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THE GENERAL STATUTES OF NORTH CAROLINA

1977 CUMULATIVE SUPPLEMENT

JAN 23 1978

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

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

Volume 1B

1969 Replacement

Annotated through 292 N.C. 643 and 33 N.C. App. 240. For complete
scope of annotations, see scope of volume page.

**Place with Corresponding Volume of Main Set. This
Supersedes Previous Pocket Supplement, Which
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Scope of Volume

Statutes:

Permanent portions of the general laws enacted at the 1971, the First and Second 1973, the First and Second 1975 and the 1977 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)-292 (p. 643).
- North Carolina Court of Appeals Reports volumes 5 (p. 228)-33 (p. 240).
- Federal Reporter 2nd Series volumes 410 (p. 449)-554 (p. 1074).
- Federal Supplement volumes 298 (p. 1201)-431 (p. 434).
- Federal Rules Decisions volumes 56 (p. 663)-74 (p. 213).
- United States Reports volumes 394 (p. 576)-419 (p. 984).
- Supreme Court Reporter volumes 89 (p. 2152)-97 (p. 2204).
- North Carolina Law Review volumes 47 (p. 732)-49 (p. 1006), volume 55 (pp. 1-750).
- Wake Forest Intramural Law Review volumes 6-13 (p. 269).
- Duke Law Journal volumes 3 (p. 485)-6 (p. 1395).
- North Carolina Central Law Journal volume 2 (pp. 1-164), volume 3 (pp. 123-268), volume 7 (pp. 201-413), volume 8 (pp. 1-122).
- Opinions of the Attorney General.

The General Statutes of North Carolina

1977 Cumulative Supplement

VOLUME 1B

Chapter 2.

Clerk of Superior Court.

Article 1.

The Office.

Sec.

- 2-1. [Repealed.]
- 2-2. [Transferred.]
- 2-3, 2-4. [Repealed.]
- 2-5, 2-6. [Transferred.]
- 2-7 to 2-9. [Repealed.]

Article 2.

Assistant Clerks.

- 2-10. [Transferred.]
- 2-11. [Repealed.]
- 2-12. [Transferred.]

Article 3.

Deputies.

- 2-13. [Transferred.]
- 2-14. [Repealed.]
- 2-15. [Transferred.]

Article 4.

Powers and Duties.

- 2-16. [Transferred.]

Sec.

- 2-16.1, 2-16.2. [Repealed.]
- 2-17. [Transferred.]
- 2-18. [Repealed.]
- 2-19 to 2-22. [Transferred.]
- 2-23. [Repealed.]
- 2-24, 2-25. [Transferred.]
- 2-26, 2-27. [Repealed.]
- 2-29 to 2-41. [Repealed.]
- 2-42. [Transferred.]
- 2-43. [Repealed.]

Article 5.

Reports.

- 2-44. [Repealed.]
- 2-45. [Transferred.]

Article 6.

Money in Hand; Investments.

- 2-46 to 2-51. [Repealed.]
- 2-52 to 2-56. [Transferred.]
- 2-57 to 2-59. [Repealed.]
- 2-60. [Transferred.]

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), rev'd on other grounds, 277 N.C. 623, 178 S.E.2d 425 (1971).

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. Ingham*, 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).

There is no 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. 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*, 279 N.C. 212, 182 S.E.2d 563 (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. Ingham*, 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. Ingham*, 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. Ingham*, 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. Ingham*, 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. Ingham*, 278 N.C. 42, 178 S.E.2d 577 (1971).

At common law forcible detention was false imprisonment, not kidnapping. *State v. Ingham*, 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. Ingham*, 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. Ingham*, 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. Ingham*, 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. Ingham*, 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. Ingham*, 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), cert. denied, 414 U.S. 1160, 94 S. Ct. 920, 39 L.Ed.2d 112 (1974).

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.**

Sec.		Sec.	
5-1.	Contempts enumerated; common law repealed.	5-6.	Courts and officers empowered to punish.
5-2, 5-3.	[Repealed.]	5-7.	[Repealed.]
5-4.	Punishment.	5-8.	Acts punishable as for contempt.
5-5.	[Repealed.]	5-9.	[Repealed.]

Cross Reference. — For new Chapter relating to contempt, effective July 1, 1978, see Chapter 5A.

§ 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.

Repeal of Section. — This section is repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Session Laws 1977, c. 711, s. 34, provides: "All statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose."

Session Laws 1977, c. 711, s. 35, provides: "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 1977, c. 711, s. 36, contains a severability clause.

Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article 85, 'Parole' shall not apply to persons sentenced before July 1, 1978."

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 favoring 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, cert. denied, 283 N.C. 666, 197 S.E.2d 880 (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, cert. denied, 283 N.C. 666, 197 S.E.2d 880 (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).

Cited in *White v. White*, 289 N.C. 592, 223 S.E.2d 377 (1976); *Paul v. Pleasants*, 551 F.2d 575 (4th Cir. 1977).

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), rev'd on other grounds, 276 N.C. 571, 173 S.E.2d 785 (1970).

Subdivision (1) of this section is not unconstitutional in that it is not vague and a denial of due process. In re Paul, 28 N.C. App. 610, 222 S.E.2d 479, appeal dismissed, 289 N.C. 614, 223 S.E.2d 767 (1976).

Due process safeguards must be extended to persons cited for direct contempt of court in cases where final adjudication and sentencing for the contemptuous conduct is delayed until after trial. In re Paul, 28 N.C. App. 610, 222 S.E.2d 479, appeal dismissed, 289 N.C. 614, 223 S.E.2d 767 (1976).

Notice and Hearing but Not Trial Required.

— Before an attorney is finally adjudicated in contempt and sentenced after trial for conduct during trial, he should have reasonable notice of the specific charges and opportunity to be heard in his own behalf. This is not to say, however, that a full scale trial is appropriate. In re Paul, 28 N.C. App. 610, 222 S.E.2d 479, appeal dismissed, 289 N.C. 614, 223 S.E.2d 767 (1976).

Due Process Requirements Met. — Due process requirements of notice and opportunity to be heard on a contempt charge were adequately met where petitioner received actual notice, including the time and place, that he would be cited for contempt, and a written transcript provided formal notice of the specific actions for which petitioner was being cited. In re Paul, 28 N.C. App. 610, 222 S.E.2d 479, appeal dismissed, 289 N.C. 614, 223 S.E.2d 767 (1976).

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).

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).

Injunction 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).

Appealability of Contempt Order. — Insofar as the contempt order was based upon defendant's willful disobedience of a prior lawful order of the trial court, it was appealable under subdivision (4) of this section and § 5-2. Willis v. Duke Power Co., 291 N.C. 19, 229 S.E.2d 191 (1976).

Punishment Not Limited by § 5-4. — One act may be punishable both "as for contempt," civil contempt, and "for contempt," criminal contempt. This kind of duality particularly

inheres in a party litigant's willful failure to comply with a discovery order. Punishment is not, therefore, limited to the criminal sanctions provided by § 5-4. Willis v. Duke Power Co., 291 N.C. 19, 229 S.E.2d 191 (1976).

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

Editor's Note. —

Session Laws 1977, c. 711, s. 34, provides: "All statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose."

Session Laws 1977, c. 711, s. 35, provides: "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 1977, c. 711, s. 36, contains a severability clause.

Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article 85, 'Parole' shall not apply to persons sentenced before July 1, 1978."

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

Finding of Fact Not Disturbed. —

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. *Piedmont Equip. Co. v. Weant*, 30 N.C. App. 191, 226 S.E.2d 688 (1976).

As to contempt not committed in the presence, etc. —

Insofar as the contempt order was based upon defendant's willful disobedience of a prior lawful order of the trial court, it was appealable under subdivision (4) of § 5-1 and this section. *Willis v. Duke Power Co.*, 291 N.C. 19, 229 S.E.2d 191 (1976).

When a civil litigant is adjudged to be in contempt for failing to comply with an earlier discovery order, the contempt proceeding is both civil and criminal in nature and the order is immediately appealable for the purpose of

testing the validity both of the original discovery order and the contempt order itself where the contemnor can purge himself of the adjudication of contempt only by, in effect, complying with the discovery order of which he essentially complains. *Willis v. Duke Power Co.*, 291 N.C. 19, 229 S.E.2d 191 (1976).

Notwithstanding Lack of Imposition of Punishment. — This section provides for an appeal upon a contemnor's being adjudged guilty of contempt notwithstanding the lack of imposition of punishment. *Willis v. Duke Power Co.*, 291 N.C. 19, 229 S.E.2d 191 (1976).

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).

§ 5-3: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Editor's Note. —

Session Laws 1977, c. 711, s. 34, provides: "All statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose."

Session Laws 1977, c. 711, s. 35, provides: "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 1977, c. 711, s. 36, contains a severability clause.

Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article 85, 'Parole' shall not apply to persons sentenced before July 1, 1978."

§ 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.

Repeal of Section. — This section is repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Session Laws 1977, c. 711, s. 34, provides: "All statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose."

Session Laws 1977, c. 711, s. 35, provides: "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 1977, c. 711, s. 36, contains a severability clause.

Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article 85, 'Parole' shall not apply to persons sentenced before July 1, 1978."

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, appeal dismissed, 288 N.C. 120, 215 S.E.2d 606 (1975).

§ 5-5: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Editor's Note. —

Session Laws 1977, c. 711, s. 34, provides: "All statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose."

Session Laws 1977, c. 711, s. 35, provides: "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 1977, c. 711, s. 36, contains a severability clause.

Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article 85, 'Parole' shall not apply to persons sentenced before July 1, 1978."

Constitutionality. —

This section is not unconstitutional on its face and does not violate due process of law. In *re Paul*, 28 N.C. App. 610, 222 S.E.2d 479, appeal dismissed, 289 N.C. 614, 223 S.E.2d 767 (1976).

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).

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 for Failure to Comply with Discovery Order. — One act may be punishable both "as for contempt," as civil contempt, and "for contempt," criminal contempt. This kind of duality particularly inheres in a party litigant's willful failure to comply with a discovery order. Punishment is not, therefore, limited to the criminal sanctions provided by this section. *Willis v. Duke Power Co.*, 291 N.C. 19, 229 S.E.2d 191 (1976).

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 allocation. 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), *rev'd* on other grounds, 276 N.C. 571, 173 S.E.2d 785 (1970).

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), rev'd on other grounds, 276 N.C. 571, 173 S.E.2d 785 (1970); *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), rev'd on other grounds, 276 N.C. 571, 173 S.E.2d 785 (1970).

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."

Repeal of Section. — This section is repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Session Laws 1977, c. 711, s. 34, provides: "All statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose."

Session Laws 1977, c. 711, s. 35, provides: "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 1977, c. 711, s. 36, contains a severability clause.

Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was

established or when judgment was entered against him, except that the provisions of Article 85, 'Parole' shall not apply to persons sentenced before July 1, 1978."

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, cert. denied, 283 N.C. 666, 197 S.E.2d 880 (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: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

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

Session Laws 1977, c. 711, s. 34, provides: "All statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose."

Session Laws 1977, c. 711, s. 35, provides: "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 1977, c. 711, s. 36, contains a severability clause.

Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article 85, 'Parole' shall not apply to persons sentenced before July 1, 1978."

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).

Repeal of Section. — This section is repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Session Laws 1977, c. 711, s. 34, provides: "All statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose."

Session Laws 1977, c. 711, s. 35, provides: "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 1977, c. 711, s. 36, contains a severability clause.

Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article 85, 'Parole' shall not apply to persons sentenced before July 1, 1978."

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, cert. denied, 283 N.C. 666, 197 S.E.2d 880 (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, cert. denied, 279 N.C. 348, 182 S.E.2d 580 (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).

Punishment for Failure to Comply with Discovery Order. — One act may be punishable both “as for contempt,” civil contempt, and “for contempt,” criminal contempt. This kind of duality particularly inheres in a party litigant’s willful failure to comply with a discovery order. Punishment is not, therefore, limited to the criminal sanctions provided by § 5-4. *Willis v. Duke Power Co.*, 291 N.C. 19, 229 S.E.2d 191 (1976).

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); *Fitch v. Fitch*, 26 N.C. App. 570, 216 S.E.2d 734 (1975).

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

§ 5-9: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Editor’s Note. — Session Laws 1977, c. 711, s. 34, provides: “All statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose.”

Session Laws 1977, c. 711, s. 35, provides: “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 1977, c. 711, s. 36, contains a severability clause.

Session Laws 1977, c. 711, s. 39, provides: “This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant’s guilt was

established or when judgment was entered against him, except that the provisions of Article 85, ‘Parole’ shall not apply to persons sentenced before July 1, 1978.”

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); *Fitch v. Fitch*, 26 N.C. App. 570, 216 S.E.2d 734 (1975).

Chapter 5A.

Contempt.

Article 1.

Criminal Contempt.

Sec.

5A-1 to 5A-10. [Reserved.]

5A-11. Criminal contempt.

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

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

5A-14. Summary proceedings for contempt.

5A-15. Plenary proceedings for contempt.

5A-16. Custody of person charged with criminal contempt.

Sec.

5A-17. Appeals.

5A-18 to 5A-20. [Reserved.]

Article 2.

Civil Contempt.

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

5A-22. Release when civil contempt no longer continues.

5A-23. Proceedings for civil contempt.

5A-24. Appeals.

5A-25. Proceedings as for contempt and civil contempt.

OFFICIAL COMMENTARY

This Chapter replaces Chapter 5 of the North Carolina General Statutes. The Commission deals with the full range of contempt, both criminal and civil, for two reasons. First, criminal contempt is clearly within the subject matter which the Commission was charged to study, and many aspects of civil contempt are necessary to the enforcement of orders in criminal cases. Second, once the Commission began to deal with criminal contempt, it became necessary also to deal with civil contempt since the two are inextricably bound together in Chapter 5. The provisions in Chapter 5A are not directly drawn from any other statute, but they

are drafted in light of Chapter 5 and of the American Bar Association's standards on the function of the trial judge. This Chapter does not carry forward the provisions of Chapter 5 which grant contempt powers to boards of county commissioners and the Utilities and Industrial Commissions. The application of those powers was sufficiently unclear under Chapter 5 that the Commission thought it best that those bodies either initiate statutes specifically dealing with that authority or that those bodies rely on court orders or criminal statutes dealing with the disruption of meetings.

Cross Reference. — For earlier provisions as to contempt, see Chapter 5.

Editor's Note. — Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that

the provisions of Article 85, 'Parole' shall not apply to persons sentenced before July 1, 1978."

Session Laws 1977, c. 711, s. 36, contains a severability clause.

The "Official Comments" under this Chapter are reprinted from the Legislative Program and Report of the Criminal Code Commission to the 1977 General Assembly.

ARTICLE 1.

Criminal Contempt.

OFFICIAL COMMENTARY

The establishment of this Article represents one of the basic purposes of the Commission in drafting the Chapter on contempt — to draw a sharp distinction between proceedings for criminal contempt and the proceedings for civil

contempt (or "as for contempt"). This Article deals with those matters for which a sanction is imposed purely as punishment. The sanction occurs without regard to what the contemnor will do after imposition of the sanction.

§§ 5A-1 to 5A-10: Reserved for future codification purposes.

§ 5A-11. **Criminal contempt.** — (a) Except as provided in subsection (b), each of the following is criminal contempt:

- (1) Willful behavior committed during the sitting of a court and directly tending to interrupt its proceedings.
- (2) Willful behavior committed during the sitting of a court in its immediate view and presence and directly tending to impair the respect due its authority.
- (3) Willful disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution.
- (4) Willful refusal to be sworn or affirmed as a witness, or, when so sworn or affirmed, willful refusal to answer any legal and proper question when the refusal is not legally justified.
- (5) Willful publication of a report of the proceedings in a court that is grossly inaccurate and presents a clear and present danger of imminent and serious threat to the administration of justice, made with knowledge that it was false or with reckless disregard of whether it was false. No person, however, may be punished for publishing a truthful report of proceedings in a court.
- (6) Willful or grossly negligent failure by an officer of the court to perform his duties in an official transaction.
- (7) Willful or grossly negligent failure to comply with schedules and practices of the court resulting in substantial interference with the business of the court.
- (8) Willful 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.
- (9) Willful communication with a juror in an improper attempt to influence his deliberations.
- (10) Any other act or omission specified elsewhere in the General Statutes of North Carolina as grounds for criminal contempt.

The grounds for criminal contempt specified here are exclusive, regardless of any other grounds for criminal contempt which existed at common law.

(b) No person may be held in contempt under this section on the basis of the content of any broadcast, publication, or other communication unless it presents a clear and present danger of an imminent and serious threat to the administration of criminal justice.

(c) This section is subject to the provisions of G.S. 7A-276.1, Court orders prohibiting publication or broadcast of reports of open court proceedings or reports of public records banned. (1977, c. 711, s. 3.)

OFFICIAL COMMENTARY

This section is based on Section 5-1. Generally this section merely compresses the existing statement of grounds for criminal contempt, including the consolidation of previously separate grounds (for example, subdivisions (1) and (2) in G.S. 5-1 become subdivision (1) in 5A-11). Under subdivision (4), refusal to answer a question when that answer is privileged would not be contempt since the refusal would be "legally justified." Subdivision (5) adds the clause "made with knowledge that it was false. . . ." thus engrafting the standard of *New York Times v. Sullivan*, 376 U.S. 254 (1964), onto cases of alleged contempt in publishing reports of proceedings. Subdivision (7) does not have a

counterpart in Chapter 5; it was added to make clear, for example, that the failure to appear in court at the proper time by one, including counsel, whose nonappearance would interfere with the court's schedule, could be subject to criminal contempt. Subdivision (a) is new and gives the court authority to step in immediately in cases of improper communication with jury. It is intended to complement the provision of a new G.S. 14-225.1, enlarging the Chapter 14 provisions dealing with jury tampering. The provisions of G.S. 5A-12(e) dictate the relationship between the two sanctions for jury tampering. Subdivision (10) is also new and is intended to insure that this chapter does not

reject attempts elsewhere in the General Statutes to make certain acts criminal contempt. The final sentences of this section are intended

to effect the same purpose as the final two sentences of G.S. 5-1.

§ 5A-12. Punishment; circumstances for fine or imprisonment; reduction of punishment; other measures. — (a) A person who commits criminal contempt, whether direct or indirect, is subject to censure, imprisonment up to 30 days, fine not to exceed five hundred dollars (\$500.00), or any combination of the three, except that a person who commits a contempt described in G.S. 5A-11(8) is subject to censure, imprisonment not to exceed six months, fine not to exceed five hundred dollars (\$500.00), or any combination of the three and a person who has not been arrested who fails to comply with a nontestimonial identification order, issued pursuant to Article 14 of G.S. 15A is subject to censure, imprisonment not to exceed 90 days, fine not to exceed five hundred dollars (\$500.00), or any combination of the three.

(b) Except for contempt under G.S. 5A-11(5) or 5A-11(9), fine or imprisonment may not be imposed for criminal contempt, whether direct or indirect, unless:

- (1) The act or omission was willfully contemptuous; or
- (2) The act or omission was preceded by a clear warning by the court that the conduct is improper.

(c) The judicial official who finds a person in contempt may at any time withdraw a censure, terminate or reduce a sentence of imprisonment, or remit or reduce a fine imposed as punishment for contempt if warranted by the conduct of the contemnor and the ends of justice.

(d) A person held in criminal contempt under this Article may nevertheless, for the same conduct, be found in civil contempt under Article 2 of this Chapter, Civil Contempt. If a person is found in both civil contempt and criminal contempt for the same conduct, the total period of imprisonment is limited as provided in G.S. 5A-21(c).

(e) A person held in criminal contempt under G.S. 5A-11(9) may nevertheless, for the same conduct, be found guilty of a violation of G.S. 14-225.1, but he must be given credit for any imprisonment resulting from the contempt. (1977, c. 711, s. 3.)

OFFICIAL COMMENTARY

Subsection (b) is drawn from the recommendations of the American Bar Association. It intends to preclude fine or punishment in response to what is essentially innocent conduct although censure alone would still be possible. Subsection (c) makes clear that

a judge may change his mind and reduce or remove any punishment he imposed in response to contempt. Subsection (d) makes clear that, although civil contempt and criminal contempt proceedings are distinct, each may be imposed for the same conduct.

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

(a) Criminal contempt is direct criminal contempt when the act:

- (1) Is committed within the sight or hearing of a presiding judicial official; and
- (2) Is committed in, or in immediate proximity to, the room where proceedings are being held before the court; and
- (3) Is likely to interrupt or interfere with matters then before the court.

The presiding judicial official may punish summarily for direct criminal contempt according to the requirements of G.S. 5A-14 or may defer adjudication and sentencing as provided in G.S. 5A-15. If proceedings for direct criminal contempt are deferred, the judicial official must, immediately following the conduct, inform the person of his intention to institute contempt proceedings.

(b) Any criminal contempt other than direct criminal contempt is indirect criminal contempt and is punishable only after proceedings in accordance with the procedure required by G.S. 5A-15. (1977, c. 711, s. 3.)

OFFICIAL COMMENTARY

This section specifies that only direct criminal contempt may be the subject of summary proceedings and defines direct criminal contempt. The three factors listed in subsection (a)(1), (2) and (3) must all be present before an act can be direct contempt. Subsection (a) also

permits the judge who is authorized to punish summarily to defer the proceedings if he choose. The last sentence of subsection (a) establishes the rule that a person be cited for contempt at the time the contempt occurs even if the proceedings are to be held later.

§ 5A-14. Summary proceedings for contempt. — (a) The presiding judicial official may summarily impose measures in response to direct criminal contempt when necessary to restore order or maintain the dignity and authority of the court and when the measures are imposed substantially contemporaneously with the contempt.

(b) Before imposing measures under this section, the judicial official must give the person charged with contempt summary notice of the charges and a summary opportunity to respond and must find facts supporting the summary imposition of measures in response to contempt. The facts must be established beyond a reasonable doubt. (1977, c. 711, s. 3.)

OFFICIAL COMMENTARY

If the contempt proceedings are to be summary, subsection (a) requires that they occur substantially at the same time as the contempt itself. Subsection (b) follows the American Bar Association recommendation that the person charged with contempt be given notice of what the contemptuous action was and an opportunity to respond. This was intended not

to provide for a hearing, or anything approaching that, in summary contempt proceedings, but merely to assure that the alleged contemnor had an opportunity to point out instances of gross mistake about who committed the contemptuous act or matters of that sort.

§ 5A-15. Plenary proceedings for contempt. — (a) When a judicial official chooses not to proceed summarily against a person charged with direct criminal contempt or when he may not proceed summarily, he may proceed by an order directing the person to appear before a judge at a reasonable time specified in the order and show cause why he should not be held in contempt of court. A copy of the order must be furnished to the person charged. If the criminal contempt is based upon acts before a judge which so involve him that his objectivity may reasonably be questioned, the order must be returned before a different judge.

(b) Proceedings under this section are before a district court judge unless a court superior to the district court issued the order, in which case the proceedings are before that court. Venue lies throughout the judicial district where the order was issued.

(c) The person ordered to show cause may move to dismiss the order.

(d) The judge is the trier of facts at the show cause hearing.

(e) The person charged with contempt may not be compelled to be a witness against himself in the hearing.

(f) At the conclusion of the hearing, the judge must enter a finding of guilty or not guilty. If the person is found to be in contempt, the judge must make findings of fact and enter judgment. The facts must be established beyond a reasonable doubt.

(g) The judge presiding over the hearing may appoint a prosecutor or, in the event of an apparent conflict of interest, some other member of the bar to represent the court in hearings for criminal contempt. (1977, c. 711, s. 3.)

OFFICIAL COMMENTARY

This section provides for a show-cause hearing in instances in which the judge either chooses not to proceed by summary proceedings or may not so proceed because the contempt was not direct. Plenary proceedings may not be held by a magistrate or clerk; they must always be held before a judge. The final sentence of subsection (a) responds to the constitutional requirement of *Bloom v. Illinois*, 391 U.S. 194 (1968), that contempt proceedings be held before another

judge when the one citing the contemnor was involved in the act in question. Subsection (f) permits the judge, in addition to using the prosecutor, who traditionally represents the court in contempt actions, to appoint another member of the Bar when there is a conflict of interest. The central example of this would be when the prosecutor himself or a law-enforcement officer with whom he worked closely was involved in the contempt.

§ 5A-16. Custody of person charged with criminal contempt. — (a) A judicial official may orally order that a person he is charging with direct criminal contempt be taken into custody and restrained to the extent necessary to assure his presence for summary proceedings or notice of plenary proceedings.

(b) If a judicial official who initiates plenary proceedings for contempt under G.S. 5A-15 finds, based on sworn statement or affidavit, probable cause to believe the person ordered to appear will not appear in response to the order, he may issue an order for arrest of the person, pursuant to G.S. 15A-305. A person arrested under this subsection is entitled to release under the provisions of Article 26, Bail, of Chapter 15A of the General Statutes. (1977, c. 711, s. 3.)

OFFICIAL COMMENTARY

The authority for taking custody of a person charged with contempt has been unclear. This section is aimed to fill that gap. Subsection (a) clarifies the legality of seizing a person charged with direct contempt and bringing him before the judge. Subsection (b) makes clear the

propriety of issuing an order for arrest of a person when the proceedings are not to be summary. A concurrent change in G.S. 15A-305, providing for the order for arrest, makes clear that an order may be used for this purpose.

§ 5A-17. Appeals. — A person found in criminal contempt may appeal in the manner provided for appeals in criminal actions, except appeal from a finding of contempt by a judicial official inferior to a superior court judge is by hearing de novo before a superior court judge. (1977, c. 711, s. 3.)

OFFICIAL COMMENTARY

This section rejects present law and permits appeal from all convictions for criminal contempt.

§§ 5A-18 to 5A-20: Reserved for future codification purposes.

ARTICLE 2.

Civil Contempt.

OFFICIAL COMMENTARY

The Commission felt that it was proper, once they had to deal with civil contempt in some respect as a consequence of severing it in Chapter 5 from the related criminal contempt

provisions, to resolve some of the uncertainties that surround the present civil contempt procedures.

§ 5A-21. Civil contempt; imprisonment to compel compliance. — (a) Failure to comply with an order of a court is a continuing civil contempt as long as:

- (1) The order remains in force;
- (2) The purpose of the order may still be served by compliance with the order; and
- (3) The person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable him to comply with the order.

(b) A judge may order a civil contemnor imprisoned as long as his civil contempt continues, unless the contempt is failure by a person not arrested for the crime to comply with a nontestimonial identification order issued pursuant to Article 14, Nontestimonial Identification Order, of Chapter 15A of the General Statutes. In that case, he may not be imprisoned more than 90 days unless he is arrested on probable cause.

(c) A person who is found in civil contempt under this Article may, nevertheless, for the same conduct, be found in criminal contempt under Article 1 of this Chapter, but the total period of imprisonment arising from the conduct may not exceed the greater of:

- (1) The period during which the contemnor may be imprisoned for civil contempt; or
- (2) The period of imprisonment provided in G.S. 5A-12(a). (1977, c. 711, s. 3.)

OFFICIAL COMMENTARY

This section is based on the Commission's recognition that civil contempt should be solely a matter of forcing the contemnor to comply with a court order and, unlike criminal contempt, is not a form of punishment. Subsections (a) and (b) make clear that civil contempt is appropriate only so long as the court order is capable of being complied with. The section rejects the approach of the present Chapter 5 specifying particular grounds for civil contempt. Instead, the only issue in determining whether imprisonment for civil contempt is proper is whether or not there is a court order which may be complied with. Subdivision (3) of subsection (a), by specifying that the contempt continues while the person is "able to take reasonable measures that would enable him to comply," is intended to make clear, for example, that the person who does not have the money to make court-ordered payments but who could take a job which would enable him to make those payments, remains in contempt by not taking such a job. In most cases, a person in civil contempt may be held for so long as his civil contempt continues; he holds the keys to his own jail by virtue of his ability to comply. The Commission felt, however, in the case of failure to comply with nontestimonial identification order by one who is only suspected of a crime, that this unlimited jailing would be improper. Therefore, unless probable cause for arrest

arises, the person subject to a nontestimonial identification order who remains noncompliant must be released after 90 days. Concurrent amendments to G.S. 15A-279 (the section dealing with nontestimonial identification orders) point out that resisting compliance with a nontestimonial identification order may be used in determining whether there is probable cause that the person subject to the order committed the crime in question. This means that in many cases the person who resists the order for the full 90 day period will become subject to arrest on probable cause, at which time the 90 day limitation will no longer apply. Another concurrent amendment to G.S. 15A-279 provides, however, that a nontestimonial identification order may not be reissued unless there is newly available evidence to support it. In subsection (c), the Commission was seeking to insure that a person could not serve a longer period of imprisonment by being found in both civil and criminal contempt for the same conduct than he could if he had been found to be in only civil or criminal contempt. An earlier draft of this subsection had specified that a finding of civil or criminal contempt did not preclude disciplinary proceedings if the contemnor were a member of the Bar. The Commission approved this policy but felt it more appropriate that it be mentioned in commentary rather than in the body of the section.

§ 5A-22. Release when civil contempt no longer continues. — (a) A person imprisoned for civil contempt must be released when his civil contempt no longer continues. The order of the court holding a person in civil contempt must specify how the person may purge himself of the contempt. Upon finding compliance with the specifications, the sheriff or other officer having custody may release the person without a further order from the court.

(b) On motion of the contemnor, the court must determine if he is subject to release and, on an affirmative determination, order his release. The motion must be directed to the judge who found civil contempt unless he is not available. Then the motion must be made to a judge of the same division in the same judicial district. The contemnor may also seek his release under other procedures available under the law of this State. (1977, c. 711, s. 3.)

OFFICIAL COMMENTARY

Subsection (a) makes clear that the person having custody of the civil contemnor may release him whenever the custodian is satisfied that the civil contempt no longer continues, without need of any court order for release or any other form of proceedings. This is intended to apply mainly to the situation in which compliance with the order calls for payment to the court. It was felt that this action was so clear that the custodian should be able to proceed on

his own. The possibility that a person will be released when a release was not proper was outweighed by the importance of seeing to it that a person did not remain jailed longer than was necessary. Subsection (b) establishes the machinery for a civil contemnor to seek his own release if he has complied or if compliance is no longer possible, but he has still not been released.

§ 5A-23. Proceedings for civil contempt. — (a) Proceedings for civil contempt are either by the order of a judicial official directing the alleged contemnor to appear at a specified reasonable time and show cause why he should not be held in civil contempt or by the notice of a judicial official that the alleged contemnor will be held in contempt unless he appears at a specified reasonable time and shows cause why he should not be held in contempt. The order or notice must be given at least five days in advance of the hearing unless good cause is shown. The order or notice may be issued on the motion and sworn statement or affidavit of one with an interest in enforcing the order, including a judge, and a finding by the judicial official of probable cause to believe there is civil contempt.

(b) Proceedings under this section are before a district court judge, unless a court superior to the district court issued the order in which case the proceedings are before that court. When the proceedings are before a superior court, venue is in the judicial district of the court which issued the order. Otherwise, venue is in the county where the order was issued.

(c) The person ordered to show cause may move to dismiss the order.

(d) The judge is the trier of facts at the show cause hearing.

(e) At the conclusion of the hearing, the judge must enter a finding for or against the alleged contemnor. If civil contempt is found, the judge must enter an order finding the facts constituting contempt and specifying the action which the contemnor must take to purge himself of the contempt.

(f) A person with an interest in enforcing the order may present the case for a finding of civil contempt for failure to comply with an order.

(g) A judge conducting a hearing to determine if a person is in civil contempt may at that hearing, upon making the required findings, find the person in criminal contempt for the same conduct, regardless of whether imprisonment for civil contempt is proper in the case. (1977, c. 711, s. 3.)

OFFICIAL COMMENTARY

Subsection (a) draws a distinction between an order to appear for a show of cause hearing and a notice that the show-cause hearing will be held. The Commission wanted to make clear the propriety of a person's not appearing if he was notified of the show-cause hearing rather than ordered to appear at it. Since the Commission felt that there were some instances in which the court would want the contemnor present regardless of his wishes, the order was left as an option. Application of subsection (b) results in magistrates and clerks being unable to hold

proceedings for civil contempt. The Commission particularly intended "a person with an interest" under subsection (f) to include the State, as represented by the district attorney, in a criminal case. Subsection (g) permits, in essence, consolidated hearings for civil and criminal contempt, thus permitting a judge who has begun a civil contempt hearing to continue and find the person in criminal contempt even though he is beyond the reach of civil contempt because of inability at that time to comply with the order.

§ 5A-24. Appeals. — A person found in civil contempt may appeal in the manner provided for appeals in civil actions. (1977, c. 711, s. 3.)

§ 5A-25. Proceedings as for contempt and civil contempt. — Whenever the laws of North Carolina call for proceedings as for contempt, the proceedings are those for civil contempt set out in this Article. (1977, c. 711, s. 3.)

OFFICIAL COMMENTARY

This section makes clear that all of the existing references to "as for contempt" in the General Statutes should be interpreted to call

for the procedures provided in this Article for civil contempt.

Chapter 6. Liability for Court Costs.

Article 1.

Generally.

Sec.

- 6-1. Items allowed as costs.
- 6-2. [Repealed.]
- 6-4. Execution for unpaid costs; bill of costs to be attached.
- 6-5, 6-6. [Repealed.]
- 6-7. Clerk to enter costs in case file.
- 6-8 to 6-12. [Repealed.]

Article 2.

When State Liable for Costs.

- 6-14. Civil action by and against State officers.
- 6-16. [Repealed.]
- 6-17. Costs of State on appeals to federal courts.

Article 3.

Civil Actions and Proceedings.

- 6-18. When costs allowed as of course to plaintiff.
- 6-21. Costs allowed either party or apportioned in discretion of court.
- 6-21.3. Remedies for returned check.
- 6-27. [Repealed.]

Article 4.

Costs on Appeal.

- 6-33. Costs on appeal generally.
- 6-34, 6-35. [Repealed.]

Article 5.

Liability of Counties in Criminal Actions.

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

Article 6.

Liability of Defendant in Criminal Actions.

Sec.

- 6-45, 6-46. [Repealed.]
- 6-47. Judgment confessed; bond given to secure fine and costs.
- 6-48. Arrest for nonpayment of fine and costs.

Article 7.

Liability of Prosecuting Witness for Costs.

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

Article 8.

Fees of Witnesses.

- 6-52. [Repealed.]
- 6-53. Witness to prove attendance; action for fees.
- 6-54 to 6-56. [Repealed.]
- 6-58, 6-59. [Repealed.]
- 6-60. No more than two witnesses may be subpoenaed to prove single material fact; liability for fees of such witnesses; one fee for day's attendance.
- 6-61. [Repealed.]
- 6-62. Solicitor to announce discharge of State's witnesses.
- 6-63. [Repealed.]

Article 9.

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

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

ARTICLE 1.

Generally.

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

Editor's Note. —

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

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, cert. denied, 283 N.C. 666, 197 S.E.2d 880 (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, cert. denied, 283 N.C. 666, 197 S.E.2d 880 (1973).

§ 6-21. Costs allowed either party or apportioned in discretion of court. — Costs in the following matters shall be taxed against either party, or apportioned among the parties, in the discretion of the court:

- (1) Application for year's support, for surviving spouse or children.
- (2) Caveats to wills and any action or proceeding which may require the construction of any will or trust agreement, or fix the rights and duties of parties thereunder; provided, however, that in any caveat proceeding under this subdivision, if the court finds that the proceeding is without

substantial merit, the court may disallow attorneys' fees for the attorneys for the caveators.

- (3) Habeas corpus; and the court shall direct what officer shall tax the costs thereof.
- (4) In actions for divorce or alimony; and the court may both before and after judgment make such order respecting the payment of such costs as may be incurred by either spouse from the sole and separate estate of either spouse, as may be just.
- (5) Application for the establishment, alteration or discontinuance of a public road, cartway or ferry. The board of county commissioners may order the costs incurred before them paid in their discretion.
- (6) The compensation of referees and commissioners to take depositions.
- (7) All costs and expenses incurred in special proceedings for the division or sale of either real estate or personal property under the Chapter entitled Partition.
- (8) In all proceedings under the Chapter entitled Drainage, except as therein otherwise provided.
- (9) In proceedings for reallocation of homestead for increase in value, as provided in the Chapter, Civil Procedure.
- (10) In proceedings regarding illegitimate children under Article 3, Chapter 49 of the General Statutes.

The word "costs" as the same appears and is used in this section shall be construed to include reasonable attorneys' fees in such amounts as the court shall in its discretion determine and allow: provided that attorneys' fees in actions for alimony shall not be included in the costs as provided herein, but shall be determined and provided for in accordance with G.S. 50-16.4. (Code, ss. 533, 1294, 1323, 1422, 1660, 2039, 2056, 2134, 2161; 1889, c. 37; 1893, c. 149, s. 6; Rev., s. 1268; C. S., s. 1244; 1937, c. 143; 1955, c. 1364; 1965, c. 633; 1967, c. 993, s. 2; c. 1152, s. 5; 1977, c. 576.)

Editor's Note. —

The 1977 amendment substituted "surviving spouse" for "widow" in subdivision (1) and "either spouse from the sole and separate estate of either spouse" for "the wife, either by the husband or by her from her separate estate" in subdivision (4).

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).

Caveats to Wills. —

Albeit subdivision (2) authorizes the trial judge in his discretion to award costs, including attorneys' fees, in the instances specified therein, it is quite clear (1) that he should not award costs and attorneys' fees to an executor-designate whose claim for appointment

is rejected unless the claim was reasonable, made in good faith and prima facie in the interest of the estate; and (2) that the judge has no discretion to tax costs against an estate when the nominated executor was disqualified to act as a matter of law. In *re Estate of Moore*, 292 N.C. 58, 231 S.E.2d 849 (1977).

When an executor's right to qualify is contested and judicially denied, whether the court will exercise its discretion to award costs, including attorney's fees, incurred in his unsuccessful litigation, will depend in each case upon the grounds for the opposition and the reasonableness of his resistance to it, his good faith in pressing his appointment and whether his efforts were in the interest of the estate. In *re Estate of Moore*, 292 N.C. 58, 231 S.E.2d 849 (1977).

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, cert. denied, 286 N.C. 723, 213 S.E.2d 721 (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, cert. denied, 286 N.C. 723, 213 S.E.2d 721 (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, cert. denied, 288 N.C. 240, 217 S.E.2d 664 (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, cert. denied, 286 N.C. 723, 213 S.E.2d 721 (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, cert. denied, 288 N.C. 240, 217 S.E.2d 664 (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, cert. denied, 288 N.C. 240, 217 S.E.2d 664 (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, cert. denied, 288 N.C. 240, 217 S.E.2d 664 (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 judgment 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, cert. denied, 288 N.C. 240, 217 S.E.2d 664 (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.

This section represents a far reaching exception to the well-established rule against attorney's fees obligations. *State Whsle. Supply, Inc. v. Allen*, 30 N.C. App. 272, 227 S.E.2d 120 (1976).

But this section only validates attorney's fees obligations in certain carefully defined instances and imposes a ceiling on the amount

of attorney's fees a party can obtain. *State Whsle. Supply, Inc. v. Allen*, 30 N.C. App. 272, 227 S.E.2d 120 (1976).

A rule of strict construction must be applied to this section. *Yeargin Constr. Co. v. Futren Dev. Corp.*, 29 N.C. App. 731, 225 S.E.2d 623, cert. denied, 290 N.C. 660, 228 S.E.2d 459 (1976).

Evidence of indebtedness within the meaning of this section signifies a written agreement or acknowledgment of debt, such as a promissory note or conditional sales contract, which is executed and signed by the party obligated under the terms of the instrument. *State Whsle. Supply, Inc. v. Allen*, 30 N.C. App. 272, 227 S.E.2d 120 (1976).

A "note" and "conditional sales contract" are the primary types of "evidence of indebtedness" contemplated by this section. *State Whsle. Supply, Inc. v. Allen*, 30 N.C. App. 272, 227 S.E.2d 120 (1976).

A formal credit agreement executed by the parties prior to the establishment of the open account would suffice as an evidence of indebtedness; and if such an agreement contains a provision for attorney's fees, it will be valid and enforceable pursuant to this section. *State Whsle. Supply, Inc. v. Allen*, 30 N.C. App. 272, 227 S.E.2d 120 (1976).

Sales receipt and three-day invoice containing provision for attorney's fees is not an "evidence of indebtedness" within the meaning of this section. *State Whsle. Supply, Inc. v. Allen*, 30 N.C. App. 272, 227 S.E.2d 120 (1976).

A paragraph of a construction contract providing for a 10 percent attorney's fee in the event of litigation was held not to be "other evidence of indebtedness" within the meaning of this section. *Yeargin Constr. Co. v. Futren Dev. Corp.*, 29 N.C. App. 731, 225 S.E.2d 623, cert. denied, 290 N.C. 660, 228 S.E.2d 459 (1976).

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).

This section contemplates liability on the part of endorsers of a note since it provides for the giving of notice to endorsers by the holder or his attorney that the provision for attorney's fees, in addition to the outstanding balance, shall be enforced. *Wachovia Bank & Trust Co. v. Peace Broadcasting Corp.*, 32 N.C. App. 655, 233 S.E.2d 687 (1977).

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, cert. denied, 286 N.C. 214, 209 S.E.2d 315 (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); *Phil Mechanic Constr. Co. v. Gibson*, 30 N.C. App. 385, 226 S.E.2d 837 (1976); *Nytco Leasing, Inc. v. Dan-Cleve Corp.*, 31 N.C. App. 634, 230 S.E.2d 559 (1976).

§ 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).

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 that 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), *aff'd*, 478 F.2d 694 (4th Cir. 1973).

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).

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 to 7-456: Transferred to §§ 7A-400 to 7A-408 by Session Laws 1971, c. 377, s. 1.1, effective October 1, 1971.

Chapter 7A.

Judicial Department.

SUBCHAPTER I. GENERAL COURT OF JUSTICE.

Article 1A.

[Reserved.]

Article 1B.

Age Limits for Service as Justice or Judge.

Sec.

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

7A-4.21. Validation of official actions of district court judges of twenty-fifth judicial district performed after mandatory retirement age.

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

Article 2.

Appellate Division Organization.

7A-6. Appellate division reporters; reports.

Article 3.

The Supreme Court.

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

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

7A-14. Reprints of Supreme Court Reports.

7A-15. [Reserved.]

Article 4.

Court of Appeals.

7A-16. Creation and organization.

Article 5.

Jurisdiction.

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

7A-28. [Repealed.]

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

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

7A-35. [Repealed.]

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

Sec.

Supreme Court and judges of the Court of Appeals.

7A-39.3. Retired justices and judges constituted emergency justices and judges subject to recall to active service; compensation.

7A-39.6. Notice to Governor of intention to retire; commission as emergency justice or emergency judge.

7A-39.12. Applicability of §§ 7A-39.2 and 7A-39.11.

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

Article 7.

Organization.

7A-40. Composition; judicial powers of clerk.

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

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

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

7A-44.1. Secretarial and clerical help.

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

7A-49.2. Civil business at criminal sessions; criminal business at civil sessions.

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.

7A-52. Retired judges constituted emergency judges subject to recall to active service; compensation for emergency judges on recall.

7A-53. Notice to Governor of intention to retire; commission as emergency judge.

7A-56. Applicability of §§ 7A-51 and 7A-55.

7A-57 to 7A-59. [Reserved.]

Article 9.

District Attorneys and Judicial Districts.

7A-60. District attorneys and prosecutorial districts.

7A-61. Duties of solicitor.

7A-63. Assistant solicitors.

Sec.

7A-66. Removal of district attorneys.

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.

7A-67. [Repealed.]

Sec.

7A-68. Administrative assistants.

7A-69. Investigatorial assistants.

Article 10.

7A-70 to 7A-94. [Reserved.]

Article 11.

Special Regulations.

7A-95. Reporting of trials.

7A-97 to 7A-99. [Reserved.]

Article 12.

Clerk of Superior Court.

7A-100. Election; term of office; oath; vacancy; office and office hours; appointment of acting clerk.

7A-101. Compensation.

7A-102. Assistant and deputy clerks; appointment; number; salaries; duties.

7A-102.1. Transfer of sick leave earned as county or municipal employees by certain employees in offices of clerks of superior court.

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

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

7A-105. Suspension, removal, and reinstatement of clerk.

7A-106. Custody of records and property of office.

7A-107. Bonds of clerks, assistant and deputy clerks, and employees of office.

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

7A-109. Record-keeping procedures.

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

7A-110. List of attorneys furnished to Secretary of Revenue.

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

7A-112. Investment of funds in clerk's hands.

7A-113 to 7A-129. [Reserved.]

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

Article 13.

Creation and Organization of the District Court Division.

Sec.

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

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

7A-134. [Repealed.]

Article 14.

District Judges.

7A-142. Vacancies in office.

7A-143. [Repealed.]

7A-145. [Repealed.]

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

7A-147. Specialized judgeships.

Article 15.

District Prosecutors.

7A-160 to 7A-165. [Repealed.]

Article 16.

Magistrates.

7A-170. Nature of office and oath.

7A-171. Numbers; appointment and terms; vacancies.

7A-171.1. Duty hours and salary.

7A-171.2. Qualifications for nomination or renomination.

7A-172. Minimum and maximum salaries.

7A-173. Suspension; removal; reinstatement.

7A-177. Training course in duties of magistrate.

7A-178, 7A-179. [Reserved.]

Article 17.

Clerical Functions in the District Court.

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

7A-181. Functions of assistant and deputy clerks of superior court in district court matters.

Article 18.

District Court Practice and Procedure Generally.

7A-194. [Repealed.]

GENERAL STATUTES OF NORTH CAROLINA

Article 19.

Small Claim Actions in District Court.

Sec.

- 7A-210. Small claim action defined.
- 7A-211.1. Actions to enforce motor vehicle mechanic and storage liens.
- 7A-213. Procedure for commencement of action; request for and notice of assignment.
- 7A-216. Form of complaint.
- 7A-217. Methods of subjecting person of defendant to jurisdiction.
- 7A-219. Certain counterclaims; cross claims; third-party claims not permissible.
- 7A-222. General trial practice and procedure.
- 7A-223. Practice and procedure in small claim actions for summary ejectment.
- 7A-227. Stay of execution on appeal.
- 7A-232. Forms.

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-246. Special proceedings; exception; guardianship and trust administration.
- 7A-247. Quo warranto.
- 7A-249. Corporate receiverships.
- 7A-250. Review of decisions of administrative agencies.
- 7A-252. [Repealed.]

Article 21.

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

- 7A-258. Motion to transfer.
- 7A-261. [Repealed.]

Article 22.

Jurisdiction of the Trial Divisions in Criminal Actions.

- 7A-271. Jurisdiction of superior court.
- 7A-273. Powers of magistrates in criminal actions.
- 7A-275. [Repealed.]

Article 22A.

Prohibited Orders.

- 7A-276.1. Court orders prohibiting publication or broadcast of reports of open

Sec.

court proceedings or reports of public records banned.

Article 23.

Jurisdiction and Procedure Applicable to Children.

- 7A-277. Purpose.
- 7A-278. Definitions.
- 7A-279. Juvenile jurisdiction.
- 7A-281. Petition.
- 7A-283. Service of summons and petition.
- 7A-284. Immediate custody of a child.
- 7A-285. Juvenile hearing.
- 7A-286. Disposition.
- 7A-286.1. Conditional release revocation hearings.
- 7A-287. Juvenile records; adjudication of delinquency not disqualification for public office nor deemed a criminal conviction.
- 7A-288. [Repealed.]
- 7A-289. Appeals; modification of order after affirmation.

Article 24.

Juvenile Services.

- 7A-289.1. Purpose.
- 7A-289.2. Definitions.
- 7A-289.3. Division of Juvenile Services.
- 7A-289.4. Duties and powers of Administrator.
- 7A-289.5. Duties and powers of chief court counselors.
- 7A-289.6. Duties and powers of court counselors.
- 7A-289.7. Intake authorized.
- 7A-289.8 to 7A-289.12. [Reserved.]

Article 24A.

Delinquency Prevention and Youth Services.

- 7A-289.13. Legislative intent.
- 7A-289.14. Duties of Secretary of Human Resources.
- 7A-289.15. Purchase of care or services from programs meeting State standards.
- 7A-289.16. County assessment of youth needs.
- 7A-289.17 to 7A-289.21. [Reserved.]

Article 24B.

Termination of Parental Rights.

- 7A-289.22. Legislative intent; construction of Article.
- 7A-289.23. Jurisdiction.
- 7A-289.24. Who may petition.
- 7A-289.25. Petition.
- 7A-289.26. Preliminary hearing; unknown parent.
- 7A-289.27. Issuance of summons.
- 7A-289.28. Failure of respondents to answer.

- Sec.
 7A-289.29. Answer of respondents.
 7A-289.30. Adjudicatory hearing on termination.
 7A-289.31. Disposition.
 7A-289.32. Grounds for terminating parental rights.
 7A-289.33. Effects of termination order.
 7A-289.34. Appeals; modification of order after affirmation.

Article 25.

Jurisdiction and Procedure in Criminal Appeals from District Courts.

- 7A-290. Appeals from district court in criminal cases; notice; appeal bond.

Article 26.

Additional Powers of District Court Judges and Magistrates.

- 7A-291. Additional powers of district court judges.
 7A-292. Additional powers of magistrates.

SUBCHAPTER VI. REVENUES AND EXPENSES OF THE JUDICIAL DEPARTMENT.

Article 27.

Expenses of the Judicial Department.

- 7A-300. Expenses paid from State funds.

Article 28.

Uniform Costs and Fees in the Trial Divisions.

- 7A-304. Costs in criminal actions.
 7A-305. Costs in civil actions.
 7A-305.1. Discovery, fee on filing verified petition.
 7A-306. Costs in special proceedings.
 7A-307. Costs in administration of estates.
 7A-308. Miscellaneous fees and commissions.
 7A-309. Magistrate's special fees.
 7A-311. Uniform civil process fees.
 7A-312. Uniform fees for jurors; meals.
 7A-313. Uniform jail fees.
 7A-314. Uniform fees for witnesses; experts; limit on number.
 7A-316. Payment of witness fees in criminal actions.
 7A-319. [Repealed.]

SUBCHAPTER VII. ADMINISTRATIVE MATTERS.

Article 29.

Administrative Office of the Courts.

- 7A-343. Duties of Director.
 7A-343.1. Distribution of copies of the appellate division reports.

- Sec.
 7A-344. Special duties of Director concerning representation of indigent persons.
 7A-346. Information to be furnished to Administrative Officer.
 7A-347 to 7A-374. [Reserved]

Article 30.

Judicial Standards Commission.

- 7A-375. Judicial Standards Commission.
 7A-376. Grounds for censure or removal.
 7A-377. Procedures; employment of executive secretary, special counsel or investigator.
 7A-378 to 7A-399. [Reserved.]

Article 31.

Judicial Council.

- 7A-400. Establishment and membership.
 7A-401. Terms of office.
 7A-402. Vacancy appointments.
 7A-403. Chairman of Council.
 7A-404. Meetings.
 7A-405. Duties of Council.
 7A-406. Annual report; submission of recommendations.
 7A-407. Compensation of members.
 7A-408. Executive secretary; stenographer or clerical assistant.

SUBCHAPTER VIII.

Articles 32 to 35.

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

SUBCHAPTER IX. REPRESENTATION OF INDIGENT PERSONS.

Article 36.

Entitlement of Indigent Persons Generally.

- 7A-451. Scope of entitlement.
 7A-452. Source of counsel; fees.
 7A-453. Duty of custodian of a possibly indigent person; determination of indigency.
 7A-457. Waiver of counsel; pleas of guilty.

Article 37.

The Public Defender.

- 7A-465. Public defender; defender districts; qualifications; compensation.
 7A-466. Selection of defender; term; removal.

SUBCHAPTER X. NORTH CAROLINA COURTS COMMISSION.

Article 40.

North Carolina Courts Commission.

- 7A-500 to 7A-505. [Repealed.]

§ 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 equally applicable to emergency justices and judges who have been commissioned under G.S. 7A-39.3(a) and G.S. 7A-52(a). (1971, c. 508, s. 1; c. 1194; 1973, c. 248; 1977, c. 736, s. 5.)

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).

The 1977 amendment substituted "equally applicable" for "inapplicable" and "have been commissioned under G.S. 7A-39.3(a) and G.S. 7A-52(a)" for "may continue to serve as provided in G.S. 7A-39.3 and G.S. 7A-52" in subsection (b).

§ 7A-4.21. Validation of official actions of district court judges of twenty-fifth judicial district performed after mandatory retirement age. — No official action performed by any judge of the twenty-fifth judicial district of the district court division of the General Court of Justice shall be declared

to be invalid by reason of the fact that the judge was beyond the mandatory retirement age set out in G.S. 7A-4.20 at the time of his performing any such act; provided this section shall only apply to those official actions performed prior to May 1, 1977. (1977, c. 389.)

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 superior court district attorney, to each superior court clerk, to each district court prosecutor, to each special counsel at regional psychiatric facilities, and, in such numbers 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; 1977, c. 721, s. 1.)

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).

The 1977 amendment, in subsection (c), substituted "to each superior court district attorney" for "to each public defender," added the language beginning "to each district court prosecutor" to the end, and deleted the former second sentence which read "He shall furnish two copies to each superior court solicitor, and as many copies as may be reasonably necessary to the Supreme Court library."

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.

Effective January 1, 1977, the number of judges is increased to 12; and the Governor, on or after July 1, 1977, shall make temporary appointments to the additional judgeships thus created. The appointees shall serve until January 1, 1979. Their successors shall be elected at the general election for members of the General Assembly in November, 1978, and shall take office on January 1, 1979, to serve the remainder of the unexpired term which began on January 1, 1977.

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; 1977, c. 1047.)

Editor's Note. —

The 1973 amendment added the last paragraph.

The 1977 amendment added the present fifth 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-25. Original jurisdiction of the Supreme Court.

Section Unconstitutional. — Even if the General Assembly did not intend to repeal this section by ratification of the 1971 revision of N.C. Const., Art. IV, this section is unconstitutional. *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976).

This section was rendered null and void when the electorate approved revised N.C. Const., Art. IV, which deleted the provision granting the Supreme Court original jurisdiction of claims against the State. *Smith v. State*, 289 N.C. 303, 212 S.E.2d 412 (1976).

Legislative Intent to Repeal. — It was the intent of the General Assembly that upon the

ratification of the 1971 revision of N.C. Const., Art. IV, this section be repealed, since the jurisdiction which this section purports to give to the Supreme Court exceeded that granted to it in revised Article IV of the State Constitution. *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976).

No Execution to Enforce Judgment Available from Supreme Court. — In the event a plaintiff is successful in establishing a claim for breach of contract against the State, he cannot obtain execution from the Supreme Court to enforce the judgment. *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976).

§ 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), cert. denied, 428 U.S. 909, 96 S. Ct. 3220, L. Ed. 2d (1976).

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), cert. denied, 428 U.S. 909, 96 S. Ct. 3220, L. Ed. 2d (1976).

Objections and Exceptions Necessary to Preserve Legal Questions on Appeal. — Jurisdiction of the Supreme Court on appeal is limited to questions of law or legal inference, which, ordinarily, must be presented by objections duly entered and exceptions duly taken to the rulings of the lower court. *State v. Hedrick*, 289 N.C. 232, 221 S.E.2d 350 (1976).

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, cert. denied, 279 N.C. 727, 184 S.E.2d 884 (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, cert. denied, 279 N.C. 727, 184 S.E.2d 884 (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), cert. denied, 428 U.S. 909, 96 S. Ct. 3220, L. Ed. 2d (1976).

§ 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.

(c) 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.

Amendment Effective July 1, 1978. — Session Laws 1977, c. 711, s. 4, effective July 1, 1978, will delete "or one entered in a post-conviction hearing under Article 22 of Chapter 15" from subsection (b).

Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article 85, 'Parole' shall not apply to persons sentenced before July 1, 1978."

Session Laws 1977, c. 711, s. 36, contains a severability clause.

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).

This section was not repealed or nullified by the enactment of Chapter 1A of the General Statutes prescribing the presently effective Rules of Civil Procedure. *Wachovia Realty Invs. v. Housing, Inc.*, 292 N.C. 93, 232 S.E.2d 667 (1977).

The General Assembly did not restrict the right of appeal provided by § 1-277 and subsection (d) of this section by engrafting Rule 54(b) requirements upon them. *Oestreicher v. American Nat'l Stores, Inc.*, 290 N.C. 118, 225 S.E.2d 797 (1976).

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).

When Interlocutory Order Appealable Generally. — Ordinarily, an appeal lies only from a final judgment, but an interlocutory order which will work injury if not corrected before final judgment is appealable. *Wachovia Realty Invs. v. Housing, Inc.*, 292 N.C. 93, 232 S.E.2d 667 (1977).

Ordinarily, an appeal from an interlocutory order will be dismissed as fragmentary and premature unless the order affects some substantial right and will work injury to appellant if not corrected before appeal from final judgment. *Wachovia Realty Invs. v. Housing, Inc.*, 292 N.C. 93, 232 S.E.2d 667 (1977).

Effect of Procedures for Staying Execution of Judgment. — The existence of the procedures under §§ 1-269, 1-289 and 1A-1, Rule 62, for staying execution on the judgment does not prevent the entry of the judgment from affecting a substantial right of the judgment debtor. *Wachovia Realty Invs. v. Housing, Inc.*, 292 N.C. 93, 232 S.E.2d 667 (1977).

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 Granting Summary Judgment. — The order granting summary judgment denies plaintiff a jury trial on the issue of its claim against the bank and, in effect, determines the claim in favor of the bank. Thus the order affects a substantial right and is appealable under § 1-277 and this section. *Nasco Equip. Co. v. Mason*, 291 N.C. 145, 229 S.E.2d 278 (1976).

Appeal from Contempt Order. — See *Willis v. Duke Power Co.*, 291 N.C. 19, 229 S.E.2d 191 (1976).

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); *State v. Bock*, 288 N.C. 145, 217 S.E.2d 513 (1975); *State v. Sanders*, 288 N.C. 285, 218 S.E.2d 352 (1975); *State v. McZorn*, 288 N.C. 417, 219 S.E.2d 201 (1975); *State v. Branch*, 288 N.C. 514, 220 S.E.2d 495 (1975); *State v. Miller*, 288 N.C. 582, 220 S.E.2d 326 (1975); *State v. Williams*, 288 N.C. 680, 220 S.E.2d 558 (1975); *State v. Hammonds*, 290 N.C. 1, 224 S.E.2d 595 (1976); *State v. Phifer*, 290 N.C. 203, 225 S.E.2d 786 (1976); *State v. McMorris*, 290 N.C. 286, 225 S.E.2d 553 (1976); *State v. Thompson*, 290 N.C. 431, 226 S.E.2d 487 (1976); *State v. Davis*, 290 N.C. 511, 227 S.E.2d 97 (1976); *State v. Hunter*, 290 N.C. 556, 227 S.E.2d 535 (1976); *State v. Cawthorne*, 290 N.C. 639, 227 S.E.2d 528 (1976); *State v. Harris*, 290 N.C. 718, 228 S.E.2d 424 (1976); *State v. Hicks*, 290 N.C. 767, 228 S.E.2d 252 (1976); *State v. Davis*, 291 N.C. 1, 229 S.E.2d 285 (1976); *State v. Monk*, 291 N.C. 37, 229 S.E.2d 163 (1976); *State v. Beaver*, 291 N.C. 137, 229 S.E.2d 179 (1976); *State v.*

Boykin, 291 N.C. 264, 229 S.E.2d 914 (1976); State v. Slade, 291 N.C. 275, 229 S.E.2d 921 (1976); State v. Cousin, 291 N.C. 413, 230 S.E.2d 518 (1976); State v. Miley, 291 N.C. 431, 230 S.E.2d 537 (1976); Bridges v. Bridges, 29 N.C. App. 209, 223 S.E.2d 845 (1976); State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977); State v. Britt, 291 N.C. 528, 231 S.E.2d 644 (1977); State v. Foddrell, 291 N.C. 546, 231 S.E.2d 618 (1977); State v. Locklear, 291 N.C. 598, 231 S.E.2d 256 (1977); State v. Jones, 291 N.C. 681, 231 S.E.2d 252 (1977); State v. Tilley, 292 N.C. 132, 233 S.E.2d 433 (1977); State v. Warren, 292 N.C. 235, 232 S.E.2d 419 (1977); State v. Stanfield, 292 N.C. 357, 233 S.E.2d 574 (1977); State v. Herndon, 292 N.C. 424, 233 S.E.2d 557 (1977); State v. Womble, 292 N.C. 455, 233 S.E.2d 454 (1977); State v. Jones, 292 N.C. 513, 234 S.E.2d 555 (1977); State v. Siler, 292 N.C. 543, 234 S.E.2d 733 (1977); State v. Willard, 292 N.C. 567, 234 S.E.2d 587 (1977); State v. Beeson, 292 N.C. 602, 234 S.E.2d 595 (1977).

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); State v. Carey, 288 N.C. 254, 218 S.E.2d 387 (1975); State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975); State v. Carter, 289 N.C. 35, 220 S.E.2d 313 (1975); State v. Bush, 289 N.C. 159, 221 S.E.2d 333 (1976); State v. Harrill, 289 N.C. 186, 221 S.E.2d 325 (1976); State v. Lester, 289 N.C. 239, 221 S.E.2d 268 (1976); State v. Sellers, 289 N.C. 268, 221 S.E.2d 264 (1976); State v. Alford, 289 N.C. 372, 222 S.E.2d 222 (1976); State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976); State v. McCall, 289 N.C. 512, 223 S.E.2d 303 (1976); State v. Biggs, 289 N.C. 522, 223 S.E.2d 371 (1976); State v. Warren, 289 N.C. 551, 223 S.E.2d 317 (1976).

§ 7A-28: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Editor's Note. — Session Laws 1977, c. 711, s. 34, provides: "All statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose."

Session Laws 1977, c. 711, s. 35, provides: "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 1977, c. 711, s. 36, contains a severability clause.

Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered

against him, except that the provisions of Article 85, 'Parole' shall not apply to persons sentenced before July 1, 1978."

For note entitled, "The North Carolina Post-Conviction Hearing Act: A Procedural Snare," see 55 N.C.L. Rev. 653 (1977).

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, rev'd on other grounds, 279 N.C. 212, 182 S.E.2d 563 (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, rev'd on other grounds, 279 N.C. 212, 182 S.E.2d 563 (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, appeal dismissed, 285 N.C. 759, 209 S.E.2d 282 (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 422 (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, 16 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 36 (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); 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. Lysterly, 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); Sink v. Easter, 288 N.C. 183, 217 S.E.2d 532 (1975); State v. McCotter, 288 N.C. 227, 217 S.E.2d 525 (1975); Williams v. Pilot Life Ins. Co., 288 N.C. 338, 218 S.E.2d 368 (1975); Canady v. Creech, 288 N.C. 354, 218 S.E.2d 383 (1975); Pruitt v. Williams, 288 N.C. 368, 218 S.E.2d 348 (1975); Caldwell v. Deese, 288 N.C. 375, 218 S.E.2d 379 (1975); Sauls v. Sauls, 288 N.C. 387, 218 S.E.2d 338 (1975); Adder v. Holman &

Moody, Inc., 288 N.C. 484, 219 S.E.2d 190 (1975); State v. Scott, 289 N.C. 712, 224 S.E.2d 185 (1976); State v. Rhodes, 290 N.C. 16, 224 S.E.2d 631 (1976); Cogdill v. Scates, 290 N.C. 31, 224 S.E.2d 604 (1976); State v. Wright, 290 N.C. 45, 224 S.E.2d 624 (1976); State v. Atwood, 290 N.C. 266, 225 S.E.2d 543 (1976); Watkins v. City of Wilmington, 290 N.C. 276, 225 S.E.2d 577 (1976); Rickenbaker v. Rickenbaker, 290 N.C. 373, 226 S.E.2d 347 (1976); Nantz v. Employment Security Comm'n, 290 N.C. 473, 226 S.E.2d 340 (1976); Crumpton v. Crumpton, 290 N.C. 651, 227 S.E.2d 587 (1976); Brock v. North Carolina Property Tax Comm'n, 290 N.C. 731, 228 S.E.2d 254 (1976); State v. Finney, 290 N.C. 755, 228 S.E.2d 433 (1976); State v. Asbury, 291 N.C. 164, 229 S.E.2d 175 (1976); State v. Sauls, 291 N.C. 253, 230 S.E.2d 390 (1976); State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976); State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 361, 230 S.E.2d 671 (1976); State v. Castor, 28 N.C. App. 336, 220 S.E.2d 819 (1976); Manganello v. PermaStone, Inc., 291 N.C. 666, 231 S.E.2d 678 (1977); State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Administrative Office, 292 N.C. 1, 231 S.E.2d 867 (1977); State v. McKenzie, 292 N.C. 170, 232 S.E.2d 424 (1977); Foremost Ins. Co. v. Ingram, 292 N.C. 244, 232 S.E.2d 414 (1977); State v. Thomas, 292 N.C. 251, 232 S.E.2d 411 (1977); State v. Best, 292 N.C. 294, 233 S.E.2d 544 (1977); State ex rel. Edmisten v. J.C. Penney Co., 292 N.C. 311, 233 S.E.2d 895 (1977); Gallimore v. Marilyn's Shoes, 292 N.C. 399, 233 S.E.2d 529 (1977); Thompson v. Wake County Bd. of Educ., 292 N.C. 406, 233 S.E.2d 538 (1977); Falls Sales Co. v. Board of Transp., 292 N.C. 437,

233 S.E.2d 569 (1977); Farmer v. Chaney, 292 N.C. 451, 233 S.E.2d 582 (1977); State v. Gainey, 292 N.C. 627, 234 S.E.2d 610 (1977).

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. 465, 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); Dantzie 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. 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); State v. Miller, 289 N.C. 1, 220 S.E.2d 572 (1975); Watson Seafood & Poultry Co. v. George W. Thomas, Inc., 289 N.C. 7, 220 S.E.2d 536 (1975); Clark v. Bodycombe, 289 N.C. 246, 221 S.E.2d 506 (1976); Pruitt v. Knight Publishing Co., 289 N.C. 254, 221 S.E.2d 355 (1976); Whitaker v. Earnhardt, 289 N.C. 260, 221 S.E.2d 316 (1976); Penland v. Green, 289 N.C. 281, 221 S.E.2d 365 (1976); State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 289 N.C. 286, 221 S.E.2d 322 (1976); Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976); Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976); State v. Greene, 289 N.C. 578, 223 S.E.2d 365 (1976); Tennessee-Carolina Transp., Inc. v. Strick Corp., 289 N.C. 587, 223 S.E.2d 346 (1976); State v. McFadden, 292 N.C. 609, 234 S.E.2d 742 (1977).

§ 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.

Amendment Effective July 1, 1978. —

Session Laws 1977, c. 711, s. 5, effective July 1, 1978, will delete "and except a cause involving review of post-conviction proceeding under Article 22, Chapter 15" from the first sentence of subsection (a).

Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article 85, 'Parole' shall not apply to persons sentenced before July 1, 1978."

Session Laws 1977, c. 711, s. 36, contains a severability clause.

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), cert. denied, 406 U.S. 974, 92 S. Ct. 2409, 32 L. Ed. 2d 674 (1972).

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), cert. denied, 406 U.S. 974, 92 S. Ct. 2409, 32 L. Ed. 2d 674 (1972).

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), rev'd on other grounds, 483 F.2d 650 (4th Cir. 1973), aff'd sub nom. *Ross v. Moffitt*, 417 U.S. 600, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974).

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 546 (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); Pritchett v. Clapp, 288 N.C. 329, 218 S.E.2d 406 (1975); State v. McZorn, 288 N.C. 417, 219 S.E.2d 201 (1975); State v. Branch, 288 N.C. 514, 220 S.E.2d 495 (1975); Taylor v. Johnston, 289 N.C. 690, 224 S.E.2d 567 (1976); State v. Scott, 289 N.C. 712, 224 S.E.2d 185 (1976); Cedar Creek Enterprises, Inc. v. State Dept. of Motor Vehicles, 290 N.C. 450, 226 S.E.2d 336 (1976); Shore v. Edmisten, 290 N.C. 628, 227 S.E.2d 553

(1976); Nasco Equip. Co. v. Mason, 291 N.C. 145, 229 S.E.2d 278 (1976); State v. Fair, 291 N.C. 171, 229 S.E.2d 189 (1976); State v. Boykin, 291 N.C. 264, 229 S.E.2d 914 (1976); State v. Smith, 291 N.C. 438, 230 S.E.2d 644 (1976); State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977); In re Arthur, 291 N.C. 640, 231 S.E.2d 614 (1977); Whitten v. Bob King's AMC/Jeep, Inc., 292 N.C. 84, 231 S.E.2d 891 (1977); State v. Tilley, 292 N.C. 132, 233 S.E.2d 433 (1977); State ex rel. Dorothea Dix Hosp. v. Davis, 292 N.C. 147, 232 S.E.2d 81 (1977); State v. Siler, 292 N.C. 543, 234 S.E.2d 733 (1977); State v. Willard, 292 N.C. 567, 234 S.E.2d 587 (1977); State v. McFadden, 292 N.C. 609, 234 S.E.2d 742 (1977).

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); State v. Carey, 288 N.C. 254, 218 S.E.2d 387 (1975); State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976); State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976); Tennessee-Carolina Transp., Inc. v. Strick Corp., 289 N.C. 587, 223 S.E.2d 346 (1976); In re Thomas, 290 N.C. 410, 226 S.E.2d 371 (1976).

§ 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); *State v. Strickland*, 290 N.C. 169, 225 S.E.2d 531 (1976); *In re Thomas*, 290 N.C. 410, 226 S.E.2d 371 (1976); *Crumpton v. Crumpton*, 290 N.C. 651, 227 S.E.2d 587 (1976).

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

Cited in *North Carolina Fire Ins. Rating Bureau v. Ingram*, 29 N.C. App. 338, 224 S.E.2d 229 (1976).

§ 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) Justices of the Supreme Court and judges of the Court of Appeals who have not reached the mandatory retirement age specified in G.S. 7A-4.20(a) but have retired (i) under the provisions of either G.S. 7A-39.2(a) or 7A-39.2(b); or (ii) under the Uniform

Judicial Retirement Act after having completed 15 years of creditable service and after having attained the age of 65, are hereby constituted emergency justices and emergency judges of the court from which they retired, and shall be subject to temporary recall to active service on that court in the place of any justice of the Supreme Court or judge of the Court of Appeals, respectively, who is temporarily incapacitated to the extent that he cannot perform efficiently and promptly all the duties of his office.

(b) In addition to the compensation 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; 1977, c. 736, s. 1.)

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).

The 1977 amendment rewrote subsection (a).

§ 7A-39.6. Notice to Governor of intention to retire; commission as emergency justice or emergency judge. — Any justice of the Supreme Court or judge of the Court of Appeals who is eligible and desires to retire and is qualified to become an emergency justice or judge shall notify the Governor in writing of his intention to do so, including in the notice the facts which entitle him to retire. Upon receipt of such notice, the Governor shall issue to any such judge or justice qualified to receive it a commission as an emergency justice or judge. The commission shall be effective upon the date of his retirement and shall terminate when he reaches the maximum age for judicial service specified in G.S. 7A-4.20. Any commission for life heretofore issued to an emergency judge who has reached the maximum age for judicial service as specified in G.S. 7A-4.20, which became effective January 1, 1973, is hereby declared invalid. (1967, c. 108, s. 1; 1977, c. 736, s. 2.)

Editor's Note. — The 1977 amendment substituted "eligible and desires to retire and is qualified to become an emergency justice or judge" for "qualified and who desires to retire under the provisions of § 7A-39.2" in the first sentence, inserted "to any such judge or justice qualified to receive it" in the second sentence,

deleted "as appropriate, to the applicant, effective upon the date of his retirement" from the end of the second sentence, rewrote the third sentence, which formerly read "The commission shall be effective for life," and added the fourth sentence.

§ 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 [32] 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	2	7
	4	Duplin, Jones, Onslow, Sampson	2	7
	5	New Hanover, Pender	2	6
	6	Bertie, Halifax, Hertford, Northampton	1	3
	7	Edgecombe, Nash, Wilson	2	4
	8	Greene, Lenoir, Wayne	2	6
	9	Franklin, Granville, Person, Vance, Warren	1	3
Second	10	Wake	4	12
	11	Harnett, Johnston, Lee	1	4
	12	Cumberland, Hoke	3	9
	13	Bladen, Brunswick, Columbus	1	3
	14	Durham	3	6

Judicial Division	Judicial District	Counties	No. of Resident Judges	No. of Full-Time Asst. District Attorneys
Third	15A	Alamance	1	3
	15B	Orange Chatham	1	2
	16	Robeson, Scotland	1	5
	17	Caswell, Rockingham, Stokes, Surry	1	4
	18	Guilford	3	10
	19	Cabarrus, Montgomery, Ran- dolph, Rowan	3	7
	20	Anson, Moore, Richmond, Stanly, Union	2	7
	21	Forsyth	2	8
	22	Alexander, Davidson, Davie, Iredell	2	5
	23	Alleghany, Ashe, Wilkes, Yadkin	1	2
Fourth	24	Avery, Madison, Mitchell, Watauga, Yancey	1	2
	25	Burke, Caldwell, Catawba	2	6
	26	Mecklenburg	5	15
	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	3

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; 1975, 2nd Sess., c. 983, s. 114; 1977, c. 1119, ss. 1, 3, 4; c. 1130, 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.

The 1975, 2nd Sess., amendment, effective July 1, 1976, increased the number of full-time assistant district attorneys in the fourth, ninth and thirtieth judicial districts.

The first 1977 amendment, effective July 1, 1977, increased the number of resident superior court judges in the third, fourth, eighth, tenth, twelfth, fourteenth, nineteenth, twentieth, twenty-second, and twenty-sixth judicial districts, increased the number of assistant district attorneys for the third, fourth, fifth, eighth, tenth, twelfth, thirteenth, fourteenth, sixteenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth and twenty-seventh-A judicial districts, and changed the figure designating the number of resident judges in the fifth judicial district from "1" to "2" in order to reflect the additional judge provided by Session Laws 1969, c. 1171.

The second 1977 amendment, effective July 15, 1977, substituted the listings for the fifteenth-A and fifteenth-B judicial districts for a listing for the fifteenth judicial district.

Session Laws 1977, c. 1119, s. 2, effective July 1, 1977, provides: "The additional judges authorized in section 1 of this act shall be appointed by the Governor and shall take office on July 1, 1977. The successors of the Governor's appointees shall be chosen in the manner prescribed by law for other resident superior court judges in the general election of 1978 to serve for the unexpired portion of the term of eight years which began as of January 1, 1977, and their successors shall be chosen thereafter in the manner and serve for terms as prescribed for other resident superior court judges."

Amendment Effective Jan. 1, 1979. — Session Laws 1977, c. 1130, s. 2, effective Jan. 1, 1979, will substitute for the listing for the twenty-seventh judicial district the following:

		No. of Resident Judges	No. of fulltime Asst. District Attorneys	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).
Judicial District	Counties			
27A	Gaston	2	5	
27B	Cleveland Lincoln	1	3"	

§§ 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; 1975, 2nd Sess., c. 983, s. 13; 1977, c. 802, s. 41.1.)

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.

The 1975, 2nd Sess., amendment, effective July 1, 1976, added a second paragraph, which provided for an additional allowance of \$1,500 to superior court judges under certain conditions.

The 1977 amendment, effective July 1, 1977, deleted the former second paragraph, which provided for an additional allowance to superior court judges under certain conditions.

Session Laws 1977, c. 802, s. 53, contains a severability clause.

§ 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.

Applied in *Taylor v. Triangle Porsche-Audi, Inc.*, 27 N.C. App. 711, 220 S.E.2d 806 (1975).

§ 7A-47.1. Jurisdiction in vacation or in session.

Applied in *Towne v. Cope*, 32 N.C. App. 660, 233 S.E.2d 624 (1977).

§ 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, cert. denied, 283 N.C. 665, 197 S.E.2d 874 (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.

Prosecutor Controls Calendar. — Under North Carolina practice, sanctioned by this section, the prosecutor controls the criminal calendar and decides when to set cases for trial. *Shirley v. North Carolina*, 528 F.2d 819 (4th Cir. 1975).

Prosecutor'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).

No Defense Subpoenas until Case Calendared. — Until the prosecutor files his calendar, criminal defendants are unable to subpoena witnesses, for this section requires defense subpoenas to state the date of trial, a detail which, of course, cannot be known until the case is calendared. *Shirley v. North Carolina*, 528 F.2d 819 (4th Cir. 1975).

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 have not reached the mandatory retirement age specified in G.S. 7A-4.20, but have retired under the provisions of either G.S. 7A-51(a) or 7A-51(b); or under the Uniform Judicial Retirement Act after having completed 15 years of creditable service and after having attained the age of 65, are hereby constituted emergency judges of the superior court. 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; 1977, c. 736, s. 3.)

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).

The 1977 amendment rewrote the first sentence of subsection (a).

§ 7A-53. Notice to Governor of intention to retire; commission as emergency judge. — Any judge of the superior court who is eligible and desires to retire and is qualified to become an emergency judge shall notify the Governor in writing of his intention to do so, including in the notice the facts which entitle him to retire. Upon receipt of the notice, the Governor shall issue to any such judge qualified to receive it a commission as an emergency judge. The commission shall be effective upon the date of his retirement and shall terminate when he reaches the maximum age for judicial service specified in G.S. 7A-4.20. Any commission for life heretofore issued to an emergency judge who has reached the maximum age for judicial service as specified in G.S. 7A-4.20, which became effective January 1, 1973, is hereby revoked. (1967, c. 108, s. 2; 1977, c. 736, s. 4.)

Editor's Note. — The 1977 amendment substituted "is eligible and desires to retire and is qualified to become an emergency judge" for "qualified and who desires to retire under the provisions of § 7A-51" in the first sentence, substituted "the notice" for "such notice" in the second sentence, inserted "to any such judge qualified to receive it" and "an" preceding

"emergency judge" in the second sentence, deleted "to the applicant, effective upon the date of his retirement" from the end of the second sentence, rewrote the third sentence, which formerly read "The commission shall be effective for life," and added the fourth sentence.

§ 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.

Effective July 15, 1977, the fifteenth prosecutorial district is divided into two prosecutorial districts, to be known as Prosecutorial Districts 15A and 15B. District 15A shall consist of Alamance County, and District 15B shall consist of Orange and Chatham Counties. The current district attorney of the fifteenth prosecutorial district shall become the district attorney for Prosecutorial District 15A, and the Governor shall appoint a district attorney for Prosecutorial District 15B. The appointee shall serve until January 1, 1979, and his successor shall be chosen in the general election of November 1978, to serve a four-year term beginning January 1, 1979. (1967, c. 1049, s. 1; 1975, c. 956, s. 4; 1977, c. 1130, s. 3.)

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

The 1977 amendment, effective July 15, 1977, added the second paragraph of subsection (b).

§ 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 incipency. State v. Page, 22 N.C. App. 435, 206 S.E.2d 771, appeal dismissed, 285 N.C. 763, 209 S.E.2d 287 (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, appeal dismissed, 285 N.C. 763, 209 S.E.2d 287 (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, appeal dismissed, 285 N.C. 763, 209 S.E.2d 287 (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, appeal dismissed, 285 N.C. 763, 209 S.E.2d 287 (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, cert. denied, 281 N.C. 622, 190 S.E.2d 471 (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, cert. denied, 288 N.C. 250, 217 S.E.2d 674 (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 district attorney 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 30 days either review and act on the charges or refer them for review and action within 30 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 the superior court judge finds that the charges if true do not constitute grounds for suspension or finds that no probable cause exists for believing that the charges are true, he shall dismiss the proceeding.

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. 47, s. 2; c. 148, s. 1; 1977, c. 21, ss. 1, 2.)

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

The 1977 amendment substituted "30 days" for "15 days" in two places in the second sentence of the second paragraph and added the last sentence of the second paragraph.

Pursuant to Session Laws 1973, c. 47, s. 2, "district attorney" has been substituted for "solicitor" in the first sentence of the second paragraph.

§ 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 third, fourth, seventh, tenth, eleventh, twelfth, fourteenth, fifteenth-A, sixteenth, eighteenth, twentieth, twenty-first, twenty-fifth, twenty-sixth, twenty-seventh, twenty-eighth, twenty-ninth and thirtieth 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; 1977, c. 969, s. 1.)

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

The 1977 amendment, effective July 1, 1977, inserted the references to the third, fourth, seventh, eleventh, fifteenth-A, sixteenth, twenty-fifth, twenty-ninth and thirtieth judicial districts in the first sentence.

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).
Stated in North Carolina Ass'n for Retarded Children v. State, 420 F. Supp. 451 (M.D.N.C. 1976).

§§ 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	\$ 11,798
10,000 to 19,999	14,904
20,000 to 49,999	17,700
50,000 to 99,999	20,244
100,000 to 199,000 [199,999]	23,196
200,000 and above	28,130

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; 1975, 2nd Sess., c. 983, s. 11; 1977, c. 802, s. 42.)

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 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.

The 1975, 2nd Sess., amendment, effective July 1, 1976, increased all salaries in the schedule. The amendment also, apparently through inadvertence, substituted "199,000" for "199,999" in the next-to-last line of the schedule.

The 1977 amendment, effective July 1, 1977, increased all salaries in the schedule. The 1977 amendatory act, apparently through inadvertence, retained the figure "199,000" instead of "199,999" in the next-to-last line of the schedule.

Session Laws 1977, c. 802, s. 53, contains a severability clause.

§ 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).

Session Laws 1975, 2nd Sess., c. 983, s. 113, effective July 1, 1976, makes an appropriation to provide for 155 new deputy clerks of court. The new positions are allocated to the clerks of the superior courts in the numbers and to the counties as follows:

Alamance	2
Alexander	1
Anson	1
Ashe	1
Avery	1
Beaufort	1
Bertie	1
Bladen	2
Brunswick	1
Buncombe	3
Burke	2
Cabarrus	2
Caldwell	2
Camden	1
Carteret	2
Caswell	1
Catawba	3
Chatham	1
Cherokee	1
Chowan	1
Cleveland	2
Columbus	2
Craven	2
Cumberland	3
Currituck	1
Dare	1
Davidson	2
Davie	1
Duplin	1
Durham	3
Edgecombe	2
Forsyth	4
Franklin	1
Gaston	3
Gates	1
Graham	1
Granville	1
Greene	1
Guilford	4
Halifax	2
Harnett	1
Haywood	2
Henderson	1
Hertford	1

Hoke	1
Hyde	1
Iredell	2
Jackson	1
Johnston	2
Jones	1
Lee	1
Lenoir	2
Lincoln	1
Macon	1
Madison	1
Martin	1
McDowell	1
Mecklenburg	4
Mitchell	1
Montgomery	1
Moore	1
Nash	2
New Hanover	2
Northampton	1
Onslow	3
Orange	2
Pamlico	1
Pasquotank	1
Pender	1
Perquimans	1
Person	1
Pitt	3
Polk	1
Randolph	2
Richmond	1
Robeson	3
Rockingham	2
Rowan	2
Rutherford	1
Sampson	2
Scotland	1
Stanly	2
Stokes	1
Surry	2
Transylvania	1
Tyrrell	1
Union	2
Vance	1
Wake	4
Warren	1
Washington	1
Watauga	2
Wayne	3
Wilkes	2
Wilson	2
Yadkin	1

Quoted in Ridge Community Investors, Inc. v. Berry, 32 N.C. App. 642, 234 S.E.2d 6 (1977).

§ 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 clerk or the clerk's spouse 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 clerk or the clerk's spouse 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; 1977, c. 546.)

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.

The 1977 amendment substituted "clerk or the clerk's spouse" for "he or his wife" near the beginning of subdivisions (3) and (4) of subsection (a).

§ 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 *Kelly v. Davenport*, 7 N.C. App. 670, 173 S.E.2d 600 (1970); *State v. Barker*, 8 N.C.

App. 311, 174 S.E.2d 88 (1970); *Bryant v. Kelly*, 279 N.C. 123, 181 S.E.2d 438 (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); *In re Estate of Adamee*, 291 N.C. 386, 230 S.E.2d 541 (1976).

§ 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.-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	5	7	
		Beaufort	4	5	
		Tyrrell	1	2	
		Hyde	2	3	
3	5	Washington	3	4	
		Craven	7	9	
		Pitt	10	12	Farmville Ayden
		Pamlico	2	3	
4	4	Carteret	5	8	
		Sampson	6	8	
		Duplin	9	10	
		Jones	2	3	
		Onslow	8	10	
5	3	New Hanover	6	9	
		Pender	4	6	
6	3	Northampton	5	6	
		Halifax	9	13	Roanoke Rapids, Scotland Neck
7	4	Bertie	4	5	
		Hertford	5	6	
		Nash	7	10	Rocky Mount
		Edgecombe	4	6	Rocky Mount
		Wilson	4	6	
8	5	Wayne	5	7	Mount Olive
		Greene	2	4	
		Lenoir	4	7	La Grange
9	4	Person	3	4	
		Granville	3	5	
		Vance	3	4	
		Warren	3	4	
10	6	Franklin	3	5	
		Wake	12	16	Apex Wendell Fuquay-Varina
11	4	Harnett	7	10	Dunn
		Johnston	10	12	Benson and Selma
		Lee	4	6	

District	Judges	County	Magistrates Min.-Max.		Additional Seats of Courts
12	5	Cumberland	10	15	
		Hoke	4	5	
13	3	Bladen	4	6	
		Brunswick		6	
		Columbus	6	8	Tabor City
14	3	Durham	8	10	
15A	3	Alamance	7	9	Burlington
15B	2	Orange	4	8	Chapel Hill
		Chatham	3	6	Siler City
16	4	Robeson	8	14	Fairmont
					Maxton
					Pembroke
					Red Springs
					Rowland
					St. Pauls
		Scotland	2	3	
17	4	Caswell	2	4	
		Rockingham	4	8	Reidsville
					Eden
					Madison
		Stokes	2	3	
		Surry	4	7	Mt. Airy
18	8	Guilford	20	25	High Point
19	5	Cabarrus	5	8	Kannapolis
		Montgomery	2	3	
		Randolph	5	8	Liberty
		Rowan	5	9	
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	7	10	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	5	6	
		Yancey	2	3	
25	5	Burke	4	6	
		Caldwell	4	7	
		Catawba	6	9	Hickory
26	8	Mecklenburg	15	25	
27	5	Cleveland	5	8	
		Gaston	10	18	
		Lincoln	3	5	

District	Judges	County	Magistrates Min.-Max.		Additional Seats of Court
28	4	Buncombe	6	12	
29	3	Henderson	4	6	
		McDowell	3	4	
		Polk	3	4	
		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, ss. 8, 10; 1977, cc. 121, 122; c. 678, s. 2; c. 947, s. 1; c. 1130, s. 4.)

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.

The 1975 amendment increased by one the total number of judges in districts 3, 9, 16, 18 and 30, effective Dec. 6, 1976, and increased the quotas of magistrates in Carteret, Harnett, Chatham, Orange, Randolph, Moore, Davidson, Iredell, Caldwell, Buncombe, Cherokee, Haywood, Jackson and Macon Counties, effective July 1, 1975.

The first 1977 amendment, effective July 1, 1977, designated La Grange as an additional seat of court for the eighth district.

The second 1977 amendment, effective July 1, 1977, designated Pembroke as an additional seat of court for the sixteenth district.

The third 1977 amendment deleted "Shallotte" from the list of additional seats of court opposite Brunswick County in the thirteenth district.

The fourth 1977 amendment, effective July 1, 1977, increased the quotas of magistrates in Martin, Craven, Pitt, Carteret, Sampson, Halifax, Lee, Hoke, Durham, Guilford, Cabarrus, Randolph, Rowan, Davidson, Watauga, and Polk Counties and increased the maximum number of magistrates in Greene, Robeson, and Surry Counties.

The fifth 1977 amendment, effective July 15, 1977, substituted the listings for the fifteenth-A and fifteenth-B judicial districts for a listing for the fifteenth judicial district.

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."

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."

Session Laws 1977, c. 678, s. 2, provides, in part: "It is the intent of this section to authorize that the new county seat of Brunswick County shall be the sole seat of court for the superior and district courts of Brunswick County."

Session Laws 1977, c. 1130, s. 4, effective July 15, 1977, provides, in part: "The additional district court judge authorized by this act for district fifteen-A shall be appointed by the Governor to serve until the first Monday in December 1980. The appointee's successor shall be chosen in a general election of November 1980 to serve a four-year term beginning the first Monday in December 1980."

Amendment Effective Jan. 1, 1979. — Session Laws 1977, c. 1130, s. 5, effective Jan. 1, 1979, will substitute for the listing for the twenty-seventh district the following:

District	Judges	County
27A	4	Gaston
27B	2	Cleveland Lincoln

Session Laws 1977, c. 1130, s. 5, effective Jan. 1, 1979, provides, in part: "The additional district court judge authorized by this act for district 27B shall be appointed by the Governor to serve until the first Monday in December 1980. The appointee's successor shall be chosen in the general election of November 1980, to serve a four-year term beginning the first Monday in December 1980."

§ 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); *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 consistent with the salaries set by the Administrative Officer of the Courts, prescribing times and places at which magistrates shall be available for the performance of their duties; however, the chief district judge may in writing delegate his authority to prescribe times and places at which magistrates in a particular county shall be available for the performance of their duties to an employee of the General Court of Justice within that particular county, and the person to whom such authority is delegated shall make monthly reports to the chief district judge of the times and places actually served by each magistrate; and
- (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 during an emergency to temporary duty outside the county of their residence but within that district; and, upon the request of a chief district judge of an adjoining district and upon the approval of the Administrative Officer of the Courts, to temporary duty in the district of the requesting chief district judge; 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; 1977, c. 945, s. 1.)

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

The 1977 amendment, effective July 1, 1977, inserted "consistent with the salaries set by the Administrative Officer of the Courts" in subdivision (4), added the language beginning "however, the chief district judge" to the end of subdivision (4), substituted "during" for "in" and "that district" for "the district" in subdivision (9), and added the language beginning "upon the request of a chief district judge" to the end of subdivision (9).

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).

Cited in *Sauls v. Sauls*, 288 N.C. 387, 218 S.E.2d 338 (1975).

§ 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 and oath. — A magistrate is an officer of the district court. Before entering upon the duties of his office, a magistrate shall take the oath of office prescribed for a magistrate of the General Court of Justice. A magistrate possesses all the powers of his office at all times during his term. (1965, c. 310, s. 1; 1969, c. 1190, s. 13; 1977, c. 945, s. 2.)

Editor's Note. —

The 1977 amendment, effective July 1, 1977, deleted "The times and places at which each magistrate is required to maintain regular office and court hours and to be otherwise available for the performance of his duties is prescribed by the chief district judge of the district in which he is resident, but" from the beginning of the third sentence.

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, cert. denied, 285 N.C. 589, 205 S.E.2d 722 (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, cert. denied, 285 N.C. 589, 205 S.E.2d 722 (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; appointment and terms; vacancies. — (a) The General Assembly shall establish a minimum and a maximum quota of magistrates for each county. In no county shall the minimum quota be less than one.

(b) Not earlier than the Tuesday after the first Monday nor later than the third Monday in December of each even-numbered year, the clerk of the 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. Not later than the fourth Monday in December, the senior regular resident superior court judge shall, from the nominations submitted by the clerk of the superior court, appoint magistrates to fill the minimum quota established for each county of his district. 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; 1977, c. 945, s. 3.)

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).

The 1977 amendment, effective July 1, 1977, deleted the former third sentence of subsection (a), which read "A magistrate shall be a resident of the county for which appointed," and in subsection (b), deleted the former first and second sentences, which related to the salaries of magistrates, substituted "Not earlier than the Tuesday after the first Monday nor later than the third Monday" for "Not later than the second Monday" at the beginning, inserted "the" preceding "superior court shall," and deleted "specifying as to each nominee the salary level for which nominated" from the end, all in the present first sentence, and deleted "such appointments to be at the various salary levels prescribed by the Administrative Officer of the Courts" from the end of the present second sentence.

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

Amendment Effective Sept. 1, 1978. — Session Laws 1977, c. 945, s. 4, effective Sept. 1, 1978, will amend subsections (c) and (d) to read as follows:

"(c) After the biennial appointment of the minimum quota of magistrates, additional magistrates in a number not to exceed, in total, the maximum quota established for each county may be appointed in the following manner. The chief district judge, with the approval of the Administrative Officer of the Courts, may

certify to the clerk of superior court that the minimum quota is insufficient for the efficient administration of justice and that a specified additional number, not to exceed the maximum quota established for the county, is required. Within 15 days after the receipt of this certification 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 additional magisterial office. Within 15 days after receipt of the nominations the senior regular resident superior court judge shall from the nominations submitted appoint magistrates in the number specified in the certification. A magistrate so appointed shall serve a term commencing immediately and expiring on the same day as the terms of office of magistrates appointed to fill the minimum quota for the county.

"(d) Within 30 days after a vacancy in the office of magistrate occurs the clerk of superior court shall submit to the senior regular resident superior court judge the names of two (or more, if so requested by the judge) nominees for the office vacated. Within 15 days after receipt of the nominations the senior regular resident superior court judge shall appoint from the nominations received a magistrate who shall take office immediately and shall serve for the remainder of the unexpired term."

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. 187 (1970).

§ 7A-171.1. Duty hours and salary. — The Administrative Officer of the Courts, after consultation with the chief district judge and pursuant to the following provisions, shall set an annual salary for each magistrate.

- (1) A full-time magistrate, so designated by the Administrative Officer of the Courts, shall be paid the annual salary indicated in the table below according to the number of years he has served as a magistrate prior to the beginning of that term:

Table of Salaries of Full-Time Magistrates

<i>Number of prior years of service</i>	<i>Annual salary</i>
Less than 1	\$ 8,172
1 or more but less than 3	8,892
3 or more but less than 5	9,720
5 or more but less than 7	10,596
7 or more but less than 9	11,580
9 or more	12,672

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

Notwithstanding any other provision of this subdivision, a full-time magistrate, who was serving as a magistrate on December 31, 1978,

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

- (2) A part-time magistrate, so designated by the Administrative Officer of the Courts, shall receive an annual salary based on the following formula: The average number of hours a week that a part-time magistrate is assigned work during his term shall be multiplied by the annual salary payable to a full-time magistrate who has the same number of years of service prior to the beginning of that term as does the part-time magistrate and the product of that multiplication shall be divided by the number 40. The quotient shall be the annual salary payable to that part-time magistrate.

A "part-time magistrate" is a magistrate who is assigned to work an average of less than 40 hours of work a week during his term. No magistrate may be assigned an average of less than 10 hours of work a week during his term.

Notwithstanding any other provision of this subdivision, upon reappointment as a magistrate and being assigned to work the same or greater number of hours as he worked as a magistrate for a term of office ending on December 31, 1978, a person who received an annual salary in excess of that to which he would be entitled under the formula contained in this subdivision shall receive an annual salary equal to that received during the prior term. That magistrate's salary shall increase in accordance with the salary formula contained in this subdivision. (1977, c. 945, s. 5.)

Editor's Note. — Session Laws 1977, c. 945, s. 8, provides, in part: "Sections 4 and 5 of this act shall become effective on September 1, 1978; however, salaries of magistrates serving on that date shall remain the same during the remainder of that term of office, and the salaries of

magistrates appointed to serve between September 1, 1978, and December 31, 1978, shall be set in accordance with the statutes in existence prior to the date of effectiveness of these sections."

§ 7A-171.2. Qualifications for nomination or renomination. — (a) In order to be eligible for nomination or for renomination as a magistrate an individual must be a resident of the county for which he is appointed.

(b) To be eligible for nomination as a magistrate, an individual must have successfully completed a high school education, or have qualified for a certificate of high school equivalency, or have successfully completed the course of basic training prescribed by G.S. 7A-177.

(c) In order to be eligible for renomination as a magistrate an individual must have successfully completed the course of basic training for magistrates prescribed by G.S. 7A-177.

(d) Notwithstanding any other provision of this subsection, an individual who holds the office of magistrate on July 1, 1977, shall not be required to have successfully completed the course of basic training for magistrates prescribed by G.S. 7A-177 in order to be eligible for renomination as a magistrate. (1977, c. 945, s. 6.)

Editor's Note. — Session Laws 1977, c. 945, s. 8, makes this section effective July 1, 1977.

§ 7A-172. Minimum and maximum salaries. — Magistrates shall receive not less than one thousand two hundred dollars (\$1,200) and not more than eleven thousand four hundred seventy-six dollars (\$11,476) per year. (1965, c. 310, s. 1; 1969, c. 1186, s. 6; 1971, c. 877, s. 3; 1973, c. 571, s. 3; c. 1236; 1975, 2nd Sess., c. 983, s. 12; 1977, c. 802, s. 41.3.)

Cross Reference. — As to salaries of magistrates, see § 7A-171.1.

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)."

The 1975, 2nd Sess., amendment, effective July 1, 1976, substituted "ten thousand seven hundred seventy-six dollars (\$10,776)" for "ten thousand seventy-four dollars (\$10,074)."

The 1977 amendment, effective July 1, 1977, substituted "eleven thousand four hundred seventy-six dollars (\$11,476)" for "ten thousand seven hundred seventy-six dollars (\$10,776)."

Session Laws 1977, c. 802, s. 53, contains a severability clause.

Repeal of Section. — This section is repealed by Session Laws 1977, c. 945, s. 5, effective Sept. 1, 1978.

Session Laws 1977, c. 945, s. 8, provides, in part: "Sections 4 and 5 of this act shall become effective on September 1, 1978; however, salaries of magistrates serving on that date shall remain the same during the remainder of that term of office, and the salaries of magistrates appointed to serve between September 1, 1978, and December 31, 1978, shall be set in accordance with the statutes in existence prior to the date of effectiveness of these sections."

§ 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.

This section and § 7A-191 are both subject to the provisions of § 7A-192. *Bowen v. Hodge Motor Co.*, 29 N.C. App. 463, 224 S.E.2d 699 (1976), rev'd on other grounds, 292 N.C. 633, 234 S.E.2d 748 (1977).

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.

Section 7A-190 and this section are both subject to the provisions of § 7A-192. *Bowen v. Hodge Motor Co.*, 29 N.C. App. 463, 224 S.E.2d 699 (1976), rev'd on other grounds, 292 N.C. 633, 234 S.E.2d 748 (1977).

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.

Sections 7A-190 and 7A-191 are both subject to the provisions of this section. *Bowen v. Hodge Motor Co.*, 29 N.C. App. 463, 224 S.E.2d 699 (1976), rev'd on other grounds, 292 N.C. 633, 234 S.E.2d 748 (1977).

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).

Chambers matters may be heard by the chief district judge at any time and place within the district, but other district judges have no

authority to hear chambers matters out of session except upon written order or rule of the chief district judge. *Bowen v. Hodge Motor Co.*, 29 N.C. App. 463, 224 S.E.2d 699 (1976), rev'd on other grounds, 292 N.C. 633, 234 S.E.2d 748 (1977).

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).

Written Authorization for Hearing Motions in Chambers. — A district judge other than the chief district judge may hear motions and enter interlocutory orders during any session over which he has been assigned to preside, whether the assignment be oral or written, but he may not hear motions in chambers without written authorization. *Jim Walter Homes, Inc. v. Peartree*, 28 N.C. App. 709, 222 S.E.2d 706 (1976).

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-194: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Cross Reference. — As to applicability of superior court procedure in district court, see § 15A-1101, effective July 1, 1978.

Session Laws 1977, c. 711, s. 34, provides: "All statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose."

Session Laws 1977, c. 711, s. 35, provides: "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 1977, c. 711, s. 36, contains a severability clause.

Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article 85, "Parole" shall not apply to persons sentenced before July 1, 1978."

§ 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. 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, cert. denied, 281 N.C. 315, 188 S.E.2d 898 (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 services of a reporter. *McAlister v. McAlister*, 14

N.C. App. 159, 187 S.E.2d 449, cert. denied, 281 N.C. 315, 188 S.E.2d 898 (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, cert. denied, 281 N.C. 315, 188 S.E.2d 898 (1972).

Stated in *North Carolina Ass'n for Retarded Children v. State*, 420 F. Supp. 451 (M.D.N.C. 1976).

Cited in *Sauls v. Sauls*, 288 N.C. 387, 218 S.E.2d 338 (1975).

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).

For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

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-211.1. Actions to enforce motor vehicle mechanic and storage liens. — Notwithstanding the provisions of G.S. 7A-210(2) and 7A-211, the chief district judge may in his discretion, by specific order or general rule, assign to any magistrate of his district actions to enforce motor vehicle mechanic and storage liens arising under G.S. 44A-2(d) when the claim arose in the county in which the magistrate resides. The defendant may be subjected to the jurisdiction of the court over his person by the methods provided in G.S. 7A-217 or G.S. 1A-1, Rule 4(j), Rules of Civil Procedure. (1977, c. 86, s. 1.)

Editor's Note. — Session Laws 1977, c. 86, s. 3, makes the act effective July 1, 1977.

Session Laws 1977, c. 86, s. 2, provides that the act shall not affect pending litigation.

§ 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.

For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

§ 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.

For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

§ 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.

For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

§ 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.

For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

Applied in *Chandler v. Cleveland Sav. & Loan Ass'n*, 24 N.C. App. 455, 211 S.E.2d 484 (1975); *Ervin Co. v. Hunt*, 26 N.C. App. 755, 217 S.E.2d 93 (1975).

§ 7A-221. Objections to venue and jurisdiction over person.

Editor's Note. — For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

§ 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.
For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

Cited in Chandler v. Cleveland Sav. & Loan Ass'n, 24 N.C. App. 455, 211 S.E.2d 484 (1975).

§ 7A-227. Stay of execution on appeal. — Appeal from judgment of a magistrate does not stay execution if the judgment is for recovery of specific property. Such execution may be stayed by order of the clerk of superior court upon petition by the appellant accompanied by undertaking in writing, executed by one or more sufficient sureties approved by the clerk, to the effect that if judgment be rendered against appellant the sureties will pay the amount thereof with costs awarded against the appellant. Appeal from judgment of a magistrate does stay execution if the judgment is for money damages. (1965, c. 310, s. 1; 1967, c. 24, s. 1; 1977, c. 844.)

Editor's Note. —
The 1977 amendment, effective July 1, 1977, added "if the judgment is for recovery of specific property" to the end of the first

sentence, added "Such" to the beginning of the second sentence, and added the third sentence.

§ 7A-228. No new trial before magistrate; appeal for trial de novo; how appeal perfected; oral notice.

Applied in Ervin Co. v. Hunt, 26 N.C. App. 755, 217 S.E.2d 93 (1975); Ball Photo Supply Co.

v. McClain, 30 N.C. App. 132, 226 S.E.2d 178 (1976).

§ 7A-229. Trial de novo on appeal.

Editor's Note. — For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

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

FORM 4.

COMPLAINT ON A PROMISSORY NOTE

NORTH CAROLINA

General Court of Justice
District Court Division
SMALL CLAIM

..... COUNTY

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.

For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

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, *aff'd*, 478 F.2d 694 (4th Cir. 1973)).

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).

This section reemphasizes the fact that the district courts have no jurisdiction of probate matters, and except in those instances where the clerk is disqualified to act, it vests probate

jurisdiction in the superior courts to be exercised originally by the clerks as ex officio judges of probate in the manner specified in the applicable statutes, that is, "according to the practice and procedure provided by law." *In re Estate of Adamee*, 291 N.C. 386, 230 S.E.2d 541 (1976).

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).

The clerk is a part of the superior court. In re Estate of Adamee, 28 N.C. App. 229, 221 S.E.2d 370, rev'd on other grounds, 291 N.C. 386, 230 S.E.2d 541 (1976).

Under this section, the clerk of superior court, "as ex officio judge of probate," continues to exercise probate jurisdiction "according to the practice and procedure provided by law"; and in doing so, he continues to act as "a judicial officer of the superior court division, and not as a separate court" pursuant to § 7A-40. In re Estate of Adamee, 291 N.C. 386, 230 S.E.2d 541 (1976).

Allocation of Jurisdiction Between Clerk and Judge. — This section does not say that concurrent jurisdiction in probate matters is vested in the clerk and the judge of the superior court. It says that probate jurisdiction is vested in the superior court division to be exercised by the superior court and the clerk according to the practice and procedure provided by law. The law, that is, the statutes specifying this practice and procedure, has allocated the jurisdiction between the clerk and the judge. By § 28A-2-1 the clerk is given exclusive original jurisdiction of "the administration, settlement and distribution of estates of decedents" except in cases where the clerk is disqualified to act under § 28A-2-3. When the clerk is disqualified to exercise his jurisdiction the judge has equal authority to perform the clerk's probate duties and, in that sense, he exercises concurrent jurisdiction of probate matters. In all other instances, however, the judge's probate jurisdiction is, in effect, that of an appellate court pursuant to § 7A-251. In re Estate of Adamee, 291 N.C. 386, 230 S.E.2d 541 (1976).

Section Supports § 28A-2-1 Assignment of Authority to Clerk. — The assignment of original authority of probate matters to the clerk in § 28A-2-1 is supported by, and not

contravened by, this section. In re Estate of Adamee, 28 N.C. App. 229, 221 S.E.2d 370, rev'd on other grounds, 291 N.C. 386, 230 S.E.2d 541 (1976).

Reference to "Practice and Procedure Provided by Law". — When this section was enacted in 1965 its reference to "the practice and procedure provided by law" was a reference to Chapter 28, which remained applicable to the estates of all decedents dying on or before October 1, 1975. After that date the reference in this section was to Chapter 28A. In re Estate of Adamee, 291 N.C. 386, 230 S.E.2d 541 (1976).

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).

Strict Construction of Appeal Procedure from Clerk Conflicts with Section. — Under a strict construction of §§ 1-272 and 1-273 as they affect § 7A-251, in probate matters originally heard by the clerk, an appeal would lie directly to the judge of superior court in matters of law and legal inference; but in the hearing before the clerk if issues of fact, or both law and fact, were raised, the appeal would lie directly to the superior court for jury trial on the issues of fact. But this strict construction would ignore the "according to the practice and procedure provided by law" mandate of this section. In re Estate of Adamee, 28 N.C. App. 229, 221 S.E.2d 370, rev'd on other grounds, 291 N.C. 386, 230 S.E.2d 541 (1976).

Judge Deals with Probate and Nonprobate Issues. — The judge of superior court in the exercise of his inherent powers upon appeal from clerk's finding had the right to submit to the jury the one issue that would resolve both the right to qualify as administratrix, a probate matter, and the right to share in the decedent's estate, which is not a probate matter. In re Estate of Adamee, 28 N.C. App. 229, 221 S.E.2d 370, rev'd on other grounds, 291 N.C. 386, 230 S.E.2d 541 (1976).

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).

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

Editor's Note. — For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

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

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).

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. Torres*, 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.

The clerk is a part of the superior court. In *re Estate of Adamee*, 28 N.C. App. 229, 221 S.E.2d 370, rev'd on other grounds, 291 N.C. 386, 230 S.E.2d 541 (1976).

Allocation of Jurisdiction between Clerk and Judge. — Section 7A-241 does not say that concurrent jurisdiction in probate matters is vested in the clerk and the judge of the superior court. It says that probate jurisdiction is vested in the superior court division to be exercised by the superior court and the clerk according to the practice and procedure provided by law. The law, that is, the statutes specifying this practice and procedure, has allocated the jurisdiction between the clerk and the judge. By § 28A-2-1 the clerk is given exclusive original jurisdiction of "the administration, settlement and distribution of estates of decedents" except in cases where the clerk is disqualified to act under § 28A-2-3. When the clerk is disqualified to exercise his jurisdiction the judge has equal authority to perform the clerk's probate duties and, in that sense, he exercises concurrent jurisdiction of probate matters. In all other instances, however, the judge's probate jurisdiction is, in effect, that of an appellate court pursuant to this section. In *re Estate of Adamee*, 291 N.C. 386, 230 S.E.2d 541 (1976).

Strict Construction of Appeal Procedure from Clerk Conflicts with Section. — Under a strict construction of §§ 1-272 and 1-273 as they affect this section, in probate matters originally heard by the clerk, an appeal would lie directly to the judge of superior court in matters of law and legal inference; but in the hearing before the clerk if issues of fact, or both law and fact, were raised, the appeal would lie directly to the superior court for jury trial on the issues of fact. But this strict construction would ignore the "according to the practice and procedure provided by law" mandate of § 7A-241. In *re Estate of Adamee*, 28 N.C. App. 229, 221 S.E.2d 370, rev'd on other grounds, 291 N.C. 386, 230 S.E.2d 541 (1976).

Judge Deals with Probate and Nonprobate Issues. — The judge of superior court in the exercise of his inherent powers upon appeal from clerk's finding had the right to submit to the jury the one issue that would resolve both the right to qualify as administratrix, a probate matter, and the right to share in the decedent's estate, which is not a probate matter. In *re Estate of Adamee*, 28 N.C. App. 229, 221 S.E.2d 370 (1976).

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); *Ervin Co. v. Hunt*, 26 N.C. App. 755, 217 S.E.2d 93 (1975).

§ 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, cert. denied, 279 N.C. 726, 184 S.E.2d 884 (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.

Amendment Effective July 1, 1978. — Session Laws 1977, c. 711, s. 6, effective July 1, 1978, will substitute "G.S. 15A-926" for "G.S. 15-152" in subdivision (3) of subsection (a).

Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions

without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article 85, 'Parole' shall not apply to persons sentenced before July 1, 1978."

Session Laws 1977, c. 711, s. 36, contains a severability clause.

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 Generally. — 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).

Since the offense for which defendants were tried was a different offense than that charged in the presentment, the cases were not "initiated by presentment" within the exception contained in subsection (a)(2). *State v. Cole*, 33 N.C. App. 48, 234 S.E.2d 191 (1977).

§ 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).

A "driving under the influence" misdemeanor charge and a manslaughter felony charge were based on the same transaction within the meaning of subdivision (a)(3). *State v. Karbas*, 28 N.C. App. 372, 221 S.E.2d 98, cert. denied, 289 N.C. 618, 223 S.E.2d 394 (1976).

Jurisdiction after "Nol Pros" in District Court. — And therefore the superior court had jurisdiction of both charges and had the right to proceed to the trial on the misdemeanor charge under the joinder exception of this section, the "original jurisdiction" of the district court having been lost after nolle prosequi was entered as to the misdemeanor in that court. *State v. Karbas*, 28 N.C. App. 372, 221 S.E.2d 98, cert. denied, 289 N.C. 618, 223 S.E.2d 394 (1976).

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. Weideman*, 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).

Cited in *State v. Cash*, 30 N.C. App. 677, 228 S.E.2d 85 (1976); *State v. Morrow*, 31 N.C. App. 592, 230 S.E.2d 182 (1976).

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).

District Court Jurisdiction Lost after "Nol Pros". — A "driving under the influence" misdemeanor charge and a manslaughter felony charge were based on the same transaction within the meaning of § 7A-271(a)(3), and therefore the superior court had jurisdiction of both charges and had the right to proceed to the trial on the misdemeanor charge under the joinder exception of § 7A-271, the "original jurisdiction" of the district court having been lost after nolle prosequi was entered as to the misdemeanor in that court. *State v. Karbas*, 28 N.C. App. 372, 221 S.E.2d 98, cert. denied, 289 N.C. 618, 223 S.E.2d 394 (1976).

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).

Jurisdiction to Determine Paternity Issue. — Since the district court has exclusive original jurisdiction to entertain a proceeding under the Uniform Reciprocal Enforcement of Support Act, it is clear that the district court has jurisdiction to determine the issue of paternity in such a case. *Amaker v. Amaker*, 28 N.C. App. 558, 221 S.E.2d 917 (1976).

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, cert. denied, 409 U.S. 1047, 93 S. Ct. 537, 34 L.Ed. 2d 499 (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, cert. denied, 409 U.S. 1047, 93 S. Ct. 537, 34 L.Ed. 2d 499 (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, cert. denied, 409 U.S. 1047, 93 S. Ct. 537, 34 L.Ed. 2d 499 (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); *State v. Cole*, 33 N.C. App. 48, 234 S.E.2d 191 (1977).

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 as the chief district judge shall direct in all worthless check cases brought under G.S. 14-107, when the amount of the check is four hundred dollars (\$400.00) or less. Provided, however, that under this section magistrates may not impose a prison sentence longer than 30 days.
- (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; 1977, c. 873, s. 1.)

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).

The 1977 amendment in subdivision (6), inserted "as the chief district judge shall direct" in the first sentence, substituted "four hundred dollars (\$400.00)" for "fifty dollars (\$50.00)" in the first sentence, and added the second

sentence. Session Laws 1977, c. 873, s. 2, provides: "This act shall become effective July 1, 1977, and shall be applicable to all criminal proceedings begun on and after that date."

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 22A.

Prohibited Orders.

§ 7A-276.1. Court orders prohibiting publication or broadcast of reports of open court proceedings or reports of public records banned. — No court

shall make or issue any rule or order banning, prohibiting, or restricting the publication or broadcast of any report concerning any of the following: any evidence, testimony, argument, ruling, verdict, decision, judgment, or other matter occurring in open court in any hearing, trial, or other proceeding, civil or criminal; and no court shall issue any rule or order sealing, prohibiting, restricting the publication or broadcast of the contents of any public record as defined by any statute of this State, which is required to be open to public inspection under any valid statute, regulation, or rule of common law. If any rule or order is made or issued by any court in violation of the provisions of this statute, it shall be null and void and of no effect, and no person shall be punished for contempt for the violation of any such void rule or order. (1977, c. 711, s. 3.)

Editor's Note. — Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article 85, 'Parole' shall not apply to persons sentenced before July 1, 1978."

Session Laws 1977, c. 711, s. 34, provides: "All statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose."

Session Laws 1977, c. 711, s. 36, contains a severability clause.

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.

For comment on due process in juvenile proceedings, see 3 N.C. Cent. L.J. 255 (1972).

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), cert. denied, 403 U.S. 940, 91 S. Ct. 2258, 29 L. Ed. 2d 719 (1971).

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).

§ 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, 1978. — Session Laws 1975, c. 929, 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."

The amendment was originally made effective July 1, 1977, by Session Laws 1975, c. 929, s. 3. Session Laws 1977, c. 291, amended Session Laws 1975, c. 929, s. 3, so as to postpone the effective date of the amendment from July 1, 1977 to July 1, 1978.

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, aff'd, 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).

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); In re McMillan, 30 N.C. App. 235, 226 S.E.2d 693 (1976).

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); In re Drakeford, 32 N.C. App. 113, 230 S.E.2d 779 (1977).

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).

"Neglected" Child. — It is fundamental that a child who receives proper care and supervision in modern times is provided a basic education. A child does not receive "proper care" and lives in an "environment injurious to his welfare" when he is deliberately refused this education, and he is "neglected" within the meaning of subsection (4). In re McMillan, 30 N.C. App. 235, 226 S.E.2d 693 (1976).

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, cert. denied, 287 N.C. 664, 216 S.E.2d 910 (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); In re Williams, 28 N.C. App. 462, 221 S.E.2d 759 (1976); In re Fewell, 32 N.C. App. 295, 231 S.E.2d 925 (1977); In re Frye, 32 N.C. App. 384, 232 S.E.2d 301 (1977); In re Johnson, 32 N.C. App. 492, 232 S.E.2d 486 (1977); In re Kowalzek, 32 N.C. App. 718, 233 S.E.2d 655 (1977).

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); In re Drakeford, 32 N.C. App. 113, 230 S.E.2d 779 (1977).

§ 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).

Applied in In re Arthur, 291 N.C. 640, 231 S.E.2d 614 (1977).

§ 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, appeal dismissed, 285 N.C. 758, 209 S.E.2d 279 (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, appeal dismissed, 285 N.C. 758, 209 S.E.2d 279 (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, appeal dismissed, 285 N.C. 758, 209 S.E.2d 279 (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, appeal dismissed, 285 N.C. 758, 209 S.E.2d 279 (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, appeal dismissed, 285 N.C. 758, 209 S.E.2d 279 (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.

For comment on due process in juvenile proceedings, see 3 N.C. Cent. L.J. 255 (1972).

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. — The summons and a copy of the petition shall be served upon the parents or either of them or the guardian or custodian, and the child, not less than five days prior to the date scheduled for the hearing, provided that the time provided herein may be waived in the discretion of the judge in the best interest of the child. Service of the summons and petition shall be made personally by leaving a copy of the summons and the petition with the person summoned. If personal service upon a parent is

attempted at his last known address but such parent cannot be located, and there is no parent, guardian or custodian available to appear with the child for the hearing, the court shall appoint a guardian ad litem or a guardian of the person to appear with the child.

If the court finds it is impractical to obtain personal service upon the parents, guardian or custodian, the judge may authorize service of summons and petition by mail or by publication; provided that a guardian or custodian shall appear with the child for the hearing if neither parent is present.

If the parent, guardian or custodian is personally served as herein provided and fails without reasonable cause to appear and to bring the child, he may be proceeded against as for contempt of court.

In cases in which the petition alleges that a child is neglected, the court shall appoint a guardian ad litem to represent the child unless the court shall find as a fact that the child is not in need of and cannot benefit from such representation. The duties of the guardian ad litem shall be to make an investigation to determine the facts, the needs of the child, and the resources available within the family and in the community to meet those needs; to appear on behalf of the child in the juvenile proceeding and to perform necessary and appropriate legal services on behalf of the child in order to present the relevant facts to the court at the adjudicatory part of the hearing and the possible options to the court at the dispositional part of the hearing; to serve the child and the court by protecting and promoting the best interests of and the least detrimental alternatives for the child at every stage of the proceeding until formally relieved of the responsibility by the court; to appeal, when deemed advisable, from an adjudication or order of disposition to the Court of Appeals pursuant to G.S. 7A-289. The court shall order the Department of Social Services to conduct follow-up investigations as necessary to insure that the orders of the court are being properly executed and to report to the court when the needs of the child are not being met.

The guardian ad litem shall be an attorney-at-law, licensed to practice in the State of North Carolina, who shall be compensated as in cases of indigency. The court may order those parents, guardians, or custodians who have sufficient income to reimburse, in whole or in part, the State treasury, for the expenses involved in such representation. In no case shall the court appoint a public defender as guardian ad litem.

The court may order that the guardian ad litem have the authority to demand the release to him and the court of any information or reports, whether or not confidential, that may in his opinion be relevant to the case. This provision shall apply specifically, but not exclusively, to any professional person, including but not limited to those listed by profession in the Child Abuse Reporting Law, G.S. 110-117(5). Neither the physician-patient privilege nor the husband-wife privilege may be invoked to prevent the guardian ad litem and the court from obtaining such information. The confidentiality of such information or reports shall be respected by the guardian ad litem and no disclosure of any such information or reports shall be made to anyone except by order of the presiding judge. (1919, c. 97, s. 8; C. S., s. 5046; 1969, c. 911, s. 2; 1977, c. 766, s. 1.)

Editor's Note. — The 1977 amendment, effective Sept. 26, 1977, added the fourth, fifth and sixth paragraphs.

For comment on due process in juvenile proceedings, see 3 N.C. Cent. L.J. 255 (1972).

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).

Cited in In re Kowalzek, 32 N.C. App. 718, 233 S.E.2d 655 (1977).

§ 7A-284. Immediate custody of a child. — (a) If it appears from a petition that a child is in danger, or subject to such serious neglect as may endanger his health or morals, or that the best interest of the child requires that the court assume immediate custody of the child prior to a hearing on the merits of the case, the judge may enter an order directing an officer or other authorized person to assume immediate custody of the child. Such an order shall constitute authority to assume physical custody of the child and to take the child to such place or person as is designated in the order. The court shall conduct a hearing on the merits at the earliest practicable time within five days after assuming custody, and if such a hearing is not held within five days, the child shall be released.

(b) Upon a written petition to a magistrate by a parent, county director of social services or social worker, sheriff or deputy sheriff to a magistrate when the office of the clerk is not open or when a district court judge is not in the county of the petitioning party alleging that a child is in danger or subject to serious neglect of his or her health or morals or that the best interest of the child requires that the court assume immediate custody of the child, the magistrate may receive the petition and upon the oral direction of a district court judge of the judicial district in which the petitioner resides or is employed, may issue an order under the name of said judge by his oral authority given after the petition is presented directing that the sheriff take custody of the child and place said child in the custody of the county director of social services or a social worker charged with protective services duties for a period of 72 hours. The magistrate shall upon opening of the clerk's office file said petition and order with the clerk of superior court of the county. A district court judge upon a preliminary hearing on the facts set out in the petition may extend said order until a hearing is held on the merits. If the order is not extended the child shall be returned to the person or persons from whose custody he or she was taken. (1919, c. 97, s. 7; C. S., s. 5045; 1969, c. 911, s. 2; 1977, c. 901.)

Editor's Note. — The 1977 amendment, effective July 1, 1977, designated the former provisions of this section as subsection (a) and added subsection (b).

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).

This section does not authorize a district court judge to issue an immediate custody order by telephone. See opinion of Attorney General to The Honorable Walter P. Henderson, District Court Judge, Fourth Judicial District, 46 N.C.A.G. 50 (1976).

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).

For comment on due process in juvenile proceedings, see 3 N.C. Cent. L.J. 255 (1972).

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), aff'd, sub nom. McKeiver v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29

L. Ed. 2d 647 (1971); In re Jones, 11 N.C. App. 437, 181 S.E.2d 162, appeal dismissed, 279 N.C. 616, 184 S.E.2d 267 (1971); In re Drakeford, 32 N.C. App. 113, 230 S.E.2d 779 (1977).

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 162, appeal dismissed, 279 N.C. 616, 184 S.E. 267 (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).

Juveniles in delinquency proceedings are entitled to constitutional safeguards similar to those afforded adult criminal defendants. In re *Arthur*, 27 N.C. App. 227, 218 S.E.2d 869, cert. granted, 288 N.C. 730, 220 S.E.2d 621 (1975).

Juvenile delinquency hearings, pursuant to Chapter 7A, Article 23, place juveniles in danger of confinement, and, therefore, the proceedings are to be treated as criminal proceedings, conducted with due process in accord with constitutional safeguards of the Fifth Amendment. In re *Chavis*, 31 N.C. App. 579, 230 S.E.2d 198; 291 N.C. 711, 232 S.E.2d 203 (1976).

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 162, appeal dismissed, 279 N.C. 616, 184 S.E.2d 267 (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).

Scope of juvenile due process is not as extensive as that incident to adversary adjudication for adult criminal defendants. In re *Arthur*, 27 N.C. App. 227, 218 S.E.2d 869, cert. granted, 288 N.C. 730, 220 S.E.2d 621 (1975).

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), aff'd, sub nom. *McKeiver v. Pennsylvania*, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971).

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).

Due process for a juvenile includes written notice of specific charges in advance of hearing, notification to child and parent of the right to counsel and that, if necessary, counsel will be appointed; the privilege against self-incrimination, proof of the offense charged beyond a reasonable doubt and determination of delinquency based on sworn testimony subject to cross-examination in the absence of a valid confession. In re *Arthur*, 27 N.C. App. 227, 218 S.E.2d 869, cert. granted, 288 N.C. 730, 220 S.E.2d 621 (1975).

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).

Juvenile Proceedings Designed to Foster Individualized Disposition. — Juvenile proceedings are something less than a full blown determination of criminality. They are designed to foster individualized disposition of juvenile offenders under protection of the courts in accordance with constitutional safeguards. In re *Arthur*, 27 N.C. App. 227, 218 S.E.2d 869, cert. granted, 288 N.C. 730, 220 S.E.2d 621 (1975).

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 162, appeal dismissed, 279 N.C. 616, 184 S.E.2d 267 (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).

An admission by the juvenile to the allegations of the petition is the equivalent to a plea of guilty by an adult in a criminal prosecution. In re Johnson, 32 N.C. App. 492, 232 S.E.2d 486 (1977).

Acceptance of Admission. — At a juvenile hearing an admission by a juvenile must be made knowingly and voluntarily, and this fact must affirmatively appear on the face of the record, or the juvenile will be allowed to replead. In re Chavis, 31 N.C. App. 579, 230 S.E.2d 198 (1976).

Before accepting the juvenile's admission, the judge can question the juvenile to determine if his admission is understandingly and voluntarily made. In re Chavis, 31 N.C. App. 579, 230 S.E.2d 198; 291 N.C. 711, 232 S.E.2d 203 (1976).

In a juvenile hearing to determine delinquency, which may lead to commitment to

a State institution, an admission by the juvenile of the allegations of the petition must be made with awareness of the consequences of the admission and must be made understandingly and voluntarily, and these facts must affirmatively appear in the record of the proceeding. In re Johnson, 32 N.C. App. 492, 232 S.E.2d 486 (1977).

Double Jeopardy. — Although distinctions between juvenile proceedings and criminal prosecutions do still exist, they are sufficiently similar in nature that the double jeopardy provisions of the United States and North Carolina Constitutions are applicable to them. Accordingly, jeopardy attaches to the initial petition once an adjudicatory hearing on the merits is held. In re Drakeford, 32 N.C. App. 113, 230 S.E.2d 779 (1977).

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), aff'd, sub nom. McKeiver v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971).

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), aff'd, sub nom. McKeiver v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971).

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), aff'd, sub nom. McKeiver v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971).

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, cert. denied, 281 N.C. 622, 190 S.E.2d 471 (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, cert. denied, 281 N.C. 622, 190 S.E.2d 471 (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 proper quantum of proof in a juvenile hearing to determine delinquency is proof beyond a reasonable doubt. *In re Johnson*, 32 N.C. App. 492, 232 S.E.2d 486 (1977).

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); *In re Johnson*, 32 N.C. App. 492, 232 S.E.2d 486 (1977).

Applied in *In re Williams*, 28 N.C. App. 462, 221 S.E.2d 759 (1976); *In re Arthur*, 291 N.C. 640, 231 S.E.2d 614 (1977); *In re Fewell*, 32 N.C. App. 295, 231 S.E.2d 925 (1977); *In re Kowalzek*, 32 N.C. App. 718, 233 S.E.2d 655 (1977).

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); *In re Frye*, 32 N.C. App. 384, 232 S.E.2d 301 (1977).

§ 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.

In any case where the court removes custody from a parent or person standing in loco parentis because of abuse or neglect, the child shall not be returned to said parent or person standing in loco parentis unless the court finds sufficient facts to show that the child will receive proper care and supervision.

In any case where custody is removed from a parent, the court shall after 10 days' notice to the parent order and conduct periodic reviews, not less frequently than semiannually during the first year after such removal and annually thereafter, to determine if the needs of the child are being met and if the placement is in the child's best interests. The court may order the department of social services, the juvenile court counselor, or any other public or private community agency to timely present the review to the court and assist in making such determination. The court shall after findings of fact enter an order (i) continuing the placement under review, (ii) providing for a different placement, or (iii) making such other provision for the child as is deemed to be in the child's best interests. If at any time custody is restored to a parent, the court shall be relieved of the duty to conduct periodic judicial reviews of the placement.

- (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 Human Resources, 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; 1977, c. 627, s. 17; c. 786, s. 3; c. 1121, s. 1.)

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).

The first 1977 amendment substituted "Department of Human Resources" for "Department of Correction" near the beginning of the introductory paragraph of subdivision (5).

The second 1977 amendment added the third paragraph of subdivision (2).

The third 1977 amendment added the fourth paragraph of subdivision (2). Session Laws 1977, c. 1121, s. 2, provides: "This act shall become effective on Jan. 1, 1978, and shall only apply to custody orders entered on or after Jan. 1, 1978."

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), cert. denied, 403 U.S. 940, 91 S. Ct. 2258, 29 L. Ed. 2d 719 (1971).

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), cert. denied, 403 U.S. 940, 91 S. Ct. 2258, 29 L. Ed. 2d 719 (1971).

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).

The provision in subsection (6) that a juvenile judge may not commit a child directly to a mental institution was clearly designed to prevent conflicts with various statutes under Chapter 122. In re Mikels, 31 N.C. App. 470, 230 S.E.2d 155 (1976).

Chapter 122 was written to provide constitutional defense procedural and evidentiary rules. To allow juvenile judges to commit minors to mental institutions with a lesser standard than that set forth in Chapter 122 would subject such commitments to constitutional challenge as a deprivation of liberty without due process of law. In re Mikels, 31 N.C. App. 470, 230 S.E.2d 155 (1976).

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), cert. denied, 403 U.S. 940, 91 S. Ct. 2258, 29 L. Ed. 2d 719 (1971).

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); In re Williams, 28 N.C. App. 462, 221 S.E.2d 759 (1976); In re Kowalzek, 32 N.C. App. 718, 233 S.E.2d 655 (1977).

Cited in In re Bullard, 22 N.C. App. 245, 206 S.E.2d 305 (1974); In re Fewell, 32 N.C. App. 295, 231 S.E.2d 925 (1977).

§ 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 274 (1971).

§ 7A-288: Repealed by Session Laws 1977, c. 879, s. 7, effective October 1, 1977.

Cross Reference. — For present provisions covering the subject matter of the repealed section, see § 7A-289.22 et seq.

Editor's Note. —

Session Laws 1977, c. 879, s. 9, effective Oct.

1, 1977, provides that the act shall not affect pending litigation.

§ 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.

For comment on due process in juvenile proceedings, see 3 N.C. Cent. L.J. 255 (1972).

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).

Applied in In re Kowalzek, 32 N.C. App. 718, 233 S.E.2d 655 (1977).

Stated in In re Arthur, 291 N.C. 640, 231 S.E.2d 614 (1977).

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.

Chapter 134 was rewritten by Session Laws 1975, c. 742, s. 1, effective July 1, 1975, and recodified as Chapter 134A. For present provisions similar to § 134-17, referred to in this section, see §§ 134A-32 to 134A-33.

§ 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 Crime Commission.
- (5) It is the intent of the General Assembly that the Secretary of the Department of Human Resources 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; 1977, c. 627, ss. 18, 19.)

Editor's Note. — The 1977 amendment substituted "Crime Commission" for "Committee on Law and Order" at the end of subdivision (4) and deleted "in conjunction with

the Technical Advisory Committee described in G.S. 143B-207 of this Article" following "Department of Human Resources" in subdivision (5).

§ 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) Repealed by Session Laws 1977, c. 627, s. 20.
- (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 Youth Services 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 Secretary.

- (7) To develop 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; 1977, c. 627, ss. 20-23.)

Editor's Note. — The 1977 amendment repealed subdivision (2), relating to staff services to the former Technical Advisory Committee on Delinquency Prevention and Youth Services, substituted "Youth Services Advisory Committee" for "Technical Advisory Committee" at the end of subdivision (3) and

"Secretary" for "Technical Advisory Committee" at the end of subdivision (6) and deleted "in coordination with the Technical Advisory Committee as described in G.S. 143B-207 of this Article" following "To develop" at the beginning of subdivision (7).

§ 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 Secretary of Human Resources 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; 1977, c. 627, s. 24.)

Editor's Note. — The 1977 amendment substituted "Secretary of Human Resources"

for "Technical Advisory Committee" near the beginning of the second paragraph.

§ 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.)

§§ 7A-289.17 to 7A-289.21: Reserved for future codification purposes.

ARTICLE 24B.

Termination of Parental Rights.

§ 7A-289.22. **Legislative intent; construction of Article.** — The General Assembly hereby declares as a matter of legislative policy with respect to termination of parental rights:

- (1) The general purpose of this Article is to provide judicial procedures for terminating the legal relationship between a child and his or her biological or legal parents when such parents have demonstrated that they will not provide the degree of care which promotes the healthy and orderly physical and emotional well-being of the child.
- (2) It is the further purpose of this Article to recognize the necessity for any child to have a permanent plan of care at the earliest possible age, while at the same time recognizing the need to protect all children from the unnecessary severance of a relationship with biological or legal parents.
- (3) Action which is in the best interests of the child should be taken in all cases where the interests of the child and those of his or her parents or other persons are in conflict; and to that end this Article should be liberally construed. (1977, c. 879, s. 8.)

Editor's Note. — Session Laws 1977, c. 879, Oct. 1, 1977, but shall not affect pending s. 9, provides: "This act shall become effective litigation."

§ 7A-289.23. **Jurisdiction.** — The district court shall have exclusive original jurisdiction to hear and determine any petition relating to termination of parental rights to any child who resides in, is found in, or is in the legal or actual custody of a county department of social services or licensed child-placing agency in the district at the time of filing of the petition. The court shall have jurisdiction to terminate the parental rights of any parent irrespective of the age of the parent. A guardian ad litem shall be appointed to represent such minor parent, under the age of 14 years. (1977, c. 879, s. 8.)

§ 7A-289.24. **Who may petition.** — A petition to terminate the parental rights of either or both parents to his, her, or their minor child may only be filed by:

- (1) Either parent seeking termination of the right of the other parent; or
- (2) Any person who has been judicially appointed as the guardian of the person of the child; or
- (3) Any county department of social services or licensed child-placing agency to whom custody of the child has been given by a court of competent jurisdiction; or
- (4) Any county department of social services or licensed child-placing agency to which the child has been surrendered for adoption by one of the parents or by the guardian of the person of such child, pursuant to G.S. 48-9(a)(1); or
- (5) Any person with whom the child has resided for a continuous period of two years or more next preceding the filing of the petition. (1977, c. 879, s. 8.)

§ 7A-289.25. **Petition.** — The petition shall be verified by the petitioner and shall be entitled "In re (*last name of child*) a minor child"; and shall set forth such of the following facts as are known; and with respect to the facts which are unknown the petitioner shall so state:

- (1) The name of the child as it appears on the child's birth certificate, the date and place of birth, and the county where the child is presently residing.
- (2) The name and address of the petitioner and facts sufficient to identify the petitioner as one entitled to petition under G.S. 7A-289.24.
- (3) The name and address of the parents of the child. If the name or address of one or both parents is unknown to the petitioner, the petitioner shall set forth with particularity the petitioner's efforts to ascertain the identity or whereabouts of the parent or parents. Such information may be contained in an affidavit attached to the petition and incorporated therein by reference.
- (4) The name and address of any person appointed as guardian of the person of the child pursuant to the provisions of Article 1 of Chapter 33 of the General Statutes, or of G.S. 7A-286(7).
- (5) The name and address of any person or agency to whom custody of the child has been given by a court of this or any other state; and a copy of such custody order shall be attached to the petition.
- (6) Facts which are sufficient to warrant a determination that one or more of the grounds for terminating parental rights exist. (1977, c. 879, s. 8.)

§ 7A-289.26. Preliminary hearing; unknown parent. — (a) If either the name or identity of any parent whose parental rights the petitioner seeks to terminate is not known to the petitioner, the court shall within 10 days from the date of filing of the petition, or during the next term of court in the county where the petition is filed if there is no court in said county in that 10-day period, conduct a preliminary hearing to ascertain the name or identity of such parent.

(b) The court may, in its discretion, inquire of any known parent of the child concerning the identity of the unknown parent and may appoint a guardian ad litem for the unknown parent to conduct a diligent search for the parent. Should the court ascertain the name or identity of the parent, it shall enter a finding to that effect; and such parent shall be summoned to appear in accordance with G.S. 7A-289.27.

(c) Notice of the preliminary hearing need be given only to the petitioner who shall appear at the hearing; but the court may cause summons to be issued to any person directing him to appear and testify.

(d) If the court is unable to ascertain the name or identity of the unknown parent, the court shall order publication of notice of the termination proceeding and shall specifically order the place or places of publication and the contents of the notice which the court concludes is most likely to identify the child to such unknown parent. The notice shall be published in a newspaper qualified for legal advertising in accordance with G.S. 1-597 and 1-598 and published in the counties directed by the court, once a week for three successive weeks. Provided, further, the notice shall:

- (1) Designate the court in which the petition is pending;
- (2) Be directed to "the father (mother) (father and mother) of a male (female) child born on or about in (date)

County, (City) (State)
respondent";

- (3) Designate the docket number and title of the case (the court may direct the actual name of the title be eliminated and the words "In Re Doe" substituted therefor);
- (4) State that a petition seeking to terminate the parental rights of the respondent has been filed;
- (5) Direct the respondent to answer the petition within 30 days after a date

stated in the notice, exclusive of such date, which date so stated shall be the date of first publication of notice, and be substantially in the form as set forth in G.S. 1A-1, Rule 4(j)(9)(c); and

- (6) State that the respondent's parental rights to the child will be terminated upon failure to answer the petition within the time prescribed.

Upon completion of the service, an affidavit of the publisher shall be filed with the court.

(e) The court shall issue the order required by G.S. 7A-289.26(b) and (d) within 30 days from the date of the preliminary hearing unless the court shall determine that additional time for investigation is required.

(f) Upon the failure of the parent served by publication pursuant to G.S. 7A-289.26(d) to answer the petition within the time prescribed, the court shall issue an order terminating all parental rights of the unknown parent. (1977, c. 879, s. 8.)

§ 7A-289.27. Issuance of summons. — Except as provided in G.S. 7A-289.26, upon the filing of the petition, the court shall cause a summons to be issued, directed to the following persons or agency, not otherwise a party petitioner, who shall be named as respondents:

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

Provided, no summons need be directed to or served upon any parent who has previously surrendered the child to a county department of social services or licensed child-placing agency, nor to any parent who has consented to the adoption of the child by the petitioner. The summons shall notify the respondents to file written answer within 30 days after service of the summons and petition and that if the respondents fail to answer, the petitioner will apply to the court for the relief prayed for in the petition. Service of the summons shall be completed as provided under the procedures established by G.S. 1A-1, Rule 4(j); but the parent of the child shall not be deemed to be under disability even though such parent is a minor. (1977, c. 879, s. 8.)

§ 7A-289.28. Failure of respondents to answer. — Upon the failure of the respondents to file written answer to the petition with the court within 30 days after service of the summons and petition, or within 30 days from the date of first publication if service is by publication, the court shall issue an order terminating all parental and custodial rights of the respondent or respondents with respect to the child; provided the court shall order a hearing on the petition and may examine the petitioner or others on the facts alleged in the petition. (1977, c. 879, s. 8.)

§ 7A-289.29. Answer of respondents. — (a) Any respondent may file a written answer to the petition. The answer shall admit or deny the allegations of the petition and shall set forth the name and address of the answering respondent or his or her attorney.

(b) If an answer denies any material allegation of the petition, the court shall appoint a licensed attorney as guardian ad litem for the child to represent the best interests of the child. The court shall conduct a special hearing after notice of not less than 10 days nor more than 30 days to the petitioner, the answering respondent(s), and the guardian ad litem for the child, to determine the issues raised by the petition and answer(s). Notice of the hearing shall be deemed to have been given upon the depositing thereof in the United States mail, first-class

postage prepaid, and addressed to the petitioner, respondent, and guardian ad litem or their counsel of record, at the addresses appearing in the petition and responsive pleading. (1977, c. 879, s. 8.)

§ 7A-289.30. Adjudicatory hearing on termination. — (a) The hearing on the termination of parental rights shall be conducted by the district court sitting without a jury. Reporting of the hearing shall be as provided by G.S. 7A-198 for reporting civil trials.

(b) The court may, upon finding that reasonable cause exists, order the child to be examined by a psychiatrist, a licensed clinical psychologist, a physician, a public or private agency, or any other expert in order that the child's psychological or physical condition or needs may be ascertained or, in the case of a parent whose ability to care for the child is at issue, the court may order a similar examination of any parent of the child.

(c) The court may for good cause shown continue the hearing for such time as is required for receiving additional evidence, any reports or assessments which the court has requested, or any other information needed in the best interest of the child.

(d) The court shall take evidence, find the facts, and shall adjudicate the existence or nonexistence of any of the circumstances set forth in G.S. 7A-289.32 which authorize the termination of parental rights of the respondent.

(e) All findings of fact shall be based upon a preponderance of the evidence. No husband-wife or physician-patient privilege shall be grounds for excluding any evidence regarding the existence or nonexistence of any circumstance authorizing the termination of parental rights. (1977, c. 879, s. 8.)

§ 7A-289.31. Disposition. — (a) Should the court determine that any one or more of the conditions authorizing a termination of the parental rights of a parent exist, the court shall issue an order terminating the parental rights of such parent with respect to the child unless the court shall further determine that the best interests of the child require that the parental rights of such parent not be terminated.

(b) Should the court conclude that irrespective of the existence of one or more circumstances authorizing termination of parental rights, the best interests of the child require that such rights should not be terminated, the court shall dismiss the petition, but only after setting forth the facts and conclusions upon which such dismissal is based.

(c) Should the court determine that circumstances authorizing termination of parental rights do not exist, the court shall dismiss the petition, making appropriate findings of fact and conclusions.

(d) The court may tax the cost of the proceeding to any party. (1977, c. 879, s. 8.)

§ 7A-289.32. Grounds for terminating parental rights. — The court may terminate the parental rights upon a finding of one or more of the following:

- (1) The parent has without cause failed to establish or maintain concern or responsibility as to the child's welfare.
- (2) The parent has physically abused or neglected the child. The child shall be deemed to be physically abused or neglected if the court finds the child to be an abused child within the meaning of G.S. 110-117(1)(a), (b), or (c), or a neglected child within the meaning of G.S. 7A-278(4).
- (3) The parent has willfully left the child in foster care for more than two consecutive years without showing to the satisfaction of the court that substantial progress has been made within two years in correcting those conditions which led to the removal of the child for neglect, or without showing positive response within two years to the diligent efforts of a county department of social services, a child-caring institution or licensed child-placing agency to encourage the parent to

strengthen the parental relationship to the child or to make and follow through with constructive planning for the future of the child.

- (4) The child has been placed in the custody of a county department of social services, a licensed child-placing agency, or a child-caring institution, and the parent, for a continuous period of six months next preceding the filing of the petition, has failed to pay a reasonable portion of the cost of care for the child.
- (5) One parent has been awarded custody of the child by judicial decree, or has custody by agreement of the parents, and the other parent whose parental rights are sought to be terminated has for a period of one year or more next preceding the filing of the petition willfully failed without justification to pay for the care, support, and education of the child, as required by said decree or custody agreement.
- (6) The father of a child born out of wedlock has not prior to the filing of a petition to terminate his parental rights:
 - a. Established paternity judicially or by affidavit; or
 - b. Legitimated the child pursuant to provisions of G.S. 49-10, or filed a petition for this specific purpose; or
 - c. Legitimated the child by marriage to the mother of the child; or
 - d. Provided substantial financial support or consistent care with respect to the child and mother. (1977, c. 879, s. 8.)

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), decided under former § 7A-288.

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). *In re Godwin*, 31 N.C. App. 137, 228 S.E.2d 521 (1976), decided under former § 7A-288.

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); *In re Godwin*, 31 N.C. App. 137, 228 S.E.2d 521 (1976), decided under former § 7A-288.

§ 7A-289.33. Effects of termination order. — An order terminating the parental rights completely and permanently terminates all rights and obligations of the parent to the child and of the child to the parent, arising from the parental relationship, except that the child's right of inheritance from his or her parent shall not terminate until such time as a final order of adoption is issued. Such parent is not thereafter entitled to notice of proceedings to adopt the child and may not object thereto or otherwise participate therein.

- (1) If the child had been placed in the custody of or released for adoption by one parent to, a county department of social services or licensed child-placing agency and is in the custody of such agency at the time of such filing of the petition, that agency shall, upon entry of the order terminating parental rights, acquire all of the rights for placement of said child as such agency would have acquired had the parent whose rights are terminated released the child to that agency pursuant to the provisions of G.S. 48-9(a)(1), including the right to consent to the adoption of such child.
- (2) Except as provided in subdivision (1) above, upon entering an order terminating the parental rights of one or both parents, the court may place the child in the custody of the petitioner, or some other suitable person, or in the custody of the Department of Social Services or licensed child-placing agency, as may appear to be in the best interest of the child. (1977, c. 879, s. 8.)

§ 7A-289.34. 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. (1977, c. 879, s. 8.)

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 765 (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).

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;
- (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; 1977, c. 375, s. 4.)

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.

The 1977 amendment, effective Jan. 1, 1978, deleted "and to make a private examination of the wife, as provided in G.S. 52-6" from the end of subdivision (10).

Session Laws 1977, c. 375, s. 17, provides that no provision of this act shall affect pending litigation.

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 nineteen dollars (\$19.00) in the district court, including cases before a magistrate, and the sum of twenty-eight dollars (\$28.00) 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; 1975, 2nd Sess., c. 980, s. 1.)

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).

The 1975, 2nd Sess., amendment, effective July 1, 1976, substituted "nineteen dollars (\$19.00)" for "seventeen dollars (\$17.00)" and

"twenty-eight dollars (\$28.00)" for "twenty dollars (\$20.00)" in subdivision (4) of subsection (a).

Session Laws 1977, c. 244, ss. 1 and 2, provide:

"Section 1. Section 4 of Chapter 980 of the 1975 (Second Session 1976) Session Laws is hereby amended to read as follows: 'Sec. 4. This act shall become effective on July 1, 1976. However, it shall apply only to civil actions instituted on or after July 1, 1976, and shall not apply to civil actions initiated prior to July 1, 1976, regardless of the date of termination of such actions.'

"Sec. 2. This act shall not be construed to require a refund of any amount previously paid."

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-eight dollars (\$28.00) in the superior court, and the sum of eighteen dollars (\$18.00) 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; 1975, 2nd Sess., c. 980, ss. 2, 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 1975, 2nd Sess., amendment, effective July 1, 1976, substituted "twenty-eight dollars (\$28.00)" for "twenty dollars (\$20.00)" and "eighteen dollars (\$18.00)" for "ten dollars (\$10.00)" in subdivision (2) of subsection (a).

Session Laws 1977, c. 244, ss. 1 and 2, provide:

"Section 1. Section 4 of Chapter 980 of the 1975 (Second Session 1976) Session Laws is hereby amended to read as follows: 'Sec. 4. This act shall become effective on July 1, 1976. However, it shall apply only to civil actions instituted on or after July 1, 1976, and shall not apply to civil actions initiated prior to July 1, 1976, regardless of the date of termination of such actions.'

"Sec. 2. This act shall not be construed to require a refund of any amount previously paid."

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), *aff'd*, 478 F.2d 694 (4th Cir. 1973).

§ 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).

Cited in *Fowler v. Alexander*, 340 F. Supp. 168 (M.D.N.C. 1972).

As the rest of the section was not changed by the amendment, only the opening paragraph and subdivision (2) are set out.

§ 7A-343.1. **Distribution of copies of the appellate division reports.** — The Administrative Officer of the Courts shall, at the State's expense distribute such number of copies of the appellate division reports to federal, State departments and agencies, and to educational institutions of instruction, as follows:

Governor, Office of the	1
Lieutenant Governor, Office of the	1
Secretary of State, Department of the	2
Treasurer, Department of the State	1
Superintendent of Public Instruction	1
Office of the Attorney General	11

State Bureau of Investigation	1
Agriculture, Department of	1
Labor, Department of	1
Insurance, Department of	1
Budget Bureau, Department of Administration	1
Property Control, Department of Administration	1
State Planning, Department of Administration	1
Board of Natural Resources and Community Development	1
Revenue, Department of	1
Board of Human Resources	1
Commission for the Blind	1
Board of Transportation	1
Motor Vehicles, Division of	1
Utilities Commission	8
Industrial Commission	11
Employment Security Commission	1
Commission of Correction	1
Parole Commission	1
Archives and History, Division of	1
State Library	3
Legislative Building Library	2
Justices of the Supreme Court	1 ea.
Judges of the Court of Appeals	1 ea.
Judges of the Superior Court	1 ea.
District Attorneys	1 ea.
Emergency and Special Judges of the Superior Court	1 ea.
Supreme Court Library	AS MANY AS REQUESTED
Appellate Division Reporter	1
University of North Carolina, Chapel Hill	71
University of North Carolina, Charlotte	1
University of North Carolina, Greensboro	1
University of North Carolina, Asheville	1
North Carolina State University, Raleigh	1
Appalachian State University	1
East Carolina University	1
Fayetteville State University	1
North Carolina Central University	17
Western Carolina University	1
Duke University	17
Davidson College	2
Wake Forest University	25
Lenoir Rhyne College	1
Elon College	1
Campbell College	17
Federal, Out-of-State and Foreign	
Secretary of State	1
Secretary of Defense	1
Secretary of Health, Education and Welfare	1
Secretary of Housing and Urban Development	1
Secretary of Transportation	1
Attorney General	1
Department of Justice	1
Internal Revenue Service	1
Veterans' Administration	1
Library of Congress	5
Federal Judges resident in North Carolina	1 ea.

Marshal of the United States Supreme Court	1
Federal District Attorneys resident in North Carolina	1 ea.
Federal Clerks of Court resident in North Carolina	1 ea.
Supreme Court Library exchange list	1

Each justice of the Supreme Court and judge of the Court of Appeals shall receive for his private use, one complete and up-to-date set of the appellate division reports. The copies of reports furnished each justice or judge as set out in the table above may be retained by him personally to enable him to keep up-to-date his personal set of reports. (1977, c. 379, s. 2; c. 771, s. 4.)

Editor's Note. — The 1977 amendment substituted "Board of Natural Resources and Community Development" for "Board of Natural and Economic Resources" in the list of agencies.

§ 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.

Applied in State v. Wright, 290 N.C. 45, 224 S.E.2d 624 (1976).

§§ 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 shall 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.)

The phrase, "wilful misconduct in office," is not unconstitutionally vague or overbroad. In re Edens, 290 N.C. 299, 226 S.E.2d 5 (1976).

Nor is the phrase, "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." In re Edens, 290 N.C. 299, 226 S.E.2d 5 (1976).

Willful Misconduct Defined. — Willful misconduct in office is improper and wrong conduct of a judge acting in his official capacity done intentionally, knowingly and, generally, in bad faith. It is more than a mere error of judgment or an act of negligence. While the term would encompass conduct involving moral turpitude, dishonesty or corruption, these elements need not necessarily be present. In re Edens, 290 N.C. 299, 226 S.E.2d 5 (1976); In re Stuhl, 292 N.C. 379, 233 S.E.2d 562 (1977).

Conduct Prejudicial to Administration of Justice That Brings Judicial Office into Disrepute Defined. — Conduct prejudicial to the administration of justice that brings the judicial office into disrepute has been defined as conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office. In re Edens, 290 N.C. 299, 226 S.E.2d 5 (1976); In re Stuhl, 292 N.C. 379, 233 S.E.2d 562 (1977).

Conduct Rather Than Motives Determinative. — Whether the conduct of a judge may be characterized as prejudicial to the administration of justice which brings the judicial office into disrepute depends not so much upon the judge's motives but more on the conduct itself, the results thereof and the impact such conduct might reasonably have upon knowledgeable observers. In re Crutchfield, 289 N.C. 597, 223 S.E.2d 822 (1975); In re Edens, 290 N.C. 299, 226 S.E.2d 5 (1976); In re Stuhl, 292 N.C. 379, 233 S.E.2d 562 (1977).

Whether a judge receives any personal benefit from his conduct is wholly irrelevant to inquiry into conduct of judicial officer. In

re Crutchfield, 289 N.C. 597, 223 S.E.2d 822 (1975).

The fact that a judge received no personal benefit, financial or otherwise, from his conduct does not preclude his conduct from being prejudicial to the administration of justice and that brings the judicial office into disrepute. In re Crutchfield, 289 N.C. 597, 223 S.E.2d 822 (1975).

A judge may not escape responsibility for any judgments signed by him by delegating their preparation to counsel or anyone else. In re Crutchfield, 289 N.C. 597, 223 S.E.2d 822 (1975).

Disposition of cases for reasons other than an honest appraisal of facts and law, as disclosed by the evidence presented, will amount to conduct prejudicial to the proper administration of justice whenever and however it may be defined or whoever does the defining. In re Crutchfield, 289 N.C. 597, 223 S.E.2d 822 (1975).

Gross Abuse of Motor Vehicle Statutes Amounting to Prejudicial Conduct. — Judge's execution judgments allowing limited driving privileges under § 20-179 upon a mere ex parte request without making any effort or conducting any inquiry to ascertain whether the facts recited in the judgments were true and whether he was lawfully entitled to enter the judgments and without giving the State an opportunity to be heard when in truth the judgments were supported neither in fact nor in law and were beyond the judge's jurisdiction to enter constituted a gross abuse of important provisions of the motor vehicle statutes and amounted to conduct prejudicial to the administration of justice that brings the judicial office into disrepute. In re Crutchfield, 289 N.C. 597, 223 S.E.2d 822 (1975).

§ 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).

Nature of Proceeding upon Recommendation of Commission. — A proceeding before the Supreme Court on the recommendation of the Judicial Standards Commission is neither criminal nor civil in nature, but is an inquiry into the conduct of a

judicial officer, the purpose of which is not primarily to punish any individual but to maintain due and proper administration of justice in our State's courts, public confidence in its judicial system and the honor and integrity of its judges. In re Crutchfield, 289 N.C. 597, 223 S.E.2d 822 (1975).

§§ 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, cert. denied, 409 U.S. 1047, 93 S. Ct. 537, 34 L. Ed. 2d 499 (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, cert. denied, 285 N.C. 375, 205 S.E.2d 100 (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, cert. denied, 409 U.S. 1047, 93 S. Ct. 537, 34 L. Ed. 499 (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).

The statutory plan established in this section and § 7A-454 and the plan of § 7A-468 for state provision of investigative or expert assistance are substantially equivalent. In neither case is a defendant entitled to an investigator at State expense upon demand. In both instances he is entitled to a state-appointed investigator when he has made a showing of need sufficient to convince a public official, in the exercise of his discretion, that those services are necessary to a fundamentally fair trial. There is then no real distinction between indigent defendants represented by a public defender and those with court-appointed counsel with respect to the availability of state-provided investigative assistance. Therefore, the denial of defendant's motion for the appointment of an investigator did not violate his constitutionally guaranteed rights to equal protection of the laws. *State v. Tatum*, 291 N.C. 73, 229 S.E.2d 562 (1976).

Denial of a state-paid private investigator to an indigent defendant under subsection (b) of this section does not, ipso facto, constitute a denial of equal protection of the laws notwithstanding that such investigators might be available to indigent defendants represented by public defenders under § 7A-468, and to pecunious defendants. *State v. Gray*, 292 N.C. 270, 233 S.E.2d 905 (1977).

When Private Investigators or Expert Assistance Provided. — Subsection (b) of this section and § 7A-454 require that private investigators or expert assistance be provided only upon a showing by defendant that there is a reasonable likelihood that it will materially assist the defendant in the preparation of his defense or that without such help it is probable that defendant will not receive a fair trial. Neither the State nor the federal Constitution requires more. *State v. Gray*, 292 N.C. 270, 233 S.E.2d 905 (1977).

Subsection (b) of this section has never been construed to extend to the employment of an investigator in the absence of a showing of a reasonable likelihood that such an investigator could discover evidence favorable to the defendant. *State v. Gray*, 292 N.C. 270, 233 S.E.2d 905 (1977).

This section has never been construed to extend to the employment of an investigator in the absence of a showing of a reasonable likelihood that such an investigator could

discover evidence favorable to the defendant. *State v. Montgomery*, 291 N.C. 91, 229 S.E.2d 572 (1976).

Discretion of Trial Judge. — The appointment of experts to assist an indigent in his defense depends really upon the facts and circumstances of each case and lies, finally, within the discretion of the trial judge. *State v. Gray*, 292 N.C. 270, 233 S.E.2d 905 (1977).

This section and the better reasoned decisions place the question of whether an expert should be appointed at State expense to assist an indigent defendant within the sound discretion of the trial judge. *State v. Tatum*, 291 N.C. 73, 229 S.E.2d 562 (1976).

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), appeal dismissed, 280 N.C. 304, 186 S.E.2d 179 (1972).

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), appeal dismissed, 280 N.C. 304, 186 S.E.2d 179 (1972).

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), appeal dismissed, 280 N.C. 304, 186 S.E.2d 179 (1972).

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) In any case of execution against the person under Chapter 1, Article 28 of the General Statutes, and in any civil arrest and bail proceeding under Chapter 1, Article 34, of the General Statutes;
- (8) In the case of a juvenile, a hearing as a result of which commitment to an institution or transfer to the superior court for trial on a felony charge is possible;
- (9) A hearing for revocation of parole at which the right to counsel is provided in accordance with the provisions of Chapter 148, Article 4, of the General Statutes;
- (10) A proceeding for sterilization under Chapter 35, Article 7 (Sterilization of Persons Mentally Ill and Mentally Retarded) of the General Statutes; and
- (11) A proceeding for the provision of protective services according to Chapter 108, Article 4, of the General Statutes;
- (12) In the case of a juvenile alleged to be neglected under Chapter 7A, Article 23 of the General Statutes.

(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; 1977, c. 649, s. 4; c. 766, 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).

The first 1977 amendment substituted "In any case of execution against the person under Chapter 1, Article 28 of the General Statutes, and in any" for "A" at the beginning of subdivision (7) of subsection (a).

The second 1977 amendment, effective Sept. 26, 1977, added subdivision (12) to subsection (a).

For comment on assigned counsel and public defender systems, see 49 N.C.L. Rev. 705 (1971).

Amendment Effective March 1, 1978. — Session Laws 1977, c. 725, s. 2, effective March 1, 1978, will add subdivision (13) to subsection (a). Subdivision (13) reads as follows:

"(13) A proceeding to find a person incompetent under Chapter 35, Article 1A, of the General Statutes."

Session Laws 1977, c. 725, s. 8, provides: "This act shall become effective on March 1, 1978, and shall apply only to appointments made on or after that date."

Amendment Effective July 1, 1978. — Session Laws 1977, c. 711, ss. 7 and 8, effective July 1, 1978, will amend subdivisions (3) and (4) of subsection (a) to read as follows:

"(3) A motion for appropriate relief under Chapter 15A of the General Statutes if the defendant has been convicted of a felony, has been fined five hundred dollars (\$500.00) or more, or has been sentenced to a term of imprisonment;

"(4) A hearing for revocation of probation";

Session Laws 1977, c. 711, s. 7, will amend subdivision (6) of subsection (b) to read as follows:

"(6) Review of any judgment or decree pursuant to G.S. 7A-27, G.S. 7A-30(1), 7A-30(2), and Subchapter XIV of Chapter 15A of the General Statutes."

Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article 85, 'Parole' shall not apply to persons sentenced before July 1, 1978."

Session Laws 1977, c. 711, s. 36, contains a severability clause.

This section does not cover appointment of counsel in federal habeas corpus or State or federal civil rights actions, all of which are

encompassed by the constitutional right of access to the courts. *Bounds v. Smith*, U.S. , 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977).

There is no constitutional right to appointed counsel to seek discretionary review in either a State forum or the United States Supreme Court. *Morgan v. Yancy County Dep't of Cors.*, 527 F.2d 1004 (4th Cir. 1975).

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), rev'd on other grounds, 483 F.2d 650 (4th Cir. 1973), aff'd sub nom. *Ross v. Moffitt*, 417 U.S. 600, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974).

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, death sentence vacated, 409 U.S. 1004, 93 S. Ct. 453, 34 L. Ed. 2d 295 (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, cert. denied, 281 N.C. 157, 188 S.E.2d 366 (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), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2875, 33 L. Ed. 2d 762 (1972).

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), death sentence vacated, 408 U.S. 940, 92 S. Ct. 2878, 33 L. Ed. 2d 764 (1972).

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), death sentence vacated, 408 U.S. 940, 92 S. Ct. 2878, 33 L. Ed. 2d 764 (1972).

Where defendant's narrative confession was not the result of an in-custody interrogation, even though his indigency be assumed, and the presence of counsel was not required at that time. *State v. Lynch*, 279 N.C. 1, 181 S.E.2d 561 (1971).

The standard for determining when an "in-custody interrogation" occurs under this section is a question of State law which is not inextricably linked to the evolving federal standard for an "in-custody interrogation" actionable under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966). *Chance v. Garrison*, 537 F.2d 1212 (4th Cir. 1976).

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, death sentence vacated, 409 U.S. 1004, 93 S. Ct. 453, 34 L. Ed. 2d 295 (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 of 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), death sentence vacated, 408 U.S. 940, 92 S. Ct. 2878, 33 L. Ed. 2d 764 (1972).

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), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3202, 1 L. Ed. 2d (1976).

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. — Uncontroverted 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, cert. denied, 409 U.S. 888, 93 S. Ct. 194, 34 L. Ed. 2d 145 (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, cert. denied, 409 U.S. 1047, 93 S. Ct. 537, 34 L. Ed. 2d 499 (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).

The right to free counsel provided by the legislature survives the release of a debtor upon the expiration of 72 hours, under § 23-32, even if the creditor has not insisted on an adversary hearing at that time. In such a situation the question of indigency and the other side of the coin — concealment or diversion of assets — is unresolved. The debtor contends he is indigent, and the creditor may later choose to insist that he is concealing assets. The clerk or a judge under such circumstances must make a provisional determination of whether the debtor can provide his own counsel and upon a finding of apparent indigency, one should be appointed for him at the expense of the State. *Grimes v. Miller*, 429 F. Supp. 1350 (M.D.N.C. 1977).

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.

Amendment Effective July 1, 1978. — Session Laws 1977, c. 711, s. 9, effective July 1,

1978, will change the catchline to read "Source of counsel; fees; compensation of standby counsel," and will add new subsection (d) to read as follows:

"(d) Unless a public defender or assistant public defender is appointed to serve, the trial judge appointing standby counsel under G.S. 15A-1243 shall award reasonable compensation to be paid by the State."

Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article 85, 'Parole' shall not apply to persons sentenced before July 1, 1978."

Session Laws 1977, c. 711, s. 36, contains a severability clause.

Quoted in State v. Memes, 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.

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 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, cert. denied, 409 U.S. 1047, 93 S. Ct. 537, 34 L. Ed. 2d 499 (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).

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-454. Supporting services.

The statutory plan established in § 7A-450 and this section and the plan of § 7A-468 for State provision of investigative or expert assistance are substantially equivalent. In neither case is a defendant entitled to an investigator at State expense upon demand. In both instances he is entitled to a state-appointed investigator when he has made a showing of need sufficient to convince a public official, in the exercise of his discretion, that those services are necessary to a fundamentally fair trial. There is then no real distinction between indigent defendants represented by a public defender and those with court-appointed counsel with respect to the availability of state-provided investigative assistance. Therefore, the denial of defendant's motion for the appointment of an investigator did not violate his constitutionally guaranteed rights to equal protection of the laws. *State v. Tatum*, 291 N.C. 73, 229 S.E.2d 562 (1976).

This section permits but does not compel providing an expert to criminally accused at State expense. *State v. Patterson*, 288 N.C. 553, 220 S.E.2d 600 (1975), death sentence vacated, U.S. , 96 S. Ct. 3211, 49 L. Ed. 2d 1211 (1976).

When Private Investigators or Expert Assistance Provided. — Section 7A-450(b) and this section require that private investigators or expert assistance be provided only upon a showing by defendant that there is a reasonable likelihood that it will materially assist the

defendant in the preparation of his defense or that without such help it is probable that defendant will not receive a fair trial. Neither the State nor the federal Constitution requires more. *State v. Gray*, 292 N.C. 270, 233 S.E.2d 905 (1977).

Discretion of Trial Judge. — This section and the better reasoned decisions place the question of whether an expert should be appointed at State expense to assist an indigent defendant within the sound discretion of the trial judge. *State v. Tatum*, 291 N.C. 73, 229 S.E.2d 562 (1976).

The language contained in this section is consistent with the rule that appointment of experts lies within the discretion of the trial judge. *State v. Tatum*, 291 N.C. 73, 229 S.E.2d 562 (1976).

Where the motion to the court submitted by defendant's counsel simply stated, "That the defendant is an indigent person with court-appointed counsel, and, in the opinion of counsel, psychiatric evidence will be necessary and proper in behalf of the defense of the charges of murder against the defendant," without more, there was not abuse of the trial court's discretion in denying the motion. *State v. Grainger*, 29 N.C. App. 694, 225 S.E.2d 595 (1976).

Stated in *State v. Lewis*, 7 N.C. App. 178, 171 S.E.2d 793 (1970); *In re Moore*, 289 N.C. 95, 221 S.E.2d 307 (1976).

§ 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).

§ 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), death sentence vacated, 408 U.S. 940, 92 S. Ct. 2878, 33 L. Ed. 2d 764 (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).

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, cert. denied, 285 N.C. 595, 206 S.E.2d 866 (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, cert. denied, 285 N.C. 595, 206 S.E.2d 866 (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, cert. denied, 285 N.C. 595, 206 S.E.2d 866 (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, cert. denied, 285 N.C. 595, 206 S.E.2d 866 (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), cert. denied, 414 U.S. 1160, 94 S. Ct. 920, 39 L. Ed. 2d 112 (1974).

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).

The standard for determining when an "in-custody interrogation" occurs under this section is a question of State law which is not inextricably linked to the evolving federal standard for an "in-custody interrogation" actionable under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966). *Chance v. Garrison*, 537 F.2d 1212 (4th Cir. 1976).

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).

Refusal to sign a written waiver is a fact which may tend to show that no waiver occurred, but it is not conclusive in the face of other evidence tending to show waiver. *State v. Patterson*, 288 N.C. 553, 220 S.E.2d 600 (1975), death sentence vacated, U.S. , 96 S. Ct. 3211, 49 L. Ed. 2d 1211 (1976).

A refusal to sign a waiver form does not necessarily preclude a valid oral waiver. *State v. Patterson*, 288 N.C. 553, 220 S.E.2d 600 (1975), death sentence vacated, U.S. , 96 S. Ct. 3211, 49 L. Ed. 2d 1211 (1976).

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, cert. denied, 285 N.C. 375, 205 S.E.2d 100 (1974).

Waiver in Capital Case Prior to 1971 Amendment. — See *State v. Doss*, 279 N.C. 413, 183 S.E.2d 671 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2875, 33 L. Ed. 2d 762 (1972); *State v. Chance*, 279 N.C. 643, 185 S.E.2d 227 (1971), death sentence vacated, 408 U.S. 940, 92 S. Ct. 2878, 33 L. Ed. 2d 764 (1972); *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); *State v. Monroe*, 27 N.C. App. 405, 219 S.E.2d 270 (1975); *State v. Hodge*, 27 N.C. App. 502, 219 S.E.2d 568 (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); *State v. Boyd*, 31 N.C. App. 328, 229 S.E.2d 229 (1976).

§ 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. Effective January 1, 1979, the twenty-seventh judicial district is divided into judicial districts 27A and 27B. On that date the current public defender of the twenty-seventh district shall become the public defender for district 27A.

The public defender shall be an attorney licensed to practice law in North Carolina, and shall devote his full time to the duties of his office. (1969, c. 1013, s. 1; 1973, c. 47, s. 2; c. 799, s. 1; 1975, c. 956, s. 14; 1977, c. 802, s. 41.2; c. 1130, s. 6.)

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.

The first 1977 amendment, effective July 1, 1977, deleted the former second sentence of the last paragraph, which read: "The compensation of the defender is the same as that of a full-time district attorney, and is paid by the State."

The second 1977 amendment, effective July 15, 1977, added the second and third sentences of the third paragraph.

Session Laws 1977, c. 802, s. 53, contains a severability clause.

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-A judicial districts shall be appointed by the Governor from a list of not less than two and not more than three names nominated by written ballot of the attorneys resident in the district who are licensed to practice law in North Carolina. The public defender in the twenty-eighth judicial district shall be appointed by the senior resident superior court judge of that judicial district from a list of not less than two names and not more than three names nominated by written ballot of the attorneys resident in the district who are licensed to practice law in North Carolina. The balloting shall be conducted pursuant to regulations promulgated by the Administrative Office of the Courts. The terms of office of the public defenders authorized in G.S. 7A-465 are for four years, beginning on the dates specified in that section for each district, and each fourth year thereafter.

A vacancy in the office of public defender is filled, in the same manner as the original appointment, for the unexpired term.

A public defender or assistant public defender may be suspended or removed from office, and reinstated, for the same causes and under the same procedures as are applicable to removal of a superior court district attorney. (1969, c. 1013, s. 1; 1973, c. 47, s. 2; c. 148, s. 5; c. 799, s. 2; 1975, c. 956, ss. 15, 16; 1977, c. 1130, s. 7.)

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.

The 1977 amendment, effective July 15, 1977, substituted "twenty-seventh-A" for "twenty-seventh" near the beginning of the first sentence.

§ 7A-468. Investigative services.

The statutory plan established in §§ 7A-450 and 7A-454 and the plan of this section for State provision of investigative or expert assistance are substantially equivalent. In neither case is a defendant entitled to an investigator at State expense upon demand. In

both instances he is entitled to a state-appointed investigator when he has made a showing of need sufficient to convince a public official, in the exercise of his discretion, that those services are necessary to a fundamentally fair trial. There is then no real distinction between

indigent defendants represented by a public defender and those with court-appointed counsel with respect to the availability of state-provided investigative assistance. Therefore, the denial of defendant's motion for the appointment of an investigator did not violate his constitutionally guaranteed rights to equal protection of the laws. *State v. Tatum*, 291 N.C. 73, 229 S.E.2d 562 (1976).

Denial of a state-paid private investigator to an indigent defendant under subsection (b) of § 7A-450 does not, ipso facto, constitute a denial of equal protection of the laws notwithstanding that such investigators might be available to indigent defendants represented by public defenders under this section and to pecunious

defendants. *State v. Gray*, 292 N.C. 270, 233 S.E.2d 905 (1977).

The services of an investigator are at the disposal of each public defender, to be used by him whenever, in his discretion, a particular case indicates the need therefor. *State v. Tatum*, 291 N.C. 73, 229 S.E.2d 562 (1976).

Employment of Investigator. — Nothing in this section requires or contemplates the employment or use of an investigator for the purpose of embarking upon a statewide, or worldwide, search for evidence in the absence of any indication whatever that such evidence exists anywhere. *State v. Montgomery*, 291 N.C. 91, 229 S.E.2d 572 (1976).

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.**

Sec.

8-5. Town ordinances certified.

Article 3.**Public Records.**

8-35.1. Division of Motor Vehicles' record admissible as prima facie evidence of convictions under §§ 20-138 and 20-139.

Article 4.**Other Writings in Evidence.**

8-40.1. Statements in published treatises, periodicals, or pamphlets.

8-44.1. Copies of medical records.

Article 4A.**Photographic Copies of Business and Public Records.**

8-45.1. Photographic reproductions admissible; destruction of originals.

Article 5.**Life Tables.**

8-46. Mortuary tables as evidence.

Article 7.**Competency of Witnesses.**

8-50.1. Competency of evidence of blood tests.

8-51. A party to a transaction excluded, when the other party is dead.

8-51.1. Dying declarations.

8-52. [Repealed.]

8-53. Communications between physician and patient.

8-53.1. Physician-patient privilege waived in child abuse.

8-53.4. School counselor privilege.

8-55. Testimony enforced in certain criminal investigations; immunity.

Sec.

8-56. Husband and wife as witnesses in civil action.

8-57. Husband and wife as witnesses in criminal actions.

8-57.1. Husband-wife privilege waived in child abuse.

8-58. [Repealed.]

8-58.1 to 8-58.5. [Reserved.]

Article 7A.**Restrictions on Evidence in Rape Cases.**

8-58.6. Restrictions on evidence in rape cases.

Article 8.**Attendance of Witness.**

8-59. Issue and service of subpoena.

8-63. Witnesses attend until discharged; effect of nonattendance.

Article 9.**Attendance of Witnesses from without State.**

8-65 to 8-70. [Transferred.]

Article 10.**Depositions.**

8-74. Depositions for defendant in criminal actions.

8-75. [Repealed.]

8-83. When deposition may be read on the trial.

8-84. [Repealed.]

Article 11.**Perpetuation of Testimony.**

8-85. Court reporter's certified transcription.

Article 12.**Inspection and Production of Writings.**

8-89.1. [Repealed.]

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 775 (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.

"Written Hearsay" Admissible. — North Carolina countenances the introduction of test results, certified copies of official documents

and records, as well as other writings, which, but for statute or decisional authority, would be written hearsay. In re Arthur, 27 N.C. App. 227, 218 S.E.2d 869, cert. granted, 288 N.C. 730, 220 S.E.2d 621.

Cited in In re Arthur, 291 N.C. 640, 231 S.E.2d 614 (1977); State v. Gray, 292 N.C. 270, 233 S.E.2d 905 (1977).

§ 8-35. Authenticated copies of public records.

"Written Hearsay" Admissible. — North Carolina countenances the introduction of test results, certified copies of official documents and records, as well as other writings, which, but for statute or decisional authority, would be written hearsay. In re Arthur, 27 N.C. App. 227, 218 S.E.2d 869, cert. granted, 288 N.C. 730, 220 S.E.2d 621 (1975).

The purpose of authentication and certification of records is to avoid the inconvenience and sometimes the impossibility of producing original public documents in court. State v. Watts, 289 N.C. 445, 222 S.E.2d 389 (1976).

Admission of certified records tends to expedite trial of cases. State v. Watts, 289 N.C. 445, 222 S.E.2d 389 (1976).

Public documents may be authenticated by mechanical reproduction of signature of authorized officer when he intends to adopt the mechanical reproduction as his signature. State v. Watts, 289 N.C. 445, 222 S.E.2d 389 (1976).

And Such Is Presumed. — When the authorized officer of the Division of Motor Vehicles provides records of the Division pursuant to the provisions of § 20-222, it may be presumed that he intends to authenticate the documents and to adopt the mechanical

reproduction of his name as his own signature. *State v. Watts*, 289 N.C. 445, 222 S.E.2d 389 (1976).

Requirements of Mechanically Reproduced Signature. — This section does not impose the restriction upon the general rule that for a stamped, printed or typewritten signature to be a good signature, the signature be made under the hand of the person making it. *State v. Watts*, 289 N.C. 445, 222 S.E.2d 389 (1976).

Reading of Record by District Attorney. — There is no error in allowing a properly certified copy of a record to be read into evidence by the district attorney, as opposed to having the document passed among the jurors. *State v. Miller*, 288 N.C. 582, 220 S.E.2d 326 (1975).

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, appeal dismissed, 277 N.C. 459, 177 S.E.2d 900 (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 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, cert. denied, 288 N.C. 247, 217 S.E.2d 671 (1975).

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, cert. denied, 288 N.C. 247, 217 S.E.2d 671 (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); *In re Arthur*, 291 N.C. 640, 231 S.E.2d 614 (1977); *State v. Gray*, 292 N.C. 270, 233 S.E.2d 905 (1977).

§ 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.

"Written Hearsay" Admissible. — North Carolina countenances the introduction of test results, certified copies of official documents and records, as well as other writings, which, but for statute or decisional authority, would be written hearsay. *In re Arthur*, 27 N.C. App. 227, 218 S.E.2d 869, cert. granted, 288 N.C. 730, 220 S.E.2d 621 (1975).

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).

Cited in *In re Arthur*, 291 N.C. 640, 231 S.E.2d 614 (1977).

ARTICLE 4.

*Other Writings in Evidence.***§ 8-39. Parol evidence to identify land described.****In General. —**

A deed purporting to convey an interest in land is void unless it contains a description of the land sufficient to identify it or refers to something extrinsic by which the land may be identified with certainty. *Overton v. Boyce*, 289 N.C. 291, 221 S.E.2d 347 (1976).

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).

When the deed itself, including the references to extrinsic things, describes with certainty the property intended to be conveyed, parol evidence is admissible to fit the description in the deed to the land. *Overton v. Boyce*, 289 N.C. 291, 221 S.E.2d 347 (1976).

Parol evidence may not be introduced to remove a patent ambiguity in the description of the land since to do so would not be a use of such evidence to fit the description to the land but a use of such evidence to create a description by adding to the words of the instrument. *Overton v. Boyce*, 289 N.C. 291, 221 S.E.2d 347 (1976).

Because Deed Containing Such Void. — Where the description of land in a deed under

which plaintiffs claimed was patently ambiguous, the deed was void and could not be the basis for a valid claim of title in the plaintiffs to the land claimed by them. *Overton v. Boyce*, 289 N.C. 291, 221 S.E.2d 347 (1976).

Patently Ambiguous Description. — When it is apparent upon the face of the deed, itself, that there is uncertainty as to the land intended to be conveyed and the deed, itself, refers to nothing extrinsic by which such uncertainty can be resolved, the description is said to be patently ambiguous. *Overton v. Boyce*, 289 N.C. 291, 221 S.E.2d 347 (1976).

A patent ambiguity in the description of the land is such an uncertainty appearing on the face of the instrument that the court, reading the language in the light of all the facts and circumstances referred to in the instrument, is unable to derive therefrom the intention of the parties as to what land was to be conveyed. *Overton v. Boyce*, 289 N.C. 291, 221 S.E.2d 347 (1976).

The description in a deed under which plaintiffs claimed title was patently ambiguous where it referred to nothing extrinsic to which one could turn in order to identify with certainty the land intended to be conveyed. *Overton v. Boyce*, 289 N.C. 291, 221 S.E.2d 347 (1976).

Scope of Descriptive Words, etc. —

Parol evidence is not admissible to enlarge the scope of the description in the deed. *Overton v. Boyce*, 289 N.C. 291, 221 S.E.2d 347 (1976).

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).

§ 8-40.1. Statements in published treatises, periodicals, or pamphlets. — In all actions in the superior court to the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, the hearsay rule shall not exclude statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or

admission of the witness or by other expert testimony or by judicial notice, even though the declarant is available as a witness. If admitted, the statements may be read into evidence but may not be received as exhibits unless agreed to by counsel for the parties. (1977, c. 1116.)

Editor's Note. — Session Laws 1977, c. 1116, s. 2, makes this section effective July 1, 1977.

§ 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.

Applied in *State v. Tolley*, 290 N.C. 349, 226 S.E.2d 353 (1976).

§ 8-45. Itemized and verified accounts.

Purpose. —

This section was designed to facilitate the collection of accounts about which there is no bona fide dispute. *Bramco Elec. Corp. v. Shell*, 31 N.C. App. 717, 230 S.E.2d 576 (1976).

Construction of Section. — This section must be strictly construed. *Bramco Elec. Corp. v. Shell*, 31 N.C. App. 717, 230 S.E.2d 576 (1976).

Since many states have statutes similar to this section it is appropriate to review decisions from those states for guidance in construing this section. *Bramco Elec. Corp. v. Shell*, 31 N.C. App. 717, 230 S.E.2d 576 (1976).

Competency of Witness Required. —

The account must be sworn to by some person who would be a competent witness to testify to the correctness of the account. *Johnson Serv. Co. v. Richard J. Curry & Co.*, 29 N.C. App. 166, 223 S.E.2d 565 (1976).

An affiant who verifies an account of goods sold and delivered, which is to be received into evidence and taken as prima facie evidence of its correctness pursuant to this section, shall be regarded and dealt with as a witness pro tanto, and to such extent must meet the requirements and is subject to the qualifications and restrictions as other witnesses. *Bramco Elec. Corp. v. Shell*, 31 N.C. App. 717, 230 S.E.2d 576 (1976).

Sufficiency of Verification. — Verification of the itemized account is sufficient if the affiant has personal knowledge of the account or is familiar with the books and records of the

business and is in a position to testify as to the correctness of the records. *Johnson Serv. Co. v. Richard J. Curry & Co.*, 29 N.C. App. 166, 223 S.E.2d 565 (1976).

Where plaintiff's purported itemized statement was verified by a woman who is identified in the verification as the president of plaintiff corporation, the verification contained no statement to the effect, and there was no other showing that affiant had any personal knowledge of the matters set forth in the affidavit or that she was familiar with the books and records of plaintiff corporation, and the burden was on plaintiff to establish a prima facie case, it failed to show that the affiant would have been competent to testify if called as a witness at trial. *Bramco Elec. Corp. v. Shell*, 31 N.C. App. 717, 230 S.E.2d 576 (1976).

Prima Facie Case. —

To make out a prima facie case under this section, the account not only must be properly verified and itemized, it must also be stated so as to show an indebtedness. *Kight v. Harris*, 33 N.C. App. 200, 234 S.E.2d 637 (1977).

Use Not Limited to Absence of Witness. — Nothing in this section or case law limits the use of a verified statement of the account to only those situations where the witness is unavailable to testify. *Johnson Serv. Co. v. Richard J. Curry & Co.*, 29 N.C. App. 166, 223 S.E.2d 565 (1976).

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. — If any business, institution, member of a profession or calling, or any

department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation, X ray or combination thereof, of any act, transaction, occurrence or event, and in the regular course of business has caused any or all of the same to be recorded, copied or reproduced by any photographic, photostatic, microfilm, microcard, miniature photographic, or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business unless held in a custodial or fiduciary capacity or unless its preservation is required by law. Such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not and an enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement or facsimile, does not preclude admission of the original. (1951, c. 262, s. 1; 1977, c. 569.)

- Editor's Note.** — The 1977 amendment inserted "X ray" near the beginning of the first sentence.
- "Written Hearsay" Admissible.** — North Carolina countenances the introduction of test results, certified copies of official documents and records, as well as other writings, which, but for statute or decisional authority, would be written hearsay. *In re Arthur*, 27 N.C. App. 227, 218 S.E.2d 869, cert. granted, 288 N.C. 730, 220 S.E.2d 621 (1975).
- 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).
- Cited in** *In re Arthur*, 291 N.C. 640, 231 S.E.2d 614 (1977).

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

<i>Completed Age</i>	<i>Expectation</i>
12	59.20
13	58.22
14	57.25
15	56.29
16	55.34
17	54.39
18	53.45
19	52.52
20	51.58
21	50.65
22	49.72
23	48.80
24	47.87
25	46.94
26	46.02
27	45.09
28	44.17
29	43.25
30	42.33
31	41.41
32	40.49
33	39.58
34	38.67
35	37.76
36	36.85
37	35.95
38	35.06
39	34.17
40	33.29
41	32.42
42	31.57
43	30.72
44	29.87
45	29.04
46	28.21
47	27.38
48	26.56
49	25.76
50	24.96
51	24.18
52	23.40
53	22.64
54	21.89
55	21.15
56	20.42
57	19.70
58	18.99
59	18.29
60	17.61
61	16.94
62	16.29
63	15.65
64	15.02
65	14.40
66	13.79

*Completed Age**Expectation*

67	13.20
68	12.61
69	12.04
70	11.48
71	10.93
72	10.39
73	9.86
74	9.35
75	8.84
76	8.35
77	7.87
78	7.40
79	6.96
80	6.53
81	6.12
82	5.75
83	5.39
84	5.05
85	4.70
86	4.38
87	4.08
88	3.79
89	3.54
90	3.30
91	3.08
92	2.89
93	2.72
94	2.56
95	2.43
96	2.32
97	2.21
98	2.10
99	2.01
100	1.91
101	1.83
102	1.75
103	1.67
104	1.60
105	1.53
106	1.46
107	1.40
108	1.35
109	1.29

(1883, c. 225; Code, s. 1352; Rev., s. 1626; C. S., s. 1790; 1955, c. 870; 1971, c. 968.)

Editor's Note. — The 1971 amendment revised the mortuary table.

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. Parties competent as witnesses.**

It is well established that an accomplice is always a competent witness. *State v. Taylor*, 289 N.C. 223, 221 S.E.2d 359 (1976).

The fact that accomplice's testimony is usually induced by promise of or hope for leniency goes only to his credibility as a witness, and not to his competency as a witness. *State v. Taylor*, 289 N.C. 223, 221 S.E.2d 359 (1976).

Consolidation and Testimony of Codefendant. — Where the testimony of codefendant would have carried equal force if it

had been received without an order of consolidation, there was no abuse of discretion in the trial judge's order consolidating cases for trial. *State v. Taylor*, 289 N.C. 223, 221 S.E.2d 359 (1976).

Defendant's contention that consolidation of cases resulted in prejudicial error to him because he was deprived of his right to open and close the jury arguments when his codefendant elected to testify is without merit. *State v. Taylor*, 289 N.C. 223, 221 S.E.2d 359 (1976).

§ 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.

For case discussing full faith and credit aspects of an alleged adjudication of paternity

in a foreign jurisdiction, see *Brondum v. Cox*, 292 N.C. 192, 232 S.E.2d 687 (1977).

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).

A defendant is entitled in a proceeding under the Uniform Reciprocal Enforcement of Support Act to a blood-grouping test pursuant to this section where the issue of paternity is raised and, upon timely motion, is entitled to have the jury pass on the issue of paternity. *Brondum v. Cox*, 30 N.C. App. 35, 226 S.E.2d 193, *aff'd*, 30 N.C. App. 35, 232 S.E.2d 687 (1976).

The 1975 amendment to this section amplifies the importance of the right to a blood-grouping test under § 49-7. *State v. Morgan*, 31 N.C. App. 128, 228 S.E.2d 523 (1976).

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. — Upon the trial of an action, or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest, against the executor, administrator or survivor of a deceased person, or the committee of a lunatic, or a person deriving his title or interest from, through or under a deceased person or lunatic, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or lunatic; except where the executor, administrator, survivor, committee or person so deriving title or interest is examined in his own behalf, or the testimony of the lunatic or deceased person is given in evidence concerning the same transaction or communication. Nothing in this section shall preclude testimony as to the identity of the operator of a motor vehicle in any case. (C. C. P., s. 343; Code, s. 590; Rev., s. 1631; C. S., s. 1795; 1967, c. 896, s. 1; 1977, c. 74, s. 2.)

I. GENERAL CONSIDERATION.

Editor's Note. —

The 1977 amendment, effective July 1, 1977, in the last sentence, deleted "deceased" preceding "operator" and deleted "brought against the deceased's estate arising out of the operation of a motor vehicle in which the deceased is alleged to have been the operator or one of the operators involved" from the end.

Session Laws 1977, c. 74, s. 5, provides: "This act shall not affect pending litigation."

For analysis of cases dealing with this section, see *In re Will of Ricks*, 292 N.C. 28, 231 S.E.2d 856 (1977).

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), rev'd on other grounds, 276 N.C. 263, 171 S.E.2d 894 (1970).

Record Evidence Not Within Section. — The death certificate of the daughter intestate recorded no transaction between the child's mother and the doctor, and even had that been the case, record evidence does not fall within the ban of this section. *Spillman v. Forsyth Mem. Hosp.*, 30 N.C. App. 406, 227 S.E.2d 292 (1976).

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), rev'd on other grounds, 276 N.C. 263, 171 S.E.2d 894 (1970).

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); *In re Will of Wadsworth*, 30 N.C. App. 593, 227 S.E.2d 632 (1976); *Waters v. Humphrey*, 33 N.C. App. 185, 234 S.E.2d 462 (1977).

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); *Wall v. Sneed*, 30 N.C. App. 680, 228 S.E.2d 81 (1976).

II. THE SECTION DISQUALIFIES WHOM.

A. Parties to the Action.

Probate of Will. —

A caveator or a propounder in a will contest is a "party" to whom the prohibitions and exceptions of this section apply. *In re Will of Ricks*, 292 N.C. 28, 231 S.E.2d 856 (1977).

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, cert. denied, 287 N.C. 465, 215 S.E.2d 623 (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), rev'd on other grounds, 276 N.C. 263, 171 S.E.2d 894 (1970).

In accord with 2nd paragraph in original. See *Ballard v. Lance*, 6 N.C. App. 24, 169 S.E.2d 199 (1969).

Conversations between Decedent and Third Person. —

The transaction observed and testified to by the plaintiff mother of intestate was not one between her and the deceased doctor but was one between the deceased doctor and a third party, her daughter. Therefore, notwithstanding her interest, she was properly allowed to testify concerning it. *Spillman v. Forsyth Mem. Hosp.*, 30 N.C. App. 406, 227 S.E.2d 292 (1976).

This section applies to caveat proceedings, etc. —

This section operates to exclude evidence by caveator in a caveat proceeding concerning any personal transactions or communications between him and decedent. *In re Will of Edgerton*, 29 N.C. App. 60, 223 S.E.2d 524, cert. denied, 290 N.C. 308, 225 S.E.2d 832 (1976).

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 section does not prevent an interested witness, where there is an issue of mental capacity, from relating personal transactions and communications between the witness and a decedent as a basis for his opinion as to the mental capacity of the decedent. In *re Will of Ricks*, 28 N.C. App. 649, 222 S.E.2d 471 (1976), *rev'd* on other grounds, 292 N.C. 28, 231 S.E.2d 856 (1977).

A party or an interested witness may, notwithstanding this section, in an action to set aside a will, a deed or other writing, testify to communications or conversations with a deceased to show the basis upon which the party or witness has formed an opinion regarding the mental capacity of the deceased, when he testifies to such an opinion, and when the lack of such capacity is a ground for setting aside the instrument. In *re Will of Ricks*, 292 N.C. 28, 231 S.E.2d 856 (1977).

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).

This section 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. In *re Will of Ricks*, 292 N.C. 28, 231 S.E.2d 856 (1977).

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), *rev'd* on other grounds, 276 N.C. 263, 171 S.E.2d 894 (1970).

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), *rev'd* on other grounds, 276 N.C. 263, 171 S.E.2d 894 (1970).

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), *rev'd* on other grounds, 276 N.C. 263, 171 S.E.2d 894 (1970). 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), cert. denied, 280 N.C. 495, 186 S.E.2d 513 (1972).

§ 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.

The declaration must have been voluntary and made when the declarant was conscious of approaching death and without hope for recovery. *State v. Bowden*, 290 N.C. 702, 228 S.E.2d 414; *State v. Cousin*, 291 N.C. 413, 230 S.E.2d 518 (1976).

The words "no hope of recovery" in this section may make the statutory exception to the hearsay rule more restrictive than existing case law. *State v. Bowden*, 290 N.C. 702, 228 S.E.2d 414; *State v. Cousin*, 291 N.C. 413, 230 S.E.2d 518 (1976).

It is not necessary for the declarant to state that he perceives he is going to die. If all the circumstances, including the nature of the wound, indicate that the declarant realized death

was near, this requirement of the law is satisfied. *State v. Bowden*, 290 N.C. 702, 228 S.E.2d 414; *State v. Cousin*, 291 N.C. 413, 230 S.E.2d 518 (1976).

The admissibility of a declaration as a dying declaration is a question to be determined by the trial judge, and when the judge admits the declaration, his ruling is reviewable only to determine whether there is evidence tending to show facts essential to support it. *State v. Bowden*, 290 N.C. 702, 228 S.E.2d 414; *State v. Cousin*, 291 N.C. 413, 230 S.E.2d 518 (1976).

A dying declaration is not conclusive, its weight and credibility being for the jury to determine. It may be impeached in the same manner as any other sworn statement. *State v. Harding*, 291 N.C. 223, 230 S.E.2d 397 (1976).

§ 8-52: Repealed by Session Laws 1973, c. 41.

§ 8-53. Communications between physician and patient. — No person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon. Confidential information obtained in medical records shall be furnished only on the authorization of the patient, or if deceased, the executor, administrator, or, in the case of unadministered estates, the next of kin; provided, that the court, either at the trial or prior thereto, or the Industrial Commission pursuant to law may compel such disclosure, if in his opinion the same is necessary to a proper administration of justice. (1885, c. 159; Rev., s. 1621; C. S., s. 1798; 1969, c. 914; 1977, c. 1118.)

Cross Reference. — As to the competency of doctor of chiropractic to testify as an expert in his field, see § 90-157.2.

Editor's Note. —

The 1977 amendment deleted the proviso from the end of the first sentence and added the second sentence.

For note on reporting patients for review of driver's license, see 48 N.C.L. Rev. 1003 (1970).

For a comment on the evidentiary implications

at trial of the physician-patient privilege, see 12 Wake Forest L. Rev. 849 (1976).

For comment on release of medical records by North Carolina hospitals, see 7 N.C. Cent. L.J. 299 (1976).

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, appeal dismissed, 283 N.C. 670, 197 S.E.2d 879 (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, appeal dismissed, 283 N.C. 670, 197 S.E.2d 879 (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.

§ 8-53.3. Communications between psychologist and client.

Editor's Note. —

For a comment on the evidentiary implications at trial of the physician-patient privilege, see 12 Wake Forest L. Rev. 849 (1976).

§ 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).

When the common-law rules of evidence, which declared that parties were incompetent to testify, were changed by this section, an important privilege was extended to defendants, guarded by the provision that a failure to exercise it should raise no presumption of guilt against them. *State v. Smith*, 290 N.C. 148, 226 S.E.2d 10, cert. denied, U.S. , 97 S. Ct. 339, 50 L. Ed. 2d 301 (1976).

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, rev'd on other grounds, 285 N.C. 364, 204 S.E.2d 675 (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), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3203, 49 L. Ed. 2d 1205 (1976).

A witness, including a defendant in a criminal action, is subject to being impeached or discredited by cross-examination. *State v. Waddell*, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, U.S. , 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

A testifying defendant is subject to impeachment by cross-examination, generally to the same extent as any other witness. *State v. Lester*, 289 N.C. 239, 221 S.E.2d 268 (1976).

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); *State v. Poole*, 289 N.C. 47, 220 S.E.2d 320 (1975); *State v. Alford*, 289 N.C. 372, 222 S.E.2d 222 (1976).

In cross-examination, the witness, including a defendant in a criminal case, may be asked all sorts of disparaging questions and he may be particularly asked whether he has committed specified criminal acts or has been guilty of specified reprehensible or degrading conduct. *State v. Waddell*, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, U.S. , 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

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), cert. denied, 282 N.C. 674, 194 S.E.2d 154 (1973).

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), cert. denied, 282 N.C. 674, 194 S.E.2d 154 (1973).

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); *State v. Alford*, 289 N.C. 372, 222 S.E.2d 222 (1976).

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, rev'd on other grounds, 285 N.C. 364, 204 S.E.2d 675 (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).

Inquiry of a witness, including a defendant, into prior convictions for certain crimes is relevant to impeach the witness. *State v. Collins*, 29 N.C. App. 120, 223 S.E.2d 575 (1976).

Trial judge did not err in admitting defendant's testimony under cross-examination of prior criminal convictions where the district attorney repeatedly asked defendant what he had been convicted of, not what he had been charged with, it was defendant who unresponsively volunteered information as to charges, and defendant's motion to strike all testimony as to charges was allowed and the judge instructed the jury to disregard all of it. *State v. Lester*, 289 N.C. 239, 221 S.E.2d 268 (1976).

And Criminal Conduct. — Contention that cross-examination concerning criminal conduct is limited to inquiry about prior convictions is

unsound. *State v. Poole*, 289 N.C. 47, 220 S.E.2d 320 (1975).

Cross-examination for impeachment purposes is not limited to conviction of crimes. *State v. Poole*, 289 N.C. 47, 220 S.E.2d 320 (1975).

And Specific Acts of Misconduct. — Where a defendant in a criminal case testifies in his own behalf, specific acts of misconduct may be brought out on cross-examination to impeach his testimony. *State v. Poole*, 289 N.C. 47, 220 S.E.2d 320 (1975).

An accused person who testifies as a witness may be cross-examined regarding prior acts of misconduct. *State v. Lester*, 289 N.C. 239, 221 S.E.2d 268 (1976).

Any act of the witness which tends to impeach his character may be inquired about or proven by cross-examination. *State v. Poole*, 289 N.C. 47, 220 S.E.2d 320 (1975).

Such as Undesirable Discharge from Military. — Trial judge did not err in allowing cross-examination of defendant concerning the circumstances of his undesirable discharge from military service. *State v. Lester*, 289 N.C. 239, 221 S.E.2d 268 (1976).

Contradiction of Testimony. — Defendant's privilege against self-incrimination was not violated where State was permitted to show for purposes of impeachment that defendant had not voluntarily turned himself in to the police, and defendant had already testified to the contrary. *State v. Lester*, 289 N.C. 239, 221 S.E.2d 268 (1976).

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).

Witness, including a defendant in a criminal case, cannot be impeached by cross-examination as to whether he has been arrested for, indicted for or accused of an unrelated criminal offense. *State v. Waddell*, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, U.S. , 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

It is improper to cross-examine a witness, including a defendant in a criminal trial, as to indictments, warrants or arrests which may have been made against him. *State v. Lester*, 289 N.C. 239, 221 S.E.2d 268 (1976).

A defendant may not be asked on cross-examination for impeachment purposes if he has been accused, arrested or indicted for a particular crime, but he may be asked if he in fact committed the crime. *State v. Poole*, 289 N.C. 47, 220 S.E.2d 320 (1975); *State v. Alford*, 289 N.C. 372, 222 S.E.2d 222 (1976).

Failure to Take Stand. —

North Carolina cases do not prescribe any mandatory formula with regard to defendant's failure to testify not creating any presumption against him, but instead look to see if the spirit of this section has been complied with. *State v. Sanders*, 288 N.C. 285, 218 S.E.2d 352 (1975), cert. denied, 423 U.S. 1091, 96 S. Ct. 886, 47 L. Ed. 2d 102 (1976).

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. —

This section does not restrict the prosecuting attorney from making such comments upon the evidence and drawing such deductions therefrom as would have been legitimate before the passage of the act, for, while enlarging the rights of the defendants, the section did not abridge the privileges of the prosecution. *State v. Smith*, 290 N.C. 148, 226 S.E.2d 10, cert. denied, U.S. , 97 S. Ct. 339, 50 L. Ed. 2d

301 (1976); *State v. Peplinski*, 290 N.C. 236, 225 S.E.2d 568 (1976).

It is the purpose of the section not to restrict the officer prosecuting for the State from making a comment upon the testimony that would have been legitimate before the passage of the act, and in which no direct reference was made to the right of the prisoner to testify or his failure to exercise it. *State v. Smith*, 290 N.C. 148, 226 S.E.2d 10, cert. denied, U.S. , 97 S. Ct. 339, 50 L. Ed. 2d 301 (1976).

In accord with 2nd paragraph in original. See *State v. Bryant*, 283 N.C. 227, 195 S.E.2d 509 (1973); *State v. Caron*, 288 N.C. 467, 219 S.E.2d 68 (1975), cert. denied, U.S. , 96 S. Ct. 2168, 48 L. Ed. 2d 794 (1976).

This section unquestionably prohibits any mention before the jury of a defendant's failure to testify in his own behalf. *State v. Taylor*, 289 N.C. 223, 221 S.E.2d 359 (1976).

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 effect of this section is to prohibit the district attorney from commenting on defendant's failure to testify. *State v. Peplinski*, 290 N.C. 236, 225 S.E.2d 568 (1976).

A bare statement by the prosecution to the effect that the State's evidence is uncontradicted is not an improper reference to the defendant's failure to testify. *State v. Smith*, 290 N.C. 148, 226 S.E.2d 10, cert. denied, U.S. , 97 S. Ct. 339, 50 L. Ed. 2d 301 (1976).

The State may fairly draw the jury's attention to the failure of the defendant to produce exculpatory evidence or to contradict the State's case. *State v. Tilley*, 292 N.C. 132, 233 S.E.2d 433 (1977).

The district attorney had a right to comment on defendant's failure to account for the hours between 4:30 and 6:45 P.M., especially after the defendant had offered evidence tending to establish an alibi. The prosecutor's remarks were directed solely at defendant's failure to offer evidence rebutting the State's case, rather than at his failure to take the stand. *State v. Stanfield*, 292 N.C. 357, 233 S.E.2d 574 (1977).

Exception to improper remarks of counsel during the argument must be taken before verdict. The rationale for this rule is that a party cannot be allowed to speculate upon his chances for a verdict, and then complain because counsel were not arrested in their comments upon the case. Such exceptions, like those to the

admission of incompetent evidence, must be made in apt time, or else be lost. *State v. Hopper*, 292 N.C. 580, 234 S.E.2d 580 (1977).

Exception in Death Cases. — The general rule that exception to improper remarks of counsel during the argument must be taken before verdict has been modified in recent years so that it does not apply to death cases, when the argument of counsel is so prejudicial to the defendant that in this court's opinion, it is doubted that the prejudicial effect of such argument could have been removed from the jurors' minds by any instruction the trial judge might have given. *State v. Hopper*, 292 N.C. 580, 234 S.E.2d 580 (1977).

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).

But Jury May Consider Fact State's Evidence Not Contradicted or Rebutted by Defendant. — While defendant's failure to testify is not the subject of comment or consideration, the jury, in weighing the credibility of the evidence offered by the State, may consider the fact that it is uncontradicted or un rebutted by evidence available to defendant. *State v. Stanfield*, 292 N.C. 357, 233 S.E.2d 574 (1977).

While defendant's failure to testify is not the subject of comment or consideration, the jury, in weighing the credibility of the evidence offered by the State, may consider the fact that it is uncontradicted or un rebutted by evidence available to defendant. *State v. Tilley*, 292 N.C. 132, 233 S.E.2d 433 (1977).

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, cert. denied, 282 N.C. 428, 192 S.E.2d 841 (1972).

It is the better practice not to instruct on the defendant's failure to testify. *State v. Covington*, 290 N.C. 313, 226 S.E.2d 629 (1976).

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).

If a district attorney improperly comments on a defendant's failure to testify, this error may be cured by a withdrawal of the remark or by

a statement of the court that it was improper, followed by an instruction to the jury to disregard it. *State v. Peplinski*, 290 N.C. 236, 225 S.E.2d 568 (1976).

The instruction was sufficient to remove any prejudice that might have resulted from the challenged remarks of the prosecuting attorney. *State v. Hopper*, 292 N.C. 580, 234 S.E.2d 580 (1977).

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, cert. denied, 279 N.C. 396, 183 S.E.2d 243 (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).

Any instruction is incomplete and prejudicially erroneous unless it makes clear to the jury that the defendant has the right to offer or to refrain from offering evidence as he sees fit and that his failure to testify should not be considered by the jury as basis for any inference adverse to him. *State v. Sanders*, 288 N.C. 285, 218 S.E.2d 352 (1975), cert. denied, 423 U.S. 1091, 96 S. Ct. 886, 47 L. Ed. 2d 102 (1976); *State v. Caron*, 288 N.C. 467, 219 S.E.2d 68 (1975), cert. denied, U.S. , 96 S. Ct. 2168, 48 L. Ed. 2d 794 (1976).

Trial judge's instruction to the jury that they "should" not consider defendant's failure to take the stand against him, rather than that they "shall" not consider his failure to take the stand against him, was not error. *State v. Sellers*, 289 N.C. 268, 221 S.E.2d 264 (1976).

Where an instruction was unduly repetitious, but stripped of unnecessary verbiage, the instruction was that a defendant may or may not testify in his own behalf as he sees fit, and that his failure to testify shall not be held against him to any extent, this instruction met the requirements of this section. *State v. Caron*, 288 N.C. 467, 219 S.E.2d 68 (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, cert. denied, 279 N.C. 396, 183 S.E.2d 243 (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); *State v. Caron*, 288 N.C. 467, 219 S.E.2d 68 (1975), cert. denied, U.S. , 96 S. Ct. 2168, 48 L. Ed. 2d 794 (1976).

Under this section the judge is not required to instruct the jury that a defendant's failure to testify creates no presumption against him unless defendant so requests. *State v. Caron*, 288 N.C. 467, 219 S.E.2d 68 (1975), cert. denied, U.S. , 96 S. Ct. 2168, 48 L. Ed. 2d 794 (1976).

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, cert. denied, 279 N.C. 396, 183 S.E.2d 243 (1971).

Absent a special request, the trial court is not required to instruct the jury that defendant's failure to testify creates no presumption against him. *State v. Warren*, 292 N.C. 235, 232 S.E.2d 419 (1977).

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, cert. denied, 279 N.C. 396, 183 S.E.2d 243 (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, cert. denied, 279 N.C. 396, 183 S.E.2d 243 (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), appeal dismissed, 284 N.C. 621, 201 S.E.2d 692 (1974).

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), cert. denied, 283 N.C. 108, 194 S.E.2d 636 (1973); *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).

Defendant may properly raise a violation of this section for the first time on appeal. *State v. Fleming*, 33 N.C. App. 216, 234 S.E.2d 431 (1977).

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. — In any trial or inquiry in any suit, action or proceeding in any court, or before any person having, by law or consent of parties, authority to examine witnesses or hear evidence, the husband or wife of any party thereto, or of any person in whose behalf any such suit, action or proceeding is brought, prosecuted, opposed or

defended, shall, except as herein stated, be competent and compellable to give evidence, as any other witness on behalf of any party to such suit, action or proceeding. Nothing herein shall render any husband or wife competent or compellable 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; or in any action or proceeding for or on account of criminal conversation, except that in actions of criminal conversation brought by a married person in which the character of the spouse is assailed, that spouse shall be a competent witness to testify in refutation of such charges: Provided, however, that in all such actions and proceedings, the husband or wife shall be competent to prove, and may be required to prove, the fact of marriage. No husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage. (1866, c. 43, ss. 3, 4; C. C. P., s. 341; Code, s. 588; Rev., s. 1636; 1919, c. 18; C. S., s. 1801; 1945, c. 635; 1977, c. 547.)

Editor's Note. —

The 1977 amendment substituted "a married person in which the character of the spouse is assailed, that spouse" for "the husband in which the character of the wife is assailed she" in the second sentence.

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, appeal withdrawn, 282 N.C. 151, 191 S.E.2d 365 (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).

Quoted in *Earles v. Earles*, 26 N.C. App. 559, 216 S.E.2d 739, cert. denied, 288 N.C. 239, 217 S.E.2d 679 (1975).

§ 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, cert. denied, 281 N.C. 762, 191 S.E.2d 363 (1972).

This section is an evidentiary rule and applies to a spouse testifying or to the admission of a statement by a spouse into evidence. *State v. Cousin*, 291 N.C. 413, 230 S.E.2d 518 (1976).

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).

This section was not intended to prohibit, and it does not prohibit, a husband or wife from making voluntary statements to police officers during the investigatory stage of a criminal proceeding. *State v. Aaron*, 29 N.C. App. 582, 225 S.E.2d 117 (1976), cert. denied, U.S. , 97 S. Ct. 1180, 51 L. Ed. 2d 585 (1977).

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, cert. denied, 281 N.C. 762, 191 S.E.2d 363 (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, cert. denied, 281 N.C. 762, 191 S.E.2d 363 (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, cert. denied, 281 N.C. 762, 191 S.E.2d 363 (1972).

When defendant's wife was examined as witness for defendant, she was therefore subject to be cross-examined to the same extent as if unrelated to him. *State v. Carey*, 288 N.C. 254, 218 S.E.2d 387 (1975), death sentence vacated, U.S. , 96 S. Ct. 3209, 49 L. Ed. 2d 1209 (1976).

As to Prior Inconsistent Statements. — In a prosecution for murder committed in the perpetration of an armed robbery and for conspiracy to commit armed robbery, if based on information and asked in good faith, it was permissible for the district attorney to ask defendant's wife about her prior inconsistent statements as they related to her previous relationship with the trigger man for purposes of impeachment. *State v. Carey*, 288 N.C. 254, 218 S.E.2d 387 (1975), death sentence vacated, U.S. , 96 S. Ct. 3209, 49 L. Ed. 2d 1209 (1976).

Where evidence is rendered incompetent by this section, it is the duty of the trial judge to exclude it, and his failure to do so is reversible error, whether objection is interposed and

exception noted or not. *State v. Thompson*, 290 N.C. 431, 226 S.E.2d 487 (1976).

Where evidence is rendered incompetent by this section, it is the duty of the judge to act on his own motion and exclude the evidence. *State v. Thompson*, 290 N.C. 431, 226 S.E.2d 487 (1976).

Or Instruct Concerning Such Evidence Improperly Placed before Jury. — When evidence forbidden by this section is argumentatively placed before the jury and used to the prejudice of the defense, it is the duty of the judge ex mero motu to intervene and promptly instruct the jury that the wife's failure to testify and the improper argument concerning that fact must be disregarded and under no circumstances used to the prejudice of the defendant. *State v. Thompson*, 290 N.C. 431, 226 S.E.2d 487 (1976).

Failure to Instruct as to Failure of Wife to Appear and Testify. —

In a prosecution for first-degree murder, where the district attorney in his argument to the jury used the failure of defendant's wife to testify on defendant's behalf to the prejudice of the defense, the failure of the trial judge to intervene on his own motion and promptly instruct the jury that the wife's failure to testify and the improper argument regarding that fact must be disregarded and under no circumstances used to the prejudice of the defendant was reversible error. *State v. McCall*, 289 N.C. 570, 223 S.E.2d 334 (1976).

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); *State v. Phifer*, 290 N.C. 203, 225 S.E.2d 786 (1976).

§ 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.

§§ 8-58.1 to 8-58.5: Reserved for future codification purposes.

ARTICLE 7A.

Restrictions on Evidence in Rape Cases.

§ 8-58.6. Restrictions on evidence in rape cases. — (a) As used in this section, the term "sexual behavior" means sexual activity of the complainant other than the sexual act which is at issue in the indictment on trial.

(b) The sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior:

- (1) Was between the complainant and the defendant; or
- (2) Is evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant; or
- (3) Is evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented; or
- (4) Is evidence of sexual behavior offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged.

(c) No evidence of sexual behavior shall be introduced at any time during the trial of a charge of rape or any lesser-included offense thereof, nor shall any reference to any such behavior be made in the presence of the jury, unless and until the court has determined that such behavior is relevant under subsection (b). Before any questions pertaining to such evidence are asked of any witness, the proponent of such evidence shall first apply to the court for a determination of the relevance of the sexual behavior to which it relates. The proponent of such evidence may make application either prior to trial pursuant to G.S. 15A-952, or during the trial at the time when the proponent desired to introduce such evidence. When application is made, the court shall conduct an in-camera hearing, which shall be transcribed, to consider the proponent's offer of proof and the arguments of counsel, including any counsel for the complainant, to determine the extent to which such behavior is relevant. In the hearing, the proponent of the evidence shall establish the basis of admissibility of such evidence. If the court finds that the evidence is relevant, it shall enter an order stating that the evidence may be admitted and the nature of the questions which will be permitted.

(d) The record of the in-camera hearing and all evidence relating thereto shall be open to inspection only by the parties, the complainant, their attorneys and the court and its agents, and shall be used only as necessary for appellate review. At any probable cause hearing, the judge shall take cognizance of the evidence, if admissible, at the end of the in-camera hearing without the questions being repeated or the evidence being resubmitted in open court. (1977, c. 851, s. 1.)

Editor's Note. — Session Laws 1977, c. 851, on Jan. 1, 1978, and shall apply to offenses s. 2, provides: "This act shall become effective committed on and after that date."

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."

Applied in *State v. Wells*, 290 N.C. 485, 226 S.E.2d 325 (1976).

Stated in *North Carolina Ass'n for Retarded Children v. State*, 420 F. Supp. 451 (M.D.N.C. 1976).

§ 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.

Applied in *State v. Wells*, 290 N.C. 485, 226 S.E.2d 325 (1976).

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.

Sec.

9-2. Preparation of jury list; sources of names.

9-2.1. Alternate procedure in certain counties.

9-3. Qualifications of prospective jurors.

9-6. Jury service a public duty; excuses to be allowed in exceptional cases; procedure.

9-8. [Repealed.]

Article 2.

Petit Jurors.

9-12. Supplemental jurors from other counties.

Sec.

9-15. Questioning jurors without challenge; challenges for cause.

9-18. Alternate jurors.

Article 3.

Peremptory Challenges.

9-21. Peremptory challenges in criminal cases.

Article 4.

Grand Jurors.

9-22 to 9-26. [Repealed.]

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, cert. denied, 396 U.S. 1024, 90 S. Ct. 599, 24 L. Ed. 2d 518 (1970).

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); *State v. Foddrell*, 291 N.C. 546, 231 S.E.2d 618 (1977).

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, cert. denied, 396 U.S. 1024, 90 S. Ct. 599, 24 L. Ed. 2d 518 (1970).

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, cert. denied, 282 N.C. 429, 192 S.E.2d 839 (1972), U.S. cert. denied, 414 U.S. 938, 94 S. Ct. 240, 38 L. Ed. 2d 165 (1973).

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), cert. denied, 396 U.S. 1024, 90 S. Ct. 599, 24 L. Ed. 2d 518 (1970).

More 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, cert. denied, 282 N.C. 429, 192 S.E.2d 839 (1972), U.S. cert. denied, 414 U.S. 938, 94 S. Ct. 240, 38 L. Ed. 2d 165 (1973).

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, cert. denied, 282 N.C. 429, 192 S.E.2d 839 (1972), U.S. cert. denied, 414 U.S. 938, 94 S. Ct. 240, 38 L. Ed. 2d 165 (1973).

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), rev'd on other grounds, 470 F.2d 1092 (4th Cir. 1972).

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), rev'd on other grounds, 470 F.2d 1092 (4th Cir. 1972).

To establish a prima facie case of systematic racial exclusion, defendants are generally required to produce not only statistical evidence establishing that blacks were underrepresented on the jury but also evidence that the selection procedure itself was not racially neutral, or that for a substantial period in the past relatively few Negroes have served on the juries of the county notwithstanding a substantial Negro population therein, or both. *State v. Foddrell*, 291 N.C. 546, 231 S.E.2d 618 (1977).

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), rev'd on other grounds, 470 F.2d 1092 (4th Cir. 1972).

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).

§ 9-2.1. Alternate procedure in certain counties. — In counties having electronic data processing equipment, the functions of preparing and maintaining custody of the list of prospective jurors, the procedure for drawing and summoning panels of jurors, and the procedure for maintaining records of names of jurors who have served, been excused, been delayed in service, or been disqualified, may be performed by this equipment, except that decisions as to mental or physical competency of prospective jurors shall continue to be made by jury commissioners. The procedure for performing these functions by electronic data processing equipment shall be in writing, adopted by the jury

commission, and kept available for public inspection in the office of the clerk of court. The procedure must effectively preserve the authorized grounds for disqualification, the right of public access to the list of prospective jurors, and the time sequence for drawing and summoning a jury panel. (1977, c. 220, s. 1.)

Editor's Note. — Session Laws 1977, c. 220, s. 2, makes the act effective July 1, 1977.

§ 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.

Amendment Effective July 1, 1978. — Session Laws 1977, c. 711, s. 10, effective July 1, 1978, will insert "who can hear and understand the English language" in the first sentence of this section.

Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article 85, 'Parole' shall not apply to persons sentenced before July 1, 1978."

Session Laws 1977, c. 711, s. 36, contains a severability clause.

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, appeal dismissed, 281 N.C. 761, 191 S.E.2d 363 (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, cert. denied, 283 N.C. 106, 194 S.E.2d 634 (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), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3204, L. Ed. 2d (1976).

§ 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).

Motions for change of venue or special venire are addressed to the sound discretion of the trial judge and, absent abuse of discretion, his rulings will not be disturbed on appeal. State v. Brower, 289 N.C. 644, 224 S.E.2d 551 (1976); State v. Hopper, 292 N.C. 580, 234 S.E.2d 580 (1977).

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, rev'd on other grounds, 287 N.C. 470, 215 S.E.2d 123 (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); Kinston City Bd. of Educ. v. Board of Comm'rs, 29 N.C. App. 554, 225 S.E.2d 145 (1976).

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, cert. denied, 409 U.S. 1043, 93 S. Ct. 537, 34 L. Ed. 2d 493 (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, cert. denied, 414 U.S. 850, 94 S. Ct. 143, 38 L. Ed. 2d 99 (1973); State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3203, 49 L. Ed. 2d 1205 (1976).

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), appeal dismissed, 287 N.C. 261, 214 S.E.2d 434 (1975), cert. denied, 423 U.S. 1080, 96 S. Ct. 868, 47 L. Ed. 2d 91 (1976).

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).

Decisions as to a juror's competency at the time of selection and his continued competency to serve are matters resting in the trial judge's sound discretion and are not subject to review unless accompanied by some imputed error of law. *State v. Waddell*, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, U.S. , 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

It is the duty of the trial judge to see that a competent, fair and impartial jury is impaneled, and to that end the judge may, in his discretion, excuse a prospective juror even without challenge from either party. *State v. Waddell*, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, U.S. , 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

Unquestionably the trial judge is vested with broad discretionary powers in determining the competency of jurors and that discretion will not ordinarily be disturbed on appeal. *State v. Lee*, 292 N.C. 617, 234 S.E.2d 574 (1977).

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, cert. denied, 414 U.S. 850, 94 S. Ct. 143, 38 L. Ed. 2d 99 (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, cert. denied, 409 U.S. 1043, 93 S. Ct. 537, 34 L. Ed. 2d 493 (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, cert. denied, 409 U.S. 1043, 93 S. Ct. 537, 34 L. Ed. 2d 493 (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, cert. denied, 409 U.S. 1043, 93 S. Ct. 537, 34 L. Ed. 2d 493 (1972).

Excusing Unchallenged Juror.—

In accord with 2nd paragraph in original. See *State v. Harris*, 283 N.C. 46, 194 S.E.2d 796, cert. denied, 414 U.S. 850, 94 S. Ct. 143, 38 L. Ed. 2d 99 (1973).

The erroneous allowance of an improper challenge.—

In accord with original. See *State v. Harris*, 283 N.C. 46, 194 S.E.2d 796, cert. denied, 414 U.S. 850, 94 S. Ct. 143, 38 L. Ed. 2d 99 (1973).

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), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3203, 49 L. Ed. 2d 1205 (1976); *State v. Tatum*, 291 N.C. 73, 229 S.E.2d 562 (1976); *State v. Sweezy*, 291 N.C. 366, 230 S.E.2d 524 (1976).

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), appeal dismissed, 287 N.C. 261, 214 S.E.2d 434 (1975), cert. denied, 423 U.S. 1080, 96 S. Ct. 868, 47 L. Ed. 2d 91 (1976).

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), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3207, L. Ed. 2d (1976).

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), appeal dismissed, 287 N.C. 261, 214 S.E.2d 434 (1975), cert. denied, 423 U.S. 1080, 96 S. Ct. 868, 47 L. Ed. 2d 91 (1976).

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, cert. denied, 409 U.S. 1043, 93 S. Ct. 537, 34 L. Ed. 2d 493 (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), death sentence vacated,

428 U.S. 903, 96 S. Ct. 3205, L. Ed. 2d (1976).

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), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, L. Ed. 2d (1976).

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), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, L. Ed. 2d (1976).

In a first-degree murder trial where prospective juror stated that knowing that the death penalty would be imposed he did not feel that he could vote for a verdict of guilty even though he was satisfied of defendant's guilt, the trial judge, in his discretion, and at the request of the prospective juror, in excusing the prospective juror did not commit prejudicial error. *State v. Waddell*, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, U.S. , 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

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.

Amendment Effective July 1, 1978. — Session Laws 1977, c. 711, s. 11, effective July 1, 1978, will rewrite subsection (c) to read as follows: "(c) In civil cases if any juror has a suit pending and at issue in the court in which he is serving, he may be challenged for cause, and he

shall be withdrawn from the trial panel, and may be withdrawn from the venire in the discretion of the presiding judge. In criminal cases challenges are governed by Article 72, Selecting and Impaneling the Jury, of Chapter 15A of the General Statutes."

Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article 85, 'Parole' shall not apply to persons sentenced before July 1, 1978."

Session Laws 1977, c. 711, s. 36, contains a severability clause.

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), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3207, L. Ed. 2d (1976).

The purpose of the voir dire examination and the exercise of challenges, either peremptory or for cause, is to eliminate extremes of partiality and to assure both the defendant and the State that the persons chosen to decide the guilt or innocence of the accused will reach that decision solely upon the evidence produced at trial. *State v. Honeycutt*, 285 N.C. 174, 203 S.E.2d 844 (1974), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3205, L. Ed. 2d (1976).

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), cert. denied, 410 U.S. 958, 93 S. Ct. 1432, 35 L. Ed. 2d 691 (1973).

The primary purpose of the voir dire of prospective jurors is to select an impartial jury. *State v. Lee*, 292 N.C. 617, 234 S.E.2d 574 (1977).

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), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3207, L. Ed. 2d (1976).

Counsel's exercise of the right to inquire into the fitness of jurors is subject to the trial judge's close supervision. The regulation of the manner and the extent of the inquiry rests largely in the trial judge's discretion. *State v. Boykin*, 291 N.C. 264, 229 S.E.2d 914 (1976).

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).

Each defendant is entitled to full opportunity to face the prospective jurors, make diligent

inquiry into their fitness to serve, and to exercise his right to challenge those who are objectionable to him. *State v. Boykin*, 291 N.C. 264, 229 S.E.2d 914 (1976).

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, cert. denied, 414 U.S. 850, 94 S. Ct. 143, 38 L. Ed. 2d 99 (1973); *State v. Girley*, 27 N.C. App. 388, 219 S.E.2d 301 (1975), cert. denied, 289 N.C. 141, 220 S.E.2d 799 (1976).

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), cert. denied, 410 U.S. 958, 93 S. Ct. 1432, 35 L. Ed. 2d 691 (1973).

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), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3205, L. Ed. 2d (1976).

Voir dire examination of prospective jurors in capital cases is proper. *State v. Honeycutt*, 285 N.C. 174, 203 S.E.2d 844 (1974), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3205, L. Ed. 2d (1976).

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), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3205, L. Ed. 2d (1976); *State v. Hunt*, 289 N.C. 403, 222 S.E.2d 234 (1976).

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), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3209, L. Ed. 2d (1976).

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); *State v. Foddrrell*, 291 N.C. 546, 231 S.E.2d 618 (1977).

In a first-degree murder trial where prospective juror stated that knowing that the death penalty would be imposed he did not feel that he could vote for a verdict of guilty even though he was satisfied of defendant's guilt, the trial judge, in his discretion, and at the request of the prospective juror, in excusing the prospective juror did not commit prejudicial error. *State v. Waddell*, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, U.S. , 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

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. Monk*, 291 N.C. 37, 229 S.E.2d 163 (1976).

It is settled law that a challenge for cause should be sustained where the venireman challenged states unmistakably that he would, by reason of the death penalty, automatically vote against conviction without regard to any evidence developed at trial. *State v. Smith*, 291 N.C. 505, 231 S.E.2d 663 (1977).

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).

Veniremen may not be challenged for cause simply because they voice general objections to the death penalty or express conscientious or religious scruples against its infliction. *State v. Foddrrell*, 291 N.C. 546, 231 S.E.2d 618 (1977).

Excusal of Juror without Challenge by Party. In spite of the last phrase of subsection

(a) of this section, it is the right and duty of the court to see that a competent, fair and impartial jury is impaneled and, to that end, the court, in its discretion, may excuse a prospective juror without a challenge by either party. *State v. Smith*, 290 N.C. 248, 226 S.E.2d 10, cert. denied, U.S. , 97 S. Ct. 339, 50 L. Ed. 2d 301 (1976).

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), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3207, L. Ed. 2d (1976).

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.

§ 9-17. Jurors impaneled to try case furnished with accommodations; separation of jurors.

Amendment Effective July 1, 1978. — Session Laws 1977, c. 711, s. 12, effective July 1, 1978, will add the following sentence to the first paragraph: "When sequestration of the jury is ordered in a criminal case, however, the State shall pay for all accommodations of jurors."

Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article 85, 'Parole' shall not apply to persons sentenced before July 1, 1978."

Session Laws 1977, c. 711, s. 36, contains a severability clause.

No Federal Constitutional Issue Presented. — Petitioner's contention that he was denied a

State v. Bryant, 282 N.C. 92, 191 S.E.2d 745 (1972), cert. denied, 410 U.S. 958, 93 S. Ct. 1432, 35 L. Ed. 2d 691 (1973).

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).

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).

A motion for the sequestration of witnesses is addressed to the discretion of the court. *State v. Monk*, 291 N.C. 37, 229 S.E.2d 163 (1976).

Applied in *State v. Swift*, 290 N.C. 383, 226 S.E.2d 652 (1976).

§ 9-18. Alternate jurors. — Whenever the presiding judge deems it appropriate, one or more alternate jurors may be selected in the same manner as the regular trial panel of jurors in the case, but after the regular jury has been duly impaneled; provided, however, that in all criminal actions in which one or more defendants is to be tried for a capital offense, or enter a plea of guilty to a capital offense, the presiding judge shall provide for the selection of at least two alternate jurors, or more as he deems appropriate. Each party shall be entitled to two peremptory challenges as to each such alternate juror, in addition to any unexpended challenges the party may have left after the selection of the regular trial panel. Alternate jurors shall be sworn and seated near the jury with equal opportunity to see and hear the proceedings and shall attend the trial at all times with the jury and shall obey all orders and admonitions of the court to the jury. When the jurors are ordered kept together in any case, the alternate jurors shall be kept with them. An alternate juror shall receive the same compensation as other jurors and, except as hereinafter provided, shall be discharged upon the final submission of the case to the jury; provided, however, that no alternate juror in a capital case shall be discharged until the trial jury

begins its deliberations on the issue of penalty. If before that time any juror dies, becomes incapacitated or disqualified, or is discharged for any reason, an alternate juror shall become a part of the jury and serve in all respects as those selected on the regular trial panel. If more than one alternate juror has been selected, they shall be available to become a part of the jury in the order in which they were selected.

In capital cases the alternate jurors shall be retained during the deliberations of the jury on the issue of guilt or innocence under such restrictions, regulations and instructions as the presiding judge shall direct. In case of sequestration of a jury during deliberations in a capital case, alternates shall be sequestered in the same manner as is the trial jury, but such alternates shall also be sequestered from the trial jury. In no event in the trial of any issue in a criminal case shall more than 12 jurors participate in the jury's deliberations. (1931, c. 103; 1939, c. 35; 1951, cc. 82, 1043; 1967, c. 218, s. 1; 1977, c. 406, ss. 3-5.)

Editor's Note. —

The 1977 amendment, effective June 1, 1977, added the proviso to the end of the first and fifth sentences of the first paragraph and added the second paragraph.

Session Laws 1977, c. 406, s. 8, provides: "The provisions of this act shall apply to murders committed on or after the effective date of this act."

Session Laws 1977, c. 406, s. 7, contains a severability clause.

The cases cited under this section were decided prior to the 1977 amendment.

Amendment Effective July 1, 1978. — Session Laws 1977, c. 711, s. 13, effective July 1, 1978, will designate the present section as subsection (a), amend the first sentence of the section by inserting "Civil Cases," and will add new subsection (b) to read as follows:

"(b) Criminal Cases. — Procedures relating to alternate jurors in criminal cases are governed by Article 72, Selecting and Impaneling the Jury, of Chapter 15A of the General Statutes."

Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article 85, 'Parole' shall not apply to persons sentenced before July 1, 1978."

Session Laws 1977, c. 711, s. 36, contains a severability clause.

For a comment entitled, "An Historical Analysis of Mandatory Capital Punishment," see 7 N.C. Cent. L.J. 306 (1976).

Requirements of this section and N.C. Const., Art. I, § 24 are mandatory. State v. Bindyke, 288 N.C. 608, 220 S.E.2d 521 (1975).

Defendant Cannot Assent to Trial by More Than 12 Jurors. If a defendant in a felony trial cannot consent to a trial by fewer than 12 jurors, it is clear that he cannot assent to deliberations by more than 12. State v. Rowe, 30 N.C. App. 115, 226 S.E.2d 231 (1976).

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 Reversible Error Per Se. — Where the alternate juror was not discharged when the jury retired as required by this section, and although the record shows that the court corrected its mistake after only three or four minutes had elapsed, and the alternate did not participate in the deliberation and verdict of the other 12, his brief visit to the jury room was reversible error per se. State v. Bindyke, 288 N.C. 608, 200 S.E.2d 521 (1975); State v. Rowe, 30 N.C. App. 115, 226 S.E.2d 231 (1976).

At any time an alternate juror is in the jury room during deliberations he participates by his presence and, whether he says little or nothing, his presence will void the trial. State v. Rowe, 30 N.C. App. 115, 226 S.E.2d 231 (1976).

The presence of an alternate juror, either during the entire period of deliberation preceding the verdict, or his presence at any time during the deliberations of the 12 regular jurors, is a fundamental irregularity of constitutional proportions which requires a mistrial or vitiates the verdict, if rendered. And this is the result notwithstanding the defendant's counsel consented, or failed to object, to the presence of the alternate. State v. Rowe, 30 N.C. App. 115, 226 S.E.2d 231 (1976).

Inquiry Into Effect of Presence of Alternate Juror. — If the judge, from his trial experience and knowledge of the circumstances of the particular case, believes it probable that the jury has not begun its consideration of the evidence, he may properly recall the jury and the alternate

and, in open court, inquire of them whether there had been any discussion of the case. If the answer is "no," the alternate will be excused and the jury returned to consider its verdict. If the answer is "yes," there must be a mistrial. No inquiry into the extent or nature of the deliberations is permissible. *State v. Bindyke*, 288 N.C. 608, 220 S.E.2d 521 (1975).

If alternate juror's presence in jury room is inadvertent and momentary, and it occurs under

circumstances from which it can be clearly seen or immediately determined that the jury has not begun its function as a separate entity, then the rule of per se reversible error is not applicable. *State v. Bindyke*, 288 N.C. 608, 220 S.E.2d 521 (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.

Amendment Effective July 1, 1978. — Session Laws 1977, c. 711, s. 14, effective July 1, 1978, will rewrite the section to read as follows:

"§ 9-21. Peremptory challenges in criminal cases governed by Chapter 15A. — Peremptory challenges in criminal cases are governed by Article 72, Selecting and Impaneling the Jury, of Chapter 15A of the General Statutes."

Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article 85, 'Parole' shall not apply to persons sentenced before July 1, 1978."

Session Laws 1977, c. 711, s. 36, contains a severability clause.

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), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3205, L. Ed. 2d (1976).

The obvious purpose of this section is to protect defendants in criminal cases by giving them the last opportunity to challenge a venireman. *State v. Bock*, 288 N.C. 145, 217 S.E.2d 513 (1975), death sentence vacated, U.S. , 96 S. Ct. 3208, 49 L. Ed. 2d 1209 (1976).

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, cert. denied, 414 U.S. 850, 94 S. Ct. 143, 38 L. Ed. 2d 99 (1973); *State v. Bock*, 288 N.C. 145, 217 S.E.2d 513 (1975), death sentence

vacated, U.S. , 96 S. Ct. 3208, 49 L. Ed. 2d 1209 (1976).

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).

Denial of Defendant's Right. — Because the district attorney violated a prior agreement, when defendant arrived, the jury had been selected, his peremptory challenges had been expended and he had been deprived of the right to question the jurors. Further, he was only given the opportunity to challenge for cause those jurors he knew. Thus, defendant faced a jury that he had no part in selecting. Under the circumstances of the case, defendant did not waive his right to be present at the jury selection and was denied a substantial right. *State v. Hayes*, 291 N.C. 293, 230 S.E.2d 146 (1976).

And defendant has no vested right to a particular juror. *State v. Woods*, 286 N.C. 612, 213 S.E.2d 214 (1975), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3207, L. Ed. 2d (1976).

An accused is not entitled to a jury of his choice and has no vested right to any particular juror. *State v. McKenna*, 289 N.C. 668, 224 S.E.2d 537 (1976).

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, cert. denied, 414 U.S. 850, 94 S. Ct. 143, 38 L. Ed. 99 (1973).

Subsection (b) of this section does not deprive the trial judge of his power to closely regulate and supervise the selection of the jury to the end that both the defendant and the State may receive a fair trial before an impartial jury. *State v. McKenna*, 289 N.C. 668, 224 S.E.2d 537; *State v. Bowden*, 290 N.C. 702, 228 S.E.2d 414 (1976).

Allowance of Challenge of Juror Previously Accepted by State and Tendered to Defendant. — Nothing in this section prohibits the trial

court, in the exercise of its discretion, before the jury is impaneled, from allowing the State to challenge peremptorily or for cause a prospective juror previously accepted by the State and tendered to the defendant. *State v. McKenna*, 289 N.C. 668, 224 S.E.2d 537 (1976).

Nothing in subsection (b) of this section limits the trial court's discretion to allow the State, before the jury is impaneled, to challenge either peremptorily or for cause a prospective juror previously accepted by the State and tendered to the defendant. *State v. Bowden*, 290 N.C. 702, 228 S.E.2d 414 (1976).

Nothing in subsection (b) of this section prohibits the trial court, in the exercise of its discretion, before the jury is impaneled, from allowing the State to challenge peremptorily or for cause a prospective juror previously accepted by the State and tendered to the defendant. *State v. Harris*, 290 N.C. 681, 228 S.E.2d 437 (1976).

Excusal of Juror without Challenge by Party. — It is the duty of the trial judge to see that a competent, fair and impartial jury is impaneled, and to that end the judge may, in his discretion, excuse a prospective juror even without challenge from either party. *State v. McKenna*, 289 N.C. 668, 224 S.E.2d 537 (1976).

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), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3203, 49 L. Ed. 2d 1205 (1976). *State v. Carey*, 285 N.C. 497, 206 S.E.2d 213 (1974); *State v. Smith*, 291 N.C. 505, 231 S.E.2d 663 (1977).

Peremptory challenges are challenges that may be made according to the judgment of the party entitled thereto. *State v. Fowler*, 285 N.C. 90, 203 S.E.2d 803 (1974), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, L. Ed. 2d (1976).

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), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3207, L. Ed. 2d (1976).

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), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3207, L. Ed. 2d (1976).

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), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, L. Ed. 2d (1976).

The essential nature of the peremptory challenge denotes that it is a challenge exercised without a reason stated, without inquiry and without being subject to the court's control. In other words, the peremptory challenge permits rejection for a real or imagined partiality, and an examination of the prosecutor's reasons for the exercise of his challenges in any given case is not permitted. *State v. Smith*, 291 N.C. 505, 231 S.E.2d 663 (1977).

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).

Cross-Examination of Juror Irrevocably against Death Sentence Not Allowed. — To allow defense counsel to cross-examine a juror who has informed the court and counsel that he is irrevocably committed to vote against any verdict which would result in a death sentence would thwart the protective purposes of subsection (b) of this section. *State v. Bock*, 288 N.C. 145, 217 S.E.2d 513 (1975), death sentence

vacated, U.S. , 96 S. Ct. 3208, 49 L. Ed. 2d 1209 (1976).

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), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3207, L. Ed. 2d (1976).

If defense counsel desires to take exception to the act of the court in excusing a prospective juror, he should either enter into a stipulation with the State setting out in detail the reason for excusing the juror, or he should include a transcript of the voir dire examination as to that juror in the case on appeal. *State v. Fowler*, 285 N.C. 90, 203 S.E.2d 803 (1974), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, L. Ed. 2d (1976).

Where the trial court in a capital case erroneously disallowed defendant's challenge for cause of a prospective juror, and defendant exercised all of his peremptory challenges, including one for the juror for whom the challenge for cause was erroneously disallowed, the trial court's refusal to allow defendant to challenge peremptorily an additional juror on the ground that defendant had exhausted his peremptory challenges is a denial of defendant's right 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).

Although there was a violation of subsection (b) of this section in allowing the State 10 peremptory challenges, the error was not prejudicial to defendant where defendant not only failed to object or otherwise bring the error to the attention of the court but also failed to exhaust his own peremptory challenges. *State v. Smith*, 290 N.C. 148, 226 S.E.2d 10 (1976).

Review. — Decision as to a juror's competency at the time of selection and his continued competency to serve are matters resting in the trial judge's sound discretion and are not subject

to review unless accompanied by some imputed error of law. *State v. McKenna*, 289 N.C. 668, 224 S.E.2d 537 (1976).

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.

Sec.	Sec.
10-1. Appointment and commission; term of office; revocation of commission.	10-10. Notarial stamp or seal.
10-2. To qualify before register of deeds; record of qualification.	10-11. Acts of minor notaries validated.
10-3. Clerks notaries ex officio; may certify own seals.	10-12. Acts of certain notaries prior to qualification validated.
10-4. Register of deeds notary ex officio with respect to certain instruments; to use seal of office.	10-13. Acts of notaries public in certain instances validated.
10-5. Powers of notaries public.	10-14. Validation of acknowledgment wherein expiration of notary's commission erroneously stated.
10-6. May exercise powers in any county.	10-15. Validation of instruments which do not contain readable impression of notary's name.
10-7. Certificates of official character.	10-16. Acts of notaries with seal containing name of another state validated.
10-8. Fees of notaries.	10-17. Validation of certain instruments acknowledged prior to January 1, 1945.
10-9. Official acts of notaries public; signatures; appearance of names; notarial stamps or seals; expiration of commissions.	

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.

§ 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 of a contract, release, or separation agreement between a husband or wife as prescribed by the provisions of G.S. 52-10 or 52-10.1, and take and certify the acknowledgment or proof of the execution or signing of any other instrument or writing;
- (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; 1977, c. 375, s. 5.)

Editor's Note. — The 1977 amendment, effective Jan. 1, 1978, rewrote subdivision (1) of subsection (a).

Session Laws 1977, c. 375, s. 17, provides that no provision of this act shall affect pending litigation.

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, cert. denied, 283 N.C. 257, 195 S.E.2d 689 (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 \$1.00
 - (2) Taking affidavits 1.00
 - (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; 1977, c. 429, ss. 1, 2.)

Editor's Note. — The 1977 amendment increased the fees in subdivisions (1) and (2) from 50¢ to \$1.00.

§ 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; 1977, c. 734, s. 1.)

Editor's Note. — The 1977 amendment reenacted this section without change.

Session Laws 1977, c. 734, s. 2, provides that nothing contained in the act shall affect pending litigation.

Session Laws 1977, c. 734, s. 3, provides: "This act shall become effective upon ratification [June 24, 1977] and shall apply only to those acts performed on or before May 15, 1977."

§ 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; 1977, c. 734, s. 1.)

Editor's Note. — The 1977 amendment reenacted this section without change.

Session Laws 1977, c. 734, s. 2, provides that nothing contained in the act shall affect pending litigation.

Session Laws 1977, c. 734, s. 3, provides: "This act shall become effective upon ratification [June 24, 1977] and shall apply only to those acts performed on or before May 15, 1977."

§ 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.**

Sec.

11-2. Administration of oath upon the Gospels.

11-7.1. Who may administer oaths of office.

Article 2.**Forms of Official and Other Oaths.**

Sec.

11-11. Oaths of sundry persons; forms.

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, the peace" following "Judges" near the effective Oct. 1, 1971, deleted "and justices of 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;
- (6) The chairman of a committee of the House or Senate of the General Assembly, or either of the cochairmen of a joint committee.

(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; 1977, c. 344, s. 2.)

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.

The 1977 amendment, effective Aug. 1, 1977, added subdivision (6) to subsection (a).

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 unrepresented 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.

Witness before a Legislative Committee or Commission

You swear (or affirm) that the testimony you shall give to the committee (or commission) shall be the truth, the whole truth, and nothing but the truth; 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; 1977, c. 344, s. 3.)

Editor's Note.—

The 1971 amendment, effective Oct. 1, 1971, deleted the oath for "Constable" and the oath for "Justice of the Peace."

The 1977 amendment, effective Aug. 1, 1977, added the oath for "Witness before a Legislative Committee or Commission."

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, cert. denied, 414 U.S. 850, 94 S. Ct. 143, 38 L. Ed. 2d 99 (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, cert. denied, 414 U.S. 850, 94 S. Ct. 143, 38 L. Ed. 2d 99 (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.

12-3. Rules for construction of statutes.

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).

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).

General Rule in Criminal Actions. —

Where a repealing statute contains a saving clause as to crimes committed prior to the repeal

§ 12-3. Rules for construction of statutes. — In the construction of all statutes the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the General Assembly, or repugnant to the context of the same statute, that is to say:

(3) “Month” and “Year”. — The word “month” shall be construed to mean a calendar month, unless otherwise expressed; and the word “year,” a calendar year, unless otherwise expressed; and the word “year” alone shall be equivalent to the expression “year of our Lord.” When a statute refers to a period of one or more months and the last month does not have a date corresponding to the initial date, the period shall expire on the last day of the last month.

(1977, c. 446, s. 4.)

I. GENERAL CONSIDERATION.

Editor's Note. — The 1977 amendment, effective Sept. 1, 1977, added the second sentence of subdivision (3).

Session Laws 1977, c. 446, s. 5, provides: “This act shall apply only to the administration of the estates of persons who die on or after the effective date of this act.”

As the rest of the section was not changed by the amendment, only the introductory language and subdivision (3) are set out.

The cardinal principle of statutory construction is to save and not to destroy. In *re Appeal of Arcadia Dairy Farms, Inc.*, 289 N.C. 456, 223 S.E.2d 323 (1976).

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.

A. In General.

Ordinarily a strict or narrow construction is applied to statutory exceptions to the operation of laws. *News & Observer Publishing Co. v. Interim Bd. of Educ.*, 29 N.C. App. 37, 223 S.E.2d 580 (1976).

Those seeking to be excluded from operation of a law must establish that statutory exception embraces them. *News & Observer Publishing Co. v. Interim Bd. of Educ.*, 29 N.C. App. 37, 223 S.E.2d 580 (1976).

Those seeking to come within the exceptions to the open meetings law should have the burden of justifying their action. *News & Observer Publishing Co. v. Interim Bd. of Educ.*, 29 N.C. App. 37, 223 S.E.2d 580 (1976).

B. Criminal Statutes.

The doing of the act expressly inhibited by a criminal statute constitutes the crime. *State v. Abrams*, 29 N.C. App. 144, 223 S.E.2d 516 (1976).

Whether a criminal intent is a necessary element of a statutory offense is a matter of construction to be determined from the language of the statute in view of its manifest purpose and design. *State v. Abrams*, 29 N.C. App. 144, 223 S.E.2d 516 (1976).

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).

Construction so as to Avoid Constitutional Question. — If a statute is reasonably susceptible of two constructions, one of which will raise a serious question as to its constitutionality and the other will avoid such question, the courts should construe the statute so as to avoid the constitutional question. In re Appeal of *Arcadia Dairy Farms, Inc.*, 289 N.C. 456, 223 S.E.2d 323 (1976).

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).

Duty to Adopt Constitutional Interpretation. — As between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, the plain duty of the court is to adopt that which will save the act. In re Appeal of *Arcadia Dairy Farms, Inc.*, 289 N.C. 456, 223 S.E.2d 323 (1976).

Even to avoid a serious doubt about the constitutionality of a statute the rule is that as between two possible interpretations of the statute, the court should adopt that which will save the act. In re Appeal of *Arcadia Dairy Farms, Inc.*, 289 N.C. 456, 223 S.E.2d 323 (1976).

§ 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.**

Sec.

13-1. Restoration of citizenship.

13-2. Issuance and filing of certificate or order of restoration.

13-3. Issuance, service and filing of warrant of unconditional pardon.

Sec.

13-4. Endorsement of warrant, service and filing of conditional pardon.

13-5 to 13-10. [Repealed.]

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.

§ 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.
- (4) With regard to any person convicted of a crime against the United States, the unconditional discharge of such person by the agency of the United States having jurisdiction of such person, the unconditional pardon of such person or the satisfaction by such person of a conditional pardon. (1971, c. 902; 1973, c. 251; c. 1262, s. 10; 1977, c. 813, s. 1.)

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.

The 1977 amendment added subdivision (4).

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), *aff'd*, 284 N.C. 562, 202 S.E.2d 153 (1974).

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.

In the case of a person convicted of a crime against the United States, whose rights to citizenship have been restored according to G.S. 13-1, the following provisions shall apply:

- (1) It shall be the duty of the clerk of the court in the county where such person resides, upon a showing by such person or his representative that the conditions of G.S. 13-1 have been met, to issue the certificate described in this section. For purposes of this section, the fulfillment of the conditions of G.S. 13-1 shall be considered met upon the presentation to the clerk of any paper writing from the agency of the United States government which had jurisdiction over such person, which shows that the conditions of G.S. 13-1 have been met.
- (2) The certificate described in this section shall be filed by the clerk of the General Court of Justice in the county in which such person resides as though it were a civil action bearing such person's name.
- (3) The provisions of this section apply equally to conditional and unconditional pardons by the President of the United States, as well as unconditional discharges by the agency of the United States having jurisdiction over said person. (1971, c. 902; 1973, c. 251; 1977, c. 813, s. 2.)

Editor's Note. — The 1977 amendment added the third paragraph.

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.

14-2. Punishment of felonies; what constitutes life sentence.

14-2.1. Punishment of felonies; second or subsequent offenses.

Article 2A.

Habitual Felons.

14-7.1. Persons defined as habitual felons.

SUBCHAPTER III. OFFENSES AGAINST THE PERSON.

Article 6.

Homicide.

14-17. Murder in the first and second degree defined; punishment.

14-17.1. Crime of suicide abolished.

Article 7.

Rape and Kindred Offenses.

14-21. Rape; punishment in the first and second degree.

14-24, 14-25. [Repealed.]

Article 8.

Assaults.

14-32. Felonious assault with deadly weapon with intent to kill or inflicting serious injury; punishments.

14-33. Misdemeanor assaults, batteries, and affrays, simple and aggravated; punishments.

14-34.2. Assault with a firearm or other deadly weapon upon law-enforcement officer or fireman.

Article 10.

Kidnapping and Abduction.

14-39. Kidnapping.

14-43.1. Unlawful arrest by officers from other states.

Article 11.

Abortion and Kindred Offenses.

14-45.1. When abortion not unlawful.

14-46. Concealing birth of child.

Article 12.

Libel and Slander.

14-48. [Repealed.]

SUBCHAPTER IV. OFFENSES AGAINST THE HABITATION AND OTHER BUILDINGS.

Article 14.

Burglary and Other Housebreakings.

Sec.

14-52. Punishment for burglary.

14-56.1. Breaking into or forcibly opening coin- or currency-operated machines.

14-56.2. Damaging or destroying coin- or currency-operated machine.

14-56.3. Breaking into paper currency machines.

Article 15.

Arson and Other Burnings.

14-58. Punishment for arson.

14-58.1. Definition of "house" and "building."

14-58.2. Burning of mobile home, manufactured-type house or recreational trailer home.

14-59. Burning of certain public buildings.

14-60. Burning of schoolhouses or buildings of educational institutions.

14-61. Burning of certain bridges and buildings.

14-62. Burning of churches and certain other buildings.

14-62.1. Burning of building or structure in process of construction.

14-63. Burning of boats and barges.

14-64. Burning of ginhouses and tobacco houses.

14-65. Fraudulently setting fire to dwelling houses.

14-66. Burning of personal property.

14-67. Attempting to burn dwelling houses and certain other buildings.

14-67.1. Burning or attempting to burn other buildings.

SUBCHAPTER V. OFFENSES AGAINST PROPERTY.

Article 16.

Larceny.

14-71. Receiving stolen goods.

14-71.1. Possessing stolen goods.

14-72. Larceny of property; receiving stolen goods or possessing stolen goods not exceeding \$200.00 in value.

14-72.1. Concealment of merchandise in mercantile establishments.

14-72.2. Unauthorized use of a motor-propelled conveyance.

14-73.1. Petty misdemeanors.

GENERAL STATUTES OF NORTH CAROLINA

Sec.

14-76.1. Mutilation or defacement of records and papers in the North Carolina State Archives.

14-78. Larceny of ungathered crops.

Article 17.

Robbery.

14-87. Robbery with firearms or other dangerous weapons.

14-89.1. Safecracking.

Article 19.

False Pretenses and Cheats.

14-100. Obtaining property by false pretenses.

14-107. Worthless checks.

14-111.2. Obtaining ambulance services without intending to pay therefor — certain named counties.

14-111.3. Making false ambulance request in Ashe, Buncombe, Duplin, Haywood and Madison Counties.

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.

14-113.5. Making, possessing or transferring device for theft of telecommunication service; publication of information regarding schemes, devices, means, or methods for such theft; concealment of existence, origin or destination of any telecommunication.

14-113.6A. Venue of offenses.

Article 19B.

Credit Card Crime Act.

14-113.8. Definitions.

Article 20.

Frauds.

14-117.2. Gasoline price advertisements.

14-118.4. Extortion.

Article 21.

Forgery.

14-121. Selling of certain forged securities.

SUBCHAPTER VI. CRIMINAL TRESPASS.

Article 22.

Trespasses to Land and Fixtures.

14-128. Injury to trees, crops, lands, etc., of another.

Sec.

14-129. Taking, etc., of certain wild plants from land of another.

14-129.1. Selling or bartering venus flytrap.

14-131. Trespass on land under option by the federal government.

14-132.2. Willfully trespassing upon or damaging a public school bus.

14-134. Trespass on land after being forbidden; license to look for estrays.

14-134.1. [Repealed.]

14-134.2. Operating motor vehicle upon utility easements after being forbidden to do so.

14-137. Willfully or negligently setting fire to woods and fields.

14-139. Setting fires in certain areas.

14-151.1. Interfering with electric, gas or water meters; prima facie evidence of intent to alter, tamper with or bypass electric, gas or water meters; civil liability.

14-155. Unauthorized connections with telephone, telegraph and cable television wires.

Article 23.

Trespasses to Personal Property.

14-160.1. Alteration, destruction or removal of permanent identification marks from personal property.

14-162. Removing boats.

14-163. Poisoning livestock.

SUBCHAPTER VII. OFFENSES AGAINST PUBLIC MORALITY AND DECENCY.

Article 26.

Offenses against Public Morality and Decency.

14-180 to 14-182. [Repealed.]

14-185. [Repealed.]

14-187. [Repealed.]

14-189 to 14-190. [Repealed.]

14-190.1. Obscene literature and exhibitions.

14-190.2. Adversary hearing prior to seizure or criminal prosecution.

14-190.3. Exhibition of obscene pictures; posting of advertisements.

14-190.4. Coercing acceptance of obscene articles or publications.

14-190.5. Preparation of obscene photographs, slides and motion pictures.

14-190.6. Employing or permitting minor to assist in offense under Article.

14-190.7. Dissemination to minors under the age of 16 years.

14-190.8. Dissemination to minors 12 years of age or younger.

14-190.9. Indecent exposure.

14-190.10. Disseminating sexually oriented material to minors.

Sec.

14-190.11. Public display of sexually oriented materials.

14-191 to 14-194. [Repealed.]

14-197. Using profane or indecent language on public highways; counties exempt.

14-198. [Repealed.]

14-202.1. Taking indecent liberties with children.

14-202.2 to 14-202.9. [Reserved.]

Article 26A.

Adult Establishments.

14-202.10. Definitions.

14-202.11. Restrictions as to adult establishments.

14-202.12. Violations; penalties.

SUBCHAPTER VIII. OFFENSES AGAINST PUBLIC JUSTICE.

Article 28.

Perjury.

14-211. Perjury before legislative committees.

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.]

14-225.1. Picketing or parading.

14-225.2. Harassment of and communications with jurors.

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; participation in business transaction involving public funds.

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 32.

Misconduct in Private Office.

14-254. Malfeasance of corporation officers and agents.

Article 33.

Prison Breach and Prisoners.

Sec.

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.]

14-265. [Repealed.]

SUBCHAPTER IX. OFFENSES AGAINST THE PUBLIC PEACE.

Article 35.

Offenses against the Public Peace.

14-269. Carrying concealed weapons.

14-269.2. Weapons on campus or other educational property.

14-269.3. Carrying weapons into assemblies and establishments where intoxicating liquors are sold and consumed.

14-276. [Repealed.]

14-277.1. Communicating threats.

SUBCHAPTER X. OFFENSES AGAINST THE PUBLIC SAFETY.

Article 36.

Offenses against the Public Safety.

14-281.1. Throwing, dropping, etc., objects at sporting events.

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 PO- LICE 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.

GENERAL STATUTES OF NORTH CAROLINA

Sec.

- 14-299. Property exhibited by gamblers to be seized; disposition of same.
14-306. Slot machine or device defined.

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.
14-335.1. Detention of public drunks.

Article 43.

Vagrants and Tramps.

- 14-337. [Repealed.]
14-340, 14-341. [Repealed.]

Article 44.

Regulation of Sales.

- 14-344. Sale of athletic contest and musical concert tickets in excess of printed price.

Article 45.

Regulation of Employer and Employee.

- 14-347 to 14-352. [Repealed.]

Article 47.

Cruelty to Animals.

- 14-363.1. Living baby chicks or other fowl, or rabbits under eight weeks of age; disposing of as pets or novelties forbidden.

Article 49.

Protection of Livestock Running at Large.

Sec.

- 14-365. [Repealed.]

Article 52.

Miscellaneous Police Regulations.

- 14-381. Desecration of State and United States flag.
14-391. Usurious loans on household and kitchen furniture or assignment of wages.
14-399. Littering.
14-400. Tattooing prohibited.
14-401.5. Practice of phrenology, palmistry, fortune-telling or clairvoyance prohibited.
14-401.6. Unlawful to possess, etc., tear gas except for certain purposes.
14-401.9. Parking vehicle in private parking space without permission.
14-401.11. Distribution of certain food at Halloween and all other times prohibited.

Article 52A.

Sale of Weapons in Certain Counties.

- 14-402. Sale of certain weapons without permit forbidden.

Article 53.

Sale of Weapons in Certain Other Counties.

- 14-409.1. Sale of certain weapons without permit forbidden.

Article 53A.

Other Firearms.

- 14-409.12. "Historic edged weapons" defined.

Article 54A.

The Felony Firearms Act.

- 14-415.1. Possession of firearms, etc., by felon prohibited.
14-415.2. [Repealed.]

Article 58.

Records, Tapes and Other Recorded Devices.

- 14-432. "Owner" defined.
14-433. Recording of live concerts or recorded sounds and distribution, etc., of such recordings unlawful in certain circumstances.
14-434. Retailing, etc., of certain recorded devices unlawful.
14-435. Recorded devices to show true name of manufacturer.

Sec.

14-436. Recorded devices; civil action for damages.

Sec.

14-437. Violation of Article a misdemeanor.

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.

Amendment Effective July 1, 1978. — Session Laws 1977, c. 711, s. 15, effective July 1, 1978, will delete the second sentence of the section.

Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article 85, 'Parole' shall not apply to persons sentenced before July 1, 1978."

Session Laws 1977, c. 711, s. 36, contains a severability clause.

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, cert. denied, 279 N.C. 350, 182 S.E.2d 582 (1971); *State v. Sligh*, 27 N.C. App. 668, 219 S.E.2d 801 (1975).

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. 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); *State v. McNeil*, 28 N.C. App. 125, 220 S.E.2d 401 (1975).

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); *State v. Washington*, 11 N.C. App. 441, 181 S.E.2d 260 (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); *State v. Davis*, 290 N.C. 511, 227 S.E.2d 97 (1976); *State v. Martin*, 30 N.C. App. 166, 226 S.E.2d 682 (1976).

§ 14-2.1. Punishment of felonies; second or subsequent offenses. — Notwithstanding the provisions of G.S. 15-197, or any other provisions of law, any person who has been previously convicted of a felony where a deadly weapon was used in the commission of the crime in the courts of this State, upon conviction of a second felony where a deadly weapon was used in the commission of the crime within seven years of the date of the previous felony conviction, provided that the previous felony did not occur within 10 days of the second felony, shall be sentenced to imprisonment for a minimum period of seven years and shall, in every instance, serve the first seven calendar years of his sentence without benefit of parole, probation, suspended sentence, or any other judicial or administrative remedy for release from incarceration. Such term will be computed allowing credit for good behavior, credit for time served while incarcerated awaiting trial, and such other provisions as the Secretary of Correction might make pursuant to G.S. 148-11. Upon completion of service of such term, the prisoner will be eligible to have his case considered for parole if the requisites of G.S. 148-58 regarding time served have been satisfied. The

power of the Governor to grant commutations, pardons, and reprieves, and the power of the courts to grant appropriate relief under Article 22 of the General Statutes Chapter 15 will not be affected by the provisions of this section.

For the purpose of this section, the record or records of the prior felony conviction shall be admissible in evidence after conviction and before sentencing, but only for the purpose of proving that said person has been convicted of a previous felony. A judgment of a conviction or plea of guilty to such felony offense certified to a superior court of this State from the custodian of records of any other court of this State 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.

For the purpose of this section, felonies committed before a person attains the age of 21 years shall not constitute a previous felony conviction.

Pleas of guilty to or convictions of felony offenses prior to September 1, 1977, 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. (1977, c. 1131, s. 1.)

Editor's Note. — Session Laws 1977, c. 1131, s. 2, makes this section effective Sept. 1, 1977.

§ 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, cert. denied, 279 N.C. 350, 182 S.E.2d 582 (1971).

Attempt to Obtain Property by False Pretense. — Any attempt to obtain property by false pretense necessarily is done with intent to deceive. By its plain language subsection (b) of this section makes any attempt to obtain property by false pretenses a felony. The plain language of subsection (b) of this section is more convincing than any inference to be drawn from the fact that § 14-100 was amended in 1975. *State v. Page*, 32 N.C. App. 478, 232 S.E.2d 460 (1977).

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, cert. denied, 279 N.C. 350, 182 S.E.2d 582 (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); *State v. Puryear*,

30 N.C. App. 719, 228 S.E.2d 536, appeal dismissed, 291 N.C. 325, 230 S.E.2d 678 (1976).

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); State v. Cooper, 288 N.C. 496, 219 S.E.2d 45 (1975).

§ 14-4. Violation of local ordinances misdemeanor.

Applied in Brown v. Brannon, 399 F. Supp. 133 (M.D.N.C. 1975), *aff'd*, 535 F.2d 1249 (4th Cir. 1976).

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); Pharo v. Pearson, 28 N.C. App. 171, 220 S.E.2d 359 (1975).

ARTICLE 2.

Principals and Accessories.

§ 14-5. Accessories before the fact; trial and punishment.

Common-Law Provision. —

The crime of accessory before the fact is a common-law offense. State v. Sauls, 29 N.C. App. 457, 224 S.E.2d 702, *rev'd* on other grounds, 291 N.C. 253, 230 S.E.2d 390 (1976), *cert. denied*, U.S. , 97 S. Ct. 2178, 53 L. Ed. 2d 226 (1977).

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), appeal dismissed, 287 N.C. 261, 214 S.E.2d 434 (1975), *cert. denied*, 423 U.S. 1080, 96 S. Ct. 868, 47 L. Ed. 2d 91 (1976); State v. Branch, 288 N.C. 514, 220 S.E.2d 495 (1975).

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), appeal dismissed, 287 N.C. 261, 214 S.E.2d 434 (1975), *cert. denied*, 423 U.S. 1080, 96 S. Ct. 868, 47 L. Ed. 2d 91 (1976); State v. Sauls, 291 N.C. 253, 230 S.E.2d 390 (1976), *cert. denied*, U.S. , 97 S. Ct. 2178, 53 L. Ed. 2d 226 (1977).

The elements necessary to be proved under this section in order to sustain a conviction for accessory before the fact are: (1) that under this section defendant counseled, procured or commanded the principal to commit the offense; (2) that defendant was not present when the principal committed the offense; and (3) that the principal committed the offense. State v. Sauls, 291 N.C. 253, 230 S.E.2d 390 (1976), *cert. denied*, U.S. , 97 S. Ct. 2178, 53 L. Ed. 2d 226 (1977).

Proof of three elements is necessary to sustain a conviction for accessory before the fact. It must be shown (1) that the defendant counseled, procured, commanded or encouraged the principal to commit the crime, (2) that he was

not present when the crime was committed, and (3) that the principal committed the crime. State v. Philyaw, 291 N.C. 312, 230 S.E.2d 370 (1976).

To convict the defendant of being an accessory before the fact the State must prove (1) that the defendant counseled, procured, commanded, encouraged or aided another to commit the offense; (2) the defendant was not present when the crime was committed; and (3) the principal committed the crime. State v. Hunter, 290 N.C. 556, 227 S.E.2d 535 (1976), *cert. denied*, U.S. , 97 S. Ct. 1106, 51 L. Ed. 2d 539 (1977).

Who Are Principals. —

A defendant may be tried and convicted as a principal in the first degree as the actual perpetrator of the offense, or as a principal in the second degree as an aider or abettor of the perpetrator, in which case he must be actually or constructively present. State v. Sauls, 29 N.C. App. 457, 224 S.E.2d 702 (1976).

All persons present, actually or constructively, and participating in a criminal offense are principals therein, either in the first or second degree, and not accessories. State v. Squire, 292 N.C. 494, 234 S.E.2d 563 (1977).

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); State v. Slade, 291 N.C. 275, 229 S.E.2d 921 (1976).

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); *State v. Wilson*, 31 N.C. App. 323, 229 S.E.2d 314 (1976).

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, cert. denied, 282 N.C. 154, 191 S.E.2d 603 (1972), 410 U.S. 990, 93 S. Ct. 1508, 36 L. Ed. 2d 189 (1973).

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), cert. denied, 284 N.C. 622, 202 S.E.2d 278 (1974); *State v. Scott*, 289 N.C. 712, 224 S.E.2d 185 (1976); *State v. Barrow*, 292 N.C. 227, 232 S.E.2d 693 (1977).

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); *State v. Robinette*, 33 N.C. App. 42, 234 S.E.2d 28 (1977).

One who is present, aiding and abetting in a rape actually perpetrated by another is equally guilty with the actual perpetrator of the crime. *State v. Thompson*, 290 N.C. 431, 226 S.E.2d 487 (1976).

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); *State v. Robinette*, 33 N.C. App. 42, 234 S.E.2d 28 (1977).

In Misdemeanors and Treason All Are Principals. — The distinction between principals and accessories is made only in felonies. All persons who participate in treason or in misdemeanors, whether present or absent, are indictable and punishable as principals. *State v. Bindyke*, 288 N.C. 608, 220 S.E.2d 521 (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), cert. denied, 284 N.C. 622, 202 S.E.2d 278 (1974).

Presence at the scene of the crime and little else is sufficient to constitute aiding and abetting, i.e., under some circumstances mere presence plus friendship with the perpetrator. *State v. Sauls*, 29 N.C. App. 457, 224 S.E.2d 702, rev'd on other grounds, 291 N.C. 253, 230 S.E.2d 390 (1976), cert. denied, U.S. , 97 S. Ct. 2178, 53 L. Ed. 2d 226 (1977).

Mere presence at the scene of the crime is not sufficient to denominate an accused an 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).

The crime of accessory before the fact is included in the charge of the principal crime. *State v. Branch*, 288 N.C. 514, 220 S.E.2d 495 (1975).

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); *State v. Sauls*, 29 N.C. App. 457, 224 S.E.2d 702, rev'd on other grounds, 291 N.C. 253, 230 S.E.2d 390 (1976), cert. denied, U.S. , 97 S. Ct. 2178, 53 L. Ed. 2d 226 (1977).

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).

The fact that defendant was indicted for first-degree murder did not preclude her conviction as an accessory before the fact. Upon trial on an indictment, a defendant may always be convicted of the crime charged therein or a lesser degree of the same crime and accessory before the fact is a lesser included offense of the principal crime. *State v. Philyaw*, 291 N.C. 312, 230 S.E.2d 370 (1976).

In enacting this section, North Carolina recognized accessory before the fact as a substantive felony, making it no longer

necessary to first convict the principal in order to convict an accessory. *State v. Philyaw*, 291 N.C. 312, 230 S.E.2d 370 (1976).

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); *State v. Squire*, 292 N.C. 494, 234 S.E.2d 563 (1977).

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), appeal dismissed, 287 N.C. 261, 214 S.E.2d 434 (1975), cert. denied, 423 U.S. 1080, 96 S. Ct. 868, 47 L. Ed. 2d 91 (1976).

An accessory before the fact is one who furnishes the means to carry on the crime, whose acts bring about the crime through the agency of or in connection with the perpetrators, who is a confederate, who instigates a crime. *State v. Sauls*, 29 N.C. App. 457, 224 S.E.2d 702, rev'd on other grounds, 291 N.C. 253, 230 S.E.2d 390 (1976), cert. denied, U.S. , 97 S. Ct. 2178, 53 L. Ed. 2d 226 (1977).

For a defendant, not actually or constructively present at the scene, to be criminally responsible for the acts of others as an accessory before the fact, it must be shown that he counseled, or procured, or commanded the others to perpetrate the crime. *State v. Sauls*, 29 N.C. App. 457, 224 S.E.2d 702, rev'd on other grounds, 291 N.C. 253, 230 S.E.2d 390 (1976), cert. denied, U.S. , 97 S. Ct. 2178, 53 L. Ed. 2d 226 (1977).

To render one guilty as an accessory before the fact, he must have had the requisite criminal intent; and it has been said that he must have the same intent as the principal. It is well settled, however, that he need not necessarily have intended the particular crime committed by the principal; an accessory is liable for any criminal act which in the ordinary course of things was the natural or probable consequence of the crime that he advised or commanded. *State v. Hewitt*, 33 N.C. App. 168, 234 S.E.2d 468 (1977).

What Constitutes Counseling, etc. —

The term "counsel" as used in this section describes the offense of a person who, not actually doing the felonious act, by his will contributed to it or procured it to be done. *State v. Hewitt*, 33 N.C. App. 168, 234 S.E.2d 468 (1977).

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).

Sentences Imposed Need Not Be Equal. — There is no rule of law that sentences imposed upon defendants for a crime jointly committed by them must be equal. *State v. Barrow*, 292 N.C. 227, 232 S.E.2d 693 (1977).

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); *State v. Branch*, 288 N.C. 514, 220 S.E.2d 495 (1975); *State v. Sauls*, 29 N.C. App. 457, 224 S.E.2d 702, rev'd on other grounds, 291 N.C. 253, 230 S.E.2d 390 (1976), cert. denied, U.S. , 97 S. Ct. 2178, 53 L. Ed. 2d 226 (1977).

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), cert. denied, 284 N.C. 622, 202 S.E.2d 278 (1974).

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 doubtably 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).

Applied in *State v. Branch*, 288 N.C. 514, 220 S.E.2d 495 (1975).

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), cert. denied, 282 N.C. 675, 194 S.E.2d 155 (1973).

An accessory after the fact under this section

is one who, knowing that a felony has been committed by another, receives, relieves, comforts or assists such other, the felon, or in any manner aids him to escape arrest or punishment. *State v. Squire*, 292 N.C. 494, 234 S.E.2d 563 (1977).

Elements of Crime. —

To constitute a person an accessory after the fact, these essentials must appear: (1) manslaughter must have been committed; (2) the accused must know that manslaughter has been committed by the person received, relieved or assisted; (3) the accessory must render assistance to the felon personally. *State v. Martin*, 30 N.C. App. 166, 226 S.E.2d 682 (1976).

It is not necessary that the aid given by the accessory after the fact be effective to enable the felon to escape all or a part of his punishment. *State v. Martin*, 30 N.C. App. 166, 226 S.E.2d 682 (1976).

"Accessory after Fact" Is a Substantive Crime. —

The offense of being an accessory after the fact to manslaughter is a substantive felony

offense. *State v. Martin*, 30 N.C. App. 166, 226 S.E.2d 682 (1976).

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.

Being an habitual felon is not a crime but is a status the attaining of which subjects a person thereafter convicted of a crime to an increased

punishment for that crime. The status itself, standing alone, will not support a criminal sentence. *State v. Allen*, 292 N.C. 431, 233 S.E.2d 585 (1977).

§ 14-7.2. Punishment.

Being an habitual felon is not a crime but is a status the attaining of which subjects a person thereafter convicted of a crime to an increased punishment for that crime. The status itself, standing alone, will not support a criminal sentence. *State v. Allen*, 292 N.C. 431, 233 S.E.2d 585 (1977).

The only reason for establishing that an accused is an habitual felon is to enhance the

punishment which would otherwise be appropriate for the substantive felony which he has allegedly committed while in such a status. The effect of such a proceeding is to enhance the punishment of those found guilty of crime who are also shown to have been convicted of other crimes in the past. *State v. Allen*, 292 N.C. 431, 233 S.E.2d 585 (1977).

§ 14-7.3. Charge of habitual felon.

One basic purpose behind this Chapter is to provide notice to defendant that he is being prosecuted for some substantive felony as a recidivist. Failure to provide such notice where the State accepts a guilty plea on the substantive felony charge may well vitiate the plea itself as not being knowingly entered with full understanding of the consequences. *State v. Allen*, 292 N.C. 431, 233 S.E.2d 585 (1977).

Separate Indictment Charging Defendant as Habitual Felon Contemplated. — Properly construed, this Chapter clearly contemplates that when one who has already attained the status of an habitual felon is indicted for the commission of another felony, that person may

then be also indicted in a separate bill as being an habitual felon. *State v. Allen*, 292 N.C. 431, 233 S.E.2d 585 (1977).

Defective Indictment. — Since it is clear from the indictment that prior to its return all the substantive felony proceedings upon which it is based had been prosecuted to completion and there was no pending felony prosecution to which the habitual felon proceeding could attach as an ancillary proceeding, the indictment on motion of the defendant should have been dismissed for failure of the bill to charge a cognizable offense. *State v. Allen*, 292 N.C. 431, 233 S.E.2d 585 (1977).

§ 14-7.5. Verdict and judgment.

It is clear that the proceeding by which the State seeks to establish that defendant is an habitual felon is necessarily ancillary to a pending prosecution for the "principal," or substantive, felony. The Chapter does not

authorize a proceeding independent from the prosecution of some substantive felony for the sole purpose of establishing a defendant's status as an habitual felon. *State v. Allen*, 292 N.C. 431, 233 S.E.2d 585 (1977).

§ 14-7.6. Sentencing of habitual felons.

Being an habitual felon is not a crime but is a status the attaining of which subjects a person thereafter convicted of a crime to an increased punishment for that crime. The status itself, standing alone, will not support a criminal sentence. *State v. Allen*, 292 N.C. 431, 233 S.E.2d 585 (1977).

The only reason for establishing that an accused is an habitual felon is to enhance the punishment which would otherwise be

appropriate for the substantive felony which he has allegedly committed while in such a status. The effect of such a proceeding is to enhance the punishment of those found guilty of crime who are also shown to have been convicted of other crimes in the past. *State v. Allen*, 292 N.C. 431, 233 S.E.2d 585 (1977).

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 attempted perpetration of any arson, rape, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon, shall be deemed to be murder in the first degree, and any person who commits such murder shall be punished with death or imprisonment in the State's prison for life as the court shall determine pursuant to G.S. 15A-2000. All other kinds of murder shall be deemed murder in the second degree, and any person who commits such murder 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; 1977, c. 406, 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."

The 1977 amendment, effective June 1, 1977, in the first sentence, substituted "attempted perpetration of" for "attempt to perpetrate," inserted "committed or attempted with the use of a deadly weapon" and "any person who commits such murder," and added "or imprisonment in the State's prison for life as the court shall determine pursuant to G.S. 15A-2000" to the end. The amendment also inserted "any person who commits such murder" in the second sentence. Session Laws 1977, c. 406, s. 8, provides: "The provisions of this act shall apply to murders committed on or after the effective date of this act."

Session Laws 1977, c. 406, s. 6, provides: "In the event that it is determined by the Supreme Court of North Carolina or by the Supreme Court of the United States that a sentence of

death may not be constitutionally imposed for a capital offense for which the death penalty is provided by this act, the punishment for that offense shall be imprisonment in the State's prison for life."

Session Laws 1977, c. 406, s. 7, contains a severability clause.

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).

For a comment entitled, "An Historical Analysis of Mandatory Capital Punishment," see 7 *N.C. Cent. L.J.* 306 (1976).

For a note on the burden of proof for affirmative defenses in homicide cases, see 12 *Wake Forest L. Rev.* 423 (1976).

For note on the erosion of the retreat rule and self-defense, see 12 *Wake Forest L. Rev.* 1093 (1976).

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, cert. denied, 414 U.S. 1000, 94 S. Ct. 353, 38 L. Ed. 2d 235 (1973).

This section is capable of standing alone. *State v. Roseboro*, 276 N.C. 185, 171 S.E.2d 886 (1970), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2289, 29 L. Ed. 2d 860 (1971); *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), death sentence vacated, 403 U.S. 948, 91

S. Ct. 2289, 29 L. Ed. 2d 860 (1971); *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), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2289, 29 L. Ed. 2d 860 (1971); *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), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2287, 29 L. Ed. 2d 860 (1971).

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. 1209, 20 L. Ed. 2d 138 (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), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2290, 29 L. Ed. 2d 860 (1971).

Definitions. —

In accord with original. See *State v. Davis*, 289 N.C. 500, 223 S.E.2d 296 (1976); *State v. McCall*, 289 N.C. 512, 223 S.E.2d 303 (1976).

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), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2290, 29 L. Ed. 2d 860 (1971).

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), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

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), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

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), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2289, 29 L. Ed. 2d 860 (1971).

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, cert. denied, 403 U.S. 934, 91 S. Ct. 2266, 29 L. Ed. 2d 715 (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), death sentence vacated, 40 U.S. 937, 92 S. Ct. 2863, 33 L. Ed. 2d 755 (1972).

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), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2289, 29 L. Ed. 2d 860 (1971).

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), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2875, 33 L. Ed. 2d 762 (1972); *State v. Frazier*, 280 N.C. 181, 185 S.E.2d 652 (1972), death sentence vacated, 409 U.S. 1004, 93 S. Ct. 453, 34 L. Ed. 2d 295 (1973).

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, cert. denied, 285 N.C. 760, 209 S.E.2d 284 (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 830 (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 830 (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, cert. denied, 281 N.C. 157, 188 S.E.2d 366 (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).

For discussion of burden on defendant to prove self-defense in light of *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975), see *State v. Hankerson*, 288 N.C. 632, 220 S.E.2d 575 (1975).

A person may kill in self-defense if he be free from fault in bringing on the difficulty and if it is necessary, or appears to him to be necessary, to kill so as to save himself from death or great bodily harm. *State v. Davis*, 289 N.C. 500, 223 S.E.2d 296 (1976).

A person is justified in defending himself if he is without fault in provoking, or engaging in, or continuing a difficulty with another. *State v. Lewis*, 27 N.C. App. 426, 219 S.E.2d 554 (1975), cert. denied, 289 N.C. 141, 220 S.E.2d 799 (1976).

Where the jury finds that the defendant intended to kill and inflicted injuries, to be completely absolved, the jury must find that he acted in self-defense against actual or apparent danger of death or greater bodily harm. *State v. Lewis*, 27 N.C. App. 426, 219 S.E.2d 554 (1975), cert. denied, 289 N.C. 141, 220 S.E.2d 799 (1976).

Where a defendant in a prosecution for first-degree murder raises a defense of self-defense, the reasonableness of his belief that it was necessary to kill so as to save himself from death or great bodily harm, and the amount of force required, must be judged by the jury upon the facts and circumstances as they

appeared to the defendant at the time of the killing. *State v. Davis*, 289 N.C. 500, 223 S.E.2d 296 (1976).

Where the jury finds that the defendant did not intend to kill, the defendant is privileged by the law of self-defense to use such force against the other as is actually or reasonably necessary under the circumstances to protect himself from bodily injury or offensive physical contact at the hands of the other, even though he is not thereby put in actual or apparent danger of death or great bodily harm. *State v. Lewis*, 27 N.C. App. 426, 219 S.E.2d 554 (1975), cert. denied, 289 N.C. 141, 220 S.E.2d 799 (1976).

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); *State v. Davis*, 290 N.C. 511, 227 S.E.2d 97 (1976); *State v. Young*, 291 N.C. 562, 231 S.E.2d 577 (1977); *State v. Manuel*, 291 N.C. 705, 231 S.E.2d 588 (1977); *State v. Stanfield*, 292 N.C. 357, 233 S.E.2d 574 (1977).

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); *Resendez v. Garrison*, 528 F.2d 1310 (4th Cir. 1975); *State v. Brower*, 289 N.C. 644, 224 S.E.2d 551 (1976).

II. MURDER IN GENERAL.

The corpus delicti in criminal homicide involves two elements: (1) the fact of the death, and (2) the existence of the criminal agency of another as the cause of death. *State v. Jensen*, 28 N.C. App. 436, 221 S.E.2d 717 (1976).

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); *State v. Patterson*, 288 N.C. 553, 220 S.E.2d 600 (1975), death sentence vacated, U.S. , 96 S. Ct. 3211, 49 L. Ed. 2d 1211 (1976);

State v. Cousins, 289 N.C. 540, 223 S.E.2d 338 (1976).

In accord with 3rd paragraph in original. See *State v. Patterson*, 288 N.C. 553, 220 S.E.2d 600 (1975), death sentence vacated, U.S. , 96 S. Ct. 3211, 49 L. Ed. 2d 1211 (1976).

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, cert. denied, 287 N.C. 262, 214 S.E.2d 434 (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).

The killing of a person with a deadly weapon, when established beyond a reasonable doubt, raises two presumptions: first, that the killing was unlawful, and second, that it was done with malice. *State v. McCall*, 289 N.C. 512, 223 S.E.2d 303 (1976).

When a killing resulting from the intentional use of a deadly weapon is established, two presumptions arise: (1) that the killing was unlawful, and (2) that it was done with malice. *State v. Lee*, 292 N.C. 617, 234 S.E.2d 574 (1977).

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), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2290, 29 L. Ed. 2d 860 (1971).

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), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

"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).

Constitutionality of Presumptions as to Malice and Unlawfulness. — Under the decision of *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975), the due process clause of the Fourteenth Amendment prohibits the use of our long-standing rules in homicide cases that, in order to rebut the presumption of malice, defendant must prove to the satisfaction of the jury that he killed in the heat of a sudden passion, and in order to rebut the presumption of unlawfulness, defendant must prove to the satisfaction of the jury that he killed in self-defense. *State v. Hankerson*, 288 N.C. 632, 220 S.E.2d 575 (1975).

The *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975) decision does not preclude use of the presumptions of malice and unlawfulness upon proof beyond a reasonable doubt of a killing by the intentional use of a deadly weapon; nor does it prohibit making the presumptions mandatory in the absence of contrary evidence or permitting the logical inferences from facts proved to remain and be weighed against contrary evidence if it is produced. *State v. Hankerson*, 288 N.C. 632, 220 S.E.2d 575 (1975).

The ruling of *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975) does not preclude all use of traditional presumptions of malice and unlawfulness. It precludes only utilizing them in such a way as to relieve the State of the burden of proof on these elements when the issue of their existence is raised by the evidence. The presumptions themselves, standing alone, are valid and constitutional. *State v. Biggs*, 292 N.C. 328, 233 S.E.2d 512 (1977).

The presumptions of unlawfulness and malice arising from an intentional assault with a deadly weapon proximately resulting in death are constitutional. *State v. Lester*, 289 N.C. 239, 221 S.E.2d 268 (1976).

Mullaney v. Wilbur, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975) does not apply to the presumption of malice created when the

State proves beyond a reasonable doubt that the accused intentionally inflicted a wound with a deadly weapon proximately causing death. *State v. Johnson*, 28 N.C. App. 265, 220 S.E.2d 834, cert. denied, 289 N.C. 454, 223 S.E.2d 162 (1976).

The presumptions of malice and unlawfulness arising from an intentional assault with a deadly weapon proximately causing death are constitutionally sound. *State v. Biggs*, 292 N.C. 328, 233 S.E.2d 512 (1977).

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. Barnwell*, 17 N.C. App. 299, 194 S.E.2d 63, cert. denied, 283 N.C. 106, 194 S.E.2d 634 (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), cert. denied, 286 N.C. 419, 211 S.E.2d 799 (1975).

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), cert. denied, 286 N.C. 419, 211 S.E.2d 799 (1975).

Finding as to Mental Capacity Conclusive on Appeal. — Where the jury, by its verdict, has established that the defendant, at the time of the alleged offenses, had the mental capacity to know right from wrong with reference to these acts, that finding, supported as it is by ample evidence, is conclusive on appeal. *State v. Shepherd*, 288 N.C. 346, 218 S.E.2d 176 (1975).

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, cert. denied, 287 N.C. 262, 214 S.E.2d 434 (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, cert. denied, 287 N.C. 262, 214 S.E.2d 434 (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), cert. denied, 404 U.S. 840, 92 S. Ct. 133, 30 L. Ed. 2d 74 (1971); *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, cert. denied, 284 N.C. 256, 200 S.E.2d 656 (1973); *State v. Sparks*, 285 N.C. 631, 207 S.E.2d 712 (1974), death sentence vacated, 428 U.S. 905, 96 S. Ct. 3213, L. Ed. 2d (1976); *State v.*

McLaughlin, 286 N.C. 597, 213 S.E.2d 238 (1975), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3206, L. Ed. 2d (1976); *State v. Smith*, 290 N.C. 148, 226 S.E.2d 10, cert. denied, U.S. , 97 S. Ct. 339, 50 L. Ed. 2d 301 (1976); *State v. Biggs*, 292 N.C. 328, 233 S.E.2d 512 (1977).

In accord with 2nd paragraph in original. See *State v. Patterson*, 288 N.C. 553, 220 S.E.2d 600 (1975), death sentence vacated, U.S. , 96 S. Ct. 3211, 49 L. Ed. 2d 1211 (1976); *State v. Barbour*, 28 N.C. App. 259, 220 S.E.2d 812, appeal dismissed, 289 N.C. 452, 223 S.E.2d 160 (1976).

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), death sentence vacated, 428 U.S. 905, 96 S. Ct. 3213, L. Ed. 2d (1976).

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), death sentence vacated, 428 U.S. 905, 96 S. Ct. 3213, L. Ed. 2d (1976); *State v. McLaughlin*, 286 N.C. 597, 213 S.E.2d 238 (1975), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3206, L. Ed. 2d (1976).

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); *State v. Shepherd*, 288 N.C. 346, 218 S.E.2d 176 (1975); *State v. Hammonds*, 290 N.C. 1, 224 S.E.2d 595 (1976).

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), death sentence vacated, 408 U.S. 937, 92 S. Ct. 2862, 33 L. Ed. 2d 754 (1972).

Previously existing hostile feelings between defendant and deceased, a prior assault upon the deceased by defendant, the use of grossly excessive force and killing in an unusually brutal way have all been held to be circumstances

tending to show premeditation and deliberation. *State v. Patterson*, 288 N.C. 553, 220 S.E.2d 600 (1975), death sentence vacated, U.S. , 96 S. Ct. 3211, 49 L. Ed. 2d 1211 (1976).

Among the circumstances to be considered in determining whether a killing is done with premeditation and deliberation are: (1) want of provocation on the part of the deceased, (2) the conduct of defendant before and after the killing, (3) the dealing of lethal blows after deceased has been felled and rendered helpless, (4) the vicious or brutal manner of the killing, (5) the number of shots fired. *State v. Davis*, 289 N.C. 500, 223 S.E.2d 296 (1976).

Among the circumstances to be considered in determining whether a murder was committed with premeditation and deliberation are: (1) want of provocation, (2) the conduct of the accused before and after the killing, (3) threats and declarations of the accused, (4) the use of grossly excessive force or the dealing of lethal blows after the deceased has been felled. *State v. Stewart*, 292 N.C. 219, 232 S.E.2d 443 (1977).

The use of grossly excessive force or the delivering of lethal blows after a deceased has been felled are among the circumstances to be considered in determining whether a killing is done with premeditation and deliberation. *State v. Spaulding*, 288 N.C. 397, 219 S.E.2d 178 (1975), death sentence vacated, U.S. , 96 S. Ct. 3210, 49 L. Ed. 2d 1210 (1976).

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 and the use of grossly excessive force. *State v. Barbour*, 28 N.C. App. 259, 220 S.E.2d 812, appeal dismissed, 289 N.C. 452, 223 S.E.2d 160 (1976).

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), cert. denied, 404 U.S. 840, 92 S. Ct. 133, 30 L. Ed. 2d 74 (1971).

Premeditation and deliberation may be inferred from a vicious and brutal slaying of a

human being. *State v. Reams*, 277 N.C. 391, 178 S.E.2d 65 (1970), cert. denied, 404 U.S. 840, 92 S. Ct. 133, 30 L. Ed. 2d 74 (1971).

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), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

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), cert. denied, 404 U.S. 840, 92 S. Ct. 133, 30 L. Ed. 2d 74 (1971).

Same — Premeditation. —

In accord with original. See *State v. Hamilton*, 19 N.C. App. 436, 199 S.E.2d 159, cert. denied, 284 N.C. 256, 200 S.E.2d 656 (1973).

Premeditation means thought beforehand for some length of time. *State v. Bush*, 289 N.C. 159, 221 S.E.2d 333 (1976); *State v. Davis*, 289 N.C. 500, 223 S.E.2d 296 (1976).

Premeditation may be defined as thought beforehand for some length of time. *State v. Smith*, 290 N.C. 148, 226 S.E.2d 10, cert. denied, U.S. , 97 S. Ct. 339, 30 L. Ed. 2d 301 (1976).

Premeditation means "thought beforehand" for some length of time, however short. *State v. Sanders*, 276 N.C. 598, 174 S.E.2d 487 (1970), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2290, 29 L. Ed. 2d 860 (1971); *State v. Reams*, 277 N.C. 391, 178 S.E.2d 65 (1970), cert. denied, 404 U.S. 840, 92 S. Ct. 133, 30 L. Ed. 2d 74 (1971); *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); *State v. Biggs*, 279 N.C. 328, 233 S.E.2d 512 (1977).

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), cert. denied, 404 U.S. 840, 92 S. Ct. 133, 30 L. Ed. 2d 74 (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, cert. denied, 284 N.C. 256, 200 S.E.2d 656 (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 defendant in a cool state of blood, in furtherance of a fixed design or to accomplish some unlawful purpose. *State v. Smith*, 290 N.C. 148, 226 S.E.2d 10, cert. denied, U.S. , 97 S. Ct. 339, 50 L. Ed. 2d 301 (1976).

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), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2290, 29 L. Ed. 2d 860 (1971); *State v. Biggs*, 292 N.C. 328, 233 S.E.2d 512 (1977).

Deliberation means that the action was done in a cool state of blood. *State v. Bush*, 289 N.C. 159, 221 S.E.2d 333 (1976).

Deliberation does not require reflection or brooding for an apparent length of time, but rather an intention to kill executed by defendant in furtherance of a fixed design to gratify a feeling of revenge or to accomplish some unlawful purpose and not under the influence of a violent passion, suddenly aroused by just cause or legal provocation. *State v. Bush*, 289 N.C. 159, 221 S.E.2d 333 (1976).

Deliberation means an intention to kill, executed by defendant in a cool state of blood, in furtherance of a fixed design or to accomplish some unlawful purpose. *State v. Davis*, 289 N.C. 500, 223 S.E.2d 296 (1976).

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, cert. denied, 284 N.C. 256, 200 S.E.2d 656 (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).

Where one forms a purpose to take the life of another and weighs this purpose in his mind long enough to form a fixed design or determination to kill at a subsequent time, no matter how soon or how late, and pursuant thereto kills, this would be a killing with premeditation and deliberation and would be murder in the first degree. *State v. Bock*, 288 N.C. 145, 217 S.E.2d 513 (1975), death sentence vacated, U.S. , 96 S. Ct. 3208, 49 L. Ed. 2d 1209 (1976).

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); *State v. Bock*, 288 N.C. 145, 217 S.E.2d 513 (1975), death sentence vacated, U.S. , 96 S. Ct. 3208, 49 L. Ed. 2d 1209 (1976).

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, cert. denied, 284 N.C. 256, 200 S.E.2d 656 (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); *State v. Bock*, 288 N.C. 145, 217 S.E.2d 513 (1975), death sentence vacated, U.S. , 96 S. Ct. 3208, 49 L. Ed. 2d 1209 (1976).

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), death sentence vacated, 428 U.S. 905, 96 S. Ct. 3213, L. Ed. 2d (1976); *State v. Strickland*, 290 N.C. 169, 225 S.E.2d 531 (1976).

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), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3206, L. Ed. 2d (1976).

Elements of first-degree murder are not usually susceptible to direct proof, but must be established, if at all, from the circumstances surrounding the homicide. *State v. Patterson*, 288 N.C. 553, 220 S.E.2d 600 (1975), death sentence vacated, U.S. , 96 S. Ct. 3211, 49 L. Ed. 2d 1211 (1976).

While the State must prove premeditation and deliberation, ordinarily it is not possible to prove these elements directly. *State v. Barbour*, 28 N.C. App. 259, 220 S.E.2d 812, appeal dismissed, 289 N.C. 452, 223 S.E.2d 160 (1976).

Premeditation and deliberation must usually be inferred from various circumstances including (1) want of provocation on the part of the deceased, (2) the conduct of an accused before and after the killing and (3) that the killing was done in a vicious and brutal manner. *State v. Bush*, 289 N.C. 159, 221 S.E.2d 333 (1976).

Premeditation and deliberation are not ordinarily susceptible of proof by direct evidence and therefore must usually be proved by circumstantial evidence. *State v. Davis*, 289 N.C. 500, 223 S.E.2d 296 (1976).

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), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2875, 33 L. Ed. 2d 762 (1972).

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), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2290, 29 L. Ed. 2d 860 (1971).

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), death

sentence vacated, 428 U.S. 905, 96 S. Ct. 3213, L. Ed. 2d (1976).

A murder perpetrated by means of poison, etc. —

In a prosecution for first-degree murder by poison, the evidence was sufficient to withstand motions for directed verdict and for judgment of nonsuit, where defendant purchased rat poison with intent to kill deceased and, pursuant to a preconceived plan to do so, defendant poured it into tea prepared specially for deceased's consumption, deceased drank the tea and almost immediately became ill and died. *State v. Hunt*, 289 N.C. 403, 222 S.E.2d 234 (1976).

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, cert. denied, 409 U.S. 888, 93 S. Ct. 194, 34 L. Ed. 2d 145 (1972).

Under this section, premeditation and deliberation are not elements of the crime of felony-murder. *State v. Swift*, 290 N.C. 383, 226 S.E.2d 652 (1976).

Evidence of premeditation and deliberation is not required as an essential element of proof of a felony-murder charge. *Chance v. Garrison*, 537 F.2d 1212 (4th Cir. 1976).

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).

An interrelationship between the felony and the homicide is prerequisite to application of felony-murder doctrine. *State v. Bush*, 289 N.C. 159, 221 S.E.2d 333 (1976); *State v. Squire*, 292 N.C. 494, 234 S.E.2d 563 (1977).

Completion of the robbery or other felony is not required to sustain a conviction under the felony-murder rule. *State v. Hopper*, 292 N.C. 580, 234 S.E.2d 580 (1977).

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), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3207, L. Ed. 2d (1976).

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).

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. Swift*, 290 N.C. 383, 226 S.E.2d 652 (1976).

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); *State v. Bush*, 289 N.C. 159, 221 S.E.2d 333 (1976); *State v. Covington*, 290 N.C. 313, 226 S.E.2d 629 (1976); *State v. Squire*, 292 N.C. 494, 234 S.E.2d 563 (1977).

A killing is committed in the perpetration of a felony when an unbroken chain of events leads from such felony to the act causing death, so that the homicide is part of a series of events forming one continuous transaction. *State v. Shrader*, 290 N.C. 253, 225 S.E.2d 522 (1976).

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); *State v. Jones*, 290 N.C. 292, 225 S.E.2d 549 (1976).

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); *State v. Bush*, 289 N.C. 159, 221 S.E.2d 333 (1976).

A homicide is murder in the first degree if it results from the commission or attempted commission of one of the four specified felonies or of any other felony inherently dangerous to life, without regard to whether death was intended or not. *State v. Swift*, 290 N.C. 383, 226 S.E.2d 652 (1976).

The killing of another human being, whether intentional or otherwise, while the person who kills is engaged in the perpetration of a felony,

which felony is inherently or foreseeably dangerous to human life, is murder at common law. *State v. Shrader*, 290 N.C. 253, 225 S.E.2d 522 (1976).

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), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3206, L. Ed. 2d (1976).

Killing in Perpetration of Robbery. —

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).

This section expressly provides that a murder perpetrated in an attempt to commit robbery is murder in the first degree. *State v. Carey*, 288 N.C. 254, 218 S.E.2d 387 (1975), death sentence vacated, U.S. , 96 S. Ct. 3209, 49 L. Ed. 2d 1209 (1976).

In a prosecution for murder committed during perpetration of an armed robbery and for conspiracy to commit armed robbery, the proof of murder in the first degree is complete when the State proves beyond a reasonable doubt that the trigger man shot and killed the victim in the trigger man's attempt to rob him. *State v. Carey*, 288 N.C. 254, 218 S.E.2d 387 (1975), death sentence vacated, U.S. , 96 S. Ct. 3209, 49 L. Ed. 2d 1209 (1976).

Where a homicide is committed in the commission of, or in the attempt to commit, an armed robbery, the State is not required to prove premeditation and deliberation; this section pronounces it murder in the first degree. *State v. McZorn*, 288 N.C. 417, 219 S.E.2d 201 (1975), death sentence vacated, U.S. , 96 S. Ct. 3210, 49 L. Ed. 2d 1210 (1976).

A murder committed in the perpetration or attempted perpetration of robbery is murder in the first degree. *State v. Bush*, 289 N.C. 159, 221 S.E.2d 333 (1976).

A murder committed in the perpetration of, or attempt to perpetrate, a robbery is murder in the first degree and punishable by death. *State v. Jones*, 290 N.C. 292, 225 S.E.2d 549 (1976).

A murder committed in the perpetration of any robbery, whether armed robbery or common-law robbery, is murder in the first degree. *State v. Dollar*, 292 N.C. 344, 233 S.E.2d 521 (1977).

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); *State v. Swift*, 290 N.C. 383, 226 S.E.2d 652 (1976).

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), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2287, 29 L. Ed. 2d 860 (1971).

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); *State v. Peplinski*, 290 N.C. 236, 225 S.E.2d 568 (1976).

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), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3207, L. Ed. 2d (1976).

Where all of the defendants not only conspire to perpetrate a robbery, but all actually participate actively in its perpetration, and in the course thereof a killing occurs, all participants are guilty of murder in the first degree. *State v. Squire*, 292 N.C. 494, 234 S.E.2d 563 (1977).

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), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2875, 33 L. Ed. 2d 762 (1972).

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), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3207, L. Ed. 2d (1976).

Killing During Escape or Flight. — Escape is ordinarily within the res gestae of the felony and a killing committed during escape or flight is ordinarily within the felony-murder rule. *State v. Squire*, 292 N.C. 494, 234 S.E.2d 563 (1977).

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).

Section 14-34.1, relating to the intentional discharge of a firearm into an occupied dwelling, is an unspecified felony under this section because of the reasonable correlation between committing a crime under § 14-34.1 and the possibility of death occurring. *State v. Swift*, 290 N.C. 383, 226 S.E.2d 652 (1976).

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); *State v. Carey*, 288 N.C. 254, 218 S.E.2d

387 (1975), death sentence vacated, U.S. , 96 S. Ct. 3209, 49 L. Ed. 2d 1209 (1976); *State v. Peplinski*, 290 N.C. 236, 225 S.E.2d 568 (1976); *State v. Squire*, 292 N.C. 494, 234 S.E.2d 563 (1977).

The felony-murder rule applies whenever a conspirator kills another person in the course of committing a felony, as against the contention that the killing was not part of the conspiracy. If the unlawful act agreed to be done is dangerous or homicidal in its character, or if its accomplishment necessarily or probably required the use of force and violence which may result in the taking of life unlawfully, every party in such agreement will be held criminally liable for whatever any of his co-conspirators may do in furtherance of the common design. *State v. Carey*, 288 N.C. 254, 218 S.E.2d 387 (1975), death sentence vacated, U.S. , 96 S. Ct. 3209, 49 L. Ed. 2d 1209 (1976).

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, cert. denied, 409 U.S. 888, 93 S. Ct. 194, 34 L. Ed. 2d 145 (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, cert. denied, 419 U.S. 867, 95 S. Ct. 123, 42 L. Ed. 2d 104 (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).

When the State, in the trial of a charge of murder, uses evidence that the murder occurred

in the perpetration of an armed robbery so as to establish that the murder was a murder in the first degree, the underlying felony becomes a part of the murder charge to the extent of preventing a further prosecution of the defendant for, or a further sentence of the defendant for, commission of the armed robbery. *State v. Squire*, 292 N.C. 494, 234 S.E.2d 563 (1977).

Proof of the arson charge was an essential and indispensable element in the State's proof of felony-murder and as such affords no basis for additional punishment. *State v. White*, 291 N.C. 118, 229 S.E.2d 152 (1976).

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), overruled on another point, *State v. Hunt*, 283 N.C. 617, 197 S.E.2d 513 (1973).

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, cert. denied, 414 U.S. 1000, 94 S. Ct. 353, 38 L. Ed. 2d 235 (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).

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), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3205, L. Ed. 2d (1976).

Judgment and sentence of death upon conviction of first-degree murder is not unconstitutional. *State v. Griffin*, 288 N.C. 437, 219 S.E.2d 48 (1975), death sentence vacated, U.S. , 96 S. Ct. 3210, 49 L. Ed. 2d 1210 (1976).

Imposition of the death penalty upon conviction of first-degree murder is not cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments to the United States Constitution. *State v. Spaulding*, 288 N.C. 397, 219 S.E.2d 178 (1975), death sentence vacated, U.S. , 96 S. Ct. 3210, 49 L. Ed. 2d 1210 (1976).

Defendants' contention that capital punishment under this section would violate the federal and State Constitutions has been rejected several times. *State v. Bush*, 289 N.C. 159, 221 S.E.2d 333 (1976).

Defendant's contention in a trial for first-degree murder that the imposition of the death penalty results in cruel and unusual punishment and is therefore constitutionally impermissible has been rejected in many decisions. *State v. Carter*, 289 N.C. 35, 220 S.E.2d 313 (1975), death sentence vacated, U.S. , 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976).

Mandatory Death Penalty Held Unconstitutional. — North Carolina's mandatory death penalty statute for first-degree murder contained in this section as amended in 1973 and before its amendment in 1977, departed markedly from contemporary standards respecting the imposition of the punishment of death and thus could not be applied consistently with the Eighth and Fourteenth Amendments' requirement that the State's power to punish be exercised within the limits of civilized standards. *Woodson v. North Carolina*, 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976).

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), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2290, 29 L. Ed. 2d 860 (1971).

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), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2290, 29 L. Ed. 2d 860 (1971).

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), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

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), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

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), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

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), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

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), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

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), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2290, 29 L. Ed. 2d 860 (1971).

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), death sentence vacated, 408 U.S. 937, 92 S. Ct. 2862, 33 L. Ed. 2d 754 (1972).

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).

Defendant who does not have mental capacity to form intent to kill, or to premeditate and deliberate upon the killing, cannot be convicted of murder in the first degree. *State v. Shepherd*, 288 N.C. 346, 218 S.E.2d 176 (1975).

If a defendant does not have the mental capacity to form an intent to kill or to premeditate and deliberate upon the killing, he cannot be lawfully convicted of murder in the first degree, whether such mental deficiency be due to disease of the mind or some other cause. *State v. Hammonds*, 290 N.C. 1, 224 S.E.2d 595 (1976).

Theory of Diminished Responsibility Not Adopted. — The Supreme Court has not adopted

with respect to the specific intent to commit a crime such as first-degree murder what has been called the theory of diminished responsibility, under which some of the states hold that a defendant may offer evidence of an unusual or abnormal mental condition which is not sufficient to establish legal insanity, but tends to show that he did not have the capacity to premeditate or deliberate at the time of the murder. *State v. Shepherd*, 288 N.C. 346, 218 S.E.2d 176 (1975).

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), death sentence vacated, 408 U.S. 937, 92 S. Ct. 2862, 33 L. Ed. 2d 754 (1972).

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).

If 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 intent to kill, essential elements of murder in the first degree are absent and it is said that the grade of the offense is reduced to murder in the second degree. *State v. Bock*, 288 N.C. 145, 217 S.E.2d 513 (1975), death sentence vacated, U.S. , 96 S. Ct. 3208, 49 L. Ed. 2d 1209 (1976).

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), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3206, L. Ed. 2d (1976).

Voluntary Intoxication as Defense to Felony-Murder Charge. — Since voluntary intoxication is not a defense to a charge of arson, it is not a defense to a charge of felony-murder having as its underlying felony the crime of arson. *State v. White*, 291 N.C. 118, 229 S.E.2d 152 (1976).

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), death sentence vacated, 408 U.S. 937, 92 S. Ct. 2862, 33 L. Ed. 2d 754 (1972); *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), death sentence vacated, 408 U.S. 937, 92 S. Ct. 2862, 33 L. Ed. 2d 754 (1972); *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), death sentence vacated, 408 U.S. 937, 92 S. Ct. 2862, 33 L. Ed. 2d 754 (1972).

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 submission 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), death sentence vacated, 408 U.S. 937, 92 S. Ct. 2862, 33 L. Ed. 2d 754 (1972).

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, cert. denied, 283 N.C. 755, 198 S.E.2d 725 (1973); *State v. Davis*, 289 N.C. 500, 223 S.E.2d 296 (1976); *State v. Cousins*, 289 N.C. 540, 223 S.E.2d 338 (1976); *State v. Christopher*, 29 N.C. App. 231, 223 S.E.2d 835 (1976); *State v. Jones*, 291 N.C. 681, 231 S.E.2d 252 (1977).

In accord with 3rd paragraph in original. See *State v. Winford*, 279 N.C. 58, 181 S.E.2d 423 (1971); *State v. Williams*, 288 N.C. 680, 220 S.E.2d 558 (1975).

Murder in the second degree is the unlawful killing of a human being with malice but without premeditation and deliberation. *State v. Periman*, 32 N.C. App. 33, 230 S.E.2d 802 (1977).

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); *State v. Williams*, 288 N.C. 680, 220 S.E.2d 558 (1975).

Trial judge did not err in instructing the jury that second-degree murder differs from first-degree murder in that a specific intent to kill is not an element of second-degree murder. *State v. Lester*, 289 N.C. 239, 221 S.E.2d 268 (1976).

A specific intent to kill is not an element of second-degree murder or manslaughter. *State v. Lester*, 289 N.C. 239, 221 S.E.2d 268 (1976).

Proximate cause is an element of second-degree murder and manslaughter. *State v. Sherrill*, 28 N.C. App. 311, 220 S.E.2d 822 (1976).

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, cert. denied, 281 N.C. 316, 188 S.E.2d 900 (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, cert. denied, 287 N.C. 667, 216 S.E.2d 910 (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, cert. denied, 287 N.C. 667, 216 S.E.2d 910 (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. Barnwell*, 17 N.C. App. 299, 194 S.E.2d 63, cert. denied, 283 N.C. 106, 194 S.E.2d 634 (1973).

For discussion of burden of proof on defendant to prove self-defense in light of *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975), see *State v. Hankerson*, 288 N.C. 632, 220 S.E.2d 575 (1975).

Presumption. —

In accord with 4th paragraph in original. See *State v. Barbour*, 28 N.C. App. 259, 220 S.E.2d 812, appeal dismissed, 289 N.C. 452, 223 S.E.2d 160 (1976).

The intentional use of a deadly weapon proximately causing death gives rise to presumptions that (1) the killing was unlawful, and (2) the killing was done with malice. This is second-degree murder. *State v. Bush*, 289 N.C. 159, 221 S.E.2d 333 (1976).

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, cert. denied, 287 N.C. 667, 216 S.E.2d 910 (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); *State v. Chavis*, 30 N.C. App. 75, 226 S.E.2d 389, cert. denied, 290 N.C. 778, 229 S.E.2d 33 (1976).

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), cert. denied, 282 N.C. 674, 194 S.E.2d 154 (1973).

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), cert. denied, 409 U.S. 987, 93 S. Ct. 342, 34 L. Ed. 2d 253 (1972).

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), cert. denied, 404 U.S. 840, 92 S. Ct. 133, 30 L. Ed. 2d 74 (1971).

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, cert. denied, 283 N.C. 106, 194 S.E.2d 634 (1973).

Malice may be implied from circumstances other than the use of a deadly weapon. *State v. Periman*, 32 N.C. App. 33, 230 S.E.2d 802 (1977).

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 *ipse iuris* 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, appeal dismissed, 287 N.C. 261, 214 S.E.2d 433 (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), death sentence vacated, 409 U.S. 1004, 93 S. Ct. 453, 34 L. Ed. 2d 295 (1973).

An indictment under § 15-144 will support a verdict of murder in the first degree if the jury finds beyond a reasonable doubt that an accused killed with malice and after premeditation and deliberation or in the perpetration or attempted perpetration of any arson, rape, robbery, burglary or other felony the commission of which creates any substantial foreseeable human risk and actually results in loss of life. *State v. Bush*, 289 N.C. 159, 221 S.E.2d 333 (1976).

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).

Indictment Procedure for Felony-Murder. — The better practice where the State prosecutes a defendant for first-degree murder on the theory that the homicide was committed in the perpetration of or attempt to perpetrate a felony under the provisions of this section would be that the district attorney should not secure a separate indictment for the felony. If he does, and there is a conviction of both, the defendant will be sentenced for the murder and the judgment will be arrested for the felony under the merger rule. If the separate felony indictment is treated as surplusage only and the murder charge submitted to the jury under the felony-murder rule, then obviously the defendant cannot thereafter be tried for the felony. *State v. Carey*, 288 N.C. 254, 218 S.E.2d 387 (1975), death sentence vacated, U.S. , 96 S. Ct. 3209, 49 L. Ed. 2d 1209 (1976).

Guilty Plea to Capital Crime Not Accepted. —

When a defendant is charged with first-degree murder, he is not permitted to plead

guilty to it. *State v. Griffin*, 288 N.C. 437, 219 S.E.2d 48 (1975), death sentence vacated, U.S. , 96 S. Ct. 3210, 49 L. Ed. 2d 1210 (1976).

What State Must Prove Generally. — 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).

The State must bear the burden throughout the trial of proving each element of the crime charged including, where applicable, malice and unlawfulness beyond a reasonable doubt. *State v. Hankerson*, 288 N.C. 632, 220 S.E.2d 575 (1975).

Same — Felony-Murder. — The felony-murder rule does not place any burden of proof upon a criminal defendant. The State is required to prove, beyond a reasonable doubt, that a murder was committed in the perpetration or attempted perpetration of a robbery, and that defendant participated in that crime. Upon a finding by the jury that these elements are proved beyond a reasonable doubt, defendant is by this section, guilty of first-degree murder. There is no requirement in the statutory definition of the crime that the State prove malice, premeditation or deliberation. Thus, the State is not relieved of the burden of proving malice, since malice is not an element of the crime. Further, no burden is placed upon a defendant to prove or disprove any of the elements of the crime contained in this section. *State v. Womble*, 292 N.C. 455, 233 S.E.2d 454 (1977).

It is a well-established rule that when the law and evidence justify the use of the felony-murder rule, then the State is not required to prove premeditation and deliberation. *State v. Warren*, 292 N.C. 235, 232 S.E.2d 419 (1977).

The State is not required to elect prior to the introduction of evidence as to whether it will proceed under the felony-murder rule or on the basis of premeditation and deliberation. *State v. Swift*, 290 N.C. 383, 226 S.E.2d 652 (1976).

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, aff'd, 285 N.C. 570, 206 S.E.2d 238 (1974).

To warrant a conviction for homicide the State must establish that the act of the accused was a proximate cause of the death. *State v. Jones*, 290 N.C. 292, 225 S.E.2d 549 (1976).

Plea of Not Guilty. —

Defendant's plea of not guilty puts into issue all of the elements of the charges against him and the burden remains on the State to satisfy the jury beyond a reasonable doubt of all of the elements of the offense charged, including the

lesser offense of second-degree murder. *State v. Griffin*, 288 N.C. 437, 219 S.E.2d 48 (1975), death sentence vacated, U.S. , 96 S. Ct. 3210, 49 L. Ed. 2d 1210 (1976).

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).

Assertion by an accused that a killing with a deadly weapon was accidental is in no sense an affirmative defense shifting the burden to him to satisfy the jury that death of the victim was in fact an accident. *State v. Harris*, 289 N.C. 275, 221 S.E.2d 343 (1976).

Defendant's contention that decedent's death resulted from an accident is a denial that he committed the crime charged, and such contention is not an affirmative defense which results in the imposition of any burden of proof upon him. *State v. Harris*, 289 N.C. 275, 221 S.E.2d 343 (1976).

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).

The district attorney during the trial of defendant on a capital offense, and when defendant was voluntarily absent, could properly elect to waive the charge of first-degree murder and proceed with the prosecution of a noncapital offense, second-degree murder. *State v. Mulwee*, 27 N.C. App. 366, 219 S.E.2d 304, cert. denied, 288 N.C. 732, 220 S.E.2d 622 (1975).

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), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2290, 29 L. Ed. 2d 860 (1971); *State v. Sparks*, 285 N.C. 631, 207 S.E.2d 712 (1974); *State v. Strickland*, 290 N.C. 169, 225 S.E.2d 531 (1976).

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), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3206, 96 L. Ed. 2d (1976); *State v. Smith*, 290 N.C. 148, 226 S.E.2d 10, cert. denied, U.S. , 97 S. Ct. 339, 50 L. Ed. 2d 301 (1976).

Ordinarily, it is not possible to prove premeditation and deliberation by direct evidence. Therefore these elements of first-degree murder must be established by proof of circumstances from which they may be inferred. *State v. Shepherd*, 288 N.C. 346, 218 S.E.2d 176 (1975); *State v. Mitchell*, 288 N.C. 360, 218 S.E.2d 332 (1975), death sentence vacated, U.S. , 96 S. Ct. 3209, 49 L. Ed. 2d 1210 (1976); *State v. Griffin*, 288 N.C. 437, 219 S.E.2d 48 (1975), death sentence vacated, U.S. , 96 S. Ct. 3210, 49 L. Ed. 2d 1210 (1976).

Among the circumstances to be considered by the jury in determining whether a killing was with premeditation and deliberation are: want of provocation on the part of the deceased; the conduct of the 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. Shepherd*, 288 N.C. 346, 218 S.E.2d 176 (1975); *State v. Mitchell*, 288 N.C. 360, 218 S.E.2d 332 (1975), death sentence vacated, U.S. , 96 S. Ct. 3209, 49 L. Ed. 2d 1210 (1976); *State v. Griffin*, 288 N.C. 437, 219 S.E.2d 48 (1975), death sentence vacated, U.S. , 96 S. Ct. 3210, 49 L. Ed. 2d 1210 (1976).

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), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2875, 33 L. Ed. 2d 762 (1972).

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), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

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).

In order to convict the defendant of first-degree murder, the State must satisfy the jury beyond a reasonable doubt of all the elements thereof, to-wit, an unlawful killing of a human being with malice and with a specific intent to kill and committed after premeditation and deliberation. *State v. Mitchell*, 288 N.C. 360, 218 S.E.2d 332 (1975), death sentence vacated, U.S. , 96 S. Ct. 3209, 49 L. Ed. 2d 1210 (1976).

Photographs, etc. —

In accord with 4th paragraph in original. See *State v. Westbrook*, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

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), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

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), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

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).

In a prosecution for first-degree murder, photographs of deceased and the clothing of deceased are admissible despite defendant's contention that since he did not controvert the killing, the photographs and clothing were prejudicial and inflammatory, since the burden was still on the State to prove its case beyond a reasonable doubt so as to convince the jury that there had been an unlawful killing with malice and that the circumstances of the killing justified a finding of premeditation, deliberation and a specific intent to kill. *State v. Williams*, 289 N.C. 439, 222 S.E.2d 242 (1976).

In a prosecution for first-degree murder a photograph is admissible for the purpose of illustrating the testimony of the doctor who examined the deceased. *State v. Williams*, 289 N.C. 439, 222 S.E.2d 242 (1976).

In a prosecution for first-degree murder the fact that a photograph depicts a gruesome scene does not render it incompetent. *State v. Williams*, 289 N.C. 439, 222 S.E.2d 242 (1976).

In a prosecution for second-degree murder or involuntary manslaughter photographs depicting the way deceased looked at the hospital the night he died are not inadmissible because they were not made at the time of the event, or because they are gory or gruesome. *State v. Cox*, 289 N.C. 414, 222 S.E.2d 246 (1976).

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), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, L. Ed. 2d (1976).

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), cert. denied, 284 N.C. 258, 200 S.E.2d 658 (1973).

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).

For discussion of burden of defendant to prove self-defense in light of *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975), see *State v. Hankerson*, 288 N.C. 632, 220 S.E.2d 575 (1975).

The court correctly refused to give an instruction on self-defense which omitted the requirement that before one may kill in self-defense he must have reasonable grounds to believe that it is necessary to kill to protect himself from death or great bodily harm. *State v. Bock*, 288 N.C. 145, 217 S.E.2d 513 (1975), death sentence vacated, U.S. , 96 S. Ct. 3208, 49 L. Ed. 2d 1209 (1976).

In a prosecution for first-degree murder, evidence of powder burns on defendant's hands, which at most permitted an inference that defendant struggled for possession of the murder weapon before the fatal shots were fired, was insufficient to require an instruction to the jury on self-defense. *State v. Davis*, 289 N.C. 500, 223 S.E.2d 296 (1976).

When the State or defendant produces evidence that defendant acted in self-defense in a prosecution for first-degree murder, the question of self-defense becomes a substantial feature of the case requiring the trial judge to state and apply the law of self-defense to the facts of the case. *State v. Davis*, 289 N.C. 500, 223 S.E.2d 296 (1976).

If the evidence is insufficient to evoke the doctrine of self-defense in a prosecution for first-degree murder, the trial judge is not required to give instructions on that defense even when specifically requested. *State v. Davis*, 289 N.C. 500, 223 S.E.2d 296 (1976).

The trial court is required to charge on self-defense, even without a special request, when, but only when, there is some construction of the evidence from which could be drawn a reasonable inference that the defendant assaulted the victim in self-defense. *State v. Lewis*, 27 N.C. App. 426, 219 S.E.2d 554 (1975), cert. denied, 289 N.C. 141, 220 S.E.2d 799 (1976).

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, cert. denied, 285 N.C. 760, 209 S.E.2d 284 (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), death sentence

vacated, 428 U.S. 903, 96 S. Ct. 3206, L. Ed. 2d (1976).

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, cert. denied, 414 U.S. 1000, 94 S. Ct. 353, 38 L. Ed. 2d 235 (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, cert. denied, 414 U.S. 1000, 94 S. Ct. 353, 38 L. Ed. 2d 235 (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, cert. denied, 414 U.S. 1000, 94 S. Ct. 353, 38 L. Ed. 2d 235 (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), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

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), death sentence vacated, 428 U.S. 905, 96 S. Ct. 3213, L. Ed. 2d (1976).

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, cert. denied, 281 N.C. 157, 188 S.E.2d 366 (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).

The necessity for instructing the jury as to an included crime of lesser degree, such as manslaughter, than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The presence of such evidence is the determinative factor. *State v. Jones*, 291 N.C. 681, 231 S.E.2d 252 (1977).

In a prosecution for first-degree murder, instructions on a lesser included offense of manslaughter are required only when there is evidence from which the jury could find that such included crime of lesser degree was committed. *State v. Stewart*, 292 N.C. 219, 232 S.E.2d 443 (1977).

In those cases in which the State proves a murder committed by one of the means stated in this section, or in the perpetration or attempted perpetration of a felony, an instruction to the jury to return a verdict of murder in the first degree or not guilty is proper; provided, that there is no evidence, or any inference deducible therefrom, tending to show a lesser offense. *State v. Harris*, 290 N.C. 718, 228 S.E.2d 424 (1976).

When all the evidence tends to show that the accused committed second-degree murder and there is no evidence of guilt of involuntary manslaughter, the court correctly refuses to charge on the unsupported lesser offense. The presence of such evidence is the determinative factor. *State v. Redfern*, 291 N.C. 319, 230 S.E.2d 152 (1976).

The trial judge must instruct the jury as to involuntary manslaughter when the crime charged is second-degree murder if there is evidence from which the jury could find that the defendant committed the lesser offense. *State v. Redfern*, 291 N.C. 319, 230 S.E.2d 152 (1976).

It is a well-established rule that when the law

and evidence justify the use of the felony-murder rule, the court is not required to submit to the jury second-degree murder or manslaughter unless there is evidence to support it. *State v. Warren*, 292 N.C. 235, 232 S.E.2d 419 (1977).

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), death sentence vacated, 428 U.S. 905, 96 S. Ct. 3213, L. Ed. 2d (1976).

Where defendant was not harmed by the victim in any way and did not believe he would have had any difficulty in defending himself against her, and the victim's death was an unnecessary and senseless killing; where the 55 stab wounds constituted grossly excessive force; and where force which would have been lethal had the victim not already been dead was applied when an automobile was driven over her felled body, the evidence was sufficient to take the issue of defendant's guilt of first-degree murder to the jury. *State v. Bock*, 288 N.C. 145, 217 S.E.2d 513 (1975), death sentence vacated, U.S. , 96 S. Ct. 3208, 49 L. Ed. 2d 1209 (1976).

In a prosecution for first-degree murder, the evidence was sufficient to withstand a motion for nonsuit where it tended to show that deceased died as a result of a gunshot wound inflicted by a shot fired from a trailer, defendant, a short time before the shooting, had test fired a 12 gauge shotgun, 12 gauge shotgun wadding was found in a straight line between the trailer and the bodies after the shooting, a freshly-fired 12 gauge shotgun was later found in defendant's house hidden between the quilts and mattress of a bed and defendant was the only person in the trailer when the fatal shots were fired. *State v. McCall*, 289 N.C. 512, 223 S.E.2d 303 (1976).

In a prosecution for first-degree murder, where defendant admitted to State's witness that he and his brother had a blunt instrument

and a knife when they decided to rob decedent, and evidence showed that decedent died of injuries inflicted by both blunt and sharp objects, the evidence was sufficient to withstand a motion for nonsuit even though defendant's admissions did not include the actual use of the weapons against decedent. *State v. Warren*, 289 N.C. 551, 223 S.E.2d 317 (1976).

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, cert. denied, 414 U.S. 1000, 94 S. Ct. 353, 38 L. Ed. 2d 235 (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), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

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), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

Circumstantial evidence must exclude every reasonable hypothesis of innocence. *State v. Westbrook*, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

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), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

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), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

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), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

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), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

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).

Testimony relating to insanity or mental debilities is not competent for jury consideration as bearing upon whether the State has satisfied the jury from the evidence beyond a reasonable doubt that a defendant has unlawfully killed the victim in the execution of an actual, specific

intent to kill formed after premeditation and deliberation or that the defendant has intentionally killed the victim. *State v. Hammonds*, 290 N.C. 1, 224 S.E.2d 595 (1976).

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, cert. denied, 287 N.C. 667, 216 S.E.2d 910 (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), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, L. Ed. 2d (1976).

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), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, L. Ed. 2d (1976).

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).

In a prosecution for first-degree murder, a new trial was required where the trial judge twice and at crucial times in the charge to the jury gave an incorrect instruction as to the definition of voluntary manslaughter and related it to the evidence in a manner which would not disclose patent error to the average juror, despite the fact that the trial judge properly defined voluntary manslaughter in another portion of the charge. *State v. Cousins*, 289 N.C. 540, 223 S.E.2d 338 (1976).

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).

A trial judge is not required to define "reasonable doubt" without a request to do so, but if he does undertake to define it, the definition should be in substantial accord with the definitions of this court. *State v. Shepherd*, 288 N.C. 346, 218 S.E.2d 176 (1975).

In a prosecution for first-degree murder, trial judge did not err in charging the jury that if the State proved beyond a reasonable doubt that defendant killed deceased with a deadly weapon, the law raised presumptions that the killing was unlawful and that it was done with malice. *State v. Taylor*, 289 N.C. 223, 221 S.E.2d 359 (1976).

Instruction on Inability to Form Specific Intent. — The trial court did not err in instructing the jury that in order to find that

defendant could not form a specific intent to commit a felony or that the defendant was mentally incapable of premeditation and deliberation they must find that the defendant was "utterly incapable" (or "utterly unable") of forming a specific intent. *State v. Griffin*, 288 N.C. 437, 219 S.E.2d 48 (1975), death sentence vacated, U.S. , 96 S. Ct. 3210, 49 L. Ed. 2d 1210 (1976).

Alibi Instruction Not Required. — In prosecution for first-degree murder, where the record shows that the crime was committed on a certain corner at a specified time, and defendant testified that he was on that corner at that time, there was insufficient evidence to require instruction on alibi even had there been a special request for it. *State v. Waddell*, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, U.S. , 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

Instruction on Accident. — In a prosecution for murder and assault with a deadly weapon with intent to kill where the trial judge instructs the jury on the defense of accident it is not error if the court does not define the word "accident." *State v. Reives*, 29 N.C. App. 11, 222 S.E.2d 727, cert. denied, 289 N.C. 728, 224 S.E.2d 675 (1976).

Trial judge's charge to jury in prosecution for first-degree murder placing burden on defendant to rebut presumption of malice so as to reduce the charge from second-degree murder to manslaughter was not error where all the evidence revealed a cold-blooded killing done with malice and with premeditation and deliberation, and the jury returned a verdict of murder in the first degree never reaching the questions raised as to instructions relating to second-degree murder and manslaughter. *State v. Taylor*, 289 N.C. 223, 221 S.E.2d 359 (1976).

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), cert. denied, 410 U.S. 958, 93 S. Ct. 1432, 35 L. Ed. 2d 691 (1973); *State v. Chavis*, 30 N.C. 75, 226 S.E.2d 389, cert. denied, 290 N.C. 778, 229 S.E.2d 33 (1976).

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, cert. denied, 284 N.C. 256, 200 S.E.2d 656 (1973).

In a prosecution for first-degree murder, the trial judge's characterization of deceased as the common-law husband of the defendant in his charge to the jury was harmless error. *State v. Hunt*, 289 N.C. 403, 222 S.E.2d 234 (1976).

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), death sentence vacated, 403 U.S. 2287, 91 S. Ct. 2287, 29 L. Ed. 2d 860 (1971).

Verdict of Armed Robbery in Prosecution for First-Degree Murder. — Where the jury returned a verdict of guilty as to the charge of armed robbery, the trial judge did not enter judgment as to that charge and properly so since it conclusively appears that the armed robbery charge was proved as an essential element in the capital offense of murder in the first degree. The armed robbery charge, therefore, became a part of and was merged into the murder charge. *State v. Williams*, 290 N.C. 770, 228 S.E.2d 241 (1976).

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 830 (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).

Clothing Admissible. — In cases of homicide or other crimes against the person, clothing worn by the defendant or by the victim is admissible if its appearance throws any light on the circumstances of the crime. *State v. Norwood*, 289 N.C. 424, 222 S.E.2d 253 (1976).

In a prosecution for first-degree murder the clothing of deceased is admissible if its appearance throws any light on the circumstances of the crime. *State v. Williams*, 289 N.C. 439, 222 S.E.2d 242 (1976).

The clothing of the deceased worn at the time of a homicide is another circumstance showing the manner of the killing. *State v. Williams*, 289 N.C. 439, 222 S.E.2d 242 (1976).

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), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

"Fruit" of Plain View Search Admissible. — In a prosecution for first-degree murder, where a State trooper had stopped defendants' car for reckless driving and had subsequently observed the butt of a revolver protruding from under the center armrest, the revolver was properly admissible in evidence as the fruit of a lawful warrantless "plain view" seizure under circumstances requiring no search. *State v. Smith*, 289 N.C. 143, 221 S.E.2d 247 (1976).

§ 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.

Editor's Note. —

For note on the erosion of the retreat rule and self-defense, see 12 Wake Forest L. Rev. 1093 (1976).

For a note on the burden of proof for affirmative defenses in homicide cases, see 12 Wake Forest L. Rev. 423 (1976).

Definitions. —

In accord with 1st paragraph in original. See *State v. Bunn*, 283 N.C. 444, 196 S.E.2d 777 (1973); *State v. Spencer*, 27 N.C. App. 301, 219 S.E.2d 231 (1975); *State v. Cousins*, 289 N.C. 540, 223 S.E.2d 338 (1976); *State v. Jones*, 291 N.C. 681, 231 S.E.2d 252 (1977); *State v. Stewart*, 292 N.C. 219, 232 S.E.2d 443 (1977).

In accord with 3rd paragraph in original. See *State v. Fox*, 18 N.C. App. 523, 197 S.E.2d 265, cert. denied, 283 N.C. 755, 198 S.E.2d 725 (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), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2289, 29 L. Ed. 2d 860 (1971); *State v. Richardson*, 14 N.C. App. 86, 187 S.E.2d 435 (1972), cert. denied, 284 N.C. 258, 200 S.E.2d 658 (1973).

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, cert. denied, 283 N.C. 755, 198 S.E.2d 725 (1973); *State v. Christopher*, 29 N.C. App. 231, 223 S.E.2d 835 (1976).

Voluntary manslaughter is the unlawful killing of a person without malice and without premeditation. *State v. Foust*, 32 N.C. App. 301, 232 S.E.2d 276 (1977).

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); *State v. Stewart*, 292 N.C. 219, 232 S.E.2d 443 (1977).

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), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3206, L. Ed. 2d (1976).

Involuntary manslaughter is the unlawful killing of a human being unintentionally and without malice but proximately resulting from the commission of an unlawful act not amounting to a felony, or some act done in an unlawful or culpably negligent manner. Culpable negligence under the criminal law is such recklessness or carelessness, resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others. *State v. Newcomb*, 26 N.C. App. 595, 216 S.E.2d 730, cert. denied, 288 N.C. 249, 217 S.E.2d 680 (1975).

Involuntary manslaughter is the unlawful and unintentional killing of another human being without malice and which proximately results from the commission of an unlawful act not amounting to a felony or not naturally dangerous to human life, or from the commission of some act done in an unlawful or culpably negligent manner, or from the culpable omission to perform some legal duty. *State v. Everhart*, 291 N.C. 700, 231 S.E.2d 604 (1977).

Involuntary manslaughter is the unintentional killing of a human being without malice, proximately caused by (1) an unlawful act not amounting to a felony nor naturally dangerous to human life, or (2) culpably negligent act or omission. *State v. Redfern*, 291 N.C. 319, 230 S.E.2d 152 (1976).

Involuntary manslaughter is the unintentional killing of a person without malice (1) by some unlawful act not amounting to a felony or naturally dangerous to human life, or (2) by an act or omission constituting culpable negligence. *State v. Waite*, 32 N.C. App. 279, 232 S.E.2d 278 (1977).

Culpable negligence. —

Culpable negligence in the law of involuntary manslaughter is something more than actionable negligence in the law of torts, and is such recklessness or carelessness, proximately resulting in injury or death, as is incompatible with a proper regard for the safety or rights of others. *State v. Gainey*, 29 N.C. App. 653, 225 S.E.2d 843 (1976), *rev'd* on other grounds, 292 N.C. 627, 234 S.E.2d 610 (1977).

Culpable negligence in the criminal law requires more than the negligence necessary to sustain a recovery in tort. Rather, for negligence to constitute the basis for the imposition of criminal sanctions, it must be such reckless or careless behaviour that the act imports a thoughtless disregard of the consequences of the act or the act shows a heedless indifference to the rights and safety of others. There must be negligence of a gross and flagrant character, evincing reckless disregard of human life. *State v. Everhart*, 291 N.C. 700, 231 S.E.2d 604 (1977).

In a prosecution for involuntary manslaughter, the violation of a safety statute regulating the use of highways does not constitute culpable negligence unless such violation is intentional, willful or wanton, or unless the violation, though unintentional, is accompanied by recklessness or is under circumstances from which death or injury to others might have been reasonably anticipated. *State v. Gainey*, 29 N.C. App. 653, 225 S.E.2d 843 (1976), *rev'd* on other grounds, 292 N.C. 627, 234 S.E.2d 610 (1977).

An intentional, willful or wanton violation of a statute or ordinance, designed for the protection of human life or limb, which proximately results in injury or death, is culpable negligence. *State v. Stewardson*, 32 N.C. App. 344, 232 S.E.2d 308 (1977); *State v. Jones*, 32 N.C. App. 408, 232 S.E.2d 475 (1977).

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), *cert. denied*, 286 N.C. 416, 211 S.E.2d 796 (1975); *State v. Redfern*, 291 N.C. 319, 230 S.E.2d 152 (1976).

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).

Proximate cause is an element of second-degree murder and manslaughter. *State v. Sherrill*, 28 N.C. App. 311, 220 S.E.2d 822 (1976).

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, *aff'd*, 288 N.C. 34, 215 S.E.2d 598 (1975).

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, *aff'd*, 288 N.C. 34, 215 S.E.2d 598 (1975).

Instruction sufficient to apprise jury that defendant did not have the burden of proving self-defense. *State v. Sprinkle*, 30 N.C. App. 383, 226 S.E.2d 827 (1976).

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), cert. denied, 286 N.C. 419, 211 S.E.2d 799 (1975).

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), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3206, L. Ed. 2d (1976).

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), cert. denied, 286 N.C. 419, 211 S.E.2d 799 (1975).

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, cert. denied, 287 N.C. 262, 214 S.E.2d 434 (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), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3206, L. Ed. 2d (1976).

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), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, L. Ed. 2d (1976).

The jury is required to find that defendant committed either an unlawful or a culpably negligent act before it can convict him of involuntary manslaughter. *State v. Walker*, 31 N.C. App. 199, 228 S.E.2d 772 (1976).

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, rev'd on other grounds, 286 N.C. 179, 209 S.E.2d 785 (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, aff'd, 286 N.C. 327, 210 S.E.2d 424 (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), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3206, L. Ed. 2d (1976).

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); *State v. Allmond*, 27 N.C. App. 29, 217 S.E.2d 734 (1975).

Cited in *Lofton v. Lofton*, 26 N.C. App. 203, 215 S.E.2d 861 (1975); *State v. Davis*, 290 N.C. 511, 227 S.E.2d 97 (1976).

§ 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:

(1) **First-Degree Rape** —

- a. 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
- b. 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.

(2) **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.

As to restrictions on evidence in rape cases, see § 8-58.6.

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), [G.S. 14-21(1)], 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 section 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), cert. denied, 428 U.S. 909, 96 S. Ct. 3220, L. Ed. 2d (1976).

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 (2). *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, death sentence vacated, 403 U.S. 948, 91 S. Ct. 2292, 29 L. Ed. 2d 861 (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, death sentence vacated, 403 U.S. 948, 91 S. Ct. 2292, 29 L. Ed. 2d 861 (1971).

The most that can be demanded of a venireman with regard to the death penalty is that he be willing to consider all of the penalties provided by State law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. If the voir dire testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out. *State v. Atkinson*, 278 N.C. 168, 179 S.E.2d 410, death sentence vacated, 403 U.S. 948, 91 S. Ct. 2292, 29 L. Ed. 2d 861 (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), cert. denied, 428 U.S. 909, 96 S. Ct. 3220, L. Ed. 2d (1976).

Rape Defined. —

In accord with 3rd paragraph in original. See *State v. Henderson*, 285 N.C. 1, 203 S.E.2d 10 (1974), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3202, L. Ed. 2d (1976); *State v. Hines*, 286 N.C. 377, 211 S.E.2d 201 (1975); *State v. Dull*, 289 N.C. 55, 220 S.E.2d 344 (1975), death sentence vacated, U.S. , 96 S. Ct. 3211, 49 L. Ed. 2d 1211 (1976); *State v. Wells*, 290 N.C. 485, 226 S.E.2d 325 (1976).

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).

Where the victim is more than 12 years of age, rape is the carnal knowledge of a female person by force and against her will. *State v. Perry*, 291 N.C. 586, 231 S.E.2d 262 (1977).

The distinguishing features between the former law and that provided in this section are that rape is now divided into two degrees, and that subdivision (a)(2) of this section now requires that the "force" be such that "the rape victim had her resistance overcome or her submission procured by the use of a deadly weapon . . ." *State v. Dull*, 289 N.C. 55, 220 S.E.2d 344 (1975), death sentence vacated, U.S. , 96 S. Ct. 3211, 49 L. Ed. 2d 1211 (1976).

Prior to the enactment of this section in its present form by Session Laws 1973, c. 1201 (Second Session, 1974), there was but one degree of rape in North Carolina. The Act of 1973 divided the crime into two separate offenses. It did not change the definition of rape per se. *State v. Perry*, 291 N.C. 586, 231 S.E.2d 262 (1977).

The General Assembly's only purpose in dividing rape into degrees was to reduce the mandatory sentence of death theretofore imposed upon all defendants convicted of rape to a term of years or life imprisonment in those cases in which the rape was not accompanied by serious injury or accomplished by the use or threatened use of a deadly weapon and the victim was 12 years of age or over. *State v. Davis*, 291 N.C. 1, 229 S.E.2d 285 (1976).

The elements of rape in the first degree, the victim being 12 years of age or older, are: (1) carnal knowledge of a female person, (2) by force or by fear, fright or coercion, (3) against the will of the victim, (4) the defendant being more than 16 years of age, and (5) the victim's resistance having been overcome or her submission having been procured by the use of a deadly weapon, or by the infliction of serious bodily injury upon her. *State v. Perry*, 291 N.C. 586, 231 S.E.2d 262 (1977).

"By Force". —

In accord with 2nd paragraph in original. See *State v. Henderson*, 285 N.C. 1, 203 S.E.2d 10 (1974), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3202, L. Ed. 2d (1976); *State v. Yancey*, 291 N.C. 656, 231 S.E.2d 637 (1977).

In accord with 4th paragraph in original. See *State v. Henderson*, 285 N.C. 1, 203 S.E.2d 10 (1974), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3202, L. Ed. 2d (1976); *State v. Hines*, 286 N.C. 377, 211 S.E.2d 201 (1975); *State v. Yancey*, 291 N.C. 656, 231 S.E.2d 637 (1977).

The force necessary to constitute rape need not be physical force. *State v. Hines*, 286 N.C. 377, 211 S.E.2d 201 (1975).

Under subsection (b) of this section, the "force" necessary to constitute an offense need not be actual physical force. Constructive force is sufficient, and the female's submission under fear or duress takes the place of actual physical force. *State v. Dull*, 289 N.C. 55, 220 S.E.2d 344 (1975), death sentence vacated, U.S. , 96 S. Ct. 3211, 49 L. Ed. 2d 1211 (1976).

A deadly weapon is used to procure the subjugation or submission of a rape victim within the meaning of subdivision (a)(2) when (1) it is exhibited to her and the defendant verbally, by brandishment or otherwise, threatens to use it; (2) the victim knows, or reasonably believes, that the weapon remains in the possession of her attacker or readily accessible to him; and (3) she submits or terminates her resistance because of her fear that if she does not he will kill or injure her with the weapon. *State v. Thompson*, 290 N.C. 432, 226 S.E.2d 487 (1976); *State v. Gray*, 292 N.C. 270, 233 S.E.2d 905 (1977).

The deadly weapon is used, within the meaning of subdivision (a)(2), not only when the attacker overcomes the rape victim's resistance or obtains her submission by its actual functional use as a weapon, but also by its threatened use of it when the victim knows, or reasonably believes, that the weapon is readily accessible to her attacker or that he commands its immediate use. *State v. Thompson*, 290 N.C. 431, 226 S.E.2d 487 (1976); *State v. Gray*, 292 N.C. 270, 233 S.E.2d 905 (1977).

Actual Threat Does Not Have to Continue Until Moment of Rape. — Subdivision (a)(2) of this section does not require that the defendant must continue to display the deadly weapon in a threatening manner until the moment of the rape. *State v. Dull*, 289 N.C. 55, 220 S.E.2d 344 (1975), death sentence vacated, U.S. , 96 S. Ct. 3211, 49 L. Ed. 2d 1211 (1976).

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), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3202, L. Ed. 2d (1976).

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, cert. denied, 283 N.C. 259, 195 S.E.2d 691 (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, cert. denied, 283 N.C. 259, 195 S.E.2d 691 (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, cert. denied, 283 N.C. 259, 195 S.E.2d 691 (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), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3205, L. Ed. 2d (1976).

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), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3205, L. Ed. 2d (1976).

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 Unconstitutional.

— Since the Supreme Court of the United States, in *Woodson v. North Carolina*, U.S. , 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976) held that the former provisions of § 14-17 imposing the death penalty for murder in the first degree, violated the Constitution of the United States and, so, could not be given effect by the courts of North Carolina, and since the provisions of this section, imposing the death penalty for the offense of first-degree rape, cannot be distinguished, in this respect, from the provisions of § 14-17, there is merit in the defendant's attack upon the death sentence imposed upon him. *State v. Montgomery*, 291 N.C. 91, 229 S.E.2d 572 (1976).

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), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3203, 49 L. Ed. 2d 1205 (1976).

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), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3205, L. Ed. 2d (1976).

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), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3202, L. Ed. 2d (1976).

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), cert. denied, 414 U.S. 1132, 94 S. Ct. 873, 38 L. Ed. 2d 757 (1974).

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), cert. denied, 414 U.S. 1132, 94 S. Ct. 873, 38 L. Ed. 2d 757 (1974).

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, cert. denied, 414 U.S. 836, 94 S. Ct. 182, 38 L. Ed. 2d 72 (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), cert. denied, 39 U.S. 1024, 90 S. Ct. 599, 24 L. Ed. 2d 518 (1970).

Generally, rape is not a continuous offense, but each act of intercourse constitutes a distinct and separate offense. *State v. Small*, 31 N.C. App. 556, 230 S.E.2d 425 (1976), cert. denied, 291 N.C. 715, 232 S.E.2d 207 (1977).

Necessary Allegations in Indictment for First-Degree Rape. — The age of the defendant is an essential element of first-degree rape and a conviction for that offense cannot be sustained under an indictment which does not allege the defendant to have been more than 16 years of

age at the time of the commission of the offense. *State v. Perry*, 291 N.C. 586, 231 S.E.2d 262 (1977).

In a prosecution for first-degree rape under subdivision (a)(2), the State must allege in the indictment and prove that the defendant was more than 16 years of age at the time of the alleged rape, this being an essential element of the crime. *State v. Gray*, 292 N.C. 270, 233 S.E.2d 905 (1977).

Sufficiency of Indictment. — The indictment did not charge the offense of rape in the first degree since it did not charge the use of a “deadly” weapon but the use of a “dangerous” weapon, the two terms not being synonymous, and, further, it did not allege that the defendant, at the time of the offense, was more than 16 years of age. *State v. Perry*, 291 N.C. 586, 231 S.E.2d 262 (1977).

An indictment which charges that the defendant “did, unlawfully, willfully and feloniously ravish and carnally know, by force and against her will,” the prosecuting witness, a female, charges all of the elements of second-degree rape. *State v. Perry*, 291 N.C. 586, 231 S.E.2d 262 (1977).

The indictment upon which defendant was tried charged common-law rape, and its language was clearly sufficient to embrace second-degree rape as defined by this section. *State v. Davis*, 291 N.C. 1, 229 S.E.2d 285 (1976).

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).

The general character of the prosecutrix in a rape case may be shown as bearing upon the question of consent. *State v. Tuttle*, 28 N.C. App. 198, 220 S.E.2d 630 (1975).

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).

The prosecutrix may be cross-examined concerning specific acts of unchastity for the sole purpose of impeaching credibility, but the

defendant is bound by her answer. *State v. Tuttle*, 28 N.C. App. 198, 220 S.E.2d 630 (1975).

But testimony of specific acts of unchastity, etc. —

A witness called by the defendant cannot be asked about specific acts of misconduct by prosecutrix. This witness must confine himself to testimony concerning general reputation for chastity. *State v. Tuttle*, 28 N.C. App. 198, 220 S.E.2d 630 (1975).

Specific acts of unchastity with persons other than defendant are inadmissible in rape cases. *State v. Tuttle*, 28 N.C. App. 198, 220 S.E.2d 630 (1975).

Corroborative Evidence. —

Evidence of independent witnesses as to the physical condition of the prosecutrix on the night the intercourse occurred corroborates her testimony. *State v. Tuttle*, 28 N.C. App. 198, 220 S.E.2d 630 (1975).

Opinion Testimony as to Age of Defendant.

— Lay witnesses with an adequate opportunity to observe and who have in fact observed may state their opinion regarding the age of a defendant in a criminal case when the fact that he was at the time in question over a certain age is one of the essential elements to be proved by the State. *State v. Gray*, 292 N.C. 270, 233 S.E.2d 905 (1977).

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), cert. denied, 428 U.S. 909, 96 S. Ct. 3220, L. Ed. 2d (1976).

In a prosecution for first-degree rape and kidnapping where the defendant told the prosecutrix she would not live to be 19 if she did not cooperate with him, and she had every reason to believe that he would carry out his threat to kill her, and the defendant had exhibited a knife and threatened the life of the prosecutrix with it, and the knife continued in use as long as it was accessible to him, there was ample evidence to submit this case to the jury on first-degree rape and kidnapping. *State v. Dull*, 289 N.C. 55, 220 S.E.2d 344 (1975), death sentence vacated, U.S. , 96 S. Ct. 3211, 49 L. Ed. 2d 1211 (1976).

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, cert. denied, 414 U.S. 836, 94 S. Ct. 182, 38 L. Ed. 2d 72 (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), cert. denied, 428 U.S. 909, 96 S. Ct. 3220, L. Ed. 2d (1976).

In prosecutions for rape, when all the evidence tended to show a completed act of intercourse and the only issue was whether the act was with the prosecuting witness's consent or by force and against her will, it was not proper to submit to the jury lesser offenses included within a charge of rape. *State v. Davis*, 291 N.C. 1, 229 S.E.2d 285 (1976).

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, death sentence vacated, 403 U.S. 948, 91 S. Ct. 292, 29 L. Ed. 2d 861 (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, death sentence vacated, 403 U.S. 948, 91 S. Ct. 292, 29 L. Ed. 2d 861 (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, death sentence vacated, 403 U.S. 948, 91 S. Ct. 292, 29 L. Ed. 2d 861 (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, death sentence vacated, 403 U.S. 948, 91 S. Ct. 292, 29 L. Ed. 2d 861 (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, death sentence vacated, 403 U.S. 948, 91 S. Ct. 292, 29 L. Ed. 2d 861 (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, death sentence vacated, 403 U.S. 948, 91 S. Ct. 292, 29 L. Ed. 2d 861 (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, death sentence vacated, 403 U.S. 948, 91 S. Ct. 292, 29 L. Ed. 2d 861 (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, death sentence vacated, 403 U.S. 948, 91 S. Ct. 292, 29 L. Ed. 2d 861 (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, death sentence vacated, 403 U.S. 948, 91 S. Ct. 292, 29 L. Ed. 2d 861 (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, death sentence vacated, 403 U.S. 948, 91 S. Ct. 292, 29 L. Ed. 2d 861 (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), cert. denied, 414 U.S. 1132, 94 S. Ct. 873, 38 L. Ed. 2d 757 (1974).

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).

It is clear that the evidence was sufficient to withstand the defendant's motions for nonsuit for second-degree rape. The evidence clearly indicates that defendant had carnal knowledge of the prosecutrix by force and against her will. The defendant had attempted to choke prosecutrix, told her how easy it would be to kill her and held an open knife against her stomach prior to the commission of the rape. *State v. Williams*, 31 N.C. App. 588, 229 S.E.2d 839 (1976).

There was plenary evidence to show that fear for her own safety and life and for the safety and life of her infant daughter overcame the prosecuting witness' resistance and caused her to submit to the desires of her assailants. The trial judge properly overruled defendant's motion for judgment as of nonsuit. *State v. Yancey*, 291 N.C. 656, 231 S.E.2d 637 (1977).

A verdict of guilty of rape in the first degree necessarily includes the jury's determination that the defendant is guilty of each element of rape in the second degree, which this section declares to be "a lesser-included offense of rape in the first degree." *State v. Perry*, 291 N.C. 586, 231 S.E.2d 262 (1977).

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); *State v. Cooper*, 288 N.C. 496, 219 S.E.2d 45 (1975); *State v. Caldwell*, 27 N.C. App. 323, 219 S.E.2d 235 (1975); *State v. Tolley*, 290 N.C. 349, 226 S.E.2d 353 (1976); *State v. Sharratt*, 29 N.C. App. 199, 223 S.E.2d 906 (1976).

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); *State v. Wilson*, 289 N.C. 531, 223 S.E.2d 311 (1976); *State v. Davis*, 290 N.C. 511, 227 S.E.2d 97 (1976); *State v. Foddrrell*, 291 N.C. 546, 231 S.E.2d 618 (1977).

§ 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), cert. denied, 414 U.S. 1160, 94 S. Ct. 920, 39 L. Ed. 2d 112 (1974); *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), cert. denied, 414 U.S. 1160, 94 S. Ct. 920, 39 L. Ed. 2d 112 (1974).

Intent. —

In accord with 1st paragraph in original. See *State v. Hudson*, 280 N.C. 74, 185 S.E.2d 189 (1971), cert. denied, 414 U.S. 1160, 94 S. Ct. 920, 39 L. Ed. 2d 112 (1974); *State v. Norman*, 14 N.C. App. 394, 188 S.E.2d 667 (1972); *State v. Bradshaw*, 27 N.C. App. 485, 219 S.E.2d 561 (1975), cert. denied, 289 N.C. 299, 222 S.E.2d 699 (1976).

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, appeal dismissed, 285 N.C. 664, 207 S.E.2d 758 (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 of the assault. *State v. Rice*, 18 N.C. App. 575, 197 S.E.2d 245, cert. denied, 283 N.C. 757, 198 S.E.2d 727 (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), cert. denied, 414 U.S. 1160, 99 S. Ct. 920, 39 L. Ed. 2d 112 (1974); *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, cert. denied, 288 N.C. 251, 217 S.E.2d 676 (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), cert. denied, 414 U.S. 1160, 94 S. Ct. 920, 39 L. Ed. 2d 112 (1974).

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, appeal dismissed, 285 N.C. 664, 207 S.E.2d 758 (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), cert. denied, 414 U.S. 1160, 94 S. Ct. 920, 39 L. Ed. 2d 112 (1974).

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).

Cited in *State v. Davis*, 290 N.C. 511, 227 S.E.2d 97 (1976).

§ 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), appeal dismissed, 277 N.C. 727, 178 S.E.2d 494 (1971).

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), appeal dismissed, 277 N.C. 727, 178 S.E.2d 494 (1971).

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), appeal dismissed, 277 N.C. 727, 178 S.E.2d 494 (1971).

§ 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."

For note on the erosion of the retreat rule and self-defense, see 12 Wake Forest L. Rev. 1093 (1976).

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); *State v. Williams*, 29 N.C. App. 24, 222 S.E.2d 720, cert. denied, 289 N.C. 728, 224 S.E.2d 676 (1976).

"Serious injury" under subsection (b) of this section is the same as under subsection (a) of this section. *State v. Williams*, 29 N.C. App. 24, 222 S.E.2d 720, cert. denied, 289 N.C. 728, 224 S.E.2d 676 (1976).

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); *State v. Pearson*, 27 N.C. App. 157, 218 S.E.2d 192, cert. denied, 425 U.S. 938, 96 S. Ct. 1671, 48 L. Ed. 2d 179 (1975); *State v. Williams*, 29 N.C. App. 24, 222 S.E.2d 720, cert. denied, 289 N.C. 728, 224 S.E.2d 676 (1976).

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); *State v. Williams*, 29 N.C. App. 24, 222 S.E.2d 720, cert. denied, 289 N.C. 728, 224 S.E.2d 676 (1976).

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); *State v. Reives*, 29 N.C. App. 11, 222

S.E.2d 727, cert. denied, 289 N.C. 728, 224 S.E.2d 676 (1976).

In accord with 2nd paragraph in original. See *State v. Jones*, 18 N.C. App. 531, 197 S.E.2d 268, cert. denied, 283 N.C. 756, 198 S.E.2d 726 (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).

Ordinarily, a specific intent to do an act is shown by the proof of facts and circumstances from which such an intent may be inferred. *State v. Parks*, 290 N.C. 748, 228 S.E.2d 248 (1976).

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, cert. denied, 283 N.C. 756, 198 S.E.2d 726 (1973).

In a prosecution for assault with a deadly weapon with intent to kill, an altercation, the shooting and resulting death of decedent soon after defendant pointed the pistol at another's chest and pulled the trigger, and other circumstances, were sufficient evidence of intent to kill. *State v. Reives*, 29 N.C. App. 11, 222 S.E.2d 727, cert. denied, 289 N.C. 728, 224 S.E.2d 676 (1976).

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, appeal dismissed, 285 N.C. 668, 207 S.E.2d 751 (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, appeal dismissed, 282 N.C. 428, 192 S.E.2d 838 (1972); *State v. Turner*, 21 N.C. App. 608, 205 S.E.2d 628, appeal dismissed, 285 N.C. 668, 207 S.E.2d 751 (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), cert. denied, 415 U.S. 927, 94 S. Ct. 1434, 39 L. Ed. 2d 484 (1974).

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); *State v. Hall*, 31 N.C. App. 34, 228 S.E.2d 637 (1976).

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).

The right of self-defense is available only to a person who is without fault. *State v. Plemmons*, 29 N.C. App. 159, 223 S.E.2d 549 (1976).

If a person voluntarily, that is, aggressively and willingly, without legal provocation or excuse, enters into a fight, he cannot invoke the doctrine of self-defense unless he first abandons the fight and withdraws from it and gives notice to his adversary that he has done so. *State v. Plemmons*, 29 N.C. App. 159, 223 S.E.2d 549 (1976).

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); *State v. Whitaker*, 29 N.C. App. 602, 225 S.E.2d 129 (1976).

A deadly weapon is not one which must kill but one which under the circumstances of its use is

likely to cause death or great bodily harm. *State v. Strickland*, 290 N.C. 169, 225 S.E.2d 531 (1976).

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).

Where the instrument may or may not be likely to produce death or great bodily harm, 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. Whitaker*, 29 N.C. App. 602, 225 S.E.2d 129 (1976).

A pistol or a gun is a deadly weapon. *State v. Parker*, 7 N.C. App. 191, 171 S.E.2d 665 (1970).

A pistol is a deadly weapon per se. *State v. Reives*, 29 N.C. App. 11, 222 S.E.2d 727, cert. denied, 289 N.C. 728, 224 S.E.2d 676 (1976).

An unexplained misfiring of a loaded pistol does not change its deadly character. *State v. Reives*, 29 N.C. App. 11, 222 S.E.2d 727, cert. denied, 289 N.C. 728, 224 S.E.2d 676 (1976).

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).

Plastic Bag. — Given proper surrounding circumstances, a plastic bag is a deadly weapon. *State v. Strickland*, 290 N.C. 169, 225 S.E.2d 531 (1976).

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, appeal dismissed, 282 N.C. 428, 192 S.E.2d 838 (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, cert. denied, 283 N.C. 756, 198 S.E.2d 726 (1973).

Assault with a deadly weapon, which is a misdemeanor under § 14-33(b)(1), is a lesser included offense of the felonies described in this section. However, the necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The presence of such evidence is the determinative factor. *State v. Williams*, 31 N.C. App. 111, 228 S.E.2d 668, cert. denied, 291 N.C. 450, 230 S.E.2d 767 (1976).

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, appeal dismissed, 285 N.C. 668, 207 S.E.2d 751 (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, appeal dismissed, 282 N.C. 428, 192 S.E.2d 838 (1972); *State v. Turner*, 21 N.C. App. 608, 205 S.E.2d 628, appeal dismissed, 285 N.C. 668, 207 S.E.2d 751 (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, cert. denied, 283 N.C. 756, 198 S.E.2d 756 (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. Hearn*, 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).

The term "intent to kill," etc. —

In the absence of a special request for instructions from the defendant, the judge is not required to define "intent to kill." The meaning is obvious and no explanation is necessary. However, when a trial judge undertakes to define the term, he must do so correctly. *State v. Parks*, 290 N.C. 748, 228 S.E.2d 248 (1976).

Instruction as to Serious Injury. —

In a prosecution for assault with a deadly weapon inflicting serious injury, the trial judge's instruction to the jury that a serious injury is any physical injury that causes great pain and suffering was not error since it imposed a greater degree of injury than necessary. *State v. Williams*, 29 N.C. App. 24, 222 S.E.2d 720, cert. denied, 289 N.C. 728, 224 S.E.2d 676 (1976).

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. Hearn*, 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).

Where there is evidence that defendant acted in defense of his home, an instruction on the defendant's right to act in self-defense without an instruction also on the defendant's right to act in defense of home contains prejudicial error. *State v. Edwards*, 28 N.C. App. 196, 220 S.E.2d 158 (1975).

Erroneous Instructions. —

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 was not cured by the discussion of the law of self-defense in the body of the charge. By failing to so charge, the jury could have assumed that a verdict of not guilty by reason of self-defense was not a permissible verdict in the case. *State v. Girely*, 27 N.C. App. 388, 219 S.E.2d 301 (1975), cert. denied, 289 N.C. 141, 220 S.E.2d 799 (1976).

In a prosecution for murder and assault with a deadly weapon with intent to kill where the trial judge instructs the jury on the defense of accident it is not error if the court does not define the word "accident." *State v. Reives*, 29 N.C. App. 11, 222 S.E.2d 727, cert. denied, 289 N.C. 728, 224 S.E.2d 675 (1976).

In a prosecution for assault with a deadly

weapon with intent to kill, inflicting serious injury, an instruction on self-defense was not warranted where defendant never abandoned the fight and never withdrew, but simply drove off a short distance out of sight of the victim and then stepped from his car and shot the victim. *State v. Plemmons*, 29 N.C. App. 159, 223 S.E.2d 549 (1976).

Instruction was erroneous and prejudicial because it invaded the province of the jury to determine whether nightstick used by the defendant was a "deadly weapon." *State v. Buchanan*, 28 N.C. App. 163, 220 S.E.2d 207 (1975), cert. denied, 289 N.C. 452, 223 S.E.2d 161 (1976).

Burden of Proof. —

In accord with 2nd paragraph in original. See *State v. Turner*, 29 N.C. App. 33, 222 S.E.2d 745 (1976).

It has long been the rule in North Carolina that a defendant, in cases not involving homicide, does not have the burden of satisfying the jury that he acted in self-defense. *State v. Smith*, 28 N.C. App. 314, 220 S.E.2d 858 (1976).

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. 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); *State v. Ware*, 31 N.C. App. 292, 229 S.E.2d 249 (1976); *State v. Best*, 31 N.C. App. 389, 229 S.E.2d 202 (1976).

Quoted in *State v. McLaurin*, 12 N.C. App. 23, 182 S.E.2d 280 (1971).

Stated in *State v. Harris*, 27 N.C. App. 520, 219 S.E.2d 538 (1975).

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."

Constitutionality. —

A sentence of imprisonment which is within the limitation authorized by statute cannot be held cruel or unusual in the constitutional sense. *State v. Cross*, 27 N.C. App. 335, 219 S.E.2d 274 (1975).

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).

Definition. — An assault is an intentional offer or attempt by force or violence to do injury to the person of another. *State v. Thompson*, 27 N.C. App. 576, 219 S.E.2d 566 (1975), cert. denied, 289 N.C. 141, 220 S.E.2d 800 (1976).

An assault is a show of violence causing a reasonable apprehension of immediate bodily harm. *State v. Thompson*, 27 N.C. App. 576, 219 S.E.2d 566 (1975), cert. denied, 289 N.C. 141, 220 S.E.2d 800 (1976).

The common-law offense of assault is an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm. *State v. Sawyer*, 29 N.C. App. 505, 225 S.E.2d 328 (1976).

An affray is defined by the common law as a fight between two or more persons in a public place so as to cause terror to the people. In *re Drakeford*, 32 N.C. App. 113, 230 S.E.2d 779 (1977).

"Show of Violence" Rule. — In some cases of assault, North Carolina has adopted the "show of violence" rule which requires a reasonable apprehension on the part of the assailed witness of immediate bodily harm or injury which caused him to engage in a course of conduct he would not have otherwise followed. *State v. Sawyer*, 28 N.C. App. 490, 221 S.E.2d 518 (1976).

Under common law, test for simple assault requires an overt act or an attempt with force and violence to do some immediate physical

injury to the person of another. *State v. Sawyer*, 28 N.C. App. 490, 221 S.E.2d 518 (1976).

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).

A criminal assault may be committed with an automobile. *State v. Sawyer*, 28 N.C. App. 490, 221 S.E.2d 518 (1976).

Where evidence discloses actual battery, whether victim is "put in fear" is inapposite. *State v. Thompson*, 27 N.C. App. 576, 219 S.E.2d 566 (1975), cert. denied, 289 N.C. 141, 220 S.E.2d 800 (1976).

Any party charged with an affray may be charged with the lesser included offense of an assault. In re *Drakeford*, 32 N.C. App. 113, 230 S.E.2d 779 (1977).

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).

This section creates no new offense, etc. — In accord with 2nd paragraph in original. See *State v. Perry*, 291 N.C. 586, 231 S.E.2d 262 (1977).

Punishment—Extent. —

As long as the punishment rendered is within the maximum provided by law, an appellate court must assume that the trial judge acted fairly, reasonably and impartially in the performance of his office. *State v. Cross*, 27 N.C. App. 335, 219 S.E.2d 274 (1975).

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, appeal dismissed, 281 N.C. 761, 191 S.E.2d 363 (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, appeal dismissed, 281 N.C. 761, 191 S.E.2d 363 (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, appeal dismissed, 281 N.C. 761, 191 S.E.2d 363 (1972); *State v. Bradley*, 32 N.C. App. 666, 233 S.E.2d 603 (1977).

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), cert. denied, 282 N.C. 673, 194 S.E.2d 153 (1973).

Where the evidence is so conflicting as to raise the question of whether the law officer is acting lawfully, the jury must be properly instructed by the trial judge. *State v. Bradley*, 32 N.C. App. 666, 233 S.E.2d 603 (1977).

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, appeal dismissed, 281 N.C. 761, 191 S.E.2d 363 (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).

Failure to Dismiss Charge Held Error. — The affray charge upon which respondent juvenile was convicted had as an essential element the assault charge which had been dismissed for lack of evidence. Consequently, respondent's acquittal on the assault charge barred further petitions based on that charge. Therefore, respondent was twice put in jeopardy for the same offense under § 14-33 and the trial judge erred in failing to dismiss the petition. *In re Drakeford*, 32 N.C. App. 113, 230 S.E.2d 779 (1977).

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.

Sentence on Conviction of Assault upon Female. — One lawfully convicted of assault upon a female may be sentenced to a longer term of imprisonment, if the evidence shows him to be, and he is found to be, over 18 years of age, than would be proper in the absence of such evidence and finding, even though the indictment under which he was tried does not allege his age. *State v. Perry*, 291 N.C. 586, 231 S.E.2d 262 (1977).

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 Instruct as to Lesser Offense Held Not Error. — All the evidence tended to show that defendant pulled a gun from his waistband and fired at the officers who were attempting to arrest him for possession of a stolen vehicle. There was no evidence of any lesser offenses so that it was not error for the trial judge to refuse to instruct as to the offenses under subsections (a) and (b) of this section and § 14-34. *State v. Irick*, 291 N.C. 480, 231 S.E.2d 833 (1977).

Assault with a deadly weapon, which is a misdemeanor under subdivision (b)(1), is a lesser included offense of the felonies described in § 14-32. However, the necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The presence of such evidence is the determinative factor. *State v. Williams*, 31 N.C. App. 111, 230 S.E.2d 668, cert. denied, 291 N.C. 450, 230 S.E.2d 767 (1976).

Since the evidence that defendant used a deadly weapon was uncontradicted, he was not entitled to a charge on assault inflicting serious injury. *State v. Springs*, 33 N.C. App. 61, 234 S.E.2d 193 (1977).

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); *State v. Cooper*, 288 N.C. 496, 219 S.E.2d 45 (1975); *State v. Thomas*, 29 N.C. App. 757, 226 S.E.2d 163 (1976); *State v. Mayes*, 31 N.C. App. 694, 230 S.E.2d 563 (1976).

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).

If a pistol is a deadly weapon and is pointed at the person of another, then such pointing is an assault with a deadly weapon. *State v. Reives*, 29 N.C. App. 11, 222 S.E.2d 727, cert. denied, 289 N.C. 728, 224 S.E.2d 675 (1976).

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, 190 S.E.2d 278 (1972).

Stated in *State v. Blanton*, 20 N.C. App. 66, 200 S.E.2d 425 (1973).

Cited in *State v. Irick*, 291 N.C. 480, 231 S.E.2d 833 (1977).

§ 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, cert. denied, 286 N.C. 724, 213 S.E.2d 724 (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, cert. denied, 286 N.C. 724, 213 S.E.2d 724 (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, 211 S.E.2d 508, cert. denied, 286 N.C. 724, 213 S.E.2d 724 (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, cert. denied, 286 N.C. 724, 213 S.E.2d 724 (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).

A correct charge would provide that the accused would be guilty if he intentionally, without legal justification or excuse, discharged a firearm into an occupied building with knowledge that the building was then occupied by one or more persons, or when the accused had reasonable grounds to believe that the building might be occupied by one or more persons. *State v. Burris*, 27 N.C. App. 656, 219 S.E.2d 807 (1975).

Although a preferable instruction to the jury would use the language "intentionally discharged a firearm," there was no prejudicial error by the use of the language "intentionally used a firearm." *State v. Swift*, 290 N.C. 383, 226 S.E.2d 652 (1976).

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).

In a prosecution for willfully or wantonly discharging a firearm into an occupied dwelling in violation of this section, the trial court erred in giving an instruction which equated willful or wanton conduct with knowledge that the house in question was occupied by one or more persons when the defendant fired the shot. *State v. Leeper*, 27 N.C. App. 420, 219 S.E.2d 253 (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); *State v. Butcher*, 31 N.C. App. 572, 230 S.E.2d 191 (1976).

Quoted in *State v. Blizzard*, 280 N.C. 11, 184 S.E.2d 851 (1971).

§ 14-34.2. Assault with a firearm or other deadly weapon upon law-enforcement officer or fireman. — Any person who shall commit an assault with a firearm or any other deadly weapon upon any law-enforcement officer or fireman while such officer or fireman is in the performance of his

duties shall be guilty of a felony and shall be fined or imprisoned for a term not to exceed five years in the discretion of the court. (1969, c. 1134; 1977, c. 829.)

Editor's Note. — The 1977 amendment, effective July 1, 1977, inserted "or any other deadly weapon."

Effect of Use of Excessive Force by Officer in Making Lawful Arrest. — While the use of excessive force in a lawful arrest may subject a law-enforcement officer to civil or criminal liability, it does not take the officer outside the performance of his duties for purposes of this section. *State v. Irick*, 291 N.C. 480, 231 S.E.2d 833 (1977).

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, cert. denied, 283 N.C. 757, 198 S.E.2d 727 (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); *State v. Polk*, 29 N.C. App. 360, 224 S.E.2d 272 (1976); *State v. Thomas*, 29 N.C. App. 757, 226 S.E.2d 163 (1976).

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."

Most of the cases cited in the following annotations 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.

For a note analyzing the recent amendment codifying the definition of kidnapping, see 12 Wake Forest L. Rev. 434 (1976).

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), rev'd on other grounds, 282 N.C. 490, 193 S.E.2d 897 (1973).

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. Ingham*, 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), cert. denied, 414 U.S. 1160, 94 S. Ct. 920, 39 L. Ed. 2d 112 (1974).

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), rev'd on other grounds, 282 N.C. 490, 193 S.E.2d 897 (1973).

Kidnaping 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. Ingham*, 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), cert. denied, 414 U.S. 1160, 94 S. Ct. 920, 39 L. Ed. 2d 112 (1974).

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), cert. denied, 404 U.S. 1023, 92 S. Ct. 699, 30 L. Ed. 2d 673 (1972).

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), cert. denied, 404 U.S. 1023, 92 S. Ct. 699, 30 L. Ed. 2d 673 (1972).

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).

Kidnaping 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, rev'd on other grounds, 282 N.C. 490, 193 S.E.2d 897 (1973); *State v. Sommerset*, 21 N.C. App. 272, 204 S.E.2d 206, cert. denied, 285 N.C. 594, 205 S.E.2d 725 (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. Ingham*, 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. Ingham*, 278 N.C. 42, 178 S.E.2d 577 (1971).

In addition to unlawful restraint, the taking, carrying away, transportation, 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).

Kidnaping 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. Ingham*, 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. Ingham*, 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. Ingham*, 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. Ingham*, 278 N.C. 42, 178 S.E.2d 577 (1971).

The term "hostage" as used in subdivision (a)(1) of this section implies the unlawful taking, restraining or confining of a person with the intent that the person, or victim, be held as security for the performance or forbearance of

some act by a third person. *State v. Lee*, 33 N.C. App. 162, 234 S.E.2d 482 (1977).

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), cert. denied, 404 U.S. 1023, 92 S. Ct. 699, 30 L. Ed. 2d 673 (1974).

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), cert. denied, 404 U.S. 1023, 92 S. Ct. 699, 30 L. Ed. 2d 673 (1974).

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), cert. denied, 404 U.S. 1023, 92 S. Ct. 699, 30 L. Ed. 2d 673 (1974).

The crime of kidnapping, etc. —

In accord with original. See *State v. Barbour*, 278 N.C. 449, 180 S.E.2d 115 (1971), cert. denied, 404 U.S. 1023, 92 S. Ct. 699, 30 L. Ed. 2d 673 (1974).

Threats and intimidation are equivalent to the use of actual force or violence. *State v. Inghand*, 278 N.C. 42, 178 S.E.2d 577 (1971); *State v. Hudson*, 281 N.C. 100, 187 S.E.2d 756 (1972), cert. denied, 414 U.S. 1160, 94 S. Ct. 920, 39 L. Ed. 2d 112 (1974).

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).

Threats by actions may be more effective than when made by mere words, and defendant's uninvited entrance into the car in itself constituted a threat under this section. *State v. Ballard*, 28 N.C. App. 146, 220 S.E.2d 205 (1975).

Defendant's conduct on first entering a car and in directing the driver/victim where to drive constituted such a threat as to put an ordinarily prudent person in fear for her life or personal

safety so as to secure control of her person against her will, and from that point on there was an ample showing of asportation to constitute the crime of kidnapping. *State v. Ballard*, 28 N.C. App. 146, 220 S.E.2d 205 (1975).

Threat and Weapon. — In a prosecution for first-degree rape and kidnapping where the defendant told the prosecutrix she would not live to be 19 if she did not cooperate with him, and she had every reason to believe that he would carry out his threat to kill her, and the defendant had exhibited a knife and threatened the life of the prosecutrix with it, and the knife continued in use as long as it was accessible to him, there was ample evidence to submit the case to the jury on first-degree rape and kidnapping. *State v. Dull*, 289 N.C. 55, 220 S.E.2d 344 (1975), death sentence vacated, U.S. , 96 S. Ct. 3211, 49 L. Ed. 2d 1211 (1976).

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), rev'd on other grounds, 282 N.C. 490, 193 S.E.2d 897 (1973).

The asportation requirement has been relaxed so that any carrying away is sufficient, and the distance the victim is carried is immaterial. *State v. Inghand*, 278 N.C. 42, 178 S.E.2d 577 (1971); *State v. Dix*, 14 N.C. App. 328, 188 S.E.2d 737 (1972), rev'd on other grounds, 282 N.C. 490, 193 S.E.2d 897 (1973).

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), cert. denied, 404 U.S. 1023, 92 S. Ct. 699, 30 L. Ed. 2d 673 (1974); *State v. Dix*, 14 N.C. App. 328, 188 S.E.2d 737 (1972), rev'd on other grounds, 282 N.C. 490, 193 S.E.2d 897 (1973).

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), cert. denied, 414 U.S. 1160, 94 S. Ct. 920, 39 L. Ed. 2d 112 (1974).

"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), rev'd on other grounds, 282 N.C. 490, 193 S.E.2d 897 (1973).

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), rev'd on other grounds, 282 N.C. 490, 193 S.E.2d 897 (1973).

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), rev'd on other grounds, 282 N.C. 490, 193 S.E.2d 897 (1973).

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, cert. denied, 287 N.C. 263, 214 S.E.2d 435 (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. Inghand*, 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), cert. denied, 414 U.S. 1160, 94 S. Ct. 920, 39 L. Ed. 2d 112 (1974).

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. Inghand*, 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. Inghand*, 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), cert. denied, 404 U.S. 1023, 92 S. Ct. 699, 30 L. Ed. 2d 673 (1974).

False Imprisonment. — At common law forcible detention was false imprisonment, not kidnapping. *State v. Inghand*, 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. Inghand*, 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. Inghand*, 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. Inghand*, 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. Inghand*, 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, cert. denied, 287 N.C. 263, 214 S.E.2d 435 (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, cert. denied, 287 N.C. 263, 214 S.E.2d 435 (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), cert. denied, 404 U.S. 1023, 92 S. Ct. 699, 30 L. Ed. 2d 673 (1974).

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); State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

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); State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

An indictment charging that defendant “unlawfully, did feloniously and forcibly kidnap” a person named is not defective or violative of North Carolina Const., Art. I, §§ 22 and 23 for failure to charge additionally that the victim was forcibly carried away against her will. State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

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), cert. denied, 404 U.S. 1023, 92 S. Ct. 699, 30 L. Ed. 2d 673 (1974).

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, cert. denied, 285 N.C. 594, 205 S.E.2d 725 (1974).

Instruction on Elements of Kidnapping Held Improper. — Where the trial judge instructed the jury that kidnapping was the taking and carrying away without lawful authority of a human being by force, threat of force, or fraud, the trial judge failed to properly instruct the jury on the elements of kidnapping. State v. Wingo, 30 N.C. App. 123, 226 S.E.2d 221 (1976).

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, cert. denied, 287 N.C. 263, 214 S.E.2d 435 (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, cert. denied, 414 U.S. 836, 94 S. Ct. 182, 38 L. Ed. 2d 72 (1973).

Evidence held sufficient for submission to jury on charge of aggravated kidnapping. — See State v. Barrow, 292 N.C. 227, 232 S.E.2d 693 (1977).

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); State v. Vawter, 33 N.C. App. 131, 234 S.E.2d 438 (1977).

Cited in State v. Tatum, 291 N.C. 73, 229 S.E.2d 562 (1976); State v. Sharratt, 29 N.C. App. 199, 223 S.E.2d 906 (1976).

§ 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. — See Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971), judgment vacated, 410 U.S. 950, 93 S. Ct. 1411, 34 L. Ed. 2d 682 (1973), for reconsideration in light of Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147, rehearing denied, 410 U.S. 959, 93 S. Ct. 1409, 35 L. Ed. 2d 694 (1973) and Doe

v. Bolton, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201, rehearing denied, 410 U.S. 959, 93 S. Ct. 1410, 35 L. Ed. 2d 694 (1973).

Cited in Hallmark Clinic v. North Carolina Dep't of Human Resources, 519 F.2d 1315 (4th Cir. 1975).

§ 14-45. Using drugs or instruments to produce miscarriage or injure pregnant woman.

Constitutional Power of State. — See Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971), judgment vacated, 410 U.S. 950, 93 S. Ct. 1411, 34 L. Ed. 2d 682 (1973), for reconsideration in light of Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147, rehearing denied, 410 U.S. 959, 93 S. Ct. 1409, 35 L. Ed. 2d 694 (1973) and Doe v. Bolton, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201, rehearing denied, 410 U.S. 959, 93 S. Ct. 1410, 35 L. Ed. 2d 694 (1973).

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, cert. denied, 285 N.C. 375, 205 S.E.2d 100 (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, cert. denied, 285 N.C. 375, 205 S.E.2d 100 (1974).

Cited in Hallmark Clinic v. North Carolina Dep't of Human Resources, 519 F.2d 1315 (4th Cir. 1975).

§ 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).

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), judgment vacated, 410 U.S. 950, 93 S. Ct. 1411, 34 L. Ed. 2d 682 (1973), for reconsideration in light of *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147, rehearing denied, 410 U.S. 959, 93 S. Ct. 1409, 35 L. Ed. 2d 694 (1973) and *Doe v. Bolton*, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201, rehearing denied, 410 U.S. 959, 93 S. Ct. 1410, 35 L. Ed. 2d 694 (1973).

"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.

§ 14-46. Concealing birth of child. — If any person shall, by secretly burying or otherwise disposing of the dead body of a newborn child, endeavor to conceal the birth of such child, such person shall be guilty of a felony and punished by fine or imprisonment, or both, in the discretion of the court. Any person aiding, counseling or abetting any other person in concealing the birth of a child in violation of this statute shall be guilty of a misdemeanor. (21 Jac. I, c. 27; 43 Geo. III, c. 58, s. 3; 9 Geo. IV, c. 31, s. 14; 1818, c. 985, P. R.; R. C., c. 34, s. 28; 1883, c. 390; Code, s. 1004; Rev., s. 3623; C. S., s. 4228; 1977, c. 577.)

Editor's Note. —

The 1977 amendment, effective Oct. 1, 1977, substituted "in the discretion of the court" for "such imprisonment to be in the county jail or State's prison, at the discretion of the court" in

the first sentence, deleted the two provisos from the end of the first sentence, and substituted "any other person" for "any woman" and "a child in violation of this statute" for "her child" in the second sentence.

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).

Count Charging Violation of This Section as Embracing a Charge under § 14-127. — See State v. Bindyke, 288 N.C. 608, 220 S.E.2d 521 (1975).

"Feliciously" Not Substitute for "Maliciously" in Indictment Under this Section. — Use of the word "feliciously" 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 "feliciously" 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, cert. denied, 282 N.C. 428, 192 S.E.2d 841 (1972).

Sufficiency of Evidence. — In a prosecution for willful and malicious injury to person and property by means of dynamite, and conspiracy to injure a person by means of dynamite, where defendant knew the victim was an undercover narcotics agent, an informer saw defendant and his coconspirators in possession of dynamite while they were beside the victim's car with its hood raised, defendant stated in coming away from the car that "it would happen in the

morning," and the victim was injured the next morning by an explosion when he attempted to start his car, the evidence for the State was sufficient to withstand defendant's motion for nonsuit. *State v. Sellers*, 289 N.C. 268, 221 S.E.2d 264 (1976).

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); *State v. Sanders*, 288 N.C. 285, 218 S.E.2d 352 (1975).

Cited in *State v. Grier*, 30 N.C. App. 281, 227 S.E.2d 126 (1976).

§ 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).

Description in the indictment of the property damaged as a "1974 Ford Torino owned by the North Carolina State Bureau of Investigation, being at the time occupied by another, Albert Stout, Jr.," was sufficient to inform defendant with certainty as to the crime that he had allegedly committed. *State v. Sanders*, 288 N.C. 285, 218 S.E.2d 352 (1975), cert. denied, 423 U.S. 1091, 96 S. Ct. 886, 47 L. Ed. 2d 102 (1976).

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, cert. denied, 282 N.C. 428, 192 S.E.2d 841 (1972).

Sufficiency of Evidence. — In a prosecution for willful and malicious injury to person and property by means of dynamite, and conspiracy to injure a person by means of dynamite, where

defendant knew the victim was an undercover narcotics agent, an informer saw defendant and his coconspirators in possession of dynamite while they were beside the victim's car with its hood raised, defendant stated in coming away from the car that "it would happen in the morning," and the victim was injured the next morning by an explosion when he attempted to start his car, the evidence for the State was sufficient to withstand defendant's motion for nonsuit. *State v. Sellers*, 289 N.C. 268, 221 S.E.2d 264 (1976).

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, cert. denied, 282 N.C. 428, 192 S.E.2d 841 (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).

Cited in *State v. Grier*, 30 N.C. App. 281, 227 S.E.2d 126 (1976).

§ 14-50. Conspiracy to injure or damage by use of explosive or incendiary; punishment.

A conspiracy is an "agreement between two or more individuals to do an unlawful act or to do a lawful act in an unlawful way." *State v. Grier*, 30 N.C. App. 281, 227 S.E.2d 126, cert. denied, 291 N.C. 177, 229 S.E.2d 691 (1976).

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, cert. denied, 282 N.C. 428, 192 S.E.2d 841 (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, rev'd on other grounds, 288 N.C. 608, 220 S.E.2d 521 (1975).

Criminal responsibility for a conspiracy requires more than a merely passive attitude toward an existing conspiracy. One who commits an overt act with knowledge of the conspiracy is guilty. And one who tacitly consents to the object of a conspiracy and goes along with the other conspirators, actually standing by while the others put the conspiracy into effect, is guilty though he intends to take no active part in the crime. *State v. Grier*, 30 N.C. App. 281, 227 S.E.2d 126, cert. denied, 291 N.C. 177, 229 S.E.2d 691 (1976).

Direct proof of the charge of conspiracy is not essential, for such is rarely obtainable. It may be, and generally is, established by a

number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy. *State v. Grier*, 30 N.C. App. 281, 227 S.E.2d 126, cert. denied, 291 N.C. 177, 229 S.E.2d 691 (1976).

For one to be convicted of the crime of conspiracy, the State need not prove that the parties agreed in express terms to unite for the common illegal purpose. A mutual, implied understanding is sufficient to constitute the offense. *State v. Grier*, 30 N.C. App. 281, 227 S.E.2d 126, cert. denied, 291 N.C. 177, 229 S.E.2d 691 (1976).

Sufficiency of Evidence. — In a prosecution for willful and malicious injury to person and property by means of dynamite, and conspiracy to injure a person by means of dynamite, where defendant knew the victim was an undercover narcotics agent, an informer saw defendant and his coconspirators in possession of dynamite while they were beside the victim's car with its hood raised, defendant stated in coming away from the car that "it would happen in the morning," and the victim was injured the next morning by an explosion when he attempted to start his car, the evidence for the State was sufficient to withstand defendant's motion for nonsuit. *State v. Sellers*, 289 N.C. 268, 221 S.E.2d 264 (1976).

§ 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.

In General. —

To warrant a conviction for burglary the State's evidence must show that there was a breaking and entering during the nighttime of a dwelling or sleeping apartment with intent to commit a felony therein. *State v. Wilson*, 289 N.C. 531, 223 S.E.2d 311 (1976).

Burglary, whether in the first degree or in the second degree, is the breaking and entering of a dwelling house of another in the nighttime with the intent to commit a felony therein. *State v. Cooper*, 288 N.C. 496, 219 S.E.2d 45 (1975).

Burglary is a common-law offense. It consists of the felonious breaking and entering of the dwelling house or sleeping apartment of another in the nighttime with the intent to commit a felony therein, whether such intent be executed or not. *State v. Beaver*, 291 N.C. 137, 229 S.E.2d 179 (1976).

The purpose of the statute, etc. —

The purpose of the law in the offense of first-degree burglary was and is to protect the habitation of men, where they repose and sleep, from meditated harm. *State v. Beaver*, 291 N.C. 137, 229 S.E.2d 179 (1976).

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); *State v. Wilson*, 289 N.C. 531, 223 S.E.2d 311 (1976).

By this section the offense of burglary is divided into two degrees, first and second. The distinction between the two degrees depends upon the actual occupancy of the dwelling house or sleeping apartment at the time of the commission of the crime. *State v. Beaver*, 291 N.C. 137, 229 S.E.2d 179 (1976).

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), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3202, L. Ed. 2d (1976); *State v. Bell*, 285 N.C. 746, 208 S.E.2d 506 (1974).

First-degree burglary is defined as the unlawful breaking and entering of an occupied dwelling or sleeping apartment in the nighttime with the intent to commit a felony therein. *State v. Sweezy*, 291 N.C. 366, 230 S.E.2d 524 (1976).

The crime of burglary in the first degree is complete when an occupied dwelling is broken and entered in the nighttime with the intent to commit larceny therein whether or not anything was actually stolen from the house. *State v. Coffey*, 289 N.C. 431, 222 S.E.2d 217 (1976).

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).

The constituent elements of burglary in the first degree are: (1) the breaking (2) and entering (3) in the nighttime (4) into a dwelling house or a room used as a sleeping apartment (5) which is actually occupied at the time of the offense (6)

with the intent to commit a felony therein. *State v. Wells*, 290 N.C. 485, 226 S.E.2d 325 (1976).

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), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3202, L. Ed. 2d (1976).

A “breaking” is an essential element of the crime of first-degree burglary. *State v. Wilson*, 289 N.C. 531, 223 S.E.2d 311 (1976).

If any force at all is employed to effect an entrance through any usual or unusual place of ingress, whether open, partly open or closed, there is a breaking sufficient in law to constitute burglary, if the other elements of the offense are present. *State v. Wilson*, 289 N.C. 531, 223 S.E.2d 311 (1976).

The mere pushing or pulling open of an unlocked door constitutes a breaking. *State v. Sweezy*, 291 N.C. 366, 230 S.E.2d 524 (1976).

The moving and raising of the window would be a breaking within the meaning of the law. *State v. Wells*, 290 N.C. 485, 226 S.E.2d 325 (1976).

A breaking may be actual or constructive. *State v. Wilson*, 289 N.C. 531, 223 S.E.2d 311 (1976).

Constructive breaking, as distinguished from actual forcible breaking, may be classed under the following heads: (1) when entrance is obtained by threats, as if the felon threatens to set fire to the house unless the door is opened, (2) when in consequence of violence commenced, or threatened in order to obtain entrance, the owner, with a view more effectually to repel it, opens the door and sallies out, and the felon enters, (3) when entrance is obtained by procuring the servants or some inmate to remove the fastening, (4) when some process of law is fraudulently resorted to for the purpose of obtaining an entrance, (5) when some trick is resorted to to induce the owner to remove the fastening and open the door, and the felon enters; as, if one knocks at the door, under pretense of business, or counterfeits the voice of a friend, and, the door being opened, enters. *State v. Wilson*, 289 N.C. 531, 223 S.E.2d 311 (1976).

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, cert. denied, 283 N.C. 666, 200 S.E.2d 655 (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), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3202, L. Ed. 2d (1976).

In a prosecution for first-degree burglary and second-degree rape, defendant's entry was accomplished by a "breaking" notwithstanding the fact that the prosecuting witness "cracked" her door to see who was there. *State v. Wilson*, 289 N.C. 531, 223 S.E.2d 311 (1976).

Inferring of Breaking and Entering from Possession of Stolen Articles. — Upon proof of larceny following a breaking and entering, the defendant's possession of the stolen articles under such circumstances will also support an inference that he committed the breaking and entering. *State v. Greene*, 30 N.C. App. 507, 227 S.E.2d 154 (1976).

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, cert. denied, 283 N.C. 666, 200 S.E.2d 655 (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 intelligent mind will take cognizance of the fact that 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. 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. Sweezy*, 291 N.C. 366, 230 S.E.2d 524 (1976).

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).

In a prosecution for first-degree burglary, where the State's evidence showed that defendant entered an occupied dwelling in the nighttime by climbing a ladder to reach a second-floor balcony, and defendant had done work for the owner of the house and was familiar with the layout of the house, intent to commit the felony of larceny could be inferred by the jury and motion to dismiss was properly denied. *State v. Hedrick*, 289 N.C. 232, 221 S.E.2d 350 (1976).

An unexplained breaking and entering into a dwelling house in the nighttime is in itself sufficient to sustain a verdict that the breaking and entering was done with the intent to commit larceny rather than some other felony. *State v. Hedrick*, 289 N.C. 232, 221 S.E.2d 350 (1976).

In a prosecution for first-degree burglary, where the State attempts to show intent to commit larceny, the fact that defendant did not disturb any of the valuables in the house does not aid him. *State v. Hedrick*, 289 N.C. 232, 221 S.E.2d 350 (1976).

In the absence of evidence of other intent or explanation for breaking and entering, the usual object or purpose of burglarizing a dwelling house at night is theft. *State v. Hedrick*, 289 N.C. 232, 221 S.E.2d 350 (1976).

There is no requirement that there be an individual asleep in the house which is broken into in order for burglary to be committed. *Edwards v. Garrison*, 529 F.2d 1374 (4th Cir. 1975).

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).

The actual commission of the intended felony is not essential to the crime of burglary. *State v. Wells*, 290 N.C. 485, 226 S.E.2d 325 (1976).

Indictment Must Charge Intended Felony. —

In specifying the felony intended in an indictment for burglary it is enough to state the offense generally and to designate it by name. *State v. Norwood*, 289 N.C. 424, 222 S.E.2d 253 (1976).

The indictment for burglary must specify the particular felony which the defendant is alleged to have intended to commit at the time of the breaking and entering, and it is not sufficient to charge generally an intent to commit an

unspecified felony. *State v. Norwood*, 289 N.C. 424, 222 S.E.2d 253 (1976).

The particular felony which it is alleged the accused intended to commit must be specified. *State v. Wells*, 290 N.C. 485, 226 S.E.2d 325 (1976).

In an indictment for burglary it is not enough to charge generally an intent to commit "a felony" in the dwelling house of another. *State v. Wells*, 290 N.C. 485, 226 S.E.2d 325 (1976).

But Not Fully and Specifically. — In an indictment for burglary the felony intended need not be set out as fully and specifically as would be required in an indictment for the actual commission of that felony. *State v. Norwood*, 289 N.C. 424, 222 S.E.2d 253 (1976).

The indictment for burglary need not set out the felony which the defendant, at the time of the breaking and entering, intended to commit within the dwelling in as complete detail as would be required in an indictment for the actual commission of that felony. It must, however, state with certainty the felony which the State alleges he intended, at the time of his breaking and entering, to commit within the dwelling. *State v. Cooper*, 288 N.C. 496, 219 S.E.2d 45 (1975).

The felony intended, need not be set out as fully and specifically as would be required in an indictment for the actual commission of said felony, where the State is relying only upon the charge of burglary. *State v. Wells*, 290 N.C. 485, 226 S.E.2d 325 (1976).

It is ordinarily sufficient to state the intended offense generally, as by alleging an intent to commit therein the crime of larceny, rape or arson. *State v. Wells*, 290 N.C. 485, 226 S.E.2d 325 (1976).

The occupant of the building at the time of the burglary is the owner, and it is unnecessary to allege ownership of the title to the building. *State v. Beaver*, 291 N.C. 137, 229 S.E.2d 179 (1976).

There is no requirement that actual ownership of the occupied premises be alleged and proved. *State v. Beaver*, 291 N.C. 137, 229 S.E.2d 179 (1976).

It is not required that indictment for first-degree burglary describe property which defendant intended to steal, or that which he did steal. *State v. Coffey*, 289 N.C. 431, 222 S.E.2d 217 (1976).

It is not necessary that an indictment for burglary describe the property stolen by the burglar. *State v. Coffey*, 289 N.C. 431, 222 S.E.2d 217 (1976).

Indictment for burglary is fatally defective if it fails to identify the premises broken and entered with sufficient certainty to enable the defendant to prepare his defense and to offer him protection from another prosecution for the same incident. *State v. Coffey*, 289 N.C. 431, 222

S.E.2d 217 (1976); *State v. Beaver*, 291 N.C. 137, 229 S.E.2d 179 (1976).

Burglary Indictment Insufficient. — An indictment alleging that defendant broke and entered, with intent to commit a felony within, to wit: "by sexually assaulting a female," did not charge the defendant with the crime of burglary and would not support the imposition of a sentence to life imprisonment for first-degree burglary. *State v. Cooper*, 288 N.C. 496, 219 S.E.2d 45 (1975).

Sufficient Evidence to Submit Question of Second-Degree Burglary. —

Evidence held sufficient to withstand motion for nonsuit. *State v. Irick*, 291 N.C. 480, 231 S.E.2d 833 (1977).

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).

§ 14-52. Punishment for burglary. — (a) Any person convicted of burglary in the first degree shall be imprisoned for life in the State's prison. Anyone convicted of the crime of burglary in the second degree shall be punished by imprisonment for not less than seven years nor more than life imprisonment in the State's prison.

(b) Any person who has been convicted of a violation of G.S. 14-52(a) shall serve the first seven years of his sentence 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 of less than seven years. Sentences imposed pursuant to this section 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 the release of an inmate sentenced under this section prior to his having been incarcerated for seven years, except such time as may be allowed for good behavior. (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; 1977, c. 871, 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.

As to facilities and programs for youthful offenders, see § 148-49.10 et seq.

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.

The 1977 amendment, effective Oct. 1, 1977, designated the former provisions of this section as subsection (a), deleted "the crime of" preceding "burglary" in the first sentence of

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), death sentence vacated, 428 U. S. 902, 96 S. Ct. 3202, L. Ed. 2d (1976).

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); *State v. Corpening*, 31 N.C. App. 376, 229 S.E.2d 206 (1976); *State v. Perry*, 291 N.C. 586, 231 S.E.2d 262 (1977).

subsection (a), rewrote the second sentence of subsection (a), and added subsection (b): Session Laws 1977, c. 871, s. 4, provides: "This act shall apply to all offenses committed on or after the effective date of this act."

Session Laws 1977, c. 871, s. 5, provides: "This act shall in no manner impair the powers of the Governor under the provisions of Article III, § 6, of the North Carolina Constitution."

Session Laws 1977, c. 871, s. 7, provides: "In the event of any conflict between the provisions of this act and the provisions of Article 3B of Chapter 148, the provisions of Article 3B shall control and remain in full force and effect."

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).

§ 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, cert. denied, 285 N.C. 668, 207 S.E.2d 760 (1974), 419 U.S. 1116, 95 S. Ct. 795, 42 L. Ed. 2d 814 (1975).

§ 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, cert. denied, 281 N.C. 625, 190 S.E.2d 468 (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, cert. denied, 281 N.C. 761, 191 S.E.2d 358 (1972).

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).

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).

A mandatory life sentence under this section does not violate any provision of the federal or State Constitutions. *State v. Sweezy*, 291 N.C. 366, 230 S.E.2d 524 (1976).

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); *Edwards v. Garrison*, 529 F.2d 1374 (4th Cir. 1975).

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); *State v. Wilson*, 289 N.C. 531, 223 S.E.2d 311 (1976).

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); *State v. Corpening*, 31 N.C. App. 376, 229 S.E.2d 206 (1976).

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, cert. denied, 281 N.C. 761, 191 S.E.2d 358 (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).

An indictment under this section is sufficient if the building allegedly broken and entered is described sufficiently to show that it is within the language of the section and to identify it with reasonable particularity so that defendant may prepare his defense and plead his conviction or acquittal as a bar to further prosecution for the same offense. *State v. Vawter*, 33 N.C. App. 131, 234 S.E.2d 438 (1977).

If evidence offered at trial fails to show ownership as alleged in indictment of premises entered and property taken, a motion for judgment of nonsuit should be allowed, both to a charge of breaking or entering and to a charge of felonious larceny. *State v. Crawford*, 29 N.C. App. 117, 223 S.E.2d 534 (1976).

In a prosecution for breaking or entering, and felonious larceny, the allegations of ownership described in a bill of indictment are essential. *State v. Crawford*, 29 N.C. App. 117, 223 S.E.2d 534 (1976).

Possession of Recently Stolen Property. —

In accord with original. See *State v. Snuggs*, 18 N.C. App. 226, 196 S.E.2d 525 (1973).

The presumption of recent possession, or inference as it is more properly called, is one of fact and not of law. The inference derived from recent possession "is to be considered by the jury merely as an evidentiary fact, along with the other evidence in the case, in determining whether the State has carried the burden of satisfying the jury beyond a reasonable doubt of the defendant's guilt. *State v. Fair*, 291 N.C. 171, 229 S.E.2d 189 (1976).

While possession of recently stolen property will support both a presumption of guilt of larceny and an inference of guilt of breaking and entering, they are mere inferences which the jury may consider along with other evidence in the case, which other evidence may be sufficient to tip the scales with respect to one count but not the other. *State v. Barnes*, 30 N.C. App. 671, 228 S.E.2d 83 (1976).

Proof of recent possession by the State does not shift the burden of proof to the defendant but the burden remains with the State to demonstrate defendant's guilt beyond a reasonable doubt. *State v. Fair*, 291 N.C. 171, 229 S.E.2d 189 (1976).

Even though property found in a defendant's possession is not listed in a bill of indictment

charging that defendant with the felonies of breaking or entering and larceny, a presumption that defendant broke or entered and stole the property listed in the indictment arises if the property found in defendant's possession was recently stolen at the same time and place as the property listed in the indictment. *State v. Fair*, 29 N.C. App. 147, 223 S.E.2d 407, cert. granted, 290 N.C. 310, 225 S.E.2d 830 (1976).

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).

Indictment under § 14-51 Supports Conviction under This Section. —

Though not sufficient as an indictment for burglary, an indictment, under which the defendant was tried for and convicted of burglary in the first degree, alleging that the defendant, at the specified time, broke and entered the dwelling house therein described, was sufficient to support a conviction under subsection (b) for wrongfully breaking and entering a building. *State v. Cooper*, 288 N.C. 496, 219 S.E.2d 45 (1975).

Included Offense. —

In accord with 4th paragraph in original. See *State v. Lewis*, 17 N.C. App. 117, 193 S.E.2d 455 (1972), cert. denied, 283 N.C. 258, 259, 195 S.E.2d 691 (1973).

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), cert. denied, 284 N.C. 618, 201 S.E.2d 690 (1974).

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, cert. denied, 283 N.C. 757, 198 S.E.2d 727 (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, cert. denied, 284 N.C. 426, 200 S.E.2d 662 (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, appeal withdrawn, 282 N.C. 154, 191 S.E.2d 365 (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, cert. denied, 281 N.C. 627, 190 S.E.2d 470 (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).

In prosecution for breaking and entering, where the State's evidence established that: (1) defendant's right thumbprint was found on the lock at the scene of the crime, a fact defendant solemnly admitted in open court; (2) no other fingerprints — of defendant or anyone else — were found at the scene; and (3) when informed of the fingerprint defendant stated to the police that he had never been in the business establishment alleged to have been broken into, a statement now conceded to be false, defendant's motion to nonsuit on the breaking and entering count was properly denied. *State v. Miller*, 289 N.C. 1, 220 S.E.2d 572 (1975).

In prosecution for breaking and entering testimony by a qualified expert that fingerprints found at the scene of the crime correspond with the fingerprints of the accused, when accompanied by substantial evidence of circumstances from which the jury can find that the fingerprints could only have been impressed at the time the crime was committed, is sufficient to withstand motion for nonsuit and carry the case to the jury. *State v. Miller*, 289 N.C. 1, 220 S.E.2d 572 (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).

There was sufficient circumstantial evidence from which the court could have found that respondent committed the breaking or entering: (1) Numerous items similar though not identified, as those stolen were found in the car driven by respondent; (2) respondent's companion in the car had a fresh cut on his hand and at the store that was broken into, blood was found on the window and near the cash register; (3) and the officer's observation of the car being driven by respondent under suspicious circumstances "backing out from behind" the store and thereafter stopping the car. In *re Frye*, 32 N.C. App. 384, 232 S.E.2d 301 (1977).

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), *aff'd*, 435 F.2d 1305 (4th Cir. 1971).

"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. 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); *State v. McNeil*, 28 N.C. App. 125, 220 S.E.2d 401 (1975); *State v. Greene*, 33 N.C. App. 228, 234 S.E.2d 428 (1977).

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); *State v. Corpening*, 31 N.C. App. 376, 229 S.E.2d 206 (1976).

§ 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), cert. denied, 278 N.C. 105, 179 S.E.2d 453 (1971); *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), cert. denied, 278 N.C. 105, 179 S.E.2d 453 (1971).

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, aff'd, 276 N.C. 518, 173 S.E.2d 753 (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), cert. denied, 278 N.C. 105, 179 S.E.2d 453 (1971).

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, appeal dismissed, 279 N.C. 513, 183 S.E.2d 689 (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), cert. denied, 278 N.C. 105, 179 S.E.2d 453 (1971).

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, appeal dismissed, 279 N.C. 513, 183 S.E.2d 689 (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, appeal dismissed, 279 N.C. 513, 183 S.E.2d 689 (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), cert. denied, 278 N.C. 105, 179 S.E.2d 453 (1971).

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), cert. denied, 278 N.C. 105, 179 S.E.2d 453 (1971).

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), cert. denied, 278 N.C. 105, 179 S.E.2d 453 (1971).

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).

Possession of Recently Stolen Goods. — In a prosecution under this section, the doctrine of possession of recently stolen goods does not apply unless there is proof that the property had

been stolen. *State v. McKay*, 32 N.C. App. 61, 231 S.E.2d 22 (1977).

In a prosecution under this section, the doctrine of inference of guilt derived from the possession of recently stolen goods applies only when the possession is of a kind which manifests that the stolen goods came to the possessor by his own act or with his undoubted concurrence, and so recently and under such circumstances as to give reasonable assurance that such possession could not have been obtained unless the holder was himself the thief. *State v. McKay*, 32 N.C. App. 61, 231 S.E.2d 22 (1977).

Possession of recently stolen goods does not have to be such that the goods are actually in the hands or on the person of the accused. It is sufficient if the property was under his exclusive personal control. *State v. McKay*, 32 N.C. App. 61, 231 S.E.2d 22 (1977).

Evidence of Control by Defendant Lacking. — In a prosecution for breaking and entering a motor vehicle and larceny, evidence that defendant was present in the vehicle containing stolen items and with individuals who had attempted to negotiate stolen traveler's checks,

without any evidence that any of the stolen items were under the actual control of defendant, is insufficient to carry the question of defendant's guilt to the jury. *State v. Millsaps*, 29 N.C. App. 176, 223 S.E.2d 559 (1976).

Cited in *State v. Jones*, 275 N.C. 432, 168 S.E.2d 380 (1969).

§ 14-56.1. Breaking into or forcibly opening coin- or currency-operated machines. — Any person who forcibly breaks into, or by the unauthorized use of a key or other instrument opens, any coin- or currency-operated machine with intent to steal any property or moneys therein shall be guilty of a misdemeanor punishable by fine or imprisonment or both in the discretion of the court, but if such person has previously been convicted of violating this section, such person shall be guilty of a felony. The term "coin- or currency-operated machine" shall mean any coin- or currency-operated vending machine, pay telephone, telephone coin or currency receptacle, or other coin- or currency-activated machine or device.

There shall be posted on the machines referred to in G.S. 14-56.1 a decal stating that it is a crime to break into vending machines, and that a second offense is a felony. (1963, c. 814, s. 1; 1977, c. 723, ss. 1, 3.)

Editor's Note. — The 1977 amendment, effective Oct. 1, 1977, rewrote this section.

§ 14-56.2. Damaging or destroying coin- or currency-operated machine. — Any person who shall willfully and maliciously damage or destroy any coin- or currency-operated machine shall be guilty of a misdemeanor punishable by fine or imprisonment or both in the discretion of the court. The term "coin- or currency-operated machine" shall be defined as set out in G.S. 14-56.1. (1963, c. 814, s. 2; 1977, c. 723, s. 2.)

Editors' Note. — The 1977 amendment, effective Oct. 1, 1977, rewrote this section.

§ 14-56.3. Breaking into paper currency machines. — Any person, who with intent to steal any moneys therein forcibly breaks into any vending or dispensing machine or device which is operated or activated by the use, deposit or insertion of United States paper currency, shall be guilty of a misdemeanor, but if such person has previously been convicted of violating this section, such person shall be guilty of a felony.

There shall be posted on the machines referred to in G.S. 14-56.3 a decal stating that it is a crime to break into paper currency machines. (1977, c. 853, ss. 1, 2.)

Editor's Note. — Session Laws 1977, c. 853, s. 3, makes this section effective Oct. 1, 1977.

§ 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); *State v.*

Corpening, 31 N.C. App. 376, 229 S.E.2d 206 (1976).

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 committed 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).

Specific intent is not an essential element of the crime of common-law arson. State v. White, 291 N.C. 118, 229 S.E.2d 152 (1976).

Voluntary intoxication is not a defense to a charge of arson. State v. White, 291 N.C. 118, 229 S.E.2d 152 (1976).

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); *State v. Caron*, 288 N.C. 467, 219 S.E.2d 68 (1975); *State v. Moorefield*, 33 N.C. App. 37, 234 S.E.2d 25 (1977).

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

§ 14-62.1. Burning of building or structure in process of construction. — If any person shall wantonly and willfully set fire to or burn or cause to be burned, or aid, counsel or procure the burning of, any building or structure in the process of construction for use or intended to be used as a dwelling house or in carrying on any trade or manufacture, or otherwise, whether the same or any of them respectively shall then be in the possession of the offender, or in the possession of any other person, he shall be guilty of a felony, and shall, on conviction, be imprisoned in the State's prison for not less than two nor more than 30 years, and may also be fined in the discretion of the court. (1957, c. 792; 1971, c. 816, s. 5.)

Editor's Note. — The 1971 amendment substituted "If any person shall wantonly and willfully set fire to or burn or cause to be burned, or aid, counsel or procure the burning" for "The wilful and intentional burning," at the beginning of the section and substituted "he shall be guilty of a felony, and shall, on conviction be

imprisoned in the State's prison for not less than two nor more than 30 years, and may also be fined" for "shall be a felony and punished by imprisonment in the county jail or State prison, or by fine or by both such fine and imprisonment" at the end of the section.

§ 14-63. Burning of boats and barges. — If any person shall wantonly and willfully set fire to or burn or cause to be burned or aid, counsel or procure the burning of, any boat, barge, ferry or float, without the consent of the owner thereof, he shall be guilty of a felony and shall, on conviction, be punished by imprisonment in the State's prison for not less than four months nor more than 10 years, and may also be fined in the discretion of the court. In the event the consent of the owner is given for an unlawful or fraudulent purpose, however, the penalty provisions of this section shall remain in full force and effect. (1909, c. 854; C. S., s. 4243; 1971, c. 816, s. 6.)

Editor's Note. — The 1971 amendment rewrote the first sentence and added the last sentence.

§ 14-64. Burning of ginhouses and tobacco houses. — If any person shall wantonly and willfully set fire to or burn or cause to be burned, or aid, counsel or procure the burning of, any ginhouse or tobacco house, or any part thereof, he shall, on conviction, be imprisoned in the State's prison for not less than four months nor more than 10 years, and may also be fined in the discretion of the court. (1863, c. 17; 1868-9, c. 167, s. 5; Code, s. 985, subsec. 2; 1903, c. 665, s. 1; Rev., s. 3341; C. S., s. 4244; 1971, c. 816, s. 7.)

Editor's Note. — The 1971 amendment rewrote this section.

§ 14-65. Fraudulently setting fire to dwelling houses. — If any person, being the occupant of any building used as a dwelling house, whether such person be the owner thereof or not, or, being the owner of any building designed or intended as a dwelling house, shall wantonly and willfully or for a fraudulent purpose set fire to or burn or cause to be burned, or aid, counsel or procure the burning of such building, he shall be guilty of a felony, and shall, on conviction, be punished by imprisonment in the State's prison for not less than four months nor more than 10 years, and may also be fined in the discretion of the court. (Code, s. 985; 1903, c. 665, s. 3; Rev., s. 3340; 1909, c. 862; C. S., s. 4245; 1927, c. 11, s. 2; 1971, c. 816, s. 8.)

Editor's Note. — The 1971 amendment substituted "wantonly and willfully" for "willfully and wantonly," inserted "on conviction," and substituted "for not less than four months nor more than 10 years" for "or county jail."

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. 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).

Possession of Fruits of Crime. —

A defendant's possession of stolen goods soon after the theft is a circumstance tending to show him guilty of the larceny. State v. Greene, 30 N.C. App. 507, 227 S.E.2d 154 (1976).

The doctrine of possession of recently stolen property is a factual presumption whereby a person found in the unexplained possession of recently stolen property is presumed to be the thief. State v. Majette, 30 N.C. App. 120, 226 S.E.2d 223 (1976).

Mullaney v. Wilbur, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975), is inapposite to the so-called recent possession doctrine because that doctrine does not shift the burden of proof to the defendant. The doctrine only allows the jury to infer that the defendant stole the goods, because the State first proved that the stolen goods were in defendant's possession so soon after the theft that it was unlikely that he obtained them honestly. The doctrine is only an evidentiary inference shifting to the defendant the burden of going forward with evidence. Evidentiary inferences and presumptions such as this are unaffected by Mullaney. State v. Hales, 32 N.C. App. 729, 233 S.E.2d 601 (1977).

Where no evidence was presented which tended to show that codefendant was ever in possession, actual or constructive, of the recently stolen property, the instruction to apply the doctrine of possession of recently stolen property was prejudicial error as to him. *State v. Majette*, 30 N.C. App. 120, 226 S.E.2d 223 (1976).

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), vacated on other grounds, 278 N.C. 199, 179 S.E.2d 388 (1971).

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, cert. denied, 283 N.C. 758, 198 S.E.2d 728 (1973).

In a prosecution for breaking or entering, and felonious larceny, the allegations of ownership described in a bill of indictment are essential. *State v. Crawford*, 29 N.C. App. 117, 223 S.E.2d 534 (1976).

If the evidence offered at trial fails to show the ownership as alleged in the indictment of the premises entered and the property taken, a motion for judgment of nonsuit should be allowed, both to a charge of breaking or entering and to a charge of felonious larceny. *State v. Crawford*, 29 N.C. App. 117, 223 S.E.2d 534 (1976).

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), vacated on other grounds, 278 N.C. 199, 179 S.E.2d 388 (1971).

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).

Since all the evidence indicated that the value of the stolen property exceeded \$200, the trial court did not err by failing to instruct as to the lesser included offense of misdemeanor larceny. *State v. Reese*, 31 N.C. App. 575, 230 S.E.2d 213 (1976).

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).

Evidence held sufficient to withstand motion for nonsuit in prosecution for larceny. — See *State v. Ellis*, 32 N.C. App. 226, 231 S.E.2d 285 (1977); *State v. Craft*, 32 N.C. App. 357, 232 S.E.2d 282 (1977).

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), cert. denied, 406 U. S. 974, 92 S. Ct. 2409, 32 L. Ed. 2d 674 (1972).

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, cert. denied, 285 N.C. 88, 203 S.E.2d 60 (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, cert. denied, 283 N.C. 757, 198 S.E.2d 727 (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, appeal dismissed, 285 N.C. 593, 206 S.E.2d 865 (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), cert. denied, 406 U. S. 974, 92 S. Ct. 2409, 32 L. Ed. 2d 674 (1972), 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 as 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, cert. denied, 281 N.C. 625, 190 S.E.2d 469 (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, cert. denied, 281 N.C. 625, 190 S.E.2d 469 (1972).

Reasonable Belief and Knowledge Differentiated. — "To reasonably believe" and "to know" are not interchangeable terms. While the latter may be implied or inferred from circumstances establishing the former, it does not follow that reasonable belief and implied knowledge are synonymous. The State must

establish that the defendant received the goods "knowing the same to have been feloniously stolen or taken," and this is not necessarily accomplished by establishing the existence of circumstances "such as to cause the defendant to reasonably believe" the goods were stolen. *State v. Hobbs*, 26 N.C. App. 588, 217 S.E.2d 7 (1975), decided under this section as it stood before the 1975 amendment.

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, cert. denied, 281 N.C. 625, 190 S.E.2d 469 (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, cert. denied, 285 N.C. 88, 203 S.E.2d 60 (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, cert. denied, 281 N.C. 625, 190 S.E.2d 469 (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), cert. denied, 406 U. S. 974, 92 S. Ct. 2409, 32 L. Ed. 2d 674 (1972).

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), cert. denied, 406 U. S. 974, 92 S. Ct. 2409, 32 L. Ed. 2d 674 (1972).

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, appeal dismissed, 285 N.C. 593, 206 S.E.2d 865 (1974).

Applied in *State v. Burchfield*, 30 N.C. App. 128, 226 S.E.2d 384 (1976); *State v. Irick*, 291 N.C. 480, 231 S.E.2d 833 (1977).

§ 14-71.1. Possessing stolen goods. — If any person shall possess 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 possessor 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 possessor may be dealt with, indicted, tried and punished in the county where he actually possessed such chattel, money, security, or other thing; and such possessor shall be punished as one convicted of larceny. (1977, c. 978, s. 1.)

Editor's Note. — Session Laws 1977, c. 978, s. 4, makes this section effective Oct. 1, 1977.

§ 14-72. Larceny of property; receiving stolen goods or possessing stolen goods not exceeding \$200.00 in value. — (a) Except as provided in subsections (b) and (c) below, the larceny of property, the receiving of stolen goods knowing them to be stolen or the possessing 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 possessing stolen goods knowing or having reasonable grounds to believe them to be stolen in the circumstances described in subsection (b) is a felony or 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; 1977, c. 978, ss. 2, 3.)

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).

The 1977 amendment, effective Oct. 1, 1977, deleted "or" following "the larceny of property" and inserted "or the possessing of stolen goods knowing them to be stolen" in the first sentence of subsection (a) and added "The crime of possessing stolen goods knowing or having reasonable grounds to believe them to be stolen in the circumstances described in subsection (b) is a felony or" to the beginning of subsection (c).

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, cert. denied, 285 N.C. 88, 203 S.E.2d 60 (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, cert. denied, 285 N.C. 88, 203 S.E.2d 60 (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), cert. denied, 282 N.C. 675, 194 S.E.2d 155 (1973).

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), cert. denied, 282 N.C. 675, 194 S.E.2d 155 (1973).

In accord with 2nd paragraph in original. See *State v. Wesson*, 16 N.C. App. 683, 193 S.E.2d 425 (1972), cert. denied, 282 N.C. 675, 194 S.E.2d 155 (1973).

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), cert. denied, 282 N.C. 675, 194 S.E.2d 155 (1973); *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), cert. denied, 282 N.C. 675, 194 S.E.2d 155 (1973).

"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), cert. denied, 282 N.C. 675, 194 S.E.2d 155 (1973).

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); *State v. Corpening*, 31 N.C. App. 376, 229 S.E.2d 206 (1976).

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), aff'd, 435 F.2d 1305 (4th Cir. 1971).

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. — In a prosecution for larceny the State must prove that the person alleged in the indictment to have a property interest in the property stolen has ownership, meaning title to the property or some special property interest. *State v. Greene*, 289 N.C. 578, 223 S.E.2d 365 (1976).

The purpose of the requirement that ownership be alleged in an indictment for larceny is to (1) inform defendant of the elements of the alleged crime, (2) enable him to determine whether the allegations constitute an indictable offense, (3) enable him to prepare for trial and (4) enable him to plead the verdict in bar of subsequent prosecution for the same offense. *State v. Greene*, 289 N.C. 578, 223 S.E.2d 365 (1976).

The indictment in a larceny case must allege a person who has a property interest in the property stolen. *State v. Greene*, 289 N.C. 578, 223 S.E.2d 365 (1976).

The indictment for larceny must correctly charge the owner or the person in possession of the property stolen. *State v. Vawter*, 33 N.C. App. 131, 234 S.E.2d 438 (1977).

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).

Or Else a Nonsuit. — In a prosecution for larceny, if the person alleged in the indictment to have a property interest in the stolen property is not the owner or special owner of it, there is a fatal variance entitling defendant to a nonsuit. *State v. Greene*, 289 N.C. 578, 223 S.E.2d 365 (1976).

Not in a Servant. — In an indictment for larceny, it is not sufficient to charge the stolen property to be the property of one who is a mere servant, although he may have had actual possession at the time of the larceny; because having no property, his possession is the possession of his master. *State v. Greene*, 289 N.C. 578, 223 S.E.2d 365 (1976).

But There May Be Joint Property Interests.

— There is no fatal variance in an indictment for larceny where the indictment alleges that two persons had a property interest in the stolen property when in fact, one was the bailee or special owner of the property, and the other had legal title to the property, since the property may be laid in either the owner, the special owner or both. *State v. Greene*, 289 N.C. 578, 223 S.E.2d 365 (1976).

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 necessary 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, cert. denied, 279 N.C. 513, 183 S.E.2d 689 (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, cert. denied, 279 N.C. 513, 183 S.E.2d 689 (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).

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. *State v. Curry*, 288 N.C. 312, 218 S.E.2d 374 (1975).

It is incumbent upon the State to prove beyond a reasonable doubt that the value of the stolen property was more than \$200; and, value in excess of \$200 being an essential element of the offense, it is incumbent upon the trial judge to so instruct the jury. The basis for this requirement is the elementary proposition that the credibility of the testimony, even though unequivocal and uncontradicted, must be passed upon by the jury. *State v. Curry*, 288 N.C. 312, 218 S.E.2d 374 (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, appeal dismissed, 281 N.C. 624, 190 S.E.2d 467 (1972); *State v. Solomon*, 24 N.C. App. 527, 211 S.E.2d 478 (1975); *State v. Greene*, 289 N.C. 578, 223 S.E.2d 365 (1976).

In accord with 3rd paragraph in original. See *State v. Greene*, 289 N.C. 578, 223 S.E.2d 365 (1976).

In accord with 4th paragraph in original. See *State v. Greene*, 289 N.C. 578, 223 S.E.2d 365 (1976).

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, rev'd on other grounds, 282 N.C. 249, 192 S.E.2d 441 (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).

Possession of stolen property shortly after the time of theft raises a presumption of the possessor's guilt of larceny of such property but the presumption does not apply until the identity of the property is established. *State v. Bembery*, 33 N.C. App. 31, 234 S.E.2d 33 (1977).

Even though property found in a defendant's possession is not listed in a bill of indictment charging that defendant with the felonies of breaking or entering and larceny, a presumption that defendant broke or entered and stole the property listed in the indictment arises if the property found in defendant's possession was recently stolen at the same time and place as the property listed in the indictment. *State v. Fair*, 29 N.C. App. 147, 223 S.E.2d 407, cert. granted, 290 N.C. 310, 225 S.E.2d 830 (1976).

The presumption that the possessor is the thief which arises from the possession of stolen goods is a presumption of fact and not of law. *State v. Greene*, 289 N.C. 578, 223 S.E.2d 365 (1976).

It is the general rule in this State that one found in the unexplained possession of recently stolen property is presumed to be the thief. This is a factual presumption and is strong or weak depending on circumstances — the time between the theft and the possession, the type of property involved and its legitimate availability in the community. *State v. Hagler*, 32 N.C. App. 444, 232 S.E.2d 712 (1977).

Strength of Recent Possession Presumption Depends on Lapse of Time. —

The presumption that the possessor is the thief, which arises from the possession of stolen goods, is strong or weak as the time elapsing between the stealing of the goods and the finding of them in the possession of the defendant is short or long. *State v. Greene*, 289 N.C. 578, 223 S.E.2d 365 (1976).

Presumption Is an Evidential Fact. — The presumption that the possessor is the thief, which arises from the possession of stolen goods, is to be considered by the jury merely as an evidential fact, along with the other evidence in the case, in determining whether the State has carried the burden of satisfying the jury beyond a reasonable doubt of the defendant's guilt. *State v. Greene*, 289 N.C. 578, 223 S.E.2d 365 (1976).

The presumption of recent possession, or inference as it is more properly called, is one of fact and not of law. The inference derived from recent possession is to be considered by the jury merely as an evidentiary fact, along with the other evidence in the case, in determining whether the State has carried the burden of satisfying the jury beyond a reasonable doubt of

the defendant's guilt. *State v. Fair*, 291 N.C. 171, 229 S.E.2d 189 (1976).

However, recent possession is not evidence of guilt; it just raises an inference that will permit the case to go to the jury under proper instructions from the court. *State v. Greene*, 289 N.C. 578, 223 S.E.2d 365 (1976).

Proof of recent possession by the State does not shift the burden of proof to the defendant but the burden remains with the State to demonstrate defendant's guilt beyond a reasonable doubt. *State v. Fair*, 291 N.C. 171, 229 S.E.2d 189 (1976).

Mullaney v. Wilbur, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975), is inapposite to the so-called recent possession doctrine because that doctrine does not shift the burden of proof to the defendant. The doctrine only allows the jury to infer that the defendant stole the goods, because the State first proved that the stolen goods were in defendant's possession so soon after the theft that it was unlikely that he obtained them honestly. The doctrine is only an evidentiary inference shifting to the defendant the burden of going forward with evidence. Evidentiary inferences and presumptions such as this are unaffected by *Mullaney*. *State v. Hales*, 32 N.C. App. 729, 233 S.E.2d 601 (1977).

"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).

The word "value" as used in this section does not mean the price at which the owner would sell, but means fair market value. *State v. Haney*, 28 N.C. App. 222, 220 S.E.2d 371 (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, cert. denied, 285 N.C. 87, 203 S.E.2d 60 (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, rev'd on other grounds, 282 N.C. 249, 192 S.E.2d 441 (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).

As to a possible verdict of misdemeanor larceny, it is well-established that where there is no evidence from which it can be inferred that

the value of the stolen property was less than \$200, defendant is not entitled to an instruction with respect to larceny of property of a value less than \$200. *State v. Reese*, 31 N.C. App. 575, 230 S.E.2d 213 (1976).

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).

Acquittal of Breaking and Entering Doesn't Preclude Conviction of Larceny.—

Where trial proceeded on the theory that defendant was guilty, if at all, as an aider and abettor of two other principal perpetrators, a not guilty verdict on a count of breaking and entering is not necessarily a finding by the jury that larceny was not committed by defendant pursuant to a breaking. It could be a finding simply that defendant was not an aider and abettor on the breaking count. The jury could, therefore, consistently with its verdict on the breaking count find that felonious larceny was committed pursuant to a breaking by the principal perpetrators and defendant, by reason of aiding and abetting, was guilty of the felony as a principal in the second degree, provided, of course, this theory of the case was presented to them in the trial judge's instructions. *State v. Curry*, 288 N.C. 312, 218 S.E.2d 374 (1975).

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, cert. denied, 281 N.C. 625, 190 S.E.2d 468 (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, rev'd on other grounds, 282 N.C. 249, 192 S.E.2d 441 (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); *State v. Morrow*, 31

N.C. App. 592, 230 S.E.2d 182 (1976); *State v. Irick*, 291 N.C. 480, 231 S.E.2d 833 (1977); *State v. Greene*, 33 N.C. App. 228, 234 S.E.2d 428 (1977).

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, willfully 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).

Elements of Offense. —

In accord with original. See *State v. Watts*, 31 N.C. App. 513, 229 S.E.2d 715 (1976).

Willful Concealment. —

In accord with original. See *State v. Watts*, 31 N.C. App. 513, 229 S.E.2d 715 (1976).

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, cert. denied, 283 N.C. 758, 198 S.E.2d 728 (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, cert. denied, 283 N.C. 758, 198 S.E.2d 728 (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, cert. denied, 283 N.C. 758, 198 S.E.2d 728 (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, cert. denied, 283 N.C. 758, 198 S.E.2d 728 (1973).

Evidence Sufficient to Convict. — See *State v. Watts*, 31 N.C. App. 513, 229 S.E.2d 715 (1976).

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 motor-propelled conveyance. — (a) A person is guilty of an offense under this section if, without the express or implied consent of the owner or person in lawful possession, he takes or operates an aircraft, motorboat, motor vehicle, or other motor-propelled conveyance of another.

(b) 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 motor-propelled conveyance is a misdemeanor punishable by a fine, imprisonment not to exceed two years, or both, in the discretion of the court.

(c) Unauthorized use of a motor-propelled conveyance shall be a lesser-included offense of unauthorized use of an aircraft.

(d) As used in this section, “owner” means any person with a property interest in the motor-propelled conveyance. (1973, c. 1330, s. 38; 1977, c. 919.)

Editor's Note. — Session Laws 1973, c. 1330, s. 40, makes this section effective Jan. 1, 1975.

The 1977 amendment inserted “express or implied” and “or person in lawful possession” in subsection (a), substituted “takes or operates” for “takes, operates or exercises control over” in subsection (a), deleted former subsection (b), which prohibited the presumption or implication of consent because of consent of the owner on a previous occasion, redesignated former subsections (c) through (e) as present subsections (b) through (d), inserted “motor-propelled” in the second sentence of present subsection (b), and rewrote present subsections (c) and (d).

Most of the cases cited below were decided under former § 20-105.

Constitutionality. — See *State v. Graham*, 32 N.C. App. 601, 233 S.E.2d 615 (1977), decided prior to the 1977 amendment.

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).

Quoted in *State v. Kaerner*, 28 N.C. App. 223, 220 S.E.2d 397 (1975).

Cited in *State v. Reese*, 31 N.C. App. 575, 230 S.E.2d 213 (1976).

§ 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.

History of Section. — See *State v. West*, 31 N.C. App. 431, 229 S.E.2d 826 (1976).

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, vegetable 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 seven 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.

(c) Any person who has been convicted of a violation of G.S. 14-87(a) shall serve the first seven years of his sentence 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 of less than seven years. Sentences imposed pursuant to this section 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 the release of an inmate sentenced under this section prior to his having been incarcerated for seven years except such time as may be allowed as a result of good behavior. (1929, c. 187, s. 1; 1975, cc. 543, 846; 1977, c. 871, ss. 1, 6.)

Cross Reference. — As to facilities and programs for youthful offenders, see § 148-49.10 et seq.

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).

The 1977 amendment, effective Oct. 1, 1977, substituted "seven years" for "five years" near the end of subsection (a) and added subsection (c). Session Laws 1977, c. 871, s. 4, provides: "This act shall apply to all offenses committed on or after the effective date of this act."

Session Laws 1977, c. 871, s. 3, provides: "Each business establishment in this State, to which has been issued a retail sales tax license, is authorized to display a cardboard placard not less than 8 inches by 11 inches which shall bear the following inscription in letters not less than three-fourths inch high:

'By Act of the North Carolina General Assembly Any Person Convicted of Armed Robbery Shall Serve a Sentence of No Less Than 7 Years of Imprisonment Without Probation or Parole.'

Session Laws 1977, c. 871, s. 5, provides: "This act shall in no manner impair the powers of the Governor under the provisions of Article III, § 6, of the North Carolina Constitution."

Session Laws 1977, c. 871, s. 7, provides: "In the event of any conflict between the provisions of this act and the provisions of Article 3B of Chapter 148, the provisions of Article 3B shall control and remain in full force and effect."

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), cert. denied, 409 U.S. 948, 93 S. Ct. 293, 34 L. Ed. 2d 218 (1972); *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), cert. denied, 282 N.C. 673, 194 S.E.2d 152 (1973).

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), cert. denied, 409 U.S. 948, 93 S. Ct. 293, 34 L. Ed. 2d 218 (1972).

This section requires, among other things, that a robbery be 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. Jones*, 292 N.C. 255, 232 S.E.2d 707 (1977).

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); *State v. Dollar*, 292 N.C. 344, 233 S.E.2d 521 (1977).

Common-Law Robbery Defined. —

In accord with 1st paragraph in original. See *State v. Moore*, 279 N.C. 455, 183 S.E.2d 546 (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, cert. denied, 281 N.C. 316, 188 S.E.2d 899 (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), cert. denied, 409 U.S. 948, 93 S. Ct. 293, 34 L. Ed. 2d 218 (1972); *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 546 (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 546 (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 546 (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, cert. denied, 287 N.C. 666, 216 S.E.2d 909 (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, appeal dismissed, 402 U.S. 1006, 91 S. Ct. 199, 29 L. Ed. 2d 428 (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), appeal dismissed, 284 N.C. 620, 202 S.E.2d 276 (1974).

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, 175 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, appeal dismissed, 402 U.S. 1006, 91 S. Ct. 199, 29 L. Ed. 2d 428 (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).

A taking with "felonious intent," etc. —

The felonious intent to take the goods of another and appropriate them to defendant's own use is a necessary element of armed robbery. *State v. Webb*, 27 N.C. App. 391, 219 S.E.2d 268 (1975).

"Intent to Rob" Is, etc. —

The expression "intent to rob" is a sufficient definition of "felonious intent" as applied to the robbery statute, in the absence of evidence raising an inference of a different intent or purpose. *State v. Webb*, 27 N.C. App. 391, 219 S.E.2d 268 (1975); *State v. Hunter*, 290 N.C. 556, 227 S.E.2d 535 (1976), cert. denied, U.S. , 97 S. Ct. 1106, 51 L. Ed. 2d 539 (1977).

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).

The taking and carrying away is an essential element of the crime of robbery. *State v. Bobbitt*, 29 N.C. App. 155, 223 S.E.2d 398 (1976).

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, cert. denied, 285 N.C. 593, 206 S.E.2d 864 (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 546 (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 546 (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).

The crime of armed robbery includes an assault on the person with a deadly weapon, but it does not include the additional elements of (1) intent to kill or (2) inflicting serious injury. *State*

v. Kearns, 27 N.C. App. 354, 219 S.E.2d 228 (1975), cert. denied, 289 N.C. 300, 222 S.E.2d 700 (1976).

Profit Immaterial. —

In accord with original. See *State v. Jenkins*, 8 N.C. App. 532, 174 S.E.2d 690 (1970).

It is not necessary to describe accurately, etc. —

In robbery it is not necessary or material to describe accurately or prove the particular identity or value of the property, further than to show that it was the property of the person assaulted or in his care, and had a value. *State v. Council*, 6 N.C. App. 397, 169 S.E.2d 921 (1969).

In an indictment for robbery, unlike an indictment for larceny, the kind and value of the property taken is not material — the gist of the offense is not the taking but a taking by force or putting in fear. *State v. Council*, 6 N.C. App. 397, 169 S.E.2d 921 (1969).

Where the gist of the offense as described in the indictment is the attempt to commit robbery by the use or threatened use of firearms, the force or intimidation occasioned by the use or threatened use of firearms is the main element of the offense. In such a case, it is not necessary or material to describe accurately or prove the particular identity or value of the property, provided the indictment shows that the property was that of the person assaulted or under his care, and that such property is the subject of robbery and that it had some value. *State v. Owens*, 277 N.C. 697, 178 S.E.2d 442 (1971).

An indictment for robbery 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, cert. denied, 282 N.C. 155, 191 S.E.2d 604 (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).

In accord with 6th paragraph in original. See *State v. Fletcher*, 27 N.C. App. 672, 220 S.E.2d 101 (1975).

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, appeal dismissed, 402 U.S. 1006, 91 S. Ct. 199, 29 L. Ed. 2d 428 (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), cert. denied, 409 U.S. 948, 93 S. Ct. 293, 34 L. Ed. 2d 218 (1972).

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), appeal dismissed, 284 N.C. 620, 202 S.E.2d 276 (1974).

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), appeal dismissed, 284 N.C. 620, 202 S.E.2d 276 (1974).

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 was sufficient to be submitted to the jury in a prosecution for armed robbery where the evidence tended to show that the night manager of a motel sensed an object against his head which felt like a pistol barrel and he heard

it click, a toy pistol was found in defendant's room, and money and a .38 caliber pistol were taken in the robbery. *State v. Dark*, 26 N.C. App. 610, 216 S.E.2d 498, cert. denied, 288 N.C. 245, 217 S.E.2d 669 (1975).

Where the State's evidence showed that the defendant held a dangerous weapon in his hand at the time he assaulted the victim, that he still had the weapon hanging from his arm at the time he went into the kitchen to take food from the refrigerator, and that it was no longer necessary for him to use or threaten to use the weapon at the time of the robbery since he had already injured and subdued the victim, viewing this evidence in the light most favorable to the State, there was sufficient evidence to submit the charge of armed robbery to the jury and that the trial court properly denied the defendant's motion for nonsuit as to that charge. *State v. Lilly*, 32 N.C. App. 467, 232 S.E.2d 495 (1977).

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 725 (1975).

Principals Equally Guilty. — 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. Dowd*, 28 N.C. App. 32, 220 S.E.2d 393 (1975).

By its express terms, this section extends to one who aids and abets in an attempt to commit armed robbery. *State v. Dowd*, 28 N.C. App. 32, 220 S.E.2d 393 (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, cert. denied, 287 N.C. 666, 216 S.E.2d 909 (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); *State v. Cherry*, 29 N.C. App. 599, 225 S.E.2d 119 (1976).

In order to constitute an attempt, it is essential that the defendant, with the intent of committing the particular crime, should have done some overt act adapted to, approximating, and which in the ordinary and likely course of things would result in the commission thereof. *State v. Dowd*, 28 N.C. App. 32, 220 S.E.2d 393 (1975).

The act of attempt must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation. It must not be merely preparatory. In other words, while it need not be the last proximate act to the consummation of the offense attempted to be perpetrated, it must approach sufficiently near to it to stand either as the first or some subsequent step in a direct movement towards the commission of the offense after the preparations are made. *State v. Dowd*, 28 N.C. App. 32, 220 S.E.2d 393 (1975).

In a prosecution for attempted armed robbery, the evidence did no more than place defendant in the hardware store with a pistol in his belt. He had no accomplice. He did not make a gesture indicating an intent to touch, withdraw or otherwise threaten the use of the pistol. There was, therefore, no threat, actual or constructive, of the use of a deadly weapon. He did not make a demand, express or implied, for money or other property. The evidence raises a suspicion that defendant may have intended to commit a robbery or other crime but falls short of showing an overt act in furtherance of an intent to rob. *State v. Jacobs*, 31 N.C. App. 582, 230 S.E.2d 550 (1976).

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 attempt to rob now is on equal level with the taking: Each offense is of equal gravity. *State v. Cherry*, 29 N.C. App. 599, 225 S.E.2d 119 (1976).

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); State v. Cherry, 29 N.C. App. 599, 225 S.E.2d 119 (1976).

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), cert. denied, 282 N.C. 674, 194 S.E.2d 153 (1973).

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), cert. denied, 409 U.S. 948, 93 S. Ct. 293, 34 L. Ed. 2d 218 (1972).

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), cert. denied, 409 U.S. 948, 93 S. Ct. 293, 34 L. Ed. 2d 218 (1972).

In an armed robbery prosecution where there is no other evidence of a weapon, and the robbery victim is not sure whether defendant actually had a weapon, it is error for the trial judge to fail to charge on the lesser offense of common-law robbery. State v. Jackson, 27 N.C. App. 675, 219 S.E.2d 816 (1975).

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); State v. Martin, 29 N.C. App. 17, 222 S.E.2d 718, cert. denied, 290 N.C. 96, 225 S.E.2d 325 (1976); State v. Dollar, 292 N.C. 344, 233 S.E.2d 521 (1977).

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); State v. Dollar, 292 N.C. 344, 233 S.E.2d 521 (1977).

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, cert. denied, 409 U.S. 948, 93 S. Ct. 293, 34 L. Ed. 2d 218 (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, cert. denied, 281 N.C. 763, 191 S.E.2d 360 (1972).

Punishment Provisions of Section Valid. — It is within the province of the General Assembly to prescribe maximum punishments which may be imposed upon those convicted of crime. It is not for courts to say that the policy judgment of the General Assembly with respect to punishment for armed robbery is wrong. Armed robbery is a crime of violence and those who take the risk must assume the consequences involved. The punishment provisions of this section are constitutionally valid. State v. Legette, 292 N.C. 44, 231 S.E.2d 896 (1977).

Discretion of Trial Judge In Imposing Sentence. — Where a sentence is within statutory limits the punishment actually imposed by the trial judge is a discretionary matter. State v. Barrow, 292 N.C. 227, 232 S.E.2d 693 (1977).

As long as a sentence is within the statutory limits, the punishment imposed by a trial judge is in his discretion. State v. Slade, 291 N.C. 275, 229 S.E.2d 921 (1976).

By virtue of subsection (a) of this section, the legislature has granted a wide discretion to the trained presiding judge who has had the opportunity to hear the facts, observe the parties to the proceeding and, after verdict, to inquire into the habits, mentality and past record of the person to be sentenced before imposing punishment within the limits of this section. The

use of this discretionary power by the trial judge is not a denial of equal protection of the laws. *State v. Jenkins*, 292 N.C. 179, 232 S.E.2d 648 (1977).

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).

A sentence which does not exceed the maximum length as stated in this section will not be considered cruel and unusual punishment. *State v. Slade*, 291 N.C. 275, 229 S.E.2d 921 (1976).

A sentence which is within the maximum authorized by statute is not cruel and unusual in a constitutional sense, unless the punishment provisions of the statute itself are unconstitutional. *State v. Barrow*, 292 N.C. 227, 232 S.E.2d 693 (1977).

In a prosecution for armed robbery, the trial court did not err in sentencing defendant to prison "for the term of not less than thirty (30) years" without specifying a minimum term, since the maximum punishment for armed robbery was 30 years (now life), and the judge set the minimum sentence at the maximum allowed by law. *State v. Lipscomb*, 27 N.C. App. 416, 219 S.E.2d 349 (1975).

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), appeal dismissed, 284 N.C. 620, 202 S.E.2d 276 (1974).

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, cert. denied, 281 N.C. 760, 191 S.E.2d 363 (1972).

Even though the crime of attempted armed robbery as defined in this section includes the crime of assault with a deadly weapon, the absence of any evidence that the defendant committed such a crime of lesser degree made it unnecessary for the court to submit to the jury as one of its permissible verdicts the crime of assault with a deadly weapon. *State v. Harris*, 27 N.C. App. 520, 219 S.E.2d 538 (1975).

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); *State v. Harris*, 27 N.C. App. 520, 219 S.E.2d 538 (1975).

Assault with a deadly weapon is a lesser included offense of the crime of robbery by firearm. *State v. Davis*, 31 N.C. App. 590, 230 S.E.2d 203 (1976).

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), cert. denied, 415 U.S. 927, 94 S. Ct. 1434, 39 L. Ed. 2d 484 (1974).

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); *State v. Harris*, 27 N.C. App. 520, 219 S.E.2d 538 (1975).

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), cert. denied, 415 U.S. 927, 94 S. Ct. 1434, 39 L. Ed. 2d 484 (1974).

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, appeal dismissed, 285 N.C. 595, 206 S.E.2d 866 (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, appeal dismissed, 285 N.C. 595, 206 S.E.2d 866 (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, appeal dismissed, 285 N.C. 595, 206 S.E.2d 866 (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, appeal dismissed, 402 U.S. 1006, 91 S. Ct. 199, 29 L. Ed. 2d 428 (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. Reeves*, 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), cert. denied, 409 U.S. 948, 93 S. Ct. 293, 34 L. Ed. 2d 218 (1972).

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, appeal dismissed, 402 U.S. 1006, 91 S. Ct. 199, 29 L. Ed. 2d 428 (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).

The trial judge is required to charge on the lesser included offense of assault with a deadly weapon only when there is evidence to support such verdict. *State v. Davis*, 31 N.C. App. 590, 230 S.E.2d 203 (1976).

In a prosecution for attempted armed robbery, the necessity for instructing the jury as to included crimes of assault with a deadly weapon and simple assault arises when and only when there is evidence from which the jury could find that such included crimes of lesser degree were committed. The presence of such evidence is the determinative factor. *State v. Sanders*, 29 N.C. App. 662, 225 S.E.2d 620 (1976).

When the State's evidence tends to show armed robbery, there is no conflicting evidence relating to elements of the offense and the only offense committed, if any, was the one charged, the court is not required to instruct on the lesser included offense of assault with a deadly

weapon. *State v. Davis*, 31 N.C. App. 590, 230 S.E.2d 203 (1976).

Common-law robbery is a lesser included offense of armed robbery. However, the necessity for instructing the jury as to a lesser included offense arises only when there is evidence to support such a verdict. *State v. Wilson*, 31 N.C. App. 323, 229 S.E.2d 314 (1976).

Refusal to charge on lesser included offenses held proper. *State v. Harmon*, 21 N.C. App. 508, 204 S.E.2d 883, cert. denied, 285 N.C. 593, 206 S.E.2d 864 (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), cert. denied, 409 U.S. 948, 93 S. Ct. 293, 34 L. Ed. 2d 218 (1972).

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, cert. denied, 285 N.C. 593, 206 S.E.2d 864 (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. Somerset*, 21 N.C. App. 272, 204 S.E.2d 206, cert. denied, 285 N.C. 594, 205 S.E.2d 725 (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), cert. denied, 282 N.C. 673, 194 S.E.2d 152 (1973).

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, appeal dismissed, 288 N.C. 246, 217 S.E.2d 670 (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. Carey*, 288 N.C. 254, 218 S.E.2d 387 (1975); *State v. Dunn*, 26 N.C. App. 475, 216 S.E.2d 412 (1975); *State v. Portee*, 28 N.C. App. 507, 221 S.E.2d 722 (1976); *State v. Artis*, 31 N.C. App. 193, 228 S.E.2d 768 (1976); *State v. Dollar*, 292 N.C. 344, 233 S.E.2d 521 (1977).

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. Sanders*, 288 N.C. 285, 218 S.E.2d 352 (1975); *State v. Jones*, 26 N.C. App. 467, 216 S.E.2d 387 (1975); *State v. Davis*, 290 N.C. 511, 227 S.E.2d 97 (1976); *State v. Gray*, 292 N.C. 270, 233 S.E.2d 905 (1977).

14-89.1. Safecracking. — (a) A person is guilty of safecracking if he unlawfully opens, enters, or attempts to open or enter a safe or vault:

- (1) By the use of explosives, drills, or tools; or
- (2) Through the use of a stolen combination, key, electronic device, or other fraudulently acquired implement or means; or
- (3) Through the use of a master key, duplicate key or device made or obtained in an unauthorized manner, stethoscope or other listening device, electronic device used for unauthorized entry in a safe or vault, or other surreptitious means; or
- (4) By the use of any other safecracking implement or means.

(b) A person is also guilty of safecracking if he unlawfully removes from its premises a safe or vault for the purpose of stealing, tampering with, or ascertaining its contents.

(c) Safecracking is a felony punishable by imprisonment for a term of not less than two nor more than 30 years. (1961, c. 653; 1973, c. 235, s. 1; 1977, c. 1106.)

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."

The 1977 amendment, effective Oct. 1, 1977, rewrote this section.

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), cert. denied, 418 U.S. 905, 94 S. Ct. 3195, 41 L. Ed. 2d 1153 (1974).

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), cert. denied, 418 U.S. 905, 94 S. Ct. 3195, 41 L. Ed. 2d 1153 (1974).

"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); *State v. Thomas*, 292 N.C. 251, 232 S.E.2d 411 (1977).

Stated in *State v. Johnson*, 7 N.C. App. 53, 171 S.E.2d 106 (1969).

Cited in *Blackledge v. Allison*, U.S. , 97 S. Ct. 1621, 52 L. Ed. 2d 136 (1977).

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), cert. denied, 283 N.C. 758, 198 S.E.2d 728 (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, cert. denied, 279 N.C. 350, 182 S.E.2d 583 (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, cert. denied, 279 N.C. 350, 182 S.E.2d 583 (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, cert. denied, 279 N.C. 350, 182 S.E.2d 583 (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), cert. denied, 283 N.C. 758, 198 S.E.2d 728 (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 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).

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, cert. denied, 287 N.C. 468, 215 S.E.2d 628 (1975); *State v. Rogers*, 30 N.C. App. 298, 226 S.E.2d 829, cert. denied, 290 N.C. 781, 229 S.E.2d 35 (1976).

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).

A false representation of a subsisting fact may be accompanied by a promise and may be considered as together constituting the false pretense, or if the false representation and the promise can be separated and the evidence discloses that the victim relied on the false

representation of fact, the promise may be disregarded and the accused may be convicted of the false representation of fact. *State v. Rogers*, 30 N.C. App. 298, 226 S.E.2d 829, cert. denied, 290 N.C. 781, 229 S.E.2d 35 (1976).

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, cert. denied, 287 N.C. 468, 215 S.E.2d 628 (1975).

Evidence Sufficient to Submit Charges to the Jury. — See *State v. Rogers*, 30 N.C. App. 298, 226 S.E.2d 829, cert. denied, 290 N.C. 781, 229 S.E.2d 35 (1976).

Applied in *State v. Simpson*, 25 N.C. App. 176, 212 S.E.2d 566 (1975).

Cited in *State v. Page*, 32 N.C. App. 478, 232 S.E.2d 460 (1977).

§ 14-107. Worthless checks. — It shall be unlawful for any person, firm or corporation, to draw, make, utter or issue and deliver to another, any check or draft on any bank or depository, for the payment of money or its equivalent, knowing at the time of the making, drawing, uttering, issuing and delivering such check or draft as aforesaid, that the maker or drawer thereof has not sufficient funds on deposit in or credit with such bank or depository with which to pay the same upon presentation.

It shall be unlawful for any person, firm or corporation to solicit or to aid and abet any other person, firm or corporation to draw, make, utter or issue and deliver to any person, firm or corporation, any check or draft on any bank or depository for the payment of money or its equivalent, being informed, knowing or having reasonable grounds for believing at the time of the soliciting or the aiding and abetting that the maker or the drawer of the check or draft has not sufficient funds on deposit in, or credit with, such bank or depository with which to pay the same upon presentation.

The word "credit" as used herein shall be construed to mean an arrangement or understanding with the bank or depository for the payment of any such check or draft.

Any person, firm or corporation violating any provision of this section shall be guilty of a misdemeanor and upon conviction shall be punished as follows:

(1) If the amount of such check or draft is not over fifty dollars (\$50.00), the punishment shall be by a fine not to exceed fifty dollars (\$50.00) or imprisonment for not more than 30 days. Provided, however, if such person has been convicted three times of violating G.S. 14-107, he shall on the fourth and all subsequent convictions be punished in the discretion of the district or superior court as for a general misdemeanor.

- (2) If the amount of such check or draft is over fifty dollars (\$50.00), the punishment shall be by a fine not to exceed five hundred dollars (\$500.00) or imprisonment for not more than six months, or both. Provided, however, if such person has been convicted three times of violating G.S. 14-107, he shall on the fourth and all subsequent convictions be punished in the discretion of the district or superior court as for a general misdemeanor.
- (3) If such check or draft is drawn upon a nonexistent account, the punishment shall be by a fine not to exceed one thousand dollars (\$1,000) or imprisonment for not more than two years, or both.
- (4) If such check or draft is drawn upon an account that has been closed by the drawer prior to time the check is drawn, the punishment shall be a fine not to exceed four hundred dollars (\$400.00) or imprisonment for not more than five months or both. (1925, c. 14; 1927, c. 62; 1929, c. 273, ss. 1, 2; 1931, cc. 63, 138; 1933, cc. 43, 64, 93, 170, 265, 362, 458; 1939, c. 346; 1949, cc. 183, 332; 1951, c. 356; 1961, c. 89; 1963, cc. 73, 547, 870; 1967, c. 49, s. 1; c. 661, s. 1; 1969, c. 157; c. 876, s. 1; cc. 909, 1014; c. 1224, s. 10; 1971, c. 243, s. 1; 1977, c. 885.)

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.

The 1971 amendment, effective Aug. 1, 1977, added subdivisions (3) and (4) to 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, Ashe, Beaufort, Caldwell, Caswell, Catawba, Chatham, Cleveland, Cumberland, Davie, Duplin, Forsyth, Gaston, Guilford, Haywood, Henderson, Hyde, Iredell, Mecklenburg, Montgomery, Orange, Pasquotank, Person, Randolph, Rockingham, Scotland, Stanly, Surry, Transylvania, Union, Vance, Wilkes and Yadkin Counties only. (1967, c. 964; 1969, cc. 292, 753; c. 1224, s. 4; 1971, cc. 125, 203, 300, 496; 1973, c. 880, s. 2; 1977, cc. 63, 144.)

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.

The first 1977 amendment made this section applicable to Beaufort, Caldwell, Cleveland, Haywood, Henderson, Hyde, Mecklenburg, Pasquotank, Scotland, Transylvania, Union and Yadkin Counties.

The second 1977 amendment, effective July 1, 1977, made this section applicable to Ashe County.

14-111.3. Making false ambulance request in Ashe, 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 Ashe, Buncombe, Duplin, Haywood and Madison. (1965, c. 976, s. 2; 1971, c. 496; 1977, c. 96.)

Editor's Note. — The 1971 amendment made this section applicable to Duplin County.

The 1977 amendment, effective July 1, 1977, made this section applicable to Ashe 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.

For an article on the civil aspects of credit card law, see 2 N.C. Cent. L.J. 43 (1970).

Cited in State v. Trollinger, 11 N.C. App. 400, 181 S.E.2d 212 (1971).

§ 14-113.9. Credit card theft.

Editor's Note. — For an article on the civil aspects of credit card law, see 2 N.C. Cent. L.J. 43 (1970).

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.

Editor's Note. — For an article on the civil aspects of credit card law, see 2 N.C. Cent. L.J. 43 (1970).

Applied in *State v. Hudson*, 11 N.C. App. 712, 182 S.E.2d 198 (1971).

§ 14-113.13. Credit card fraud.

Editor's Note. — For an article on the civil aspects of credit card law, see 2 N.C. Cent. L.J. 43 (1970).

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

§ 14-113.15. Criminal receipt of goods and services fraudulently obtained.

Editor's Note. — For an article on the civil aspects of credit card law, see 2 N.C. Cent. L.J. 43 (1970).

§ 14-113.17. Punishment and penalties.

Applied in *State v. Caudle*, 276 N.C. 550, 173 S.E.2d 778 (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. Banguess*, 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), appeal dismissed, 280 N.C. 303, 186 S.E.2d 177 (1972).

An intent to defraud is an essential element of forgery. However, it is not essential that any person be actually defrauded or that any act be done other than the fraudulent making or altering of the instrument. *State v. Williams*, 291 N.C. 442, 230 S.E.2d 515 (1976).

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).

Indictment. —

The false instrument must be as such as does, or may, tend to prejudice the right of another, and such tendency must be apparent to the court, either from the face of the writing itself, or from it, accompanied by the averment of extraneous facts, that show the tendency to injure. If the forged writing itself shows such tendency, then it will be sufficient to set it forth

in the indictment, alleging the false and fraudulent intent; but where such tendency does not so appear, the extraneous facts, necessary to make it apparent, must be averred. This is essential, so as to enable the court to see in the record, that the indictment charges a complete offense. *State v. Treadway*, 27 N.C. App. 78, 217 S.E.2d 743 (1975).

Uttering Distinct from Forgery. —

In accord with original. See *State v. Treadway*, 27 N.C. App. 78, 217 S.E.2d 743 (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); *State v. Freeman*, 28 N.C. App. 346, 220 S.E.2d 844 (1976).

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).

The essential elements of the crime of uttering a forged check are (1) the offer of a forged check to another, (2) with knowledge that the check is false, and (3) with the intent to defraud or injure another. *State v. Hill*, 31 N.C. App. 248, 229 S.E.2d 810 (1976).

Uttering Distinct from Forgery. —

In accord with original. See *State v. Treadway*, 27 N.C. App. 78, 217 S.E.2d 743 (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 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. 295, 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); *Singleton 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."

§ 14-122. Forgery of deeds, wills and certain other instruments.

Where defendant signs the name of another person to an instrument, there is no presumption of want of authority. *State v. Martin*, 30 N.C. App. 512, 227 S.E.2d 172 (1976).

Proof of Signature of Another Name to Instrument without Authority Required. — To show that the defendant signed the name of some other person to an instrument, and that he

passed such instrument as genuine, is not sufficient to establish the commission of a crime. It must still be shown that it was a false instrument, and this is not established until it is shown that the person who signed another's name did so without authority. *State v. Martin*, 30 N.C. App. 512, 227 S.E.2d 172 (1976).

SUBCHAPTER VI. CRIMINAL TRESPASS.

ARTICLE 22.

*Trespasses to Land and Fixtures.***§ 14-126. Forcible entry and detainer.**

Editor's Note. — For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

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).

Cited in State v. Davis, 291 N.C. 1, 229 S.E.2d 285 (1976).

§ 14-127. Willful 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).

Count Charging Violation of § 14-49 as

Embracing a Charge under This Section. — See State v. Bindyke, 288 N.C. 608, 220 S.E.2d 521 (1975).

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, willfully 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 Department of Transportation while in the discharge of their duties within the right-of-way or easement of the Department 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; 1977, c. 464, s. 34.)

Editor's Note. —

The 1973 amendment, effective July 1, 1973, substituted "Board of Transportation" for "State Highway Commission" and for "Commission" in the proviso.

The 1977 amendment, effective July 1, 1977, substituted "Department of Transportation" for "Board of Transportation" in two places 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 canadensis*), 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 Resources and Community Development. 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 Resources and Community Development. (1951, c. 367, s. 2; 1957, c. 334; 1969, c. 1224, s. 11; 1973, c. 1262, s. 86; 1977, c. 771, s. 4.)

Editor's Note. —

The 1973 amendment, effective July 1, 1974, substituted "Department of Natural and Economic Resources" for "Department of Conservation and Development."

The 1977 amendment substituted "Natural Resources and Community Development" for "Natural and Economic Resources."

Session Laws 1977, c. 771, s. 22, contains a severability clause.

§ 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 Resources and Community Development 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 Resources and Community Development 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; 1977, c. 771, s. 4.)

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."

The 1977 amendment substituted "Natural Resources and Community Development" for "Natural and Economic Resources."

Session Laws 1977, c. 771, s. 22, contains a severability clause.

§ 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: Repealed by Session Laws 1977, c. 887, s. 2, effective July 1, 1977.

Cross Reference. — As to littering, see § 14-399.

§ 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. Willfully 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 Resources and Community Development 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; 1977, c. 771, s. 4.)

Editor's Note. — The 1973 amendment, effective July 1, 1974, substituted "Department of Natural and Economic Resources" for "State forest service."

The 1977 amendment substituted "Natural Resources and Community Development" for "Natural and Economic Resources."

Session Laws 1977, c. 771, s. 22, contains a severability clause.

§ 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 Resources and Community Development or within 500 feet of any such protected area without first having obtained from the Secretary of the Department of Natural Resources and Community Development, 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 Resources and Community Development, 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

Resources and Community Development, 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 Resources and Community Development 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 Resources and Community Development, 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 Resources and Community Development 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 Resources and Community Development 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 Resources and Community Development, 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; 1977, c. 771, s. 4.)

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.

The 1977 amendment substituted "Natural Resources and Community Development" for "Natural and Economic Resources."

Session Laws 1977, c. 771, s. 22, contains a severability clause.

§ 14-151.1. Interfering with electric, gas or water meters; prima facie evidence of intent to alter, tamper with or bypass electric, gas or water meters; civil liability. — (a) It shall be unlawful for any unauthorized person to alter, tamper with or bypass a meter which has been installed for the purpose of measuring the use of electricity, gas or water or knowingly to use electricity, gas or water passing through any such tampered meter or use electricity, gas or water bypassing a meter provided by an electric, gas or water supplier for the purpose of measuring and registering the quantity of electricity, gas or water consumed.

(b) Any meter or service entrance facility found to have been altered, tampered with, or bypassed in a manner that would cause such meter to inaccurately measure and register the electricity, gas or water consumed or which would cause the electricity, gas or water to be diverted from the recording apparatus of the meter shall be prima facie evidence of intent to violate and of the violation of this section by the person in whose name such meter is installed or the person or persons so using or receiving the benefits of such unmetered, unregistered or diverted electricity, gas or water.

(c) Any person violating any of the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than five hundred dollars (\$500.00) or imprisoned not longer than two years, or both fined and imprisoned, in the discretion of the court.

(d) Whoever is found in a civil action to have violated any provision hereof shall be liable to the electric, gas or water supplier in triple the amount of losses and damages sustained or five hundred dollars (\$500.00), whichever is greater.

(e) Nothing in this section shall be construed to apply to licensed contractors while performing usual and ordinary services in accordance with recognized customs and standards. (1977, c. 735, s. 1.)

Editor's Note. — Session Laws 1977, c. 735, s. 2, makes this section effective Oct. 1, 1977.

§ 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. Willful 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. Locklear*, 7 N.C. App. 375, 172 S.E.2d 267 (1970); *In re Ingram*, 8 N.C. App. 266, 174 S.E.2d 89 (1970).

§ 14-160.1. Alteration, destruction or removal of permanent identification marks from personal property. — (a) It shall be unlawful for any person to alter, deface, destroy or remove the permanent serial number, manufacturer's identification plate or other permanent, distinguishing number or identification mark from any item of personal property with the intent thereby to conceal or misrepresent the identity of said item.

(b) It shall be unlawful for any person knowingly to sell, buy or be in possession of any item of personal property, not his own, on which the permanent serial number, manufacturer's identification plate or other permanent, distinguishing number or identification mark has been altered, defaced, destroyed or removed for the purpose of concealing or misrepresenting the identity of said item.

(c) A violation of any of the provisions of this section shall be a misdemeanor, punishable on conviction thereof by imprisonment not to exceed two years or by a fine not to exceed one thousand dollars (\$1,000) or both, in the discretion of the court.

(d) This section shall not in any way affect the provisions of G.S. 20-108, 20-109(a) or 20-109(b). (1977, c. 767, s. 1.)

Editor's Note. — Session Laws 1977, c. 767, s. 2, makes this section effective on Oct. 1, 1977.

§ 14-162. Removing boats. — If any person shall loose, unmoor, or turn adrift from any landing or other place wherever the same shall be, any boat, canoe, or other marine vessel, or if any person shall direct the same to be done without the consent of the owner, or the person having the lawful custody or possession of such vessel, he shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding five hundred dollars (\$500.00), imprisonment for not more than six months or both. The owner may also have his action for such injury. The penalties aforesaid shall not extend to any person who shall press any such property by public authority. (R.C., c. 14, ss. 1, 3; Code, s. 2288; 1889, c. 378; Rev., s. 3544; C. S., s. 4333; 1977, c. 729.)

Editor's Note. — The 1977 amendment rewrote the first sentence.

§ 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.

which formerly related to killing or abusing livestock not enclosed by a lawful fence.

Editor's Note. —

The 1973 amendment rewrote this section,

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, appeal dismissed, 288 N.C. 245, 217 S.E.2d 669 (1975), cert. denied, 425 U.S. 903, 96 S. Ct. 1492, 48 L. Ed. 2d 810 (1976).

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, cert. denied, 279 N.C. 512, 183 S.E.2d 688 (1971).

Definition. —

In accord with original. See State v. Wright, 27 N.C. App. 263, 218 S.E.2d 511, cert. denied, 288 N.C. 733, 220 S.E.2d 622 (1975).

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, cert. denied, 279 N.C. 512, 183 S.E.2d 688 (1971).

Scope of Section. —

This section is broad enough to include in the crime against nature other forms of the offense than sodomy and buggery. It includes all kindred acts of a bestial character whereby degraded and perverted sexual desires are sought to be gratified. *State v. Wright*, 27 N.C. App. 263, 218 S.E.2d 511, cert. denied, 288 N.C. 733, 220 S.E.2d 622 (1975).

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, cert. denied, 279 N.C. 512, 183 S.E.2d 688 (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, cert. denied, 279 N.C. 512, 183 S.E.2d 688 (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, cert. denied, 279 N.C. 512, 183 S.E.2d 688 (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, cert. denied, 279 N.C. 512, 183 S.E.2d 688 (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, cert. denied, 288 N.C. 251, 217 S.E.2d 676 (1975).

Proof of penetration, etc. —

In accord with original. See *State v. Copeland*, 11 N.C. App. 516, 181 S.E.2d 722, cert. denied, 279 N.C. 512, 183 S.E.2d 688 (1971); *State v. Wright*, 27 N.C. App. 263, 218 S.E.2d 511, cert. denied, 288 N.C. 733, 220 S.E.2d 622 (1975).

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. Best*, 13 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); *State v. Speight*, 28 N.C. App. 201, 220 S.E.2d 628 (1975); *Brown v. Brannon*, 399 F. Supp. 133 (M.D.N.C. 1975); *State v. Sharratt*, 29 N.C. App. 199, 223 S.E.2d 906 (1976).

§ 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).

Applied in *State v. Rhodes*, 290 N.C. 16, 224 S.E.2d 631 (1976).

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), cert. denied, 282 N.C. 583, 193 S.E.2d 747, vacated and remanded, 413 U.S. 913, 93 S. Ct. 3065, 37 L. Ed. 2d 1036 (1973).

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), cert. denied, 282 N.C. 583, 193 S.E.2d 747, vacated and remanded, 413 U.S. 913, 93 S. Ct. 3065, 37 L. Ed. 2d 1036 (1973).

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), aff'd, 285 N.C. 82, 203 S.E.2d 36, cert. denied, 419 U.S. 974, 95 S. Ct. 238, 42 L. Ed. 2d 188 (1974).

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), cert. denied, 282 N.C. 583, 193 S.E.2d 747, vacated and remanded, 413 U.S. 913, 93 S. Ct. 3065, 37 L. Ed. 2d 1036 (1973).

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. Bryant*, 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 conceivable 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), *aff'd*, 285 N.C. 82, 203 S.E.2d 36, cert. denied, 419 U.S. 974, 95 S. Ct. 238, 42 L. Ed. 2d 188 (1974).

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).

Positive and Negative Findings Required. — This section, in addition to requiring positive findings on the questions of offensive display of sexual conduct patently offensive to the average person, requires an additional negative finding that the material lacks serious literary, artistic, political, educational or scientific value. *State ex rel. Yeager v. Neal*, 26 N.C. App. 741, 217 S.E.2d 576 (1975).

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), cert. denied, 282 N.C. 583, 193 S.E.2d 747, vacated and remanded, 413 U.S. 913, 93 S. Ct. 3065, 37 L. Ed. 2d 1036 (1973).

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), *aff'd*, 285 N.C. 82, 203 S.E.2d 36, cert. denied, 419 U.S. 974, 95 S. Ct. 238, 42 L. Ed. 2d 188 (1974).

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), cert. denied, 282 N.C. 583, 193 S.E.2d 747, vacated and remanded, 413 U.S. 913, 93 S. Ct. 3065, 37 L. Ed. 2d 1036 (1973).

Applied in *State v. Horn*, 285 N.C. 82, 203 S.E.2d 36 (1974).

Cited in *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 G.S. 14-190.1, G.S. 14-190.3, 14-190.4 or 14-190.5 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 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.

Notwithstanding any provision of G.S. 14-190.2, an adversary determination to adjudge whether material is obscene shall not be required prior to the arrest or indictment of any person, firm or corporation for a violation of any provision of G.S. 14-190.6, 14-190.7, 14-190.8, or whether such material is sexually oriented pursuant to G.S. 14-190.10 or 14-190.11.

(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; 1977, c. 440, 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.

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).

The 1977 amendment, effective July 1, 1977, in subsection (h), deleted "a provision of" following "any violation of," "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" following "G.S. 14-190.5," and "or in the case of G.S. 14-190.10 or G.S. 14-190.11, to be sexually oriented" following "declared by the court to be obscene" in the first paragraph, inserted "or" preceding "G.S. 14-190.5" in the first paragraph, and added the second paragraph.

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.

Session Laws 1977, c. 440, s. 4, contains a severability clause.

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).

Applied in State ex rel. Yeager v. Neal, 26 N.C. App. 741, 217 S.E.2d 576 (1975).

§ 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, except this statute shall not apply to a teacher, a member of the clergy, priests, and rabbis, physician, nurse, or a librarian in the discharge of official responsibilities. (1971, c. 405, s. 1; 1977, c. 440, s. 2.)

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 1977 amendment, effective July 1, 1977, added the exception to the end of the section.

Session Laws 1977, c. 440, s. 4, contains a severability clause.

§ 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, except this statute shall not apply to a teacher, a member of the clergy, priests, and rabbis, physician, nurse, or a librarian in the discharge of official responsibilities. (1971, c. 405, s. 1; 1977, c. 440, s. 3.)

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 1977 amendment, effective July 1, 1977, added the exception to the end of the section.

Session Laws 1977, c. 440, s. 4, contains a severability clause.

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, modified on other grounds, 285 N.C. 305, 204 S.E.2d 667 (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, modified on other grounds, 285 N.C. 305, 204 S.E.2d 667 (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, modified on other grounds, 285 N.C. 305, 204 S.E.2d 667 (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, modified on other grounds, 285 N.C. 305, 204 S.E.2d 667 (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).

Cited in *Freewood Associates v. Davie County Zoning Bd. of Adjustment*, 28 N.C. App. 717, 222 S.E.2d 910 (1976).

§ 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, cert. denied, 287 N.C. 666, 216 S.E.2d 909 (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, cert. denied, 287 N.C. 666, 216 S.E.2d 909 (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, cert. denied, 279 N.C. 512, 183 S.E.2d 688 (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, cert. denied, 279 N.C. 512, 183 S.E.2d 688 (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, cert. denied, 279 N.C. 512, 183 S.E.2d 688 (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, cert. denied, 279 N.C. 512, 183 S.E.2d 688 (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, cert. denied, 279 N.C. 512, 183 S.E.2d 688 (1971).

Applied in *State v. Wells*, 31 N.C. App. 736, 230 S.E.2d 437 (1976).

§§ 14-202.2 to 14-202.9: Reserved for future codification purposes.

ARTICLE 26A.

Adult Establishments.

§ 14-202.10. Definitions. — As used in this Article:

- (1) "Adult bookstore" means a bookstore having as a preponderance of its publications books, magazines, and other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing, or relating to specified sexual activities or specified anatomical areas, as defined in this section.
- (2) "Adult establishment" means an adult bookstore, adult motion picture theater, adult mini motion picture theater, or a massage business as defined in this section.
- (3) "Adult motion picture theater" means an enclosed building with a capacity of 50 or more persons used for presenting motion pictures, a preponderance of which are distinguished or characterized by an emphasis on matter depicting, describing, or relating to specified sexual activities or specified anatomical areas, as defined in this section, for observation by patrons therein.

- (4) "Adult mini motion picture theater" means an enclosed building with a capacity for less than 50 persons used for presenting motion pictures, a preponderance of which are distinguished or characterized by an emphasis on matter depicting, describing, or relating to specified sexual activities or specified anatomical areas, as defined in this section, for observation by patrons therein.
- (5) "Massage" means the manipulation of body muscle or tissue by rubbing, stroking, kneading, or tapping, by hand or mechanical device.
- (6) "Massage business" means any establishment or business wherein massage is practiced, including establishments commonly known as health clubs, physical culture studios, massage studios, or massage parlors.
- (7) "Sexually oriented devices" means without limitation any artificial or simulated specified anatomical area or other device or paraphernalia that is designed in whole or part for specified sexual activities.
- (8) "Specified anatomical areas" means:
 - a. Less than completely and opaquely covered: (i) human genitals, pubic region, (ii) buttock, or (iii) female breast below a point immediately above the top of the areola; or
 - b. Human male genitals in a discernibly turgid state, even if completely and opaquely covered.
- (9) "Specified sexual activities" means:
 - a. Human genitals in a state of sexual stimulation or arousal;
 - b. Acts of human masturbation, sexual intercourse or sodomy; or
 - c. Fondling or other erotic touchings of human genitals, pubic regions, buttocks or female breasts. (1977, c. 987, s. 1.)

Editor's Note. — Session Laws 1977, c. 987, s. 2, makes this Article effective Jan. 1, 1978.

§ 14-202.11. Restrictions as to adult establishments. — No building, premises, structure, or other facility that contains any adult establishment shall contain any other kind of adult establishment. No building, premises, structure, or other facility in which sexually oriented devices are sold, distributed, exhibited, or contained shall contain any adult establishment. (1977, c. 987, s. 1.)

§ 14-202.12. Violations; penalties. — Any person who violates G.S. 14-202.11 shall be guilty of a misdemeanor and shall be imprisoned for a term not to exceed three months or fined an amount not to exceed three hundred dollars (\$300.00), or both, in the discretion of the court. Any person who has been previously convicted of a violation of G.S. 14-202.11, upon conviction for a second or subsequent violation of G.S. 14-202.11, shall be guilty of a misdemeanor and shall be imprisoned for a term not to exceed six months or fined an amount not to exceed five hundred dollars (\$500.00), or both, in the discretion of the court. (1977, c. 987, s. 1.)

ARTICLE 27.

Prostitution.

§ 14-203. Definition of terms.

Applied in *State v. Bethea*, 9 N.C. App. 544, 176 S.E.2d 904 (1970); *Brown v. Brannon*, 399 F. Supp. 133 (M.D.N.C. 1975).

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.

§ 14-209. Punishment for perjury.

Definition of Perjury. —

In accord with original. See *State v. Wilson*, 30 N.C. App. 149, 226 S.E.2d 518 (1976).

Law of perjury was intended to afford defendant greater protection against the chance of unjust conviction than is ordinarily afforded in prosecuting for crime. *State v. Horne*, 28 N.C. App. 475, 221 S.E.2d 715 (1976).

Materiality of False Testimony a Question of Law. — On a trial for perjury the question of the materiality of the alleged false testimony is in its nature a question of law for the court rather than of fact for the jury. *State v. Wilson*, 30 N.C. App. 149, 226 S.E.2d 518 (1976).

Circumstantial evidence of perjury alone is not sufficient. *State v. Horne*, 28 N.C. App. 475, 221 S.E.2d 715 (1976).

Corroborating Evidence. — To sustain a conviction for perjury, the falsity of the oath must be directly proved by one witness and there must be corroborating evidence of independent and supplemental character, sufficient to resolve "the dilemma of weighing [one] oath against [another]." *State v. Horne*, 28 N.C. App. 475, 221 S.E.2d 715 (1976).

In a prosecution for perjury it is required that the falsity of the oath be established by the testimony of two witnesses, or by one witness and corroborating circumstances sufficient to

turn the scales against the defendant's oath. *State v. Wilson*, 30 N.C. App. 149, 226 S.E.2d 518 (1976).

§ 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).

§ 14-211. Perjury before legislative committees. — If any person shall willfully and corruptly swear falsely to any fact material to the investigation of any matter before any committee or commission of either house of the General Assembly, he shall be subject to all the pains and penalties of willful and corrupt perjury, and, on conviction in the Superior Court of Wake County, shall be confined in the State's prison for the time prescribed by law for perjury. (1869-70, c. 5, s. 4; Code, s. 2857; Rev., s. 3611; C. S., s. 4366; 1977, c. 344, s. 4.)

Editor's Note. — The 1977 amendment, effective Aug. 1, 1977, inserted "or commission" near the middle of the section.

§ 14-214. False statement to procure benefit of insurance policy or certificate. — Any person who shall willfully 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).

Applied in *State v. Martin*, 30 N.C. App. 512, 227 S.E.2d 172 (1976); *State v. Downing*, 31 N.C. App. 743, 230 S.E.2d 581 (1976).

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), rev'd on other grounds, 278 N.C. 243, 179 S.E.2d 708 (1971).

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), appeal dismissed, 281 N.C. 761, 191 S.E.2d 363 (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), aff'd, 282 N.C. 157, 192 S.E.2d 569 (1972).

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), appeal dismissed, 281 N.C. 761, 191 S.E.2d 363 (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), cert. denied, 282 N.C. 673, 194 S.E.2d 153 (1973).

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, cert. denied, 285 N.C. 759, 209 S.E.2d 283 (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, appeal dismissed, 281 N.C. 761, 191 S.E.2d 363 (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), rev'd on other grounds, 278 N.C. 243, 179 S.E.2d 708 (1971).

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), rev'd on other grounds, 278 N.C. 243, 179 S.E.2d 708 (1971).

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); *In re Jacobs*, 33 N.C. App. 195, 234 S.E.2d 639 (1977).

§ 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.

§ 14-225.1. Picketing or parading. — Any person who, with intent to interfere with, obstruct, or impede the administration of justice, or with intent to influence any justice or judge of the General Court of Justice, juror, witness, district attorney, assistant district attorney, or court officer, in the discharge of his duty, pickets, parades, or uses any sound truck or similar device within 300 feet of an exit from any building housing any court of the General Court of Justice, or within 300 feet of any building or residence occupied or used by such justice, judge, juror, witness, district attorney, assistant district attorney, or court officer, shall upon plea or conviction be guilty of a misdemeanor and imprisoned for not more than two years or fined not more than one thousand dollars (\$1000), or both. (1977, c. 266, s. 1.)

Editor's Note. — Session Laws 1977, c. 266, s. 2, makes the act effective July 1, 1977.

§ 14-225.2. Harassment of and communication with jurors. — (a) If a person, with intent to influence the official action of another as a juror, communicates with him other than as part of the proceedings in a case, or harasses or alarms him, he is guilty of a felony punishable by fine, imprisonment up to five years, or both. Conduct directed against the juror's spouse or other relative residing in the same household with the juror constitutes conduct directed against the juror.

(b) In this section "juror" means a grand juror or a petit juror and includes a person who has been drawn or summoned to attend as a prospective juror. (1977, c. 711, s. 16.)

Editor's Note. — Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when

judgment was entered against him, except that the provisions of Article 85, 'Parole' shall not apply to persons sentenced before July 1, 1978."

Session Laws 1977, c. 711, s. 36, contains a severability clause.

§ 14-226. Intimidating or interfering with jurors and witnesses.

Amendment Effective July 1, 1978. — Session Laws 1977, c. 711, s. 16, effective July 1, 1978, will delete "juror or" in two places from the section and "jurors and" from the catchline.

Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and

applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article 85, 'Parole' shall not apply to persons sentenced before July 1, 1978."

Session Laws 1977, c. 711, s. 36, contains a severability clause.

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; participation in business transaction involving public funds. — (a) 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 or public utilities regulated under the provisions of Chapter 62 of the General Statutes in regular course of business: Provided further, that such undertaking or contracting shall be authorized by said governing board by specific resolution on which such public official shall not vote.

(b) 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.

(c) No director, board member, commissioner, or employee of any State department, agency, or institution shall directly or indirectly enter into or otherwise participate in any business transaction involving public funds with any firm, corporation, partnership, person or association which at any time during the preceding two-year period employed or otherwise had a financial association with such director, board member, commissioner or employee.

(d) The provisions of subsection (c) shall not apply to any transactions meeting the requirements of Article 3, Chapter 143 of the General Statutes or any other transaction specifically authorized by the Advisory Budget Commission.

(e) Anyone violating this section shall be guilty of a misdemeanor. (1825, c. 1269, P. R.; 1826, c. 29; R. C., c. 34, s. 38; Code, s. 1011; Rev., s. 3572; C. S., s. 4388; 1929, c. 19, s. 1; 1969, c. 1027; 1975, c. 409; 1977, cc. 240, 761.)

Local Modification. — Northampton: 1973, c. 865.

Editor's Note. —

The 1975 amendment inserted "or savings and loan associations" in the first proviso.

The first 1977 amendment inserted "or public utilities regulated under the provisions of Chapter 62 of the General Statutes" in the first proviso and added "by specific resolution on which such public official shall not vote" at the end of the second proviso in the first paragraph.

The second 1977 amendment designated the first paragraph as subsection (a) and the second paragraph as subsection (b) and added subsections (c), (d) and (e).

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 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. — (a) If any president, director, cashier, teller, clerk or agent of any corporation shall embezzle, abstract or willfully misapply any of the moneys, funds or credits of the corporation, or shall, without authority from the directors, issue or put forth any certificate of deposit, draw any order or bill of exchange, make any acceptance, assign any note, bond, draft, bill of exchange, mortgage, judgment or decree, or make any false entry in any book, report or statement of the corporation with the intent in either case to injure or defraud or to deceive any person, or if any person shall aid and abet in the doing of any of these things, he shall be guilty of a felony, and upon conviction shall be imprisoned in the State's prison for not less than four months nor more than 15 years, and likewise fined, at the discretion of the court.

(b) For purposes of this section, "person" means a natural person, association, consortium, corporation, body politic, partnership, or other group, entity, or organization. (1903, c. 275, s. 15; Rev., s. 3325; C. S., s. 4401; 1977, c. 809, ss. 1, 2.)

Editor's Note. — The 1977 amendment, effective Oct. 1, 1977, designated the provisions of this section as subsection (a), substituted "person" for "officer of the corporation" following "defraud or to deceive any" near the

middle of present subsection (a), and added subsection (b).

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.

§ 14-265: Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Editor's Note. — Session Laws 1977, c. 711, s. 34, provides: "All statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose."

Session Laws 1977, c. 711, s. 35, provides: "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 1977, c. 711, s. 36, contains a severability clause.

Session Laws 1977, c. 711, s. 39, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of Article 85, 'Parole' shall not apply to persons sentenced before July 1, 1978."

SUBCHAPTER IX. OFFENSES AGAINST THE PUBLIC PEACE.

ARTICLE 35.

Offenses against the Public Peace.

§ 14-269. **Carrying concealed weapons.** — If anyone, except when on his own premises, shall willfully and intentionally carry concealed about his person any bowie knife, dirk, dagger, sling shot, loaded cane, brass, iron or metallic knuckles, razor, pistol, gun or other deadly weapon of like kind, 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. 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 State guard when called into actual service, officers of the State, or of any county, city, or town, charged with the execution of the laws of the State, when acting in the discharge of their official duties, provided, however, full-time sworn law-enforcement officers may carry a concealed weapon when off-duty in jurisdiction where assigned if so authorized by written regulations of the law-enforcement unit, which must be filed with the clerk of court in the county where the law-enforcement unit is located, provided further, that no such regulation shall permit the carrying of a concealed weapon while the officer is consuming or under the influence of intoxicating liquor. (Code, s. 1005; Rev., s. 3708; 1917, c. 76; 1919, c. 197, s. 8; C. S., s. 4410; 1923, c. 57; Ex. Sess. 1924, c. 30; 1929, cc. 51, 224; 1947, c. 459; 1949, c. 1217; 1959, c. 1073, s. 1; 1965, c. 954, s. 1; 1969, c. 1224, s. 7; 1977, c. 616.)

Editor's Note. —

The 1977 amendment added the two provisos to the end of the section.

Concealment of the weapon must be shown.

State v. Cobb, 18 N.C. App. 221, 196 S.E.2d 521 (1973), rev'd on other grounds, 284 N.C. 573, 201 S.E.2d 878 (1974).

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), appeal dismissed, 284 N.C. 622, 201 S.E.2d 692 (1974).

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), appeal dismissed, 283 N.C. 587, 196 S.E.2d 811 (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); *State v. McZorn*, 288 N.C. 417, 219 S.E.2d 201 (1975).

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).

Applied in *In re Johnson*, 32 N.C. App. 492, 232 S.E.2d 486 (1977).

§ 14-269.3. Carrying weapons into assemblies and establishments where intoxicating liquors are sold and consumed. — (a) It shall be unlawful for any person to carry any gun, rifle, or pistol into any assembly where a fee has been charged for admission thereto, or into any establishment in which intoxicating liquors are sold and consumed. 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.

(b) This section shall not apply to the following:

- (1) A person exempted from the provisions of G.S. 14-269;
- (2) The owner or lessee of the premises or business establishment;
- (3) A person participating in the event, if he is carrying a gun, rifle, or pistol with the permission of the owner, lessee, or person or organization sponsoring the event; and
- (4) A person registered or hired as a security guard by the owner, lessee, or person or organization sponsoring the event. (1977, c. 1016, s. 1.)

Editor's Note. — Session Laws 1977, c. 1016, s. 2, makes this section effective Oct. 1, 1977.

§ 14-271. Engaging in and betting on prize fights.

Local Modification. — Cumberland: 1977, c. 437.

§ 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); *In re Johnson*, 32 N.C. App. 492, 232 S.E.2d 486 (1977).

§ 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.

§ 14-281.1. **Throwing, dropping, etc., objects at sporting events.** — It shall be unlawful for any person to throw, drop, pour, release, discharge, expose or place in an area where an athletic contest or sporting event is taking place any substance or object that shall be likely to cause injury to persons participating in or attending such contests or events or to cause damage to animals, vehicles, equipment, devices, or other things used in connection with such contests or events. Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not more than one hundred dollars (\$100.00) or imprisoned not more than 30 days, or both, in the discretion of the court. (1977, c. 772, s. 1.)

Editor's Note. — Session Laws 1977, c. 772, s. 2 makes this section effective July 1, 1977.

§ 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), *aff'd*, 277 N.C. 484, 178 S.E.2d 449 (1971).

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).

Subdivision (8) Not Essential Part of § 14-288.4(a)(4)a. — See *State v. Strickland*, 27 N.C. App. 40, 217 S.E.2d 758, cert. denied, 288 N.C. 512, 219 S.E.2d 348 (1975).

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 214 (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), aff'd, 468 F.2d 639 (4th Cir. 1972), cert. denied, 411 U.S. 920, 93 S. Ct. 1552, 36 L. Ed. 2d 314 (1973).

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), cert. denied, 411 U.S. 920, 93 S. Ct. 1552, 36 L. Ed. 2d 314 (1973).

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), aff'd, 468 F.2d 639 (4th Cir. 1972), cert. denied, 411 U.S. 920, 93 S. Ct. 1552, 36 L. Ed. 2d 314 (1973).

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 "Willfully 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, appeal dismissed, 285 N.C. 762, 208 S.E.2d 380 (1974), cert. denied, 420 U.S. 996, 95 S. Ct. 1431, 43 L. Ed. 2d 675 (1975).

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).

Constitutionality of Subsection (a)(4)a. — Subsection (a)(4)a makes it clear that a violation of the statute occurs when a person intentionally refuses to vacate any building or facility of any public or private educational institution after having been ordered to do so by the chief administrative officer of the institution or his authorized representative, and the statute is not unconstitutionally vague. *State v. Strickland*, 27 N.C. App. 40, 217 S.E.2d 758, cert. denied, 288 N.C. 512, 219 S.E.2d 348 (1975).

Legislative Guidelines Not Needed. — The validity of subsection (a)(4)a making it a misdemeanor to refuse to vacate an educational institution building after having been ordered to do so by the chief administrative officer of the institution or his representative does not depend upon the enactment by the legislature of detailed guidelines for the guidance of the specified school officials in the exercise of their responsibility to control the use of the buildings and facilities under their care. *State v. Strickland*, 27 N.C. App. 40, 217 S.E.2d 758, cert. denied, 288 N.C. 512, 219 S.E.2d 348 (1975).

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,

appeal dismissed, 285 N.C. 762, 208 S.E.2d 380 (1974), cert. denied, 420 U.S. 996, 95 S. Ct. 1431, 43 L. Ed. 2d 675 (1975).

Evidence Required. — It was necessary under this section for the State to present evidence of defendant's failure to disperse on command to do so and that the officer had reasonable ground to believe that disorderly conduct was occurring by an assemblage of three or more persons. *State v. Thomas*, 28 N.C. App. 495, 221 S.E.2d 749 (1976).

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 semiautomatic firearm capable of firing 31 rounds or more without reloading, any firearm capable of fully automatic fire, any shotgun with a barrel of less than 18 inches in length or an overall length of less than 26 inches; 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; 1977, c. 810.)

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.

The 1977 amendment rewrote subdivision (c) (3).

As the rest of the section was not changed by the amendments, 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.), cert. denied, 404 U.S. 943, 92 S. Ct. 294, 30 L. Ed. 2d 258 (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.), cert. denied, 404 U.S. 943, 92 S. Ct. 294, 30 L. Ed. 2d 258 (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.), cert. denied, 404 U.S. 943, 92 S. Ct. 294, 30 L. Ed. 2d 258 (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.), cert. denied, 404 U.S. 943, 92 S. Ct. 294, 30 L. Ed. 2d 258 (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.), cert. denied, 404 U.S. 943, 92 S. Ct. 294, 30 L. Ed. 2d 258 (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.), cert. denied, 404 U.S. 943, 92 S. Ct. 294, 30 L. Ed. 2d 258 (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.), cert. denied, 404 U.S. 943, 92 S. Ct. 294, 30 L. Ed. 2d 258 (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.), cert. denied, 404 U.S. 943, 92 S. Ct. 294, 30 L. Ed. 2d 258 (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.), cert. denied, 404 U.S. 943, 92 S. Ct. 294, 30 L. Ed. 2d 258 (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.), cert. denied, 404 U.S. 943, 92 S. Ct. 294, 30 L. Ed. 2d 258 (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.), cert. denied, 404 U.S. 943, 92 S. Ct. 294, 30 L. Ed. 2d 258 (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.), cert. denied, 404 U.S. 943, 92 S. Ct. 294, 30 L. Ed. 2d 258 (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.), cert. denied, 404 U.S. 943, 92 S. Ct. 294, 30 L. Ed. 2d 258 (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.), cert. denied, 404 U.S. 943, 92 S. Ct. 294, 30 L. Ed. 2d 258 (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.), cert. denied, 404 U.S. 943, 92 S. Ct. 294, 30 L. Ed. 2d 258 (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 214, appeal dismissed, 285 N.C. 591, 205 S.E.2d 724 (1974), cert. denied, 419 U.S. 1127, 95 S. Ct. 814, 42 L. Ed. 2d 828 (1975).

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 214, appeal dismissed, 285 N.C. 591, 205 S.E.2d 724 (1974), cert. denied, 419 U.S. 1127, 95 S. Ct. 814, 42 L. Ed. 2d 828 (1975).

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 214, appeal dismissed, 285 N.C. 591, 205 S.E.2d 724 (1974), cert. denied, 419 U.S. 1127, 95 S. Ct. 814, 42 L. Ed. 2d 828 (1975).

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 214, appeal dismissed, 285 N.C. 591, 205 S.E.2d 724 (1974), cert. denied, 419 U.S. 1127, 95 S. Ct. 814, 42 L. Ed. 2d 828 (1975).

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 214, appeal dismissed, 285 N.C. 591, 205 S.E.2d 724 (1974), cert. denied, 419 U.S. 1127, 95 S. Ct. 814, 42 L. Ed. 2d 828 (1975).

§ 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*,

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 214, appeal dismissed, 285 N.C. 591, 205 S.E.2d 724 (1974), cert. denied, 419 U.S. 1127, 95 S. Ct. 814, 42 L. Ed. 2d 828 (1975).

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 214, appeal dismissed, 285 N.C. 591, 205 S.E.2d 724 (1974), cert. denied, 419 U.S. 1127, 95 S. Ct. 814, 42 L. Ed. 2d 828 (1975).

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 214, appeal dismissed, 285 N.C. 591, 205 S.E.2d 724 (1974), cert. denied, 419 U.S. 1127, 95 S. Ct. 814, 42 L. Ed. 2d 828 (1975).

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 214, appeal dismissed, 285 N.C. 591, 205 S.E.2d 724 (1974), cert. denied, 419 U.S. 1127, 95 S. Ct. 814, 42 L. Ed. 2d 828 (1975).

19 N.C. App. 131, 198 S.E.2d 236, appeal dismissed, 284 N.C. 121, 199 S.E.2d 663 (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; Jones: 1971, c. 627; 1977, c. 157; Lincoln: 1971, c. 627; 1977, c. 66; Onslow:

1973, c. 1080; Pamlico: 1971, c. 627; 1977, c. 157; Polk: 1971, c. 627; Rutherford: 1971, c. 627; Union: 1971, c. 627; 1977, c. 157.

§ 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, cert. denied, 287 N.C. 264, 214 S.E.2d 436, 423 U.S. 894, 96 S. Ct. *193, 46 L. Ed. 2d 126 (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, cert. denied, 287 N.C. 264, 214 S.E.2d 436, 423 U.S. 894, 96 S. Ct. 193, 46 L. Ed. 2d 126 (1975).

Instruction. — In a prosecution for possession of lottery tickets, the trial court properly instructed the jury that the State had the burden of proving that the defendant knew that the pieces of paper with the numbers on them were lottery tickets, but the court erred in

instructing that, “under our law unless the defendant introduces evidence of lack of knowledge, this element may be presumed.” *State v. Mayo*, 27 N.C. App. 336, 219 S.E.2d 255 (1975).

In a prosecution for possession of certificates, tickets and orders used in the operation of a numbers lottery, where the court instructed the jury that before it could find defendant guilty of violating the statute it must find from the evidence and beyond a reasonable doubt that (1) the defendant possessed the tickets and orders and (2) that such tickets, orders and paraphernalia were used in a numbers lottery, the charge, when considered contextually as a whole, complies with the requirements of § 1-180. *State v. Roberson*, 29 N.C. App. 152, 223 S.E.2d 551 (1976).

Sufficiency of Evidence. —

In accord with 1st paragraph in original. See *State v. Roberson*, 29 N.C. App. 152, 223 S.E.2d 551 (1976).

§ 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).

Applied in *Greensboro Elks Lodge v. North Carolina Bd. of Alcoholic Control*, 27 N.C. App. 594, 220 S.E.2d 106 (1975).

§ 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 "sheriffs" and "constables" following deleted "justices of the peace" preceding "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.

§ 14-306. Slot machine or device defined. — Any machine, apparatus or device is a slot machine or device within the provisions of G.S. 14-304 through 14-309, if it is one that is adapted, or may be readily converted into one that is adapted, for use in such a way that, as a result of the insertion of any piece of money or coin or other object, such machine or device is caused to operate or may be operated in such manner that the user may receive or become entitled to receive any piece of money, credit, allowance or thing of value, or any check, slug, token or memorandum, whether of value or otherwise, or which may be exchanged for any money, credit, allowance or any thing of value, or which may be given in trade, or the user may secure additional chances or rights to use such machine, apparatus or device; or any other machine or device designed and manufactured primarily for use in connection with gambling and which machine or device is classified by the United States as requiring a federal gaming device tax stamp under applicable provisions of the Internal Revenue Code. This definition is intended to embrace all slot machines and similar devices except slot machines in which is kept any article to be purchased by depositing any coin or thing of value, and for which may be had any article of merchandise which makes the same return or returns of equal value each and every time it is operated, or any machine wherein may be seen any pictures or heard any music by depositing therein any coin or thing of value, or any slot weighing machine or any machine for making stencils by the use of contrivances operated by depositing in the machine any coin or thing of value, or any lock operated by slot wherein money or thing of value is to be deposited, where such slot machines make the same return or returns of equal value each and every time the same is operated and does not at any time it is operated offer the user or operator any additional money, credit, allowance, or thing of value, or check, slug, token or memorandum, whether of value or otherwise, which may be exchanged for money, credit, allowance or thing of value or which may be given in trade or by which the user may secure additional chances or rights to use such machine, apparatus, or device, or in the playing of which the operator does not have a chance to make varying scores or tallies.

The definition contained in the first paragraph of this section does not include, and shall not be construed as including, coin-operated machines or devices designed and manufactured for amusement and the operation of which depends in part upon the skill of the player. Included within this exception, are pinball machines and other arcade amusement devices which award a limited number of replays which are not convertible to money or other things of tangible value, and which do not require a federal gaming device tax stamp. (1937, c. 196, s. 3; 1967, c. 1219; 1977, c. 837.)

Editor's Note. —

The 1977 amendment designated provisions of the former last sentence of this section as the first sentence in the present second paragraph, and in that paragraph, substituted "The definition contained in the first paragraph of this

section does not include, and shall not be construed as including" for "This definition shall not include" and "manufactured for amusement" for "manufactured to be played for amusement only" in the first sentence and added the second sentence.

ARTICLE 39.

*Protection of Minors.***§ 14-313. Selling cigarettes to minors.**

Applicable to State Training Schools. — See Paige, Office of Youth Development, 42 opinion of Attorney General to Mr. James M. 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).

§ 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

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, cert. denied, 283 N.C. 669, 197 S.E.2d 898 (1973).

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), aff'd, 283 N.C. 242, 195 S.E.2d 300 (1973).

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), aff'd, 283 N.C. 242, 195 S.E.2d 300 (1973).

§ 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); State v. Buff, 32 N.C. App. 395, 232 S.E.2d 303 (1977).

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 44.

Regulation of Sales.

§ 14-344. **Sale of athletic contest and musical concert tickets in excess of printed price.** — It shall be unlawful for any person, firm or corporation to sell or offer for sale any ticket of admission to any musical concert, baseball, basketball, football game or other athletic contest of any kind in excess of the sale price written or printed on such ticket or tickets. Any person, firm or corporation violating any provision 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. (1941, c. 180; 1969, c. 1224, s. 8; 1977, c. 9.)

Editor's Note. —

The 1977 amendment inserted "musical concert" near the middle of the first sentence.

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. — Any person, firm or corporation who shall lend money in any manner whatsoever by note, chattel mortgage, conditional sale, or purported conditional sale or otherwise, upon any article of household or kitchen furniture, or any assignment of wages, earned or to be earned, and shall willfully:

- (1) Take, receive, reserve or charge a greater rate of interest than permitted by law, either before or after the interest may accrue; or
- (2) Refuse to give receipts for payments on interest or principal of such loan; or
- (3) Fail or refuse to surrender the note and security when the same is paid off or a new note and mortgage is given in renewal, unless such new mortgage shall state the amount still due by the old note or mortgage and that the new one is given as additional security;

shall be guilty of a misdemeanor and in addition thereto shall be subject to the provisions of G.S. 24-2. (1907, c. 110; C. S., s. 4509; 1927, c. 72; 1959, c. 195; 1977, c. 807.)

Editor's Note. —

The 1977 amendment substituted "permitted by law" for "six percent (6%)" in subdivision (1).

For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

§ 14-399. Littering. — (a) No person, firm, organization, private corporation, or governing body, agents or employees of any municipal corporation shall intentionally or recklessly throw, scatter, spill or place or intentionally or recklessly cause to be blown, scattered, spilled, thrown or placed or otherwise dispose of any litter upon any public property or private property not owned by him within this State or in the waters of this State including, but not limited to, any public highway, public park, beach, campground, forest land, recreational area, trailer park, highway, road, street or alley except:

- (1) When such property is designated by the State or political subdivision thereof for the disposal of garbage and refuse, and such person is authorized to use such property for such purpose; or
- (2) Into a litter receptacle in such a manner that the litter will be prevented from being carried away or deposited by the elements upon any part of such private or public property or waters.

(b) When litter is so blown, scattered, spilled, thrown or placed from a vehicle or watercraft, the operator thereof shall be presumed to have committed such offense.

(c) As used in this section, the word "litter" shall be defined as any rubbish, waste material, cans, refuse, garbage, trash, debris, dead animals or discarded materials of every kind and description; the word "vehicle" shall be defined as in G.S. 20-4.01(49); and the word "watercraft" shall be defined as any boat or vessel used for transport upon or across the water.

(d) A violation of this section is a misdemeanor punishable by a fine of not more than two hundred dollars (\$200.00). (1935, c. 457; 1937, c. 446; 1943, c. 543; 1951, c. 975, s. 1; 1953, cc. 387, 1011; 1955, c. 437; 1957, cc. 73, 175; 1959, c. 1173; 1971, c. 165; 1973, c. 877; 1977, c. 887, s. 1.)

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.

The 1977 amendment, effective July 1, 1977, rewrote this section.

§ 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, Columbus, 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; 1977, c. 335.)

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.

The 1977 amendment inserted "Columbus" in the list of counties in the third paragraph.

§ 14-401.6. Unlawful to possess, etc., tear gas except for certain purposes. — It shall be unlawful for any person, firm, corporation or association to possess, use, store, sell or transport within the State of North Carolina, any form of that type of gas generally known as "tear gas," or any container or device for holding or releasing the same; provided, the provisions of this section shall

not apply to the possession, use, storage, sale or transportation of such gas by or for any of the armed services of the United States or of this State, or by or for any governmental agency, or municipal and State peace officers of this State and security guards sanctioned under Chapters 74A and 74B of the General Statutes provided such security guards shall have received training according to standards prescribed by the State Bureau of Investigation, or for bona fide scientific, educational or industrial purposes, or for use in safes, vaults and depositories as a means of protection against robbery.

Any person, firm, corporation or association violating any provision 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. (1951, c. 592; 1969, c. 1224, s. 8; 1977, c. 126.)

Editor's Note. —

The 1977 amendment inserted the language beginning "and security guards" and ending

"Bureau of Investigation" near the end of the first paragraph.

§ 14-401.9. Parking vehicle in private parking space without permission.

— It shall be unlawful for any person other than the owner or lessee of a privately owned or leased parking space to park a motor or other vehicle in such private parking space without the express permission of the owner or lessee of such space; provided, that such private parking lot be clearly designated as such by a sign no smaller than 24 inches by 24 inches prominently displayed at the entrance thereto, and provided further, that the parking spaces within the lot be clearly marked by signs setting forth the name of each individual lessee or owner.

Any person violating any of the provisions of this section shall be guilty of a misdemeanor and upon conviction shall be fined not more than ten dollars (\$10.00) in the discretion of the court. (1955, c. 1019; 1977, c. 398, s. 2.)

Editor's Note. —

The 1977 amendment deleted the former second paragraph, which read: "The provisions of this section shall only

apply to parking spaces located within the corporate limits of municipalities."

§ 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.

Session Laws 1959, c. 1073, s. 4, was amended by Session Laws 1971, c. 192, which deleted Washington, and by Session Laws 1971, c. 410, which deleted Iredell, 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.

Session Laws 1959, c. 1073, s. 4, was amended by Session Laws 1977, c. 35, which deleted Avery, Bladen, and Cherokee, and by Session Laws 1977, c. 72, which deleted Davie from the list of counties.

Session Laws 1977, c. 223, provides that notwithstanding any other provisions of law, in Greene County pistol permits shall be issued by the sheriff or any deputy sheriff designated by the sheriff.

Session Laws 1977, c. 235, provides that notwithstanding any other provision of law, in Moore County pistol permits required by

§§ 14-402 and 14-409.1 shall be issued by the sheriff or any deputy sheriff designated by the sheriff.

Session Laws 1977, c. 347, effective July 1,

1977, provides that in Sampson and Caswell Counties pistol permits shall be issued by the sheriff or any deputy sheriff designated by the sheriff.

§ 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).

Board of County Commissioners without Authority to Increase Fee for Issuance of Permit. — See opinion of Attorney General to Mr. John T. Page, Jr., Attorney for Richmond County Board of Commissioners, 46 N.C.A.G. 134 (1976).

§ 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).

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.

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Avery, Bladen, and Cherokee, and by Session Laws 1977, c. 72, which deleted Davie from the list of counties.

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Session Laws 1977, c. 235, provides that notwithstanding any other provision of law, in Moore County pistol permits required by §§ 14-402 and 14-409.1 shall be issued by the sheriff or any deputy sheriff designated by the sheriff.

Session Laws 1977, c. 347, effective July 1, 1977, provides that in Sampson and Caswell Counties pistol permits shall be issued by the sheriff or any deputy sheriff designated by the sheriff.

§ 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 of any crime set out in subsection (b) of this section 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, or any weapon of mass death and destruction as defined in G.S. 14-288.8(c), within five years from the date of such conviction, or the 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) Prior convictions which cause disqualification under this section shall only include:

- (1) Felonious violations 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, or of Article 5 of Chapter 90 of the General Statutes;
- (2) Common law robbery and common law maim; and
- (3) Violations of criminal laws of other states or of the United States substantially similar to the crimes covered in subdivisions (1) and (2) which are punishable where committed by imprisonment for a term exceeding two years.

When a person is charged under this section, records of prior convictions of any offense, whether in the courts of this State, or in the courts of any other state or of the United States, shall be admissible in evidence for the purpose of proving a violation of this section. The term "conviction" is defined as a final judgment in any case in which felony punishment, or imprisonment for a term exceeding two years, as the case may be, is permissible, 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; 1977, c. 1105, 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 1977 amendment, effective Oct. 1, 1977, rewrote subsections (a) and (b).

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), rev'd on other grounds, 284 N.C. 573, 201 S.E.2d 898 (1974).

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), rev'd on other grounds, 284 N.C. 573, 201 S.E.2d 898 (1974).

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).

§ 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

October 15, 1977

I, Rufus L. Edmisten, Attorney General of North Carolina, do hereby certify that the foregoing 1977 Supplement to the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Department of Justice of the State of North Carolina.

RUFUS L. EDMISTEN
Attorney General of North Carolina

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