The Law of Arrest in North Carolina

Albert Coates

THE LAW OF ARREST IN NORTH CAROLINA

ALBERT COATES*

An arrest, said Justice Merrimon in *Lawrence v. Buxton*,[1] "is intended to serve and does serve the end of bringing the person . . . within the custody and control of the law." A person is clearly brought "within the custody and control of the law" where he is overcome with physical force; where he submits at a touching on the shoulder to the authority of the law; where he submits without even a touching after the reading of a warrant in his presence,[2] where he submits on being informed the officer has a warrant, without hearing it read or without even seeing it,[3] where he submits to the officer's authority even though the officer has no warrant.[4] To arrest a person, therefore, it is not only not necessary to bring him within the officer' hands, nor even within the officer's grasp, provided "he is within the officer's control, with power of actual seizure if necessary," as in *Journey v. Sharpe*,[5] where the officer was on horseback outside the yard fence and the person to be arrested was on the porch of her dwelling. "There must be a compulsory restraint," said Justice Gaston in *Mead v. Young*.[6] "But what is meant by compulsory restraint? . . . Is it more or less than submission to restraint without incurring the risque of personal violence and insult by resistance?"

Interesting cases arise when the officer uses no force and the person to be arrested offers no resistance. It is not enough for the officer to have a warrant with him, nor to make it known that he has a warrant with him, nor even to read the warrant to the person named therein; he must intend to execute it. And so, where the officer told *A* he had a warrant for him, suggested that *A* go with him and left without further action on *A's* refusal to go, the arrest was not complete.[7] On the other hand it is not enough for the person to be arrested to believe the officer has a warrant with him, nor to see it, nor to hear it read; he must intend to submit. And so, where the officer told *A* he had a warrant for him and touched him on the shoulder, *A* asked to see the warrant and on examining it pointed out a flaw, and the officer left without

* Professor of Law, University of North Carolina.

[1] 102 N. C. 129, 131, 8 S. E. 774 (1889).

[2] Hadley v. Tinnin, 170 N. C. 84, 86 S. E. 1017 (1915); Stancil v. Underwood, 188 N. C. 475, 124 S. E. 845 (1924).

[3] Mead v. Young, 19 N. C. 521 (1837).

[4] Martin v. Houck, 141 N. C. 317, 54 S. E. 291 (1906).

[5] 49 N. C. 166 (1856).

[6] 19 N. C. 521, 523 (1837).

[7] Lawrence v. Buxton, 102 N. C. 129, 8 S. E. 774 (1889).

further action, the arrest was not complete.[8] "Where a transaction takes its character from the intention of the parties," said Chief Justice Nash in *Journey v. Sharpe*,[8a] "this intent is a matter of fact to be submitted to the jury. . . . What is an arrest is a question of law. Whether there has been an arrest, under particular circumstances, depending on the intent, is a question of fact." There is evidence of intention to arrest when the officer tells a person he has a warrant for him and asks him if he submits;[9] where the officer informs a person he has a warrant for him and tells him to meet him at another place in a few minutes,[10] or next morning,[11] or two days later;[12] where the officer tells a person he is arresting him and that he must get somebody to go on his bond or go to jail.[13] There is evidence of intention to submit where the person sought goes with the officer;[14] where he does not go with the officer but offers to give bond if bond is required,[15] or agrees to attend trial when the case is called,[16] or agrees to meet the officer at a later time and another place,[17] or puts up a cash bond to keep from going with the officer.[18]

The arresting power has steadily shifted through the centuries from

[8] Jones v. Jones, 35 N. C. 448 (1852).
[8a] 49 N. C. 166, 168 (1856).
[9] Mead v. Young, 19 N. C. 521 (1837).
[10] Jones v. Jones, 35 N. C. 448 (1852).
[11] Martin v. Houck, 141 N. C. 317, 54 S. E. 291 (1906).
[12] Journey v. Sharpe, 49 N. C. 166 (1856).
[13] Stancil v. Underwood, 188 N. C. 475, 124 S. E. 845 (1924).
[14] Mead v. Young, 19 N. C. 521 (1837).
[15] Hadley v. Tinnin, 170 N. C. 84, 86 S. E. 1017 (1915).
[16] Journey v. Sharpe, 49 N. C. 166 (1856).
[17] Martin v. Houck, 141 N. C. 317, 54 S. E. 291 (1906).
[18] Stancil v. Underwood, 188 N. C. 475, 124 S. E. 845 (1924). In *Martin v. Houck*, 141 N. C. 317, 323, 324, 54 S. E. 291, 293 (1906) Justice Walker writes, "There was abundant evidence to show that the plaintiff had been unduly restrained of his liberty by Houck and the other defendants who were present and participated. In ordinary practice, words are sufficient to constitute an imprisonment, if they impose a restraint upon the person, and the party is accordingly restrained; for he is not obliged to incur the risk of personal violence and insult by resisting until actual violence be used. This principle is reasonable in itself, and is fully sustained by the authorities. Nor does there seem that there should be any very formal declaration of arrest. If the officer goes for the purpose of executing his warrant, has the party in his presence and power, if the party so understands it, and in consequence thereof submits, and the officer, in the execution of the warrant, takes the party before a magistrate, or receives money or property in discharge of his person, it is in law an arrest, although he did not touch any part of the body. It is not necessary to constitute false imprisonment that the person restrained of his liberty should be touched or actually arrested. If he is ordered to do or not to do the thing, to move or not to move against his own free will, if it is not left to his option to go or stay where he pleases, and force is offered or there is reasonable ground to apprehend that coercive measures will be used if he does not yield, the offense is complete upon his submission. A false imprisonment may be committed by words alone, or by acts alone, or by both, and by merely operating on the will of the individual, or by personal violence, or both. It is not necessary that the individual be confined within a prison or within walls, or that he be assaulted. It may be committed by threats."

days when every man took the law in his own hands, to the days of William the Conqueror and his sons when the law of the land called on all men to combine in associations of ten and required each one to produce his associates when charged with crime, to the days when "all persons fifteen years of age and upwards" were sworn to follow fleeing felons in the hue and cry,[19] to the beginnings of the full time police and their growing responsibility for enforcing the law. This article undertakes to outline for law enforcing officers in North Carolina (1) the powers of police officers and private persons to arrest with and without warrant for felonies and misdemeanors, (2) the force they may use in making arrests when the accused person submits, resists, flees, seeks to escape detention or avoid recapture and the extent to which they may call on private citizens for assistance, (3) their right of search and seizure incidental to arrest and otherwise.

Arrest Without Warrant for Felony

"Every sheriff, coroner, constable, officer or police, or other officer," says the North Carolina statute, "entrusted with the care and preservation of the public peace," *shall* arrest without warrant whenever he has reasonable ground to believe (1) "that any felony has been committed," or (2) "that any dangerous wound has been given," (3) that a particular person is guilty, and (4) "that such person may escape if not immediately arrested."[20] And every private person, says the statute, *may* arrest without a warrant whenever a felony has been committed in his presence and he knows or has reasonable ground to believe a particular person is guilty.[21] "It is the duty of every sworn

[19] See 1 Stephen, History of the Criminal Law of England 184, *et seq.* (1883).

[20] P. L. N. C. 1868-69, c. 178, sub c. 1, §3; N. C. Code Ann. (Michie, 1935) §4544. Statutory provisions for arrest without a warrant have undergone many changes as to the crimes for which arrest might be made. The early law, as set out in the Revised Statutes of 1837, c. 35, §2 (citing 3 Edw. 1, c. 9) provided that "whenever a felony shall be committed peace officers should pursue and arrest the offender upon information received by them." The Revised Code of 1854, c. 35, §2, added after the word "felony," "or any crime, the punishment whereof for the first or second offence is death, or any part of the punishment thereof is whipping or standing in the pillory." The statute of 1868-69 specifies "felony or larceny." The Code of 1883, §1126 adds "Or that any dangerous wound has been given." The Consolidated Statutes of 1919, §4544 omit the word "larceny."

[21] P. L. N. C. 1868-69, c. 178, sub c. 1, §6; N. C. Code Ann. (Michie, 1935) §4543. In State v. Stancill, 128 N. C. 606, 609, 38 S. E. 926, 928 (1901) the court says: "A private citizen has the right to arrest a felon, whether he is present when the felony is committed or not. When he is not present, it devolves on him to show that the felony, for which he arrested, had been committed." In Martin v. Houck, 141 N. C. 317, 321, 54 S. E. 291, 293 (1906), the court says: "We need not inquire whether the statute, in this respect, is exclusive of the common-law right of a person to arrest another who is suspected of having committed a felony, and that question is not therefore decided."

officer," said Justice Reade in *State v. Bryant*,[22] "and the privilege of every private person to prevent the commission of crime, and to arrest the felon when crime has been committed."[22a] The basic questions confronting public officer and private person are therefore: What is a felony? What constitutes reasonable ground for believing a felony has been committed?

What Is a Felony? At common law a felony was (1) any offence punishable by death or (2) any offence "to which the old English law attached the total forfeiture of lands or goods or both."[23] A crime created by statute was a felony when expressly designated as such, or impliedly so designated through the use of the word "feloniously" in creating the crime,[24] or when the crime was made punishable by death.[25] All other crimes were misdemeanors.[26]

This distinction between felonies and misdemeanors became more and more arbitrary as statutes added to the list of felonies some crimes less serious than misdemeanors, and to the list of misdemeanors some crimes more serious than some felonies.[27] In the effort to correct this condition the North Carolina legislature in 1891 defined anew the distinction between felonies and misdemeanors. "A felony," says the North Carolina statute, "is a crime which is or may be punishable by

[22] 65 N. C. 327, 328 (1871).

[22a] In State v. Roane, 13 N. C. 58, 62 (1828) a citizen awakened at night by a dog barking, got his gun, opened the door, saw the accused going from the kitchen toward the gate, called to him, and when he did not answer, shot and killed him. On affirming conviction for manslaughter the Court said: "When an individual commits a homicide on the ground of making an arrest, he must show a felony committed, if not by the person killed, at least by someone; and secondly that he made known his object—*that it was only to arrest*, and that the [accused] refused to submit, and that the killing was necessary to make the arrest."

[23] 1 BISHOP CRIM. LAW (8th ed. 1923) §615.

[24] State v. Hill, 91 N. C. 561 (1884).

[25] 1 BISHOP CRIM. LAW (8th ed. 1923) §615.

[26] Prior to 1891, writes Justice Clark, "North Carolina followed the somewhat arbitrary common law rule as to what crimes were felonies, and what were misdemeanors." State v. Mallett, 125 N. C. 718, 723, 34 S. E. 651, 652 (1899).

[27] Prior to 1868, misdemeanors were divided into two classes: "those which by reason of their heinous nature, might be punished corporally; and those that could not be so punished." The first class embraced many crimes that were "infamous and done in secrecy and malice or with deceit and intent to defraud which were punishable corporally, and after 1868 by imprisonment in the State's prison." The statute of 1891, note 28, automatically changed this class of misdemeanors into felonies. "Among those as enumerated in the REVISED CODE (of 1854), ch. 34, were accessories to felony (section 54); certain grades of arson (section 30); bribery of jurors (section 34); mismarking cattle, larceny (section 57); concealing birth of child (section 28); false pretense (section 67); forgeries (sections 64, 65, and 66); certain larcenies (sections 31 and 32); receiving stolen goods (section 56), and perjury (section 49)." State v. Lytle, 138 N. C. 738, 743, 51 S. E. 66, 68 (1905). In 1871-72, violations of town ordinances were declared to be misdemeanors. P. L. N. C. 1871-72, c. 195, §2; N. C. CODE ANN. (Michie, 1935) §4174. Prior to the enactment of this statute, disobedience to a municipal ordinance was not a crime. State v. Parker, 75 N. C. 249 (1876); School Directors v. Asheville, 137 N. C. 503, 509, 50 S. E. 279, 281 (1905).

either death or imprisonment in the State's prison. Any other crime is a misdemeanor."[28] And thus the law stands today.

Reasonable grounds of belief. In *Neal v. Joyner*[29] the Supreme Court of North Carolina considered the question of reasonable grounds for believing a felony has been committed. *A* reported that someone had broken in his house the night before and stolen a trunk containing eighty dollars. *A* later learned from the railroad section master that some person had the night before signalled the engineer at a crossing three miles from the place where the trunk was stolen, an unusual place for stopping, and had got on the train with a trunk. Thereupon *A* telegraphed the mayor of the town through which the train was passing to arrest the suspect. The Court held these facts did not constitute reasonable grounds of belief. "Except the coincidence in time no circumstance is shown to connect the plaintiff with the criminal act, or to awaken a just suspicion of his being the guilty party, nothing in his manner or conduct, nothing found in his possession but an article carried with them by all travelers going to a distant point or for a considerable absence. . . . The arrest was procured upon information wholly insufficient to warrant it, or reasonably to justify the belief of the plaintiff's guilt." In *Martin v. Houck*[30] *A* told the officer that somebody else had told him that *B* had stolen shoes from a burning store. *B* was seen wearing a pair of new shoes two weeks after the fire. The court held this was not sufficient grounds for believing a larceny had been committed to go to the jury. In *State v. Fowler,*[31] officers, who knew that there had been an epidemic of house breakings, and who were specially instructed by the chief of police "to keep a careful watch for suspicious persons on the streets because of the recent robberies," saw two men near the depot at four o'clock in the morning, hailed them, and when they fled, pursued and arrested them. The court declared that the officers were justified in making the arrest. In *State v. Blackwelder*[32] a private person asleep in his house at night heard the creaking of his garage door in the back yard, went out on the back porch and saw his garage door was open, fired his shot-gun,

[28] P. L. N. C. 1891, c. 205; N. C. CODE ANN. (Michie, 1935) §4171. In 1884, the court had rejected this classification in the absence of a statute. State v. Hill, 91 N. C. 561 (1884). Under this statute, even though a crime may be termed a misdemeanor, the type of punishment is controlling, and if the crime may be punishable by imprisonment in the State's prison, it is a felony. For example, in the REVISAL of 1905, §3615, perjury is termed a misdemeanor, but the punishment may be imprisonment for as much as ten years in the county jail or State's prison, and the crime is held to be a felony. State v. Hyman, 164 N. C. 411, 79 S. E. 284 (1913).

[29] 89 N. C. 287, 290, 291 (1883).

[30] 141 N. C. 317, 54 S. E. 291 (1906).

[31] State v. Fowler, 172 N. C. 905, 90 S. E. 408 (1916).

[32] 182 N. C. 899, 109 S. E. 644 (1921); see Brockway v. Crawford, 48 N. C. 433 (1856).

heard a car crank up and drive off down the road, followed it, and found the accused's glove and a pair of bolt nippers near the place where he overtook the accused. This was held reasonable ground for believing that the accused had attempted to take the car.

In other jurisdictions, the following facts have been held to justify an arrest for felony without a warrant: the officer knew that the governor had issued a proclamation offering a reward for the apprehension of the felon;[33] the officer had knowledge of an outstanding unexecuted warrant for the arrest of the felon;[34] the officer had received a letter from a prosecuting attorney;[35] the officer knew that a dangerous wound had been given;[36] an apparently credible fifteen year old boy pointed out the person he thought had attempted to rob him;[37] the sheriff of one county received a telephone call from the sheriff of a neighboring county, describing a stolen car;[38] an officer received a telegram from an officer in another state stating that an indicted felon had fled into second state;[39] an officer, summoned to a burglarized home, saw a man flee from the house, hide in the bushes, refusing to come out on demand;[40] a fireman, seeing a light flashing on and off and a hand moving in a dentist's office, called an officer and accompanied him to the office where they met, emerging through the open door of the office, a man who said he had come to see the dentist;[41] a person, possessing a horse answering the telegraphic description of a stolen horse, gave evasive answers when questioned as to ownership and as to where he had procured the horse.[42]

In other jurisdictions the following facts have been held not to justify an arrest for felony without a warrant: a reward notice over the signature of a private person in an unofficial publication of a foreign detective agency;[43] an anonymous telephone call not supported by other facts;[44] a telegram from a private person (officer acts at his own peril);[45] a telegram from a police officer of another state request-

[33] Eanes v. State, 6 Humph. 53 (Tenn. 1845).
[34] Smotherman v. State, 140 Ala. 168, 37 So. 376 (1904); Bourne v. Richardson, 133 Va. 441, 113 S. E. 893 (1922).
[35] Eberhart v. Murphy, 110 Wash. 158, 194 Pac. 415 (1915).
[36] Com. v. Phelps, 209 Mass. 396, 95 N. E. 868 (1911).
[37] Grace v. Forge, 183 Ky. 521, 209 S. W. 369 (1919).
[38] Colorado v. Hutchinson, 9 F. (2d) 275 (C. C. A. 8th. 1925); (1926) 24 MICH. L. REV. 712.
[39] Simmons v. Van Dyke, 138 Ind. 380, 37 N. E. 973 (1894); Burton v. N. Y. C. R. R., 147 App. Div. 557, 132 N. Y. Supp. 628 (1911).
[40] Murphey v. Murray, 74 Cal. App. 726, 241 Pac. 938 (1925).
[41] Bird v. State, 154 Miss. 512, 122 So. 529 (1929).
[42] Brish v. Carter, 98 Md. 445, 57 Atl. 210 (1904).
[43] State v. Evans, 83 Mo. App. 301 (1900).
[44] People v. Guertins, 224 Mich. 8, 194 N. W. 561 (1923).
[45] Jones v. Wilson, 119 La. 491, 44 So. 275 (1907).

ing police "to keep track of . . . two swindling commission merchants."[46]

Arrest Without Warrant for Misdemeanor

"A peace officer," said Justice Rodman in *State v. Belk*,[47] "may arrest without warrant . . . for [a misdemeanor amounting to] a breach of the peace committed in his presence" and for other misdemeanors when authorized by statute. "Every person," says the North Carolina statute,[48] "present at any riot, rout, affray or other breach of the peace, shall endeavour to suppress and prevent the same, and, if necessary for that purpose, shall arrest the offenders." The basic questions confronting public officer and private citizen are, therefore: What is a "misdemeanour amounting to a breach of the peace?" When is it "committed in his presence?" What are the "other misdemeanours" for which officers may arrest without a warrant when authorized by statute?

Breach of the Peace. Riots (unlawful assembly of three or more people, intending mutually to assist one another against lawful authority, accompanied by acts of violence),[49] *routs* (meeting of three or more persons to accomplish an unlawful act and taking steps towards carrying it out)[50] and *affrays* ("a fighting of two or more persons in a public place, . . . or publicly riding or going armed offensively to the terror and alarm of peaceful citizens")[51] are referred to in the statute as breaches of the peace for which an officer may arrest without a warrant when committed in his presence. "Other breaches of the peace," for which an officer may arrest without a warrant include such offenses as: assault and battery,[52] forcible entry and detainer if accompanied by violence or threat of violence,[53] "driving or

[46] Cunningham v. Baker, 104 Ala. 160 (1893). See Wilgus, *Arrests Without a Warrant* 22 Mich. L. Rev. 695-698 (1924).

[47] 76 N. C. 10, 13 (1877).

[48] P. L. N. C. 1868-69, c. 178, sub c. 1, §1; N. C. Code Ann. (Michie, 1935) §4542.

[49] State v. Hoffman, 199 N. C. 328, 154 S. E. 314 (1930) (crowd armed with sticks, knives and rocks, yelling and cursing officers who were attempting to replace furniture in a mill house from which strikers had removed it, assembled to prevent furniture from being moved, threw rocks at driver of furniture wagon, and beat mules; *held* to be a riot). Justice Daniel, in *State v. Stalcup*, 23 N. C. 30 at 31 (1840), defines a riot as "a tumultuous disturbance of the peace by three persons or more assembled together of their own authority with an intent to mutually assist one against all who shall oppose them, and afterwards putting the design into execution in a terrific and violent manner, whether the object in question be lawful or otherwise."

[50] 1 Bishop, Crim. Law (8th ed. 1923) §534(3). A suggested illustration is when three men meet together, to lynch or tar and feather a certain person, and start out after him. Clark and Marshall, Law of Crimes (3rd ed. 1927) §424.

[51] Battle, J., in State v. Woody, 47 N. C. 335, 337 (1855).

[52] State v. McAfee, 107 N. C. 812, 12 S. E. 435 (1890).

[53] State v. Davenport, 156 N. C. 596, 72 S. E. 7 (1911).

riding through a courthouse or crowded street . . . so as to endanger the safety of inhabitants,"[54] and other "violent and disorderly acts and threats."[55].

Officers have also been held justified in arresting without a warrant for public nuisances committed in their presence, even though the public nuisance did not amount to a breach of the peace: *public drunkenness,* as in *State v. Freeman*[56] where the person "was found lying helplessly intoxicated upon the sidewalk near the post office, a place much frequented, opposing an obstruction to all persons passing and repassing," as in *State v. McNinch*[57] where a person was lying apparently drunk and asleep in the yard behind a bar room with a hotel on one side and a boarding house on the other with some of the windows of each overlooking the yard;[58] *driving under the influence of intoxicating liquor* as in *State v. Loftin;*[59] *indecent exposure of the person in public places* as in *State v. Freeman,*[60] or *indecent exhibitions of shows begun or about to begin* as in *Brewer v. Wynne;*[61] *obscene pictures and "like offences against decency and morality."*

[54] State v. Lanier, 71 N. C. 288 (1874).

[55] State v. McAfee, 107 N. C. 812, 12 S. E. 435 (1890).

[56] 86 N. C. 683 (1882).

[57] 87 N. C. 567 (1882). In this case, two officers arrested a man for being drunk and asleep in the yard behind a bar-room; windows of a hotel and of a boarding house overlooked the yard. The officers were prosecuted for assault and false imprisonment. Justice Ashe on page 569 writes, "The [officers] justified their act of arresting the prosecutor under the common law and an ordinance of the city of Charlotte. His Honor charged the jury that the guilt of the [officers] depended upon the question whether the place where the prosecutor was arrested was a public place, and that if in order to view or see the prosecutor it was necessary for the citizens to go to the windows, then it would not be a public place. The charge is erroneous. His Honor in making it seems to have had in his mind the crime of nuisance at common law, but the ordinance of the city was evidently intended to create different offences from that. It was a police regulation, adopted not merely to secure the citizens of the city against annoyance, but to prevent the evil example of such immoral conduct.

"The ordinance embraces two offences, loud and profane swearing and public drunkenness. To make these criminal offences it is not necessary they should be committed in a public place. There is nothing in the ordinance about a 'public place.'

"His Honor did not seem to consider the difference between public drunkenness and drunkenness in a public place. If, for instance, the prosecutor had remained in Sneider's bar-room and had been seen there by several persons and was in full view of the dining-room of the hotel, only about eight steps distant, and the windows of a boarding-house on the opposite side of the small square while the guests were at dinner, and indulged in loud and profane swearing, it was a violation of the ordinance, and, according to its provisions, a misdemeanor, and the [officers] were justified by it in making the arrest." See also State v. McNinch, 90 N. C. 695 (1884).

[58] In *State v. Hunter,* 106 N. C. 796, 803, 11 S. E. 366, 369 (1890), Justice Avery says that the court in *State v. McNinch* "went to the extreme limit in sustaining the right to declare any act a nuisance that was not a nuisance at common law."

[59] 186 N. C. 205, 119 S. E. 209 (1923).

[60] 86 N. C. 683 (1882).

[61] 163 N. C. 319, 79 S. E. 629 (1913).

Committed in his presence. In *State v. McAfee*[62] an officer was informed in the night time that the accused was beating his wife and about to kill her. He went out into the road and heard persons talking in a loud tone in the darkness and as they came within forty feet, heard a blow given as with a stick, and a woman screamed. A few minutes thereafter the accused and his wife came along, the accused with a stick in his hand and cursing violently, his wife crying loudly. An officer is "unquestionably authorized to arrest without warrant one who commits . . . a breach of the peace in his presence," said Justice Avery. "If the [accused] struck his wife with the stick described by the witness at a point so near to the officer that he could distinctly hear what was said and the sound made by the blow, it would be considered in law a breach of the peace in his presence, though he could not at the time actually see the [accused] because it was too dark. . . . The reason of the law is as fully met as if he had acquired the information through his sense of sight." And this decision was followed in *State v. Blackwelder*[63] where the creaking of the garage door in the night time, heard by the owner in the house, was considered evidence of an attempt to steal a car in his presence.

In other jurisdictions the crime was committed in the officer's presence *when he saw:* the flash of a pistol at a distance in the dark, if the circumstances were such that the officer could have seen the occurrence if it had been light;[64] liquor in the possession of another person;[65] a bottle of whisky in a person's pocket;[66] a person operating a whisky still";[67] *when he heard* in a house at night quarreling, amounting to a breach of the peace;[68] swearing and cursing inside a house, indicating a disturbance;[69] screams from an upstairs room, where on investigation, it was discovered a man had been beating a woman although the beating stopped just before the officer entered;[70] guns fired on Sunday (as violating Sunday laws) although the officer could not see the offenders;[71] shots fired and on rushing to the scene of the shooting found the offender, with evidences of the crime on him, or running away as if in apparent flight;[72] *when he smelled* odor of mash, and on investigation found a still;[73] opium fumes emanating from building, and, on

[62] 107 N. C. 812, 816, 817, 12 S. E. 382 (1890).
[63] 182 N. C. 899, 109 S. E. 644 (1921).
[64] People v. Barty, 53 Mich. 493, 19 N. W. 161 (1884).
[65] Smuk v. People, 72 Colo. 97, 209 Pac. 636 (1922).
[66] Robertson v. Commonwealth, 198 Ky. 699, 249 S. W. 1010 (1923).
[67] Martin v. State, 48 S. W. (2d) 1118 (Tex. Crim. App. 1932).
[68] State v. Peters, 242 S. W. 894 (Mo. 1922).
[69] Stoehr v. Payne, 132 La. 213, 61 So. 206 (1913).
[70] Ramsey v. State, 92 Ga. 53, 17 S. E. 613 (1893); Dilger v. Commonwealth, 88 Ky. 550, 11 S. W. 651 (1889).
[71] People v. Barkas, 255 Ill. 516, 99 N. E. 698 (1912).
[72] Piedmont Hotel Co. v. Henderson, 9 Ga. App. 672, 72 S. E. 51, 55 (1911).
[73] Kelley v. United States, 61 F. (2d) 843 (C. C. A. 8th, 1932).

investigation, found a person inside smoking opium.[74] When officers by means of a mechanical instrument, a "direction finder," were able to detect and track down a radio transmitter being illegally operated in a certain building, it was held that, because of the officer's perception of the crime through the mechanical instrument, the crime was being committed in his presence.[75]

In other jurisdictions, the following facts did *not* constitute crimes committed in the officer's presence: person cursing in policeman's hearing but not heard by policeman;[76] officer, who hears "whooping and hollering" around corner of street, finding two men, not creating any disturbance, one of whom tells the officer the other had been making the noise;[77] officers within seeing and hearing distance of shootings, which amounted to a breach of the peace, but not actually seeing or hearing the shooting;[78] hearing sounds of stealing corn, while watching for thief, but not seeing who was committing theft.[79]

Authority to arrest even for a misdemeanor amounting to a breach of peace committed in the officer's presence appears to be limited to the duration of the emergency: to keep it from starting, to stop it after it starts, to keep it from starting again. The statutes authorizing public officers and private persons to arrest in these cases, said Chief Justice Merrimon in *State v. Campbell,*[80] limit the arresting power to "offences actually being perpetrated—going on to completion, or when they are imminent—about to be perpetrated." And so, there was no authority to arrest a person who had been in an affray, had his wounds dressed and was some hours later walking peaceably down the road. But in *State v. McClure,*[81] it was held that an officer had not lost his right to arrest the accused when he had walked fifty or seventy-five yards away after committing an assault on the officer.

In other jurisdictions it has been held that in order to justify an arrest without a warrant to prevent a breach of the peace, the facts must be such as would lead an officer reasonably to believe an arrest necessary to prevent an immediate breach, "as where a threat is made coupled with some overt act in attempted execution" of the threat.[82] The right to arrest for a breach of the peace without a warrant must

[74] United States v. Fisher, 38 F. (2d) 830 (D. C. Pa. 1930); (1931) 15 MINN. L. REV. 359.
[75] United States v. Harnish, 7 F. Supp. 305 (D. C. Me. 1934); (1925) 19 MINN. L. REV. 468.
[76] Smith v. State, 10 Ga. App. 36, 72 S. E. 527 (1911).
[77] People v. Johnson, 86 Mich. 175, 48 N. W. 870 (1891).
[78] Brown v. Wallis, 100 Tex. 546, 101 S. W. 1068 (1906).
[79] Gray v. Earls, 298 Mo. 116, 250 S. W. 567 (1923); see Wilgus, *Arrest Without a Warrant* (1924) 22 MICH. L. REV. 678-683.
[80] 107 N. C. 948, 953, 12 S. E. 441, 442 (1890).
[81] 166 N. C. 321, 81 S. E. 458 (1914).
[82] Quinn v. Heisel, 40 Mich. 576 (1879).

be exercised immediately. "If the officer does not make the arrest when the breach of the peace or other misdemeanor is being committed, but goes away and returns after the entire transaction is over, with no danger of its renewal, he is too late to proceed without a warrant."[83] It has been held in other jurisdictions to be too late, if the officer delays for several days,[84] or for one day,[85] or for several hours.[86]

Statutory extensions of arresting power. Special laws have from time to time extended the power of police in certain cities and towns to arrest without a warrant:[87] when *any* town ordinance is violated in the view of the officer, even when it does not amount to a breach of the peace;[88] when any ordinance violator endeavors to escape from the corporate limits;[89] when any ordinance violation is committed in the night time;[90] when any state law is violated in the presence of the officer;[91] when the officer has sufficient reason to suspect that there is gambling going on, or liquor being illegally sold, or prostitution being engaged in at a particular house, (officer may enter and arrest without a warrant);[92] when any criminal offence is committed in the mayor's jurisdiction.[93]

Other special laws have conferred miscellaneous powers to arrest without a warrant in specific cases: bank examiners may arrest without a warrant, even for past offences, any officer, agent, employee, director, stockholder or owner of any bank for violating state banking laws;[94] forest wardens within state forests may arrest "on sight without warrant" for criminal law violations with reference to real estate and forests;[95] the fisheries commissioner, the assistant commissioner and inspectors may arrest without a warrant for violations of fisheries laws in their presence;[96] game wardens may arrest for violations of the game laws committed in their presence;[97] passenger train conductors on trains and the railroad rights of way, and station agents in depots may arrest for offences committed in their presence;[98] special police

[83] 1 BISHOP, NEW CRIMINAL PROCEDURE (2nd ed. 1913) §183(6).
[84] Wiggins v. State, 14 Ga. App. 314, 80 S. E. 724 (1914).
[85] Eldridge v. Mitchell, 214 Mass. 480, 102 N. E. 69 (1913).
[86] Wahl v. Walton, 30 Minn. 506, 16 N. W. 397 (1883).
[87] Officers should consult local statutes for extensions of the arresting power in particular cities and towns.
[88] PRIV. L. N. C. 1874-75, c. 164 (Statesville).
[89] *Ibid.*
[90] PRIV. L. N. C. 1883, c. 153 (Troy). [91] PRIV. L. N. C. 1885, c. 23 (Lenoir).
[92] PRIV. L. N. C. 1891, c. 307 (Winston).
[93] PRIV. L. N. C. 1899, c. 174 (Kenansville).
[94] P. L. N. C. 1921, c. 4, §76; 1931, c. 243, §5; N. C. CODE ANN. (Michie, 1935) §223(e).
[95] P. L. N. C. 1909, c. 89; N. C. CODE ANN. (Michie, 1935) §6131.
[96] P. L. N. C. 1915, c. 84, §6; 1917, c. 290, §2; 1935, c. 118; N. C. CODE ANN. (Michie, 1935) §1885.
[97] P. L. N. C. 1927, c. 51, §21; N. C. CODE ANN. (Michie, 1935) §2141(x).
[98] P. L. N. C. 1907, c. 470, §§3, 4; N. C. CODE ANN. (Michie, 1935) §3483.

at the State hospitals, at the State school for the deaf and at Caswell training school may arrest without a warrant for city ordinance or state law violations committed in their presence on the institution's grounds;[99] any person may arrest an escaped convict;[100] any person may arrest without a warrant "upon reasonable information that the accused stands charged with a crime punishable by death or life imprisonment or ten years in the State's prison in the courts of another State."[101]

In 1917, statutes regulating motor vehicle equipment and the operation of motor vehicles on the highways, authorized any officer to arrest, within the limits of his jurisdiction, "any person known personally to any such officer, or upon the sworn information of a credible witness, to have violated any of the" motor vehicle laws.[102] In 1935, highway patrolmen were further authorized to arrest anywhere in the state without a warrant, "any person who in the presence of [the] officer is engaged in the violation of any" of the motor vehicle laws, "or of laws with respect to the protection of the highways of the State."[103]

Arrest With Warrant

The practice of granting warrants for arrests came long after the practice of arrests without warrants was under way. Sheriffs, constables and justices of the peace, says Stephen, were authorized to raise the hue and cry after fleeing criminals. "If offenders were to be followed from township to township, the different constables of each being required to join, a written authority from a known public officer like a justice of the peace would be a great convenience. The phrase 'grant a hue and cry' was apparently in common use in the seventeenth century for granting a warrant, but the granting of warrants was afterwards recognized by various statutes."[103a]

[99] P. L. N. C. 1899, c. 1, §55; 1901, c. 627; 1921, c. 207; N. C. Code Ann. (Michie, 1935) §6181.

[100] P. L. N. C. 1925, c. 163; N. C. Code Ann. (Michie, 1935) §7707(a); P. L. N. C. 1933, c. 172, §21; N. C. Code Ann. (Michie, 1935) §7748(q). In *State v. Stancill*, 128 N. C. 606, 38 S. E. 926 (1901) the superintendent of a prison camp, without warrant, in the effort to arrest a convict who had escaped from the prison camp ten years before, shot and killed him and was convicted of manslaughter. In affirming the conviction Chief Justice Furches said that the right existed to arrest an escaped convict where the convict knew he was superintendent. But here he did not know it and the superintendent had no more right to make the arrest than any private citizen. The court said the superintendent was not a peace officer in the meaning of the statute. Justices Cook and Clark dissented.

[101] P. L. N. C. 1931, c. 124, §13; N. C. Code Ann. (Michie, 1935) §4556(m). See footnote 140, *infra*, for laws providing for issuance of warrants for the arrest of fugitives from other states.

[102] P. L. N. C. 1917, c. 140, §22; N. C. Code Ann. (Michie, 1935) §2600.

[103] P. L. N. C. 1935, c. 324, §3; N. C. Code Ann. (Michie, 1935) §3846(000). See P. L. N. C. 1927, c. 122, §3; 1933, c. 214, §10; 1935, c. 324, §7; N. C. Code Ann. (Michie, 1935) §2621(3).

[103a] 1 Stephen, History of the Criminal Law of England (1883) 190.

Who may issue warrants. "The following persons respectively," says the North Carolina statute, "have power to issue process: . . . the chief justice and the associate justices of the supreme court, the judges of the superior court, judges of criminal courts, presiding officers of inferior courts, justices of the peace, mayors of cities, or other chief officers of incorporated towns."[104] By judicial decision this statute includes a mayor *pro tem.*[105] To these have been added by special statutes many other officers empowered to hear complaints and issue warrants in various inferior courts: recorders, vice recorders, presiding justices of the courts, clerks and deputy clerks of court.[106]

Requisites of Warrant

In writing. "The law requires a warrant in writing," said the Court in *Lutterloh v. Powell*[107] "that the officer may be directed precisely what to do, that he may know how far he ought to go, and that he may produce it in his justification when questioned for what he has done

[104] P. L. N. C. 1868-69, c. 178, sub c. 3, §1; N. C. Code Ann. (Michie, 1935) §4522.

[105] State v. Thomas, 141 N. C. 791, 53 S. E. 522 (1906).

[106] The following persons are authorized to hear complaints in various inferior courts:

(1) Municipal Recorders' Courts: clerk of the court. P. L. N. C. 1919, c. 277; N. C. Code Ann. (Michie, 1935) §1553. Recorder, P. L. N. C. 1919, c. 157; N. C. Code Ann. (Michie, 1935) §1549.

(2) County Recorders' Courts: clerk or deputy clerk of superior court, recorder, or any justice of the peace of the county. P. L. N. C. 1919, c. 277, §30; 1921, c. 110, §6; N. C. Code Ann. (Michie, 1935) §1571.

(3) General County Courts: clerk of superior court (who is *ex officio* clerk of General County Court), or any deputy clerk. P. L. N. C. 1923, c. 216, §4; 1931, c. 233; N. C. Code Ann. (Michie, 1935) §1608(j).

(4) Domestic Relations Court: There is no statutory provision referring specifically to issuance of process, but a statute indicates that the same persons who would issue process in other courts having jurisdiction of the offenses of which the domestic relations court is given jurisdiction, would be authorized to issue process for this court, and hence hear complaints. P. L. N. C. 1929, c. 343, §6; N. C. Code Ann. (Michie, 1935) §1461(h).

(5) District County Courts: the several clerks of the superior court of the several counties of the district are, by statute, delegated the same duties as are set forth in the Code, section 1608(j) (above) one of which is the issuance of process. P. L. N. C. 1931, c. 70; N. C. Code Ann. (Michie, 1935), §1608(dd).

(6) County Criminal Courts: any justice of the peace of the county or mayor of any incorporated town. P. L. N. C. 1931, c. 89, §16; N. C. Code Ann. (Michie, 1935) §1608(16). Or, the "clerk of the county," P. L. N. C. 1931, c. 89, §12; N. C. Code Ann. (Michie, 1935) §1603(12).

There is also a provision that a warrant issuing from a recorder's court or other court inferior to the superior court, except justices of the peace, may be signed by the recorder, vice-recorder, or presiding justice of the court, or by the clerk of the court or deputy clerk, if any. The inference is that any of these persons would have authority to entertain the complaint. P. L. N. C. 1919, c. 277, §12; 1919, c. 157; N. C. Code Ann. (Michie, 1935) §1549.

There are many public-local laws and municipal ordinances relating to the issuance of process, and designating persons other than those listed above as authorized to hear complaints.

[107] 2 N. C. 395, 396 (1796).

under it. . . . For the benefit of the citizen, therefore, that he may at all times be able to call upon the officer to produce his authority, and to see precisely what it was, the law established the necessity of a written warrant." Warrants may issue at any time.[108]

In the name of the State. A warrant for the arrest of a person charged with crime issues in the name of the State. In *Ellis v. Gee*[109] a warrant not issuing in the name of the State was held invalid, and in *State v. Peters*[110] where the warrant was headed "State and City of Greensboro," the words "and City of Greensboro" were stricken out as surplusage.

To designated officers. A warrant is issued to a designated person—usually a regular officer but sometimes to a person specially deputized for the purpose as in *State v. Garrett.*[111] A warrant was held invalid in *Ellis v. Gee* for failure to designate a particular person to make the arrest.

To take named persons: "General warrants," says the Constitution of North Carolina,[112] "whereby any officer or messenger may be commanded . . . to seize any person or persons not named, whose offence is not particularly described and supported by evidence are dangerous to liberty and ought not to be granted." Pursuant to this constitutional provision the North Carolina statute requires "a proper warrant" to recite the accusation, name the person accused and command that he be brought before a magistrate.[113] And Justice Hoke in *Brewer v. Wynne*[114] says: "Judicial warrants, general in terms and unsupported by preliminary oath or sworn evidence and for conduct not committed in the immediate presence of the magistrate, are not recognized in the law of this country."

Under seal. "Though it seems recently to be thought sufficient by some if the warrant be in writing and under the hand of the justice" said Chief Justice Ruffin in *Welch v. Scott,*[115] "yet so many of the older and most respectable authorities lay it down positively that a seal is necessary to a warrant for a criminal charge that we are obliged to consider it established law." This conclusion was affirmed in *State v. Worley*[116] where Justice Nash said: "If there be no seal, the precept is void and offers no protection to the officer attempting to execute it; and if its execution is resisted by the defendant he is guilty of no offence against the law."

[108] See N. C. CODE ANN. (Michie, 1935) §§4522-4527.
[109] 5 N. C. 446 (1810).
[110] 107 N. C. 876, 12 S. E. 74 (1890).
[111] 60 N. C. 144 (1863).
[112] ART. I, §15.
[113] P. L. N. C. 1868-69, c. 178, sub c. 3, §3; N. C. CODE ANN. (Michie, 1935) §4524.
[114] 163 N. C. 319, 325, 79 S. E. 629, 631 (1913).
[115] 27 N. C. 72, 75 (1844).
[116] 33 N. C. 242, 243 (1850).

The statute of 1868-69 provides that a magistrate may issue a warrant "with or without seal."[117] This represents the last stage in the development of the law on this point.

Super visum or on oath. "A magistrate may grant a warrant *super visum,*" said Chief Justice Ruffin in *Welch v. Scott.* "But except in that case it is his duty, before issuing a warrant to require evidence on oath amounting to a direct charge or a strong suspicion of guilt."[118] And this was affirmed in *State v. Bryson.*[119] While the testimony taken by the magistrate must be on oath, it need not be in writing, "but it would be safest for the magistrate in every case," said Justice Ashe in *State v. Bryson,* "for the purpose of his own protection, to take and preserve a written memorial of the evidence."

Contents of warrant. The North Carolina statute provides that when a complaint of a criminal offence is made to a magistrate on oath, he "shall issue a proper warrant reciting the accusation. . . ."[120] "What we understand is meant by 'reciting the accusation,'" said Justice Ashe in *State v. Bryson,*[120a] "is not a *verbatim* recital of the words of the affidavit or the evidence, but a plain, brief narrative of the facts disclosed by the evidence, showing a violation of the criminal law."

Warrants for arrest and warrants for trial. The court draws a distinction between warrants covering crimes for which the issuing magistrate can only bind over and warrants covering crimes for which the magistrate may try. In the first class of cases he needs only to find probable cause of guilt; in the second class of cases he must find guilty or not guilty. More particularity is therefore required in the second class of warrants. And where the warrant charged "violation of one of the ordinances of the town of Hendersonville" it was held invalid for failure to "state facts and circumstances constituting the offence with such certainty that the defendant may be enabled to determine the species of the offence with which he is charged, in order that he may be able to prepare his defence, and that the court may be in no doubt as to the judgment it should pronounce if the defendant be convicted."[121]

The officer was protected in *State v. Jones*[122] in serving a warrant, for the arrest of the accused for larceny, omitting the word "felonious" and the allegation of ownership of the property charged to have been

[117] P. L. N. C. 1868-69, c. 178, sub c. 3, §3; N. C. CODE ANN. (Michie, 1935) §4524.
[118] 27 N. C. 72, 76 (1844). See P. L. N. C. 1868-69, c. 178, sub c. 3, §2; N. C. CODE ANN. (Michie, 1935) §4523.
[119] 84 N. C. 780, 782 (1881).
[120] P. L. N. C. 1868-69, c. 178, sub c. 3, §3; N. C. CODE ANN. (Michie, 1935) §4524.
[120a] 84 N. C. 780, 782 (1881).
[121] Hendersonville v. McMinn, 82 N. C. 533 (1880).
[122] 88 N. C. 672 (1883).

stolen. These omissions would have been fatal defects in an indictment for trial but were not fatal in a warrant for arrest, and the accused had no right to resist. The officer was again protected in *State v. Gupton*[123] in serving a warrant for the arrest of the accused for assault and battery, omitting the name of the person on whom the assault was made. This omission would have been fatal in an indictment for trial, but not in a warrant for arrest.

The officer may be protected in serving a warrant in some cases where the magistrate is not protected in issuing it. In *Welch v. Scott*[124] the warrant was not issued on the magistrate's own view or on oath. "There is no doubt that an innocent person arrested [on such a warrant]," said Chief Justice Ruffin, "would have an action against the magistrate. . . . But where the warrant purports to be for a matter within the jurisdiction of the [magistrate] the officer is obliged to execute it and of course must be justified by it. He cannot inquire upon what evidence the judicial officer proceeded or whether he committed an error or irregularity in his decision." On this same theory, an officer was convicted of a misdemeanor in failing to serve a warrant in *State v. Ferguson*[125] even though it was issued neither on view nor on oath. "No inquiry is admissible into the circumstances on which [the warrant] was issued," said Chief Justice Smith in *State v. James*[126] in protecting an officer serving a warrant based on a false affidavit.

But the officer is not protected in serving a warrant covering a crime beyond the jurisdiction of the magistrate issuing it as in *State v. McDonald*,[127] where the officer was convicted of forcible trespass in serving such a warrant. "In issuing such a warrant," said Justice Daniel, "[the magistrate] exceeded his jurisdiction, therefore it was void; and the officer was bound to know it was void and would be no justification to him if he executed it. The officer is not bound to know whether a warrant, which upon its face was professedly within the jurisdiction of a [magistrate] had been issued regularly or not. But if from what is stated on the face of the warrant it appears that the [magistrate] has exceeded his jurisdiction, the officer is bound to know that such a warrant is void and will be no justification for his acting under it; and if he executes it he does so at his peril." The same rule applies when the ordinance under which the officer arrests without a warrant is later declared unconstitutional as in *State v. Hunter*.[128] "Policemen must determine at their peril," said Justice Avery, "preliminary to proceeding without a warrant, whether a valid ordinance has been

[123] 166 N. C. 257, 80 S. E. 989 (1914).
[124] 27 N. C. 72, 76 (1844).
[125] 76 N. C. 197 (1877).
[126] 80 N. C. 371, 372 (1879).
[127] 14 N. C. 469, 471 (1832).
[128] 106 N. C. 796, 802, 11 S. E. 366, 369 (1890).

violated." The court held likewise in *Rhodes v. Collins*[129] where the warrant covered conduct which was not a crime.[130]

Duty to show warrant or other authority on arrest. The officer should make plain the authority on which he acts, whether he arrests with or without warrant. "If the officer be a known officer of the district in which he is acting," said the Court in *State v. Curtis*,[131] "he need not show his warrant when he makes the arrest; but if he is an officer appointed for a special purpose, he ought to show his warrant if demanded." In *State v. Garrett*[132] a citizen, deputized as a special officer to arrest the accused, told him he had a warrant for him. The accused asked to see it or hear it read but the officer refused, called on the accused to submit and found it necessary to shoot him in order to overcome his resistance to arrest. "One who is not a known officer," said Chief Justice Pearson, "ought to show his warrant, and read it, if required, but it would seem that this duty is not so imperative as that a neglect of it will make him a trespasser *ab initio*, where there is proof that the party, subject to be arrested, had notice of the warrant, and was fully aware of its contents, and had made up his mind to resist its execution at all hazards." In *State v. Rollins*[133] the following charge was held correct: "He must, unless he is a known officer, notify the person that he is an officer and has authority, and if he fails to do so, especially upon demand, then the arrest is illegal and may be lawfully resisted by the party or by third persons." This was affirmed in *State v. Rogers*:[134] "The right to make an arrest without a warrant imposes upon the officer the duty to make himself known as such at the time."

In *State v. Dula*,[135] a specially deputized officer with process in his possession, failed to show his warrant, but merely announced he was an officer. The accused was convicted of assault and battery with a deadly weapon for advancing on the officer with an axe, because the fact that the officer had previously served process on the defendant was evidence that the defendant knew he was an officer. In *State v. Beal*,[136] an officer who had left his warrant at home, one-half a mile

[129] 198 N. C. 23, 150 S. E. 492 (1929).

[130] The statutes provide: "Any city prosecuting attorney, any sheriff, police officer, or constable, shall be removed from office by the judge of the superior court upon charges made in writing, and hearing thereunder, for the following cause: first, for willful or habitual neglect or refusal to perform the duties of his office; second, for willful misconduct or maladministration in office; third, for corruption; fourth, for extortion; fifth, upon conviction of a felony; sixth, for intoxication, or upon conviction of being intoxicated. P. L. N. C. 1919, c. 288; PUB. LOC. 1913, c. 761, §20; N. C. CODE ANN. (Michie, 1935) §3208. For discussion of this statute, see *State v. Hamme*, 180 N. C. 684, 104 S. E. 174 (1920).

[131] 2 N. C. 471 (1797).

[132] 60 N. C. 144, 150 (1863).

[133] 113 N. C. 722, 18 S. E. 394 (1893).

[134] 166 N. C. 388, 389, 390, 81 S. E. 999, 1000 (1914).

[135] 100 N. C. 423, 6 S. E. 89 (1888).

[136] 170 N. C. 764, 87 S. E. 416 (1915).

away, arrested the accused, who knew him to be an officer and submitted. As the officer and accused walked along, the accused's brother approached, demanded that the officer show his warrant, and on his failure to do so, knocked him down with a rock. Since the accused had no right to demand the warrant, the brother was in no better position, and was guilty of assault and battery.

In *State v. Kirby*[137] an officer had valid and invalid warrants in his possession at the time he arrested the accused. He was indicted for assault and battery and false imprisonment and convicted on a charge by the trial judge that if the arrest was made on the valid warrant the officer was justified and not if on the invalid warrant. On appeal this was held error. "If a known officer," said Justice Gaston, "who has two warrants in his hands, the one legal and the other illegal, declare at the time of the arrest that he makes the arrest by virtue of the illegal warrant, that is not a false imprisonment, for the lawfulness of the arrest does not depend on what he declares but on the sufficiency of the authority which he then has." In *Meeds v. Carver*,[138] where a deputy sheriff arrested the accused on an invalid process, he was held not liable for false imprisonment because there was a valid process in the sheriff's hands which justified the deputy, although both the deputy and the accused were ignorant of the existence of that process.

Fugitives from other states. The laws of 1868-69 provide that a warrant shall be issued on satisfactory information that a fugitive, or any other person, in this state, has committed in any other state an offense punishable by death or by imprisonment for one year or more in a state prison. The arrested person may be committed to jail for six months, unless sooner demanded by the other state. If no demand is made within six months, the fugitive will be released.[139]

[137] 24 N. C. 201, 203 (1842).

[138] 30 N. C. 298 (1848). In *State v. Elrod*, 28 N. C. 250 (1846), an officer indicted for seizing a mare which he claimed as his father's property, was held to be not guilty because he also had an execution to levy. Justice Daniel at p. 251 said, "It is not what [the officer] declares, but the authority which he has, that is his justification."

[139] P. L. N. C. 1868-69, 178 sub c. 3, §34; 1895, c. 103; N. C. CODE ANN. (Michie, 1935) §4550. A similar statute was enacted in 1810, LAWS N. C. 1810, c. 786, §12 (Martin Compilation). Crimes for which a fugitive could be arrested under this early statute included felonies and even misdemeanors punishable by whipping, branding or standing in the pillory. The statute of 1868-69, as well as the earlier statute, was limited in application to "fugitives." A North Carolinian, going to Philadelphia, by false pretenses persuading a company to ship goods to North Carolina, and returning to North Carolina before the goods were shipped, was held to be a fugitive from Pennsylvania. *In re* Sultan, 115 N. C. 57, 20 S. E. 375 (1894); but in *State v. Hall*, 115 N. C. 811, 20 S. E. 729 (1894), a person standing in North Carolina and shooting a man in Tennessee was held not to be a fugitive from Tennessee. The following year, the Legislature amended the statute to cover such cases by adding after the word "fugitive" the phrase, "or

Under the provisions of the extradition laws enacted in 1931,[140] a warrant will be issued on the sworn complaint "of any credible person . . . or [on] complaint made . . . setting forth on the affidavit of any credible person in another state," that a crime has been committed in the other state, that the accused has been charged with it, has fled from that state, and is believed to have been found in this state.

Force Used in Arrest, Detention, Recapture

An officer or private person may use all force necessary to make a lawful arrest with or without warrant but no more. This topic will be discussed in situations (1) where the accused submits, (2) where the accused resists, (3) where the accused flees.

When the accused submits. When no force is necessary none may be used. In *State v. Belk*[141] an officer arrested the accused for a misdemeanor. The accused submitted without resistance. The officer, having the accused in his custody and control, hit him over the head with his billy. The accused thereupon gave the officer a violent shove and was charged with assault on an officer. "If there is no attempt to escape," said Justice Rodman, "and no forcible resistance, it is an excess of authority and a criminal offence which may be called an outrage in the officer to inflict any blow or other violence upon his prisoner. The prisoner is justified in using any force, not excessive, in defending himself from such unauthorized assault."

When the accused resists. An officer may use all the force necessary to overcome resistance to a lawful arrest. In *State v. Dunning*[142] a warrant was sworn out for the arrest of the accused for disorderly conduct. The officer took the warrant, entered the store where the accused was sitting by the stove, walked within ten feet of him and said, "I have a warrant for you; consider yourself under arrest." The accused got up with an open knife in his hand and said, "Damn you and your warrant too; take your hand off of your gun." These salutations were repeated by both sides and the accused then advanced toward the officer a step or two with the open knife in his hand drawn

any other person." An arrest may not be made under this statute without a warrant, it was held in *State v. Shelton,* 79 N. C. 605 (1878) where several persons, shooting an alleged fugitive they were attempting to arrest without a warrant, were held guilty of assault and battery. Further provisions of this law provide that the committing magistrate must notify the Governor of this State immediately on commitment, and he in turn is directed to notify the Governor of the State (if the District of Columbia, the President) from which the fugitive is supposed to have fled, P. L. N. C. 1868-69, c. 178, sub c. 3, §§35. 36; N. C. Code Ann. (Michie, 1935) §§4551, 4552.

[140] P. L. N. C., c. 124, §12; N. C. Code Ann. (Michie, 1935) §4556(1). For arrest of fugitives from other states without a warrant in certain cases, see footnote 101, *supra.*

[141] 76 N. C. 11, 14 (1877).

[142] 177 N. C. 559, 563, 98 S. E. 530, 532 (1919).

back for striking. The officer shot and wounded the accused and was indicted for assault with a deadly weapon. There was an open door behind the officer who could have retreated in safety if he had desired to do so. On these facts the trial judge charged the jury that the officer was guilty. On appeal this was held incorrect. It was "both his legal right and official duty," said Justice Hoke, "to proceed according to the exigency of his writ . . . and to use the force necessary to overcome resistance to the extent of taking life if that is required." This doctrine was first announced in North Carolina in *State v. Garrett*[143] where a person charged with a misdemeanor was killed while resisting an officer's efforts to make a lawful arrest. There, as in *State v. Dunning,* the officer could have retired in safety had he desired to do so, and the trial judge charged the jury that the officer had no "authority . . . to take away life by the use of a deadly weapon in order to execute warrants" for a misdemeanor. And this was held to be error. The trial judge "ought to have instructed the jury," said Chief Justice Pearson, that as the [accused] had put himself in resistance to the officer and his guard, they were not only authorized but were bound to use such a degree of force as was necessary in order to execute the warrants and were entitled to a verdict of acquittal on the ground that the homicide was justifiable if no unnecessary violence had been used. . . . The warrant must be executed peaceably if you can, forcibly if you must." This doctrine was reaffirmed on similar facts in *State v. Horner*[144] and in *State v. Durham*[145] where the accused was held guilty of murder for killing an officer who was seeking under a lawful warrant to arrest him for a misdemeanor.

In *State v. Pugh*[146] an officer without a warrant undertook to stop a fight by taking the accused by the shoulder and telling him to consider himself under arrest. The accused "cast his eye" at the officer but kept on fighting and was in the act of striking his adversary when the officer hit him over the head with his billy. The officer was indicted for assault and battery and the trial judge charged that on these facts he was guilty "because the [accused] offered no resistance to the officer and there was no necessity for the blow." On appeal, the Supreme Court held this charge was incorrect; that it was the duty of the officer "to interfere and suppress the fight"; that refusal to stop fighting at the officer's command and while the officer had hold of him was "evidence of resistance to the officer and of the necessity to exercise further force to suppress further violence."

Where the accused flees. An officer may not shoot in order to arrest a fleeing misdemeanant. He is guilty of an assault if he shoots and

[143] 60 N. C. 149 (1863).
[144] 139 N. C. 603, 52 S. E. 136 (1905).
[145] 141 N. C. 741, 53 S. E. 720 (1906).
[146] 101 N. C. 737, 7 S. E. 757 (1888).

misses, as in *State v. Sigman*[147] where the officer shot at a person fleeing from arrest for assault. He is guilty of assault and battery if he shoots and hits, as in *Nichols v. Bradshaw*[148] where the officer shot a person fleeing from arrest for operating a still. He is guilty of manslaughter at least if he shoots and kills and of murder if the killing is intentional. A misdemeanant fleeing to avoid arrest is shielded, said Justice Avery in *State v. Sigman,*[148a] "by the merciful rule which forbids the risk of human life or the shedding of blood in order to bring to justice one who is charged with so trivial an offence. . . . The law does not justify killing one accused of a misdemeanor in order merely to stop his flight, and we cannot concur in any view of the law that might be construed to justify such careless handling of guns or pistols by officers armed with criminal process merely because they can satisfy a jury that at the moment of firing they did not intend to hit one fleeing from arrest on a charge of misdemeanour."

Nor may one shoot a person fleeing from arrest for a minor felony, as in *State v. Bryant*[149] where a private person shot the accused fleeing from arrest for the theft of hogs. "The powers of arresting and the means used must be enlarged or modified by the character of the felony," said Justice Reade. "Extreme measures which might be resorted to in capital felonies would shock us if resorted to in inferior felonies. But in any case where extreme measures are resorted to in making arrests, it must appear that they were necessary and that the felon could not be otherwise taken. It should be noted also that the cases where extreme measures have been justified have usually been cases where the felon has actually resisted. . . . There is nothing in the case to show even a probability that if the felon escaped then, he could not be arrested at some other time or place. So there was no necessity to kill; and if the defendant had killed he would have been guilty of manslaughter at the least."

The different standards of force permissible in overcoming the resistance and the flight of a fleeing criminal are explained by Justice Reade in *State v. Bryant;*[149a] "In case of resistance and conflict the resistance must be overcome then and there, because not only is the arrest of the felon involved, but the safety of him who is rightfully making the arrest. But ordinarily there is not the same urgency in case of flight, for, although he be not arrested then and there, yet he may be arrested at another time and place. So it would seem that, at any rate, there ought to be pursuit, or a certainty of escape, before killing

[147] 106 N. C. 728, 11 S. E. 520 (1890).
[148] 195 N. C. 763, 143 S. E. 469 (1928).
[148a] 106 N. C. 728, 732, 11 S. E. 520, 521 (1890).
[149] 65 N. C. 327, 328, 329 (1871). [149a] *Id.* at 329.

could be justified; else how does it appear that he 'could not be otherwise arrested?' "

These different standards make it necessary to distinguish between resistance and flight: In *State v. Garrett,* a citizen, deputized by the sheriff, went to arrest the accused for a misdemeanor, and notified him he had warrants for his arrest, but the accused having his gun in his hands refused to submit. The deputy decided that discretion was the better part of valor and retreated, but returned next day with eighteen assistants. The accused came out to meet them with his gun, accompanied by his wife with an axe, and his daughter with a butcher knife. The accused began walking backward, gun in hand. His wife called out to the deputy and his assistants, "Don't shoot," to which the deputy replied, "If he won't shoot, I won't." Guns were pointed several times by both sides. As the accused, gun still in hand but not pointed, started to get over a fence, the deputy shot and killed him. Was he resisting?—if so, the officer might be justified. Was he fleeing?—if so, the officer would not be justified. The fact that he had started to cross the fence might be evidence that he had abandoned resistance and turned to flight, or it might be evidence that he planned to renew resistance from cover and to make a running flight, in which case, said the Court,[149b] "The officer and his men were not bound to risk their lives by rushing on a desperate man, who still kept his gun in his hands." It was for the jury to decide. Similar situations existed in *State v. Horner*[150] and in *State v. Durham*[151] with similar results.

Detention and recapture. How much force may the officer use to keep the accused in custody after he has caught him? In *State v. Stalcup*[152] the officer after the arrest tied the accused in order to prevent his escape, and in *State v. Sigman*[153] the officer handcuffed him, and in both cases was indicted for assault and in both cases acquitted. "In the precautionary measures of securing a prisoner, who had shown himself so swift and slippery, by the use of handcuffs," said Justice Avery in *State v. Sigman,*[153a] "[the officer] did not so abuse his power, according to the evidence, as to subject himself to indictment for assault." And the Court went further in declaring: "After an accused person has been arrested, an officer is justified in using the amount of force necessary to detain him in custody, and he may kill his prisoner to prevent his escape, provided it becomes necessary, whether he be charged with a felony or a misdemeanor." The officer, therefore, can

[149b] 60 N. C. 149, 150 (1863).
[150] 139 N. C. 603, 52 S. E. 136 (1905).
[151] 141 N. C. 741, 53 S. E. 720 (1906).
[152] 24 N. C. 50 (1841).
[153] 106 N. C. 728, 11 S. E. 520 (1890).
[153a] *Id.* at 731, 11 S. E. at 521.

use as much force to keep the accused in custody as he could use to overcome resistance to arrest.

"But when a prisoner charged with a misdemeanor has already escaped," said the Court, "the officer cannot lawfully use any means to recapture that he would not have been justified in employing in making the first arrest; and if in the pursuit he intentionally killed the accused, it is murder; and if it appear that death was not intended the offence will be manslaughter." The officer, therefore, can use as much force to recapture an escaped prisoner as he could use to catch him in the first place.

The different standards of force the officer may use for detention and for recapture make it important therefore to determine the point at which detention leaves off and recapture begins. In other words, when has the prisoner escaped? As soon as he shakes loose from the officer's grasp and starts to run? or when he is disappearing in the bushes at the edge of a clearing? or when he is crossing the city limits where the officer's authority ends, as in *Sossaman v. Cruze?*[154] Here again the jury must decide.

Who determines whether the force used in arrest, detention and recapture was necessary or unnecessary? The short answer to this question is: the officer determines whether it *is;* the jury determines whether it *was.* When the race is on, the officer cannot quit to consult a lawyer or impanel a jury. He must make up his mind in the moment at his peril, subject to approval at a later time. The law laid down to guide the jury on these questions has shown increasing strictness with the years. In *State v. Stalcup*[154a] the Court said, "Of the propriety and necessity of adopting this mode (tying) of securing the prisoner, the officer is judge and the jury cannot supervise the correctness of his judgment." In *State v. McNinch*[155] where the officers resorted to force to overcome the accused's resistance to arrest and efforts to escape, the Court recognized the difference between judgment of the officer in the heat of the struggle and the judgment of twelve men in the quiet of the jury room, and reversed a judgment against the officers for the use of excessive force. The error in the charge of the trial judge, said Chief Justice Smith, is that "it transfers the honest exercise of the judgment of the accused, as to the degree of force required to overcome resistance and the means appropriate and adequate to secure submission, under the attending circumstances, to the cooler judgment of the jurors taking a retrospective view of the occurrence. It moreover ignores the question of the good faith in which the accused aver they acted in enforcing the ordinance and pre-

[154] 133 N. C. 470, 45 S. E. 757 (1903).
[154a] 24 N. C. 50, 52 (1841).
[155] 90 N. C. 695, 698 (1884).

serving public order and quiet. . . . The amount of force and the employment of the usual means in making the arrest and detention, when within the compass of the usual means ordinarily resorted to for securing one found committing a criminal act, must be left to the discretion and judgment of the officer, when, actuated by no ill-will or malevolent impulse, he is engaged in discharging a public and official duty." This decision was slightly stricter on the officer than the former. It left the necessary force to the officer's judgment unless he was actuated by ill will or malice and left the question of his ill will or malice to the jury.

State v. Bland[156] further tightened the lines on the officer. Here he had arrested the accused for drinking and disorderly conduct in his presence, had killed a person who had tried to rescue the accused and was convicted of manslaughter. The supreme court disapproved counsel's contention that the officer was "the sole judge of the propriety and necessity of carrying [the accused] to the place of confinement and of the necessity of using force to prevent his rescue and of the extent to which it was necessary." The jury are to "judge of the reasonableness" of the officer's action, said Justice Davis,[156a] in approving the following charge of the lower court: "In order to enable the jury to form a correct judgment whether [the officer] at the time was in such danger or not, they may, as far as possible from the testimony, place themselves in [the officer's] situation, surrounded with the appearances of danger, if there were such appearances, with the same degree of knowledge of the deceased's probable purpose which [the officer] possessed, if he possessed such knowledge. . . . If he could have kept Brooks in custody and prevented deceased from rescuing him without striking, it was his duty to do so. Were there by-standers? If so, he had authority to call them to his aid, and if by doing so he could have avoided striking the deceased, he should have done so, and if he failed to do so, he was not justified in striking the deceased, and it will be your duty to return a verdict of guilty; but if the situation was such that he could not reasonably and conveniently procure assistance, then he had a right to use such force as was necessary under the circumstances, to secure Brooks, and if in the due exercise of that right he struck deceased, he was justified."

The law stands today where the court left it in *State v. Pugh*[157] in 1888, where the officer was indicted for assault and battery for the use of excessive force in making an arrest. There the court said, "It was the duty of [the officer] to interfere and suppress the fight,

[156] 97 N. C. at 438, 2 S. E. 460 (1887).
[156a] *Id.* at 440, 2 S. E. at 462.
[157] 101 N. C. 737, 739, 740, 7 S. E. 757, 758 (1888).

and if need be, he might, in good faith, strike a reasonable blow for the purpose. While he had no authority to strike an unnecessary blow, or one greatly in excess of what was necessary for the purpose, and wanton, he was the judge of the force to be applied under the circumstances, and he would not be guilty of an assault and battery unless he arbitrarily and grossly abused the power confided to him, and whether he did or not was an inquiry to be submitted to the jury, under proper instructions from the Court. A grossly unnecessary, excessive and wanton exercise of force would be evidence—strong evidence—of a wilful and malicious purpose, but the jury ought not to weigh the conduct of the officer as against him in "gold scales"; the presumption is he acted in good faith. This is the rule applicable in such cases as the present one."

Breaking down doors. "All persons," says the North Carolina statute,[158] "are authorized to break open and enter a house to prevent a felony about to be committed." "It shall be lawful for any sheriff, coroner, constable or police officer," says the statute,[159] "if a felony or other infamous crime has been committed or a dangerous wound has been given and there is reasonable ground to believe that the guilty person is concealed in a house, admittance having been demanded and denied, to break open the door and enter the house and arrest the person against whom there shall be such ground of belief." And in *State v. Mooring*[160] where the officer with a warrant for the arrest of the accused, charged with assault and battery, summoned assistance, proceeded to the house of the accused, demanded admittance and was refused, broke down the door and entered, Justice Avery said: "It seems to be well settled by the courts, both in this country and in England, that where an officer comes armed with process founded on a breach of the peace, he may, after demand of admittance for the purpose of making the arrest, and refusal of the occupant to open the doors of a house, lawfully break them in order to effect an entrance and if he act in good faith in doing so, both he and his *posse comitatus* will be protected." The fact that the person in the house notified the officer the accused was not there was not in itself enough to overcome "the presumption of law that the officer in the execution of process was not moved by malice or other improper motive, but acted in good faith with the intent and desire to discharge his duty to the State. . . . It is possible that the officer had good reason to believe that the defendant bore such relation to the accused that he would be tempted

[158] P. L. N. C. 1868-69, c. 178, sub c. 1, §4; N. C. CODE ANN. (Michie, 1935) §4545.

[159] P. L. N. C. 1868-69, c. 178, sub c. 1, §5; N. C. CODE ANN. (Michie, 1935) §4546.

[160] 115 N. C. 709, 710, 20 S. E. 182 (1894).

to aid him in evading arrest by telling a falsehood. The right to break into houses in order to arrest criminals would be confined within very narrow limits if their comrades could give them shelter in their houses and by simply telling a falsehood take from officers in pursuit of them the benefit of the presumption of law that ordinarily protects them." That this doctrine extends to all cases of lawful arrests with or without warrant and for even the smallest of misdemeanors is clearly implied in the language of the courts and writers but has not been specifically decided by the North Carolina Court. Perhaps it may be justified on the grounds of overcoming resistance to arrest. The fleeing criminal slamming the door of his home in the face of a pursuing officer may well be considered to have interposed a barrier which the officer of the law may lawfully overcome.

Officers' Power to Summon Assistance

It is a long way from the day when the hue and cry called on every citizen of "fifteen years and upwards" to follow a fleeing criminal to the day when by-standers jeer at prohibition agents raiding speakeasies. The intervening time has witnessed the responsibility for enforcing the criminal law shift from the avocation of the rank and file of citizens to the vocation of full time law enforcing officers in every town, township, county, state and federal governmental unit in the land, from laws requiring everyone to have his quota of weapons in his home as a measure of protection to himself and family against invading foes or tyrannical overlord to laws prohibiting the possession of certain types of firearms by the rank and file of people without a permit as a measure of protection from organized gangs who would use these weapons to prey upon society. But this does not mean the citizen's responsibility for law enforcement has ended or that his participation in law enforcing tasks has ceased. There are still cases where as in *State v. Garrett* the officer was afraid to go and get his man and a citizen volunteered and went and carried others with him. There are still cases where as in *State v. Dunning* the officer called on citizens to help him take a desperado who had terrorized the neighborhood and they were afraid to go. But through all the shifting circumstances in the preservation of the peace, the law is still in the books waiting to be called into action when the citizen wishes and when the officer calls. It is every citizen's duty, says the statute, to prevent or suppress all riots, routs, affrays and other breaches of the peace, committed in his presence, to interfere to prevent the commission of any felony in his presence even to the breaking down of doors if necessary and the arresting on the spot of the violators of the law, and it is his right to summon "every sheriff,

coroner, constable or officer of the police to assist in the arrest." The citizens, too, are reserves on whom the officers may call in time of need and who must answer to the call. When the citizen answers, the law gives him the same protection it gives the officer, as in *State v. James*[161] and perhaps he may be protected when the officer is not, as in *State v. McMahon*.[162]

Duty after arrest. "Every person arrested without warrant," says the North Carolina statute,[163] "shall be either immediately taken before some magistrate having jurisdiction to issue a warrant in the case, or else committed to the county prison, and as soon as may be, taken before such magistrate, who, on proper proof, shall issue a warrant and thereon proceed to act as may be required by law." "Holding that a person may be arrested for drunkenness upon view, where it is a public nuisance," said Justice Ashe in *State v. Freeman*,[164] "the question occurs, what is the officer to do with the offender when he shall have been arrested without a warrant? All the authorities agree that he should be carried, as soon as conveniently may be, before some justice of the peace. And if he is arrested at a time and under such circumstances as he cannot be carried immediately before a justice, the officer may keep him in custody, commit him to jail or the lock-up, or even tie him, according to the nature of the offence and the necessity of the case. . . . While it is the duty of a peace officer when he apprehends an offender, whether with a warrant or without one, upon view, as in this case, to carry him at once before a justice or other tribunal having jurisdiction, the law is not unreasonable, and does not require that he should do so at a late and unreasonable hour of the night, but should do so at an early hour the next morning. That was done in this case. And we are of the opinion the officer did what it was lawful for him to do under the circumstances. The prosecutor was too much intoxicated to be tried, and it was too late for a trial if he had been sober. He carried him to the lock-up and made him as comfortable as the circumstances would admit, and the next morning at seven o'clock carried him before the magistrate." In *State v. Parker*[165] an officer arrested a person intoxicated on the street, locked him up till he was sober, discharged him without taking him before a magistrate. The officer was convicted of assault and battery. The officer arrested and imprisoned the accused, said Justice Bynum, "not for safekeeping until he could be tried before a competent tribunal but he imprisoned him until he became sober, according to his judgment, and then released him. The [officer] thus

[161] 80 N. C. 371 (1879).
[162] 103 N. C. 379, 9 S. E. 489 (1889).
[163] P. L. N. C. 1868-69, c. 178 sub c. 1, §7; N. C. CODE ANN. (Michie, 1935) §4548.
[164] 86 N. C. 683, 685, 686 (1882).
[165] 75 N. C. 249, 250 (1876).

constituted himself the judge, jury and executioner. This is the best description of despotism." Likewise an officer was held for false imprisonment in *State v. James*[166] where after a valid arrest, he put the person in jail on a verbal order of the justice of the peace and kept him locked up till next day. "If the justice for any cause was unable to hear the case it does not appear that the [officer] attempted to carry him before the next nearest justice in the county."

Detention for Investigation. Special laws have in numerous instances specified the length of detention permissible before trial. Typical illustrations are: where the accused may be apprehended and confined in jail for as "early trial as possible";[167] or "if drunk or otherwise incapacitated," he may be confined until "in fit condition for trial";[168] or if arrested at night he may be confined till morning;[169] or if arrested on Sunday, he may be confined till Monday.[170]

In some jurisdictions, detention without a warrant has been held to be unreasonable: when the accused was detained without a warrant under a town by-law authorizing arrest and detention without a warrant for forty-eight hours, because such a by-law was repugnant to general laws requiring that an arrested person be taken before a magistrate as soon as conveniently possible, and because no provisions were made for further criminal proceedings to dispose of the case;[171] when the accused was arrested without a warrant on suspicion of having committed larceny in another state and detained five days without being taken before a magistrate, where there was nothing to prevent taking the prisoner before a magistrate immediately;[172] when prisoner was taken before a police magistrate the day after his arrest and, charged with being a suspicious character, was committed to jail for ten days (prisoner discharged on habeas corpus);[173] when a man arrested on suspicion of receiving stolen goods was confined more than five days without the officers securing a warrant or giving him an opportunity to be heard;[174] when a man suspected of having purchased a stolen railroad ticket was arrested, "booked" as a "suspicious character," imprisoned for an hour and a half pending investigation, and then released (*held,* would not be regarded as reasonable as a matter of law).[175]

[166] 78 N. C. 455, 457 (1878).
[167] PRIV. L. N. C. 1876-77, c. 117 (Winston).
[168] PRIV. L. N. C. 1887, c. 137 (Webster).
[169] PRIV. L. N. C. 1899, c. 307 (Sanford).
[170] PRIV. L. N. C. 1885, c. 127 (Waynesville). Officers should consult local statutes.
[171] Burke v. Bell, 36 Me. 317 (1853).
[172] Cochran v. Tober, 14 Minn. 385 (1869).
[173] Hill v. Smith, 107 Va. 848, 59 S. E. 475 (1907).
[174] Leger v. Warren, 62 Ohio St. 500, 57 N. E. 506 (1900).
[175] Keefe v. Hart, 213 Mass. 476, 100 N. E. 558 (1913).

SEARCH AND SEIZURE

The fourth amendment to the Constitution of the United States declares, "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized." This amendment was a limitation on the powers of the federal government, designed to protect the people from "unreasonable searches and seizures . . . of their persons, houses, papers and effects" by federal agents and applies neither to state and local governments nor to state and local officers.[176]

The fifteenth section of article one of the North Carolina Constitution declares: "General warrants, whereby any officer or messenger may be commanded to search suspected places, without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and ought not to be granted." This provision is a limitation on state and local officers.

Pursuant to this provision the North Carolina legislature has enacted that "if any credible witness shall prove upon oath before any justice of the peace, or mayor of any city, or chief magistrate of any incorporated town, that there is reasonable cause to suspect that any person has in his possession, or on his premises any property stolen or . . . counterfeit coin . . . note, bill or bonds . . . instrument . . . for the counterfeiting of such coin . . . note, bill or bond . . . it shall be lawful for such justice, mayor or chief magistrate of any incorporated town to grant a warrant . . . to any proper officer, authorizing him to search for such property, and to seize the same, and to arrest the person having [it] in possession or on whose premises [it] may be found . . . and to bring them before any magistrate of competent jurisdiction to be dealt with according to law."[177]

"Such search warrant," says the statute, "shall describe the article to be searched for with reasonable certainty, and by whom the complaint is made, and in whose possession the article to be searched for is supposed to be; it shall be made returnable as other criminal process is by law required to be, and the proceedings thereupon shall be as required in other cases of criminal complaint."[178] "Warrants to search for stolen goods," said Justice Daniel in *State v. McDonald*,[179] are author-

[176] Weeks v. United States, 232 U. S. 383, 58 L. ed. 652, 34 Sup. Ct. 341 (1914).
[177] P. L. N. C. 1868-69, c. 178, sub c. 3, §38; N. C. CODE ANN. (Michie, 1935) §4529.
[178] P. L. N. C. 1868-69, c. 178, sub c. 3, §39; N. C. CODE ANN. (Michie, 1935) §4530.
[179] 14 N. C. 469, 470 (1832).

ized by the principles of the common law. . . . A search warrant in this State is to be granted only where larceny is charged to have been committed. It is not to be granted without oath made before a justice that felony has been committed, and that the party complaining has probable cause to suspect that the stolen goods are in such a place, and he should show his reasons for the suspicion. The warrant then should be directed to a constable or public officer, and not to a private person." This doctrine was affirmed in *State v. Mann*[180] where the home owner was justified in resisting an officer with a search warrant for runaway slaves, for which "the magistrate had no power to grant. . . a warrant. The warrant, therefore, was null and void, and conferred on the officer no power to act. . . . An officer has no power to execute a precept which is not within the jurisdiction of the magistrate issuing it . . . and in attempting to execute it . . . he is a trespasser."

Laws of search and seizure have been extended by statutes to cover intoxicating liquors. The present liquor search warrant law enacted in 1923 requires a "justice of the peace, recorder, mayor, or other officer authorized by law to issue warrants . . . upon the filing of a complaint under oath by a reputable citizen or information furnished under oath by an officer that he has reason to believe that any person has in his possession . . . liquor for the purpose of sale . . . to issue a warrant . . . commanding the officer to search the . . . places specified . . . and seize all liquor, glasses, bottles, jugs, pumps, bars or other equipment used in the business of selling intoxicating liquor . . . and keep [the goods seized] subject to the order of the court." The information or complaint must describe: (1) the place or places to be searched with sufficient particularity to identify them, and (2) the liquor or other property used in the business of illegal selling "as particularly as practicable, [but] any description, however general, that will enable the officer . . . to identify the property seized shall be deemed sufficient."[181]

The laws of 1923 authorized any officer who "shall discover any person in the act of transporting . . . intoxicating liquor . . . in violation of the law to . . . seize . . . the liquor . . . and arrest any person in charge thereof." They also authorized the officer "to search any automobile or vehicle or baggage of any person without a search warrant duly issued . . . where the officer sees or has absolute personal knowledge that there

[180] 27 N. C. 45, 47, 48 (1844).

[181] P. L. N. C., 1923, c. 1, §12; N. C. CODE ANN. (Michie, 1935) §3411(1). By the laws of 1913, a search warrant for liquor conformed to the then-current prohibition laws which permitted possession of limited quantities of liquor. The complaint or information, furnishing the basis of the search warrant, was required to allege possession "of more than one gallon of spirituous or vinous liquors or more than five gallons of malt liquors." P. L. N. C. 1913, c. 44, §3; N. C. CODE ANN. (Michie, 1935) §3380.

is intoxicating liquor in such vehicle or baggage."[182] The crucial questions for the officer are therefore: When does an officer "discover any person in the act;" and when does he have "absolute personal knowledge?"

In *State v. Campbell*[183] officers knew the accused had a bad reputation for dealing in liquor and that he had been convicted and fined for the illegal sale of liquor, and had information that he had liquor in his possession when they arrested him walking on the street. At his request the officers did not search him but took him to the sheriff's office where he voluntarily produced five pints of corn whiskey from his pocket. The court held the arrest without a warrant was lawful and that since the accused voluntarily produced the whiskey there was no search. Such a search, however, would have been justified as incidental to a lawful arrest.

In *State v. Godette*[184] officers heard the accused say he was going to deliver a load of liquor the next night at nine o'clock. Officers on the look-out saw the accused and a fleet of five cars stop in the heart of town. As the officers came up two men jumped out of one car and ran. The accused drove rapidly away but soon returned and was arrested. One officer saw a few uncovered containers in one of the cars. Another said the stuff in the containers smelled like whiskey. On arrest of the accused and search of the car, the officers found the whiskey. The arrest and search were justified said the court.[184a] "The officer can arrest (1) when he sees the liquor; (2) when he has absolute personal knowledge. . . . This absolute personal knowledge can be acquired through the senses of seeing, hearing, smelling, tasting or touching."

In *State v. Simmons*[185] officers went to a house (on what information does not appear), and waited till the accused drove up and started into the house with a grip in his hand. One of the officers followed the accused into the house and the accused tried to escape from the rear. The officers opened the grip and found eight quarts of liquid that smelled like peach brandy. "The [accused] was not the owner of the house," said Chief Justice Clark, and "no question arises as to the validity of the search warrant. The [accused] was simply caught in the act with the goods upon him, and the officers under the authority of our statute took the prisoner and the illegal goods before a magistrate and proceeded regularly."

[182] P. L. N. C. 1923, c. 1, §6; N. C. CODE ANN. (Michie, 1935) §341(f). See N. C. CODE ANN. (Michie, 1935) §§3398-3405.
[183] 182 N. C. 911, 110 S. E. 86 (1921).
[184] 188 N. C. 497, 125 S. E. 24 (1924).
[184a] *Id.* at 503, 125 S. E. at 28.
[185] 183 N. C. 684, 686, 110 S. E. 591, 592 (1922).

In *State v. Jenkins*[186] a private person informed an officer that the accused was in the habit of bringing in liquor to sell, that he had got some from him and that if the officer would be on the look-out he could catch him. The officer saw the accused on the street with a suitcase which seemed to be heavily loaded in his hand, stopped him, told him he was under arrest and that he would have to see what was in his grip. The accused started off, the officer started to take hold of the suit case with his pistol in his hand, the accused struck him with the stick and the officer fired. The accused dropped the suit case and ran and on opening it the officer found four gallon cans of whiskey. On the officer's appeal from conviction for assault with a deadly weapon, Justice Clarkson said:[186a] "There can be no doubt, we think, under the decisions of this Court that the [officer] had authority to arrest [the accused] when he met him coming along the road with a suitcase loaded as this suitcase was, particularly when his attention had been directed to [the accused] as a man who was selling liquor in the camp. . . . All he need to show is satisfactory reasons for his belief that [the accused] was in his presence breaking the law by transporting spirituous liquors." The suit case, said the court, was not "baggage" protected by the statute against search and seizure without a warrant.

In *State v. Hickey*[187] an officer was informed the accused was transporting liquor, saw him get out of a car and start in a building with something under his arm, caught him and took liquor from under his sweater. In upholding the conviction of the accused, Justice Clarkson said: "In the case at bar the officer had information, which proved to be correct, that the defendant was carrying on his person, concealed, a quantity of liquor in violation of the provisions of the Consolidated Statutes above quoted. The offence was continuing, and the sale had not been consummated at the time the arrest was made. In many cases, unless an arrest is made under these circumstances, the criminal would escape or the crime be committed before the officer could make affidavit and obtain a warrant. For instance, if the officers had information, which was reliable, that one was carrying a concealed weapon, or was on his way to commit an assault with it, surely it would be their duty to arrest the offender though our statutes and our decisions require that in such case they should at once take him before a judicial officer and procure a warrant and institute a judicial investigation."

In none of the foregoing cases but *State v. Jenkins* was the officer's right of arrest, search and seizure tested by a suit against the officer. Perhaps their conclusions may be partly explained on the ground that

[186] 195 N. C. 747, 143 S. E. 538 (1928).
[186a] *Id.* at 749, 143 S. E. at 539.
[187] 198 N. C. 45, 50, 150 S. E. 615, 617 (1929).

North Carolina courts admit evidence obtained by illegal search and seizure to convict the accused and leave the accused to a suit against the officer in vindication of his constitutional rights. What results might have been reached in the foregoing cases if the officer's information had not "proved to be correct" and the officer had been directly charged with unlawful arrest, is not made clear by the court. But in *State v. Simmons*[187a] the officers were convicted of manslaughter where they tried to stop a car, occupied by two boys who had reputations for selling liquor, in order to search it, fired at the tires when the car refused to stop, killed one of the occupants and found no liquor in the car. "They were acting solely upon suspicion," said Justice Connor, "which however well founded they thought it to be, appeared at the trial groundless." And in *State v. DeHerrodora*[188] the officers were held liable in damages for assault and battery, when they were informed that the accused would be at a street intersection at three o'clock in the morning with a car full of milk cans containing liquor, when they found the accused at the time and place appointed with the cans in his car, and they fired at the car refusing to stop, burst its tire and wrecked it, but found no liquor in the car.[189]

The law against unreasonable searches and seizures does not apply to searches incidental to a lawful arrest as in *State v. Fowler*[190] where the officers found and took from the persons of the prisoners a pistol, pistol scabbards and chisel and were not required to return them before the trial.

In other jurisdictions it has been held that a search and seizure without a warrant was justified, where officers upon going to accused's house and knocking, saw defendant flee with a suitcase which he threw away when the officers overtook him, and the officers found liquor in the suitcase;[191] where officers hearing loud disturbance, and fighting and threats to kill in a private house after midnight, entered to quiet the disturbance, and saw and seized several bottles of whiskey on a table;[192] where an officer obtained, from an informant who claimed to have bought liquor from the accused, information that a certain person

[187a] 192 N. C. 692, 695, 135 S. E. 866, 867 (1926).

[188] 192 N. C. 749, 136 S. E. 6 (1926).

[189] For search warrants for deserting seamen, see P. L. N. C. 1881, c. 256, §3; N. C. CODE ANN. (Michie, 1935) §4473; *in re* game law violations, see P. L. N. C. 1927, c. 51 §§21, 22; N. C. CODE ANN. (Michie, 1935) §§2141(x), 2141(y); for seizure of property exhibited by gamblers, see N. C. CODE ANN. (Michie, 1935) §§4436, 4437; for seizure of narcotics, see P. L. N. C. 1935, c. 477; N. C. CODE ANN. (Michie, 1935) §6686(1-28).

[190] 172 N. C. 905, 90 S. E. 408 (1916).

[191] Mabray v. Commonwealth, 201 Ky. 236, 256 S. W. 392 (1923).

[192] People v. Woodward, 220 Mich. 511, 190 N. W. 721 (1922).

was transporting intoxicating liquor, entered the accused's premises and searched an automobile in which the accused was sitting.[193]

Search incidental to arrest. After an arrest is made an officer has a right to search the arrested person.[194] As expressed in *Smith v. State*,[195] "It is well settled that an officer making an arrest has authority to search the person and immediate place of arrest of his prisoner and to take from him any dangerous weapons or anything that he may reasonably deem necessary to his own or the public safety, or to prevent escape . . . or which might be used as evidence against him . . . or which he believes to be connected with the offence charged or that may give a clue to the commission of the crime." Courts in other jurisdictions have decided many questions arising out of searches incidental to arrests. The officer is not limited to a search of the person. If the arrest is made in a room, the officer may seize all incriminating objects that are visible,[196] and in some states it has been held permissible to make an exploratory search of the room.[197] But the officer usually will not be justified in searching other rooms, such as the upstairs rooms,[198] or the cellar.[199] If the arrest is not made at the accused's residence, the officer is not authorized to go to the residence and search it after the arrest is made.[200]

Property which may be seized. The officer may seize property which tends to incriminate the arrested person. Examples of property held lawfully seized in other jurisdictions are: lottery tickets;[201] revolvers found in accused's room when the charge was murder;[202] incriminating letters;[203] gambling paraphernalia.[204]

The laws against unreasonable searches and seizures also do not apply when such searches and seizures are made with the consent of the person whose house is being searched, as in *State v. Fowler,* where the officers with the consent of the owner searched the dwelling and took newspaper clippings, mutilated coins and other property which they thought would be useful in the case. "There could not be any objection to the introduction in evidence of the articles found by the officers and voluntarily given by the two women who had them in their possession.

[193] People v. Bresler, 223 Mich. 610, 194 N. W. 559 (1923).
[194] 1 BISHOP, NEW CRIMINAL PROCEDURE (2nd ed. 1913) 210-212.
[195] 52 Okla. Crim. 333, 4 P. (2d) 1076 (1931).
[196] People v. Woodward, 220 Mich. 511, 190 N. W. 721 (1922).
[197] People v. Cona, 180 Mich. 641, 147 N. W. 525 (1914).
[198] People v. Conway, 225 Mich. 152, 195 N. W. 679 (1923).
[199] People v. Woodward, 220 Mich. 511, 190 N. W. 721 (1922).
[200] Agnello v. United States, 269 U. S. 20, 70 L. ed. 145, 46 Sup. Ct. 4 (1925).
[201] Collins v. Lean, 68 Cal. 284, 9 Pac. 173 (1885).
[202] People v. Cona, 180 Mich. 641, 147 N. W. 525 (1914).
[203] People v. Trine, 164 Mich. 1, 129 N. W. 3 (1910).
[204] People v. Adams, 176 N. Y. 351, 68 N. E. 636 (1903).

This was not an illegal search and seizure within the meaning of the constitutional provision against them."[205]

Conclusion. The history of arrests is part of the history of law and order; it is also part of the history of liberty. The constitutional provisions, the legislative enactments, the judicial decisions carried on the printed pages of North Carolina's law books are more than figments of past imaginations. They are instinct with the meaning of Magna Carta, guaranteeing that no free man should be imprisoned but by the law of the land; of the Petition of Rights, guaranteeing that no free man should be imprisoned or detained without cause shown to which he might make answer according to law; of the Habeas Corpus act, guaranteeing to any man restrained of his liberty by decree of any court or by command of the King himself the right to be brought before the board to determine whether his commitment be just; of the Bill of Rights, guaranteeing against the evasion of the foregoing rights by providing that excessive bail should not be required. They furnish the rules of the race between the pursuing officer and the fleeing criminal.

Law enforcing officers in North Carolina today are the lineal heirs of men who a thousand years ago took the law in their own hands and when they caught a criminal "red handed," "backbearing," or "hand having," killed him on the spot. They are also the heirs of men who through the centuries have slowly knit the fabric of a law which guarantees to every arrested person the right to a hearing before a magistrate, a trial in open court before a jury of his peers, and judgment according to law. They must not forget that the hue and cry of a thousand years ago may be the lynch law of today; that the officer too ready with the billy and too quick on the trigger, and the citizen with the mob that hangs the victim on the spot are in one instinctive moment blotting out the slow and painful steps through which our race has slowly fought and climbed its way from savage isolation to organic social life.

[205] 172 N. C. 905, 912, 90 S. E. 408, 411 (1916).