and particularly where he has done so by committing a battery, he is required to abandon the combat in good faith and signify this in some way to his adversary. There is every reason for saying that the conduct of the accused relied upon to sustain such a defense must have been so marked in the matter of time, place, and circumstance as not only to clearly evince the withdrawal of the accused in good faith from the combat, but also as fairly to advise his adversary that his danger has passed and to make his conduct thereafter the pursuit of vengeance rather than measures taken to repel the original assault. And when, as heretofore shown, the counterassault is so fierce that the original assailant cannot comply with this requirement, then, in the language of Lord Hale, "He that first assaulted hath done the first wrong and brought upon himself this necessity, and shall not have the advantage of his own wrong to gain the favorable interpretation of the law, that that necessity which he brought on himself should, by way of interpretation, be accounted a flight to save himself from murder or manslaughter." State v. Winford, 279 N.C. 58, 181 S.E.2d 423 (1971).

It is incumbent upon defendant to satisfy the jury (1) that he did act in self-defense, and (2) that, in the exercise of his right to self-defense, he used no more force than was or reasonably appeared necessary under the circumstances to protect himself from death or great bodily harm. State v. Boyd, 278 N.C. 682, 180 S.E.2d 794 (1971).

The burden is on defendant to prove his plea of self-defense to the satisfaction of the jury and to prove that he used no more force than was or reasonably appeared necessary under the circumstances to protect himself from death or great bodily harm. State v. Boyd, 278 N.C. 682, 180 S.E.2d 794 (1971).

Self-defense requires, among other things, that the one invoking the defense be without fault in initiating the affray. It must also be shown that the killing was necessary or appeared to be necessary to prevent death or great bodily harm to defendant. State v. Mays, 14 N.C. App. 90, 187 S.E.2d 479 (1972).

Where a prisoner makes an assault upon A. and is reassaulted so fiercely that the prisoner cannot retreat without danger of his life, and the prisoner kills A.: Held, that the killing cannot be justified upon the ground of self-defense. The first assailant does the first wrong and brings upon himself the necessity of slaying, and is therefore not entitled to a favorable interpretation of the law. State v. Winford, 279 N.C. 58, 181 S.E.2d 423 (1971).

A defendant, prosecuted for a homicide in a situation that he has provoked by the use of language "calculated and intended" to bring on the encounter, cannot maintain the position of perfect self-defense unless, at a time prior to the killing, he withdrew from the encounter within the meaning of the law. State v. Watson, 287 N.C. 147, 214 S.E.2d 85 (1975).

Applied in State v. Smith, 279 N.C. 505, 183 S.E.2d 649 (1971); State v. Freeman, 280 N.C. 622, 187 S.E.2d 59 (1972); State v. Bolin, 281 N.C. 415, 189 S.E.2d 235 (1972); State v. Willis, 281 N.C. 558, 189 S.E.2d 190 (1972); State v. Cutshall, 281 N.C. 588, 189 S.E.2d 176 (1972); State v. Ingram, 282 N.C. 142, 191 S.E.2d 595 (1972); State v. Edwards, 282 N.C. 201, 192 S.E.2d 304 (1972); State v. Hegler, 15 N.C. App. 51, 189 S.E.2d 596 (1972); State v. McSwain, 15 N.C. App. 675, 190 S.E.2d 682 (1972); Ham v. North Carolina, 471 F.2d 406 (4th Cir. 1973); State v. Huffman, 21 N.C. App. 331, 204 S.E.2d 241 (1974); State v. Perry, 21 N.C. App. 528, 204 S.E.2d 916 (1974); State v. Harrington, 22 N.C. App. 473, 206 S.E.2d 768 (1974); State v. Greenlee, 22 N.C. App. 489, 206 S.E.2d 753 (1974); State v. Boyd, 287 N.C. 131, 214 S.E.2d 14 (1975); State v. Woodson, 287 N.C. 578, 215 S.E.2d 607 (1975).

Quoted in State v. Benton, 275 N.C. 378, 167 S.E.2d 775 (1969).

Cited in State v. Clark, 22 N.C. App. 81, 206 S.E.2d 252 (1974); State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975); Lofton v. Lofton, 26 N.C. App. 203, 215 S.E.2d 861 (1975).

II. MURDER IN GENERAL.

Malice — Definition. —

In accord with 1st paragraph in original. See State v. Tilley, 18 N.C. App. 300, 196 S.E.2d 816 (1973).

In accord with 2nd paragraph in original. See State v. Drake, 8 N.C. App. 214, 174 S.E.2d 132 (1970).

Same — Implied from Use of Deadly Weapon. —

Malice is implied in law from the intentional killing with a deadly weapon. State v. McCain, 6 N.C. App. 558, 170 S.E.2d 531 (1969).

A presumption of malice arises when one intentionally assaults another with a deadly weapon and thereby proximately causes his death. State v. Goins, 24 N.C. App. 468, 211 S.E.2d 481 (1975).

The intentional use of a deadly weapon, as a weapon, when death proximately results from such use, gives rise to two presumptions: (1) that the killing was unlawful, and (2) that it was done with malice. The presumptions do not rise from the mere use of a deadly weapon—the use must be intentional. State v. Drake, 8 N.C. App. 214, 174 S.E.2d 132 (1970).

Malice may be presumed from evidence which satisfies the jury beyond a reasonable doubt that the death of the victim proximately resulted from pistol shots intentionally fired at him by the defendant. State v. Sanders, 276 N.C. 598, 174 S.E.2d 487 (1970).

Malice, as one of the essential elements of murder in the second degree, is not presumed merely by the pointing of a gun or pistol at another person in fun in violation of § 14-34. In order for this presumption of malice to arise from an assault with a deadly weapon, there must be an intent to inflict a wound with such weapon which produces death. State v. Currie, 7 N.C. App. 439, 173 S.E.2d 49 (1970).

It is error for the trial court to instruct the jury that once a killing is proven to have been done with a deadly weapon the law presumes malice, since in order for a presumption of malice to arise, it has to be established or admitted that the defendant intentionally used a deadly weapon, as a weapon, and inflicted wounds proximately resulting in death. State v. Drake, 8 N.C. App. 214, 174 S.E.2d 132 (1970).

Same—Evidence. —

Any unseemly conduct toward the corpse of the person slain or any indignity offered it by the slayer should go to the jury on the question of malice. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971).

"Malice aforethought" was a term used in defining murder prior to the time of the adoption of this section dividing murder into degrees. As then used it did not mean an actual, express or preconceived disposition; but imported an intent, at the moment, to do without lawful authority, and without the pressure of necessity, that which the law forbade. As used in this section, the term premeditation and deliberation is more comprehensive and embraces all that is meant by aforethought, and more. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

Motive—Necessity. —

In accord with original. See State v. Van Landingham, 283 N.C. 589, 197 S.E.2d 539 (1973).

Motive is not an essential element of murder; however, while not necessary to be proven, motive or the absence of motive is a circumstance to be considered. State v. Barnell, 17 N.C. App. 299, 194 S.E.2d 63 (1973).

Same—To Strengthen State's Case. —

In accord with original. See State v. Van Landingham, 283 N.C. 589, 197 S.E.2d 539 (1973).

Abusive language will not serve as a legally sufficient provocation for a homicide in this State. State v. Watson, 287 N.C. 147, 214 S.E.2d 85 (1975).

Nor Mitigate Homicide to Lesser Degree. — Mere words, however abusive, are never sufficient legal provocation to mitigate a homicide to a lesser degree. State v. Watson, 287 N.C. 147, 214 S.E.2d 85 (1975).

Heat of Passion Defined. — See State v. Pope, 24 N.C. App. 217, 210 S.E.2d 267 (1974).

Foreseeability is not an element of proximate cause in a homicide case where an intentionally inflicted wound caused the victim's death. State v. Wrenn, 279 N.C. 676, 185 S.E.2d 129 (1971).

The crucial question is whether a wound inflicted by an unlawful assault proximately caused the death, not whether death was a natural and probable result of such a wound and should have been foreseen. State v. Wrenn, 279 N.C. 676, 185 S.E.2d 129 (1971).

Legal insanity requires that the accused be laboring under such defect of reason from disease of the mind as to be incapable of knowing the nature and quality of his act, or if he does know this, not to know right from wrong. State v. Pope, 24 N.C. App. 217, 210 S.E.2d 267 (1974).

There May Be Accessories to Murder in Both Degrees. — Since malice, express or implied, is a constituent element of murder in any degree, there may be accessories before the fact to the crime of murder in both degrees. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

There may, of course, be accessories before the fact in all kinds of murder with deliberation, or premeditation, or malice aforethought, including murder in the second degree, which involves malice. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

The punishment for an accessory before the fact to a murder in any degree remains imprisonment for life. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

Where one incites or employs a mental defective to kill another the question whether the employer is guilty as a principal depends upon whether the defective was criminally responsible for his act under the McNaughten rule. If the agent is legally responsible for his own acts, the instigator is only an accessory before the fact if he is absent when the crime is committed. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

Indictment Sufficient to Charge Conspiracy to Murder. — See State v. Graham, 24 N.C. App. 591, 211 S.E.2d 805 (1975).

State's evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of conspiracy to commit murder where there was evidence that defendant had discussed the murder with

another and the means by which it might be accomplished, that defendant sent the coconspirator a picture of the victim for identification purposes, that defendant sent sums of money to the coconspirator, and that after an unsuccessful attempt was made upon the victim's life, defendant had stated to a friend, who had introduced her to the coconspirator, that the coconspirator knew somebody who would "finish the job." State v. Graham, 24 N.C. App. 591, 211 S.E.2d 805 (1975).

III. MURDER IN THE FIRST DEGREE.

Definition. —

In accord with 1st paragraph in original. See State v. Robbins, 275 N.C. 537, 169 S.E.2d 858 (1969); State v. Reams, 277 N.C. 391, 178 S.E.2d 65 (1970); State v. Duboise, 279 N.C. 73, 181 S.E.2d 393 (1971); State v. Fountain, 282 N.C. 58, 191 S.E.2d 674 (1972); State v. Hamilton, 19 N.C. App. 436, 199 S.E.2d 159 (1973); State v. Sparks, 285 N.C. 631, 207 S.E.2d 712 (1974); State v. McLaughlin, 286 N.C. 597, 213 S.E.2d 238 (1975).

Murder in the first degree is sometimes defined briefly as murder in the second degree plus premeditation. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

It is not necessary that the words "fixed design" always be included in defining murder in the first degree. State v. Sparks, 285 N.C. 631, 207 S.E.2d 712 (1974).

A specific intent to kill, etc. —

In accord with original. See State v. Robbins, 275 N.C. 537, 169 S.E.2d 858 (1969); State v. Sparks, 285 N.C. 631, 207 S.E.2d 712 (1974); State v. McLaughlin, 286 N.C. 597, 213 S.E.2d 238 (1975).

A specific intent to kill is an essential element of first degree murder. State v. Duncan, 282 N.C. 412, 193 S.E.2d 65 (1972).

A specific intent to kill is a necessary ingredient of premeditation and deliberation. State v. Cooper, 286 N.C. 549, 213 S.E.2d 305 (1975).

Deliberation and Premeditation. —

In accord with original. See State v. Walters, 275 N.C. 615, 170 S.E.2d 484 (1969); State v. Duncan, 282 N.C. 412, 193 S.E.2d 65 (1972); State v. Van Landingham, 283 N.C. 589, 197 S.E.2d 539 (1973).

The following are indicia of premeditation and deliberation: want of provocation on the part of the deceased; the conduct of defendant before and after the killing; threats and declarations of defendant before and during the course of the occurrence giving rise to the death of the deceased; the dealing of lethal blows after deceased has been felled and rendered helpless. State v. Hamby, 276 N.C. 674, 174 S.E.2d 385 (1970).

The additional ingredient of premeditation and deliberation necessary in first degree murder may be inferred from the vicious and brutal circumstances of the homicide, e.g., lack of provocation, threats before and during the occurrence, infliction of lethal blows after the victim had been felled and rendered helpless, and conduct of the defendant before and after the killing. State v. Duboise, 279 N.C. 73, 181 S.E.2d 393 (1971).

Want of provocation, absence of excuse, lack of justification, and defendant's statement that he shot a person "to prove a point" — all permit, if not compel, a legitimate inference of premeditation and deliberation. State v. Rich, 277 N.C. 333, 177 S.E.2d 422 (1970).

Evidence of threats against the victim are admissible in evidence to show premeditation and deliberation. State v. Reams, 277 N.C. 391, 178 S.E.2d 65 (1970).

Premediation and deliberation may be inferred from a vicious and brutal slaying of a human being. State v. Reams, 277 N.C. 391, 178 S.E.2d 65 (1970).

Any unseemly conduct toward the corpse of the person slain, or any indignity offered it by the slayer, and also concealment of the body, are evidence of express malice, and of premeditation and deliberation in the slaying, depending, of course, upon the particular circumstances of the case. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971).

When a homicide is perpetrated by means of torture, premeditation and deliberation are presumed and defendant is guilty of murder in the first degree. State v. Duboise, 279 N.C. 73, 181 S.E.2d 393 (1971).

No presumption as to premeditation and deliberation arises from a killing proximately caused by the intentional use of a deadly weapon. State v. Reams, 277 N.C. 391, 178 S.E.2d 65 (1970).

Same — Premeditation. —

In accord with original. See State v. Hamilton, 19 N.C. App. 436, 199 S.E.2d 159 (1973).

Premeditation means "thought beforehand" for some length of time, however short. State v. Sanders, 276 N.C. 598, 174 S.E.2d 487 (1970); State v. Reams, 277 N.C. 391, 178 S.E.2d 65 (1970); State v. Fountain, 282 N.C. 58, 191 S.E 2d 674 (1972); State v. Britt, 285 N.C. 256, 204 S.E.2d 817 (1974).

Premeditation means thought over beforehand for some length of time, however short, but no particular time is required for the mental process of premeditation. State v. Robbins, 275 N.C. 537, 169 S.E.2d 858 (1969).

Same — Deliberation. —

In accord with original. See State v. Reams, 277 N.C. 391, 178 S.E.2d 65 (1970); State v. Fountain, 282 N.C. 58, 191 S.E.2d 674 (1972); State v. Hamilton, 19 N.C. App. 436, 199 S.E.2d 159 (1973).

Deliberation does not require brooding or reflection for any appreciable length of time, but

imports the execution of an intent to kill in a cool state of blood without legal provocation, and in furtherance of a fixed design. State v. Britt, 285 N.C. 256, 204 S.E.2d 817 (1974).

Deliberation means an intention to kill, executed by the defendant in a cool state of blood, in furtherance of a fixed design or to accomplish some unlawful purpose, and not under the influence of a violent passion, suddenly aroused by some lawful or just cause or legal provocation. State v. Sanders, 276 N.C. 598, 174 S.E.2d 487 (1970).

Deliberation means revolving over in the mind. A deliberate act is one done in a cool state of the blood in furtherance of some fixed design. State v. Robbins, 275 N.C. 537, 169 S.E.2d 858 (1969).

"Cool state of blood" does not mean the absence of passion and emotion, but an unlawful killing is deliberate and premeditated if done pursuant to a fixed design to kill, notwithstanding that defendant was angry or in an emotional state at the time, unless such anger or emotion was such as to disturb the faculties and reason. State v. Britt, 285 N.C. 256, 204 S.E.2d 817 (1974).

The requirement of a cool state of blood does not mean that the defendant must be calm or tranquil. Premeditation and deliberation may be present even though the defendant is angry at the time of the killing, if he acts in the furtherance of a fixed design to kill. State v. Hamilton, 19 N.C. App. 436, 199 S.E.2d 159 (1973).

Same — Length of Time Immaterial. — No fixed length of time is required for the mental processes of premeditation and deliberation constituting an element of the offense of murder in the first degree, and it is sufficient if these processes occur prior to, and not simultaneously with, the killing. State v. Walters, 275 N.C. 615, 170 S.E.2d 484 (1969); State v. Perry, 276 N.C. 339, 172 S.E.2d 541 (1970).

The true test for premeditation is not the duration of time as much as it is the extent of the reflection. State v. Buchanan, 287 N.C. 408, 215 S.E.2d 80 (1975).

The time for premeditation would naturally vary with different individuals and under differing circumstances. State v. Buchanan, 287 N.C. 408, 215 S.E.2d 80 (1975).

Same — Inferred from Circumstances. — The elements of premeditation and deliberation are not ordinarily susceptible to direct proof, but are inferred from various circumstances, such as ill will, previous difficulty between the parties, or evidence that the killing was done in a vicious and brutal manner. State v. Fountain, 282 N.C. 58, 191 S.E.2d 674 (1972).

Ordinarily, it is not possible to prove premeditation and deliberation by direct evidence. These facts must be established by proof of circumstances from which they may be inferred. State v. Van Landingham, 283 N.C. 589, 197 S.E.2d 539 (1973); State v. Britt, 285 N.C. 256, 204 S.E.2d 817 (1974).

It is not necessary, and usually is not possible, for the State to prove premeditation and deliberation directly; they must be inferred from the circumstances. State v. Hamilton, 19 N.C. App. 436, 199 S.E.2d 159 (1973).

Among the circumstances to be considered in determining whether a killing was with premeditation and deliberation are: Want of provocation on the part of the deceased; the conduct of defendant before and after the killing; the use of grossly excessive force, or the dealing of lethal blows after the deceased has been felled. State v. DeGregory, 285 N.C. 122, 203 S.E.2d 794 (1974); State v. Britt, 285 N.C. 256, 204 S.E.2d 817 (1974).

Premeditation and deliberation are not usually susceptible to direct proof, but must be established from the circumstances surrounding the homicide. State v. Sparks, 285 N.C. 631, 207 S.E.2d 712 (1974).

Premeditation and deliberation are not usually susceptible of direct proof, but are susceptible of proof by circumstances from which the facts sought to be proven may be inferred. State v. McLaughlin, 286 N.C. 597, 213 S.E.2d 238 (1975).

Same—Presumption and Burden of Proof.— Where a murder is committed in the perpetration or attempt to perpetrate a felony the State is not put to the proof of premeditation and deliberation; the law presumes them. State v. Doss, 279 N.C. 413, 183 S.E.2d 671 (1971).

Same — Sufficiency of Evidence. — Evidence held sufficient to permit the jury to make a legitimate inference of premeditation and deliberation. State v. Sanders, 276 N.C. 598, 174 S.E.2d 487 (1970).

The want of provocation, the absence of any excuse or justification for the shooting, the number of shots fired or attempted to be fired, the fact that defendant ran immediately after the shooting, coupled with the other evidence, permitted a legitimate inference of premeditation and deliberation, and was sufficient to be submitted to the jury on the issue of murder in the first degree. State v. Sparks, 285 N.C. 631, 207 S.E.2d 712 (1974).

A murder committed in the perpetration or attempted perpetration of any felony within the purview of this section is murder in the first degree, irrespective of premeditation or deliberation or malice aforethought. State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972); State v. Hairston, 280 N.C. 220, 185 S.E.2d 633 (1972).

The ingredients of premeditation and deliberation necessary in first-degree murder may be inferred from the vicious and brutal circumstances of the homicide indicating a complete lack of provocation and a viciousness

which demonstrates that death was the actor's objective. State v. DeGregory, 285 N.C. 122, 203 S.E.2d 794 (1974).

What Felonies Are within Purview of Section. — A felony which is inherently dangerous to life is within the purview of this section although not specified therein. State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972); State v. Woods, 286 N.C. 612, 213 S.E.2d 214 (1975).

Any unspecified felony is within the purview of this section if the commission or attempted commission thereof creates any substantial foreseeable human risk and actually results in the loss of life. This includes, but is not limited to, felonies which are inherently dangerous to life. State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972).

Any unspecified felony which is inherently dangerous to human life, or foreseeably dangerous to human life due to the circumstances of its commission, is within the purview of this section. State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972).

Felonies which are inherently dangerous to life are not the only unspecified felonies within the purview of this section. State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972).

Killing Committed in Perpetration or Attempted Perpetration of Felony. — A killing is committed in the perpetration or attempted perpetration of a felony within the purview of a felony-murder statute when there is no break in the chain of events leading from the initial felony to the act causing death, so that the homicide is linked to or part of the series of incidents, forming one continuous transaction. State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972).

Application of the felony-murder rule supplants the necessity for proof of an intentional killing with malice after premeditation and deliberation. State v. Williams, 284 N.C. 67, 199 S.E.2d 409 (1973).

A murder committed in the perpetration or attempt to perpetrate any felony within the purview of this section is murder in the first degree without proof of an intentional killing with malice after premeditation and deliberation. State v. Williams, 284 N.C. 67, 199 S.E.2d 409 (1973).

A murder perpetrated in an attempt to commit robbery is murder in the first degree. State v. Carey, 285 N.C. 509, 206 S.E.2d 222 (1974).

Killing in Perpetration of Arson. — A murder committed in the perpetration or attempt to perpetrate arson is murder in the first degree irrespective of premeditation, deliberation, or malice aforethought. State v. McLaughlin, 286 N.C. 597, 213 S.E.2d 238 (1975).

Killing in Perpetration of Robbery. —

When a murder is committed in the perpetration or attempt to perpetrate the felony of robbery, it is murder in the first degree, irrespective of premeditation, deliberation or malice aforethought. State v. Haynes, 276 N.C. 150, 171 S.E.2d 435 (1970).

In a case of murder in the first degree committed in the perpetration of, or attempt to perpetrate, a robbery, instruction that the jury should return a verdict of guilty as charged, guilty as charged with a recommendation for life imprisonment, or not guilty is a proper instruction. When the indictment and evidence disclose a killing in the perpetration of a robbery, only one of such verdicts may be returned. State v. Hill, 276 N.C. 1, 170 S.E.2d 885 (1969).

When a murder is committed in the perpetration or attempt to perpetrate any robbery, burglary or other felony, this section declares it murder in the first degree. In those instances the law presumes premeditation and deliberation, and the State is not put to further proof of either. State v. Fox, 277 N.C. 1, 175 S.E.2d 561 (1970); State v. Jenerett, 281 N.C. 81, 187 S.E.2d 735 (1972).

Where the evidence permits a legitimate inference that a murder was committed in perpetration of a robbery, and murder so committed is "deemed to be murder in the first degree." Hence it is not then prejudicial error to defendant for the court to give the State's contentions and to charge the jury that a murder committed in the perpetration of a robbery will be deemed murder in the first degree. State v. Rich, 277 N.C. 333, 177 S.E.2d 422 (1970).

The felony-murder rule provides in pertinent part that a murder which shall be committed in the perpetration or attempt to perpetrate robbery shall be deemed to be murder in the first degree. In such cases the law presumes premeditation and deliberation, and the State is not put to further proof of either. State v. Wright, 282 N.C. 364, 192 S.E.2d 818 (1972).

Where it appears conclusively that armed robbery charges were proved as essential elements in the capital offense of murder in the first degree upon which the defendants were convicted, the robberies became a part of and were merged into the murder charges. Having been so used, the defendants cannot again be charged, convicted and sentenced for these elements although the robberies constituted crimes within themselves. State v. Carroll, 282 N.C. 326, 193 S.E.2d 85 (1972).

A finding that a homicide was committed in the perpetration of an attempted robbery suffices to support the conviction of murder in the first degree. State v. Simmons, 286 N.C. 681, 213 S.E.2d 280 (1975).

Killing in Perpetration of Act of Sodomy. — Without deciding whether every felony not specified in the statute must be inherently dangerous to life, the crime committed where a 15-year-old boy, under threat of gunfire and

knife, was compelled to submit to an act of sodomy by the defendant was a crime as atrocious and as inherently dangerous as the specified felonies in this section. State v. Doss, 279 N.C. 413, 183 S.E.2d 671 (1971).

Killing in Perpetration of Felonious Breaking and Entering and Larceny. — Where the evidence tends to show that defendant, armed with pistol, feloniously broke into and entered an apartment; that he committed the crime of felonious larceny therein; and that while in said apartment he came upon and shot and killed the deceased, these crimes created substantial foreseeable human risks and therefore were unspecified felonies within the purview of this section. State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972).

Killing in Perpetration of Burglary. — A finding that a homicide was committed in the perpetration of a burglary suffices to support the conviction of murder in the first degree. State v. Simmons, 286 N.C. 681, 213 S.E.2d 280 (1975).

Discharging Firearm into Occupied Property. — A homicide committed in the perpetration of the felony under § 14-34.1 can result in conviction for murder in the first degree under the felony-murder rule of § 14-17. State v. Williams, 21 N.C. App. 525, 204 S.E.2d 864 (1974).

The criminal offense created by § 14-34.1 is a felony within the purview of this section. State v. Williams, 284 N.C. 67, 199 S.E.2d 409 (1973).

Death Need Not Be Intended. —

In accord with 1st paragraph in original. See State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972).

All Conspirators Are Guilty, etc. —

When a conspiracy is formed to commit a robbery or burglary, and a murder is committed by any one of the conspirators in the attempted perpetration of the crime, each and all of the conspirators are guilty of murder in the first degree. State v. Fox, 277 N.C. 1, 175 S.E.2d 561 (1970).

Where all defendants had formed a conspiracy to rob the deceased, and in attempting to perpetrate this crime one defendant shot and killed the deceased, then each and all of the conspirators are guilty of murder in the first degree, and the court correctly refused to charge that the conspiracy had been abandoned, and that the other defendants were not accountable for the act of the defendant who shot and killed the deceased. State v. Hairston, 280 N.C. 220, 185 S.E.2d 633 (1972).

Where the evidence was sufficient to support a finding by the jury that defendants had formed a conspiracy to rob the deceased, and that in attempting to perpetrate this crime one of the defendants shot and killed the deceased, each of the defendants was guilty of murder in the first degree. State v. Wright, 282 N.C. 364, 192 S.E.2d 818 (1972).

Where the court has consolidated first-degree murder and armed robbery charges in the same trial against defendant under § 15-152 (now § 15A-926(a)), the court may instruct the jury on murder in the first degree as a separate crime requiring deliberation, premeditation, and malice, rather than permit the jury to rely on the felony-murder rule as a basis for finding defendant guilty of first-degree murder. State v. Thompson, 285 N.C. 181, 203 S.E.2d 781 (1974).

No Additional Punishment for Felony May Be Imposed. — When a felony within the purview of § 14-34.1 is relied upon as an essential of and the basis for the conviction of a defendant for murder in the first degree under the felony-murder rule, no additional punishment can be imposed for such felony as an independent criminal offense. State v. Williams, 284 N.C. 67, 199 S.E.2d 409 (1973).

Right of Jury to Recommend Life Imprisonment. —

Under this section the statute imposes the death penalty, and the jury can give life imprisonment in lieu of death. Garner v. State, 8 N.C. App. 109, 174 S.E.2d 92 (1970).

Under this section, the punishment imposed by law, not the jury, for first-degree murder is death. The jury does not impose the sentence of death. However, the legislature has given the jury the right to extend mercy to one guilty of first-degree murder. Garner v. State, 8 N.C. App. 109, 174 S.E.2d 92 (1970).

Except in one class of cases, the presiding judge fixes the punishment for a convicted defendant within the limits provided by the applicable statute. The exception is capital cases in which the jury may reduce the penalty from death to life imprisonment. State v. Rhodes, 275 N.C. 584, 169 S.E.2d 846 (1969).

Instructions as to Right to Recommend Life Imprisonment. —

Failure of the trial court in a rape prosecution to instruct the jury that a guilty verdict with recommendation of life imprisonment requires the court to pronounce a judgment of life imprisonment is erroneous. State v. Vance, 277 N.C. 345, 177 S.E.2d 389 (1970).

Court Has No Power to Impose Sentence Different from That Fixed by Jury. — This section clearly confers no discretionary power upon the superior court, or upon the Supreme Court of North Carolina, to impose a sentence different from that fixed by the jury. State v. Ruth, 276 N.C. 36, 170 S.E.2d 897 (1969).

Constitutionality of Death Penalty. — Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), holds that the Eighth and Fourteenth Amendments of the U. S. Constitution will no longer tolerate the infliction of a death sentence where either the jury or the judge is permitted to impose that sentence as a

matter of discretion. State v. Rankin, 282 N.C. 572, 193 S.E.2d 740 (1973); State v. Watkins, 283 N.C. 17, 194 S.E.2d 800 (1973).

Capital punishment has not been declared unconstitutional per se. Rather, the Eighth and Fourteenth Amendments will no longer tolerate the infliction of the death sentence if either judge or jury is permitted to impose that sentence as a matter of discretion. State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973).

The jury may not constitutionally be permitted to exercise its discretion and choose between life and death, a procedure held unconstitutional by the Supreme Court of the United States in Furman v. Georgia. State v. Blackmon, 284 N.C. 1, 199 S.E.2d 431 (1973).

In cases wherein the state law gives either the court or the jury the option to decide whether punishment shall be death or life imprisonment, the judgment must be life imprisonment in order to obey the mandate of the Eighth Amendment to the Constitution of the United States. State v. Carroll, 282 N.C. 326, 193 S.E.2d 85 (1972).

The State is without authority to execute a death sentence for murder in the first degree even though the jury failed to make any recommendation with respect to punishment. State v. Carroll, 282 N.C. 326, 193 S.E.2d 85 (1972).

Where the Supreme Court of the United States in Furman v. Georgia held that the imposition of the death penalty, under certain state statutes and in the application thereof, was unconstitutional, that decision did not affect the conviction but only the death sentence. State v. Wright, 282 N.C. 364, 192 S.E.2d 818 (1972); State v. Duncan, 282 N.C. 412, 193 S.E.2d 65 (1972).

Furman v. Georgia is without significance when the jury in a murder trial returns a verdict recommending life imprisonment. In that situation the defendant has no standing to raise the constitutionality of the death penalty or of a statute because it provides for that punishment. State v. Wright, 282 N.C. 364, 192 S.E.2d 818 (1972); State v. Duncan, 282 N.C. 412, 193 S.E.2d 65 (1972); State v. Rankin, 282 N.C. 572, 193 S.E.2d 740 (1973).

Prior to the repeal of § 15-162.1, the death penalty provisions relating to murder in the first degree, rape, burglary in the first degree and arson were invalidated by the decisions of the Supreme Court of the United States. State v. Childs, 280 N.C. 576, 187 S.E.2d 78 (1972).

The General Assembly reenacted the provisions of § 15-162.1 by Session Laws 1971, c. 562, effective June 15, 1971. Then, § 15-162.1 was again repealed by enactment of Session Laws 1971, c. 1225, effective July 21, 1971; thus from June 15, 1971, to July 21, 1971, the death penalty provisions once again applied only to those defendants who asserted their right to plead not guilty. While the provisions of § 15-162.1 were in effect, death sentences were unconstitutional and could not be carried out. State v. Anderson, 281 N.C. 261, 188 S.E.2d 336 (1972).

Nothing in the Constitution of the United States requires that the legislature prescribe the most efficacious punishment for crime, or even the one favored by "enlightened" sociologists. It is sufficient that reasonable men can believe that the punishment prescribed is reasonably adapted to the attainment of the goals of all criminal punishment. This section meets this constitutional standard. State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721 (1974).

Mandatory death penalty for murder in the first degree is not cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, §§ 19, 24, and 27 of the Constitution of North Carolina. State v. Fowler, 285 N.C. 90, 203 S.E.2d 803 (1974).

The penalty of death for conviction of the crime of first-degree murder does not constitute cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. State v. Honeycutt, 285 N.C. 174, 203 S.E.2d 844 (1974).

Arbitrary discrimination cannot be shown from statistical data. It requires, at least, careful study of the records in cases where different results were reached in order to determine whether those differences in result were justified by differences in the facts. Since all defendants convicted of first-degree murder or of rape, committed since January 18, 1973, have been sentenced to death, arbitrariness is, therefore, not established. State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721 (1974).

Death Penalty Is Now Mandatory. — The meaning of this section, in the light of the decision of the Supreme Court of the United States in Furman v. Georgia, is that a defendant, lawfully convicted of first-degree murder, rape, first-degree burglary or arson, the offense having been committed after January 18, 1973, must be sentenced to death, the trial judge having no discretion in the matter of the sentence to be imposed and the jury having no authority to fix a different punishment. State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721 (1974).

The death penalty is the sole and exclusive punishment for murder in the first degree committed in North Carolina after January 18, 1973. State v. Fowler, 285 N.C. 90, 203 S.E.2d 803 (1974).

Mandatory Death Penalty Applied Prospectively. — North Carolina's mandatory death penalty for rape, murder in the first degree, burglary in the first degree and arson may not be constitutionally applied to any offense committed prior to the date of this decision but shall be applied to any offense

committed after such date. State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973).

In State v. Waddell, the State Supreme Court held that the effect of Furman v. Georgia upon this section was (1) to invalidate its proviso — as well as the identical proviso in §§ 14-21 (rape), 14-52 (burglary), and 14-58 (arson) and (2) to make death the penalty for murder in the first degree, burglary in the first degree, rape, and arson. However, recognizing that this interpretation made an upward change in the penalty for these four crimes, the decision in Waddell was made to apply prospectively only. Thus, it is inapplicable to any such offense committed prior to January 18, 1973. State v. Talbert, 282 N.C. 718, 194 S.E.2d 822 (1973).

If a defendant, whose conviction and sentence of death of an offense committed before January 18, 1973 is reversed on appeal, should be convicted of murder in the first degree upon his second trial, his sentence will be imprisonment for life. State v. Talbert, 282 N.C. 718, 194 S.E.2d 822 (1973).

On June 7, 1972, the date of the homicide for which defendant was convicted, murder was not a capital crime; the only permissible punishment for murder in the first degree was life imprisonment; therefore, the proper judgment to be imposed upon defendant is life imprisonment. State v. Alexander, 284 N.C. 87, 199 S.E.2d 450 (1973).

The proper sentence to be imposed upon one convicted of murder in the first degree, committed prior to 18 January 1973, is a sentence to imprisonment for life. State v. Edwards, 286 N.C. 140, 209 S.E.2d 789 (1974).

Retention, etc., of Death Penalty Is Legislative Question. — The matter of retention, modification or abolition of the death penalty is a question for the lawmaking authorities rather than the courts. State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973).

Cases in Which Defendants Received Death Sentence Remanded Pursuant to Mandate of United States Supreme Court. — Pursuant to mandates of the Supreme Court of the United States in Hill v. North Carolina, 403 U.S. 948, 91 S. Ct. 2287, 29 L. Ed. 2d 860 (1971); Atkinson v. North Carolina, 403 U.S. 948, 91 S. Ct. 2283, 29 L. Ed. 2d 859 (1971); Williams v. North Carolina, 403 U.S. 948, 91 S. Ct. 2290, 29 L. Ed. 2d 860 (1971); Sanders v. North Carolina, 403 U.S. 948, 91 S. Ct. 2290, 29 L. Ed. 2d 860 (1971); and Roseboro v. North Carolina, 403 U.S. 948, 91 S. Ct. 2289, 29 L. Ed. 2d 860 (1971), first-degree murder cases in which the defendants received the death sentence were remanded to the superior court with direction that the defendants be sentenced to life imprisonment in the State's prison. State v. Hill, 279 N.C. 371, 183 S.E.2d 97 (1971); State v. Atkinson, 279 N.C. 386, 183 S.E.2d 106 (1971); State v. Williams, 279 N.C. 388, 183 S.E.2d 106 (1971); State v. Sanders, 279 N.C. 389, 183 S.E.2d 107 (1971); State v. Roseboro, 279 N.C. 391, 183 S.E.2d 108 (1971).

Plea of Guilty to Capital Charge Not Permitted. — Though under present North Carolina law it is not possible for a defendant to plead guilty to a capital charge, it seemingly remains possible for a person charged with a capital offense to plead guilty to a lesser charge. North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

Defendant Is Not Entitled to Have Second Jury Fix Punishment. — In this State a defendant in a first-degree murder prosecution is not entitled to a bifurcated jury trial with one jury determining the guilt or innocence and the other fixing the punishment. State v. Sanders, 276 N.C. 598, 174 S.E.2d 487 (1970).

Permissible Argument against Recommending Life Imprisonment. — In a first-degree murder prosecution, it was permissible for the solicitor to argue that in view of the brutality of defendant's conduct in the killing of his victim, the jury should find the defendant guilty of murder in the first degree without any recommendation that punishment be life imprisonment. State v. Williams, 276 N.C. 703, 174 S.E.2d 503 (1970).

In the discharge of his duties the prosecuting attorney is not required to be, and should not be, neutral. He is not the judge, but the advocate of the State's interest in the matter at hand. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971).

Where the prosecuting attorney, while making a vigorous plea for the imposition of the death penalty, did not depart from or distort the record, and there was nothing in his argument which would tend to mislead the jury or deprive the defendant of a fair trial, the argument was proper. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971).

Where the prosecuting attorney, in his argument, traveled outside the record, used language offensive in its nature, and, in support of his plea for the death penalty, injected into his argument his own account of his record as a solicitor in other cases, for the purpose of persuading the jury that he did not ask the death penalty where it was not deserved the argument was improper. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971).

The Supreme Court must determine whether the solicitor violated the right of the defendant to a fair trial, by the nature of his argument to the jury, from the record, irrespective of its view as to the policy of the State with regard to the punishment of the offense in question and without regard to the sufficiency of the evidence to support the verdict and sentence. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971).

If the prosecuting attorney passed over the boundary of this right and duty in his argument to the jury by his vigorous denunciation of the defendant and thereby denied him a fair trial,

the defendant is entitled to a new trial. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971).

Evidence Required to Sustain Verdict. — To sustain a verdict of murder in the first degree, the evidence must be sufficient to support a finding beyond a reasonable doubt that the defendant with malice, after premeditation and deliberation, intentionally shot and killed the victim. State v. Sanders, 276 N.C. 598, 174 S.E.2d 487 (1970).

In order to convict a defendant of first-degree murder the State is required to produce evidence which satisfies the jury beyond a reasonable doubt that he unlawfully killed a person with malice and in the execution of an actual specific intent to kill, formed after premeditation and deliberation. State v. Hamby, 276 N.C. 674, 174 S.E.2d 385 (1970).

Exclusion of Evidence Held Error. — In first-degree murder prosecution, the court erred in excluding the evidence that wife of deceased had employed private prosecution in the case. State v. White, 286 N.C. 395, 211 S.E.2d 445 (1975).

A murder committed in the perpetration or attempt to perpetrate a felonious escape is murder in the first degree. State v. Lee, 277 N.C. 205, 176 S.E.2d 765 (1970).

Voluntary Intoxication May Render Defendant Incapable of Forming Required Intent. — The general rule that voluntary drunkenness is no legal excuse for crime does not obtain with respect to crimes where, in addition to the overt act, it is required that a definite, specific intent be established as an essential feature. Murder in the first degree is a specific intent crime in that a specific intent to kill is a necessary ingredient of premeditation and deliberation. Intoxication which renders an offender utterly unable to form the required intent may be shown as a defense. State v. Baldwin, 276 N.C. 690, 174 S.E.2d 526 (1970).

If at the time of a killing, a defendant was so drunk as to be utterly incapable of forming a deliberate and premeditated intent to kill a person, he could not be guilty of murder in the first degree, for an essential element of that crime would be lacking. State v. Hamby, 276 N.C. 674, 174 S.E.2d 385 (1970).

If it is shown that a person on trial for murder in the first degree was so drunk at the time he committed the homicide charged in the indictment that he was utterly incapable of forming a deliberate and premeditated purpose to kill, an essential element of murder in the first degree is absent. In such a situation the grade of the offense is reduced to murder in the second degree. State v. Bunn, 283 N.C. 444, 196 S.E.2d 777 (1973).

While voluntary drunkenness is not, per se, an excuse for a criminal act, it may be sufficient in degree to prevent and, therefore, disprove the existence of a specific intent such as the intent to kill. State v. Duncan, 282 N.C. 412, 193 S.E.2d 65 (1972).

A showing of legal intoxication to the jury's satisfaction will mitigate a charge of first-degree murder to murder in the second degree. State v. McLaughlin, 286 N.C. 597, 213 S.E.2d 238 (1975).

What Evidence Must Show to Establish Defense of Voluntary Intoxication. — To make the defense of intoxication available the evidence must show that at the time of the killing the prisoner's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming a deliberate and premeditated purpose to kill. And where the evidence shows that the purpose to kill was deliberately and premeditatedly formed when sober, the imbibing of intoxicants to whatever extent in order to carry out the design will not avail as a defense. State v. Baldwin, 276 N.C. 690, 174 S.E.2d 526 (1970).

For intoxication to constitute a defense it must appear that the defendant was not able, by reason of drunkenness, to think out beforehand what he intended to do and weigh it and understand the nature and consequence of his act. State v. Duncan, 282 N.C. 412, 193 S.E.2d 65 (1972); State v. Bunn, 283 N.C. 444, 196 S.E.2d 777 (1973).

Whether intoxication and premeditation can coexist depends upon the degree of inebriety and its effect upon the mind and passions. No inference of the absence of deliberation and premeditation arises from intoxication, as a matter of law. State v. Hamby, 276 N.C. 674, 174 S.E.2d 385 (1970); State v. Bunn, 283 N.C. 444, 196 S.E.2d 777 (1973).

A person may be excited, intoxicated and emotionally upset, and still have the capability to formulate the necessary plan, design, or intention to commit murder in the first degree. State v. Hamby, 276 N.C. 674, 174 S.E.2d 385 (1970); State v. Bunn, 283 N.C. 444, 196 S.E.2d 777 (1973).

No inference of the absence of deliberation and premeditation arises as a matter of law from intoxication; and mere intoxication cannot serve as an excuse for the offender. State v. Duncan, 282 N.C. 412, 193 S.E.2d 65 (1972).

Intent to Kill Formed When Sober and Executed When Drunk. — Where the facts show that the intent to kill was deliberately formed when sober and executed when drunk, intoxication is no defense to the capital charge of murder in the first degree. State v. Baldwin, 276 N.C. 690, 174 S.E.2d 526 (1970).

The fact that, after his intent to kill was deliberately and premeditatedly formed when sober, defendant voluntarily drank enough intoxicants to produce pathological intoxication and then executed his murderous intent, is held not to constitute a valid defense to murder in the

first degree in this State. State v. Baldwin, 276 N.C. 690, 174 S.E.2d 526 (1970).

Effect of Intoxication as Question for Jury. — When a defendant has committed an overt lethal act, the decision has been that whether his intoxication was so gross as to preclude a capacity intentionally to kill is normally a fact issue for the jury to resolve. State v. Hamby, 276 N.C. 674, 174 S.E.2d 385 (1970).

It is for the jury to determine whether the mental condition of accused was so far affected by intoxication that he was unable to form a guilty intent to commit murder, unless the evidence is not sufficient to warrant the submission of the question to the jury. State v. Hamby, 276 N.C. 674, 174 S.E.2d 385 (1970).

IV. MURDER IN THE SECOND DEGREE.

Definition. —

In accord with 1st paragraph in original. See State v. McCain, 6 N.C. App. 558, 170 S.E.2d 531 (1969); State v. Jennings, 276 N.C. 157, 171 S.E.2d 447 (1970); State v. Duboise, 279 N.C. 73, 181 S.E.2d 393 (1971); State v. Cannady, 16 N.C. App. 569, 192 S.E.2d 677 (1972); State v. Fox, 18 N.C. App. 523, 197 S.E.2d 265 (1973).

In accord with 3rd paragraph in original. See State v. Winford, 279 N.C. 58, 181 S.E.2d 423 (1971).

Under statutes of this description, murder in the second degree is common-law murder but the killing is not accompanied by the distinguishing features of murder in the first degree. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

Included in Murder in First Degree. — If a person is guilty of murder in the first degree, a fortiori, his guilt encompasses murder in the second degree. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

The essential elements of the offense of murder in the second degree are that the killing was unlawful and with malice. For these elements to be presumed present, the burden is upon the State to satisfy the jury from the evidence beyond a reasonable doubt that the defendant intentionally used a deadly weapon, as a weapon, and inflicted wounds proximately resulting in death. State v. Drake, 8 N.C. App. 214, 174 S.E.2d 132 (1970).

But Not a Specific Intent to Kill. —

In accord with original. See State v. Bunn, 283 N.C. 444, 196 S.E.2d 777 (1973).

Death Ensuing from Attack Made with Hands and Feet Only. — Ordinarily if death ensues from an attack made with hands and feet only, on a person of mature years and full health and strength, the law would not imply malice required to make the homicide second-degree murder, because ordinarily death would not be caused by use of such means. The inference would be quite different, however, if the same assault were committed upon an infant of tender years or upon a person enfeebled by old age, sickness, or other apparent physical disability. State v. Sallie, 13 N.C. App. 499, 186 S.E.2d 667 (1972).

Burden of Proof. —

When the presumptions from the intentional use of a deadly weapon obtain, the burden is upon the defendant to show to the satisfaction of the jury the legal provocation that will rob the crime of malice and thus reduce it to manslaughter or that will excuse it altogether upon the ground of self-defense. State v. Boyd, 278 N.C. 682, 180 S.E.2d 794 (1971).

When the State satisfies the jury from the evidence, beyond a reasonable doubt, that defendant intentionally shot the deceased and thereby proximately caused his death, the law then casts upon the defendant the burden of showing to the satisfaction of the jury, if he can do so — not by the greater weight of the evidence nor beyond a reasonable doubt, but simply to the satisfaction of the jury — the legal provocation that will rob the crime of malice and thus reduce it to manslaughter, or that will excuse it altogether upon the ground of self-defense. State v. Oxendine, 24 N.C. App. 444, 210 S.E.2d 908 (1975).

The legal provocation that will rob the crime of malice and thus, either reduce it to manslaughter or excuse it on the ground of self-defense, are affirmative pleas, with the burden of satisfaction cast upon the defendant. State v. Oxendine, 24 N.C. App. 444, 210 S.E.2d 908 (1975).

Where the charge complained of clearly places the burden on defendant to show beyond a reasonable doubt facts which would reduce the charge from second-degree murder to manslaughter, this is error and is not cured by the fact that the trial judge did thereafter correctly and fully charge as to the burden which defendant must assume in order to reduce the charge from second-degree murder to manslaughter. State v. Winford, 279 N.C. 58, 181 S.E.2d 423 (1971).

When the presumptions of malice and an unlawful killing arise, nothing else appearing, defendant would be guilty of murder in the second degree. However, it is incumbent upon the trial judge to instruct the jury that the law casts upon the defendant the burden of showing to the satisfaction of the jury, not beyond a reasonable doubt, but simply to satisfy the jury as to legal provocation that would deprive the crime of malice and thus reduce it to manslaughter, or that will excuse it on some ground recognized in law as a complete defense. State v. Winford, 279 N.C. 58, 181 S.E.2d 423 (1971).

For the presumptions of malice and unlawfulness to arise from a killing with a deadly weapon, the defendant must admit or the

State must prove beyond a reasonable doubt that the killing was intentional. State v. Barnell, 17 N.C. App. 299, 194 S.E.2d 63 (1973).

Presumption. —

Where there is plenary evidence that deceased died from a wound intentionally inflicted by defendant with a rifle, the presumptions that the killing was unlawful and that it was done with malice are created. State v. Jennings, 276 N.C. 157, 171 S.E.2d 447 (1970).

If the State satisfies the jury beyond a reasonable doubt that a defendant intentionally used a deadly weapon and thereby caused the death, then two presumptions arise: (1) that the killing was unlawful, and (2) that it was done with malice; and nothing else appearing, the defendant would be guilty of murder in the second degree. State v. Winford, 279 N.C. 58, 181 S.E.2d 423 (1971).

When the State satisfies the jury from the evidence, beyond a reasonable doubt, that defendant intentionally shot the deceased and thereby proximately caused his death, the law raises two presumptions against him: (1) that the killing was unlawful and (2) that it was done with malice, and an unlawful killing with malice is murder in the second degree. State v. Oxendine, 24 N.C. App. 444, 210 S.E.2d 908 (1975).

When the killing with a deadly weapon is admitted or established, two presumptions arise: (1) that the killing was unlawful; (2) that it was done with malice; and an unlawful killing with malice is murder in the second degree. State v. Cannady, 16 N.C. App. 569, 192 S.E.2d 677 (1972).

When the killing with a deadly weapon is admitted or established, two presumptions arise: (1) that the killing was unlawful; (2) that it was done with malice; and an unlawful killing with malice is murder in the second degree but the expression, intentional killing, is not used in the sense that a specific intent to kill must be admitted or established. The sense of the expression is that the presumptions arise when the defendant intentionally assaults another with a deadly weapon and thereby proximately causes the death of the person assaulted. A specific intent to kill, while a necessary constituent of the elements of premeditation and deliberation in first-degree murder, is not an element of second-degree murder or manslaughter. The intentional use of a deadly weapon as a weapon, when death proximately results from such use, gives rise to the presumptions. The presumptions do not arise if an instrument, which is per se or may be a deadly weapon, is not intentionally used as a weapon, e.g., from an accidental discharge of a shotgun. State v. Winford, 279 N.C. 58, 181 S.E.2d 423 (1971).

When the killing with a deadly weapon is admitted or established, two presumptions arise: (1) that the killing was unlawful; (2) that it was done with malice; and an unlawful killing with malice is murder in the second degree. Where the defense was that an accidental discharge of the shotgun caused the death of the deceased, it was stated that the presumptions arise only when there is an intentional killing with a deadly weapon; these presumptions arise only when there is an intentional killing with a deadly weapon. But the expression, intentional killing, is not used in the sense that a specific intent to kill must be admitted or established. The sense of the expression is that the presumptions arise when the defendant intentionally assaults another with a deadly weapon and thereby proximately causes the death of the person assaulted. A specific intent to kill, while a necessary constituent of the elements of premeditation and deliberation in first-degree murder, is not an element of second-degree murder or manslaughter. The intentional use of a deadly weapon as a weapon, when death proximately results from such use, gives rise to the presumptions. State v. Duboise, 279 N.C. 73, 181 S.E.2d 393 (1971).

The intentional use of a deadly weapon as a weapon, when death proximately results from such use, gives rise to the presumptions that (1) the killing was unlawful and (2) done with malice, and an unlawful killing with malice is murder in the second degree. State v. Lea, 17 N.C. App. 71, 193 S.E.2d 383 (1972).

The intentional use of a deadly weapon as a weapon, when death proximately results from such use, gives rise to the presumptions that (1) the killing was unlawful and (2) done with malice, and an unlawful killing with malice is murder in the second degree, where all the evidence tends to show that defendant stubbornly continued over a period of hours to curse the deceased and to assault his helpless victim time after time with various deadly weapons while a witness was begging him to cease and desist. By these persistent assaults without the slightest provocation he inflicted mortal wounds proximately causing the death of his victim. This evidence affords no basis upon which defendant could be found guilty of manslaughter. Upon this evidence the presumptions arose, and it was then incumbent upon defendant, in keeping with legal principles too well settled to require repetition, to satisfy the jury of the truth of facts which would mitigate the killing to manslaughter or excuse it altogether. State v. Duboise, 279 N.C. 73, 181 S.E.2d 393 (1971).

If the State satisfied the jury from the evidence beyond a reasonable doubt that defendant stabbed the victim intentionally with a knife which constituted a deadly weapon and the stab wound so inflicted proximately caused her death, these facts would give rise to the presumptions that the killing was unlawful and with malice, the essentials of murder in the

second degree. State v. Parker, 279 N.C. 168, 181 S.E.2d 432 (1971).

If the State has satisfied the jury beyond a reasonable doubt that defendant intentionally shot his wife with a shotgun and thereby proximately caused her death, two presumptions arise: (1) that the killing was unlawful, and (2) that it was done with malice; and, nothing else appearing, the defendant would be guilty of murder in the second degree. State v. Wrenn, 279 N.C. 676, 185 S.E.2d 129 (1971).

When a jury finds from the State's evidence beyond a reasonable doubt that a defendant intentionally shot the deceased and that the wound so inflicted proximately caused his death, the presumptions arise that the killing was unlawful and that it was done with malice; nothing else appearing, the defendant is guilty of murder in the second degree. State v. Crump, 277 N.C. 573, 178 S.E.2d 366 (1971); State v. Boyd, 278 N.C. 682, 180 S.E.2d 794 (1971).

When the defendant admits or the State satisfies the jury beyond a reasonable doubt that the defendant intentionally used a deadly weapon and thereby proximately caused the death of a human being, the law raises presumptions that the killing was unlawful and that it was done with malice. Such unlawful killing of a human being with malice is murder in the second degree. State v. Reams, 277 N.C. 391, 178 S.E.2d 65 (1970).

The evidence was ample to show that the proximate cause of death was a wound in the head from a pistol bullet intentionally fired at the deceased by the defendant. Upon this evidence the law raises a presumption of an unlawful killing and a presumption of malice sufficient to support a conviction of murder in the second degree. State v. McIlwain, 279 N.C. 469, 183 S.E.2d 538 (1971).

An unlawful killing with malice is murder in the second degree, and when it is shown that a defendant intentionally shot the deceased with a deadly weapon and thereby caused his death, presumptions arise that the killing was unlawful and that it was done with malice. State v. Barnwell, 17 N.C. App. 299, 194 S.E.2d 63 (1973).

Presumption of Malice Not Rebutted. — In prosecution for second-degree murder, where there was no evidence of just cause or reasonable provocation for the homicide, nor was there evidence of self-defense, unavoidable accident or misadventure, defendant's self-serving declarations alone were not sufficient to rebut the presumption of malice arising in the case. State v. Mull, 24 N.C. App. 502, 211 S.E.2d 515 (1975).

Evidence Sufficient for Jury. —

As to evidence of second-degree murder sufficient for jury, see State v. McCain, 6 N.C. App. 558, 170 S.E.2d 531 (1969).

The evidence was sufficient to be submitted to the jury in a second-degree murder prosecution where it tended to show that the defendant and the deceased were imprisoned in the same prison unit, that a prison guard saw them arguing and broke them up, that later the guard saw defendant approach deceased who was lying on his bunk and make a striking movement toward the deceased's body, that although the guard saw no knife or other weapon in defendant's hand, a small knife was later discovered in a heater and deceased had died from a stab wound in the chest. State v. Mull, 24 N.C. App. 502, 211 S.E.2d 515 (1975).

Self-Defense Held Not Applicable in Trial for Second-Degree Murder. — See State v. Peterson, 24 N.C. App. 404, 210 S.E.2d 883 (1975).

Accessory before the Fact. — There can be an accessory before the fact to murder in the second degree. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

Admittedly the concept of accessory before the fact presupposes some arrangement between the accessory and the principal with respect to the commission of the crime. It does not follow, however, that there can be no accessory before the fact to second-degree murder, which imports a specific intent to do an unlawful act. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

It cannot be assumed that the legislature's division of murder into degrees and reduction of the punishment for murder in the second degree implied the reduction in the sentence for an accessory before the fact in second-degree murder. Had the legislature intended this revision it would undoubtedly have made it ipsissimis verbis. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

Effect of Principal's Guilty Plea to Voluntary Manslaughter. — Principal's guilty plea to voluntary manslaughter did not determine that the crime of second-degree murder had not been committed, thus barring trial of one who aided and abetted. State v. Cassell, 24 N.C. App. 717, 212 S.E.2d 208 (1975).

The fact that the law imposed the threat of the gas chamber does not render petitioner's plea of guilty to second-degree murder involuntary. Petitioner entered his plea to a lesser offense of murder and was not exposed to the defect which prompted the holding in United States v. Jackson, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968). Pickett v. Henry, 315 F. Supp. 1138 (E.D.N.C. 1970).

V. PLEADING AND PRACTICE.

Cross References. — As to indictment for homicide, see § 15-144 and the note thereto. As to verdict in prosecution for homicide, see § 15-172 and the note thereto.

Form of Indictment. —

A felony murder may be proven by the State although the bill of indictment charges murder

in the statutory language of § 15-144. State v. Lee, 277 N.C. 205, 176 S.E.2d 765 (1970).

An indictment must be sufficient in form to allege murder and support a conviction of murder in the first degree under § 15-144. It is not required that the indictment allege that the murder was committed in the perpetration of a robbery or other felony in order that it be sufficient to support a verdict of murder in the first degree. State v. Frazier, 280 N.C. 181, 185 S.E.2d 652 (1972).

Quashing Indictment. — A defendant who was tried on a bill of indictment returned by the grand jury charging him with murder in the first degree, could not quash the bill on the ground that, following a preliminary hearing, he was bound over for trial on the lesser charge of second degree murder. State v. Mack, 282 N.C. 334, 193 S.E.2d 71 (1972).

What State Must Prove. — In any prosecution for a homicide the State must prove two things: (1) that the deceased died by virtue of a criminal act; and (2) that the act was committed by the defendant. State v. Jones, 280 N.C. 60, 184 S.E.2d 862 (1971); State v. McCall, 286 N.C. 472, 212 S.E.2d 132 (1975).

Causal Connection between Assault and Death. — Nonexpert testimony, even without an opinion as to the cause of death, can establish a causal connection between an assault and death sufficient to take the State's case to the jury. State v. Luther, 21 N.C. App. 13, 203 S.E.2d 343 (1974).

Accidental Death Is Not Affirmative Defense Shifting Burden of Proof. — Defendant's assertion that the killing of deceased with a deadly weapon was accidental is not an affirmative defense which shifts the burden of proof to him to exculpate himself from a charge of murder; it is merely a denial that the defendant has committed the crime, and the burden remains on the State to prove a homicide resulting from the intentional use of a deadly weapon before any presumption arises against the defendant. State v. Wrenn, 279 N.C. 676, 185 S.E.2d 129 (1971).

Effect of Solicitor's Announcement That State Will Not Prosecute for First Degree Murder. — A solicitor's announcement that the State would not prosecute for the capital felony of first degree murder, but for a lesser included offense, did not render incompetent any pertinent evidence bearing on the defendant's guilt. State v. Ferguson, 280 N.C. 95, 185 S.E.2d 119 (1971).

Evidence of Premeditation, etc. —

Premeditation and deliberation are not usually susceptible of direct proof, and are therefore susceptible of proof by circumstances. State v. Perry, 276 N.C. 339, 172 S.E.2d 541 (1970); State v. DeGregory, 285 N.C. 122, 203 S.E.2d 794 (1974).

The elements of premeditation and deliberation are not usually susceptible to direct proof, but must be established from the circumstances surrounding the homicide. State v. Sanders, 276 N.C. 598, 174 S.E.2d 487 (1970); State v. Sparks, 285 N.C. 631, 207 S.E.2d 712 (1974).

Premeditation and deliberation are not usually susceptible of direct proof but are susceptible of proof by circumstances from which the facts sought to be proven may be inferred. State v. McLaughlin, 286 N.C. 597, 213 S.E.2d 238 (1975).

Evidence Insufficient to Convict. — A defendant who does not have the mental capacity to form an intent to kill, or to premeditate and deliberate upon the killing, cannot be lawfully convicted of murder in the first degree, whether such mental deficiency be due to a disease of the mind, intoxication or some other cause. State v. Cooper, 286 N.C. 549, 213 S.E.2d 305 (1975).

Evidence Insufficient to Sustain Conviction. — Where the State's evidence established a brutal murder, showed that defendant had the opportunity to commit it and raised suspicion in imaginative minds, it did not suffice to sustain a conviction. State v. Jones, 280 N.C. 60, 184 S.E.2d 862 (1971).

Evidence Insufficient to Support Defense of Intoxication. — Where the evidence tends to show that defendant was drinking heavily but there is no evidence tending to show that defendant did not know what he was doing, both in the planning and the execution of the crime which he consummated, then the evidence is not sufficient to make available to him the defense of intoxication. State v. Doss, 279 N.C. 413, 183 S.E.2d 671 (1971).

Beyond Reasonable Doubt. —

It makes no difference whether the State is relying on circumstantial or direct evidence, or both, the evidence must produce in the mind of the jurors a moral certainty of the defendant's guilt, otherwise the State has not proven his guilt beyond a reasonable doubt. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971).

To convict a defendant of murder in the first degree, when the killing was not perpetrated by one of the means specified by this section and was not committed in the perpetration of or attempt to perpetrate a felony, the State must prove beyond a reasonable doubt that the killing was with premeditation and deliberation. State v. Cooper, 286 N.C. 549, 213 S.E.2d 305 (1975).

Photographs, etc. —

In accord with 4th paragraph in original. See State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971).

There was no error in the admission of the two photographs of the body of a murder victim, the court instructing the jury that they were to be considered solely for the purpose of illustrating

the testimony of the witness. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971).

Photographs of the victim's body and articles of clothing found upon it were competent notwithstanding the admission by the defendant, through his counsel, in open court, that the body was that of the victim, that it was discovered in a wooded area, partially hidden under boards and an old quilt and in a state of decomposition, and that the cause of death was five gunshot wounds in the abdomen. Notwithstanding these admissions, the circumstances with reference to the shooting of the deceased and the disposition of her body were material upon the question of the degree of the homicide and the decision as to the punishment to be inflicted, if the jury should find the defendant guilty of murder in the first degree. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971).

The fact that a photograph depicts a horrible, gruesome and revolting scene, indicating a vicious, calculated act of cruelty, malice or lust, does not render the photograph incompetent in evidence, when properly authenticated. State v. Duncan, 282 N.C. 412, 193 S.E.2d 65 (1972).

Charge — Willful Premeditation and Deliberation. —

Judge's instruction to the jury in a first-degree murder case that the jury, in determining premeditation and deliberation, may consider the "absence of provocation" did not express a court opinion, contrary to § 1-180, that there was no evidence of provocation in the case. State v. Fowler, 285 N.C. 90, 203 S.E.2d 803 (1974).

Where the issues of premeditation and deliberation constituted the primary focus of the jury's inquiry, the trial court's charge that the jury could infer these elements from matters not supported by the evidence constituted prejudicial error entitling defendant to a new trial. State v. Buchanan, 287 N.C. 408, 215 S.E.2d 80 (1975).

Same — Self-Defense. —

The trial court sufficiently instructed the jury on the intensity of proof required of a defendant in order to establish the defense of self-defense when it instructed the jury that "defendant has the burden of proving, not beyond a reasonable doubt, but to your satisfaction, the absence of malice or that the killing was in self-defense." State v. Richardson, 14 N.C. App. 86, 187 S.E.2d 435 (1972).

Where there is evidence that defendant acted in self-defense, the court must charge on this aspect even though there is contradictory evidence by the State or discrepancies in defendant's evidence. State v. Dooley, 285 N.C. 158, 203 S.E.2d 815 (1974).

Failure to include not guilty by reason of self-defense in the court's final mandate to the jury, where required, is not cured by the discussion of the law of self-defense in the body of the charge to the jury. State v. Dooley, 285 N.C. 158, 203 S.E.2d 815 (1974).

North Carolina law recognizes that a person may not only take life in his own defense, but he may also do so in defense of another who stands in a family relation to him. The failure to instruct the jury on this fundamental issue constitutes prejudicial error. State v. Spencer, 21 N.C. App. 445, 204 S.E.2d 552 (1974).

In cases where the defendant has met his burden of production for self-defense, the failure of the trial judge to include not guilty by reason of self-defense as a possible verdict in his final mandate to the jury is prejudicial error and entitles the defendant to a new trial. State v. Dooley, 285 N.C. 158, 203 S.E.2d 815 (1974).

Where the State's evidence presents testimony which would permit, but not require, the jury to find that: (1) Defendant was without fault in bringing on the difficulty, (2) deceased was armed with and first assaulted defendant with a deadly weapon, (3) the fatal blow was struck during a struggle for the weapon first used by deceased and (4) the defendant used such force as was necessary or as appeared to him to be necessary to save himself from death or great bodily harm, the evidence was sufficient to require the trial judge to state and apply the law of self-defense to the facts of the case and the court's failure to so do constituted prejudicial error. State v. Deck, 285 N.C. 209, 203 S.E.2d 830 (1974).

The proper charge to the jury on the verdict of not guilty by reason of self-defense is: If, however, although you are satisfied beyond a reasonable doubt that the defendant did intentionally kill deceased and thereby proximately caused his death, if you are further satisfied, not beyond a reasonable doubt, but are satisfied that at the time of the shooting the defendant did have reasonable grounds to believe and did believe that he was about to suffer death or serious bodily harm at the hands of deceased, and under those circumstances he used only such force as reasonably appeared necessary, you the jury being the judge of such reasonableness, and you also are satisfied that the defendant was not the aggressor, then he would be justified by reason of self-defense, and it would be your duty to return a verdict of not guilty. State v. Dooley, 285 N.C. 158, 203 S.E.2d 815 (1974).

Where the jury could have logically deduced from the charge of self-defense that defendant was under a duty to retreat in his own home if the assault upon him was not murderous, defendant deserved a new trial due to error in the charge. State v. Boswell, 24 N.C. App. 94, 210 S.E.2d 129 (1974).

Same — Intoxication. — Trial court did not err in charging that defendant's intoxication could have no bearing upon his guilt or innocence of the lesser included offenses in the

charge of first-degree murder. State v. Cummings, 22 N.C. App. 452, 206 S.E.2d 781 (1974).

In the absence of evidence of intoxication to a degree precluding the ability to form a specific intent to kill, the court is not required to charge the jury thereupon. State v. McLaughlin, 286 N.C. 597, 213 S.E.2d 238 (1975).

Guilty Plea to Capital Crime Not Accepted. — Though there is no statute in this State specifically prohibiting a court from accepting a plea of guilty to a capital crime, the judiciary has observed that prohibition and it has become the public policy of the State. State v. Watkins, 283 N.C. 17, 194 S.E.2d 800 (1973).

Since an accused may be convicted by his plea as well as by a verdict, there is no reason to read into this section a legislative attempt to distinguish between conviction by plea and by verdict. State v. Watkins, 283 N.C. 17, 194 S.E.2d 800 (1973).

But there is no rule which precludes a plea of guilty to a crime for which the maximum punishment is life imprisonment. State v. Watkins, 283 N.C. 17, 194 S.E.2d 800 (1973).

Instructions. —

No set formula is required to convey to the jury the fixed principle relating to the degree of proof required for conviction. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971).

Here the erroneous definition, standing alone, did not constitute prejudicial error since the definition complained of placed upon the State the added burden of proving a specific intent to kill. This is patently favorable to defendant, and defendant cannot ordinarily complain of instructions favorable to him. The only possible vice in this instruction is that the giving of almost contemporaneous instructions — one correct and one incorrect — may have caused confusion in the minds of the jurors. State v. Winford, 279 N.C. 58, 181 S.E.2d 423 (1971).

With respect to jury instructions, the phrase "that he intended to kill" is self-explanatory, and, absent a special request for instructions from the defendant, the presiding judge was not required to supply its definition. State v. Sparks, 285 N.C. 631, 207 S.E.2d 712 (1974).

When Jury May Be Instructed as to Lesser Degree, etc. —

In a prosecution charging a defendant with the slaying of a person, the issue of defendant's guilt of second-degree murder or of manslaughter is properly submitted to the jury. State v. Crump, 277 N.C. 573, 178 S.E.2d 366 (1971).

The judge is required to declare and explain the law arising on the evidence. It is not an expression of opinion, but rather the duty of the trial judge, where the evidence so warrants, to inform the jury that manslaughter does not arise on the evidence in the case. It is the duty of the judge to determine, in the first instance, if there is any evidence or any inference fairly deducible therefrom tending to prove one of the lower grades of murder. Having done so, and having concluded that there is no basis for submission of manslaughter to the jury, it was the duty of the judge to instruct it accordingly. State v. Duboise, 279 N.C. 73, 181 S.E.2d 393 (1971).

The trial judge is required to instruct the jury on the lesser included offense of manslaughter only where there is evidence which would sustain such a verdict. It is not error to omit a charge on manslaughter where there is no evidence of manslaughter. State v. Mays, 14 N.C. App. 90, 187 S.E.2d 479 (1972).

Where the evidence offered by defendant, if believed by the jury, was sufficient to support a verdict of involuntary manslaughter, which is a lesser degree of the crime charged in the bill of indictment, the court erred in excluding it from the list of permissible verdicts. State v. Wrenn, 279 N.C. 676, 185 S.E.2d 129 (1971).

Evidence Sufficient to Support Instruction as to Murder in the First Degree. —

Where there is no evidence that the deceased had any weapon or at any time offered any threat to defendant, the want of provocation, absence of any excuse or justification, coupled with the other evidence, permitted a legitimate inference of premeditation and deliberation and was sufficient to be submitted to the jury on the issue of murder in the first degree. State v. Duncan, 282 N.C. 412, 193 S.E.2d 65 (1972).

Sufficiency of Evidence for Submission to Jury. —

The want of provocation, the absence of any excuse or justification for the shooting, the number of shots fired or attempted to be fired, the fact that defendant ran immediately after the shooting, coupled with the other evidence, permitted a legitimate inference of premeditation and deliberation, and was sufficient to be submitted to the jury on the issue of murder in the first degree. State v. Sparks, 285 N.C. 631, 207 S.E.2d 712 (1974).

The punishment to be imposed for capital felonies is no longer a discretionary question for the jury and therefore no longer a proper subject for an instruction by the judge. State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973).

The jury's discretion as to the sentence could be exercised only in connection with its verdict upon the issues of the guilt or innocence of the accused. State v. Watkins, 283 N.C. 17, 194 S.E.2d 800 (1973).

The effect of Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), upon the law of North Carolina concerning the punishment for rape, murder in the first degree, arson and burglary in the first degree is this: Upon the trial of any defendant so charged, the trial judge may not instruct the jury that it may in its discretion add to its verdict of guilty a recommendation that defendant be sentenced to

life imprisonment. The trial judge should charge on the constituent elements of the offense set out in the bill of indictment and instruct the jury under what circumstances a verdict of guilty or not guilty should be returned. Upon the return of a verdict of guilty of any such offense, the court must pronounce a sentence of death. State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973).

Admissibility of Evidence. — Evidence bearing upon the atrocity of the offense and the callous disregard exhibited by the defendant toward the victim is especially relevant and material when the punishment to be imposed is to be fixed by the jury in its discretion. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971).

Evidence as to the general moral character of the deceased is not admissible in a prosecution for homicide. State v. Vestal, 278 N.C. 561, 180 S.E.2d 755 (1971).

A charge of murder in the first degree includes murder in the second degree and manslaughter. Garner v. State, 8 N.C. App. 109, 174 S.E.2d 92 (1970).

Circumstantial Evidence to Establish Cause of Death and Criminal Agency. — Circumstantial evidence may be used in homicide cases to establish the cause of death and the criminal agency. State v. Lawson, 6 N.C. App. 1, 169 S.E.2d 265 (1969).

A defendant cannot deprive the State of the right to place before the jury all the circumstances of a homicide by admitting the bare facts as to identity, the location where the body was found, its general condition and the cause of death. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971).

Circumstantial evidence must exclude every reasonable hypothesis of innocence. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971).

While circumstantial evidence is sufficient to justify a conviction when, and only when, the circumstances proved are consistent with the hypothesis of guilt and inconsistent with every other reasonable hypothesis, no set form of words is required to be used in conveying to the jury this rule relating to the degree of proof required for conviction upon circumstantial evidence. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971).

The convincing effect of circumstantial evidence on the mind of the jury is measured by the same standard of intensity required of any other evidence — the jury must be convinced beyond a reasonable doubt as to every element of the crime before they find the defendant guilty of it, whether the evidence is wholly circumstantial, only partly so, or entirely direct. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971).

No set of words is required by the law in regard to the force of circumstantial evidence. All that the law requires is that the jury shall be clearly instructed, that unless after due consideration of the evidence they are "fully satisfied" or "entirely convinced" or "satisfied beyond a reasonable doubt" of the guilt of the defendant, it is their duty to acquit, and every attempt on the part of the courts to lay down a "formula" for the instruction of the jury, by which to "gauge" the degrees of conviction, has resulted in no good. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971).

In the absence of a request to do so, the failure of the court to instruct the jury regarding circumstantial evidence, or as to what such evidence should show, will not be held for reversible error, if the charge is correct in all other respects as to the burden and measure of proof. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971).

Evidence of Abnormal Mental Condition Not Amounting to Legal Insanity. — A defendant may offer evidence of an abnormal mental condition, although not sufficient to establish legal insanity, for the purpose of showing that he did not have the capacity to deliberate or premeditate at the time the homicide was committed — elements necessary for a conviction of murder in the first degree. State v. Baldwin, 276 N.C. 690, 174 S.E.2d 526 (1970).

Premeditation and deliberation are not usually susceptible of direct proof, and are therefore susceptible of proof by circumstances from which the facts sought to be proved may be inferred. State v. Walters, 275 N.C. 615, 170 S.E.2d 484 (1969); State v. Duncan, 282 N.C. 412, 193 S.E.2d 65 (1972).

Uncommunicated Threats. — Generally speaking, uncommunicated threats are not admissible in homicide cases. But there are exceptions to the rule which must be considered in the light of the facts of the particular case. Such exceptions occur where the evidence has an explanatory bearing on the plea of self-defense. State v. Hurdle, 5 N.C. App. 610, 169 S.E.2d 17 (1969).

It is now generally recognized that in trials for homicide uncommunicated threats are admissible where they tend to throw light on the occurrence and aid the jury to a correct interpretation of the same, and there is testimony ultra sufficient to carry the case to the jury tending to show that the killing may have been done from a principle of self-preservation. State v. Hurdle, 5 N.C. App. 610, 169 S.E.2d 17 (1969).

Burden on Defendant to Prove Self-Defense or Mitigation. — Upon the jury finding that deceased died from a wound intentionally inflicted by defendant with a rifle, it is incumbent upon the defendant to satisfy the jury that the homicide was committed without malice so as to mitigate it to manslaughter or that the homicide was justified on the ground of self-

defense. State v. Jennings, 276 N.C. 157, 171 S.E.2d 447 (1970).

When the State satisfies the jury from the evidence, beyond a reasonable doubt, that defendant intentionally shot the deceased and thereby proximately caused his death, the law then casts upon the defendant the burden of showing to the satisfaction of the jury the legal provocation that will rob the crime of malice and thus reduce it to manslaughter, or that will excuse it altogether upon the ground of self-defense. The legal provocation that will rob the crime of malice and thus, either reduce it to manslaughter or excuse it on the ground of self-defense, are affirmative pleas with the burden of satisfaction cast upon the defendant. State v. Oxendine, 24 N.C. App. 444, 210 S.E.2d 908 (1975).

Same — Instruction. — Where there is evidence sufficient to establish an affirmative defense or to rebut the presumptions which arise against a defendant when a killing results from his intentional use of a deadly weapon, the court should instruct the jury that defendant has the burden of proving his defense or mitigation to the satisfaction of the jury — not by the greater weight of the evidence or beyond a reasonable doubt — but simply to the satisfaction of the jury. State v. Freeman, 275 N.C. 662, 170 S.E.2d 461 (1969).

Refusing to Instruct or Error in Instruction as to Manslaughter. — In a prosecution for homicide, where the court correctly instructed as to murder in the first and second degrees and the jury found the defendant guilty of murder in the first degree, any error in refusing to instruct as to manslaughter is harmless. State v. Freeman, 275 N.C. 662, 170 S.E.2d 461 (1969); State v. Fowler, 285 N.C. 90, 203 S.E.2d 803 (1974).

Where a jury was properly instructed as to both degrees of murder and yet found defendant guilty of murder in the first degree rather than the second degree, it is clear that error in the charge on manslaughter is harmless. State v. Freeman, 275 N.C. 662, 170 S.E.2d 461 (1969); State v. Fowler, 285 N.C. 90, 203 S.E.2d 803 (1974).

When the jury is instructed that it may find defendant guilty of murder in the first degree, murder in the second degree, manslaughter, or not guilty, and the verdict is guilty of murder in the second degree, an error in the charge on manslaughter will require a new trial. State v. Freeman, 275 N.C. 662, 170 S.E.2d 461 (1969).

Although the trial judge in other parts of the charge had clearly stated that the only verdicts to be considered by the jury were second-degree murder, manslaughter, or not guilty, the misuse of "murder" in lieu of "manslaughter" might well have created some degree of confusion in the minds of the jurors. State v. Winford, 279 N.C. 58, 181 S.E.2d 423 (1971).

In applying the law to the facts the court charged the jury that the defendant must show beyond a reasonable doubt facts and circumstances sufficient to reduce the crime to manslaughter, and in so charging the court committed prejudicial error. State v. Winford, 279 N.C. 58, 181 S.E.2d 423 (1971).

Even if the court before and after in its charge state the general principle of law correctly that the defendant must show to the satisfaction of the jury facts and circumstances sufficient to reduce the crime to manslaughter, yet that did not cure the error in the vital part of its charge when it applied the law to the facts, by requiring the defendant to show those facts beyond a reasonable doubt. State v. Winford, 279 N.C. 58, 181 S.E.2d 423 (1971).

There being no evidence in the record to sustain a verdict of manslaughter, it was not error for the court to omit manslaughter from the possible verdicts which the jury might return. State v. Vestal, 278 N.C. 561, 180 S.E.2d 755 (1971).

Court's failure to instruct the jury that involuntary manslaughter was one of their possible verdicts was not error where all of the evidence showed that defendant took a pistol from his back pocket and shot his victim twice after the defendant, a customer, had gotten into a dispute with the victim, a storekeeper, during the course of which the victim ordered defendant out of his store, advanced upon defendant, and hit him with a "billy club," and where none of the evidence suggests that the two shots fired by defendant were fired involuntarily or by reason of culpable negligence. State v. Credle, 18 N.C. App. 142, 196 S.E.2d 289 (1973).

Where, after briefly and correctly charging as to first-degree murder and second-degree murder, the court stated that "in order to reduce the crime to manslaughter, the defendant must prove, not beyond a reasonable doubt, but simply to your satisfaction that he acted in self-defense," there is obvious and prejudicial error. State v. Carver, 286 N.C. 179, 209 S.E.2d 785 (1974).

In prosecution for second-degree murder, where there was no evidence of just cause or reasonable provocation for the homicide, nor was there evidence of self-defense, unavoidable accident or misadventure, defendant's self-serving declarations alone were not sufficient to rebut the presumption of malice arising in the case, and the trial court did not err in failing to instruct on manslaughter as a lesser included offense. State v. Mull, 24 N.C. App. 502, 211 S.E.2d 515 (1975).

Instruction on Reasonable Doubt Held Not Error. — The defining of "reasonable doubt" as a possibility of innocence not only was not reversible error but constituted an instruction more favorable to the defendant than the usual definitions such as "fully satisfied," "entirely

convinced," or "satisfied to a moral certainty." State v. Wright, 282 N.C. 364, 192 S.E.2d 818 (1972).

Instruction on Presumption if Malice Held Error. — The trial court in a homicide prosecution erred in instructing the jury to presume the existence of malice if they found that the victim's death was intentionally caused where there was no evidence of the use of a deadly weapon, since malice is presumed only where death resulted from the intentional use of a deadly weapon. State v. Tilley, 18 N.C. App. 300, 196 S.E.2d 816 (1973).

Harmless Error. —

The submission of a question regarding the guilt of a defendant of murder in the second degree becomes harmless when the jury returns a verdict of manslaughter. State v. Bryant, 282 N.C. 92, 191 S.E.2d 745 (1972).

Defendant's conviction of voluntary manslaughter would render harmless an error, had error been committed, in submitting to the jury the question of defendant's guilt of the more serious offense, at least absent any showing that the verdict of guilty of the lesser offense was affected thereby. State v. McLamb, 20 N.C. App. 164, 200 S.E.2d 838 (1973).

Where defendant contends that the State introduced no evidence of first-degree murder but defendant was found guilty of the lesser offense of murder in the second degree, any error which might have occurred by the submission of the issue for the greater offense was thereby cured. State v. Hamilton, 19 N.C. App. 436, 199 S.E.2d 159 (1973).

Verdict of Second-Degree Murder in Prosecution for First-Degree Murder. — In a case of first-degree murder, committed after premeditation and deliberation, a verdict of second-degree murder is permissible if the jury should fail to find premeditation and deliberation. State v. Hill, 276 N.C. 1, 170 S.E.2d 885 (1969).

Instruction Permitting Verdict of Guilty as Accessory to Second-Degree Murder. — In a prosecution of a defendant as an accessory before the fact to the murder of her husband, defendant was not prejudiced by an instruction which would permit the jury to return a verdict of guilty as an accessory to murder in the second degree. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

A general motion to nonsuit is properly refused where the evidence is sufficient to support conviction of any one of the degrees of homicide. State v. Lawson, 6 N.C. App. 1, 169 S.E.2d 265 (1969).

Preliminary Question to Be Determined by Court. — In a first-degree murder prosecution, the trial court must determine the preliminary question whether the evidence, in its light most favorable to the State, is sufficient to permit the jury to make a legitimate inference and finding that the defendant, after premeditation and deliberation, formed a fixed purpose to kill and thereafter accomplished the purpose. State v. Walters, 275 N.C. 615, 170 S.E.2d 484 (1969).

Question for Jury. — The reasonableness of defendant's belief that self-defense is necessary is to be determined by the jury from the facts and circumstances as they appeared to the accused at the time of the killing. State v. Deck, 285 N.C. 209, 203 S.E.2d 831 (1974).

Real Evidence Must Be Properly Identified. — Any evidence which is relevant to the trial of a criminal action is admissible but when real evidence (i.e., the object itself) is offered into evidence, it must be properly identified and offered. State v. Winford, 279 N.C. 58, 181 S.E.2d 423 (1971).

Victim's Clothing Is Admissible. — The admission in evidence of the articles of clothing found upon a murder victim's body was not error, where the location of the bullet holes in her dress and the presence thereon of stains, identified by an expert witness as powder burns, were material and tended to show that when the shots were fired the pistol was held close to the victim's body. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971).

§ 14-17.1. Crime of suicide abolished.

— The common-law crime of suicide is hereby abolished as an offense. (1973, c. 1205.)

§ 14-18. Punishment for manslaughter.

Definitions. —

In accord with 1st paragraph in original. See State v. Bunn, 283 N.C. 444, 196 S.E.2d 777 (1973).

In accord with 3rd paragraph in original. See State v. Fox, 18 N.C. App. 523, 197 S.E.2d 265 (1973).

Manslaughter is defined as the unlawful killing of a human being without malice, express or implied, without premeditation and deliberation, and without the intention to kill or to inflict serious bodily injury. State v. Roseboro, 276 N.C. 185, 171 S.E.2d 886 (1970); State v. Richardson, 14 N.C. App. 86, 187 S.E.2d 435 (1972).

Voluntary manslaughter is the unlawful killing of a human being without malice, premeditation or deliberation. State v. Rummage, 280 N.C. 51, 185 S.E.2d 221 (1971); State v. Davis, 15 N.C. App. 395, 190 S.E.2d 434 (1972); State v. Cannady, 16 N.C. App. 569, 192

S.E.2d 677 (1972); State v. Fox, 18 N.C. App. 523, 197 S.E.2d 265 (1973).

Involuntary manslaughter is the unlawful killing of a human being, unintentionally and without malice, proximately resulting from the commission of an unlawful act not amounting to a felony, or resulting from some act done in an unlawful or culpably negligent manner, when fatal consequences were not improbable under all the facts existent at the time, or resulting from the culpably negligent omission to perform a legal duty. State v. Lawson, 6 N.C. App. 1, 169 S.E.2d 265 (1969); State v. Holshouser, 15 N.C. App. 469, 190 S.E.2d 420 (1972); State v. Robinson, 15 N.C. App. 542, 190 S.E.2d 427 (1972).

Involuntary manslaughter is the unlawful killing of a human being without malice, without premeditation and deliberation, and without intention to kill or inflict serious bodily injury. State v. Davis, 15 N.C. App. 395, 190 S.E.2d 434 (1972); State v. Cannady, 16 N.C. App. 569, 192 S.E.2d 677 (1972).

Involuntary manslaughter is the unintentional killing of a human being without malice, premeditation or deliberation, which results from the performance of an unlawful act not amounting to a felony, or not naturally dangerous to human life; or from the performance of a lawful act in a culpably negligent way; or from the culpable omission to perform some legal duty. State v. Rummage, 280 N.C. 51, 185 S.E.2d 221 (1971).

Involuntary manslaughter has been defined to be, "Where death results unintentionally, so far as the defendant is concerned, from an unlawful act on his part not amounting to a felony, or from a lawful act negligently done." State v. Stimpson, 279 N.C. 716, 185 S.E.2d 168 (1971).

Involuntary manslaughter is the unintentional killing of a human being without either express or implied malice by some unlawful act not amounting to a felony or naturally dangerous to human life, or by an act or omission constituting culpable negligence. State v. Ward, 286 N.C. 304, 210 S.E.2d 407 (1974).

Wanton or Reckless Use of Firearms. —

In accord with 1st paragraph in original. See State v. Davis, 15 N.C. App. 395, 190 S.E.2d 434 (1972); State v. Adcock, 24 N.C. App. 102, 210 S.E.2d 127 (1974).

In accord with 3rd paragraph in original. See State v. Putnam, 24 N.C. App. 570, 211 S.E.2d 493 (1975).

Any careless and reckless use of loaded gun which jeopardizes the safety of another is unlawful and if death results therefrom, it is an unlawful homicide. State v. Jones, 15 N.C. App. 537, 190 S.E.2d 278 (1972).

At common law and under this section one who points a loaded gun at another, though without intention of discharging it, if the gun goes off accidentally and kills, commits manslaughter. State v. Stimpson, 279 N.C. 716, 185 S.E.2d 168 (1971).

Purpose of Proviso. —

In accord with 2nd paragraph in original. See State v. Stimpson, 279 N.C. 716, 185 S.E.2d 168 (1971).

Burden of Proof. — When the State undertakes a prosecution for unlawful homicide, it assumes the burden of producing evidence sufficient to prove that the deceased died as the result of a criminal act committed by the defendant. State v. Jones, 15 N.C. App. 537, 190 S.E.2d 278 (1972).

Killing in Self-Defense May Be Voluntary Manslaughter. — Under given circumstances a person may be justified in intentionally killing when he acts in self-defense, yet such person may be guilty of voluntary manslaughter when an intentional killing results from excessive use of force while he is acting in self-defense. State v. Rummage, 280 N.C. 51, 185 S.E.2d 221 (1971).

When excessive force or unnecessary violence is used in self-defense, the killing of the adversary is manslaughter at least. State v. Locklear, 25 N.C. App. 74, 212 S.E.2d 404 (1975).

Charge on Self-Defense Not Erroneous. — See State v. Pearson, 24 N.C. App. 410, 210 S.E.2d 887 (1975).

The charge of the court with respect to defendant's right of self-defense, when considered as a whole, was full, fair, and impartial, and gave to defendant every consideration to which he was entitled under the law. State v. Carver, 22 N.C. App. 674, 207 S.E.2d 299 (1974).

Trial court's charge that a person may not ordinarily claim self-defense when he has used deadly force to quell an assault, standing alone, unduly restricts defendant's plea of self-defense. However, any error committed was completely removed by the subsequent instruction detailing what defendant must show to excuse his act on the ground of self-defense. State v. Pearson, 24 N.C. App. 410, 210 S.E.2d 887 (1975).

Facts Supporting Charge Concerning Negligent Handling of Gun. — The showing that defendant was seated at a table, deceased was standing near him, defendant pulled the gun from his pocket after which it fired with the bullet striking deceased in the forehead, would certainly be some evidence that defendant intentionally pointed the gun at the deceased even though it may have fired accidentally. There were sufficient facts presented to support the charge concerning whether defendant handled the gun in a criminally negligent manner. State v. Jones, 15 N.C. App. 537, 190 S.E.2d 278 (1972).

Heat of Passion Defined. — See State v. Pope, 24 N.C. App. 217, 210 S.E.2d 267 (1974).

When one spouse kills the other in a heat of passion engendered by the discovery of the

deceased and a paramour in the very act of intercourse, or under circumstances clearly indicating that the act had just been completed, or was "severely proximate," and the killing follows immediately, it is manslaughter. State v. Ward, 286 N.C. 304, 210 S.E.2d 407 (1974).

Legal insanity requires that the accused be laboring under such defect of reason from disease of the mind as to be incapable of knowing the nature and quality of his act, or if he does know this, not to know right from wrong. State v. Pope, 24 N.C. App. 217, 210 S.E.2d 267 (1974).

Evidence tending to show that the deceased said, "Don't shoot me," standing alone, was not sufficient to raise an inference that the defendant intentionally pointed the weapon at her, or that he handled it in such a careless and reckless manner as to amount to culpable negligence. State v. Holshouser, 15 N.C. App. 469, 190 S.E.2d 420 (1972).

Punishment for involuntary manslaughter, etc. —

A statute prescribing punishment "by fine or imprisonment in the State's prison, or both, in the discretion of the court," does not prescribe "specific punishment" within the meaning of that term as used in § 14-2. Thus the maximum lawful term of imprisonment for involuntary manslaughter is ten years. State v. Stimpson, 279 N.C. 716, 185 S.E.2d 168 (1971).

Issue of Manslaughter Properly Submitted to Jury. — There was no error in submitting to the jury an issue as to defendant's guilt of manslaughter where the evidence would support a finding that defendant unlawfully killed, but without express or implied malice, or that he acted in self-defense but used excessive force, because either finding would warrant a verdict of manslaughter. State v. Goins, 24 N.C. App. 468, 211 S.E.2d 481 (1975).

Instruction on Manslaughter Held Proper. — Where the trial court instructed that defendant would be guilty of manslaughter if "he intentionally and unlawfully stabbed and killed" the victim, any possibility of prejudice in the defective charge was removed where prior to giving the above instruction, the court properly defined manslaughter as "the unlawful killing of a human being without malice, express or implied, and without deliberation or premeditation," and when the jury later requested repeated instructions on the offenses charged, the court again gave a proper definition of manslaughter. State v. Edwards, 24 N.C. App. 303, 210 S.E.2d 273 (1974).

Instruction on Voluntary Manslaughter Held Improper. — Voluntary manslaughter is the intentional unlawful killing of a human being, and therefore an instruction incorporating culpable negligence as an alternative finding is improper, since it does not require intent as a necessary element. St. Paul Fire & Marine Ins. Co. v. Lack, 476 F.2d 583 (4th Cir. 1973).

Evidence did not justify a charge on involuntary manslaughter where defendant intentionally discharged the gun under circumstances naturally dangerous to human life. State v. Ward, 286 N.C. 304, 210 S.E.2d 407 (1974).

Failure to Instruct as to Causal Connection between Defendant's Act and Death. — Trial judge's failure to instruct jury that a verdict of guilty of manslaughter requires proof beyond a reasonable doubt that defendant's act proximately caused the death charged is error, despite plenary evidence upon which the jury could find death was the proximate result of defendant's act. State v. Fowler, 285 N.C. 90, 203 S.E.2d 803 (1974).

Evidence Sufficient to Sustain Conviction. —

Although there was a conflicting version of the shooting from defense witnesses, the State's evidence was clearly sufficient to sustain a verdict of voluntary manslaughter. State v. Carver, 22 N.C. App. 674, 207 S.E.2d 299 (1974).

No Evidence to Sustain Verdict of Manslaughter or Involuntary Manslaughter. — See State v. Harrington, 22 N.C. App. 473, 206 S.E.2d 768 (1974).

Evidence will not support a verdict of voluntary manslaughter where the killing did not result from the use of excessive force in the exercise of the right of self-defense, nor was it the result of anger suddenly aroused by provocation which the law deems adequate to dethrone reason temporarily and to displace malice. State v. Ward, 286 N.C. 304, 210 S.E.2d 407 (1974).

Applied in State v. Brown, 282 N.C. 117, 191 S.E.2d 659 (1972); State v. Wallace, 16 N.C. App. 647, 192 S.E.2d 642 (1972); State v. Harrington, 286 N.C. 327, 210 S.E.2d 424 (1974); State v. Honeycutt, 21 N.C. App. 342, 204 S.E.2d 238 (1974); State v. Chappell, 24 N.C. App. 656, 211 S.E.2d 828 (1975).

Cited in Lofton v. Lofton, 26 N.C. App. 203, 215 S.E.2d 861 (1975).

§ 14-19. Punishment for second offense of manslaughter.

Cited in Jernigan v. State, 279 N.C. 556, 184 S.E.2d 259 (1971).

ARTICLE 7.

Rape and Kindred Offenses.

§ 14-21. Rape; punishment in the first and second degree. — Every person who ravishes and carnally knows any female of the age of 12 years or more by force and against her will, or who unlawfully and carnally knows and abuses any female child under the age of 12 years, shall be guilty of rape, and upon conviction, shall be punished as follows:

(a) First-Degree Rape —

(1) If the person guilty of rape is more than 16 years of age, and the rape victim is a virtuous female child under the age of 12 years, the punishment shall be death; or

(2) If the person guilty of rape is more than 16 years of age, and the rape victim had her resistance overcome or her submission procured by the use of a deadly weapon, or by the infliction of serious bodily injury to her, the punishment shall be death.

(b) Second-Degree Rape — Any other offense of rape defined in this section shall be a lesser-included offense of rape in the first degree and shall be punished by imprisonment in the State's prison for life, or for a term of years, in the discretion of the court. (18 Eliz., c. 7; R. C., c. 34, s. 5; 1868-9, c. 167, s. 2; Code, s. 1101; Rev., s. 3637; 1917, c. 29; C. S., s. 4204; 1949, c. 299, s. 4; 1973, c. 1201, s. 2.)

Cross References. —

As to what constitutes a sentence of life imprisonment, see § 14-2. As to eligibility of prisoners serving life sentence for parole, see § 148-58.

Editor's Note. —

The 1973 amendment rewrote this section, dividing the crime of rape into two degrees, making the death penalty mandatory for first-degree rape, and making other changes. The 1973 amendatory act became effective April 8, 1974, and is applicable to all offenses thereafter committed.

Session Laws 1973, c. 1201, s. 7, provides: "In the event it is determined by the North Carolina Supreme Court or the United States Supreme Court that a sentence of death may not be constitutionally imposed for any capital offense for which the death penalty is provided by this Act, the punishment for the offense shall be life imprisonment."

Session Laws 1975, c. 749, provides: "Section 1. The provisions of G.S. 14-21, as rewritten by section 2 of Chapter 1201 of the Session Laws of 1973, shall apply in all trials hereafter conducted for rapes committed after January 18, 1973, and prior to April 8, 1974, the effective date of Chapter 1201, Session Laws of 1973.

"Sec. 2. (a) In cases in which the defendant has been convicted of a rape committed after January 18, 1973, and prior to April 8, 1974, and the verdict and sentence of death are or have been sustained on appeal, the defendant may apply once to the judge presiding at the rape trial resulting in the sentence of death, or, if said judge is unavailable, to a resident superior court judge of the judicial district in which said rape trial was held, to determine whether the defendant could have been punished by death had the rape been committed by him after the ratification of Chapter 1201, Session Laws of 1973.

"(b) Said judge shall review a certified transcript of the evidence presented at trial (or if such transcript is not available, the record on appeal), make such independent investigation as he deems necessary to determine the age of the defendant or of the rape victim, and hear arguments or accept briefs in behalf of the defendant and the State.

"(c) Thereupon, the judge shall determine the following question: Is the evidence present at the defendant's trial, plus additional evidence of the age of the defendant or the age of the rape victim, sufficient to submit the defendant's case to a jury on the charge of first-degree rape as defined by G.S. 14-21(a), had the date of the rape been after April 8, 1974?

"(d) If the question is answered in the affirmative, the defendant shall remain subject

to the sentence of death. If the question is answered in the negative, the judge shall forthwith schedule a hearing for the presentation of evidence relative to resentencing the defendant; after the hearing, the sentence of death for rape previously imposed shall be vacated, and the defendant shall be resentenced as if he had been convicted of second-degree rape for a rape committed after April 8, 1974.

"(e) There shall be no right of appeal from the determination of the judge, but the Supreme Court of North Carolina may, upon petition for certiorari, allow review of said determination.

"(f) In cases of resentencing, the defendant shall be allowed credit for time spent in custody awaiting the execution of the sentence of death.

"Sec. 3. An indigent person under sentence of death for a rape committed after January 18, 1973, and before April 8, 1974, shall be entitled to counsel in making one application under this act for each such sentence of death, if he is otherwise entitled under Article 36 of Chapter 7A of the General Statutes of North Carolina."

For article entitled "Capital Punishment and Life Imprisonment in North Carolina, 1946 to 1968: Implications for Abolition of the Death Penalty," see 6 Wake Forest Intra. L. Rev. 417 (1970).

1973 Amendment Not Retroactive. — No reasonable basis exists for construing the 1973 amendment to this sectior to be retroactive and thus applicable to a sentence imposed upon a defendant for the crime of rape committed prior to April 8, 1974. State v. Lampkins, 286 N.C. 497, 212 S.E.2d 106 (1975).

The provision in the 1973 amendment to this section which read, "This act shall become effective upon ratification and applicable to all offenses hereafter committed" is a saving clause, showing the intent of the legislature to leave the preexisting statute in effect as to the elements of, and punishment for, the crime of rape committed prior to April 8, 1974. State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975).

This statute is not retroactive so as to make unlawful the imposition upon defendant of a sentence to death for an offense committed prior to April 8, 1974, which falls within the definition of second-degree rape contained in subdivision (b). State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975).

Removal from Jury, etc. —

A sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. State v. Atkinson, 278 N.C. 168, 179 S.E.2d 410 (1971).

Where a venireman is irrevocably committed before the trial begins to vote against the death penalty regardless of the facts and circumstances which might be revealed by the evidence, such irrevocable commitment is valid cause for challenge. State v. Atkinson, 278 N.C. 168, 179 S.E.2d 410 (1971).

The most that can be demanded of a venireman with regard to the death penalty is that he be willing to consider all of the penalties provided by State law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the of the proceedings. If the voir dire testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out. State v. Atkinson, 278 N.C. 168, 179 S.E.2d 410 (1971).

Where each of the three prospective jurors challenged for cause by the State said, in response to questions by the district attorney and by the court, that even though the evidence satisfied her beyond a reasonable doubt of the defendant's guilt of the offense of rape, she could not vote for such a verdict knowing that the death penalty was required thereupon, it was not error to sustain the district attorney's challenge for cause. State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975).

The trial court did not err in allowing the State's challenge for cause to two prospective jurors on account of their death penalty views where the jurors had stated on voir dire they did not believe in capital punishment, and would not return a verdict of guilty of rape, which would carry the death penalty, regardless of what the evidence was. State v. Lampkins, 286 N.C. 497, 212 S.E.2d 106 (1975).

Rape Defined. —

In accord with 3rd paragraph in original. See State v. Henderson, 285 N.C. 1, 203 S.E.2d 10 (1974); State v. Hines, 286 N.C. 377, 211 S.E.2d 201 (1975).

The court did not err in defining rape as forcible sexual intercourse with a woman against her will. State v. Jackson, 18 N.C. App. 234, 196 S.E.2d 568 (1973).

"By Force". —

In accord with 2nd paragraph in original. See State v. Henderson, 285 N.C. 1, 203 S.E.2d 10 (1974).

In accord with 4th paragraph in original. See State v. Henderson, 285 N.C. 1, 203 S.E.2d 10 (1974); State v. Hines, 286 N.C. 377, 211 S.E.2d 201 (1975).

The force necessary to constitute rape need not be physical force. State v. Hines, 286 N.C. 377, 211 S.E.2d 201 (1975).

Age of Consent. —

In accord with 5th paragraph in original. See State v. Murry, 277 N.C. 197, 176 S.E.2d 738 (1970).

Consent is not a defense where one is accused of abusing or carnally knowing a female child

under the age of twelve years. State v. Cox, 280 N.C. 689, 187 S.E.2d 1 (1972).

Consent Induced by Fear, etc. —

Although consent is a perfect defense to a charge of rape, there is no legal consent when it is induced by violence or threat of violence. State v. Henderson, 285 N.C. 1, 203 S.E.2d 10 (1974).

Penetration without Emission, etc. —

The terms "carnal knowledge" and "sexual intercourse" are synonymous. There is "carnal knowledge" or "sexual intercourse" in a legal sense if there is the slightest penetration of the sexual organ of the female by the sexual organ of the male. It is not necessary that the vagina be entered or that the hymen be ruptured; the entering of the vulva or labia is sufficient. State v. Murry, 277 N.C. 197, 176 S.E.2d 738 (1970); State v. Jackson, 18 N.C. App. 234, 196 S.E.2d 568 (1973).

Upon Whom Rape May be Committed — Two or More Persons. —

In accord with 2nd paragraph in original. See State v. Martin, 17 N.C. App. 317, 194 S.E.2d 60 (1973).

Same — Female Aiding Man, etc. —

A woman, who is physically incapable of committing rape upon another woman, may be convicted of rape where she aids and abets a male assailant in the rape of another woman. State v. Martin, 17 N.C. App. 317, 194 S.E.2d 60 (1973).

Same — Husband Aiding Another to Commit Crime with His Wife. — A husband who counsels, aids, or abets, assists or forces another to have sexual intercourse with his wife, or forces her to submit to sexual intercourse with another, is guilty of rape. State v. Martin, 17 N.C. App. 317, 194 S.E.2d 60 (1973).

By § 4-1 the common-law death penalty for rape was adopted in North Carolina. State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973).

Constitutionality of Death Penalty. — In Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), the imposition and carrying out of the death penalty, under statutes making the penalty discretionary with judge or jury, was found to constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. Ed. note.

The Supreme Court of the United States has held that the imposition of the death penalty, under certain state statutes and in the application thereof, is unconstitutional. That decision does not affect the conviction but only the death sentence. State v. Davis, 282 N.C. 107, 191 S.E.2d 664 (1972).

Capital punishment has not been declared unconstitutional per se. Rather, the Eighth and Fourteenth Amendments will no longer tolerate the infliction of the death sentence if either judge or jury is permitted to impose that sentence as a matter of discretion. State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973).

The decision of the Supreme Court in State v. Waddell judicially severed the unconstitutional discretionary proviso from statutes relating to capital crimes and left standing the remainder of each statute as the only valid expression of the legislative intent. The effect of that severance was to change the penalty for first degree murder, and the other capital crimes, from death or life imprisonment in the discretion of the jury to mandatory death. State v. Watkins, 283 N.C. 504, 196 S.E.2d 750 (1973).

The holdings of Furman v. Georgia and State v. Waddell do not affect the constitutionality of that portion of the statute which defines the elements of the crime of rape. State v. Williams, 283 N.C. 386, 196 S.E.2d 248 (1973).

Arbitrary discrimination cannot be shown from statistical data. It requires, at least, careful study of the records in cases where different results were reached in order to determine whether those differences in result were justified by differences in the facts. Since all defendants convicted of first-degree murder or of rape, committed since January 18, 1973, have been sentenced to death, arbitrariness is, therefore, not established. State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721 (1974).

Nothing in the Constitution of the United States requires that the legislature prescribe the most efficacious punishment for crime, or even the one favored by "enlightened" sociologists. It is sufficient that reasonable men can believe that the punishment prescribed is reasonably adapted to the attainment of the goals of all criminal punishment. This section, meets this constitutional standard. State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721 (1974).

The imposition of the sentence of death upon the verdict of guilty of rape is constitutionally permissible. State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975).

Mandatory Death Penalty Applied Prospectively. — North Carolina's mandatory death penalty for rape, murder in the first degree, burglary in the first degree and arson may not be constitutionally applied to any offense committed prior to the date of this decision but shall be applied to any offense committed after such date. State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973).

In State v. Waddell, the State Supreme Court held that the effect of Furman v. Georgia was (1) to invalidate the proviso of this section — as well as the identical proviso in § 14-17 (murder), § 14-52 (burglary), and § 14-58 (arson) — and (2) to make death the penalty for murder in the first degree, burglary in the first degree, rape and arson. However, recognizing that this interpretation made an upward change in the penalty for these four crimes, the decision in Waddell was made to apply prospectively only. Thus, it is inap-

plicable to any such offense committed prior to 18 January 1973. State v. Talbert, 282 N.C. 718, 194 S.E.2d 822 (1973); State v. Washington, 283 N.C. 175, 195 S.E.2d 534 (1973).

The above cases were decided under this section as it stood before the 1973 amendment, which divided the crime of rape into two degrees and made only first-degree rape punishable by death. — Ed. note.

The punishment to be imposed for capital felonies is no longer a discretionary question for the jury and therefore no longer a proper subject for an instruction by the judge. State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973).

The death penalty is the sole and exclusive punishment for a rape under this section committed in North Carolina after January 18, 1973. Where the rape for which defendant had been convicted was committed on May 23, 1973, the death sentence was not only proper but was the only one that the trial court could impose. State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974).

The effect of Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), upon the law of North Carolina concerning the punishment for rape, murder in the first degree, arson and burglary in the first degree is this: Upon the trial of any defendant so charged, the trial judge may not instruct the jury that it may in its discretion add to its verdict of guilty a recommendation that defendant be sentenced to life imprisonment. The trial judge should charge on the constituent elements of the offense set out in the bill of indictment and instruct the jury under what circumstances a verdict of guilty or not guilty should be returned. Upon the return of a verdict of guilty of any such offense, the court must pronounce a sentence of death. State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973).

The meaning of this section, in the light of the decision of the Supreme Court of the United States in Furman v. Georgia, is that a defendant, lawfully convicted of first-degree murder, rape, first-degree burglary or arson, the offense having been committed after January 18, 1973, must be sentenced to death, the trial judge having no discretion in the matter of the sentence to be imposed and the jury having no authority to fix a different punishment. State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721 (1974).

Since January 18, 1973, the general rule that the amount of punishment is of no concern to the jurors has become, and is now, applicable in all cases without exception, including capital cases, because jurors in the State no longer have the discretionary power to reduce the penalty in capital cases from death to life imprisonment. State v. Watkins, 283 N.C. 504, 196 S.E.2d 750 (1973).

Where the offense was committed subsequent to January 18, 1973, the trial judge properly refused to instruct the jury as to the punishment which would result from a conviction of rape or first-degree burglary. State v. Henderson, 285 N.C. 1, 203 S.E.2d 10 (1974).

The trial judge in a rape prosecution which occurred prior to January 18, 1973 should have submitted the case for jury determination solely in respect of whether defendant was guilty or not guilty of rape without referring to the punishment in the event of conviction; and, if convicted, defendant should have been sentenced to imprisonment for life. State v. Washington, 283 N.C. 175, 195 S.E.2d 534 (1973).

In a prosecution for rape allegedly committed after Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), but before State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973), the trial court erred in submitting the issue of rape to the jury and then instructing that a verdict of guilty would require imposition of the death penalty; hence, even if defendant has failed to show prejudicial error in respect of guilt, the death sentence in the rape case must be vacated and the cause remanded for proper judgment. State v. Washington, 283 N.C. 175, 195 S.E.2d 534 (1973).

The above cases were decided under this section as it stood before the 1973 amendment, which divided the crime of rape into two degrees and made only first-degree rape punishable by death. — Ed. note.

Retention, etc., of Death Penalty Is Legislative Question. — The matter of retention, modification or abolition of the death penalty is a question for the lawmaking authorities rather than the courts. State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973).

Remand of Case in Which Defendant Received Death Sentence. — Pursuant to the mandate of the Supreme Court of the United States in Atkinson v. North Carolina, 403 U.S. 948, 91 S. Ct. 2292, 29 L. Ed. 2d 861 (1971), a rape case in which the defendant received the death sentence was remanded to the superior court with direction that the defendant be sentenced to life imprisonment in the State's prison. State v. Atkinson, 279 N.C. 385, 183 S.E.2d 105 (1971).

Defendants were without standing to challenge the validity of a death sentence in a trial for rape where the jury recommended and the court imposed the life imprisonment sentences. State v. Bynum, 282 N.C. 552, 193 S.E.2d 725 (1973).

Infants of fourteen and over are not entitled to any presumption of incapacity to commit rape. State v. Rogers, 275 N.C. 411, 168 S.E.2d 345 (1969).

An accused in a prosecution for rape has a right to impeach the State's witness by competent evidence of bad reputation of the witness. In addition to the right to attack the credibility of the State's witness, the character of the alleged victim in a rape prosecution may

be shown by evidence of her reputation as bearing upon the question of consent. State v. Cole, 20 N.C. App. 137, 201 S.E.2d 100 (1973).

The most generally permissible method of proving character in a prosecution for rape is by evidence of the witness' reputation. A stranger who has investigated a person's reputation in the appropriate community may testify to the result of his investigation. State v. Cole, 20 N.C. App. 137, 201 S.E.2d 100 (1973).

Unchastity May Be Shown, etc. —

In the case of a prosecuting witness over the age of twelve years the general character of the prosecuting witness for unchastity may be shown for the purpose of attacking the credibility of her testimony, and has bearing upon the likelihood of her consent. State v. Cox, 280 N.C. 689, 187 S.E.2d 1 (1972).

Evidence Sufficient to Carry Question, etc. —

The evidence for the State was sufficient to carry to the jury the question of the defendant's guilt or innocence on the charge of rape where it showed that defendant seized the prosecutrix by the arm, pulled her to a place to which she refused to go, threw her to the ground, choked her, bumped her head, removed her clothing and had sexual intercourse with her against her will. State v. Lampkins, 286 N.C. 497, 212 S.E.2d 106 (1975).

Instructions. —

Instruction in a rape trial was upheld when considered contextually as a whole. State v. Lee, 282 N.C. 566, 193 S.E.2d 705 (1973).

The trial judge committed prejudicial error by expressing his opinion on the evidence when he instructed the jury that there was "considerable evidence" that defendant had committed the crime charged, and when he further went on to say "not satisfied with that, the evidence tends to show that he, the defendant, again had intercourse with her" intimating to the jury that it was his opinion that the defendant was guilty. State v. Head, 24 N.C. App. 564, 211 S.E.2d 534 (1975).

The court's failure to charge the jury on a lesser crime than rape as principals and to submit guilt of a lesser offense as a permissible verdict was not error since there was no evidence from which the jury could find that any defendant committed an included crime of lesser degree. State v. Dawson, 281 N.C. 645, 190 S.E.2d 196 (1972).

Where there was no evidence of any included lesser offenses embraced within the indictments for rape and kidnapping, the court was under no duty to charge on lesser included offenses. State v. Bynum, 282 N.C. 552, 193 S.E.2d 725 (1973).

The trial court did not err in failing to submit the lesser included offenses of assault with intent to commit rape and assault on a female where all the State's evidence tended to show commission of rape and the defendant's evidence was that he had never had intercourse with the prosecutrix nor did he touch her in a manner constituting an assault. State v. Lampkins, 286 N.C. 497, 212 S.E.2d 106 (1975).

Admissibility of Evidence. — Objects which have a relevant connection with the case are admissible in evidence in both civil and criminal trials. State v. Atkinson, 278 N.C. 168, 179 S.E.2d 410 (1971).

Where officers testified that defendant drew a map and that they followed it to the scene where defendant had buried the victim's body, the map was admissible to illustrate their testimony. State v. Atkinson, 278 N.C. 168, 179 S.E.2d 410 (1971).

When relevant, articles of clothing identified as worn by the victim at the time the crime was committed are always competent evidence. State v. Atkinson, 278 N.C. 168, 179 S.E.2d 410 (1971).

Garments worn by the victim of a rape and murder showing the location of a wound upon the person of the deceased, or which otherwise corroborate the State's theory of the case, are competent. State v. Atkinson, 278 N.C. 168, 179 S.E.2d 410 (1971).

Photographs are admissible in this State to illustrate the testimony of a witness. State v. Atkinson, 278 N.C. 168, 179 S.E.2d 410 (1971).

The fact that photographs are in color does not affect their admissibility. State v. Atkinson, 278 N.C. 168, 179 S.E.2d 410 (1971).

That a photograph might inflame the passions of the jurors does not render it inadmissible. State v. Atkinson, 278 N.C. 168, 179 S.E.2d 410 (1971).

Color photographs depicting the condition of the rape victim's body when examined by the doctor were competent for the purpose of illustrating the doctor's testimony. State v. Atkinson, 278 N.C. 168, 179 S.E.2d 410 (1971).

The fact that a photograph depicts a horrible, gruesome and revolting scene, indicating a vicious, calculated act of cruelty, malice or lust, does not render the photograph incompetent in evidence, when properly authenticated as a correct portrayal of conditions observed by and related by the witness who uses the photograph to illustrate his testimony. State v. Atkinson, 278 N.C. 168, 179 S.E.2d 410 (1971).

Where the jury was properly instructed to consider photographs of a rape victim's body in the morgue as illustrative of the testimony only, their admission was not error. State v. Atkinson, 278 N.C. 168, 179 S.E.2d 410 (1971).

Testimony as to the events that occurred in a home from the time of defendant's violent entry until the consummation of a rape was competent and relevant as part of the res gestae, including testimony that persons other than the rape victim had been assaulted by the defendant. State v. Burleson, 280 N.C. 112, 184 S.E.2d 869 (1971).

In a prosecution for the rape of a six-year-old child, evidence that the victim's father had discussed sexual matters in her presence was

not competent as bearing upon consent, since consent is no defense, or to impugn the credibility of the victim's testimony, or for any other purpose. State v. Cox, 280 N.C. 689, 187 S.E.2d 1 (1972).

The general rule, that in a prosecution for a particular crime the State cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense was inapplicable to testimony by the prosecuting witness as to a second rape committed by defendant in the woods where the indictment, which charged that defendant raped the witness on August 2, 1972, was sufficient to support a conviction for rape committed in the witness's home or in the woods or in the home and in the woods. State v. Washington, 283 N.C. 175, 195 S.E.2d 534 (1973).

Testimony of the prosecutrix concerning her pregnancy tended to show penetration, one of the elements of rape. Defendant's plea of not guilty placed upon the State the burden of proving beyond a reasonable doubt all the essential elements of the offense charged. Hence, evidence tending to prove penetration, an essential element of the offense, was properly admitted. State v. Cross, 284 N.C. 174, 200 S.E.2d 27 (1973).

Sufficiency of Evidence. —

Where the evidence shows the child was nine years of age at the time of the offenses and that the defendant had sexual intercourse with her, and she testified that he threatened to kill her if she did not do as he commanded, this evidence was sufficient to submit to the jury the charge of rape. State v. Robertson, 284 N.C. 549, 202 S.E.2d 157 (1974).

The evidence for the State was abundantly sufficient to permit the jury to find that a rape had been perpetrated on the 13-year-old prosecutrix and that the defendant was the perpetrator of it. State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975).

Motions for Nonsuit Properly Overruled. — Where the prosecuting witness testified that she did not consent to any one of the defendants having sexual relations with her and that each of the acts of intercourse was against her will, because, she stated, their strength was greater than hers and she feared for her life, there was substantial evidence of all material elements of the crime of rape as to each defendant, and the trial judge properly overruled the motions for nonsuit. State v. Hines, 286 N.C. 377, 211 S.E.2d 201 (1975).

Applied in State v. Jacobs, 278 N.C. 693, 180 S.E.2d 832 (1971); State v. Best, 280 N.C. 413, 186 S.E.2d 1 (1972); State v. McLean, 282 N.C. 147, 191 S.E.2d 598 (1972); State v. Carter, 282 N.C. 297, 192 S.E.2d 279 (1972); State v. McClain, 282 N.C. 357, 193 S.E.2d 108 (1972); State v. Johnson, 282 N.C. 421, 192 S.E.2d 809 (1972); State v. Chance, 283 N.C. 102, 194 S.E.2d 858 (1973); State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975).

Cited in State v. Britt, 285 N.C. 256, 204 S.E.2d 817 (1974); State v. Woodson, 287 N.C. 578, 215 S.E.2d 607 (1975).

§ 14-22. Punishment for assault with intent to commit rape.

An actual physical attempt forcibly to have carnal knowledge need not be shown. State v. Hudson, 280 N.C. 74, 185 S.E.2d 189 (1971); State v. Norman, 14 N.C. App. 394, 188 S.E.2d 667 (1972).

Impossibility of having carnal knowledge of the girl does not, as a matter of law, prevent a man from feloniously so trying. State v. Hudson, 280 N.C. 74, 185 S.E.2d 189 (1971).

Intent. —

In accord with 1st paragraph in original. See State v. Hudson, 280 N.C. 74, 185 S.E.2d 189 (1971); State v. Norman, 14 N.C. App. 394, 188 S.E.2d 667 (1972).

If defendant at any time during the assault had an intent to gratify his passion upon the woman, notwithstanding any resistance on her part, the defendant would be guilty of the offense. State v. Dais, 22 N.C. App. 379, 206 S.E.2d 759 (1974).

Where the evidence tended to show that defendant assaulted the prosecuting witness with the intent to have sexual intercourse with her notwithstanding resistance on her part, the fact that he finally desisted without accomplishing his purpose in no wise changes the nature the assault. State v. Rice, 18 N.C. App. 575, 197 S.E.2d 245 (1973).

To convict a defendant on the charge of an assault with an intent to commit rape the State must prove not only an assault but that the defendant intended to gratify his passion on the person of the woman, at all events and notwithstanding any resistance on her part. State v. Hudson, 280 N.C. 74, 185 S.E.2d 189 (1971); State v. Norman, 14 N.C. App. 394, 188 S.E.2d 667 (1972).

Assault with intent to commit rape and committing a crime against nature are not essentially the same offense since the elements of each offense are distinct and different. State v. Webb, 26 N.C. App. 526, 216 S.E.2d 382 (1975).

Intent Must Ordinarily Be Proved by Circumstantial Evidence. — Intent is an attitude or emotion of the mind and is seldom, if ever, susceptible of proof by direct evidence, it must ordinarily be proved by circumstantial evidence. State v. Hudson, 280 N.C. 74, 185 S.E.2d 189 (1971).

Felonies under This Section, etc. —
In accord with 1st paragraph in original. See State v. Harris, 277 N.C. 435, 177 S.E.2d 865 (1970).

Instruction as to Intent Held Free of Error. — The instruction that intent to commit rape is an attitude or emotion of the mind seldom if ever susceptible of proof by direct evidence but ordinarily to be proved by facts and circumstances from which it may be inferred, and that in determining the presence or absence of the element of intent, the jury may consider the acts and conduct of the defendant and the general circumstances existing at the time of the alleged commission of the offense charged, was held to be fair, correct, and free from prejudicial error. State v. Norman, 14 N.C. App. 394, 188 S.E.2d 667 (1972).

The omission of the words "at all events against her will" in an instruction to the jury with respect to assault with intent to commit rape, did not constitute prejudicial error. State v. Dais, 22 N.C. App. 379, 206 S.E.2d 759 (1974).

Evidence of Intent Held Sufficient. — Although the victim did not testify that defendant ever attempted coition, his attack upon her was indisputably sexually motivated, and the jury could reasonably infer from his treatment of her that defendant intended at some time during his continuous assaults to rape the victim if he could, notwithstanding any resistance on her part. State v. Hudson, 280 N.C. 74, 185 S.E.2d 189 (1971).

Assault with intent to commit rape is a lesser included offense of the crime of rape, and in instructing the jury a definition of rape aids in the explanation of the offense of assault with intent to commit rape. State v. Young, 16 N.C. App. 101, 191 S.E.2d 369 (1972).

Applied in State v. Rhodes, 275 N.C. 584, 169 S.E.2d 846 (1969); State v. Williams, 279 N.C. 515, 184 S.E.2d 282 (1971); Withers v. North Carolina, 328 F. Supp. 1152 (W.D.N.C. 1971); State v. Shipman, 14 N.C. App. 577, 188 S.E.2d 741 (1972).

§ 14-23. Emission not necessary to constitute rape and buggery.

Stated in State v. Mitchell, 283 N.C. 462, 196 S.E.2d 736 (1973).

§§ 14-24, 14-25: Repealed by Session Laws 1975, c. 402.

§ 14-26. Obtaining carnal knowledge of virtuous girls between twelve and sixteen years old.

Punishment. —
Imprisonment for ten years is the maximum permissible punishment for a violation of this section. State v. Harris, 277 N.C. 435, 177 S.E.2d 865 (1970).

The felony set forth in § 14-22 is not a less degree of the felony set forth in this section. State v. Harris, 277 N.C. 435, 177 S.E.2d 865 (1970).

ARTICLE 8.

Assaults.

§ 14-30.1. Malicious throwing of corrosive acid or alkali.

Unnecessary for Jury to Find Defendant's Motive Was Intent to Murder. — In a prosecution for maliciously throwing a corrosive acid or alkali, it is not necessary for the jury to find that the intent to murder, maim, or disfigure was the sole or even the dominant motivation for defendant's actions. State v. Wingard, 10 N.C. App. 101, 177 S.E.2d 765 (1970).

Defendant May Not Complain if Jury Finds Intent to Murder. — One who, without provocation, deliberately throws corrosive acid or alkali into the face and eyes of another, thereby causing serious injuries, is in no position to complain if a jury finds that he intended his act to produce the very result which it did produce, to murder, maim, or disfigure. State v. Wingard, 10 N.C. App. 101, 177 S.E.2d 765 (1970).

Error in Charging on Lesser Included Offense Not Prejudicial. — In a prosecution for the malicious throwing of corrosive acid or alkali with the intent to murder, maim, or disfigure, any error by the trial court in charging on the lesser included offense of assault could not have been prejudicial to the defendant. State v. Wingard, 10 N.C. App. 101, 177 S.E.2d 765 (1970).

§ 14-31. Maliciously assaulting in a secret manner.

Elements of Offense, Burden of Proof. — The following elements must be proven beyond a reasonable doubt in order to establish the crime of secret assault: (1) secret manner; (2) malice; (3) assault and battery; (4) deadly weapon; and (5) intent to kill. State v. Hill, 287 N.C. 207, 214 S.E.2d 67 (1975).

Intent is a prescribed element of secret assault under this section. State v. Currie, 19 N.C. App. 17, 198 S.E.2d 28 (1973).

Infliction of serious injury need not be shown at all in a prosecution under this section. State v. Hill, 287 N.C. 207, 214 S.E.2d 67 (1975).

Secret assault is not a higher degree of felonious assault with a deadly weapon with the intent to kill or inflict serious bodily injury. State v. Hill, 287 N.C. 207, 214 S.E.2d 67 (1975).

When Defendant Entitled to Judgment of Nonsuit. — If the State sought a conviction under this section and only proved that the assault was made in a secret manner, defendant would be entitled to a judgment of nonsuit. State v. Hill, 287 N.C. 207, 214 S.E.2d 67 (1975).

§ 14-32. Felonious assault with deadly weapon with intent to kill or inflicting serious injury; punishments. — (a) Any person who assaults another person with a deadly weapon with intent to kill and inflicts serious injury is guilty of a felony punishable by a fine, imprisonment for not more than 20 years, or both such fine and imprisonment.

(b) Any person who assaults another person with a deadly weapon and inflicts serious injury is guilty of a felony punishable by a fine, imprisonment for not more than 10 years, or both such fine and imprisonment.

(c) Any person who assaults another person with a deadly weapon with intent to kill is guilty of a felony punishable by a fine, imprisonment for not more than 10 years, or both such fine and imprisonment. (1919, c. 101; C. S., s. 4214; 1931, c. 145, s. 30; 1969, c. 602, s. 2; 1971, c. 765, s. 1; c. 1093, s. 12; 1973, c. 229, ss. 1-3.)

Editor's Note. —

The first 1971 amendment, effective Oct. 1, 1971, in subsection (a), deleted "firearm or other" preceding "deadly weapon," deleted "of any kind" following "deadly weapon," deleted "under G.S. 14-2" following "punishable," and added "by a fine, imprisonment for not more than 10 years, or both such fine and imprisonment." In subsection (b) the amendment deleted "firearm or other" preceding "deadly weapon," deleted "per se" following "deadly weapon," and substituted a comma for "or" following "fine." In subsection (c) the amendment also substituted a comma for "or" following "fine."

The second 1971 amendment made a technical correction in the section as it stood before the first 1971 amendment.

The 1973 amendment, effective Jan. 1, 1974, substituted "20 years" for "10 years" in subsection (a) and "10 years" for "five years" in subsections (b) and (c) and substituted "deadly weapon" for "firearm" in subsection (c).

Section 5 of the 1973 amendatory act provides: "This act does not apply to any offense committed prior to the effective date of this act, and any such offense is punishable as provided by the statute in force at the time such offense was committed."

Elements of Offense. —

In accord with 4th paragraph in original. See State v. Whitted, 14 N.C. App. 62, 187 S.E.2d 391 (1972).

A serious injury and an intent to kill are both essential elements of the crime of felonious assault. State v. Marshall, 5 N.C. App. 476, 168 S.E.2d 487 (1969).

The following elements must be proven beyond a reasonable doubt in order to establish the crime of felonious assault: (1) assault; (2) deadly weapon; (3) intent to kill; and (4) infliction of serious injury. State v. Hill, 287 N.C. 207, 214 S.E.2d 67 (1975).

Intent Is Not Prescribed Element under Subsection (b). — Intent is not a prescribed element of assault with a deadly weapon inflicting serious injury under subsection (b) of this section. State v. Currie, 19 N.C. App. 17, 198 S.E.2d 28 (1973).

But Is Prescribed under Subsection (c). — Intent is a prescribed element of assault with firearm with intent to kill under subsection (c) of this section. State v. Currie, 19 N.C. App. 17, 198 S.E.2d 28 (1973).

There must be a charge and evidence thereon of the element of inflicting serious injury in order to sustain a conviction. State v. Whitted, 14 N.C. App. 62, 187 S.E.2d 391 (1972).

The term "inflicts serious injury," etc. —

In accord with original. See State v. Marshall, 5 N.C. App. 476, 168 S.E.2d 487 (1969); State v.

Parker, 7 N.C. App. 191, 171 S.E.2d 665 (1970); State v. Whitted, 14 N.C. App. 62, 187 S.E.2d 391 (1972).

Serious injury must be separately proved in a prosecution under this section. State v. Richardson, 279 N.C. 621, 185 S.E.2d 102 (1971).

The infliction of serious injury must be proven in order to support a conviction under this section. State v. Hill, 287 N.C. 207, 214 S.E.2d 67 (1975).

Facts of Particular Case, etc. —

In accord with original. See State v. Marshall, 5 N.C. App. 476, 168 S.E.2d 487 (1969); State v. Parker, 7 N.C. App. 191, 171 S.E.2d 665 (1970); State v. Whitted, 14 N.C. App. 62, 187 S.E.2d 391 (1972).

The rule that whether serious injury has been inflicted must be determined according to the particular facts of each case applies to a prosecution under subsection (b) of this section for assault with a deadly weapon inflicting serious injury. State v. Parker, 7 N.C. App. 191, 171 S.E.2d 665 (1970).

Injury Must Fall Short, etc. —

In accord with original. See State v. Marshall, 5 N.C. App. 476, 168 S.E.2d 487 (1969); State v. Parker, 7 N.C. App. 191, 171 S.E.2d 665 (1970); State v. Whitted, 14 N.C. App. 62, 187 S.E.2d 391 (1972).

An intent to kill is a matter for the State to prove, and is ordinarily shown by proof of facts from which an intent to kill may be reasonably inferred. State v. Thacker, 281 N.C. 447, 189 S.E.2d 145 (1972).

Intent to Kill May Be Inferred, etc. —

In accord with 1st paragraph in original. See State v. Thacker, 281 N.C. 447, 189 S.E.2d 145 (1972).

In accord with 2nd paragraph in original. See State v. Jones, 18 N.C. App. 531, 197 S.E.2d 268 (1973).

The requisite intent to kill can be inferred from the nature of the assault on the victim, the manner in which it was made, and the conduct of the parties under the circumstances. State v. Marshall, 5 N.C. App. 476, 168 S.E.2d 487 (1969).

The intent to kill may be inferred or presumed from the act itself. State v. Marshall, 5 N.C. App. 476, 168 S.E.2d 487 (1969).

A person who deliberately fires a pistol into the face of his victim at point-blank range must be held to intend the normal and natural results of his deliberate act. The fact that in this case the victim's life was spared may be cause for a salute to medical science, but it hardly changes the intent apparently present when defendant pulled the trigger. State v. Jones, 18 N.C. App. 531, 197 S.E.2d 268 (1973).

Secret manner and malice need not be shown at all in a prosecution under this section. State v. Hill, 287 N.C. 207, 214 S.E.2d 67 (1975).

Proof of an assault with a deadly weapon inflicting serious injury not resulting in death does not, as a matter of law, establish a presumption of intent to kill. Such intent must be found by the jury as a fact from the evidence. State v. Thacker, 281 N.C. 447, 189 S.E.2d 145 (1972); State v. Turner, 21 N.C. App. 608, 205 S.E.2d 628 (1974).

The allegation in a warrant that defendant assaulted his wife "by threatening to kill her" fell short of charging that he acted with the specific intent to kill required to make the offense a felony under this section; the offense charged was a misdemeanor under § 14-33. State v. Harris, 14 N.C. App. 268, 188 S.E.2d 1 (1972).

Included Offense. —

Subsection (b) of this section creates a new lesser offense of subsection (a). State v. Parker, 7 N.C. App. 191, 171 S.E.2d 665 (1970).

The offense defined in subsection (b) is a lesser included offense of the offense defined in subsection (a). State v. Cox, 11 N.C. App. 377, 181 S.E.2d 205 (1971).

The crime condemned by subsection (b) is a lesser degree of the offense defined in subsection (a). State v. Thacker, 281 N.C. 447, 189 S.E.2d 145 (1972); State v. Jennings, 16 N.C. App. 205, 192 S.E.2d 46 (1972); State v. Turner, 21 N.C. App. 608, 205 S.E.2d 628 (1974).

Subsection (c) of this section creates another new lesser offense of subsection (a), that of assault with a firearm with intent to kill. State v. Parker, 7 N.C. App. 191, 131 S.E.2d 665 (1970).

Offenses Not Included under Indictment for Assault with Firearm with Intent to Kill. — An indictment for assault with a firearm with intent to kill would not support a verdict of guilty of assault with a deadly weapon with intent to kill inflicting serious injury and does not support the verdict of guilty of assault with a deadly weapon inflicting serious injury. State v. Bryant, 19 N.C. App. 676, 199 S.E.2d 744 (1973).

Offense under this Section Is Not Included in Offense of Armed Robbery. — The crime of armed robbery defined in § 14-87 includes an assault on the person with a deadly weapon. The crime of felonious assault defined in subsection (a) of this section is an assault with a deadly weapon which is made with intent to kill and which inflicts serious injury. These additional elements of the crime of felonious assault are not elements of the crime of armed robbery defined in § 14-87. State v. Richardson, 279 N.C. 621, 185 S.E.2d 102 (1971).

An assault with a deadly weapon inflicting serious injury, defined by subsection (b) of this section is not a lesser offense included in the offense of armed robbery, because the infliction of serious injury is not an essential ingredient of armed robbery. State v. Stepney, 280 N.C. 306, 185 S.E.2d 844 (1972).

An assault with a deadly weapon inflicting serious injury, as defined in subsection (b), is not

a lesser included offense of armed robbery because the infliction of serious injury is not an essential ingredient of armed robbery. State v. Teel, 24 N.C. App. 385, 210 S.E.2d 517 (1975).

A conviction of armed robbery does not establish a defendant's guilt of felonious assault. State v. Richardson, 279 N.C. 621, 185 S.E.2d 102 (1971); State v. Alexander, 284 N.C. 87, 199 S.E.2d 450 (1973).

Assault with a deadly weapon inflicting serious injury is not a lesser included offense of attempted armed robbery. State v. Wilson, 26 N.C. App. 188, 215 S.E.2d 167 (1975).

A felonious assault is not to be ignored as an independent felony simply because an assault with a deadly weapon is an essential element both of felonious assault and of armed robbery and the permissible punishment for armed robbery is greater than the permissible punishment for felonious assault. There is no sound reason why two felonies should be treated as one simply because they share a single essential element, when they consist of additional separate elements. State v. Richardson, 279 N.C. 621, 185 S.E.2d 102 (1971).

Although Felonious Assault May Be Committed during Perpetration of Armed Robbery. — The fact that a felonious assault is committed during the perpetration of armed robbery does not deprive the felonious assault of its character as a complete and separate felony. State v. Richardson, 279 N.C. 621, 185 S.E.2d 102 (1971).

Convictions of Armed Robbery and Felonious Assault Based on Separate Features of One Continuous Course of Conduct. — When separate indictments for armed robbery and felonious assault based on separate features of one continuous course of conduct are tried together, and verdicts of guilty as charged are returned, these verdicts provide support for separate judgments. State v. Richardson, 279 N.C. 621, 185 S.E.2d 102 (1971).

Secret assault is not a higher degree of felonious assault with a deadly weapon with the intent to kill or inflict serious bodily injury. State v. Hill, 287 N.C. 207, 214 S.E.2d 67 (1975).

Law of Self-Defense, etc. —

In accord with original. See State v. Barnette, 8 N.C. App. 198, 174 S.E.2d 82 (1970).

A defendant could assault a person with intent to kill only if such force was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm. Likewise, a defendant could be absolved from criminal liability for the assault with intent to kill only if he acted in self-defense when he was in actual or apparent danger of suffering death or great bodily harm. State v. Barnette, 8 N.C. App. 198, 174 S.E.2d 82 (1970).

What Is a Deadly Weapon. — Any instrument which is likely to produce death or great bodily harm, under the circumstances of its use, is properly denominated a deadly weapon. State v. Parker, 7 N.C. App. 191, 171 S.E.2d 665 (1970).

May Depend upon Manner of Use. — The deadly character of a weapon depends sometimes more upon the manner of its use, and the condition of the person assaulted, than upon the intrinsic character of the weapon itself. State v. Parker, 7 N.C. App. 191, 171 S.E.2d 665 (1970).

And May Be Question of Law or Fact. — Where the alleged deadly weapon and the manner of its use are of such character as to admit of but one conclusion, the question as to whether or not it is deadly is one of law, and the court must take the responsibility of so declaring. But where it may or may not be likely to produce fatal results, according to the manner of its use, or the part of the body at which the blow is aimed, its alleged deadly character is one of fact to be determined by the jury. State v. Parker, 7 N.C. App. 191, 171 S.E.2d 665 (1970).

A pistol or a gun is a deadly weapon. State v. Parker, 7 N.C. App. 191, 171 S.E.2d 665 (1970).

Knife. — Under the case law of this State, a knife with a three-inch blade constitutes a deadly weapon per se when used as a weapon in an assault. State v. Cox, 11 N.C. App. 377, 181 S.E.2d 205 (1971).

A baseball bat should be denominated a deadly weapon if viciously used. State v. Parker, 7 N.C. App. 191, 171 S.E.2d 665 (1970).

Defendant is entitled to have the different permissible verdicts arising on the evidence presented to the jury under proper instructions. State v. Jennings, 16 N.C. App. 205, 192 S.E.2d 46 (1972).

Right to Instruction on Lesser Included Offense. — When the lesser included offense of assault with a firearm resulting in serious bodily injury is supported by some evidence, a defendant is entitled to have the different permissible views arising on the evidence presented to the jury under proper instructions. State v. Jones, 18 N.C. App. 531, 197 S.E.2d 268 (1973).

Submission of Lesser Offense Only Where All Evidence Shows Felonious Assault. — In a prosecution for two offenses of assault with a deadly weapon with intent to kill inflicting serious injury, wherein all the evidence showed that a deadly weapon was used in both assaults and that serious injury was inflicted on both victims, the trial court erred (1) in failing to submit defendant's guilt or innocence of assault with a deadly weapon inflicting serious injury, and (2) in submitting the misdemeanors of assault inflicting serious injury and assault with a deadly weapon. State v. Thacker, 281 N.C. 447, 189 S.E.2d 145 (1972); State v. Turner, 21 N.C. App. 608, 205 S.E.2d 628 (1974).

Failure to Submit Lesser Offense Held Not Error. — Where all the evidence presented

shows a shooting with a deadly weapon with an intent to kill and none of the evidence shows the lack of such intent, it is not error for the court to fail to submit to the jury the lesser offense described in subsection (b). State v. Jennings, 16 N.C. App. 205, 192 S.E.2d 46 (1972); State v. Turner, 21 N.C. App. 608, 205 S.E.2d 628 (1974).

Where the uncontradicted evidence is that defendant shot a police officer at close range in the face, this evidence does not justify submission of the issue of guilt of a lesser included offense. State v. Jones, 18 N.C. App. 531, 197 S.E.2d 268 (1973).

Erroneous Instruction Cured by Conviction of Lesser Included Offense. — Any error in instructing the jury as to defendant's guilt or innocence of felonious assault under subsection (a) of this section was cured by the jury's verdict which found defendant guilty of the lesser included offense described in subsection (b). State v. Hearns, 9 N.C. App. 42, 175 S.E.2d 376 (1970).

Instruction on Meaning of "Assault". — It is incumbent upon the trial judge to define or otherwise explain to a jury the meaning of the legal term "assault." State v. Hickman, 21 N.C. App. 421, 204 S.E.2d 718 (1974).

Instruction on self-defense is erroneous which tells the jury that defendant could use no more force than necessary in defending himself. The law is that the defendant could use such force as was reasonably necessary or apparently necessary. One may fight in self-defense and may use more force than is actually necessary to prevent death or great bodily harm, if he believes it to be necessary and has a reasonable ground for the belief. State v. Hearns, 9 N.C. App. 42, 175 S.E.2d 376 (1970).

In a felonious assault prosecution, the language used by the court in instructing the jury on self-defense effectively conveyed to the jury that it must determine the reasonableness of defendant's belief in the necessity of force from the circumstances as they appeared to him at the time of the assault. State v. Cantrell, 24 N.C. App. 575, 211 S.E.2d 525 (1975).

Evidence of Infliction of Serious Injury. — A pistol wound in the neck, close to the spinal cord, resulting in unconsciousness, with the bullet lodging in the neck, is sufficient evidence of serious injury, within the meaning of the statute, to submit the question of serious injury to the jury. State v. Marshall, 5 N.C. App. 476, 168 S.E.2d 487 (1969).

Where there is evidence from which the jury could find that the offense defined in subsection (b) had been committed, it is not only proper but is necessary for the trial court to submit the issue. State v. Cox, 11 N.C. App. 377, 181 S.E.2d 205 (1971).

Whether serious injury has been inflicted must be determined according to the particular facts of each case and is a question the jury must answer under proper instruction. State v. Marshall, 5 N.C. App. 476, 168 S.E.2d 487 (1969); State v. Whitted, 14 N.C. App. 62, 187 S.E.2d 391 (1972).

Evidence Sufficient to Require Instruction as to Defense of Third Person. —

Where defendant saw the victim force his former girl friend from a dance hall and down the street several blocks, knew that victim had threatened to kill the girl and that he was a dangerous man with a propensity for violent conduct, observed that the victim was acting in a wild and irrational manner as if he had been drinking or taking some drugs and observed that the victim reached for his pocket just before defendant shot him, the trial court committed prejudicial error in failing to instruct upon the right of defendant to go to the defense of a third person to prevent a felonious assault, since the court must instruct the jury on all substantial features of the case that arise from the evidence. State v. Graves, 18 N.C. App. 177, 196 S.E.2d 582 (1973).

Facts Not Showing Two Offenses. — In a felonious assault case, the mere fact that some of the shots entered from the front and some entered from the back does not make two offenses. State v. Dilldine, 22 N.C. App. 229, 206 S.E.2d 364 (1974).

Evidence Sufficient to Support Conviction. —

In accord with original. See State v. Burns, 24 N.C. App. 392, 210 S.E.2d 524 (1975).

Verdict Insufficient to Support Sentence under This Section. — Although the indictment charged and the evidence showed that the deadly weapon used in an assault was a firearm, the jury's verdict of guilty of "assault with a deadly weapon with intent to kill" would not support a sentence of five years for assault with a firearm with intent to kill pursuant to subsection (c) but would support a maximum sentence of two years under § 14-33. State v. Edmondson, 283 N.C. 533, 196 S.E.2d 505 (1973), decided prior to the 1973 amendment to this section.

Applied in State v. Thacker, 13 N.C. App. 299, 185 S.E.2d 455 (1971); State v. Hinton, 14 N.C. App. 253, 188 S.E.2d 17 (1972); State v. Kinsey, 17 N.C. App. 57, 193 S.E.2d 430 (1972); State v. Moses, 17 N.C. App. 115, 193 S.E.2d 288 (1972); State v. Williams, 282 N.C. 576, 193 S.E.2d 738 (1973); State v. Coleman, 19 N.C. App. 389, 198 S.E.2d 764 (1973); State v. Brown, 19 N.C. App. 480, 199 S.E.2d 134 (1973); State v. Goff, 19 N.C. App. 588, 199 S.E.2d 502 (1973); State v. Brown, 21 N.C. App. 552, 204 S.E.2d 861 (1974); State v. Harding, 22 N.C. App. 66, 205 S.E.2d 544 (1974); State v. White, 24 N.C. App. 318, 210 S.E.2d 261 (1974); State v. Lunsford, 26 N.C. App. 78, 214 S.E.2d 619 (1975).

Quoted in State v. McLaurin, 12 N.C. App. 23, 182 S.E.2d 280 (1971).

Cited in Aetna Cas. & Sur. Co. v. Lumbermen's Mut. Cas. Co., 11 N.C. App. 490, 181 S.E.2d 727 (1971); State v. Pearson, 288 N.C. 34, 215 S.E.2d 598 (1975).

§ 14-33. Misdemeanor assaults, batteries, and affrays, simple and aggravated; punishments. — (a) Any person who commits a simple assault or a simple assault and battery or participates in a simple affray is guilty of a misdemeanor punishable by a fine not to exceed fifty dollars ($50.00) or imprisonment for not more than 30 days.

(b) Unless his conduct is covered under some other provision of law providing greater punishment, any person who commits any assault, assault and battery, or affray is guilty of a misdemeanor punishable by a fine, imprisonment for not more than two years, or both such fine and imprisonment if, in the course of the assault, assault and battery, or affray, he:

(1) Inflicts, or attempts to inflict, serious injury upon another person or uses a deadly weapon; or

(2) Assaults a female, he being a male person over the age of 18 years; or

(3) Assaults a child under the age of 12 years; or

(4) Assaults a law-enforcement officer or a custodial officer of the State Department of Correction, while the officer is discharging or attempting to discharge a duty of his office. (1870-1, c. 43, s. 2; 1873-4, c. 176, s. 6; 1879, c. 92, ss. 2, 6; Code, s. 987; Rev., s. 3620; 1911, c. 193; C. S., s. 4215; 1933, c. 189; 1949, c. 298; 1969, c. 618, s. 1; 1971, c. 765, s. 2; 1973, c. 229, s. 4; c. 1413.)

Editor's Note. —

The 1971 amendment, effective Oct. 1, 1971, rewrote subsections (b) and (c).

The first 1973 amendment, effective Jan. 1, 1974, deleted "not to exceed five hundred dollars ($500.00)" following "fine" and substituted "two years" for "six months" in the introductory paragraph of subsection (b), added "Inflicts or" and "or uses a deadly weapon" in subdivision (1), added "over the age of 18 years" in subdivision (2) and added subdivision (4) of subsection (b). The amendment eliminated former subsection (c), which provided for punishment by fine, imprisonment for not more than two years, or both, for assault inflicting serious injury, assault with a deadly weapon, assault with intent to kill or assault upon a public officer in the discharge of his duty.

The second 1973 amendment substituted "law-enforcement officer or a custodial officer of the State Department of Correction" for "public officer" in subdivision (4) of subsection (b).

Section 5 of the first 1973 amendatory act provides: "This act does not apply to any offense committed prior to the effective date of this act, and any such offense is punishable as provided by the statute in force at the time such offense was committed."

There is no statutory definition, etc. —

In North Carolina, there is no statutory definition of assault and the crime remains one governed by the rules of the common law. State v. Hill, 6 N.C. App. 365, 170 S.E.2d 99 (1969).

Intent is not a prescribed element of assault with a deadly weapon. See State v. Currie, 19 N.C. App. 17, 198 S.E.2d 28 (1973).

Lesser Offense Included in Indictment for Assault with Intent to Rape. —

Assault on a female by a male person is a lesser included offense in a proper bill of indictment charging an assault with intent to commit rape. State v. Mitchell, 6 N.C. App. 534, 170 S.E.2d 355 (1969).

Punishment—Extent. —

Although the indictment charged and the evidence showed that the deadly weapon used in an assault was a firearm, the jury's verdict of guilty of "assault with a deadly weapon with intent to kill" will not support a sentence of five years for assault with a firearm with intent to kill pursuant to § 14-32(c) but will support a maximum sentence of two years under this section. State v. Edmondson, 283 N.C. 533, 196 S.E.2d 505 (1973), decided prior to the 1973 amendments to this section and § 14-32.

The intentional firing of a high-powered rifle into or near a home, frightening the inmates and causing them to seek safety in the back of the house, would be sufficient evidence to make out a case of assault with a deadly weapon. State v. Blizzard, 280 N.C. 11, 184 S.E.2d 851 (1971).

The allegation in a warrant that defendant assaulted his wife "by threatening to kill her" fell short of charging that he acted with the specific intent to kill required to make the offense a felony under § 14-32; the offense charged was a misdemeanor under this section. State v. Harris, 14 N.C. App. 268, 188 S.E.2d 1 (1972).

Crime of Armed Robbery Includes Assault with Deadly Weapon. — The crime of armed

robbery defined in § 14-87 includes an assault on the person with a deadly weapon. State v. Richardson, 279 N.C. 621, 185 S.E.2d 102 (1971).

Convictions of Armed Robbery and Assault with Deadly Weapon Arising Out of Same Conduct. — If a person is convicted simultaneously of armed robbery and of the lesser included offense of assault with a deadly weapon, and both offenses arise out of the same conduct, and separate judgments are pronounced, the judgment on the separate verdict of guilty of assault with a deadly weapon must be arrested, because in such case the armed robbery is accomplished by the assault with a deadly weapon and all essentials of this assault charge are essentials of the armed robbery charge. State v. Richardson, 279 N.C. 621, 185 S.E.2d 102 (1971).

Submission of Lesser Offense Only Where All Evidence Shows Felonious Assault. — In a prosecution for two offenses of assault with a deadly weapon with intent to kill inflicting serious injury wherein all the evidence showed that a deadly weapon was used in both assaults and that serious injury was inflicted on both victims, the trial court erred (1) in failing to submit defendant's guilt or innocence of assault with a deadly weapon inflicting serious injury, and (2) in submitting the misdemeanors of assault inflicting serious injury and assault with a deadly weapon. State v. Thacker, 281 N.C. 447, 189 S.E.2d 145 (1972).

The clear legislative intent in enacting subdivision (b)(4) of this section was to provide greater punishment for those who place themselves in open defiance of duly constituted authority by assaulting public officers who are on duty. State v. Kirby, 15 N.C. App. 480, 190 S.E.2d 320 (1972).

The legislative intent appears to be that if a public officer is assaulted in performing or attempting to perform any duty of his office, the provision of this section is applicable. State v. Kirby, 15 N.C. App. 480, 190 S.E.2d 320 (1972).

Assault on Officer Is Primary Conduct proscribed. — In the offense of assaulting a public officer in the performance of some duty, the assault on the officer is the primary conduct proscribed by the statute and the particular duty that the officer is performing while being assaulted is of secondary importance. State v. Kirby, 15 N.C. App. 480, 190 S.E.2d 320 (1972).

Presumption that Public Officer is Acting Lawfully. — The offense under subsection (b)(4) of assaulting a public officer when such officer is discharging or attempting to discharge a duty of his office presupposes lawful conduct of the public officer in discharging or attempting to discharge a duty of his office. State v. Jefferies, 17 N.C. App. 195, 193 S.E.2d 388 (1972).

Warrant is insufficient to charge the offense of assault on a public officer, under subsection (b)(4), or the offense of resisting an officer under § 14-223, where it fails to allege the duty of his office that the public officer was discharging or attempting to discharge. State v. Mink, 18 N.C. App. 346, 196 S.E.2d 552 (1973).

Resisting Officer and Assaulting Officer Are Separate Offenses. — The charge of resisting an officer and the charge of assaulting a public officer while discharging or attempting to discharge a duty of his office are separate and distinct offenses and the trial judge did not err in failing to "merge" them. State v. Kirby, 15 N.C. App. 480, 190 S.E.2d 320 (1972).

Where Warrants Based on § 14-223 and Subsection (b)(4) Included Same Elements of Offense. — Where a defendant has been tried under two warrants, one for violating § 14-223 and the other for violating subsection (c)(4), and where each warrant included all the elements of the offense charged in the other, and each specified only acts of violence which defendant directed at the officer's person while he was attempting to hold defendant in custody, the defendant has been twice convicted and sentenced for the same criminal offense, and the constitutional guaranty against double jeopardy protects a defendant from multiple punishments for the same offense. State v. Summrell, 282 N.C. 157, 192 S.E.2d 569 (1972).

Evidence Sufficient under Section. — There was ample evidence to support the verdict of guilty of assault on a child under 12 years of age. State v. Roberts, 286 N.C. 265, 210 S.E.2d 396 (1974).

Sentence under Verdict of "Guilty of Simple Assault on a Female". —

In a prosecution for an assault with intent to commit rape a verdict of "guilty of simple assault on a female" supports a sentence for an assault on a female by a male person over the age of 18 years when the defendant's own evidence discloses that he was over 18 years of age at the time of the commission of the assault, and no question of defendant's age is raised during the trial. State v. Mitchell, 6 N.C. App. 534, 170 S.E.2d 355 (1969), decided under this section as it stood before the 1969 amendment.

A charge under this section requires all the essential elements of a charge under § 14-223. State v. Caldwell, 21 N.C. App. 723, 205 S.E.2d 322 (1974).

Failure to Submit Question of Guilt of Simple Assault. — Where in a prosecution for assault with a deadly weapon the evidence tends to show assault on a female at least, it is not error to fail to submit the question of guilt of simple assault. State v. Hill, 6 N.C. App. 365, 170 S.E.2d 99 (1969).

Applied in State v. Haith, 7 N.C. App. 552, 172 S.E.2d 912 (1970); State v. Hollingsworth, 11 N.C. App. 674, 182 S.E.2d 26 (1971); State v. Harrell, 281 N.C. 111, 187 S.E.2d 789 (1972); State v. Harris, 14 N.C. App. 270, 188 S.E.2d 2 (1972); In re Potts, 14 N.C. App. 387, 188 S.E.2d

643 (1972); State v. Lowery, 15 N.C. App. 596, 190 S.E.2d 282 (1972); State v. Moses, 16 N.C. App. 174, 191 S.E.2d 368 (1972); State v. Snipes, 16 N.C. App. 416, 192 S.E.2d 62 (1972); State v. Bunn, 283 N.C. 444, 196 S.E.2d 777 (1973); State v. Parrott, 17 N.C. App. 332, 194 S.E.2d 162 (1973); State v. Keziah, 24 N.C. App. 298, 210 S.E.2d 436 (1974); State v. Teel, 24 N.C. App. 385, 210 S.E.2d 517 (1975); State v. Davis, 24 N.C. App. 683, 211 S.E.2d 849 (1975).

Stated in State v. Walker, 7 N.C. App. 548, 172 S.E.2d 881 (1970).

Cited in State v. Rhodes, 275 N.C. 584, 169 S.E.2d 846 (1969); State v. Virgil, 276 N.C. 217, 172 S.E.2d 28 (1970); State v. Walker, 277 N.C. 403, 177 S.E.2d 868 (1970); State v. Leak, 11 N.C. App. 344, 181 S.E.2d 224 (1971); State v. Robinson, 15 N.C. App. 155, 189 S.E.2d 567 (1972); State v. Sasser, 21 N.C. App. 618, 205 S.E.2d 565 (1974).

§ 14-33.1. Evidence of former threats upon plea of self-defense.

Evidence of threats is admissible in assault cases upon a plea of self-defense; therefore, it follows that, under proper factual circumstances, such evidence is admissible upon a plea of defense of others. State v. Graves, 18 N.C. App. 177, 196 S.E.2d 582 (1973).

Prior threats are admissible in assault cases where the defendant claims self-defense when the evidence of the threats is properly presented. State v. Butler, 21 N.C. App. 679, 205 S.E.2d 571 (1974).

§ 14-34. Assaulting by pointing gun.

Assault with a Deadly Weapon. — It is axiomatic that if the gun or pistol used is in fact a deadly weapon, then the pointing thereof is an assault with a deadly weapon. State v. Currie, 7 N.C. App. 439, 173 S.E.2d 49 (1970).

Accidental Discharge of Gun — Manslaughter. —

In accord with 3rd paragraph in original. See State v. Stimpson, 279 N.C. 716, 185 S.E.2d 168 (1971).

If a person intentionally pointed the gun at the deceased and it was then discharged, inflicting the wound of which he died, or if the person was at the time guilty of culpable negligence in the way he handled and dealt with the gun, and by reason of such negligence the gun was discharged, causing the death of deceased, in either event the person would be guilty of manslaughter, and this whether the discharge of the gun was intentional or accidental. State v. Currie, 7 N.C. App. 439, 173 S.E.2d 49 (1970).

If a person points a pistol at another in sport, as a joke, or to cause fright merely, believing and, perhaps, having some reason to think that it is not loaded, and subsequently pulls the trigger, causing the pistol to be discharged, and resulting in the killing of the person pointed at, he is guilty of manslaughter. State v. Currie, 7 N.C. App. 439, 173 S.E.2d 49 (1970).

Gun Need Not Be Loaded. —

Pointing a gun at another under such circumstances as would not excuse its intentional discharge constitutes, in this and many other states, a statutory misdemeanor, and an accidental killing occasioned by it is manslaughter. In this State it is immaterial whether the gun is loaded or not. State v. Currie, 7 N.C. App. 439, 173 S.E.2d 49 (1970).

Applied in State v. Thacker, 18 N.C. App. 547, 197 S.E.2d 248 (1973); State v. Caldwell, 21 N.C. App. 723, 205 S.E.2d 322 (1974).

Quoted in State v. Jones, 15 N.C. App. 537, 90 S.E.2d 278 (1972).

Stated in State v. Blanton, 20 N.C. App. 66, 200 S.E.2d 425 (1973).

§ 14-34.1. Discharging firearm into occupied property.

Purpose of Section. — This section was enacted for the protection of occupants of the premises, vehicles, and other property described in the statute. A violation is a serious crime. State v. Williams, 21 N.C. App. 525, 204 S.E.2d 864 (1974).

The protection of the occupant(s) of the building was the primary concern and objective of the General Assembly when it enacted this section. State v. Williams, 284 N.C. 67, 199 S.E.2d 409 (1973).

Violation of this section is an unspecified felony within the purview of § 14-17. State v. Williams, 284 N.C. 67, 199 S.E.2d 409 (1973).

And Can Result in Conviction of First-Degree Murder. — A homicide committed in the perpetration of the felony under this section can result in conviction for murder in the first degree under the felony murder rule of § 14-17. State v. Williams, 21 N.C. App. 525, 204 S.E.2d 864 (1974).

When Section Violated. — A person is guilty of the felony created by this section if he intentionally, without legal justification or excuse, discharges a firearm into an occupied building with knowledge that the building is then occupied by one or more persons or when he has reasonable grounds to believe that the building might be occupied by one or more persons. State v. Williams, 284 N.C. 67, 199 S.E.2d 409 (1973); State v. Williams, 21 N.C. App. 525, 204 S.E.2d 864 (1974); State v. Gunn, 24 N.C. App. 561, 211 S.E.2d 508 (1975).

Building Must Be Occupied. — This section is not violated unless the accused discharges or attempts to discharge the firearm into a building while it is occupied. State v. Williams, 284 N.C. 67, 199 S.E.2d 409 (1973).

The attempt to draw a sharp line between a "willful" act and a "wanton" act in the context of this section would be futile. The elements of each are substantially the same. State v. Williams, 284 N.C. 67, 199 S.E.2d 409 (1973); State v. Gunn, 24 N.C. App. 561, 211 S.E.2d 508 (1975).

Instruction Held Proper. — Where the court instructed the jury that the intent required under this section was a specific intent which could be negated by the voluntary intoxication of the defendant, the charge to the jury is free from prejudicial error. State v. Gunn, 24 N.C. App. 561, 511 S.E.2d 508 (1975).

Where the trial judge specifically instructed the jury that before it could find the defendant guilty it must find beyond a reasonable doubt that the defendant acted "intentionally," this was clearly proper. State v. Gunn, 24 N.C. App. 561, 211 S.E.2d 508 (1975).

A correct charge under this section would provide that the accused would be guilty if the defendant intentionally, without legal justification or excuse, discharged a firearm into an occupied vehicle with knowledge that the vehicle was occupied by one or more persons or when he had reasonable grounds to believe that the vehicle might be occupied by one or more persons. State v. Tanner, 25 N.C. App. 251, 212 S.E.2d 695 (1975).

Instruction Held Erroneous. — It was held that an instruction to the jury on a charge under this section was erroneous where it contained provision that the jury must find that "the gun was discharged; and first and last, that the defendant acted willfully or wantonly which means that he must have known that one or more persons were in the dwelling or apartment," in that it equated willful and wanton conduct with knowledge of occupancy of the building. State v. Williams, 21 N.C. App. 525, 204 S.E.2d 864 (1974).

Instruction that equates willful and wanton conduct with knowledge of occupancy of the building and thereby attempts to condense two separate elements of the crime into one is in error. State v. Furr, 26 N.C. App. 335, 215 S.E.2d 840 (1975).

Applied in State v. Tripp, 9 N.C. App. 518, 176 S.E.2d 892 (1970); State v. Lowery, 12 N.C. App. 538, 183 S.E.2d 797 (1971); State v. Snipes, 16 N.C. App. 416, 192 S.E.2d 62 (1972); State v. Tinsley, 283 N.C. 564, 196 S.E.2d 746 (1973); State v. Evans, 19 N.C. App. 731, 200 S.E.2d 213 (1973); State v. Locklear, 26 N.C. App. 300, 215 S.E.2d 859 (1975).

Quoted in State v. Blizzard, 280 N.C. 11, 184 S.E.2d 851 (1971).

§ 14-34.2. Assault with a firearm upon law-enforcement officer or fireman.

Admissibility of Result of Breathalyzer Test. — Where defendant was not driving or operating a vehicle at the time of the alleged assault on a police officer, the court erred in admitting testimony showing the result of a breathalyzer test. State v. Powell, 18 N.C. App. 732, 198 S.E.2d 70 (1973).

Applied in State v. Jenkins, 12 N.C. App. 387, 183 S.E.2d 268 (1971); State v. Berry, 13 N.C. App. 310, 185 S.E.2d 463 (1971); State v. Cornell, 281 N.C. 20, 187 S.E.2d 768 (1972); State v. Norton, 14 N.C. App. 136, 187 S.E.2d 364 (1972); State v. Hammock, 22 N.C. App. 439, 206 S.E.2d 773 (1974).

Cited in State v. Dix, 282 N.C. 490, 193 S.E.2d 897 (1973).

ARTICLE 10.

Kidnapping and Abduction.

§ 14-39. Kidnapping. — (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age

or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:

(1) Holding such other person for ransom or as a hostage or using such other person as a shield; or

(2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or

(3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person.

(b) Any person convicted of kidnapping shall be guilty of a felony and shall be punished by imprisonment for not less than 25 years nor more than life. If the person kidnapped, as defined in subsection (a), was released by the defendant in a safe place and had not been sexually assaulted or seriously injured, the person so convicted shall be punished by imprisonment for not more than 25 years, or by a fine of not more than ten thousand dollars ($10,000), or both, in the discretion of the court.

(c) Any firm or corporation convicted of kidnapping shall be punished by a fine of not less than five thousand dollars ($5,000) nor more than one hundred thousand dollars ($100,000), and its charter and right to do business in the State of North Carolina shall be forfeited. (1933, c. 542; 1975, c. 843, s. 1.)

Editor's Note. —

The 1975 amendment rewrote this section.

Session Laws 1975, c. 843, s. 2, provides: "This act shall become effective July 1, 1975, and shall apply only to offenses committed after that date. It shall not be construed to repeal or amend the law of this State now in effect with reference to trial, conviction, sentence or punishment of any person for the crime of kidnapping committed prior to July 1, 1975."

The cases cited in the following annotation were decided under this section as it stood before the 1975 amendment. Prior to the amendment, this section did not define the crime of kidnapping, nor did it fix a minimum punishment.

Kidnapping in this State is one of the most serious of crimes. State v. Dix, 282 N.C. 490, 193 S.E.2d 897 (1973).

Kidnapping was a misdemeanor, etc. —

In accord with original. See State v. Dix, 282 N.C. 490, 193 S.E.2d 897 (1973).

Definition. —

In accord with 3rd paragraph in original. See State v. Dix, 14 N.C. App. 328, 188 S.E.2d 737 (1972).

In this State there is no statutory definition of the crime of kidnapping. State v. Reid, 5 N.C. App. 424, 168 S.E.2d 511 (1969).

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

Since this section does not define kidnapping, the common-law definition of that crime is the law of this State. State v. Murphy, 280 N.C. 1, 184 S.E.2d 845 (1971); State v. Hudson, 281 N.C. 100, 187 S.E.2d 756 (1972).

Since this section does not define the offense of kidnapping, the common-law definition may be resorted to for the particular acts constituting the offense. State v. Dix, 14 N.C. App. 328, 188 S.E.2d 737 (1972).

Kidnapping is the taking and carrying away of a human being by physical force or by constructive force unlawfully and without lawful authority. State v. Perry, 275 N.C. 565, 169 S.E.2d 839 (1969).

The word "kidnap," in its application to the evidence in the case at bar, and as used in this section, means the unlawful taking and carrying away of a person by force and against his will. State v. Reid, 5 N.C. App. 424, 168 S.E.2d 511 (1969).

The common-law definition of kidnapping is "the unlawful taking and carrying away of a person by force and against his will." State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971); State v. Murphy, 280 N.C. 1, 184 S.E.2d 845 (1971); State v. Hudson, 281 N.C. 100, 187 S.E.2d 756 (1972).

The word "kidnap" means the unlawful taking and carrying away of a person by force and against his will. State v. Penley, 277 N.C. 704, 178 S.E.2d 490 (1971).

At common law and as used in this section, the word "kidnap" means the unlawful taking and carrying away of a human being by force and against his will. State v. Barbour, 278 N.C. 449, 180 S.E.2d 115 (1971).

The unlawful taking and carrying away of a human being fraudulently is kidnapping within

the meaning of this section. State v. Barbour, 278 N.C. 449, 180 S.E.2d 115 (1971).

Where a defendant by force and threat of violence took a person and carried him where he did not consent to go, this constitutes kidnapping under this section. State v. Penley, 277 N.C. 704, 178 S.E.2d 490 (1971).

Kidnapping is defined as the unlawful taking and carrying away of a human being against his will by force, threats, or fraud. State v. Dix, 282 N.C. 490, 193 S.E.2d 897 (1973); State v. Sommerset, 21 N.C. App. 272, 204 S.E.2d 206 (1974).

In order to constitute kidnapping there must be not only an unlawful detention by force or fraud but also a carrying away of the victim. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

Common-law kidnapping contemplates, in addition to unlawful restraint, a carrying away of the person detained. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

In addition to unlawful restraint, the taking, carrying away, transporation, or asportation of the victim from the place where he is seized to some other place is an essential element of common law kidnapping. State v. Dix, 282 N.C. 490, 193 S.E.2d 897 (1973).

Kidnapping is false imprisonment aggravated by conveying the imprisoned person to some other place. State v. Dix, 282 N.C. 490, 193 S.E.2d 897 (1973).

The unlawful taking and carrying away of a person fraudulently is kidnapping, and this is true even though this section omits the words "forcibly or fraudulently." State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

The word "kidnap," as used in this section, means the unlawful taking and carrying away of a human being against his will by force or fraud or threats or intimidation. State v. Roberts, 286 N.C. 265, 210 S.E.2d 396 (1974).

Construction. —

The failure of this section to define kidnapping does not render the statute vague or uncertain and the common-law definition of the offense is incorporated in the statute by construction. State v. Penley, 277 N.C. 704, 178 S.E.2d 490 (1971); State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

To construe the word "kidnap" as used in this section as applying only to a forcible taking is too narrow a construction, and in many instances would make the section practically useless. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

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

When Person Is Guilty, etc. —

Where a motorist who invited a hitchhiker to ride with him is compelled by the force and intimidation exerted upon him by the hitchhiker to abandon his own desired course of travel and to drive his car as commanded by the hitchhiker, there is a kidnapping. State v. Barbour, 278 N.C. 449, 180 S.E.2d 115 (1971).

Taking and Carrying Away. —

This State, by judicial definition of the crime, follows the concept that some carrying away or transporting of the person of the victim is an essential element of the crime of kidnapping. State v. Reid, 5 N.C. App. 424, 168 S.E.2d 511 (1969).

Standing alone, the fact that the taking and carrying away of the victim was accomplished by means of a truck owned and operated by the victim is of no avail as a defense to the alleged kidnapping. State v. Barbour, 278 N.C. 449, 180 S.E.2d 115 (1971).

Physical Force, etc. —

The use of actual physical force or violence is not always essential to the commission of the offense of kidnapping. State v. Barbour, 278 N.C. 449, 180 S.E.2d 115 (1971).

The crime of kidnapping, etc. —

In accord with original. See State v. Barbour, 278 N.C. 449, 180 S.E.2d 115 (1971).

Threats and intimidation are equivalent to the use of actual force or violence. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971); State v. Hudson, 281 N.C. 100, 187 S.E.2d 756 (1972).

The use of actual physical force or violence is not always essential to the commission of the offense of kidnapping. The crime of kidnapping is frequently committed by threats and intimidation and appeals to the fears of the victim which are sufficient to put an ordinarily prudent person in fear for his life or personal safety, and to overcome the will of the victim and secure control of his person without his consent and against his will, and are equivalent to the use of actual force or violence. State v. Penley, 277 N.C. 704, 178 S.E.2d 490 (1971).

Distance Immaterial. —

In accord with original. See State v. Reid, 5 N.C. App. 424, 168 S.E.2d 511 (1969); State v. Dix, 14 N.C. App. 328, 188 S.E.2d 737 (1972).

The asportation requirement has been relaxed so that any carrying away is sufficient, and the distance the victim is carried is immaterial. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971); State v. Dix, 14 N.C. App. 328, 188 S.E.2d 737 (1972).

Where the gravamen of the crime is the carrying away of the person, the place from or to which the person is transported is not material, and an actual asportation of the victim is sufficient to constitute the offense without regard to the extent or degree of such movement; it is the fact, not the distance, of forcible removal which constitutes kidnapping. State v. Barbour, 278 N.C. 449, 180 S.E.2d 115

(1971); State v. Dix, 14 N.C. App. 328, 188 S.E.2d 737 (1972).

Any carrying away is sufficient; the distance the victim is carried is immaterial. State v. Murphy, 280 N.C. 1, 184 S.E.2d 845 (1971).

The distance the victim is carried is not material. Any carrying away is sufficient. State v. Hudson, 281 N.C. 100, 187 S.E.2d 756 (1972).

"Carrying away" is not based on distance since distance is immaterial. State v. Dix, 14 N.C. App. 328, 188 S.E.2d 737 (1972).

Essential Element Is "Removal". — Since distance is not material to the "carrying away," the essential element must be the term "removal." State v. Dix, 14 N.C. App. 328, 188 S.E.2d 737 (1972).

Shift of Location within Same Structure May Constitute Carrying Away. — Where the shift of location or removal was done within a physical structure such a removal constituted a carrying away and sufficiently established the offense of kidnapping. State v. Dix, 14 N.C. App. 328, 188 S.E.2d 737 (1972).

Removal of Only a Few Feet Could Be Sufficient. — In a proper case, the removal of the victim only a few feet could be sufficient to constitute kidnapping. State v. Owen, 24 N.C. App. 598, 211 S.E.2d 830 (1975).

Crime May Be Committed by Means of Fraud. — The use of fraud instead of force to effect a kidnapping is likewise a violation of the kidnapping statute. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

In the kidnapping of a person the law considers the use of fraud as synonymous with force. State v. Hudson, 281 N.C. 100, 187 S.E.2d 756 (1972).

Fraud has become synonymous with force in the common-law definition of kidnapping. State v. Murphy, 280 N.C. 1, 184 S.E.2d 845 (1971).

The common-law definition of kidnapping now encompasses not only the unlawful taking and carrying away of a person by force but also the unlawful taking and carrying away of a person by false and fraudulent representations amounting substantially to a coercion of the will. State v. Murphy, 280 N.C. 1, 184 S.E.2d 845 (1971).

Where false and fraudulent representations or fraud amounting substantially to a coercion of the will of the kidnapped person are used as a substitute for force in effecting kidnapping, there is, in truth and in law, no consent at all on the part of the victim; and under those circumstances the law has long considered fraud and violence as the same in the kidnapping of a person. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

Under the pristine law of kidnapping, actual physical force was contemplated to accomplish the crime — fraud was not considered; however the Supreme Court has recognized that one's will may be coerced as effectually by fraud as by force. State v. Murphy, 280 N.C. 1, 184 S.E.2d 845 (1971).

Where false and fraudulent representations amounting substantially to a coercion of the will of the victim are used in lieu of force in effecting kidnapping, there is in law no consent at all on the part of the victim. Under those circumstances the law considers fraud the equivalent of force. State v. Murphy, 280 N.C. 1, 184 S.E.2d 845 (1971).

Apparent consent, having been obtained by fraud, was no consent at all but simply the fruit of fraud amounting substantially to a coercion of the victim's will. State v. Murphy, 280 N.C. 1, 184 S.E.2d 845 (1971).

If it be conceded arguendo that the evidence in this case was sufficient to require a charge on kidnapping by fraud as well as kidnapping by force, it is not perceived how a failure to charge on the fraudulent aspect of the matter was prejudicial to defendant, since kidnapping effected by fraud is still kidnapping, and failure to so charge would have been advantageous to defendant. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

Punishment Discretionary. —

This section leaves the term of imprisonment in the discretion of the court, imprisonment for life being the maximum punishment. State v. Barbour, 278 N.C. 449, 180 S.E.2d 115 (1971).

False Imprisonment. — At common law forcible detention was false imprisonment, not kidnapping. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971); State v. Dix, 282 N.C. 490, 193 S.E.2d 897 (1973).

The unlawful detention of a human being against his will is false imprisonment, not kidnapping. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971); State v. Dix, 282 N.C. 490, 193 S.E.2d 897 (1973).

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

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

Unlawful detention with the intent to carry away, without the asportation in fact being accomplished, does not constitute kidnapping. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

The element of carrying away is the differentiating factor between false imprisonment and kidnapping. State v. Dix, 282 N.C. 490, 193 S.E.2d 897 (1973).

The movement of the victim by the defendant must manifest the commission of a separate crime in distinguishing kidnapping from false imprisonment. State v. Owen, 24 N.C. App. 598, 211 S.E.2d 830 (1975).

There could be no kidnapping without there first being a false imprisonment. State v. Owen, 24 N.C. App. 598, 211 S.E.2d 830 (1975).

Common Law Applies. — Since § 4-1 adopts the common law as the law of this State (with exceptions not pertinent here), the common law with respect to kidnapping and false imprisonment is the law of this State. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971); State v. Dix, 282 N.C. 490, 193 S.E.2d 897 (1973).

It is not necessary for the unlawfulness to exist from the beginning of the transaction. State v. Barbour, 278 N.C. 449, 180 S.E.2d 115 (1971).

Prosecutorial Discretion in Choice of Crime. — When kidnapping, by definition overruns other crimes for which the prescribed punishment is less severe, a prosecutor has the naked and arbitrary power to choose the crime for which he will prosecute. State v. Dix, 282 N.C. 490, 193 S.E.2d 897 (1973).

A calloused concept of kidnapping creates the potential for abusive prosecutions since virtually every false imprisonment, assault, battery, rape, robbery, escape or jail delivery will involve some movement or intentional confinement. State v. Dix, 282 N.C. 490, 193 S.E.2d 897 (1973).

Sufficiency of Indictment. — A bill of indictment charging that defendant "unlawfully, willfully, feloniously and forcibly did kidnap" a named person is sufficient to withstand a motion to quash, since the word "kidnap" has a definite legal meaning. State v. Penley, 277 N.C. 704, 178 S.E.2d 490 (1971).

Where the bill of indictment is drafted in the language of this section, charging a defendant with kidnapping without defining the word, this is sufficient. If an indictment charges the offense in a plain, intelligible, and explicit manner and contains averments sufficient to enable the court to proceed to judgment, and to bar a subsequent prosecution for the same offense, it is sufficient. State v. Penley, 277 N.C. 704, 178 S.E.2d 490 (1971).

Consolidation of Kidnapping and Assault Charges. — Where the kidnapping and assault charges arose out of the same transaction and elements of the assault charge were essentials of the kidnapping charge, the consolidation of the assault and kidnapping charges was permissible under § 15-152 (now § 15A-926(a)). State v. Barbour, 278 N.C. 449, 180 S.E.2d 115 (1971).

State Not Required to Elect between Charges of Kidnapping and Armed Robbery. — Where a victim was forced from his residence at gunpoint and transported by a car for a distance of eight miles, where he was robbed, there was sufficient asportation and evidence to support a charge to the jury of both kidnapping and armed robbery, and the State is not required to elect between charges. State v. Sommerset, 21 N.C. App. 272, 204 S.E.2d 206 (1974).

Instruction on "Distance Carried Away" Held Proper. — In prosecution for kidnapping, where the distance the victim was carried is immaterial, the court's instructing the jury that "any carrying away is sufficient, members of the jury, that is the distance he is carried is immaterial," though disapproved, did not constitute reversible error. State v. Owen, 24 N.C. App. 598, 212 S.E.2d 830 (1975).

Instructions as to Lesser Included Offenses. — Where there was no evidence of any included lesser offenses embraced within the indictments for rape and kidnapping, the court was under no duty to charge on lesser included offenses. State v. Bynum, 282 N.C. 552, 193 S.E.2d 725 (1973).

Applied in State v. McClain, 282 N.C. 396, 193 S.E.2d 113 (1972); State v. Mitchell, 283 N.C. 462, 196 S.E.2d 736 (1973); State v. Robertson, 284 N.C. 549, 202 S.E.2d 157 (1974).

§ 14-41. Abduction of children.

Removal of Child from State by Parent in Absence of Custody Order. — See opinion of Attorney General to Honorable Roy R. Holdford, Jr., Solicitor, Second Solicitorial District, 40 N.C.A.G. 143 (1970).

Applicability to Arrest by Special Police. — See opinion of Attorney General to Mr. G.R. Rankin, Vanguard Security Service, 40 N.C.A.G. 152 (1970).

§ 14-43.1. Unlawful arrest by officers from other states. — A law-enforcement officer of a state other than North Carolina who, knowing that he is in the State of North Carolina and purporting to act by authority of his office, arrests a person in the State of North Carolina, other than as is permitted by G.S. 15A-403, is guilty of a misdemeanor punishable by a fine of not more than five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1973, c. 1286, s. 10.)

Editor's Note. — Session Laws 1973, c. 1286, s. 31, provides:

"Sec. 31. This act becomes effective on July 1, 1975, and is applicable to all criminal proceedings begun on and after that date and each provision is applicable to criminal proceedings pending on that date to the extent practicable, except § 12 [§§ 15-176.3 through 15-176.5] of this act which becomes effective on July 1, 1974."

Session Laws 1975, c. 573, amends Session Laws 1973, c. 1286, s. 31, so as to make the 1973 act effective Sept. 1, 1975, rather than July 1, 1975.

ARTICLE 11.

Abortion and Kindred Offenses.

§ 14-44. Using drugs or instruments to destroy unborn child.

Constitutional Power of State. — The State of North Carolina can constitutionally assign to the human organism in its early prenatal development as embryo and fetus the right to be born (with certain exceptions as set out in the statute). Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971).

Whether possessing a soul from the moment of conception or mere protoplasm, the fertilized egg is "unique as a physical entity," with the potential to become a person. The State's power to protect children is a well-established constitutional maxim. That this power should be used to protect a fertilized egg or embryo or fetus during the period of gestation embodies no logical infirmity, but would seemingly fall within the plenary power of government. Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971).

Section relates to destruction, etc. —

This statute makes it a felony to willfully administer to any woman who is pregnant or quick with child any substance whatever with intent to destroy such child. Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971).

This section and § 14-45, etc. —

The thrust of this section is to protect the unborn child and the thrust of § 14-45 to protect the pregnant woman. Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971).

Mother's Interests Are Superior to Unquickened Embryo. — The mother's interests (before quickening) are superior to that of an unquickened embryo. Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971).

§ 14-45. Using drugs or instruments to produce miscarriage or injure pregnant woman.

Constitutional Power of State. — The State of North Carolina can constitutionally assign to the human organism in its early prenatal development as embryo and fetus the right to be born (with certain exceptions as set out in the statute). Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971).

Whether possessing a soul from the moment of conception or mere protoplasm, the fertilized egg is "unique as a physical entity," with the potential to become a person. The State's power to protect children is a well established constitutional maxim. That this power should be used to protect a fertilized egg or embryo or fetus during the period of gestation embodies no logical infirmity, but would seemingly fall within the plenary power of government. Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971).

Section Is Designed, etc. —

The evil intent proscribed is to procure a miscarriage or injure or destroy the woman. Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971).

The thrust of § 14-44 is to protect the unborn child. Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971).

And the thrust of this section to protect the pregnant woman. Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971).

Mother's Interests Are Superior to Unquickened Embryo. — The mother's interests (before quickening) are superior to that of an unquickened embryo. Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971).

This section proscribes the administering of any drug with the intent to produce a miscarriage. It is the intent which is made requisite within the statute, and not the properties of the administered drug, which makes the violation of this statute a felony. State v. Lenderman, 20 N.C. App. 687, 202 S.E.2d 787 (1974).

It was not error for the trial court to exclude testimony to the effect that pills, taken as directed, would not cause an abortion and would have no effect upon the prosecuting witness, where there was no evidence in the record that defendant was aware the drug was

ineffective as a means to induce a miscarriage, and that defendant thereby lacked the intent required in this section. State v. Lenderman, 20 N.C. App. 687, 202 S.E.2d 787 (1974).

§ 14-45.1. When abortion not unlawful. — (a) Notwithstanding any of the provisions of G.S. 14-44 and G.S. 14-45, it shall not be unlawful, during the first 20 weeks of a woman's pregnancy, to advise, procure, or cause a miscarriage or abortion when the procedure is performed by a physician licensed to practice medicine in North Carolina in a hospital or clinic certified by the Department of Human Resources to be a suitable facility for the performance of abortions.

(b) Notwithstanding any of the provisions of G.S. 14-44 and G.S. 14-45, it shall not be unlawful, after the twentieth week of a woman's pregnancy, to advise, procure or cause a miscarriage or abortion when the procedure is performed by a physician licensed to practice medicine in North Carolina in a hospital licensed by the Department of Human Resources, if there is substantial risk that continuance of the pregnancy would threaten the life or gravely impair the health of the woman.

(c) The Department of Human Resources shall prescribe and collect on an annual basis, from hospitals or clinics where abortions are performed, such representative samplings of statistical summary reports concerning the medical and demographic characteristics of the abortions provided for in this section as it shall deem to be in the public interest. Hospitals or clinics where abortions are performed shall be responsible for providing these statistical summary reports to the Department of Human Resources. The reports shall be for statistical purposes only and the confidentiality of the patient relationship shall be protected.

(d) The requirements of G.S. 130-43 are not applicable to abortions performed pursuant to this section.

(e) Nothing in this section shall require a physician licensed to practice medicine in North Carolina or any nurse who shall state an objection to abortion on moral, ethical, or religious grounds, to perform or participate in medical procedures which result in an abortion. The refusal of such physician to perform or participate in these medical procedures shall not be a basis for damages for such refusal, or for any disciplinary or any other recriminatory action against such physician.

(f) Nothing in this section shall require a hospital or other health care institution to perform an abortion or to provide abortion services. (1967, c. 367, s. 2; 1971, c. 383, ss. 1, 1½; 1973, c. 139; c. 476, s. 128; c. 711.)

Editor's Note. —

The 1971 amendment changed the residence requirement of the former sixth paragraph from four months to thirty days, rewrote the former eighth paragraph and added the former last paragraph, requiring reports to be made to the State Board of Health.

Session Laws 1973, c. 139, changed the former last paragraph of the section, added by the 1971 amendment, so as to require abortions to be reported to the State Board of Health within 30 days of the date of discharge rather than within five days of the date of operation.

Session Laws 1973, c. 711, rewrote this section.

Pursuant to Session Laws 1973, c. 476, ss. 128 and 152, effective July 1, 1973, "Department of Human Resources" has been substituted for "North Carolina Medical Care Commission" in subsections (a) and (b) and for "State Board of Health" in subsection (c) of the section as rewritten by Session Laws 1973, c. 711.

For comment on a constitutional right to abortion, see 49 N.C.L. Rev. 487 (1971).

For note on equal protection and residence requirements, see 49 N.C.L. Rev. 753 (1971).

Constitutional Power of State. — The State of North Carolina can constitutionally assign to the human organism in its early prenatal development as embryo and fetus the right to be born (with certain exceptions as set out in the statute). Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971).

Whether possessing a soul from the moment of conception or mere protoplasm, the fertilized egg is "unique as a physical entity," with the potential to become a person. The State's power to protect children is a well-established constitutional maxim. That this power should be used to protect a fertilized egg or embryo or

fetus during the period of gestation embodies no logical infirmity, but would seemingly fall within the plenary power of government. Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971).

Burden of Proof. — The legislature did not intend to reverse the presumption of innocence, and the burden of proof in a prosecution is on the State to show that an abortion did not come within the exemptions of this section. Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971).

The burden of proof must be upon the State to show that the conditions for performing therapeutic abortions, a substantial risk to the life or the health of the mother, or a substantial risk that the child would be born with grave physical or mental defect, or rape or incest, were not present. Due process forbids that the accused be required to establish to the court and jury that the abortion performed came within the exemptions of the statute. Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971).

The words in this statute authorizing abortion by a medical doctor "... if he can reasonably establish that ..." simply means that the doctor must establish to his own satisfaction that one of the three statutory reasons for abortion exists before he may lawfully proceed. Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971).

Mother's Interests Superior to Unquickened Embryo. — The mother's interests (before quickening) are superior to that of an unquickened embryo. Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971).

"Minor" for Whom Consent of Another Is Required Is Person under 18. — See opinion of Attorney General to Lena S. Davis, 41 N.C.A.G. 489 (1971).

Consent of Minor or Incompetent Not Necessary. — See opinion of Attorney General to Mr. Clifton Craig, 41 N.C.A.G. 709 (1972), issued prior to the 1973 amendments to this section.

ARTICLE 12.

Libel and Slander.

§ 14-48: Repealed by Session Laws 1975, c. 402.

ARTICLE 13.

Malicious Injury or Damage by Use of Explosive or Incendiary Device or Material.

§ 14-49. Malicious use of explosive or incendiary; attempt; punishment.

The offense created by this section is malicious injury or damage to property, real or personal, by the use of high explosives. State v. Conrad, 275 N.C. 342, 168 S.E.2d 39 (1969); State v. Cannady, 18 N.C. App. 213, 196 S.E.2d 617 (1973).

The word "malicious" as used in this section connotes a feeling of animosity, hatred or ill will toward the owner, the possessor, or the occupant. State v. Conrad, 275 N.C. 342, 168 S.E.2d 39 (1969); State v. Cannady, 18 N.C. App. 213, 196 S.E.2d 617 (1973).

"Malicious" means more than intending wrong, it connotes actual ill will or resentment toward the owner or possessor of the property and is an element of preconceived revenge. State v. Cannady, 18 N.C. App. 213, 196 S.E.2d 617 (1973).

"Feloniously" Not Substitute for "Maliciously" in Indictment Under this Section. — Use of the word "feloniously" in an indictment based on subsection (b) charging defendants with damaging real and personal property of another by use of an explosive was not a sufficient substitute for the word "maliciously" as used in the statute, since the word "feloniously" implies that the act charged to have been done proceeded from an evil heart and wicked purpose but does not allege the necessary element of actual ill will, hatred or animosity of the accused toward the person whose property was injured. State v. Cannady, 18 N.C. App. 213, 196 S.E.2d 617 (1973).

Without the element of malicious damage to property being alleged in the indictment, regardless of the method with which the damage was caused, the defendants were not apprised of the crime charged and the bill of indictment was defective. State v. Cannady, 18 N.C. App. 213, 196 S.E.2d 617 (1973).

Indictment Should Contain Identifying Description of Property. — Since no distinction whatever is made between real and personal property in this section an indictment under this section should contain an identifying description of the property which the defendant damaged or attempted to damage by the use of the explosive. State v. Conrad, 275 N.C. 342, 168 S.E.2d 39 (1969).

Where the Jury Can Consider Lesser Offense. — On an indictment under § 14-49.1, if proof of occupancy fails, the jury can consider

the lesser included offense of malicious injury to unoccupied property under this section. State v. Hanford, 16 N.C. App. 353, 191 S.E.2d 910 (1972).

Verdict in Consolidated Trial of Separate Indictments. — See same catchline in note under § 14-49.1.

Applied in State v. Chavis, 24 N.C. App. 148, 210 S.E.2d 555 (1974).

§ 14-49.1. Malicious damage of occupied property by use of explosive or incendiary; attempt; punishment.

The offense created by this section is malicious injury or damage to property, real or personal, by the use of high explosives. State v. Little, 286 N.C. 185, 209 S.E.2d 749 (1974).

The word "malicious," as used in this section, connotes a feeling of animosity, hatred or ill will toward the owner, the possessor or the occupant. State v. Little, 286 N.C. 185, 209 S.E.2d 749 (1974).

Indictment Should Include Description of Any Other Property Injured. — An indictment drawn under this section should include not only the description of the occupied property and the name of the occupant but any other property injured or attempted to be injured by the explosion so that if proof of occupancy fails, the jury could consider whether the defendant is guilty under § 14-49 of the lesser included offense of malicious injury to unoccupied property. State v. Conrad, 275 N.C. 342, 168 S.E.2d 39 (1969); State v. Hanford, 16 N.C. App. 353, 191 S.E.2d 910 (1972).

Where the Jury Can Consider Lesser Offense. — On an indictment under this section, if proof of occupancy fails, the jury can consider the lesser included offense of malicious injury to unoccupied property under § 14-49. State v. Hanford, 16 N.C. App. 353, 191 S.E.2d 910 (1972).

Verdict in Consolidated Trial of Separate Indictments. — In consolidated trial of separate indictments charging the same defendant with malicious damage to an occupied dwelling and malicious damage to an automobile, where the evidence discloses but one explosion and the jury returns a verdict finding defendant guilty of malicious damage to the occupied dwelling, a further jury verdict finding defendant guilty of malicious damage to the automobile should be treated as surplusage, since the verdict of dynamiting the occupied dwelling contains the maximum charge under § 14-49 as amended by this section. State v. Conrad, 275 N.C. 342, 168 S.E.2d 39 (1969).

§ 14-50. Conspiracy to injure or damage by use of explosive or incendiary; punishment.

This section does not require that the owner of the property be named in the indictment but only that it be property belonging to one other than defendant. State v. Hanford, 16 N.C. App. 353, 191 S.E.2d 910 (1972).

Burning of bushes and fences involves the use of an incendiary device thus making the conspiracy a felony. State v. Bindyke, 25 N.C. App. 273, 212 S.E.2d 666 (1975).

§ 14-50.1. Explosive or incendiary device or material defined.

Applied in State v. Bindyke, 25 N.C. App. 273, 212 S.E.2d 666 (1975).

SUBCHAPTER IV. OFFENSES AGAINST THE HABITATION AND OTHER BUILDINGS.

ARTICLE 14.

Burglary and Other Housebreakings.

§ 14-51. First and second degree burglary.

First and Second Degree, etc. —
If the burglarized dwelling is occupied, it is burglary in the first degree; if unoccupied, it is burglary in the second degree. State v. Frank,

284 N.C. 137, 200 S.E.2d 169 (1973); State v. Wood, 286 N.C. 248, 210 S.E.2d 52 (1974).

The bill of indictment returned by the grand jury charged all of the elements of burglary in the first degree. Consequently, it necessarily charged all of the elements of burglary in the second degree plus the additional allegation that the dwelling house in question was actually occupied at the time of the alleged breaking and entry by the defendant. This further element of actual occupancy at the time of the breaking and entering is the only distinction between the two degrees of burglary. State v. Allen, 279 N.C. 115, 181 S.E.2d 453 (1971).

Elements of Burglary in First Degree. —

In accord with original. See State v. Accor, 277 N.C. 65, 175 S.E.2d 583 (1970).

Burglary in the first degree is the breaking and entering during the nighttime of an occupied dwelling or sleeping apartment with intent to commit a felony therein. State v. Henderson, 285 N.C. 1, 203 S.E.2d 10 (1974); State v. Bell, 285 N.C. 746, 208 S.E.2d 506 (1974).

The elements of burglary in the first degree are: (1) the breaking (2) and entering (3) in the nighttime (4) with the intent to commit a felony (5) into a dwelling house or a room used as a sleeping apartment in any house or sleeping apartment (6) which is actually occupied at the time of the offense. State v. Davis, 282 N.C. 107, 191 S.E.2d 664 (1972).

A "breaking" is an essential element of the offense of first-degree burglary. There is a sufficient "breaking" to sustain a charge of first-degree burglary when a person unlocks a door with a key, or opens a closed, but not fastened window. State v. Henderson, 285 N.C. 1, 203 S.E.2d 10 (1974).

Proof that a breaking occurred, or from which it may reasonably be inferred that the defendant broke into the dwelling, is usually accomplished by testimony showing that prior to the entry all doors and windows were closed. State v. Alexander, 18 N.C. App. 460, 197 S.E.2d 272 (1973).

In order to show a breaking it is not required that the State offer evidence of damage to a door or window. State v. Henderson, 285 N.C. 1, 203 S.E.2d 10 (1974).

Nighttime. — The law considers it to be nighttime when it is so dark that a man's face cannot be identified except by artificial light or moonlight. With respect to burglary, there is no statutory definition of nighttime in North Carolina. State v. Frank, 284 N.C. 137, 200 S.E.2d 169 (1973).

Although the common law required an indictment for burglary to allege the hour the crime was committed, today it is sufficient to aver that the crime was committed in the nighttime. State v. Wood, 286 N.C. 248, 210 S.E.2d 52 (1974).

Intent. — The fifth element of burglary — the intent to commit a felony — must exist at the time of the breaking and entering. Intent, being a state of mind, is difficult to prove and ordinarily is a question for the jury to decide. State v. Alexander, 18 N.C. App. 460, 197 S.E.2d 272 (1973).

Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred. State v. Bell, 285 N.C. 746, 208 S.E.2d 506 (1974).

The intent with which an accused broke and entered may be found by the jury from evidence as to what he did within the house. State v. Bell, 285 N.C. 746, 208 S.E.2d 506 (1974).

The fact that a felony was actually committed after the house was entered is not necessarily proof of the intent requisite for the crime of burglary, but is only evidence from which such intent at the time of the breaking and entering may be found. State v. Bell, 285 N.C. 746, 208 S.E.2d 506 (1974).

Actual Commission of Felony Not Required. — Actual commission of the felony, which the indictment charges was intended by the defendant at the time of the breaking and entering, is not required in order to sustain a conviction of burglary. State v. Bell, 285 N.C. 746, 208 S.E.2d 506 (1974).

Sufficient Evidence to Submit Question of Second Degree Burglary. —

When the solicitor announces that he will not seek a conviction upon the maximum degree of the crime charged in the bill of indictment, and the defendant interposes no objection to being tried upon the lesser degree of the offense, the sufficiency of the evidence to support a conviction of the lesser degree must be measured by the same standards which would be applied had the bill of indictment charged only the lesser degree of the offense. State v. Allen, 279 N.C. 115, 181 S.E.2d 453 (1971).

Jury Must Determine Whether Criminal Intent Existed. — Where the evidence is sufficient for submission to the jury upon the allegations contained in the indictment, it is for the jury to determine, under all the circumstances, whether the defendant had the ulterior criminal intent at the time of breaking and entering to commit the felony charged in the indictment. State v. Accor, 277 N.C. 65, 175 S.E.2d 583 (1970).

The indictment having identified the intent necessary, the State is held to the proof of that

intent. Of course, intent or absence of it may be inferred from the circumstances surrounding the occurrence, but the inference must be drawn by the jury. State v. Accor, 277 N.C. 65, 175 S.E.2d 583 (1970).

The fact of the entry alone, in the nighttime, accompanied by flight when discovered, is some evidence of guilt, and in the absence of any other proof, or evidence of other intent, and with no explanatory facts or circumstances, may warrant a reasonable inference of guilty intent. State v. Accor, 277 N.C. 65, 175 S.E.2d 583 (1970).

People do not usually enter the dwellings of others in the nighttime, when the inmates are asleep, with innocent intent. The most usual intent is to steal, and when there is no explanation or evidence of a different intent, the ordinary mind will infer this also. State v. Accor, 277 N.C. 65, 175 S.E.2d 583 (1970).

Occupancy of Dwelling Is No Defense to Charge of Second Degree Burglary. — If the bill of indictment, by omitting any allegation as to occupancy of the building, charged second degree burglary only and if the evidence is sufficient to show all of the elements thereof, proof of actual occupancy of the dwelling at the time of the breaking and entering is not a defense to the charge. State v. Allen, 279 N.C. 115, 181 S.E.2d 453 (1971).

Where the solicitor's announcement precluded a verdict of guilty of burglary in the first degree, it was, in effect, a stipulation by the State that the house was not actually occupied at the time of the breaking and entering. The defendant, not having objected thereto at the time of the announcement, may not await the outcome of the trial and then attack the validity of the verdict that he was guilty of second degree burglary on the ground that the house was occupied and so he was guilty of the more serious crime. State v. Allen, 279 N.C. 115, 181 S.E.2d 453 (1971).

Instruction on Punishment Properly Refused. — Where the offense was committed subsequent to January 18, 1973, the trial judge properly refused to instruct the jury as to the punishment which would result from a conviction of rape or first-degree burglary. State v. Henderson, 285 N.C. 1, 203 S.E.2d 10 (1974).

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

Stated in State v. Bell, 284 N.C. 416, 200 S.E.2d 601 (1973).

Cited in State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969); State v. Richardson, 8 N.C. App. 298, 174 S.E.2d 77 (1970).

§ 14-52. Punishment for burglary. — Any person convicted of the crime of burglary in the first degree shall be imprisoned for life in the State's prison. Anyone so convicted of burglary in the second degree shall suffer imprisonment in the State's prison for life, or for a term of years, in the discretion of the court. (1870-1, c. 222; Code, s. 994; 1889, c. 434, s. 2; Rev., s. 3330; C. S., s. 4233; 1941, c. 215, s. 1; 1949, c. 299, s. 2; 1973, c. 1201, s. 3.)

Cross References. — As to what constitutes a sentence of life imprisonment, see § 14-2. As to eligibility of prisoners serving life sentence for parole, see § 148-58.

Editor's Note. — The 1973 amendment rewrote the first sentence, which formerly provided for the death penalty unless the jury should recommend life imprisonment. The 1973 amendatory act became effective April 8, 1974, and applies to all offenses thereafter committed.

Session Laws 1975, c. 703, ss. 1-3, provide:

"Section 1. The provisions of G.S. 14-52 and G.S. 14-58, as rewritten by Sections 3 and 4, respectively, of Chapter 1201 of the Session Laws of 1973, providing that punishment for first degree burglary and arson shall be imprisonment for life in the State's prison, shall apply to all crimes of first degree burglary and arson committed prior to April 8, 1974, the effective date of Chapter 1201, Session Laws of 1973, as well as to those thereafter committed.

"Sec. 2. In all cases in which the defendant has been convicted of first degree burglary or arson committed prior to April 8, 1974, and a sentence of death has been pronounced, the defendant may apply to the judge who presided at the burglary or arson trial resulting in the sentence of death, or, if said judge is unavailable, to a resident superior court judge of the judicial district in which said burglary or arson trial was held for a modification of the sentence in accordance with the terms of this act. Upon appropriate findings of fact, the judge shall pronounce a sentence of imprisonment for life which shall be imposed in lieu of the death sentence. The defendant shall be allowed credit for time spent in custody awaiting execution of the sentence of death.

"Sec. 3. An indigent person under sentence of death for first degree burglary or arson committed before April 8, 1974, shall be entitled to counsel in making one application under this act for each such sentence of death, if he is otherwise entitled under Article 36 of Chapter 7A of the General Statutes of North Carolina."

For article entitled "Capital Punishment and Life Imprisonment in North Carolina, 1946 to 1968: Implications for Abolition of the Death Penalty," see 6 Wake Forest Intra. L. Rev. 417 (1970).

The cases in the following annotation were decided under this section as it stood before the 1973 amendment.

Constitutionality of Death Penalty. — In Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), the imposition and carrying out the death penalty was held to constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. — Ed. note.

Capital punishment has not been declared unconstitutional per se. Rather, the Eighth and Fourteenth Amendments will no longer tolerate the infliction of the death sentence if either judge or jury is permitted to impose that sentence as a matter of discretion. State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973).

The Supreme Court of the United States has held that the imposition of the death penalty, under certain state statutes and in the application thereof, is unconstitutional. That decision does not affect the conviction but only the death sentence. State v. Davis, 282 N.C. 107, 191 S.E.2d 664 (1972).

Death penalty or life imprisonment as the punishment for burglary in the first degree, does not violate the cruel and unusual punishment prohibition of the Eighth Amendment to the federal Constitution and Art. I, §§ 19 and 27, of the Constitution of North Carolina. A sentence of imprisonment which is within the maximum authorized by statute is not cruel or unusual in a constitutional sense, unless the punishment provisions of the statute itself are unconstitutional. State v. Foster, 284 N.C. 259, 200 S.E.2d 782 (1973).

Prospective Application of Mandatory Death Penalty. — North Carolina's mandatory death penalty for rape, murder in the first degree, burglary in the first degree and arson may not be constitutionally applied to any offense committed prior to the date of this decision (January 18, 1973) but shall be applied to any offense committed after such date. State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973).

In State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973), the State Supreme Court held that the effect of Furman v. Georgia was (1) to invalidate the proviso of this section, as well as the identical proviso in §§ 14-17 (murder), 14-21 (rape) and 14-58 (arson) — and (2) to make death the penalty for murder in the first degree, burglary in the first degree, rape and arson. However, recognizing that this interpretation made an upward change in the penalty for these four crimes, the decision in Waddell was made to apply prospectively only. Thus, it is inapplicable to any such offense committed prior to 18 January 1973. State v. Talbert, 282 N.C. 718, 194 S.E.2d 822 (1973).

The punishment to be imposed for capital felonies is no longer a discretionary question for the jury and therefore no longer a proper subject for an instruction by the judge. State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973).

The only sentence the trial judge was authorized to impose on the defendant for the crime of first-degree burglary was imprisonment for life. State v. Summers, 284 N.C. 361, 200 S.E.2d 808 (1973).

The meaning of this section, in the light of the decision of the Supreme Court of the United States in Furman v. Georgia, is that a defendant, lawfully convicted of first-degree murder, rape, first-degree burglary or arson, the offense having been committed after January 18, 1973, must be sentenced to death, the trial judge having no discretion in the matter of the sentence to be imposed and the jury having no authority to fix a different punishment. State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721 (1974).

The effect of Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), upon the law of North Carolina concerning the punishment for rape, murder in the first degree, arson and burglary in the first degree, is this: Upon the trial of any defendant so charged, the trial judge may not instruct the jury that it may in its discretion add to its verdict of guilty a recommendation that defendant be sentenced to life imprisonment. The trial judge should charge on the constituent elements of the offense set out in the bill of indictment and instruct the jury under what circumstances a verdict of guilty or not guilty should be returned. Upon the return of a verdict of guilty of any such offense, the court must pronounce a sentence of death. State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973).

Since January 18, 1973, the general rule that the amount of punishment is of no concern to the jurors has become, and is now, applicable in all cases without exception, including capital cases because juries in the State no longer have the discretionary power to reduce the penalty in capital cases from death to life imprisonment. State v. Watkins, 283 N.C. 504, 196 S.E.2d 750 (1973).

Retention, Etc., of Death Penalty Is Legislative Question. — The matter of retention, modification or abolition of the death penalty is a question for the lawmaking authorities rather than the courts. State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973).

Punishment Not Exceeding Statutory Limits Cannot Be Classified Cruel and Unusual. — When punishment does not exceed the limits fixed by statute, it cannot be classified as cruel and unusual in a constitutional sense. State v. Barber, 278 N.C. 268, 179 S.E.2d 404

(1971); State v. Davis, 282 N.C. 107, 191 S.E.2d 664 (1972).

A sentence of imprisonment for a period of 30 years to life is within the maximum authorized by this section for burglary in the second degree and is not cruel or unusual in a constitutional sense. State v. Edwards, 282 N.C. 578, 193 S.E.2d 736 (1973).

Applied in Parker v. North Carolina, 397 U.S. 790, 90 S. Ct. 1458, 1474, 25 L. Ed. 2d 785 (1970); State v. Green, 280 N.C. 431, 185 S.E.2d 872 (1972).

Cited in State v. Britt, 285 N.C. 256, 204 S.E.2d 817 (1974); State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975); State v. Woodson, 287 N.C. 578, 215 S.E.2d 607 (1975).

§ 14-53. Breaking out of dwelling house burglary.

The absence of evidence of breaking does not constitute a fatal defect of proof. State v. Vester, 22 N.C. App. 16, 205 S.E.2d 556 (1974).

Cited in State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969); State v. Richardson, 8 N.C. App. 298, 174 S.E.2d 77 (1970).

§ 14-54. Breaking or entering buildings generally.

This section concerns only the crimes of breaking and entering buildings and does not relate to the felony of larceny. The crime of larceny after breaking or entering is punishable as provided in § 14-72. State v. Haigler, 14 N.C. App. 501, 188 S.E.2d 586 (1972).

A breaking is not a necessary element of the offense defined in this section. State v. Lassiter, 15 N.C. App. 265, 189 S.E.2d 798 (1972).

Offense Is Complete if There Is Entry with Felonious Intent. — The offense defined in this section is complete, all other elements being present, if there was an entry with felonious intent. State v. Lassiter, 15 N.C. App. 265, 189 S.E.2d 798 (1972).

Accomplishment of Felonious Intent Is Not a Prerequisite. — If there is a breaking and entering with the felonious intent to steal, the accomplishment of the felonious intent is not a prerequisite of guilt. State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972); State v. Harlow, 16 N.C. App. 312, 191 S.E.2d 900 (1972).

And Owner of Property Sought to Be Stolen Need Not Be Identified. — If there is a breaking and entering with the felonious intent to steal, the identification of the owner of the personal property sought to be stolen is not a prerequisite to guilt. State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972).

A person is guilty of feloniously breaking and entering a dwelling house if he unlawfully breaks and enters such dwelling house with the intent to steal personal property located therein without reference to the ownership thereof. State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972).

Criminal Conduct Not Determined by Success of Venture. —

In accord with 2nd paragraph in original. See State v. Sawyer, 283 N.C. 289, 196 S.E.2d 250 (1973).

The term "larceny" is a vital element of the crime of breaking and entering with the intent to commit larceny. State v. Elliott, 21 N.C. App. 555, 205 S.E.2d 106 (1974).

Intent Must Be Shown. —

Either a breaking or an entering with the requisite intent is sufficient to constitute a violation of this section. State v. Bronson, 10 N.C. App. 638, 179 S.E.2d 823 (1971).

Intent is not a prescribed element of wrongful breaking and entering under subsection (b) of this section. See State v. Currie, 19 N.C. App. 17, 198 S.E.2d 28 (1973).

Ownership of Property Is Immaterial. —

It is no defense to a larceny charge that title to the property taken is in one other than the person from whom it was taken. The same rule applies to breaking and entering with larcenous intent. State v. Richardson, 8 N.C. App. 298, 174 S.E.2d 77 (1970).

Value of Stolen Property Immaterial. —

Where larceny is committed pursuant to breaking and entering, it constitutes a felony without regard to the value of the property in question. State v. Richardson, 8 N.C. App. 298, 174 S.E.2d 77 (1970).

Description of Building. —

Particular identification in the indictment of the building alleged to have been broken into and entered is desirable. State v. Melton, 7 N.C. App. 721, 173 S.E.2d 610 (1970).

In light of the growth in population and in the number of structures (domestic, business and governmental), the prosecuting officers of this State would be well advised to identify the subject premises in a bill of indictment under this section by street address, highway address, rural road address or some clear description and designation to set the subject premises apart from like and other structures described in Article 14 of this Chapter. State v. Carroll, 10 N.C. App. 143, 178 S.E.2d 10 (1970).

Under this section, the breaking or entering of any building with intent to commit a felony or larceny therein constitutes a felony. Thus the

necessity for describing the building in the bill of indictment for the purpose of showing that it is within the statute no longer exists. It remains necessary, however, to identify the building with reasonable particularity so as to enable the defendant to prepare his defense and plead his conviction or acquittal as a bar to further prosecution for the same offense. State v. Carroll, 10 N.C. App. 143, 178 S.E.2d 10 (1970).

Possession of Recently Stolen Property. —

In accord with original. See State v. Snuggs, 18 N.C. App. 226, 196 S.E.2d 525 (1973).

Lesser Offense Than Burglary, etc. —

In accord with 1st paragraph in original. See State v. Bell, 284 N.C. 416, 200 S.E.2d 601 (1973).

Included Offense. —

In accord with 4th paragraph in original. See State v. Lewis, 17 N.C. App. 117, 193 S.E.2d 455 (1972).

Any person who breaks or enters any building described in this section with intent to commit any felony or larceny therein, is guilty of a felony. A wrongful breaking or entering into such building, without the intent to commit any felony therein, is a misdemeanor, a lesser included offense within the meaning of § 15-170. State v. Dozier, 19 N.C. App. 740, 200 S.E.2d 348 (1973).

Receiving stolen goods is not a lesser included offense of breaking and entering but a separate and distinct offense. State v. Miller, 18 N.C. App. 489, 197 S.E.2d 46 (1973).

Felonious Breaking and Entering as Lesser Included Offense of Felony-Murder. — Where proof that defendant feloniously broke into and entered a dwelling is an essential and indispensable element in the State's proof of murder committed in the perpetration of the felony of feloniously breaking into and entering that particular dwelling, the conviction of defendant for felony-murder, that is, murder in the first degree without proof of malice, premeditation or deliberation, is based on a finding by the jury that the murder was committed in the perpetration of the felonious breaking and entering, and the felonious breaking and entering is a lesser included offense of the felony-murder. Hence, a separate verdict of guilty of felonious breaking and entering affords no basis for additional punishment. State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972).

Unlocking Door, etc. —

The State is not required to offer evidence of damage to a door or window. A breaking or entering condemned by the statute may be shown to be a mere pushing or pulling open of an unlocked door or the raising or lowering of an unlocked window, or the opening of a locked door with a key. State v. Bronson, 10 N.C. App. 638, 179 S.E.2d 823 (1971).

Since subsection (a) of this section is in the disjunctive, the contention that there is no evidence that defendant broke and entered a house is not well taken. State v. Houston, 19 N.C. App. 542, 199 S.E.2d 668 (1973).

Entry without Breaking. —

Where the evidence in the case and the inferences to be reasonably drawn therefrom were not such as would have required the jury to find that defendant entered by a burglarious breaking, the jury might reasonably have inferred that defendant made his entry without a burglarious breaking. State v. Bell, 284 N.C. 416, 200 S.E.2d 601 (1973).

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

Proper Instruction. —

In prosecutions under this section, where the indictment charges the defendant with breaking and entering, proof by the State of either a breaking or an entering is sufficient, and instructions allowing juries to convict on the alternative propositions are proper. State v. Boyd, 287 N.C. 131, 214 S.E.2d 14 (1975).

Instruction in Words of Section Held Proper. — Where the court charged in the words of this section, the instruction was free from prejudicial error. State v. Wade, 14 N.C. App. 414, 188 S.E.2d 714 (1972).

Evidence held sufficient to overrule nonsuit, etc. —

The court properly denied a motion for nonsuit where the State, having introduced substantial evidence of each element of the offense of breaking or entering the building as charged in the indictment and that defendant was one of the persons who committed the offense, the question of guilt or innocence was properly submitted to the jury. State v. Burch, 24 N.C. App. 514, 211 S.E.2d 511 (1975).

Evidence held sufficient, etc. —

Evidence that around midnight the defendant and a companion broke the glass door of a hardware store and took away guns and ammunition was held sufficient to show a

present intent on the part of defendant to take property belonging to another and convert it to his own use. State v. Thompson, 8 N.C. App. 313, 174 S.E.2d 130 (1970).

Evidence Held Insufficient. — There was insufficient evidence from which the jury could find that defendant committed the breaking and entering where no fingerprints were taken linking the defendant to the break-in, no effort was made to determine whether the footprints leading from the home matched the defendant's footprints, and where clearly defendant never had actual possession of the stolen merchandise. State v. McKinney, 25 N.C. App. 283, 212 S.E.2d 707 (1975).

Punishment. —

Sentence of imprisonment for not less than six nor more than ten years for felonious breaking and entering was punishment within the limits authorized by statute and is not cruel and unusual punishment within the constitutional prohibition. State v. Strickland, 10 N.C. App. 540, 179 S.E.2d 162 (1971).

A sentence of ten years is not in excess of that permitted by the statute upon a conviction of the felony of breaking and entering in violation of subsection (a) of this section. State v. Cleary, 9 N.C. App. 189, 175 S.E.2d 749 (1970).

Where defendant was tried and convicted upon an indictment charging felonious breaking and entering and misdemeanor larceny, and both counts were consolidated for judgment, the fact that the one sentence imposed is in excess of that permissible upon conviction of the misdemeanor is immaterial and is not prejudicial where it does not exceed that permitted upon conviction of the felony. State v. Cleary, 9 N.C. App. 189, 175 S.E.2d 749 (1970).

Effect and Application of 1969 Amendment. — The title of the 1969 amendatory act, Session Laws 1969, c. 543, s. 7, expresses the legislative intent to clarify, not to repeal, "the laws relating to burglary and related offenses." It is, therefore, clear that the 1969 act amended, rather than repealed, this section. State v. Melton, 7 N.C. App. 721, 173 S.E.2d 610 (1970).

A defendant may be prosecuted, and if lawfully convicted may be punished, after the effective date of the 1969 amendment for a violation of this section as it existed prior to the effective date of that amendment where the offense was committed prior to the effective date. State v. Melton, 7 N.C. App. 721, 173 S.E.2d 610 (1970).

A defendant is entitled to have the jury instructed as to what facts they were required to find in order to find him guilty under the statute as it existed on the date the offense was alleged to have been committed, without reference to the less stringent requirements of the amended statute. State v. Melton, 7 N.C. App. 721, 173 S.E.2d 610 (1970).

When Entry Is Lawful. — An entry is found to be a lawful one where the owner of the premises gives the defendant permission to enter, and where the entry is with the consent and at the instance of the owner. State v. Thompson, 8 N.C. App. 313, 174 S.E.2d 130 (1970).

Bill of Indictment Must Sufficiently Describe Crime Alleged. — The bill of indictment under this section must describe the crime alleged in such detail as would enable the defendant to plead his conviction or acquittal thereof as a bar to another prosecution for the same offense. State v. Carroll, 10 N.C. App. 143, 178 S.E.2d 10 (1970).

The indictment charged store-breaking, larceny and receiving in the language of the statute under which it was drawn, § 14-72 and this section, and contained the elements of the offense intended to be charged, and sufficiently informed the petitioner of the crime with which he was charged so that he could adequately prepare his defense and could plead the judgment as a bar to any subsequent prosecution for the same offense. Nothing more was required. Harris v. North Carolina, 320 F. Supp. 770 (M.D.N.C. 1970).

"Intent". — Intent is a mental attitude which must ordinarily be proved by circumstances from which it can be inferred. State v. Bronson, 10 N.C. App. 638, 179 S.E.2d 823 (1971); State v. Harlow, 16 N.C. App. 312, 191 S.E.2d 900 (1972).

Determining Intent. — The intent with which defendant broke and entered, or entered, may be found by the jury from what he did within the building. State v. Bronson, 10 N.C. App. 638, 179 S.E.2d 823 (1971).

In determining the presence or absence of the element of intent the jury may consider the acts and conduct of defendant and the general circumstances existing at the time of the alleged commission of the offense. State v. Bronson, 10 N.C. App. 638, 179 S.E.2d 823 (1971).

Only Intent to Commit Larceny Need Be Shown. — For felonious breaking and entering there need be only an intent to commit larceny, and the value of the property involved is immaterial. State v. Richardson, 8 N.C. App. 298, 174 S.E.2d 77 (1970).

Intoxication as Defense. — Intoxication which renders an offender utterly unable to form the required specific intent may be shown as a defense. State v. Bronson, 10 N.C. App. 638, 179 S.E.2d 823 (1971).

Evidence that defendant was in an intoxicated condition at the time he was apprehended fell short of a showing that defendant was in such an intoxicated condition that he was utterly unable to form the intent required. State v. Bronson, 10 N.C. App. 638, 179 S.E.2d 823 (1971).

Voluntary intoxication is not a defense. State v. Tillman, 22 N.C. App. 688, 207 S.E.2d 316 (1974).

Insanity as Defense. — Insanity is an affirmative defense and the burden of carrying it is upon the defendant. State v. Tillman, 22 N.C. App. 688, 207 S.E.2d 316 (1974).

Tracing Stolen Articles to Defendant. — It is always competent in a prosecution for breaking and entering and larceny to show all of the goods lost from a store and to trace some or all of the articles to a defendant. State v. Richardson, 8 N.C. App. 298, 174 S.E.2d 77 (1970).

Double Jeopardy. — Where a defendant has been tried for breaking and entering, and then the State tries him for a felony in which breaking and entering is an indispensable element, he has suffered double jeopardy. This is because the charge against him was increased after he had been tried for an offense consisting of an essential element of the greater offense. Wood v. Ross, 434 F.2d 297 (4th Cir. 1970).

Applied in State v. Wilson, 6 N.C. App. 618, 170 S.E.2d 557 (1969); State v. McDonald, 6 N.C. App. 627, 170 S.E.2d 551 (1969); State v. Perry, 8 N.C. App. 83, 173 S.E.2d 521 (1970); State v. Crabb, 9 N.C. App. 333, 176 S.E.2d 39 (1970); State v. Gordon, 12 N.C. App. 38, 182 S.E.2d 14 (1971); State v. Cadora, 13 N.C. App. 176, 185 S.E.2d 297 (1971); State v. Oliver, 13 N.C. App. 184, 184 S.E.2d 900 (1971); State v. Ruiz, 13 N.C. App. 187, 185 S.E.2d 300 (1971); State v. Perry, 13 N.C. App. 304, 185 S.E.2d 467 (1971); State v. Eppley, 14 N.C. App. 314, 188 S.E.2d 758 (1972); State v. Gore, 14 N.C. App. 645, 188 S.E.2d 660 (1972); State v. Goode, 16 N.C. App. 188, 191 S.E.2d 241 (1972); State v. Boggs, 16 N.C. App. 403, 192 S.E.2d 29 (1972); State v. Huffman, 16 N.C. App. 653, 192 S.E.2d 621 (1972); State v. Brady, 18 N.C. App. 325, 196 S.E.2d 813 (1973); State v. Irby, 19 N.C. App. 262, 198 S.E.2d 447 (1973); In re Meyers, 22 N.C. App. 11, 205 S.E.2d 569 (1974); In re Meyers, 25 N.C. App. 555, 214 S.E.2d 268 (1975).

Stated in State v. Johnson, 7 N.C. App. 53, 171 S.E.2d 106 (1969).

Cited in State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969); State v. Dickerson, 6 N.C. App. 131, 169 S.E.2d 510 (1969); State v. Smith, 11 N.C. App. 552, 181 S.E.2d 778 (1971); Culp v. Bounds, 325 F. Supp. 416 (W.D.N.C. 1971); State v. Harris, 279 N.C. 307, 182 S.E.2d 364 (1971); State v. Watson, 13 N.C. App. 189, 185 S.E.2d 33 (1971); Withers v. North Carolina, 328 F. Supp. 1152 (W.D.N.C. 1971); State v. Cooper, 17 N.C. App. 184, 193 S.E.2d 352 (1972); State v. Smathers, 287 N.C. 226, 214 S.E.2d 112 (1975).

§ 14-55. Preparation to commit burglary or other housebreakings.

Separate Offenses. —

In accord with 2nd paragraph in original. See State v. Shore, 10 N.C. App. 75, 178 S.E.2d 22 (1970); State v. Hines, 15 N.C. App. 337, 190 S.E.2d 293 (1972).

The second defined offense under this section is the possession of an implement of housebreaking without lawful excuse. State v. Shore, 10 N.C. App. 75, 178 S.E.2d 22 (1970).

Sufficiency of Indictment. —

Where a count in an indictment contains words set forth in the second offense defined in this section, namely, "having in his possession without lawful excuse," those words are mere surplusage where the count sufficiently embraces the first offense defined in this section. State v. Hines, 15 N.C. App. 337, 190 S.E.2d 293 (1972).

The essential elements of the crime of possession of implements of housebreaking are (1) the possession of an implement of housebreaking (2) without lawful excuse, and the State has the burden of proving both of these elements. State v. Stockton, 13 N.C. App. 287, 185 S.E.2d 459 (1971).

State's Burden of Proof. —

In accord with 2nd paragraph in original. See State v. McCloud, 276 N.C. 518, 173 S.E.2d 753 (1970); State v. McCloud, 7 N.C. App. 132, 171 S.E.2d 470 (1970).

In a prosecution for unlawful possession of implements of housebreaking, the burden is on the State to show (1) that the person charged was found having in his possession an implement of housebreaking and (2) that such possession was without lawful excuse. State v. Shore, 10 N.C. App. 75, 178 S.E.2d 22 (1970).

Upon indictment for a crime under this section, the State has the burden of proving the following two things: (1) that the defendant was found to have in his possession an implement or implements of housebreaking enumerated in, or which come within the meaning of the statute and (2) that such possession was without lawful excuse. State v. Beard, 22 N.C. App. 596, 207 S.E.2d 390 (1974).

Proof of "Intent" or "Unlawful Use," etc. —

The offense of possessing implements of housebreaking does not require the proof of "intent" in this State. State v. Ledford, 24 N.C. App. 542, 211 S.E.2d 532 (1975).

Statute Condemns Possession of Implement with Intent to Burglarize. — The possession of an implement with intent to burglarize and not the character of the object (be it a house or vending machine) of the burglary brings the act within the condemnation of the statute. State v. Shore, 10 N.C. App. 75, 178 S.E.2d 22 (1970).

Chisels and Screwdrivers May Be Implements of Housebreaking. — Although the instruments have other uses which are

legitimate and were not made for the specific purpose of breaking into buildings, it is common knowledge that chisels and screwdrivers can be, and may be, used as implements of housebreaking. State v. Cadora, 13 N.C. App. 176, 185 S.E.2d 297 (1971).

This section does not make it illegal to possess implements used for opening car doors. State v. Kersh, 12 N.C. App. 80, 182 S.E.2d 608 (1971).

"Implements of Housebreaking". — Items which are "implements of housebreaking" are not specifically named in this section, so if their possession without lawful excuse is proscribed at all it is under the general language of the statute. State v. Shore, 10 N.C. App. 75, 178 S.E.2d 22 (1970).

Reference in an indictment to the defendant's possession of items not illegal under this section was mere surplusage and did not render the charge ambiguous since the indictment also charged the possession of specific items listed in the statute, and the proof showed that defendant possessed these specific items as well as other items which came within the generic term of implements of housebreaking. State v. Kersh, 12 N.C. App. 80, 182 S.E.2d 608 (1971).

State Need Not Prove That All Articles in Defendant's Possession Are Implements of Housebreaking. — The State is not required to prove that all the articles the defendant had in his possession are implements of housebreaking. State v. Stockton, 13 N.C. App. 287, 185 S.E.2d 459 (1971).

Constructive Possession of Implements of Housebreaking. — The State need not always prove an actual possession of implements of housebreaking, but may show constructive possession by circumstantial evidence. State v. Ledford, 24 N.C. App. 542, 211 S.E.2d 532 (1975).

Ownership of Automobile and Location of Tools Therein Need Not Be Shown. — Where the evidence tended to show that defendant was in control of an automobile, that he owned tools and had placed them therein, then who owned the automobile, and where the tools were located therein, were not essential elements which had to be shown in order to convict defendant of possession of burglary tools. State v. Kersh, 12 N.C. App. 80, 182 S.E.2d 608 (1971).

Inference Where Accused Is Borrower of Vehicle Containing Contraband. — Where contraband material, such as burglary tools, is under the control of an accused, even though the accused is the borrower of a vehicle, this fact is sufficient to give rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury. State v. Glaze, 24 N.C. App. 60, 210 S.E.2d 124 (1974).

And Inference May Be Rebutted. — If the owner of a vehicle loans the vehicle to an accused without telling him what is contained within the vehicle, the accused may offer evidence to that effect and thereby rebut the inference of knowledge and possession of the contents. State v. Glaze, 24 N.C. App. 60, 210 S.E.2d 124 (1974).

Jury Must Decide Conflicting Evidence. — The evidence as to whether the possession of an implement was lawful, being in conflict, is for the jury to decide and a nonsuit would be improper. State v. Shore, 10 N.C. App. 75, 178 S.E.2d 22 (1970).

Possession of Bolt-Cutter Raises Inference of Unlawful Purpose. — The conduct of defendants and the circumstances under which they were in possession of a bolt-cutter may raise the inference that its possession is for an unlawful purpose. State v. Shore, 10 N.C. App. 75, 178 S.E.2d 22 (1970).

It is reasonable to perceive that a burglar with a bolt-cutter, on the prowl to steal that which belongs to others, would clip a padlock and enter and steal from a service station building as readily as he would clip a metal band securing a vending machine and steal its contents. State v. Shore, 10 N.C. App. 75, 178 S.E.2d 22 (1970).

Testimony of Police May Be Competent Evidence of Possession of Burglary Tools. — Testimony of police officers in regard to the lack of defendant's need for certain tools in his employment may be competent evidence of possession of burglary tools without lawful excuse within this section. State v. Glaze, 24 N.C. App. 60, 210 S.E.2d 124 (1974).

Where defendant was charged with the first offense defined in this section, the trial court erred by instructing the jury on the first and second offenses defined in this section when it substituted "implement of housebreaking," an element of the second offense, for "dangerous or offensive weapon," an element of the first offense defined. State v. Hines, 15 N.C. App. 337, 190 S.E.2d 293 (1972).

Maximum Punishment. —

In accord with 2nd paragraph in original. See State v. Stimpson, 279 N.C. 716, 185 S.E.2d 168 (1971).

Applied in State v. Ruiz, 13 N.C. App. 187, 185 S.E.2d 300 (1971); State v. Streeter, 283 N.C. 203, 195 S.E.2d 502 (1973).

Cited in State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969).

§ 14-56. Breaking or entering into railroad cars, motor vehicles, or trailers; breaking out.

The gravamen of the offense is the breaking and entering with intent to commit larceny. State v. Harrington, 15 N.C. App. 602, 190 S.E.2d 280 (1972).

Papers, a shoe bag and cigarettes are without question personal property, and as such they may be the subject of larceny within the meaning of this section. State v. Quick, 20 N.C. App. 589, 202 S.E.2d 299 (1974).

Allegation of Ownership of Vehicle and Property Therein. — Where the bill of indictment specifically lays the ownership of the property contained in the motor vehicle in another named person, thereby negating the possibility of defendant's breaking and entering the vehicle to steal his own property, and the motor vehicle involved is described in detail and its possession is alleged to be in another, the technical ownership of the vehicle broken into is immaterial. State v. Harrington, 15 N.C. App. 602, 190 S.E.2d 280 (1972).

Cited in State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969).

§ 14-57. Burglary with explosives.

Cited in State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969); State v. Richardson, 8 N.C. App. 298, 174 S.E.2d 77 (1970).

ARTICLE 15.

Arson and Other Burnings.

§ 14-58. Punishment for arson. — Any person convicted of the crime of arson shall suffer punishment by imprisonment for life in the State's prison. (R. C., c. 34, s. 2; 1870-1, c. 222; Code, s. 985; Rev., s. 3335; C. S., s. 4238; 1941, c. 215, s. 2; 1949, c. 299, s. 3; 1973, c. 1201, s. 4.)

Cross References. —

As to what constitutes a sentence of life imprisonment, see § 14-2. As to eligibility of prisoners serving life sentence for parole, see § 148-58.

Editor's Note. —

The 1973 amendment rewrote this section so as to eliminate provisions for the death penalty. The 1973 amendatory act became effective April 8, 1974, and applies to all offenses thereafter committed.

Session Laws 1975, c. 703, ss. 1-3, provide:

"Section 1. The provisions of G.S. 14-52 and G.S. 14-58, as rewritten by Sections 3 and 4, respectively, of Chapter 1201 of the Session Laws of 1973, providing that punishment for first degree burglary and arson shall be imprisonment for life in the State's prison, shall apply to all crimes of first degree burglary and arson committed prior to April 8, 1974, the effective date of Chapter 1201, Session Laws of 1973, as well as to those thereafter committed.

"Sec. 2. In all cases in which the defendant has been convicted of first degree burglary or arson committed prior to April 8, 1974, and a sentence of death has been pronounced, the defendant may apply to the judge who presided at the burglary or arson trial resulting in the sentence of death, or, if said judge is unavailable, to a resident superior court judge of the judicial district in which said burglary or arson trial was held for a modification of the sentence in accordance with the terms of this act. Upon appropriate findings of fact, the judge shall pronounce a sentence of imprisonment for life which shall be imposed in lieu of the death sentence. The defendant shall be allowed credit for time spent in custody awaiting execution of the sentence of death.

"Sec. 3. An indigent person under sentence of death for first degree burglary or arson committed before April 8, 1974, shall be entitled to counsel in making one application under this act for each such sentence of death, if he is otherwise entitled under Article 36 of Chapter 7A of the General Statutes of North Carolina."

For article entitled "Capital Punishment and Life Imprisonment in North Carolina, 1946 to 1968: Implications for Abolition of the Death Penalty," see 6 Wake Forest Intra. L. Rev. 417 (1970).

Common-Law Offense. — Arson is not defined by statute but is a common-law offense. State v. Arnold, 285 N.C. 751, 208 S.E.2d 646 (1974).

Effect of Former Provisions for Imposition of Death Penalty. — In Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 22 L. Ed. 2d 346 (1972),

the imposition and carrying out of the death penalty where either the jury or the judge is permitted to impose that sentence as a matter of discretion was held to constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. — Ed. note.

Capital punishment has not been declared unconstitutional per se. Rather, the Eighth and Fourteenth Amendments will no longer tolerate the infliction of the death sentence if either judge or jury is permitted to impose that sentence as a matter of discretion. State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973).

The meaning of this section, as it stood before the 1973 amendment, in the light of the decision of the Supreme Court of the United States in Furman v. Georgia, was that a defendant, lawfully convicted of first-degree murder, rape, first-degree burglary or arson, the offense having been committed after January 18, 1973, must be sentenced to death, the trial judge having no discretion in the matter of the sentence to be imposed and the jury having no authority to fix a different punishment. State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721 (1974).

The effect of Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), upon the law of North Carolina concerning the punishment for rape, murder in the first degree, arson and burglary in the first degree is this: Upon the trial of any defendant so charged, the trial judge may not instruct the jury that it may in its discretion add to its verdict of guilty a recommendation that defendant be sentenced to life imprisonment. The trial judge should charge on the constituent elements of the offense set out in the bill of indictment and instruct the jury under what circumstances a verdict of guilty or not guilty should be returned. Upon the return of a verdict of guilty of any such offense, the court must pronounce a sentence of death. State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973).

The decision of the Supreme Court in State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973), judicially severed the unconstitutional discretionary proviso from statutes relating to capital crimes and left standing the remainder of each statute as the only valid expression of the legislative intent, with death as the mandatory punishment for murder in the first degree, rape, burglary in the first degree and arson. The effect of that severance was to change the penalty for first degree murder, and the other capital crimes, from death or life imprisonment in the discretion of the jury to mandatory death. State v. Watkins, 283 N.C. 504, 196 S.E.2d 750 (1973).

North Carolina's mandatory death penalty for rape, murder in the first degree, burglary in the first degree and arson could not be constitutionally applied to any offense committed prior to the date of this decision (January 18, 1973) applied to any offense committed after such date. State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973).

In State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973), the State Supreme Court held that the effect of Furman v. Georgia was (1) to invalidate the former proviso of this section — as well as the identical proviso in § 14-17 (murder), § 14-21 (rape) and § 14-52 (burglary) — and (2) to make death the penalty for murder in the first degree, burglary in the first degree, rape and arson. However, recognizing that this interpretation made an upward change in the penalty for these four crimes, the decision in Waddell was made to apply prospectively only. Thus, it is inapplicable to any such offense committed prior to January 18, 1973. State v. Talbert, 282 N.C. 718, 194 S.E.2d 822 (1973).

The above cases were decided under this section as it stood before the 1973 amendment, which eliminated provisions for the death penalty. — Ed. note.

Cited in State v. Britt, 285 N.C. 256, 204 S.E.2d 817 (1974); State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975); State v. McLaughlin, 286 N.C. 597, 213 S.E.2d 238 (1975); State v. Woodson, 287 N.C. 578, 215 S.E.2d 607 (1975).

§ 14-58.1. Definition of "house" and "building". — As used in this Article, the terms "house" and "building" shall be defined to include mobile and manufactured-type housing and recreational trailers. (1973, c. 1374.)

§ 14-58.2. Burning of mobile home, manufactured-type house or recreational trailer home. — If any person shall willfully and maliciously burn any mobile home or manufactured-type house or recreational trailer home which is the dwelling house of another and which is occupied at the time of the burning, the same shall constitute the crime of arson. (1973, c. 1374.)

§ 14-59. Burning of certain public buildings. — If any person shall wantonly and willfully set fire to or burn or cause to be burned or aid, counsel or procure the burning of, the State Capitol, the Legislative Building, the Justice Building or any building owned or occupied by the State or any of its agencies, institutions or subdivisions or by any county, incorporated city or town or other governmental or quasi-governmental entity, he shall be guilty of a felony and shall, on conviction, be imprisoned in the State's prison for not less than two nor more than 30 years, and may also be fined in the discretion of the court. (1830, c. 41, s. 1; R. C., c. 34, s. 7; 1868-9, c. 167, s. 5; Code, s. 985, subsec. 3; Rev., s. 3344; C. S., s. 4239; 1965, c. 14; 1971, c. 816, s. 1.)

Editor's Note. — The 1971 amendment rewrote this section.

Applied in State v. DeGraffenreidt, 17 N.C. App. 550, 195 S.E.2d 84 (1973).

§ 14-60. Burning of schoolhouses or buildings of educational institutions. — If any person shall wantonly and willfully set fire to or burn or cause to be burned or aid, counsel or procure the burning of, any schoolhouse or building owned, leased or used by any public or private school, college or educational institution, he shall be guilty of a felony, and shall, on conviction, be imprisoned in the State's prison for not less than two nor more than 30 years, and may also be fined in the discretion of the court. (1901, c. 4, s. 28; Rev., s. 3345; 1919, c. 70; C. S., s. 4240; 1965, c. 870; 1971, c. 816, s. 2.)

Editor's Note. — The 1971 amendment rewrote this section.

§ 14-61. Burning of certain bridges and buildings. — If any person shall wantonly and willfully set fire to or burn or cause to be burned, or aid, counsel or procure the burning of, any public bridge, or private toll bridge, or the bridge of any incorporated company, or any fire-engine house or rescue-squad building, or any house belonging to an incorporated company or unincorporated association and used in the business of such company or association, he shall be guilty of a felony, and shall, on conviction, be imprisoned in the State's prison for not less than two nor more than 30 years, and may also be fined in the discretion of the court. (1825, c. 1278, P. R.; R. C., c. 34, s. 30; Code, s. 985, subsec. 4; Rev., s. 3337; C. S., s. 4241; 1971, c. 816, s. 3.)

Editor's Note. — The 1971 amendment rewrote this section.

§ 14-62. Burning of churches and certain other buildings. — If any person shall wantonly and willfully set fire to or burn or cause to be burned, or aid, counsel or procure the burning of, any uninhabited house, any church, chapel or meetinghouse, or any stable, coach house, outhouse, warehouse, office, shop, mill, barn or granary, or any building, structure or erection used or intended to be used in carrying on any trade or manufacture, or any branch thereof, whether the same or any of them respectively shall then be in the possession of the offender, or in the possession of any other person, he shall be guilty of a felony, and shall, on conviction, be imprisoned in the State's prison for not less than two nor more than 30 years, and may also be fined in the discretion of the court. (1874-5, c. 228; Code, s. 985, subsec. 6; 1885, c. 66; 1903, c. 665, s. 2; Rev., s. 3338; C. S., s. 4242; 1927, c. 11, s. 1; 1953, c. 815; 1959, c. 1298, s. 1; 1971, c. 816, s. 4.)

I. IN GENERAL.

Editor's Note. —

The 1971 amendment deleted "to" preceding "any building," inserted "on conviction" and substituted "30 years, and may also be fined in the discretion of the court" for "forty years."

Defendant Is Charged with Complicity in Burning. — When an individual is prosecuted for procuring felonious burning under this section he is being charged with complicity in the burning and not with mere solicitation. State v. Sargent, 22 N.C. App. 148, 205 S.E.2d 768 (1974).

And State Must Prove That Building Was in Fact Burned. — To establish guilt in procuring arson, it is necessary for the State to prove not only that defendant instructed someone to burn the building, but also that the building was in fact burned. State v. Sargent, 22 N.C. App. 148, 205 S.E.2d 768 (1974).

Evidence Held Insufficient. — The evidence against the defendant on a charge of malicious burning of a dwelling house was held insufficient to survive a motion to dismiss. State v. Blizzard, 280 N.C. 11, 184 S.E.2d 851 (1971).

Applied in In re Reddy, 16 N.C. App. 520, 192 S.E.2d 621 (1972).

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

§ 14-62.1. Burning of building or structure in process of construction. — If any person shall wantonly and willfully set fire to or burn or cause to be burned, or aid, counsel or procure the burning of, any building or structure in the process of construction for use or intended to be used as a dwelling house or in carrying on any trade or manufacture, or otherwise, whether the same or any of them respectively shall then be in the possession of the offender, or in the possession of any other person, he shall be guilty of a felony, and shall, on conviction, be imprisoned in the State's prison for not less than two nor more than 30 years, and may also be fined in the discretion of the court. (1957, c. 792; 1971, c. 816, s. 5.)

Editor's Note. — The 1971 amendment substituted "If any person shall wantonly and willfully set fire to or burn or cause to be burned, or aid, counsel or procure the burning" for "The wilful and intentional burning," at the beginning of the section and substituted "he shall be guilty of a felony, and shall, on conviction be imprisoned in the State's prison for not less than two nor more than 30 years, and may also be fined" for "shall be a felony and punished by imprisonment in the county jail or State prison, or by fine or by both such fine and imprisonment" at the end of the section.

§ 14-63. Burning of boats and barges. — If any person shall wantonly and willfully set fire to or burn or cause to be burned or aid, counsel or procure the burning of, any boat, barge, ferry or float, without the consent of the owner thereof, he shall be guilty of a felony and shall, on conviction, be punished by imprisonment in the State's prison for not less than four months nor more than 10 years, and may also be fined in the discretion of the court. In the event the consent of the owner is given for an unlawful or fraudulent purpose, however, the penalty provisions of this section shall remain in full force and effect. (1909, c. 854; C. S., s. 4243; 1971, c. 816, s. 6.)

Editor's Note. — The 1971 amendment rewrote the first sentence and added the last sentence.

§ 14-64. Burning of ginhouses and tobacco houses. — If any person shall wantonly and willfully set fire to or burn or cause to be burned, or aid, counsel or procure the burning of, any ginhouse or tobacco house, or any part thereof, he shall, on conviction, be imprisoned in the State's prison for not less than four months nor more than 10 years, and may also be fined in the discretion of the court. (1863, c. 17; 1868-9, c. 167, s. 5; Code, s. 985, subsec. 2; 1903, c. 665, s. 1; Rev., s. 3341; C. S., s. 4244; 1971, c. 816, s. 7.)

Editor's Note. — The 1971 amendment rewrote this section.

§ 14-65. Fraudulently setting fire to dwelling houses. — If any person, being the occupant of any building used as a dwelling house, whether such person be the owner thereof or not, or, being the owner of any building designed or intended as a dwelling house, shall wantonly and willfully or for a fraudulent purpose set fire to or burn or cause to be burned, or aid, counsel or procure the burning of such building, he shall be guilty of a felony, and shall, on conviction, be punished by imprisonment in the State's prison for not less than four months nor more than 10 years, and may also be fined in the discretion of the court. (Code, s. 985; 1903, c. 665, s. 3; Rev., s. 3340; 1909, c. 862; C. S., s. 4245; 1927, c. 11, s. 2; 1971, c. 816, s. 8.)

Editor's Note. — The 1971 amendment substituted "wantonly and and willfully" for "willfully and wantonly," inserted "on conviction," and substituted "for not less than four months nor more than 10 years" for "or county jail."

The main import of this section is protection of the property itself, whereas the gravamen of the offense of common-law arson is the danger that results to persons who are or might be in the dwelling. State v. White, 288 N.C. 44, 215 S.E.2d 557 (1975).

Burning a dwelling for the purpose of frightening the occupant and keeping him from testifying for the State would clearly be a willful and malicious burning, but it would not be a burning "for a fraudulent purpose." State v. White, 288 N.C. 44, 215 S.E.2d 557 (1975).

§ 14-66. Burning of personal property. — If any person shall wantonly and willfully set fire to or burn, or cause to be burned, or aid, counsel or procure the burning of, any goods, wares, merchandise or other chattels or personal property of any kind, whether or not the same shall at the time be insured by any person or corporation against loss or damage by fire, with intent to injure or prejudice the insurer, the creditor or the person owning the property, or any other person, whether the property is that of such person or another, he shall be guilty of a felony and shall, on conviction, be imprisoned in the State's prison for not less than four months nor more than 10 years, and may also be fined in the discretion of the court. (1921, c. 119; C. S., s. 4245 (a); 1971, c. 816, s. 9.)

Editor's Note. — The 1971 amendment rewrote this section.

§ 14-67. Attempting to burn dwelling houses and certain other buildings. — If any person shall wantonly and willfully attempt to set fire to or burn or cause to be burned any dwelling house, uninhabited house, the State Capitol, the Legislative Building, the Justice Building or any building owned or occupied by the State or any of its agencies, institutions or subdivisions or by any county, incorporated city or town or other governmental or quasi-governmental entity, any schoolhouse or building owned, leased or used by any public or private school, college or educational institution, or any public bridge, private toll bridge or the bridge of any incorporated company, or any fire-engine house or rescue-squad building, or any house belonging to an incorporated company or unincorporated association and used in the business of such company or association, any church, chapel or meetinghouse, or any stable, coach house, outhouse, warehouse, office, shop, mill, barn or granary, or any building, structure or erection used or intended to be used in carrying on any trade or manufacture, or otherwise, any boat, barge, ferry, or float, any ginhouse or tobacco house, or any part thereof, whether such buildings or structures or any of them shall then be in the possession of the offender or in the possession of any other person, he shall be guilty of a felony, and shall, on conviction, be

imprisoned in the State's prison for not less than four months nor more than 10 years, and may also be fined in the discretion of the court. (1876-7, c. 13; Code, s. 985, subsec. 7; Rev., s. 3336; C. S., s. 4246; 1957, c. 250, s. 1; 1959, c. 1298, s. 2; 1971, c. 816, s. 10.)

Editor's Note. — The 1971 amendment rewrote this section.

Felony created by this section is a lesser included offense of the crime of arson. State v. Arnold, 285 N.C. 751, 208 S.E.2d 646 (1974).

Attempt to commit arson is now a felony rather than a common-law misdemeanor under the provisions of this section. State v. Arnold, 285 N.C. 751, 208 S.E.2d 646 (1974).

Applied in State v. Lynch, 9 N.C. App. 71, 175 S.E.2d 327 (1970); State v. Stansbury, 14 N.C. App. 294, 187 S.E.2d 882 (1972).

Cited in State v. Williams, 10 N.C. App. 183, 178 S.E.2d 41 (1970); State v. Lynch, 279 N.C. 1, 181 S.E.2d 561 (1971).

§ 14-67.1. Burning or attempting to burn other buildings. — If any person shall wantonly and willfully set fire to or burn or cause to be burned or aid, counsel or procure the burning of, or attempt to burn, any building or other structure of any type not otherwise covered by the provisions of this Article, he shall be guilty of a felony, and shall, on conviction, be imprisoned in the State's prison for not less than four months nor more than 10 years, and may also be fined in the discretion of the court. (1971, c. 816, s. 11.)

§ 14-69.2. Perpetrating hoax by use of false bomb or other device.

Applied in State v. Peek, 22 N.C. App. 350, 206 S.E.2d 386 (1974).

SUBCHAPTER V. OFFENSES AGAINST PROPERTY.

ARTICLE 16.

Larceny.

§ 14-70. Distinctions between grand and petit larceny abolished; punishment; accessories to larceny.

"Larceny". —

Larceny is a wrongful taking and carrying away of the personal property of another without his consent, which is done with felonious intent; that is, with intent to deprive the owner of his property and to appropriate it to the taker's use fraudulently. State v. Watts, 25 N.C. App. 194, 212 S.E.2d 557 (1975).

Larceny is a common-law offense. State v. Watts, 25 N.C. App. 194, 212 S.E.2d 557 (1975).

But common-law larceny does not include every wrongful taking and carrying away of the personal property of another. State v. Watts, 25 N.C. App. 194, 212 S.E.2d 557 (1975).

"Intent to appropriate the goods to his own use" has been eliminated and is not now an essential element of the crime of larceny. State v. Watts, 25 N.C. App. 194, 212 S.E.2d 557 (1975).

Purpose of Felonious Taking. — To constitute larceny it is not required that the purpose of the taking be to convert the stolen property to the pecuniary advantage or convenience of the taker but it is sufficient if the taking be fraudulent and with the intent wholly to deprive the owner of his property. State v. Watts, 25 N.C. App. 194, 212 S.E.2d 557 (1975).

Verdict of Guilty of "Grand Larceny". — While there is no longer a crime in this State designated as "grand larceny" the verdict of the jury must be considered as tantamount to a verdict finding the defendant guilty as charged in the bill of indictment. State v. Walker, 6 N.C. App. 740, 171 S.E.2d 91 (1969).

It is not necessary for an indictment to allege that a larceny was from the person for it to be shown. State v. Benfield, 9 N.C. App. 657, 177 S.E.2d 306 (1970).

Ownership of Property Must Be Alleged. — The common-law offense of larceny contemplates that the property taken must belong to or be in the possession of another and the statutory offense of embezzlement provides that the misappropriated property must belong to "any other person or corporation, unincorporated association, or organization." In

view of the breadth of the offenses, the warrant or bill of indictment charging these offenses must allege the ownership of the property either in a natural person or a legal entity capable of owning property. State v. Wooten, 18 N.C. App. 652, 197 S.E.2d 614 (1973).

Mitigation of Charge. — An indictment for larceny charges a felony, and it is a matter of defense to mitigate the charge to a misdemeanor by showing that the property taken was a value of less than the amount prescribed by statute, and that it was neither taken from the person nor from a dwelling house. State v. Benfield, 9 N.C. App. 657, 177 S.E.2d 306 (1970).

Instruction on Intent. — The trial court, in charging the jury where the factual situation raises a question as to the intent to deprive permanently, should instruct on this element and add that while temporary deprivation will not suffice, if the defendant did not ever intend to return the property and was totally indifferent as to whether the owner ever recovered it, then that would constitute an "intent to permanently deprive." State v. Watts, 25 N.C. App. 194, 212 S.E.2d 557 (1975).

Failure to Charge Lesser Included Offense. — Where all of the evidence indicated that the value of the stolen property exceeded $200.00, the trial court did not err by failing to instruct the jury to consider in addition an issue as to defendant's possible guilt or innocence of the lesser included offense of misdemeanor larceny. State v. Dickerson, 20 N.C. App. 169, 201 S.E.2d 69 (1973).

Instruction as to Felonious Larceny of Automobile. — The trial court properly charged the jury that to find defendant guilty of the felonious larceny of an automobile, they must find from the evidence and beyond a reasonable doubt not only that defendant took and carried away the automobile without the owner's consent, knowing that he was not entitled to take it and intending at the time to deprive the owner of its use permanently, but also that the automobile was worth more than $200.00. State v. Dickerson, 20 N.C. App. 169, 201 S.E.2d 69 (1973).

Applied in State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972); State v. Brady, 18 N.C. App. 325, 196 S.E.2d 813 (1973); State v. Irby, 19 N.C. App. 262, 198 S.E.2d 447 (1973); State v. Breeze, 26 N.C. App. 48, 214 S.E.2d 802 (1975).

Stated in State v. Johnson, 7 N.C. App. 53, 171 S.E.2d 106 (1969).

Cited in State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969); State v. Dickerson, 6 N.C. App. 131, 169 S.E.2d 510 (1969); Culp v. Bounds, 325 F. Supp. 416 (W.D.N.C. 1971).

§ 14-71. Receiving stolen goods. — If any person shall receive any chattel, property, money, valuable security or other thing whatsoever, the stealing or taking whereof amounts to larceny or a felony, either at common law or by virtue of any statute made or hereafter to be made, such person knowing or having reasonable grounds to believe the same to have been feloniously stolen or taken, he shall be guilty of a criminal offense, and may be indicted and convicted, whether the felon stealing and taking such chattels, property, money, valuable security or other thing, shall or shall not have been previously convicted, or shall or shall not be amenable to justice; and any such receiver may be dealt with, indicted, tried and punished in any county in which he shall have, or shall have had, any such property in his possession or in any county in which the thief may be tried, in the same manner as such receiver may be dealt with, indicted, tried and punished in the county where he actually received such chattel, money, security, or other thing; and such receiver shall be punished as one convicted of larceny. (1797, c. 485, s. 2; R. C., c. 34, s. 56; Code, s. 1074; Rev., s. 3507; C. S., s. 4250; 1949, c. 145, s. 1; 1975, c. 163, s. 1.)

Editor's Note.—

The 1975 amendment, effective Oct. 1, 1975, inserted "or having reasonable grounds to believe" near the beginning of the section.

The crime of receiving stolen goods is a sort of secondary crime based upon a prior commission of the primary crime of larceny. State v. Muse, 280 N.C. 31, 185 S.E.2d 214 (1971).

But It Is Not Accessorial to Larceny. — This section, defining the offense of receiving, clearly creates an offense not accessorial to larceny. State v. Golden, 20 N.C. App. 451, 201 S.E.2d 546 (1974).

And receiving stolen goods is not a lesser included offense of larceny, and jeopardy has not attached as to a proper larceny indictment. State v. Burnette, 22 N.C. App. 29, 205 S.E.2d 357 (1974).

Or of Breaking and Entering. — Receiving stolen goods is not a lesser included offense of breaking and entering but a separate and distinct offense. State v. Miller, 18 N.C. App. 489, 197 S.E.2d 46 (1973).

Elements of the Offense. —

In accord with 2nd paragraph in original. See State v. Grant, 17 N.C. App. 15, 193 S.E.2d 308

(1972); State v. Lash, 21 N.C. App. 365, 204 S.E.2d 563 (1974); State v. Burnette, 22 N.C. App. 29, 205 S.E.2d 357 (1974), decided under this section as it stood before the 1975 amendment.

In accord with 5th paragraph in original. See State v. Watson, 13 N.C. App. 189, 185 S.E.2d 33 (1971), decided under this section as it stood before the 1975 amendment.

The essential elements of the crime of receiving stolen goods are: (a) the stealing of the goods by some other than the accused; (b) that the accused, knowing them to be stolen, received or aided in concealing the goods; and (c) continued such possession or concealment with a dishonest purpose. State v. Muse, 280 N.C. 31, 185 S.E.2d 214 (1971), decided under this section as it stood before the 1975 amendment.

This section makes guilty knowledge one of the essential elements, etc. —

In accord with 1st paragraph in original. See State v. Grant, 17 N.C. App. 15, 193 S.E.2d 308 (1972), decided under this section as it stood before the 1975 amendment.

In accord with 2nd paragraph in original. See State v. Grant, 17 N.C. App. 15, 193 S.E.2d 308 (1972), decided under this section at it stood before the 1975 amendment.

In accord with 4th paragraph in original. See State v. Grant, 17 N.C. App. 15, 193 S.E.2d 308 (1972), decided under this section as it stood before the 1975 amendment.

Knowledge by the accused that the goods were stolen is an essential element of the offense of receiving stolen goods. State v. Watson, 13 N.C. App. 189, 185 S.E.2d 33 (1971), decided under this section as it stood before the 1975 amendment.

The test of guilty knowledge is whether defendant knew, or must have known, that the goods were stolen. State v. Hart, 14 N.C. App. 120, 187 S.E.2d 351 (1972), decided under this section as it stood before the 1975 amendment.

Guilty knowledge may be inferred from incriminating circumstances. State v. Hart, 14 N.C. App. 120, 187 S.E.2d 351 (1972).

Constructive receipt is sufficient to constitute "receiving" within the meaning of this section. State v. Hart, 14 N.C. App. 120, 187 S.E.2d 351 (1972).

But Section Applies Only to Receiving, Not Possession or Offering for Sale. — The possession or offering for sale of goods, known to have been stolen, is not a statutory crime under this section, which applies only to receiving the stolen goods. State v. Burnette, 22 N.C. App. 29, 205 S.E.2d 357 (1974).

When Acquittal of Larceny Bars Prosecution for Receiving. — Defendants acquitted of larceny, despite evidence that they had stolen the items, could not over their motion for nonsuit be convicted of receiving stolen goods, where no evidence indicated that others might have stolen the items and then transferred them to defendants. State v. Strickland, 20 N.C. App. 470, 201 S.E.2d 501 (1974).

Sufficiency of Indictment or Warrant. — It is not necessary that the warrant or indictment in a prosecution for receiving stolen goods state the names of those from whom the goods were stolen. State v. Truesdale, 13 N.C. App. 622, 186 S.E.2d 604 (1972).

Amendment of Warrant. — The court did not err in allowing the State's motion to amend warrants for receiving stolen goods since the original warrants charged all the essential elements of the offense of receiving stolen goods, and the amendment describing ownership of the property in more detail did not change the offense with which defendants were charged. State v. Truesdale, 13 N.C. App. 622, 186 S.E.2d 604 (1972).

Indictment Should Name Persons from Whom Goods Were Stolen. — In a prosecution for receiving stolen goods, it is not essential that the indictment state the names of those from whom the goods were stolen. State v. Golden, 20 N.C. App. 451, 201 S.E.2d 546 (1974).

Goods Received through Agent. —

It would certainly make the accused a receiver in contemplation of law, if the stolen property was received by his servant or agent, acting under his directions, he knowing at the time of giving the orders that it was stolen. State v. Hart, 14 N.C. App. 120, 187 S.E.2d 351 (1972).

The inference or presumption arising from the recent possession, etc. —

In accord with original. See State v. St. Clair, 17 N.C. App. 22, 193 S.E.2d 404 (1972).

Presumption from Recent Possession Does Not Apply. — The inference or presumption arising from the recent possession of stolen property, without more, does not extend to the statutory charge of receiving stolen property knowing it to have been stolen or taken. State v. Muse, 280 N.C. 31, 185 S.E.2d 214 (1971).

Instructions. —

Where the State in a prosecution for receiving stolen goods did not rely upon the presumption arising from the possession of recently stolen goods, the trial court was not required to charge that the jury must find that the goods allegedly received by defendant were the same goods that were stolen. State v. Muse, 280 N.C. 31, 185 S.E.2d 214 (1971).

An instruction which would allow the jury to find defendant guilty of the offense of receiving stolen goods without finding beyond a reasonable doubt that the defendant had knowledge that the goods had been stolen constituted prejudicial error. State v. Watson, 13 N.C. App. 189, 185 S.E.2d 33 (1971), decided under this section as it stood before the 1975 amendment.

In a prosecution for feloniously receiving stolen goods, the trial court erred in instructing the jury that defendant had guilty knowledge if he knew "or believed" someone else had stolen the property. State v. St. Clair, 17 N.C. App. 22, 193 S.E.2d 404 (1972), decided under this section as it stood before the 1975 amendment.

In a prosecution for feloniously receiving stolen goods, the trial court erred in instructing the jury that defendant had guilty knowledge if he "had good reason to believe" that the property was stolen. State v. Grant, 17 N.C. App. 15, 193 S.E.2d 308 (1972), decided under this section as it stood before the 1975 amendment.

Evidence Held Sufficient for Jury. — In accord with 2nd paragraph in original. See State v. Lash, 21 N.C. App. 365, 204 S.E.2d 563 (1974).

§ 14-72. Larceny of property; receiving stolen goods not exceeding $200.00 in value. — (a) Except as provided in subsections (b) and (c) below, the larceny of property, or the receiving of stolen goods knowing them to be stolen, of the value of not more than two hundred dollars ($200.00) is a misdemeanor punishable under G.S. 14-3(a). In all cases of doubt the jury shall, in the verdict, fix the value of the property stolen.

(b) The crime of larceny is a felony, without regard to the value of the property in question, if the larceny is:

(1) From the person; or

(2) Committed pursuant to a violation of G.S. 14-51, 14-53, 14-54 or 14-57; or

(3) Of any explosive or incendiary device or substance. As used in this section, the phrase "explosive or incendiary device or substance" shall include any explosive or incendiary grenade or bomb; any dynamite, blasting powder, nitroglycerin, TNT, or other high explosive; or any device, ingredient for such device, or type or quantity of substance primarily useful for large-scale destruction of property by explosive or incendiary action or lethal injury to persons by explosive or incendiary action. This definition shall not include fireworks; or any form, type, or quantity of gasoline, butane gas, natural gas, or any other substance having explosive or incendiary properties but serving a legitimate nondestructive or nonlethal use in the form, type, or quantity stolen.

(4) Of any firearm. As used in this section, the term "firearm" shall include any instrument used in the propulsion of a shot, shell or bullet by the action of gunpowder or any other explosive substance within it. A "firearm," which at the time of theft is not capable of being fired, shall be included within this definition if it can be made to work. This definition shall not include air rifles or air pistols.

(5) Of any record or paper in the custody of the North Carolina State Archives as defined by G.S. 121-2(7) and 121-2(8).

(c) The crime of receiving stolen goods knowing or having reasonable grounds to believe them to be stolen in the circumstances described in subsection (b) is a felony, without regard to the value of the property in question. (1895, c. 285; Rev., s. 3506; 1913, c. 118, s. 1; C. S., s. 4251; 1941, c. 178, s. 1; 1949, c. 145, s. 2; 1959, c. 1285; 1961, c. 39, s. 1; 1965, c. 621, s. 5; 1969, c. 522, s. 2; 1973, c. 238, ss. 1, 2; 1975, c. 163, s. 2; c. 696, s. 4.)

Editor's Note. —

The 1973 amendment, effective July 1, 1973, deleted "any weapon, gunpowder, ammunition, or other device or substance primarily useful in hunting or sports; any antique or souvenir weapon or ammunition" following "fireworks;" in subdivision (3) and added subdivision (4) of subsection (b).

The first 1975 amendment, effective Oct. 1, 1975, inserted "or having reasonable grounds to believe" in subsection (c).

The second 1975 amendment, effective July 1, 1975, added subdivision (5) to subsection (b).

Session Laws 1973, c. 238, s. 3, provides: "This act shall only apply to crimes committed after July 1, 1973."

Actual Value of Property Determines Grade of Larceny. — The actual value of the thing wrongfully appropriated, rather than the intention of the taker with respect to value, determines the grade of larceny. State v. Dees, 14 N.C. App. 110, 187 S.E.2d 433 (1972).

The "market value" of the stolen item is used in determining whether the crime is felonious or nonfelonious. State v. Dees, 14 N.C. App. 110, 187 S.E.2d 433 (1972).

In the case of common articles having a market value, the courts have usually rejected the original cost and any special value to the owner personally as standards of value for purposes of graduation of the offense, and have declared the proper criterion to be the price which the subject of the larceny would bring in open market — its "market value" or its "reasonable selling price," at the time and place of the theft and in the condition in which it was when the thief commenced the acts culminating in the larceny. State v. Dees, 14 N.C. App. 110, 187 S.E.2d 433 (1972).

Price Received for Stolen Goods Is Irrelevant. — The price received for stolen tools had no relevance to the "market value." State v. Dees, 14 N.C. App. 110, 187 S.E.2d 433 (1972).

It Is Inapplicable, etc. —

Larceny from the person is a felony, without regard to the value of the property. State v. Benfield, 278 N.C. 199, 179 S.E.2d 388 (1971).

Thus, larceny of property of a value in excess of $200, etc. —

In accord with original. See State v. Benfield, 278 N.C. 199, 179 S.E.2d 388 (1971).

And Larceny by Breaking and Entering. —

Where larceny is committed pursuant to breaking and entering, it constitutes a felony without regard to the value of the property in question. State v. Richardson, 8 N.C. App. 298, 174 S.E.2d 77 (1970); State v. Wright, 22 N.C. App. 428, 206 S.E.2d 787 (1974).

But Larceny of Property of a Value of Not More than $200, etc. —

Larceny of property of the value of $200 or less is a misdemeanor unless it is (1) from the person, or (2) from a building in violation of § 14-51, 14-53, 14-54 or 14-57, or (3) the property is an explosive or incendiary device or substance. State v. Benfield, 278 N.C. 199, 179 S.E.2d 388 (1971).

Only difference between larceny and embezzlement is that in the former there must be a trespass, while in the latter that is not necessary. State v. Bailey, 25 N.C. App. 412, 213 S.E.2d 400 (1975).

The offenses of larceny and receiving are separate and distinct. State v. Golden, 20 N.C. App. 451, 201 S.E.2d 546 (1974).

And Receiving Is Not Accessorial to Larceny. — This section, defining the offense of receiving, clearly creates an offense not accessorial to larceny. State v. Golden, 20 N.C. App. 451, 201 S.E.2d 546 (1974).

Guilty Knowledge Required to Make Receiving Stolen Property a Felony. — In order for the crime of receiving stolen property to be rendered a felony by subsection (c) without regard to the value of the property, the defendant must have known not only that the property was stolen, but also that the theft was accomplished under circumstances enumerated in subsection (b). State v. Scott, 11 N.C. App. 642, 182 S.E.2d 256 (1971), decided under this section as it stood before the 1975 amendment.

In a prosecution for receiving stolen goods the test of guilty knowledge is not whether a reasonable man would or should have known or suspected that the goods had been stolen. Rather, it is whether the defendant did know them to be stolen, either by proof of actual knowledge or because, under the circumstances, it can be said that he must have known that the goods were taken. State v. Scott, 11 N.C. App. 642, 182 S.E.2d 256 (1971), decided under this section as it stood before the 1975 amendment.

What Constitutes Larceny. —

Larceny is the felonious taking and carrying away by any person of the goods or personal property of another, without the latter's consent and with the felonious intent permanently to deprive the owner of his property and to convert it to the taker's own use. State v. Perry, 21 N.C. App. 478, 204 S.E.2d 889 (1974).

"Felonious intent" is an essential element of the crime. —

In accord with original. See State v. Wesson, 16 N.C. App. 683, 193 S.E.2d 425 (1972).

The phrase "felonious intent". —

In accord with 1st paragraph in original. See State v. Wesson, 16 N.C. App. 683, 193 S.E.2d 425 (1972).

In accord with 2nd paragraph in original. See State v. Wesson, 16 N.C. App. 683, 193 S.E.2d 425 (1972).

The "felonious intent" as applied to the crime of larceny is the intent which exists where a person knowingly takes and carries away the personal property of another without any claim or pretense of right with the intent wholly and permanently to deprive the owner of his property and to convert it to the use of the taker or to some other person than the owner. State v. Wesson, 16 N.C. App. 683, 193 S.E.2d 425 (1972); State v. Perry, 21 N.C. App. 478, 204 S.E.2d 889 (1974).

What is meant by "felonious intent" is a matter for the court to explain to the jury and no exact words are required to instruct the jury as to its meaning. State v. Wesson, 16 N.C. App. 683, 193 S.E.2d 425 (1972).

"Steal" Synonymous with "Felonious Intent" in Warrant Charging Misdemeanor Larceny. — The word "steal" as used in a warrant charging misdemeanor larceny encompassed and was synonymous with the required "felonious intent" and was therefore sufficient to withstand the defendant's motion to quash. State v. Wesson, 16 N.C. App. 683, 193 S.E.2d 425 (1972).

Larceny involves a trespass, etc. —

An act of trespass is an essential element in

the crime of larceny. State v. Bailey, 25 N.C. App. 412, 213 S.E.2d 400 (1975).

Every larceny includes a trespass, and if there is no trespass in taking the goods, there can be no felony committed in carrying them away. State v. Bailey, 25 N.C. App. 412, 213 S.E.2d 400 (1975).

One who lawfully acquires possession of goods or money of another cannot commit larceny by feloniously converting them to his own use, for the reason that larceny, being a criminal trespass on the right of possession, cannot be committed by one who, being invested with that right, is consequently incapable of trespassing on it. State v. Bailey, 25 N.C. App. 412, 213 S.E.2d 400 (1975).

Indictment.—

Where neither larceny from the person nor by breaking and entering is involved, an indictment for the felony of larceny must charge, as an essential element of the crime, that the value of the stolen goods was more than $200. State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969).

Where an indictment charges larceny of property of the value of $200 or less, but contains no allegation the larceny was from a building by breaking and entering, the crime charged is a misdemeanor for which the maximum prison sentence is two years, notwithstanding all the evidence tends to show the larceny was accomplished by means of a felonious breaking and entering. State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969).

To convict of felony-larceny, the indictment must allege and the State must prove beyond a reasonable doubt, as an essential element of the crime, that the value of the property exceeded $200, or that the larceny was from the person, or that the larceny was from a building in violation of § 14-51, 14-53, 14-54 or 14-57, or that the property involved was an explosive or incendiary device or substance. State v. Benfield, 278 N.C. 199, 179 S.E.2d 388 (1971).

Decisions subsequent to the Act of 1913 and at variance with the legal propositions stated herein, for example, State v. Flynn, 230 N.C. 293, 52 S.E.2d 791 (1949), and State v. Stevens, 252 N.C. 331, 113 S.E.2d 577 (1960), to the extent of such variance, are overruled. Too, decisions based on the Act of 1895, including State v. Bynum, 117 N.C. 749, 23 S.E. 218 (1895), and State v. Harris, 119 N.C. 811, 26 S.E. 148 (1896), and other decisions based thereon, are no longer authoritative. State v. Benfield, 278 N.C. 199, 179 S.E.2d 388 (1971).

In order to properly charge the felony of larceny of property, without regard to the value of the property, the bill of indictment must contain one or more of the elements set out in subsection (b) of this section. State v. Cleary, 9 N.C. App. 189, 175 S.E.2d 749 (1970).

The indictment charged store-breaking, larceny and receiving in the language of the statute under which it was drawn, § 14-54 and this section, and contained the elements of the offense intended to be charged, and sufficiently informed the petitioner of the crime with which he was charged so that he could adequately prepare his defense and could plead the judgment as a bar to any subsequent prosecution for the same offense. Nothing more was required. Harris v. North Carolina, 320 F. Supp. 770 (M.D.N.C. 1970).

Indictment for Larceny from the Person.—

A person may not be convicted and punished for the felony of larceny from the person when the indictment on which he is tried fails to allege that the larceny was from the person. State v. Benfield, 278 N.C. 199, 179 S.E.2d 388 (1971).

Decisions based on the Act of 1895, including State v. Bynum, 117 N.C. 749, 23 S.E. 218 (1895), and State v. Harris, 119 N.C. 811, 26 S.E. 148 (1896), and other decisions based thereon, are no longer authoritative. Too, decisions subsequent to the Act of 1913 and at variance with the legal propositions stated herein, for example, State v. Flynn, 230 N.C. 293, 52 S.E.2d 791 (1949), and State v. Stevens, 252 N.C. 331, 113 S.E.2d 577 (1960), to the extent of such variance, are overruled. State v. Benfield, 278 N.C. 199, 179 S.E.2d 388 (1971).

Allegation of Ownership. — An indictment for larceny of property is fatally defective if it fails to allege the ownership of the property in a natural person or a legal entity capable of owning property. State v. Roberts, 14 N.C. App. 648, 188 S.E.2d 610 (1972).

There was no fatal variance in a larceny indictment placing ownership of stolen tools in a corporation and evidence that, although the tools were personally owned by individual mechanics working for the corporation, they were left overnight on the corporation's premises and were in the possession of the corporation at the time of the theft. State v. Dees, 14 N.C. App. 110, 187 S.E.2d 433 (1972).

Sufficiency of Description of Property. — The description in a warrant or bill of indictment of the goods alleged to have been stolen is sufficient if from it defendant can have a fair and reasonable opportunity to prepare his defense, can avail himself of his conviction or acquittal as a bar to subsequent prosecution for the same offense, and the court is enabled, on conviction, to pronounce sentence according to law. State v. Fuller, 13 N.C. App. 193, 185 S.E.2d 312 (1971).

Variance between Value Alleged and Value Shown by Evidence. — Where the offense charged is that of felonious larceny, in order to distinguish the offense of felonious larceny from misdemeanor larceny, it is necesssary to show that the value of the property stolen was more than $200; this having been done, a difference

between the value alleged in the bill of indictment and the value shown by the evidence is immaterial. State v. McCall, 12 N.C. App. 85, 182 S.E.2d 617 (1971).

There was no fatal variance between indictment and proof where the indictment charged the larceny of money from "Piggly Wiggly Store #7," and witnesses referred to the store as "Piggly Wiggly in Wilson," "Piggly Wiggly Store," "Piggly Wiggly," and "Piggly Wiggly Wilson, Inc.," there being no evidence that any other Piggly Wiggly store existed in the city or county, and there being nothing to indicate that the defendants, witnesses or jurors were confused by the difference in names. State v. McCall, 12 N.C. App. 85, 182 S.E.2d 617 (1971).

Where a larceny indictment described the stolen property as "a 1970 Plymouth, Serial # PM14360F239110, the personal property of George Edison Biggs," and the evidence showed the taking by defendant of a 1970 Plymouth which was owned by George Edison Biggs but there was no evidence as to the serial number, the variance was not fatal. State v. Coleman, 24 N.C. App. 530, 211 S.E.2d 542 (1975).

When State Must Prove, etc.—

In accord with 1st paragraph in original. See State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969).

Except in those cases where this section is inapplicable, the State must prove beyond a reasonable doubt that the value of the stolen property was more than $200 in order to convict of felony-larceny, and the trial judge must so instruct the jury even though no request is made for such instruction. The reason for this requirement is that the defendant's plea of not guilty places in issue every essential element of the offense, including the element of value of the property stolen, and the credibility of the testimony must be passed upon by the jury. State v. Walker, 6 N.C. App. 740, 171 S.E.2d 91 (1969).

The burden of proof as to value in excess of $200 is upon the State as an essential element of the crime of felonious larceny where defendant is not charged with or found guilty of felonious breaking or entering as a part of the same occurrence. State v. Lilly, 25 N.C. App. 453, 213 S.E.2d 418 (1975).

It is not always necessary that the stolen property, etc. —

In accord with original. See State v. Solomon, 24 N.C. App. 527, 211 S.E.2d 478 (1975).

It is sufficient if such property, etc. —

In accord with original. See State v. Solomon, 24 N.C. App. 527, 211 S.E.2d 478 (1975).

The Principle of Law, etc.—

In accord with 1st paragraph in original. See State v. Black, 14 N.C. App. 373, 188 S.E.2d 634 (1972); State v. Solomon, 24 N.C. App. 527, 211 S.E.2d 478 (1975).

It is always competent in a prosecution for breaking and entering and larceny to show all of the goods lost from a store and to trace some or all of the articles to a defendant. State v. Richardson, 8 N.C. App. 298, 174 S.E.2d 77 (1970); State v. Eppley, 14 N.C. App. 314, 188 S.E.2d 758 (1972).

When goods are stolen, one found in possession so soon thereafter that he could not have reasonably gotten the possession unless he had stolen them himself, the law presumes he was the thief. State v. Solomon, 24 N.C. App. 527, 211 S.E.2d 478 (1975).

"Value," etc. —

For determining whether the crime is a felony or a misdemeanor under this section, the word "value" means the fair market value of the stolen item at the time of the theft. State v. Shaw, 26 N.C. App. 154, 215 S.E.2d 390 (1975).

Opinion as to Value. —

The witness's testimony as to his opinion of the "value" of the stolen automobile was properly admitted and was sufficient to require submission to the jury of an issue as to defendant's guilt of felonious larceny under this section where defendant did not object to the form of the question or move to strike the answer. State v. Coleman, 24 N.C. App. 530, 211 S.E.2d 542 (1975).

Evidence.—

Evidence held sufficient to show a present intent on the part of defendant to take property belonging to another and convert it to his own use. State v. Thompson, 8 N.C. App. 313, 174 S.E.2d 130 (1970).

There was insufficient evidence from which the jury could find that defendant committed the larceny where no fingerprints were taken linking the defendant to the larceny, no effort was made to determine whether the footprints leading from the home matched the defendant's footprints, and where clearly defendant never had actual possession of the stolen merchandise. State v. McKinney, 25 N.C. App. 283, 212 S.E.2d 707 (1975).

Nonsuit was properly denied upon proof of exercise of control over stolen goods by (1) offer of sale, (2) rental of warehouse space for storage of the goods, and (3) borrowing money upon pledge of the stolen goods. State v. Carter, 20 N.C. App. 461, 201 S.E.2d 500 (1974).

There may be joint possession of stolen goods by two or more persons if they are shown to have acted in concert, the possession of one participant being the possession of all. State v. Eppley, 14 N.C. App. 314, 188 S.E.2d 758 (1972).

Exclusive possession of stolen property may be joint possession if persons are shown to have acted in concert or to have been particeps criminis. State v. Solomon, 24 N.C. App. 527, 211 S.E.2d 478 (1975).

Instructions.—

When there is evidence tending to show the

value of the stolen goods was more than $200 and other evidence tending to show the value thereof was $200 or less, the jury should be instructed that if they find from the evidence beyond a reasonable doubt that the defendant is guilty of larceny and that the value of the stolen property was more than $200, it would be their duty to return a verdict of guilty of felony-larceny; however, if they find from the evidence beyond a reasonable doubt that the defendant is guilty of larceny but fail to find from the evidence beyond a reasonable doubt that the value of the stolen goods was more than $200, it would be their duty to return a verdict of guilty of misdemeanor-larceny. State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969).

The court should submit to the jury the issue of defendant's guilt of misdemeanor-larceny, where the evidence of the State does not show the value of the property that was taken. State v. Walker, 6 N.C. App. 740, 171 S.E.2d 91 (1969).

Although an indictment charges, and all the evidence tends to show, that the value of the stolen property was more than $200, the jury, under appropriate instructions, must find from the evidence beyond a reasonable doubt that this is the fact. In such case, there is no basis, and it is inappropriate, for the court to instruct the jury with reference to a verdict of guilty of misdemeanor-larceny. State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969).

Trial judges should bear in mind that instructions requiring proof beyond a reasonable doubt and jury findings as to all essential elements thereof are prerequisite to a conviction of felony-larceny. State v. Benfield, 278 N.C. 199, 179 S.E.2d 388 (1971).

Jury Need Not Fix Precise Value of Stolen Property.—

This section does not require that the jury fix the precise value of the stolen property. The only issue of legal significance is whether the value thereof exceeds $200. State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969).

Sentence.—

The punishment upon conviction of the misdemeanor of larceny may not exceed two years. State v. Cleary, 9 N.C. App. 189, 175 S.E.2d 749 (1970).

Where defendant was tried and convicted upon an indictment charging felonious breaking and entering and misdemeanor-larceny, and both counts were consolidated for judgment, the fact that the one sentence imposed is in excess of that permissible upon conviction of the misdemeanor is immaterial and is not prejudicial where it does not exceed that permitted upon conviction of the felony. State v. Cleary, 9 N.C. App. 189, 175 S.E.2d 749 (1970).

Punishment for Larceny after Breaking and Entering. — Section 14-54 concerns only the crimes of breaking and entering buildings and does not relate to the felony of larceny. The crime of larceny after breaking or entering is punishable as provided in this section. State v. Haigler, 14 N.C. App. 501, 188 S.E.2d 586 (1972).

Felonious Larceny as Included Offense in Felony-Murder. — A separate judgment based on a verdict of guilty of felonious larceny was arrested on the ground that the commission of this crime was an essential of and the basis for the conviction of defendant for felony-murder and therefore no additional punishment could be imposed for it as an independent criminal offense. State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972).

Larceny of any explosive or incendiary device or substance is a felony. State v. Benfield, 278 N.C. 199, 179 S.E.2d 388 (1971).

Larceny from Building. — Larceny from a building in violation of § 14-51, 14-53, 14-54 or 14-57 is a felony, without regard to the value of the property. State v. Benfield, 278 N.C. 199, 179 S.E.2d 388 (1971).

Taking and Carrying Away. — While there must be a taking and carrying away of the personal property of another to complete the crime of larceny, it is not necessary that the property be completely removed from the premises of the owner. The least removal of an article, from the actual or constructive possession of the owner, so as to be under the control of the felon, will be a sufficient asportation. State v. Walker, 6 N.C. App. 740, 171 S.E.2d 91 (1969).

The fact that the property may have been in defendant's possession and under his control for only an instant is immaterial if his removal of the property from its original status was such as would constitute a complete severance from the possession of the owner. State v. Walker, 6 N.C. App. 740, 171 S.E.2d 91 (1969).

Title to Property Taken. — It is no defense to a larceny charge that title to the property taken is in one other than the person from whom it was taken. State v. Richardson, 8 N.C. App. 298, 174 S.E.2d 77 (1970); State v. Eppley, 14 N.C. App. 314, 188 S.E.2d 758 (1972).

Effect of Plea of Not Guilty. — A plea of not guilty to an indictment charging the felony of larceny puts in issue every essential element of the crime and constitutes a denial of the charge that the value of the stolen property was more than $200. State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969).

Verdict Where Court Failed to Instruct as to Duty to Find Value of Property. — A verdict finding the defendant guilty as charged in the bill of indictment must be considered as a verdict of guilty of larceny of personal property having a value of $200 or less, a misdemeanor, where the trial court failed to instruct the jury as to their duty to fix the value of the property. State v. Walker, 6 N.C. App. 740, 171 S.E.2d 91 (1969).

Where, absent a finding of guilty of the breaking and entering, a verdict of guilty of larceny of property of a value of more than $200.00 (a felony), or of guilty of larceny of property of a value of $200.00 or less (a misdemeanor), was permissible under appropriate instructions, but the jury was not instructed as to its duty to fix the value of the property in question, the verdict must be considered as a verdict of guilty of larceny of property of a value of $200.00 or less (a misdemeanor). State v. Teel, 20 N.C. App. 398, 201 S.E.2d 733 (1974).

Applied in State v. Crabb, 9 N.C. App. 333, 176 S.E.2d 39 (1970); State v. Sharpless, 13 N.C. App. 202, 184 S.E.2d 921 (1971); State v. Truesdale, 13 N.C. App. 622, 186 S.E.2d 604 (1972); State v. Gore, 14 N.C. App. 645, 188 S.E.2d 660 (1972); State v. Boggs, 16 N.C. App. 403, 192 S.E.2d 29 (1972); State v. Huffman, 16 N.C. App. 653, 192 S.E.2d 621 (1972); State v. Crowe, 25 N.C. App. 420, 213 S.E.2d 360 (1975).

Stated in State v. Hullender, 8 N.C. App. 41, 173 S.E.2d 581 (1970).

Cited in State v. Harris, 279 N.C. 307, 182 S.E.2d 364 (1971); State v. Watson, 13 N.C. App. 189, 185 S.E.2d 33 (1971); State v. Oakley, 15 N.C. App. 224, 189 S.E.2d 605 (1972); State v. Gaddy, 16 N.C. App. 436, 192 S.E.2d 18 (1972).

§ 14-72.1. Concealment of merchandise in mercantile establishments. — (1) Whoever, without authority, willfully conceals the goods or merchandise of any store, not theretofore purchased by such person, while still upon the premises of such store, shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than one hundred dollars ($100.00), or by imprisonment for not more than six months, or by both such fine and imprisonment. Such goods or merchandise found concealed upon or about the person and which have not theretofore been purchased by such person shall be prima facie evidence of a willful concealment.

(b) Any person who has been found guilty of an offense under either subsection (a) or subsection (d) of this section and who is later found guilty of an offense under either subsection (a) or subsection (d) of this section shall be guilty of a general misdemeanor and shall be punished in the discretion of the court.

(c) A merchant, or his agent or employee, or a peace officer who detains or causes the arrest of any person shall not be held civilly liable for detention, malicious prosecution, false imprisonment, or false arrest of the person detained or arrested, where such detention is in a reasonable manner for a reasonable length of time, if in detaining or in causing the arrest of such person, the merchant, or his agent or employee, or the peace officer had at the time of the detention or arrest probable cause to believe that the person committed the offense created by this section. If the person being detained by the merchant, or his agent or employee, is a minor 16 years of age or younger, the merchant or his agent or employee, shall call or notify, or make a reasonable effort to call or notify the parent or guardian of the minor, during the period of detention.

(d) Whoever, without authority, wilfully transfers any price tag from goods or merchandise to other goods or merchandise having a higher selling price or marks said goods at a lower price or substitutes or superimposes thereon a false price tag and then presents said goods or merchandise for purchase shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than one hundred dollars ($100.00) or by imprisonment for not more than six months or by both fine and imprisonment.

Nothing herein shall be construed to provide that the mere possession of goods or the production by shoppers of improperly priced merchandise for check-out shall constitute prima facie evidence of guilt. (1957, c. 301; 1971, c. 238; 1973, c. 457, ss. 1, 2.)

Editor's Note.—

The 1971 amendment, effective July 31, 1971, designated the first paragraph as subsection (a), designated the second paragraph as subsection (b) and added subsection (c).

The 1973 amendment, effective Oct. 1, 1973, rewrote subsection (b) and added subsection (d).

For note on the 1971 amendment to this section, concerning civil actions which may

result from enforcement of the criminal sanction, see 7 Wake Forest L. Rev. 683 (1971).

The statutory offense of shoplifting is very limited in its application, particularly with respect to the owner or possessor of the property covered. State v. Wooten, 18 N.C. App. 652, 197 S.E.2d 614 (1973).

This section, due to its narrow scope, would not cover property in a residence, bank, school or church — only "the goods or merchandise of any store." State v. Wooten, 18 N.C. App. 652, 197 S.E.2d 614 (1973).

Failure to Allege Ownership of Property in Natural Person or Corporation. — Although a warrant for larceny which fails to allege the ownership of the property either in a natural person or a legal entity capable of owning property is fatally defective the rule is not applicable to the shoplifting statute. State v. Wooten, 18 N.C. App. 652, 197 S.E.2d 614 (1973).

While drafters of warrants charging a violation of this statute would be well advised to allege whether the merchandising firm is a natural person or a corporation, the failure to do so did not here render the warrant fatally defective. State v. Wooten, 18 N.C. App. 652, 197 S.E.2d 614 (1973).

Applied in State v. Wilson, 13 N.C. App. 260, 185 S.E.2d 4 (1971).

Cited in State v. Garcia, 16 N.C. App. 344, 192 S.E.2d 2 (1972).

§ 14-72.2. Unauthorized use of a conveyance. — (a) A person is guilty of an offense under this section if, without the consent of the owner, he takes, operates, or exercises control over an aircraft, motorboat, motor vehicle, or other motor-propelled conveyance of another.

(b) Consent may not be presumed or implied because of the consent of the owner on a previous occasion to the taking, operating, or exercising control of a conveyance given to the person charged or to another person.

(c) Unauthorized use of an aircraft is a felony punishable by a fine, imprisonment not to exceed five years, or both, in the discretion of the court. All other unauthorized use of a conveyance is a misdemeanor punishable by a fine, imprisonment not to exceed two years, or both, in the discretion of the court.

(d) An offense under this section may be treated as a lesser-included offense of the offense of larceny of a conveyance.

(e) As used in this section, "owner" means any person with an interest in property such that it is property of another as far as the person accused of the offense is concerned. (1973, c. 1330, s. 38.)

Editor's Note. — Session Laws 1973, c. 1330, s. 40, makes this section effective Jan. 1, 1975.

The cases cited below were decided under former § 20-105.

Inference Arising from Unlawful Possession of Vehicle. — See State v. Frazier, 268 N.C. 249, 150 S.E.2d 431 (1966); State v. Hayes, 273 N.C. 712, 161 S.E.2d 185 (1968).

Possession of One Participant Is the Possession of All. — Possession may be personal and exclusive, although it is the joint possession of two or more persons, if they are shown to have acted in concert, or to have been particeps criminis, the possession of one participant being the possession of all. State v. Frazier, 268 N.C. 249, 150 S.E.2d 431 (1966).

Immediate flight of both defendants, without explanation, at mere approach of officers may be considered more than slight corroborative evidence of relation between their then unlawful possession and the unlawful removal of automobile from parking lot. State v. Frazier, 268 N.C. 249, 150 S.E.2d 431 (1966).

§ 14-73. Jurisdiction of the superior courts in cases of larceny and receiving stolen goods.

Applied in State v. Perry, 21 N.C. App. 478, 204 S.E.2d 889 (1974).

§ 14-73.1. Petty misdemeanors. — The offenses of larceny and the receiving of stolen goods knowing the same to have been stolen, which are made misdemeanors by Article 16, Subchapter V, Chapter 14 of the General Statutes, as amended, are hereby declared to be petty misdemeanors. (1949, c. 145, s. 4; 1973, c. 108, s. 1.)

Editor's Note.—
The 1973 amendment deleted provisions as to jurisdiction of petty misdemeanors.

§ 14-76. Larceny, mutilation, or destruction of public records and papers.

Quoted in State v. Bellar, 16 N.C. App. 339, 192 S.E.2d 86 (1972).

§ 14-76.1. Mutilation or defacement of records and papers in the North Carolina State Archives. — If any person shall willfully or maliciously obliterate, injure, deface, or alter any record or paper in the custody of the North Carolina State Archives as defined by G.S. 121-2(7) and 121-2(8), he shall be guilty of a misdemeanor and upon conviction imprisoned for a term not exceeding two years or fined not exceeding one thousand dollars ($1,000) or both. The provisions of this section do not apply to employees of the Department of Cultural Resources who may destroy any accessioned records or papers that are approved for destruction by the North Carolina Historical Commission pursuant to the authority contained in G.S. 121-4(12). (1975, c. 696, s. 3.)

Editor's Note. — Session Laws 1975, c. 696, s. 5, makes the act effective July 1, 1975.

§ 14-77. Larceny, concealment or destruction of wills.

Applied in State v. McLean, 17 N.C. App. 629, 195 S.E.2d 336 (1973).

§ 14-78. Larceny of ungathered crops. — If any person shall steal or feloniously take and carry away any maize, corn, wheat, rice or other grain, or any cotton, tobacco, potatoes, peanuts, pulse, fruit, vetetable or other product cultivated for food or market, growing, standing or remaining ungathered in any field or ground, he shall be guilty of larceny, and shall be punished accordingly, such punishment to include a fine of not less than fifty dollars ($50.00) nor more than two hundred fifty dollars ($250.00). (1811, c. 816, P. R.; R. C., c. 34, s. 21; 1868-9, c. 251; Code, s. 1069; Rev., s. 3503; C. S., s. 4257; 1975, c. 697.)

Editor's Note. — The 1975 amendment, effective July 23, 1975, added "such punishment to include a fine of not less than fifty dollars ($50.00) nor more than two hundred fifty dollars ($250.00)" at the end of the section.

§ 14-80. Larceny of wood and other property from land.

In General.—

This section was enacted in 1866, immediately after the Civil War, to suppress aimless wanderers, from entering land and doing great damage. State v. Andrews, 11 N.C. App. 341, 181 S.E.2d 142 (1971).

Prior to the enactment of this section, landowners had little or no protection against the willful and unlawful taking from their land property which was not, either by common law or previous statute, the subject of larceny. State v. Andrews, 11 N.C. App. 341, 181 S.E.2d 142 (1971).

No latitude of construction is permitted in the interpretation of a penal statute. This section is highly penal in character, and the court is not at liberty to extend its import by implication or equitable construction to include an offense not clearly described. State v. Andrews, 11 N.C. App. 341, 181 S.E.2d 142 (1971).

Indictment Must Allege That Property Taken Was Property of Landowner. — The particularly peculiar wording of this section clearly requires that the indictment allege that the property taken was the property of the owner of the land. State v. Andrews, 11 N.C. App. 341, 181 S.E.2d 142 (1971).

Trespass upon land is an essential element.—

In accord with original. See State v. Gaddy, 16 N.C. App. 436, 192 S.E.2d 18 (1972).

Instructions Held Error. — In a prosecution for larceny of property from land in violation of this section, the trial court erred in giving the jury instructions which would have permitted it to return a verdict of guilty upon a finding of the elements of common-law larceny. State v. Gaddy, 16 N.C. App. 436, 192 S.E.2d 18 (1972).

ARTICLE 17.

Robbery.

§ 14-87. Robbery with firearms or other dangerous weapons. — (a) Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night, or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment for not less than five years nor more than life imprisonment in the State's prison.

(b) Any person who has been previously convicted of a violation of G.S. 14-87(a), or any person who has been previously convicted of a violation of any similar statute in any other state or the District of Columbia, upon conviction for a second or subsequent violation of G.S. 14-87(a), shall be guilty of a felony and shall be punished without benefit of parole, probation, suspended sentence, or any other judicial or administrative procedure except such time as may be allowed as a result of good behavior, whereby the period of actual incarceration of the person sentenced is reduced to a period less than that stated in the sentence imposed by the trial judge. Sentences imposed for a second or subsequent violation pursuant to this proviso shall run consecutively with and shall commence at the expiration of any other sentences being served by the person sentenced hereunder.

Notwithstanding any other provision of law, neither the Parole Commission nor any other agency having responsibility for release of inmates prior to expiration of sentences shall authorize an inmate serving a sentence imposed pursuant to the foregoing proviso of this section to be released prior to expiration of the sentence imposed for a second or subsequent violation of G.S. 14-87(a).

For purposes of determining whether a violation of G.S. 14-87(a) is a second or subsequent violation of G.S. 14-87(a) for sentencing under the foregoing proviso, any previous conviction for violation of G.S. 14-87(a) shall be considered

a previous conviction if convicted before the date of the second or subsequent violation sought to be punished by a sentence under the foregoing proviso. (1929, c. 187, s. 1; 1975, cc. 543, 846.)

Editor's Note. — The first 1975 amendment, effective Oct. 1, 1975, substituted "not less than five years nor more than life imprisonment in the State's prison" for "not less than five nor more than thirty years" at the end of subsection (a).

The second 1975 amendment, effective Oct. 1, 1975, designated the existing section as subsection (a) and added subsection (b).

This section creates no new offense. —

In accord with 1st paragraph in original. See State v. Bailey, 278 N.C. 80, 178 S.E.2d 809 (1971); State v. Osborne, 13 N.C. App. 420, 185 S.E.2d 593 (1972).

In accord with 3rd paragraph in original. See State v. Black, 286 N.C. 191, 209 S.E.2d 458 (1974).

In accord with 5th paragraph in original. See State v. Council, 6 N.C. App. 397, 169 S.E.2d 921 (1969).

This section creates no new offense, but merely provides for more severe punishment for the commission, or attempt to commit, common-law robbery when that offense is committed or attempted with the use or threatened use of firearms or other dangerous weapons. State v. Barksdale, 16 N.C. App. 559, 192 S.E.2d 659 (1972).

This section superadds, etc. —

The critical and essential difference between armed robbery and common-law robbery is that in order for the jury to convict for armed robbery the victim must be endangered or threatened by the use or threatened use of a "firearm or other dangerous weapon, implement or means." State v. Bailey, 278 N.C. 80, 178 S.E.2d 809 (1971).

The essential difference between armed robbery and common-law robbery is that the former is accomplished by the use or threatened use of a firearm or other dangerous weapon whereby the life of a person is endangered or threatened. State v. Lee, 282 N.C. 566, 193 S.E.2d 705 (1973).

Common-Law Robbery Defined. —

In accord with 1st paragraph in original. See State v. Moore, 279 N.C. 455, 183 S.E.2d 456 (1971); State v. Osborne, 13 N.C. App. 420, 185 S.E.2d 593 (1972); State v. Hoover, 14 N.C. App. 154, 187 S.E.2d 453 (1972); State v. Black, 286 N.C. 191, 209 S.E.2d 458 (1974).

In accord with 4th paragraph in original. See State v. Council, 6 N.C. App. 397, 169 S.E.2d 921 (1969); State v. Hullender, 8 N.C. App. 41, 173 S.E.2d 581 (1970).

In accord with 5th paragraph in original. See State v. Council, 6 N.C. App. 397, 169 S.E.2d 921 (1969); State v. Bailey, 278 N.C. 80, 178 S.E.2d 809 (1971); State v. Young, 16 N.C. App. 101, 191 S.E.2d 369 (1972).

The gist of the offense of robbery is the taking by force or putting in fear. State v. Spillars, 280 N.C. 341, 185 S.E.2d 881 (1972).

The word "fear" as used in the phrase, "putting him in fear," in the definition of common-law robbery is not confined to fear of death. State v. Moore, 279 N.C. 455, 183 S.E.2d 456 (1971).

For robbery at common law it is not necessary to prove both violence and putting in fear — proof of either is sufficient. State v. Moore, 279 N.C. 455, 183 S.E.2d 456 (1971).

The use or threatened use of a firearm or other dangerous weapon is not an essential of common-law robbery. State v. Moore, 279 N.C. 455, 183 S.E.2d 456 (1971).

The definition of robbery necessarily carries with it the concept that the offense can only be committed in the presence of the victim. State v. Jacobs, 25 N.C. App. 500, 214 S.E.2d 254 (1975).

Punishment for Common-Law Robbery. —

A sentence of five years' imprisonment imposed upon a verdict of guilty of common-law robbery is to be within the statutory maximum. State v. Jackson, 8 N.C. App. 346, 174 S.E.2d 53 (1970).

"Endangered or Threatened" Construed Conjunctively. — Although this section sets forth disjunctively, "endangered or threatened," several means or ways by which this offense may be committed, a warrant thereunder correctly charges them conjunctively, as "endangered and threatened." State v. Swaney, 277 N.C. 602, 178 S.E.2d 399 (1971).

Armed robbery is a crime of violence, the very nature of which suffices to support a reasonable belief that defendant would evade arrest if not immediately taken into custody. State v. Shore, 285 N.C. 328, 204 S.E.2d 682 (1974).

The gist of the offense, etc. —

In accord with 1st paragraph in original. See State v. Black, 286 N.C. 191, 209 S.E.2d 458 (1974).

In accord with 2nd paragraph in original. See State v. Johnson, 20 N.C. App. 53, 200 S.E.2d 395 (1973).

In an indictment for robbery with firearms or other dangerous weapons, the gist of the offense is not the taking of personal property, but a taking or attempted taking by force or putting in fear by the use of firearms or other dangerous weapons. State v. Harris, 8 N.C. App. 653, 174 S.E.2d 334 (1970).

The gist of the offense of armed robbery is not the taking but the taking by force or putting in fear. Testimony by the victim of the armed robbery that he was scared is sufficient to meet

the requirements of the statute. State v. Swaney, 277 N.C. 602, 178 S.E.2d 399 (1971).

The gist of the offense is the accomplishment of the robbery by the use or threatened use of firearms. State v. Waddell, 279 N.C. 442, 183 S.E.2d 644 (1971).

The gravamen of the offense of armed robbery is the endangering or threatening of human life by the use or threatened use of firearms or other dangerous weapons in the perpetration of or even in the attempt to perpetrate the crime of robbery. State v. Ballard, 280 N.C. 479, 186 S.E.2d 372 (1972).

The gist of the offense of robbery with firearms is the accomplishment of the robbery by the use or threatened use of firearms or other dangerous weapons whereby the life of a person is endangered or threatened. State v. Harris, 281 N.C. 542, 189 S.E.2d 249 (1972).

The main element of the offense. —

In accord with original. See State v. Waddell, 279 N.C. 442, 183 S.E.2d 644 (1971); State v. Ballard, 280 N.C. 479, 186 S.E.2d 372 (1972).

The offense requires the taking, etc. —

In accord with 2nd paragraph in original. See State v. Black, 286 N.C. 191, 209 S.E.2d 458 (1974).

In common-law robbery a taking is necessary, but in armed robbery either the taking or the attempt to take will support a verdict under this section. State v. Lock, 284 N.C. 182, 200 S.E.2d 49 (1973).

In order to commit robbery, property must be taken, which is larceny; thus the taking or attempted taking of property is an essential element of robbery. State v. Council, 6 N.C. App. 397, 169 S.E.2d 921 (1969).

It is not incumbent upon the State to prove that defendants actually took money. In a prosecution for the offense of armed robbery the offense is complete if there is an attempt to take personal property by use of firearms. State v. Jenkins, 8 N.C. App. 532, 174 S.E.2d 690 (1970).

"Felonious taking" is an essential element of the crime of armed robbery, and it means "a taking with the felonious intent on the part of the taker to deprive the owner of his property permanently and to convert it to the use of the taker." State v. Harmon, 21 N.C. App. 508, 204 S.E.2d 883 (1974).

State Must Show That Life of Victim Was Endangered or Threatened. — For a conviction of robbery with firearms or other dangerous weapons, the State must further show beyond a reasonable doubt that the life of a person was endangered or threatened by the defendant's, or his accomplice's, possession, use or threatened use of a firearm or other dangerous weapon, implement or means; proof of this additional element is not required for conviction of the offense of common-law robbery. State v. Evans, 279 N.C. 447, 183 S.E.2d 540 (1971).

Where a weapon which is dangerous within the meaning of this section is used in a robbery, the only difference between common-law robbery and armed robbery is whether the life of the person robbed is endangered or threatened by the weapon. State v. Osborne, 13 N.C. App. 420, 185 S.E.2d 593 (1972).

The question under this section is whether a person's life was in fact endangered or threatened by defendant's possession, use or threatened use of the opened knife, not whether the person was scared or in fear of his life. State v. Moore, 279 N.C. 455, 183 S.E.2d 456 (1971).

It may be inferred that the threat of use and actual use of a knife constitute a danger to a person's life for the purposes of this section. State v. Moore, 279 N.C. 455, 183 S.E.2d 456 (1971).

Serious injury need not be shown at all in a prosecution for armed robbery. State v. Richardson, 279 N.C. 621, 185 S.E.2d 102 (1971).

Nor Need Intent to Kill. — Neither the infliction of serious injury nor an intent to kill is an essential element of the charge of armed robbery. State v. Wheeler, 21 N.C. App. 514, 204 S.E.2d 862 (1974).

Profit Immaterial. —

In accord with original. See State v. Jenkins, 8 N.C. App. 532, 174 S.E.2d 690 (1970).

It is not necessary to describe accurately, etc. —

In robbery it is not necessary or material to describe accurately or prove the particular identity or value of the property, further than to show that it was the property of the person assaulted or in his care, and had a value. State v. Council, 6 N.C. App. 397, 169 S.E.2d 921 (1969).

In an indictment for robbery, unlike an indictment for larceny, the kind and value of the property taken is not material — the gist of the offense is not the taking but a taking by force or putting in fear. State v. Council, 6 N.C. App. 397, 169 S.E.2d 921 (1969).

Where the gist of the offense as described in the indictment is the attempt to commit robbery by the use or threatened use of firearms, the force or intimidation occasioned by the use or threatened use of firearms is the main element of the offense. In such a case, it is not necessary or material to describe accurately or prove the particluar identity or value of the property, provided the indictment shows that the property was that of the person assaulted or under his care, and that such property is the subject of robbery and that it had some value. State v. Owens, 277 N.C. 697, 178 S.E.2d 442 (1971).

An indictment for robbery will not fail if the description of the property is sufficient to show it to be the subject of robbery and negates the idea that the accused was taking his own property. State v. Spillars, 280 N.C. 341, 185 S.E.2d 881 (1972).

The kind and value of the property taken is not material so long as it is described by allegation and proof sufficient to show that it is the subject of robbery. State v. Fountain, 14 N.C. App. 82, 187 S.E.2d 493 (1972).

It is not necessary in an armed robbery prosecution to allege or prove the particular value of the property taken, provided the indictment and proof show that the property was that of the person assaulted or under his care, and that such property is the subject of robbery and that it had some value. State v. Reaves, 15 N.C. App. 476, 190 S.E.2d 358 (1972).

An indictment for robbery with firearms will support a conviction, etc. —

In accord with 5th paragraph in original. See State v. Conrad, 275 N.C. 342, 168 S.E.2d 39 (1969); State v. Black, 286 N.C. 191, 209 S.E.2d 458 (1974).

An indictment for armed robbery under this section will support a verdict of guilty of common-law robbery. State v. Jackson, 6 N.C. App. 406, 170 S.E.2d 137 (1969).

An indictment for robbery with firearms will support a conviction of the lesser offenses of common-law robbery, assault, larceny from the person, or simple larceny. State v. Swaney, 277 N.C. 602, 178 S.E.2d 399 (1971).

Common-law robbery is a lesser included offense of armed robbery, and an indictment for armed robbery will support a conviction for common-law robbery. State v. Bailey, 278 N.C. 80, 178 S.E.2d 809 (1971).

An indictment for robbery must contain a description, etc. —

An indictment is defective under this section where it does not describe any property sufficiently to show that it was the subject of robbery, and although the indictment states a value, what property has the value does not appear. State v. Owens, 277 N.C. 697, 178 S.E.2d 442 (1971).

Bill of indictment illegally amended to charge felony of attempted armed robbery. — See State v. Teel, 24 N.C. App. 385, 210 S.E.2d 517 (1975).

Proof of Intent. —

In accord with 1st paragraph in original. See State v. Reaves, 9 N.C. App. 315, 176 S.E.2d 13 (1970).

It is not necessary that ownership, etc. —

In accord with original. See State v. McGilvery, 9 N.C. App. 15, 175 S.E.2d 328 (1970); State v. Spillars, 280 N.C. 341, 185 S.E.2d 881 (1972); State v. Johnson, 20 N.C. App. 53, 200 S.E.2d 395 (1973).

To allege and prove the crime of armed robbery, it is not necessary that ownership of the property be laid in any particular person, at least so long as the allegation and proof are sufficient to negative the idea of the accused's taking his own property. State v. Fountain, 14 N.C. App. 82, 187 S.E.2d 493 (1972).

In an indictment for robbery the allegation of ownership of the property taken is sufficient when it negatives the idea that the accused was taking his own property. State v. Ballard, 280 N.C. 479, 186 S.E.2d 372 (1972).

An indictment for robbery need not specify the person who owned the property taken. State v. Johnson, 20 N.C. App. 53, 200 S.E.2d 395 (1973).

Evidence. —

Testimony by armed robbery victim, including identification of defendant, was sufficient for submission of case to the jury. State v. Canady, 8 N.C. App. 320, 174 S.E.2d 140 (1970).

Where defendants entered pleas of not guilty to charges of armed robbery and there is nothing in the record to show that they made any judicial admission that the offense had actually occurred, a trial court's instruction to the jury that defendants "do not deny that somebody did this, but they say they are not the men, and some other men did it, not themselves," is an unauthorized expression of opinion on the evidence in violation of this section. State v. Brinkley, 10 N.C. App. 160, 177 S.E.2d 727 (1970).

The evidence that defendant had a pistol within easy reach, that he had threatened the prosecutrix with it, and that she was in fear for her life when he took her money, was sufficient to go to the jury on the robbery with firearms charge. State v. Harris, 281 N.C. 542, 189 S.E.2d 249 (1972).

Proof of the defendant's presence in a place of business, his possession therein of a firearm and his intent to commit the offense of robbery is not sufficient to support a conviction of the offense described in this section, for it omits the essential elements of (1) a taking or attempt to take personal property, and (2) the endangering or threatening of the life of a person. State v. Evans, 279 N.C. 447, 183 S.E.2d 540 (1971).

In prosecution for armed robbery the trial court did not err in allowing an eyewitness to testify that the defendant robbed the same restaurant three days before the crime for which he was on trial. State v. Garnett, 24 N.C. App. 489, 211 S.E.2d 519, appeal dismissed, 286 N.C. 724, 215 S.E.2d 622 (1975).

The trial court properly allowed the photographs of the robbery to be admitted into evidence where the accuracy of the photographs was established by the testimony of a witness who was familiar with the scene, object and person portrayed therein. State v. Garnett, 24 N.C. App. 489, 211 S.E.2d 519, appeal dismissed, 286 N.C. 724, 215 S.E.2d 622 (1975).

The evidence of the State was sufficient to support the verdict of robbery with a firearm where it was established that defendant picked the victim, furnished the weapon, was present during the robbery, refused to identify the robbers, and tried to mislead the officers by

identifying another person. State v. Moore, 22 N.C. App. 679, 207 S.E.2d 358 (1974), cert. denied, 285 N.C. 762, 209 S.E.2d 286 (1974).

When the State presents evidence tending to show defendant might have aided and abetted, it is incumbent upon the trial court to explain the principles of aiding and abetting which apply to the particular evidence in the case. State v. Logan, 25 N.C. App. 49, 212 S.E.2d 236 (1975).

Evidence Sufficient to Be Submitted to Jury in Prosecution for Conspiracy to Commit Armed Robbery. — See State v. Mason, 24 N.C. App. 568, 211 S.E.2d 501, cert. denied, 286 N.C. 725, 213 S.E.2d 724 (1975).

Attempt. —

There can be no attempt to commit robbery in the absence of an overt act in part execution of the intent to commit the crime. State v. Powell, 6 N.C. App. 8, 169 S.E.2d 210 (1969).

In determining whether a person has been guilty of the offense of attempting to commit robbery, the courts are guided by the peculiar facts of each case, in order to decide whether the acts of the defendant have advanced beyond the stage of mere preparation, to the point where it can be said that an attempt to commit the crime has been made. The question is one of degree, and cannot be controlled by exact definition. State v. Powell, 6 N.C. App. 8, 169 S.E.2d 210 (1969).

The attempt to take property by the forbidden means, all other elements being present, completes the offense of armed robbery. State v. Jenkins, 8 N.C. App. 532, 174 S.E.2d 690 (1970).

An attempt to commit common-law robbery, crime punishable as a felony by virtue of § 14-3(b), is an entirely different crime from the misdemeanor offense created by § 14-196(a)(2). State v. Jacobs, 25 N.C. App. 500, 214 S.E.2d 254 (1975).

What Constitutes Attempt. — An attempt occurs when the defendant, with the requisite intent to rob, does some overt act calculated and designed to bring about the robbery, thereby endangering or threatening the life of a person. State v. Price, 280 N.C. 154, 184 S.E.2d 866 (1971).

This section makes the attempt to commit the offense an offense of equal gravity with the completed act. State v. Sanders, 280 N.C. 81, 185 S.E.2d 158 (1971).

The offense is complete if there is either a taking or an attempt to take the personal property of another by the means and in the manner prescribed by this section, but there must be one or the other. State v. Evans, 279 N.C. 447, 183 S.E.2d 540 (1971).

Under this section an attempt to rob another of personal property, made with the use of a dangerous weapon, whereby the life of a person is endangered or threatened, is a completed crime and is punishable to the same extent as if the property had been taken as intended. State v. Price, 280 N.C. 154, 184 S.E.2d 866 (1971).

Under this section the offense is complete if there is an attempt to take personal property by use of firearms or other dangerous weapon. State v. Duncan, 14 N.C. App. 113, 187 S.E.2d 353 (1972).

If all of the elements are present, the offense is complete whether the taking is successful or amounts only to an attempt to take personalty from the victim. State v. Kinsey, 17 N.C. App. 57, 193 S.E.2d 430 (1972).

Failure to Instruct on Common-Law Robbery. —

When there is evidence of defendant's guilt of common-law robbery, it is error for the court to fail to submit the lesser offense to the jury. State v. Bailey, 278 N.C. 80, 178 S.E.2d 809 (1971).

Where conflicting testimony raised an issue for the jury as to whether defendant had in his possession and used or threatened to use a firearm or other dangerous weapon to perpetrate the robbery, the trial judge, even without request for special instructions, should have submitted the lesser offense of common-law robbery to the jury under proper instructions. State v. Bailey, 278 N.C. 80, 178 S.E.2d 809 (1971).

When Instruction on Common-Law Robbery Not Required. — If the State's evidence shows an armed robbery as charged in the indictment and there is no conflicting evidence relating to the elements of the crime charged, an instruction on common-law robbery is not required. State v. Lee, 282 N.C. 566, 193 S.E.2d 705 (1973).

In a prosecution for armed robbery the court is not required to submit the lesser included offense of common-law robbery unless there is evidence of defendant's guilt of that crime. State v. Lee, 282 N.C. 566, 193 S.E.2d 705 (1973).

The evidence did not support an instruction on common-law robbery, where there was no evidence in the record of a taking, an essential element of the crime of common-law robbery. State v. Duncan, 14 N.C. App. 113, 187 S.E.2d 353 (1972).

Where all of the evidence tended to show that an armed robbery was committed by the defendant, and others, acting in concert, and that the defendant aided and abetted in the use and threatened use of firearm wielded by another, and there was no evidence tending to show the commission of common-law robbery, it would have been error for the trial court to charge on the unsupported lesser degree of the crime. State v. Curtis, 18 N.C. App. 116, 196 S.E.2d 278 (1973).

Instruction Not Relieving State of Proving Essential Element. — An instruction which merely informed the jury that a .22 caliber pistol is, in fact, a firearm and should the jury find that defendant used a .22 caliber pistol on the

occasion in question then such a weapon would be a firearm within the meaning of that term as used in this section was not objectionable on the ground that the instruction in effect told the jury that defendant used a firearm in the commission of the robbery, thereby relieving the State of the burden of proving an essential element of armed robbery. State v. Bailey, 280 N.C. 264, 185 S.E.2d 683 (1972).

Reading Statute to Jury without Further Comment. — Any error resulting from a plain reading of the statute to the jury without further comment is neither material nor prejudicial. State v. Westry, 15 N.C. App. 1, 189 S.E.2d 618 (1972).

Maximum Punishment. —

Punishment under this section which does not exceed the limit fixed by this section cannot be considered cruel and unusual in a constitutional sense. State v. Frietch, 8 N.C. App. 331, 174 S.E.2d 149 (1970).

The sentences of defendants cannot be considered cruel and unusual punishment, where they are within the limits established by this section. State v. Neal, 19 N.C. App. 426, 199 S.E.2d 143 (1973).

Property alleged to have been taken should be described by the name usually applied to it when in the condition it was in when taken, and where possible to state the number or quantity, kind, quality, distinguishing features, etc., thereof. State v. Council, 6 N.C. App. 397, 169 S.E.2d 921 (1969).

It Must Appear That Article Taken Had Some Value. — Although value need not be averred by a specific allegation, it must appear from the indictment that the article taken had some value. State v. Council, 6 N.C. App. 397, 169 S.E.2d 921 (1969).

The bill of indictment upon which defendant is tried for attempted armed robbery is fatally defective when it fails to allege that defendant attempted to take any property or thing of value from anyone. State v. Teel, 24 N.C. App. 385, 210 S.E.2d 517 (1975).

The allegation in a bill of indictment that the property taken was "personal property of the value of . . ." is insufficient to charge the offense of robbery. State v. Council, 6 N.C. App. 397, 169 S.E.2d 921 (1969).

In an indictment or information for robbery by taking money, the term "money" itself imports some value, of which fact the court will take judicial notice. State v. Owens, 277 N.C. 697, 178 S.E.2d 442 (1971).

Where the property involved is described in an indictment under this section as "U.S. currency," it is the subject of robbery and some value can be inferred from the description of the property itself. State v. Owens, 277 N.C. 697, 178 S.E.2d 442 (1971).

And That It May Be Subject of Larceny. — An indictment for robbery must contain a description of the property sufficient, at least, to show that such property is the subject of robbery. To constitute the offense of robbery the property must be such as is the subject of larceny. State v. Council, 6 N.C. App. 397, 169 S.E.2d 921 (1969); State v. Johnson, 20 N.C. App. 53, 200 S.E.2d 395 (1973).

Money is recognized by law as property which may be the subject of larceny, and hence of robbery. State v. Owens, 277 N.C. 697, 178 S.E.2d 442 (1971).

Bill Need Not Allege That Defendant Intended Conversion of Property. — A bill of indictment for armed robbery need not allege that defendants intended to convert the personal property stolen to their own use. State v. Frietch, 8 N.C. App. 331, 174 S.E.2d 149 (1970).

Bill of indictment for armed robbery sufficiently charged felonious intent where it alleged that defendants, by the use and threatened use of firearms whereby the life of a motel night clerk was endangered, unlawfully, willfully and feloniously took money from the motel. State v. Frietch, 8 N.C. App. 331, 174 S.E.2d 149 (1970).

Lesser Included Offenses Generally. — In a prosecution for robbery with a dangerous weapon, the accused may be acquitted of the crime charged and convicted of a lesser offense included in the offense charged, such as common-law robbery, if there is evidence from which the commission of such lesser offense can be found. State v. Black, 21 N.C. App. 640, 205 S.E.2d 154, aff'd, 286 N.C. 191, 209 S.E.2d 458 (1974).

Failing to Submit Issues of Assault with a Deadly Weapon and Simple Assault. — Where there is no evidence in an armed robbery prosecution that any offense other than armed robbery or common-law robbery had been committed, the trial court does not err in failing to submit the issues of assault with a deadly weapon and simple assault. State v. Gurkin, 8 N.C. App. 304, 174 S.E.2d 20 (1970).

Where all of the State's evidence tended to show the armed robbery of another person and where all of defendant's evidence tended to show that he committed no crime, the trial court was not required to charge on the lesser offense of assault with a deadly weapon. State v. Allison, 280 N.C. 175, 184 S.E.2d 857 (1971).

The trial court is not required to charge the jury upon the question of a defendant's guilt of lesser degrees of the crime charged in the indictment when there is no evidence to sustain a verdict of defendant's guilt of such lesser degrees. State v. Hailstock, 15 N.C. App. 556, 190 S.E.2d 376 (1972).

Crime of Armed Robbery Includes Assault with a Deadly Weapon. — The crime of armed robbery defined in this section includes an assault on the person with a deadly weapon.

State v. Richardson, 279 N.C. 621, 185 S.E.2d 102 (1971).

The crime of armed robbery includes an assault on a person with a deadly weapon; however, where the assault charged contains a necessary ingredient which is not an essential ingredient of armed robbery, the fact that the assault is committed during the perpetration of the armed robbery does not deprive the assault of its character as a complete and separate offense. State v. Teel, 24 N.C. App. 385, 210 S.E.2d 517 (1975).

Assault with a deadly weapon inflicting serious injury is not a lesser included offense of attempted common-law robbery. State v. Wilson, 26 N.C. App. 188, 215 S.E.2d 167 (1975).

And Convictions of Both Offenses Arising from Same Conduct Will Not Support Separate Judgments. — If a person is convicted simultaneously of armed robbery and of the lesser included offense of assault with a deadly weapon, and both offenses arise out of the same conduct, and separate judgments are pronounced, the judgment on the separate verdict of guilty of assault with a deadly weapon must be arrested because in such case, the armed robbery is accomplished by the assault with a deadly weapon and all essentials of this assault charge are essentials of the armed robbery charge. State v. Richardson, 279 N.C. 621, 185 S.E.2d 102 (1971); State v. Lunsford, 26 N.C. App. 78, 214 S.E.2d 619 (1975).

If a person is convicted simultaneously of armed robbery and the lesser included offense of assault with a deadly weapon, and both offenses arise out of the same conduct, separate judgments may not be pronounced. State v. Alexander, 284 N.C. 87, 199 S.E.2d 450 (1973).

But Felonious Assault under § 14-32 Is Not Lesser Included Offense in Armed Robbery. — The crime of felonious assault defined in § 14-32(a) is an assault with a deadly weapon which is made with intent to kill and which inflicts serious injury. These additional elements of the crime of felonious assault are not elements of the crime of armed robbery defined in this section. State v. Richardson, 279 N.C. 621, 185 S.E.2d 102 (1971).

Armed robbery and felonious assault charges are separate and distinct offenses. State v. Wheeler, 21 N.C. App. 514, 204 S.E.2d 862 (1974).

If a defendant is convicted simultaneously of armed robbery and of felonious assault under § 14-32(a), neither the infliction of serious injury nor an intent to kill is an essential of the armed robbery charge. State v. Richardson, 279 N.C. 621, 185 S.E.2d 102 (1971).

An assault with a deadly weapon inflicting serious injury, defined by § 14-32(b), is not a lesser included offense of armed robbery because the infliction of serious injury is not an essential ingredient of armed robbery. State v. Stepney, 280 N.C. 306, 185 S.E.2d 844 (1972); State v. Teel, 24 N.C. App. 385, 210 S.E.2d 517 (1975).

A conviction of armed robbery does not establish a defendant's guilt of felonious assault. State v. Richardson, 279 N.C. 621, 185 S.E.2d 102 (1971); State v. Alexander, 284 N.C. 87, 199 S.E.2d 450 (1973).

The fact that a felonious assault is committed during the perpetration of armed robbery does not deprive the felonious assault of its character as a complete and separate felony. State v. Richardson, 279 N.C. 621, 185 S.E.2d 102 (1971).

Where defendant was charged with armed robbery but found guilty of assault with a deadly weapon inflicting serious bodily injury, the trial court should have granted his motion in arrest of judgment, since assault with a deadly weapon inflicting serious injury is not a lesser included offense of armed robbery, but a separate offense. State v. Perry, 18 N.C. App. 141, 196 S.E.2d 369 (1973).

And Separate Judgment May Be Entered for Each Offense. — When separate indictments for armed robbery and felonious assault based on separate features of one continuous course of conduct are tried together, and verdicts of guilty as charged are returned, these verdicts provide support for separate judgments. State v. Richardson, 279 N.C. 621, 185 S.E.2d 102 (1971).

A defendant may be convicted for both conspiracy to commit robbery and the commission of the same robbery without being subject to double jeopardy. State v. Wiggins, 21 N.C. App. 441, 204 S.E.2d 692 (1974).

Armed robbery differs in fact and in law from accessory after the fact, etc. —

Where the bill of indictment charges armed robbery, both a waiver and information are necessary, under § 15-140.1 (now § 15A-642), to vest the court with jurisdiction to try the defendant, or to entertain his plea, on a charge of accessory after the fact of armed robbery, because the offense of accessory after the fact is not a lesser included offense of the principal crime. State v. Brown, 21 N.C. App. 87, 202 S.E.2d 798 (1974).

But the crime of accessory before the fact to robbery is included in the indictment for robbery. State v. Wiggins, 21 N.C. App. 441, 204 S.E.2d 692 (1974).

Insufficiency of the evidence to support a conviction for robbery did not entitle defendant to his discharge, and the State properly tried defendant on the same indictment as an accessory before the fact to the robbery. State v. Wiggins, 21 N.C. App. 441, 204 S.E.2d 692 (1974).

Merger of Armed Robbery and Murder Charges. — Where it appears conclusively that armed robbery charges were proved as essential elements in the capital offense of murder in the first degree upon which the defendants were convicted, the robberies became a part of and

were merged into the murder charges, and having been so used, the defendants cannot again be charged, convicted and sentenced for these elements although the robberies constituted crimes within themselves. State v. Carroll, 282 N.C. 326, 193 S.E.2d 85 (1972).

No Fatal Variance between Indictment and Evidence. — There was no fatal variance between an indictment which charged that property was taken from the "residence" or "place of business" of a named person and evidence that the armed robbery occurred at a finance company where the person named was employed, the property having been in the lawful custody of such person. State v. McGilvery, 9 N.C. App. 15, 175 S.E.2d 328 (1970).

Variance between Allegations and Proof as to Property Taken Not Material. — Variance between the allegations of the indictment and the proof in respect of the property taken is not material. State v. Ballard, 280 N.C. 479, 186 S.E.2d 372 (1972).

Variance as to Ownership of Store from Which Property Taken. — A variance between the allegation in the indictment which alleged that one person was the owner and in charge of the store from which the property was forcibly taken and the evidence which disclosed that another person owned the store is not fatal to an indictment which contained all essential averments required by the statute. State v. Waddell, 279 N.C. 442, 183 S.E.2d 644 (1971).

Judgment of Nonsuit for Variance Improvidently Entered. — The fact that one employee named in the indictment as the person endangered and threatened and from whom the store's money had been taken happened to be farther from the store's money than two other employees when it was taken into possession by robbers did not negate the fact that the money was taken from the presence of that employee and all other employees then on duty in the store; therefore a judgment of nonsuit for variance was improvidently entered. State v. Ballard, 280 N.C. 479, 186 S.E.2d 372 (1972).

Exception to signing of judgment entered upon defendant's conviction of armed robbery is without merit where the indictment properly charged defendant with armed robbery, the evidence supports the judgment and the sentence is within the statutory limits. State v. Hughes, 8 N.C. App. 334, 174 S.E.2d 1 (1970).

Verbal Demand to Surrender Money Not Required. — The fact that neither defendant nor a companion made any verbal demand on the prosecuting witness to surrender money did not entitle defendant to a nonsuit in an armed robbery prosecution, where evidence showed that the witness immediately pitched the money onto the floor when a gun was pointed in his face. State v. Jenkins, 8 N.C. App. 532, 174 S.E.2d 690 (1970).

Robbery Includes Assault. — The crime of robbery ex vi termini includes an assault on the person. State v. Powell, 6 N.C. App. 8, 169 S.E.2d 210 (1969).

The fact that the allegations in an armed robbery indictment include a charge of assault does not render the indictment invalid. State v. Swaney, 277 N.C. 602, 178 S.E.2d 399 (1971).

Necessity for Instruction as to Lesser Included Offense Arises Only Where Evidence Warrants. — In an armed robbery prosecution, there is no necessity for the trial judge to instruct the jury as to an included crime of lesser degree where the State's evidence tends to show a completed robbery and there is no conflicting evidence relating to the elements of the crime charged. State v. Reaves, 9 N.C. App. 315, 176 S.E.2d 13 (1970).

The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed, and the presence of such evidence is the determinative factor. Hence, there is no such necessity if the State's evidence tends to show a completed robbery and there is no conflicting evidence relating to elements of the crime charged. Mere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice. State v. Bailey, 278 N.C. 80, 178 S.E.2d 809 (1971).

It is true that in a prosecution for robbery with firearms, an accused may be acquitted of the major charge and convicted of an included or lesser offense, such as common-law robbery, or assault, or larceny from the person, or simple larceny, if a verdict for the included or lesser offense is supported by allegations of the indictment and by evidence on the trial. However, the trial court is not required to submit to the jury the question of a lesser offense, included in that charged in the indictment, where there is no evidence to support such a verdict. State v. Owens, 277 N.C. 697, 178 S.E.2d 442 (1971).

Where under the State's evidence, a defendant would be guilty of attempted armed robbery, and under the defendant's evidence, he would not be guilty of attempted armed robbery or attempted common-law robbery, the judge is not required to instruct the jury that it might return a verdict of guilty of attempted common-law robbery. State v. Owens, 277 N.C. 697, 178 S.E.2d 442 (1971).

Where the evidence for the State clearly shows an armed robbery and there is no evidence of a lesser offense, the trial court is not required to submit to the jury the lesser included offenses of common-law robbery and assault. State v. Swaney, 277 N.C. 602, 178 S.E.2d 399 (1971).

The trial court is not required to submit to the jury the question of a lesser offense included in

that charged where there is no evidence to support such a verdict. State v. Black, 21 N.C. App. 640, 205 S.E.2d 154, aff'd, 286 N.C. 191, 209 S.E.2d 458 (1974).

Refusal to charge on lesser included offenses held proper. State v. Harmon, 21 N.C. App. 508, 204 S.E.2d 883 (1974).

Instruction Not Misleading. — In its instructions, the trial court's use of the words "some weapon" rather than "firearms or other dangerous weapon," although not approved, was not such as to mislead or misinform the jury, where the court specified a pistol as the weapon allegedly used elsewhere in the charge. State v. Bailey, 278 N.C. 80, 178 S.E.2d 809 (1971).

Instruction on Element of Felonious Taking. — In every armed robbery case the judge must instruct the jury on the element of felonious taking, but he need not use the specific words "felonious taking;" he is only required to describe in accurate terms the state of mind necessary for the crime. State v. Harmon, 21 N.C. App. 508, 204 S.E.2d 883 (1974).

Evidence Supporting Charge on Both Kidnapping and Armed Robbery. — Where a victim was forced from his residence at gunpoint and transported by a car for a distance of eight miles where he was robbed, there was sufficient asportation and evidence to support a charge to the jury on both kidnapping and armed robbery, and the State is not required to elect between charges. State v. Sommerset, 21 N.C. App. 272, 204 S.E.2d 206 (1974).

Facts Supporting Only One Count of Robbery. — Where defendant took money from a store owner and no injury was inflicted on any one of the employees, even though the lives of all employees present were endangered, a charge and conviction of two counts of robbery was erroneous: Defendant committed only one robbery. State v. Potter, 285 N.C. 238, 204 S.E.2d 649 (1974).

Trial Court Erred in Allowing Conviction. — The trial court erred in allowing the jury to convict defendant of attempted armed robbery and of aiding and abetting in common-law robbery, a lesser included offense of armed robbery. State v. Barksdale, 16 N.C. App. 559, 192 S.E.2d 659 (1972).

Possession Raises Presumption. — If and when it is established that there was an armed robbery in which property was stolen, then the possession of such recently stolen property raises a presumption of fact that the possessor is guilty of the armed robbery. State v. Hickson, 25 N.C. App. 619, 214 S.E.2d 259 (1975).

Applied in State v. Reid, 5 N.C. App. 424, 168 S.E.2d 511 (1969); State v. Gwyn, 7 N.C. App. 397, 172 S.E.2d 105 (1970); State v. Basden, 8 N.C. App. 401, 174 S.E.2d 613 (1970); State v. Elliott, 9 N.C. App. 1, 175 S.E.2d 312 (1970); State v. Summerlin, 9 N.C. App. 457, 176 S.E.2d 356 (1970); State v. Carnes, 279 N.C. 549, 184 S.E.2d 235 (1971); State v. Williams, 279 N.C. 663, 185 S.E.2d 174 (1971); State v. Little, 13 N.C. App. 228, 185 S.E.2d 23 (1971); State v. Brown, 13 N.C. App. 261, 185 S.E.2d 471 (1971); State v. Gainey, 280 N.C. 366, 185 S.E.2d 874 (1972); State v. Long, 280 N.C. 633, 187 S.E.2d 47 (1972); State v. Davis, 14 N.C. App. 278, 188 S.E.2d 13 (1972); State v. Jackson, 14 N.C. App. 288, 188 S.E.2d 28 (1972); State v. Wynn, 14 N.C. App. 291, 187 S.E.2d 881 (1972); State v. Blake, 14 N.C. App. 367, 188 S.E.2d 607 (1972); State v. Long, 14 N.C. App. 653, 188 S.E.2d 533 (1972); State v. McLean, 14 N.C. App. 664, 188 S.E.2d 525 (1972); State v. Wiggins, 16 N.C. App. 527, 192 S.E.2d 680 (1972); State v. Howes, 19 N.C. App. 155, 198 S.E.2d 86 (1973); State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721 (1974); State v. Capel, 21 N.C. App. 311, 204 S.E.2d 226 (1974); State v. Lucas, 21 N.C. App. 343, 204 S.E.2d 195 (1974); State v. Wallace, 21 N.C. App. 523, 204 S.E.2d 855 (1974); State v. Teat, 22 N.C. App. 484, 206 S.E.2d 732 (1974); State v. Jackson, 287 N.C. 470, 215 S.E.2d 123 (1975); State v. Dunn, 26 N.C. App. 475, 216 S.E.2d 412 (1975).

Cited in State v. Bumper, 5 N.C. App. 528, 169 S.E.2d 65 (1969); State v. Smith, 278 N.C. 476, 180 S.E.2d 7 (1971); State v. Lassiter, 13 N.C. App. 292, 185 S.E.2d 478 (1971); State v. Carthens, 284 N.C. 111, 199 S.E.2d 456 (1973); State v. Hill, 287 N.C. 207, 214 S.E.2d 67 (1975); State v. Jones, 26 N.C. App. 467, 216 S.E.2d 387 (1975).

§ 14-89.1. Safecracking and safe robbery. — Any person who shall, by the use of explosives, drills, or tools, unlawfully force open or attempt to force open or "pick" the combination of a safe or vault used for storing money or other valuables, shall, upon conviction thereof, receive a sentence, in the discretion of the trial judge, of not less than two years nor more than 30 years' imprisonment in the State penitentiary. (1961, c. 653; 1973, c. 235, s. 1.)

Editor's Note. —

The 1973 amendment deleted "other" preceding "tools" and substituted "of not less than two years nor more than 30 years" for "from ten years to life imprisonment."

Session Laws 1973, c. 235, s. 2, provides: "This

act shall apply to all offenses committed after its ratification and shall become effective upon ratification." The act was ratified April 19, 1973.

Effect and Application of 1973 Amendment. — The 1973 amendment did not repeal this section. The main thrust of the amendment was directed to the punishment provisions, and the amending statute expressly provided that the act should apply to all offenses committed after its ratification. This amendment clearly manifests a legislative intent that the reduction in punishment should apply only to acts committed after April 19, 1973. State v. Cameron, 284 N.C. 165, 200 S.E.2d 186 (1973).

Session Laws 1973, c. 235, reducing the punishment for safecracking and setting it at two to 30 years imprisonment, applies to all offenses committed after its ratification and became effective upon ratification. Where the crime was committed in 1971, before Chapter 235 was ratified, defendant can be punished under the old statute. State v. Martin, 20 N.C. App. 477, 201 S.E.2d 540 (1974).

Where the acts for which defendant was prosecuted occurred prior to April 19, 1973, the trial judge properly imposed sentence according to the provision of this section as it existed before the 1973 amendment. State v. Cameron, 284 N.C. 165, 200 S.E.2d 186 (1973).

"Safecracking" and "attempted safecracking" are equivalent in words to "force open" and "attempt to force open." State v. Sanders, 280 N.C. 81, 185 S.E.2d 158 (1971).

Are Offenses of Equal Dignity. — This section makes the completed act of safecracking and attempted safecracking offenses of equal dignity. State v. Sanders, 280 N.C. 81, 185 S.E.2d 158 (1971).

This section makes an attempt to force open a safe or vault a crime of equal dignity with the completed offense. State v. Sanders, 280 N.C. 81, 185 S.E.2d 158 (1971).

Safecracking is a separate and distinct crime, usually requiring special implements or explosives and particular skills. State v. Buie, 26 N.C. App. 151, 215 S.E.2d 401 (1975).

Acts Constituting Attempted Safecracking. — Removing the dial, sawing off the hinges, chiseling out a part of the concrete bottom of a small safe and smudging it with a blowtorch were held to go beyond mere preparation for safecracking and in law to constitute attempted safecracking. State v. Sanders, 280 N.C. 81, 185 S.E.2d 158 (1971).

An indictment which clearly states that a safe was opened "by the use of chopping tools," follows the language of the safecracking statute, and is entirely proper. State v. Martin, 20 N.C. App. 477, 201 S.E.2d 540 (1974).

Evidence sufficient to sustain conviction for safecracking. State v. Walker, 6 N.C. App. 447, 170 S.E.2d 627 (1969).

Applied in State v. Battle, 279 N.C. 484, 183 S.E.2d 641 (1971); State v. McNeil, 280 N.C. 159, 185 S.E.2d 156 (1971); State v. Jones, 280 N.C. 322, 185 S.E.2d 858 (1972); State v. Lewis, 281 N.C. 564, 189 S.E.2d 216 (1972); State v. Broadway, 16 N.C. App. 167, 191 S.E.2d 243 (1972); State v. Smith, 17 N.C. App. 694, 195 S.E.2d 369 (1973); State v. Brady, 18 N.C. App. 325, 196 S.E.2d 813 (1973).

Stated in State v. Johnson, 7 N.C. App. 53, 171 S.E.2d 106 (1969).

ARTICLE 18.

Embezzlement.

§ 14-90. Embezzlement of property received by virtue of office or employment.

The offense of embezzlement is exclusively statutory, etc. —

In accord with 2nd paragraph in original. See State v. Hutson, 10 N.C. App. 653, 179 S.E.2d 858 (1971).

The crime of embezzlement, unknown to the common law, was created and is defined by statute. State v. Wooten, 18 N.C. App. 652, 197 S.E.2d 614 (1973).

Elements of Offense. —

To convict a defendant of embezzlement in violation of this statute the Supreme Court has declared that "four distinct propositions of fact must be established, (1) that the defendant was the agent of the prosecutor, and (2) by the terms of his employment had received property of his principal; (3) that he received it in the course of his employment; and (4) knowing it was not his own, converted it to his own use." State v. Buzzelli, 11 N.C. App. 52, 180 S.E.2d 472 (1971).

Fraudulent intent which constitutes a necessary element, etc. —

In accord with original. See State v. Smithey, 15 N.C. App. 427, 190 S.E.2d 369 (1972).

How Fraudulent Intent Shown. —

Fraudulent intent may be shown by direct evidence, or by evidence of facts and circumstances from which it may reasonably be inferred. State v. Smithey, 15 N.C. App. 427, 190 S.E.2d 369 (1972).

It is not necessary to show that the agent converted his principal's property to the agent's own use. It is sufficient to show that the agent fraudulently or knowingly and willfully

misapplied it, or that he secreted it with intent to embezzle or fraudulently or knowingly and willfully misapply it. State v. Smithey, 15 N.C. App. 427, 190 S.E.2d 369 (1972).

Evidence Sufficient, etc. —

The mere making of false entries in books of account is not sufficient evidence of an act of conversion constituent to the crime of embezzlement regardless of the defendant's fraudulent intent at the time of making such a false entry. But depositing funds of another in one's own account, together with the making of incorrect entries in books of account, and failing to turn the other's funds over to him at a time when obligated to do so, is sufficient evidence of conversion. State v. Buzzelli, 11 N.C. App. 52, 180 S.E.2d 472 (1971).

Evidence that during a period in which a defendant had allegedly been guilty of embezzling money from his employer the defendant spent money considerably in excess of his known income or made large bank deposits has been held admissible. State v. Buzzelli, 11 N.C. App. 52, 180 S.E.2d 472 (1971).

"Embezzlement". — Embezzlement is simply a fraudulent breach of trust by misapplying the property entrusted to the defendant to the use either of himself or another, when done with a fraudulent intent. State v. Hutson, 10 N.C. App. 653, 179 S.E.2d 858 (1971).

Embezzlement and fraudulent conversion are not necessarily and strictly synonymous. State v. Hutson, 10 N.C. App. 653, 179 S.E.2d 858 (1971).

Allegations and Proof. —

The common-law offense of larceny contemplates that the property taken must belong to or be in the possession of another and the statutory offense of embezzlement provides that the misappropriated property must belong to "any other person or corporation, unincorporated association, or organization." In view of the breadth of the offenses, the warrant or bill of indictment charging these offenses must allege the ownership of the property either in a natural person or a legal entity capable of owning property. State v. Wooten, 18 N.C. App. 652, 197 S.E.2d 614 (1973).

Indictment under This Section Rather Than § 14-168.1. — It was proper for the State to elect to indict the defendant for felonious embezzlement under this section, the broader statute, rather than to indict him under § 14-168.1, the narrower statute. State v. Hutson, 10 N.C. App. 653, 179 S.E.2d 858 (1971).

Section 14-168.1 is more limited in its scope with regard to bailees than this section; it appears to embrace a bailee "who fraudulently converts the same" to his own use, while this section covers the bailee who "shall embezzle or fraudulently or knowingly and willfully misapply or convert to his own use." State v. Hutson, 10 N.C. App. 653, 179 S.E.2d 858 (1971).

Section 14-168.1 does not remove bailees from this section or make embezzlement by a bailee a misdemeanor. State v. Hutson, 10 N.C. App. 653, 179 S.E.2d 858 (1971).

There is no irreconcilable conflict between this section and § 14-168.1 as they relate to bailees. State v. Hutson, 10 N.C. App. 653, 179 S.E.2d 858 (1971).

Applied in State v. Hitt, 25 N.C. App. 216, 212 S.E.2d 540 (1975).

ARTICLE 19.

False Pretenses and Cheats.

§ 14-100. Obtaining property by false pretenses. — (a) If any person shall knowingly and designedly by means of any kind of false pretense whatsoever, whether the false pretense is of a past or subsisting fact or of a future fulfillment or event, obtain or attempt to obtain from any person within this State any money, goods, property, services, chose in action, or other thing of value with intent to cheat or defraud any person of such money, goods, property, services, chose in action or other thing of value, such person shall be guilty of a felony, and shall be imprisoned in the State's prison not less than four months nor more than 10 years, and fined, in the discretion of the court: Provided, that if, on the trial of anyone indicted for such crime, it shall be proved that he obtained the property in such manner as to amount to larceny or embezzlement, the jury shall have submitted to them such other felony proved; and no person tried for such felony shall be liable to be afterwards prosecuted for larceny or embezzlement upon the same facts: Provided, further, that it shall be sufficient in any indictment for obtaining or attempting to obtain any such money, goods, property, services, chose in action, or other thing of value by false pretenses to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person, and without alleging any ownership of the money, goods, property, services, chose in action or other thing

of value; and upon the trial of any such indictment, it shall not be necessary to prove either an intent to defraud any particular person or that the person to whom the false pretense was made was the person defrauded, but it shall be sufficient to allege and prove that the party accused made the false pretense charged with an intent to defraud.

(b) Evidence of nonfulfillment of a contract obligation standing alone shall not establish the essential element of intent to defraud.

(c) For purposes of this section, "person" means person, association, consortium, corporation, body politic, partnership, or other group, entity, or organization. (33 Hen. VIII, c. 1, ss. 1, 2; 30 Geo. II, c. 24, s. 1; 1811, c. 814, s. 2, P. R.; R. C., c. 34, s. 67; Code, s. 1025; Rev., s. 3432; C. S., s. 4277; 1975, c. 783.)

Editor's Note. — The 1975 amendment, effective Oct. 1, 1975, rewrote this section.

Elements of the Crime. —

In accord with 4th paragraph in original. See State v. Banks, 24 N.C. App. 604, 211 S.E.2d 860 (1975); State v. Wallace, 25 N.C. App. 360, 213 S.E.2d 420 (1975).

Same — Subsisting Fact. —

A promise to do something in the future, however false, is not a false pretense within this section. State v. Banks, 24 N.C. App. 604, 211 S.E.2d 860 (1975).

False representation that land is free from encumbrances, when knowingly made in order to effect a sale, or to obtain a loan, may be the subject matter of this offense. State v. Banks, 24 N.C. App. 604, 211 S.E.2d 860 (1975); State v. Wallace, 25 N.C. App. 360, 213 S.E.2d 420 (1975).

Applied in State v. Simpson, 25 N.C. App. 176, 212 S.E.2d 566 (1975).

§ 14-107. Worthless checks. — It shall be unlawful for any person, firm or corporation, to draw, make, utter or issue and deliver to another, any check or draft on any bank or depository, for the payment of money or its equivalent, knowing at the time of the making, drawing, uttering, issuing and delivering such check or draft as aforesaid, that the maker or drawer thereof has not sufficient funds on deposit in or credit with such bank or depository with which to pay the same upon presentation.

It shall be unlawful for any person, firm or corporation to solicit or to aid and abet any other person, firm or corporation to draw, make, utter or issue and deliver to any person, firm or corporation, any check or draft on any bank or depository for the payment of money or its equivalent, being informed, knowing or having reasonable grounds for believing at the time of the soliciting or the aiding and abetting that the maker or the drawer of the check or draft has not sufficient funds on deposit in, or credit with, such bank or depository with which to pay the same upon presentation.

The word "credit" as used herein shall be construed to mean an arrangement or understanding with the bank or depository for the payment of any such check or draft.

Any person, firm or corporation violating any provision of this section shall be guilty of a misdemeanor and upon conviction shall be punished as follows:

(1) If the amount of such check or draft is not over fifty dollars ($50.00), the punishment shall be by a fine not to exceed fifty dollars ($50.00) or imprisonment for not more than 30 days. Provided, however, if such person has been convicted three times of violating G.S. 14-107, he shall on the fourth and all subsequent convictions be punished in the discretion of the district or superior court as for a general misdemeanor.

(2) If the amount of such check or draft is over fifty dollars ($50.00), the punishment shall be by a fine not to exceed five hundred dollars ($500.00) or imprisonment for not more than six months, or both. Provided, however, if such person has been convicted three times of violating G.S. 14-107, he shall on the fourth and all subsequent convictions be punished in the discretion of the district or superior court

as for a general misdemeanor. (1925, c. 14; 1927, c. 62; 1929, c. 273, ss. 1, 2; 1931, cc. 63, 138; 1933, cc. 43, 64, 93, 170, 265, 362, 458; 1939, c. 346; 1949, cc. 183, 332; 1951, c. 356; 1961, c. 89; 1963, cc. 73, 547, 870; 1967, c. 49, s. 1; c. 661, s. 1; 1969, c. 157; c. 876, s. 1; cc. 909, 1014; c. 1224, s. 10; 1971, c. 243, s. 1.)

Editor's Note. —

The 1971 amendment transferred a former last sentence in this section to appear as the third paragraph, and substituted the language beginning "and upon conviction" for "punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both" in the first sentence of the last paragraph.

Section 2, c. 243, Session Laws 1971, provides: "This act shall become effective on and apply to all violations occurring after the date of ratification." The act was ratified on April 27, 1971.

Prior Convictions Must Be Alleged in Warrant or Indictment. — Where a statute prescribes a higher penalty in case of repeated convictions for similar offenses, an indictment for a subsequent offense must allege facts showing that the offense charged is a second or subsequent crime within the contemplation of the statute in order to subject the accused to the higher penalty. State v. Williams, 21 N.C. App. 70, 203 S.E.2d 399 (1974).

Where there is no allegation in the warrant that defendant had been convicted three prior times of that offense, nor is there any other evidence in the record of that circumstance, a 90-day sentence exceeds the permissible statutory limit. State v. McCotter, 18 N.C. App. 411, 197 S.E.2d 50 (1973).

Applied in State v. McClam, 7 N.C. App. 477, 173 S.E.2d 53 (1970); Lawrence v. State, 18 N.C. App. 260, 196 S.E.2d 623 (1973).

§ 14-111.2. Obtaining ambulance services without intending to pay therefor — certain named counties. — Any person who with intent to defraud shall obtain ambulance services without intending at the time of obtaining such services to pay, if financially able, any reasonable charges therefor shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. A determination by the court that the recipient of such services has willfully failed to pay for the services rendered for a period of 90 days after request for payment, and that the recipient is financially able to do so, shall raise a presumption that the recipient at the time of obtaining the services intended to defraud the provider of the services and did not intend to pay for the services.

This section shall apply to Anson, Caswell, Catawba, Chatham, Cumberland, Davie, Duplin, Forsyth, Gaston, Guilford, Iredell, Montgomery, Orange, Person, Randolph, Rockingham, Stanly, Surry, Vance and Wilkes Counties only. (1967, c. 964; 1969, cc. 292, 753; c. 1224, s. 4; 1971, cc. 125, 203, 300, 496; 1973, c. 880, s. 2.)

Editor's Note. —

The first 1971 amendment made this section applicable to Person County.

The second 1971 amendment made this section applicable to Iredell County.

The third 1971 amendment made this section applicable to Montgomery and Vance Counties.

The fourth 1971 amendment made this section applicable to Duplin County.

The 1973 amendment deleted Alamance from the list of counties to which this section applies.

§ 14-111.3. Making false ambulance request in Buncombe, Duplin, Haywood and Madison Counties. — It shall be unlawful for any person or persons to willfully obtain or attempt to obtain ambulance service that is not needed, or to make a false request or report that an ambulance is needed. Every person convicted of violating this section shall upon conviction be punished by a fine of fifty dollars ($50.00) or imprisonment not to exceed 30 days or both such fine and imprisonment.

This section shall apply only to the Counties of Buncombe, Duplin, Haywood and Madison. (1965, c. 976, s. 2; 1971, c. 496.)

Editor's Note. — The 1971 amendment made this section applicable to Duplin County.

ARTICLE 19A.

Obtaining Property or Services by False or Fraudulent Use of Credit Device or Other Means.

§ 14-113.1. Use of false or counterfeit credit device; unauthorized use of another's credit device; use after notice of revocation. — It shall be unlawful for any person knowingly to obtain or attempt to obtain credit, or to purchase or attempt to purchase any goods, property or service, by the use of any false, fictitious, or counterfeit telephone number, credit number or other credit device, or by the use of any telephone number, credit number or other credit device of another without the authority of the person to whom such number or device was issued, or by the use of any telephone number, credit number or other credit device in any case where such number or device has been revoked and notice of revocation has been given to the person to whom issued or he has knowledge or reason to believe that such revocation has occurred. (1961, c. 223, s. 1; 1965, c. 1147; 1967, c. 1244, s. 1; 1971, c. 1213, s. 1.)

Editor's Note. — The 1971 amendment added "or he has knowledge or reason to believe that such revocation has occurred."

Applied in State v. Franks, 20 N.C. App. 160, 200 S.E.2d 828 (1973).

§ 14-113.5. Making, possessing or transferring device for theft of telecommunication service; publication of information regarding schemes, devices, means, or methods for such theft; concealment of existence, origin or destination of any telecommunication. — It shall be unlawful for any person knowingly to:

(1) Make or possess any instrument, apparatus, equipment, or device designed, adapted, or which is used
   a. For commission of a theft of telecommunication service in violation of this Article, or
   b. To conceal, or assist another to conceal, from any supplier of telecommunication service or from any lawful authority the existence or place of origin or of destination of any telecommunication, or

(2) Sell, give, transport, or otherwise transfer to another or offer or advertise for sale, any instrument, apparatus, equipment, or device described in (1) above, or plans or instructions for making or assembling the same; under circumstances evincing an intent to use or employ such apparatus, equipment, or device, or to allow the same to be used or employed, for a purpose described in (1)a or (1)b above, or knowing or having reason to believe that the same is intended to be so used, or that the aforesaid plans or instructions are intended to be used for making or assembling such apparatus, equipment or device.

(3) Publish plans or instructions for making or assembling or using any apparatus, equipment or device described in (1) above, or

(4) Publish the number or code of an existing, cancelled, revoked or nonexistent telephone number, credit number or other credit device, or method of numbering or coding which is employed in the issuance of

telephone numbers, credit numbers or other credit devices with knowledge or reason to believe that it may be used to avoid the payment of any lawful telephone or telegraph toll charge under circumstances evincing an intent to have such telephone number, credit number, credit device or method of numbering or coding so used. As used in this section, "publish" means the communication or dissemination of information to any one or more persons, either orally, in person or by telephone, radio or television, or in a writing of any kind, including without limitation a letter or memorandum, circular or handbill, newspaper or magazine article, or book.

(5) Any instrument, apparatus, device, plans or instructions or publications described in this section may be seized under warrant or incident to a lawful arrest for a violation of this section, and, upon the conviction of a person for a violation of this section, such instrument, apparatus, device, plans, instructions or publication may be destroyed as contraband by the sheriff of the county in which such person was convicted or turned over to the person providing telephone or telegraph service in the territory in which the same was seized. (1965, c. 1147; 1971, c. 1213, s. 2.)

Editor's Note. — The 1971 amendment, in subdivision (1), inserted "instrument" in the introductory language, and deleted "to" preceding "assist" in subparagraph b. The amendment also inserted "instrument" near the beginning of subdivision (2), and added subdivisions (3), (4), and (5).

§ 14-113.6A. Venue of offenses. — (a) Any of the offenses described in Article 19A which involve the placement of telephone calls may be deemed to have been committed at either the place at which the telephone call or calls were made or at the place where the telephone call or calls were received.

(b) An offense under G.S. 14-113.5(3) or (4) may be deemed to have been committed at either the place at which the publication was initiated or at which the publication was received or at which the information so published was utilized to avoid or attempt to avoid the payment of any lawful telephone or telegraph toll charge. (1971, c. 1213, s. 3.)

ARTICLE 19B.

Credit Card Crime Act.

§ 14-113.8. Definitions. — The following words and phrases as used in this Chapter, unless a different meaning is plainly required by the context, shall have the following meanings:

(2) Credit Card. — "Credit card" means any instrument or device, whether known as a credit card, credit plate, or by any other name, issued with or without fee by an issuer for the use of the cardholder in obtaining money, goods, services or anything else of value on credit, but shall not include a telephone number, credit number or other credit device which is covered by the provisions of Article 19A of this Chapter.

(1971, c. 1213, s. 4.)

Editor's Note. — The 1971 amendment, in subdivision (2), added "but shall not include a telephone number, credit number or other credit device which is covered by the provisions of Article 19A of this Chapter."

As the rest of the section was not changed by the amendment, only the opening paragraph and subdivision (2) are set out.

Cited in State v. Trollinger, 11 N.C. App. 400, 181 S.E.2d 212 (1971).

§ 14-113.9. Credit card theft.

This section is not unconstitutional in failing to require criminal intent. State v. Hudson, 11 N.C. App. 712, 182 S.E.2d 198 (1971).

An accused may violate subdivision (1) of subsection (a) in four distinct ways. He may (1) take, (2) obtain, or (3) withhold a credit card from the person, possession, custody or control of another without the cardholder's consent; or (4) he may receive a credit card with intent to use it or sell it or transfer it to some person other than the issuer or cardholder, knowing at the time that the card had been so taken, obtained or withheld. A person violating this section in any of the four enumerated ways is guilty of credit-card theft. State v. Springer, 283 N.C. 627, 197 S.E.2d 530 (1973).

Sufficiency of Description of Credit Card. — No defect appears on the face of an indictment for violation of this section where the credit card allegedly withheld is sufficiently described to inform the accused with certainty as to the crime he allegedly committed. State v. Springer, 283 N.C. 627, 197 S.E.2d 530 (1973).

The date upon which an allegedly stolen credit card was issued is not necessary to describe the card, is not an essential element of the offense charged, and therefore is not a material fact which the State must allege and prove. State v. Springer, 283 N.C. 627, 197 S.E.2d 530 (1973).

§ 14-113.10. Prima facie evidence of theft.

Evidence of Possession of Other Credit Cards. — The admission of evidence, over objection, that defendant had three other credit cards in his possession which had been issued in the names of persons other than defendant or members of his immediate family was competent (1) to make out a prima facie case as provided in this section that defendant had obtained all credit cards in his possession in violation of § 14-113.9(a); (2) to establish a common plan or scheme to commit credit-card crimes so related to each other that proof of one or more tends to prove the crime charged and to connect defendant with its commission; and (3) to show criminal intent and guilty knowledge. State v. Springer, 283 N.C. 627, 197 S.E.2d 530 (1973).

Necessity for Instruction. — In light of the provisions of this section, it is the duty of the court to instruct the jury regarding the legal significance of the State's evidence tending to show that defendant had in his possession or under his control credit cards issued in the name of two or more persons other than defendant and members of his immediate family. State v. Springer, 283 N.C. 627, 197 S.E.2d 530 (1973).

§ 14-113.11. Forgery of credit card.

Applied in State v. Hudson, 11 N.C. App. 712, 182 S.E.2d 198 (1971).

§ 14-113.13. Credit card fraud.

Applied in State v. Caudle, 276 N.C. 550, 173 S.E.2d 778 (1970); State v. Caudle, 7 N.C. App. 276, 172 S.E.2d 231 (1970).

§ 14-113.17. Punishment and penalties.

Applied in State v. Caudle, 276 N.C. 550, 173 S.E.2d 778 (1970); State v. Caudle, 7 N.C. App. 276, 172 S.E.2d 231 (1970).

ARTICLE 20.

Frauds.

§ 14-115. Secreting property to hinder enforcement of lien or security interest.

Punishment. — Since this section does not prescribe specific punishment for its violation, by virtue of § 14-3 a person convicted of violating this section would be subject to a fine, to imprisonment for a term not exceeding two years, or both, in the discretion of the court. State v. Batiste, 5 N.C. App. 511, 168 S.E.2d 510 (1969).

§ 14-117.2. Gasoline price advertisements. — (a) Advertisements by any person or firm of the price of any grade of motor fuel must clearly so indicate if such price is dependent upon purchaser himself drawing or pumping the fuel.

(b) Any person or firm violating the provisions of this section shall be guilty of a separate misdemeanor, punishable by a fine of not more than fifty dollars ($50.00) or imprisonment of not more than 30 days or both such fine and imprisonment, for each day that such violation continues. (1971, c. 324, ss. 1, 2.)

Editor's Note. — Session Laws 1971, c. 324, s. 3, makes the act effective July 1, 1971.

§ 14-118.1. Simulation of court process in connection with collection of claim, demand or account.

Cited in State v. Howell, 16 N.C. App. 707, 193 S.E.2d 418 (1972).

§ 14-118.4. Extortion. — Any person who threatens or communicates a threat or threats to another with the intention thereby wrongfully to obtain anything of value or any acquittance, advantage, or immunity is guilty of extortion and such person shall upon conviction be guilty of a felony. (1973, c. 1032.)

ARTICLE 21.

Forgery.

§ 14-119. Forgery of bank notes, checks and other securities.

Elements of Offense. —

In accord with 3rd paragraph in original. See State v. Bauguess, 13 N.C. App. 457, 186 S.E.2d 185 (1972).

Intent to defraud is an essential element of the crime of forgery. State v. Greene, 12 N.C. App. 687, 184 S.E.2d 523 (1971).

Evidence sufficient to permit a jury to find (1) a false writing of the checks described; (2) an intent to defraud on the part of defendant who falsely made the checks; and (3) an apparent capability of the checks to defraud constitutes the three essential elements necessary to constitute the crime of forgery. State v. McAllister, 287 N.C. 178, 214 S.E.2d 75 (1975).

The word "falsely" as applied to the making of a check, in order to constitute forgery, implies that the check is not genuine, that in itself it is false. State v. McAllister, 287 N.C. 178, 214 S.E.2d 75 (1975).

The fact that the drawer of a check lacks authority is one characteristic which renders an instrument false. State v. McAllister, 287 N.C. 178, 214 S.E.2d 75 (1975).

An instruction including the requirement that there be a false making encompasses the requirement that the instrument be drawn by one who lacks authority. State v. McAllister, 287 N.C. 178, 214 S.E.2d 75 (1975).

Forgery of Money Order and Forgery of Endorsement Are Separate Offenses. — To convict of the felony of forging endorsements under the second sentence of § 14-120, it was not necessary to allege or to prove forgery of the face of money orders, which would have been separate felonies under this section. State v. Sutton, 14 N.C. App. 422, 188 S.E.2d 596 (1972).

Punishment. —
A sentence of five years' imprisonment imposed upon defendant's plea of guilty to the charge of forging a check in the amount of $45.00 is within the maximum authorized by this section. State v. Bolder, 8 N.C. App. 343, 174 S.E.2d 139 (1970).

Applied in State v. Edwards, 24 N.C. App. 393, 210 S.E.2d 458, cert. denied, 286 N.C. 546, 212 S.E.2d 168 (1975); Singletary v. United States, 514 F.2d 617 (4th Cir. 1975).

Stated in State v. Cradle, 281 N.C. 198, 188 S.E.2d 296 (1972).

Cited in State v. Moffitt, 9 N.C. App. 694, 177 S.E.2d 324 (1970).

§ 14-120. Uttering forged paper or instrument containing a forged endorsement.

What Constitutes Uttering. —
In accord with 2nd paragraph in original. See State v. Jackson, 19 N.C. App. 749, 200 S.E.2d 199 (1973).

Forgery of Money Order and Forgery of Endorsement Are Separate Offenses. — To convict of the felony of forging endorsements under the second sentence of this section, it was not necessary to allege or prove forgery of the face of money orders, which would have been separate felonies under § 14-119. State v. Sutton, 14 N.C. App. 422, 188 S.E.2d 596 (1972).

Applied in State v. Hall, 8 N.C. App. 101, 173 S.E.2d 627 (1970); State v. Cradle, 281 N.C. 198, 188 S.E.2d 296 (1972); State v. Cruse, 14 N.C. App. 29, 187 S.E.2d 883 (1972); State v. Gibson, 14 N.C. App. 409, 188 S.E.2d 683 (1972); State v. Sutton, 14 N.C. App. 612, 188 S.E.2d 599 (1972); State v. Russell, 282 N.C. 240, 192 S.E.2d 294 (1972); State v. Thompson, 16 N.C. App. 62, 190 S.E.2d 877 (1972); State v. Wallace, 16 N.C. App. 645, 192 S.E.2d 585 (1972); State v. Faulkner, 18 N.C. App. 296, 196 S.E.2d 566 (1973); State v. McAllister, 287 N.C. 178, 214 S.E.2d 75 (1975); State v. Edwards, 24 N.C. App. 393, 210 S.E.2d 458, cert. denied, 286 N.C. 546, 212 S.E.2d 168 (1975); Singletary v. United States, 514 F.2d 617 (4th Cir. 1975).

Cited in State v. Moffitt, 9 N.C. App. 694, 177 S.E.2d 324 (1970); State v. Greene, 12 N.C. App. 687, 184 S.E.2d 523 (1971).

§ 14-121. Selling of certain forged securities. — If any person shall sell, by delivery, endorsement or otherwise, to any other person, any judgment for the recovery of money purporting to have been rendered by a magistrate, or any bond, promissory note, bill of exchange, order, draft or liquidated account purporting to be signed by the debtor (knowing the same to be forged), the person so offending shall be punished by imprisonment in the State's prison or county jail for not less than four months nor more than 10 years. (R. C., c. 34, s. 63; Code, s. 1033; Rev., s. 3425; C. S., s. 4295; 1973, c. 108, s. 2.)

Editor's Note. — The 1973 amendment substituted "magistrate" for "justice of the peace."

SUBCHAPTER VI. CRIMINAL TRESPASS.

ARTICLE 22.

Trespasses to Land and Fixtures.

§ 14-126. Forcible entry and detainer.

But One Who Remains, etc. —
One who remains in a home after being directed to leave is guilty of a wrongful entry and becomes a trespasser, even though the original entry was peaceful and authorized, and a householder may use such force as is reasonably necessary to eject him. State v. Kelly, 24 N.C. App. 670, 211 S.E.2d 854 (1975).

§ 14-127. Wilful and wanton injury to real property.

This section was designed to avoid the element of malicious ill will required by the common-law crime of malicious mischief. State v. Cannady, 18 N.C. App. 213, 196 S.E.2d 617 (1973).

Applied in State v. Candler, 25 N.C. App. 318, 212 S.E.2d 901 (1975).

§ 14-128. Injury to trees, crops, lands, etc., of another. — Any person, not being on his own lands, who shall without the consent of the owner thereof, wilfully commit any damage, injury, or spoliation to or upon any tree, wood, underwood, timber, garden, crops, vegetables, plants, lands, springs, or any other matter or thing growing or being thereon, or who cuts, breaks, injures, or removes any tree, plant, or flower, shall be guilty of a misdemeanor and, upon conviction, shall be fined not exceeding five hundred dollars ($500.00) or imprisoned not exceeding six months, or both in the discretion of the court: Provided, however, that this section shall not apply to the officers, agents, and employees of the Board of Transportation while in the discharge of their duties within the right-of-way or easement of the Board of Transportation. (Ex. Sess. 1924, c. 54; 1957, c. 65, s. 11; c. 754; 1965, c. 300, s. 1; 1969, c. 22, s. 1; 1973, c. 507, s. 5.)

Editor's Note. —
The 1973 amendment, effective July 1, 1973, substituted "Board of Transportation" for "State Highway Commission" and for "Commission" in the proviso.

§ 14-129. Taking, etc., of certain wild plants from land of another. — No person, firm or corporation shall dig up, pull up or take from the land of another or from any public domain, the whole or any part of any Venus flytrap (Dionaea muscipula), trailing arbutus, Aaron's Rod (Thermopsis caroliniana), Bird-foot Violet (Viola pedata), Bloodroot (Sanguinaria canadensis), Blue Dogbane (Amsonia tabernaemontana), Cardinal-flower (Lobelia cardinalis), Columbine (Aquilegia canadenis), Dutchman's Breeches (Dicentra cucullaria), Maidenhair Fern (Adiantum pedatum), Walking Fern (Camptosorus rhizophyllus), Gentians (Gentiana), Ginseng (Panax quinquefolium), Ground Cedar, Running Cedar, Hepatica (Hepatica americana and acutiloba), Jack-in-the-Pulpit (Arisaema triphyllum), Lily (Lilium), Lupine (Lupinus), Monkshood (Aconitum uncinatum and reclinatum), May Apple (Podophyllum peltatum), Orchids (all species), Pitcher Plant (Sarracenia), Sea Oats (Uniola paniculata), Shooting Star (Dodecantheon meadia), Oconee Bells (Shortia galacifolia), Solomon's Seal (Polygonatum), Trailing Christmas (Greens-Lycopodium), Trillium (Trillium), Virginia Bluebells (Mertensia virginica), and Fringe Tree (Chionanthus virginicus), American holly, white pine, red cedar, hemlock or other coniferous trees, or any flowering dogwood, any mountain laurel, any rhododendron, or any ground pine, or any Christmas greens, or any Judas tree, or any leucothea, or any azalea, without having in his possession a permit to dig up, pull up or take such plants, signed by the owner of such land, or by his duly authorized agent. Any person convicted of violating the provisions of this section shall be fined not less than ten dollars ($10.00) nor more than fifty dollars ($50.00) for each offense. The provisions of this section shall not apply to the counties of Cabarrus, Carteret, Catawba, Cherokee, Chowan, Cumberland, Currituck, Dare, Duplin, Edgecombe, Franklin, Gaston, Granville, Hertford, McDowell, Pamlico, Pender, Person, Richmond, Rockingham, Rowan and Swain. (1941, c. 253; 1951, c. 367, s. 1; 1955, cc. 251, 962; 1961, c. 1021; 1967, c. 355; 1971, c. 951.)

Editor's Note. — The 1971 amendment inserted the language beginning "Aaron's Rod" and ending "Fringe Tree (Chionanthus virginicus)" in the first sentence.

§ 14-129.1. Selling or bartering venus flytrap. — In order to prevent the extinction of the rapidly disappearing rare and unique plant known as the venus flytrap (Dionaea muscipula), it shall be unlawful for any person, firm or corporation to sell or barter or to export for sale or barter, any venus flytrap plant or any part thereof. Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both: Provided, this section shall not apply to the sale or exportation of the venus flytrap plant for the purposes of scientific experimentation or study when such sale or export for such purposes has been authorized in writing by the Department of Natural and Economic Resources. Provided further, that this section shall not prevent any person from selling or exporting for sale any venus flytrap plant which such person has cultivated domestically under controlled conditions if the person so cultivating such plants has obtained his original stock of plants either from his own land or from some lawful seller and has obtained written authorization for selling such plants from the Department of Natural and Economic Resources. (1951, c. 367, s. 2; 1957, c. 334; 1969, c. 1224, s. 11; 1973, c. 1262, s. 86.)

Editor's Note. — The 1973 amendment, effective July 1, 1974, substituted "Department of Natural and Economic Resources" for "Department of Conservation and Development."

§ 14-131. Trespass on land under option by the federal government. — On lands under option which have formally or informally been offered to and accepted by the North Carolina Department of Natural and Economic Resources by the acquiring federal agency and tentatively accepted by said Department for administration as State forests, State parks, State game refuges or for other public purposes, it shall be unlawful to cut, dig, break, injure or remove any timber, lumber, firewood, trees, shrubs or other plants; or any fence, house, barn or other structure; or to pursue, trap, hunt or kill any bird or other wild animals or take fish from streams or lakes within the boundaries of such areas without the written consent of the local official of the United States having charge of the acquisition of such lands.

Any person, firm or corporation convicted of the violation of this section shall be guilty of a misdemeanor and shall be subject to a fine of not more than fifty dollars ($50.00) or to imprisonment for not to exceed 30 days, or to both such fine and imprisonment.

The Department of Natural and Economic Resources through its legally appointed forestry, fish and game wardens is hereby authorized and empowered to assist the county law-enforcement officers in the enforcement of this section. (1935, c. 317; 1973, c. 1262, s. 86.)

Editor's Note. — The 1973 amendment, effective July 1, 1974, substituted "Department of Natural and Economic Resources" for "North Carolina Department of Conservation and Development" and for "Department of Conservation and Development."

§ 14-132. Disorderly conduct in and injuries to public buildings and facilities.

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

Cited in State v. Midgett, 8 N.C. App. 230, 174 S.E.2d 124 (1970); McKeiver v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971).

§ 14-132.2. Willfully trespassing upon or damaging a public school bus. — (a) Any person who shall unlawfully and willfully demolish, destroy, deface, injure, burn or damage any public school bus or public school activity bus shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than two years, or both.

(b) Any person who shall enter a public school bus or public school activity bus after being forbidden to do so by the authorized school bus driver in charge thereof, or the school principal to whom the public school bus or public school activity bus is assigned, shall be guilty of a misdemeanor punishable by a fine not to exceed one hundred dollars ($100.00), imprisonment for not more than 30 days, or both.

(c) Any occupant of a public school bus or public school activity bus who shall refuse to leave said bus upon demand of the authorized driver in charge thereof, or upon demand of the principal of the school to which said bus is assigned, shall be guilty of a misdemeanor punishable by a fine not to exceed one hundred dollars ($100.00), imprisonment for not more than 30 days, or both.

(d) Subsection (b) and (c) of this section shall not apply to a child less than 12 years of age, or authorized professional school personnel. (1975, c. 191, s. 1.)

Editor's Note. — Session Laws 1975, c. 191, s. 2, provides that the act shall become effective Aug. 1, 1975.

§ 14-133. Erecting artificial islands and lumps in public waters.

Applied in State v. Murry, 277 N.C. 197, 176 S.E.2d 738 (1970).

§ 14-134. Trespass on land after being forbidden; license to look for estrays. — If any person after being forbidden to do so, shall go or enter upon the lands of another, without a license therefor, he shall be guilty of a misdemeanor, and on conviction, shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both: Provided, that if any person shall make a written affidavit before a magistrate of the county that any of his cattle or other livestock (which shall be specially described in such affidavit) have strayed away, and that he has good reason to believe that they are on the lands of a certain other person, then the magistrate may, in his discretion, allow the affiant to enter on the premises of such person with one or more servants, without firearms, in the daytime (Sunday excepted), between the hours of sunrise and sunset, and make search for his estrays for such limited time as to the magistrate shall appear reasonable. The only effect of such license shall be to protect the persons entering from indictment therefor, and the license shall have this effect only where it is made bona fide and the entry is effected without any damage except such as may be necessary to conduct the search. (1866, c. 60; Code, s. 1120; Rev., s. 3688; C. S., s. 4305; 1963, c. 1106; 1969, c. 1224, s. 12; 1973, c. 108, s. 3.)

Editor's Note. — The 1973 amendment substituted "magistrate" for "justice of the peace" in one place and for "justice" in two places in the proviso to the first sentence.

Essential Ingredients of Offense. — Entering the property "without a license therefor" is not a necessary element of this crime. State v. Edgerton, 25 N.C. App. 45, 212 S.E.2d 398 (1975).

§ 14-134.1. Depositing trash, garbage, etc., on lands of another or in waters of the State. — It shall be unlawful for any person, firm, organization, corporation, or for the governing body, agents or employees of any municipal corporation or county to willfully place, deposit, leave or cause to be placed, deposited or left, either temporarily or permanently, any trash, refuse, garbage, debris, litter, plastic materials, scrap vehicle or equipment, or waste materials of any kind upon the lands of another without first obtaining written consent of the owner thereof; or unless specifically authorized by law or lawful authority, to place, deposit, leave or cause to be placed, deposited or left, either temporarily or permanently, any such materials in any waters within this State or over which this State has jurisdiction. Provided, it shall not be unlawful to deposit such materials upon a public dump maintained by a municipality or county.

A violation of this section shall constitute a misdemeanor and is punishable by a fine of not more than five hundred dollars ($500.00) or by imprisonment of not more than six months, or both, in the discretion of the court. (1965, c. 300, ss. 2, 3; 1969, c. 22, s. 2; 1971, c. 769.)

Editor's Note. — The 1971 amendment, effective July 1, 1971, inserted "willfully" near the beginning of the first sentence, and substituted the words beginning "or unless specifically authorized by law or lawful authority, to place, deposit" and ending "over which this State has jurisdiction" for "or to deposit any of such materials in any river or stream" at the end of the first sentence.

§ 14-134.2. Operating motor vehicle upon utility easements after being forbidden to do so. — If any person, without permission, shall ride, drive or operate a minibike, motorbike, motorcycle, jeep, dune buggy, automobile, truck or any other motor vehicle upon a utility easement upon which the owner or holder of the easement or agent of the owner or holder of the easement has posted on the easement a "no trespassing" sign or has otherwise given oral or written notice to the person not to so ride, drive or operate such a vehicle upon the said easement, he shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months or both, provided, however, neither the owner of the property nor the holder of the easement or their agents, employees, guests, invitees or permittees, shall be guilty of a violation under this section. (1975, c. 636, s. 1.)

Editor's Note. — Session Laws 1975, c. 636, s. 2, makes the act effective July 1, 1975.

§ 14-135. Cutting, injuring, or removing another's timber.

Cited in State v. Edgerton, 25 N.C. App. 45, 212 S.E.2d 398 (1975).

§ 14-137. Wilfully or negligently setting fire to woods and fields. — If any person, firm or corporation shall wilfully or negligently set on fire, or cause to be set on fire, any woods, lands or fields, whatsoever, every such offender, upon conviction, shall be fined or imprisoned in the discretion of the court. This section shall apply only in those counties under the protection of the Department of Natural and Economic Resources in its work of forest fire control. It shall not apply in the case of a landowner firing, or causing to be fired, his own open, nonwooded lands, or fields in connection with farming or building operations at the time and in the manner now provided by law: Provided, he shall have confined the fire at his own expense to said open lands or fields. (1907, c. 320, ss. 4, 5; C. S., s. 4310; 1925, c. 61, s. 2; 1941, c. 258; 1973, c. 1262, s. 86.)

Editor's Note. — The 1973 amendment, effective July 1, 1974, substituted "Department of Natural and Economic Resources" for "State forest service."

§ 14-139. Setting fires in certain areas. — (a) Statement of Purpose. — It is the intent and purpose of this section to enact fire control provisions that are adopted to the needs and circumstances of the respective areas of North Carolina. The General Assembly hereby finds that, in certain counties designated in subsection (b) of this section and which have organic soils associated with large expanses of forests with highly flammable fuel types, forest fires are likely to result from the unusual hazard which exists during land clearance operations, and the General Assembly hereby classifies said counties as subject to the provisions of subsection (b). The General Assembly further finds that, in the remaining counties designated in subsection (c) of this section, forest fires are not as likely to result from unusual hazards that exist during land clearance operations, and the General Assembly hereby classifies said counties as subject to the provisions of subsection (c).

(b) It shall be unlawful for any person, firm or corporation to willfully start, or cause to be started, any fire, in any of the areas of woodlands under the protection of the Department of Natural and Economic Resources or within 500 feet of any such protected area without first having obtained from the Secretary of the Department of Natural and Economic Resources, or his duly authorized agent, a permit to start and burn such fire in the above mentioned protected areas.

It shall be unlawful for any person, firm or corporation to willfully burn any debris, stumps, brush or other inflammable material accumulated as a result of ground clearance activities without having first received a special burning permit from the Secretary of the Department of Natural and Economic Resources, or his duly authorized agent, and such special permit shall be granted by the Secretary or his duly authorized agent, only if he has personally inspected the site of the proposed burning, and has assessed the conditions which might endanger protected woodlands as a result of such burning. The Secretary, or his duly authorized agent, shall be empowered to prohibit all brush burning and burning of other debris capable of spreading fire to protected woodlands regardless of the distance such burning operation may be from the said woodlands, when it is determined that hazardous fire conditions exist.

If a fire is discovered burning in any area subject to this subsection under any conditions which are considered by the Secretary of the Department of Natural and Economic Resources, or his duly authorized agent, to be hazardous to the protected forest in the vicinity, the Secretary, or any duly authorized agent, is hereby empowered to enter upon the lands where such burning is occurring and, at their option, to extinguish such fires constituting a danger to adjoining woodlands.

The provisions of this subsection shall apply only to the counties of Dare, Hyde, Tyrrell and Washington.

(c) It shall be unlawful for any person, firm or corporation to start or cause to be started any fire or ignite any material in any of the areas of woodland under the protection of the Department of Natural and Economic Resources or within 500 feet of any such protected area, during the hours starting at midnight and ending at 4:00 P.M. without first obtaining from the Secretary of the Department of Natural and Economic Resources, or his duly authorized agent, a permit to start or cause to be started any fire or ignite any material in such above mentioned protected areas.

The provisions of this subsection shall not apply to the counties of Dare, Hyde, Tyrrell and Washington.

(d) During periods of hazardous forest fire conditions or during air pollution episodes declared by competent authority pursuant to Article 21B of Chapter 143 of the General Statutes of North Carolina, the Secretary of the Department of Natural and Economic Resources is authorized to cancel all permits and special burning permits covered by this section and to prohibit all brush pile burning, the burning of other debris and the starting of any fires in any of the woodlands under the protection of the Department of Natural and Economic Resources or capable of spreading to any such protected area, without regard to the distance from such fires to such woodlands.

The Secretary, or his duly authorized agent, may refuse to issue a permit when the burning to be conducted under this section is in violation of rules and regulations governing the control of air pollution adopted by competent authority under Article 21B of Chapter 143 of the General Statutes of North Carolina. If a fire is discovered burning in any area subject to this section under any conditions which are considered by the Secretary of the Department of Natural and Economic Resources, or his duly authorized agent, to be in violation of rules and regulations governing the control of air pollution adopted by competent authority under Article 21B of Chapter 143 of the General Statutes of North Carolina, the Secretary, or any duly authorized agent, is hereby empowered to enter upon the lands where such burning is occurring and, at their option, to extinguish such fires which are in violation of said rules and regulations.

This section shall not apply to any fires started, or caused to be started, within 100 feet of an occupied dwelling house, if such fire shall be confined within an enclosure from which burning material may not escape, or within a protected area upon which a watch is being maintained and which is provided with adequate fire protection equipment.

No charge shall be made for the granting of any permit or special burning permit required by this section.

(e) Any person, firm or corporation violating any of the provisions of this section shall be guilty of a misdemeanor and upon conviction shall be fined not more than fifty dollars ($50.00) or imprisoned for a period of not more than 30 days, or both, in the discretion of the court. The penalties imposed by this section shall be separate and apart and not in lieu of any civil or criminal penalties which may be imposed by G.S. 143-215.114 of Article 21B of Chapter 143 of the General Statutes. Compliance with this section does not relieve permittee from the need to comply with rules and regulations adopted pursuant to Article 21B of Chapter 143 of the General Statutes of North Carolina. (1937, c. 207; 1939, c. 120; 1953, c. 915; 1973, c. 1262, s. 86; 1975, c. 493.)

Local Modification. — By virtue of Session Laws 1975, c. 493, Dare, Hyde, Tyrrell and Washington should be stricken from the Replacement Volume.

Editor's Note. — The 1973 amendment, effective July 1, 1974, substituted "Department of Natural and Economic Resources" for "State forest service" and "Secretary of Natural and Economic Resources" for "State Forester" in this section as it stood before the 1975 amendment.

The 1975 amendment rewrote this section.

§ 14-155. Unauthorized connections with telephone, telegraph and cable television wires. — It shall be unlawful for any person to tap or make any connection with any wire or apparatus of any telephone, telegraph or cable television company operating in this State, except such connection as may be authorized by the person or corporation operating such wire or apparatus. Any person violating this section shall, upon conviction, be fined not more than ten dollars ($10.00) or imprisoned not more than 10 days for each offense. Each day's continuance of such unlawful connection shall be a separate offense. No connection approved by the Federal Communications Commission or the North Carolina Utilities Commission shall be a violation of this section. (1911, c. 113; C. S., s. 4327; 1973, c. 648.)

Editor's Note. — The 1973 amendment substituted "telegraph or cable television" for "or telegraph" in the first sentence and added the fourth sentence. The amendment also deleted "any of the provisions of this section" following "violating" and "be guilty of a misdemeanor, and" preceding "upon conviction" in the second sentence.

ARTICLE 23.

Trespasses to Personal Property.

§ 14-160. Wilful and wanton injury to personal property; punishments.

This section was designed to avoid the element of malicious ill will required by the common-law crime of malicious mischief. State v. Cannady, 18 N.C. App. 213, 196 S.E.2d 617 (1973).

In the absence of any proof that damage was greater than $200, defendant should be sentenced pursuant to subsection (a). State v. Tanner, 25 N.C. App. 251, 212 S.E.2d 695 (1975).

Elements Differ from Discharging Firearm into Occupied Vehicle. — The elements of willful damage to property by shooting out the automobile window are not the same as discharging a firearm into an occupied vehicle. The element of damages which must be shown in a charge of willful damage to property is not an element in a charge of discharging a firearm into an occupied vehicle. Therefore, the two charges are not the same in fact or in law. State v. Tanner, 25 N.C. App. 251, 212 S.E.2d 695 (1975).

Applied in State v. Lecklear, 7 N.C. App. 375, 172 S.E.2d 267 (1970); In re Ingram, 8 N.C. App. 266, 174 S.E.2d 89 (1970).

§ 14-163. Poisoning livestock. — If any person shall willfully and unlawfully poison any horse, mule, hog, sheep or other livestock, the property of another, such person shall be guilty of a felony punishable by imprisonment for not more than five years or by a fine in the discretion of the court, or both. (1898-9, c. 253; Code, s. 1003; Rev., s. 3313; C. S., s. 4334; 1969, c. 1224, s. 3; 1973, c. 1388.)

Cross Reference. — As to molesting or injuring livestock generally, see § 14-366.

Editor's Note. —

The 1973 amendment rewrote this section, which formerly related to killing or abusing livestock not enclosed by a lawful fence.

ARTICLE 24.

Vehicles and Draft Animals — Protection of Bailor against Acts of Bailee.

§ 14-168.1. Conversion by bailee, lessee, tenant or attorney in fact.

Embezzlement and fraudulent conversion are not necessarily and strictly synonymous. State v. Hutson, 10 N.C. App. 653, 179 S.E.2d 858 (1971).

Compared with § 14-90. — This section is more limited in its scope with regard to bailees than § 14-90; it appears to embrace a bailee "who fraudulently converts the same" to his own use,

while § 14-90 covers the bailee who "shall embezzle or fraudulently or knowingly and willfully misapply or convert to his own use." State v. Hutson, 10 N.C. App. 653, 179 S.E.2d 858 (1971).

It was proper for the State to elect to indict the defendant for felonious embezzlement under § 14-90, the broader statute, rather than to indict him under this section, the narrower statute. State v. Hutson, 10 N.C. App. 653, 179 S.E.2d 858 (1971).

This section does not remove bailees from § 14-90 or make embezzlement by a bailee a misdemeanor. State v. Hutson, 10 N.C. App. 653, 179 S.E.2d 858 (1971).

There is no irreconcilable conflict between § 14-90 and this section as they relate to bailees. State v. Hutson, 10 N.C. App. 653, 179 S.E.2d 858 (1971).

Quoted in State v. Bailey, 25 N.C. App. 412, 213 S.E.2d 400 (1975).

SUBCHAPTER VII. OFFENSES AGAINST PUBLIC MORALITY AND DECENCY.

ARTICLE 26.

Offenses against Public Morality and Decency.

§ 14-177. Crime against nature.

This section is constitutional, and a defendant is not entitled to quash the bill of indictment against him on grounds that it is unconstitutional because of its vagueness and overbreadth. State v. Moles, 17 N.C. App. 664, 195 S.E.2d 352 (1973); State v. Crouse, 22 N.C. App. 47, 205 S.E.2d 361 (1974).

This section is constitutional. State v. Enslin, 25 N.C. App. 662, 214 S.E.2d 318 (1975).

No authority prohibits a state on constitutional grounds from punishing under a statute such as this section individuals who commit the proscribed act in a public restroom. State v. Jarrell, 24 N.C. App. 610, 211 S.E.2d 837, cert. denied, 286 N.C. 725, 213 S.E.2d 724 (1975).

This section condemns crimes against nature whether committed against adults or children. State v. Copeland, 11 N.C. App. 516, 181 S.E.2d 722 (1971).

Definition. —

The crime against nature is sexual intercourse contrary to the order of nature. State v. Copeland, 11 N.C. App. 516, 181 S.E.2d 722 (1971).

This section and § 14-202.1, etc. —

Because the two offenses are separate and distinct and the constituent elements are not identical, a violation of § 14-202.1 is not a lesser included offense of the crime against nature described in this section. State v. Copeland, 11 N.C. App. 516, 181 S.E.2d 722 (1971).

Section 14-202.1 condemns those offenses of an unnatural sexual nature against children under 16 years of age by persons over 16 years of age which cannot be reached and punished under the provisions of this section. State v. Copeland, 11 N.C. App. 516, 181 S.E.2d 722 (1971).

Section 14-202.1 condemns other acts against children than unnatural sexual acts. State v. Copeland, 11 N.C. App. 516, 181 S.E.2d 722 (1971).

This section and § 14-202.1 can be reconciled and both declared to be operative without repugnance. State v. Copeland, 11 N.C. App. 516, 181 S.E.2d 722 (1971).

Assault with intent to commit rape and committing a crime against nature are not essentially the same offense since the elements of each offense are distinct and different. State v. Webb, 26 N.C. App. 526, 216 S.E.2d 382 (1975).

Proof of penetration, etc. —

In accord with original. See State v. Copeland, 11 N.C. App. 516, 181 S.E.2d 722 (1971).

The sole testimony of an accomplice will support a conviction in a prosecution for crime against nature. State v. Moles, 17 N.C. App. 664, 195 S.E.2d 352 (1973).

Instructions Defective. — In prosecution for rape and crime against nature, the trial judge committed prejudicial error by expressing his opinion on the evidence when he instructed the jury that there was "considerable evidence" that defendant had committed the crime charged, and when he further went on to say "not satisfied with that, the evidence tends to show that he, the defendant, again had intercourse with her" intimating to the jury that it was his opinion that

the defendant was guilty. State v. Head, 24 N.C. App. 564, 211 S.E.2d 534 (1975).

Applied in State v. Caudle, 7 N.C. App. 276, 172 S.E.2d 231 (1970); State v. Best, 12 N.C. App. 204, 184 S.E.2d 905 (1971); State v. Mitchell, 283 N.C. 462, 196 S.E.2d 736 (1973); State v. Gray, 21 N.C. App. 63, 203 S.E.2d 88 (1974); State v. Middleton, 25 N.C. App. 632, 214 S.E.2d 248 (1975).

§ 14-178. Incest between certain near relatives.

Intercourse with Illegitimate Daughter. — A father violates this section and by reason thereof is guilty of the statutory felony of incest if he has sexual intercourse, either habitual or in a single instance, with a woman or girl whom he knows to be his daughter. State v. Vincent, 278 N.C. 63, 178 S.E.2d 608 (1971).

Evidence of Acts Other Than Those Charged in Indictment. — In a prosecution for incest, evidence of acts of incestuous intercourse between the prosecuting witness and defendant other than those charged in the indictment, whether prior or subsequent thereto, is admissible to corroborate the proof of the act relied upon for conviction. State v. Austin, 285 N.C. 364, 204 S.E.2d 675 (1974).

Corroboration of Prosecutrix' Testimony, etc. —

A conviction for incest may be had against a father upon the uncorroborated testimony of the daughter if such testimony suffices to establish all the elements of the offense beyond a reasonable doubt. State v. Vincent, 278 N.C. 63, 178 S.E.2d 608 (1971).

Cited in State v. Mizelle, 15 N.C. App. 583, 190 S.E.2d 277 (1972).

§ 14-180: Repealed by Session Laws 1975, c. 402.

§§ 14-181, 14-182: Repealed by Session Laws 1973, c. 108, s. 4.

§ 14-184. Fornication and adultery.

"Lewdly and lasciviously cohabit," etc. — A single act of illicit sexual intercourse is not fornication and adultery as defined by this section. "Lewdly and lasciviously cohabit" plainly implies habitual intercourse, in the manner of husband and wife, and together with the fact of not being married to each other, constitutes the offense, and in plain words draws the distinction between single or nonhabitual intercourse and the offense the statute means to denounce. State v. Robinson, 9 N.C. App. 433, 176 S.E.2d 253 (1970).

Circumstantial Evidence. — It is never essential to conviction of fornication and adultery that even a single act of illicit sexual intercourse be proven by direct testimony. While necessary to a conviction that such acts must have occurred, it is, nevertheless, competent to infer them from the circumstances presented in the evidence. State v. Robinson, 9 N.C. App. 433, 176 S.E.2d 253 (1970).

§ 14-185: Repealed by Session Laws 1975, c. 402.

§ 14-187: Repealed by Session Laws 1975, c. 402.

§ 14-188. Certain evidence relative to keeping disorderly houses admissible; keepers of such houses defined; punishment.

Cited in Wheeler v. Goodman, 306 F. Supp. 58 (W.D.N.C. 1969).

§§ 14-189, 14-189.1: Repealed by Session Laws 1971, c. 405, s. 4, effective July 1, 1971.

§§ 14-189.2, 14-190: Repealed by Session Laws 1971, c. 591, s. 4.

§ 14-190.1. Obscene literature and exhibitions. — (a) It shall be unlawful for any person, firm or corporation to intentionally disseminate obscenity in any public place. A person, firm or corporation disseminates obscenity within the meaning of this Article if he or it:

(1) Sells, delivers or provides or offers or agrees to sell, deliver or provide any obscene writing, picture, record or other representation or embodiment of the obscene; or

(2) Presents or directs an obscene play, dance or other performance or participates directly in that portion thereof which makes it obscene; or

(3) Publishes, exhibits or otherwise makes available anything obscene; or

(4) Exhibits, presents, rents, sells, delivers or provides; or offers or agrees to exhibit, present, rent or to provide: any obscene still or motion picture, film, filmstrip, or projection slide, or sound recording, sound tape, or sound track, or any matter or material of whatever form which is a representation, embodiment, performance, or publication of the obscene.

(b) For purposes of this Article any material is obscene if:

(1) The material depicts or describes in a patently offensive way sexual conduct specifically defined by subsection (c) of this section; and

(2) The average person applying contemporary statewide community standards relating to the depiction or representation of sexual matters would find that the material taken as a whole appeals to the prurient interest in sex; and

(3) The material lacks serious literary, artistic, political, educational or scientific value; and

(4) The material as used is not protected or privileged under the Constitution of the United States or the Constitution of North Carolina.

(c) Sexual conduct shall be defined as:

(1) Patently offensive representations or descriptions of actual sexual intercourse, normal or perverted, anal or oral;

(2) Patently offensive representations or descriptions of excretion in the context of sexual activity or a lewd exhibition of uncovered genitals, in the context of masturbation or other sexual activity.

(d) Obscenity shall be judged with reference to ordinary adults except that it shall be judged with reference to children or other especially susceptible audiences if it appears from the character of the material or the circumstances of its dissemination to be especially designed for or directed to such children or audiences. In any prosecution for an offense involving dissemination of obscenity under this Article, evidence shall be admissible to show:

(1) The character of the audience for which the material was designed or to which it was directed;

(2) Whether the material is published in such a manner that an unwilling adult could not escape it;

(3) Whether the material is exploited so as to amount to pandering;

(4) What the predominant appeal of the material would be for ordinary adults or a special audience, and what effect, if any, it would probably have on the behavior of such people;

(5) Literary, artistic, political, educational, scientific, or other social value, if any, of the material;

(6) The degree of public acceptance of the material throughout the State of North Carolina;

(7) Appeal to prurient interest, or absence thereof, in advertising or in the promotion of the material.

Expert testimony and testimony of the auditor, creator or publisher relating to factors entering into the determination of the issue of obscenity shall also be admissible.

(e) It shall be unlawful for any person, firm or corporation to knowingly and intentionally create, buy, procure or possess obscene material with the purpose and intent of disseminating it unlawfully.

(f) It shall be unlawful for a person, firm or corporation to advertise or otherwise promote the sale of material represented or held out by said person, firm or corporation as obscene.

(g) Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor and, unless a greater penalty is expressly provided for in this Article, shall be fined or imprisoned in the discretion of the court. (1971, c. 405, s. 1; 1973, c. 1434, s. 1.)

Cross Reference. — As to civil remedy for sale of harmful materials to minors, see §§ 19-9 through 19-20.

Editor's Note. — Section 5, c. 405, Session Laws 1971, makes the act effective July 1, 1971.

The 1973 amendment, effective July 1, 1974, deleted "broadcasts, televises" following "Exhibits," and "broadcast, televise" following "exhibit" near the beginning of subdivision (4) of subsection (a), rewrote subdivisions (1) through (3) of subsection (b), added present subsection (c) and redesignated former subsections (c) through (f) as (d) through (g), inserted "political" and made minor changes in wording in subdivision (5) of present subsection (d) and substituted "State of North Carolina" for "United States" at the end of subdivision (6) of present subsection (d).

History of Section. — See State v. Bryant, 285 N.C. 27, 203 S.E.2d 27 (1974).

Section Is Constitutional. — This section specifically defines the elements of obscenity and hence is not unconstitutional on grounds of vagueness or overbreadth. State v. Bryant, 16 N.C. App. 456, 192 S.E.2d 693 (1972).

This section is constitutional. State v. Johnson, 20 N.C. App. 699, 202 S.E.2d 479 (1974).

The dissemination of obscenity is not protected by the State and federal constitutions; thus, this section by its terms does not infringe upon the rights to disseminate protected material. State v. Bryant, 16 N.C. App. 456, 192 S.E.2d 693 (1972).

Motion to quash the warrant grounded on the alleged unconstitutionality of this section will be denied. State v. Horn, 18 N.C. App. 377, 197 S.E.2d 274 (1973).

Interpretation of §§ 14-190.1 to 14-190.8. — Section 2, c. 405, Session Laws 1971, effective July 1, 1971, provides: "Every word, clause, sentence, paragraph, section, or other part of this act shall be interpreted in such manner as to be as expansive as the Constitution of the United States and the Constitution of North Carolina permit."

Section 3, c. 405, Session Laws 1971, effective July 1, 1971, provides: "If any word, clause, sentence, paragraph, section, or other part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof."

Sections 14-190.1 to 14-190.8 made material and substantial changes in North Carolina law prohibiting the dissemination of obscenity. State v. McCluney, 280 N.C. 404, 185 S.E.2d 870 (1972).

The enactment of this section was an obvious attempt to provide a new law which would meet the latest tests enunciated by the United States Supreme Court in order that State law-enforcement officers might proceed with assurance against public dissemination and pandering of obscenity. State v. McCluney, 280 N.C. 404, 185 S.E.2d 870 (1972).

Section 14-189.1 Not Continued in Effect. — Session Laws 1971, c. 405, which repealed § 14-189.1, did not substantially reenact it, therefore it was not continued in effect. State v. McCluney, 280 N.C. 404, 185 S.E.2d 870 (1972).

There is nothing in Session Laws 1971, c. 405, which repealed § 14-189.1 outright and enacted this section, to indicate an intent to leave the old law unrepealed, or to reaffirm it. On the contrary, the clear implication is that the legislature intended to get rid of a law of dubious constitutionality. State v. McCluney, 280 N.C. 404, 185 S.E.2d 870 (1972).

The changes made in the 1971 Act evidence the legislature's apprehension that § 14-189.1 did not meet the requirements of the federal Constitution. State v. McCluney, 280 N.C. 404, 185 S.E.2d 870 (1972).

Application of 1973 amendment to defendants arrested prior to the amendment violated neither due process nor the ex post facto doctrine as the materials had to be found obscene under the doctrines of both Miller v. California, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), which precipitated the 1973 amendment and a book named "John Cleland's

Memoirs of A Woman of Pleasure" v. Attorney Gen., 383 U.S. 413, 86 S. Ct. 975, 16 L. Ed. 2d 1 (1966), the pre-1973 obscenity test in order to convict. State v. Hart, 287 N.C. 76, 213 S.E.2d 291 (1975).

County or Municipal Ordinance Relating to Obscenity. — Nothing in §§ 14-190.1 to 14-190.9, state-wide laws relating to obscene literature and exhibitions and to indecent exposure, expresses or indicates an intent by the General Assembly to preclude cities and towns or counties from enacting and enforcing ordinances requiring a higher standard of conduct or condition within their respective jurisdictions. State v. Tenore, 280 N.C. 238, 185 S.E.2d 644 (1972), wherein the Supreme Court declined to express any opinion as to whether a county or municipal ordinance, otherwise valid, may constitutionally prohibit and make punishable an exhibition or the dissemination of materials found to be "obscene" under the standards of the community in which such ordinance applies, though not "obscene" as judged by the "contemporary national community standards."

This section specifically defines the elements of obscenity. State v. Bryant, 16 N.C. App. 456, 192 S.E.2d 693 (1972).

Effect of U.S. Supreme Court Decisions. — The United States Supreme Court, in the interest of strengthening powers to regulate pornography, did not elect to eliminate constitutionally valid law that would otherwise be available in prosecuting pending obscenity cases. State v. Bryant, 20 N.C. App. 223, 201 S.E.2d 211 (1973).

Definitions in U.S. Supreme Court Cases to Be Considered. — In appellate review, the court shall consider both definitions of obscenity in Miller v. California, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), and A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen., 383 U.S. 413, 86 S. Ct. 975, 16 L. Ed. 2d 1 (1966). If the film is not obscene under both of these standards the charges must be dismissed. State v. Bryant, 20 N.C. App. 223, 201 S.E.2d 211 (1973).

Construction of Section to Conform to Guidelines Set by U.S. Supreme Court. — The broad terms in which obscene material was defined in subsection (b) of this section before the 1973 amendment fall far short of the United States Supreme Court's requirement that the sexual conduct which may be deemed obscene and patently offensive must be specifically defined. However, in Miller v. California, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), the United States Supreme Court held that where state obscenity statutes as written do not define what sexual conduct may be deemed obscene and patently offensive with sufficient specificity to comply with the guidelines set forth in that case, the state courts should be afforded an opportunity by construction to confine the obscene matter prohibited by their statutes to "hard-core" pornography. Thus this section as it stood before the 1973 amendment would be construed to prohibit as obscene only material consisting of the following: (a) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated and (b) patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals. State v. Bryan, 285 N.C. 27, 203 S.E.2d 27 (1974).

Films which are stark portrayals of sex acts without a suggested theme or purpose other than to portray the acts in the most blatant manner, and which exhibit a morbid interest in nudity and portray sex acts far beyond customary limits of candor in description or representation of such matters, are patently offensive "hard-core" portrayals of sexual conduct proscribed by this section which regulates dissemination of obscene materials in a public place. State v. Bryant, 20 N.C. App. 223, 201 S.E.2d 211 (1973).

Photographs can be so obscene — it is conceivably possible that they be so obscene — that the fact is incontrovertible. State v. Horn, 18 N.C. App. 377, 197 S.E.2d 274 (1973).

Application of More Stringent Criteria Than Constitutionally Required. — Where there was ample evidence to support the jury finding that films were "utterly without redeeming social value," more stringent criteria than the present test of "lacking serious literary, artistic, political or scientific value," the fact that the prosecution in these cases was required to meet the more difficult test gives these defendants no ground for complaint. State v. Bryant, 285 N.C. 27, 203 S.E.2d 27 (1974).

Although whether material alleged to be obscene is patently offensive may now be determined by "contemporary community standards" rather than by "contemporary national community standards," the fact that the prosecution was required to establish and did establish that films were patently offensive when tested by "contemporary national community standards" affords defendant no ground of complaint, since the prosecution was required to meet a more difficult test. State v. Bryant, 285 N.C. 27, 203 S.E.2d 27 (1974).

Finding of Intent and Guilty Knowledge Required for Conviction. — This section requires a finding of intent and guilty knowledge before a defendant may be convicted for dissemination of obscenity in a public place. State v. Bryant, 16 N.C. App. 456, 192 S.E.2d 693 (1972).

Notice of Nature of Material and Protection against Exposure to Juveniles. — In dissemination of obscenity case, court properly denied request for an instruction to the jury that

if the jury found the defendant provided notice to the public of the nature of the magazines involved in the case, and if they found the defendant provided reasonable protection against the exposure of the magazines to juveniles, then the jury would have to find that the defendant's conduct was protected under the First and Fourteenth Amendments to the Constitution of the United States, and that it would be the duty of the jury to return a verdict of not guilty. State v. Horn, 18 N.C. App. 377, 197 S.E.2d 274 (1973).

Case Properly Submitted to Jury. — Films shown in defendants' place of business which had no plot, no real motive and no objectives other than to appeal to the prurient interest in sex were uncontrovertibly obscene and exhibition of such films was not protected by the First and Fourteenth Amendments; therefore, the trial court did not err in submitting the case to the jury in an action under this section. State v. Bryant, 16 N.C. App. 456, 192 S.E.2d 693 (1972).

Applied in State v. Horn, 285 N.C. 82, 203 S.E.2d 37 (1974).

Cited in State v. Bryant, 12 N.C. App. 530, 183 S.E.2d 824 (1971); State v. Bryant, 280 N.C. 407, 185 S.E.2d 854 (1972).

§ 14-190.2. Adversary hearing prior to seizure or criminal prosecution. — (a) The purpose of this section is to provide an adversary determination of the question of whether books, magazines, motion pictures, or other materials are obscene prior to their seizure or prior to a criminal prosecution relating to such materials.

(b) The public policy of this State requires that all proceedings prescribed in this section shall be examined, heard and disposed of with the maximum promptness and dispatch commensurate with the Constitution of the United States and the Constitution of North Carolina.

(c) Whenever any law-enforcement officer has reasonable cause to believe that any person, firm or corporation is engaged in the sale, display, distribution or dissemination in a public place of any books, magazines, motion pictures or other materials which are obscene within the meaning of G.S. 14-190.1, he shall, without seizing such material, notify the solicitor for the judicial district in which such material is so believed to be offered. Upon receiving such notification the solicitor for said judicial district shall submit a written complaint to any resident judge of the Superior Court Division of the General Court of Justice or any judge of the District Court Division of the General Court of Justice, to which shall be attached, if available without purchase or seizure, a true copy of the allegedly obscene material. The complaint shall:

(1) Be directed against the person, firm or corporation believed to be engaged in the sale, display, distribution or dissemination in a public place of the material alleged to be obscene and against such material by name, description, volume and issue as appropriate;

(2) Allege that such material is obscene within the meaning of G.S. 14-190.1;

(3) Designate as respondent the person, firm or corporation believed to be engaged in the sale, display, distribution or dissemination in a public place of the material alleged to be obscene within the said judicial district;

(4) Seek an adjudication that said material is obscene;

(5) Seek a temporary restraining order prohibiting the respondent from removing, causing, or permitting to be removed the material alleged to be obscene within the meaning of G.S. 14-190.1; and,

(6) Seek a warrant to search for and seize said material as obscene within the meaning of G.S. 14-190.1.

(d) Upon receipt of such complaint from the solicitor, the judge shall:

(1) Issue a summons to be served upon the respondent which shall be in the same form prescribed for warrants in G.S. 15-20, except that it shall summon the respondent to appear before the said judge at a stated time not less than two days, including the day of service, and not more than four days, including the day of service, after service of the summons, and to show cause why the said material should not be declared obscene

and a warrant issued authorizing a search for and seizure of said material;

(2) Issue a subpoena as provided for under G.S. 1A-1, Rule 45 of the Rules of Civil Procedure commanding the respondent to produce copies of all items of said material not attached to the complaint in order that a complete adversary hearing may be held on the question of whether said material should be declared obscene and a warrant issued authorizing a search for and seizure of said material;

(3) Issue a temporary restraining order prohibiting the respondent from removing, causing, or permitting to be removed the material which is alleged to be obscene within the meaning of G.S. 14-190.1; provided, however, that such temporary restraining order shall not be construed as prohibiting the respondent from conducting sales in the normal course of business only, so long as at least one copy of each item alleged in the complaint to be obscene is retained for evidentiary purposes at the said hearing;

(4) Insure that any and all hearings held pursuant to this section are designed to focus searchingly upon the issue of whether the said material is obscene within the meaning of G.S. 14-190.1, and that the rights of the respondent to counsel, to confrontation and cross-examination of witnesses for the State, to present witnesses including expert witnesses in his own behalf, and all other rights granted the respondent by the Constitution of the United States or the Constitution of North Carolina are protected, and;

(5) Render a decision on the issue of whether said material is obscene within the meaning of G.S. 14-190.1 within two days, excluding the final day of said hearing, after the conclusion of any hearing held under the authority of this section.

(e) In the event that the judge fails to find the material involved is obscene within the meaning of G.S. 14-190.1, he shall enter judgment accordingly and dismiss the complaint. Should the respondent fail to appear or the judge find that said material is obscene within the meaning of G.S. 14-190.1, the judge involved shall enter judgment accordingly and issue a warrant to search for and seize said material. The warrant shall describe with reasonable certainty the person, premises or other place to be searched and the material for which the search is to be made and which is to be seized. The warrant must be signed by the issuing judge and bear the date and hour of its issuance above his signature.

(f) No judgment or subsequent order of enforcement thereof, entered pursuant to the provisions of this section, shall be of any force and effect outside the judicial district in which entered; and no such order or judgment shall be res judicata in any proceeding in any other judicial district. Further, evidence of any hearing held pursuant to this section shall not be competent or admissible in any criminal action for the violation of any other section of this Article; provided, however, that in any criminal action, charging the violation of any other section of this Article, against any person, firm or corporation that was a respondent in such hearing, and involving the same material declared to be obscene under the provisions of this section, then evidence of such hearing shall be competent and admissible as bearing on the issue of scienter only.

(g) Any respondent described in this section shall violate any provision of this section or any order issued under any provision of this section shall be subject to punishment, by the court, as for contempt.

(h) No person, firm or corporation shall be arrested or indicted for any violation of a provision of G.S. 14-190.1, G.S. 14-190.3, G.S. 14-190.4, G.S. 14-190.5, G.S. 14-190.6, G.S. 14-190.7, G.S. 14-190.8, G.S. 14-190.10 or G.S. 14-190.11 until the material involved has first been the subject of an adversary determination under the provisions of this section, wherein such person, firm

or corporation is a respondent, and wherein such material has been declared by the court to be obscene or in the case of G.S. 14-190.10 or G.S. 14-190.11, to be sexually oriented and until such person, firm or corporation continues, subsequent to such determination, to engage in the conduct prohibited by a provision of the sections hereinabove set forth.

(i) Any person, firm or corporation which is given written notice by registered mail of the filing of the complaint and of the judgment of the court as provided for in this section shall be deemed a respondent and shall be bound by the judgment of the court.

(j) The State or any respondent may appeal from a judgment. Such appeal shall not stay the judgment. If any respondent engages in conduct prohibited by this Article subsequent to notice of the judgment, finding the material to be obscene he shall be subject to criminal prosecution notwithstanding the appeal from the judgment.

(k) Any person, firm or corporation which is disseminating or which may disseminate the material challenged in the civil proceeding provided for in this section may intervene in said proceeding as a matter of right. Said intervenor shall have all the rights of a respondent and shall be bound by the judgment. (1971, c. 405, s. 1; 1973, c. 1434, ss. 2-8.)

Cross Reference. — See note to § 14-190.1.

Editor's Note. — Section 5, c. 405, Session Laws 1971, makes the act effective July 1, 1971.

The 1973 amendment, effective July 1, 1974, added "or prior to a criminal prosecution relating to such materials" at the end of subsection (a), rewrote the proviso to the second sentence of subsection (f), substituted "subject to punishment, by the court, as for contempt" for "guilty of a misdemeanor and upon conviction shall be fined or imprisoned in the discretion of the court" at the end of subsection (g), rewrote subsection (h) and added subsections (i), (j) and (k).

Section 15-20, referred to in subdivision (d)(1) of this section, was repealed by Session Laws 1973, c. 1286, s. 26, effective Sept. 1, 1975. For present provisions as to criminal process, see §§ 15A-301 to 15A-305.

Amendment Not Retroactive. — Since the General Assembly specifically provided that the 1973 amendment become effective July 1, 1974, this clearly demonstrates the manifest intent of the General Assembly that it should not be applied retroactively. State v. Hart, 287 N.C. 76, 213 S.E.2d 291 (1975).

There is in the 1973 amendment a manifest legislative intent that this section should be applied prospectively only and should not be applicable to pending prosecutions. State v. Hart, 287 N.C. 76, 213 S.E.2d 291 (1975).

Definition of "obscenity" in the former statute under which defendants were charged placed a heavier burden on the State to convict and the latest amendment makes it easier for the State to convict violators, so the amendment affords defendants no grounds on which to contend that their convictions are illegal and must abate. State v. Hart, 287 N.C. 76, 213 S.E.2d 291 (1975).

Amendments to Section Pending Appeal. — Appellate courts will not give effect to such changes in the law pending an appeal if the subsequent legislation (1) contains a savings clause or (2) manifests a legislative intent to the contrary or (3) where there is a constitutional prohibition. State v. Hart, 287 N.C. 76, 213 S.E.2d 291 (1975).

The 1973 amendment to subsection (h) does not reduce the punishment or otherwise remove any burden imposed upon these defendants by prior law. To the contrary, that amendment places an additional procedural burden upon the State to obtain an adversary judicial determination that the material in question is obscene, and thereafter disseminated by the accused, before he may be arrested or indicted. State v. Hart, 287 N.C. 76, 213 S.E.2d 291 (1975).

The 1973 changes did not repeal the former anti-obscenity statutes but only amended them effective July 1, 1974. State v. Hart, 287 N.C. 76, 213 S.E.2d 291 (1975).

Subsection (a) of this section clearly evidences the legislative intent to prevent wholesale seizures prior to an adversary judicial determination that the materials to be seized are obscene. State v. Bryant, 280 N.C. 407, 185 S.E.2d 854 (1972).

Seizure of Single Copies for Evidentiary Purposes. — Subsection (h) as it stood before the 1973 amendment made it clear that this section did not prohibit a law-enforcement officer from seizing for evidentiary purposes single copies of printed material which he reasonably believed to be obscene within the meaning of § 14-190.1, when such seizure was made pursuant to a lawful arrest. State v. Bryant, 280 N.C. 407, 185 S.E.2d 854 (1972).

§ 14-190.3. Exhibition of obscene pictures; posting of advertisements. — If any person, firm or corporation shall intentionally disseminate in any public place any motion picture which he or it knows or reasonably should know to be obscene within the meaning of G.S. 14-190.1; or, if any person, firm or corporation shall intentionally post any placard, writings, pictures, or drawings, which he or it knows or reasonably should know to be obscene within the meaning of G.S. 14-190.1, on walls, fences, billboards, or other public places; or, if any person, firm or corporation shall intentionally permit any exhibition or show, which he or it knows or reasonably should know to be obscene within the meaning of G.S. 14-190.1, to be conducted in any public place owned or controlled by said person, firm or corporation; the person, firm or corporation performing either one or all of the said acts shall be guilty of a misdemeanor and unless a greater penalty is expressly provided for in this Article, shall be punishable in the discretion of the court. (1971, c. 405, s. 1.)

Cross Reference. — See note to § 14-190.1.
Editor's Note. — Section 5, c. 405, Session Laws 1971, makes the act effective July 1, 1971.

§ 14-190.4. Coercing acceptance of obscene articles or publications. — No person, firm or corporation shall, as a condition to any sale, allocation, consignment or delivery for resale of any paper, magazine, book, periodical or publication require that the purchaser or consignee receive for resale any other article, book, or publication which is obscene within the meaning of G.S. 14-190.1; nor shall any person, firm or corporation deny or threaten to deny any franchise or impose or threaten to impose any penalty, financial or otherwise, by reason of the failure or refusal of any person to accept such articles, books, or publications, or by reason of the return thereof. Any violation of this section shall be a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1971, c. 405, s. 1.)

Cross Reference. — See note to § 14-190.1.
Editor's Note. — Section 5, c. 405, Session Laws 1971, makes the act effective July 1, 1971.

§ 14-190.5. Preparation of obscene photographs, slides and motion pictures. — Every person who knowingly:

(1) Photographs himself or any other person, for purposes of preparing an obscene film, photograph, negative, slide or motion picture for the purpose of dissemination in a public place; or

(2) Models, poses, acts, or otherwise assists in the preparation of any obscene film, photograph, negative, slide or motion picture for the purpose of dissemination in a public place, shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1971, c. 405, s. 1.)

Cross Reference. — See note to § 14-190.1.
Editor's Note. — Section 5, c. 405, Session Laws 1971, makes the act effective July 1, 1971.

§ 14-190.6. Employing or permitting minor to assist in offense under Article. — Every person 18 years of age or older who intentionally, in any manner, hires, employs, uses or permits any minor under the age of 16 years to do or assist in doing any act or thing constituting an offense under this Article and involving any material, act or thing he knows or reasonably should know to be obscene within the meaning of G.S. 14-190.1, shall be guilty of a misdemeanor, and unless a greater penalty is expressly provided for in this Article, shall be punishable in the discretion of the court. (1971, c. 405, s. 1.)

Cross Reference. — See note to § 14-190.1.
Editor's Note. — Section 5, c. 405, Session Laws 1971, makes the act effective July 1, 1971.

§ 14-190.7. Dissemination to minors under the age of 16 years. — Every person 18 years of age or older who knowingly disseminates to any minor under the age of 16 years any material which he knows or reasonably should know to be obscene within the meaning of G.S. 14-190.1 shall be guilty of a misdemeanor and unless a greater penalty is expressly provided for in this Article, shall be punishable in the discretion of the court. (1971, c. 405, s. 1.)

Cross Reference. — See note to § 14-190.1.
Editor's Note. — Section 5, c. 405, Session Laws 1971, makes the act effective July 1, 1971.

§ 14-190.8. Dissemination to minors 12 years of age or younger. — Every person 18 years of age or older who knowingly disseminates to any minor 12 years of age or younger any material which he knows or reasonably should know to be obscene within the meaning of G.S. 14-190.1 shall be guilty of a felony and upon conviction shall be imprisoned in the State's prison for not more than five years and shall be fined at the discretion of the court. (1971, c. 405, s. 1.)

Cross Reference. — See note to § 14-190.1.
Editor's Note. — Section 5, c. 405, Session Laws 1971, makes the act effective July 1, 1971.

Cited in State v. King, 20 N.C. App. 505, 201 S.E.2d 724 (1974).

§ 14-190.9. Indecent exposure. — Any person who shall willfully expose the private parts of his or her person in any public place and in the presence of any other person or persons, of the opposite sex, or aids or abets in any such act, or who procures another to perform such act; or any person, who as owner, manager, lessee, director, promoter or agent, or in any other capacity knowingly hires, leases or permits the land, building, or premises of which he is owner, lessee or tenant, or over which he has control, to be used for purposes of any such act, shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1971, c. 591, s. 1.)

Interpretation of Section. — Section 2, c. 591, Session Laws 1971, provides: "Every word, clause, sentence, paragraph, section, or other part of this act shall be interpreted in such manner as to be as expansive as the Constitution of the United States and the Constitution of North Carolina permit."

Section 3, c. 591, Session Laws 1971, provides: "If any word, clause, sentence, paragraph, section, or other part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof."

This section is not unconstitutional on its face. State v. King, 20 N.C. App. 505, 201 S.E.2d 724 (1974).

Nudity Is Conduct Subject to Regulation. — When nudity is employed as sales promotion in bars and restaurants, nudity is conduct. As conduct, the nudity of employees is as fit a

subject for governmental regulation as is the licensing of the liquor dispensaries and the fixing of their closing hours. State v. King, 20 N.C. App. 505, 201 S.E.2d 724 (1974).

This section is separate and apart from the general obscenity statutes, §§ 14-190.1 through 14-190.8, all of which deal with dissemination of obscenity. State v. King, 20 N.C. App. 505, 201 S.E.2d 724 (1974).

This section was enacted by the 1971 General Assembly by passage of Chapter 591 of the 1971 Session Laws, and is separate and apart from those statutes dealing with the dissemination of obscenity (§§ 14-190.1 through 14-190.8) all of which were enacted by passage of Chapter 405 of the 1971 Session Laws. State v. King, 285 N.C. 305, 204 S.E.2d 667 (1974).

Conduct Is Not Required to Be "Obscene" or "Indecent". — This section, like its predecessors, simply declares the act of exposing one's private parts in a public place in the presence of persons of the opposite sex, or permitting or aiding or abetting another in doing so, to be a misdemeanor. The statute does not use the term "obscene" and for that matter does not even require the act of exposing one's private parts in public to be "indecent." State v. King, 285 N.C. 305, 204 S.E.2d 667 (1974).

And Court Is Not Concerned with Definitions of "Obscene" and "Obscenity". — Since this section does not involve the concept of "obscenity" — the definition of which has given both the federal and State courts so much difficulty — the North Carolina court is not concerned with the many and often conflicting decisions attempting to define "obscene" or "obscenity." State v. King, 285 N.C. 305, 204 S.E.2d 667 (1974).

Taking Part in Immoral Show, etc., Is Covered by Obscenity Statutes. — In 1971, the General Assembly amended the obscenity statutes and the indecent exposure statute. In amending the indecent exposure statute the prohibition against procuring or "taking part in any immoral show, exhibition or performance where indecent, immoral, or lewd dances are conducted in any booth, tent, room or other public or private place to which the public is invited . . ." was deleted. This proscription was placed in the obscenity statutes and is covered by § 14-190.1, particularly subdivision (2) of subsection (a) thereof. State v. King, 20 N.C. App. 505, 201 S.E.2d 724 (1974).

Viewers of Exposure Need Not Be Unwilling. — There is nothing whatsoever in the present or former indecent exposure statutes that in any way requires the viewers of the exposure of one's private parts to be unwilling observers. State v. King, 285 N.C. 305, 204 S.E.2d 667 (1974).

Warrant Must Allege Exposure in Presence of Person of Opposite Sex. — When one of the essential elements of the offense created by this section is that the exposure of the private parts be "in the presence of any other person or persons, of the opposite sex," and the warrants fail to so charge, such omission is fatal, and the warrants must be quashed. State v. King, 285 N.C. 305, 204 S.E.2d 667 (1974).

Aiding and Abetting. — Both former § 14-190 and this section clearly and expressly proscribe the conduct for which defendant was arrested, namely, aiding or abetting other persons in willfully exposing their private parts in the presence of other persons of the opposite sex and in a public place. State v. King, 285 N.C. 305, 204 S.E.2d 667 (1974).

Conduct Constituting Violation of Section. — Where four females involved willfully exhibited their private parts to an audience of some seventy-five males in a public place, and that defendant aided and abetted in such exposure, such conduct constitutes a misdemeanor under this section. State v. King, 285 N.C. 305, 204 S.E.2d 667 (1974).

Quoted in State v. Tenore, 280 N.C. 238, 185 S.E.2d 644 (1972).

§ 14-190.10. Disseminating sexually oriented material to minors. — (a) Every person, firm or corporation who intentionally and knowingly disseminates sexually oriented material to any person under 18 years of age shall be guilty of a misdemeanor. A person, firm or corporation disseminates sexually oriented material within the meaning of this section if he, she or it:

(1) Sells, delivers or provides or offers or agrees to sell, deliver or provide any sexually oriented writing, picture, record or other representation or embodiment that is sexually oriented; or

(2) Presents or directs a sexually oriented play, dance or other performance or participates directly in that portion thereof which makes it sexually oriented; or

(3) Exhibits, presents, rents, sells, delivers or provides; or offers or agrees to exhibit, present, rent or to provide: any obscene still or motion picture, film, filmstrip, or projection slide, or sound recording, sound tape, or sound track, or any matter or material of whatever form which

is a representation, embodiment, performance, or publication that is sexually oriented.

(b) For purposes of this section any material is sexually oriented if:

(1) The material is made up in whole or dominant part of representations or descriptions, actual or simulated, of human sexual intercourse, masturbation, sodomy, direct physical stimulation of unclothed genitals, or flagellation or torture in the context of a sexual relationship or which emphasizes the uncovered human genitals; and

(2) The material lacks serious literary, artistic, political, educational or scientific value for persons under 18 years of age; and

(3) The dominant theme of the material appeals to the prurient interests in sex of persons under 18 years of age.

(c) It shall be an affirmative defense to a prosecution under this section for the defendant to show:

(1) That the dissemination was made with the consent of a parent or guardian of the recipient, that the defendant was misled as to the existence of parental consent by a misrepresentation of parental status by an individual purporting to be a parent of the recipient, or that the dissemination was made to the recipient by his teacher, clergyman or a librarian in the discharge of official responsibilities;

(2) That the recipient was married, or that the defendant was misled in this regard by a misrepresentation of marital status by the recipient;

(3) That the defendant was misled as to the age of the recipient by false proof of identification and age offered by the recipient.

(d) Any person under the age of 18 years who gains admission to any theater by falsely claiming to be 18 years of age or older shall be guilty of a misdemeanor and punished by a fine of not more than fifty dollars ($50.00). (1973, c. 1434, s. 9.)

Editor's Note. — Session Laws 1973, c. 1434, s. 11, makes the act effective July 1, 1974.

§ 14-190.11. Public display of sexually oriented materials. — (a) Every person, firm or corporation who intentionally and knowingly places sexually oriented materials upon public display, or who knowingly and intentionally fails to take prompt action to remove such a display from property in his possession after learning of its existence shall be guilty of a misdemeanor.

(b) For purposes of this section any material is sexually oriented if the material is made up in whole or dominant part of representations or descriptions of actual or simulated human sexual intercourse, masturbation, sodomy, direct physical stimulation of unclothed genitals or flagellation or torture in the context of a sexual relationship or emphasizes the uncovered human genitals and the material lacks serious literary, artistic, political, educational or scientific value and the dominant theme of the material appeals to the prurient interest in sex.

(c) A person, firm or corporation places sexually oriented material upon public display within the meaning of this Article if he, she or it places the material on or in a billboard, viewing screen, theater stage or marquee, newsstand, display rack, window, showcase, display case or similar place so that explicit sexually oriented material is easily visible from a public street, public road or sidewalk or from the normally occupied property of others.

(d) Nothing contained in this section shall be deemed to prohibit or make unlawful the dissemination or display of material, the external visible covers of which do not depict any of the acts embraced within the definition of "sexually oriented." (1973, c. 1434, s. 10.)

Editor's Note. — Session Laws 1973, c. 1434, s. 11, makes the act effective July 1, 1974.

§ 14-191: Repealed by Session Laws 1971, c. 591, s. 4.

§§ 14-192, 14-193: Repealed by Session Laws 1971, c. 405, s. 4, effective July 1, 1971.

§ 14-194: Repealed by Session Laws 1971, c. 591, s. 4.

§ 14-196. Using profane, indecent or threatening language to any person over telephone; annoying or harassing by repeated telephoning or making false statements over telephone.

Constitutionality. — Subsection (a)(1) is constitutional. In re Simmons, 24 N.C. App. 28, 210 S.E.2d 84 (1974).

The language of this section is broad, but it is neither so vague as to be easily misunderstood nor so broad as to reach beyond the State's power to enact. In re Simmons, 24 N.C. App. 28, 210 S.E.2d 84 (1974).

Threat to take one's life or to beat one falls within this section's proscription against using in telephonic communication language threatening to inflict bodily harm. State v. Jacobs, 25 N.C. App. 500, 214 S.E.2d 254 (1975).

Use of one's telephone clearly involves substantial privacy interests which the State may recognize and protect. Subsection (a)(1) seeks to protect that interest from an invasion made in an essentially intolerable manner, and the means chosen by the legislature were both appropriate and sufficiently narrowed to achieving the legitimate ends sought to be attained. In re Simmons, 24 N.C. App. 28, 210 S.E.2d 84 (1974).

An attempt to commit common-law robbery, a crime punishable as a felony by virtue of § 14-3(b), is an entirely different crime from the misdemeanor offense created by subdivision (a)(2) of this section. State v. Jacobs, 25 N.C. App. 500, 214 S.E.2d 254 (1975).

Right to Counsel. — A warrant charging a violation of this section charges a serious offense, entitling defendant to the assistance of legal counsel. State v. Best, 5 N.C. App. 379, 168 S.E.2d 433 (1969).

§ 14-197. Using profane or indecent language on public highways; counties exempt. — If any person shall, on any public road or highway and in the hearing of two or more persons, in a loud and boisterous manner, use indecent or profane language, he shall be guilty of a misdemeanor and upon conviction shall be fined not exceeding fifty dollars ($50.00) or imprisoned not exceeding 30 days. The following counties shall be exempt from the provisions of this section: Pitt and Swain. (1913, c. 40; C. S., s. 4352; Pub. Loc. Ex. Sess., 1924, c. 65; 1933, c. 309; 1937, c. 9; 1939, c. 73; 1945, c. 398; 1947, cc. 144, 959; 1949, c. 845; 1957, c. 348; 1959, c. 733; 1963, cc. 39, 123; 1969, c. 300; 1971, c. 718; 1973, cc. 120, 233.)

Editor's Note. — The 1971 amendment deleted Brunswick, Camden, Macon and Tyrrell from the list of exempt counties.

The first 1973 amendment deleted Craven and the second 1973 amendment deleted Stanly from the list of exempt counties.

§ 14-198: Repealed by Session Laws 1975, c. 402.

§ 14-202.1. Taking indecent liberties with children. — (a) A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:

(1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or

(2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.

(b) Taking indecent liberties with children is a felony punishable by a fine, imprisonment for not more than 10 years, or both. (1955, c. 764; 1975, c. 779.)

Editor's Note. — The 1975 amendment, effective Oct. 1, 1975, rewrote this section.

This section and § 14-177, etc. —

Sections 14-177 and this section can be reconciled and both declared to be operative without repugnance. State v. Copeland, 11 N.C. App. 516, 181 S.E.2d 722 (1971).

Section 14-177 condemns crimes against nature whether committed against adults or children. State v. Copeland, 11 N.C. App. 516, 181 S.E.2d 722 (1971).

This section condemns other acts against children than unnatural sexual acts. State v. Copeland, 11 N.C. App. 516, 181 S.E.2d 722 (1971).

This section condemns those offenses of an unnatural sexual nature against children under 16 years of age by persons over 16 years of age which cannot be reached and punished under the provisions of § 14-177. State v. Copeland, 11 N.C. App. 516, 181 S.E.2d 722 (1971).

Because the two offenses are separate and distinct and the constituent elements are not identical, a violation of this section is not a lesser included offense of the crime against nature described in § 14-177. State v. Copeland, 11 N.C. App. 516, 181 S.E.2d 722 (1971).

ARTICLE 27.

Prostitution.

§ 14-203. Definition of terms.

Applied in State v. Bethea, 9 N.C. App. 544, 176 S.E.2d 904 (1970).

Quoted in State v. Demott, 26 N.C. App. 14, 214 S.E.2d 781 (1975).

Cited in Wheeler v. Goodman, 306 F. Supp. 58 (W.D.N.C. 1969); State v. Blalock, 9 N.C. App. 94, 175 S.E.2d 716 (1970).

§ 14-204. Prostitution and various acts abetting prostitution unlawful.

Aiding and Abetting. —

This section punishes all who aid and abet prostitution by the means set out in the statute or by "any means whatsoever" to the same extent that it punishes those who offer their bodies for that purpose. State v. Demott, 26 N.C. App. 14, 214 S.E.2d 781 (1975).

The enterprise sought to be proscribed by this section, the offering of the body for hire, has been fragmented into multiple substantive offenses. This fragmentation serves the laudable purpose of not only punishing those who, at any stage, engage in the promotion of the enterprise, but is an obvious prosecutorial aid to those whose responsibility it is to suppress the vice. State v. Demott, 26 N.C. App. 14, 214 S.E.2d 781 (1975).

Each Step a Separate Crime. — The legislature, by making each step taken in furtherance of the vice of offering the body for sexual hire a separate crime, has made it possible to obtain convictions where, given the nature of the activity, they would otherwise be most difficult to obtain. State v. Demott, 26 N.C. App. 14, 214 S.E.2d 781 (1975).

Allegations in warrants charging violations of subdivisions (2), (4) and (6) can be so cast that neither offense is made an essential element of any other. State v. Demott, 26 N.C. App. 14, 214 S.E.2d 781 (1975).

The violation of subdivision (4) is complete when defendant directs and invites agent to her apartment for prostitution. State v. Demott, 26 N.C. App. 14, 214 S.E.2d 781 (1975).

The violation of subdivision (6) is complete when defendant enters her apartment with a person for the stated purpose. State v. Demott, 26 N.C. App. 14, 214 S.E.2d 781 (1975).

Anyone who has violated subdivision (7) has most likely, in the process of doing so, violated one or more of the other subdivisions of this section. State v. Demott, 26 N.C. App. 14, 214 S.E.2d 781 (1975).

Applied in State v. Bethea, 9 N.C. App. 544, 176 S.E.2d 904 (1970); State v. Butler, 17 N.C. App. 167, 193 S.E.2d 117 (1972).

Cited in State v. Blalock, 9 N.C. App. 94, 175 S.E.2d 716 (1970).

§ 14-208. Punishment; probation; parole.

Cited in Wheeler v. Goodman, 306 F. Supp. 58 (W.D.N.C. 1969).

SUBCHAPTER VIII. OFFENSES AGAINST PUBLIC JUSTICE.

ARTICLE 28.

Perjury.

§ 14-210. Subornation of perjury.

Elements of Offense. —

In accord with 1st paragraph in original. See State v. McBride, 15 N.C. App. 742, 190 S.E.2d 658 (1972).

How Falsity of Alleged Perjurer's Oath Established. —

The falsity of the oath of the alleged perjurer must be established in a prosecution for subornation of perjury either by the testimony of two witnesses, or by one witness and corroborating circumstances, sometimes called adminicular circumstances. State v. McBride, 15 N.C. App. 742, 190 S.E.2d 658 (1972).

Application of Requirement of Proving Commission of Perjury by Independent Circumstances. — The requirement of proving by independent circumstances the commission of perjury does not apply to the procurement element of the offense of subornation of perjury. State v. McBride, 15 N.C. App. 742, 190 S.E.2d 658 (1972).

§ 14-214. False statement to procure benefit of insurance policy or certificate. — Any person who shall wilfully and knowingly present or cause to be presented a false or fraudulent claim, or any proof in support of such claim, for the payment of a loss, or other benefits, upon any contract of insurance or certificate of insurance; or prepares, makes or subscribes to a false or fraudulent account, certificate, affidavit or proof of loss, or other documents or writing, with intent that the same may be presented or used in support of such claim, shall be guilty of a felony punishable by imprisonment for not more than five years or by a fine of not more than five thousand dollars ($5,000), or by both such fine or imprisonment in the discretion of the court. (1899, c. 54, s. 60; Rev., s. 3487; 1913, c. 89, s. 28; C. S., s. 4369; 1937, c. 248; 1967, c. 1088, s. 1.)

Editor's Note. —

This section is set out to correct a typographical error in the replacement volume.

The filing of an insurance claim based on an accident admittedly staged with the intent to defraud the insurance company is a violation of this section. State v. Walker, 22 N.C. App. 291, 206 S.E.2d 395 (1974).

ARTICLE 29.

Bribery.

§ 14-218. Offering bribes.

Cited in State v. Stanley, 19 N.C. App. 684, 200 S.E.2d 223 (1973).

ARTICLE 30.

Obstructing Justice.

§ 14-221.1. Altering, destroying, or stealing evidence of criminal conduct. — Any person who breaks or enters any building, structure, compartment,

vehicle, file, cabinet, drawer, or any other enclosure wherein evidence relevant to any criminal offense or court proceeding is kept or stored with the purpose of altering, destroying or stealing such evidence; or any person who alters, destroys, or steals any evidence relevant to any criminal offense or court proceeding shall be guilty of a felony punishable by a fine not to exceed five thousand dollars ($5,000), or imprisonment for not more than five years, or both.

As used in this section, the word evidence shall mean any article or document in the possession of a law-enforcement officer or officer of the General Court of Justice being retained for the purpose of being introduced in evidence or having been introduced in evidence or being preserved as evidence. (1975, c. 806, ss. 1, 2.)

Editor's Note. — Session Laws 1975, c. 806, s. 3, provides: "This act shall become effective July 1, 1975, but shall not apply to any act consummated prior to the effective date of this act."

§ 14-223. Resisting officers.

Purpose. — The purpose of this section is to enforce orderly conduct in the important mission of preserving the peace, carrying out the judgments and orders of the court, and upholding the dignity of the law. State v. Leigh, 278 N.C. 243, 179 S.E.2d 708 (1971).

The provisions of this section provide for safeguards that are essential to the welfare of the public. State v. Leigh, 278 N.C. 243, 179 S.E.2d 708 (1971).

Constitution Does Not Preclude Prosecution for Violation of Criminal Statute. — The First and Fourteenth Amendments to the United States Constitution do not preclude prosecution and conviction of a defendant for violation of the provisions of a criminal statute enacted in the public interest. State v. Leigh, 278 N.C. 243, 179 S.E.2d 708 (1971).

The words "delay" and "obstruct" appear to be synonymous as used in this section. State v. Leigh, 278 N.C. 243, 179 S.E.2d 708 (1971).

And perhaps the word "resist" would infer more direct and forceful action. State v. Leigh, 278 N.C. 243, 179 S.E.2d 708 (1971).

This section will apply to cases falling within any one of the descriptive words, since the words describing the act are joined by the disjunctive (or). State v. Leigh, 278 N.C. 243, 179 S.E.2d 708 (1971).

There does not have to be an assault on or actual physical interference with the officer in order to constitute a crime under this section. Neither does the conduct of a defendant have to be so effective that it permanently prevents the officer from making his investigation. State v. Leigh, 10 N.C. App. 202, 178 S.E.2d 85 (1970).

No actual assault or force or violence is necessary to complete the offense described by this section. State v. Kirby, 15 N.C. App. 480, 190 S.E.2d 320 (1972).

Duty to Submit Peaceably to Arrest. — When a person has been lawfully arrested by a lawful officer and understands that he is under arrest, it is his duty to submit peaceably to the arrest. State v. Summrell, 13 N.C. App. 1, 185 S.E.2d 241 (1971).

Resisting Officer in Performance of Some Duty Is Primary Conduct Proscribed. — In the offense of resisting an officer, the resisting of the public officer in the performance of some duty is the primary conduct proscribed by this section, and the particular duty that the officer is performing while being resisted is of paramount importance and is very material to the preparation of the defense. State v. Kirby, 15 N.C. App. 480, 190 S.E.2d 320 (1972).

Right to Resist Illegal Conduct of Officer. — Decisions of the Supreme Court recognize the right to resist illegal conduct of an officer. State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970).

Every person has the right to resist an unlawful arrest and he may use such force as reasonably appears to be necessary to prevent the unlawful arrest. State v. Allen, 14 N.C. App. 485, 188 S.E.2d 568 (1972).

The offense of resisting arrest, both at common law and under this section, presupposes a lawful arrest. Every person has the right to resist an unlawful arrest. In such case the person attempting the arrest stands in the position of a wrongdoer and may be resisted by the use of force, as in self-defense. See State v. Jefferies, 17 N.C. App. 195, 193 S.E.2d 388 (1972).

Resisting Arrest under Invalid Warrant. — Where police officers attempt an arrest under an invalid arrest warrant, the person sought to be arrested has a legal right to resist and that, in such instances, in prosecutions for resisting arrest, the defendant's motion for judgment as

of nonsuit should be granted. State v. Carroll, 21 N.C. App. 530, 204 S.E.2d 908 (1974).

Applicability to Arrest by Special Police. — See opinion of Attorney General to Mr. G.R. Rankin, Vanguard Security Service, 40 N.C.A.G. 152 (1970).

Conduct Not Constituting Obstruction of Officer. — Merely remonstrating with an officer in behalf of another, or criticizing or questioning an officer while he is performing his duty, when done in an orderly manner, does not amount to obstructing or delaying an officer in the performance of his duties. State v. Leigh, 278 N.C. 243, 179 S.E.2d 708 (1971).

Merely remonstrating with an officer in behalf of another, or criticizing an officer while he is performing his duty, does not amount to obstructing, hindering, or interfering with an officer. State v. Allen, 14 N.C. App. 485, 188 S.E.2d 568 (1972).

Citizen may advise another of his constitutional rights in an orderly and peaceable manner while the officer is performing his duty without necessarily obstructing or delaying the officer in the performance of his duty. State v. Leigh, 278 N.C. 243, 179 S.E.2d 708 (1971).

Vague, intemperate language used without apparent purpose is not sufficient to constitute the offense of resisting, delaying and obstructing an officer. State v. Allen, 14 N.C. App. 485, 188 S.E.2d 568 (1972).

Nor Is Arguing With Officer and Protesting Confiscation of Property. — Where defendant was merely arguing with the officer and protesting the confiscation of his property, he had committed no offense and the officer had no authority to arrest him. State v. Allen, 14 N.C. App. 485, 188 S.E.2d 568 (1972).

Illegal Entry by Officer into Home. — Officers have no duty to make an illegal entry into a person's home. Hence, one who resists an illegal entry is not resisting an officer in the discharge of the duties of his office. These views are in accordance with the ancient rules of the common law and are predicated on the constitutional principle that a person's home is his castle. State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970).

A State highway patrolman, when acting as such, is a public officer within the purview of this section. State v. Powell, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

A deputy sheriff is discharging or attempting to discharge a duty of his office when he begins an investigation of a crime reported to him by eyewitnesses, under circumstances which appear to threaten a further breach of the peace. State v. Leigh, 278 N.C. 243, 179 S.E.2d 708 (1971).

"Arrest". — The term "arrest" has a technical meaning, applicable in legal proceedings. It implies that a person is thereby restrained of his liberty by some officer or agent of the law, armed with lawful process, authorizing and requiring the arrest to be made. It is intended to serve and does serve, the end of bringing the person arrested personally within the custody and control of the law, for the purpose specified in, or contemplated by the process. State v. Leak, 11 N.C. App. 344, 181 S.E.2d 224 (1971).

In criminal procedure an arrest consists in the taking into custody of another person under real or assumed authority for the purpose of holding or detaining him to answer a criminal charge or of preventing the commission of a criminal offense. State v. Leak, 11 N.C. App. 344, 181 S.E.2d 224 (1971).

An "arrest" does not necessarily terminate the instant a person is taken into custody; arrest also includes "bringing the person personally within the custody and control of the law." State v. Leak, 11 N.C. App. 344, 181 S.E.2d 224 (1971).

The arrest of defendant in the instant case did not terminate until he was delivered to the jailer and properly confined. State v. Leak, 11 N.C. App. 344, 181 S.E.2d 224 (1971).

Resisting Officer and Assaulting Officer Are Separate Offenses. — The charge of resisting an officer and the charge of assaulting a public officer while discharging or attempting to discharge a duty of his office are separate and distinct offenses and the trial judge did not err in failing to "merge" them. State v. Kirby, 15 N.C. App. 480, 190 S.E.2d 320 (1972).

Sufficiency of Warrant, etc. —

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

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

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

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

An instrument setting forth the charge of assault by the use of the words "assault on an officer" to identify the person assaulted was not sufficient to charge the offense of assault. State v. Powell, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

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

Warrant is insufficient to charge the offense of resisting an officer under this section where it fails to allege the duty of his office that the public officer was discharging or attempting to discharge. State v. Mink, 18 N.C. App. 346, 196 S.E.2d 552 (1973).

Where Warrants Based on This Section and Former § 14-33(c)(4) Included Same Elements of Offense. — Where a defendant had been tried under two warrants, one for violating this section and the other for violating former § 14-33(c)(4); and where each warrant included all the elements of the offense charged in the other, and each specified only acts of violence which defendant directed at the officer's person while he was attempting to hold defendant in custody; the defendant had been twice convicted and sentenced for the same criminal offense, and the constitutional guaranty against double jeopardy protected him from multiple punishments for the same offense. State v. Summrell, 282 N.C. 157, 192 S.E.2d 569 (1972).

What State May Show to Convict. — In order to convict a person of a violation of this section, the State does not have to show that a defendant resisted, delayed and obstructed an officer. It is sufficient if a defendant unlawfully and willfully resists, or delays, or obstructs an officer. State v. Leigh, 10 N.C. App. 202, 178 S.E.2d 85 (1970).

Sufficiency of Evidence. — Where the evidence is sufficient for the jury to find that a defendant unlawfully and willfully, by loud and abusive language directed at an officer, delayed him in making his investigation, this requires the submission of the case to the jury. State v. Leigh, 10 N.C. App. 202, 178 S.E.2d 85 (1970).

Conceding that no actual violence or force was used by defendant, there was plenary evidence to support a jury finding that defendant did by his actions and language delay and obstruct the officer in the performance of his duties. State v. Leigh, 278 N.C. 243, 179 S.E.2d 708 (1971).

Rejection of Argument That Acts Not in Connection with Arrest. — The defendant's contention that at the time he was in the magistrate's office his arrest had been consummated, and that the acts alleged to have occurred between the magistrate's office and the jail were not in connection with his arrest, and that, therefore, he was not guilty of resisting arrest, was rejected. State v. Leak, 11 N.C. App. 344, 181 S.E.2d 224 (1971).

Instructions on Right of Self-Defense. — While a defendant was not charged with assaulting an officer, where the actions which he contends he took in self-defense are those which the warrants charge constitute the unlawful interference and the resistance to arrest, the jury should have been properly charged on the principle of self-defense under this factual situation and if they were satisfied defendant was legitimately exercising a right of self-defense it would be their duty to acquit him, not simply to take it into consideration in arriving at their verdict as the court charged. State v. May, 8 N.C. App. 423, 174 S.E.2d 633 (1970).

Where, in a prosecution charging defendant with resisting arrest and with obstructing an officer in the performance of his duties, the defendant offered evidence that the officer had struck the first blow and that defendant was forced in self-defense to take the actions which resulted in the charges against him, the trial court should have instructed the jury to acquit defendant if they found that he was legitimately exercising a right of self-defense; the court's instruction merely that the jury "will take into consideration in arriving at your verdict" the defendant's lawful exercise of self-defense, is insufficient and is reversible error. State v. May, 8 N.C. App. 423, 174 S.E.2d 633 (1970).

Applied in State v. Hollingsworth, 11 N.C. App. 674, 182 S.E.2d 26 (1971); State v. Speights, 12 N.C. App. 32, 182 S.E.2d 204 (1971); State v. Tilley, 18 N.C. App. 341, 196 S.E.2d 549 (1973); State v. Fuller, 24 N.C. App. 38, 209 S.E.2d 805 (1974).

Cited in State v. Speights, 280 N.C. 137, 185 S.E.2d 152 (1971).

§ 14-224: Repealed by Session Laws 1973, c. 1286, s. 26, effective September 1, 1975.

Cross References. — See Editor's note following the analysis to Chapter 15. For present provisions as to assistance to law-enforcement officers by private persons, see § 15A-405.

Editor's Note. —

Session Laws 1975, c. 573, amends Session Laws 1973, c. 1286, s. 31, so as to make the 1973 act effective Sept. 1, 1975, rather than July 1, 1975.

ARTICLE 31.

Misconduct in Public Office.

§ 14-230. Willfully failing to discharge duties. — If any clerk of any court of record, sheriff, magistrate, county commissioner, county surveyor, coroner, treasurer, or official of any of State institutions, or of any county, city or town, shall willfully omit, neglect or refuse to discharge any of the duties of his office, for default whereof it is not elsewhere provided that he shall be indicted, he shall be guilty of a misdemeanor. If it shall be proved that such officer, after his qualification, willfully and corruptly omitted, neglected or refused to discharge any of the duties of his office, or willfully and corruptly violated his oath of office according to the true intent and meaning thereof, such officer shall be guilty of misbehavior in office, and shall be punished by removal therefrom under the sentence of the court as a part of the punishment for the offense, and shall also be fined or imprisoned in the discretion of the court. (1901, c. 270, s. 2; Rev., s. 3592; C. S., s. 4384; 1943, c. 347; 1973, c. 108, s. 5.)

Editor's Note. — The 1973 amendment substituted "magistrate" for "justice of the peace" and deleted "recorder, prosecuting attorney of any recorder's court" and "constable" in the list of officials in the first sentence.

§ 14-232. Swearing falsely to official reports. — If any clerk, sheriff, register of deeds, county commissioner, county treasurer, magistrate or other county officer shall willfully swear falsely to any report or statement required by law to be made or filed, concerning or touching the county, State or school revenue, he shall be guilty of a misdemeanor. (1874-5, c. 151, s. 4; 1876-7, c. 276, s. 4; Code, s. 731; Rev., s. 3605; C. S., s. 4386; 1973, c. 108, s. 6.)

Editor's Note. — The 1973 amendment substituted "magistrate" for "justice of the peace" and deleted "constable" following "magistrate."

§ 14-234. Director of public trust contracting for his own benefit. — If any person appointed or elected a commissioner or director to discharge any trust wherein the State or any county, city or town may be in any manner interested shall become an undertaker, or make any contract for his own benefit, under such authority, or be in any manner concerned or interested in making such contract, or in the profits thereof, either privately or openly, singly or jointly with another, he shall be guilty of a misdemeanor. Provided, that this section shall not apply to public officials transacting business with banks or banking institutions or savings and loan associations in regular course of business: Provided further, that such undertaking or contracting shall be authorized by said governing board.

Nothing in this section nor in any general principle of common law shall render unlawful the acceptance of remuneration from a governmental board, agency or commission for services, facilities, or supplies furnished directly to needy individuals by a member of said board, agency or commission under any program of direct public assistance being rendered under the laws of this State or the United States to needy persons administered in whole or in part by such board, agency or commission; provided, however, that such programs of public assistance to needy persons are open to general participation on a nondiscriminatory basis to the practitioners of any given profession, professions or occupation; and provided further that the board, agency or commission, nor any of its employees or agents, shall have no control over who, among licensed or qualified providers, shall be selected by the beneficiaries of the assistance, and that the remuneration for such services, facilities or supplies shall be in the

same amount as would be paid to any other provider; and provided further that, although the board, agency or commission member may participate in making determinations of eligibility of needy persons to receive the assistance, he shall take no part in approving his own bill or claim for remuneration. (1825, c. 1269, P. R.; 1826, c. 29; R. C., c. 34, s. 38; Code, s. 1011; Rev., s. 3572; C. S., s. 4388; 1929, c. 19, s. 1; 1969, c. 1027; 1975, c. 409.)

Local Modification. — Northampton: 1973, c. 865.

Editor's Note. —

The 1975 amendment inserted "or savings and loan associations" in the first proviso.

Opinions of Attorney General. —

Mr. Bobby F. Jones, Elm City Town Attorney, 40 N.C.A.G. 563 (1969).

Inapplicable When Company in which Local School Board Member Contracts with State Board of Education. — See opinion of Attorney General to Mr. Bobby R. Stott, 40 N.C.A.G. 217 (1970).

Officers and Employees of City Selling Property Not Prohibited from Buying at Sale. — See opinion of Attorney General to Mr. E. Murray Tate, Jr., 41 N.C.A.G. 276 (1971).

Services Donated as County Employee Do Not Create a Conflict of Interest Where the Same Person Is a County Commissioner. — See opinion of Attorney General to Honorable Charles H. Taylor, N.C. General Assembly, 41 N.C.A.G. 765 (1972).

Member of County Board of Elections May Not Serve as Executive Secretary of That Board. — See opinion of Attorney General to Honorable Ed McKnight, N.C. House of Representatives, 41 N.C.A.G. 577 (1971).

When County Commissioners Who Run Grocery Stores May Authorize Food Stamp Program. — County commissioners who run grocery stores may authorize food stamp program if the specifics from the exemption from this section for public assistance programs are complied with. Opinion of Attorney General to Mr. Clifford L. Moore, Jr., 41 N.C.A.G. 530 (1971).

§ 14-236. Acting as agent for those furnishing supplies for schools and other State institutions.

Inapplicable When Company in which Local School Board Member Contracts with State Board of Education. — See opinion of Attorney General to Mr. Bobby R. Stott, 40 N.C.A.G. 217 (1970).

Applicable to County Board of Education Purchasing from Company of Which Member Is Partner. — See opinion of Attorney General to Mr. Garrett Dixon Bailey, 42 N.C.A.G. 180 (1973).

§ 14-239. Allowing prisoners to escape; burden of proof. — If any person charged with a crime or sentenced by the court upon conviction of any offense, shall be legally committed to any sheriff, or jailer, or shall be arrested by any sheriff, deputy sheriff or coroner acting as sheriff, by virtue of any capias issuing on a bill of indictment, information or other criminal proceeding, and such sheriff, deputy sheriff, coroner, or jailer, willfully or negligently, shall suffer such person, so charged or sentenced and committed, to escape out of his custody, the sheriff, deputy sheriff, coroner, or jailer so offending, being thereof convicted, shall be removed from office, and shall be fined or imprisoned, or both, at the discretion of the court before whom the trial may be had; and in all such cases it shall be sufficient, in support of the indictment against such sheriff or other officer, to prove that the person so charged or sentenced was committed to his custody, and it shall lie upon the defendant to show that such escape was not by his consent or negligence, but that he had used all legal means to prevent the same, and acted with proper care and diligence: Provided, that such removal of a sheriff shall not affect his duty or power as a collector of the public revenue, but he shall proceed on such duty and be accountable as if such conviction and removal had not been had. (1791, c. 343, s. 1, P. R.; R. C., c. 34, s. 35; Code, s. 1022; 1905, c. 350; Rev., s. 3577; C. S., s. 4393; 1973, c. 108, s. 7.)

Editor's Note. — The 1973 amendment deleted "constable" in three places.

§ 14-240. Solicitor to prosecute officer for escape. — It shall be the duty of solicitors, when they shall be informed or have knowledge of any felon, or person otherwise charged with any crime or offense against the State, having within their respective districts escaped out of the custody of any sheriff, deputy sheriff, coroner, or jailer, to take the necessary measures to prosecute such sheriff or other officer so offending. (1791, c. 343, s. 2, P. R.; R. C., c. 34, s. 36; Code, s. 1023; Rev., s. 2822; C. S., s. 4394; 1973, c. 108, s. 8.)

Editor's Note. — The 1973 amendment deleted "constable" following "coroner."

§ 14-245: Repealed by Session Laws 1973, c. 108, s. 9.

§ 14-246. Failure of ex-magistrate to turn over books, papers and money. — If any magistrate, on expiration of his term of office, or if any personal representative of a deceased magistrate shall, after demand upon him by the clerk of the superior court, willfully fail and refuse to deliver to the clerk of the superior court all dockets, all law and other books, all money, and all official papers which came into his hands by virtue or color of his office, he shall be guilty of a misdemeanor. (Code, ss. 828, 829; 1885, c. 402; Rev., s. 3578; C. S., s. 4399; 1973, c. 108, s. 10.)

Editor's Note. — The 1973 amendment substituted "magistrate" for "justice of the peace" and inserted "all money."

§ 14-247. Private use of publicly owned vehicle.

Local Modification. — Mecklenburg: 1971, c. 302; city of Charlotte: 1971, c. 220.

§ 14-249. Limitation of amount expended for vehicle. — It shall be unlawful for any officer, agent, employee or department of the State of North Carolina, or of any county, or of any institution or agency of the State to expend from the public treasury an amount in excess of three thousand five hundred dollars ($3,500) for any motor vehicle other than motor trucks; except upon the approval of the Governor and Council of State: Provided, that nothing in G.S. 14-247 through G.S. 14-251 shall be construed to authorize the purchase or maintenance of an automobile at the expense of the State by any State officer unless he is now authorized by statute to do so: Provided further, that the limitation prescribed by this section shall not be applicable to the purchase of any motor vehicle by any county, city or town in this State, where such motor vehicle is purchased in accordance with the provisions of Article 8 of Chapter 143 of the General Statutes of North Carolina. (1925, c. 239, s. 3; 1957, c. 862, s. 6; c. 1345; 1959, c. 172; 1971, c. 337.)

Editor's Note. — The 1971 amendment substituted "three thousand five hundred dollars ($3,500)" for "two thousand five hundred dollars ($2,500.00)" near the beginning of the section.

§ 14-250. Publicly owned vehicle to be marked. — It shall be the duty of the executive head of every department of the State government, and of any county, or of any institution or agency of the State, to have painted on every motor vehicle owned by the State, or by any county, or by any institution or agency of the State, a statement that such car belongs to the State or to some county, or institution or agency of the State. Provided, however, that no automobile used by any officer or official in any county in the State for the purpose of transporting, apprehending or arresting persons charged with violations of the laws of the State of North Carolina, shall be required to be lettered. Provided, further, that in lieu of the above method of marking motor vehicles owned by any agency or department of the State government, it shall be deemed a compliance with the law if such vehicles have imprinted on the license tags thereof, above the license number, the words "State Owned" and that such such vehicles have affixed to the front thereof a plate with the statement "State Owned." Provided, further, the Council of State shall have authority to authorize exemptions from the provisions of this section with respect to any state-owned vehicle when they find that it is in the public interest to do so because of the use to be made of the vehicle. Such exemptions shall be perfected and effective upon the filing with the Secretary of State of a notice of exemption identifying the vehicle, stating the use to be made of it, the individual or department to which assigned, and the period of the exemption, which may not exceed 12 months. Provided, further, that in lieu of the above method of marking vehicles owned by any county, it shall be deemed a compliance with the law if such vehicles have painted or affixed on the side thereof a circle not less than eight inches in diameter showing a replica of the seal of such county. (1925, c. 239, s. 4; 1929, c. 303, s. 1; 1945, c. 866; 1957, c. 1249; 1961, c. 1195; 1965, c. 1186; 1971, c. 3.)

Editor's Note. — The 1971 amendment added the fourth and fifth sentences.

§ 14-252. Five preceding sections applicable to cities and towns.

Local Modification. — City of Charlotte: 1971, c. 220.

ARTICLE 32.

Misconduct in Private Office.

§ 14-254. Malfeasance of corporation officers and agents.

Applied in State v. Chapman, 26 N.C. App. 66, 214 S.E.2d 789 (1975).

ARTICLE 33.

Prison Breach and Prisoners.

§ 14-255. Escape of hired prisoners from custody.

Two Classes of Escape. — There are two classes of escape from the State prison system. One is a felonious escape and the other is a misdemeanor. A defendant who has committed an escape is entitled to have his case submitted to the jury on the question of whether he was imprisoned while serving a sentence imposed for a felony or for a misdemeanor. State v. Ledford, 9 N.C. App. 245, 175 S.E.2d 605 (1970).

No Evidence that Defendant Was Hired out under this Section. — A defendant's contention that he should have been tried for escape under

this section rather than under § 148-45 was without merit where the evidence showed that, when he escaped, defendant was in the custody of the State Department of Correction and was under the supervision of a foreman for the State Highway Department, and there was no evidence that defendant was being hired out by a county, city or town under the provisions of this section. State v. Ledford, 9 N.C. App. 245, 175 S.E.2d 605 (1970).

§ 14-258.1. Furnishing poison, controlled substances, deadly weapons, cartridges, ammunition or intoxicating liquor to inmates of charitable, mental or penal institutions or local confinement facilities. — (a) If any person shall give or sell to any inmate of any charitable, mental or penal institution, or local confinement facility, or if any person shall combine, confederate, conspire, aid, abet, solicit, urge, investigate, counsel, advise, encourage, attempt to procure, or procure another or others to give or sell to any inmate of any charitable, mental or penal institution, or local confinement facility, any deadly weapon, or any cartridge or ammunition for firearms of any kind, or any controlled substances included in Schedules I through VI contained in Article 5 of Chapter 90 of the General Statutes except under the general supervision of a practitioner, poison or poisonous substance, except upon the prescription of a physician, he shall be guilty of a felony and upon conviction thereof shall be fined or imprisoned in the State's prison for not more than 10 years in the discretion of the court; and if he be an officer or employee of any institution of the State, or of any local confinement facility, he shall be dismissed from his position or office.

(b) Any person who shall knowingly give or sell any intoxicating liquor to any inmate of any State mental or penal institution, or to any inmate of any local confinement facility, except for medical purposes as prescribed by a duly licensed physician; or any person who shall combine, confederate, conspire, procure, or procure another or others to give or sell any intoxicating liquor to any inmate of any such State institution or local confinement facility, except for medical purposes as prescribed by a duly licensed physician; or any person who shall bring into the buildings, grounds or other facilities of such institution any intoxicating liquor, except for medical purposes as prescribed by a duly licensed physician, shall be guilty of a misdemeanor, and on conviction thereof shall be fined or imprisoned, in the discretion of the court. If such person is an officer or employee of any institution of the State, such person shall be dismissed from office. (1961, c. 394, s. 2; 1969, c. 970, s. 6; 1971, c. 929; 1973, c. 1093; 1975, c. 804, ss. 1, 2.)

Editor's Note. — Prior to the enactment of Session Laws 1971, c. 929, provisions similar to the above section appeared in § 90-113.13.

The 1973 amendment inserted "mental" in two places near the beginning of the section and substituted "controlled substances included in Schedules I through VI contained in Article 5 of Chapter 90 of the General Statutes except under the general supervision of a practitioner" for "narcotic" near the middle of the section.

The 1975 amendment designated the existing section as subsection (a), inserted "or local confinement facility" near the beginning and near the middle of that subsection, inserted "or of any local confinement facility" near the end of that subsection and added subsection (b).

§ 14-258.2. Possession of dangerous weapon by prisoner. — Any person while in the custody of the Division of Prisons, or any person under the custody of any local confinement facility as defined in G.S. 153A-217, who shall have in his possession without permission or authorization a weapon capable of inflicting serious bodily injuries or death, or who shall fabricate or create such a weapon from any source, shall be guilty of a misdemeanor; and any person who commits any assault with such weapon and thereby inflicts bodily injury or by the use of said weapon effects an escape or rescue from imprisonment shall be guilty

of a felony punishable by a fine or imprisonment not to exceed 10 years. (1975, c. 316, s. 1.)

Editor's Note. — Session Laws 1975, c. 316, s. 2, makes the act effective Oct. 1, 1975.

§ 14-258.3. Taking of hostage, etc., by prisoner. — Any prisoner in the custody of the Department of Correction, including persons in the custody of the Department of Correction pending trial or appellate review or for presentence diagnostic evaluation, or any prisoner in the custody of any local confinement facility (as defined in G.S. 153A-217), or any person in the custody of any local confinement facility (as defined in G.S. 153A-217) pending trial or appellate review or for any lawful purpose, who by threats, coercion, intimidation or physical force takes, holds, or carries away any person, as hostage or otherwise, shall be guilty of a felony and shall be punished as provided in G.S. 14-2. The provisions of this section apply to: (i) violations committed by any prisoner in the custody of the Department of Correction, whether inside or outside of the facilities of the North Carolina Department of Correction; (ii) violations committed by any prisoner or by any other person lawfully under the custody of any local confinement facility (as defined in G.S. 153A-217), whether inside or outside the local confinement facilities (as defined in G.S. 153A-217). (1975, c. 315.)

§ 14-259. Harboring or aiding escaped prisoners.

Cited in State v. Dix, 282 N.C. 490, 193 S.E.2d 897 (1973).

§ 14-262: Repealed by Session Laws 1975, c. 402.

SUBCHAPTER IX. OFFENSES AGAINST THE PUBLIC PEACE.

ARTICLE 35.

Offenses against the Public Peace.

§ 14-269. Carrying concealed weapons.

Concealment of the weapon must be shown. State v. Cobb, 18 N.C. App. 221, 196 S.E.2d 521 (1973).

That defendant was not on his own premises when discovered carrying a concealed weapon is an element of this section. State v. Stanfield, 19 N.C. App. 622, 199 S.E.2d 741 (1973).

Possession of an Unconcealed Pistol in an Automobile Not Violation of Statute. — See opinion of Attorney General to Honorable Albert Jackson, Sheriff of Henderson County, 41 N.C.A.G. 207 (1971).

Illustrations — Revolver in Bag in Back Seat. — Where police officers stopped defendant's car to make a routine driver's license check and defendant removed revolver from a bag in the back seat, the police properly arrested him without a warrant inasmuch as they had reasonable ground to believe defendant was committing a misdemeanor — carrying a concealed weapon in violation of this section — in their presence. State v. White, 18 N.C. App. 31, 195 S.E.2d 576 (1973).

Applied in State v. Ratliff, 281 N.C. 397, 189 S.E.2d 179 (1972); State v. Patton, 18 N.C. App. 266, 196 S.E.2d 560 (1973).

Cited in State v. Streeter, 283 N.C. 203, 195 S.E.2d 502 (1973).

§ 14-269.1. Confiscation and disposition of deadly weapons.

Certain Counties Governed by Former § 14-269(b). — Halifax was deleted from the list of excepted counties by Session Laws 1973, c. 1399.

§ 14-269.2. Weapons on campus or other educational property. — It shall be unlawful for any person to possess, or carry, whether openly or concealed, any gun, rifle, pistol, dynamite cartridge, bomb, grenade, mine, powerful explosive as defined in G.S. 14-284.1, bowie knife, dirk, dagger, slungshot, leaded cane, switch-blade knife, blackjack, metallic knuckles or any other weapon of like kind, not used solely for instructional or school sanctioned ceremonial purposes, in any public or private school building or bus, on any public or private school campus, grounds, recreation area, athletic field, or other property owned, used or operated by any board of education, school, college, or university board of trustees or directors for the administration of any public or private educational institution. For the purpose of this section a self-opening or switch-blade knife is defined as a knife containing a blade or blades which open automatically by the release of a spring or a similar contrivance, and the above phrase "weapon of like kind" includes razors and razor blades (except solely for personal shaving) and any sharp pointed or edged instrument except unaltered nail files and clips and tools used solely for preparation of food, instruction and maintenance. This section shall not apply to the following persons: Officers and enlisted personnel of the armed forces of the United States when in discharge of their official duties as such and acting under orders requiring them to carry arms or weapons, civil officers of the United States while in the discharge of their official duties, officers and soldiers of the militia and the national guard when called into actual service, officers of the State, or of any county, city, or town, charged with the execution of the laws of the State, when acting in the discharge of their official duties, any pupils who are members of the Reserve Officer Training Corps and who are required to carry arms or weapons in the discharge of their official class duties, and any private police employed by the administration or board of trustees of any public or private institution of higher education when acting in the discharge of their duties.

Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction shall be punished in the discretion of the court by fine or imprisonment or by both such fine and imprisonment, not to exceed five hundred dollars ($500.00) fine or six months imprisonment. (1971, c. 241, ss. 1, 2; c. 1224.)

Editor's Note. — The 1971 amendment added the language beginning "and any private police" at the end of the last sentence in the first paragraph.

Faculty Member May Have Gun in Own Home Located on Campus. — See opinion of Attorney General to Mr. Pritchard C. Smith, 41 N.C.A.G. 466 (1971).

§ 14-273. Disturbing schools and scientific and temperance meetings; injuring property of schools and temperance societies.

Elements, etc. —

In accord with original. See State v. Midgett, 8 N.C. App. 230, 174 S.E.2d 124 (1970).

Evidence Sufficient for Jury. — In a prosecution charging that defendants unlawfully and willfully interrupted a public school in violation of this section, the issue of defendants' guilt was properly submitted to the jury, where the State's evidence tended to show that (1) the defendants entered the office of the secretary to the principal and told her that they were going to interrupt the school that day; (2) the defendants locked the secretary out of her office, moved furniture about, scattered papers, and dumped books on the floor; (3) the secretary and several teachers were kept away from their jobs or classes by these actions; (4) the defendants also occupied the principal's office

and operated the bells that normally signalled the change of classes; and (5) the principal, as a result of the commotion, was forced to dismiss school prior to the regular closing hour. State v. Midgett, 8 N.C. App. 230, 174 S.E.2d 124 (1970).

Reduction of Sentence. — In a school disturbance prosecution the Court of Appeals, in the exercise of its supervisory powers, reduced the defendants' sentences of imprisonment from 12 months to six months, where the amendment to this section mitigating the punishment for the offense had become effective on the day defendants were sentenced. State v. Evans, 8 N.C. App. 469, 174 S.E.2d 680 (1970).

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

Cited in McKeiver v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971); Lynch v. Snepp, 350 F. Supp. 1134 (W.D.N.C. 1972).

§ 14-276: Repealed by Session Laws 1971, c. 357.

§ 14-277.1. Communicating threats. — (a) A person is guilty of a misdemeanor if without lawful authority:

(1) He wilfully threatens to physically injure the person or damage the property of another;

(2) The threat is communicated to the other person, orally, in writing, or by any other means;

(3) The threat is made in a manner and under circumstances which would cause a reasonable person to believe that the threat is likely to be carried out; and

(4) The person threatened believes that the threat will be carried out.

(b) A violation of this section is punishable by a fine of not more than five hundred dollars ($500.00), imprisonment of not more than six months, or both. (1973, c. 1286, s. 11.)

Editor's Note. — Session Laws 1973, c. 1286, s. 31, provides:

"Sec. 31. This act becomes effective on July 1, 1975, and is applicable to all criminal proceedings begun on and after that date and each provision is applicable to criminal proceedings pending on that date to the extent practicable, except § 12 [§§ 15-176.3 through 15-176.5] of this act which becomes effective on July 1, 1974."

Session Laws 1975, c. 573, amends Session Laws 1973, c. 1286, s. 31, so as to make the 1973 act effective Sept. 1, 1975, rather than July 1, 1975.

SUBCHAPTER X. OFFENSES AGAINST THE PUBLIC SAFETY.

ARTICLE 36.

Offenses against the Public Safety.

§ 14-284.1. Regulation of sale of explosives; reports; storage.

Applicability of Section to United States. — See Duvall v. United States, 312 F. Supp. 625 (E.D.N.C. 1970).

Violation as Negligence. — A violation of a statute enacted for safety and protection of the general public, such as this section, is negligence per se. Duvall v. United States, 312 F. Supp. 625 (E.D.N.C. 1970).

A person in North Carolina who has explosives under his control or in his possession must take adequate precautions to insure that no person, and especially children, are able to gain possession of these dangerous devices. If the person fails to take such precautions, under North Carolina law he is negligent. Duvall v. United States, 312 F. Supp. 625 (E.D.N.C. 1970).

§ 14-286. Giving false fire alarms; molesting fire-alarm, fire-detection or fire-extinguishing system. — It shall be unlawful for any person or persons to wantonly and willfully give or cause to be given, or to advise, counsel, or aid and abet anyone in giving, a false alarm of fire, or to break the glass key protector, or to pull the slide, arm, or lever of any station or signal box of any fire-alarm system, except in case of fire, or willfully misuse or damage a portable fire extinguisher, or in any way to willfully interfere with, damage, deface,

molest, or injure any part or portion of any fire-alarm, fire-detection, smoke-detection or fire-extinguishing system. Any person violating any of the provisions of this section shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1921, c. 46; C. S., s. 4426(a); 1961, c. 594; 1969, c. 1224, s. 5; 1975, c. 346.)

Editor's Note. —
The 1975 amendment inserted "or willfully misuse or damage a portable fire extinguisher" and "fire-detection, smoke-detection or fire-extinguishing" in the first sentence.

ARTICLE 36A.

Riots and Civil Disorders.

§ 14-288.1. Definitions. — Unless the context clearly requires otherwise, the definitions in this section apply throughout this Article:

(2) "Dangerous weapon or substance": Any deadly weapon, ammunition, explosive, incendiary device, radioactive material or device, as defined in G.S. 14-288.8(c)(5), or any instrument or substance designed for a use that carries a threat of serious bodily injury or destruction of property; or any instrument or substance that is capable of being used to inflict serious bodily injury, when the circumstances indicate a probability that such instrument or substance will be so used; or any part or ingredient in any instrument or substance included above, when the circumstances indicate a probability that such part or ingredient will be so used.

(1975, c. 718, s. 5.)

Editor's Note. — The 1975 amendment inserted "radioactive material or device, as defined in G.S. 14-288.8(c)(5)" near the beginning of subdivision (2).

As the rest of the section was not changed by the amendment, only the introductory language and subdivision (2) are set out.

Constitutionality. — The statutory scheme of this Article is not unconstitutional in contravention of the First, Fourth, Ninth and Fourteenth Amendments to the U.S. Constitution and N.C. Const., Art. I, § 19. State v. Dobbins, 9 N.C. App. 452, 176 S.E.2d 353 (1970).

Action in Federal Court Attacking Constitutionality of Article. — The rule is that in addition to facial unconstitutionality of a statute, not susceptible of a limiting state court construction, involving fundamental constitutional rights, federal courts must abstain unless there is a showing of bad faith or harassment, and a showing that the enforcement of the statute will result in irreparable harm that is both great and immediate; a "chilling effect" on first amendment rights will not by itself justify intervention. Therefore, where there was no showing of a bad faith use of this article or that it had been used in a threatening or harassing manner against the plaintiffs or anyone else, and a voluntary dismissal was taken in the State court suit for injunctive relief, which relief had been granted pursuant to § 14-288.18, and there was no evidence that any of the plaintiffs had been arrested or threatened since they were charged with violating the article, an action attacking its constitutionality was dismissed. Fuller v. Scott, 328 F. Supp. 842 (M.D.N.C. 1971).

Applied in State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

Quoted in State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971); United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971); State v. Allred, 21 N.C. App. 229, 204 S.E.2d 215 (1974).

Cited in State v. Underwood, 283 N.C. 154, 195 S.E.2d 489 (1973).

§ 14-288.2. Riot; inciting to riot; punishments.

This section is constitutionally valid. State v. Brooks, 24 N.C. App. 338, 210 S.E.2d 535, aff'd in part, 287 N.C. 392, 215 S.E.2d 111 (1975).

The scope of this section in no way infringes upon the freedom of nonviolent assemblage. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

The reach of this section is not so pervasive as to include activity protected by the First Amendment. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

The fact that correct application of this section requires a cross reference through interlocking statutory descriptions does not make this section so complex and imprecise as to be unconstitutional. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

The key words of the statutory definition of riot are "three persons," "violent conduct," and "clear and present danger of injury or damage." State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

The words of this section are not words so vague and imprecise that men of common intelligence and understanding must guess at their meanings. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

One purpose for codifying riot as an offense was to simplify the common law by setting out in concrete form the essential elements that constitute this crime. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

The State has a paramount duty to maintain order not only in the streets but in schools, hospitals and other public places. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

The right of freedom of speech is not an absolute one, and the State in the exercise of its police power may punish the abuse of this freedom. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

The advocacy of imminent lawless action is not protected by the First Amendment. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

Advocacy of imminent lawless action is the only type of speech that can come within the purview of this section. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

Damage or Injury or Threat Thereof. — A public disturbance involving three or more people, no matter how noisy or boisterous, cannot, under the statutory definition, be a riot unless violence or the threat of immediate violence which poses a clear and present danger to persons or property is present. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

Under subsection (a) the capacity of members of the assemblage to inflict injury or damage to persons or property or to create the clear and present danger of such injury or damage is material to the crime of riot and is relevant to establish the proposition defendant was engaged in a riot. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

The component elements that constitute the crime of riot are: (1) public disturbance; (2) assemblage; (3) three or more persons; (4) disorderly and violent conduct, or the imminent threat of such conduct; and (5) results in injury or damage to persons or property or creates a clear and present danger of injury or damage to persons or property. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

The common-law crime of unlawful assembly, which is a component element of common-law riot, contains the following elements: (1) the participation of three or more persons; (2) a common intent to attain a purpose which will interfere with the rights of others by committing disorderly acts; and (3) a purpose to commit acts in such manner as would cause firm persons to apprehend a breach of peace. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

Warrant charging "engaging in a riot" states a proper cause of action. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

Failure of Warrant to State Crime. — Warrant charging that defendant did unlawfully, willfully incite a riot by urging three or more persons to congregate at Prospect School, Robeson County, North Carolina, thereby creating a clear and present danger of a riot fails to state the commission of any criminal offense, much less the offense of inciting a riot. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

There is no federal law restraining prosecutions for riot. Frinks v. North Carolina, 333 F. Supp. 169 (E.D.N.C. 1971).

The 1964 Federal Civil Rights Act does not in any sense void the antiriot laws of North Carolina. Frinks v. North Carolina, 468 F.2d 639 (4th Cir. 1972).

Petition for Removal of Prosecution to Federal Court. — Where defendants, charged with inciting and/or engaging in a riot, alleged in their petition for removal to the United States District Court that they were peaceably exercising their rights to public accommodations, removal under 28 U.S.C. § 1443(1) was not required simply by reason of an artfully drafted petition. Nor was an evidentiary hearing required because the petition alleged a peaceful exercise of civil rights. Frinks v. North Carolina, 333 F. Supp. 169 (E.D.N.C. 1971).

Cited in Fuller v. Scott, 328 F. Supp. 842 (M.D.N.C. 1971).

§ 14-288.3. Provisions of Article intended to supplement common law and other statutes.

Applied in State v. Brooks, 24 N.C. App. 338, 210 S.E.2d 535 (1975).

§ 14-288.4. Disorderly conduct. — (a) Disorderly conduct is a public disturbance intentionally caused by any person who:

(1) Engages in fighting or other violent conduct or in conduct creating the threat of imminent fighting or other violence; or

(2) Makes or uses any utterance, gesture, display or abusive language which is intended and plainly likely to provoke violent retaliation and thereby cause a breach of the peace; or

(3) Takes possession of, exercises control over, or seizes any building or facility of any public or private educational institution without the specific authority of the chief administrative officer of the institution, or his authorized representative; or

(4) Refuses to vacate any building or facility of any public or private educational institution in obedience to:

a. An order of the chief administrative officer of the institution, or his authorized representative; or

b. An order given by any fireman or public health officer acting within the scope of his authority; or

c. If a state of emergency is occurring or is imminent within the institution, an order given by any law-enforcement officer acting within the scope of his authority; or

(5) Shall, after being forbidden to do so by the chief administrative officer, or his authorized representative, of any public or private educational institution:

a. Engage in any sitting, kneeling, lying down, or inclining so as to obstruct the ingress or egress of any person entitled to the use of any building or facility of the institution in its normal and intended use; or

b. Congregate, assemble, form groups or formations (whether organized or not), block, or in any manner otherwise interfere with the operation or functioning of any building or facility of the institution so as to interfere with the customary or normal use of the building or facility; or

(6) Disrupts, disturbs or interferes with the teaching of students at any public or private educational institution or engages in conduct which disturbs the peace, order or discipline at any public or private educational institution or on the grounds adjacent thereto.

As used in this section the term "building or facility" includes the surrounding grounds and premises of any building or facility used in connection with the operation or functioning of such building or facility.

(b) Any person who willfully engages in disorderly conduct is guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00) or imprisonment for not more than six months. (1969, c. 869, s. 1; 1971, c. 668, s. 1; 1973, c. 1347; 1975, c. 19, s. 4.)

Editor's Note. — The 1971 amendment rewrote subdivisions (1) and (2), deleted former subdivision (3), which read "Wilfully or wantonly creates a hazardous or physically offensive condition; or," renumbered former subdivisions (4), (5) and (6) as (3), (4) and (5) and substituted "or seizes" for "seizes, or occupies" near the beginning of present subdivision (3).

The 1973 amendment added subdivision (6) to subsection (a).

The 1975 amendment added "or" at the end of paragraph b of subdivision (5) of subsection (a).

Section 2, c. 668, Session Laws 1971, provides: "Every word, clause, sentence, paragraph, section, or other part of this act shall be interpreted in such manner as to be as expansive as the Constitution of the United States and the Constitution of North Carolina permit."

Section 3, c. 668, Session Laws 1971, contains a severability clause.

Applicable to Nonriot Situation. — See opinion of Attorney General to Mr. G. Patrick Hunter, Jr., Charlotte Police Attorney, 40 N.C.A.G. 166 (1970).

Subdivision (a)(3) and Portion of Subdivision (a)(2) Held Unconstitutional. — Subdivision (a)(3) and that portion of subdivision (a)(2), which proscribes offensively coarse utterances and acts such as to alarm and disturb persons present, are unconstitutionally vague and overbroad. State v. Summrell, 282 N.C. 157, 192 S.E.2d 569 (1972).

But Fighting or Insulting Words May Constitutionally Be Prevented and Punished. — There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the insulting or "fighting" words which by their very utterance tend to incite an immediate breach of the peace. State v. Summrell, 282 N.C. 157, 192 S.E.2d 569 (1972).

There can be no doubt that the General Assembly intended to prohibit "fighting words," words tending to cause an immediate breach of the peace wilfully spoken in a public place, and that such an interpretation accurately expresses the legislative purpose. State v. Summrell, 282 N.C. 157, 192 S.E.2d 569 (1972); State v. Orange, 22 N.C. App. 220, 206 S.E.2d 377 (1974).

Illustration — Words not protected by First Amendment. — When the defendant was informed that the black doctor, whom he had demanded, was not immediately available he began shouting profanities, cursing all whites, and loudly voicing unfounded complaints. Such words and mode of communication in a hospital emergency room are not protected by the First Amendment. State v. Summrell, 282 N.C. 157, 192 S.E.2d 569 (1972).

Where the trial judge inadvertently failed to note the 1971 amendment to this section in his instructions to the jury and in so doing charged concerning disorderly conduct in the language of subdivisions (1) and (2) of subsection (a) as those subdivisions were originally enacted in 1969, the court's charge failed to limit the definition of disorderly conduct to embrace only actions and words likely to bring on an immediate breach of the peace, as would be required by the 1971 amendment. For this error in the charge, defendant is entitled to a new trial in the case charging him with failing to comply with a lawful order to disperse. State v. Brooks, 24 N.C. App. 338, 210 S.E.2d 535, aff'd in part, 287 N.C. 392, 215 S.E.2d 111 (1975).

Applied in State v. Carroll, 21 N.C. App. 530, 204 S.E.2d 908 (1974); State v. Clark, 22 N.C. App. 81, 206 S.E.2d 252 (1974); State v. Butts, 22 N.C. App. 504, 206 S.E.2d 806 (1974); State v. McLoud, 26 N.C. App. 297, 215 S.E.2d 872 (1975).

Cited in Fuller v. Scott, 328 F. Supp. 842 (M.D.N.C. 1971).

§ 14-288.5. Failure to disperse when commanded, misdemeanor; prima facie evidence.

This section is constitutional. State v. Brooks, 24 N.C. App. 338, 210 S.E.2d 535, aff'd in part, 287 N.C. 392, 215 S.E.2d 111 (1975).

Failure to Disperse Where No Disorderly Conduct was Occurring. — Under this section the failure to disperse when commanded by an officer would be an offense where no disorderly conduct was occurring so long as it is shown on trial that the officer had reasonable grounds to believe that disorderly conduct was occurring by an assemblage of three or more persons. State v. Orange, 22 N.C. App. 220, 206 S.E.2d 377 (1974).

Evidence sufficient to support jury's finding that defendant was guilty of charge of failing to comply with lawful command to disperse. State v. Brooks, 24 N.C. App. 338, 210 S.E.2d 535, aff'd in part, 287 N.C. 392, 215 S.E.2d 111 (1975).

Applied in State v. Clark, 22 N.C. App. 81, 206 S.E.2d 252 (1974).

Cited in Fuller v. Scott, 328 F. Supp. 842 (M.D.N.C. 1971).

§ 14-288.7. Transporting dangerous weapon or substance during emergency; possessing off premises; exceptions.

Penalty Not Limited to that Prescribed by Ordinance. — Since this section itself makes the possession of a disassembled shotgun and the shotgun shells in the area in question a criminal offense and specifies the penalty therefor, and since the warrant relating to this offense was founded upon the statute, not the ordinance, the sentence imposable in this case was not limited

to the penalty prescribed for such conduct by the ordinance. State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971).

Applied in State v. Dobbins, 9 N.C. App. 452, 176 S.E.2d 353 (1970).

§ 14-288.8. Manufacture, assembly, possession, storage, transportation, sale, purchase, delivery, or acquisition of weapon of mass death and destruction; exceptions.

(c) The term "weapon of mass death and destruction" includes:

(1) Any explosive, incendiary, poison gas or radioactive material:
   a. Bomb; or
   b. Grenade; or
   c. Rocket having a propellant charge of more than four ounces; or
   d. Missile having an explosive or incendiary charge of more than one-quarter ounce; or
   e. Mine; or
   f. Device similar to any of the devices described above; or

(2) Any type of weapon (other than a shotgun or a shotgun shell of a type particularly suitable for sporting purposes) which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter; or

(3) Any machine gun, sawed-off shotgun, or other weapon designed for rapid fire or inflicting widely dispersed injury or damage (other than a weapon of a type particularly suitable for sporting purposes); or

(4) Any combination of parts either designed or intended for use in converting any device into any weapon described above and from which a weapon of mass death and destruction may readily be assembled;

(5) Radioactive material, which means any solid, liquid or gas which emits or may emit ionizing radiation spontaneously or which becomes capable of producing radiation or nuclear particles when controls or triggering mechanisms of any associated device are operable.

The term "weapon of mass death and destruction" does not include any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line-throwing, safety, or similar device; surplus ordnance sold, loaned, or given by the Secretary of the Army pursuant to the provisions of section 4684(2), 4685, or 4686 of Title 10 of the United States Code; or any other device which the Secretary of the Treasury finds is not likely to be used as a weapon, is an antique, or is a rifle which the owner intends to use solely for sporting purposes, in accordance with Chapter 44 of Title 18 of the United States Code.

(1975, c. 718, ss. 6, 7.)

Editor's Note. — The 1975 amendment substituted "poison gas or radioactive material" for "or poison gas" in the introductory language in subdivision (c)(1) and added subdivision (c)(5). The amendatory act used the word "poisonous" rather than "poison" in quoting the original language of the section.

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

§ 14-288.9. Assault on emergency personnel; punishments.

Applied in State v. Chavis, 24 N.C. App. 148, 210 S.E.2d 555 (1974).

§ 14-288.11. Warrants to inspect vehicles in riot areas or approaching municipalities during emergencies.

Search of Automobile without Warrant Is Reasonable. — Because of its mobility, a search of an automobile without a warrant is reasonable if it is based on probable cause. United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971).

Search May Be Conducted After Automobile Transported to Police Station. — If there is probable cause to search the automobile at the place where it was stopped, it matters not that the search is conducted sometime later after the automobile has been transported to the police station. United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971).

§ 14-288.12. Powers of municipalities to enact ordinances to deal with states of emergency.

Cross Reference. — See note to § 14-288.13.

Constitutionality. — The contention that this statute is unconstitutionally vague in that it fails to provide a standard for the exercise of the discretion conferred is clearly without merit. State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971).

Control of Civil Disorders Is Within Police Power. — Control of civil disorders that may threaten the very existence of the State is certainly within the police power of government. United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971).

Section Delegates Portion of Police Power to Municipalities. — By this section, the State has delegated a portion of its police power to its municipalities. This statute authorizes the city to enact an ordinance prohibiting the movement of people in public places "during a state of emergency" as defined in § 14-288.1(10). State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971).

The "state of emergency" is the condition precedent to the exercise of this power by the city. State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971).

Only when local law-enforcement is no longer able to maintain order and protect lives and property may the emergency powers be invoked. United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971).

Maintenance of Public Order Is Duty of Executive. — The responsibility for maintaining public peace on a day-to-day basis is lodged with the executive branch of government. United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971).

Public peace in our cities may be suddenly breached by massive civil disorder. Dealing with such an emergency situation requires an immediacy of action that is not possible for judges. It would be highly inappropriate for the court, removed from the primary responsibility for maintaining order and with the benefit of time for reflection not available to the mayor, to substitute its judgment of necessity for his. United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971).

Precise Definition Would Destroy Executive's Broad Discretion. — Attempting to precisely define under what specific conditions each of the authorized restrictions might be imposed would destroy the "broad discretion" necessary for the executive to deal with an emergency situation. United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971).

Mayor's Power Subject to Definite Standard. — The mayor's power to impose the restraints enumerated in this section and Asheville City Ordinance No. 613 is subject to a narrow, objective, and definite standard. United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971).

Standard Is that which Applies to Executive's Use of Military. — The standard is essentially the same as that which applies to the executive's inherent power to restore order through the use of the military. United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971).

Mayor's Actions Subject to Judicial Review. — The executive's decision that civil control has broken down to the point where emergency measures are necessary is not conclusive or free from judicial review, but the scope of review must be limited to a determination of whether the mayor's actions were taken in good faith and whether there is some factual basis for his decision that the restrictions he imposed were necessary to maintain order. United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971).

Where actual violence, good faith, and a relation between means and ends are shown, an

executive's finding of necessity will be upheld in court. United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971).

Declaration of State of Emergency Must Be Necessary to Preserve Order. — The declaration of a state of emergency and the restrictions imposed pursuant to it must appear to have been reasonably necessary for the preservation of order. United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971).

Freedom of Travel May Be Limited. — The liberty of every American citizen freely to come and to go must frequently, in the face of sudden danger, be temporarily limited or suspended. United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971).

Freedom of travel like freedom of speech may be subject to reasonable limitations as to time and place. United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971).

Incidental Restriction on Freedom of Speech May Be No Greater than Essential to Government Interest. — The standard that has developed where regulation of conduct has an incidental effect on speech is that the incidental restriction of First Amendment freedoms can be no greater than is essential to the furtherance of the government interest which is being protected. United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971).

Imposition of Curfew is Proper Exercise of Police Power. — Whatever the cause, given the fact of widespread riotous conditions and criminal activities, the restoration of "domestic tranquility" becomes, not alone a constitutional right, but a constitutional obligation. The temporary imposition of a curfew, limited in time and reasonably made necessary by conditions prevailing, is a legitimate and proper exercise of the police power of public authority. State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971).

Prohibiting Use of Public Parks at Night and Forbidding Transportation of Arms. — The restrictions imposed by a proclamation which only prohibited use of the public parks at night or forbade transportation of dangerous arms or substances were clearly among those authorized by subsection (b) of this section. State v. Allred, 21 N.C. App. 229, 204 S.E.2d 215 (1974).

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

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

Burden of Proof. — The defendant's contention that the burden was on the State to prove that his presence on the streets was for a purpose other than those excepted by the ordinance and by the curfew proclamation is without merit. State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971).

A defendant, charged with the crime, who seeks protection by reason of the exception has the burden of proving that he comes within the same. State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971).

§ 14-288.13. Powers of counties to enact ordinances to deal with states of emergency.

Cross Reference. — See note to § 14-288.12.

Constitutionality. — The limited delegation of the State's police power which the legislature deemed wise to grant by this Article to local governmental units in order to assist them in maintaining public peace and order during periods of emergency is held constitutional. State v. Allred, 21 N.C. App. 229, 204 S.E.2d 215 (1974).

Responsibilities and Powers of Local Executive Officials. — This Article wisely provides for placing in local executive officials, whose first and primary duty it is to maintain public order, powers adequate to their responsibilities. State v. Allred, 21 N.C. App. 229, 204 S.E.2d 215 (1974).

The initial decision as to whether a "state of emergency" in fact exists must be made by those who bear primary responsibility and who are closest to the scene. Their decision, however, while entitled to great respect, is not conclusive or entirely free from judicial review. State v. Allred, 21 N.C. App. 229, 204 S.E.2d 215 (1974).

The local official may not act arbitrarily or without some factual basis to support his determination that a state of emergency in fact exists, and the prohibitions and restrictions which he imposes must be among those authorized by this section. State v. Allred, 21 N.C. App. 229, 204 S.E.2d 215 (1974).

And His Decision Is Subject to Review. — The decision of the responsible local official as to whether a "state of emergency" in fact exists, while entitled to great respect, is not conclusive or entirely free from judicial review. State v. Allred, 21 N.C. App. 229, 204 S.E.2d 215 (1974).

The scope of judicial review in cases reviewing the validity of a proclamation is thus

limited to the type of review which traditionally is for the judge, and not for the jury, to perform. State v. Allred, 21 N.C. App. 229, 204 S.E.2d 215 (1974).

Proclamation Need Not Make Reference to Section. — That a proclamation makes no reference to this section in no way affected its validity; the existence of the statute, not reference to it in the proclamation, is all that matters. State v. Allred, 21 N.C. App. 229, 204 S.E.2d 215 (1974).

That the activities of an organization may have been a major factor in bringing on the conditions which prompted declaration of the state of emergency furnishes no valid support for the contention that that organization and its members were unfairly discriminated against, if once the proclamation was issued, it was uniformly enforced as to all. State v. Allred, 21 N.C. App. 229, 204 S.E.2d 215 (1974).

§ 14-288.18. Injunction to cope with emergencies at public and private educational institutions.

This section envisions an action in the nature of a civil action for a permanent injunction, in which the parties to be enjoined are named or described with at least a modicum of particularity. State ex rel. Moore v. John Doe, 19 N.C. App. 131, 198 S.E.2d 236 (1973).

Cited in Fuller v. Scott, 328 F. Supp. 842 (M.D.N.C. 1971).

SUBCHAPTER XI. GENERAL POLICE REGULATIONS.

ARTICLE 37.

Lotteries and Gaming.

§ 14-289. Advertising lotteries.

Local Modification. — (As to Article 37) Carteret: 1971, c. 221; Cleveland: 1971, c. 627; Craven: 1975, c. 665; Onslow: 1973, c. 1080; Polk: 1971, c. 627; Rutherford: 1971, c. 627.

§ 14-291.1. Selling "numbers" tickets; possession prima facie evidence of violation.

Lottery Defined. — A lottery is any scheme for the distribution of prizes, by lot or chance, by which one, on paying money or giving any other thing of value to another, obtains a token which entitles him to receive a larger or smaller value, or nothing, as some formula of chance may determine. State v. Walker, 25 N.C. App. 157, 212 S.E.2d 528 (1975).

Warrant Sufficient. — Warrant charging the defendant with the sale of tickets and tokens to be used in a numbers "lottery" omits none of the essential elements of the offense. State v. Walker, 25 N.C. App. 157, 212 S.E.2d 528 (1975).

§ 14-291.2. Pyramid and chain schemes prohibited. — (a) Any person who shall establish, promote, operate or participate in any pyramid distribution plan, program, device or scheme whereby a participant pays a valuable consideration for the opportunity or chance to receive a fee or compensation upon the introduction of other participants into the program, whether or not such opportunity or chance is received in conjunction with the purchase of merchandise, shall be deemed to have participated in a lottery and shall be punished as provided for in G.S. 14-290.

(b) "Pyramid distribution plan" means any program utilizing a pyramid or chain process by which a participant gives a valuable consideration for the opportunity to receive compensation or things of value in return for inducing other persons to become participants in the program;

"Compensation" does not mean payment based on sales of goods or services to persons who are not participants in the scheme, and who are not purchasing in order to participate in the scheme; and

"Promotes" shall mean inducing one or more other persons to become a participant.

(c) Any judge of the superior court shall have jurisdiction, upon petition by the Attorney General of North Carolina or solicitor of the superior court, to enjoin, as an unfair or deceptive trade practice, the continuation of the scheme described in subsection (a); in such proceeding the court may assess a civil penalty against any defendant found to have engaged in the willful promotion of such a scheme with knowledge that such conduct violated this section, in an amount not to exceed two thousand dollars ($2,000) which shall be for the benefit of the general fund of the State of North Carolina as reimbursement for expenses incurred in the institution and prosecution of the action; and the court may appoint a receiver to secure and distribute assets obtained by any defendant through participation in any such scheme.

(d) Any contract hereafter created for which a part of the consideration consisted of the opportunity or chance to participate in a program described in subsection (a) is hereby declared to be contrary to public policy and therefore void and unenforceable. (1971, c. 875, s. 1.)

Editor's Note. — Session Laws 1971, c. 875, s. 2, makes the act effective Oct. 1, 1971.

Injunctive Relief at Instance of State. — Even though individual remedies may exist, the statutes provide for injunctive relief at the instance of the State. To hold otherwise would cripple the legislative intent to provide an effective means of curbing illegitimate business schemes and protecting the consumers of our State. State ex rel. Morgan v. Dare to Be Great, Inc., 15 N.C. App. 275, 189 S.E.2d 802 (1972).

§ 14-292. Gambling.

Games of Chance, etc. —

In accord with 1st paragraph in original. See State v. Eisen, 16 N.C. App. 532, 192 S.E.2d 613 (1972).

Whether blackjack was a game of chance or one of skill was a question for the jury to decide from the evidence. State v. Eisen, 16 N.C. App. 532, 192 S.E.2d 613 (1972).

Court's Ruling on Blackjack Held Not Error. — The court did not err in referring to rule as a matter of law that the game of blackjack is a game of skill. State v. Eisen, 16 N.C. App. 532, 192 S.E.2d 613 (1972).

§ 14-298. Gaming tables, illegal punchboards and slot machines to be destroyed by police officers. — All sheriffs and officers of police are hereby authorized and directed, on information made to them on oath that any gaming table prohibited to be used by G.S. 14-289 through 14-300, or any illegal punchboard or illegal slot machine is in the possession or use of any person within the limits of their jurisdiction, to destroy the same by every means in their power; and they shall call to their aid all the good citizens of the county, if necessary, to effect its destruction. (1791, c. 336, P. R.; 1798, c. 502, s. 2, P. R.; R. C., c. 34, s. 74; Code, s. 1049; Rev., s. 3720; C. S., s. 4435; 1931, c. 14, s. 4; 1973, c. 108, s. 11.)

Editor's Note. — The 1973 amendment deleted "justices of the peace" preceding "sheriffs" and "constables" following "sheriffs" near the beginning of the section.

§ 14-299. Property exhibited by gamblers to be seized; disposition of same. — All moneys or other property or thing of value exhibited for the purpose of alluring persons to bet on any game, or used in the conduct of any such game, including any motor vehicle used in the conduct of a lottery within the purview of G.S. 14-291.1, shall be liable to be seized by any court of competent jurisdiction or by any person acting under its warrant. Moneys so seized shall be turned over to and paid to the treasurer of the county wherein they are seized, and placed in the general fund of the county. Any property seized which is used for and is suitable only for gambling shall be destroyed, and all other property so seized shall be sold in the manner provided for the sale of personal property by execution, and the proceeds derived from said sale shall (after deducting the expenses of keeping the property and the costs of the sale and after paying, according to their priorities all known prior, bona fide liens which were created without the lienor having knowledge or notice that the motor vehicle or other property was being used or to be used in connection with the conduct of such game or lottery) be turned over and paid to the treasurer of the county wherein the property was seized, to be placed by said treasurer in the general fund of the county. (1798, c. 502, s. 3, P. R.; R. C., c. 34, s. 77; Code, s. 1051; Rev., s. 3722; C. S., s. 4436; 1943, c. 84; 1957, c. 501; 1973, c. 108, s. 12.)

Editor's Note. — The 1973 amendment deleted "justice of the peace or other" preceding "court" and "his or" preceding "its warrant" in the first sentence.

ARTICLE 39.

Protection of Minors.

§ 14-313. Selling cigarettes to minors.

Applicable to State Training Schools. — See opinion of Attorney General to Mr. James M. Paige, Office of Youth Development, 42 N.C.A.G. 203 (1973).

§ 14-314: Repealed by Session Laws 1971, c. 31.

§ 14-316. Permitting young children to use dangerous firearms.

(b) Air rifles, air pistols, and BB guns shall not be deemed "dangerous firearms" within the meaning of subsection (a) of this section except in the following counties: Anson, Caldwell, Caswell, Chowan, Cleveland, Cumberland, Durham, Forsyth, Gaston, Harnett, Haywood, Mecklenburg, Stanly, Stokes, Surry, Union, Vance. (1913, c. 32; C. S., s. 4441; 1965, c. 813; 1971, c. 309.)

Editor's Note. — The 1971 amendment added Cumberland to the list of counties in subsection (b). As the rest of the section was not changed by the amendment, only subsection (b) is set out.

§ 14-316.1. Contributing to delinquency and neglect by parents and others. — (a) Any parent, guardian, or other person acting in loco parentis to a child under 16 years of age who fails to exercise reasonable diligence in the care, protection, or control of such child, or who knowingly or willfully permits such child to associate with immoral persons, or to beg, or to solicit funds, or to be unlawfully absent from school, or to engage in sexual intercourse, or to enter any place which may be injurious to the morals, health, or general welfare of such child shall be guilty of a misdemeanor.

(b) Any person who knowingly or willfully causes, encourages, or aids any child under 16 years of age to be in a place or condition, or to commit an act

whereby such child could be adjudicated delinquent, undisciplined or neglected as defined by G.S. 7A-278 or who engages in sexual intercourse with such child shall be guilty of a misdemeanor.

(c) It shall not be necessary for a district court exercising juvenile jurisdiction to make an adjudication that any child is delinquent, undisciplined or neglected in order to prosecute a parent or any other person under this section. An adjudication that a child is delinquent, undisciplined or neglected shall not preclude a subsequent prosecution of a parent or any other person who contributes to the delinquent, undisciplined or neglected condition of any child. (1919, c. 97, s. 19; C. S., s. 5057; 1959, c. 1284; 1969, c. 911, s. 4; 1971, c. 1180, s. 5.)

Editor's Note. —

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

This section is not unconstitutional for vagueness. State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970).

The words used in this section are ordinary words in common usage, and adequate warning is provided those inclined to violate them. Simply stated, any person who knowingly does any act to produce, promote or contribute to any condition of delinquency of a child is in violation of the section. State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970).

Statutes such as this section are preventive as well as punitive in nature. State v. Worley, 13 N.C. App. 198, 185 S.E.2d 270 (1971).

And it is not necessary to allege or prove that the child in fact is, or has become a delinquent. State v. Worley, 13 N.C. App. 198, 185 S.E.2d 270 (1971).

This section does not require that the creation of a state of delinquency be accomplished; the legislative intent was to protect children from wrongful influence by adults, and in protection of minors the State should not await the result of the wrong perpetrated before punishing the offender. State v. Worley, 13 N.C. App. 198, 185 S.E.2d 270 (1971).

Conviction of Minor Not Required. — It is not necessary that a minor be convicted of the charges contained in a juvenile petition before a person may be prosecuted under this section for contributing to the delinquency of the minor. State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970).

Neglect Resulting in Death of Child As Involuntary Manslaughter. — Where evidence was sufficient to show that the child's death resulted from the culpably negligent omission of defendants to perform their legal duty with respect to the child, the trial court did not err in overruling defendants' motions for nonsuit as to involuntary manslaughter. State v. Mason, 18 N.C. App. 433, 197 S.E.2d 79 (1973).

§ 14-318.2. Child abuse a general misdemeanor. — (a) Any parent of a child less than 16 years of age, or any other person providing care to or supervision of such child, who inflicts physical injury, or who allows physical injury to be inflicted, or who creates or allows to be created a substantial risk of physical injury, upon or to such child by other than accidental means is guilty of the misdemeanor of child abuse.

(b) The misdemeanor of child abuse is an offense additional to other civil and criminal provisions and is not intended to repeal or preclude any other sanctions or remedies, and is punishable as provided in G.S. 14-3(a). (1965, c. 472, s. 1; 1971, c. 710, s. 6.)

Editor's Note. —

The 1971 amendment, effective July 1, 1971, rewrote this section, which formerly related to immunity of physicians and others reporting abuse or neglect of children. For present provisions as to reporting and investigating abuse and neglect of children, see § 110-115 et seq.

By the enactment of this section the General Assembly intended to provide for three separate and independent offenses, none dependent on the other; therefore, the first provision of this section making infliction of injury upon the child by the parent himself a punishable offense is divisible and separable from the remainder of the statute. State v. Fredell, 283 N.C. 242, 195 S.E.2d 300 (1973).

State's Burden of Proof. — To convict a parent of child abuse under this section it is necessary that the State prove only one of three separate and distinct acts or courses of conduct; that the parent, other than by accidental means, (1) inflicted physical injury upon the child, (2) allowed physical injury to be inflicted upon the

child, or (3) created or allowed to be created a substantial risk of physical injury upon the child. State v. Fredell, 17 N.C. App. 205, 193 S.E.2d 587 (1972).

Complaint of Constitutional Vagueness in Provision of Section Not Allowed. — Where defendant's case was submitted to the jury only on the issue of whether defendant actually inflicted her child's injuries, defendant could not complain of alleged unconstitutional vagueness in the provision of this section, making it a criminal offense to create or allow to be created a substantial risk of physical injury upon a child since provisions of this section are severable. State v. Fredell, 17 N.C. App. 205, 193 S.E.2d 587 (1972).

§ 14-318.3: Repealed by Session Laws 1971, c. 710, s. 7, effective July 1, 1971.

§ 14-319: Repealed by Session Laws 1975, c. 402.

§ 14-320. Separating child under six months old from mother. — It shall be unlawful for any person to separate or aid in separating any child under six months old from its mother for the purpose of placing such child in a foster home or institution, or with the intent to remove it from the State for such purpose, without the written consent of either the county director of social services of the county in which the mother resides, or of the county in which the child was born, or of a private child-placing agency duly licensed by the Social Services Commission; but the written consent of any of the officials named in this section shall not be necessary for a child when the mother places the child with relatives or in a boarding home or institution inspected by the Department of Human Resources and licensed by the Social Services Commission. Such consent when required shall be filed in the records of the official or agency giving consent. Any person or agency violating the provisions of this section shall, upon conviction, be fined not exceeding five hundred dollars ($500.00) or imprisoned for not more than one year, or both, in the discretion of the court. (1917, c. 59; 1919, c. 240; C. S., s. 4445; 1939, c. 56; 1945, c. 669; 1949, c. 491; 1965, c. 356; 1969, c. 982; 1973, c. 476, s. 138.)

Editor's Note. — The 1973 amendment, effective July 1, 1973, substituted "Social Services Commission" for "State Board of Public Welfare" in two places and inserted "by the Department of Human Resources" in the first sentence.

ARTICLE 40.

Protection of the Family.

§ 14-322. Abandonment by husband or parent.

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

Elements of Offense. —

In accord with 2nd paragraph in original. See Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971).

Abandonment, etc. —

There is a distinction between criminal abandonment and the matrimonial offense of desertion. Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971).

This section in express terms, etc. —

A parent's willful failure or refusal to provide adequate support for his children is a continuing offense, and is not barred by any statute of limitations until the youngest child shall have reached the age of 18 years. State v. McMillan, 10 N.C. App. 734, 180 S.E.2d 35 (1971).

Abandonment Must Be Willful. —

In a prosecution under this section the failure by a defendant to provide adequate support for his child must be willful, that is, he intentionally and without just cause or excuse does not provide adequate support for his child according to his means and station in life, and this essential element of the offense must be alleged and proved. State v. McMillan, 10 N.C. App. 734, 180 S.E.2d 35 (1971).

Where there was no evidence in the record that the defendant was employed, or that he owned any property, or had any income or any ability whatsoever to contribute to the support of his children; nor any evidence that the defendant had failed to apply himself to some

honest calling for the support of himself and family, or that he was a frequenter of drinking houses, or a known common drunkard, so as to bring the case within the presumption raised by § 14-323, the record was devoid of evidence from which the jury might infer that the defendant willfully or intentionally failed to discharge his obligation to support his children, and the defendant's motion for judgment as of nonsuit should have been allowed. State v. McMillan, 10 N.C. App. 734, 180 S.E.2d 35 (1971).

Applied in State v. Smith, 18 N.C. App. 308, 196 S.E.2d 519 (1973).

Cited in State v. Stevens, 11 N.C. App. 402, 181 S.E.2d 159 (1971).

§ 14-322.2. Failure to support handicapped dependent. — If any father or mother shall wilfully fail and refuse to provide support for a physically handicapped child or a mentally retarded child who becomes 18 years of age and who is unable to be self-supporting, then the parent shall be guilty of a misdemeanor; failure to provide such support shall be a continuing offense after the eighteenth birthday and after the child reaches his majority until such time as the physically handicapped or mentally retarded dependent is able to become self-supporting or until such time as such dependent attains age 21 and is a patient in a facility owned or operated by the Department of Human Resources. (1969, c. 889, s. 1; 1971, c. 218, s. 2; 1973, c. 476, s. 133.)

Editor's Note. —

The 1971 amendment added the language beginning "or until such time."

Session Laws 1971, c. 218, s. 4, as amended by Session Laws 1971, c. 1142, provides: "This act is intended to relieve and shall be construed to relieve, any parent of any liability for charges accrued prior to the ratification of this act for treatment, care and maintenance of a natural or adoptive child at facilities owned or operated by the State Department of Mental Health. It is the intent of this act to limit the existing liability of all parents, in the manner set out in the previous sections of this act, in regard to charges made prior to the date of the ratification of this act, or to be made subsequent to such date, for treatment, care and maintenance of a natural or adopted child at facilities owned or operated by the State Department of Mental Health."

The 1973 amendment, effective July 1, 1973, substituted "Department of Human Resources" for "State Department of Mental Health."

Exemption from Liability for Care of "Long-Term Patients" in Certain Facilities. — Sections 50-13.8 and 143-127.1 exempt a parent from liability for charges made by a facility owned or operated by the Division of Mental Health for the treatment, care and maintenance of a physically or mentally handicapped child who has attained the age of 18 years and is considered a "long-term patient." See opinion of Attorney General to Dr. Renee Westcott, Director, Division of Social Services, Department of Human Resources, 43 N.C.A.G. 299 (1974).

§ 14-325. Failure of husband to provide adequate support for family.

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

ARTICLE 41.

Intoxicating Liquors.

§§ 14-327, 14-328: Repealed by Session Laws 1971, c. 872, s. 3, effective October 1, 1971.

§§ 14-330 to 14-332: Repealed by Session Laws 1971, c. 872, s. 3, effective October 1, 1971.

Editor's Note. — Section 14-330 was also repealed by Session Laws 1971, c. 168.

ARTICLE 42.

Public Drunkenness.

§ 14-333: Repealed by Session Laws 1971, c. 872, § 3, effective October 1, 1971.

§ **14-335. Public drunkenness.** — (a) If any person shall be found drunk or intoxicated in any public place, he shall be guilty of a misdemeanor and upon conviction or plea of guilty shall be punished by a fine of not more than fifty dollars ($50.00) or by imprisonment for not more than 20 days in the county jail. Upon conviction for any subsequent offense under this section within a 12-month period he shall be punished by a fine of not more than fifty dollars ($50.00) or by imprisonment for not more than 20 days in the county jail or by commitment to the custody of the Secretary of Correction for an indeterminate sentence of not less than 30 days and not more than six months.

(b) The Secretary of Correction or his agent shall designate the place of confinement within the State prison system where a person committed to the Secretary's custody under the provisions of this section shall begin service of the sentence. At any time during the period such person is committed to the custody of the Secretary, the Secretary or his agent may authorize his release under such conditions as the Secretary or his agent may prescribe, in order to receive care and treatment from a specified hospital, outpatient clinic, or other appropriate facility or program outside the State prison system. The conditions of release may be modified or the conditional release may be revoked by the Secretary or his agent at any time during the period such person is committed to the Secretary's custody, provided that the total time served in confinement and on conditional release shall not exceed a term of six months from the date of entry into the State prison system. If a conditional release is revoked, the revocation order shall constitute authority for any prison, parole or peace officer to arrest such person without a warrant and return him to a facility of the State prison system. The Secretary of Correction shall require any person committed to his custody under the provisions of this section to serve at least 30 days of the sentence, but this minimum term can be served in part on conditional release after a period of confinement. The Secretary or his agent may discharge the person from custody at any time after service of the minimum term.

(1973, c. 1262, s. 10.)

Editor's Note. —

The 1973 amendment, effective July 1, 1974, substituted "Secretary of Correction" for "Commissioner of Correction," "Secretary" for "Commissioner" and "Secretary's" for "Commissioner's" throughout subsections (a) and (b).

As subsection (c) was not changed by the amendment, it is not set out.

Trial Judge Must Define State of Being Drunk or Intoxicated in Submitting Case to Jury. — The state of being "drunk" or "intoxicated" varies greatly in the opinion of different persons. What would constitute this status in the eyes and opinion of one person might be far different from that of another person. In view of this situation it is not proper for the jury to be turned loose without further guidance from the trial judge and a definition of what would constitute being "drunk" or "intoxicated" in order to sustain a conviction for a violation of this section. State v. Patton, 18 N.C. App. 266, 196 S.E.2d 560 (1973).

Applied in State v. Gaddy, 14 N.C. App. 599, 188 S.E.2d 745 (1972); State v. Patton, 18 N.C. App. 266, 196 S.E.2d 560 (1973).

Cited in State v. Godwin, 13 N.C. App. 700, 187 S.E.2d 400 (1972); State v. Currie, 284 N.C. 562, 202 S.E.2d 153 (1974).

§ 14-335.1. Detention of public drunks. — (a) Any law-enforcement officer may take a public drunk into custody for the following purposes:

(1) Transporting him to his residence; or
(2) Transporting him to a detoxification center, or public or private hospital if such is available and willing to admit him; or
(3) Transporting him to an official authorized to issue warrants.

(b) For purpose of this section, "public drunk" means any person who is:

(1) Intoxicated to the extent of being unconscious or is substantially unable to control himself under the circumstances so as to create a risk of harm to himself or to the public; and
(2) Is in a public place.

(c) A law-enforcement officer acting pursuant to this section and in good faith shall be exempt from civil and criminal liability arising out of the circumstances of the detention or transportation of the public drunk. (1973, c. 696.)

Article 43.

Vagrants and Tramps.

§ 14-336. Persons classed as vagrants.

Editor's Note. —

For note, "Federal Court Intervention as Protection against Illegal Police Harassment," see 48 N.C.L. Rev. 138 (1969).

For comment entitled "Vagrancy — A Crime of Status," see 6 Wake Forest Intra. L. Rev. 307 (1970).

This section is unconstitutional and its enforcement is permanently enjoined. Wheeler v. Goodman, 306 F. Supp. 58 (W.D.N.C. 1969).

This section is void for vagueness and overbreadth. The section's terms do not give fair notice of what acts are criminally prohibited and are so broad as to embrace, on its face, obviously innocent activities. Wheeler v. Goodman, 306 F. Supp. 58 (W.D.N.C. 1969).

This section is unconstitutional because it is vague and overbroad; because it punishes mere status; and because it invidiously discriminates against those without property, all in violation of the Fourteenth Amendment. Wheeler v. Goodman, 306 F. Supp. 58 (W.D.N.C. 1969).

This vagrancy statute is properly attacked on its face as being vague and overbroad; it suppresses free expression and free association; no single criminal state court prosecution could conceivably explore and clarify and limit its myriad possible constructions. Wheeler v. Goodman, 298 F. Supp. 935 (W.D.N.C. 1969).

§ 14-337: Repealed by Session Laws 1973, c. 108, s. 13.

§ 14-340: Repealed by Session Laws 1971, c. 700.

§ 14-341: Repealed by Session Laws 1971, c. 699.

Article 45.

Regulation of Employer and Employee.

§ 14-347: Repealed by Session Laws 1971, c. 350.

§ 14-348: Repealed by Session Laws 1971, c. 701.

§ 14-349: Repealed by Session Laws 1971, c. 351.

§ 14-350: Repealed by Session Laws 1971, c. 352.

§ 14-351: Repealed by Session Laws 1971, c. 353.

§ 14-352: Repealed by Session Laws 1971, c. 354.

§ 14-353. Influencing agents and servants in violating duties owed employers.

Cited in State v. Fredell, 283 N.C. 242, 195 S.E.2d 300 (1973).

ARTICLE 47.

Cruelty to Animals.

§ 14-360. Cruelty to animals; construction of section.

The word "willful," etc. —
In accord with original. See State v. Fowler, 22 N.C. App. 144, 205 S.E.2d 749 (1974).

Punishment administered to an animal in an honest and good faith effort to train it is not without justification and not willful. State v. Fowler, 22 N.C. App. 144, 205 S.E.2d 749 (1974).

Applied in State v. Candler, 25 N.C. App. 318, 212 S.E.2d 901 (1975).

§ 14-363.1. Living baby chicks or other fowl, or rabbits under eight weeks of age; disposing of as pets or novelties forbidden. — If any person, firm or corporation shall sell, or offer for sale, barter or give away as premiums living baby chicks, ducklings, or other fowl or rabbits under eight weeks of age as pets or novelties, such person, firm or corporation shall be guilty of a misdemeanor punishable by a fine not to exceed one hundred dollars ($100.00) or imprisonment for not more than 30 days, or both. Provided, that nothing contained in this section shall be construed to prohibit the sale of nondomesticated species of chicks, ducklings, or other fowl, or of other fowl from proper brooder facilities by hatcheries or stores engaged in the business of selling them for purposes other than for pets or novelties. (1973, ch. 466, s. 1.)

Editor's Note. — Session Laws 1973, c. 466, s. 2, makes the act effective July 1, 1973.

ARTICLE 49.

Protection of Livestock Running at Large.

§ 14-365: Repealed by Session Laws 1971, c. 110.

ARTICLE 52.

Miscellaneous Police Regulations.

§ 14-381. Desecration of State and United States flag. — It shall be unlawful for any person wilfully and knowingly to cast contempt upon any flag of the United States or upon any flag of North Carolina by public acts of physical

contact including, but not limited to, mutilation, defiling, defacing or trampling. Any person violating this section shall be deemed guilty of a misdemeanor and shall be punished by a fine not exceeding five hundred dollars ($500.00) or imprisonment for not more than six months or both, in the discretion of the court.

The flag of the United States, as used in this section, shall be the same as defined in 4 U.S.C.A. 1 and 4 U.S.C.A. 2. The flag of North Carolina, as used in this section, shall be the same as defined in G.S. 144-1. (1917, c. 271; C. S., s. 4500; 1971, c. 295.)

Editor's Note. — The 1971 amendment rewrote this section.

Former Provisions Held Unconstitutional. — See Parker v. Morgan, 322 F. Supp. 585 (W.D.N.C. 1971).

§ 14-382. Pollution of water on lands used for dairy purposes.

Cited in Stanley v. Department of Conservation & Dev., 284 N.C. 15, 199 S.E.2d 641 (1973).

§ 14-391. Usurious loans on household and kitchen furniture or assignment of wages.

Editor's Note. —
For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

§ 14-399. Placing of trash, refuse, etc., on the right-of-way of any public road. — It is unlawful for any person, firm, organization or private corporation, or for the governing body, agents or employees of any municipal corporation, to place or leave or cause to be placed or left temporarily or permanently, any trash, refuse, garbage, scrapped automobile, scrapped truck or part thereof on the right-of-way of any State highway or public road, unless such refuse, garbage, scrapped automobile, scrapped truck or part thereof is placed in a designated location or container for removal by a specific garbage or trash service collector.

The placing or leaving of the articles or matter forbidden by this section shall, for each day or portion thereof that said articles or matter are placed or left, constitute a separate offense.

A violation of this section is a misdemeanor punishable by a fine of not less than ten dollars ($10.00) or more than two hundred dollars ($200.00), imprisonment for not more than 30 days, or both. (1935, c. 457; 1937, c. 446; 1943, c. 543; 1951, c. 975, s. 1; 1953, cc. 387, 1011; 1955, c. 437; 1957, cc. 73, 175; 1959, c. 1173; 1971, c. 165; 1973, c. 877.)

Editor's Note. — The 1971 amendment, effective Sept. 1, 1971, added the language following "incorporated town" in the first paragraph and substituted "or more than two hundred dollars ($200.00), imprisonment for not more than 30 days, or both" for "and not more than fifty dollars ($50.00) for each offense" in the third paragraph.

The 1973 amendment deleted "where said highway or public road is outside of an incorporated town" following "public road" in the first paragraph.

§ 14-400. Tattooing prohibited. — It shall be unlawful for any person or persons to tattoo the arm, limb, or any part of the body of any other person under 18 years of age. Anyone violating the provisions of this section shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1937, c. 112, ss. 1, 2; 1969, c. 1224, s. 8; 1971, c. 1231, s. 1.)

Editor's Note. —
The 1971 amendment substituted "18" for "twenty-one" in the first sentence.

§ 14-401.5. Practice of phrenology, palmistry, fortune-telling or clairvoyance prohibited. — It shall be unlawful for any person to practice the arts of phrenology, palmistry, clairvoyance, fortune-telling and other crafts of a similar kind in the counties named herein. Any person violating any provision of this section shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than five hundred dollars ($500.00) or imprisonment for not more than six months or both such fine and imprisonment in the discretion of the court.

This section shall not prohibit the amateur practice of phrenology, palmistry, fortune-telling or clairvoyance in connection with school or church socials, provided such socials are held in school or church buildings.

Provided that the provisions of this section shall apply only to the Counties of Alexander, Ashe, Avery, Bertie, Bladen, Brunswick, Buncombe, Burke, Caldwell, Camden, Carteret, Caswell, Chatham, Chowan, Clay, Craven, Cumberland, Currituck, Dare, Davidson, Davie, Duplin, Durham, Franklin, Gates, Graham, Granville, Greene, Guilford, Halifax, Harnett, Haywood, Henderson, Hertford, Hoke, Iredell, Johnston, Lee, Lenoir, Madison, Martin, McDowell, Mecklenburg, Moore, Nash, New Hanover, Northampton, Onslow, Pasquotank, Pender, Perquimans, Person, Polk, Richmond, Robeson, Rockingham, Rutherford, Sampson, Scotland, Surry, Transylvania, Union, Vance, Wake and Warren. (1951, c. 314; 1953, cc. 138, 227, 328; 1955, cc. 55, 454; 1957, cc. 151, 166, 309, 355, 915; 1959, cc. 428, 1018; 1961, c. 271; 1969, c. 1224, s. 20; 1973, cc. 12, 195; 1975, cc. 331, 351.)

Editor's Note. —
The first 1973 amendment inserted New Hanover and the second 1973 amendment inserted Henderson in the list of counties in the third paragraph.

The first 1975 amendment deleted Orange in the list of counties, and the second 1975 amendment, effective July 1, 1975, inserted Lenoir.

§ 14-401.11. Distribution of certain food at Halloween and all other times prohibited. — (a) It shall be unlawful for any person to knowingly distribute, sell, give away or otherwise cause to be placed in a position of human accessibility, any food or eatable substance which that person knows to contain:

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

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

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

(b) Penalties.

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

a. Where the actual or possible effect on a person eating the food or substance was or would be limited to mild physical discomfort without any lasting effect, shall be guilty of a misdemeanor punishable in the discretion of the court.

b. Where the actual or possible effect on a person eating the food or substance was or would be greater than mild physical discomfort without any lasting effect, shall be guilty of a felony punishable in the discretion of the court.

(2) Any person violating the provisions of G.S. 14-401.11(a)(2) shall be guilty of a felony punishable by imprisonment in the Department of Correction for not less than two nor more than 10 years.

(3) Any person violating the provisions of G.S. 14-401.11(a)(3) shall be guilty of a felony punishable by imprisonment in the Department of Correction for not less than five nor more than 40 years. (1971, c. 564; 1973, c. 540, s. 1.)

Editor's Note. — The 1973 amendment rewrote subdivision (2) of subsection (a).

ARTICLE 52A.

Sale of Weapons in Certain Counties.

§ 14-402. Sale of certain weapons without permit forbidden. — It shall be unlawful for any person, firm, or corporation in this State to sell, give away, or dispose of, or to purchase or receive, at any place within the State from any other place within or without the State, unless a license or permit therefor shall have first been obtained by such purchaser or receiver from the sheriff of the county in which such purchase, sale, or transfer is intended to be made, any pistol, so-called pump gun, bowie knife, dirk, dagger, slungshot, blackjack or metallic knucks.

It shall be unlawful for any person or persons to receive from any postmaster, postal clerk, employee in the parcel post department, rural mail carrier, express agent or employee, railroad agent or employee, within the State of North Carolina any pistol, so-called pump gun, bowie knife, dirk, dagger or metallic knucks without having in his or their possession and without exhibiting at the time of the delivery of the same and to the person delivering the same, the permit from the sheriff as provided in G.S. 14-403. Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than fifty dollars ($50.00) nor more than two hundred dollars ($200.00), or imprisoned not less than 30 days nor more than six months, or both, in the discretion of the court.

"Antique firearm" as defined by G.S. 14-409.11, and "historic edged weapon" as defined by G.S. 14-409.12, are hereby excepted from the provisions of this section. (1919, c. 197, s. 1; C. S., s. 5106; 1923, c. 106; 1947, c. 781; 1959, c. 1073, s. 2; 1971, c. 133, s. 2.)

Editor's Note. —

The 1971 amendment added the last paragraph.

Iredell was deleted from the list of counties by Session Laws 1971, c. 410, amending Session Laws 1959, c. 1073, s. 4.

Session Laws 1959, c. 1073, s. 4, was amended by Session Laws 1971, c. 192, by deleting Washington from the list of counties.

Session Laws 1959, c. 1073, s. 4, was amended by Session Laws 1973, c. 421, which deleted Union from the list of counties.

Session Laws 1959, c. 1073, s. 4, was amended by Session Laws 1975, c. 134, s. 1, which deleted Person, by Session Laws 1975, c. 139, s. 1, which deleted Franklin, by Session Laws 1975, c. 173, which deleted Franklin, Halifax, Jackson, Macon and Stokes, and by Session Laws 1975, c. 374, which deleted Halifax, from the list of counties.

§ 14-404. Applicant must be of good moral character; weapon for defense of home; sheriff's fee.

Local Modification. — Caldwell: 1975, c. 478; Chatham: 1975, c. 477; Forsyth: 1971, c. 411; Lee: 1975, c. 377; Mecklenburg: 1971, c. 411; Orange: 1975, c. 477.

Issuance of Pistol Permits to 18, 19 and 20 Year Olds. — See opinion of Attorney General to Mr. Isaac T. Avery, Jr., 41 N.C.A.G. 465 (1971).

More Than One Permit Allowed. — See opinion of Attorney General to Mr. Leroy Reavis, 41 N.C.A.G. 415 (1971).

§ 14-409. Machine guns and other like weapons.

Definitions. — The usual and customary definitions of the words used in this section are as follows: A machine gun is defined as an automatic gun using small-arms ammunition for rapid continuous firing; a submachine gun as a lightweight automatic or semiautomatic portable firearm fired from the shoulder or hip; a carbine as a light automatic or semiautomatic military rifle; and an automatic rifle as a rifle capable commonly of either semiautomatic or full automatic fire and designed to be fired without a mount. State v. Lee, 277 N.C. 242, 176 S.E.2d 772 (1970).

"Automatic". — The word "automatic" as used in connection with a firearm is one using either gas pressure or force of recoil and mechanical spring action for repeatedly ejecting the empty cartridge shell, introducing a new cartridge and firing it. State v. Lee, 277 N.C. 242, 176 S.E.2d 772 (1970).

In ordinary usage the word "automatic" is used to describe both automatic and semiautomatic weapons. State v. Lee, 277 N.C. 242, 176 S.E.2d 772 (1970).

A machine gun is automatic. State v. Lee, 277 N.C. 242, 176 S.E.2d 772 (1970).

A submachine gun can be automatic or semiautomatic. State v. Lee, 277 N.C. 242, 176 S.E.2d 772 (1970).

Section Excludes Weapons Which Shoot Less Than 31 Times. — The General Assembly intended to include within the prohibition of this section all weapons either automatic or semiautomatic which shoot 31 times or more and to exclude such weapons which shoot less than 31 times. State v. Lee, 277 N.C. 242, 176 S.E.2d 772 (1970).

This section has a proviso which excludes automatic shotguns and pistols or other automatic weapons that shoot less than 31 shots. Giving the usual and customary meaning to the word "automatic," the proviso would exclude automatic weapons or semiautomatic weapons which shoot less than 31 shots. State v. Lee, 277 N.C. 242, 176 S.E.2d 772 (1970).

Weapon Not Machine Gun, etc., within Meaning of Section. — A weapon described as a Universal Caliber 30 M1 Carbine, capable of firing 31 shots by the successive pulling of the trigger is not a "machine gun, submachine gun or other like weapon" within the meaning of this section. State v. Lee, 8 N.C. App. 601, 174 S.E.2d 658 (1970).

ARTICLE 53.

Sale of Weapons in Certain Other Counties.

§ 14-409.1. Sale of certain weapons without permit forbidden. — It shall be unlawful for any person, firm, or corporation in this State to sell, give away, or dispose of, or to purchase or receive, at any place within the State from any other place within or without the State, unless a license or permit therefor shall have first been obtained by such purchaser or receiver from the clerk of the superior court of the county in which such purchase, sale or transfer is intended to be made, any pistol, so-called pump gun, bowie knife, dirk, dagger, slungshot, blackjack or metallic knucks.

It shall be unlawful for any person or persons to receive from any postmaster, postal clerk, employee in the parcel post department, rural mail carrier, express agent or employee, railroad agent or employee, within the State of North Carolina any pistol, so-called pump gun, bowie knife, dirk, dagger or metallic knucks without having in his or their possession and without exhibiting at the

time of the delivery of the same and to the person delivering the same, the permit from the clerk of the superior court as provided in G.S. 14-409.2. Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than fifty dollars ($50.00) nor more than two hundred dollars ($200.00), or imprisoned not less than 30 days nor more than six months, or both, in the discretion of the court.

"Antique firearm" as defined by G.S. 14-409.11, and "historic edged weapon" as defined by G.S. 14-409.12, are hereby excepted from the provisions of this section. (1919, c. 197, s. 1; C. S., s. 5106; 1923, c. 106; 1947, c. 781; 1971, c. 133, s. 2.)

Editor's Note. —

The 1971 amendment added the last paragraph.

Session Laws 1959, c. 1073, s. 4, was amended by Session Laws 1971, c. 192, which deleted "Washington" from the list of counties.

Iredell was deleted from the list of counties by Session Laws 1971, c. 410, amending Session Laws 1959, c. 1073, s. 4.

Session Laws 1959, c. 1073, s. 4, was amended by Session Laws 1973, c. 421, which deleted "Union" from the list of counties.

Session Laws 1959, c. 1073, s. 4, was amended by Session Laws 1975, cc. 173, 374, both of which deleted Halifax from the list of counties.

§ 14-409.3. Applicant must be of good moral character; weapon for defense of home; clerk's fee.

Issuance of Pistol Permits to 18, 19 and 20 Year Olds. — See opinion of Attorney General to Mr. Isaac T. Avery, Jr., 41 N.C.A.G. 465 (1971).

ARTICLE 53A.

Other Firearms.

§ 14-409.12. "Historic edged weapons" defined. — The term "historic edged weapon" means any bayonet, trench knife, sword or dagger manufactured during or prior to World War II but in no event later than January 1, 1946. (1971, c. 133, s. 1.)

ARTICLE 54.

Sale, etc., of Pyrotechnics.

§ 14-410. Manufacture, sale and use of pyrotechnics prohibited; public exhibitions permitted; common carriers not affected.

Applied in State v. Salem, 17 N.C. App. 269, 193 S.E.2d 755 (1973).

§ 14-414. Pyrotechnics defined; exceptions.

What Prohibited within Definition of Pyrotechnics. — See opinion of Attorney General to Mr. W.I. Adams, Sheriff, Wayne County, 40 N.C.A.G. 174 (1970).

ARTICLE 54A.

The Felony Firearms Act.

§ 14-415.1. Possession of firearms, etc., by felon prohibited. — (a) It shall be unlawful for any person who has been convicted in any court of this State,

of any other state of the United States, or of the United States, of feloniously violating any provision of Articles 3, 4, 6, 7, 8, 10, 13, 14, 15, 17, 30, 33, 36, 36A, 52A, or 53 of Chapter 14 of the General Statutes to purchase, own, possess, or have in his custody, care, or control any handgun or other firearm with a barrel length of less than 18 inches or an overall length of less than 26 inches within five years from the date of such conviction, or unconditional discharge from a correctional institution, or termination of a suspended sentence, probation, or parole upon such conviction, whichever is later.

Every person violating the provisions of this section shall be guilty of a felony and shall be imprisoned for not more than five years in the State's prison or shall be fined an amount not exceeding five thousand dollars ($5,000), or both.

Nothing in this subsection would prohibit the right of any person to have possession of a firearm within his own home or on his lawful place of business.

(b) In all cases where the person is charged under the provisions of this section, the record or records of prior convictions of any offense whether in courts in this State, or in courts of any other state or in any court of the United States shall be admissible in evidence, but only for the purpose of proving that said person has been convicted of a previous offense the punishment for which may be more than two years. The term "conviction" is defined as a final judgment in any case of any offense having a maximum permissible penalty of more than two years without regard to the plea entered or to the sentence imposed. A judgment of a conviction or a plea of guilty to such an offense certified to a superior court of this State from the custodian of records of any state or federal court under the same name as that by which the defendant is charged shall be prima facie evidence that the identity of such person is the same as the defendant so charged and shall be prima facie evidence of the facts so certified.

(c) The indictment charging the defendant under the terms of this section shall be separate from any indictment charging him with other offenses related to or giving rise to a charge under this section. An indictment which charges the person with violation of this section must set forth the date that the prior offense was committed, the type of offense and the penalty therefor, and the date that the defendant was convicted or plead guilty to such offense, the identity of the court in which the conviction or plea of guilty took place and the verdict and judgment rendered therein. (1971, c. 954, s. 1; 1973, c. 1196; 1975, c. 870, ss. 1, 2.)

Cross Reference. — See note to § 14-415.2.

Editor's Note. — Session Laws 1971, c. 954, s. 3, makes the act effective on Oct. 1, 1971.

The 1973 amendment, effective Oct. 1, 1974, substituted "or other firearms with a barrel length of less than 18 inches or an overall length of less than 26 inches" for "or pistol" in the first paragraph of subsection (a).

The 1975 amendment, effective Oct. 1, 1975, rewrote the first paragraph, substituted "five years" for "10 years" and added "or both" in the second paragraph, and added the third paragraph, of subsection (a).

The Felony Firearms Act applies only to those who are no longer citizens by reason of a prior conviction of a felony. Once they regain their citizenship, the act no longer applies. State v. Currie, 284 N.C. 562, 202 S.E.2d 153 (1974).

In a prosecution under this section, defendant was not subjected to double jeopardy, though he had been tried and acquitted in district court on the charge of carrying a concealed weapon, a charge stemming from the same transaction from which the charge under this section arose, since the warrant in the former action and the indictment in the present action were drawn pursuant to different statutes and elements of the two offenses were separate and distinct. State v. Cobb, 18 N.C. App. 221, 196 S.E.2d 521 (1973).

Section Held Not Ex Post Facto Respecting Alleged Violation on July 31, 1972. — See State v. Cobb, 18 N.C. App. 221, 196 S.E.2d 521 (1973).

Applied in State v. Currie, 19 N.C. App. 241, 198 S.E.2d 491 (1973); State v. Cobb, 284 N.C. 573, 201 S.E.2d 878 (1974).

Cited in State v. Hart, 22 N.C. App. 738, 207 S.E.2d 766 (1974).

§ 14-415.2: Repealed by Session Laws 1975, c. 870, s. 3, effective October 1, 1975.

ARTICLE 58.

Records, Tapes and Other Recorded Devices.

§ 14-432. "Owner" defined. — As used in this Article "owner" means the person who owns any master phonograph record, master disc, master tape, master film or other device used for reproducing recorded sounds on phonograph records, discs, tapes, films or other articles on which sound is recorded and from which the transferred sounds are directly or indirectly derived. (1973, c. 1279, s. 1.)

Editor's Note. — Session Laws 1973, c. 1279, s. 2, makes the act effective Jan. 1, 1975.

§ 14-433. Recording of live concerts or recorded sounds and distribution, etc., of such recordings unlawful in certain circumstances. — It shall be unlawful for any person to:

(1) Knowingly transfer or cause to be transferred, directly or indirectly by any means, any sounds at a live concert or any sounds recorded on a phonograph record, disc, wire, tape, film or other article on which sounds are recorded, with the intent to sell or cause to be sold, or to be used for profit through public performance, such article on which sounds are so transferred, without consent of the owner; or

(2) Manufacture, distribute or wholesale any article with the knowledge that the sounds are so transferred, without consent of the owner.

This section shall not apply to any person engaged in radio or television broadcasting who transfers, or causes to be transferred, any such sounds other than from the sound track of a motion picture intended for, or in connection with broadcast or telecast transmission or related uses, or for archival purposes. (1973, c. 1279, s. 1.)

§ 14-434. Retailing, etc., of certain recorded devices unlawful. — It shall be unlawful for any person to knowingly retail or possess for the purpose of retailing any recorded device that has been produced, manufactured, distributed, or acquired at wholesale in violation of any provision of this Chapter. (1973, c. 1279, s. 1.)

§ 14-435. Recorded devices to show true name of manufacturer. — Ninety days after January 1, 1975, every recorded device sold or transferred or possessed for the purpose of sale by any manufacturer, distributor, or wholesale or retail merchant shall contain on its packaging the true name of the manufacturer. The term "manufacturer" shall not include the manufacturer of the cartridge or casing itself. (1973, c. 1279, s. 1.)

§ 14-436. Recorded devices; civil action for damages. — Any owner of a recorded device as defined in this Chapter whose work is allegedly the subject of a violation of G.S. 14-433 or G.S. 14-434, shall have a cause of action in the courts of this State for all damages resulting therefrom, including actual, compensatory and incidental damages. (1973, c. 1279, s. 1.)

§ 14-437. Violation of Article a misdemeanor. — Every individual manufacture, distribution, sale or transfer of such recorded devices in contravention of the provisions of this Article shall constitute a misdemeanor punishable by six months in jail, a fine of up to five hundred dollars ($500.00), or both. (1973, c. 1279, s. 1.)

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

November 1, 1975

I, Rufus L. Edmisten, Attorney General of North Carolina, do hereby certify that the foregoing 1975 Cumulative Supplement to the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Division of Legislative Drafting and Codification of Statutes of the Department of Justice of the State of North Carolina.

RUFUS L. EDMISTEN

Attorney General of North Carolina